APPEAL NO. 786

RACING PENALTIES APPEAL TRIBUNAL

DETERMINATION

APPELLANT:	**BENJAMIN WILLIAM OWEN**
APPLICATION NO:	**A30/08/786**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MS K FARLEY SC (MEMBER)**
DATE OF HEARING:	**2 MAY 2016**
DATE OF DETERMINATION:	**19 MAY 2016**

IN THE MATTER OF an appeal by Mr Benjamin William OWEN against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 29 February 2016 finding the Appellant guilty and on 18 March 2016 imposing a fine of $400.00 and a disqualification of 4 years for breaches of Rules 178A and AR175(h)(i) of the Rules of Thoroughbred Racing.

Mr T F Percy QC with Mr T Lyons of Gibson Lyons Lawyers represented Mr B Owens.

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

By a unanimous decision of the members of the Tribunal:

1. the appeal against conviction under rule 178A is dismissed;
2. the appeal against conviction under AR175(h)(i) is dismissed;
3. the appeal against the penalty of 4 years disqualification for breach of AR175(h)(i) is dismissed.

D. Mossenson

_____ **DAN MOSSENSON, CHAIRMAN**

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

APPEAL NO. 786

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**BENJAMIN WILLIAM OWEN**
APPLICATION NO:	**A30/08/786**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MS K FARLEY SC (MEMBER)**
DATE OF HEARING:	**2 MAY 2016**
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IN THE MATTER OF an appeal by Mr Benjamin William OWEN against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 29 February 2016 finding the Appellant guilty and on 18 March 2016 imposing a fine of $400.00 and a disqualification of 4 years for breaches of Rules 178A and AR175(h)(i) of the Rules of Thoroughbred Racing.

Mr T F Percy QC with Mr T Lyons of Gibson Lyons Lawyers represented Mr B Owens.

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.

D. Mossenson

_____ **DAN MOSSENSON, CHAIRPERSON**

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

APPEAL NO. 786

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS KAREN FARLEY SC (MEMBER)

APPELLANT:	**BENJAMIN WILLIAM OWEN**
APPLICATION NO:	**A30/08/786**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MS K FARLEY SC (MEMBER)**
DATE OF HEARING:	**2 MAY 2016**
DATE OF DETERMINATION:	**19 MAY 2016**

IN THE MATTER OF an appeal by Mr Benjamin William OWEN against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 29 February 2016 finding the Appellant guilty and on 18 March 2016 imposing a fine of $400.00 and a disqualification of 4 years for breaches of Rules 178A and AR175(h)(i) of the Rules of Thoroughbred Racing.

Mr T F Percy QC with Mr T Lyons of Gibson Lyons Lawyers represented Mr B Owens.

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.

Kare Farley

_____ **KAREN FARLEY SC, MEMBER**

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

APPEAL NO. 786

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR PATRICK HOGAN (MEMBER)

APPELLANT:	**BENJAMIN WILLIAM OWEN**
APPLICATION NO:	**A30/08/786**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MS K FARLEY SC (MEMBER)**
DATE OF HEARING:	**2 MAY 2016**
DATE OF DETERMINATION:	**19 MAY 2016**

IN THE MATTER OF an appeal by Mr Benjamin William OWEN against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 29 February 2016 finding the Appellant guilty and on 18 March 2016 imposing a fine of $400.00 and a disqualification of 4 years for breaches of Rules 178A and AR175(h)(i) of the Rules of Thoroughbred Racing.

Mr T F Percy QC with Mr T Lyons of Gibson Lyons Lawyers represented Mr B Owens.

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

Introduction

1 These are appeals against conviction and penalty.

2 On 29 February 2016, the Racing and Wagering Western Australia Stewards of Thoroughbred Racing found the Appellant guilty of offences against Rules 178A and 175(h)(i) of the Rules of Thoroughbred Racing. On 18 March 2016, the Stewards imposed a fine of $400.00 for the breach of Rule 178A and imposed a disqualification of 4 years for the

breach of Rule 175(h)(i).

