THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR

APPELLANT: TRAVIS WILLIAM BULL

APPLICATION NO: A30/08/709

PANEL: MR D MOSSENSON (CHAIRPERSON)

MR J PRIOR (MEMBER)

MR W CHESNUTT (MEMBER)

DATE OF HEARING: 10 DECEMBER 2009

DATE OF DETERMINATION: 26 FEBRUARY 2010

IN THE MATTER OF an appeal by TRAVIS WILLIAM BULL against the determination made by the Racing and Wagering Western Australian Stewards of Harness Racing on 31 May 2009 imposing a disqualification of 12 months for breach of Rule 243 of the Rules of Harness Racing

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Mr T Bull appeared for himself.

Mr W Delaney appeared for Racing and Wagering Western Australian Stewards of Harness Racing

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Background

On 31 May 2009 at a hearing before the Racing and Wagering Western Australian ("RWWA") Stewards of Harness Racing the appellant was charged with breach of Rule 243 of the Rules of Harness Racing ("the hearing").

Rule 243 of the Rules of Harness Racing is in the following terms:

"A person employed, engaged or participating in the harness racing industry, shall not behave in a way which is prejudicial or detrimental to the industry".

The appellant was charged by the Stewards at the hearing in the following terms:

> "And what Mr Bull the charge against you is that at Geraldton Trials on 26th of May 2009 you were the driver of Barney O'Shanessy in Trial 2. You have used the whip excessively and in an improper manner during the trial. After the trial in the horse stall area you have struck the gelding with the whip and kneed it in the stomach. Now the Stewards are of the opinion that, that behaviour is detrimental to the industry."

The appellant pleaded not guilty and was convicted as charged. The appellant was disqualified for a period of 12 months.

At the hearing the Stewards heard evidence from a total of 11 witnesses, including the appellant.

Some of these witnesses were called at the appellant's request.

The hearing arose out of a report made by the Steward Mr B Brown, who was a trial steward, secretary and treasurer of the Geraldton Harness Racing Club and had witnessed the events the subject of the hearing.

Not surprisingly, as there were a number of witnesses who gave evidence at the hearing and there was some inconsistency between the various witnesses as to the appellant's behaviour towards the horse he was driving, Barney O'Shanessy, including factual issues such as the following:

1. How many times the appellant hit the horse with his whip.

2. When the appellant hit the horse with his whip.

3. The level of force used by the appellant to hit the horse with his whip.

4. At what stage in the trial the appellant hit the horse.

5. Whether it was necessary for the appellant to hit the horse at the relevant period of time.

6. Whether the appellant hit the horse with his whip in the stalls after the trial.

7. If the appellant used his whip in the stalls, whether in fact it made contact with the horse itself.

8. Whether the appellant kneed the horse in the stomach.

Given that the various witnesses were not viewing all the relevant incidents the subject of the hearing and were not all located in the same place, there was differing accounts given by the witnesses of the factual issues referred to above.

In this respect, given the Stewards were inquiring into the incident and adjudicating on whether the charge had been proved, the Stewards were at liberty to prefer some witnesses' evidence over others and accept some of the evidence of an individual witness, but not necessarily all of the evidence.

After hearing all the evidence, the Stewards adjourned and upon resumption of the hearing, gave very brief reasons for convicting the appellant in the following terms:

> "Mr Bull the Stewards have very carefully considered all the evidence tendered at this inquiry. We have compelling evidence from Mr Brown the Trial Steward, Mr Fairless, Mr Hobson, Mr Gates and to some extent Mr Phillips. Therefore the Stewards preferred their evidence to that tendered by yourself. It is the Stewards' opinion that you were evasive and attempted to mislead the inquiry. For these reasons we find you guilty of the charge as laid Mr Bull. Now before you put submissions to the Stewards on penalty Mr Bull, I'd like you to realise that it is one of the most serious charges one can be found guilty of within the Rules of Harness Racing. Now is there a submission you would like to put to us on penalty now Mr Bull?"

Following the comments made above by the Chairman by way of the reasons for convicting the appellant for breach of the Rule, the appellant and Chairman had a brief discussion about his previous record and whether the appellant wished to say anything further to the Stewards on penalty.

