NORTHERN TERRITORY RACING APPEALS TRIBUNAL

DATE: 22 February 2013

MEMBERS: Chairman: Mr John Birch SM

Deputy Chairman: Mr Geoffrey Clift

Member: Mr James De-Belin

APPELLANT: Mr Neil Dyer

APPEARANCES: Mr Peter McMillan for the Appellant and Mr David De Silva for the Stewards

HEARING DATE: 26 and 27 March 2012 and 14 January 2013

IN THE MATTER OF: An appeal by Neil Dyer from the Stewards of Thoroughbred Racing Northern Territory against the finding of guilt made in connection of the charge made against him under AR 175 (h) (ii) and the penalty imposed in respect of a charge made against him under AR 175 (h) (ii) of a fine of $5,000 and against the finding that a prohibited substance had been detected in a sample taken from "Palmyra Boy" following the running of the TTF Food Chief Minister's Cup at Fannie Bay Racecourse on 9 July 2011 and against the disqualification of "Palmyra Boy" as the winner of the TTF Food Chief Minister's Cup run at Fannie Bay Racecourse on 9 July 2011.

DECISION: The Appeal is dismissed.

REASONS FOR DECISION

The appellant appeared before an Inquiry conducted by the Stewards of Thoroughbred Racing Northern Territory (the "Stewards") at Fannie Bay Racecourse on 27 September 2011 and 7 November 2011 (the "Inquiry"). At the conclusion of the Inquiry on 7 November 2011 the appellant was charged by the Stewards with one breach of Australian Rules of Racing ("AR") Rule 175 (h) (ii). The particulars of the charge were that the appellant "as the Trainer of Palmyra Boy which ran in and won the Chief Ministers Cup at Fannie Bay on 9 July you administered a prohibited substance to that gelding which was detected in a sample taken from it subsequent to the above race." (the "Charge") The appellant entered a plea of not guilty to the Charge. The Stewards, on 7 November 2011, found the appellant guilty of the Charge and imposed a penalty of a fine of $5,000.00 (the "Finding of Guilt" and the "Penalty"). The Stewards also on 7 November 2011 disqualified Palmyra Boy from the TTF

Food Chief Minister's Cup run at Fannie Bay racecourse on 9 July 2011, pursuant to AR Rule 177 (the "Disqualification").

The appellant instituted an appeal to this Tribunal pursuant to section 145D of the Racing and Betting Act (the "Act") by lodgement of a notice of appeal dated 11 November 2011 (the "Appeal"). The Appeal was against the Finding of Guilt, the Penalty and the Disqualification.

The Appeal was heard by the Tribunal as constituted by the Chairman, the Deputy Chairman and Member Mr De-Belin on 26 and 27 March 2012. On 27 March 2012 the Tribunal reserved its decision as to the matters argued before it on those dates. The Tribunal, as constituted by the Deputy Chairman and Member De-Belin, the Chairman having post 27 March 2012 resigned from the Tribunal, now publishes its reasons for decision in connection with those matters. The appellant later made application to the Tribunal to ventilate a ground of appeal contained within the notice of appeal but not ventilated on 26 and 27 March 2012, namely "that the penalty imposed by the Stewards arising out of its finding was manifestly excessive". That application was granted by the Tribunal, constituted by the Deputy Chairman and Member De-Belin, on 19 December 2012. That ground of appeal was heard by the Tribunal, as constituted by the Deputy Chairman and Member De-Belin, on 14 January 2013. On 14 January 2013 the Tribunal reserved its decision in connection with that ground of appeal. The Tribunal, as constituted by the Deputy Chairman and Member De-Belin, now publishes its reasons for decision in connection with that ground of appeal.

BACKGROUND TO THE APPEAL

AR Rule 175 (h) (ii) is in the following terms:

"The Committee of any Club or the Stewards may penalise:

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

(ii) which is detected in any sample taken from such horse prior to or following the running of any race."

AR Rule 1 defines the following:

""Stewards" means the persons appointed as such in accordance with the Local Rules of a Principal Racing Authority and includes the Deputy Stewards duly appointed."

"The expression "Principal Racing Authority" means:

(a) A body, statutory or otherwise, that has the control and general supervision of racing within a State or Territory (provided any Member thereof is not a direct Government appointee) and means...in the Northern Territory, Thoroughbred Racing NT..."

""Prohibited Substance" means a substance declared by these Rules to be a prohibited substance, or which falls within any of the groups of substances declared by these Rules to be prohibited substances unless it is specifically excepted."

""Race" includes each division of a divided race."

"" Sample" means a specimen of saliva, urine, perspiration, breath, blood, tissue, hair, or any other excretion product or body fluid taken from a horse or person."

""Trainer" means a person licensed or granted a permit by a Principal Racing Authority to train horses, and includes any persons licensed to train as a training partnership."

"Official Racing Laboratory" means an analytical racing laboratory that is accredited by the National Association of Testing Authorities or by a similar authority in an overseas country, and is approved by the Australian Racing Board and published in the Racing Calendar."

A note appears below the definition of "Official Racing Laboratory" indicating that, inter alia, the "Australian Racing Forensic Laboratory, Sydney" and the "Queensland Government Racing Science Centre Brisbane" "have been approved by the Australian Racing Board".

AR Rule 178B is in, relevantly, the following terms:

"The following substances are declared as prohibited substances:

(1) Substances capable at any time of acting directly or indirectly on one or more of the following mammalian body systems:

the central and/or peripheral nervous systems

the cardiovascular system

the respiratory system

the alimentary digestive system

the musculo-skeletal system

the uro-genital system

the endocrine system

(2) Substances falling within the following categories of substances-

....

adrenergic stimulants

anabolic agents

hormones (including trophic hormones) and their synthetic counterparts...

(3) Metabolites, artifacts and isomers of the prohibited substance prescribed by subrules (1) and (2) of this rule."

AR Rule 178C is in, relevantly, the following terms:

"(1) The following prohibited substances when present at or below the concentrations respectively set out are excepted from the provisions of AR 178B-

(g) Testosterone (including both free testosterone and testosterone liberated from its conjugates):

(i) in geldings: at a mass concentration of 20 micrograms per litre in urine;"

AR Rule 178D is in the following terms:

"(1) Samples taken from horses in pursuance of the powers conferred on the stewards by AR 8(j) shall be analysed by only an official racing laboratory.

(2) Upon the detection by an official racing laboratory of a prohibited substance in a sample taken from a horse such laboratory shall-

(a) notify its finding to the stewards, who shall thereupon notify the trainer of the horse of such finding; and

(b) nominate another official racing laboratory and refer to it the reserve portion of the same sample and, except in the case of a blood sample, the control of the same sample, together with advice as to the identity of the prohibited substance detected.

(3) In the event of the other official racing laboratory detecting the same prohibited substance, or metabolites, isomers or artifacts of the same prohibited substance, in the referred reserve portion of the sample and not in the referred portion of the control, the certified findings of both official racing laboratories shall be prima facie evidence upon which the stewards may find that a prohibited substance had been administered to the horse from which it was taken."

AR Rule 177 is in the following terms:

"Any horse that has been brought to a racecourse and a prohibited substance is detected in any sample taken from it prior to or following its running in any race must be disqualified from any race in which it started on that day."

The appellant is a licensed trainer and is therefore a "Trainer". He was at all material times the Trainer of, and managing part owner of, a gelding known as Palmyra Boy. On 9 July 2011, Palmyra Boy contested the TTF Food Chief Minister's Cup run at Fannie Bay Racecourse Darwin (the "Racecourse"). Palmyra Boy won that race.

The appellant, relevantly, administered a product known as "Ropel" to Palmyra Boy on 11 June 2011, 18 June 2011 and 25 June 2011. "Ropel" has as an active constituent testosterone enanthate. The Ropel in question was prescribed to the appellant by a veterinary surgeon Dr Brown ("Brown"). It was in liquid form and was administered by injection.

After the race, a sample of urine was taken from Palmyra Boy at the Racecourse. The sample of urine as collected was placed in sample containers and a Sample Identity Card was created in respect thereto bearing the identification number "N101186" (collectively the "Sample").Paperwork in connection with the Sample was completed by the Swabbing Attendant and countersigned by the strapper of Palmyra Boy. The Sample was then placed in a refrigerator in the swabbing room at the Racecourse, which room was kept locked when not in use. Later that day the Swabbing Attendant removed the Sample from the refrigerator in the swabbing room and placed it into a Racing Industry Security Satchel bearing identification number "N101186"which was then sealed. The Sample in the Satchel was then transferred by the Swabbing Attendant to a locked refrigerator in the Stewards room at the Racecourse. That room was also locked when not in use.

Mr Lane, the Northern Territory Chairman of the Stewards ("Lane"), on either 10 July 2011 or 11 July 2011, collected the Sample from the locked refrigerator in the locked Stewards room. The Sample was at this time in a Racing Industry Security Satchel bearing identification number "N101186". The Sample, contained in the Security Satchel, was then personally transported by Lane in his airconditioned motor vehicle from the Racecourse to Darwin Airport. Lane then delivered the Sample to the office of Australian Air Express situated at the Airport. The Sample within the Security Satchel was marked as a "chiller item" and was addressed for delivery to the Australian Forensic Racing Laboratory in Sydney ("ARFL").The Sample was then subsequently delivered by air to Sydney and was ultimately delivered to ARFL in Sydney. The Sample was kept chilled in transit.

ARFL is accredited by the National Association of Testing Authorities ("NATA"). The Sample was received at ARFL on 11 July 2011.

Work began at ARFL in connection with the Sample on 12 July 2011. The Sample itself was divided into two (the "A Sample" and the "B Sample") .ARFL retained the B Sample and did no testing in connection with it. ARFL tested the A Sample. Testing was done in three stages.

The first stage commenced on 12 July 2011. The pH value of the A Sample was ascertained, on or about 12 July 2011, as being 7.7.The first stage involved the combination of the A Sample with 2 other urine samples taken from other horses and sent to ARFL for analysis. The 3 combined samples were analysed as one for the presence of various substances. Relevantly, these combined samples indicated an elevated level of testosterone of 27.6 micrograms of testosterone per litre of urine. This result was recorded on 19 July 2011. No measurement of uncertainty was applied to the recorded level of testosterone. This elevated level of testosterone prompted ARFL to further test the A Sample.

The second stage of testing involved the analysis of the A Sample alone for the presence, inter alia, of testosterone. This took place on 2 August 2011. Upon this analysis a mass concentration of 24.47 micrograms of testosterone per litre of urine was detected. No measurement of uncertainty was applied to the recorded level of testosterone. This elevated level of testosterone prompted ARFL to further test the A Sample.

The third stage of testing took place later in August 2011.It involved the analysis of the A Sample alone for the presence, inter alia, of testosterone. Upon this analysis a mass concentration of between 25 and 26 micrograms of testosterone per litre of urine was detected. This figure was rounded down to 25 micrograms of testosterone per litre of urine. A measurement of uncertainty of minus 4 micrograms of testosterone per litre of urine was applied yielding a final analysis of a mass concentration of 21 micrograms of testosterone per litre of urine in the A Sample.

ARFL, on 15 August 2011, issued certificate number ARF 11/1683-C in connection with the third stage of testing of the A Sample (the "ARFL Certificate"). The ARFL Certificate was dated 15 August 2011 and was signed by the General Manager of ARFL, Mr John Keledjian ("Keledjian") and by the Quality manager of ARFL, Mr Cary Murphy ("Murphy"). The ARFL Certificate recorded that the Sample arrived at ARFL on 11 July 2011 and that the seals pertaining to the Sample were found, upon the arrival of the Sample at ARFL, to be intact.

The ARFL Certificate was, in part, in the following terms:

"I hereby certify that sample number N101186 was found to contain the prohibited substance testosterone confirmed at a concentration in urine of 25 micrograms per litre.

The measurement of uncertainty is four micrograms per litre at the threshold concentration of 20 micrograms per litre with a 99.7 per cent level of confidence.

No other prohibited substances were detected in the sample which was analysed by methods MOA.004, MOA.006, MOA.012, MOA.015, MOA.018, MOA.025, MOA.027, CMOA.114 and CMOA.115."

The B Sample was sent by Keledjian to the Queensland Racing Science Centre ("QRSC") together with a request that it be analysed for the presence and concentration of

testosterone. The B Sample was sent on 15 August 2011 and was received by QRSC on 16 August 2011. QRSC is accredited by NATA.

The B Sample was subsequently tested by QRSC. Upon completion of that testing QRSC issued certificate number 34158R dated 1 September 2011 signed by the Manager of Analytical Services of QRSC, Mr Mark Jarrett (the "QRSC Certificate" and "Jarrett"). The QRSC Certificate was, in part, in the following terms:

"Status of the sample- the sample was analysed as received. Seals were intact

Sample information- the number N 101186, Lab number 12-021143, date received 16 August 2011, and the type urine and control

Place of analysis – Racing Science Centre Hamilton

Date of analysis- the sample was analysed between the 16th of August and 1st of September

Method of analysis- Lab Chemical Analysis Manual section 26

Result of analysis- the urine sample was shown to contain testosterone, including both free testosterone and testosterone liberated from its conjugates, at a mass concentration of 31 micrograms per litre. A measurement of uncertainty of plus or minus four micrograms per litre at greater than or equal to 99.7 per cent level of confidence applies at the threshold level. Testosterone was not detected in the associated control solution."

Applying a measurement of uncertainty of minus four micrograms per litre, the testing at QRSC resulted in the detection in the B Sample of a mass concentration of testosterone of 27 micrograms per litre of urine.

Upon receipt of the ARFL Certificate and the QRSC Certificate the Stewards determined to conduct the Inquiry. The appellant engaged Mr Peter McMillan as his representative in connection with the Inquiry.