3 Rule 178A is in the following terms:

"AR.178A.

(1) No person, unless he has first obtained the written permission of the Stewards, shall have in his possession on a racecourse where a race meeting is being conducted or in any motor vehicle or horse float or other mode of transport being used for the purpose of conveying a horse or horses to or from a race meeting any prohibited substance or a syringe, needle, naso-gastric tube or other instrument that could be used –

(a) to administer a prohibited substance to a horse; or
(b) to produce a prohibited substance in a horse.

(2) The Stewards may at their complete discretion grant written permission for a person to have in his possession on a racecourse where a race meeting is being conducted or in any motor vehicle or horse float being used for the purpose of conveying a horse or horses to and/or from a race meeting any prohibited substance or a syringe, needle, naso-gastric tube or other instrument that could be used –

(a) to administer a prohibited substance to a horse, or
(b) to produce a prohibited substance in a horse.

The Stewards may impose terms or conditions on a permission granted under this subrule.

(3) A person who fails to comply with subrule (1) or with a term or condition imposed under subrule (2) is guilty of an offence, and any substances or items concerned may be confiscated."

Rule 175(h)(i) is in the following terms:

"AR.175.

The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalize;

.....

(h) any person who administers, or causes to be administered, to a horse any prohibited substance –

.....

(i) for the purpose of affecting the performance or behavior of a horse in a race or of preventing its starting in a race.

HISTORY

4 The Appellant was the trainer of RHINO'S LAD. He brought that horse to the Pinjarra Racecourse on Sunday 13 December 2015 to start in Race 6, the Edinger Real Estate Handicap. A witness, Ms Gallacher, saw the Appellant engaging in what she regarded as suspicious activity. Cadet Steward Butler was nearby. Ms Galacher immediately told Mr Butler *"..I think he's giving something to that horse in the wash bay."* Cadet Steward Butler reported what he had been told to Deputy Chairman of Stewards Taylor, who was present at the Racecourse on that day. RHINO'S LAD duly started, and won the race.

5 Shortly after the race, the Appellant was summoned to the Stewards room. It was put to him that he had administered a substance to RHINO'S LAD. After some prompting, he produced from his person a bottle of nitrolingual spray. It was seized by the Stewards.

6 The Stewards wrote to the Appellant the next day, Monday 14 December 2015. By that letter, the Appellant's licences were suspended. An investigation commenced, which ultimately led to a formal inquiry.

7 The inquiry began with its first hearing on 28 January 2016. Prior to that date, evidence had been gathered during the investigative stage. The initial process in the Stewards' room at the Racecourse on 13 December 2015 had been recorded and transcribed. The transcript became exhibit 3 at the inquiry. Ms Gallacher was interviewed on Tuesday, 15 December 2015 by Racing and Wagering Western Australia ("RWWA") Investigator Mr Criddle. Her interview was recorded and transcribed and it became exhibit 20 at the inquiry. Also on 15 December 2015, Cadet Steward Butler wrote a memo to Chief Steward Lewis, and that memo became exhibit 17 at the inquiry.

8 Towards the end of the first sitting of the inquiry, the Appellant was charged with the two offences referred to. The Stewards said at T145:

"And the charge today is under AR178 part (1) and the particulars of the charge Mr Owen

are that at Pinjarra on the 13th of December 2015 you did have in your possession the prohibited substance Nitrolingual spray without first obtaining written permission from the Stewards as contemplated by that rule."

9 The Stewards further said at T146:

"So the charge today is under AR 175(h)(i) and the particulars Mr Owen you are charged under that rule being that, at Pinjarra on the 13th of December 2015, shortly before race 6, you did administer within the wash bay area the prohibited substance Nitrolingual spray to RHINO'S LAD for the purpose of effecting (sic) its performance in that race."

10 The Appellant pleaded guilty to the possession charge, and not guilty to the administration charge. On the hearing of this appeal, the Stewards did not submit that the plea of guilty to possession prevented the Tribunal from considering the appeal.

11 The inquiry was adjourned then reconvened and heard further evidence and submissions on 23 February 2016. The Stewards' decision was then reserved.

12 On 29 February 2016 the Stewards wrote to the Appellant with their decision and reasons. He was found guilty of both charges.

13 The inquiry reconvened on 11 March 2016 and submissions on penalty were heard. The decision on penalty was reserved. On 18 March 2016, by letter to the Appellant, the Stewards imposed the penalties and provided their reasons.

Conduct of the inquiry

14 The Stewards were not bound by the rules of evidence in the conduct of the inquiry. They were obliged to proceed according to natural justice. Evidence not otherwise admissible in a court was admissible at the inquiry. The types of evidence given and produced at this inquiry which would not normally be admissible included hearsay, opinion (Ms Gallacher), previous discreditable conduct (exhibit 20 page 9 and T51 28 January 2016), previous consistent statements (exhibits 3, 17 and 20), and failure to deny in the face of an accusation (exhibit 3 page 1). No challenge is made at this appeal to any of this evidence, so it does not need to be considered. In any event, the Stewards did not rely on the hearsay or previous discreditable conduct in their reasons for

conviction. Further, each of the material witnesses who gave previous consistent statements was called in person at the inquiry, and the Appellant was represented at each stage. However, Ms Gallacher on a number of occasions in her statements to investigator Criddle and at the inquiry itself gave her opinion (on the ultimate issue) that the horse had been given something. For example, she said in exhibit 20 at page 10 - *"..oh, I bet my life on it, he was giving the horse something".* At the inquiry she said - *"I know something was given to that horse"* (T56 28 January 2016). There is no doubt that the evidence given by Ms Gallacher by way of opinion was admissible. It reinforced her credibility on what she said she had seen.

Consideration of the appeals against conviction

15 The Appellant says that it was not open to the Stewards to make the finding of fact in relation to Rule 175(h)(i) that he administered the prohibited substance to the horse. The appeal in relation to that rule largely concerns the use the Stewards made of the Appellant's "post offence conduct". Further, it is said that the case against the Appellant on Rule 175(h)(i) was a "circumstantial case", and the other findings of fact were not sufficient to prove the administration. Finally, it is contended that the decision to convict was against the evidence and the weight of the evidence.

16 In relation to the Appeal against conviction on Rule 178A, it is said that the Stewards misconstrued the rule. It is said that they should have read into it the words "without lawful excuse" and they did not do so and therefore failed to consider a necessary element of the offence.

17 The facts relied upon by the Stewards can be recited quite shortly. At this early stage, it can be noted that the Appellant at the inquiry said that he did administer the spray in the wash bay at the racecourse, but to himself rather than the horse (T92).

18 It is useful to separate the various items if evidence into what occurred before and what occurred after the alleged administration.

The facts - Pre Offence

19 The Appellant was the trainer of RHINO'S LAD. He brought that horse to the Pinjarra Racecourse on Sunday 13 December 2015 to start in Race 6, the Edinger Real Estate Handicap.

20 The Appellant had been prescribed by his doctor a medication known as nitrolingual spray, to be used by him on the sudden onset of symptoms of angina. The medication was in the form of a small bottle of pump spray to be administered on or under the tongue by one or two sprays separated by five minutes. The bottle is red, with a white top.

21 Nitrolingual spray contains glyceryl trinitrate, otherwise known as nitroglycerin. It is a vasodilator primarily used in human medicine. It improves the blood flow to the heart muscle and thus improves the oxygen carrying capacity to the heart muscle. It has the same effect in animals as it has in humans. It is a prohibited substance in terms of the Rules of Racing.

22 Glyceryl nitrate is not detectable in blood or urine. It is detectable for an hour or two in saliva. The Stewards have no protocols for taking saliva samples from a horse.

23 Race 6 at Pinjarra was due to start at 3.38 pm. Shortly before that time, the Appellant was with the horse in one of the stalls. At 3.29 pm Cadet Steward Butler was in the stabling area trying to locate runners that were a few minutes late in presenting to the mounting enclosure for race 6. The Appellant was told that the race was about to start.

24 There was another person nearby, Ms Gallacher. She is an employee of licensed trainer Ms Erkelens. Ms Gallacher was about 10 metres away. Ms Gallacher heard and saw a series of events.

25 Ms Gallacher heard the Appellant being told to hurry up. The Appellant then ran or rushed to the nearby carpark. He rushed back in with nothing in his hand which Ms Gallacher could see.

26 At the end of the row of stalls, there is a wash bay (sometimes called the hose bay). The Appellant took the horse into the wash bay. The wash bay is brick enclosed on three sides, with one side open and facing to the rest of the stabling area.

27 Ms Gallacher saw that the horse was taken in to the wash bay head first. The horse's head could not be seen from outside. She has considerable experience in the industry, and agreed with Dr Medd's observation that most people walk a horse in and turn it around (exhibit 3 page 4).

28 The horse was facing to the back wall, into the corner. The horse spun around quickly. The Appellant had the nitrolingual spray in his hand. The hand with the spray was over the horse's muzzle (T41 28 January 2016). Ms Gallacher described it as a white tube or spray. She said that the Appellant then "slipped" it back into his pocket. The Appellant then used the hose and washed the horse's nose and mouth. The Appellant then walked the horse to the mounting yard. Ms Gallacher did not see the Appellant apply the spray to the horse's mouth or nose (T42 28 January 2016).

29 The item in the Appellant's hand was the nitrolingual spray.

30 Ms Gallacher formed the opinion that the Appellant was giving the horse something.

31 Ms Gallacher immediately told Cadet Steward Butler of what she had seen. She said *"...it's just been given something whether it was in its mouth or nose I don't know, it's just been given something..."*. She also told her trainer, Ms Erkelens.

32 Mr Butler reported what he had been told to Mr Taylor, Deputy Chairman of Stewards, who was present on the course that day.

The facts - Post Offence Conduct

33 Post offence conduct as evidence of guilt is well understood in the criminal law. It is conduct which evidences a consciousness of guilt, together with the absence of any other explanation. It is also a rule of common sense. A guilty person has something to hide. Despite the fact that the criminal standard of proof did not apply to the Stewards deliberations, they did in fact go about their task by applying that high standard in relation to post offence conduct. In categorizing the case as a "circumstantial case", including the post offence conduct, the Stewards said at paragraph 8 of their reasons – *"....It is only where we are satisfied that the inference is the only rational one, that we have placed any reliance on it."* That approach to fact finding is an application of the criminal standard of proof beyond reasonable doubt, a standard not necessary but in fact

applied by the Stewards.

34 After Ms Gallacher saw what she did, the Appellant's conduct could have been evidence of a number of different things. It could have been evidence of guilt of the possession offence, guilt of the administration offence, guilt of both, or not guilty conduct at all. The post offence conduct included but was not limited to the following matters:

- After the race and after presentation, Cadet Steward Butler approached Mr Owen and told him he was required in the Stewards' room. The Appellant appeared to be clenching an object in his right fist inside his trousers pocket (exhibit 17 page 2 and T22 28 January 2016).

- Approaching the Stewards' room the Appellant removed his hand from his pocket and shoved it down the front of his pants as if he was placing something down the front of his underwear (exhibit 17 page 2 and T23 28 January 2016).

- In the Stewards room, Steward Mr Taylor directed the Appellant to empty his pockets. He stood, emptied his pockets, and put the contents on the table (T16 23 February 2016). He sat back down.

- On being asked *"...underpants as well"*, the Appellant said *"...tucking it in"* (exhibit 3 page 1).