The Chairman of the Stewards then gave the reasons for imposing the penalty in the following terms:

> "Mr Bull the Stewards have considered the matter of penalty at some length. We are of the opinion that the charge which you were found guilty of is one of the

most serious charges that can be issued under the Rules of Harness Racing. In an industry that relies heavily on the conduct of its individuals involved there can be no place for this type of behavior, then any penalty imposed must reflect this. Penalties imposed for previous offences of this nature have been disqualifications for a period of 6 months upwards. Mr Bull your offence report shows you were disqualified for 12 months on July 2001 under the provisions of Rule 243 for similar behaviour to this charge today. Accordingly the penalty imposed upon you is a disqualification of your licence with Racing and Wagering Western Australia for a period of 12 months."

The appellant lodged his Notice of Appeal containing 6 grounds at the Tribunal Registry on 4 June 2009. The appellant's application for a stay of proceedings was refused on 5 June 2009. The appellant did not proceed with the listing of his appeal until December 2009.

Grounds of Appeal

At the hearing of this appeal before this Tribunal, the Chairman granted leave for the appellant to amend his grounds of appeal from the original 6 grounds that he had filed, which all were appeals against conviction, to 7 grounds, including an appeal against penalty.

The amended grounds of appeal are as follows:

1. Not all witnesses were available.

2. Inconsistency in evidence given.

3. No consideration given to the horse's dangerous behavior.

4. Lack of care and safety of driver and horse due to rules of controlling bodies not being adhered to.

5. I should have been charged by Rule 156(3)(b).

6. New evidence.

7. The penalty was manifestly excessive.

Ground 1

As I have previously stated in these reasons, 11 witnesses were called at the hearing.

Four of these witnesses, Messrs Knight, Galea, Inwood and Worthington were all called at the request of the appellant.

An adjournment was granted to the appellant by the Stewards to call such witnesses.

When the last witness Mr Worthington completed his evidence, the Stewards adjourned the hearing before resuming and charging the appellant.

At no stage before that adjournment did the appellant request that the hearing be adjourned again so that he could call any further witnesses.

The hearing was adjourned on three further occasions before the Stewards announced to the appellant their reasons for convicting him.

A further adjournment of the hearing occurred while the Stewards considered the appropriate penalty to impose.

At no stage before or after any of these adjournments did the appellant request to call further witnesses, nor did he give any indication to the Stewards that there were witnesses who were available which would have assisted him in relation to the hearing.

At the hearing of this appeal before the Tribunal, the appellant submitted that the starter of the trial race and a spectator were not available at the hearing. There was no request made by the appellant at the hearing, despite the opportunities I have referred to above, to have those persons attend at the hearing to give evidence before the Stewards.

In any event, when questioned by the Chairman at the Appeal Hearing as to what any additional witnesses would say, the appellant advised that he was unsure.

The appellant has failed to identify what evidence additional witnesses would have been able to give in relation to the subject matter of the Stewards' investigation at the hearing.

In all of these circumstances, I would dismiss this ground of appeal.

Ground 2

As I have stated previously in these reasons, there were a number of witnesses who gave evidence at the hearing and the evidence of a number of these witnesses were inconsistent with each other, in particular in relation to the factual issues in question being the subject of the Stewards' charge.

Mere inconsistency in evidence between various eye witnesses themselves was not a sufficient basis for the Stewards, on the evidence available to them, to dismiss the charge.

Having considered the evidence before the Stewards at the hearing, I am satisfied there was a sufficient consistency in the evidence of the majority of the witnesses as to treatment by the appellant towards the horse Barney O'Shanessy. The Stewards in their reasons stated that they preferred the evidence of some witnesses over others.

The consistency of this evidence, in particular from the witnesses the Stewards preferred, was such that I am satisfied that the Stewards, giving proper weight to the fact that the appellant had no onus of proof and weighing in the principal set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 347 per Latham CJ, could have convicted the appellant of the charge on the evidence available.

In considering this evidence and the inconsistencies between the various witnesses, I have also taken in to account the advantage which the Stewards presiding at the hearing had on the day of the hearing in assessing the veracity and credibility of the witnesses.

In this respect, as an Appellate Tribunal, I am conscious of the fact that we are only provided with the transcript of the hearing and did not see the 11 witnesses give evidence at the hearing.

I would dismiss this ground of appeal.

Ground 3

There was evidence given by the appellant at the hearing about the horse Barney O'Shanessy's previous dangerous behavior at the start of a race a week before the trial which was the subject of the hearing.

There was no dispute with this evidence provided by the appellant.

This ground of appeal was not pursued with much vigour by the appellant at the hearing before the Tribunal. The submission by the appellant was that the horse had misbehaved at its previous start and the Steward Mr B Brown was uninterested in the horse's previous misbehaviour when advised by the appellant after the trial in Geraldton on 26 May 2009.

Given the nature of the evidence before the Stewards at the hearing by various witnesses as to the appellant's behaviour towards the horse Barney O'Shanessy during the trial and

in the stalls after the trial, I am unable to understand as to how such previous misbehaviour of the horse could justify the appellant's level of behaviour towards the horse on the day in question.

I would dismiss this ground of appeal.

Ground 4

There is no merit in this ground whatsoever.

In essence, this ground generally constitutes a complaint by the appellant as to the behaviour of the persons representing the controlling body at the Geraldton Trials on 26 May 2009. The appellant complains about the provisions made in relation to the starter and whether a catcher was available at the end of the trials.

Those complaints lead the appellant to submit that all the Trials on 26 May 2009 at Geraldton should have been cancelled.

Whether there is any merit in the complaints of the appellant is a matter of no relevance in relation to this appeal. These are matters the appellant is at liberty to refer to the relevant authorities.

None of these complaints have any impact upon any submissions as to whether there was any error by the Stewards or a miscarriage of justice in the Stewards convicting the appellant of the charge on the evidence that was available to them at the hearing.

I would dismiss this ground of appeal.

Ground 5

In relation to this ground, the appellant not only submits that he should have been charged for breach of Rule 156(3)(b) of the Rules of Harness Racing, he also conceded at the hearing before this Tribunal that he was guilty of breaching this Rule.

A concession of this nature was effectively made by the appellant in his evidence before the Stewards at the hearing.

Rule 156(3)(b) of the Rules of Harness Racing is in the following terms:

> "A driver shall not use a whip excessively".

Clearly, Rule 243 under which the appellant was charged and convicted at the hearing, is a Rule which covers a much wider range of conduct than Rule 156(3)(b).

On the evidence which was before the Stewards at the hearing, I am not satisfied that the Stewards fell into error in charging the appellant and convicting the appellant for breach of Rule 243 instead of Rule 156(3)(b).

The focus in Rule 156(3)(a)-(f) is on the driver's use of the whip during races or trials.

In the hearing, the conduct of the appellant which the Stewards focused on and was subject of the charge not only included the appellant's use of the whip during the trial, but also his behaviour in the stall area after the trial had been completed.

In those circumstances, I am satisfied that the charge against the appellant and subsequent conviction of the appellant under Rule 243 by the Stewards was not in error and this ground of appeal should be dismissed.

Ground 6

This ground of appeal was not pursued with any vigour by the appellant at the hearing before the Tribunal.

All the appellant submitted was that he sustained injuries due to the behaviour of the horse in question. It was not suggested that evidence of the injuries the appellant sustained was not available for presentation by the appellant and consideration by the Stewards at the hearing. The appellant referred to his injuries and treatment with Nurofen at the hearing.

I am not satisfied that any injury sustained by the appellant from his involvement with the horse in question could have justified or excused his behaviour the subject of the charge and conviction.

Generally, in my view, the only circumstances where substantial use of the whip bordering on breach of Rules 156(3)(a)-(f) may be justified and excuse a driver's behaviour would be if his or her or another person in close proximity to the horse had their personal health or welfare in jeopardy.

In this matter, a significant part of the Stewards' reasons for convicting the appellant for breach of the Rule was his use of the whip during the actual trial when his health and welfare or that of others was in no jeopardy.

I would dismiss this ground of appeal.

Ground 7

A submission that the penalty imposed was manifestly excessive in the circumstances suggests that there was some implicit error by the relevant entity that imposed the penalty or sentence (*Dinsdale v The Queen* (2000) 202 CLR 321).