By letter dated 12 September 2011, Mr McMillan requested that the Stewards provide, inter alia, "copies of all analytical data, reports and images pertaining to the analysis of each portion of the sample". Lane responded by letter dated 15 September 2011 stating that "We have been advised by the respective analytical laboratories that they are not in a position to provide all analytical data, reports and images pertaining to the analysis of each portion of the sample. That said if you wish to conduct a peer- review of the analytical data from the ARFL by a suitably qualified professional analyst that could be arranged. The conditions of such a review would be that the said analyst must be accompanied by an independent representative of NATA and it would be conducted at the ARFL laboratory." Mr McMillan responded to Lane's letter by letter dated 21 September 2011 advising Lane that the appellant did wish to conduct a peer review upon the conditions outlined in the letter and

nominated Mr Steven Korkoneas, an Analytical Chemist ("Korkoneas") as the analyst to conduct the peer review.

The Inquiry commenced on 27 September 2011.

Oral evidence was taken from the appellant, Dr Adam Cawley the Science Manager of ARFL ("Cawley"), Murphy, Jarrett and Brown. The appellant was given the opportunity to ask questions of each witness. A transcript of a telephone conversation between the appellant and Mr Kane Ashby a Steward ("Ashby") conducted on 24 August 2011 was read into evidence as was a statement of Mr Craig Atkinson a licensed Jockey ("Atkinson"). Ashby conducted an inspection of the appellant's stables in Victoria on that day and took photographs of, inter alia, one bottle containing Ropel and two bottles containing a testosterone based product named "Testoprop". Those photographs were tendered in the Inquiry. The Inquiry was then adjourned. The adjournment was granted by the Stewards to allow time for Korkoneas to conduct a review of the testing undertaken at ARFL and to produce a report in connection with that review.

Korkonoeas conducted a review of the testing of the A Sample at ARFL on 17 October2011 (the "Peer Review"). Korkoneas met with a representative of NATA, Dr Graham Tout ("Tout"), and Keledjian and Murphy whilst conducting the Peer Review. Korkoneas subsequently produced a report in connection with the Peer Review dated 19 October 2011. He later produced a supplementary report dated 4 November 2011.

The appellant sought, via a letter from Mr McMillan to Lane dated 21 October 2011, inter alia, the opportunity, upon resumption of the Inquiry, to question not only Murphy and Keledjian but also "each and every analyst/s who undertook work [at ARFL] around this sample."

The appellant sought, via a letter from Mr McMillan to Lane dated 25 October 2011, inter alia, "a written copy or copies of the laboratory's [ARFL's] policy/s around screening as it applied at all relevant times, specifically with regard to testosterone."

By letter dated 27 October 2011 from Mr McMillan to Lane, the appellant reiterated his request to question all analysts at ARFL who worked on the A Sample and reiterated his request for copies of ARFL's policies. Further, the appellant sought "copies of the chain of custody documentation relative to this sample and on Sunday (at the reconvened Inquiry) to question individual/s or officials who participated in collecting, securing and preparing the sample for transport to Sydney." The requests in connection with the chain of custody issue were reiterated, as were the request for copies of ARFL's policies, in a letter from McMillan to Lane dated 2 November 2011.

By letter dated 3 November 2011 L ane responded to the letter from Mr McMillan dated 2 November 2011. The letter stated, inter alia, as follows:

"The request for the ARFL policy/s has been forwarded to Mr John Keledjian (General Manager). Mr Keledjian has advised that he will provide a report prior to the commencement of the inquiry on the 7 November."

"In respect of the availability of each and every analyst involved in the analysis of N101186 for questioning, Mr Keledjian and Mr Murphy the Quality Control Manager will be available. They have advised that they are confident they can provide all necessary information. If that proves not to be the case we will consider an application to question further witnesses."

The Inquiry resumed on 7 November 2011.

A report from Keledjian addressed to Lane dated 3 November 2011 was read into evidence.

A letter from the Chief Executive of Racing New South Wales to Lane dated 3 November 2011 was read into evidence. In that letter the Chief Executive Officer declined to provide copies of "the policies and protocols" of ARFL upon the basis that such policies and protocols were "confidential and commercial in confidence" and also upon the basis that there was no "precedent or proper basis" for the provision of the same.

A report from Tout addressed to Lane dated 28 October 2011 was read into evidence.

Ms Christine Clarke, the Swabbing Attendant of Thoroughbred Racing NT ("Clarke"), gave oral evidence. A written statement prepared by Clarke and dated 11 October 2011 was read into evidence. Clarke was questioned by Mr McMillan. It was Clarke who collected the Sample.

The appellant tendered an article appearing in the journal "Analytical Biochemistry" titled "Stabilization of human urine doping control samples. II. Microbial degradation of steroids". The article was first published on 14 February 2009 and was co-authored by, inter alia, Dr Maria Tsivou (the "Article" and "Tsivou").Tsivou gave oral evidence in connection with the Article.

The appellant also tendered an article appearing in the journal "The Lancet" titled "Microbial production of testosterone". The article was published on 6 May 1995 and was authored by "RF Bilton" (the "Second Article").

Keledjian and Cawley gave oral evidence. Mr McMillan was afforded the opportunity of questioning them. The analysts at ARFL who in fact conducted the actual tests involved in all 3 stages of testing did not give evidence.

The supplementary report provided by Korkoneas and dated 4 November 2011 was read into evidence. Korkoneas gave oral evidence.

Oral evidence was given by Lane as to usual procedures adopted in connection with the storage of samples at the Racecourse and transportation of the same from the Racecourse to Darwin Airport and procedures adopted at the Airport. Lane also gave oral evidence as

regards the absence of "chain of custody" documentation pertaining to those usual procedures.

The Inquiry concluded on 7 November 2011.

Mr McMillan addressed the Stewards at the conclusion of the Inquiry.

He submitted that the principles enunciated in Briginshaw v Briginshaw (1938) 60 CLR 336 should be applied by the Stewards in assessing the evidence given at the Inquiry in the context of the Stewards accepting the ARFL Certificate and the QRSC Certificate as sufficient proof that Palmyra Boy had a mass concentration in excess of 20 micrograms of testosterone per litre of urine at the time the Sample was collected. He submitted that those principles required the Stewards to be "comfortably satisfied" on the evidence that any charge laid is proven.

Mr McMillan further submitted that the level of the testing at the first stage at ARFL and the different levels contained in the ARFL and QRSC Certificates led to two matters of importance in the context of acceptance by the Stewards of either Certificate as prima facie proof of the presence of testosterone in the urine of Palmyra Boy at the mass concentrations indicated therein. He described those two matters as being:

"(a) the first test result would, in accordance with normal analytical laboratory practice, have ended the process because the detection of such a level would have been treated as not justifying further testing and (b) over a period of several weeks, the detected adjusted levels have gone from 20 to 31 – that's applying the plus or minus four to the 24.47 – up to 31, ie an increase in the level of some approximately 50 per cent."

That submission was developed. Mr McMillan pointed to the testing at ARFL and QRSC as resulting in "progressively elevated" levels. It was further submitted that the fact that the appellant had administered testosterone based products to horses under his care and control as a trainer, including Palmyra Boy, over an extended period without the threshold level having been exceeded upon testing "on a great many occasions in several jurisdictions", and the fact that "the alleged breach of the permitted level of testosterone is so small", should lead the Stewards to "the comfortable conclusion that something must have gone wrong in either the collection or testing process". Bacterial contamination of the Sample was put forward as the "explanation for the increased levels detected in the testing". The time and source or cause of the bacterial contamination was identified as being the point of collection of the Sample from Palmyra Boy by Clarke and her failure to wear "the required protective gloves when collecting and dealing with the urine sample". It was said that "the reason for this requirement is obviously enough in order to prevent contamination of the sample". As regards what may have gone "wrong" "in the ..testing process" no specific fact or matter was identified. It was suggested, on the basis of the

evidence of Korkoneas as regards his difficulties in obtaining data during the course of the Peer Review, that "it was almost as if the analysts of ARFL had something to hide".

Mr McMillan complained that refusal by the Stewards "to permit cross examination of the analysts involved in the testing process" constituted "a basic infringement of the principles of natural justice".

The Stewards, at the conclusion of Mr McMillan's submissions, stated as follows:

"Mr Dyer and Mr McMillan, the Stewards have considered all the evidence before us and the Stewards are satisfied with the analytical reports as provided, the certified findings, and therefore that there is prima facie evidence that a prohibited substance has been detected in the sample N101186."

The Stewards invited the appellant to make submissions as regards the application of AR Rules 177 and 178F. Mr McMillan and the appellant made further submissions.

After consideration of those further submissions, the Stewards stated as follows:

"Mr Dyer and Mr McMillan, as I said previously, the Stewards, having accepted the analyst's findings, also accept therefore that Palmyra Boy was in breach of 178C...".

The Stewards then imposed the Disqualification.

The Stewards then, on 7 November 2011, laid the Charge, to which the appellant pleaded not guilty. Mr McMillan further addressed the Stewards and in doing so stressed the evidence of Tsivou as regards bacterial contamination of urine samples and testing for testosterone. He also stressed that Tsivou was the only "microbiologist" that had given evidence at the Inquiry. He again submitted, in effect, that the Stewards should not be satisfied that the Charge was proven on the evidence given at the Inquiry.

The Stewards proceeded to find the appellant guilty in respect of the Charge, stating as follows:

"Mr Dyer, the Stewards have given consideration to it, and we find you guilty as charged."

The Stewards then invited submissions as to penalty. Submissions were received and considered. The Stewards then proceeded to impose the Penalty.

On 7 February 2012 McMillan forwarded a letter to Keledjian stating, inter alia, as follows:

"We have been led to understand the Australian Racing Forensic Laboratory has recently conducted research related activity around the analysis of equine urine for testosterone which was the subject (of course) of Mr Dyer's Inquiry and eventual sanction.

Accordingly, we would most grateful for;

1. Confirmation of the existence of the research works by your laboratory;
2. The date on which the activity commenced and concluded (if indeed our understanding is accurate);
3. The scope and nature of the research project; and
4. Advice as to the preliminary findings around these works?"

That letter was responded to by Mr R P Murrihy, Chairman of Stewards of Racing NSW ("Murrihy"). In a letter dated 10 February 2012, Murrihy advised as follows:

"With respect to the queries you raise in your letter of the 7th February 2012, Racing NSW responds by confirming that a study involving the collection of urine samples on race day for testing for testosterone and other steroids was commenced in late 2011. The study is ongoing." (the "Testosterone Study")

The appellant, via a letter from Mr McMillan addressed to the Tribunal and dated 14 February 2012, made the Tribunal aware of the Testosterone Study. A copy of that letter was made available to the Stewards. A letter was subsequently received by the Tribunal from Messrs De Silva Hebron, solicitors for the Stewards, dated 29 February 2012. The Tribunal was advised, inter alia, as follows:

"For the record, and without derogating from the above comments, the Stewards were not aware of the Study at the time of their Inquiry. Subsequent inquiries made of Racing NSW by the Stewards have produced little information other than:

(a) The study does not in any way touch upon matters in issue in the Appeal currently before the Tribunal; and
(b) The Appellant's advisor, Mr McMillan, has been informed of the contents of subparagraph (a) above.

The Stewards continue to make inquiries in respect of the Study. Should any further relevant information emerge from those inquiries the Stewards will make that information available to both the Tribunal and the Appellant."

The Stewards made further inquiries of Racing NSW in connection with the Testosterone Study. A letter was subsequently sent by solicitors for the Stewards addressed to the Tribunal and dated 5 March 2012.The letter was in, inter alia, the following terms:

"I refer to our letter dated 29 February 2012.

Last Friday, myself and the Chairman of the Thoroughbred Racing NT Stewards, Mr Lane, conducted a telephone conference with Mr Ray Murrihy the Chairman of Stewards NSW Racing.

Earlier, Mr Lane had forwarded a copy of Mr McMillan's letter dated 14 February 2012 (the "Letter") to Mr Murrihy to enable him to understand the issues we wished to raise and discuss with him. During our conference Mr Murrihy informed us of the following:

(a) That a research study is being conducted by the Racing NSW Stewards not the Australian Forensic Laboratory as stated in the Letter;
(b) The Australian Racing Forensic Laboratory together with other laboratories in the UK and Hong Kong are being utilised by Racing NSW Stewards to conduct some of the testing;
(c) That his correspondence to Mr McMillan (enclosed with the Letter) dated 10 February 2012 was vague because conclusions of any kind have not been made and the study itself is being conducted confidentially;
(d) The study is being undertaken to allow an understanding of a series of elevated testosterone levels found in horses in NSW and in parts of Queensland. Please note Mr Murrihy was at pains to advise these elevated testosterone levels did not necessarily indicate that the testosterone levels in the horses exceeded the accepted levels for racing;
(e) Samples have been taken from horses which Mr Murrihy believes to be drug free. In this respect in so far as is possible the samples have been taken form horses which have not had veterinary treatment. The Stewards have endeavoured to ensure from these investigations that there was no evidence of drug administration to the subject horses. The medicine cabinets together with the treatment records of the horses were checked prior to the samples being taken;
(f) No conclusions have been made of any kind in respect of preliminary results received and Mr Murrihy does not anticipate being in a position to draw conclusions for some time;
(g) The study is in no way directed to the issues raised by the Appellant in the current Appeal namely the methodology surrounding the analysis of urine samples taken from the horse Palmyra Boy including collection and transportation of the samples for testing. Mr Murrihy stated that the study being conducted by the Stewards in NSW differs from the case the subject of the Appeal because the subject horses sampled in the study were not treated with steroids while Palmyra Boy was so treated. This fact has been admitted by the Appellant;
(h) Mr Murrihy informed us that he was contacted by the Appellant's representative Mr McMillan who explained to Mr Murrihy the details of the case involving Palmyra Boy;
(i) After hearing Mr McMillan's explanation Mr Murrihy said he informed Mr McMillan, a former colleague, in words to the effect: "Peter you are wasting your time. Our study cannot be of any help to you as we are not dealing with any of the circumstances in your case. If a person is trying to dose his horse to a certain level he is on his own." Mr Murrihy also said he told Mr McMillan that pursuing the study

being conducted by the Stewards of Racing NSW could not be of any assistance to him."