- The Appellant was told *"if you've got something that you need to disclose, you need to disclose it now."* After a delay, the Appellant said *"I will disclose something, yes, I will disclose it"* (exhibit 3 page 1 and T25 23 February 2016).

- The Appellant stood up, undid the buckle of his belt, undid his fly and produced the nitrolingual spray on to the table (T25 23 February 2016).

- On being asked what the item was, the Appellant said it was an *"airway sort of cleaner, like eucalyptus oil"* (exhibit 3 page 2).

- There was no doubt in Mr Taylor's mind that the Appellant was trying to hide the bottle (T19 23 February 2016).

- At the inquiry, the Appellant said that he administered the spray to himself in the wash bay while handling the horse (T91 28 January 2016). He did not say that on being questioned in the Stewards' room at Pinjarra on 13 December 2015 (Exhibit 3).

- He put the spray bottle in his fob pocket at the front of his pants, not in his

underwear (T92 and T95 28 January 2016).

35 From all of the above, the Stewards found that the Appellant tried to conceal the spray bottle and that he lied about both possessing it and administering it to the horse. Both are a species of post offence conduct, which is circumstantial evidence, admissible in any case. The Stewards used the post offence conduct as evidence of guilt of administration.

The Stewards' reasons on conviction

36 Because of the Appellant's plea of guilty to the possession offence, the Stewards' reasons concentrated only on the administration offence. The principal matters to consider, and to be considered on this appeal, were the use to be made of Ms Gallacher's evidence and the post offence conduct. As noted above, the Stewards had said early in their reasons at paragraph 8 *"....It is only where we are satisfied that the inference is the only rational one, that we have placed any reliance on it."* They went on to say at paragraph 32:-

> *"As compelling as her evidence appears to be, were this the only evidence before the Stewards it would be problematical as to whether it was sufficient to sustain the charge and we do not rely on her evidence entirely. It is but one thread of evidence we must consider whose strength as a piece of evidence is only fortified by the following events. Even If her evidence is afforded minimal weight the other evidence is of sufficient cogency and weight when taken in total to prove the charge, we have looked beyond merely her evidence to all of the evidence in assessing the charge. Whilst the conclusions she drew were based primarily on circumstantial events, her observations are direct evidence which we are entitled to consider and accept as an accurate account. We are satisfied that she had a good enough view of what occurred as for the most part it accords with your own descriptions."*

And further at paragraph 48:-

> *"The evidence of Ms Gallacher, which in the first instance gave rise to her suspicions which led to the Stewards questioning of you, rather than being brought into question was only improved by virtue of your conduct thereafter and what you told the Stewards on the day. Combining the descriptions of what took place in the wash bay with that with what you came to say in response to the allegations being put and the clear attempt at hiding the source of the administration are satisfied that the specifics*

of the charges as articulated with respect to the act of administration did occur. Even if the evidence of Ms Gallacher is ignored entirely and no weight is attached to it, your own conduct and responses to the matter would in our view go along (sic) way to sustain the charge. Your lack of candour and openness and reluctance to be forthcoming indicate a clear attempt to minimize the damage of your actions"

The grounds of the appeals against conviction

37 In relation to the possession offence (referred to as charge one), the grounds of appeal are as follows:-

1. *The Stewards erred by convicting the appellant on Charge One.*

PARTICULARS

(a) *Notwithstanding the plea of guilty the Stewards erred by convicting the appellant of this count.*

(b) *The Rule in question (178A) should be read as only creating an offence where the substance in question was in a person's possession without lawful excuse.*

(c) *Notwithstanding the absence of any written permission from the Stewards, the nitro lingual spray was a prescription medication that was lawfully in the possession of the appellant at the time in question.*

(d) *The rule did not apply to the substance and there was no case to answer on this charge notwithstanding the guilty plea.*

38 There is no merit in ground 1. The spray may well have been in the Appellant's lawful possession for the purposes of the civil or criminal law, but that does not make the possession "compliant" for the purposes of the Rules of Racing. This ground seeks to read into Rule 178A an excusatory provision which is not there. Had the Appellant complied with the Rule and gone to the Stewards to seek permission, they may well have given that permission. He did not do so.

39 In relation to the administration offence (referred to as charge two), the grounds of appeal are as follows:

2. *The Stewards erred: in convicting the appellant of Charge Two, there being no direct*

evidence before them of any administration as required under the Rule, nor any circumstantial evidence that would establish the charge to the required standard.

3. *The Stewards erred in convicting the appellant of Charge Two:*

(a) *There being no direct evidence of any intent on the appellant's part to affect the horse's performance in the race; and*

(b) *There being no circumstantial evidence before the Stewards which would have entitled them to be satisfied to the required standard that any administration of any substance to the horse by the appellant was intended to affect the horse's performance in the race.*

4. *The Stewards erred in using their negative assessment of the accused's answer 'to the allegations and his post-offence conduct to prove the charge against the appellant.*

PARTICULARS

(a) *The Stewards formed a negative view of the accused's credibility during the course of the inquiry and his post-offence conduct.*

(b) *Whilst these could be used to assist the Stewards in their assessment of his credit, they could not be used to fill any evidentiary gap in the evidence as to any element of the offence under consideration.*

(c) *Even where the Stewards are comfortably satisfied that a witness has been untruthful before them, the fact of that untruthfulness could not in itself constitute independent evidence of guilt.*

(d) *Similarly where the Stewards found to the required standard that the post-offence conduct was suspicious and consistent with guilt, that finding alone could not constitute evidence of guilt*

5. *The decision of the Stewards to convict on Charge Two was contrary to the evidence and the weight of the evidence.*

PARTICULARS

(a) *There was no direct evidence of administration of the substance to the horse.*

(b) *The Steward's approach to the question of intent was counterintuitive given the evidence that the appellant washed the horse's mouth with water immediately following the supposed administration, which was contrary to the directions of the manufacturer of the substance.*

(c) *There was no evidence from which the Stewards could conclude that the appellant, in washing the horse's mouth, knew that the substance might be quick acting on a horse's metabolism.*

(d) *In the absence of the evidence relied upon in contravention of what is asserted at Ground 4, there was no evidence upon which would have established the charge to the required standard, either as regards to administration or intent.*

Consideration of the grounds of appeals against conviction

40 As to ground 2, it is arguably not correct to say that there was no direct evidence of administration. Ms Gallacher saw everything except the spray going into the horse's mouth or nose. In any event, it is certainly not correct to say that there was no circumstantial evidence that would establish to charge to the required standard. The Stewards had, amongst other things, the direct evidence of Ms Gallacher's observations together with the post offence conduct. At paragraph 11 of their reasons, the Stewards expressly applied the standard of proof required in inquiries, namely being "comfortably satisfied". I would not uphold ground 2.

41 As to ground 3, it should be noted that intent is not an element of the offence. The Stewards had to be satisfied that the administration was for the purpose of affecting performance. The Stewards dealt with this element of the offence at paragraph 50. All of the evidence, circumstantial and direct, was taken into account by the Stewards. This included, most obviously, the timing of the administration and the nature of the substance. There is no merit in ground 3.

42 Ground 4 is without merit. The Stewards did not use the Appellant's post offence conduct (including lies) to fill a gap in the evidence. They used it as part of the evidence as they were entitled to do. The post offence conduct was not used alone and was not the only evidence of guilt. I would not uphold ground 4.

43 Ground 5 invites the Tribunal on this appeal to consider the whole of the evidence before the Stewards to see if it was open to them to find to the required standard that the Appellant was guilty. In my opinion, the Stewards were amply justified in finding the Appellant guilty and I am not persuaded that any Stewards acting reasonably must have reached a different conclusion.

