APPEAL - 712

DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: **DUNCAN MILLER**

APPLICATION NO: **A30/08/712**

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

DATE OF HEARING: **12 FEBRUARY 2010**

DATE OF DETERMINATION: **7 MAY 2010**

IN THE MATTER OF an appeal by Duncan Miller against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 26 October 2009 imposing disqualifications of 12 months for a breach of Rule 175(a) and 6 months for a breach of Rule 137A(1)(b) of the Rules of Thoroughbred Racing.

Mr T F Percy QC with Ms L M Timpano appeared for the Appellant.

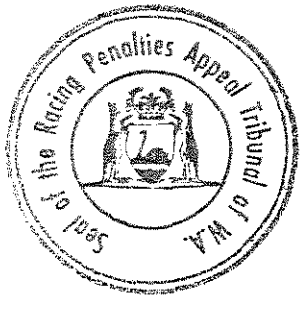
Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

By a unanimous decision of the Tribunal, the appeal against conviction in relation to the improper conduct offence is dismissed.

By a decision of the majority of the Tribunal, the Chairperson dissenting, the appeal against conviction in relation to the modified whip offence is allowed and that conviction is set aside.

By a decision of the majority of the Tribunal, the Chairperson dissenting, the appeal against penalty in relation to the improper conduct offence is allowed. The penalty imposed by the Stewards is varied from twelve months disqualification to nine months suspension.

DAN MOSSENSON, CHAIRPERSON



APPEAL – 712

THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)

APPELLANT:	**DUNCAN MILLER**
APPLICATION NO:	**A30/08/712**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR W CHESNUTT (MEMBER)**
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IN THE MATTER OF an appeal by Duncan Miller against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 26 October 2009 imposing disqualifications of 12 months, for a breach of Rule 175(a), and six months, for a breach of Rule 137A(1)(b) of the Rules of Thoroughbred Racing.

Mr T F Percy QC with Ms L M Timpano appeared for the appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

BACKGROUND

The appellant's written submissions in support of the appeal commence with a helpful summary of the factual background to this matter. It is convenient to quote the summary by way of introduction:

> *'1. The Appellant is an apprentice jockey aged 17 years.*
>
> *2. In June 2009 the Appellant claimed to have found a whip in the jockey's (sic) room of the Kalgoorlie Race Course. The Appellant took possession of the whip and began using it. The Appellant used the whip for a total of 103 starts.*
>
> *3. Following the running of Race 4 at Belmont Park on 3rd October, the Stewards conducted an impromptu inspection of the riders' whips. The Stewards inspected the whip that the Appellant was using that belonged to another apprentice, Jarred Noske. The Stewards also inspected a whip found beside the Appellant which is the whip the subject of the charges.*
>
> *4. The Appellant asserts that he had used the whip for two races that day but then felt that it had become too 'flexi' and that he had commenced using a whip he borrowed from Jarrad Noske.*
>
> *5. Upon a close inspection of the Appellant's whip, the whip appeared to be modified. It was subsequently found to contain two pieces of led* (sic) *each weighing four grams and being 1.5cm x 1.3cm.*
>
> *6. The Appellant denied any knowledge of the modifications to the whip.*
>
> *7. The Appellant appeared before a RWWA Stewards inquiry which commenced on 3 October and was charged with two offences. Count one alleged that the Appellant was guilty of an improper practice having carried and used the modified whip in races and trials in the period between 1 August 2009 and 3 October 2009 contrary to rule 175(a) of the Rules of Racing. The second count alleged that he carried the whip in races and trials during the same period contrary to rule 137A of the Rules of Racing.*
>
> *8. The Appellant pleaded not guilty to the charges but was found guilty by the Stewards of both counts.*
>
> *9. On 26 October 2009, the Appellant was disqualified for 12 months in relation to the first charge and 6 months in relation to the second charge. The penalties were backdated to 4 October 2009 and ordered to be served concurrently.*
>
> *10. The Appellant appeals against both his conviction and sentence.'*

A detailed statement of the facts is to be found in the Stewards' reasons for convicting. I will quote those reasons in full later. The appellant did not challenge the way the Stewards set

out the facts in those reasons. I am satisfied the Stewards accurately identified and appropriately summarised all of the relevant facts. The appeal essentially relates to the conclusions which the Stewards drew and the findings they made based on those details.

RELEVANT RULES AND CHARGES

Offence Rule AR175 of the Rules of Thoroughbred Racing states:

> *'The Committee of any club or the Stewards may penalize;*
>
> *(a) Any person, who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing.'*

Running Rule AR137A, which was introduced by way of replacement on 1 August, 2009, states:

> *'(1) (a) Only padded whips of a design and specifications approved by a panel appointed by the Australian Racing Board may be carried in races, official trials or jump-outs.*
>
> *(b) Every such whip must be in a satisfactory condition and must not be modified in any way.*
>
> *(c)…..'*

The following particulars of the first charge were:

> *'…..you are charged under that rule* (Rule 175) *with an improper practice. The improper practice being that you carried and used in races and trials in the period between 1 August 2009 and 3 October 2009 a whip which had weighted objects in the padded section of the whip.'* (T.63)

The particulars of the second charge were:

> *'…..you are charged under that rule* (Rule 137A) *with sub section (b) in that you carried in races and trials for a period between 1 August 2009 and 3 October 2009 a whip which was not in a satisfactory condition and which had been modified by weighted objects being fitted into the padded section of the whip.'* (T.63)

REACTIONS TO THE CHARGES

In answer to both charges the appellant responded:

> *"I can't plead guilty to something that I didn't know about so not guilty."* (T.63)

The proceedings were then adjourned. At the resumption on 26 October 2009 Ms B Lonsdale appeared as legal representative for the appellant. Ms Lonsdale advanced a number of submissions and also made some admissions. The fact that the whip was carried and used extensively in both races and trials for some time was not disputed. Nor was it disputed that the whip was modified and was contrary to the regulations. However, Mr Miller claimed he was innocent because he did not know that the weighted objects had been inserted into the whip. Counsel argued why the appellant's evidence as to his state of mind

should be accepted. A character reference was produced. The Stewards were then reminded that Mr Miller's legal representative at an earlier hearing had raised the issue that the charges were duplicitous, being the same conduct in respect of two charges.

The allegation of lack of knowledge was in essence the issue between the parties at the hearing. It was accepted by the parties that the conduct would be improper if the appellant had known of the presence of the foreign objects in the whip. The Stewards did not believe the appellant's explanation and reached their decisions to convict in each case based on a range of circumstantial factors.

STEWARDS' REASONS FOR CONVICTING

The Stewards carefully scrutinized the evidence with more than their usual analysis and attention to detail. Despite being of considerable length the nature and seriousness of the case make it appropriate to quote the reasons for convicting in full:

> *'The Stewards have considered both charges taking into account the evidence in total and the submissions of legal representative Ms Belinda Lonsdale, Apprentice Miller, Master Neville Parnham and mother Sharon Miller. The Stewards are also aware of the standards of proof required in a serious matter of this nature, where if you are found guilty, the consequential adverse findings may have significant implications for yourself. The determination of this matter requires us to make findings of fact using the Briginshaw standard working to the higher level. Accordingly the Stewards have carefully considered the evidence before them to this recognised standard. For the most of the early part of 2009 there was constant and robust discussion on whip use in thoroughbred racing. The Australian Racing Board put out discussion papers to all industry peak bodies and the general public to canvass comments on this contentious issue. After due process the ARB they promulgated rules to take effect on 1 August 2009 with significant changes to the type of whip permitted in whip rules. One basic change was that only approved padded whip could be used from 1 August 2009. The introduction of the padded whip was central to whip reform. RWWA Stewards commenced to educate and inform riders of these changes as early as May 2009. Stewards provided padded whips for jockeys to try and evaluate. Only two whips had been approved, the ProCrush and Persuader. This was done for every race meeting in the Metropolitan, Provincial and major country areas. Many riders took advantage of trialling these padded whips. There can be no doubt that you would have been aware of these changes, had seen these whips and its very likely that you have tried these whips. Also these changes would have been discussed at length at the apprentice school which you attend regularly. In addition, in July 2009 Stewards conducted a PowerPoint presentation on the changes to whips and whip rules. You attended that session. In addition you were provided with a print out of the presentation and DVD on correct whip usage. In the printout it refers to all the new rules and that no modification is permitted and clearly gives whip specifications and specifically states that the shaft of the whip including the padded section must be sooth and no protrusion or raised surface. Also in 1 August 2009 only two whips had been approved, the ProCrush and Persuader, both whips were labelled with the manufacturers name. The responsibility of conformity clearly lies with you and it is incumbent on the rider to ensure that all his riding equipment is regulation. Riders ensure that their helmets and body protectors are legal – whips are no different. You maintain that you found the modified whip in the Kalgoorlie Jockeys room and that*

you discovered the whip when arriving in the jockey's room for a race meeting. Coincidentally, that whip happened to have a yellow handle the same colour that your old whip had and a colour you liked on whips. The only person you showed the whip to was Jockey Mark Miller. Nobody claimed the modified whip so you took possession of it. There was no visible label on the whip. On Saturday 3 October 2009, you had 6 rides. In Race 1 you rode FRIAR's TOUCH which finished fourth. In Race 2 you rode BRAVE KNIGHT which ran second. As the rules require you weighed in to make correct weight. The whip, helmet and saddlecloth number are items that are not included in the weighing in process and are handed to the steward in charge who stands alongside the scales with the Clerk of the Scales. After using the whip in these two races and as the evidence reveals you had used this whip in 103 races leading into Saturday 3 October, you then chose not to use it again as amazingly you maintain it had become too flexible. Whilst you had purchased a regulation whip in June, you advised that you had never used this whip and did not bring that whip to the races. For that reason you had borrowed a regulation whip from Apprentice Noske the race prior to the Stewards inspection due to the whip in question having become too flexible according to you. For reasons that follow, the Stewards believe that you had concerns with the whip that are not related to the question of its level of flex and chose not to use it again as it may have been detected that this whip had been modified. On 3 October following the running of race 4, the Stewards entered the Jockey's room without prior notice and the Chairman of Stewards announced on masse that an inspection of all riders whips was to take place and for all riders to have their whips ready for inspection. Each Steward on duty then dispersed through the Jockey's room and began to inspect whips. Yours was not the first whip inspected by the Chairman of Stewards who had commenced inspecting whips in your vicinity. Apprentice Noske's whip was inspected without event and when asked if he had any other whips he advised that you had borrowed his other whip. The whip was inspected and passed and then Jockey Dan Miller who sits beside you in the jockey's room, whip was inspected. After completion of that inspection, the inspection Steward noticed on the bench next to you a yellow handled whip. You did not volunteer that whip for inspection. When asked as to who that whip belonged to, you attempted to distance yourself from it by advising that it was your whip but it was a 'shit' whip and that you did not use it. The decision to cease using it having been made only the race before in the context that you had no other spare whips to turn to and had to borrow another rider's whip. Your opinion of the whip you had suddenly abandoned and statement that you did not use it, did not suggest that it had in fact been used that very day a short time before. Although you claimed ownership of it, you did not at that time indicate that you had used the whip that day. On inspection it became immediately evident that there was something foreign in the padded section. It did not require any length of time or great examination to realise this whip was not to standard. There was a raised area, clearly visible and on touch a definite hardness was felt that confirmed that all was not in order. This inspection alerted the steward immediately that there was a problem with this whip. The whip was seized and taken to the Stewards room immediately where this panel was able to see the whip for itself and had no difficulty in detecting that it was abnormal. As the video footage of the whips dissection shows, although not as clearly as could be seen by the human eye at the time we first inspected the whip and felt the evident bulge, there was a distinct raised or dimpled section. Stewards were able to see this almost immediately on viewing the whip and it served to draw our attention to the area to ascertain why this was there. Yet you

had this whip in your possession used it several times a week over the course of 103 races and claimed to be oblivious to this clear imperfection on its surface that could be seen with the naked eye and easily be felt with the slightest pressure in the region. Given that there was a change to padded whips that were designed to cushion the strike, as soon as something hard is felt beneath its surface it must immediately give rise to concern as it is negating the cushioning effect. Clearly that is exactly what the modifier of this whip would have intended. Whilst remarkably you claim to be able to notice a subtle degradation to the flex that occurs in the space of two races, you wielded this whip for 103 starts, handled it, no doubt cleaned it as required and at no time noticed anything unusual about this padded section. The Chairman of Stewards picked it up and almost immediately notices and is concerned by it. Yet when asked about this whip your first response is words to the effect that it was a 'shit whip' and you don't use it. Quite distinct from something you did not use or felt adverse to as your first statement suggests, this was a favoured tool of your trade that you immediately took a liking to, to the extent that it was the only whip you used and had continued to use that very same day. The way you attempted to distance yourself from it when first asked not only raises the suspicions of anyone looking to inspect rider's whips, but becomes more of a concern when it is discovered that these suspicions are well founded. Eventually, as videoed, the whip is dissected to determine the cause of the evident bulge. Whilst the whip needed to be dissected in order to ascertain exactly what was inside it, it was the fact that it was clear there was something in it that caused this whip to be immediately seized and later opened. It was not a surprise discovery to see that something was in the padding which turned out to be lead pieces in the bottom of the padded section of the whip. From that point the gravity of the situation was confirmed and serious questions needed to be answered in relation to this whip. You advised that you came to take possession of this whip after finding it left abandoned in the Kalgoorlie Jockey's room. Although you could not provide a date with any certainty it was said to some months prior. The only person witness to your finding was your uncle, Jockey Mark Miller. The modification to the whip to insert these lead pieces was done in such way to minimise the chances of the modification being detected. As the manufacturer's interviewed by Mr O'Reilly commented on, it was difficult even for them to ascertain that in its original form, this was a whip made by them. Someone and we still do not know who went to some degree of effort and applied a degree of skill in an attempt to make this whip look as close to possible to any other whip. We do not know of its origin, or the identity of the person who undertook the modifications or even for whom this whip was originally made. The level of work required to succeed in this subterfuge does however allow us to infer that the existence of this whip is not an accident. It was designed to limit detection in order to be used in contravention of the rules. Having found the whip in the manner in which you described, you could have very little confidence that this whip was an approved whip. It was not given to you by a fellow rider or licensed trainer. You had not acquired it from a reliable supplier. It was a piece of gear abandoned by its owner at some unknown time. Around that time, the issue of the whip was in the spotlight like never before. All attention and discussion revolved around padded whips and their use. With the change to padded whips riders were under some pressure to acquire the newer whips. Unlike their predecessors, these whips were not plentiful in a rider's kit around this time so that a rider may not notice losing it. Finding a whip or any gear with no owner is not justification to assuming it must be acceptable for it to be used. You are responsible for your gear and the observance of the rules of racing that relate to them. If you had

exercised even a modicum of diligence you would have readily seen that it carried no visible label and that the colour of the handle was not to standard. The colour of the handle however was the very least of this whips concerns, but it at least should have alerted a responsible rider, especially in the absence of a label, to fully satisfy himself that it was to standard. You have sought to attach reliance on the location of the whip when you found it as justification for assuming it must be okay to be used. Jockey's rooms (sic) *on racecourses are not secure places between race days. They are not areas of sanctity where it automatically follows that any item within them must be suitable, functional, operational or legal. Particularly outside of race day, a variety of people may come and go through this area. Finding items of no known origin brings with it a responsibility to satisfy yourself as to whether it is entirely appropriate for the use intended. That aside, it did not require a great deal of science to realise this whip was a problem. Having found it the way you claim to have found it, and used it for the length of time you did, it is more than reasonable to find that you must have noticed the difference we did in the padded section. That you claim you did not, and the excuses offered for not, give rise to an inference that you do in fact know more about this whip than you are prepared to admit. At some later time after the finding of the whip, you purchased from a reliable source one of the new padded whips. You stated at one point you did so as it was good to have a spare. Yet you chose not to use this one or even carry it with you. It is a contradiction to be purchasing spare whips but then coming to the races with only one whip. Your answers in this respect did not follow logic. Significantly, you did comment that this new whip was much thicker and bigger than the whip you had. Knowing the manner in which you found it and noting this obvious difference between the two, it would seem you would have had some cause to consider whether this found whip was suitable. Clearly you were aware that the found whip was notably different from your other whip on appearances alone even ignoring the raised section in the padded section. Yet again you maintain that you remained oblivious to the fact that the found whip had the raised section it did even though you had noticed it was thinner. At a time when all focus was on whips, and the padding of them in particular given the revolutionary change to padded whips, you found a whip, noticed it was thinner but kept using it anyway without at any time checking its suitability or legality. Neither did you notice at any time prior that which the Stewards did. How you could not notice in all of these circumstances, that which the Stewards noticed almost immediately remains unexplained. It lieu of explanation you have made several attempts to deflect the blame for your possession and use of this illegal whip upon someone else. You began by placing the location of the whip in the Jockey's* (sic) *room and inferring that by finding it there it was safe for you to assume some other rider had used it. That infers that unknown rider is responsible for the existence of this whip. You have indicated that you had handed this whip on numerous times to the stewards at scale and as they did not notice it, that somehow absolves you. Stewards at scale have a very significant responsibility and are focussed upon ensuring all returning riders weigh in correctly before authorising correct weight and the payment of investments. The whip at that time is handed to the Stewards along with the saddle cloth, and helmet. The Stewards attention is solely on the weighing of riders. The first time the Stewards actually looked at your whip it took seconds to see it was a problem. It is of no assistance to your cause that during an entirely different process, the true nature of your whip remained undetected. There are some illogical circumstances that we cannot reconcile despite our best efforts. We know from an attachment of Exhibit J that you purchased a padded whip from Bio John on 15 June 2009. You told us you*

purchased that whip as a spare and that you already had the whip you found. (Page 16). It would therefore follow that you found this whip prior to the 15 June 2009 which would seem to be consistent with your comments on Page 11. So therefore you found the modified whip prior to the 15 June 2009 and even before you used it, you decided to buy a spare. Yet you tell us you never used the spare in a race and only used the modified whip once the new rule took effect in August and you had returned from suspension. Not only did you not use the spare, you did not even carry it with you, even though that is the very reason you told us you bought it. Why would you purchase a new padded whip on the 15th June 2009 that you eventually did not like as you never used it in a race and did not carry with you at all times. The reason for not using it would seem that your preferred the thinner whip over this thicker one. So according to you, you bought a whip that was not to your liking and therefore you left it at home. Then the whip you were using for 103 starts suddenly and without prior warning becomes too flexible for your liking and you have to borrow another rider's whip. Apparently this could not wait for even one more race or the next day when you might have been able to revert to the spare whip you went out to purchase. The sudden demise of this found whip on the day in question, in your eyes, is a concern. Having found the offending whip prior to 15 June 2009, this was over a month before the new rule was even gazetted and without ever using it, you went out and bought another whip. You tell us you first used the found whip after your return from suspension on 18 August 2009. Having waited several months to put your find to work, you use it almost without exception until the day of the Stewards' inspection and the very race prior to the Stewards inspection; you switch to a borrowed legal whip. After failing to offer the whip you had been using that day and indeed for months for inspection and instead presenting a borrowed whip, when quizzed it suddenly has lost all appeal to you given what you say about it. This has all the hallmarks of someone who knows more about the offending whip than they are willing to admit. Much of the background to the whip discovery as has been commented on in detail is well recognised and appreciated as being circumstantial. Although not a court of law we appreciate that under the principles we work under and the burden of proof that applies in a case such as this, that it is important to be careful in assessing proper evidentiary weight. The background provides a context and the ability to contrast your submissions with what we were able to really see for ourselves when first discovering the whip. The circumstantial evidence all points in the same direction to the available conclusion that you knew this whip was not a legal whip like the whip you purchased from Bio John. Reaching that conclusion does not require a leap of faith given that we were immediately able to detect problems with this whip. It was readily apparent that the padding of this whip was of concern. You may not have known what exactly was within the padded section but it matters not. For the purposes of this matter it is sufficient for us to be satisfied that you were aware that the padded section contained something that would be considered to be contrary to the rules. We do not know who modified this whip in the manner it was modified. We do not know whether you were any party to the modification or had any knowledge of the act at the time it was occurring. We make no findings of fact in this regard. What is evident is that you had this whip in your possession for a considerable period of time and that it was not difficult for us to detect the problem with it on the first occasion that the Stewards gave attention to inspecting whips. It cannot be anything other than an improper act if a rider is in possession and uses a whip that he has a knowledge, awareness or belief that it has been modified. There is no doubt you were in possession of such a whip. The ease of which a concern could be had with

this whip as outlined in detail and your actions and submissions when quizzed as to your possession, use and sudden cessation of use satisfy us that you did have the required level of prior knowledge. In all of the circumstances and for the reasons discussed we do find you guilty of the offence. In regards to the second charge: The Principal Investigator Mr Phil O'Reilly took Exhibit A to Sydney and Melbourne. In Melbourne, the whip was taken to the office of Persuader whips. There, Persuader part owner Mr Mark Bourke and production manager Mr Wayne Johnson were interviewed and shown the whip in question. Eventually, after close scrutiny, both Mr Bourke and Mr Johnson confirmed that it was definitely a Persuader whip which had been modified. At the Stewards inquiry on 3 October 2009, the whip in question was opened to reveal lead pieces in the padded section. This process was video recorded. Exhibit A was an ARB approved whip which had been modified by the insertion of weighted objects into the padded section. This modified whip was in your possession and had been carried and used in races and trials by you. For the purposes of this charge it is not relevant what you did or did not know about this modification. That is a matter relevant to the first charge whereas this charge deals with a different question that needs to be answered. Each charge needs to be evaluated separately against the evidence tabled, recognising that the determination of one does not necessarily make the other a foregone conclusion. As a rider, you have a responsibility to only use gear in races which is approved, appropriate and legal. This whip was not obtained from a reputable source nor was any attempt made by you to ensure it was not an item contrary to the rules. In your own words 'it never went through your head' to ensure you were complying with rule. The location of this find, as commented on in relation to the first charge, does not in our view override your responsibility to ensure the gear you use is approved gear. This piece of gear had no owner, no visible label and no known source of origin. Quite simply it could have had anything in it and as it turns out it did. In these circumstances relying on where you found it does not in our view absolve you of your culpability to this second charge. The rule in question requires that whips used must be approved and must not be modified in any way. Clearly it was not in a satisfactory condition and had been modified. For all the reasons indicated the Stewards find you guilty as charged.' (T.80 - 89)

REASONS FOR THE PENALTIES

After reading the reasons for convicting the Stewards allowed the appellant's counsel Ms B Lonsdale to make submissions and to call Mr Parnham to give character evidence. That evidence was quite positive and helpful to the appellant. Then, after counsel submitted the Stewards should treat the matter as *' ... reckless misconduct'* as opposed to deliberate conduct designed to achieve some advantage, the Stewards reached their verdict on the penalties. The following very detailed and logical reasons were given:

'The Stewards have fully considered all matters in relation to the question of penalty for what are serious offences to be found guilty of. In this respect there are two distinct charges each requiring a determination of penalty that is appropriate for the offence committed. This process requires us to exercise the penalty discretion mindful of the differences between the two charges and isolation of each offence to determine the appropriate penalty for that particular offence. There are however certain considerations that are relevant to each charge. Although we have treated each charge separately, we address these common matters at the outset before

dealing with penalty for each charge. We recognize your youth and that you are an apprentice rider, recognized as one of the state's leading apprentices. We are on the cusp of our lucrative racing season where a rider of your capability is likely to be keenly sort (sic) *after and that these opportunities would go a long way in your development as a jockey. We are fully aware that any time lost by a young rider such as you for disciplinary reasons is of considerable disadvantage beyond the monetary effect of such penalty. Any prolonged absence from the saddle for a rider such as yourself does have significant impact and present additional challenges to resume such as management of weight issues and re-establishing yourself within the industry. We therefore do not take lightly the onus on us in this matter. Although you are young, you have spent your life in the racing industry and come from a family with a long history in the sport. In truth, you have knowledge and experience beyond your years in relation to the racing industry having spent you life in it and having gone through the apprentice system as you have, would be keenly aware of the important responsibilities you have as a rider of racehorses and your role within the industry. The state's leading trainer and your host trainer Mr Neville Parnham spoke well of you and clearly has a good opinion of you and we take his comments on board. The matter of whips in racing has been in the spotlight nationally for some time now. The industry is under pressure as never before to maintain the acceptance and support of the general public who are vital to the ongoing viability of the sport. Animal welfare, whilst always paramount to the industry, is receiving increased focus as the industry self-regulates to ensure that world class standards are maintained. In this respect the rider's whip represents a visual matter of concern which society sees being wielded in races in the pursuit of victory. It is a high profile and important piece of Gear that is stringently regulated under the rules. Strict criteria are determined by the industry as to what is acceptable both in terms of construction of whips and the manner in which they are used. This is done to not only actively ensure the welfare of the horses, but to demonstrate to all that the industry is a responsible entity that places the welfare of the horse on a pedestal so that mainstream society does not withdraw its acceptance or support of racing. In a very public display of the industries commitment to welfare, and not without a considerable degree of difficulty, after thorough investigation, the industry made rule amendments to ban the old whips in favour of the new padded whips. Whilst debate has continued since as to how this new piece of equipment is to be used in races, this fundamental change has been universally accepted by the industry. The impetus to changing to a padded whip is couched on scientific opinion that these style of whips are kinder to the animal and inflict less pain or discomfort than the old style whip. From the moment the old style whips are banned, the use of anything other than the approved padded whips not only became a contravention of the rules but amounted to inflicting what the industry had determined was an unacceptable act to the horse. By doing so the welfare and infliction of pain to the animal is immediately brought into question, making such event very serious. Referring first to the first charge, by your own admission you have used in races and trials for a considerable period of time a weighted whip. The use of such whip can be clearly seen to be likely to cause a level of pain stimulus to the animal which the industry has determined is not acceptable. It further gives rise to questions of unfair advantage over other riders who are restricted in using a piece of equipment which exerts a decreased level of stimulus. These are very serious matters. This was not just a whip found in your possession with no proof of having been used. It was a piece of equipment, carefully modified to make it look like an*

approved whip, with such modifications cleverly disguised so that it would be less likely to be detected. It needed to be done with a high degree of care as riders on weighing-in hand such whips to the Stewards on a regular basis. At the time of weighing-in the Steward concerned is not focused upon whether the whip just handed to him has metal objects imbedded in the padding and no inspections of the whip are undertaken. It therefore need only look like any other whip to escape detection and it is this which enabled you to continue to use this whip until the Stewards inspection. We recognize that there is no evidence that the use of this whip has actually harmed any race horse. Neither has it been scientifically qualified how much, if any, additional force is dispersed by this whip as compared to the approved whip. It is irrelevant to compare this whip with the now banned old style whips. From the evidence of Dr Medd it is clear that a whip of the design of Exhibit A clearly has the potential to disperse a level of impact and stimulus greater than an approved whip. Logically that is what the maker, whoever he was, intended with this whip. Your involvement with this whip does not extend to being the architect of it. You were, however, the person in possession of it, aware as we have found you were that was not to regulation and yet you continued to use it. The use of it being done before the very eyes of the Stewards and public which the industry relies upon for its financial viability at a time where every effort was being made by the industry to improve its image in relation to whips before the broader community. Rather than comply, even though you had at your disposal the means to comply by virtue of the whip you purchased but never used, you continued to use this whip you knew to be non-standard almost to the point of the Stewards inspection on 3 October. This places this type of offending in a most serious category with respect to determining the appropriate penalty in relation to the first charge. Much has been said about the decreased level of use of the whip by yourself and the lack of advantage that could be had by using this whip. Clearly the creator of it feels it is worth the trouble of creating it and by continuing to use it as you did in preference to a regulation whip, obviously you felt the risk of detection was outweighed by the benefit. As more time went on and the true nature of the whip remained unknown to the Stewards, your concerns about detection would have diminished. Perhaps on the day in question through repeated use the ability to detect the weighted pieces increased which led you to abandon the whip as you did. Knowing as we have found you did that this whip was not normal, you more than anyone would have noticed the degradation of the area over time as it wore. We likely will never know whether it is this which saw your sudden change to a borrowed whip. It matters not to the question of penalty. What does matter is that you used it, knowing as we found you did that it was not to regulation, clearly seeking to an advantage of some kind over other riders. The potential damage done to the image of racing when it is found that the riders are using whips with lead pieces inserted into them is considerable. It raises questions of animal welfare, cheating and casts the image of racing and its participants in the poorest light. To suggest that whips of this nature are lying around Jockey's rooms to be found and used in races is a terrible slight on racing and the control over it. As this is such a public matter and message needs to be delivered that such conduct cannot and will not be tolerated. This needs to be balanced with the need to penalize you for the offence you have been found guilty of. This is often referred to as issuing a penalty that has both specific and general deterrence. In a matter such as this, this is an important aspect of penalty. Whilst you are a young person you have been in this industry your whole life. You are a young person you've been in this industry you (sic) *whole life, you are a young person in the professional industry.*

The nature of your profession in the industry is very public. There are considerable rewards available to a rider of your ability and we have heard mentioned today that your inability to compete since this inquiry commenced has meant a loss of earnings in the vicinity of $20,000. This exemplifies the rewards on offer. The privileged (sic) *of being able to compete for this sort of reward brings with it important onuses. Riders like licensed trainers, have the most important onuses placed on them by the rules of racing as they have a direct influence over what happens on the race track. Riders, perhaps even more so than trainers. By knowingly taking a whip out in races that was not to regulation of the kind used in this case, you have abused the privilege and responsibility on you. These circumstances cannot be taken lightly or be entirely overcome by your youth. Grave departures of the standards expected of riders such as this warrant penalties that are commensurate with the serious of all circumstances. Whilst the rules in relation to padded whips are new, it has never been appropriate to modify or use modified whips of such construction. As we have not found you to have been responsible for the modification in any way we find in all of these circumstances this case to be unique and thus will set a standard for this type of offence. The case of Yugovich we do not find to be of great assistance. On a closer reading of the article regarding Jockey F. Dettori, whilst not privy to the full details, the context of his offence would appear to relate more closely to the use of an otherwise approved and unmodified whip than one that was modified as the headline suggests. As we would expect and has been the case in Australia since the new rules, exceeding the permitted number of strikes in a race can lead to suspension of the kind issued to Jockey Dettori. Modifying a whip to make it heavier whether by soaking it in water or the insertion of foreign objects is an entirely different matter where we would expect far more significant penalties to be applied. The penalties open to the Stewards range from fines, suspension, disqualifications or a combinations of these. We do not believe a fine of any value to be appropriate for an offence of this nature. It sends clearly the wrong message for this type of offence and carries insufficient deterrent value for both the offender and others. The Stewards are left to determine that if a penalty is to be issued and clearly one must be whether suspension or disqualification are appropriate modes. In this respect we have given very careful consideration to the submission made by you and on your behalf as to the effect a disqualification would have. We have also considered the matter of suspension, in particular in light of comments made by Mr Parnham in his submissions that this mode of penalty would provide a greater level of control over you during your time sidelined by enabling you to continue an involvement in an industry that you have been in your whole life. Disqualification is usually reserved for the most serious of offences where a person by their conduct or actions has forsaken the privilege to be further involved in the industry. It sends a clear message to the offender and all that there is no place for this type of conduct or actions. Whilst a penalty has to take into account the individuals circumstances, these circumstances are not the sole matters of consideration and have to be weighed against all relevant considerations. After carefully undertaking this discretionary process we do find that disqualification to be the appropriate mode of penalty for both offences. In relation to the second charge, this is the less serious of the two. That said much of which has been discussed in relation to the damage done to the industry and other common matters apply equally to the determination of this matter. It is less serious as it deals only with the fact that you used a modified whip contrary to the rules but it still remains a serious matter of its own right. It does not deal with any levels of knowledge but rather by the mere fact of using such whip*

an offence has been committed which then once proven can lead to the imposition of penalty. When the whip was dissected and confirmed to have been modified, the offence was made. Having not obtained it from an appropriate source but instead found it in the manner you did and taking any proper measures to ensure it was legal your culpability in the matter arises. Using found gear or any kind without first thoroughly checking its suitability is a serious matter. When this gear is a whip that is going to be used to strike the horse and cause it some level of discomfort in order to act as a method of persuasion then even greater diligence should be exercised. Had you have done so and then acted appropriately you would never have taken possession of this whip let alone proceeded to use it over 100 times in races. Again a level of deterrence needs to be factored into the penalty that reflects the significant and serious onus on riders to ensure that only approved gear is used in races or trials. We have exercised our minds in isolation of the other charge to an appropriate penalty but find that for the reasons previously discussed disqualification to be the appropriate mode of penalty. In consideration of all these matters as discussed in relation to the first charge the Stewards are issuing a disqualification of 12 months effective from 4 October 2009. In relation to the second charge the Stewards are issuing a disqualification of 6 months also effective 4 October 2009 with both penalties to be served concurrently.' (T.101 - 108)

GROUNDS OF APPEAL

The amended grounds of appeal are numerous. Most of the grounds are liberally particularized. The first six grounds address the convictions. The balance six concern the penalties. I will deal with each ground in turn.

'Ground One - Count One – Knowledge

1. *The Stewards erred in convicting the Appellant of Count One despite having made no finding as to his knowledge of the existence of pieces of lead in the whip.*

PARTICULARS

(i) *The charge specifically alleged possession of a whip with pieces of lead in it.*

(ii) *A specific finding of knowledge on the part of the Appellant as to the presence of the lead in the whip was essential to any finding of guilt on this count.*

(iii) *A finding that the Appellant should have known or suspected that the whip had been modified or that there was some form of foreign object in the whip was insufficient to make good the charge.*

(iv) *The Stewards failure to make a finding to the required standard on the central question of whether the Appellant knew that the whip contained the lead precluded them from convicting him of Count One as framed.'*

The allegation in this ground, that there was no finding as to knowledge of the existence of *'... pieces of lead in the whip'*, is incorrect. The assertions in particulars (i) and (ii) respectively, as to *'... pieces of lead ...'* and *'... presence of the lead ...'* are equally wrong.

The particulars of the charge as already quoted clearly only specify there were '*... weighted objects in the padded section of the whip*'. Indeed, the Stewards acknowledged in the reasons for convicting '*... the whip needed to be dissected in order to ascertain exactly what was inside it ...' (T.83).* The Stewards did not find the appellant knew there were pieces of lead or any lead in the whip. Rather they did find the appellant knew there were weighted objects in the padding of the whip. These observations, whilst of relevance, are not the reason why I would dismiss ground one, however.

After the charges were laid legal counsel for the appellant sought time to consider them and to provide submissions. As a consequence the hearing was adjourned. Prior to its resumption the appellant's lawyer sent a facsimile to Mr Zucal, the Chairman of Stewards, asserting the charges were '*... duplicitous in that the same allegation is essentially being made twice under different rules.*' (T.68) The letter went on to state:

> '*Counsel has asked if by way of particulars it is contended that; (a) our client knew that the whip in question had been modified with the objects in question in the padded section of the whip and (b) whether our client is said to have been responsible for the modification of the whip in that regard.*' (T.68)

The letter was responded to by Mr Zucal in the following terms:

> '... (a) *the Stewards will take the view that for the conduct to improper* (sic) *it must be established that Apprentice Miller had knowledge or belief that the whip had been modified;*
>
> (b) *who modified is not a question to be determined ...* ' (T.68).'

Ground one complains that the Stewards convicted the appellant of the improper conduct offence despite not having found as a fact that he knew of the presence of the lead. The transcript more than clearly reveals there can be no doubt that the Stewards in fact positively found that the appellant did know the whip was unsatisfactory due to the presence of the weighted objects, or at least because he knew that the whip had been modified.

Indeed in their detailed reasons for convicting the Stewards enunciate repeatedly their findings that they were satisfied the appellant did have the requisite knowledge as to modification of the whip. After making the fairly obvious observation at any early stage that it is a jockey's responsibility to ensure all riding equipment conforms, the reasons proceed to state that, on inspection by the Stewards, it was immediately evident the whip '*... was not to standard*' (T.82). The explanation for this conclusion included such facts as:

1 '*On inspection it became immediately evident there was something foreign in the padded section';* (T.82)

2 '*There was a raised area, clearly visible and on touch a definite hardness was felt that confirmed that all was not in order.*' (T.82)

3 '*... clearly as could be seen by the human eye at the time we first inspected the whip and felt the evident bulge, there was a distinct raised or dimpled section.' (T.82 & 83); and*

4 *'If you had exercised even a modicum of diligence you would have readily seen that it carried no visible label and that the colour of the handle was not to standard.'* (T84 & 85)

These points must be considered in the context where the appellant admitted using the whip in competitive riding situations on more than 100 occasions. As the Chairman then said:

> *'...Having found it the way you claim to have found it, and used it for the length of time you did, it is more than reasonable to find that you must have known the difference we did in the padded section. That claim you did not, and the excuses offered for not, give rise to an inference that you do in fact know more about this whip than you are prepared to admit...';* (T.85)

The reasons proceed to acknowledge:

> *'Clearly you were aware that the found whip was notably different from your other whip on appearances alone even ignoring the raised section.'* (T.85)

and

> *'....This has all the hallmarks of someone who knows more about the offending whip than they are willing to admit.'* (T.87);

Further, at T88 the reasons state:

> *'The circumstantial evidence all points in the same direction to the available conclusion that you knew this whip was not a legal whip like the whip you purchased from Bio John. Reaching that conclusion does not require a leap of faith given that we were immediately able to detect problems with this whip. It was readily apparent that the padding of this whip was of concern. You may not have known what exactly was within the padded section but it matters not. For the purposes of this matter it is sufficient for us to be satisfied that you were aware that the padded section contained something that would be considered to be contrary to the rules. ...The ease of which a concern could be had with this whip as outlined in detail and your actions and submissions when quizzed as to your possession, use and sudden cessation of use satisfy us that you did have the required level of prior knowledge.'*

> *'....You were, however, the person in possession of it, aware as we have found you were that was not to regulation...' (sic)*

All of these quotes must be considered in the context of the Stewards' observations, made early in their reasons, regarding the publicity associated with use of whips in racing, the then new whip rules, the introduction of padded whips, discussion at apprentice school and the various presentations which the appellant had attended.

The fact that the Stewards clearly had found that there was the requisite knowledge is confirmed later in their penalty reasons where they state:

> *'....you continued to use this whip you knew to be non-standard almost to the point of the Stewards inspection on 3 October...'*

> *'... you used it, knowing as we found you did that it was not to regulation...'* (T.104)

As I am satisfied the finding as to the knowledge was open to be made based on the evidence, the reasoning process employed in actually arriving at that conclusion was correct and that only appropriate conclusions were reached, I would dismiss this ground of appeal.

'Ground Two - Circumstantial Evidence

2. *The Stewards erred in their treatment of the circumstantial evidence in the case against the Appellant.*

PARTICULARS

(i) The Stewards failed to acknowledge that they were entitled to draw adverse inferences against the Appellant only where there was no other reasonable inference consistent with innocence arising from the evidence.

(ii) The Stewards drew adverse inferences against the Appellant wherever there was any form of equivocal or circumstantial evidence, and failed to resolve any circumstantial aspect of the case in the Appellant' s favour.

(iii) In adopting this approach the Stewards effectively reversed the onus of proof and thereby fell into error.'

The case against the appellant was virtually entirely reliant on the circumstantial evidence. The Stewards were at pains to identify the large body of factual material which they relied on to reach their findings. They made abundantly clear the basis on which they drew their conclusions. Their thought processes are clearly recorded and were logically progressed. I am not persuaded there was any error on the part of the Stewards in the way they analysed and evaluated the evidence. The conclusions which they reached were clearly open to them. I am not persuaded any error has been demonstrated in how they went about the process of deciding the matters and reaching their conclusions.

In effect the second particular of this ground is repeated in ground three.

'Ground Three - Findings of Fact Not Reasonably Open

3. *The factual findings of the Stewards on a number of the central factual issues in the case were manifestly against the evidence and the weight of the evidence or were not reasonably open to them.*

PARTICULARS

(i) The Stewards' finding that the Appellant must have been aware that the whip was modified was manifestly against the weight evidence.

(a) During the time which the Appellant used the whip he had "weighed in" on more than 50 separate occasions, each of which involved handing the whip in question to a Steward.

(b) On no occasion did any of the Stewards notice anything untoward about the whip. The proposition that the modification to the whip was patently obvious ran contrary to the evidence regarding the number

of times that various Stewards would have been in physical possession of it.

(ii) The finding by the Stewards that the Appellant's evidence that he had found the whip in the jockeys' room was a lie, was unreasonable and contrary the uncontradicted evidence of the witness Mark Miller.

(iii) The finding by the Stewards that the Appellant's changing of whips was unequivocally consistent with guilt was unreasonable.

(a) The Stewards accepted that their inspection was conducted without notice to the Appellant or any other rider.

(b) The Appellant cold not have known of the impending search by the Stewards.

(c) The proposition that the Appellant changed whips out of a consciousness of guilt was untenable.'

The key issues to be decided were the state of mind of the appellant when carrying and using the whip in question, in relation to the first charge, and when carrying the whip in relation to the second. The Stewards' inquiry proceeded on the basis of investigating those issues. The evidence on these aspects addressed those questions inferentially in the absence of any admission by the appellant. The inferences were fairly easily able to be drawn on the evidence. Conclusions were arrived at by combining numerous pieces of relevant evidence. The fitting together of the pieces in the end irresistibly led to and fully supported the factual findings as to knowledge of the existence of the weighted objects. Such a situation could only mean the whip was not in a satisfactory condition as it had been modified. The conclusions in my assessment were all clearly open to the Stewards. I reject the propositions the findings referred to in the first particular were inappropriate in any way.

The failure by Stewards to notice the whip's aberration at weigh ins is explained in the Stewards' reasons. As I understand it, the attention and concern of any Stewards whilst jockeys are being weighed following a race are only directed to the weighing in exercise and not to checking or in any way scrutinising the equipment. The role of Stewards whilst they briefly hold the equipment at such times is simply to act in effect as a handy convenience for the jockeys. The fact that no attention is given to the equipment in that situation arguably may be said to be a weakness of the system. Although this point was not addressed by counsel, the circumstances of this unusual case possibly indicate it might be appropriate for some checking of the equipment to occur at weigh ins. How practical or desirable it is to change the existing practice I do not claim to know or be qualified to usefully comment and I hasten to emphasise, this gratuitous observation in no way should be considered relevant to the merits of this appeal.

I am not persuaded there is merit in the other particulars to this ground. Equally I am not persuaded that any inferences consistent with innocence were of sufficient weight to negate the overwhelming inferences of guilt. The combination of the overwhelmingly damning evidence clearly lead to the conclusion that the appellant knew he was using a modified whip which did not meet the standards of approval. For these reasons I would dismiss this ground.

These reasons in relation to ground three in part reinforce my conviction there is no merit in ground two and also support my conclusion regarding the next ground.

'Ground Four – Conviction against the Weight of the Evidence

4. *The finding of guilt on both counts was manifestly against the weight of the evidence having regard to the combination of the matters set out in grounds 1 - 3 above.'*

I find ground four really adds nothing of substance to ground three despite the different wording. I would not uphold ground four for the reasons expressed in ground three.