A copy of the letter of 5 March 2012 was provided to the appellant. Mr McMillan subsequently wrote to Murrihy. In a letter dated 20 March 2012, Mr McMillan summarised the contents of that letter and posed the following to Murrihy:

"Assuming we have correctly understood and summarised the key points, we seek (please) your most urgent reply to the following queries:

1. When precisely it was that staff of ARFL initially communicated with the Racing NSW Stewards as to concerns around testosterone levels in horses racing and sampled in NSW?
2. When was it that the analysis of samples subject of the study commenced at laboratories in the UK and Hong Kong and for what reasons?
3. Can you confirm that conclusions of any kind have not been made, that the study is being conducted confidentially and the reasons (specifically) why that is the case?
4. The number of horses and samples involved in NSW and Queensland and without disclosing the identity of the trainers of those horses, the specific levels reported by each of the laboratories involved?
5. The specific controls applied by the Stewards in ensuring the integrity of the subject samples pre-collection?
6. The accuracy of the assertion of De Silva Hebron, (following the telephone conference with you) that no conclusions have been made and that it will be some time before that is the case?
7. The specific security methodologies applied in guaranteeing subject horses sampled in the study were not treated with steroids at any time in the period prior to collection and analysis?
8. The accuracy of and your comments on the assertion of De Silva Hebron, (following its telephone conference with you) that the sample obtained from Mr Dyer's horse differs "because the subject horses sampled in the study were not treated with steroids"?"

In the letter, Mr McMillan continued as follows:

"As you may be aware, this Appeal is scheduled for Monday 26 March 2012.

Accordingly, we look forward to your reply to each of the above at your earliest convenience and would respectfully seek to ask that you be available for the purpose of giving telephone evidence on that date?

Other than for the purpose of Mr Dyer's appeal, we hereby undertake to maintain the confidentiality of your response."

Murrihy had not responded to that letter as at the time of the hearing of the Appeal on 26 and 27 March 2012.

Mr McMillan wrote to the Tribunal on 5 October 2012 by e-mail enclosing a copy of an article said by him to have been published in the "ATA Journal" and drawing the Tribunal's attention to recent amendments to the AR.

The copy article stated as follows:

"During the later part of 2011 Racing NSW conducted a widespread population study of over 200 geldings for the purpose of examining pre-race urinary testosterone concentrations involving geldings and in particular those that travelled long distances to race meetings. The study identified a significant number of elevated levels in pre and post raceday samples which were the subject then of a concentrated follow up program involving a testing regime of the individual horses.

That study identified possible multi-factorial causations in elevated testosterone concentrations in geldings other than synthetic administrations of testosterone or its precursors, or pharmaceutical stimulations of the adrenal gland. These factors causing elevated endogenous production of testosterone include excitation caused by transport, genetic predisposition for adrenal gland function, water deprivation and feed micro nutrients.

The results of the study have been the subject of peer review by international experts in the analytical science field and has led to the Australian Racing Board (ARB) introducing new rules of racing AR 177C, AR 178G, AR 200A. In essence the amendments now allow for the breaching of the current testosterone threshold in geldings (20 mg/l) to be viewed as a cause for Investigation rather than a prima facie breach of the prohibited substance rules.

Stewards are therefore provided with the discretion to consider all relevant scientific and analytical evidence available to them in reaching satisfaction to the relevant standard of proof, as to whether or not the detected elevated level of testosterone (above 20 mg/l) in the sample was naturally produced by the horse. The amendment however does not allow for the raising of evidence that a prohibited substance was not administered as being grounds to enact the Stewards' discretion under these new rules.

Analytical experts by examining a range of additional steroid markers will provide this necessary advice to Stewards following a report of an elevated level of testosterone in a gelding's sample and the ARB has commissioned additional research to further validate this approach.

Stewards however remain mindful that pharmaceutical testosterone is a potent agent with the potential to boost performance."

A copy of the e-mail and the copy article was forwarded by the Tribunal to the Stewards. Upon receipt of the e-mail and copy article, solicitors for the Stewards wrote to the Tribunal by letter dated 21 November 2012. That letter was in the following terms:

"We refer to the email you have sent to us on the direction of the Deputy Chairman which email enclosed an article published in the Australian Trainers Association Journal related to a study conducted in New South Wales into levels of testosterone detected in geldings ("the ATA article").

Your email does not indicate as to whether the Deputy Chairman will be referring to the ATA article when considering the grounds of appeal and as a result we submit that in the event that it will be taken into consideration there is a need for the Tribunal to reconvene the appeal to take submissions on this issue.

For the record, the position of the Stewards is that the ATA article is not sufficient material for the Tribunal to be guided by. In the event the Tribunal sees the need to consider this issue to assist in deciding the outcome of the appeal the complete study conducted by NSW Racing Stewards ought to be considered by the Tribunal. It is the Stewards' considered view that when examined in full, the study is not (and cannot be) of assistance to the Appellant in his case.

Some of the submissions we would raise if the study (or the ATA article) are to be taken into consideration by the Tribunal are:

1. The study was directed to the testing of testosterone levels in geldings "and in particular those that travel long distances to race meetings". It is the Stewards' understanding that the study considered geldings which travelled long distances to race meetings on the day of the races. In the appeal currently before the Tribunal, the horse Palmyra Boy was stabled at Fannie Bay. It did not travel any distance on the day of the race as it had been stabled in Darwin for at least four (4) weeks prior to the Chief Minister's Cup and had raced two (2) weeks prior to that race without returning elevated testosterone levels.
2. The outcome of the New South Wales study resulted in an amendment to the Rules of Racing whereby stewards are given a discretion not to consider the detection of the testosterone above the permitted levels as being a breach of the rules where it can be proven that the presence of the testosterone had not occurred by the administration of a pharmaceutical testosterone. In the present case, Mr Dyer admitted to the administration of pharmaceutical testosterone prior to the racing of the horse thereby clearly distinguishing the elevated readings in his horse from the findings derived from the NSW study. We note the last sentence of the extract of the ATA article reminds that "stewards however remain mindful that pharmaceutical testosterone is a potent anabolic agent with the potential to boost performance."

If the Tribunal is minded to take the study into account, please advise if the Tribunal will allow us the opportunity to put oral submissions to the Tribunal addressing, inter alia, the matters raised above."

The AR was amended on 1 October 2012 to add AR 177C, AR 178G and AR 200A.

AR 177C and 178G are in the following terms:

"In the case of the presence of testosterone (including both free testosterone and testosterone liberated from its conjugates) above a mass concentration of 20 micrograms per litre being detected in a urine sample taken from a gelding prior to or following its running in any race it is open to the stewards to find that the provisions of AR 177 do not apply if on the basis of the scientific and analytical evidence available to them they are satisfied that the detected level in the sample was of endogenous origin or as a result of endogenous activity."

AR 200A states as follows:

"As at the date on which AR 177C and AR 178G take effect, all urine samples taken from horses prior to that date which have not been adjudicated upon by the Stewards shall be dealt with subject to those new Rules."

Mr McMillan had further correspondence with Murrihy in connection with the Testosterone Study. In that correspondence Mr McMillan sought a complete copy of all "papers reports and data forming the Study". That correspondence culminated in Murrihy writing to Mr McMillan in December 2012 in the following terms, inter alia:

"The RNSW study on testosterone to which you refer has been completed and the results to date are preliminary in terms of any scientific interpretation that may be inferred.

Te ARB has commissioned Charles Sturt University to continue that study but no results will be forthcoming this year. As such, the RNSW study is considered to an internal document not for public release."

THE APPEAL

The Appeal was heard on 26 and 27 March 2012 and 14 January 2013.

The Appeal was instituted via the filing of a notice of appeal dated 11 November 2011.

The notice of appeal stated that the decision appealed from was "The disqualification of Palmyra Boy in the Chief Minister (sic) Cup and the finding of guilt against me and the fine imposed by the Stewards." The notice of appeal did not set out the grounds of appeal.

By letter from the appellant to the Tribunal dated 2 December 2012, the appellant set out the following grounds of appeal:

"1.That in and throughout the course of a Stewards Inquiry arising from a report from the analyst with respect to a urine sample obtained from the horse "Palmyra Boy" at Fannie Bay racecourse Darwin on 9 July 2001 (sic) I was denied natural justice;

2. That in and throughout the course of a Stewards Inquiry arising from a report from the analyst with respect to a urine sample obtained from the horse "Palmyra Boy" at Fannie Bay racecourse Darwin on 9 July 2001 (sic) I was not afforded procedural fairness;

3. That the decision of the Stewards to disqualify "Palmyra Boy" as the winner of the Chief Ministers Cup at Fannie Bay racecourse Darwin on 9 July, 2001 (sic) under Australian Rule of Racing 177 was formed on an incorrect premise and was, in all the circumstances, contrary to the evidence given at the Inquiry; and

4. That the decision of the Stewards to find me guilty of a charge of AR 175H(ii) and to penalise me was formed on an incorrect premise and was, in all the circumstances, contrary to the evidence given at the Inquiry.

5. That the penalty imposed by the Stewards arising out of its finding was manifestly excessive."

By letter from the appellant to the Tribunal dated 27 December 2011, the appellant set out the following particulars of the first four grounds of appeal:

"GROUNDS 1 & 2 – Natural Justice & Procedural Fairness

In each of the following particulars, I was denied natural justice and procedural fairness by;

1. The refusal of the Stewards, the Australian Racing Forensic Laboratory (ARFL) and Racing New South Wales to permit me access to the policies and procedures surrounding the analysis of urine samples (transcript – p. 61, 62, 64 and 65).

2. The failure of the Stewards and the Australian Racing Forensic Laboratory to ensure the fairness and proper transparency of a "peer review" conducted in Sydney, New South Wales on 17 October, 2011 (transcript – p. 7, 8, 9, 17, 18, 19, 20, 51, 52, 56, 57, 63, 65, 66, 78, 79, 80, 88, 89, 93, 113, 114, 121, 122 and 129).

3. The Stewards decision not to permit the proper and complete examination of certain expert witnesses to the Inquiry, (Keledjian and Murphy) in matters critical to the appellant and directly of relevance, (transcript – p. 84, 85, 92, 93, 94, 96, 97 and 98).

4. The participation of the Stewards in conversations "outside" the Inquiry with the witness Dr Cawley, particularly with regard to matters central to the Stewards eventual decision to

find the appellant guilty of the charges and to disqualify "Palmyra Boy", (transcript pages 100, 105 – 108).

5. The Stewards decision to accept, admit and have regard to the evidence of Dr Cawley in circumstances contrary to and in direct conflict with the approach set out in particular 3, (above) – transcript pages 100 – 112.

6. The Stewards decision not to permit, (whatsoever), the examination of the ARFL analysts Booth and Smart, persons specifically and immediately involved in the analysis of the relevant sample, (transcript – page 130).

Grounds 3 & 4 – Evidence Given at the Inquiry

In each of the following particulars and with regard to evidence given at the Inquiry, I submit;

7. The Stewards failed to give sufficient and appropriate weight to the evidence submitted by the expert witness Tsivou, (transcript pages 124 -128).

8. The Stewards failed to give sufficient and appropriate weight to the evidence and reports submitted by and consequent to the actions of the expert witness Korkoneas, (transcript pages 61- 66, 80 – 82, 88 – 90, 107, 112 – 123).

9. The Stewards should have had regard for the possibility of bacterial contamination of the sample when protective gloves, (which were issued together with the urine collection kit prepared and supplied by the ARFL) were not used, (transcript 8 – 9, 54 – 55, 67 – 78, 86 – 87, 130).

10. The Stewards should have had regard for the identification and implementation of an alternative protocol in ensuring the sample collector, Ms Clarke could adequately protect and ensure my interests in preventing possible contamination of the sample when Ms Clarke did not, (with their approval) utilise protective gloves which were issued together with the urine collection kit prepared and supplied by the ARFL, (transcript 8- 9, 54 – 55, 67 – 78, 86 – 87, 130).

11. The Stewards should have had sufficient regard for the evidence of my previously unproblematic use of testosterone products and application of the expert advice of the veterinary surgeon Dr Brown in the relevant period, (transcript 8, 11, 14, 16, 30, 34 – 42, 134, 136).

12. Finally, as to the issue of possible bacterial degradation and changes in the level of testosterone discussed by Tsivou, (transcript – pages 124 – 128) I refer the Tribunal to a complete absence of critical "chain of custody" documentation following collection which may have assisted in establishing the precise details surrounding the adequacy of storage,

transport and preservation of the sample in Darwin, prior to its eventual shipping to Sydney."

Prior to the hearing of the Appeal, Mr McMillan, on behalf of the appellant, made application to the Tribunal on two occasions, for an adjournment of the hearing on the basis that the appellant was disadvantaged in presenting his case on appeal. It was said that he could not fairly present his case until such time as the results or findings of the Testosterone Study were known. The Stewards opposed any adjournment. The Chairman determined that the Appeal would proceed on 26 March 2012.

