**APPEAL NO. 750**

**DETERMINATION OF THE**

**RACING PENALTIES APPEAL TRIBUNAL**

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| **APPELLANT:** | **GAVIN SLATER** |
| **APPLICATION NO:** | **A30/08/750** |
| **PANEL:** | **MR D MOSSENSON (CHAIRPERSON)** |
| | **MR P HOGAN (MEMBER)** |
| | **MR W CHESNUTT (MEMBER)** |
| **DATE OF HEARING:** | **18 DECEMBER 2012** |
| **DATE OF DETERMINATION:** | **24 APRIL 2013** |

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**IN THE MATTER OF an appeal by Mr Gavin Slater against determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing convicting him of breach of Rule 178G of the Racing and Wagering Western Australia Rules of Thoroughbred Racing and imposing 12 months disqualification.**

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Mr G Slater represented himself, assisted by Mr Peter Slater.

Mr D Borovica represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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By a decision of the majority of the members of the Tribunal, Chairperson D Mossenson dissenting, the appeal against penalty under rule 178G is upheld.

The 12 month disqualification penalty imposed by the Stewards on the appellant is varied to a period of 6 months disqualification.

**DAN MOSSENSON, CHAIRPERSON**

Seal of the Racing Penalties Appeal Tribunal of W.A.

**APPEAL NO. 750**

# THE RACING PENALTIES APPEALS TRIBUNAL

## REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

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| **APPELLANT:** | **GAVIN SLATER** |
| **APPLICATION NO:** | **A30/08/750** |
| **PANEL:** | **MR D MOSSENSON (CHAIRPERSON)**<br>**MR P HOGAN (MEMBER)**<br>**MR W CHESNUTT (MEMBER)** |
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**BACKGROUND**

This is an appeal by a trainer against his penalty of 12 months disqualification for having presented a horse to race with a high level of testosterone detected in a pre-race sample. The trainer pleaded guilty to the charge of breaching Australian Rule of Racing 178G and fully cooperated with the Stewards at the inquiry. The substance was detected at a level exceeding 40 micrograms per litre of urine. The regulatory threshold level for this

endogenous substance is 20 micrograms. The Stewards had concluded the detection of the high level of the substance was the result of exogenous administration. There was no dispute as to that conclusion.

The appellant did not have an unblemished record, having previously been convicted for a TC02 offence in 1997 and testosterone offence in 2008. The more recent offence had resulted in a six month disqualification.

In giving their reasons for imposing the penalty, the Stewards made the following statements:

1 Anabolic steroids when used in excess potentially do significantly detract from the image of the sport and consequently damage the public's confidence as to the fairness of the manner in which the industry is being conducted.

2 Such damage to the public support of racing is serious and undermines the survival of the industry.

3 Penalties handed down for such breaches must be severely punished so as to send clear messages to both offenders and the industry in general that such offences will not be tolerated.

4 Imposing periods of disqualifications, as distinct from lesser penalties, do send the appropriate messages.

The Stewards concluded their findings on penalty with the following observations:

> *The Stewards are extremely mindful of the consequences of disqualification in your circumstances, we do not take lightly the imposition of this penalty. Despite your unflattering record you are someone attempting to conduct your affairs as a Trainer in a professional manner, albeit without complete risk aversion as you should. Whilst you have attempted to make use of a legally obtained substance in a judicious way,*

*unfortunately for you and the Industry as a whole, this has not been successful. The use of the substance in your stables is of such routine it is largely good fortune that you have not had a detection prior to this point. In these circumstances we do not feel that any penalty other than disqualification is appropriate.*

The four numbered points above are indisputable. I fully agree that a severe punishment and strong message were necessary in this case. The appropriate way to so punish and convey that message was to disqualify the trainer. I believe the real question for the Tribunal's determination is whether or not the period of 12 months which was imposed was the appropriate period for Mr Slater to be ex-communicated from the sport and denied the opportunity to earn a livelihood. This raises important public interest considerations which need to be carefully considered and evaluated together with the private interest aspects of the impact on the offender and those associated with him.

Mr Slater raised some 12 grounds of appeal. The first ground states "The severity of 12 months disqualification". The wording of all of the other grounds are in essence no more than particulars of the one substantive first ground. Grounds 2-12 inclusive, are set out verbatim in the Reasons for Determination of the Member Mr Chesnutt. Those reasons also contain a summary of the facts of the matter. I had the opportunity to read a draft of those reasons. I agree with all of the conclusions which Mr Chesnutt reached as to the grounds of appeal 2-12 inclusive. I have nothing useful to add in relation to them or the facts as set out by Mr Chesnutt.