'Ground Five – Count Two - Duplicity

5. *Count two was bad for duplicity; having regard to the subject matter of count one, and internally by alleging two separate offences.*

PARTICULARS

(i) Australian Rule of Racing 137A (1b) creates two potential areas of offending. A rider can offend by not having a whip in a satisfactory condition, or alternatively, having a modified whip.

(ii) The Appellant was charged with both aspects, in breach of the rule against duplicity.

(iii) The subject matter of Count Two was encompassed by the allegation in Count One and by the factual findings necessary to establish that charge. Count Two was duplicitous vis-a-vis Count one and should be set aside as being void.

(iv) The Stewards' finding that the Appellant had breached the rule on both counts was void for duplicity.'

This appeal does not concern criminal charges where the rule against duplicity is strictly applied. Flexibility is in order in disciplinary proceedings. The rationale behind the rule against duplicity is different in a case like the present compared to a criminal case and even a civil case.

Duplicity occurs in three situations, namely:

- where a charge alleges one breach but two offences have in fact occurred;
- in a single charge when in fact two charges are particularised; and
- where each charge alleges one offence when the evidence potentially proves multiple offences

(*Johnson v Miller* (1937) 59 CLR 467, 497-498).

Ground five raises two separate duplicity arguments in relation to the second offence. The first proposition, which is that count two duplicates count one, is supported by particular (iii). The second argument is the allegation that count two contained an internal duplication. This

second argument, which is qualified by particulars (i) and (ii), is the much simpler to address so I will deal with it first.

I consider there is no substance in either particular (i) or (ii). Count two did not offend the rule against duplicity as claimed. There was no internal allegation of two separate offences contained in the second charge. The wording of the Rule in question is not couched in the alternative as alleged in particular (i). In this respect particular (i) to appeal ground six accurately reflects the position, whereas particular (ii) of ground six both contradicts particular 6(i) and does not accurately reflect the Rule. The second charge as laid properly included the necessary conjoint aspects of Rule 137A (1b), namely carrying a whip in races and trials which at the relevant time (firstly) was not in a satisfactory condition and (secondly) had been modified. The condition of Mr Miller's confiscated whip clearly was not satisfactory. On initial examination the Stewards readily observed it obviously had been modified. Weighted objects were fitted in the padded section. This fact was also referred to in the particulars. Those objects proved to be pieces of lead. Another modification was its yellow handle which was not that of the makers.

This aspect was not particularized or pursued by the Stewards. In order to offend Rule 137A (1b) both the aspect of unsatisfactory condition and that of modification were required to be alleged and proven. I am satisfied both aspects of the Rule were appropriately alleged and properly proven by the Stewards.

Particular (iii) does raise the complex issue of the role that the rule against duplicity plays in disciplinary tribunals. Unfortunately counsel on both sides only made passing comment on this technical question. On the one hand, for the appellant, the Tribunal was told the rule does apply to this case. On the other hand, for the Stewards, it was said it was not applicable in the case of disciplinary tribunals.

Even though *Johnson v Miller* (supra) is distinguishable, being a case involving criminality, it identifies the injustice of duplicity. That injustice is the inability to properly plead to the charges and not know which charge is required to be answered. These prejudices do not apply to Mr Miller's case.

As stated by Dunford J in *Jacobsen v Nurses Tribunal*, SC NSW, 3 October 1997, No 30101/96:

> *'The strict rules relating to duplicity in criminal proceedings do not apply to proceedings of a disciplinary nature which are bought for the protection of the public, provided the respondent has adequate notice of the allegations against him or her.'*

Statutory and other disciplinary bodies are required to afford procedural fairness and natural justice to parties facing disciplinary charges. Where a party claims unfairness due to duplicity the disciplinary body should clarify matters for the respondent (*James Malcolm Woods v The Legal Ombudsman* SCV.CA No 3743 of 2002). Clarification by the Stewards, as has already been pointed out, did in fact occur in this case.

If a disciplinary body in its decision makes known the facts which it finds proven and its reason for arriving at its decision a respondent will generally have no cause for complaint that the charge is duplex (*R v General Medical Council; ex parte Gee* [1986] 1 WLR 537 at 545).

Disciplinary charges are governed by principles of the administrative law. The principles of natural justice in administrative law are rules of procedural fairness (*Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11). When there is no guidance as to what procedures a disciplinary body should follow, as is the case under the Rules of Thoroughbred Racing, one turns to the general law to determine what if any unfairness a respondent has suffered.

There is no statutory prohibition in the Rules of Thoroughbred Racing to more than one charge being laid as occurred in this case. The same situation applies to the Rules of Harness Racing. A recent example of an allegation of three offences arising out of the same facts is the appeal by *W Watson* (Tasmanian Racing Appeal Board Appeal 6 of 2009/10). Mr Watson, a trainer was charged with breaches of Harness Racing Rules 194, (controlling a drug without a supporting prescription), 190(2) (presenting a horse to race which was not free of a prohibited substance and AR 196A(1)(ii) (administering a prohibited substance). The evidence did not support the first charge. Mr Watson was convicted of the other two charges and disqualified for nine months for the two breaches on an *in globo* basis. His appeal did not challenge the two charges and convictions.

It was clear from the moment the Stewards indicated to Mr Miller they intended to lay charges there were two separate charges. There is no general rule preventing a tribunal from dealing with several charges at once provided they are not so numerous or complex as to deprive a party of a proper hearing (*Gardiner v Land Agents' Board* (1976 12 SASR 458; *Hardcastle v Commissioner of Australian Federal Police* (1984) 53 ALR 593 at 602). It cannot be said any such deprivation occurred before the Stewards in this matter. Generally, offences will be joined together where they are related or arise from the same acts or commissions (*Ludlow v Metropolitan Police Commissioner* [1971] AC 29 at 38-9). The Stewards appropriately handled the two counts together in the one hearing and correctly published separate findings and reasons applicable to each of them, despite the factual overlap

In order to determine the appropriateness or otherwise of the second charge it is also appropriate to analyse the essential elements of both charges. This involves the proper construction of the relevant provisions of the Rules as well as careful examination of the wording of both the charges and their respective particulars.

Count one did require proof of a fact not relevant to count two, namely the *'use'* of the whip. As laid both counts required proving the whip was *'carried'*. As is already clear the reasons reveal the Stewards found as a fact not only had the appellant used the whip in two races on the day the whip was discovered by the Stewards to be unsatisfactory, but the appellant also *'...had used this whip in 103 races leading into Saturday 3 October...'*. It was appropriate for a strict finding to be made by the Stewards on the use point as far as the first count is concerned (*Duncan v Medicare Disciplinary Committee* [1986] NZLR 537 at 545), as, I repeat, the particulars of the charge alleged Mr Miller *'...carried and used'* the whip in races and trials in the months leading up to 3 October. As it happens the Stewards made findings in both cases that the whip had been used, as well as carried, although it was strictly only relevant to the particulars alleged in relation to count one.

This is not a case of punishing the offender twice for the elements that are identical, despite the common elements. Further, the Stewards in their reasons clearly explained why one offence was different from the other and more serious than the other. The punishments are not identical. The Stewards took into account the differences in the conduct and the different

implications of the conduct and punished accordingly. Mr Miller has not been doubly or additionally punished for the one act. The sentences were imposed concurrently.

As I interpret things, the two offences are intended to play different roles in the scheme of the Rules. One clue to this is the fact the two relevant provisions are identified or labelled differently in the Rules. The relevant rule for the first count falls under the broad section heading of *'Offences'*, whereas the second under the heading of *'Running'*. It is worth mentioning the Rules of Thoroughbred Racing comprise the Australian Rules and some Local Rules. The two rules which were breached by Mr Miller are both Australian Rules.

It should also be noted the words in the two Rules are couched differently. The second offence is expressed in mandatory terms which leaves no room for discretion. The first offence on the other hand is one of those special types which are expressed to be *'in the opinion of the Stewards'*. The Tribunal has on many occasions in dealing with provisions which are so worded been required to comment on the particular nature and consequences of that wording. Those comments have some relevance in explaining the difference between the two rules in question in the scheme of things. One rule under which Mr Miller was charged is specific in that it outlaws particular behaviour involved during the running of races and trials. The other rule, however, has general application. The specific rule relates to the conduct of those jockeys participating in a race and trial in terms of their equipment. Clearly certain standards of skill and levels of judgement are required from a safety viewpoint during the running of races and trials. In addition, there is the need to ensure there is a level playing field to avoid any unfair advantage gained by the misuse of equipment or the use of outlawed equipment. Over and above that, the specific conduct of participants engaged in races and trials can have broader ramifications for the industry than the immediacy of the outcome of the race in question. In this broader context beyond the actual conduct of the participants during the short period of time that each race is conducted is the bigger picture, namely the image of the industry and the attitude of the betting public and the community in general to the overall conduct of horse racing. The Stewards made it clear in their reasons that the first offence, being of broader thrust was the more serious. This fact too is reflected in the penalties which were imposed. The particulars of the two offences only differ with the addition of the words *'and used'* after reference to carrying the whip in races and trials. The act of employing a whip which is not to standard due to the insertion of foreign objects in it clearly is a more serious and controversial type of conduct than merely the act of holding such a whip whilst riding the horse but not actually using it to strike the animal.

When the conduct is looked at along the lines of the explanation in the previous paragraph it is clear the two separate offences brought under different provisions of the Rules are intended to address different issues. This is despite the fact the behaviour is essentially the same. The behaviour addressed by the two separate rules has different implications or consequences. Despite the relevant evidence having been common to both, save for the one additional component I have identified, the consequences which were being addressed were significantly different. In that sense *'... they deal with separate and different wrongful acts albeit, in one sense, acts that are related to one broad act of improper conduct.'* (*James Malcolm Woods v The Legal Ombudsman* (supra at para 57). These consequences clearly were considered sufficiently distinguishable for the disciplinarians to have felt justified in bringing the two separate charges.

Both charges were established on the evidence. The lesser charge in one sense was a backup charge. It does not however infringe the rule against duplicity as it clearly was a

separate charge. In all of the circumstances I am satisfied in this case no *'... appreciable harm ...'* or injustice has been established (*Tamesby v General Medical Counsellor* (Appeal No 2 of 1969) (Privy Council, 20 July 1970, unreported) referred to by Mann J in *R v General Medical Council* (supra)).

For these reasons I am satisfied particular (iv) has no impact. Accordingly I would dismiss ground five.

'Ground Six - Count Two - Absolute Offence

6. *The Stewards erred by treating the offence alleged in Count Two as an absolute offence.*

PARTICULARS

(i) *Count Two alleged that the whip was not in a satisfactory condition and had been modified.*

(ii) *The rule implicitly requires that a rider using any such whip must know that the whip in question was not in a satisfactory condition or that it had been modified.*

(iii) *The offence was not an absolute offence and required an element of guilty knowledge.*

(iv) *The Stewards finding that for the purposes of the charge it was "not relevant" that a rider did not know that a whip had been modified or was not in a satisfactory condition was an error.*

(v) *The Stewards subsequent contention that the charge was "indefensible" was misconceived.'*

This ground asserts that the Stewards erred by treating the modified whip offence as an absolute offence when it should have required an element of knowledge. I would dismiss this ground because knowledge was an element duly taken into account by the Stewards. This element was clearly established, as my observations in relation to ground one reflect.

