IN THE RACING APPEALS TRIBUNAL

JIMMY JOHN MAGNISALIS
Appellant

v

GREYHOUND WELFARE AND INTEGRITY COMMISSION
Respondent

REASONS FOR DETERMINATION

DATES OF HEARING	**3 December 2024** **29 January 2025**
WRITTEN SUBMISSIONS	**Appellant – 20 February 2025** **Respondent – 3 March 2025** **Appellant – 11 March 2025**
DATE OF DETERMINATION	**28 April 2025**
APPEARANCES	**Mr J Bryant for the Appellant** **Ms A Summerson for the Respondent**

ORDERS

1. **The appeal in respect of Charge 2, having been withdrawn, is dismissed.**
2. **The fine of $375.00 imposed in respect of Charge 2 is confirmed.**
3. **The appeal against the finding of guilt in respect of Charge 1 is dismissed.**
4. **The appeal against the penalty imposed in respect of Charge 1 is upheld.**
5. **The penalty of 16 months disqualification imposed in respect of Charge 1 is quashed.**
6. **In lieu thereof, a disqualification of 14 months is imposed, commencing on 9 October 2024.**
7. **The appeal deposit is forfeited.**

INTRODUCTION

1. By a Notice of Appeal dated 1 October 2024[1] Jimmy John Magnisalis (the Appellant) has appealed against a determination of the Greyhound Welfare and Integrity Commission (the Respondent) to disqualify him for a period of 16 months, and impose a fine, for separate breaches of the *Greyhound Racing Rules* (the Rules).

2. The hearing of the appeal extended over two days, in the course of which I heard oral evidence from:

    (i) Dr Adam Cawley, Scientific Manager, Racing Analytical Services Limited;
    (ii) Dr Steven Karamatic, Veterinarian;
    (iii) Anne-Marie Jarvis, swab attendant; and
    (iv) Dr Derek Major, an expert witness called by the Appellant.

3. In addition to the oral evidence, I was provided with a Tribunal Book extending to some 300 pages, along with an Amended Tribunal Book of similar length. The need for the preparation of an Amended Book came about as a consequence of the addition of evidence between the first day of the hearing (on 3 December 2024) and the second day (on 29 January 2025). The references in these reasons are to the Amended Tribunal Book (TB).

AN OVERVIEW OF THE CASE AGAINST THE APPELLANT

4. The following overview of the case against the Appellant is taken, in part, from the Respondent's outline of submissions filed prior to the hearing.[2]

The Appellant's background

5. At the material time, the Appellant was a registered participant in the greyhound racing industry. Between 16 January 2024 and 17 September 2024 he was the trainer of '*Remission*' *(the greyhound),* and was responsible for its care and custody.

[1] TB 1 – 4.
[2] Commencing at TB 9.

6. On 28 May 2024, the greyhound competed in race 3 at a meeting held at Gosford, and placed first.

The taking and analysis of a urine sample from the greyhound

7. A urine sample V828336 (*the sample*)[3] was taken from the greyhound following the race and was received by Racing Analytical Services Limited (RASL) on 31 May 2024. On 2 July 2024, RASL issued a Certificate of Analysis certifying that the sample contained amphetamine, hydroxyamphetamine, methamphetamine and hydroxymethamphetamine.[4]

8. On 2 August 2024, the Australian Racing Forensic Laboratory (ARFL) issued a second Certificate of Analysis[5] certifying that a reserve sample contained amphetamine, hydroxyamphetamine, methamphetamine and hydroxymethamphetamine.

The Kennel inspection

9. On 4 July 2024, the Respondent conducted a kennel inspection of the Appellant's registered kennel premises,[6] at which time the Appellant was notified of the detection of permanently banned prohibited substances in the sample, and of the fact that the Respondent had commenced an inquiry.

The charges against the Appellant

10. On 13 September 2024 the Respondent issued a Notice of Proposed Disciplinary Action to the Appellant outlining two charges. The first charge (Charge 1) alleged an offence contrary to r 141(1)(a) of the Rules which provides as follows:

[3] TB 91.
[4] TB 100 – 101.
[5] TB 108 and following.
[6] TB 102 – 107.

Greyhound to be free of prohibited substances

141 (1) The owner, trainer or other person in charge of a greyhound:

(a) nominated to compete in an event;
...
must present the greyhound free of any prohibited substance.

...

(3) The owner, trainer or other person in charge of a greyhound presented contrary to subrule (1) of this rule shall be guilty of an offence.

11. Charge 1 was particularised in the following terms:[7]

1. *That [the Appellant], as a registered Owner Trainer, while in charge of the greyhound Remission (the greyhound) presented the Greyhound for the purpose of competing in race 3 at the Gosford meeting on 28 May 2024 in circumstances where the greyhound was not free of any prohibited substance;*

2. *The prohibited substances detected in the sample of urine taken from the greyhound following the event were amphetamine, hydroxyamphetamine, methamphetamine and hydroxymethamphetamine.*

3. *Amphetamine, hydroxyamphetamine, methamphetamine and hydroxymethamphetamine are permanently banned prohibited substances under Rule 139(1)(g) of the Rules.*

12. The second charge (Charge 2) alleged an offence contrary to r 148(2) of the Rules which is in the following terms:

148 Possession of a prohibited substance etc

(1) ...

(2) A person must not provide, possess, acquire, attempt to acquire, administer, attempt to administer or allow to be administered to a greyhound, any prohibited substance, exempted substance or other substance (including any other medication, medicine, injectable substance, supplement, herbal product or therapeutic good), that is not labelled, prescribed, dispensed and obtained in accordance with relevant Commonwealth, state and territory legislation.

[7] TB 48 – 49.

13. Charge 2 was particularised as follows:[8]

> 1. *That [the Appellant) was at all material times registered as an Owner/Trainer who owned, trained, raced and or/were in charge of greyhounds … (the Property) being premises used in relation to greyhound racing.*
>
> 2. *On Thursday 4 July 2024 [the Appellant) had in his possession at the Property liquid in a bottle labelled 'Promote'.*
>
> 3. *The bottle was tested by Racing Analytical Services Ltd and was found, by way of Results RS24/10156-2 to contain Phenyl Salicylate.*
>
> 4. *Phenyl Salicylate is a prohibited substance under Rule 137(b)(xxii) of the Greyhound Racing Rules. It is an offence under Rule 148(2) to possess any prohibited substance that is not labelled, prescribed, dispensed and obtained in accordance with relevant Commonwealth, state and territory legislation.*

The hearing before Stewards and the penalties imposed

14. The Appellant appeared with his legal representative before Stewards on 17 September 2024.[9] He pleaded guilty to both charges[10] and the hearing proceeded.

15. On 30 September 2024, the Respondent imposed the following penalties:[11]

> 1. Charge 1 – a disqualification of 16 months.
> 2. Charge 2 – a fine of $375.00.

<u>THE APPELLANT'S CASE ON APPEAL</u>

16. At the commencement of the hearing Mr Bryant, who appeared for the Appellant, indicated that the appeal was not pressed in respect of Charge 2.[12] In those circumstances it will be appropriate in due course for orders to be made dismissing the appeal in respect of that charge, and confirming the penalty imposed.

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[8] TB 49.
[9] TB 161 – 205.
[10] TB 163.1; 165.1.
[11] TB 52 – 54.
[12] Transcript at 2.26.

17. to As to Charge 1, Mr Bryant entered a plea of not guilty on behalf of the Appellant. That was not the plea which was entered before the Stewards, but as this appeal proceeds as a hearing *de novo* it is open to the Appellant to take that course. In doing so, Mr Bryant explained the Appellant's position in this way:[13]

> ***It's a plea of not guilty purely based on the testing procedure***. … *And if that's found against us in that position, then it'll be a plea of guilty based on the McDonough principles, if that's allowed.* …. *What I believe is that if the testing procedure is called into question, the two certificates don't come into play****. What we say is that there's a material flaw in the testing*** (emphasis added in each case).