For the Tribunal to interfere with the penalty and substitute some lessor period of disqualification, it must be shown that the Stewards have fallen into error by imposing a sentence that was too harsh in all of the circumstances of the case, or in some other way they have materially erred.

Despite the coherence of the propositions presented by Mr Slater in defence of his position, I have not been persuaded that the period of disqualification imposed was so severe as to justify quashing it and substituting a lesser one. I do acknowledge that in the sentencing

process, Mr Slater must be given the benefit of having fully cooperated at the Steward's inquiry. Further, Mr Slater maintained administration records, was acting on veterinary advice and administered a lesser dosage than his veterinarian suggested. Another factor in Mr Slater's favour is that it is open to conclude he was unlucky as there possibly was a build up of the substance due to its repeated administration in the scar tissue. I have taken all of these factors into account in reaching my conclusions, as did the Stewards. But despite those positives from Mr Slater's perspective, I am still not satisfied that the decision should be disturbed. I believe other facts and relevant considerations combine to be paramount in this case. The level of concentration of the substance was well above the threshold. Regular warnings are given to trainers to avoid administration to racing animals in the light of "Unpredictable and Prolonged excretion times of Prohibited Substances". Trainers had also been notified of the fact "there is no reliable information on how long testosterone persists after administration".

In the light of the warnings that had been issued to the industry in the Racing Magazine, the Stewards concluded Mr Slater should have learned from his earlier unhappy experience with testosterone administration. The Stewards' conclusion that he should have not have routinely administered the substance to a racing animal, in the light of the regular publicity given by them as to the dangers in the Racing Magazine, in the end satisfied me they had not erred as to penalty.

Around the country a wide range of penalties for such unlawful substance administration offences has been imposed. Each case depends on its own circumstances. Within each jurisdiction the range varies greatly as well. One disqualification penalty in this state was as high as 10 years (P Graham). Clearly, the Stewards do have a wide discretion in deciding these matters. In exercising that discretion as the duly appointed experts, they, more so than the Tribunal, should know what is best for the industry and appropriate in the circumstances of each case. The Tribunal should therefore not lightly interfere with their decision making in such matters.

Those industry participants who are afforded the privilege to train and present animals to compete in races must ensure they strictly comply with their obligations. Those obligations are

clearly set out in the Rules of Racing. In addition guidance and directions are communicated to industry participants, as occurred in this case. The Stewards are appointed, amongst other things to ensure compliance occurs and that participants compete fairly. When licensees fail to conform or refuse to comply, they can expect to suffer significant adverse consequences.

For the above reasons I have concluded that the Stewards' decision should not be interfered with. I would therefore confirm the decision and dismiss the appeal.

Dan Mossenson

**DAN MOSSENSON, CHAIRPERSON**

Seal of the Racing Penalties Appeal Tribunal of W.A.

**APPEAL NO. 750**

# THE RACING PENALTIES APPEALS TRIBUNAL

## REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

**APPELLANT:** GAVIN SLATER

**APPLICATION NO:** A30/08/750

**PANEL:** MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR W CHESNUTT (MEMBER)

**DATE OF HEARING:** 18 DECEMBER 2012

**DATE OF DETERMINATION:** 24 APRIL 2013

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**IN THE MATTER OF an appeal by Mr Gavin Slater against determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing convicting him of breach of Rule 178G of the Racing and Wagering Western Australia Rules of Thoroughbred Racing and imposing 12 months disqualification.**

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Mr G Slater represented himself, assisted by Mr Peter Slater.

Mr D Borovica represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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I have read the draft reasons of Mr W Chesnutt, Member.

I agree with those reasons and conclusions and have nothing further to add.

PATRICK HOGAN, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.

**APPEAL NO. 750**

# THE RACING PENALTIES APPEALS TRIBUNAL

## REASONS FOR DETERMINATION OF MR W CHESNUTT (MEMBER)

**APPELLANT:** GAVIN SLATER

**APPLICATION NO:** A30/08/750

**PANEL:** MR D MOSSENSON (CHAIRPERSON)

MR P HOGAN (MEMBER)

MR W CHENUTT (MEMBER)

**DATE OF HEARING:** 18 DECEMBER 2012

**DATE OF DETERMINATION:** 24 APRIL 2013

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**IN THE MATTER OF an appeal by Mr Gavin Slater against determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing convicting him of breach of Rule 178G of the Racing and Wagering Western Australia Rules of Thoroughbred Racing and imposing 12 months disqualification.**

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Mr G Slater represented himself, assisted by Mr Peter Slater.

Mr D Borovica represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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This is an appeal by Mr Gavin Slater, a registered trainer, against a sentence of 12 months disqualification imposed on him by the stewards of RWWA on 9 November 2012. On that day Mr Slater pleaded guilty at a stewards inquiry at Ascot to a charge that he breached rule 178G of the Australian Rules of Racing by presenting a horse to race with a prohibited substance, testosterone, being detected at a level in excess of 20 micrograms per litre in its urine.

The horse, a gelding called Youbetcha, won Race 6 at Northam on Thursday, 20 September 2012. Mr. Slater was its trainer. A race day urine sample showed the presence of testosterone in excess of 40 micrograms per litre.

In geldings, the acceptable level of testosterone is set by AR 178B(1) at 20 micrograms per litre, and anything above that is deemed to be a prohibited substance. The level is set at this limit to accommodate the fact that even a gelding can naturally produce small amounts of testosterone.

The rules do not seek to prohibit testosterone being administered to a horse, and it seems to be accepted by both Dr. Judith Medd, the RWWA veterinarian, and the stewards that this can quite legitimately and properly be done for therapeutic purposes, provided that the horse is not then presented to race with testosterone present at a level greater than the prescribed threshold.

Mr. Slater has filed a handwritten notice of appeal dated 21 November 2012 in which he sets out the following grounds of appeal, which I reproduce verbatim:

1. *The severity of 12 months disqualification.*

2. *My adherence to veterinary advice as tabled at the inquiry.*

3. *The transcript is incomplete in parts and contains errors in data taken from my medical diary.*

4. *My "personal circumstances" being taken into account in determining the penalty.*

5. *There being no "intent" to circumvent Racing Rules.*

6. *Failure to take cognizance of the mitigating circumstances when deciding the penalty.*

7. *The widespread use of testosterone as a therapeutic in the racing industry at large.*

8. *Fastidious record keeping in my medicine register.*

9. *The Rules fall under the Australian Racing Board and any penalty should be uniform across Australia.*

I will deal with the last of these first. Racing in Australia is administered on a state-by-state basis. In Western Australia, those responsible for the administration of the rules and for imposing penalties for breach of the rules are the stewards of RWWA. While the penalties which are imposed for breaches of the same rule by other authorities throughout the rest of Australia can provide some guidance to the stewards of RWWA in any particular case, they provide no more than guidance and the stewards in this state are in no way bound by those decisions or obliged to impose any penalty other than that which they think appropriate simply because an authority in another state has

taken a different view. In this tribunal, we would be most unlikely to overrule a decision by the stewards on a penalty for no other reason than that it was different to penalties imposed in other parts of Australia for a breach of the same rule. Uniformity may be desirable, but it cannot take precedence over a proper decision-making process by those who carry the responsibility in this state for making decisions as to the appropriate penalty for a breach of the rules. Were it otherwise, the decision-making power would effectively be taken away from those to whom it has been entrusted by the Parliament of this state, and placed into the hands of those who administer racing in whichever state was prepared to impose the lowest or weakest penalties. Of course, there can still be cases where a penalty imposed by the RWWA stewards is so far out of line with other penalties imposed in this state for the same breach of the rules as to suggest that the discretion of the stewards has miscarried. Mr. Slater has pointed to an instance where a trainer named Coulson received a fine for presenting a horse with excess testosterone. Whatever the reasons may have been for such an extraordinarily light sentence, that case should not be seen as being in any way a precedent for the sort of penalty that might be handed down in this state for presenting a horse with a prohibited substance in it.

Let me now deal with ground 1. Presenting a horse to race with a prohibited substance present in it is a very serious matter which is quite properly treated very seriously by the stewards of RWWA. Although there is no tariff, and each case must be considered on its own merits, it will be a very rare case indeed where any penalty less than immediate disqualification will be imposed, and unless there are quite exceptional circumstances the starting point for that disqualification will often be a period of 12 months.

That is not to say that there cannot be cases where some lesser period or lesser penalty is appropriate, but a penalty of 12 months disqualification will be seen in the majority of cases as being at the bottom end of the scale rather than as being harsh or unjustified.