Mr McMillan appeared for the appellant on the hearing of the Appeal, with leave. At the commencement of the hearing of the Appeal, Mr McMillan made a further application for an adjournment of the hearing of the Appeal. The adjournment was sought, not only on the basis of the earlier applications, but also upon the basis that the appellant wished to summons various persons, namely Keledjian, Murphy, Cawley and two employees of ARFL who conducted the testing of the Sample at ARFL and upon the basis that a response from Murrihy to the letter from Mr McMillan dated 20 March 2012 was required for the appellant to present his case and that a response had not yet been received. The Stewards, via Mr De Silva, opposed the application.

The Tribunal, on 26 March 2012, refused the application for adjournment.

The correspondence passing between Mr McMillan and the Stewards in connection with the Inquiry, the Peer Review, the reports of Korkoneas, the request for copies of ARFL's policies and protocols as regards testing for testosterone, the data surrounding all stages of testing at ARFL, evidence pertaining to the stable inspection undertaken by Ashby, requests for chain of custody documentation, requests for the originals of the appellant's records as regards treatment provided to horses and accounts as regards that treatment and the request for the making of all analysts at ARFL available for questioning was tendered, with leave.

The correspondence passing between Mr McMillan, Murrihy, the Stewards and Mr De Silva in connection with the Testosterone Study was tendered, with leave.

A copy of a document prepared by ARFL titled, "Guidelines For Sample Collection – Racing NSW" (the "Guidelines") was tendered, with leave.

The report of Korkoneas dated 19 October 2011 was tendered, with leave.

A swabbing kit, being a sealable plastic satchel bearing the wording "Racing Industry Security Satchel and the number "N113099" containing a blank card titled "Australian Racing Forensic Laboratory Sample Identity Card", a plastic bag bearing that number, two plastic containers with white lids, one plastic container with a red lid containing a control solution and a pair of rubber gloves (the "Swabbing Kit") was tendered, with leave.

Grounds of appeal "1", "2", "3" and "4" were ventilated on 26 and 27 March 2012. Confusion existed as to whether or not ground of appeal "5" had been abandoned. The appellant ultimately advised the Tribunal that he wished to press that ground. The Stewards opposed the appellant's application for the Tribunal to re-convene to hear argument in connection with this ground of appeal. The application was heard and determined on 19 December 2012. The application was allowed. That ground of appeal was ventilated via a hearing before the Tribunal on 14 January 2013. The Tribunal reserved its decision.

The appellant also made application to the Tribunal to re-open the hearing of the Appeal so that further evidence could be adduced in connection with the Testosterone Study. The Stewards opposed that application. The application was heard on 19 December 2012. The Tribunal refused the application and gave ex tempore oral reasons for its decision on that day.

DETERMINATION OF THE APPEAL

The Appeal is in the nature of a rehearing as distinct from an appeal in the strict sense or an appeal in the nature of a hearing de novo. Absent express or indicative statutory provisions to the contrary an appellant must ordinarily demonstrate legal, factual and/or discretionary error if the appeal is to be successful (refer Coal And Allied Operations Pty Ltd v Australian Industrial Relations Commission and Others (2000)203 CLR 194 and Allesch v Maunz (2000) 203 CLR 172). We are of the view that no such provisions appear in the Act. As such the appellant bears the onus of persuading us that the decisions of the Stewards to find the appellant guilty of the Charge and/or to impose the Penalty and/or to impose the Disqualification were infected with legal, factual and/or discretionary error on the part of the Stewards. We will not intervene and exercise our powers as set out at section 145ZE of the Act in favour of the appellant unless we are satisfied that relevant error has been demonstrated or unless fresh evidence which is adduced before the Tribunal requires that intervention.

Natural Justice and Procedural Fairness

It is now generally accepted that the duty to accord natural justice is to be equated with the duty to accord procedural fairness (refer McGovern v Ku Ring-Gai Council [2008] 72 NSWLR 504 per Campbell JA at p.557).

It has been authoritatively determined that the Stewards, when exercising their powers conferred by AR 8(d), 8(e) and 10, which powers were utilised by them in this matter, are generally required to accord natural justice/procedural fairness . This is so notwithstanding

that the Stewards are a domestic disciplinary tribunal and notwithstanding that the appellant is bound by the AR by voluntary agreement. The powers exercised by the Stewards, being quasi-judicial in character, attract that duty. However, the principles of natural justice/ procedural fairness may be modified or abrogated by the AR to the extent that the AR admit of a construction requiring such modification or abrogation. (refer R v Brewer: Ex Parte Renzella [1973] VR 375). This authority has been applied in the context of similar rules of racing in Calvin v Carr [1977] 2 NSWLR 308 and Hall v New South Wales Trotting Club Ltd [1977] 1 NSWLR 378). It has also been applied in other decisions of the Tribunal. The appellant asserted such a duty on the part of the Stewards in connection with the Inquiry. Mr De Silva did not submit that the principles of natural justice/procedural fairness did not apply to the conduct of the Inquiry.

The content of the principles of natural justice/procedural fairness to be applied in a particular case are not susceptible to precise enumeration. It has been said that "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth."(refer Russell v Duke of Norfolk [1949] 1 All ER 109 at p.118 and R v Commonwealth Conciliation and Arbitration Commission; Ex Parte Angliss Group(1969) 122 CLR 546 at pp. 552 to 553).

The following was stated in R v Brewer at p.381:

"In substance, the only requirements of natural justice unaffected by the rules relating to the stewards and their inquiry, because not therein dealt with, are that the stewards must give adequate notice to a person charged of the precise charges against him and a fair opportunity after hearing the evidence against him of making his defence thereto. As it is the duty of the stewards to give a fair hearing to the person charged, they must of course until he has been heard in his defence keep their minds open in the sense of being ready and willing to be persuaded by the party charged. An open mind in this sense is essential to any bona fide and honest exercise of a jurisdiction to adjudicate after inquiry, otherwise the inquiry is a mere mockery."

The last sentence of the extract from the judgment in R v Brewer set out above was cited with approval in both Calvin v Carr and Hall v NSW Trotting Club Ltd.

The following was further stated in Hall v NSW Trotting Club Ltd at p. 388:

"It is necessary first to establish what rules of natural justice the stewards were required to observe. In my view, they were these. The stewards were bound to inform the appellant of the nature of the accusations made against him, and to give him "a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice"; De Verteuil v Knaggs, applied in University of Ceylon v Fernando."

The statements in those cases have similar application to the content of the duty to accord natural justice/procedural fairness to a person charged after a finding of guilt is made and consideration is being given as to the imposition of a penalty. (refer Hall v NSW Trotting Club Ltd at pp. 382 and 391).

The statements in those cases accurately set out the minimum content of the Stewards' duty to accord natural justice/ procedural fairness to the appellant in the context of the Inquiry, the finding of guilt and the imposition of the Penalty and the Disqualification.

It may be added that not all failures to accord natural justice/procedural fairness will result in appellate intervention. No intervention will occur if in correcting the failure a different result will not possibly be produced. However, appellate bodies must be cautious in coming to such a conclusion, particularly when the failure relates to evidence and/or a party's ability to make submissions on evidence. (refer Stead v State Government Insurance Commission (1986) 161 CLR 141).

A failure to accord natural justice/procedural fairness is an error of law (refer Maurice v London County Council (1964) 2 QB 362).

Grounds of appeal "1" and "2"- Denial of Natural Justice and Procedural Fairness

At the outset of the Appeal, Mr McMillan summarised the appellant's complaints as to denial of natural justice/procedural fairness as follows:

"We intend pointing this Tribunal to multiple breaches in the course of the Stewards inquiry of the appellant's rights to procedural fairness to fully understand the entirety of the evidence against him, to have the opportunity to properly and fairly question witnesses in his case and to make thoroughly informed submissions."

The particulars of grounds of appeal "1" and "2" provided by the appellant go to the alleged "multiple breaches" of the "appellant's rights to procedural fairness" the asserted content of which is said to be, in general terms, a right to be informed of the "entirety of the evidence against him" and to be given the "opportunity to properly and fairly question witnesses" and to be given the opportunity "to make thoroughly informed submissions".

We will address each of the particulars of these grounds of appeal in turn.

Particular 1: The refusal of the Stewards, the Australian Racing Forensic Laboratory (ARFL) and Racing New South Wales to permit me access to the policies and procedures surrounding the analysis of urine samples (transcript – p. 61, 62, 64 and 65).

The appellant complains that the "refusal" by the Stewards and/or ARFL and/or Racing New South Wales to permit him to have access to relevant "policies and procedures surrounding the analysis of urine samples" constituted a breach of the Stewards' obligation to accord natural justice/procedural fairness in the course of the Inquiry.

In his oral submissions, Mr McMillan referred the Tribunal to two transcript references within exhibit 4. Exhibit 4 is the transcript of the Inquiry. Those references related to requests or submissions made by Mr McMillan of and to the Stewards. Mr McMillan there reiterated a request for "written protocol and procedures around the analysis of testosterone that reflects on the issue of measurement of uncertainty being applied or otherwise" and asked the Stewards to "give further consideration of refusals thus far". It was submitted to the Stewards by Mr McMillan that, in the absence of access to such policies and protocols, the appellant was "not armed with the evidence which is against [him]" and that, in those circumstances, the appellant had "not been able to draw, for example, Korkoneas' expert opinion around some of the issues, particularly in relation to the first screening or the split sample, the screening of the first split."

Mr McMillan then went on to state the following in the course of oral submissions in connection with this particular:

"Now that's said in respect of the first screening of Mr Dyer's sample when it's taken away from the composite set if you like and I talked earlier about combining three samples. Korkoneas, qualified person, says that there has to be a measurement of uncertainty applied at that step, where Dyer's sample first runs on its own and the measurement of uncertainty should be at least four and might be more than that. In fact might be much more than that because this is the first quantitative analysis of Dyer's sample on its own and we respect the evidence of the experts from the laboratory who say "Well look, this is the first screen if you like". We don't object strongly to your evidence around that, there are many many other issues, but Korkoneas at least said should be at least four, might be more than that."

Mr De Silva, in written submissions to the Tribunal, submitted:

"The Stewards position is that as the ARFL were a third party and as such the most the Stewards could do was request that the ARFL policies and procedures be provided which the Stewards did. The evidence at transcript 64.8 to 65 is a letter from Peter VLandys the Chief Executive of Racing New South Wales dated 3 November 2011 in which Racing New South Wales refused to provide the policies and protocols of the ARFL to the inquiry.

Additionally, it is a case that the Appellant throughout the inquiry emphasised that he was not attacking the validity of the result.

Transcript PM T30, PM T66.7, PM T90.3 and PM T17."

Mr De Silva reiterated those matters in oral submissions.

In reply, Mr McMillan, made the following submission:

"Now it's been suggested to you this morning that it was our obligation to do all sorts of things, to go, to run off and access policies and procedures and to, to persist with attempting to obtain data and the Northern Territory stewards could step away if you like at arms length from all of that, not concern themselves with it. We submit to the Tribunal that with great respect is just completely unacceptable. That because of the unique position of the stewards referred to by Pannam and others that it's critical that they do far more than just say we'll accept the two certificates, play on, that's the end of it."

It is evident that the nub of the appellant's complaint in connection with this particular is that the "refusal" of access to the policies and procedures deprived him of a fair opportunity to make his defence (R v Brewer supra) in the sense that it deprived him of a fair opportunity to correct or controvert the evidence prejudicial to him constituted by the ARFL Certificate (Hall v NSW Trotting Club Ltd) via evidence, inter alia, adduced from Korkoneas.

The requests made by Mr McMillan of the Stewards for copies of the relevant policies and procedures are contained in letters from Mr McMillan to Lane dated 25 October 2011, 27 October 2011 and 2 November 2011. The letters and their relevant content are referred to earlier in these Reasons. Those letters formed part of exhibit 3. Lane's response to those requests via letter dated 3 November 2011 is similarly referred to earlier in these Reasons. That letter also formed part of exhibit 3. ARFL is "controlled" by Racing New South Wales. Exhibit 3 records that Racing New South Wales, via a letter dated 3 November 2011 to Lane, declined to provide copies of the policies and protocols sought to either the Stewards or the appellant. The relevant parts of that letter are set out earlier in these Reasons.

Did the Stewards' undoubted duty to accord natural justice/procedural fairness require them to produce the protocols and policies?

We are of the view that their duty did not require them to do so.

In certain circumstances, a decision maker may be under an obligation to make further inquiries before coming to a decision. That obligation may be said to be implied and may arise from an inquisitorial role held by the decision maker. The duty has been said in some instances to be sourced from the rules of natural justice ("Judicial Review of Administrative Action" Aronsen and Dyer 1996 pp.302 to 309). Most of the case law has arisen under the Administrative Decisions Judicial Review Act (Cth). Whilst, we are here dealing with a different legislative context we consider the following comments of Wilcox J. in Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 at p.169 to be relevant:

"The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision- maker to make the applicant's case

for him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it."

The specific complaint is that the lack of access to the policies and protocols deprived the appellant of a fair opportunity to correct or controvert the ARFL Certificate.

It is to be noted that the Stewards did attempt to assist the appellant by requesting the material sought from ARFL. It is also to be noted that the Stewards had no power to compel ARFL to produce that material. In those circumstances, the policies and protocols were not "readily available" to the Stewards. Thus, we are of the view that the Stewards were not in breach of their obligations as set out in Prasad.

In any event, the possible relevance of the policies and protocols to the appellant's defence must be considered. That is, were the policies and protocols "centrally relevant" to the Decision?

At the Inquiry, Mr McMillan submitted that the Stewards ought not accept the ARFL Certificate on a number of bases. One basis was that "the first test result would in accordance with normal analytical laboratory practice have ended the process because the detection of such a level would have been treated as not justifying any further testing...". It was said that "the first test at ARFL, 24.47, which, if rounded down to 24 and then adjusted for an uncertainty factor – and we understand, Mr Chairman, that the lab has elected not to apply an uncertainty factor, and you've heard from Korkoneas on that issue – of at least plus or minus four would have resulted in an adjusted level of 20 or, based on Korkoneas' evidence, perhaps something below that figure."

Korkoneas gave the following evidence at the Inquiry:

"Mr McMillan: Perhaps, Mr Korkoneas, could we take you directly to the several concerns that you've indicated need to be raised with the additional peer review and the first is: what is the measurement of uncertainty for the screening result of 24 nanograms per mill. Why is that a matter of concern?

Korkoneas: Like I mentioned in the report, obviously with all values, there must be a measure of uncertainty applied to the value and why we say that is because if it hasn't exceeded the measure of uncertainty, you can't be certain that it's actually exceeded the regulatory level. So by saying that there's no measure of uncertainty while that really doesn't make any sense of why and how you can proceed with the supplementary confirmatory analysis without being certain to a certain degree that you've actually exceeded that, in this case the testosterone level of 21 micrograms per litre.

Mr McMillan: Evidence has been given today that it's not necessary to apply a measurement of uncertainty to that first screen – we've been referring to it as the first split screen. What's your comment on that?

Korkoneas: Well, look, I tend to disagree with that. There has to be a measure of uncertainty. For example, if you had a sample of that read, say 22 and your quality control – and I still haven't had any questions or answers on that quality control – and your quality control read 24, well what measure do you take as being correct? So you have to have some form of measurement of uncertainty for both your screening result of the sample and the screening result of the sample and the screening result of your spike or your quality control to ascertain that the assay has actually worked. So I put to this Inquiry: what was the level of their so-called 20 nanograms per mill spike or quality control for that screening result?

Mr McMillan: Okay. So you're saying that the spiked quality control can have- the amount of testosterone in the spike control can have an impact on the eventual result?

Korkoneas: Correct because you need to have a valid spike or quality control sample to make sure that your actual screening for that particular day has worked. You must have a level. You know, the level might have been 23.2 or whatever is within your lab or procedure specifications but you have to be confident that that 23 is actually 20.2 which then says yep it's within our measurement of uncertainty and this assay has worked and we go the next confirmatory stage. So has that spike or quality control sample been supplied by ARFL?

Mr McMillan: No.

Korkoneas: Well, I put it back to the Inquiry that there's no evidence to say that the actual screening data for that day is actually valid without a spike or quality control sample."

Later, Korkoneas gave the following evidence:

"Lane: I'm struggling to see what – Mr Korkoneas, in relation to the confirmatory analysis, do you have any issues with the confirmatory analysis?

Korkoneas: No. In my first report, Mr Chairman, I made it quite clear that the testosterone was present. The confirmatory method was followed to the best of my knowledge. You know the level of 25, as run on the day was 25. I've got no problem with the confirmatory process, but saying that you need to fully understand from where I'm coming as an Analytical Chemist you must make sure that the screening result's actually been exceeded before you can apply the confirmatory procedure.

Lane: What you're putting is that the reason you want the spike or the quality control is to ascertain whether the laboratory was within their rights to proceed to the confirmatory analysis?

Korkoneas: Correct. And that's why it's quite important to understand that spike data that they run in their screening is within the lab specifications and they've applied their calculated measurement of uncertainty to make sure that to go to that next stage is the value of 21 has been exceeded.

Lane: So that information won't have any impact on the actual result of the confirmatory analysis?

Korkoneas: No because like I said in my first report, I made that clear. Testosterone was present. It was 25 but saying that the screening results need to be confirmed to make sure that that next step that the lab is obviously needs to go to has been applied correctly.

Lane: I understand what you're saying.

Korkoneas: Yes, but the other thing – you must exceed the screening level before you go to the confirmatory level.

Lane: No, I understand what you're saying."

After Korkoneas gave evidence to the Inquiry, the following exchange, inter alia, took place between Lane and Mr McMillan:

"Lane: Well, I'm not sure what more we would want. At this point in time Mr Korkoneas is satisfied with the confirmatory result of 25. So if he's satisfied with the confirmatory result – I know he's not happy about the measurement of uncertainty in relation to the screening samples, but Mr Keledjian has given us an answer in relation to that and Dr Tout has given his view on it, and that's something we'll consider. You can put to us if you wish, if that's what you want to put to us, that because of Mr Korkoneas' concern, it shouldn't have gone to confirmatory analysis, but it did go to confirmatory analysis and he's satisfied with the result.

Mr McMillan: It did. As high as we can put it would be to say that there is a significant doubt whether or not it should have gone further and we say that in circumstances where our case is that there has been activity occurring within this sample."

Keledjian gave evidence to the effect that no measurement of uncertainty was applied prior to the third stage of testing because the first and second stages used methodologies that were intended to provide indications only.

Tout's report contained, inter alia, the following statement:

"Mr Korkoneas stated in his report that he required an estimate of the uncertainty of this screening result. The screening analysis is just that and is not intended for precise measurement and laboratories would not normally carry out uncertainty calculations on screening methods which are semi-quantitative and used to determine which samples should be investigated further with more rigorous quantitative methods. This is exactly

what the ARFL have done. The purpose of screening is not to miss any possible violations and the laboratory is entitled to, and indeed it would be rightly criticised if they did not, further investigate any sample with a concentration of testosterone close to 20 mg/ml as found by the screening method....

Mr Korkoneas has also requested the actual concentration of the split sample and the uncertainty of this measurement. I do not believe that provision of this information is necessary to determine whether the sample N101186 contained testosterone at a concentration above 20 mg/ml. The laboratory did carry out the analyses to determine which sample contained the elevated level of testosterone but was quite entitled on the basis of the first screening data to carry out a full confirmatory analysis on any of the split samples."

Mr McMillan did not seek to specifically challenge the validity or accuracy of the result obtained at the third stage of testing, save on the basis of possible contamination of the sample. The methodologies employed by ARFL at this stage of testing were not specifically queried by Mr McMillan.

Upon the resumption of the Inquiry on 7 November 2011, Mr McMillan, whilst armed with the advice of Korkoneas, stated variously:

"We wish to make it absolutely clear that we are not attacking the methods applied in either of the laboratories. That's not what this is about. The tone I suggest of the letters is that we're assaulting, if you like, the way that things were done. The panel needs to know that's not the position at all. There are other issues but this is not an attempt in any way to undermine the methods that were applied or the accreditation of the labs or anything like that....the panel should understand we're not getting after or trying to, in any way, diminish the importance or the accuracy or the methodologies that were used in the laboratory, particularly the Sydney laboratory."

"I think it important, Mr Keledjian, we've made it clear to the Stewards today we are not in any way attacking the methodologies that were applied in your laboratory or trying in any way to undermine your results. We are simply asking why it is that we had to go through this arm wrestle to eventually get a part of a very critical piece of the work that had been done in the lab on this specific sample."

"We're not questioning the methodologies and the numbers that have been established, we're not questioning or attacking the analytical process. We're trying to get an understanding of whether or not there has been any activity within this sample, upward or downward for that matter."

As has been noted earlier in these Reasons, Mr McMillan did proceed, in the face of the statements made to the Stewards as set out above, to submit that "something was wrong with the testing procedures" and that "something must have gone wrong ...in the testing

process". It is significant that he did not attempt to identify what in fact might have been "wrong". It is also significant that Mr McMillan, in referring the Tribunal to these submissions, did not identify what in fact might have been "wrong" other than by referring to the Testosterone Study and the failure by Keledjian, Murphy and/or Cawley to refer to it in evidence at the Inquiry, a lack of access to all data surrounding the testing of the A Sample and the prevention by Lane of full cross examination of Keledjian and Murphy and alleged refusal to have other analysts available for cross examination. Those are not matters that pertain to this particular however.

Whilst there was some evidence before the Stewards that doubt existed as to whether or not testing would or should have progressed beyond the first or possibly the second stage of testing and that the policies or protocols of ARFL might have confirmed those doubts, there is no doubt on the evidence as to the accuracy and validity of the result of the third stage of testing which formed the basis of the ARFL Certificate. There was in this sense no clear challenge before the Stewards as to the ARFL Certificate. There was similarly no such clear challenge mounted before the Tribunal.

We do not consider, in light of the above, that the policies and protocols were "centrally relevant" to the Decision.

Even if we were satisfied that the Stewards had erred in not ensuring that the appellant had access to ARFL's protocols and/or policies as regards the analysis of urine samples and in particular the analysis of urine samples for the presence of testosterone, there would in our view be no possibility that the Stewards would be obliged, on remitter, to reject the ARFL Certificate on the basis of the evidence of Korkoneas or upon any content within the protocols or policies. They would, on all the evidence, still be entitled to rely on the ARFL Certificate because no challenge could be mounted, on all the evidence including that of Korkoneas, to the validity and accuracy of the third stage of testing. We would not, in those circumstances, following Stead v State Government Insurance Commission supra, intervene to correct any such error.

This particular is not made out.

Particular 2: The failure of the Stewards and the Australian Racing Forensic Laboratory to ensure the fairness and proper transparency of a 'peer review" conducted in Sydney, New South Wales on 17 October, 2011 (transcript – p. 7, 8, 9. 17. 18. 19. 20. 51. 52. 56, 57, 63, 65, 66, 78, 79, 80, 88, 89, 93, 113, 114, 121, 122 and 129).

The appellant makes numerous complaints in connection with this particular. As we understand the oral submissions of Mr McMillan, the complaints are: (i) that the appellant was not provided with all data surrounding the testing of the A Sample; (ii) that the appellant was belatedly provided with data surrounding the testing of the A Sample; (iii) that Mr McMillan ought not have been in the position, on 27 September 2011, of cross

examining Brown, Cawley and Murphy in the Inquiry without the benefit of having access to all data surrounding the testing of the A Sample and without the benefit of obtaining expert assistance in connection with that data; (iv) that Lane displayed prejudgment in connection with the issue of acceptance of the ARFL Certificate prior to the peer review being conducted and (v) that Keledjian, Murphy and Cawley knew of the Testosterone Study when they gave evidence to the Inquiry on 7 November 2011 but did not disclose the existence of the Testosterone Study to the Stewards and the appellant and did not disclose the relevance of the Testosterone Study to the Charge to the Stewards and the appellant.

As to (i) it would seem that this complaint rests upon the evidence of Korkoneas at the Inquiry which was as follows:

"Mr McMillan: And what's ordinarily contained in an analytical pack? Is that the entire data that might be generated during the course of analysis?

Korkoneas: Correct, It's normally from the time the sample arrives to the time it gets reported and that also includes both screening and confirmatory data done by both laboratories.

Mr McMillan: In percentage terms, how much have we been given of the available data that might be there?

Korkoneas: Oh well, we haven't got the Queensland report so if you include that its fifty percent of the data and with this spike and pool sample that hasn't been supplied so that's another five per cent, so you've probably been given forty, forty five per cent, of the whole analytical pack."

The complaint must be that the appellant, in the absence of receipt of all of the data available through ARFL, was deprived of a fair opportunity to correct or controvert the ARFL Certificate. The ground of appeal relates only to the conduct of the peer review and must only relate to data available from ARFL.

This complaint can be answered, by reference to the principles enunciated in Prasad v Minister for Immigration and Ethnic Affairs supra, by noting that ARFL could not be compelled by the Stewards to produce the data identified by Korkoneas as was submitted by Mr De Silva in written and oral submissions. If the Stewards could not compel the production of the data then they could not have failed to accord the appellant natural justice/procedural fairness, absent fraud or bad faith on the part of third parties or the Stewards. Furthermore, the relevance of that data to any defence advanced by the appellant is not apparent given the evidence of Korkoneas set out earlier in these Reasons to the effect that he accepted the validity and accuracy of the third stage of testing. It follows that perusal by Korkoneas of the extant data could not have caused him to question the validity and accuracy of the ARFL Certificate.

Even if we were satisfied that the Stewards had been in breach of their duty, we would not intervene as on any remitter the Stewards would not be obliged to disregard the ARFL Certificate. The Stewards would have been entitled to rely upon the ARFL Certificate. There would be no possibility of a different result before the Stewards based on a consideration by them of any such further data (Stead v State Government Insurance Commission supra).

It was faintly submitted by Mr McMillan to the Tribunal that denial of access to all of the data by ARFL vitiated the Decision. What is essentially alleged is that "third party fraud" occurred in the context of the Inquiry and the production of the ARFL Certificate. Such fraud can amount to a denial of natural justice/procedural fairness (R v Crown Court at Knightsbridge ; Ex Parte Goonatileke [1985] 2 All ER 498, Blundston Prison Board of Visitors; Ex Parte Fox-Taylor [1982] 1 All ER 646 and SZFDE v Minister For Immigration And Citizenship (2007) 232 CLR 189). "Fraud" in this context encompasses "bad faith" (Craig v South Australia (1995) 184 CLR 163). Courts are careful not to find fraud unless it is distinctly pleaded and proved (Lazarus Estates Ltd v Beasley [1956] 1 QB 702). Because of the gravity of such an allegation any appellate body must view the evidence put forward to support it and must reach its conclusions in accordance with the principles enunciated in Briginshaw v Briginshaw (1938) 60 CLR 336.

As courts are slow to find fraud, this Tribunal must be similarly slow to find it even in the broader sense of "bad faith".

It was submitted by Mr McMilian that a nexus existed as regards failure to supply all the data available and the Testosterone Study and the failure on the part of Keledjian, Murphy and/or Cawley to disclose to the Stewards and the appellant the existence of the Testosterone Study. The submission must be based on the following assertions, namely: that ARFL was involved in the Testosterone Study; that the Testosterone Study was in existence as at 7 November 2011; that the Testosterone Study indicated anomalies as regards the testing of urine samples for the presence of testosterone at ARFL; that the extant data was evidence of those anomalies; that Keledjian, Murphy and/or Cawley knew of the Testosterone Study and that it indicated the anomalies; that the anomalies undermined the ARFL Certificate as prima facie evidence of its contents and that in order to preserve the ARFL Certificate as prima facie evidence of its contents, Keledjian, Murphy and/or Cawley deliberately withheld the aforesaid matters from the Stewards and the appellant.

Given the gravity of the assertions, we would have expected that the appellant would have sought to lead evidence before the Tribunal as to those assertions. The appellant elected not to seek to call evidence from Keledjian, Murphy and/or Cawley. When queried as to the bases for that election, Mr McMillan referred to the assertions by Racing New South Wales of the confidentiality of the interim results of the Testosterone Study and the lack of a response by Murrihy to recent correspondence from Mr McMillan. Notwithstanding those matters, it seems to us that questions ought to have been posed to those persons as regards

what they in fact knew as regards the Testosterone Study and when and why they failed to mention the Testosterone Study in their evidence to the Inquiry.

Nevertheless, we must assess the evidence that is before the Tribunal on this issue. Evidence exists that ARFL was involved in the Testosterone Study. Some evidence exists to suggest that it is likely that the Testosterone Study was in existence as at 7 November 2011. It may be readily inferred that Keledjian, as General Manager of ARFL, knew of the Testosterone Study. That inference is harder to draw in connection with Murphy and Cawley. Murphy's position as Quality Manager may or may not have led to him having knowledge of the Testosterone Study at the relevant time. Cawley's position as Science Manager at ARFL may or may not have led to him having knowledge of the Testosterone Study at the relevant time. Evidence exists that the Testosterone Study was set in train in order to investigate the cause or causes of the presence of elevated levels of testosterone in geldings previously tested in New South Wales and Queensland. Evidence exists that at some point the Testosterone Study identified "possible multifactorial causations in elevated testosterone concentrations in geldings." However, no evidence exists as to when those "possible multifactorial causations" were first identified. Furthermore, the evidence suggests that the extant data was not in any way relevant to the issues of the presence of elevated levels of testosterone in geldings in New South Wales and Queensland and the "possible multifactorial causations" referred to. The evidence before the Tribunal is that the Testosterone Study related only to horses that had not been in receipt of treatment involving the administration of testosterone. The evidence does not suggest that the use of the ARFL Certificate as prima facie evidence of its contents is in doubt or could be in doubt on account of the Testosterone Study. This militates against any possible finding that Keledjian, Murphy and/or Cawley deliberately withheld relevant evidence from the Stewards and/or the appellant as asserted.

The asserted fraud or bad faith is not substantiated.

As to (ii), this complaint arises from the production by ARFL of data in connection with the second stage of testing. That data was received by Korkoneas on or about 31 October 2011 and is annexure "A" to his report dated 4 November 2011. That report forms part of exhibit 9. The data was produced approximately 14 days after Korkoneas attended at ARFL for the purposes of the Peer Review. There was a dispute on the evidence at the Inquiry as to whether or not Korkoneas had in fact requested the production of this data whilst he was at ARFL.

When questioned by the Tribunal as to what practical consequences flowed from the alleged belated delivery of the data, Mr McMillan was unable to point to any particular prejudice to the appellant in the context of the mounting of his defence. It was suggested by Mr McMillan, albeit faintly, in oral submissions at the Inquiry, that the late delivery of the data pointed to a lack of bona fides on the part of Keledjian, Murphy, Cawley and/or

ARFL as a whole in the context of the Peer Review. In oral submissions to the Tribunal, Mr McMillan stated:

"Yes, we, the way we're putting this is that we wanted it then and there because I made a point yesterday about how inquiries can head off in a particular direction and how it can be at times it would be nice to have access to things as inquiries unfold and as the questioning process unfolds because to get it later means that an opportunity might be lost at the time that a witness has been spoken to or evidence has been taken by a tribunal in this case a stewards panel. It's I don't say in any, I don't suggest for a moment that this particular individual issue has caused the Inquiry to miscarry or anything. We're not putting it as highly as that. What we're saying is that this is an example of the way in which Dyer has had frequent, if you like, or been treated and please pardon the pun, from the very outset. It's one in a number of examples and we raised those examples I think yesterday."

As we understand the appellant's case on this issue, it is simply a complaint as regards the alleged obstruction on the part of Keledjian, Cawley, Murphy and/or other staff at ARFL which delayed production of the data. No complaint is made that this delay affected the appellant's ability to mount his defence. It was not suggested by Mr McMillan in submissions to the Tribunal that the evidence of Keledjian, Cawley and/or Murphy given at the Inquiry was tainted in any way by reference to the alleged delay. Mr McMillan did not assert that the alleged obstruction amounted to fraud or bad faith on the part of Keledjian, Cawley, Murphy and/or others such as to vitiate the Decision.

In the absence of a nexus between this complaint and evidence given at the Inquiry and/or the appellant's ability to mount his defence or an allegation of fraud or bad faith no basis exists for a finding that the Stewards failed to accord natural justice/procedural fairness.

As to (iii), the complaint appears to be that the appellant had, on 27 September 2011, insufficient information to adequately address evidence adverse to him and to call evidence to correct or controvert that adverse evidence. As this complaint rests on complaints (i) and (ii), no basis exists for a finding that the Stewards failed to accord natural justice/procedural fairness.

As to (iv), the appellant complains that Lane had closed his mind, on 27 September 2011, as regards the utility and/or outcome of the Peer Review in the context of any challenge to the ARFL Certificate. Mr McMillan pointed to three exchanges between himself and the appellant and Lane at the Inquiry as demonstrating prejudgment by Lane or the existence of a closed mind on this issue. They were as follows:

"Mr McMillan: It seems to us that you rejected our submissions that we ask these questions after the undertaking of a peer review. Does that mean that you're declining our opportunity to take part in a peer review or otherwise? I just wasn't quite sure what you meant.

Lane: No, no. We're not declining that offer at all, but, to be honest, we're at a little bit of a loss as to what is to be achieved by a peer review. It would seem to us that both laboratories are approved and accredited. If you told us that you were questioning their analytical results, we'd probably be a little surprised, but I guess that's your prerogative. If there's something which – some question in relation to the particular result of the sample which the analyst may well be able to answer satisfactorily, it may well mean that at the conclusion that you don't wish to do a peer review. If you still wish to do a peer review, we'll consider that application. We're certainly not saying that we won't allow it at this point in time."

"Mr McMillan: Well, we accept that if the peer review – if our expert, assuming this just does occur, if our expert comes back to us and says "there's absolutely nothing wrong with the data" , you'll have no more trouble from us. I mean we've come from the outset and said: We're using this stuff. We don't dispute that." What we're saying is that we'd like to get an understanding of what led up to at the end of what was almost five weeks with our sample sitting in a Sydney laboratory, what led up to the issuing of the certificate. Now surely we're entitled to get an understanding of what occurred there. We're not saying that there's anything wrong with the laboratory or its data whatsoever at this point. We'd just like to have it independently looked at. Mr Dyer's in a very difficult position. There's a lot of money involved because there's prize money. His reputation is such that it's obviously at risk as well, yet he finds himself not enjoying the opportunity to look at the evidence that's to be used against him.

Lane: Well, the evidence from the laboratory – you should be well aware of what the Rules say. If we have two analytical reports from accredited laboratories we have prima facie evidence. Again, if the question is why it took five weeks for the analyst to give us a certificate, I'm more than happy to ask the question and get an answer. At the end of that question we might be able to be satisfied – you might be able to be satisfied or you might well raise questions we want answers to. But, again, I come back to my personal view is that a peer review – unless the peer review comes back and tells you that the data is flawed, it can't tell you anything else other than what you might be able to ask the analyst now because what else is he going to tell you? The result is twenty five or the result is not twenty five. That's what the data will tell you. I'm not sure whether the data will tell you why it's taken five weeks. The analyst should be able to tell us though."

"Lane: Yes. While Mr Merrit is looking at these, Mr Dyer, is there anything further you wish to put to the Stewards at this stage?

Dyer: Can I just?

Lane: I'm more than happy to take a five minute break if you so desire.

Dyer: Thanks

Lane: If you want to consider if there's anything further you wish to put to the Stewards, if you want to continue with the submission in relation to the peer review and perhaps whether you wish to put anything to the Stewards in relation to 177, which is disqualification and I'll read the rule just so we know what you're talking to and whether you think the Stewards are in a position or otherwise to proceed in relation to 177. And 177 says "Any horse that has been brought to a racecourse and a prohibited substance is detected in any sample taken from it prior to or following its running in any race must be disqualified from any race in which it started on that day." So, I guess, unless there's something further you wish to put to us, we're probably at this point at the point where we're likely to start to give consideration to 177. So when you come back we might ask you if there's anything further you wish to put to the Stewards. If you wish to proceed with your submission in relation to getting a peer review given the evidence we've taken from the analysts and a submission in relation to 177."

The appellant also relies upon the following exchange between Lane and Mr McMillan as evidencing prejudgment or the lack of an open mind on the part of Lane as regards the evidence of Tsivou:

"Mr McMillan: Now there is one more witness, and that is a member of the research team from the Athens laboratory. Obviously, it's a critical issue as to whether or not testosterone levels can rise or fall when degradation is occurring,

Lane: I think I'd be reasonably satisfied that they can fall. I'm far from satisfied that they can rise.

Mr McMillan: I appreciate that

Lane: I'd certainly need some further evidence if that's what you're going to put."

We understood Mr McMillan to be asserting actual prejudgment on the part of Lane. We will approach this particular as encompassing also a complaint of apprehended prejudgment.

Mr De Silva submitted that the passages referred to did not give rise to actual or apprehended prejudgment on the part of Lane.

As to the test of actual prejudgment the statement of principle by Gleeson CJ and Gummow J in Minister For Immigration And Multicultural Affairs v Jia Legeng (2001) 205 CLR 507 at p.532 (paragraph 72) applies:

"The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion."

We are of the view that a fair reading of the exchanges relied upon by Mr McMillan does not support the complaint of actual prejudgment. It does not seem to us that the exchanges indicate that Lane had at the various times reached a conclusion as to the non utility and/or the outcome of the Peer Review that was incapable of alteration. We take him to have been indicating only that, on his understanding, any Peer Review would be unlikely to throw up any relevant further evidence unless it indicated that flaws existed with the testing undertaken at ARFL. His reference to submissions on the issue of AR 177 must be viewed in the context of an invitation by him to the appellant to indicate a final position as to whether or not he wished to proceed with the Peer Review. Once it became clear that the appellant persisted in wishing to proceed with the Peer Review no further mention was made at that point of the Inquiry as to any need for the receipt of submissions in connection with AR 177. Lane must be taken as then awaiting the outcome of the Peer Review and receipt of further evidence and submissions before reaching a conclusion as to the appellant's guilt or otherwise in connection with the Charge. We are of the view that the exchange in connection with the evidence of Tsivou indicates no more than Lane's view that the evidence of Cawley was to the effect that bacterial contamination of the Sample would result in a lowering of recorded levels of testosterone and not an increase in them. Lane went on to indicate that he would require, in the face of Cawley's evidence, evidence to support the proposition that bacterial contamination of the Sample could have resulted in an increase in recorded levels of testosterone. He cannot be taken to have reached a final immutable conclusion on this issue. He was awaiting receipt of further evidence on the issue and, no doubt, submissions.

As to the test of apprehended bias in the form of apprehended prejudgment the test is whether or not a fair minded lay observer might reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the question or issue he or she is required to decide. (refer Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337)

The following parts of the judgment of Kirby and Crennan JJ in Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577 at P.610 (paragraphs 11 and 112) are apposite:

"Judges at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.

Sometimes judicial interventions and observations can exceed what is a proper and reasonable expression of tentative views. Whether that has happened is a matter of judgement taking into account all of the circumstances of the case. However, one thing that

is clear is that the expression of tentative views during the course of argument as to matters on which the parties are permitted to make full submissions does not manifest partiality or bias."

Whilst their Honours are there clearly referring to judicial proceedings and not proceedings before a domestic disciplinary tribunal, we are of the view that the principles articulated are equally applicable in respect of this appeal.

We are of the view that a fair reading of the of the exchanges relied upon in the context of what transpired at the Inquiry would not lead a fair minded lay observer to apprehend prejudgment on the part of Lane, either in regard to the utility of, or outcome of, the Peer Review or as regards the evidence of Tsivou. Lane must be taken as expressing only tentative views susceptible of alteration should further evidence emerge.

As to (v), Mr McMillan, in oral submissions, sought to attack the evidence of Keledjian, Murphy and Cawley and thus the ARFL Certificate, on the basis that these persons, when giving evidence to the Inquiry on 7 November 2011, failed to disclose to the Stewards and the appellant the existence of the Testosterone Study. It was suggested by Mr McMillan that there was a nexus between the subject matter of the Testosterone Study and the elevated levels of testosterone evidenced by the ARFL Certificate. "Third party fraud" or "bad faith" on the part of Keledjian, Murphy and/or Cawley vitiating the Decision is alleged.

The matters canvassed and the conclusion reached as regards similar allegations at (i) are equally applicable here. The allegations of fraud or bad faith cannot be sustained.

This particular is not made out.

Particular 3. The Stewards decision not to permit the proper and complete examination of certain expert witnesses to the Inquiry, (Keledjian and Murphy) in matters critical to the appellant and directly of relevance, (transcript – p. 84, 85, 92, 93, 94, 96, 97 and 98).

This particular relates to a number of exchanges between Mr McMillan and Lane concerning Mr McMillan's cross examination of Keledjian during the course of the Inquiry. Mr McMillan asked Keledjian a number of questions. Those questions were designed to elicit an answer as to whether or not, at the second stage of testing, a level different from the level of 24.47 micrograms of testosterone per litre of urine actually obtained at the second stage of testing could have been obtained had the testing occurred some days prior to or after 2 August 2011. Lane effectively prevented Keledjian from answering the questions upon the basis that Keledjian was being asked to hypothesise about what testing on another day may have resulted in in terms of a recorded level of testosterone in the A Sample. The particular also relates to cross examination of Murphy.

In oral submissions, Mr McMillan stated that his questioning of Keledjian relevant to this particular went to the possibility of bacterial contamination of the A Sample such that the

level of testosterone within it may have been increasing over time. He submitted, in effect, that Lane's prevention of cross examination on this issue prevented the appellant from eli citing evidence that tended to or could controvert the ARFL Certificate.

In written submissions, Mr De Silva submitted that no error could be demonstrated in connection with this particular as "the questions asked of these witnesses were hypothetical and any answers given by the witness would not assist the Stewards in their deliberations."

In oral submissions, Mr De Silva, asked the Tribunal to compare and contrast the questions that Mr McMillan was attempting to have Keledjian and Murphy answer and the questions posed to Cawley that were allowed. Mr De Silva, in answer to questions posed by the Tribunal, appeared to concede that the questions posed by Mr McMillan should have been allowed but submitted that any failure to accord natural justice/procedural fairness arising therefrom should not be a cause for intervention because, inter alia, any answers given by Keledjian or Murphy would not or could not have affected the Decision.

Hypothetical questions posed to, or questions that elicit evidence in the form of, speculation, from experts in connection with their field of expertise are not objectionable per se. However, care must be taken to ensure that the basis or bases for the question are proved if the expert is being asked to assume a certain state or set of facts or circumstances. If the basis or bases are not proved then the evidence will not usually be susceptible to proper evaluation by the tribunal of fact (refer "Expert Evidence Law, Practice Procedure and Advocacy" 3rd Edition Freckleton and Selby pp. 897 to 899).

In our view the complaint in connection with the cross examination of Murphy has no substance. We take the complaint to be in the same terms as the complaint in connection with the cross examination of Keledjian. Even a cursory perusal of the transcript of the Inquiry reveals that Murphy was asked questions by Mr McMillan going to the issue of possible contamination of the A Sample and the significance or otherwise of a seeming increase in recorded levels of testosterone in the A Sample over time. Mr McMillan was not actually prevented from asking questions that were clearly relevant to those issues. It is true that Lane did discourage Mr McMillan from repeating the particular questions that were posed to Keledjian but in practical terms the appellant was not, in our view, hampered in seeking to adduce evidence that he considered relevant to his defence or which he considered could controvert the ARFL Certificate. In any event, even if it could be said that the appellant was hampered, the questions Mr McMillan was discouraged from asking were designed to explore an area of expertise that Murphy indicated in his evidence he did not possess. They were objectionable on that basis. In any event, even if Lane was in error in disallowing the questions, we would not intervene as such answers could not affect the result on remitter (Stead v State Government Insurance Commission). Answers to those questions would have not assisted the Stewards in their deliberations.

We are also of the view that the complaint in connection with the cross examination of Keledjian has no substance. Keledjian gave evidence that he was not a microbiologist and had no knowledge of the science of microbiology and that he therefore could not comment on possible bacterial contamination of urine samples. The questions sought to be answered by Mr McMillan were outside his area of expertise and were objectionable on that basis. In any event, even if Lane was in error in disallowing the questions, we would not intervene as such answers could not affect the result on remitter (Stead v State Government Insurance Commission). Answers to those questions would not have assisted the Stewards in their deliberations.

Mr McMillan also submitted, faintly, that the Decision was vitiated via the conduct of Lane in preventing Keledjian and Murphy from answering particular questions as outlined above. A sinister motive on the part of Lane was hinted at, namely a desire on the part of Lane to divert the evidence adduced at the Inquiry away from the Testosterone Study and whatever data that had prompted it.

This is a serious allegation and is therefore one that would require cogent exact evidence in order to be made out. No such evidence was adduced by Mr McMillan. He has simply pointed to the conduct of Lane as outlined above. That is mere assertion and is insufficient to enable the Tribunal to find fraud or bad faith on the part of Lane. We also note that this assertion contradicts the position taken by the appellant in connection with particulars 1 and 2, namely that the Stewards did not know of the Testosterone Study at the time of the Inquiry.

This particular is not made out.

Particular 4.The participation of the Stewards in conversations "outside" the Inquiry with the witness Dr Cawley particularly with regard to matters central to the Stewards eventual decision to find the appellant guilty of the charges and to disqualify "Palmyra Boy", (transcript pages 100, 105 – 108).

The appellant complains that Lane had a conversation or conversations with Cawley before Cawley gave evidence at the Inquiry. It was said that in having these conversations there was a "significant risk" that he would be "unduly swayed" by whatever was said by Cawley. It was also put that someone other than Lane (and we apprehend the Stewards who participated in the Inquiry) should have carried out the "investigations". It was also put that there was a danger that in undertaking the investigations themselves, the Stewards may unduly limit the ambit of those investigations.

Mr De Silva, in written submissions, pointed to the nature of the Inquiry and the role of the Stewards in that Inquiry, namely that the Inquiry is in part investigative in nature and that the Stewards have intertwined roles as investigators, framers of any charges and adjudicators and sentencers in connection with those charges. He submitted that there was

nothing in the existence of those intertwined roles that offended against the rules of natural justice/procedural fairness. He pointed to a statement of this Tribunal in the matter of Lionel Holdsworth (28 February 2006) to this effect. Those matters were reiterated in oral submissions.

We agree that the intertwined roles of the Stewards do not offend against the rules of natural justice/procedural fairness per se. The decisions in R V Brewer, Calvin v Carr and Hall v New South Wales Trotting Club Ltd supra, all recognised the intertwined roles of Stewards. The content of the rules of natural justice/procedural fairness identified in those decisions was identified against the backdrop of those intertwined roles.

It is significant that Mr McMillan did not assert a particular breach of the applicable rules of natural justice/procedural fairness. It was not asserted that Lane took evidence or received representations from Cawley in these conversations and/or that Lane failed to disclose that evidence or the fact and content of any representations. Lane was entitled to inquire of Cawley, outside of the Inquiry, as to any area of expertise he may have possessed relevant to the issues raised in the Inquiry. After having done that he did not breach any duty to accord natural justice/procedural fairness by not, at the outset of the resumption of the Inquiry on 7 November 2011, or prior to Cawley giving evidence, disclosing the fact of or the content of the conversations. Lane did not discuss in any great detail what evidence Cawley would or could give to the Inquiry. There was thus nothing that Lane needed to appraise the appellant of relevant to those conversations prior to Cawley giving his evidence.

This particular is not made out.

Particular 5.The Stewards decision to accept, admit and have regard to the evidence of Dr Cawley in circumstances contrary to and in direct conflict with the approach set out in particular 3, (above) – transcript pages 100 – 112.

In oral submissions Mr McMillan pointed to a "clear difference between the approach to Cawley's evidence before he gives it relative to the other two (Keledjian and Murphy)" and a "significant change" "when Cawley took the telephone relative to what had occurred when Keledjian and Murphy gave their evidence". Mr McMillan did not develop his submission. We apprehend that bias in the form of actual prejudgment on the part of Lane is asserted.

It is seemingly the appellant's contention that Lane was eager to have Cawley give evidence because it tended to contradict the anticipated evidence of Tsivou and that this eagerness was borne out of a closed mind as to the issue of possible contamination of the Sample resulting in microbial activity within it leading to an increase in the level of testosterone within the Sample over time. This contention presupposes that Lane knew in some detail, via his earlier conversations with Cawley, what evidence Cawley would or could give to the Inquiry. As is indicated in our Reasons relevant to particular 4, this was not the case.

This particular is not made out.

Particular 6. The Stewards decision not to permit, (whatsoever), the examination of the ARFL analysts Booth and Smart, persons specifically and immediately involved in the analysis of the relevant sample, (transcript – page 130).

It was submitted by Mr McMillan that the Stewards had refused to make the analysts Booth and Smart available for cross examination at the Inquiry and that the possible reason why this occurred was a fear on the part of the Stewards and/or ARFL that they "might have made reference to what was going on in New South Wales in the month of November 2011 around the testosterone study."

Mr De Silva in written submissions referred to 8 pieces of correspondence wherein the Stewards enquired of Mr McMillan as to what witnesses he required to be brought to the Inquiry and submitted that the "request for the analyst(sic) Booth and Smart to give evidence did not emerge after the first day of the inquiry until the closing submissions. Transcript 130". In oral submissions, Mr De Silva placed particular emphasis on the letter from Lane to Mr McMillan and the appellant dated 3 November 2011 noting that it stated, inter alia, that Keledjian and Murphy would be available for cross examination, and that Keledjian and Murphy were confident they could provide all "necessary information" and that "if that proves not to be the case we will consider an application to question further witnesses."

Contrary to Mr De Silva's written submissions, Mr McMillan did make written requests of the Stewards that the analysts be made available for cross examination via letters dated 21 October 2011 and 27 October 2011 and 2 November 2011.

Leaving aside the issue of whether or not a refusal or failure by the Stewards to make Booth and Smart available for cross examination could amount to a breach of the rules of natural justice/procedural fairness as a matter of law, this particular can be dealt with on the facts.

The Stewards did not at any time state to the appellant or Mr McMillan that they would not permit the cross examination of the analysts. The letter from Lane to Mr McMillan and the appellant dated 3 November 2011 does no more than indicate that they were relying on what they had been told by Keledjian and Murphy about the completeness of the evidence they could give and based on that information they did not at that time consider that evidence from others at ARFL would be necessary. Crucially, the Stewards indicated that after Keledjian and Murphy gave evidence they would consider at the resumed Inquiry any application for the making of the analysts available for cross examination. Mr McMillan made no such application. In those circumstances it cannot be said that there was any relevant refusal by the Stewards as alleged. The situation would have been different had Mr McMillan made that application on 7 November 2011 and had the Stewards refused it. No error on the part of the Stewards has been demonstrated.

This particular is not made out.

Grounds of Appeal "1" and "2" are dismissed.

Grounds of appeal 3 & 4 – Evidence Given at the Inquiry

The particulars of these grounds of appeal indicate that error on the part of the Stewards is asserted in 2 different categories. Particulars 7 and 8 assert error in the Stewards failing to give "sufficient and appropriate weight" to certain evidence, namely that of Tsivou and Korkoneas. Particulars 9 and 10 assert error on the basis that the Stewards "should have had regard" (and did not) to the possibility of bacterial contamination of the Sample arising from the failure by Clarke to wear protective gloves when collecting the Sample. Particular 11 asserts error on the basis that the Stewards "should have had sufficient regard" (and did not) to evidence concerning the appellant's past use of testosterone without incident under the advice of Brown. Particular 12 seemingly asserts error on the basis that the Stewards should have considered (and did not) the possibility of bacterial contamination of the Sample in Darwin via possible inadequate storage, transport and/or preservation of the Sample.

Particulars 7 and 8 and 11 assert error in the Stewards' ultimate conclusion of fact, namely that the ARFL and QSRC Certificates evidenced the presence of testosterone in the A and B Samples at the time of collection above the threshold of 20 mg per litre of urine. The asserted error may be paraphrased as being an assertion that this conclusion was "against the evidence or the weight of the evidence" before them. These "errors" cannot amount to an error of law. (refer Tracy Village Sports Club Inc v Walker (1992) 111 FLR 32 and Wilson v Lowery (1993) 4 NTLR 79)

Particulars 9, 10 and 12 assert error in the Stewards' ultimate conclusion of fact, namely that the ARFL and QSRC Certificates evidenced the presence of testosterone in the A and B Samples at the time of collection above the threshold of 20 mg per litre of urine. The asserted errors contended for cannot amount to an error of law if in fact there was evidence before the Stewards, which, if believed, would support that finding. (refer Tracy Village Sports Club Inc v Walker and Wilson v Lowery supra).

Allegations of factual error will not found appellate intervention unless unreasonableness, arbitrariness, perversity, capriciousness, irrationality, fancifulness and/ or lack of bona fides are involved. Decisions may be set aside if they are not based on logically probative evidence or if the reasoning supporting the fact finding contains logical self-contradiction(refer Judicial Review of Administrative Action Aronsen and Dyer supra atpp.286 to 287)

We will address each particular in turn.

Particular 7. The Stewards failed to give sufficient and appropriate weight to the evidence submitted by the expert witness Tsivou, (transcript pages 124 -128).

As this particular does not assert an error of law, the appellant must establish factual error sufficient to justify intervention by this Tribunal.

Tsivou gave evidence that levels of testosterone in contaminated samples could either increase or decrease. She stated however that an increase in levels could occur where the urine sample is "not well preserved" as where it is exposed to high temperatures. A temperature of 39 degrees celsius was referred to. Her published article tended to downplay high pH levels as a reliable indicator of microbial activity.

Tsivou's evidence was countered to a degree by the evidence of Cawley. Although not a microbiologist as Tsivou is, Cawley professed expertise in the area of microbial contamination of horse and human urine samples vis a vis detected levels of testosterone in such samples. He is a chemist who did post graduate work in this area. Cawley's evidence was to the effect that it was more likely that levels of testosterone in a contaminated sample would decrease rather than increase. He also gave evidence that the recorded ph level in the A Sample did not indicate the presence of microbial activity.

It must be borne in mind that all of the evidence before the Tribunal indicated that the Sample was refrigerated continuously from shortly after collection until it was taken to Darwin Airport and that it was then placed into a chiller box.

It cannot be assumed that the Stewards preferred the evidence of Cawley over that of Tsivou on this issue. They were entitled to form the view, relying on Tsivou's evidence, that microbial contamination of the Sample would not have increased the levels of testosterone within it given that it had not been, on the evidence, mishandled in terms of non refrigeration post collection.

We are of the view that the Decision was based on logically probative evidence on this issue. No unreasonableness, arbitrariness, perversity, capriciousness, irrationality, fancifulness and/ or lack of bona fides is evident.

Relevant factual error has not been demonstrated.

This particular is not made out.

Particular 8. The Stewards failed to give sufficient and appropriate weight to the evidence and reports submitted by and consequent to the actions of the expert witness Korkoneas, (transcript pages 61- 66, 80 – 82, 88 – 90, 107, 112 – 123).

As this particular does not assert an error of law, the appellant must establish factual error sufficient to justify intervention by this Tribunal.

Korkoneas' evidence is canvassed elsewhere in these Reasons. Suffice to say his evidence ultimately did not challenge the validity or accuracy of the third stage of testing upon which the ARFL Certificate was based. In those circumstances it cannot be said that there could be

error on the part of the Stewards in relying on the ARFL Certificate in the face of his evidence.

We are of the view that the Decision was based on logically probative evidence on this issue. No unreasonableness, arbitrariness, perversity, capriciousness, irrationality, fancifulness and/ or lack of bona fides is evident.

Relevant factual error has not been demonstrated.

This particular is not made out.

Particular 9. The Stewards should have had regard for the possibility of bacterial contamination of the sample when protective gloves, (which were issued together with the urine collection kit prepared and supplied by the ARFL) were not used, (transcript 8 – 9, 54 – 55, 67 – 78, 86 – 87, 130).

We are of the view that there was indeed evidence that could have supported the conclusion of fact ultimately reached by the Stewards. Our reference to particulars 7 and 8 outlines that evidence as regards microbial contamination, the refrigeration of the Sample and the validity and accuracy of the ARFL Certificate and thus its status as prima facie evidence of its contents.

As such the error asserted via this particular cannot amount to an error of law. Therefore the appellant must establish factual error sufficient to justify intervention by this Tribunal.

The evidence before the Stewards was to the effect that Clarke did not wear the gloves forming part of the Swabbing Kit (exhibit 11) when she collected the Sample. The evidence was also to the effect that the gloves themselves were not sterile and thus could themselves be a source of microbial contamination. The Guidelines (exhibit 8), whilst referring to such gloves and specifying their use, do not state why they are to be used. The possible impact of contamination of the sample via the uncovered hands of Clarke is covered by the evidence of Cawley and Tsivou.

Our comments as regards particular 7 and the ability of the Stewards to rely on the ARFL Certificate in light of Tsivou's evidence and the evidence as regards refrigeration of the Sample post collection are equally relevant in connection with this particular.

We are of the view that the Decision was based on logically probative evidence on this issue. No unreasonableness, arbitrariness, perversity, capriciousness, irrationality, fancifulness and/ or lack of bona fides is evident.

Relevant factual error has not been demonstrated.

This particular is not made out.

Particular 10. The Stewards should have had regard for the identification and implementation of an alternative protocol in ensuring the sample collector, Ms Clarke could adequately protect and ensure my interests in preventing possible contamination of the sample when Ms Clarke did not, (with their approval) utilise protective gloves which were issued together with the urine collection kit prepared and supplied by the ARFL, (transcript 8- 9, 54 – 55, 67 – 78, 86 – 87, 130).

The comments we have made in connection with particular 9 apply equally to this particular.

This particular is not made out.

Particular 11. The Stewards should have had sufficient regard for the evidence of my previously unproblematic use of testosterone products and application of the expert advice of the veterinary surgeon Dr Brown in the relevant period, (transcript 8, 11, 14, 16, 30, 34 – 42, 134, 136).

As this particular does not assert an error of law, the appellant must establish factual error sufficient to justify intervention by this Tribunal.

The appellant's evidence before the Inquiry was that he undertook a conservative treatment regime under the advice of Brown in his administration of Ropel to Palmyra Boy and other horses and that that regime had not previously brought about levels of testosterone above the threshold in that horse or other horses. There was evidence that the regime was designed to elevate the endogenous level of testosterone in all of the horses, including Palmyra Boy, to near but not above the threshold. The appellant's evidence as to his understanding of the dosage and periods of administration and withholding of Ropel prescribed by Brown was confused. His evidence of the potential inaccuracy of the syringe he used to administer Ropel to Palmyra Boy cast doubt on his ability to always accurately administer the required dose of Ropel.

The evidence of the matters as regards the design of the regime, the appellant's understanding of the dosage and periods of administration and withholding of Ropel and the method of its administration could lead a reasonable decision maker to conceive of the possibility that negligence on the part of the appellant could have been the cause of the elevated levels of testosterone recorded in the ARFL and QRSC Certificates notwithstanding the evidence as to the conservative treatment regime under the advice of Brown and the and its previous unproblematic outcomes in connection with Palmyra Boy and other horses.

In any event, no unreasonableness, arbitrariness, perversity, capriciousness, irrationality, fancifulness and/ or lack of bona fides is evident.

Relevant factual error has not been demonstrated.

This particular is not made out.

Particular 12. Finally, as to the issue of possible bacterial degradation and changes in the level of testosterone discussed by Tsivou, (transcript – pages 124 – 128) I refer the Tribunal to a complete absence of critical "chain of custody" documentation following collection which may have assisted in establishing the precise details surrounding the adequacy of storage, transport and preservation of the sample in Darwin prior to its eventual shipping to Sydney.

We are of the view that there was indeed evidence that could have supported the conclusion of fact ultimately reached by the Stewards. Our reference to particulars 7, 8 and 9 outlines that evidence as regards microbial contamination, the refrigeration of the Sample and the validity and accuracy of the ARFL Certificate and thus its status as prima facie evidence of its contents.

As such the error asserted via this particular cannot amount to an error of law. Therefore the appellant must establish factual error sufficient to justify intervention by this Tribunal.

The evidence before the Stewards was to the effect that no "chain of custody" documentation existed as regards the passage of the Sample post collection in Darwin. However evidence was given as to what occurred as regards the storage, transport and preservation of the Sample post collection. None of that evidence cast doubt as to the proper handling of the Sample post collection.

We are of the view that the Decision was based on logically probative evidence on this issue. No unreasonableness, arbitrariness, perversity, capriciousness, irrationality, fancifulness and/ or lack of bona fides is evident.

Relevant factual error has not been demonstrated.

This particular is not made out.

Grounds of appeal "3" and "4"are dismissed.

Ground of appeal 5.That the penalty imposed by the Stewards arising out of its finding was manifestly excessive.

This ground of appeal is an assertion that the Penalty and Disqualification were manifestly excessive in all the circumstances in that it is apparent that it is plainly unreasonable and/or unjust.

Specific error need not be identified by the appellant to have the Tribunal uphold this ground of appeal. (refer House v The King (1936) 55 CLR 499 and Dinsdale v The Queen (2000) 202 CLR 321).

A penalty will be manifestly excessive if it is out of all proportion to any view of the seriousness of the offence which could reasonably be taken (refer Cranssen v R (1936) 55 CLR 509 and Mace v Hales [2002] NTSC 15). A penalty must be shown to be "manifestly" excessive not just excessive. A penalty will be "manifestly" excessive if it is "clearly and obviously " so "and not just arguably" excessive (refer R v Woods [2000] NTCCA 2).

In written submissions, Mr McMillan submitted that an appropriate penalty in all the circumstances, taking into account the appellant's personal circumstances, his antecedants and the circumstances surrounding the breach of AR leading to the Charge, was a fine of about $1000. It was to be inferred that the Penalty of $5000 was therefore manifestly excessive. The written submissions and brief oral submissions of Mr McMillan did not address the Disqualification. We will proceed by assuming that a challenge is made not only to the Penalty but also to the Disqualification, the two having a cumulative effect upon the appellant as an owner of Palmyra Boy.

Mr McMillan referred the Tribunal to the appellant's long career of over 25 years as a trainer with "only one previous blemish" as regards breaches of AR dealing with prohibited substances. The prior offending occurred in 2000. Mr McMillan stressed that the appellant administered the Ropel under a conservative regime devised by Brown and that he had used testosterone throughout much of his training career "without incident" previously. He submitted that the appellant was not negligent in his administration of Ropel to Palmyra Boy and that any elevated level of testosterone in the Sample could only have occurred via an "accident" "in the integrity of the collection and/or analytical process". He also stressed that the appellant had immediately, upon the commencement of investigations initiated by the Stewards, admitted to the administration of Ropel to Palmyra Boy and had otherwise co-operated with the Stewards. As to personal circumstances, Mr McMillan referred to the considerable expense that the appellant had incurred in engaging Korkoneas, in attending the Inquiry and in attending before the Tribunal.

Mr McMillan referred us to a decision of the Racing Appeals and Disciplinary Board of Victoria in the matter of Paul Banks delivered on 12 July 2011. He submitted that the facts of that matter were comparable. The Board in that matter found that the administration of testosterone by Banks under the advice of a veterinary surgeon was a "significant mitigating factor". The Board considered that a "moderate to modest " fine of $1000 was appropriate in connection with the charge of a breach of AR 178.

We note that in the Banks matter, the trainer in question pleaded guilty and that he had no antecedants. We understand that like the appellant, that trainer was acting under the advice of Brown.

Mr De Silva, in written and oral submissions, contended that the Penalty was not manifestly excessive. He submitted that, by reference to previous decisions of this Tribunal in the matters of T N Pike (26 July 1992), Catriona Green (25 September 1997), Aureole King (16

July 1999) and Gary Clarke (20 August 2004), the starting point for braches of AR 178 and 175 ought be disqualification in the absence of exceptional circumstances. He noted that the Penalty indicated a finding by the Stewards of exceptional circumstances in this instance. An extract of penalties imposed by the Stewards in similar matters was attached to the written decisions. Disqualifications of between 9 months and 3 months have previously been imposed. In some instances fines of $10000 and $2000 have been imposed. The extract included a reference to the Tribunal decision in Lionel Holdsworth supra which involved the imposition of a disqualification of 9 months. In every instance, the horse involved was disqualified. Mr De Silva did not dispute the appellant's antecedants as referred to by Mr McMillan. Mr De Silva effectively submitted that the appellant was negligent in his administration of Ropel to Palmyra Boy. He asserted that that administration of Ropel was to improve performance rather than to act as a purely therapeutic treatment. He noted that the appellant had not pleaded guilty to the Charge but had rather strongly asserted his innocence in respect thereto before this Tribunal.

Mr De Silva finally submitted that "In the event that the Tribunal after giving consideration to the facts determine the Stewards erred in finding exceptional circumstances existed in this matter, the Tribunal ought to return to the starting point and impose a period of disqualification". Pike was referred to.

Dealing with Mr De Silva's final submission first, we are of the view that it would not be appropriate for us to impose a greater penalty than that imposed by the Stewards. The hearing of the Appeal before us did not proceed as a hearing de novo or as a rehearing where fresh evidence was adduced that impacted upon the validity or appropriateness of the Stewards' deliberations as regards the Penalty. In those circumstances, In order for us to exercise our powers under section under 145ZE of the Act error on the part of the Stewards must be established. Here, the appellant asserts error in that the Penalty is excessive and manifestly so. If we disagree with that assertion the Penalty will remain undisturbed. If we agree with that assertion we could only intervene to impose a lesser penalty.

We would follow the approach taken in Pike as regards the assessment of appropriate penalties for breaches of AR 178 and 175. Disqualification is the appropriate starting point. The presentation of horses for racing with the presence of prohibited substances has the tendency to undermine public confidence in racing and is therefore a danger not only to its integrity but also to its future. It is even more important that public confidence be maintained in racing in the Northern Territory given the industry's small size, relatively small public support base and its need to rely in part upon government funding.

It is evident that the Stewards departed from that starting point upon consideration of what they considered to be "exceptional circumstances"; namely the fact that the appellant had been a full time trainer for 25 years, was the trainer of a relatively large number of horses, had administered the Ropel under the advice of Brown and had only one relevant prior conviction in 2000. In so departing a fine of $5000 was imposed.

The Penalty is well within the range of penalties that could have been reasonably imposed. It cannot, in our view, be said to be a penalty out of all proportion to any view of the seriousness of the offence which could reasonably be taken. Adequate allowance was clearly made by the Stewards to all mitigating factors relevant to the offence and the appellant.

The allegation that the Penalty was manifestly excessive is not established.

As to the Disqualification, we note that AR 177 appears to be in mandatory terms. If that be so then no discretion exists (save via AR 177C) to not impose a disqualification upon the horse the subject of a charge and finding of guilt under AR 175. AR 177C was not in place when the Stewards imposed the Disqualification. We are of the view that in the circumstances the Stewards had no option but to impose the Disqualification. No error on the part of the Stewards is demonstrated as regards the Disqualification. Even if we are wrong as regards the mandatory nature of AR 177 as it then was, we would accept the general approach taken by this Tribunal in the matter of Donald Green (19 February 1993). Consistent with Pike, it was there said that " quite extraordinary circumstances" would have to be found to exist before consideration could be given to not imposing a disqualification on a horse the subject of a finding of guilt in connection with a breach of AR 178 or AR 175. We would not find such circumstances in this case where there was a deliberate administration of Ropel designed to elevate endogenous levels of testosterone near to the threshold.

This ground of appeal is dismissed.

It follows from all of the above that we uphold the Finding of Guilt, the Penalty and the Disqualification.

ORDERS

The Appeal is dismissed.

Mr Geoffrey Clift

Deputy Chairman

Mr Geoffrey Clift

Deputy Chairman

For and on behalf of

Mr James De-Belin

Member