44 Again particular 5(b) assumes that intent is an element of the offence, but it is not. Assuming for the moment that "*purpose*", which is mentioned in the rule, equates to intent, there is still no merit in this particular or particular 5(c). There was in fact no evidence that the Appellant actually washed inside the horse's mouth, as impliedly asserted by these particulars.

45 Ms Gallacher said :-

> *"...was really washing its nose, and its (sic) around its mouth..."* (exhibit 20 page 2)
>
> *"...turned the hose on and then wiped all its mouth off."* (exhibit 20 page 2)
>
> *"....he didn't stick, everyone sticks the hose, normally in the horse's mouth, but he washed its nose and around its mouth and everything."* (exhibit 20 page 7)

46 At the inquiry, the questions and the acceptance proceeded on the basis that the Appellant was washing the muzzle, not inside the mouth (T44 28 January 2016). Relevantly, Ms Gallacher's answers accepted that proposition and her answers were given on the basis that she was talking about the muzzle, not the inside of the mouth.

47 Whilst I am prepared to accept that the any of the Appellant's conduct consistent with innocence is admissible, these particulars are factually incorrect.

Conclusion on appeals against conviction

48 I would dismiss the appeals against conviction in relation to both charges.

Consideration of the appeal against penalty

49 The Appellant only appeals against the disqualification, not the imposition of the $400.00 fine for the possession offence.

50 The ground of appeal is expressed as follows:-

> 6. *The penalty imposed by the Stewards was manifestly excessive in all the circumstances of the case.*

51 In consideration of this ground, the beginning point is that the minimum penalty which could be imposed was one of 3 years disqualification.

52 Rule 196 is in the following terms:-

.....

(5) "Where a person is found guilty of a breach of any of the Rules listed below, a penalty of disqualification for a period of not less than the period specified for that Rule must be imposed unless there is a finding that a special circumstance exists whereupon the penalty may be reduced:

.....

AR.175(h)(i) - 3 years"

53 Local Rule 196A is as follows:-

"L.R-196A. For the purposes of these Rules and the imposition of a penalty under AR196(5), a special circumstance may apply, if in the opinion of the Stewards, it is in the interests of justice given the special circumstances and conduct of the person in relation to the commission and investigation of the offence."

54 No submission was made to the Stewards or on the hearing of this appeal that special circumstances apply. In those circumstances, it is difficult to apply to this appeal a consideration of the principles commonly taken into account in imposing penalty, in particular the standards of sentencing customarily imposed. The Stewards in their reasons on penalty referred to two recent cases in which disqualifications of 3 years were imposed. In the Appellant's written submissions, reference is made to cases in which a 12 month suspension and a $50,000.00 fine were imposed. Those cases are not a useful comparison where a 3 year minimum is under consideration.

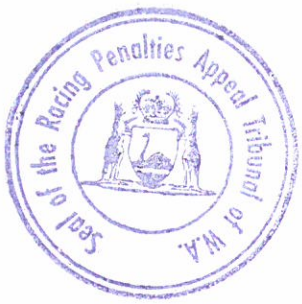
55 What can be said however is that the Stewards did take into account the Appellant's personal circumstances, and took into account other factors which they saw as aggravating. The Stewards said at paragraph 17 of their reasons on penalty:-

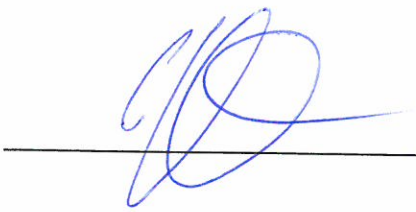
"The circumstances of your offence, the timing of it, the nature of the substance used, the location of it, the absence of any pleas of guilty, remorse or contrition all combine to lend weight to the imposition of a penalty greater than that prescribed by the AR196(5)"

56 In my view, the Stewards took into account all relevant factors and the sentence did not reflect any error of principle.

Conclusion on appeal against penalty

57 I would dismiss the appeal against penalty.





PATRICK HOGAN, MEMBER