The offence is one of strict liability, the purpose of the rule is to try to make racing as much as possible a drug-free sport, and penalties which do not reflect the seriousness of presenting an animal to race with a prohibited substance in its body detract from this purpose. Although the consequences may be hard for those who breach the rule, that is so in order that there is a strong incentive for those involved in the industry to take all possible steps to ensure that their horses are not presented to race with prohibited substances in them. Put shortly, the rule is designed so that the onus is on trainers to make sure that their horses race free of prohibited substances. In most cases, any penalty less than a period of disqualification would undermine the purpose and intent of the rule and would be inappropriate.

I will return to ground 2 shortly.

As to ground 3, the transcript of the stewards' inquiry was provided to us and I have read through it. There is nothing in what I have read that suggests that it is in any way incomplete. The exhibits which were the pages of Mr. Slater's diary where he recorded administrations of pharmaceutical substances to his horses were provided to us in photocopy form and I have looked through these and compared them to the transcript. I am unable to say that there is anything in those exhibits that has caused any error on the part of the stewards. Mr. Borovica quite properly admitted in the course of the hearing before us that an entry in the diary that was partly illegible in fact referred to a horse called "Yo Yo" and not to Youbetcha. That does not seem to have made any

appreciable difference to the reasoning of the stewards in arriving at the penalty they did.

Grounds 4 & 6 can be dealt with together. It is not clear from the transcript of the stewards' inquiry that they failed to take into account any mitigating circumstances or failed to take into account Mr. Slater's personal circumstances. At page 53 they asked him about the consequences to him of a disqualification and were advised by him of the likely consequences. They went on to ask him if there was anything else, and received the reply "I think we've covered everything now." They cannot be expected to take account of any matter which was not before them.

At page 56 the stewards stated that they had taken into account his personal circumstances and there is no reason to doubt that they did. Mr. Slater did not advance anything further of significance before us by way of mitigating circumstances. Any trainer who is disqualified will suffer a degree of hardship. That is part and parcel of the penalty of being disqualified. There is nothing about Mr. Slater's case that has been drawn to our attention to make him different in any way from any other trainer who might be disqualified. The purpose of imposing a penalty is to discourage a breach of the rules, and a degree of hardship to the rule breaker is a necessary part of the penalty for presenting a horse with a prohibited substance in it.

If there are any mitigating factors in this case they must be found in the conduct surrounding the breach of the rules, if they are to be found at all.

This brings me to grounds 2, 5, 7 and 8 which I propose to deal with together.

Dr. Medd gave evidence at the inquiry that testosterone is classified both as an anabolic steroid and as a sex hormone. An anabolic agent is anything that assists with the conversion of feed or carbohydrates to muscle, that is it increases the rate and magnitude of such conversion. This means that there is slightly better muscle development and an anabolic agent is therefore classified as potentially performance enhancing.

While recognising the undoubted correctness of this, it needs to be borne in mind that this rather indirect performance enhancement is quite different from the direct performance enhancement that comes when a trainer presents a horse with, for example, elevated CO2 levels.

It was made plain by Mr. Slater during the stewards' inquiry that he administers testosterone to horses that he trains in order to assist with keeping them interested in their feed in the periods between races. Testosterone is available commercially for this very purpose, and Dr. Medd seemed to agree in the course of the inquiry that it can quite properly be used in this way for this purpose provided, and this is where Mr. Slater fell foul of the rules, that the administration is stopped a sufficiently long time before the race so as to enable the horse to have excreted it from its body to a level below the threshold set by the rules by the time of the race. That is, there is nothing necessarily improper about administering testosterone to horses *per se*, it only becomes improper if it is still in the horse at a high enough level on race day.

Accordingly, trainers need to be scrupulously careful about both how many days before a race they stop administering, as well as the size of the dose which they administer. Mr. Slater was quite obviously not careful enough. If that was all there was to it, it would not be enough to help him. Trainers will always be tempted to try and go as

close to the limit as they can, and if they go too far, to throw their hands up and say "it was an accident that I shouldn't be held accountable for." It is in order to meet that sort of behaviour that the rule is crafted as one of strict liability. Penalties, too, will be set at a level sufficiently high to act as a real deterrent to this kind of conduct.

