

**DETERMINATION OF THE
RACING PENALTIES APPEAL TRIBUNAL**

APPELLANT: WAYNE JACOBSON

APPLICATION NO: A30/08/762

PANEL: MR D MOSSENSON
MS K FARLEY SC (MEMBER)
MR R NASH (MEMBER)

DATE OF HEARING: 6 NOVEMBER 2013

DATE OF DETERMINATION: 29 JANUARY 2014

IN THE MATTER OF an appeal by Wayne Jacobson against the determination made by Racing and Wagering Western Australia Stewards of Greyhound Racing imposing a nine month disqualification for breach of Rule 83(2)(a) of the Racing & Wagering Western Australia Rules of Greyhound Racing.

Mr M Millington appeared for Mr W Jacobson.

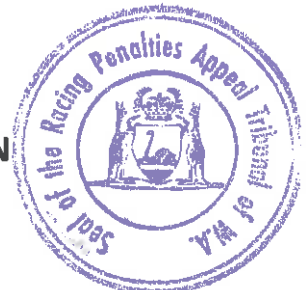
Mr R J Davies QC, appeared for the Racing and Wagering Western Australia Stewards of Greyhound Racing.

By unanimous decision the appeal against the nine month disqualification penalty imposed by the Stewards on the appellant under Rule 83(2)(a) is upheld.

By a majority decision, with Chairperson Dan Mossenson dissenting, the penalty is varied and a penalty of six months disqualification is hereby imposed.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



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

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

STEWARDS' INQUIRY

This is an appeal against the severity of the penalty imposed on 10 September 2013, by the Racing and Wagering Western Australia (RWAA) Stewards of Greyhound Racing. A Stewards' inquiry had been convened following receipt of a report dated 30 July 2013 from Chem Centre in Perth, that the post race urine sample taken from ROCK ME PLEASE, after

winning at Greyhounds WA Northam on 8 July 2013, was found to contain the presence of 5β -androstane-3 α , 17 β -diol at a concentration in excess of 20 nanograms per millilitre. For convenience I too will refer to the detected substance simply as the metabolite of testosterone, as did the Stewards during the course of their inquiry. Confirmation of the presence of this metabolite in the sample taken from ROCK ME PLEASE was received from the Racing Science Centre in Queensland. As a consequence of the two reports ROCK ME PLEASE's trainer, Wayne Jacobson, was initially interviewed and then called before a Stewards' inquiry. Following the inquiry Mr Jacobson was disqualified for nine months. ROCK ME PLEASE was disqualified from winning the event.

Mr James White, a scientist at the Chem Centre, gave evidence to the inquiry that laboratory screening for the metabolite of testosterone had commenced as recently as January 2013 following a rule change which had been introduced from the beginning of last year. The screening process that was employed did not involve a new methodology or technique. The instrumentation and all of the system around it was the same as had been used for anabolic steroids' metabolites for a very long time. Use of this old and robust method resulted in the sample taken from Mr Jacobson's greyhound being the first of its kind in Western Australia to be so tested and result in a positive finding. (T9). The actual reading was 67 nanograms per millilitre, which, with the appropriate margin for error, meant it could in fact be as high as 70 or low as 64 nanograms.

Doctor Judith Medd, gave evidence before the Stewards in her capacity as a Regulatory Veterinarian. Dr Medd's testimony established the presence of the metabolite of testosterone above 10 nanograms per millilitre was evidence that testosterone has been administered. Under the RWWA Rules of Greyhound Racing, testosterone is a prohibited substance, being classified as both an anabolic steroid and sex hormone. The Rules prescribe that owners and trainers must present their greyhounds to race free from prohibited substances. Anabolic steroids, which have a direct action on the muscular skeletal system, are specifically a prohibited class of drug. Testosterone as evidenced by the presence of 5β -androstane-3 α ,

17 β -diol at or below a concentration of 10 nanograms per millilitre, in the sample of urine taken from a bitch, does not amount to a breach of the Rules. The reason for the threshold is that testosterone to some degree is considered an endogenous substance. All animals have a very small amount of testosterone in their bodies. The threshold ensures that the probability of a bitch that has not been administered testosterone inadvertently exceeding that threshold based on the data will be less than 1 in 800 million. The probability of exceeding a concentration of 67 would be almost incalculable. Dr Medd proceeded to explain to the Stewards that testosterone is classified as an androgenic anabolic steroid, being a steroid that is naturally produced by a male animal. Its effect is to increase the size and mass of muscle in the body and has the potential to increase strength. Combining anabolic steroids and training together achieves bigger, larger, stronger muscle and bone tissue in the body. It can be used to help repair body tissues that have been damaged and simulate appetite. In addition to potentially making an animal compete faster, it can increase aggression and drive and will also make it want to chase harder. When asked regarding notification to the industry of the Rule change Dr Medd responded there was a notice to that effect that RWWA had published both in Kennel Notes and on its internet site. Dr Medd asserted Mr Jacobson "...knows the Rules with respect to testosterone, as it has widely been promoted since its introduction". (T30).

The notice which Dr Medd was referring to is dated 3 December 2012. It is headed, "Notice to Greyhound Industry Participants - New Rule of Racing Relating to Testosterone". (Ex.6).

The Notice clearly states inter alia:

"Testosterone is a "prohibited substance" as defined by the National Racing Rules.

...

The threshold level exemption is set at or below a concentration of 10 nanograms per millilitre in a sample of urine and has been determined following extensive research, analytical studies and statistical analysis, taking into account the variations in natural testosterone levels of bitches and allowing for a statistically robust margin of safety. The threshold allows for only a minimal level of endogenous, or naturally occurring, testosterone to be considered acceptable in a bitch presented for racing.

...

RWWA advises greyhound industry participants that the administration of testosterone products to racing greyhounds may result in a level of testosterone exceeding the threshold specified in R83(6) being detected in a race day sample for any of the above reasons, which

will result in a breach of the rules of racing. To avoid such circumstances arising, RWWA advises that testosterone products should not be used in racing greyhounds.

...

Participants should also note that products containing ethyloestrenol, such as Nandoral and Nitrothin, are exempted substances and are the only approved substances to control oestrus in racing bitches. Testosterone products should not be used for oestrus control in racing greyhounds.

It is the participant's responsibility to ensure that all greyhounds are presented free of prohibited substances. The presence of prohibited substances in racing greyhounds is viewed extremely seriously and punishments are generally severe.

...

Mr Geoff Johnson, the RWWA Racing Integrity Investigator, gave evidence of his interview of Mr Jacobson following the receipt of the laboratory reports. During the course of the interview Mr Jacobson admitted he did not keep a medical journal. Rather, apparently "... he keeps everything in his head" (T31) and therefore had to rely on memory. Further, Mr Jacobson was solely responsible for administering medication to his dogs. Mr Jacobson told Mr Johnson he did not bet on ROCK ME PLEASE. The substance administration wasn't motivated in an effort to achieve performance enhancement. Rather it was just a mistake to keep the bitch off season. The trainer admitted the administration of a dose of Testropop was his fault. He explained it could have occurred as a consequence of a large number of black bitches including ROCK ME PLEASE being kennelled next to each other. He went on to state "...I should have just grabbed the ear brands, looked at the ear brands and said right, you're the race one, so we'll miss you. You know what I mean, but being a little bit, ah tired, from a long day with bathing and everything, I've just gone along, didn't check if the race bitch has gone in right, back in the right kennel. Just a silly little mistake...". (T36).

During the course of the inquiry, the trainer acknowledged to the Stewards he had no issues regarding the sampling process and the certificates. Because of this fulsome cooperation the Stewards were not put to the trouble of having to evaluate any conflicting evidence in determining the facts and at arriving at the truth.

In view of what emerged at the inquiry the Stewards charged Mr Jacobson under Rule 83(2)(a) of the Rules. Rule 83 in full reads as follows:

"R83 Racing greyhound to be free of prohibited substances

- (1) A person who -
- (a) administers, attempts to administer or causes to be administered a prohibited substance to a greyhound;
 - (b) aids or abets any person to administer a prohibited substance to a greyhound; or
 - (c) has prior knowledge of a prohibited substance being administered to a greyhound

for the purpose of preventing it from starting in an Event, affecting its condition, behaviour or performance in an Event or when subject to any other contingency provided for pursuant to these Rules, shall be guilty of an offence.

- (2) The owner, trainer or person in charge of a greyhound -
- (a) nominated to compete in an Event;
 - (b) presented for a satisfactory, weight or whelping trial or such other trial as provided for pursuant to these Rules; or
 - (c) presented for any test or examination for the purpose of a period of incapacitation or prohibition being varied or revoked

shall present the greyhound free of any prohibited substance.

- (3) The owner, trainer or person in charge of a greyhound presented contrary to sub-rule (2) shall be guilty of an offence.
- (4) A greyhound presented for an Event contrary to sub-rules (1) and (2) shall be disqualified from the Event or any benefit derived from a trial or test.
- (5) Where an Event is being or has been conducted as a series, if upon a single analysis a prohibited substance is found in a sample -
- (a) the greyhound shall be disqualified from the Event from which the sample was taken and shall not be eligible to compete in any further Event in the series; and
 - (b) if the greyhound has competed in any further Event of the series the greyhound shall be disqualified retrospectively from the Event.

- (6) Testosterone as evidenced by the presence of 5 β -androstane-3 α , 17 β -diol at or below a concentration of 10 nanograms per millilitre in a sample of urine taken from a bitch will not breach the provisions of sub rule (2) of this rule."

Mr Jacobson pleaded guilty to the charge that he, as the trainer, had "...nominated and presented ROCK ME PLEASE to compete in Race 1 at Greyhounds WA Northam on the 8 July 2013 when it was not free of a prohibited substance testosterone as evidenced by the presence of 5 β -androstane-3 α , 17 β -diol at a concentration greater than 10 nanograms per litre in a urine sample taken from it following it competing and winning that event". (T44).

PERSONAL CIRCUMSTANCES

Mr Jacobson's personal circumstances which were revealed before the Stewards are largely summarised as follows. This was Mr Jacobson's first offence relating to a prohibited substance during his fairly lengthy and quite positive involvement in the greyhound racing industry. The actual period of involvement was not made entirely clear but it appeared to have spanned at least 12 years. (T2 & 45). Mr Jacobson had a large investment in the industry. As a public trainer Mr Jacobson trained for other people or other owners and also did pre-training for other owners. The appellant had some 40 to 45 greyhounds in his care. Mr Jacobson had no other work outside of greyhound racing and was not able to obtain employment elsewhere (T47). His house was mortgaged and he had some other liabilities. (T51). To be deprived of the ability to train greyhounds and earn a livelihood from that activity clearly was an enormous setback to him.

STEWARDS' REASONS

The Stewards issued lengthy reasons which contain detailed observations and conclusions. Rather than quote them in full it is sufficient for my purposes to summarise and quote sequentially what I consider to be the most salient aspects of those reasons as follows:

- 1 Mr Jacobson had breached the fundamental and important rule of competitive racing that participants must be free of prohibited substances. There is no place for such

substances in any contest where a level playing field is expected and the integrity of the sport requires it.

- 2 Testosterone falls into the category of an anabolic steroid as it assists in the building of muscle and affects aggression. It assists performance due to the increased muscle mass brought on by the substance. Additionally its physiological effects further enhance the chase desire.
- 3 The only substances that should be used to regulate oestrus control are the approved alternatives available. Anyone who chooses to ignore the controlling body notices and warnings and uses anabolic steroids rather than the alternatives takes an unacceptable and unrecommended risk.
- 4 Where there are acceptable alternatives to be used as approved exempted substances that are ignored, little if any mitigation can be applied should such actions result in a greyhound being found to be in excess of the prescribed threshold and thus deemed to be the recipient of the prohibited substance testosterone. (T60-61).
- 5 "The manner of administering the testoprop can be described as haphazard at best. There was no proper control over this process... the manner ... (of) the administration is well short of that expected of a Public Trainer. There were no records of administration kept. There was no check done either prior to or following to ensure greyhounds due to race were not being administered prohibited substances. All this only a day or at best two days before five greyhounds were due to race at Northam. Whilst there may not have been a deliberate intent to present the greyhound with this substance in its system, there was very little done to ensure this did not occur, when according to you, you went to a three or four year old bottle of the substance as a substitute, to the approved substance and administered it with little if any caution to bitches. Rather than taking extra precautions as you should have in these circumstances, you took none. That does not place your case in a special circumstance, if anything acts as exacerbation to the offence in that it was entirely avoidable had you shown more care and attention." (T61).

- 6 The high level of the metabolite of testosterone found in the racing greyhound was a concern, not being a marginal transgression but rather one significantly above the threshold level. The regulatory level itself is set generously higher than what might be thought to be a natural level. Doctor Medd quoted that there was a 1 in 800 million chance that a level in the vicinity of 67 would be reached naturally.
- 7 The industry is "... almost completely reliant on the income generated from wagering, or the outcome of races for its financial well being". Consequently "... there can be nothing more likely to detract negatively from that than when greyhounds are found to not have competed free of prohibited substances. The confidence of those wagering on the outcome of races is inextricably linked to the industry maintaining a level playing field and the confidence that all runners are competing on equal terms. The detection of prohibited substances in runners attacks that confidence and with it tarnishes the industry and exposes the possibility of that confidence being reduced. If the contest is not thought to be a fair one by those wagering on the outcome, then it follows they will be less likely to place such wagers. This is a situation that demands of us to view such matters as this as serious and respond accordingly". (T62).
- 8 A clear message must be sent to all in and outside of the industry that it is unacceptable to present greyhounds to compete in races not free of prohibited substances. Both general and specific deterrence do apply.
- 9 "Western Australia has a nationally enviable record in relation to prohibited substances whereby this detection is the first in at least 3 years. The confidence in our industry is very high and it is our aim and duty to keep it that way for the good of the industry and all who take part in it, directly or indirectly. RWWA has been at great pains and gone to great lengths to warn Trainers of the dangers of using anabolic steroids" (T62-63).
- 10 "As this is the first such case in WA, it is one that will set the standard. It is often said that where offences of these sorts ... arise involving substances that have potentially performance enhancing qualities that, unless special circumstances prevail disqualification is the most suitable mode of penalty." (T63).

- 11 "... some penalties issued in other jurisdictions ... offer a potential guide but they are not determinative of themselves and each case must be judged on its own merits within the respective jurisdictions ... WA traditionally had a reputation for having harsher penalties of some Eastern States jurisdictions and also a proud and enviable record in regard to the level of positive swabs when compared with other States. That can be demonstrated by the fact that this is the first positive swab dealt with by us for three years despite many thousands of samples being analysed. We strive to maintain our records in this regard and standards and so whilst not ignoring the national scene we are also mindful of our own". (T63).
- 12 Numerous positive aspects were mitigating factors in the case. Mr Jacobson had "... been a Trainer for many years and eventually ... lived ... life in greyhound racing". He enjoyed a record "... unblemished with respect to prohibited substances". He had conducted himself "... well and professionally through all stages of this inquiry". He was "... forthright with respect to ... use of this substance" and "... had accepted the laboratory and veterinary evidence and ... accepted culpability under the rules as evidenced by your plea of guilty... There is no betting activity to suggest any premeditated intention to profit from the administration of the substance and you have been co-operative and forthright throughout. You also play an important role in the industry at varied levels, and are heavily reliant on it for your livelihood. As such you perform an important service for many persons in the industry, in addition to the significant levels of success personally as a Trainer. We are fully aware of your level of involvement in the industry and that the imposition of a disqualification will have significant ramifications to you". (T63&64).
- 13 Despite these mitigating factors, they do not amount to special circumstances that would warrant the imposition of an alternative mode of penalty over disqualification. "A suspension for a drug of this nature would be unprecedented and in the circumstances would be manifestly inadequate. The same applies to the issue of a fine. Such is the potential for a positive swab particularly in relation to testosterone, to cast the industry into a poor light that it would be very few cases where exceptional or unique circumstances prevail where a mode of penalty other than disqualification would apply". (T64).

BRIEF OUTLINE OF THE ARGUMENTS

Mr Millington for the appellant essentially argued the mitigating factors were not given sufficient credit. The Stewards in setting the penalty did not have a starting point. Although they referred to the mitigation, how the mitigatory factors were addressed or influenced the outcome was not made clear. Counsel also argued the decision would set a benchmark as this was the first case of such an offence in this State. In other States such offences had been dealt with and lighter penalties had been imposed including some relatively modest fines.

Mr Davies QC for the Stewards emphasised the importance of the local Stewards' tougher sentencing approach, to the health of the West Australian industry. Senior Counsel highlighted the experience of the adjudicating Steward's panel and submitted the Stewards are in a better position than the Tribunal to deal with the matter. The appellant had ignored the publicity and the warning that had been issued. It was submitted Stewards are entitled to conclude that general deterrence is the most important consideration and that one cannot fault the reasons. Mr Davies also referred to the appeal of SA Beard (Appeal 536) where Member Hogan addressed the situation of different levels of penalties in other States of Australia. The Member concluded "Whilst I accept that consistency in penalty Australia wide might be a desirable object, I am not persuaded that it is necessarily so. Further, even if it were, I am of the opinion that nothing has been demonstrated to indicate that the Western Australian approach is not the one to be followed."

INTRODUCTORY COMMENTS ON STEWARDS' REASONING AND TASK BEFORE THEM

In this particular case, the task of the Stewards in determining how the transgression arose was greatly assisted by Mr Jacobson's cooperation. Mr Jacobson offered an explanation as to how the substance found its way into the competing animal. Further, he did not challenge the process of taking of the sample, the findings of the two analysing laboratories nor indeed any of the other expert evidence that was presented. By virtue of him having pleaded guilty to the charge, the Stewards were not put to the trouble of having to decide the question of guilt or innocence in the face of conflicting evidence. There were no elements of conjecture as to how and when the substance entered the animal. In essence the Stewards were only obliged to

exercise their minds as to what was the appropriate level of seriousness of the offence, the type of penalty to apply and the length of that penalty. This task was however made rather complicated by virtue of the fact that they were for the first time in this State, dealing with a trainer who had presented a greyhound to race with the metabolite of testosterone in excess of the allowable threshold. As there had been no precedents, at least in Western Australia to follow, in exercising their sentencing discretion I believe the Stewards should have been particularly conscious of and needed to especially evaluate a wide range of relevant factors. They needed to address all of the relevant factors in their reasons for the benefit of Mr Jacobson, the industry generally and because of the possibility of an appeal. This requirement for more than the usual attention to detail was particularly so, absent the benefit of other local cases directly on point to provide guidance or direction. The factors which are particularly relevant in this case include the impeccable record of the trainer and his level of involvement in the industry, the trainer's full cooperation at all stages, the circumstances of the admitted administration, the fact that Mr Jacobson did not bet on the race and that there was no unusual betting activity, the level or concentration of the substance, the nature of the substance and its effect, the plea of guilty, the trainer's personal circumstances and the fact that the greyhound won the race. As with all drug misdemeanours, the impact on the image of the industry and how the incident is perceived by the public are other noteworthy pertinent factors. The levels of penalties imposed for testosterone offences in both greyhound racing and the other codes as well as the way in which any such offences had been dealt with in other jurisdictions also should have been carefully considered and referred to in the reasons.

CONTROL OF RACING

Greyhound racing in Australia is a heavily controlled and regulated industry. The industry needs these controls as the livelihood of large numbers of people are directly or indirectly dependant on it. Government revenue is derived as a consequence of the betting and other related activities. A key element in the ongoing success and development of the racing industry is the support contributed by the members of the public in laying bets, both small and large, on the outcome of races. Interest in the sport and motivation to bet on greyhound races,

as with the other racing codes, very much influences the public's confidence in the integrity of the operation of the sport. That integrity has as its foundation the expectation that races are won on merit and that those who are approved or licensed to participate, do so in accordance with the Rules that impose the regulatory regime. Potentially, for those miscreants who may be determined to stray from proper practice there are many opportunities for deliberate attempts to be made to breach the Rules with a view to gaining some unfair advantage or reward. Further, there are lots of possibilities for inadvertent breaches of these rules. When breaches are suspected, whether caused by design or accident, the regulators are obliged to diligently inquire and ascertain the circumstances. Should a breach be revealed as a consequence, those in authority are duty bound to impose appropriate penalties. The determination of any penalty involves exercising a wide discretion in deciding the commensurate punishment to be imposed on the offender, as well as the message or the lesson to be communicated to others. Part of that process is to make it clear to the betting public and all others in any way involved in the industry that as far as possible, racing is conducted fairly and is entirely based on merit. Each jurisdiction in the country has its own controlling authority. In this State RWWA is charged with the responsibility of running the sport (s38 RWWA Act 2003). In discharging some of its duties, RWWA engages qualified and experienced employees to officiate. The Stewards are so appointed to conduct meetings, inquire into any suspicious circumstances or suspected non-compliance and to lay charges where appropriate. Then, depending on the outcomes of their deliberations, the Stewards may be required to decide what are the appropriate sanctions for breaches. As I stated in D. Harrison (Appeal 215 at page 15), it is the function of the Stewards, not this Tribunal, "to set penalties".

The permission to train animals and to present them to participate in trials and compete in races is restricted to a relatively few licensed trainers. To become a trainer is not a simple or automatic process. In seeking permission to train, applicants must be suitably qualified and contractually agree to abide by the Rules. By complying strictly with the Rules, trainers help to ensure the integrity of the sport is maintained, public confidence is not diminished and the welfare of the industry is fostered. In so doing the general community benefits.

All suspected breaches of the Rules must be closely scrutinised and carefully addressed. Any breach of the Rules is an offence, as is a failure to comply with the conditions of one's registration as a trainer (Rule 86(a) and (b)). Offenders, at the discretion of the Stewards are liable to any one or a combination of penalties (Rule 95(1)(a) and (b)). Less serious breaches may result in fines or suspensions or a combination of both. The more serious breaches would normally result in a complete cancellation of registration. This means the privilege to continue to participate is terminated with or without a fine (Rule 95(1), (c)-(e)). The length of any exclusion can be short term or permanent depending on the nature of the breach and the surrounding circumstances. There is power to suspend "any portion of the penalty...for such time and pursuant to such conditions as ordered by...the Stewards." (Rule 95(3)).

APPELLATE JURISDICTION

Although all of the Australian jurisdictions operate pursuant to a standard set of rules, supplemented by some Local Rules, each State and Territory is entitled to apply the Rules, particularly at the level of imposing penalties, according to the prevailing parochial circumstances. In GW O'Donnell (Appeals 263 and 264) I observed:

"Despite the uniformity in the Rules of Racing Australia wide there are different individual considerations which appear to be relevant to each state or territory from a racing industry perspective. These considerations which may justify or explain the fact that different attitudes have been adopted in relation to the imposition of drug penalties. Each of the more populated States, which presumably support larger racing industries, in general have adopted a less harsh approach to sentencing than the other States and the Northern Territory. It should also be noted that the appellate processes and the jurisdiction of the appeal tribunals in each state and territory are not identical. Whether this fact in any way influences the different approaches to the penalties applied to drug offences in the face of the uniform rules, I cannot comment.

While it appears in every jurisdiction that the Tribunals and Stewards place the utmost importance on the health and integrity of the Racing Industry and all agree that drug use is not acceptable in any form, there clearly is no universal application of the penalties that are available. The variations, which are significant, must stem from the individual perceptions that each Tribunal has in relation to what is appropriate in its own jurisdiction in order to keep the industry free from drugs.

Each case involving drugs should only be determined after a careful analysis of all of the relevant facts and circumstances. Usually little reliance can be placed on previous decisions without knowing all of the relevant surrounding facts and circumstances."

In the recent matter of G Slater (Appeal 750) which dealt with presenting a horse to race with a high level of testosterone I made the following observation:

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

As I have already stated, but repeat for emphasis, it is the Stewards' role to set penalties.

APPEAL PROCESS

In the matter of GP Slater (Appeal 359), I considered the basis upon which an appeal against the exercise of a wide discretion relating to the penalty for a prohibited substance offence needed to be considered. At pages 17 and 18, I made the following statements:

"As a consequence of this very wide discretion open to Turf Club Stewards the task of review on appeal can be complicated and there is a need to gain some guidance from the established authority. In House v The King (1936) 55 CLR 499 at 504-505 where Dixon, Evatt and McTiernan JJ stated:

"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

Subsequent cases followed this approach including The Queen v Tait (1979) 46 FLR 386 at 388 where Brennan, Deane and Gallop JJ stated:

"An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or

in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error."

As is stated by Mason and Deane JJ in Norbis v Norbis (1986) 161 CLR 513 at 518-519:

"If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the question, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at the first instance, in the absence of error on his part. According to our conception of the appellant process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."

Section 17(9) of the *Racing Penalties (Appeals) Act* states:

"Upon the determination of an appeal the Tribunal may –

- (c) confirm, vary or set aside the determination or finding appealed against or any order or penalty imposed to which it relates."

STEWARDS' APPROACH TO PENALTY

The Stewards in their reasons for imposing the nine month disqualification did not refer to any examples of penalties imposed in this State or elsewhere which they may have taken into account. However, the transcript does reveal that after the Stewards had completed stating their reasons and the penalty had been announced the Chairman stated "... that concludes the inquiry". (T65). Despite that fact, the transcript reflects that some further discussion did ensue. This arose because Mr Jacobson protested and queried why other States had imposed fines yet he was disqualified. In the brief exchange which followed, it does become clear the Stewards were conscious of some determinations in other States dealing with the same Rule and the question of the metabolite of testosterone having been discovered in racing greyhounds. The information supplied to Mr Jacobson in response to his protestation is quite vague or unclear. As a consequence, Mr Jacobson did not have the benefit of being informed either in the reasons and the discussion which followed, precisely which decision or decisions were taken into account and what impact, if any, it or they had on the nine month outcome.

CASE AUTHORITIES

A useful Victorian Civil & Administrative Tribunal case came to light only after the appeal hearing, namely Graeme Bate v Greyhound Racing Victoria VCAT Reference No. Z417/2013. The decision is dated six days subsequent to the appeal hearing of Mr Jacobson's matter. In dealing with "Parity in Sentencing" Vice President Judge Jenkins helpfully states:

- "26. The Board has considered four other cases this year involving the same charge. In each case the persons charged pleaded guilty. The circumstances and penalties imposed were as follows:
- (a) Mr Collyer senior was disqualified for nine months, with three months suspended after committing the offence on 5 May 2013. He had been training greyhounds for more than 20 years; and had two prior convictions about 20 years ago;
 - (b) Mr Collyer junior was disqualified for six months with three suspended after committing the offence also on 5 May 2013. He was a licensed trainer for about 18 months with no priors;
 - (c) Justin Dunn was disqualified for six months with three suspended after committing the offence on 30 May 2013. He was a licensed trainer for about four years with no priors; and
 - (d) Peter Mullen was disqualified for seven months with three months suspended after committing the offence on 6 May 2013. He was a licensed trainer with no priors.
- 27 Interstate cases concerning the same charge to date include:
- (a) In the West Australian case of Mr Jacobsen, [sic] the trainer was disqualified for a period of nine months with no suspension, having committed the offence on 8 July 2013. The stewards took into account the seriousness of the offence, the nature of the substance; his unblemished record over many years; his guilty plea; and general deterrence and specific deterrence;
 - (b) In Queensland there have been six cases: three offences committed in March and April resulted in fines, in the sum of \$2,000; the next three offences committed in June and July resulted in suspensions of six months (for two of the offenders) and three months; and
 - (c) In NSW two cases, [Free and Caden], concerned offences both committed in February, which resulted in fines.
- 28 In imposing financial penalties in the early cases in Queensland and in the NSW case of Caden, stewards acknowledged that a level of leniency should be shown, as the rule change "requires a cultural change".
- 29 The Tribunal was also referred to other cases involving anabolic steroids:
- (a) Mr Carr was disqualified for seven months after committing the offence on 21 October 2008. He was a licensed trainer for about 25 years with no priors;
 - (b) Mr Cotton was disqualified for six months (after appeal to VCAT) after committing the offence on 1 September 2010. He had no priors;

- (c) Mr Wells was disqualified for four months after committing the offence on 28 September 2011;
- (d) Mr Frusher, was disqualified for nine months with three months suspended after committing the offence on 30 November 2011;
- (e) Mr Mowatt was disqualified for six months with three months suspended after committing the offence on 2 January 2011; and
- (f) Mr Boyce was disqualified for six months with two months suspended after committing the offence on 23 June 2013."

There are some differences between Mr Jacobson's case and Bate's case (*supra*). The level of the metabolite of testosterone in Bate's case was described as "more than twice the permissible prescribed level (paragraph 47(b)). The evidence revealed "... at the level detected, the BaB was unlikely to have had a performance enhancing effect" (paragraph 44(e)). The concentration in Mr Jacobson's case was much higher than this. Further, the unchallenged evidence in the present matter was as to its performance enhancing propensity.

The table of testosterone offences in the other codes presented by Mr Davies QC on behalf of the Stewards shows a wide range of penalties as low as \$5,000, where it was administered on veterinary advice five days before racing (in the case of P Coulson (0014)), to as high as 10 years disqualification (in the matter of P Graham (0018)). Two 12 month disqualifications were reduced by the Tribunal to six months (J Bull and G Slater (0138)), and three nine months were imposed (G Durrant (0022) and A Suvaljko (0139)). A copy of the table is attached.

CONCLUSION

I consider nothing was presented on the appellant's behalf to cast any doubt as to factual conclusions as well as the logic and reasoning process applied by the Stewards as summarised in points 1-13 inclusive above. Clearly a fundamental rule had been breached (point 1). The description of the affect of the substance, its use and its substitutes cannot be questioned (points 2 – 4). Mr Jacobson's sloppy or careless approach was appropriately described (point 5). The high concentration of the substance was an aggravating factor (point 6). The role of wagering (point 7) and the need for a clear message in the outcome of Stewards' inquiries (point 8) cannot be faulted. The case does set a benchmark and only a

disqualification is appropriate (point 10). My attitude to point 11 is clear from my earlier quotations under the heading Appellate Jurisdiction. The positive aspects are all appropriately acknowledged (point 12). I can find no fault with the propositions in point 13.

The Stewards also stated that Western Australia has an enviable record when it comes to drug offences and that penalties imposed in this State have been a factor in that result (point 9). This aspect was not challenged in the appeal. There would appear to be no dispute that over the years Western Australian Stewards have imposed a tougher regime in setting penalties. Generally this approach has been supported by the Tribunal in its determinations. It would appear the local racing industry has been the beneficiary as a consequence.

It is clear that from the Stewards' comprehensive reasons, as summarised in these 13 points, the Stewards correctly expressly addressed relevant factors. I am satisfied it has not been shown that any relevant consideration had been overlooked or was incorrectly dealt with by the Stewards in their explanation as to how they reached the point of pronouncing or setting the penalty to be imposed.

The Stewards, are obviously charged with the duty of not only protecting the industry, but of running and administering the sport. It is appropriate to acknowledge they are the experts. Indeed, the panel which dealt with Mr Jacobson was comprised of the most senior and experienced officials employed by RWWA for the purpose.

I am more than satisfied that only a penalty of disqualification is appropriate for such a blatant offence with its adverse industry consequences. From one perspective, this case is a fairly straightforward matter. As already acknowledged, due to Mr Jacobson's cooperation, there was no uncertainty as to any of the relevant facts and circumstances. The licensed trainer admitted to having administered a substance to a racing animal due to a mistake which had occurred whilst he was treating other greyhounds. The administration was not done by the appellant deliberately. Nor was it done with the intention of gaining an advantage or otherwise cheating the system. The trainer knew or at least certainly should have known that the substance was prohibited in a racing animal. Unfortunately, for a man responsible for many

dogs so haphazard was his practice at his kennels that the mix-up which occurred arguably was as unsurprising as it was inevitable. The display of such indifference or carelessness whilst handling racing animals, coupled with the excessive level of the concentration of the substance which was way above the acceptable threshold, clearly are highly aggravating circumstances. The substance administered by the appellant clearly had the potential to be performance enhancing both in terms of muscle development and the desire to chase. The fact that the substance improved ROCK ME PLEASE's prospects of winning adds to the seriousness of the matter. There had been wide publicity alerting the industry to the Rule change. The fact the case was the first offence therefore does not work in Mr Jacobson's favour. Keeping the industry drug free has always been and should permanently remain a constant essential priority for those administering the sport. Testosterone continued to be a prohibited substance despite the rule change. The adverse impact on the industry is so well known it hardly needs to be re-enunciated. The Stewards clearly addressed all of these aspects appropriately in their reasons.

But, as stated previously, the Stewards in setting the penalty did fail to identify a starting point or range of possible penalties. Nor did they as a consequence reveal the benefit of the significant mitigatory factors. As this was the first such case for this State, all the more should they have been alert as to the need to do so.

Although the Stewards assert in their reasons that they have taken into account the mitigating circumstances, there is no way of knowing from the reasons how or to what extent that was in fact done. The mitigation in this case is of substance and helps to distinguish Mr Jacobson from many of the other cases. I am satisfied the Stewards did make an error in determining the penalty.

As it is not apparent on the face of the reasons as to how mitigation was dealt with or what influence it had on the outcome I am satisfied it would not be offending the rules identified in Slater (supra) to uphold the appeal and vary the determination. On the basis of the penalty decisions referred to, albeit some in a different code of racing, I believe it would not be

inappropriate to take 12 months disqualification as the starting point for the high end of the range for this type of offence. From that point, the various positive aspects and mitigating factors should come into play to reduce the penalty.

I do readily agree, and adopt the logic of Member Nash, whose draft reasons I have had the opportunity to read, where he states:

"... it is also important that trainers and industry participants who transgress the rules see the benefit of fully cooperating with the Stewards when being investigated and being prepared to admit their wrongdoing at an early stage. To send that message to industry participants is also in the interests of the administration of the Racing Industry generally."

I have for these reasons concluded that the unqualified nine month disqualification penalty is excessive and should be varied. I would substitute for it a penalty of nine months disqualification, but with three months of it suspended for a period of 12 months after Mr Jacobson resumes training, on the condition Mr Jacobson does not again breach Rule 83 within the 12 months.


DAN MOSSENSON, CHAIRPERSON



Tabled by Ron Davies

RWWA Table of Testosterone offences

CASE	INQUIRY DATE	PERSON	CODE & STATUS	HORSE/GREY HOUND	RULE	SPECIFICS	PENALTY	APPEAL	COMMENTS
0014	8-Jul-05	COULSON Phil	(T) Trainer	RUNNING SHU	AR178	Presented with Testosterone	\$5000 + Horse disqualified	None	Administered on veterinary advice 7-days prior.
0018	5-Aug-05	GRAHAM Peter	(T) Stable Hand	ACE IN FLIGHT	AR175(h)(iii)	Administered Testosterone	10-yrs Disq.	None	Previous offences.
0018	5-Aug-05	BULL Jeff	(T) Trainer	ACE IN FLIGHT	AR178	Presented with Testosterone	12-mths. Disq. + Horse disqualified.	RPAT. Dismissed. Penalty varied to 6 mths disq.	Administration by P G Graham.
0022	23-Aug-05	DURRANT Geoff	(T) Trainer	CONTENTIOUS MISS	AR178	Presented with Testosterone	9-mths. Disq. + Horse disqualified.	RPAT. No stay - Dismissed	Previous offence 2002 (Testosterone)
0023	23-Aug-05 13-Feb-06	BULL Jeff	(T) Trainer	GOLD ASSET	AR178	Presented with Testosterone	6-mths. Disq. + Horse disqualified.	None	Concurrent with Case 18.
0032	9-Jan-06	CORVER Brendan	(T) Trainer	INDIAN PACIFIC (York 27/10/05)	AR178	Presented with Testosterone	6-mths Disq. + horse disq.	RPAT - Withdrawn. IAC varied last 6-weeks to susp.	Acknowledged offence
0068	5-Sep-08	SLATER Gavin	(T) Trainer	REASSESS	ARR178	Presented with excessive Testosterone (>110n estimated at >200) & Ketoprofen	6-months disqualification Testosterone/ 4 months Ketoprofen concurrent.	None	Pleaded Guilty.
0135	17/09/2012	SUVALJKO Amanda	(H) Trainer	ON ALL FOURS (Gloucester Park 13/07/2012)	HRR 190 (1)	Presented with Testosterone in excess of 20 m/g per litre of urine	Disqualified 9 months. Horse Disqualified	No Appeal	
0139	21/11/2012	SUVALJKO Amanda	(H) Trainer	OUR GENT (Pinjarra 20/8/2012)	HRR 190 (1)	Presented with Testosterone in excess of 20 m/g per litre of urine	Disqualified 9 months. Horse Disqualified (Not her 1st offence but committed prior to first offence being known.)	No Appeal	Pleaded Guilty
0138	9/11/2012	SLATER Gavin	(T) Trainer	YOUBETYA (Northam 20/9/2012)	ARR 178	Presented with Testosterone in excess of 20 m/g per litre in urine.	Disqualified 12-months. (2nd offence for Testosterone, previous TCO2 - 1997) Horse disqualified.	RPAT - Appeal against Penalty upheld, reduced to 6 months.	Pleaded Guilty

THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION
OF MR R NASH (MEMBER)

APPELLANT: WAYNE JACOBSON

APPLICATION NO: A30/08/762

PANEL: MR D MOSSENSON (CHAIRPERSON)
MS K FARLEY SC (MEMBER)
MR R NASH (MEMBER)

DATE OF HEARING: 6 NOVEMBER 2013

DATE OF DETERMINATION: 29 JANUARY 2014

IN THE MATTER OF an appeal by Wayne Jacobson against the determination made by Racing and Wagering Western Australia Stewards of Greyhound Racing imposing a nine month disqualification for breach of Rule 83(2)(a) of the Racing & Wagering Western Australia Rules of Greyhound Racing.

Mr M Millington appeared for Mr W Jacobson.

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

The Appellant is a licensed public trainer of greyhounds with RWWA and was the trainer of the greyhound ROCK ME PLEASE which ran in and won Race 1 at the Greyhounds Northam WA meeting on 8th July 2013.

On 10 September 2013, the RWWA Stewards conducted an inquiry after receiving a report from the Chem Centre, Perth dated 30th July 2013 showing that the post-race urine sample of ROCK ME PLEASE contained the presence of 5 β -androstane-3 α , 17 β -diol, which is a metabolite of Testosterone (known as and hereinafter referred to as "BaB Diol"). The sample analysis, which was not in dispute, was that the sample contained in excess of 20 nanograms

per millilitre of BaB Diol. The evidence was that the actual result was 67 nanograms plus or minus 3 ng.

Testosterone, although being endogenous (ie; a naturally occurring substance in greyhounds), constitutes a prohibited substance when found in an abnormally high amount. It is classified as an anabolic steroid and is performance enhancing in that it promotes bigger, larger, and stronger muscle and bone tissue in the body.

Rule 83(6) provides that where the BaB Diol metabolite is found at or below a concentration of 10 nanograms per millilitre in a sample of urine taken from a female greyhound bitch, it will not be in breach of Rule 83 (2).

Mr Jacobson fully cooperated with the Inquiry and did not challenge or contest the evidence that ROCK ME PLEASE had been presented with a prohibited substance. He explained that he had administered a substance called TESTOPROP in order to keep a number of bitches in his kennel, which were not racing, "off season". TESTOPROP contains Testosterone. He accepted that he must have made a mistake by accidentally administering it to ROCK ME PLEASE which should not have been included because it was scheduled to race. He said he would not have raced ROCK ME PLEASE if he had realised it had been administered the TESTOPROP. He accepted he'd made a stupid mistake and had not been careful enough in his kennel management. The Stewards received evidence that there was no detected abnormal betting activity of ROCK ME PLEASE prior to the Race.

Immediately following the Inquiry, the Stewards informed Mr Jacobson that they were charging him under Rule 83 (2) (a), in combination with Rule 83(3), for failing to present a greyhound free of any prohibited substances. Specifically the charge was that as the trainer he presented ROCK ME PLEASE to compete in Race 1 at Greyhounds WA Northam on 8 July 2013 not free of the prohibited substance Testosterone as evidenced by the presence of BaB Diol at a concentration of greater than 10 nanograms per millilitre in a urine sample taken from the greyhound following it competing and winning the Race.

Mr Jacobson pleaded guilty to the charge.

It was Mr Jacobson's first offence. He had been training greyhounds for 15 years and had been regularly swabbed without ever having a previous positive swab. He said he took great pride in presenting his dogs "drug free" and had 'slipped up' on this occasion. Training greyhounds was Mr Jacobson's livelihood and he does not work outside the industry. He has won 6 racing premierships in Northam over 15 years of training. He has the usual financial commitments including a mortgage of around \$190,000 over his house. He said before

greyhound racing he had been a meat worker but as a result of disabilities (he referred to having plates and screws in his back) he would not be able to return to that work if disqualified. After deliberating, the Stewards gave reasons for decision in which they rightly stated that the offence was a serious one in that the prohibited substance found was potentially performance enhancing and the greyhound in this instance won the Race. What is more, they noted that the recorded level of the substance was high. The Stewards were critical of the manner in which Mr Jacobson administered his stables and the lack of administration records kept by him.

On behalf of the Stewards, in giving the reasons for decision, the Chief Steward noted that whilst the presentation of the greyhound with a prohibited substance may not have been intentional, it was apparent that no proper precautions were taken to prevent an accidental administration. The Chief Steward indicated that the Stewards considered that the lack of proper kennel controls exacerbated the seriousness of the offending. He went on to say that a clear message needed to be sent out to the industry that the Stewards will 'not accept greyhounds being presented to compete in races not free of prohibited substances.' He referred to the enviable record WA has of drug free racing and the need to maintain the confidence of all those who participate in the Industry. He said that given this was the first such case in WA, it is the case that will set the standard.

After considering all the matters personal to Mr Jacobson and the circumstances of offending the Stewards determined that an appropriate penalty was a 9 months disqualification of licence effective immediately.

The issue in this appeal is whether the penalty of 9 months disqualification of the appellant was manifestly excessive in all the circumstances.

Mr Millington who appeared on behalf of Mr Jacobson emphasised Mr Jacobson's cooperation with the Inquiry, his guilty plea at the first opportunity, his acceptance of responsibility, his unblemished long standing record in the industry, the fact that there was no evidence to suggest there had been any abnormal wagering involved, and that Mr Jacobson's sole source of income was from his participation in the Industry and that the loss of his vocation would mean he would suffer hardship in meeting his financial commitments such as his mortgage.

Mr Davies QC, appearing for the Stewards, reiterated the matters referred to by the Stewards in their reasons. He referred to the fact that the Industry had gone to significant lengths to draw to the attention of trainers to the risks involved in using TESTOPROP and the fact that Mr Jacobson had acknowledged he was aware of the issue in his interview with the investigating Steward. He referred to the lack of controls in the kennel, the lack of records and the lack of any proper dog control system.

At the hearing, materials were provided in relation to other racing jurisdictions and Codes in which Testosterone (BaB Diol) presentation cases were dealt with. Two cases cited were from Greyhound Racing Victoria. In the matter of Murray Collyer (21 August 2013), the Racing Appeals & Disciplinary Board imposed on a trainer who pleaded guilty, a 9 month disqualification with 3 months suspended. In the matter of matter of Steven Collyer (16 August 2013), a sentence of 6 months disqualification with 3 months suspended was imposed. After the hearing of this appeal a further decision of Judge Jenkins, Vice President of the Victorian Civil and Administrative Tribunal, in *VCAT Ref No 2147/2013 Bates v Greyhound Racing Victoria*, was provided to the Tribunal by the Stewards. In that case, a penalty of disqualification for 9 months with 3 months suspended was imposed for a greyhound Testosterone presentation offence.

A list of penalties imposed for similar offences for the horse racing codes in WA was also provided at the hearing by the Stewards. It included the case of Slater (9 November 2012) in which this Tribunal on appeal reduced a penalty imposed from 12 months to 6 months. The case involved a plea of guilty. There were a number of other cases listed and the penalty commonly ranged between 6 and 9 months disqualification, unless there were exceptional circumstances.

It is difficult without seeing the full decisions of each case to formulate a full understanding of the circumstances of each offence under consideration. As I interpreted it, the information provided of the penalties imposed in Victoria and for the other racing codes in WA for offences of this kind suggests that the appropriate starting point for a presentation offence of this kind, where the trainer has no prior record of offending and has been in the industry for many years, would be in the order of 9 months disqualification.

General deterrence in cases of this kind is an important factor in setting penalties. The message to the industry was clearly and properly the central consideration and focus of the Stewards in this case as is evidenced by their reasons and the level of emphasis it received from their counsel during the hearing of the appeal.

However, although general deterrence is a highly significant factor in cases such as this, it is also important that trainers and industry participants who transgress the rules see the benefits of fully cooperating with the Stewards when being investigated and being prepared to admit their wrong doing at an early stage. To send that message to industry participants is also in the interests of the administration of the Racing Industry generally.

In this case it is my view that the Stewards, in their desire to send a message of general deterrence to the industry, overlooked the need to also demonstrate tangibly the credit that a

trainer will receive for his acknowledged openness, preparedness to admit his wrongdoing, and his full cooperation with the Stewards in their Inquiry. One can understand Mr Jacobson's bafflement when the penalty was imposed without any clear articulation by the Stewards of the discount he received in acknowledgment of his openness, frankness and acceptance of wrong doing. Nobody seriously challenged that the administration was a mistake. In fact the level was so high and likely so recently administered, that it bespoke of being a clumsy mistake rather than a clandestine or calculated effort to test the threshold levels by administering just enough to avoid exceeding a positive sample.

Although there was an acknowledgment of the various mitigating factors by the Stewards, there was in my view no demonstrated tangible reduction of the penalty imposed in recognition of Mr Jacobson's frank openness and his high level of cooperation with the Stewards. In my view it is not in the interests of the Racing Industry for trainers and participants to develop a perception that full cooperation and preparedness to readily admit transgressions will not be acknowledged by a demonstrable discount to the penalty that would otherwise have been imposed.

In my view the starting point for the Stewards, given they were dealing with a first offender who had a long standing unblemished involvement in the industry, should have been 9 months disqualification and there should have been a tangible and stated discount to that penalty to acknowledge his full and complete cooperation and frankness during the Inquiry and his subsequent plea of guilty at the first opportunity. The penalty must, however, still be seen by industry participants as severe in order to achieve general deterrence.

In my view a 3 month reduction in penalty for those factors is appropriate. A 6 month disqualification of a full time trainer whose livelihood depends on his involvement in the Industry is still very severe and still achieves the object of general deterrence, albeit it also acknowledges he has fully cooperated and has pleaded guilty at the first opportunity.

In my view the appeal against penalty should be allowed and the penalty of 9 months disqualification should be substituted with a penalty of 6 months disqualification.



ROBERT NASH, MEMBER



THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION
OF MS KAREN FARLEY SC (MEMBER)

APPELLANT: WAYNE JACOBSON

APPLICATION NO: A30/08/762

PANEL: MR D MOSSENSON (CHAIRPERSON)
MS K FARLEY SC (MEMBER)
MR R NASH (MEMBER)

DATE OF HEARING: 6 NOVEMBER 2013

DATE OF DETERMINATION: 29 JANUARY 2014

IN THE MATTER OF an appeal by Wayne Jacobson against the determination made by Racing and Wagering Western Australia Stewards of Greyhound Racing imposing a nine month disqualification for breach of Rule 83(2)(a) of the Racing & Wagering Western Australia Rules of Greyhound Racing.

Mr M Millington appeared for Mr W Jacobson.

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

A steward's inquiry was held at the Ascot Racecourse Stewards room on Tuesday 10th September 2013.

Following that inquiry, the appellant Mr Jacobson was charged with an offence of presenting a greyhound for racing that was not free of any prohibited substance.

Rule 83(2)(a) of the RWWA Rules of Greyhound Racing states:

"The owner, trainer, or person in charge of a greyhound

(a) nominated to compete in an event....

(b) shall present the greyhound free of any prohibited substances."

The particulars of the charge were that Mr Jacobson, being the trainer of a greyhound "ROCK ME PLEASE", nominated and presented that greyhound to compete in Race 1 at Greyhounds WA Northam on 8 July 2013, not free of a prohibited substance, testosterone, as evidenced by the presence of 5B – androstane – 3a 17B - diol at a concentration greater than 10 nanograms per millilitre in a urine sample taken from the greyhound following it competing in and winning the event.

Having clarified with the stewards that he was not charged with wilfully or knowingly presenting the greyhound, Mr Jacobson immediately pleaded to the charge (T45)). The stewards recognised that he had cooperated fully and thoroughly with the investigation of this matter.

Mr Jacobson had been involved in greyhound racing and training for 15 or 16 years (T45). He had no prior offences relating to prohibited substances. He relied upon his involvement in greyhound racing for his livelihood, and gave evidence prior to sentencing that he was at the time of the offence training between 40 and 45 dogs. He is responsible for a mortgage on a home occupied by his ex wife and daughter which stood at \$190,000.00 at the time. He had no alternative realistic employment opportunities.

Testosterone is an androgenic anabolic steroid, and also a sex hormone. Evidence given to the stewards by Dr Judith Medd, a qualified veterinarian, led properly to a conclusion that this was a performance enhancing substance. In arriving at their penalty, the stewards quite rightly noted

(T60) "the spectre of anabolic steroids in sport is well known. It brings the sport into disrepute when its athletes are associated with it. Ostensibly it has no place in a sport couched upon the principle of level of playing field (sic) or its participants competing free of prohibitive substances".

It should be noted that there was no evidence that Mr Jacobson administered testosterone (by way of a product "Testoprop") with the intention of giving ROCK ME PLEASE any advantage over other dogs racing at Northam on the day in question or with the intention of enhancing her performance. Rather, he gave evidence that he administered the Testoprop to bitches in his care to prevent them from coming into season.

It must be said that Dr Medd gave evidence that there are other "less androgenic" alternatives that should be used in this regard. Mr Jacobson gave evidence that at the time he believed he was unable to access any of those alternatives and so resorted to a substance that he had kept in his kennels for some years, namely the Testoprop.

The name of this substance should perhaps have set off warning bells to Mr Jacobson, particularly given the context of exhibit 6 in the enquiry being a Notice to Greyhound Industry Participants alerting the industry to new rules of racing relating to testosterone, and dated 3 December 2012, however it did not, and the nature and degree of Mr Jacobson's offending behaviour was quite properly described thus by the stewards:

"The manner of administering the Testoprop can be described as haphazard at best there was no check done either prior to or following to ensure greyhounds due to race were not administered prohibited substances..... whilst there may not have been a deliberate intent to present the greyhound with this substance in its system, there was very little to done to ensure this did not occur....." (T60).

This was the first charge laid in Western Australia pursuant to *Rule of Racing 83* following the inclusion of sub rule (6). This national rule of greyhound racing was implemented as of 1 January 2013.

Rule 83(6) states: "Testosterone as evidenced by the presence of 5B – androstane – 3a 17B – diol at or below a concentration of 10 nanograms per millilitre in a sample or urine taken from a bitch will not breach the provisions of sub rule (2) of this Rule".

The amended Rule thereby replaces the absolute prohibition with a prohibition above the prescribed permissible limit, as evidenced by the presence of metabolites above that limit. This acknowledges a previous practice regarding the use of testosterone in treating bitches and also takes account of the variation in natural testosterone levels in bitches.

Exhibit 6 in the inquiry clearly states "testosterone products should not be used for oestrus control in racing greyhounds".

The appellant in this matter was disqualified for a period of nine months pursuant to Rule 95(1)(c) RWWA Rules of Greyhound Racing.

Rule 46(9)(c) of the *Racing Penalties (Appeals) Act 1990* gives this tribunal the power to "confirm, vary, or set aside the determination or finding appealed against or any order or penalty imposed to which it relates".

By notice of appeal dated 23 October 2013, the appellant appealed against the penalty imposed upon by the stewards on 10 September 2013.

The tribunal heard the appeal on 6 November 2013. Following the hearing, the tribunal members received further information from the stewards, being records of like charges and penalties imposed in Queensland, New South Wales and Victoria.

of when the offence occurred as was the case in the imposition of in Queensland and New South Wales.

I am of the view that disqualification in this case, as in that of Mr Bates, was inevitable given the serious nature of the offending and the potential damage to the industry.

I am, however, of the view that Mr Jacobson has a justifiable sense of grievance with regard to the structure of his penalty as it compares to that imposed in other jurisdictions for similar offences.

Given that he had no prior convictions for an offence of this nature, as opposed to Mr Bates who had four prior offences involving the presentation of greyhounds not free of prohibited substances, and given that Mr Jacobson's administration of the prohibitive substance was inadvertent rather than proactive, and given the substantial effect upon Mr Jacobson's lifestyle and finances, that disqualification necessarily needed to be a disqualification for as short a period of time as the circumstances required. I am also of the view that Mr Jacobson should have been given a tangible and significant discount for his cooperation in the investigation of this matter.

There was error demonstrated in the penalty imposed upon Mr Jacobson in that in all the circumstances of the case, including particularly but not limited to the nature of the offending, Mr Jacobson's cooperation, and the penalties imposed in comparable matters, the penalty of nine months disqualification was manifestly excessive.

Whilst the stewards were correct to impose a penalty of disqualification, I am of the view that the penalty should be varied to disqualify the appellant for a period of six months.



KAREN FARLEY SC, MEMBER