18. Accordingly, the appeal has proceeded on the following bases:

    1. the Appellant takes no issue with the fact that:
        (a) he was the trainer of the greyhound;
        (b) the greyhound was presented to, and did, participate in the relevant event; and
        (c) the sample was taken from the greyhound following the event;
    2. the two Certificates of Analysis previously referred to were issued, certifying the presence of certain substances in the sample;
    3. the Appellant challenges the testing procedure and/or the results of that procedure, on the basis that the procedure was materially flawed, and in doing so challenges the evidentiary effect of the two certificates;
    4. if those challenges are unsuccessful, the Appellant accepts that his guilt in respect of Charge 1 will be made out;
    5. in that event, the Appellant submits that the circumstances of the offending would fall within category 2 of the so-called *McDonough* principles, so as to reduce his level of culpability, and thus reduce any penalty which might be imposed.

[13] Transcript at 2.43 – 3.2. This position was confirmed on the second day of the hearing at Transcript 36.24.

THE EVIDENCE

19. I turn to the evidence adduced in the appeal.

The Appellant's Affidavit

20. The Appellant filed an Affidavit dated 16 January 2025[14] the contents of which were essentially limited to addressing subjective factors. Ms Summerson, who appeared for the Respondent, did not seek to cross-examine the Appellant on that Affidavit.[15]

Dr Adam Cawley

21. Dr Cawley is the Scientific Manager of RASL. He provided two statements, the first of which was dated 30 October 2024.[16] The contents of that statement may be summarised as follows:

    1. The sample, consisting of three bottles (two of urine and one of control solution) was delivered to RASL by courier at approximately 11.52 am on 31 May 2024 in tamper evident security packs.[17]
    2. The contents of the first bottle were tested through a general routine screen, applying a range of different methods, which indicated the presence of amphetamine, hydroxyamphetamine, methamphetamine and hydroxymethamphetamine.[18]
    3. The results of that analysis were confirmed on 2 July 2024.[19]
    4. The reserve sample was sent to ARFL for confirmatory analysis.[20]
    5. On 2 August 2024, ARFL confirmed the presence of the substances in [2] above[21] all of which are prohibited under the Rules.[22]

[14] TB 62 – 63.
[15] Transcript 35.32.
[16] Commencing at TB 131.
[17] At [4] – [5].
[18] At [6] – [7].
[19] At [8].
[20] At [9] – [11].
[21] At [12].
[22] At [15].

22. Dr Cawley provided a second statement dated 11 December 2024[23] the contents of which may be summarised as follows:

    1. RASL does not routinely monitor for the presence of hydroxyamphetamine and hydroxymethamphetamine in human oral fluid (i.e. saliva).[24]
    2. There can be a relationship between plasma and oral fluid concentrations, such that if these metabolites were found to be present it should be assumed that they would be of very low concentration, possibly below laboratory limits.[25]
    3. It may be possible for hydroxyamphetamine and hydroxymethamphetamine to be excreted in sweat, the assumption being that the concentration would be very low.[26]

23. In cross-examination, Dr Cawley was asked about the "lowest concentration" of amphetamine or methamphetamine which was capable of being detected. His response was as follows:[27]

> *It really depends on the sample in question, Mr Bryant. There's no definitive answer to that. As I've mentioned in other cases involving illicit substances, such as amphetamine, methamphetamine and their metabolites, look, it's a rule of thumb that leading racing laboratories would be required to detect at least 1 nanogram per ml. So that's the ceiling, not the floor, I think, in relation to the expectation of our customers.*
>
> *How much lower than 1 nanogram per ml really comes down to the particular sample in question. Some samples might be cleaner, and so we can see prohibited substances at lower levels. Other samples might be dirty, and so that limit of detection might be closer to that 1 nanogram per ml expectation.*

[23] TB 129 – 130.
[24] At [4] – [6].
[25] At [7].
[26] At [9].
[27] Transcript at 6.35 – 6.45.

24. Dr Cawley agreed that 1 nanogram was a low level.[28] He also agreed that a low level would be a range of 1 nanogram to 10 nanograms,[29] that a medium level would be 10 to 100 nanograms,[30] and that a high level would be in excess of 100 nanograms. Those estimated ranges were accompanied by the following qualification:[31]

> *[I] just caution that this is all relative on the types of equipment that I've been using over the last 15, you know, nearly 20 years. It is 20 years, I should say. You know, beforehand, these levels might have been considered all quite low. It really depends on the stage of technological advancement that we're dealing with.*
>
> *But with the, you know, instrumentation that you've asked me, what we've used pertaining to this sample, liquid chromatography high-resolution mass spectrometry, and for the confirmatory analysis, liquid chromatography tandem spectrometry, they are the opinions I'm comfortable to provide.*

25. Dr Cawley said that all four substances were easily detected in the sample and that this was particularly the case with amphetamine,[32] a circumstance which he did not regard as unusual.[33] Bearing in mind that he is an analytical chemist and not a pharmacologist, Dr Cawley said that in his opinion it was likely that there had been metabolism of amphetamine and/or methamphetamine in the greyhound, but could not express any view about whether this was through the liver or some other organ.[34] He confirmed his understanding that the metabolites (i.e. hydroxyamphetamine and hydroxymethamphetamine), the presence of which were confirmed in the sample, are common to human metabolism, such that it was possible that they were processed by a human liver and not necessarily the greyhound's liver.[35] Dr Cawley was not able to comment upon any aspect of the swabbing procedure as he considered this to fall outside of his area of expertise.[36]

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[28] Transcript at 7.1 – 7.6.
[29] Transcript at 7.8.
[30] Transcript at 7.14.
[31] Transcript at 7.18 – 7.27.
[32] Transcript at 8.28 – 8.32.
[33] Transcript at 8.42.
[34] Transcript at 9.23 – 9.45.
[35] Transcript at 10.18 – 10.25.
[36] Transcript 10.35.

26. Dr Cawley did not agree[37] with the opinion of Dr Major as to the approximate levels of substance in the sample. He also expressed what might be described as a degree of bewilderment[38] as to the basis on which Dr Major had concluded that such levels were indicative of "*low level exposure close to the time of sampling"*. He pointed out that there were no defined levels of any of the substances,[39] and expressed the view[40] that Dr Major's report was lacking in any underlying reasoning.

Dr Steven Karamatic

27. Dr Karamatic is the Chief Veterinarian of Greyhound Racing Victoria. He has been a Veterinary Surgeon since 2007. In response to a request that he provide an opinion in relation to the detection of prohibited substances in the greyhound, and that he comment on the opinions of Dr Major, Dr Karamatic provided a report dated 20 November 2024[41] in which he said (inter alia) the following:

    1. Amphetamines of the kind detected in the sample are capable of affecting a greyhound's behaviour.[42]
    2. The exposure of a greyhound to amphetamine alone, or to both methamphetamine and amphetamine, could result in the detection of amphetamine, hydroxyamphetamine, methamphetamine and hydroxymethamphetamine, as confirmed in the sample.[43]
    3. He was not aware of the approximate concentration (i.e. levels) of each substance in the sample, and had not been provided with those levels by the Respondent.[44]
    4. It was standard practice in the case of prohibited substances which are not subject to a threshold that the analysis undertaken was qualitative (i.e. to confirm the presence of a prohibited substance) and not

[37] Transcript at 12.22.
[38] Transcript at 13.36 – 13.38.
[39] Transcript at 13.40 – 13.46.
[40] Transcript at 12.26 – 13.23.
[41] Commencing at TB 137.
[42] At [12].
[43] At [20].
[44] At [26] – [27.]

quantitative (i.e. not to provide an accurate measurement of the concentration of such substance).[45]

5. The basis of the levels opined by Dr Major was unclear, but they could only be regarded as approximations due to the nature of the analysis which had been carried out and were, in any event, within the typical range of urinary concentrations of amphetamines found in previous cases in which Dr Karamatic had given evidence.[46]
6. A greyhound exposed to amphetamine alone will not produce a urine sample containing methamphetamine or hydroxymethamphetamine.[47]
7. The conclusions expressed by Dr Major that:
    (a) the estimated level of amphetamine was 8 nanograms;
    (b) this was an inconsequential finding;
    (c) such a finding well below the Australian "cut-offs" applicable to drug testing in humans,

    were wrong, because screening limits and residue limits applicable to greyhound racing are not the same as the cut off levels to which reference was made.[48]
8. The conclusion expressed by Dr Major that the greyhound had been exposed, by some route, to a very small quantity of amphetamine or methamphetamine, very close to the time of sample collection, was wrong, because the greyhound could not have produced the results which were found if the greyhound was exposed in the circumstances postulated by Dr Major. Amphetamine exposure alone could not have produced methamphetamine or hydroxymethamphetamine because the amphetamine would have needed to be contaminated with methamphetamine.[49]
9. The conclusion expressed by Dr Major that the greyhound was not presented with a prohibited substance in its system was contrary to the

[45] At [27].
[46] At [28] – [29].
[47] At [32].
[48] At [42].
[49] At [34].

objective fact that a urine sample was taken from the greyhound immediately following the race, in which the presence of four prohibited substances had been confirmed.[50]

10. The conclusion expressed by Dr Major that the circumstances suggested a low level of exposure close to the time of sampling, contradicted his (i.e. Dr Major's) other conclusion that the excretion of amphetamines in urine was highly variable, such that it was not possible to draw inferences, from the relative percentages of metabolite, as to the time and amount of contact.[51]
11. The conclusion expressed by Dr Major that the low levels detected in the present case suggested a low level of exposure close to the time of sampling, was one of many possible scenarios as to how the greyhound came to have the prohibited substances in its system.[52]
12. The greyhound may have been exposed to methamphetamine, +/- amphetamine, at any stage over the preceding several days.[53]
13. The substance and amounts to which the greyhound was exposed, the route of exposure, and other factors related to the individual greyhound, will all impact on the approximate concentration of substance detected in a sample. Given the normal security arrangements which generally applied to greyhounds at race meetings, the opinion of Dr Major that there was a low level of exposure at the time of testing was unlikely.[54]
14. As to Dr Major's conclusion that a small quantity of bodily fluid from a person or animal exposed to a high level of amphetamine had contaminated the collection vessel directly or from the environment, it remained the case that the person or animal would had to have had

[50] At [36].
[51] At [44].
[52] At [45].
[53] At [45]/
[54] At [45].

methamphetamine +/- amphetamine in their system to cause the detection of the four amphetamines in the sample.[55]

15. The confirmed finding of the presence of prohibited substances rendered it likely that the greyhound had been exposed to methamphetamine, +/- amphetamine within the previous 7 days.[56]
16. Amphetamines are capable of affecting the condition or performance of a greyhound, with any effect more likely to be positive on performance, such as by reducing fatigue and increasing mood, although toxic effects are more likely at high doses.[57]

28. When cross-examined, Dr Karamatic explained that exposure to both amphetamine and methamphetamine was capable of producing all four substances which had been detected in the sample.[58] He also explained that methamphetamine can be smoked, inhaled, injected, or snorted/blown into a body cavity,[59] thus exposing the substance to mucous membranes within (for example) the nasal cavity or the gums.

29. It was put to Dr Karamatic[60] that the only realistic scenario in the circumstances of this case was that the greyhound had inhaled methamphetamine closely after the race or on the way to the kennels, for example by walking through an area in which someone was smoking the drug. Dr Karamatic's response was that *"anything is possible"*.[61] It was also put to Dr Karamatic that if a greyhound licked a surface that had methamphetamine on it, it would lead to a positive result.[62] In response to that proposition, Dr Karamatic said:[63]

> *Anything that exposes the greyhound to methamphetamine it can occur – result in the positive, it's just a matter of how likely those scenarios are.*

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[55] At [49].
[56] At [45]; [55]
[57] At [56].
[58] Transcript at 15.34 – 15.41.
[59] At [14]; Transcript at 17.25 – 17.28.
[60] Transcript at 17;43 – 17.45; 18.15 – 18.17.
[61] Transcript at 18.19.
[62] Transcript at 18.26 – 18.27.
[63] Transcript at 18.29 – 18.31.

30. Consistent with the evidence of Dr Cawley, Dr Karamatic confirmed that the analysis which had been undertaken was not quantitative, such that actual levels of a prohibited could not be specified.[64] He agreed that eliminating cross-contamination in the sampling process was very important, and was a factor that was essential to maintaining the integrity of the process.[65]

31. The questioning of Dr Karamatic then turned to circumstances of the sampling process which were said to include "*skylarking*" on the part of the swab attendant, Ms Jarvis.[66] At that point in the hearing, Dr Karamatic's further cross-examination was deferred, subsequent to which Mr Bryant indicated that he did not wish to ask Dr Karamatic any further questions.[67]

Anne-Marie Jarvis

32. Ms Jarvis is a swab official and provided a statement of 17 December 2024.[68] She was working at the Gosford race track on 28 May 2024 and was responsible for taking the sample from the greyhound.[69] In circumstances where she takes a number of urine samples from greyhounds in any given week, she had no independent recollection of collecting the sample in this particular case, and said that there was nothing about the case that made it stand out in her mind.[70]

33. Having worked as a sample official for more than 10 years, Ms Jarvis outlined her processes in some detail. Those processes, which she said were followed in the present case, may be summarised as follows:[71]

[64] Transcript at 20.34.
[65] Transcript at 24.14 – 24.20.
[66] Transcript at 24.22 – 22.31.
[67] Transcript at 101.19.
[68] TB 124 – 128.
[69] Statement at [6].
[70] Statement at [7].
[71] At [8].

1. When a direction is given for a sample to be taken, the greyhound is walked by its handler, supervised by a staff member, to a kennelling area.
2. Ms Jarvis then walks with the greyhound and its handler to a swabbing bay.
3. Ms Jarvis unlocks the swabbing bay and enters with the greyhound and handler.
4. She invites the handler to hang their items on a hook in the wash bay, or on a hook in the swab bay.
5. The handler is given the opportunity to wash and water the greyhound in a wash bay, and then take it for a short walk if necessary.
6. The greyhound's water bowl is filled, and the greyhound is placed in the swab bay kennel, following which Ms Jarvis and the handler leave the kennel area, which is then locked.
7. At a pre-arranged time, generally about 40 minutes later, Ms Jarvis and the handler return, and a swab kit is obtained.
8. Ms Jarvis then washes her hands, and repeatedly washes the ladle before hanging it to dry on a hook in a manner in which ensures that it does not come into contact with any surface.
9. The swab kit is unpacked (in the handler's presence) with care being taken to ensure the integrity of the bottles.
10. At least 50 mls of control solution is placed into the ladle, and is then bottled.
11. Ms Jarvis, the handler and the greyhound then walk from the swab bay to another area where the urine sample is collected from the greyhound. Ms Jarvis then holds the ladle above her head with her right hand, returns to the swab room, and bottles the sample.

34. Ms Jarvis stated[72] that she ensures that throughout the process, she does not touch the greyhound, or any items that belong to it, or to its handler. Importantly, she also stated[73] that she does not:

    1. take any prescribed medications that contain any form of amphetamine; and
    2. otherwise use amphetamine or methamphetamine, and has never done so.