But of course such behaviour is somewhat less sinister than the deliberate administration of a direct performance enhancing substance on race day. We have in the past upheld disqualifications of 1 year for presenting a horse with an elevated level of CO2.

Mr. Slater points in ground 7 to the widespread use of testosterone as a therapeutic in the racing industry at large. He seems to be saying that the stewards erred in not treating him leniently because of this. It will be apparent from what I have said already that the widespread use of testosterone, if indeed that is the case, could be seen as a reason for a stiff penalty in order to make other trainers behave more carefully.

Mr. Slater does not come before us with an unblemished record. His prior indiscretions were canvassed before the stewards on page 45 of the transcript. In 1997 he was convicted of an offence involving excess CO2 in a horse and given a 12 months disqualification reduced to 8 months on appeal. He then apparently didn't train for about 8 years, but in 2008 he was convicted in relation to excess testosterone in a horse called Reassess and given 6 months disqualification for this. He comes before us as effectively a third offender asking for mercy, and it might be thought a bold thing to be doing that in those circumstances. However, there is a little more to it.

Following his 2008 conviction Mr. Slater changed his training regime, and in particular he changed the system he employed for administering therapeutics to horses. He now

keeps a diary recording all such administrations. More importantly, he took advice from vets in private practice about how long before a race he could safely go before stopping the administration of testosterone in order to comply with the Rules of Racing. A letter of advice from Dr. JD McDermott dated 4 November 2012 was exhibited before the stewards and provided to us. It refers to Testosterone Propinate and reads: *"It has been my recommendation that no more then 1 ml, via i/m injection, be administered to a horse within 7 days of racing."* It is common ground that i/m stands for intramuscular, and that Mr. Slater administered this substance by injecting it into the muscle of the horse. In particular he claims, and it is not disputed, that he injected it at the same spot on the same muscle on every occasion. Mr. Slater argued before us that he built in a margin of safety by administering only 1/4 ml seven days prior to racing, although the advice from the vet was that he could safely go as high as 1 ml.

For a period of time, the system seemed to work. The horse was being raced regularly, and it was swabbed and found to come in under the limit. Mr. Slater could be said to have reason to think that the system that he had changed to was working safely for him.

However, on the occasion the subject of this charge the horse was swabbed and found to be over the limit. In the course of investigating the incident, Dr. Medd discovered a buildup of scar tissue at the site where the horse is typically injected. She put that forward as the likely explanation for the high reading on this occasion - that an injection into scar tissue would inhibit the absorption of the testosterone, thereby also delaying the time at which the testosterone will be sufficiently excreted to bring the level of the drug below the threshold limit.

Mr. Borovica for the stewards has made the point that Dr. Medd and RWWA take the view that any administration at all of testosterone when a horse is regularly racing is dangerous because of the unpredictable rate at which the substance is absorbed. Therefore the official line is that it should not be administered at all if a trainer wants to be safe.

But it was acknowledged by Dr. Medd that testosterone can be quite properly administered for a therapeutic purpose. She also acknowledged that there is no research into exactly what the rates of excretion of testosterone are at various dosages - particularly with the "micro-dosing" which is now apparently common among trainers. It is for this reason that she cannot say what will be a safe dose, or a safe period of time before a race, to ensure that a horse will be presented with testosterone below the threshold limit.

Mr. Slater's offence really is that he has engaged in a course of training that carried an inherent risk that he might present a horse above the limit. But he embarked upon this after taking a vet's advice and he tried to build in a margin of safety by giving a dose at a lower level than the vet's recommendation. By doing this he obtained results for a period of time which caused him to believe that his system was safe. It is probable that the reason that he breached the rule was because of the buildup of scar tissue, which appears to be something beyond either his knowledge or control.

On the previous occasion when he presented a horse with excess testosterone he received a 6 month disqualification. This time the stewards gave him 12 months. Although they do not explicitly say so, they appear to have taken the approach that as he continues to offend in the same way they must increase the penalty.

In this case, there appears to me to be an error by the stewards. They have not paid sufficient regard to the steps that this trainer took to change his regime following his offence in 2008 with Reassess. They also, especially, do not pay sufficient regard to the fact that this was an accidental presentation caused by the injection going into scar tissue.

Given these factors, I do not think it is necessary to give this man any greater period than the 6 months that he received last time. I would therefore allow the appeal and reduce his disqualification to a period of 6 months.

**WILLIAM CHESNUTT, MEMBER**

Seal of the Racing Penalties Appeal Tribunal of W.A.