As to particular (iv), the actual wording contained in the reasons is:

> *'....For the purposes of this charge, it is not relevant what you did or did not know about this modification.'* (T.89)

I understand these words in their context to mean only that Mr Miller's state of knowledge as to what the weighted objects in fact were and how those objects found their way into the whip were both irrelevant. From that perspective only I agree with the proposition as stated by the Stewards at T.89.

For these reasons I am satisfied the Stewards were correct in reaching the conclusion they did and I would dismiss ground six.

'Ground Seven— Youth of the Appellant and Emphasis on General Deterrence

7. The Stewards failed to give any proper or adequate consideration to the fact that the Appellant was not an adult and failed to properly reduce the weight given to the factor of general deterrence.

PARTICULARS

(i) The Appellant was at all material times aged 17 and an apprentice jockey.

(ii) The Stewards failed to have regard to the principle that any requirement for general deterrence should be substantially reduced in a case dealing with a young offender.

(iii) The Stewards in imposing the penalty of 12 months disqualification placed significant and undue emphasis on the requirement of general deterrence and the damage done to the image of racing.

(iv) The Stewards erred in principle by using the case to set a standard for penalties for this type of offence.

(v) The Stewards erred in having regard to the level of publicity surrounding use of whips which had occurred in the public domain at around the time of the offence in question and a perceived need to be seen to be taking a firm stand on issues relating to whips.'

I would not uphold this ground. The reasons make it clear the Stewards did fully acknowledge and carefully consider the fact of the appellant's youth and implications for his career progression as a consequence of the imposition of the period of disqualification. Despite his tender years the Stewards found the appellant had spent his life in the industry and came from a family with a long history in the sport (T.102). I will not repeat the details of this which have already been quoted. I am not persuaded the decision was unbalanced in relation to the general deterrence and damage to the image of racing. In this case the deterrence and image factors were so important in the light of the prolonged use of the whip at a time when the issue of whips in racing was most topical being the source of so much concern to the industry and others.

I see nothing wrong with the prospect of this particular case being used to help set a standard for the future. Being the first of its kind it is almost inevitable. Obviously due allowances in any future case will be needed according to the factual differences. Each case must be decided on its own particular facts and circumstances. Differences in any future case may include the offender's age, experience and record, and the extent to which the public interest is involved. The fact that in the present case the offending implement was employed knowingly for so many rides and so publicly suggest this case may be likely to be considered at the upper end of severity in the future should further whip offenders be dealt with for the same type of wrong doing.

'Ground Eight - Irrelevant and Unproven Considerations

8. *The Stewards in imposing penalty improperly took into account as aggravating features of the case several irrelevant and unproven considerations*

PARTICULARS

(i) The Stewards took into account:

(a) that the whip might have afforded an unfair advantage to the person using it, which was never established on the evidence.

(b) the degree to which the modifications to the whip had been disguised, which modification had not (on their findings) been effected by the Appellant.

(c) that the whip had degraded over time in the error of its modification.

(d) that the Appellant had lied about finding the whip in the jockey's room.

(ii) None of these aggravating factors were appropriate matters to be taken into account for the purpose of imposing a penalty.'

I am not persuaded the matters particularised in support of this ground were irrelevant to the setting of the penalty. In my assessment, in the circumstances of the case, all four aspects as particularised were appropriately and properly considered for the purpose of determining penalty.

'Ground Nine - Overall Criminality of the Offence

9. *The Stewards erred by placing the offending in a category of seriousness which was manifestly beyond the facts found by them and established by the evidence.*

PARTICULARS

(i) The Stewards did not find as a fact that the Appellant had any knowledge of the lead which was within the whip, but still proceeded to impose a penalty which was commensurate with a finding of that nature.

(ii) The penalty imposed was consistent with the Appellant having effected the modification to the whip himself, notwithstanding a finding to the contrary.

(iii) The penalty was consistent with a finding that that the modified whip had harmed the horses on which it was used to a greater extent than old styled whip, which proposition was never established.

(iv) In the circumstances of this case where no such findings were reasonably open to the Stewards on either charge the penalty was manifestly excessive.'

I would dismiss this ground. The offence was very grave in nature due to the prolonged use of a seriously offending whip at a time when so much attention was being placed on the role of whips in racing. The appellant's conduct was blatant, indeed bordered on the brazen.

The damage to the industry cannot be overstated although it is incapable of measurement. The Stewards properly found the appellant knew the whip was not in a satisfactory condition and had been modified. Had the facts supported the types of findings referred to in particular (ii) or particular (iii), I consider longer periods of disqualification would have been warranted.

I have dealt with the aspect of knowledge which is raised in particular (i) sufficiently already.

'Ground Ten — Penalty outside a broad discretionary range

10. The Stewards erred in imposing a penalty that was outside a sound discretionary range of penalties for the offending.

PARTICULARS

(i) There was no previously decided case which was directly applicable to guide the Stewards on the specific nature of the charge in question.

(ii) There were a number of analogous cases to which the Stewards ought to have had regard, including Harvey, Dettori, Santich and Chomiak which were generally applicable to an assessment of the overall seriousness of the offending.

(iii) The Stewards failure to take any guidance from the level of penalties imposed in these cases was in error.'

I would reject this ground. This case is special in that it can be categorised as one of upper level seriousness. It is only ameliorated somewhat by virtue of the appellant's young age. I only say somewhat because this particular appellant comes from such a strong family racing background which resulted in a relatively longish exposure to racing as is explained in the Stewards' reasons.

'Ground Eleven

11. The Stewards erred in not imposing a period of suspension as a penalty.'

I am not persuaded offences of this nature involving the prolonged and blatant use of a whip which had inserted into it weighted objects should attract anything other than complete bans from participation in the industry. Suspension in my assessment is insufficient punishment for this particular offence. Suspending would not reflect the significance of the adverse impact on the image and operation of racing. It would not reflect the seriousness of the prolonged riding with such an offending piece of equipment.

'Ground Twelve Totality of Errors

12. By reason of the errors alleged in Grounds 7- 11 individually and conjunctively the penalty imposed was manifestly excessive in all the circumstances of the case.'

As I have not been persuaded as to any errors in the earlier grounds addressing penalty I would dismiss this ground as well.

CONCLUSION

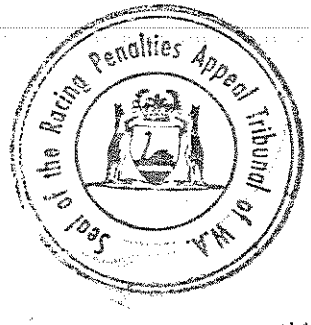
In the light of these reasons I would make the following orders:

1. The appeal against conviction in relation to both offences be dismissed.

2. The appeal against the penalties in relation to both offences be dismissed.

3. Both penalties be confirmed.

DAN MOSSENSON, CHAIRPERSON



APPEAL – 712

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT: DUNCAN MILLER

APPLICATION NO: A30/08/712

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

DATE OF HEARING: 12 FEBRUARY 2010

DATE OF DETERMINATION: 7 MAY 2010

IN THE MATTER OF an appeal by Duncan Miller against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 26 October 2009 imposing disqualifications of 12 months for a breach of Rule 175(a) and 6 months for a breach of Rule 137A(1)(b) of the Rules of Thoroughbred Racing.

Mr T F Percy QC with Ms L M Timpano appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

INTRODUCTION

These are appeals against conviction and penalty.

The Appellant is an apprentice jockey. On 26 October 2009, the Racing and Wagering Western Australia Stewards of Thoroughbred Racing ("the Stewards") found him guilty of two offences under the Rules of Thoroughbred Racing. The findings of guilty ("the convictions") followed a single hearing, because both of the charges arose out of the same set of facts. This appeal also deals with both of the convictions and both of the penalties.

THE OFFENCES

The Appellant was convicted of an offence against Rule 175(a). That Rule is in the following terms:

> *"AR.175. The Committee of any club or the Stewards may penalize;*
>
> *(a) Any person, who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing."*

The Chairman of Stewards gave the following particulars at page 63 ("T63") of the transcript of the Stewards' inquiry:

> *".....you are charged under that rule with an improper practice. The improper practice being that you carried and used in races and trials in the period between 1 August 2009 and 3 October 2009 a whip which had weighted objects in the padded section of the whip."*

The Appellant was also convicted of an offence against Rule 137A (1)(a). That Rule is in the following terms:

> *"AR137A. (1)*
>
> *(a) Only padded whips of a design and specifications approved by a panel appointed by the Australian Racing Board may be carried in races, official trials or jump-outs.*
>
> *(b) Every such whip must be in a satisfactory condition and must not be modified in any way.*
>
> *(c)....."*

The Chairman of Stewards also gave the particulars of this charge at T63. The Chairman said:

> *".....you are charged under that rule with sub section (b) in that you carried in races and trials for a period between 1 August 2009 and 3 October 2009 a whip which was not in a satisfactory condition and which had been modified by weighted objects being fitted into the padded section of the whip."*

THE APPELLANT'S ANSWER TO THE CHARGES

It is useful at this early stage to set out the Appellant's immediate answer to both charges. He was asked at T63 how he wished to plead to the Rule 175(a) offence ("the improper conduct offence"). He said:

> *"I can't plead guilty to something that I didn't know about so not guilty."*

The Appellant was then asked how he wished to plead to the Rule 137A offence ("the modified whip offence"). He said:

> *"The same as before, I can't plead guilty to that."*

THE ISSUES BETWEEN THE PARTIES AT THE HEARING

The particulars of the improper conduct offence comprised three different parts. The Stewards alleged (a) that the Appellant carried and used the whip, (b) that the whip had weighted objects in it, and (c) that his conduct by carrying and using it was improper.

The particulars of the modified whip offence comprised two different parts. It was alleged (a) that the Appellant carried the whip, and (b) that it had been modified by having weighted objects inserted into it. The added allegation of the whip not being in a satisfactory condition really added nothing to the allegation of modification.

The Appellant did not dispute (a) that he carried and used the whip. He did not dispute (b) that it had weighted objects in it. He said that he was not guilty of both charges because he did not know that the weighted objects had been inserted into the whip. The Appellant's knowledge or lack of knowledge was the only issue between the parties at the hearing. It was accepted by the parties that the conduct would be improper if the Appellant had known of the objects.

The Stewards did not believe the Appellant, and found him guilty.

THE PENALTY

On the improper conduct offence, the Appellant was disqualified for twelve months. On the modified whip offence, he was disqualified for six months. Both penalties were ordered to be served concurrently

THE GROUNDS OF APPEAL

The grounds of appeal are as follows:

"A. CONVICTION

Ground One - Count One - Knowledge

1. The Stewards erred in convicting the Appellant of Count One despite having made no finding as to his knowledge of the existence of pieces of lead in the whip.

PARTICULARS

(i) The charge specifically alleged possession of a whip with pieces of lead in it.
(ii) A specific finding of knowledge on the part of the Appellant as to the presence of the lead in the whip was essential to any finding of guilt on this count.
(iii) A finding that the Appellant should have known or suspected that the whip had been modified or that there was some form of foreign object in the whip was insufficient to make good the charge.
(iv) The Stewards failure to make a finding to the required standard on the central question of whether the Appellant knew that the whip contained the lead precluded them from convicting him of Count One as framed.

Ground Two - Circumstantial Evidence

2. The Stewards erred in their treatment of the circumstantial evidence in the case against the Appellant.

PARTICULARS

(i) The Stewards failed to acknowledge that they were entitled to draw adverse inferences against the Appellant only where there was no other reasonable inference consistent with innocence arising from the evidence.
(ii) The Stewards drew adverse inferences against the Appellant wherever there was any form of equivocal or circumstantial evidence, and failed to resolve any circumstantial aspect of the case in the Appellant' s favour.
(iii) In adopting this approach the Stewards effectively reversed the onus of proof and thereby fell into error.

Ground Three - Findings of Fact Not Reasonably Open

3. The factual findings of the Stewards on a number of the central factual issues in the case were manifestly against the evidence and the weight of the evidence or were not reasonably open to them.

PARTICULARS

(i)The Stewards' finding that the Appellant must have been aware that the whip was modified was manifestly against the weight evidence.

(a) During the time which the Appellant used the whip he had "weighed in" on more than 50 separate occasions, each of which involved handing the whip in question to a Steward.
(b) On no occasion did any of the Stewards notice anything untoward about the whip. The proposition that the modification to the whip was patently obvious ran contrary to the evidence regarding the number of times that various Stewards would have been in
physical possession of it.

(ii) The finding by the Stewards that the Appellant's evidence that he had found the whip in the jockeys' room was a lie, was unreasonable and contrary the uncontradicted evidence of the witness Mark Miller.
(iii) The finding by the Stewards that the Appellant's changing of whips was unequivocally consistent with guilt was unreasonable.

(a) The Stewards accepted that their inspection was conducted without notice to the Appellant or any other rider.
(b) The Appellant cold not have known of the impending search by the Stewards.
(c) The proposition that the Appellant changed whips out of a consciousness of guilt was untenable.

Ground Four – Conviction against the Weight of the Evidence

4. The finding of guilt on both counts was manifestly against the weight of the evidence having regard to the combination of the matters set out in grounds 1 - 3 above.
Ground Five- Count Two - Duplicity

Ground Five – Count Two - Duplicity

5. Count two was bad for duplicity; having regard to the subject matter of count one, and internally by alleging two separate offences.

PARTICULARS

(i) Australian Rule of Racing 137A (1b) creates two potential areas of offending. A rider can offend by not having a whip in a satisfactory condition, or alternatively, having a modified whip.
(ii) The Appellant was charged with both aspects, in breach of the rule against duplicity.
(iii) The subject matter of Count Two was encompassed by the allegation in Count One and by the factual findings necessary to establish that charge. Count Two was duplicitous vis-a-vis Count one and should be set aside as being void.
(iv) The Stewards' finding that the Appellant had breached the rule on both counts was void for duplicity.

Ground Six - Count Two - Absolute Offence

6. The Stewards erred by treating the offence alleged in Count Two as an absolute offence.

PARTICULARS

(i) Count Two alleged that the whip was not in a satisfactory condition and had been modified.
(ii) The rule implicitly requires that a rider using any such whip must know that the whip in question was not in a satisfactory condition or that it had been modified.
(iii) The offence was not an absolute offence and required an element of guilty knowledge.
(iv) The Stewards finding that for the purposes of the charge it was "not relevant" that a rider did not know that a whip had been modified or was not in a satisfactory condition was an error.
(v) The Stewards subsequent contention that the charge was "indefensible" was misconceived.

B. PENALTY

Ground Seven— Youth of the Appellant and Emphasis on General Deterrence

7. The Stewards failed to give any proper or adequate consideration to the fact that the Appellant was not an adult and failed to properly reduce the weight given to the factor of general deterrence.

PARTICULARS

(i) The Appellant was at all material times aged 17 and an apprentice jockey.
(ii) The Stewards failed to have regard to the principle that any requirement for general deterrence should be substantially reduced in a case dealing with a young offender.
(iii) The Stewards in imposing the penalty of 12 months disqualification placed significant and undue emphasis on the requirement of general deterrence and the damage done to the image of racing.
(iv) The Stewards erred in principle by using the case to set a standard for penalties for this type of offence.
(v) The Stewards erred in having regard to the level of publicity surrounding use of whips which had occurred in the public domain at around the time of the offence in question and a perceived need to be seen to be taking a firm stand on issues relating to whips.

Ground Eight - Irrelevant and Unproven Considerations

8. The Stewards in imposing penalty improperly took into account as aggravating features of the case several irrelevant and unproven considerations

PARTICULARS

(i) The Stewards took into account:

(a) that the whip might have afforded an unfair advantage to the person using it, which was never established on the evidence.
(b) the degree to which the modifications to the whip had been disguised, which modification had not (on their findings) been effected by the Appellant.
(c) that the whip had degraded over time in the error of its modification.
(d) that the Appellant had lied about finding the whip in the jockey's room.

(ii) None of these aggravating factors were appropriate matters to be taken into account for the purpose of imposing a penalty.

Ground Nine - Overall Criminality of the Offence

9. The Stewards erred by placing the offending in a category of seriousness which was manifestly beyond the facts found by them and established by the evidence.

PARTICULARS

(i) The Stewards did not find as a fact that the Appellant had any knowledge of the lead which was within the whip, but still proceeded to impose a penalty which was commensurate with a finding of that nature.
(ii) The penalty imposed was consistent with the Appellant having effected the modification to the whip himself, notwithstanding a finding to the contrary.
.(iii) The penalty was consistent with a finding that that the modified whip had harmed the horses on which it was used to a greater extent than old styled whip, which proposition was never established.
(iv) In the circumstances of this case where no such findings were reasonably open to the Stewards on either charge the penalty was manifestly excessive.

Ground Ten — Penalty outside a broad discretionary range

10. The Stewards erred in imposing a penalty that was outside a sound discretionary range of penalties for the offending.

PARTICULARS

(i) There was no previously decided case which was directly applicable to guide the Stewards on the specific nature of the charge in question.
(ii) There were a number of analogous cases to which the Stewards ought to have had regard, including Harvey, Dettori, Santich and Chomiak which were generally applicable to an assessment of the overall seriousness of the offending.
(iii) The Stewards failure to take any guidance from the level of penalties imposed in these cases was in error.

Ground Eleven

11. The Stewards erred in not imposing a period of suspension as a penalty.

Ground Twelve Totality of Errors

12. By reason of the errors alleged in Grounds 7- 11 individually and conjunctively the penalty imposed was manifestly excessive in all the circumstances of the case."

CONSIDERATION OF THE GROUNDS OF APPEAL

Some of the grounds of appeal can be disposed of without reference to the facts.

Ground five asserts that the modified whip offence was bad for duplicity. Although that language is borrowed directly from the criminal law, which does not apply to the Steward's hearings, it nevertheless is a convenient manner of expression. It means that a person should not be charged with the same thing twice. In my opinion, that is what occurred here. There were only two parts making up the modified whip offence, and they were the same as two of the three parts of the improper conduct offence. I would uphold ground five, specifically on the basis of particular numbered (iii) of that ground. There is no substance in particulars (i) and (ii).

Ground six says that the Stewards erred by treating the modified whip offence as an absolute offence. This can best be illustrated by comparing the Stewards approach to this offence with their approach to the improper conduct offence. As to the improper conduct offence, the Stewards accepted that they would have to be satisfied that the Appellant knew of the weighted objects. At T68 the Chairman read out the terms of a letter which he had earlier sent to the Appellant's solicitors. The Chairman said in his letter:

> *"....for the conduct to be improper it must be established that Apprentice Miller had knowledge or belief that the whip had been modified."*

As to the modified whip offence, the Chairman said at T89:

> *"....For the purposes of this charge, it is not relevant what you did or did not know about this modification."*

It is not necessary to make a finding on this ground of appeal, bearing in mind my decision on ground five. The issue may possibly be determined in future on a different case, but it becomes irrelevant here on this appeal.

Ground one complains that the Stewards convicted the Appellant of the improper conduct offence despite having not found as a fact that he knew of the existence off the weighted objects. In my opinion, a fair reading of the transcript shows that this assertion is incorrect.

As noted above, prior to the giving of reasons the Stewards accepted that for the Appellant to be found guilty, knowledge was essential. Then, in giving their reasons for convicting the Appellant, the Stewards plainly did find as a fact that the Appellant had the requisite knowledge.

At T85 the Chairman said:

> *"...Having found it the way you claim to have found it, and used it for the length of time you did, it is more than reasonable to find that you must have known the difference we did in the padded section. The claim that you did not, and the excuses offered for not, give rise to an inference that you do in fact know more about this whip than you are prepared to admit..."*;

and at T87:

> *"....This has all the hallmarks of someone who knows more about the offending whip than they are willing to admit...."*;

and further, at T88:

> *"....The ease of which a concern could be had with this whip as outlined in detail and you actions and submissions when quizzed as to your possession, use and sudden cessation of use satisfy us that you did have the required level of prior knowledge...."*.

After conviction, and during the penalty part of the hearing, the Chairman said at T68 and T68 – T69:

> *"....You were, however, the person in possession of it, aware as we have found you were that was not to regulation..." (sic)*

> *"....you continued to use this whip you knew to be non-standard almost to the point of the Stewards inspection on 3 October..."*

> *"....What does matter is that you used it, knowing as we found you did that it was not to regulation..."*

The Stewards clearly did find that the Appellant knew of the existence of the weighted objects. I would not uphold this ground of appeal.

Ground four adds nothing to ground three. It is simply ground three worded a different way. I would not uphold ground four.

GROUNDS TWO AND THREE

The substance of this appeal lies in these two grounds.

Ground two (ii) complains that the Stewards drew adverse inferences against the Appellant wherever the evidence on which those inferences were based was equivocal. Ground three complains of exactly the same thing, namely that the Stewards found facts against the Appellant against the weight of the evidence. Parts (i) (ii) and (iii) of ground three are the particular factual findings which the Appellant complains about in ground two(ii).

It must be borne in mind that there was only one issue in this case, namely the Appellant's state of mind. It was not a case, as ground three suggests, in which there were a number of "central factual issues", because there was only one central factual issue. Neither the Appellant nor the Stewards disputed any other fact at the hearing. Further, the evidence on that issue could only be arrived at by inference, and nothing else. Short of an admission by the Appellant, there could be no direct evidence that he knew of the existence of the weighted objects. No-one could see his state of mind.

There were number of pieces of evidence, from which the Stewards drew the inference that the Appellant knew of the modification. They made only one factual finding, namely that the Appellant knew of the existence of the weighted objects. They arrived at that factual finding by inference. The pieces of evidence from which the Stewards drew the inference can be categorized as circumstantial, because they provided a basis for the inference which they drew.

Ground two seems to refer to the concepts of circumstantial evidence and the drawing of inferences interchangeably. Either way, the point sought to be advanced by the Appellant is the same. The Appellant says that (1) inferences should only have been be drawn against him where there was no other inference available, and (2) he should only have been found guilty if there was no rational view of the evidence consistent with his innocence. Bearing in mind that this was a single issue case, the two things amount to the same thing.

THE FACTS

The weighted objects referred to in the improper conduct charge were two pieces of lead. Each piece was flattened out, roughly square, and of a size small enough to fit into the striking end of the whip (T17). There was one piece on each side of the striking surface. The whip had been partially unstitched to allow for the insertion of each weight, and then restitched to hide the insertions.

The RWWA veterinarian, DR Medd, gave evidence at the Stewards' inquiry. She gave evidence about the effect on a horse if struck with the modified whip. Even without the benefit of that expert evidence, it is obvious to anyone that the whip would cause more pain than a normal whip, and the user would be hoping that the horse travelled faster.

On Saturday 3 October 2009, the Stewards conducted a random inspection of rider's whips at Belmont Park Racecourse. The inspection took place following the running of Race 4. The Stewards went into the Jockey's room, where the Appellant was present along with other riders. He was in possession of a normal whip, which he said that had borrowed from another rider, Apprentice Jarrad Noske, for the previous race. The Chairman of Stewards saw the modified whip on the bench next to the Appellant. The Chairman said "whose whip is this?" The Appellant said "It's mine", and he went on to say "It's a shit whip, I don't use that". The Chairman picked up the whip. He said that it was immediately apparent to him that something was present in the whip (T12).

The Stewards commenced the enquiry after the races on 3 October, the same day as the whip was found. The Appellant said that he had found the whip in the Jockey's room at Kalgoorlie (T2). He had found it a few months ago. He said that the whip felt nice, and no-one claimed it so he started using it (T2). He had used it right up until the first two races on the day it was found, and then borrowed a whip from apprentice jockey Jarrad Noske for the race before it was found. He stopped using the modified whip because it had become too flexible. He said that he didn't notice the modification. He said that he had never thought to have the whip checked to see if it was an approved whip (T6).

The enquiry was adjourned, and recommenced on 6 October. The Appellant continued to answer questions. He said that he had found the whip at least two months before August 2009, but that he had not used it in races until August. He repeated his explanation that he had found the whip in the Jockey's room at Kalgoorlie. He said that his uncle, Mr Mark Miller, was with him at the time. Apprentice Jarrad Noske gave evidence, and confirmed that he had lent the Appellant a whip at the races on 3 October, soon before the modified whip had been found.

The enquiry was adjourned again, and recommenced on 16 October. During the adjournment period, the Racecourse Investigator Mr O'Reilly had interviewed the Appellant's uncle, Mark Miller. Mark Miller said that he had been at the Kalgoorlie races some time during the season and the Appellant asked him if he knew who owned the whip or if he knew who owned it (T37). Mr O'Reilly had also interviewed the Kalgoorlie Club's Racing Manager, who said that it was extremely doubtful that any property would be left behind in the jockey's room after the ground staff and the cleaners had been through (T39). In answer to that evidence, both the Appellant and his trainer, Mr Parnham, disputed the report that it was unlikely that items would be left in the jockey's room (T44).

Significantly, the modified whip had been seen and handled by Stewards numerous times up to when it was found on 3 October. It was calculated that the Appellant, on his own version of events, had used the whip in 105 rides up to when it was found (T49). It was further calculated (by Mr Parnham) that the Appellant would have weighed in about 50 times out of those 105 rides (T56). As part of that weighing in process, the whip would have been handed to and held by one of the Stewards. On the hearing of this appeal, a video of one instance that process was played in evidence. The Appellant can clearly be seen saluting the Stewards with the modified whip, and then handing it and his other gear to the Steward at the scales. The significance of this evidence is twofold. Firstly, it is argued that the fact that the Stewards at the scales failed to notice the modification 50 times detracts from the evidence of the Chairman that the modification was immediately apparent to him when he found the whip (T12). Secondly, it is argued that the Appellant's actions in openly using the whip and handing it to Stewards at weighing in supports his evidence that he did not know of the modification.

Mr Parnham also gave evidence about whether or not the modification was noticeable. He said that he had handled the whip including by tapping it in his hand, and he had not noticed the modification.

The hearing was adjourned yet again, and recommenced on 26 October. No further evidence was given, apart from character evidence by way of a letter in support of the Appellant. The Appellant's legal representative made submissions. The Stewards gave their decision. They found both charges proved.

THE STEWARDS' REASONS

The Chairman began by saying that:

"....The determination of this matter requires us to make findings of fact using the Briginshaw standard working to the higher level..."

This was entirely correct. What it means is that the Stewards were not applying the criminal standard of proof. There is no room for the operation of the rules applicable to criminal trials, namely that (1) an inference should only be drawn when there is no other inference available consistent with innocence, and (2) an accused should only be found guilty if there is no rational view of the evidence consistent with innocence.

The Stewards did not accept that that the Appellant did not know of the modification. They found that the Appellant's actions in changing whips on the very day of the finding of the modified whip was indicative of guilt They referred to his explanation of the reason he did so as "amazing" (T81 and T87)). They found that it was "remarkable" that he did not notice the modification, whilst at the same time claiming to have changed whips because of a subtle change in the flexibility of the modified whip (T83). They found that his actions and explanation when first asked about the whip amounted to an "attempt to distance himself" from the whip. They said that it was "more than reasonable" to find that he must have known of the modification, based on the circumstances of finding it and the length of time that he had used it (T85). The Stewards discounted the fact that the whip had been handed to the Steward at the scales on numerous occasions, and said that the Steward in those circumstances has his attention solely on the weighing of riders (T86).

The Stewards reasoning process was correct, based on the evidence that they had. They were not obliged to apply the rules applicable to a criminal trial.

I would not uphold grounds 2 and 3.

APPEAL AGAINST PENALTY

It is not necessary to consider the penalty on the modified whip offence. The Stewards imposed a concurrent penalty for that offence, and as I have noted above the Appeal against that conviction should be allowed.

The Stewards categorized the improper conduct offence as "very serious" (T103) and "most serious" (T104). They discounted a fine, and a suspension, as appropriate types of penalties. The Chairman noted at T106 that disqualification is usually reserved for the most serious of offences.

The policy reasons behind the Stewards finding that the offence was in the most serious category are set out at T102. The Chairman said:

> *"...The matter of whips in racing has been in the spotlight nationally for some time now. The industry is under pressure as never before to maintain the acceptance and support of the general public who are vital to the ongoing viability of the sport. Animal welfare, whilst always paramount to the industry, is receiving increased focus as the industry self regulates to ensure that world class standards are maintained. In this respect, the rider's whip represents a visual matter of concern which society sees being wielded in races in the pursuit of victory. It is a high profile and important piece of Gear that is stringently regulated under the rules. Strict criteria are determined by the industry as to what is acceptable both in terms of construction of whips and the manner in which they are used. This is done to not only actively ensure the welfare of horses, but to demonstrate to all that the industry is a responsible entity that places the welfare of the horse on a pedestal so that mainstream society does not withdraw its acceptance or support of racing....."*

Further, at T103, the Chairman said:

> *"...From the moment the old style whips were banned, the use of anything other than the approved padded whips not only became a contravention of the rules but amounted to inflicting what the industry had determined was an unacceptable act to the horse. By doing so the welfare and infliction of pain to the animal is immediately brought into question, making such an event very serious....."*

The Stewards took into account not only the seriousness of the offence, but also the Appellant's personal circumstances. At the time of his disqualification, he was 17 years of age, and he had eighteen months of his apprenticeship to run. He comes from a well established racing family. He had previously received a fine for unnecessary and excessive use of a whip, and a reprimand for continuing to use a whip when out of contention.

A penalty will not be set aside merely because an appellate tribunal would have imposed a different penalty. It must be shown that the Stewards fell into error in some way. It would have to be shown that the Stewards took into account irrelevant considerations, or failed to take a relevant consideration into account, or that the penalty itself was so far outside the range of penalties commonly impose as to demonstrate error.

In this case, I am satisfied Stewards were in error in not giving sufficient weight to the fact that the Appellant was an apprentice, and only 17 years of age. The Stewards certainly did

recognize those factors, and they said so at T101. However, young people who transgress in any sphere of activity should always be treated differently than adults, and extra consideration given to whether they can be dealt with in a way more suited to their level of experience and maturity. In short, they should be treated differently than adults, and in the case of apprentices, different than those who have completed their time. Sometimes the application of that principle will lead to a penalty which contains more of a rehabilitative aspect than a penalty imposed on an adult or a fully qualified rider. Although the Stewards considered whether a suspension would have been an appropriate penalty, their decision to not choose that type of penalty did not give sufficient weight to these factors.

I would allow the appeal against penalty. I would set aside the penalty of 12 months disqualification, and impose a period of suspension of 9 months backdated to commence on 3 October 2009. The period of suspension takes into account that the Appellant has already served 6 months by way of disqualification.

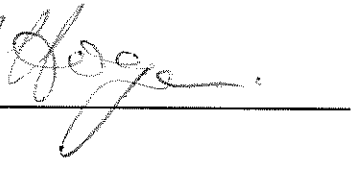
CONCLUSION

I would make the following orders:

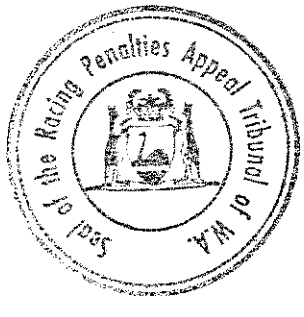
1. The Appeal against conviction in relation to the improper conduct offence is dismissed.

2. The Appeal against conviction in relation to the modified whip offence is allowed. The conviction is set aside.

3. The Appeal against penalty in relation to the improper conduct offence is allowed. The penalty of 12 months disqualification is set aside and a penalty of 9 months suspension is substituted.



PATRICK HOGAN, MEMBER



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR W CHESNUTT (MEMBER)

APPELLANT: DUNCAN MILLER

APPLICATION NO: A30/08/712

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

DATE OF HEARING: 12 FEBRUARY 2010

DATE OF DETERMINATION: 7 MAY 2010

IN THE MATTER OF an appeal by Duncan Miller against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 26 October 2009 imposing disqualifications of 12 months for a breach of Rule 175(a) and 6 months for a breach of Rule 137A(1)(b) of the Rules of Thoroughbred Racing.

Mr T F Percy QC with Ms L M Timpano appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr P Hogan, Member.

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

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

WILLIAM CHESNUTT, MEMBER