35. Ms Jarvis was cross-examined at considerable length on the second day of the hearing. The cross-examination traversed a number of subjects. Some of it was conducted by reference to different excerpts of video footage taken on the day, and which form part of the evidence.

36. Ms Jarvis confirmed that her procedure was to wash the ladle into which the urine sample is deposited.[74] She also explained[75] that there were four or five hooks in the wash bay and that trainers were invited to "hang their things on them" when they came in.

37. Ms Jarvis agreed that part of her role was to protect the integrity of the sample, and said that this is what she did on each and every occasion.[76] She described herself as being "*very particular"* about the way in which she carried out her procedures, and that, in particular, she ensured that no other person came in touch with the ladle.[77]

38. Ms Jarvis said that on the way to obtaining the sample, her practice was to hold the ladle above her head. She explained that she held the ladle in that way to ensure

[72] At [9].
[73] At [13] – [14].
[74] Transcript 42.6 – 42.33.
[75] Transcript 45.3 – 45.29.
[76] Transcript 49.27 – 50.1.
[77] Transcript 51.14 – 51.45.

that it did not come into contact with anything else, so as to prevent contamination.[78]

39. It was variously put to Ms Jarvis, by reference to the footage, that she:

    1. was, at one point, *"singing"* into the ladle;[79]
    2. was, on another occasion, talking to someone when the ladle was not above her head;[80]
    3. was, on another occasion, swinging (the ladle) around;[81]
    4. did not, at least on one occasion (and perhaps on others) have the ladle above her head.[82]

40. Ms Jarvis did not accept any of those propositions. Specifically, she did not accept that the footage showed the ladle close to her mouth, and not above her head, at any point.[83] She also denied that after the sample had been collected, she did not have the ladle above her head.[84]

41. In re-examination, Ms Jarvis stated that the Appellant raised no issue with her on the day regarding any aspect of the taking of the swab[85] and that the Appellant did not, at any time, touch the ladle.[86] She again confirmed that she took no prescribed medications containing amphetamine, and that she did not use amphetamine or methamphetamine recreationally.[87]

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[78] Transcript 46.6 – 46.25; 48.4 – 48.15.
[79] Transcript 52.10 – 52.20.
[80] Transcript 52.23 – 53.2;
[81] Transcript 43.4 – 44.10; 44.35 – 44.39.
[82] Transcript 53.5 – 53.26.
[83] Transcript 56.31 – 58.27; 67.23 – 67.46.
[84] Transcript 63.41 – 64.8.
[85] Transcript 71.42 – 72.27.
[86] Transcript 71.40.
[87] Transcript 72.29 – 72.39.

42. Ms Jarvis was also asked about her evidence regarding hooks in the swab bay and the wash bay. She confirmed that trainers were given an option of which one to use.[88]

Dr Derek Major

43. Dr Major provided two reports, the first of which was dated 14 September 2024.[89] A summary of his conclusions expressed in that report is as follows:

    1. the approximate levels of substances detected (expressed in nanograms) were:[90]
        - Amphetamine – 8
        - Hydroxyamphetamine – 3
        - Methamphetamine – 2
        - Hydroxymethamphetamine – 2
    2. the reported level of amphetamine in this case was an *"inconsequential finding"* and *"well below the Australian cut offs of 150 and 300 for drug testing in humans"*;[91]

44. In a supplementary report dated 15 December 2024[92] Dr Major stated that in his opinion:

    1. RASL was equipped with current, and world's best practice, equipment, which can often measure substances at picogram level;[93]
    2. there was no impediment to RASL detecting the present substances in oral fluid;[94]
    3. there were two possible scenarios which could have produced the result in the present case, namely:

[88] Transcript 69.45.
[89] TB 55 and following.
[90] At [1].
[91] Conclusion 1.
[92] TB 64 and following.
[93] At [2].
[94] At [2].

(a) the greyhound had been exposed, by some route, to a very small quantity of amphetamine or methamphetamine, very close to sample collection; or

(b) a small quantity of body fluid, such as saliva, contaminated skin, sweat or urine, from a person or animal exposed to a high level of amphetamine, has contaminated the collection vessel directly or from the environment.[95]

45. Dr Major went on to say this:[96]

> *Amphetamine can be both a component of the "street drug", and a metabolite of the substance Methamphetamine. The amounts of substance detected, and the relatively low amounts of the Hyrdroxy-metabolites, are not consistent with the administration of a pharmacologically significant dose of an amphetamine to the dog. As the dog is securely impounded before the race it would appear unlikely that he would be exposed to the substance pre-race.*
>
> *The alternative explanation is that the sample pot has collected some airborne contamination from a person who has "snorted", or otherwise consumed, a "dose" of amphetamine/methamphetamine, or transferred it from a surface such as a seat.*
>
> *It should be noted that:*
>
> - *A typical dose of "ice" is reported as being 100 milligrams. This equates to 100,000,000 nanograms. Within minutes metabolites would appear.*
> - *There is a proliferation of reports in the lay and scientific literature noting that amphetamines are routinely detected in public places.*

46. I have addressed Dr Major's opinions in detail below.

[95] At [4].
[96] At p. 2 – 3.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

47. The Appellant commenced by making a number of general submissions as to the approach to be taken in determining the issues in the present case. Those submissions included that:

    1. the standard of proof discussed in *Briginshaw v Briginshaw*[97] was to be applied;[98]
    2. a defence was available to the Appellant if he could demonstrate a material flaw in the certification procedure, or in any act or omission related to the process leading up to the issuing of the relevant certificates.[99]

48. The Appellant then turned to the evidence of Ms Jarvis regarding hooks, and submitted that:

    1. there was a discrepancy between the procedure outlined by Ms Jarvis in relation to the hooks available for trainers to hang their belongings, and the practice which was employed in this case, all of which undermined the integrity of the testing environment;[100]
    2. that discrepancy gave weight to Dr Major's opinion that contamination could occur if a small quantity of bodily fluid, contaminated skin, or clothing from a person or animal exposed to a high level of amphetamine contaminated the collection vessel directly or from the environment;[101]
    3. the absence of hooks meant that the Appellant had to "*improvise"* by placing his items on unsuitable surfaces such as padlocks or latches,

[97] (1938) 60 CLR 34; [1938] HCA 34,
[98] Submissions at [9].
[99] Submissions at [10] citing *Andrew Bell v Greyhound Welfare and Integrity Commission,* 1 December 2022 (Bell).
[100] Submissions at [21].
[101] Submissions at [23].

and that deviation from expected procedures increased the risk of environmental contamination, as opined by Dr Major.[102]

49. The Appellant's submissions then addressed the evidence of Ms Jarvis concerning her manner of holding the ladle. It was submitted that what was depicted on the footage in this regard was at odds with the oral evidence of Ms Jarvis and that, in circumstances where Dr Karamatic had given evidence emphasising the importance of ensuring the integrity of the testing process, I should find that Ms Jarvis' conduct fell "*well short of the standard required of a steward or authorised person*".[103] As I understood it, this amounted to the proposition that I should find that the actions of Ms Jarvis compromised the integrity of the swabbing process.

50. The Appellant's submissions then turned to the possibility that the substances which were found to be present in the sample could have been processed by the greyhound's liver. It was submitted that such a possibility was supported by the evidence of both Dr Karamatic and Dr Major.[104] The Appellant placed further reliance on the opinion of Dr Major that saliva could have contaminated the collection vessel.[105]

51. The Appellant then made further submissions in relation to the evidence of Ms Jarvis.[106] It was submitted, in particular, that:

    1. Ms Jarvis' evidence as to consistently holding the ladle high above her head should be rejected;[107]
    2. Ms Jarvis' credit was undermined by her admission that she was talking, or calling out, to someone whilst holding the ladle;[108]

[102] Submissions at [24].
[103] Submissions at [39].
[104] Submissions at [40] – [42].
[105] Submissions at [43].
[106] Submissions commencing at [52].
[107] Submissions at [68].
[108] Submissions at [69].

3. inconsistencies in Ms Jarvis' evidence supported a conclusion that she had failed to adhere to proper procedures, and that at no stage did she hold the ladle above her head;[109]
4. Ms Jarvis' failure to hold the ladle above her head supported a conclusion that there was a material flaw in the testing process, which was further supported by the evidence that:
    (a) Ms Jarvis had communicated with people outside the swab area;
    (b) she was seen to be talking and laughing in the direction of the ladle;
    (c) the ladle had come close to her mouth;[110]
5. the time, distance and method by which the ladle was transported after being washed further supported the conclusion that there was a material flaw in the testing process.[111]

52. The ultimate submission advanced by the Appellant was that what were said to be the identified procedural flaws, the footage, the asserted inconsistencies in the evidence of Ms Jarvis, and the expert opinions of Dr Major, raised *"significant doubts about the integrity of the testing process"*.[112] In those circumstances it was submitted that I should conclude that there was a material flaw in the process, as a consequence of which the Appellant's appeal should be upheld, and the charge dismissed.

53. In the event that the offence was found to be established, the Appellant submitted that a conclusion should be reached that the circumstances of this case fell within category 3 of the so-called *McDonough* principles.[113] It was submitted[114] that such a conclusion was supported by:

[109] Submissions at [70].
[110] Submissions at [71]; [72] – [79].
[111] Submissions at [85].
[112] Submissions at [95].
[113] [2008] VRAT 6.
[114] Submissions commencing at [93].

1. the Appellant's evidence that:
   (a) he had never used or touched methamphetamine; and
   (b) had not given methamphetamine to the greyhound;
2. the absence of any evidence that the Appellant had administered either substance to the greyhound, be it deliberately or accidentally;
3. the opinions of Dr Major;
4. the possibility of cross-contamination.

Submissions of the Respondent

54. The Respondent accepted that it had the onus of establishing the fact in issue, namely that the greyhound was presented not free of a prohibited substance, that the *Briginshaw* standard was applicable,[115] and that the process in which a sample is collected from a greyhound could be considered to be part of the process of certification, testing and analysis referred to in the Rules.[116] In summary, the Respondent's case was encompassed in the following propositions:

    1. The evidence supported a finding that the greyhound was presented not free of a prohibited substance.
    2. The primary question for determination was whether there was a material flaw in the certification, testing or analysis process which would lead to the evidentiary certificates being set aside.
    3. The onus was on the Appellant to establish such a material flaw.
    4. The Appellant had failed to discharge that onus, and the offence was made out.

55. As to the primary question identified in [54](2) above, the Respondent submitted[117] that it was necessary for me to:

[115] Submissions at [5] – [6].
[116] Submissions at [9].
[117] Submissions at [13].

1. reach a factual finding as to whether a material flaw in the process did occur; and if so
2. determine whether such flaw was sufficient to displace the conclusive nature of the evidentiary certificates.

56. In terms of the evidence of the use of the hook on which to hang belongings, the Respondent submitted that:

1. the Appellant's position regarding the hook oversimplified the evidence of Ms Jarvis;[118]
2. the absence of a hook did not constitute a material flaw in the process;[119]
3. the Appellant had not, in any event, adduced any evidence to support the proposition that the placing of his belongings in the manner in which he did had resulted in contamination of any kind, so as to result in a positive sample being returned;[120]
4. the area in which the Appellant had placed his items was only accessible to staff and race officials.[121]

57. The Respondent's submissions then turned to the pre-swab procedure. It was submitted that:

1. whilst ensuring the integrity of the process was of the utmost importance, the conduct of Ms Jarvis did not fall short of an acceptable standard;[122]
2. I should conclude that Ms Jarvis was a conscientious person, who took pride in her work, who understood the process, and who gave consistent and cogent evidence as to the steps she takes generally, and

[118] Submissions at [21].
[119] Submissions at [22].
[120] Submissions at [23].
[121] Submissions at [24].
[122] Submissions at [26].

which she took on this occasion, to maintain the integrity of the process;[123]

3. the evidence fell short of establishing that Ms Jarvis had not held the ladle in the manner in which she maintained she did and that, at its highest, the footage established that she held the ladle in line with, or slightly above, her head.[124]

58. The Respondent's position was that the various criticisms advanced by the Appellant of Ms Jarvis' evidence should be rejected,[125] as should the general challenge to her credit.[126]

59. The Respondent invited me to reject Dr Major's opinion that there had been contamination of the collection vessel, either directly or from the environment, primarily on the basis that there was simply no evidence to support it.[127] As to the proposition that the collection vessel or the sample had been contaminated by human saliva, the Respondent submitted that such a proposition should be rejected on the same basis.[128]

60. Bearing in mind all of these factors, the Respondent submitted that:[129]

1. I should find that the greyhound was not free of any prohibited substances when it was presented to compete;
2. the various scenarios relied upon by the Appellant were largely, if not entirely, unsupported by the evidence;
3. I would be satisfied that Ms Jarvis adhered to the standards expected of her;

[123] Submissions at [27].
[124] Submissions at [29].
[125] Submissions [39] – [46]
[126] Submissions [47] – [50].
[127] Submissions at [30].
[128] Submissions at [32] – [38].
[129] Submissions at [51] – [54].

4. I would be satisfied with the integrity of the process adopted in this case;
5. the charge was made out; and
6. the appeal should therefore be dismissed.

61. In the event that I came to consider the question, the Respondent submitted that the circumstances of this case fell squarely into category 2 of *McDonough* because the Appellant, despite his best efforts, was unable to provide an explanation for the presence of the substance.[130] It was submitted that there was no real explanation of how the substances came to be present in the greyhound.[131]

CONSIDERATION

62. In light of the way in which the Appellant's puts his case, his primary focus on the testing procedure, and his ultimate submission that such procedure was materially flawed, it is appropriate to commence by addressing those provisions in the Rules which govern the evidentiary value of the Certificates of Analysis which were issued.

The provisions of the Rules regarding the evidentiary status of Certificates

63. I have already noted that two Certificates of Analysis were issued in the present case, both of which confirmed the presence of prohibited substances in the sample. In those circumstances, rr 154(5), (6) and (8) of the Rules have a role to play.

64. Rule 154(5) is in the following terms:

> *A certificate of analysis signed by a person at an approved laboratory who is authorised to and purports to have analysed a sample ("A" portion) is, with or without proof of that person's signature, prima facie evidence of the matters contained in it in relation to the presence of a prohibited substance for the purpose of any proceeding pursuant to the Rules.*

[130] Submissions at [57].
[131] Submissions at [59].

65. Rule 154(6) is in the following terms:

> *A second certificate of analysis signed by a person at an approved laboratory who is authorised to and purports to have analysed another portion of a sample (the reserve ("B") portion) which confirms that the prohibited substance detected in the reserve ("B") portion and identified in the second certificate of analysis is the same as the prohibited substance detected in the "A" portion and identified in the first certificate of analysis constitutes, with or without proof of that person's signature and subject to subrule (8) below, together with the first certificate of analysis, conclusive evidence of the presence of a prohibited substance.*

66. Pursuant to these provisions, but subject to r 154(8), the two Certificates which have been issued constitute conclusive evidence of the presence of the four nominated substances in the respective samples. The Appellant accepts this to be the case. However, as explained at the commencement of the hearing, he seeks to invoke r 154(8) which is in the following terms:

> *Notwithstanding the provisions of this rule, certificates of analysis do not possess evidentiary value and do not establish an offence if it is proved that the certification, testing or analysis process which preceded the production of a certificate of analysis was materially flawed.*

67. It will be evident from the passages of the transcript that I have previously set out[132] that the Appellant's case centres upon the provisions of r 154(8). Specifically, the Appellant asserts that the "*process"* as it is referred to in r 154(8) was materially flawed in a number of respects. The Appellant accepts that if I come to the conclusion that there is no material flaw in the process, a finding that Charge 1 is made out will inevitably follow. There is, of course, no question that there is a fundamental need to ensure that the process is free of any material compromise.[133]

68. It is appropriate at this point to consider the breadth of the term *"certification, testing or analysis process"* which is used in r 154(8). In *Bell,* this Tribunal (differently constituted) concluded that the reference to the "*process*" encompasses everything

[132] At [17] above.
[133] Transcript 24.14 – 24.20; 98.42 – 99.5.

undertaken from the time at or around which the sample is taken, up to the issue of the certificate(s).[134] I respectfully agree with that interpretation. That means, in the context of the present case, that the process includes, amongst other things, the various steps taken by Ms Jarvis in relation to the taking of the sample which were a primary focus of the evidence.

69. However, the Tribunal in *Bell* went on to say the following:[135]

> *[132] The Tribunal is satisfied that under the greyhound rules, the fact that there has been a failure in a step in the sampling or analysis and certificate process does not necessarily mean that the results can be disregarded. That is, that a prima facie certificate status is set aside.*
>
> *[133] Something more is needed. That is, that the actual failure itself must be examined to see whether it indicates that anything has been done, or not done, which casts doubt on the validity of the sample result. This could apply at any time in the whole of the sampling process. It could apply during the whole of the analysis and certification process.*

70. Whilst nothing turns on it in the present case, the correctness of at least some of those statements may be open to question.

71. To begin with, it is arguable that the Tribunal's reference to a *"prima facie certificate status"* is inapposite. Rule 154(6), as I read it, confers *conclusive* evidentiary status upon a combination of the two certificates.

72. Secondly, r 154(8) does not refer to a "*failure in a step*" in the process. It refers to a "*material flaw"* in the process. Not every failure will necessarily amount to a material flaw. The term "*material"* has work to do. In the sense that it is used in r 154(8), it means a flaw in the process which is of significance or importance.

73. Thirdly, and perhaps most fundamentally, the strict terms of r 154(8) do not support the proposition that *"something more"* than the existence of a material flaw is

[134] At [130].
[135] At [132] – [133].

needed in order to invoke its provisions. The Tribunal's reasoning tends to suggest that it came to the view that the *"failure"* was required to be causative of some identified anomaly or unreliability in the end result of the process. It may be arguable that such an interpretation is the product of reading into r 158(8) words which are not there. If that conclusion were reached, it would reflect an approach somewhat at odds with authority.[136]

74. In view of the conclusions I have reached in the present case, it is not necessary for me to consider these observations any further. Consideration of the issue can await a case in which I have the benefit of full argument.

The approach to analysing the expert evidence

75. It will be evident that I have been provided with a considerable amount of expert evidence in the present case. In *Goadsby v Harness Racing New South Wales*[137] I made the following observations regarding the assessment of expert evidence in matters coming before the Tribunal:

> *[45] It will be evident from the submissions of each party that the expert evidence in the present case assumes considerable significance. Indeed, the submissions in reply filed by counsel for the Appellant made clear that the Appellant relies solely on that evidence to support his case. It is therefore appropriate that this evidence be addressed at the outset, as its evaluation will necessarily have a direct effect on my ultimate conclusions.*
>
> *[46] Sitting as the Tribunal, I am not bound by rules of evidence. I may inquire into, or inform myself in respect of, a matter, in any way I think fit, subject to rules of natural justice.[138] It follows that in terms of expert opinion evidence, the provisions of s 79 of the Evidence Act 1995 (NSW) have no application. Similarly, the authorities which, by reference to s 79, set out preconditions to the admissibility of expert opinion evidence, do not apply.[139]*
>
> *[47]. The evaluation of all of the evidence remains a matter for me. It follows that it is for me to determine what evidence to accept, what evidence to reject, and*

[136] See for example *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 per Gageler and Keane JJ at [65] – [66]; *HFM043 v Republic of Nauru* (2018) 359 ALR 176; [2018] HCA 37 at [24] per Kiefel CJ; Gageler and Nettle JJ.
[137] A decision of the Tribunal of 8 October 2024 at [45] – [47].
[138] *Racing Appeals Tribunal Regulation 2024* (NSW) cl 17(1) (the Regulation).
[139] See for example *Makita (Australia) Pty Limited v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705; *Dasreef Pty Limited v Hawchar* [2011] HCA 21; (2011) 243 CLR 588.

> *what weight should be attached to the evidence I do accept. In terms of the evaluation of expert evidence, and even though the rules of evidence do not apply, a relevant consideration will necessarily be the extent to which, and the terms in which, an expert explains the path of reasoning which resulted in the opinion expressed. As a matter of common sense, the expression of an opinion without an underlying explanation for its basis is likely to be afforded less weight than an opinion which is supported by the exposition of the reasoning process which led to it.*

76. An application for judicial review of my determination in *Goadsby* was dismissed by Stern J in the Supreme Court of New South Wales.[140] Her Honour noted in her judgment[141] that the Plaintiff did not assert that the approach to the evaluation of the expert evidence set out in the paragraphs extracted above was wrong. I have therefore adopted that approach in evaluating the expert evidence in the present case.

Specific observations as to the evidence of Ms Jarvis

77. The first challenge to the evidence of Ms Jarvis might be described as a general one, in the sense that it was submitted that her credit had been damaged to the point where I should conclude that she was not a reliable witness. The hearing of the appeal was conducted over AVL. Assessing the credit of a witness when the evidence is given by that method is, for obvious reasons, more difficult than when a witness gives evidence in person. However, even when an appropriate allowance for that restriction is made, it is my firm view that Ms Jarvis was someone who was, at all times, making a concerted effort to give her evidence truthfully, and to the best of her recollection. Whilst it might be said that some of her answers were a little loquacious, I came to the view that this was simply because she was endeavouring to be thorough. I do not accept that she was evasive, nor do I accept that she was unreliable. She was, in my view, a person who was doing her best to give her evidence honestly and truthfully.

78. One of the specific issues raised in the context of Ms Jarvis' evidence concerned the evidence surrounding what she said was her practice of holding the ladle above her

[140] See *Goadsby v Harness Racing New South Wales* [2024] NSWSC 355.
[141] At [28].

head. On my assessment of the evidence, she generally did so, although some angles of the footage were clearer in this regard than others, and leave open the possibility that there may have been occasions on which the ladle was more at shoulder height. However, given the case that the Appellant brings, it is, frankly, largely immaterial whether the ladle was held at or above head height, or more at shoulder height. The more important consideration is whether the ladle was held away from Ms Jarvis' body so as to prevent contamination. I am satisfied that it was on each and every occasion depicted in the footage. There is absolutely no evidence that Ms Jarvis came in contact with that part of the ladle which was used to obtain the sample at any point. Her evidence, which I unreservedly accept, is that she took every step available to her to ensure that the ladle did not come into contact with anyone.

79. Dr Karamatic was asked questions in cross-examination based upon the proposition that a "*swabbing official had the ladle in close proximity to their mouth and appeared to be speaking into that ladle*."[142] He appeared to accept that this could give rise to contamination of the sample. Based on that evidence it was effectively put on the Appellant's behalf that this, either by itself or in combination with other factors, constituted a material flaw in the process.

80. I am unable to accept that proposition. Even if it were accepted that, contrary to her denial, Ms Jarvis held the ladle close to her mouth to the point where her saliva somehow ended up in it, her unchallenged evidence, both in her statement and in re-examination, that she has *never* consumed amphetamine or methamphetamine, prescribed or otherwise. Accepting that unchallenged evidence, neither substance could have been in her bloodstream, or more specifically in her saliva, in the first place.

81. Another challenge to the evidence of Ms Jarvis concerned the practice of trainers placing their belongings on hooks. Even if it is accepted that items were placed on

[142] Transcript 23.41 – 23.43.

a padlock of the swab kennel, proceeding to a conclusion that this amounts to a material flaw in the process is, to say the least, something of a quantum leap. It also relies on the evidence of Dr Major which, for the reasons set out more fully below, I am not able to accept.

Theoretical propositions which are unsupported by the evidence

82. Various other scenarios were sought to be raised by the Appellant through the expert witnesses in support of the proposition that the process was materially flawed. It was put to Dr Karamatic[143] that *"a dog walking to get tested could be exposed, if it's walking through somewhere where someone's smoking a meth pipe"*. It was also put to him[144] that *"if the dog licked a surface that had methamphetamine on it, that could result in in a positive"*. Dr Karamatic was prepared to accept that anything was possible.[145]

83. Dr Cawley was prepared to accept the possibility of metabolization by a human liver.[146]

84. Other possibilities were put to Dr Major, such as a person sneezing in the vicinity of the greyhound.[147]

85. The fundamental difficulty with the Appellant's reliance upon such propositions is that there is not a scintilla of evidence to support them. For example, there is no evidence that:

    1. any person was smoking a methamphetamine pipe in the vicinity of the greyhound at any time;
    2. the greyhound licked a surface containing traces of amphetamine or methamphetamine at any time; or

[143] Transcript 18.15.
[144] Transcript 18.26.
[145] Transcript 18.91; 18.29.
[146] Transcript 10.18 – 10.25.
[147] Transcript 99.4 – 99.27.

3. anyone who had been using either of those substances had sneezed in the greyhound's vicinity, or in the vicinity of the ladle held by Ms Jarvis, at any time.

86. In reaching a determination in this case, I am concerned with proof of facts *on the balance of probabilities*. I am not concerned with entertaining theoretical possibilities which are entirely unsupported by the evidence, and which amount to little more than speculative conjecture. Pursuing such propositions in the absence of evidence to support them is a largely, if not entirely, unproductive exercise, which is lacking in any forensic or probative value, and which is therefore of little assistance.

Other aspects of the expert evidence

87. The evidence of Dr Cawley, which I accept, is that a laboratory is unable to provide levels in circumstances where the testing and analysis is qualitative and not quantitative.[148] How, in those circumstances, Dr Major came to the conclusion about the levels which were detected, was not explained.

88. Moreover, Dr Major expressed the view that the excretion of amphetamines in urine was highly variable.[149] That is somewhat at odds with his precise determination of the levels detected in the sample.

89. Further, a number of Dr Major's conclusions are underpinned by the proposition that the level of amphetamine found in the greyhound was *"inconsequential"*. That conclusion is obviously based upon his opinion as to the levels. For the reasons I have given, I do not accept that opinion.

90. There are, however, some further comments which should be made in relation to Dr Major's evidence, specifically by reference to my observations in *Goadsby* at [47].

[148] Transcript 7.33; 20.34.
[149] TB 60.

91. To begin with neither of Dr Major's reports set out, in any sense, a statement of the facts and/or assumptions on which his various opinions were based. That is at odds with the generally accepted practice adopted by expert witnesses in any forum. Moreover, there was little attempt by Dr Major to correlate his opinions with the evidence which was available.

92. A further difficulty with Dr Major's reports stems from the fact that his opinions are largely, if not entirely, bereft of the exposition of the reasoning process which he adopted. For example, one of the conclusions Dr Major reached was that the greyhound *"had been exposed, by some route, to a very small quantity of amphetamine or methamphetamine, very close to sample collection"*. However, he completely failed to explain:

    1. what was meant by *"a very small quantity"*;
    2. the *"route"* to which reference was made;
    3. what was meant by a time frame which was *"very close to sample collection"*;
    4. why such a time frame was material; and
    5. how the greyhound had been exposed.

93. By way of further example, Dr Major expressed the view that "*a small quantity of bodily fluid such as saliva, contaminated skin, sweat or urine, from a person or animal exposed to a high level of amphetamine, has contaminated the collection vessel directly or from the environment"*. Dr Major did not explain what was meant by *"a small quantity",* nor did he explain how such contamination could have arisen *"from the environment"*. Moreover, Dr Major did not attempt to correlate this opinion to any evidence. The simple fact is that there is not a skerrick of evidence which would give rise to even the vaguest possibility that the collection vessel was contaminated by:

    (i) saliva;
    (ii) contaminated skin;

(iii) sweat; or

(iv) urine.

94. It follows that the opinion of Dr Major in this respect is entirely unsupported by the evidence.

95. Dr Major also expressed the view[150] that the *"inconsequential"* level did not *"provide a basis to conclude that the dog presented with a prohibited substance in its system"*. That proposition is untenable in light of the Certificates. Moreover, it is a proposition from which it is evident that:

1. Dr Major accepts that there was a quantity of prohibited substance present in the sample (albeit at an *"inconsequential level"*); but
2. takes the view that notwithstanding the presence of that substance in the sample, there is no basis to conclude that it was in the greyhound's system.

96. That is, with respect, a contradiction in terms.

CONCLUSION

97. For the reasons expressed, I am not satisfied that there was any material flaw in any aspect of the relevant process. It follows that the Certificates have conclusive evidentiary value.

98. Consistent with the way in which the case was articulated at the commencement of the hearing of the appeal, it must follow that the Appellant is guilty of Charge 1.

THE APPELLANT'S LEVEL OF CULPABILITY

99. In *McDonough,* it was concluded that cases of this kind generally fall into one of three categories, namely:

[150] TB 56.

1. where there is evidence of positive culpability (for example, where there is evidence of the participant knowingly and intentionally administering the prohibited substance);
2. where the participant provides no explanation for the presence of the prohibited substance, or where such explanation which is proffered is rejected, such that the Tribunal is left in a position of having no real idea as to how the substance came to be in the animal's system;
3. where the participant provides an explanation for the presence of the prohibited substance which the Tribunal accepts, and which supports a conclusion that there is no culpability at all.

100. It was noted in *McDonough*[151] that depending upon the facts of the case, there may be little difference in the first and second categories. It was also noted[152] that an evidentiary onus remains on the participant to avail himself or herself of the benefits of reduced culpability by reference to the three categories.

101. The Appellant submitted that the circumstances of the present case fell within the third category, which carries the lowest level of culpability. In advancing that submission, the Appellant relied, to a large extent, upon the same submissions as those on which he relied for the purposes of determining whether the charge was made out.[153] For the reasons I have outlined, I do not accept those submissions, which means that the Appellant has failed to discharge the evidentiary onus referred to in *McDonough*.

102. The facts of this case fall squarely into the second category. I do not accept the explanations (such as they were) which were advanced by the Appellant, and accordingly am not able to reach a conclusion as to how the substances entered the greyhound's system.

[151] At p. 6.
[152] At p. 6.
[153] See for example submissions at [96].

PENALTY

Submissions of the Appellant

103. It was submitted on behalf of the Appellant that a minimal penalty was warranted in all of the circumstances and that I should conclude that the penalty served to date (was sufficient. It was further submitted that if I were to conclude that any further penalty was warranted, it should be wholly suspended. In all of these respects, the Appellant relied, for the purposes of parity, on the decision in *Bell*.

Submissions of the Respondent

104. The Respondent submitted that the penalty imposed at first instance was appropriate. In putting that position, the Respondent pointed out that the Appellant had two prior entries for offending of a similar nature in his disciplinary history, although it was acknowledged that they were incurred some time ago.

105. Significantly, and with commendable fairness, the Respondent drew my attention to the fact that the Appellant recently provided assistance in association with an unrelated investigation of another matter.[154] Although not expressly stated, I infer from what has been said that such assistance was given willingly, and was material.

CONSIDERATION

106. Very little has been put before me in terms of the Appellant's subjective case. His disciplinary history[155] indicates that he has been registered since 1989[156] and has two prior offences of a similar nature, one in 2008 (which resulted in the imposition of a fine) and the other in 2013 (which resulted in a disqualification of 12 months). Those matters cannot be ignored, and it is a matter of concern that the 2013 offending involved the presence of amphetamine. That said, the Appellant has not come under notice for what could be described as any substantive offending for some time and is entitled to have that taken into account.

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[154] Submissions at [62] – [63].
[155] Commencing at TB 153.
[156] TB 154.

107. The Appellant's assistance to the Respondent is clearly something which he is entitled to have taken into account. The law recognises the appropriateness of a discount on sentence when a person who is found guilty of an offence has given assistance to the authorities.[157] The fact that many of the circumstances taken into account in that regard in a criminal context have no application in a case such as the present does not mean that the Appellant's assistance should not be regarded as a mitigating factor.

110. Although it was accepted at the commencement of the hearing that the Appellant accepted that he would be found guilty of Charge 1 if his challenged to the testing procedure failed, no utilitarian value stemmed from that position. Accordingly, the Appellant is not entitled to any discount for foreshadowing an acceptance of guilt if his challenge to the integrity of the testing and analysis process failed as it ultimately did. At the same time, the penalty is not to be incrementally increased because the Appellant chose to adopt that course. That was his right. The fact that some of the matters he advanced were, in my view, lacking in substance, is not something for which he can, or should, be further penalised.

111. The submissions of the Appellant placed significant reliance on the decision of the Tribunal in *Bell* which was the subject of an unsuccessful application by the Respondent to the Supreme Court of New South Wales for judicial review.[158] In particular, it was put by the Appellant that the Court *"upheld the penalty handed down by [the Tribunal]".*[159] That is not a correct categorisation of the Court's determination. Moreover, it is one which reflects a misunderstanding of both the determination itself, and the nature of the application which was brought.

112. The proceedings in *Bell* sought judicial review of the Tribunal's determination to impose a disqualification of 6 weeks, on the basis that such determination was

[157] See for example *York v The Queen* (2005} 225 CLR 466 per Gleeson CJ at [3] and the authorities cited therein.
[158] *Greyhound Welfare and Integrity Commission v Bell* [2023] NSWSC 1150.
[159] Submissions at]104].

legally unreasonable. It was not her Honour's function on the application to determine the *merits* of what the Tribunal did in terms of imposing a penalty. Her Honour's function was to determine whether the Tribunal's determination was infected by legal error. Her Honour found that the Respondent (who was the Plaintiff in the proceedings) had failed to prove that the decision was infected by legal unreasonableness.[160] Importantly, her Honour did ***not*** determine that the penalty which was imposed was appropriate. Indeed, her Honour stated that it would have been open to the Tribunal to impose a different, and more severe, penalty.

113. The decision of the Court in *Bell* is certainly not authority for the proposition that a 6 week disqualification is appropriate in a case of the present kind, nor is it authority for the proposition that the Court upheld the penalty imposed by the Tribunal.

114. In any event, when one considers the bases for the Tribunal's determination in *Bell,* it becomes immediately apparent that there were a number of distinguishing features between that case and the present, not the least of which is the need for specific deterrence in the case of this Appellant who has two prior offences of a similar nature. It is also not without significance that the Tribunal in *Bell* went to some lengths to emphasise that the penalty it considered appropriate did not *"establish a precedent for leniency"* and that the penalty imposed was limited to the particular facts of that case.[161] As is always the position, determinations of penalty are to be made on the facts of the case under consideration.

115. The Respondent's submissions[162] made reference to the adoption of a starting point, and the appropriateness of a reduction from that starting point on account of the Appellant's *"significant contributions to the industry"*. Precisely what those contributions have been remains unclear,[163] but the Respondent's ultimate position was that the 16 month disqualification was appropriate.

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[160] At [102].
[161] At [178].
[162] At [66].
[163] They were obviously taken into account at first instance – see TB 53 at [6].

116. I recently had occasion, in an appeal in the harness racing industry, to make comment as to the practice of adopting starting points when assessing penalty.[164] On that occasion I said the following:[165]

> *It was effectively submitted on behalf of the Appellant that there is a requirement for this Tribunal, when assessing penalty in a matter of this kind, to adopt a starting point. It appeared to be suggested, in particular, that such a requirement arose, at least in part, from the Respondent's penalty guidelines. It has been said on many occasions that the guidelines are just that – a guide. Whilst those guidelines may well be adopted by Stewards, I am not bound by them. An assessment of penalty which is made by this Tribunal is not a process which is akin to a mathematical calculation. On the contrary, an assessment of penalty by this Tribunal is a discretionary decision which is made in light of firstly, the circumstances of the individual case, and secondly, the purposes which are intended to be served by such a penalty as set out in Pattinson.*[166] *To the extent that Mr Morris sought to argue that the adoption of a starting point was a necessary (or perhaps even mandatory) step in that process, I am unable to agree. Such an approach has the clear tendency to advocate the undertaking of an almost purely mathematical exercise in which there are increments to, or decrements from, a predetermined starting point or range. It has been observed that such an approach is apt to give rise to error, is and is one which departs from principle.*[167] *Whilst those observations were made in the context of criminal proceedings, it seems to me that they necessarily have some role to play in the approach which is to be taken when this Tribunal is assessing penalties. Such approach must be one of instinctive synthesis in which all relevant matters are taken into account, the appropriate degree of weight is ascribed to each of them, and a determination is then reached. Some general support for that approach, and for the proposition that I am not bound by any guidelines, is to be found in the decision of Walton J in McCarthy v Harness Racing New South Wales.*[168]

117. It seems to me that these observations have no less force in an appeal in the greyhound racing industry, and I have applied them.

118. Taking all relevant factors into account, but particularly the Appellant's assistance, I consider that a disqualification of 14 months is appropriate.

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[164] See *Wade v Harness Racing New South Wales,* 4 March 2025.
[165] At [22].
[166] See *R v Engert* [1995} NSWCCA, 20 November 1995 unreported; *Markarian v The Queen* (2005) 79 ALJR 1048 at [27].
[167] *Wong v The Queen* [2001] HCA 64 at [74]; *Markarian v The Queen* [2005] HCA 25 at [30] – [34].
[168] [2024] NSWSC 865 at [216]

119. The Appellant withdrew his appeal in respect of Charge 2, and has had mixed success in respect of his appeal in respect of Charge 1. In the circumstances, the appeal deposit should be forfeited.

ORDERS

120. For the reasons given I make the following orders:

1. The appeal in respect of Charge 2, having been withdrawn, is dismissed.
2. The fine of $375.00 imposed in respect of Charge 2 is confirmed.
3. The appeal against the finding of guilt in respect of Charge 1 is dismissed.
4. The appeal against the penalty imposed in respect of Charge 1 is upheld.
5. The penalty of 16 months disqualification imposed in respect of Charge 1 is quashed.
6. In lieu thereof, a disqualification of 14 months is imposed, commencing on 9 October 2024.
7. The appeal deposit is forfeited.

THE HONOURABLE G J BELLEW SC

28 April 2025