Generally, such grounds are based on submissions that the penalty imposed, when considering all the relevant factual circumstances, is outside the range that generally applies to an offence of the nature of which the person has been convicted (*Chan* (1989) 38 A Crim R 337 Malcolm CJ at 342).

The Stewards in their reasons for imposing the penalty considered the appellant's behavior as encaptured in the charge for breach of rule 243 as most serious. Given the appellant's behavior affected the welfare of an animal in a public forum, I am satisfied that such categorization by the stewards was justified.

The Stewards in imposing the penalty on the appellant in their reasons placed some weight on the fact that this was the appellant's second conviction for breach of Rule 243 and for his previous conviction a penalty of 12 months disqualification had been imposed. An appeal against this penalty was dismissed by this Tribunal in Appeal 540.

Notwithstanding that the previous conviction for breach of Rule 243 was in 2001, I am satisfied that in all the circumstances a disqualification of 12 months for this second offence is not outside the range of penalties which have been imposed for this type of offence.

As the Stewards stated in their reasons for imposing their penalty, penalties imposed on other persons for previous offences of breach of Rule 243 have been disqualifications for a period of 6 months upwards.

No challenge was made by the appellant as to that statement by the Stewards as to the lower end of the range of penalties for offences of this nature.

In those circumstances, given the appellant is a second offender, I consider that a disqualification period of 12 months is within the general range of penalties imposed for breach of Rule 243 and I am not satisfied that the appellant has made out the ground that

the penalty imposed was manifestly excessive in the circumstances.

JOHN PRIOR, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON

APPELLANT: TRAVIS WILLIAM BULL

APPLICATION NO: A30/08/709

PANEL: MR D MOSSENSON (CHAIRPERSON)

MR J PRIOR (MEMBER)

MR W CHESNUTT (MEMBER)

DATE OF HEARING: 10 DECEMBER 2009

DATE OF DETERMINATION: 26 FEBRUARY 2010

IN THE MATTER OF an appeal by TRAVIS WILLIAM BULL against the determination made by the Racing and Wagering Western Australian Stewards of Harness Racing on 31 May 2009 imposing a disqualification of 12 months for breach of Rule 243 of the Rules of Harness Racing

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Mr T Bull appeared for himself.

Mr W Delaney appeared for Racing and Wagering Western Australian Stewards of Harness Racing.

I have read and agree with the draft Reasons for Determination of Mr J Prior, Member. I have nothing to add regarding conviction.

As Mr Prior indicates in relation to penalty, it is appropriate to consider all of the relevant surrounding facts and circumstances. In the course of the Stewards' inquiry Mr Bull admitted that his conduct amounted to a breach of the excessive use of whip Rule 156(3)(b). The misconduct was more extensive than the misconduct that rule addresses.

The particulars of the charge which was laid include the following elements:

1 excessive use of the whip during the trial;

2 improper use of the whip during the trial;

3 striking the gelding with the whip in the stall area; and

4 kneeding the horse in the stomach in the stall area.

I am satisfied it was open to the Stewards on the evidence to be find each element identified in the particulars was in fact present. The nature and extent of the misconduct involved highlights the seriousness of the matter. This aspect, coupled with the reasons set out by Mr Prior, in my assessment reflect why the penalty cannot be said to be manifestly excessive.

I would dismiss the appeal as to the penalty as well as conviction.

DAN MOSSENSON, CHAIRPERSON

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

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR W CHESNUTT

APPELLANT:	**TRAVIS WILLIAM BULL**
APPLICATION NO:	**A30/08/709**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATE OF HEARING:	**10 DECEMBER 2009**
DATE OF DETERMINATION:	**26 FEBRUARY 2010**

IN THE MATTER OF an appeal by TRAVIS WILLIAM BULL against the determination made by the Racing and Wagering Western Australian Stewards of Harness Racing on 31 May 2009 imposing a disqualification of 12 months for breach of Rule 243 of the Rules of Harness Racing

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Mr T Bull appeared for himself.

Mr W Delaney appeared for Racing and Wagering Western Australian Stewards of Harness Racing

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I have read the draft reasons of Mr J Prior, Member. I agree with the reasons and conclusions and have nothing to add.

WILLIAM CHESNUTT, MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA