APPEAL NO. 823

THE RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: **FRANK MAYNARD**

APPLICATION NO: **A30/08/823**

PANEL: **MS K FARLEY SC (CHAIRPERSON)**
MR R NASH (MEMBER)
MR A E MONISSE (MEMBER)

DATES OF HEARINGS: **08 MARCH and 10 APRIL 2019**

DATE OF DETERMINATION: **06 SEPTEMBER 2019**

IN THE MATTER OF an appeal by FRANK MAYNARD against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 17 January 2019 imposing a disqualification of 18 months for breach of Rule 178 of the RWWA Rules of Thoroughbred Racing.

Mr TF Percy QC instructed by Ms Josephine Byrne of Equitas Lawyers represented Mr Maynard.

Mr RJ Davies QC represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

By a unanimous decision of the members of the Tribunal, the appeal against penalty under Rule 178 of the RWWA Rules of Thoroughbred Racing is upheld and the period of disqualification is reduced from 18 months to 12 months.

KAREN FARLEY SC, CHAIRPERSON

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

APPEAL NO. 823

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A E MONISSE (MEMBER)

APPELLANT: **FRANK MAYNARD**

APPLICATION NO: **A30/08/823**

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1. This is an appeal by a licensed thoroughbred trainer Mr Frank Maynard against a penalty of disqualification for 18 months. This penalty was imposed by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing ("the Stewards") for breach of Rule AR178 of the RWWA *Rules of Thoroughbred Racing* ("the Rules").

The Inquiry

2. On 14 January 2019, the Stewards conducted an inquiry ("the inquiry") into a post-race blood sample taken from the horse MISS FROST ("the horse") which won Race 5 at Ascot on 6 November 2018. The analysis of this sample detected the therapeutic, anti-inflammatory substance Flunixen in plasma at a level of approximately 12 nanograms/ml. At all material times the Appellant was the trainer of the horse.

3. After hearing evidence, the Stewards charged the Appellant with contravening Rule AR178 of the Rules. That rule then provided -

> *"Subject to AR177C, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.*

4. Flunixen is a prohibited substance under the Rules if it is detected in a horse equal or greater than 1 nanogram/ml.

5. The Stewards charged the Appellant with breaching Rule AR178, with the following particulars for it:

> *"that you [the Appellant, as the licenced trainer brought MISS FROST to race in Race 5 at Ascot on the 6th of November 2018 where it competed and finished first with the prohibited substance Flunixen being detected in a post–race blood sample taken from that filly".*

6. Upon being provided with those particulars the Appellant advised the Stewards that he understood the charge and pleaded *Guilty* to it.

7. When he was first questioned about the Flunixen sample at his Henley Brook training property by the RWWA investigator Mr Geoff Johnson on 11 December 2018, the Appellant said that he had no idea how Flunixen came to be in the horse's blood

sample, that he had no Flunixen on his property and that he would only use it on a horse if it had colic.

8. However, at the inquiry the Appellant informed the Stewards of his routine practice of giving Flunixen to his horses for pain relief after a run. Entries in the Appellant's medical journal confirmed this. When asked why he didn't advise the RWWA investigator of that practice when being questioned by him, the Appellant said that he was in shock that day with having just been advised that the horse returned a positive sample.

9. The horse's last run before the 6 November race was on 24 October 2018 at Ascot where it came second. Veterinarian Dr Peter Symons gave unchallenged expert evidence at the inquiry where he stated (at p 11 of the inquiry transcript) that:

"[Flunixen] is a prohibited substance. It's an anti-inflammatory agent and it has an action on the muscular skeletal system. For example for lameness (sic) or soreness. It's also used, as Mr Maynard said, it's also a prohibited substance because it's an analgesic or a pain relief agent and it can have an action on the digestive system, for example with colic as Mr Maynard mentioned."

10. Dr Symons also provided the following evidence in an exchange with the Chairman of the Stewards (at pp 12 and 13 of the inquiry transcript):

"CHAIRMAN *In terms of its actions on a racing animal, what sort of effect would it have on a horse if it's present in a horse that's racing?*

SYMONS *Well, it's a therapeutic drug so it wouldn't improve a horse's performance but it would certainly return it to its normal performance by reducing inflammation, removing pain, taking soreness away. So, it tends to be a quite effective drug in doing that. But it's certainly not performance enhancing. It's considered therapeutic.*

CHAIRMAN *Are there any welfare risks to a horse that races with a substance such as this in its system?*

SYMONS *I think an undiagnosed lameness, a horse on anti-inflammatories with an undiagnosed lameness, there is certainly risks. We don't allow horses to race or trial in Australia. They do in America and that's been a long-standing practice. They race on anti-inflammatories but their break down rate is 5 times ours. So, I don't think it's a good idea and there is some risk associated with it with an undiagnosed lameness.*

CHAIRMAN *Alright. We've heard from the Chemistry Centre earlier that they had approximated a level of 12 nannograms/ml detected in the sample. In your opinion are you able, from that, glean a possible administration time, or where does that fit?*

SYMONS *There is one research paper and it looks at around, for that level in blood, it's around 96 hours, so it's around the 4 day mark. But they're horses that aren't in training. They're not a perfect model but it's as close as the information we have. So, it looks like it's towards the end of its period, its withdrawal period. It doesn't look like it's the day of the race or within 24 hours of the race administration.*

CHAIRMAN *So when this horse, obviously must have somehow got the Flunixen inside of itself and administered to it, however it's got in there, we'd be looking at a tail end administration. Is that what we're talking about?*

SYMONS *Yes, towards the tail end. Yes."*

11. Notwithstanding that evidence and his practice of when he would administer Flunixen, the Appellant maintained at the inquiry that he was unaware of how a positive blood sample for the horse was returned. That evidence was at least consistent with his medical journal where the last entry for the horse was on 25 October 2010 for substances other than Flunixen.

12. At the inquiry the Appellant suggested that the horse was contaminated with Flunixen as it was sharing a box with a pony that was being treated with that drug. Dr Symons confirmed contamination as a reported possibility for such a positive result. Whatever the reason for the positive result, there was no evidence before the Stewards that there was a sinister administration of Flunixen given to the horse.

13. The Stewards in the inquiry informed the Appellant that for a "long time" there have been notices in the monthly Racing Calendar warning trainers about addressing the possibility of contamination. In the inquiry the Chairman of the Stewards stated the following as to the November 2018 notice (at pp 33 and 34 of the inquiry transcript):

> *'And it says "Possibility of Contamination: Trainers should be aware of the possibility of contamination of stables and feed by certain drugs and treatment regimes. Contamination of the stable area is most likely to occur with the administration of granules, powders or liquids/pastes mixed into feed. Oral treatments are often long term, may involve the use of larger amounts of drugs than with injectable treatments can be subject to spillage when they are added and mixed with feed and are likely to contaminate other feeds if appropriate precautions are not taken during preparation". I'll just interrupt myself to say obviously that's talking about oral treatments so that's not really all that relevant to your situation that you have spoken of, but it then it goes on "In addition environmental contamination can also result from "messy" eaters and the urine and manure from horses under treatment by any route of administration which can contain low levels of a drug." So that's probably a bit more pertinent to your scenario that you've put forward. "Trainers are advised that where possible a separate stable, preferably a dedicated medication stall, should be used for all treatments. Treated horses should be removed after the completion of treatment. All medications, particularly oral and topical should be administered by a responsible person and then stored securely. Medicated feed should be prepared separately to avoid the possibility of cross contamination or feed mix ups. Disposable gloves should be worn when adding and mixing drugs into feeds and if the person mixing the feeds is using any personal topical medications. Topical medications such as gels, pastes and creams may have the potential to accumulate in the hair or on the skin and act as a reservoir of the substance. Horses may also lick the treated area and ingest the substance. If a prohibited substance is detected in a sample, the possibility of recycling or environmental contamination does not absolve the trainer from their responsibilities under the Rules of Racing.'*

14. Upon informing the Appellant of that notice the Chairman of the Stewards commented "*I didn't get the impression that you were very strict at your stable in controlling when you're medicating your horses*". The Appellant in response stated (at p 34 of the inquiry transcript):

"Well, I'm fairly strict but I just never, you know thought that this contamination you know, in a horse, that would go on. I just wasn't aware really aware of that sort of thing."

15. In the final stage of the inquiry the Appellant made submissions regarding the penalty to be imposed on him. This included him confirming the Stewards understanding that he "would find it a bit difficult to pay a big fine" (at p 40 of the inquiry transcript).

The Stewards' decision and reasons on penalty

16. In a letter dated 17 January 2019, the Stewards informed the Appellant of their penalty for his breach of Rule AR178 of 18 months disqualification effective from that date and provided their reasons for doing so. The Stewards stated (at p 5 in their reasons) the following extensive record for the Appellant:

1. *"4 May 1984 - Fined $1000.00 under A.R.R. 177A for presenting MINT JULUP to race at Ascot on 7 April 1984 with Dexamethasone being detected in a post-race sample.*
2. *12 September 1988 - Disqualified for a period of three years under A.R.R. 175(h)(ii) for administering the prohibited substance Methylprednisolone to PRINCESS OF REMLAP, ICE ON FIRE (twice), and BEST TIME. The WATC Committee later reduced this penalty to a fine of $12,000.*
3. *16 March 1990 - Disqualified for a period of two years under A.R.R. 178 for presenting PAKLANI to race at Ascot on 26 December 1989 with Flunixen being detected in a post-race urine sample. Appeal was dismissed.*
4. *7 May 1993 Disqualified for three years under A.R.R. 175 (h) (ii) for administering Methylprednisolone to PALATIOUS prior to it winning at Ascot on 27 March 1993. Appeal dismissed. Subsequent appeal to Supreme Court saw matter referred back to RPAT which then directed the Stewards to re-hear the inquiry again. Original penalty re-imposed. Matter again appealed to the RPAT which upheld the appeal and quashed the conviction.*
5. *23 August 1996 - Disqualified for a period of 18 months under A.R.R 178 for presenting COUNT THE CASH to race at Belmont on 27 July 1996 with Isoxsuprine being detected in a post-race urine sample.*

6. *26 September 2000 - Disqualified for a total of 18 months and fined the sum of $6,000 under A.R.R 178 for presenting SURELY TRUE to race at Belmont on 5 August 2000 with Naproxen and Flunixen being detected in a post-race urine sample.*
7. *16 October 2000 - Disqualified for a period of two years under A.R.R. 178 for presenting PACKED WITH MAGIC to race at Belmont on 26 August 2000 with Flunixen being detected in a post-race sample."*

Grounds of Appeal

17. The Appellant filed a *Notice of Appeal* dated 30 January 2019 against the penalty the Stewards imposed on him for his breach of Rule AR178. The grounds of appeal for it were:

1. The Stewards erred by failing to give any or any significant weight to:

(a) the 18 year period of time since the Appellant's most recent conviction;
(b) the fact that two of the previous offences occurred more than 20 years ago; and
(c) the fact that two of the previous convictions occurred more than 30 years ago,

2. The Stewards erred by equating the Appellant's offending to that of:

(a) offenders dealt with for using prohibited stimulant drugs; and
(b) repeat offenders whose re-offending occurred relatively proximately to their new offences.

3. The Stewards erred in fact by categorising the offence as the Appellant's eighth conviction against the rules of racing when it was only his seventh.

4. The Stewards erred by imposing a penalty that was manifestly excessive in all the circumstances of the case having regard to:

(a) the Appellant's age;

(b) the Appellant's record since 2005;

(c) the non-stimulant nature of the substance and the low level at which it was detected; and

(d) the Appellant's guilty plea and co-operation.

18. On 8 March and 10 April 2019, the Appellant's appeal was heard before the Tribunal. Written and oral submissions were made by both parties to the appeal. On 28 May 2019, the Tribunal received a request from the Appellant's solicitor that the Tribunal not deliver its determination in the matter until it had the opportunity to make an assessment on enlarging the ambit of the appeal, possibly as to conviction as well as penalty. This request was based on concerns the Appellant's lawyers had as to the integrity of the testing of the samples from the horse, and they estimated that not more than a month was required for their assessment.

19. The above email request was first sent by the Appellant's solicitor on 15 May 2019 but inexplicably it was not then received by the Tribunal. In a letter dated 31 May 2019 the Stewards provided to the Tribunal and to the Appellant's lawyers their response to that request. On 5 June 2019, the Chairperson of the Tribunal gave the Appellant until 12 June 2019 to file any application to add fresh grounds of appeal. No such application was filed. On 08 July 2019 the Appellant's solicitor advised the Tribunal by email of his instructions that there no further application was sought in the appeal.

Errors of Principle

20. This Tribunal can set aside a penalty if the Stewards have made an error of principle. In my opinion they have made two such errors.

Appeal Ground 1

Appeal Ground 1 relied upon the "13 year gap" during which the Appellant did not breach the Rules. This period commenced in 2005 when the Appellant had his training licence re-instated by the Western Australian Turf Club (which was after his last two periods of disqualification totalling 3½ years ended on 26 March 2004) and ended with his *presentation* offence on 6 November 2018 (the breach of the Rules the subject of his appeal). In my view this 13 year gap over which the Appellant had a good record was a

relevant mitigating factor that was not taken into account by the Stewards when assessing the penalty to be imposed.

21. The Stewards in their reasons did refer to the Appellant's good record over that 13 year gap but only in the following context (at paragraph 16):

> *'Although it has been several years since you commenced training again without offences arising, it is difficult to ascribe this eighth offence under this rule to 'human frailty or misadventure" or unusual circumstance that would invite significant mitigation as applies to those persons who have unblemished records.'*

22. It is also evident that that the Stewards did not consider the Appellant's 13 year gap of blemish free training as a mitigating factor in their reasons when they later stated (at paragraph 18):

> *"The significant mitigations afforded for good records and first offenders clearly cannot apply in your case and the assessment of penalty we undertake must take into account that you are a multiple offender."*

Appeal Ground 2(b)

23. In their determination of the appropriate penalty to be imposed, the Stewards in their reasons provided the following list of "multiple presentation" offenders (at paragraph 19):

"GD Harper

- *26 November 1993-Disqualified for six months under AR 175 (h) (ii) on two accounts for presenting TOP VILLAIN to race in the 1993 Kalgoorlie Cup with an elevated level of TCO2 and for administering sodium bicarbonate to TOP VILLAIN. The penalties were ordered to be served concurrently. Racing Penalties Appeal Tribunal (RPAT) Appeal (14/3/94) Dismissed.*
- *16 November 1999 - Disqualified for twelve months under AR178 for presenting CORNER BLEAK to race at Belmont on 21 July 1999 with an elevated level of TCO2. Stay of proceedings granted by RPAT. Appeal to RPAT subsequently dismissed.*

- *17 February 2000 -Whilst on a Stay of Proceedings from CORNER BLEAK matter, disqualified for 18 months under ARI 78 for presenting CALABRATION to race at Pinjarra on 17 December 1999 with caffeine being detected in a post-race sample.*
- *14 July 2009- Disqualified for 5 years under Thoroughbred Rule AR178 for presenting FLYTHAGIA to race with an elevated level of TCO2. Appeal to RPAT (no. 710) dismissed.*

K Nolan

- *10 December 1999 - HRR 190 Suspended for 3 months in relation to presenting a horse not free of prohibited substances (TCO2).*
- *10 January 2005 - HRR 190 in relation to presenting SMART AS not free of prohibited substances (TCO2). Disqualified for 12 months. Appeal to RPAT dismissed.*
- *3 October 2008 - HRR 190 in relation to presenting OUR WHIMMAWAY not free of prohibited substances (TCO2). Disqualified for 6 months.*
- *22 March 2013 - HRR 190 in relation to presenting OUR UNIVERSAL RULER not free of prohibited substances (TCO2). Disqualified for 3 years.*

B McIntosh

- *13/911993 - Disqualified for 8-months in relation to presenting HOMESTEADER with an elevated TCO2.*
- *20/8/2008 - Disqualified for 8 months for presenting ZULUSHAR with an elevated TCO2*
- *20/02/2012 – Disqualified for 2 years for presenting OUTSTANDIN NZ with an elevated TCO2*

Mark Reed

- *28/9/01 - $5,000 fine for presenting a runner with an elevated TCO2*
- *25/10/2010 - Disqualified for 6 months for presenting a runner with an elevated TCO2*
- *27/10/2011 - Disqualified for 2 years for presenting a runner with an elevated TCO2"*

24. These examples show that subsequent offences, particularly the last one recorded, received substantially higher penalties of disqualification than that which was imposed for

the previous presentation offence. The greatest period of time that had lapsed over that period was 7½ years for GD Harper, with K Nolan next being 4 years, B McIntosh nearly 3 years and Mark Reed only 6 months. However, I am of the view that the Appellant's situation is markedly different to those cases in that he had a 13 years gap from when he was able to resume training before his fourth presentation offence for Flunixen. Given that time period, the Appellant was in a different category of offender to those other cases as there was a substantial period of time during which he had reformed his training ways and maintained a clean record. Accordingly, the Stewards erred in putting the Appellant in same category of offenders as those that it had identified. This error is confirmed by the Stewards in their reasons stating (at paragraph 28):

> *"Mindful of the differences in substance and those personal matters in relation to you and this case, we do not believe a penalty of duration like that of Mr Nolan or Mr Harper to be appropriate as they represent the top end of the range."*

25. Further confirmation of the categorisation error described above occurs when the Stewards, after analysing its list of multiple presentation offenders, state in their reasons (at paragraph 20):

> *"This reflects that the same level of mitigation cannot be afforded to repeat offenders as it is to those with unblemished or less extensive records."*

26. The Stewards in their reasons did state (at paragraph 22) that *"[T]he principles outlined in these past matters involving persons with similar, albeit less in number, repeat offences provide some guidance*". However, that was stated in the context from their statement that immediately followed of *"[i]t is clear that such persons do not attract the same mitigations that apply to those with unblemished or fewer such entries and as a result much higher penalties have resulted and been confirmed on appeal*".

27. The two errors identified above demonstrate that the Stewards in their reasons gave insufficient mitigation to the Appellant of his good record over the 13 year gap period leading up to his offence the subject of this appeal. Consequently, the Stewards failed in the exercise of their discretion when deciding the penalty to be imposed on the Appellant.

Appeal Ground 2(a)

28. In relation to Appeal Ground 2(a), the Stewards in their reasons made it plainly apparent that they were not equating the Appellant's latest offending to that of offenders using prohibited stimulant drugs.

Appeal Ground 3

29. In relation to Ground 3, while there may be an argument that the Stewards incorrectly totalled the number of the Appellant's prior presentation offences, they always knew what those offences were such that any error was of no significance.

Appeal Ground 4

30. Having identified express errors in this appeal it is not necessary to consider the merits of the implied error claimed in Appeal Ground 4.

The Appropriate Penalty

31. Having found that the Stewards erred as described above, I would allow the appeal against penalty and proceed to re-sentence the Appellant.

32. Determination of the appropriate type of penalty to be imposed depends on the circumstances of each particular case. While fines are and can be imposed in presentation cases involving the therapeutic substance Flunixen, the circumstances of the Appellant's breach of the *Rules* requires a period of disqualification for the reasons which follow.

33. Firstly, the presence of a therapeutic substance like Flunixen in a horse is indicative of a horse that was not fit to race without medicinal assistance. This raises welfare considerations not only for a horse that so races and its jockey, but for all the other participants in the same race. There can be the real potential for catastrophic consequences for all concerned when a horse races when the Rules prohibit it from doing so.

34. Second, although the Appellant's 13 year gap of a clean record is significantly mitigatory, his breaches of the *Rules* prior to the one the subject of this appeal cannot be altogether ignored. Given that his latest breach of the *Rules* was a fourth presentation offence for Flunixen, general and specific deterrence requires that he receive a period of disqualification for it. In that context I agree with the following statement by the Stewards in their reasons (at paragraph 16):

> *"It is a poor reflection of the racing industry when positive swabs arise, made worse when they occur by repeat offenders as it calls into question the industries (sic) commitment to maintaining its integrity and the confidence of those that support it."*

35. The appropriateness of considering the Appellant's entire record commencing in 1984 when determining the penalty to be imposed is confirmed by the following proposition. Had his training record from 1984 been an unblemished one, then the Appellant would have justifiably been entitled to greater mitigation for it.

36. Third, aggravating factors in this case are that a horse that was not free of a prohibited substance won its race and did so before one of the largest crowd days at Ascot Racecourse being Melbourne Cup Day 2018. In that context, there is no doubt as to the significant level of interest in the race notwithstanding that it was not a Group 1 race. Given that level of interest, the harm caused to the integrity of the racing industry in Western Australia would have at least been significant.

37. That harm includes the impact that a disqualification of a horse that finished first in a race has on the public that placed bets on the other horses in the race, with bets not being paid out correctly or at all. Analogous to the principle in Criminal Law where offenders are generally punished for the harm that they cause, the appropriate type of penalty for the harm resulting from the Appellant's latest presentation offence can only be disqualification.

38. Given all the factors in this case concerning the Appellant's offending behaviour but also taking into account his entire record which includes the good record he had over 13 years prior to committing his latest breach of the Rules, I am of the view that 12 months disqualification is the appropriate period of disqualification to be imposed.

39. This penalty takes into account the factors personal to the Appellant. These factors are: the Appellant's plea of *Guilty*, although that was almost inevitable given all the circumstances of the offence in combination with Rule AR178 being an offence of absolute liability; the remorse demonstrated by that plea and by the Appellant in the inquiry; his co-operation in the Stewards' inquiry; that there is a crushing aspect to a long period of disqualification being imposed on the Appellant given his age of 77 years although now less so when compared to the Stewards' initial penalty of 18 months disqualification; that the Appellant will suffer financial hardship from a period of disqualification as training of his small stable of horses is his livelihood (at the inquiry the Appellant advised that he had two in work), but this is qualified by there almost always being a financial loss for anyone required to serve such a penalty.

40. In arriving at the view that disqualification for a period of 12 months is the appropriate penalty, I am given some guidance from three disqualification penalties for Flunixen presentation imposed by stewards that the Stewards referred to in the inquiry being: greyhound trainer Robert Catanzaro who in March 2005 after pleading *Guilty* received 6 months for his first offence; horse trainer Graeme Webster who in May 2005 received 5 months for his third Flunixen offence within 8 years; and greyhound trainer Peter Glenny who in June 2005 received 6 months for his first offence where Flunixen and Procaine were involved.

Conclusion

41. For these reasons, I would uphold the appeal and disqualify the Appellant for 12 months.

A E Monisse **ANDREW MONISSE, MEMBER**

APPEAL NO. 823

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS K FARLEY SC (CHAIRPERSON)

APPELLANT: FRANK MAYNARD

APPLICATION NO: A30/08/823

PANEL: MS K FARLEY SC (CHAIRPERSON)
MR R NASH (MEMBER)
MR A E MONISSE (MEMBER)

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Mr TF Percy QC instructed by Ms Josephine Byrne of Equitas Lawyers represented Mr Maynard.

Mr RJ Davies QC represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr A E Monisse, Member.

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

Kare Farley

KAREN FARLEY SC, CHAIRPERSON

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

APPEAL NO. 823

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANT: FRANK MAYNARD

APPLICATION NO: A30/08/823

PANEL: MS K FARLEY SC (CHAIRPERSON)
MR R NASH (MEMBER)
MR A E MONISSE (MEMBER)

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I have read the draft reasons of Mr A E Monisse, Member.

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

ROBERT NASH, MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA