

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Graham v Queensland Racing Integrity Commission*
[2021] QCATA 125

PARTIES: **DARREL WILLIAM GRAHAM**
(applicant/appellant)

v

**QUEENSLAND RACING INTEGRITY
COMMISSION**
(respondent)

APPLICATION NO/S: APL229-19

ORIGINATING APPLICATION NO/S: OCR174-16

MATTER TYPE: Appeals

DELIVERED ON: 11 November 2021

HEARING DATE: 17 February 2020

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President, Presiding Member
Senior Member Howard

ORDERS: **1. The appeal is allowed.**

2. The decision of the Tribunal delivered on 31 July 2019 is set aside and the following decision is substituted:

The Tribunal sets aside the decision of the Queensland Racing Integrity Commission and substitutes a decision that the applicant is not guilty of the charge.

ASSOCIATIONS AND CLUBS – RACING CLUBS AND ASSOCIATIONS – DISQUALIFICATIONS – OF OWNER, TRAINER OR JOCKEY – where failure to present a horse free of prohibited substances – where urine sample was above the permitted level of cobalt – where the trainer faced disciplinary charges – where the Tribunal confirmed the substantiation of the trainer’s charge – where the trainer was suspended

ASSOCIATIONS AND CLUBS – RACING CLUBS AND ASSOCIATIONS – GENERALLY – where things for analysis were for disciplinary purposes – where the control body must take and deal with the thing – where a

certificate was given in respect of the incorrect entry made by an authorised representative of the control body – where the incorrect entry did not compromise the integrity of the process

ASSOCIATIONS AND CLUBS – RACING CLUBS AND ASSOCIATIONS – GENERALLY – where things for analysis were for disciplinary purposes – where the control body must take and deal with the thing – where it was considered whether the substance was analysed by an accredited facility approved by the Controlling Body – where the statute was interpreted to intend to prevent persons involved in the first analysis from being involved in the second analysis – where the facility at which analysis took place was not an accredited facility and did not comply with statute – where the person who analysed the sample did not meet the statutory definition of an analyst – where the sample was unable to be further analysed due to non-compliance with statute

ASSOCIATIONS AND CLUBS – RACING CLUBS AND ASSOCIATIONS – GENERALLY – where things for analysis were for disciplinary purposes – where certificates of analysis were rendered inadmissible – where it was considered whether there could be proof established in other ways – where the results of the analysis were unable to be used for disciplinary purposes

ASSOCIATIONS AND CLUBS – RACING CLUBS AND ASSOCIATIONS – GENERALLY – where things for analysis were for disciplinary purposes – where it was considered whether the correct sample was tested – where the integrity of the analysis and chain of custody was questioned – where the integrity of the analysis and chain of custody was compromised and rendered subsequent compliance with legislative requirements impossible

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – JUDGE MISTAKEN OR MISLED – GENERALLY – where there were errors of law by the Tribunal below – where the Tribunal below relied upon a certificate from a non-accredited facility and did not consider relevant evidence – where a failure to consider material evidence can constitute an error of law

ASSOCIATIONS AND CLUBS – RACING CLUBS AND ASSOCIATIONS – GENERALLY – where it was argued that the trainer was careless in his administration of Tripart as the horse did not require its administration at the time of the race – where the trainer was advised to not cease administering Tripart – where the trainer was advised to

continue with its feeding regime – where the evidence overall did not support a finding of substantial carelessness

Australian Harness Racing Rules, r 188A(1)(a), r 188A(1)(b), r 190, r 190(1), r 190(4), r 191(1), r 191(2), r 191(3), r 191(6), r 191(7)

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20, s 24(1), s 142

Racing Act 2002 (Qld), s 4, s 5, s 40, s 115(3), s 131, s 131(2)(a), s 131(2)(b), s 131(2)(f), s 132, s 143, s 143(2), s 143(3), s 143(4), s 143(4)(a), s 143(4)(b), s 145, s 145(1), s 145(2), s 145(3), s 145(4), s 146(1), s 146(1)(a), s 146(1)(b), s 146(2), s 146(3), s 146(4), s 147, s 147(1), s 147(2), s 147(3), s 147(4), s 149, s 352A, s 352A(1), s 352A(2), s 352A(3)

Chopra v Department of Education and Training (2020) 60 VR 505

Collector of Customs v Agfa-Gevaert Ltd (1996) 141 ALR 59

Collector of Customs v Pozzolanic Enterprises Ltd (1993) 43 FCR 280

Eagil Trust Co Ltd v Piggott-Brown [1985] 3 All ER 119

Ericson v QBSA [2013] QCA 391

Harrison v Meehan [2017] QCA 315

Hooper v QRIC [2017] QCAT 326

McPhee v S Bennett Ltd (1934) 8 WCR 372

Mifsud v Campbell (1991) 21 NSWLR 725

Minister for Immigration v Li [2013] HCA 18, (2013) 297 ALR 225

Nexus Adhesives Pty Ltd v RLA Polymers Pty Ltd (2012) 97 IPR 160, [2012] FCAFC 135

Racing Victoria v Kavanagh [2017] VSCA 334

Ratray v Queensland Racing Integrity Commission [2018] QCATA 19

Scott v QRIC (No 2) [2018] QCAT 301

Urquart v Partington [2016] QCA 87

Vetter v Lake Macquarie City Council (2001) 202 CLR 349

Wallace v Queensland Racing [2007] QDC 168

**APPEARANCES &
REPRESENTATION:**

Applicant/Appellant: Murdoch JE QC, instructed by O'Connor Ruddy & Garrett Solicitors

Respondent: Anderson RJ QC, instructed by Turks Legal

REASONS FOR DECISION

JUDGE ALLEN QC, DEPUTY PRESIDENT:

Introduction

- [1] I am grateful for the comprehensive statement in the reasons of Senior Member Howard of the factual background to this matter, the relevant evidence, the relevant legislative provisions and the competing contentions of the parties. The Senior Member's detailed statement and analysis of those matters permit me to state my reasons for allowing the appeal in much shorter form than would otherwise have been the case.
- [2] The appellant has enumerated numerous grounds of appeal. In my view, the decisive grounds of appeal are as follows:
 - 5. The decision failed to observe and apply Chapter 4, particularly sections 147 and 149 of the *Racing Act 2002* ("the Act"). The Certificates of Analysis relied on by the Respondent were non-compliant with those statutory requirements and, accordingly, should not have admitted [sic] into evidence.
 - 9. The decision relies on cases from other states to support findings that, if the Certificates of Analysis are materially flawed and thereby inadmissible, the results of the analysis which lays behind the Certificates can be relied on in any event.
- [3] Such grounds raise questions of law as to the proper construction and effect of the provisions of chapter 4, part 4 of the *Racing Act 2002* (Qld) (the Racing Act) and rule 191 of the Australian Harness Racing Rules (the Rules), such that leave to appeal is not required.¹ I would, pursuant to section 146 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), allow the appeal on those grounds, set aside the decision of the learned Senior Member at first instance and substitute a decision setting aside the decision of the respondent and substituting a decision that the appellant is not guilty of the charge of contravening rule 190 of the Rules.
- [4] The provisions of rule 191 of the Rules must be construed in the context of the legislative scheme established by those Rules and the provisions of the Racing Act as enacted at the relevant times. To the extent of any inconsistency between a provision of the Racing Act and the Rules, the provisions of the Racing Act prevail.² The error of the learned Senior Member at first instance was to fail to recognise the primacy of provisions of the Racing Act over the Rules when considering whether any of the four evidentiary certificates relied upon by the respondent could be relied upon in proof of the charge against the appellant. A proper consideration of the effect of the provisions of chapter 4, part 4 of the Racing Act should have led the learned Senior Member to conclude that the respondent's failure to comply with those provisions meant that

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142.

² *Racing Act*, s 91(5).

none of the evidentiary certificates were available, pursuant to rule 191 of the Rules or at all, in proof of the charge against the appellant. In the absence of those certificates having probative force, there was no evidence to prove the charge against the appellant and the correct and preferable decision of the Tribunal³ should have been to set aside the decision and substitute a decision⁴ that the appellant was not guilty of the charge that he breached rule 190 of the Rules.

Legislative scheme

- [5] Senior Member Howard has detailed the relevant provisions of the Racing Act, the Collection Procedures and the Rules.⁵ I gratefully adopt Senior Member Howard's analysis of the legislative scheme and refer, by way of emphasis, to the following provisions.
- [6] Sections 146 to 149 comprise chapter 4, part 4, division 3 of the Racing Act which is headed "**Analysing things delivered for analysis**". They mandate a process for the handling of, documentation of, and certification of the results of analysis of "a thing for analysis" that "has been delivered to an accredited facility". They also provide, in certain circumstances, for a process of forwarding of the "thing" to "a secondary facility for the accredited facility".
- [7] Section 143 is found in chapter 4, part 4, division 2 of the Racing Act which is headed "**Taking and dealing with things for analysis**" and provides as follows:

143 Way control body may take or deal with a thing for analysis

- (1) This section applies if a control body's policy about drug control relating to licensed animals provides for the analysis of things.
- (2) If the results of the analysis are to be used by the control body only for research or survey purposes, the control body may take or deal with the thing in a way the control body considers is consistent with the research or survey purposes.
- (3) If the results of the analysis are to be used by the control body for a purpose other than for research or survey purposes, the control body must take and deal with the thing for analysis under the integrity board's procedures mentioned in section 115(3) as in force at the relevant time.

Note—

See section 352A (Integrity of analysis of thing).

- (4) The control body must deliver the thing for analysis to—
 - (a) if the thing is to be delivered under an agreement between the control body and an accredited facility—the accredited facility that is a party to the agreement; or
 - (b) otherwise—another facility that has the capacity to analyse things relating to licensed animals if the delivery is approved by an integrity officer.

³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), ss 19 and 20.

⁴ *Ibid*, s 24(1).

⁵ At [55]-[78].

- [8] The applicable requirements in sub-sections (3) and (4) are mandatory, as compared to the permissive provisions of sub-section (2) had analysis been for research or survey purposes.
- [9] The “thing for analysis”, within the terms of section 143(4) of the Racing Act, was the pre-race urine sample taken from *Mafuta Vautin* on 30 May 2015 (the sample) or, more accurately, that part of the sample submitted to a respective facility by the control body at the respective time.
- [10] It was not contended by the respondent, and there was no evidence upon which it could be concluded, that the delivery of the samples to any of the facilities was approved by an integrity officer pursuant to section 143(4)(b) of the Racing Act.
- [11] Section 143(4)(a) thus required that any part of the sample for analysis be “delivered under an agreement between the control body and an accredited facility” to “the accredited facility that is a party to the agreement”. “Agreement” means an agreement entered into under section 40 of the Racing Act.⁶
- [12] Section 145 of the Racing Act then relevantly restricted interference with the container in which the sample was held to interference by “an analyst employed by an accredited facility or a secondary facility for an accredited facility” as part of the process of analysis by that analyst.
- [13] The following provisions of chapter 4, part 4, division 3 of the Racing Act, dealing with the analysis of the sample and certification of the results of analysis are all predicated on the sample having “been delivered to an accredited facility”⁷ or, in certain circumstances, forwarded on to a secondary facility for the accredited facility.
- [14] It can readily be seen that the statutory scheme established by the Racing Act for the analysis of things such as the sample taken from *Mafuta Vautin* is predicated on accreditation of facilities and analysts authorised to carry out such analysis and accreditation of veterinary surgeons authorised to certify the results of that analysis.⁸ Unsurprisingly, such provisions and the contents of the Collection Procedures are also directed towards maintaining the integrity of samples taken for analysis, including provision for means of taking and storing samples, maintaining and recording a chain of custody and prohibiting interference with samples by other than those expressly authorised to do so.
- [15] There are sound policy reasons why the legislature would choose to enact such a statutory scheme regulating the admissibility of evidence by way of certificates of analysis. Because of the terms of rule 191 of the Rules, such certificates have a profound effect in proof of a presentation offence of the type with which the applicant was charged. There is good reason why the evidentiary value of certificates should depend upon full compliance with processes for collection and testing of samples by accredited persons at accredited facilities.
- [16] The admissibility of the certificates of analysis relied on by the respondent in proof of the charge against the appellant must be considered in the context of the statutory scheme.

⁶ Racing Act, s 142.

⁷ Ibid, s 146(1).

⁸ Ibid, s 40; See also provisions of chapter 4, parts 2, 3 and 4.

Admissibility of the certificates of analysis as prima facie or conclusive evidence for the purposes of rule 191 of the Rules

Racing Science Centre certificate dated 26 June 2015

- [17] On all the material before the Tribunal, and according to the way the parties conducted the proceedings at first instance and on appeal, it appears that it was the “A sample” aliquot of the sample that was delivered to the Racing Science Centre on 1 June 2015.
- [18] There was uncontested evidence before the Tribunal that in mid-2015:
- (a) the relevant control body was Racing Queensland;
 - (b) the control body had entered into an agreement with the Racing Science Centre (RSC) pursuant to section 40 of the Racing Act;
 - (c) the agreement did not specify the drugs and other substances for which analysis was to be undertaken;
 - (d) the RSC laboratory was independently accredited by the National Association of Testing Authorities (NATA); and
 - (e) prior to 25 June 2015, the RSC was not accredited to analyse equine urine for cobalt.⁹
- [19] The respondent did not seek to argue that, given that the RSC was party to an agreement with Racing Queensland pursuant to section 40 of the Racing Act and accredited pursuant to section 131 of the Racing Act generally¹⁰, it was, even prior to 25 June 2015, an “accredited facility” within the terms of the Racing Act for purposes of dealing with the sample.¹¹ That is an appropriate concession by the respondent. It is clear the parties to the agreement relied upon NATA certification for capability for analysis of particular things as defining the current scope of accreditation pursuant to section 131 of the Racing Act¹² and that approach is consistent with a consideration of the terms of section 131(2)(a) and (b) and (f) which require satisfaction of certain matters involving “analysing things”. It is clear that the terms of section 131 contemplated a continuing process of accreditation, in practice informed by NATA accreditation, for the facility’s accreditation to analyse certain things.
- [20] On a proper construction of the relevant provisions of the Racing Act, the RSC was not, prior to 25 June 2015, an “accredited facility” for the purpose of analysis of equine urine for cobalt. Prior to 25 June 2015, no analyst employed by the RSC met the definition of “analyst” in section 145(4) of the Racing Act for the purpose of analysis of equine urine for cobalt.
- [21] The RSC certificate dated 26 June 2015 followed dealings by persons employed by that facility with the sample between its delivery to the facility on 1 June 2015 and the production of the certificate on 26 June 2015. Those dealings included receipt of

⁹ Affidavit of S J Stephens affirmed 6 March 2017, paras 6 and 11–13; affidavit of S J Stephens affirmed 16 October 2017, paragraphs 2–5, 8 and 11 (Appeal Books, pages 311–312 and 297–298).

¹⁰ See the accreditation certificate issued pursuant to s 132 of the Act dated 14 November 2013 at Appeal Book, pages 128–129.

¹¹ Rather, the respondent argued, successfully at first instance, and unsuccessfully on appeal, that the “confirmatory analysis” and certification that occurred subsequent to NATA accreditation cured any difficulties of lack of prior NATA accreditation.

¹² See the correspondence between the RSC and Racing Queensland dated 1 July 2015 at Appeal Book, pages 122–123.

the sample on 1 June 2015 and what the learned Senior Member at first instance described as “screening analysis” between 2 and 3 June 2015. The delivery of the sample to the RSC on 1 June 2015 was not authorised by section 143(4) of the Racing Act and was contrary to the legislative mandate as to what was required to be done with the sample. The dealings with the sample between 1 and 3 June 2015 were not authorised by sections 146(1) and 147 of the Racing Act. Section 149 of the Racing Act was not engaged so as to authorise a certificate of analysis according to its terms.

- [22] The RSC certificate dated 26 June 2015 was not produced according to the requirements of the Racing Act applicable to the use of certificates in proof of proceedings such as those brought against the appellant. It was not admissible as proof, pursuant to rule 191 of the Rules, in those proceedings and the learned Senior Member at first instance erred in finding otherwise.

ChemCentre certificate dated 7 July 2015

- [23] On all the material before the Tribunal, and according to the way the parties conducted the proceedings at first instance and on appeal, it appears that it was the “B sample” aliquot of the sample that was delivered to ChemCentre for analysis.
- [24] ChemCentre did become an “accredited facility” for any purpose pursuant to the Racing Act before 22 September 2015.
- [25] For the reasons already discussed above in respect of the RSC certificate dated 26 June 2015, the ChemCentre certificate dated 7 July 2015 was not produced according to the requirements of the Racing Act applicable to the use of certificates in proof of proceedings such as those brought against the applicant. It was not admissible as proof, pursuant to rule 191 of the Rules, in those proceedings.
- [26] I agree with the conclusion of the learned Senior Member at first instance to the same effect.¹³

RSC certificate dated 5 January 2016 and RASL certificate dated 8 March 2018

- [27] It appears that it was a further aliquot of the “A sample” that was analysed by the RSC with the results of such analysis contained in the certificate dated 5 January 2016.
- [28] There appears to be some doubt, and a subject of dispute between the parties, whether it was a further aliquot of the “A sample” or the “B sample” that was analysed by the RASL with the results of such analysis contained in the certificate dated 5 January 2016. Something might turn on that if one of the three earlier certificates was admissible as proof for the purposes of rule 191 of the Rules. But in my view none of the four certificates are admissible as proof for the purposes of rule 191 of the Rules.
- [29] I have already expressed my reasons for the inadmissibility of the 2015 certificates. Those same reasons have the effect of rendering the subsequent certificates inadmissible as proof for the purposes of rule 191 of the Rules. The unauthorised dealings with the sample (comprising the “A sample” and “B sample” aliquots) had the effect of rendering subsequent compliance with the legislative requirements for the admissibility of results of analysis of the sample impossible. It was no longer possible for “the thing for analysis” within the terms of section 143(4) of the Racing Act to be delivered to an accredited facility for analysis. That thing (the pre-race urine sample taken from *Mafuta Vautin* on 30 May 2015 comprising an “A sample” and a

¹³ Reasons for decision (‘RFD’), [29].

“B sample”) was delivered to the RSC and ChemCentre in 2015. The nature of that thing was then altered by sampling and analysis. At the very least it was diminished in that any subsequent testing was of a smaller aliquot/s of the A and/or B samples. I consider that the nature of the thing was also altered, having regard to the legislative intent in maintaining the integrity of such samples, by dealings with the samples in ways not authorised by the Racing Act. The certificates of 2016 and 2018 did not follow the procedures mandated by chapter 2, part 4, divisions 2 and 3 of the Racing Act and were not admissible as proof, pursuant to rule 191 of the Rules, in the proceedings.

- [30] The learned Senior Member at first instance also found that the 2016 certificate was not admissible as proof, pursuant to rule 191 of the Rules, but for different reasons concerning the wording of rule 191(2) and the identity of the persons who analysed the sample and certified the results of the analysis.¹⁴ Given the conclusions I have reached as to the inadmissibility of the certificate, there is no utility in further considering this alternative ground for its inadmissibility.
- [31] The learned Senior Member at first instance found that the 2018 certificate was admissible as proof, pursuant to rule 191 of the Rules. I find that the learned Senior Member erred in that regard for the reasons I have stated.
- [32] The “substantial compliance” saving provisions of section 352A of the Racing Act cannot lead to any contrary conclusions as to the admissibility of the certificates. The terms of section 352A(2) and the note to section 143(3) make it clear that section 352A is concerned with a departure from the Collection Procedures and does not deal with the non-compliance with provisions of the Racing Act that renders the certificates inadmissible as proof in this matter. That conclusion is supported by the requirement in section 352A(3) that evidence of substantial compliance come from “an accredited analyst, or accredited veterinary surgeon, for an accredited facility”.
- [33] Given the conclusions I have reached that none of the certificates were, prima facie, admissible as proof pursuant to rule 191 of the Rules, the possible operation of the exclusionary provision of rule 191(7) does not arise for consideration. However, if I am wrong about that, I agree with Senior Member Howard that the non-compliance with the provisions of chapter 4, part 4 of the Racing Act would amount to “the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of” the certificates being “materially flawed” such that none of the certificates could possess evidentiary value or establish the offence.

Use of the results of analysis otherwise as proof of the offence

- [34] The learned Senior Member at first instance held that, in the event that, contrary to his conclusion, the certificates of 26 June 2015 and 8 March 2018 did not constitute, respectively, prima facie and conclusive evidence pursuant to rule 191, rule 191(6) nevertheless permitted evidence of the results of analysis resulting in those certificates as evidence otherwise proving the offence, citing the decision of the Victorian Court of Appeal in *Racing Victoria v Kavanagh*¹⁵.
- [35] I respectfully disagree with that conclusion. *Kavanagh* is readily distinguishable in the absence of provisions in the relevant Victorian legislation cognate with the provisions of chapter 4, part 4 of the Racing Act. On a proper construction of the

¹⁴ RFD, [40].

¹⁵ [2017] VSCA 334.

relevant provisions of the Racing Act, they covered the field insofar as the admissibility of evidence of results of analysis is concerned. Such a construction does not permit the conclusion that, notwithstanding non-compliance with the provisions of chapter 4, part 4 of the Racing Act, the respondent might nevertheless use the results of analysis undertaken contrary to those provisions in proof of a charge. Such a conclusion is contrary to the plain wording and readily discernible purpose of the provisions. The learned Senior Member at first instance erred in concluding otherwise.

Other proposed grounds of appeal

- [36] Ground 1 is a broad contention of error by the learned Senior Member at first instance in concluding that the evidence was such as to establish the charge against the appellant. It does identify any question of law and should be characterised as raising a mixed question of law and fact such that leave to appeal is required.¹⁶ The ground raises no important question of general importance and leave is not required to correct any substantial injustice to the appellant. I would refuse leave to appeal on such ground.
- [37] Grounds 2 to 4 and 12 attack the reasoning of the Tribunal in its ultimate conclusion that the results of analysis resulting in the certificates of analysis established proof of the charge against the applicant. They refer to issues raised in evidence, including expert evidence, as to a distinction between “organic” and “inorganic” cobalt, the presence of cobalt in vitamin B12 supplements and the possible unreliability of results of analysis due to dehydration of the horse at the time of sampling of urine. Such grounds should be characterised as raising questions of fact or questions of mixed law and fact such that leave to appeal is required.¹⁷ Leave is not required to correct any substantial injustice to the appellant. Further, to the extent that I have considered such matters, I am of the view that the learned Senior Member’s conclusions were reasonably open on the evidence and that such grounds would enjoy limited prospects of success. I would refuse leave to appeal on such grounds.
- [38] Grounds 10 and 11 do raise questions of law but those questions have already been answered in disposition of ground 5 and accordingly no further separate consideration of those grounds is required.
- [39] Grounds 6 to 8, 13 and 14 raise further arguments relating to the issue of admissibility of the certificates of analysis as proof pursuant to rule 191 of the Rules. They identify no questions of law in addition to those already answered in disposition of ground 5 and should be characterised as raising questions of fact or mixed questions of law and fact such that leave to appeal is required.¹⁸ No further consideration of such grounds is required to deal with the substantial merits of the appeal or correct any substantial injustice to the appellant and I would refuse leave to appeal on such grounds.
- [40] Ground 15 alleges error of law by reason of manifest excessiveness of the penalty substituted by the learned Senior Member at first instance. It should be characterised as raising a mixed question of law and fact such that leave to appeal is required.¹⁹ Given the appeal is being allowed and a decision of acquittal substituted, there is no utility in granting leave to appeal on such ground. It does not raise a question of general importance and leave is not necessary to correct any substantial injustice to

¹⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

the appellant. Furthermore, on my consideration of the reasons of the learned Senior Member at first instance, I discern no reasonable prospects of the appellant establishing specific error in the reasoning of the learned Senior Member regarding penalty or establishing that the penalty substituted by the Tribunal was manifestly excessive. I would refuse leave to appeal on ground 15.

SENIOR MEMBER HOWARD:

Part 1: Background

[41] Mr Darrel William Graham has been involved in the horse racing industry as a licenced driver and trainer. Mr Graham faced disciplinary charges arising from events on 30 May 2015 when he presented the gelding *Mafuta Vautin* (*Mafuta Vautin* or the horse) for a harness race at Albion Park raceway. *Mafuta Vautin* finished the race in first position. A pre-race urine sample taken from the horse was later analysed for cobalt. The maximum cobalt level allowed under the Australian Harness Racing Rules (AHRR) was then 200 micrograms per litre in urine.

[42] Mr Graham faced a disciplinary charge in the following terms:

...that Mr Graham presented MAFUTA VAUTIN to race in Race 5 at Albion Park on 30 May 2015, when a pre-race urine sample taken from that gelding was found, upon analysis, to contain the prohibited substance Cobalt above the prescribed threshold.²⁰

Initially, racing stewards found the charge substantiated and imposed a sanction of 15 months disqualification upon him. A review by QRIC confirmed the stewards' decision. Mr Graham sought external review of the disciplinary decision in QCAT pursuant to the *Racing Act* 2002 (Qld) (the *Racing Act* or the *Act*). Following four days of hearing, the Tribunal made a decision on 31 July 2019 in effect confirming substantiation of the charge and suspending Mr Graham's driver's licence and trainer's licence for 12 months.

[43] Mr Graham appeals the substantiation of the disciplinary charge and the sanction imposed upon him. He contends that the Tribunal erred in law in a myriad of stated ways in determining the review. QRIC contends that no appellable error is demonstrated in the appeal.

[44] For the reasons explained below, I would allow the appeal on the basis of error of law and set aside the Tribunal's decision. I would substitute a decision that the disciplinary charge is not established.

The grounds of appeal

[45] Because they are lengthy, for convenience, the grounds of appeal are reproduced in Annexure A.

[46] Most issues raised on appeal relate to the findings in substantiation of the disciplinary charge. Four primary issues are raised in relation to substantiation. The first is whether the Tribunal adopted the proper construction of the relevant legislative scheme. This issue is raised in challenging the admissibility of certificates of analysis. The other issues relate to whether certain findings made by the Tribunal were open on the evidence; whether the Tribunal failed to consider material evidence; and whether

²⁰ Section 21(2) documents, page 6 Steward's Report 25 August 2016.

the Tribunal failed to deal with material issues. In relation to sanction, the issue raised is whether the sanction imposed was manifestly excessive.

- [47] At the commencement of the hearing of the appeal proceeding, Mr Graham's representatives confirmed that all grounds of appeal are argued as errors of law.
- [48] The courts have not found it an easy task to formulate a test of universal application to explain the distinction between questions of law and questions of fact and questions of mixed law and fact. In *Collector of Customs v Pozzolanic Enterprises Ltd*,²¹ the Full Federal Court attempted to explain the distinction between questions of law and questions of fact by reference to general propositions (although qualifying one of the propositions). The High Court of Australia, in *Collector of Customs v Agfa-Gevaert Ltd*²² said that while general explanations may often assist, they are not of universal utility.
- [49] In *Chopra v Department of Education and Training*²³ the Victorian Court of Appeal, (recently cited by the Queensland Court of Appeal in *Crime and Corruption Commission v Andersen & Anor*²⁴) summarised as follows:

The principles for distinguishing between questions of law, questions of fact and mixed questions of law and fact are well established. However, those principles are difficult to apply in practice. What is the proper meaning, as a matter of construction, of a statutory provisions is usually a question of law. Ordinarily, whether facts fully found fall within a statutory provision, properly construed, is a question of law. However, where a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts as found fall within those words, the question whether they do or not is one of fact.²⁵

(footnotes omitted)

- [50] Argued solely as errors of law, I make the observation that the grounds of appeal could be drafted with greater clarity. That said, I would allow the appeal on the basis of error of law in construction of the statutory scheme for the reasons later explained.
- [51] To the extent that I am wrong in so characterising the grounds, if it was necessary to do so, I would grant leave to appeal in light of material error identified and the substantial injustice that would result if the error identified was not corrected.

The appeal process

- [52] Section 146 of the QCAT Act provides for the manner of deciding an appeal on a question of law only. An appeal, on a question of law only, is an appeal in the strict sense: there is no element of rehearing in s 146.²⁶ On the other hand, leave to appeal is required in respect of a question of fact or a question of mixed law and fact: s 142. If leave is granted, (because of arguable grounds of error and a substantial injustice requires correction), the appeal must be decided by way of rehearing by the appeal tribunal: s147.

²¹ (1993) 43 FCR 280; 115 ALR 1.

²² 141 ALR 59, 63.

²³ (2020) 60 VR 505.

²⁴ [2021] QCA 222, [37].

²⁵ (2020) 60 VR 505, 528, [88].

²⁶ *Ericson v QBSA* [2013] QCA 391, [12]–[13]; *Albrecht v Ainsworth* [2015] QCA 220, [94] (although the decision was overturned on appeal in the High Court of Australia, the appeal did not affect the point in respect of which the decision is relied upon here). Cf. appeals against a decision on a question of fact or mixed law and fact are decided by way of rehearing pursuant to s 147.

- [53] In deciding an appeal in the strict sense, if the error of law disposes of the proceeding in its entirety, the appeal tribunal may confirm or amend the decision or substitute its own decision.²⁷ Further, if it identifies an error of law, it may substitute its own decision based on the material before the tribunal.²⁸ Otherwise, the appeal tribunal may set the decision aside and return the matter to the tribunal for determination according to law.
- [54] The Court of Appeal has said that the appeal tribunal must determine all questions raised in an appeal argued before it,²⁹ although it need not necessarily discuss distinctly each of the questions if it is sufficiently clear how it reached its conclusions.³⁰ In my reasons for decision, I have discussed the substance of the grounds raised.

Part 2: The legislative framework provided for in the Racing Act and associated statutory instruments

- [55] It is not contentious that the relevant version of the *Racing Act* 2002 (Qld) is the version current at 1 July 2014 and the relevant version of the Australian Harness Racing Rules (AHRR) is as amended up to and including 13 October 2014. References throughout these reasons for decision to the *Racing Act* and the AHRR are to these relevant versions unless otherwise stated.

The Racing Act

- [56] The main purposes of the *Racing Act* include maintaining public confidence in the racing of animals for lawful betting; and ensuring the integrity of all persons involved in racing, as well as the welfare of animals involved in racing.³¹
- [57] A control body has powers for its code of racing.³² ‘Harness racing’ is a code of racing.³³ A ‘code of racing’ in relation to a control body is the code stated in the approval for the control body.³⁴ A control body must enter an agreement with an accredited facility for scientific and professional services for analysing ‘things relating to licensed animals for the presence of drugs and other substances.’³⁵ A control body may make policy for its code of racing³⁶ and it must make rules of racing for each code of racing³⁷ consistent with the Act and any relevant policy.³⁸ To the extent

²⁷ *Ericson v QBSA* [2013] QCA 391, [12]–[13]; *Albrecht v Ainsworth* [2015] QCA 220, [94]; *Harrison v Meehan* [2017] QCA 315, [46]–[50].

²⁸ *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *Allesch v Maunz* (2000) 203 CLR 180, [22]; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 556; *Albrecht v Ainsworth* [2015] QCA 220, [94]

²⁹ *Urquart v Partington* [2016] QCA 87, at [84-86].

³⁰ *Harrison v Meehan* [2017] QCA 315, at [46-50].

³¹ *Racing Act* ss 4 and 5.

³² *Ibid* s 34.

³³ *Ibid* sch 3, ‘code of racing.’

³⁴ *Ibid* sch 3, ‘code of racing’.

³⁵ *Ibid* s 40.

³⁶ *Ibid* s 80.

³⁷ *Ibid* s 91(1).

³⁸ *Ibid* s 91(4).

of any inconsistency between the Act and the rules, the Act prevails over the rules.³⁹ Policies and rules of racing are statutory instruments.⁴⁰

- [58] Chapter 4 is entitled ‘Integrity Control.’ The Racing Animal Welfare and Integrity Board (the Integrity Board) is established under Chapter 4, Part 1.⁴¹ The Integrity Board’s functions include developing, adopting and publishing procedures about the manner in which things taken for analysis are taken and dealt with.⁴² Relevantly, the Integrity Board has developed ‘The Collection Procedures.’
- [59] Accreditation of facilities is provided for in Chapter 4, Part 2. The chief executive may accredit a facility only if satisfied of specified matters,⁴³ including that its security systems ensure the integrity of analysis,⁴⁴ that its staff have the necessary expertise,⁴⁵ and other requirements under a regulation, including for quality assurance procedures, are complied with.⁴⁶ An accreditation certificate for a facility must set out the name of the facility; the name of the person who holds the accreditation; the name/s of each person who may take delivery of things for analysis; and is an accredited analyst or an accredited veterinary surgeon for the facility.⁴⁷ Similar details are required for any secondary facility for the accredited facility. Part 3 provides for disciplinary proceedings against accredited facilities, including for contravention of a provision of the Act, irrespective of whether the provision breached provides for the act to constitute an offence.⁴⁸
- [60] Of key importance here is Chapter 4, Part 4, entitled ‘Dealing with, and analysis of, things.’ It is set out in three divisions. Division 1 contains definitions for Part 4. ‘Deal’, is defined to mean ‘in relation to a thing for analysis, means mark, seal or deliver the thing for analysis’.⁴⁹
- [61] Division 2 is entitled ‘Taking and dealing with things for analysis’. Section 143 applies if a control body’s policy about drug control regarding licensed animals provides for analysis of things. Pursuant to s 143(3), if results of analysis are to be used for a purpose, other than research or survey purposes, the control body must take and deal with the thing for analysis under the Integrity Board’s procedures referred to in s 115(3) (that is, The Collection Procedures).
- [62] Pursuant to s 143(4), the control body must deliver the thing for analysis to either:
- (a) If the thing is to be delivered under an agreement between the control body and an accredited facility, the accredited facility that is party to the agreement; or
 - (b) Otherwise, to another facility that has the capacity to analyse things relating to licensed animals if the delivery is approved by an integrity officer.
- [63] Section 145 applies to a thing dealt with *inter alia* under s 143. It provides that (other than an integrity officer or analyst as part of the process of allowing things to be

³⁹ Ibid s 91(5).

⁴⁰ Ibid s 79.

⁴¹ Ibid s 114.

⁴² Ibid s 115(3).

⁴³ Ibid s 131.

⁴⁴ Ibid s 131(2)(a).

⁴⁵ Ibid s 131(2)(b).

⁴⁶ Ibid s 131(2)(f).

⁴⁷ Ibid s 132.

⁴⁸ Ibid s 135.

⁴⁹ Ibid s 142.

analysed),⁵⁰ a person must not interfere with a container in which a thing is placed by a control body under s 143 without a reasonable excuse.⁵¹ A maximum penalty of 600 penalty units is specified. For section 145, ‘interfere with, a container’ means to open, alter or break the container or seal on the container or remove a mark or seal.⁵² Relevantly, the prohibition does not apply to an analyst who interferes with the container as part of the process of allowing the thing to be analysed.⁵³ ‘Analyst’ is defined for s 145, to mean ‘an analyst employed by an accredited facility or secondary facility for an accredited facility.’⁵⁴

- [64] Chapter 4, Part 4, Division 3 is entitled ‘Analysing things delivered for analysis.’ It provides, among other things, for receipting the delivery of a thing by an accredited facility,⁵⁵ giving the thing to an analyst at the accredited facility,⁵⁶ and (if it cannot be analysed within a reasonable time) delivering it to an analyst at a secondary facility for the accredited facility.⁵⁷ Following analysis of a thing delivered for analysis to an accredited facility which has been the subject of analysis (at the accredited facility or a secondary facility), or receiving the results,⁵⁸ the analyst must (unless no drug or code substance was found or was found below the allowable level)⁵⁹ give a notice of results⁶⁰ to, if the thing was delivered by the control body, the accredited veterinary surgeon for the accredited facility; or, if the thing was delivered by the integrity officer, the integrity officer.⁶¹
- [65] The notice of results must include a certificate signed by an accredited analyst stating all of the specified matters, including information to identify the thing analysed; the place at which, and the day when or period over which, the thing was analysed; relevantly, the fact that a code substance was found; and its name and information requested by the control body about the amount or concentration.⁶² If the analyst fails to complete the analysis of the thing, notice of the failure to complete it must similarly be given to the control body or the integrity officer, respectively, stating that there was a failure to do so and the reason for the failure.⁶³
- [66] If the notice of results is given to an accredited veterinary surgeon in accordance with the requirements of the Division, the accredited veterinary surgeon must give a signed certificate to the control body stating the pharmacology of the drug or substance; the effect of using it on the behaviour, performance or physical condition of the type of animal; and other specified information if a drug is found.⁶⁴
- [67] Chapter 9, ‘Miscellaneous provisions’ includes s 352A, entitled ‘Integrity of analysis of thing’. It applies to disciplinary proceedings taken in reliance upon a relevant

⁵⁰ Ibid s 142(3).

⁵¹ Ibid s 145(1).

⁵² Ibid s 145(4).

⁵³ Ibid s 145(3).

⁵⁴ Ibid.

⁵⁵ Ibid s 146(1)(a).

⁵⁶ Ibid s 146(1)(b).

⁵⁷ Ibid s 146(2), (3) and (4).

⁵⁸ Ibid s 147(1)

⁵⁹ Ibid s 147(4).

⁶⁰ Ibid s 147(3).

⁶¹ Ibid s 147(2).

⁶² Ibid s 147(3).

⁶³ Ibid s 148.

⁶⁴ Ibid s149.

certificate of analysis.⁶⁵ It applies to specified decisions including decisions made in a tribunal review. In making the decision, it is enough that the decision-maker is satisfied that the method of taking and dealing with a thing for analysis complied with s 143(3) to the extent that the integrity of the analysis was not adversely affected.⁶⁶ Evidence of an accredited analyst or accredited veterinary surgeon that the method of taking and dealing with the thing was in substantial compliance with s 143(3) is evidence of substantial compliance, and in the absence of contrary evidence, conclusive evidence of that fact.

The Collection Procedures

- [68] As above, the Integrity Board developed ‘The Collection Procedures’ pursuant to s 115(3) of the Racing Act. Version 4 was effective from 1 June 2012. The Collection Procedures provide for the taking of things for analysis for, including, monitoring compliance with the rules of racing.
- [69] Part 2 sets out the Racing Act requirements for taking and dealing with things for analysis, reciting sections 143, 144 and 352A. Part 3 sets out protocols for taking and dealing with things for analysis. Relevantly, Protocol A is generally to be used for samples taken for investigating a suspected breach of the control body’s rules. It applies except when it is not practical to split a thing for analysis into two portions at the time of collection.⁶⁷ Part 4 provides for a process for taking and dealing with things for analysis under Protocol A. Amongst other things, it provides for uniquely numbered traceable sampling equipment, security of samples, comprehensive records of the chain of custody, and tamper evident tags. It provides prescriptive procedures about who must take possession of samples and deliver them for testing, how that is to be done, to whom they are to be delivered, and the records to be kept.
- [70] Part 4 specifies that samples are to be taken in accordance with the appendices. Appendix 2 specifies the ‘Procedure for taking and dealing with urine samples’.⁶⁸ Appendix 2 provides for three screw top sample bottles to be used, one of which contains the control solution, stating ‘The control solution is a solution used to detect contamination of the sampling equipment.’⁶⁹ ‘Step 3’ provides that, once taken, the sample must be split between the two empty rinsed bottles.⁷⁰ It is not controversial that the samples are commonly referred to respectively as the A and B samples and the control.
- [71] The samples must be delivered to an accredited facility.

The AHRR

- [72] Rule 188A(1) provides for prohibited substances. They are substances capable of directly or indirectly causing an action and/or effect within one or more of specified mammalian body systems, including relevantly, the blood system.⁷¹ Substances that fall within certain specified categories are prohibited substances, including Haematopoietic agents.⁷² Rule 188(2) provides that specified substances are excepted

⁶⁵ Ibid s 352A(1).

⁶⁶ Ibid s 352A(2).

⁶⁷ The Procedures, 3.1.

⁶⁸ The Procedures, 4.3.1.

⁶⁹ The Procedures, Appendix 2, ‘Urine Collection Equipment’, (c).

⁷⁰ The Procedures, Appendix 2, ‘STEP 3 Split the urine sample.’

⁷¹ Australian Harness Racing Rules r 188A(1)(a) (‘AHRR’).

⁷² AHRR r 188A(1)(b).

from the provisions of Rule 188A(1) when at or below specified levels. Amongst those substances excepted by Rule 188A(2)(k) is cobalt at a concentration at or below 200 micrograms per litre of urine.

- [73] Rules 15(1)(k) and 189 provides in general terms for testing by racing stewards for prohibited substances.
- [74] Under AHRR r 190, a horse must be presented for a race free of prohibited substances, and if it is not, the trainer is guilty of an offence.⁷³ If not so presented, an offence is committed regardless of the circumstances in which the prohibited substance came to be present.⁷⁴
- [75] Rule 191 entitled ‘Evidentiary certificates’ is as follows:
- (1) A certificate from a person or drug testing laboratory approved by the Controlling Body which certifies the presence of a prohibited substance in or on a horse at, or approximately at, a particular time, or in blood, urine, saliva, or other matter or sample or specimen tested, or that a prohibited substance had at some time been administered to a horse is prima facie evidence of the matters certified.
 - (2) If another person or drug testing laboratory approved by the Controlling Body analyses a portion of the sample or specimen referred to in sub rule (1) and certifies the presence of a prohibited substance in the sample or specimen that certification together with the certification referred to in sub rule (1) is conclusive evidence of the presence of a prohibited substance.
 - (3) A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse at a meeting shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the horse was presented for a race not free of prohibited substances.
 - (4) A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the prohibited substance was present in or on the horse at the time the blood, urine, saliva, or other matter or sample or specimen was taken from the horse.
 - (5) Sub rules (1) and (2) do not preclude the presence of a prohibited substance in or on a horse, or in blood, urine, saliva, or other matter or sample or specimen, or the fact that a prohibited substance had at some time been administered to a horse, being established in other ways.
 - (6) Sub rule (3) does not preclude the fact that a horse was presented for a race not free of prohibited substances being established in other ways.
 - (7) Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed.

⁷³ AHRR r 190(1) and (2).

⁷⁴ AHRR r 190(4).

- [76] Relevantly, when two certificates are provided which meet the requirements of AHRR 191(1) and (2), the certificates are together conclusive evidence that a horse was presented for a race not free of prohibited substances. AHRR 191(3) contemplates circumstances in which only one certificate meets the requirements, and in which case, it shall be prima facie evidence if sub rule 191(1) only applies.
- [77] AHRR r 191(6) provides that r 191(3) does not preclude the fact that a horse was presented for a race not free of prohibited substances ‘being established in other ways.’
- [78] That said, AHRR 191(7) provides that notwithstanding the provisions of the rule, certificates do not possess evidentiary value nor establish an offence, if it is proved that ‘the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed.’

Part 3: The appeal against substantiation of the disciplinary charge

- [79] It is useful to summarise relevant aspects of the Tribunal’s decision before embarking upon a consideration of the grounds of appeal.

The Tribunal’s decision on substantiation of the disciplinary charges

- [80] The Tribunal considered that the AHRR provides for prohibited substances, the testing of horses for its presence, and how its presence might be proved,⁷⁵ The learned Member discusses provisions of the AHRR, namely AHRR r 188A and AHRR r 189, and sets out in full AHRR r 191.⁷⁶ It observed that Mr Graham’s submissions ‘rest on the validity or evidential value of the four certificates of analysis.’⁷⁷
- [81] The Tribunal considered ‘the status of cobalt as a prohibited substance’⁷⁸ pursuant to AHRR r 188A. It observes that r 188A(2) provides that the specified substances at or below the amount set out therein are excepted from the general prohibition and that r 188A(2)(k), refers to cobalt at a concentration of 200 micrograms per litre of urine. It said, ‘That evidently presumes that cobalt is a prohibited substance in terms of rule 188A(1).’⁷⁹ It goes on then to say that it accepts expert evidence of Professors Mills and Chapman that cobalt is capable of affecting the body system of a horse, in particular the blood system, and that it is a haematopoietic agent.⁸⁰
- [82] There were four certificates of analysis:
- (i) Racing Science Centre (RSC) dated 26 June 2015;
 - (ii) ChemCentre dated 7 July 2015;
 - (iii) RSC dated 5 January 2016; and
 - (iv) Racing Analytical Services Limited (RASL) dated 8 March 2018.
- [83] The Tribunal was satisfied as to substantiation of the disciplinary charge based upon two certificates of analysis before it: the RSC certificate of 26 June 2015 and the RASL certificate of 8 March 2018. It stated that those certificates constitute, under

⁷⁵ RFD [5].

⁷⁶ Ibid [6]–[10].

⁷⁷ Ibid [11].

⁷⁸ Ibid [12].

⁷⁹ Ibid [13].

⁸⁰ Ibid [14].

AHRR 191(3), conclusive evidence that the horse was not presented free of a prohibited substance, namely cobalt above the prescribed threshold.⁸¹

Mr Graham's submissions that each of the certificates was inadmissible

- [84] In reaching its conclusion, the Tribunal considered and largely rejected in respect of each certificate, multiple submissions from Mr Graham that each of the four certificates was inadmissible.⁸² The arguments and the Tribunal's conclusions about each of them are summarised in the following paragraphs.

The organic and inorganic cobalt argument

- [85] In considering each of the certificates, the Tribunal appears to have rejected submissions and related evidence relied upon by Mr Graham, which it characterised as being to the effect that a distinction is to be drawn between the levels of inorganic and organic cobalt in the sample, and that only inorganic cobalt over 200 micrograms can fall within substances prohibited by AHRR rr 188A(1)(a) and/or 188A(1)(b). The Tribunal refers to reliance by Mr Graham on a certificate given by Dr Caldwell, an accredited veterinary surgeon, which stated that inorganic cobalt may act to stimulate the formation of red blood cells.⁸³
- [86] Relevantly to the argument made by Mr Graham, the Tribunal states that evidence was presented to the effect that vitamin B12 contains organic cobalt and that Tripart, which had been administered to the horse, contained vitamin B12, '*of which cobalt in organic form is an active component.*'⁸⁴ The Tribunal records that Professor Mills questioned whether Tripart given the day before could result in high cobalt levels, because B12 disappears quickly through urination.⁸⁵
- [87] The learned Member, noting that the AHRR makes no distinction between organic and inorganic cobalt, accepted evidence of Professor Mills that organic cobalt in B12 '*influences the production of red blood cells and as such is capable of directly or indirectly causing an effect within a relevant body system of a horse.*'⁸⁶ The Tribunal said, and appears to have concluded in respect of this issue, that:

Presumably the then permissible threshold of 200 micrograms took account of the fact that there could quite properly be some absorption of cobalt in organic or inorganic form.⁸⁷

The Dehydration Argument

- [88] In the case of all four certificates, Mr Graham challenged the reliability of the analysis of the sample because of extreme dehydration of the horse. The Tribunal observed that AHRR r 191, and in particular, the effect of r 191(3) is not qualified by reference '*to the condition of the horse at the time of testing.*'⁸⁸ It referred to evidence of Professors Mills and Chapman to the effect that concentration of urine does not '*impact the capacity to measure the cobalt level.*'⁸⁹

⁸¹ Ibid [45].

⁸² Ibid [11].

⁸³ Ibid [17]–[19], [28], [31], [42].

⁸⁴ Ibid [18]

⁸⁵ Ibid.

⁸⁶ Ibid [19].

⁸⁷ Ibid.

⁸⁸ Ibid [20].

⁸⁹ Ibid [20], [28], [31], [42].

The RSC certificate dated 26 June 2015—the accreditation argument

- [89] At the date of delivery (on 1 June 2015) of the sample to RSC for testing, although accredited for other purposes, RSC was not accredited to test for cobalt in urine. It obtained the relevant accreditation on the morning of 25 June 2015.⁹⁰
- [90] The Tribunal said that Mr Graham argued that, because part of the analysis resulting in the flagging of the sample for further testing for cobalt occurred before 25 June 2015, the certificate of analysis was inadmissible. The certificate stated that testing occurred between 1 and 26 June 2015.⁹¹ The Tribunal said the evidence was to the effect that the earlier testing was ‘screening analysis’⁹² and that ‘confirmation analysis’ was completed between the evening of 25 June 2015 and 26 June 2015 and the certificate issued on 26 June 2015.⁹³ The learned Member said that r 191(1) ‘seems to suggest’ that the ‘crucial point of reference in relation to approval is the time of certification,’⁹⁴ whereas for r 191(2) approval was required at the time of analysis and certification.⁹⁵
- [91] The learned Member went on to say that in any event, the ‘confirmation analysis’ and certification had occurred after accreditation was obtained,⁹⁶ and that ‘in my view, the fact of the earlier “screening analysis” is not relevant.’⁹⁷ It appears that the Tribunal considered in referring to the evidence of Ms Nelis about the testing process, that it is ‘*evident that the purpose of the screening process is*’ to identify samples requiring further analysis.⁹⁸ The Tribunal considers this interpretation consistent with terms of AHRR r 191(7) which provides for certificates not to possess evidentiary value where the certification procedure or process was materially flawed, on the basis that:
- [26] It is to be imagined that it was not intended that rule 191(7) would invalidate an analysis in the present case the ‘confirmation analysis’, that is carried out in accordance with the rules and prescribed procedures and where the process for that analysis was not ‘materially flawed’, simply on the basis that some earlier screening analysis, of a different aliquot of the sample is questionable.⁹⁹

The ChemCentre certificate dated 7 July 2015 – the accreditation argument

- [92] The Tribunal accepted that the ChemCentre certificate was not certification for purposes of AHRR 191(1) or (2) because ChemCentre was not an accredited facility at the relevant time under s 132 of the Racing Act. Despite that, the Tribunal considered that it ‘might be considered as evidence going to proof by conventional means that the horse was not presented for a race not free of prohibited substances.’¹⁰⁰
- [93] Although specific findings to this effect were not made, on a fair reading, it appears that the learned Member rejected Mr Graham’s arguments that, because the analyst

⁹⁰ Ibid [21].

⁹¹ Ibid.

⁹² Ibid [21]–[27].

⁹³ Ibid [22].

⁹⁴ Ibid [24].

⁹⁵ Ibid [22].

⁹⁶ Ibid [25].

⁹⁷ Ibid.

⁹⁸ Ibid [22], [25].

⁹⁹ Ibid [26].

¹⁰⁰ Ibid [29].

was not an analyst for the purposes of s 145 of the Racing Act, his dealing with the reserve or B sample rendered the B sample unlawfully compromised. The learned Member said that, leaving aside the intended reach of s 145(2), there is nothing in the AHRR which precludes sending a sample for analysis to a laboratory that is not approved by the control body.¹⁰¹ Again, on a fair reading, the Tribunal appears to have therefore rejected the argument that the process or procedure of subsequent certification was ‘materially flawed’ in this manner within the meaning of AHRR Rule 191(7).¹⁰²

The RSC certificate dated 5 January 2016 – the sample was compromised by unlawful interference with by ChemCentre and the certificate was not signed by the person who performed the analysis

- [94] In relation to the argument that the B sample was unlawfully dealt with or interfered with and therefore compromised for further testing purposes, the Tribunal said that it had earlier addressed the argument.¹⁰³
- [95] In considering the requirements of r 191(2) of the AHRR, the Tribunal stated that the object of the rule was to ensure that those involved in the second analysis and certification had not been involved in the first analysis and certification (given that the second certificate, if it met all requirements, is conclusive evidence of presentation of a horse not free of prohibited substance pursuant to AHRR Rule 191(3)). Further, it concluded that there was no requirement for the person who conducted the analysis to sign the certificate, provided that the analyser and the certifier both have the relevant approvals.¹⁰⁴
- [96] It concluded that the words in r 191(2), ‘another person... approved by the controlling body’ who analyses and certifies in respect of a sample, requires that both the person who conducts the analysis, if different from the person who certifies, must be approved by the controlling body. Here, a Mr Zabrocki who performed the analysis was not an approved person, although the certifier, Ms Nelis, was an approved person. The Tribunal concluded the analysis was not carried out by an approved person.
- [97] The learned Senior Member therefore does not to rely upon it.¹⁰⁵ However, he goes on to suggest that the certificate might nevertheless be considered as evidence going to proof ‘by conventional means’ for purposes of r 191(6).¹⁰⁶

The RASL certificate dated 8 March 2018 – the arguments that the sample was compromised by unlawful interference by ChemCentre and the certificate was not signed by the analyst who performed the analysis

- [98] The Tribunal said it relied upon its earlier approach to the various arguments made by Mr Graham to reject the submission that the certificate was inadmissible and to treat the certificate, together with the RSC certificate dated 26 June 2015, as conclusive evidence under r 191(3), rejecting that the RASL certification procedure was materially flawed.

¹⁰¹ Ibid [30].

¹⁰² Ibid [30].

¹⁰³ Ibid [31].

¹⁰⁴ Ibid [35].

¹⁰⁵ Ibid esp at [39]–[40].

¹⁰⁶ Ibid [41].

- [99] The learned Member states that Mr Graham has not ‘said why as a consequence’ (of the ChemCentre testing) ‘the certification or process was ‘materially flawed,’¹⁰⁷ observing that evidence was received to the effect that ChemCentre had been accredited for purposes other than as relevantly required under the Racing Act.¹⁰⁸
- [100] In relation to the RASL certificate dated 8 March 2018, the Tribunal says that it has dealt with and rejected the argument of unlawful interference above.¹⁰⁹ Further, it says that similarly to its conclusions rejecting arguments that the ChemCentre certificate and the RSC certificate of 5 January 2016 were not signed by the person who performed the analysis, there was no requirement that it be so signed.¹¹⁰
- Rule 191(6) – the arguments about the interpretation of establishing the disciplinary charge ‘in other ways’*
- [101] The Tribunal goes on to make observations in the event that, contrary to the learned Member’s conclusions, the certificates of 26 June 2015 and 8 March 2018 do not comply with r 191 (and therefore, do not constitute prima facie or conclusive evidence for r 191).¹¹¹
- [102] The Tribunal considered that where a certificate does not constitute prima facie or conclusive proof under rule 191 (1)-(3), it might nevertheless form part of evidence used to establish proof through conventional means.¹¹² It discussed *Racing Victoria v Kavanagh*,¹¹³ which it said considered a similar prima facie evidence provision that contained no equivalent provision to AHRR r 191(6), where the Victorian Court of Appeal held that proof by conventional means was not precluded.¹¹⁴ The learned Senior Member considered that AHRR r 191(6) reinforced the approach in *Kavanagh* here, subject to AHRR r 191(7). It suggested, reading the reference in AHRR 191(3) to a certificate ‘furnished under this rule’ in conjunction with AHRR 191(6), that ‘where the certificate is not furnished ‘under this rule’ then, subject to rule 191(7), it might form part of the evidence used to establish proof through conventional means.’¹¹⁵ That is, evidence would also be required as to the ‘veracity of the testing process and the qualifications’ of the analysts.¹¹⁶ The Tribunal did not then discuss the effect or application of AHRR r 191(7) in this context.
- [103] The Tribunal had affidavit and oral evidence in the proceeding in relation to the certifications, which it said supported a conclusion that appropriate processes were followed in the testing process and in reaching the conclusions reflected in the certificates. The Tribunal then states that ‘discounting’ Rule 191(3), it is satisfied ‘on all of the evidence’ that the horse was presented not free of a prohibited substance.¹¹⁷

¹⁰⁷ Ibid [30].

¹⁰⁸ Ibid [30].

¹⁰⁹ Ibid [43].

¹¹⁰ Ibid [44].

¹¹¹ Ibid [46].

¹¹² Ibid [48].

¹¹³ [2017] VSCA 334, discussed at RFD [47]–[48].

¹¹⁴ RFD [84].

¹¹⁵ Ibid [48].

¹¹⁶ Ibid.

¹¹⁷ Ibid [50].

Construction of the scheme

The parties' submissions

- [104] Mr Graham alleges numerous errors by the Tribunal in its interpretation of the Racing Act, The Collection Procedures and the AHRR.
- [105] Mr Graham argues that Chapter 4 of the Racing Act provides a code for dealing with samples for analysis, through the specific requirements of Chapter 4, Part 4, Division 3. He argues that Chapter 4 is mandatory in prescribing measures to protect the integrity of the testing regime across racing codes and that it replaced the common law principle of proof through conventional means. He submits that the Tribunal failed to observe and apply it in making its decision in the review. He says that pursuant to s 143(3), the control body was obliged to deal with the urine samples in the manner prescribed by The Collection Procedures, by delivery for analysis at an accredited facility (or otherwise, a facility approved by an integrity officer). He argues that, consequently, the certificates were erroneously accepted into evidence despite their non-compliance with the requirements of Chapter 4, including s 147 and s 149.
- [106] Mr Graham argues that the control body must deliver the thing for analysis in accordance with s 143(4). Further, he argues that The Collection Procedures developed under s 115(3) require analysis at an accredited facility. Accordingly, he argues that s 352A of the Racing Act is not, and cannot be, enlivened so as to make the RSC certificate of 26 June 2015 admissible. Therefore, Mr Graham argues that the certificate had no evidentiary value. As a consequence of the proper application of Chapter 4, Mr Graham submits that the RSC Certificate dated 26 June 2015 is inadmissible. RSC did not have accreditation to test for cobalt until 25 June 2015, whereas, as the certificate declares, the analysis was conducted between 1 June and 26 June 2015.
- [107] He also argues that the ChemCentre certificate is inadmissible by reason of Chapter 4 and AHRR r 191(7) because it is materially flawed, since it is undisputed that neither RSC nor ChemCentre were at the relevant dates (that is, when the thing was delivered for analysis to each of them and when the thing was analysed by each of them), an accredited facility or secondary facility for an accredited facility within the meaning of Chapter 4, Part 2. Further, he observes that there was no evidence an integrity officer, as per s 143(4)(b), had authorised the sending of the sample to either RSC or ChemCentre.
- [108] Also, he submits that the Tribunal erred in rejecting the submission that by failing to properly interpret and apply s145(2) of the Racing Act, Chapter 4 generally and The Collection Procedures, ChemCentre's opening of the B Sample resulted in it being unlawfully compromised and unable to be used for future analyses. Further, if this argument is successful, it affects potentially, validity of the RSC certificate dated 5 January 2016, and the RASL certificate.¹¹⁸

¹¹⁸ Appeal Book, p 70. Further, Mr Graham argues that potentially it affects the RASL certificate if it is not accepted that RASL tested the A Sample: Mr Graham's submissions filed 11 November 2019, paragraph 19(c). However, his primary argument on appeal is that the evidence does not support RSC having sent either the A sample or the B sample from *Mafuta Vautin* to RASL for testing as later discussed.

- [109] Further, he submits that the Tribunal misconstrued AHRR rr 191(6) and (7) in determining that certificates of analysis which under AHRR r 191(7) do ‘not possess evidentiary value or establish an offence’ may ‘form part of the evidence used to establish proof through conventional means’.¹¹⁹ Mr Graham argues that in AHRR r 191(6), established ‘in other ways’ must mean ways other than through certificates of analysis (such as admissions; eye-witness evidence of administration of a prohibited substance; or stable treatment records). He says that the Tribunal erred in following *Racing Victoria v Kavanagh*¹²⁰ because the provision of the thoroughbred racing rules considered there by the Victorian Court of Appeal was materially different in that it did not contain an equivalent provision to AHRR r 191(7). Further, the legislative regime applicable did not contain provisions equivalent to Chapter 4 of the Racing Act.
- [110] Further, Mr Graham submits that the Tribunal erred in any event in finding that ‘Evidence provided by affidavit and oral testimony support the conclusion that appropriate processes were followed in the testing of the samples and in reading the conclusions reflected in the certificates’.¹²¹ He argues that there was no evidence from the analysts who conducted the testing said to be evidenced by the certificates and the affidavit material cited to support this finding was signed by persons other than the analysts who performed the testing at RSC and RASL, and that nor was there any such evidence before the Tribunal.¹²² In relation to ChemCentre, he contends that the affidavit relied upon deals with generic processes only and is not said to be provided by the analyst.
- [111] In the alternative, Mr Graham further submits that by s 91(5) of the Racing Act, which provides as discussed that to the extent of any inconsistency between the AHRR and a provision of the Racing Act, the provision of the Act prevails.
- [112] QRIC appears to submit that non-compliance with Chapter 4 of the Racing Act is of little consequence and cannot be fatal. It says that the statutory language does not indicate that it is a code and that it ‘seems unlikely’ that it could be fatal given that the AHRR set out a delegated means of undertaking the exercise. Further, it submits that s 145(2) is a penalty provision and irrelevant to the question of further uses to which the sample could be put. It argues that it is not determinative of procedure in relation to handling and analysis, and the events did not result in the irretrievable compromise of any future analysis.
- [113] QRIC suggests that Mr Graham’s submission about the construction of AHRR r 191(7), at its heart, is that certificates that do not fall within the deeming provisions as to conclusivity are inadmissible for all purposes. It submits that AHRR r 191(7) applies only if it is proved that the ‘certification process or any act forming part of or relevant to the process resulting in the issue of the certificate was ‘materially flawed.’ It argues that the evidence does not establish such an outcome. It suggests that the ‘other ways’ of establishing proof posited by Mr Graham would be of little assistance in a case of this nature that can be established only by a level of concentration in urine.
- [114] Further, QRIC submits that non-compliance with AHRR s 191(1) to (4) simply means that the certificates do not receive the benefit of the short-cut evidentiary provisions.

¹¹⁹ Referring to RFD [21], [29], [41], [48], [49].

¹²⁰ [2017] VSCA 334 (Maxwell P). Referring to RFD [48].

¹²¹ RFD [49].

¹²² Mr Graham’s submissions filed 11 November 2019, paras 10(a), (b).

It contends that certificates from NATA accredited facilities RSC, RASL and ChemCentre are not ‘irrelevant’ because of, what it refers to as, ‘administrative’ shortcomings. QRIC also submits that the certificates might be appropriately used to establish proof ‘in other ways’ in such circumstances, irrespective that they do not carry the benefit of the short-cut evidentiary provisions. Reliance is placed on *Racing Victoria v Kavanagh*,¹²³ in which the Victorian Court of Appeal said that it would consider it remarkable if non-compliance with procedural steps prevented establishing a contravention by conventional means of proof.

- [115] QRIC submits that evidence of process is appropriately given by the supervising analyst, as occurred here, and need not be given by every analyst involved in testing, unless evidence had been led by Mr Graham to suggest a material flaw in the process. It submits that it had not been, and therefore the Tribunal’s findings were not made in error. QRIC further argues that at the very least, the RSC certificate of 26 June 2015 and RASL 8 March 2018 were *prima facie* and conclusive evidence respectively of the breach.
- [116] It argues that the combined four certificates or any combination of them, or any one singly was evidence the horse was presented to race with in excess of the allowable cobalt. It submits that the issues raised by Mr Graham do not demonstrate a material flaw in the process or procedure for any of the certificates. It concedes that ChemCentre was not accredited under the Racing Act, but was accredited by NATA, underscoring the relevance of its certificate. Likewise, it argues that it cannot have been intended that Mr Zabrocki’s status as an unaccredited analyst render the RSC’s certificate materially flawed.
- [117] Mr Graham submits in reply that, the interpretation QRIC contends for, dismisses the provisions of the Racing Act and the AHRR as ‘optional guidelines’, despite the presumptive imposition of strict liability for presentation charges.¹²⁴ He says the manifest intent of the rule-makers was that non-compliant certificates are inadmissible, but violation of the presentation rule may be established in other ways, that is, other than admitting certificates into evidence. He says the interpretation QRIC contends would mean that AHRR r 191(7) was restricted in application to circumstances that a regulator relies on AHRR r 191(1) and (2), and has no work to do if the case is sought to be proved ‘in other ways’ as contemplated by AHRR r 191(6). Further, he submits that in context AHRR r 191(7) follows AHRR r 191(6) and applies in all methods of proof.
- [118] Mr Graham contends that the Tribunal formed the ‘view’ that the RSC analysis dated 5 January 2016 was not carried out by an approved person for the purposes of AHRR 191(2).¹²⁵ It erred, he says, by not finding therefore that AHRR r 191(7) properly interpreted and applied such that the certificate had no evidentiary value. Specifically, he argues that as the certificate was not, as required by AHRR191(2) properly interpreted and applied, certified by the person who conducted the analysis, it should have ‘invalidate(d) the certificate as evidence in support of the charges’.¹²⁶ Further, he submits that the Tribunal impermissibly and contrary to the clear words of AHRR191(2) said:

¹²³ [2017] VSCA 33.

¹²⁴ Mr Graham’s submissions in reply filed 28 January 2020, [7]–[12].

¹²⁵ RFD [40].

¹²⁶ Mr Graham’s submissions filed 11 November 2019, para 8(b).

- [35] In my view, there does not appear to be any reason why the person conducting the analysis need be the one and the same as the person issuing the certificate..... The evident object of rule 191(2) is to ensure that those involved in the second analysis and certification had no involvement in the first.... That is achieved where neither the certifier nor analyst were involved in the first testing process....different people were involved in each process.

Did the Tribunal err in its construction of the scheme?

- [119] As my earlier analysis reveals, the starting point in interpreting the legislative scheme for taking and dealing with things for analysis is the proper construction of the Racing Act. The AHRR must then be interpreted in the context of the mandatory requirements provided for in the Racing Act. To the extent of any inconsistency, the provision of the Racing Act prevails: s 91. Following a proper construction, the law is to be applied to the facts as found.
- [120] Integrity control is the subject of Chapter 4 of the Racing Act. Consistently with the objects of the Racing Act, the provisions of Chapter 4 indicate Parliament's intention to mandate a robust system for scrupulous dealings with samples to be used for disciplinary processes. There are sound policy reasons for such an approach for the maintenance of public confidence.
- [121] As discussed earlier, Chapter 4, Part 2 provides for accreditation of a testing facility *only if* the security system of a facility ensures the integrity and quality of analysis.¹²⁷ As discussed, the name of a person who holds accreditation and the names of each person who may take delivery of things for analysis, is an accredited analyst, and is an accredited veterinary surgeon, for the accredited facility, must be specified in the accreditation certificate.¹²⁸ Similar provisions apply for any secondary facility for an accredited facility. An accredited facility may be disciplined for breaches of the Racing Act, irrespective whether the breach is an offence under the Act.¹²⁹
- [122] Chapter 4, Part 4 then provides in mandatory terms for the process whereby things for analysis may be dealt with and analysed when the results of the analysis are to be used for a purpose, other than research or survey purposes. Such other potential purposes include disciplinary purposes. By virtue of s 143(3), if the results of the analysis are for disciplinary purposes, the control body must take and deal with the thing, relevantly, in compliance with The Collection Procedures. Relevantly, the control body must, pursuant to s 143(4), deliver the thing for analysis to an accredited facility (in this instance, there is no evidence an integrity officer approved it being delivered to another facility, so the alternative procedure provided for in such a case is not relevant). Pursuant to s 145, it is an offence for a person to interfere with a container in which a thing (for analysis) is placed by a control body, except as part of dealing with a thing, relevantly under s 143. Relevantly, this does not apply to an analyst employed by an accredited facility or a secondary facility for an accredited facility.
- [123] Chapter 4, Part 4, Division 3 then provides for mandatory procedures to be followed by an accredited facility once a thing is delivered to it for analysis.
- [124] As earlier discussed, the procedures require that, following analysis at the accredited facility or the secondary facility for an accredited facility in compliance with s 146,

¹²⁷ *Racing Act* s 131(2) in particular, (a), (b), (f).

¹²⁸ *Ibid* s 132.

¹²⁹ *Ibid* s 135.

an analyst at the accredited facility must give a notice of results (unless s 147(4) applies if no drug or code substance was found) and, relevantly, if the control body delivered the thing, to the accredited veterinary surgeon for the accredited facility. Pursuant to s 147(3), the notice of results must include a certificate signed by an accredited analyst which must state information to identify the thing analysed; the place, day or period of the analysis; relevantly, the drug or code substance found and, its name; and the information requested (relevantly, by the control body) about the amount or concentration.

- [125] Section 352A applies to decisions made in a variety of circumstances, including a decision of the tribunal in a review proceeding. In making a decision, it is enough for a decision-maker to be satisfied of substantial compliance with s 143(3), that is, that The Collection Procedures have been complied with to the extent that the integrity of the analysis is not affected. Evidence of an accredited analyst or accredited veterinary surgeon that the method of taking and dealing with the thing for analysis was in substantial compliance with s 143(3) is evidence of that fact and in the absence of evidence to the contrary, conclusive evidence of the fact. For example, in this proceeding, a s 352A certificate was given in respect of the incorrect entry by made an authorised representative for the control body, which recorded 10.17 am, instead of 10.17 pm, against the time the sample was received, in circumstances that the records show that the sample was taken at 6.43pm, received at 10.17 am, and then placed in storage at 11.41pm.¹³⁰
- [126] The inclusion of s 352A is consistent with the objects of the Act as identified earlier to provide for stringent requirements in taking and dealing with samples for analysis, but contemplates that minor irregularities that do not affect the integrity of the analysis and may be overcome. In the example provided of the s 352A certificate given in this proceeding, it is apparent that the incorrect recording of ‘am’ instead of ‘pm’ in the circumstances outlined would not raise concerns about the integrity of the process. It is in the nature of a clerical error-- ticking the wrong box on a form to indicate ‘am,’ rather than ‘pm.’
- [127] Section 352A does not apply to excuse compliance with the mandatory requirements of the Racing Act.
- [128] I turn to the AHRR. AHRR r 191(1) refers to a certificate from ‘a person or drug testing laboratory approved by the Controlling Body’. The Racing Act requires that a relevant thing be delivered to and analysed by an analyst at ‘an accredited facility’. It specifies the certificates to be given and by whom.
- [129] In my view, interpreting the relevant provisions of the AHRR in the context of and consistently with the Racing Act, where the AHRR r 191 refers to a ‘person or drug testing laboratory approved by the Controlling Body’, the reference to the ‘drug testing laboratory’ means an accredited facility or a secondary facility for an accredited facility which is accredited for testing for the substance, here, cobalt in urine for the purposes of the Racing Act. Further, the reference in the AHRR to a ‘person’ must be interpreted in the context of the mandatory requirements of the Racing Act, to refer to a person who is relevantly, an analyst, accredited analyst, or accredited veterinary surgeon for the accredited facility, as the context may require or permit. As discussed, under the Racing Act, accreditation, in respect of the substance,

¹³⁰ Appeal Book, Volume 2, 296 and s 21(2) Documents at 62 and 63.

here cobalt in urine, must be in place at all relevant times when the sample is dealt with by delivery and during analysis for the substance.

- [130] The reference in AHRR 191(2) to ‘another person or drug testing laboratory approved by the Controlling Body’ must be similarly interpreted in the context of and consistently with the Racing Act as explained above. In context, the reference to testing by ‘another person’ contemplates that confirmation testing may be performed and a certificate issued, as the Tribunal found, at the same accredited facility from which the first certificate emanated but by another accredited analyst. That second certificate, together with the first may be conclusive evidence. In particular, the term ‘another person... approved by the Controlling Body’ must be interpreted in the context of the s 147 requirements for analysis and certification. In my view, the analysis must be performed and certified by an accredited analyst to satisfy AHRR 191(2). Although s 147 provides that an analyst at an accredited facility may give notice of results, which must then be certified by an accredited analyst, in my view, the requirement for an accredited analyst to analyse and give notice of the results is not inconsistent, but rather an additional consistent requirement in relation to the integrity of the certification procedure. Although in my view, the latter construction issue does not arise for determination in disposing of the appeal, I would agree here with the learned Member, in so far as he found the evident intention is to ensure those persons involved in the first analysis have no involvement in the second, if the same ‘drug testing laboratory’ provides the second certificate.
- [131] On a proper construction, by virtue of AHRR rr 190 and 191, strict liability for presentation charges is imposed, which may be established through providing two certificates of analysis which are together conclusive evidence. That is, provided that the certificates result from a procedure that meets the mandatory requirements imposed by the Racing Act and The Collection Procedures, and to the extent they are consistent, any additional requirements of AHRR r191 itself.
- [132] Minor breaches of The Collection Procedures, but not the Racing Act, where there has been substantial compliance and do not compromise the integrity of the analysis, may be excused pursuant to s 352A. However, pursuant to AHRR r 191(7), a material flaw in ‘the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate’ will render a certificate inadmissible.
- [133] On a proper construction, non-compliance with the mandatory provisions of the Racing Act results in a material flaw in the certification procedure, because the certificate is not produced as the result of an analysis that can be used for a disciplinary purpose having regard to s 143(3)..A material flaw may also result from an act or omission forming part of or relevant to the process of analysis or testing itself which resulted in the issue of a certificate. In both cases, pursuant to AHRR 191(7), a certificate that results from a materially flawed certification procedure or process has no evidentiary value. On a plain reading, such a certificate is not admissible for disciplinary purposes if a material flaw is established.

Are the certificates admissible for disciplinary purposes?

RSC certificate dated 26 June 2015

- [134] On a proper construction of the scheme, it was therefore not open to the Tribunal to conclude, as it did, that the relevant time at which the drug testing laboratory (that is, here, RSC) was required to hold approval (that is, on a proper construction, accreditation) was the time of certification. It follows that the Tribunal’s

interpretation of AHRR r 191(1) in distinguishing between ‘screening analysis’ and ‘confirmation analysis’ to determine that there was no material flaw in the certification procedure or process because approval was in place during the confirmation analysis, is inconsistent with the statutory scheme.

- [135] It is uncontentional that RSC was not an accredited facility pursuant to the Racing Act for testing of cobalt in urine at the date the sample was delivered to it for testing. Further, it is uncontentional that it was not accredited to test for cobalt until 25 June 2015. The samples could only be delivered by the control body to an accredited facility for the purposes of testing for cobalt in urine. Here, the control body did not so deliver it. It therefore did not comply with s 143(4)(a).¹³¹ Section 145(2) requiring that a person must not interfere with a sample container was breached, in that the container holding the sample was interfered with by a person who was not an analyst for an accredited facility for testing cobalt in urine when opening it and performing analysis on 1 June 2015. It follows that the certification procedure did not comply with the mandatory requirements of the Racing Act for use for a disciplinary purpose.
- [136] Further, on a proper construction, because of non-compliance with the mandatory provisions of the Racing Act and the prohibited interference with the container holding the sample at a time when RSC was not accredited to test for cobalt in urine, the sample was rendered unable to be used for any future analysis for disciplinary purposes.
- [137] Accordingly, for AHRR 191(7), there was a material flaw in the certification procedure: the certificate was not the product of the procedure mandated by the Racing Act. The irregularity is not of the type that may be excused by s 352A. It follows that AHRR 191(7) renders the certificate inadmissible.
- [138] Even if I am wrong about the effect of breaches of the Racing Act rendering the certificate materially flawed and inadmissible, I would consider that an interpretation of AHRR 191(1) which mandates requisite approval or accreditation of the drug testing laboratory only at the time of certification (as opposed to analysis) is incorrect having regard to the terms of AHRR 191 itself. I would conclude that on a plain reading the requirements, in respect of certificates, which may constitute prima facie evidence pursuant to AHRR 191 (1), are not intended to impose more limited requirements of accreditation for a person or drug testing laboratory approved by the Controlling Body than those specified in r 191(2). In each case, the person or drug testing laboratory must be accredited at all material times in compliance with the Racing Act. Further, in the context of the strict liability for a presentation charge, such an intention (to create a lesser or more limited requirement for accreditation or approval in respect of a certificate which may constitute prima facie evidence) would need to be clear and it is not. I would consider that on a proper construction, accreditation or approval must be in place during the whole of the analysis and certification procedure and process.

The ChemCentre Certificate

- [139] It is uncontentional that the reserve or B sample was sent to ChemCentre. The Tribunal concluded that the ChemCentre certificate was not able to be relied upon under AHRR 191(2) and (3). I agree. ChemCentre was not an accredited facility or a relevant

¹³¹ There is no evidence or submission to suggest that an integrity officer approved the delivery as contemplated by s 143(4)(b).

secondary facility for an accredited facility and the person who opened the container interfered with it within the meaning of s 145.

- [140] However, in my respectful view, the learned Senior Member erred in concluding that, putting aside the intended reach of s 145(2), the AHRR did not preclude sending a sample for analysis to a laboratory which is not ‘approved.’ On a proper construction of the scheme, the Racing Act precluded delivery to a facility which is not an accredited facility or a secondary facility for an accredited facility. The Tribunal rejected the argument that s 145(2) operated to render the B sample sent to ChemCentre ‘unlawfully compromised’¹³² without considering the mandatory requirements of the Racing Act. In my view, delivery of the sample to ChemCentre and ChemCentre’s analysis of the reserve or B sample were not in compliance with the mandatory provisions of the Racing Act for use in disciplinary proceedings.
- [141] In my view, for the reasons identified earlier, the consequence is that there is a material flaw in the ChemCentre certification procedure within the meaning of AHRR r 191(7)).¹³³ It follows that the certificate has no evidentiary value and is inadmissible.
- [142] Further, on a proper construction, the dealings with the sample inconsistently with the mandatory provisions of the Racing Act also had the effect of rendering the reserve or B sample compromised for use in any further testing for the purpose of disciplinary action.

RSC certificate dated 5 January 2016

- [143] The B sample was tested by RSC after its return from ChemCentre. On a proper construction of the scheme, because the B sample had previously been dealt with and interfered with other than in accordance with the mandatory requirements of the Racing Act, it had been rendered incapable of further use (and analysis) for disciplinary purposes under the Racing Act.
- [144] Once again, on a proper construction of AHRR 191(7), it follows that the certification procedure is materially flawed. The certificate has no evidentiary value and is inadmissible.

RASL certificate dated 8 March 2018

- [145] Issues are raised on appeal about whether the A or B sample was sent to RASL for testing. These are later addressed.
- [146] That said, on a proper construction neither the A nor the B sample had been dealt with in accordance with the requirements of the Racing Act for the reasons explained. Therefore, neither sample was capable of being the basis of (further) testing for use for disciplinary purposes under the Racing Act.
- [147] It follows that the certification procedure in respect of the RASL certificate is materially flawed and the certificate has no evidentiary value and is inadmissible.

AHRR 191(6): the meaning of ‘proof in other ways’

- [148] As discussed, the Tribunal placed a construction on the ‘other ways’ in which a presentation charge may be established, in reliance upon *Racing Victoria v Kavanagh* which considered an equivalent rule, but absent r 191(6) and (7). The learned Senior

¹³² RFD [29]–[30].

¹³³ Ibid [30], [31], [43].

Member considered it ‘evident’ that r 191(6), in its terms, reinforced the *Kavanagh* approach that sanctioned the establishment of the contravention by conventional means of proof. He further considered that AHRR r 191(3), in referring to a certificate furnished ‘under this rule’ as providing prima facie or conclusive evidence, also supported the conclusion. Read together, the Tribunal said it suggests that if a certificate is not furnished ‘under this rule,’ then subject to AHRR r 191(7) it might form part of the evidence establishing proof in conventional means, noting that, in the ordinary course of events evidence verifying the testing process and qualifications of those involved would be required, if not for AHRR r 191.

- [149] I respectfully disagree. The reference in AHRR 191(3) to a certificate furnished ‘under this rule’ refers to AHRR 191, entitled ‘Evidentiary certificates’, not AHRR sub-rule 191(3).
- [150] Further, as identified earlier, *Kavanagh* concerned the construction of rules of racing that did not contain an equivalent to either AHRR r 191(6) or AHRR r 191(7). The regime also did not contain an equivalent to Chapter 4 of the Racing Act. Therefore, *Kavanagh* does not assist in determining the proper construction here.¹³⁴
- [151] AHRR r 191 and in particular, 191(3) contemplates that one certificate may be available which is found to be prima facie evidence pursuant to r 191(1), but that there may not be a second certificate which satisfies r 191(2). AHRR 191 also contemplates that any available certificates may have no evidentiary value and cannot be relied upon as either prima facie or conclusive evidence. In such a case, the charge may be ‘established in other ways’ pursuant to r 191(6). However, in the context of AHRR 191(7), no reliance may be placed on the certificates that do not meet the requirements to be considered prima facie or conclusive evidence. As explained, in my view, the certificates have no evidentiary value and are inadmissible.
- [152] Therefore, proof ‘established in other ways’ must necessarily mean other than proof established through certificates which are inadmissible in the proceeding pursuant to AHRR 191(7). Further, in my view, evidence of the underlying results of analyses (which resulted in inadmissible certificates which were generated by a procedure that did not comply with the mandatory provisions of the Racing Act) cannot constitute proof ‘in other ways’. On a proper construction of the Racing Act, evidence of the underlying testing and results are also inadmissible for use as proof in other ways by virtue of s 143(3), because the results of the analysis could only be used by the control body for purposes other than research or survey if the mandatory requirements of the Racing Act were followed. They were not. Therefore, they cannot be used for a disciplinary purpose.
- [153] QRIC says that AHRR r 191(6) would have little application if interpreted thus in relation to a presentation charge since a level of prohibited substance must be established. However, on a plain reading AHRR 191 contemplates that where a certificate of analysis is accepted as prima facie evidence under AHRR 191 (but there is no second relevant certificate which constitutes conclusive evidence), the certificate and additional relevant direct evidence may be sufficient to satisfy the Tribunal that a

¹³⁴ See also discussion of *Kavanagh* in *Rattray v Queensland Racing Integrity Commission* [2018] QCATA 39. The Appeal Tribunal did not find it necessary to decide the issue raised in the appeal proceeding concerning proof other than through the certificates.

presentation charge is established. Therefore, AHRR 191(6) does not lack utility as contended for by QRIC.

- [154] Accordingly, in my respectful view, to the extent that the learned Senior Member considered that the certificates and evidence as to the underlying analyses and results could be relied upon irrespective of compliance with the mandatory provisions of the Racing Act for taking and dealing with things for analysis and analysing things, as ‘proof in other ways’,¹³⁵ he erred in law.

My conclusions and disposition of the appeal

- [155] For the reasons explained, in my view, the Tribunal erred in the construction of the statutory scheme in deciding that the RSC certificate dated 26 June 2015 and the RASL certificate dated 8 March 2018 constituted conclusive evidence that *Mafuta Vautin* was not presented free of a prohibited substance. None of the four certificates were admissible as prima facie or conclusive evidence for the purposes of AHRR 191 (1-3), nor (to the extent the Tribunal concluded otherwise) pursuant to AHRR 191(6) as proof of the charge being ‘established in other ways’

- [156] I would allow the appeal.

- [157] I would substitute a decision that the disciplinary charge is not substantiated.

Part 4: Observations about the remaining grounds of appeal on substantiation

- [158] In case I am wrong in allowing the appeal on the basis of the construction errors explained, I deal with the issues raised by the remaining grounds of appeal.

RSC certificate dated 26 June 2015: Was the Tribunal’s finding of fact as to the date of the analysis open on the evidence?

- [159] Mr Graham’s primary argument is that the evidence did not support the Tribunal’s finding that the RSC’s analysis was undertaken on 25 and 26 June 2015 (by determining that the ‘screening analysis’ on 2 and 3 June 2015 was not part of the analysis of the A portion of the sample).¹³⁶ Mr Graham submits that this is contrary to the unchallenged evidence before the Tribunal.¹³⁷
- [160] QRIC submits that relevant testing for cobalt did not occur until after accreditation and that it is irrelevant that earlier screening testing occurred and the sample readied for later testing. It submits that the evidence of Ms Nelis establishes this and was accepted by the Tribunal.¹³⁸
- [161] The analyst’s certificate stated that the analysis occurred between the dates stated that is between 1 and 26 June 2015. As the Tribunal’s reasons for decision themselves reveal, the uncontradicted evidence is that the overall analyses occurred over the period 1 June to 26 June 2015.
- [162] In my respectful view, it was not open to the Tribunal to find that the analysis occurred otherwise than when the certificate, and the other evidence before it, said it did, by distinguishing between the ‘screening analysis’ and the ‘confirmation analysis.’ It was all part of the overall process of analysis of the sample. Finding a fact in the

¹³⁵ RFD [46]–[50].

¹³⁶ Ibid [22]–[26].

¹³⁷ The evidence relied upon is identified at Mr Graham’s submissions filed 11 November 2019 at paras 6(c), (d), (e), (f), (g), (h).

¹³⁸ Exhibit 7 Affidavit of Samantha Nelis and Transcript 2–33.

absence of evidence to support it is an error of law.¹³⁹ If it was necessary to do so, in so finding, I would respectfully find the Tribunal erred in law.

Which sample did RASL test? Was it open to the Tribunal to admit the certificate in the absence of evidence as to which sample was tested and/or did it give adequate reasons for doing so?

- [163] Before the learned Senior Member, QRIC submitted that the A sample was sent to RASL. However, the official sample movement record does not record the sample coming out of the storage freezer at RSC at a proximate time.¹⁴⁰ Nor is there a record that the B sample was sent to RASL.¹⁴¹
- [164] Mr Graham argues that there is no evidence to establish which sample went to and was tested by RASL. He contends that based on official records, it could not have been the A sample or the B sample. He submits that the Tribunal failed to consider this issue, which went to the integrity of the analysis and the chain of custody. Further, he argues that if, as QRIC's Counsel conceded, it was the A sample that RASL tested (and in the absence of the control sample), that it is non-compliant with the requirements of the RSC's Sample Handling Procedure for confirmation testing of the B sample¹⁴² which applies when it completes confirmation testing.
- [165] QRIC's submissions are to the effect that an inconsistency between the evidence and counsel's submissions about the origin of the sample that was sent to RASL is irrelevant and that if only the A sample (and not the control as well) went to RASL for testing, it is unremarkable. Ms Selvadurai is said by QRIC to have confirmed the latter. It argues that it does not justify the consequence that the certificate should be wholly disregarded: RASL was NATA accredited and an accredited secondary facility. The certificate, it argues, should be viewed as conclusive proof for the presence of cobalt in urine and thereby a breach of AHRR r 191(1).
- [166] Respectfully, the submissions from QRIC miss the point made by Mr Graham – the argument is that the RSC records do not indicate that either the A or the B sample for *Mafuta Vautin* was sent for testing to RASL. The only indication of which sample was sent is a 'concession' from Counsel. RASL received something to test. Ms Selvadurai, an employee of RASL, did not know or confirm whether RASL was sent the A or B sample by RSC. The sample arrived without the control (which allows a cross-check against contamination during testing).¹⁴³ Her evidence was to the effect that a seal on the sample had been broken and a another affixed, she understood because it had previously been tested.¹⁴⁴ Both the A and the B samples had been opened and analysed previously by either RSC and ChemCentre, so that does not assist in establishing whether it was the A or B sample. The photographs before the Tribunal bore the correct identifying number, but nothing more to identify which sample it was.
- [167] There was no evidence before the Tribunal as to which sample was sent. It was not for QRIC's Counsel to give evidence from the bar table as to this critical integrity issue or to concede that it was a particular sample. The international standards for the

¹³⁹ *McPhee v S Bennett Ltd* (1934) 8 WCR 372.

¹⁴⁰ Appeal Book 237.

¹⁴¹ Appeal Book 251.

¹⁴² Relying upon Appeal Book 184–185.

¹⁴³ Appeal Book, Vol 2, Affidavit of Naomi Selvadurai, [16]–[17]; Transcript I-27, lines 13-20; I-33, lines 31-45; and I-32. Although she refers in her affidavit to receiving the control, in oral evidence Ms Selvadurai corrected this error.

¹⁴⁴ Appeal Book, Vol 2, Affidavit of Naomi Selvadurai, [16]–[19]; at Transcript I-31.

industry¹⁴⁵ and RSC's own Sample Handling Procedure¹⁴⁶ for confirmation testing of the B Sample confirm that the B sample should be tested. Otherwise, if the A sample is contaminated in some way, the confirmatory testing will not discover the contamination error. Here, in the circumstances that the control was not provided to RASL, the integrity of the process is in further doubt. It was not safeguarded in the only other way it could be in respect of any confirmatory testing, if the A sample was sent and tested again. In my view, a serious integrity issue is identified.

- [168] It was an issue seriously raised before the Tribunal about the integrity of the RASL certification procedure, and whether it was materially flawed and, therefore, the certificate inadmissible in the proceeding. The Tribunal made no finding about which sample was tested but nevertheless relied upon the RASL certificate, (together with the RSC certificate dated 26 June 2015), as conclusive evidence of the presentation charge
- [169] In my respectful view, the Tribunal erred in law in failing to make a material finding of fact about the identification of the sample which was critical to the integrity of the certification procedure; and in failing to consider whether the certification procedure was consequently materially flawed and the certificate therefore inadmissible having regard to the statutory provisions properly construed. In my view, whether there was a material flaw in the certification procedure was material to whether the facts fully found fell within the properly construed statutory provisions. Respectfully, the Tribunal failed to deal with the issues and failed to provide any or adequate reasons for concluding, as it appears to have done, that the uncertainty as to the sample tested was not material to whether for AHRR 191(7) there was a material flaw in the certification procedure. Failure to give adequate reasons for decision is also an error of law.¹⁴⁷
- [170] If it was necessary to determine the issue, in my view, the proper inference to be drawn, and the only inference reasonably open, is that it can not be established whether RASL tested the A or the B sample, and in the absence of the control. Having regard to the integrity issues arising from non-compliance with the Sample Handling Policy this reveals, this break in the records of the chain of custody would lead me to conclude, if it was necessary to do so, that the certification procedure resulting in the issue of the RASL certificate was materially flawed for the purposes of AHRR 191(7). If necessary to do so, I would therefore find it inadmissible.

The dehydration issue: did the Tribunal fail to have regard to material evidence and/or fail to give adequate reasons for decision?

- [171] Mr Graham submits that the Tribunal erred in law in rejecting as immaterial¹⁴⁸ the uncontested evidence of Ross Wenzel that the urine sample was so degraded as a result of dehydration as to be unsuitable for analysis and incapable of yielding a reliable result for trace elements. He argued that as a consequence of the dehydration of the horse, the process of analysis was 'materially flawed' within the meaning of AHRR

¹⁴⁵ Section 21(2) documents, Vol 1, Document 43 ILAC Accreditation Requirements and Operating Criteria for Horseracing Laboratories pp 199-213, esp at 212 and Document 44 AORC (Association of Official Racing Chemists) Guidelines for Referee Analysis pp 214-215.

¹⁴⁶ Section 21(2) documents, Vol 1, Document 69, pp 420-421.

¹⁴⁷ It is a question of law whether facts as found bring the case within the statutory provisions properly construed: *Vetter v Lake Macquarie City Council* (2001) 202 CLR 349 per Gleeson CJ, Gummow and Callinan JJ; *McPhee v S Bennett Ltd* (1934) 8 WCR 372.

¹⁴⁸ RFD [20].

r 191(7) and the certificates of analysis therefore inadmissible. In this regard, Mr Graham submits that Professor Hibbert's initial criticism of Mr Wenzel's methodology was directed to the organic vs non-organic cobalt issue, not the testing for the level of creatinine which Mr Wenzel contended was relevant to the dehydration issue.¹⁴⁹

- [172] Before turning to QRIC's submission, I observe here that in considering the dehydration argument, the learned Senior Member did not in finding the disciplinary charge substantiated refer directly to Mr Wenzel's evidence, (although in dealing with sanction at paragraphs [57]-[59], the Tribunal discusses some of the evidence here relied upon by Mr Graham). In dealing with the dehydration issue, the learned Member observed that AHRR r 191 makes no 'qualification... as to the condition of the horse at the time of testing.'¹⁵⁰ Further, the Tribunal accepted evidence of Professor Mills that although the degree of concentration can affect the analysis, the 200mg per litre in urine takes account of a wide range of urinary concentrations.¹⁵¹ The Tribunal states that the 200mg bar was set to take into account such factors and that Professor Mills and Professor Chapman agreed that the fact of concentration did not prevent measurement of cobalt in urine.
- [173] QRIC submits that Professor Chapman's primary concern (which it does not accept) seemed not to be that the horse's hydration status made the urine sample unreliable as a medium for testing for cobalt, but that it made the urine sample unreliable as a medium for analysis to determine the amount of cobalt in the horse's system. That said, even if he is correct, QRIC says it is irrelevant because under the AHRR the issue was whether cobalt was present at a concentration above the threshold. That said, it posits that if Professor Chapman was correct, Mr Wenzel could not therefore analyse component parts of the sample into organic and inorganic compounds—if it is unreliable for analysis, that must be so for all purposes. Further, it submits, Professor Hibbert called into question the procedure used by Mr Wenzel. In any event, it submits neither the AHRR nor the testing protocol require that consideration be given to the hydration status of the horse.
- [174] QRIC further says that any attempt to make this issue relevant to the proposition that the testing was materially flawed face similar 'boundaries', because if a reliable test required a hydration test, that would be a requirement of NATA accreditation or substantial public reporting of the need for testing against that condition, but that is not the case. Further, it says Professor Chapman's assertion found support in a WHO paper concerned with chemical testing in human samples.
- [175] In making the findings and observations set out at paragraph [20] of the reasons for decision, the Tribunal did not consider whether the dehydration of the sample rendered the sample unsuitable for analysis and incapable of rendering a reliable result, and consequently whether the testing process resulting in the certificate was thereby materially flawed within the meaning of AHRR r 191(7). Respectfully, the matters discussed by the learned Tribunal did not determine the issue. The basis for the setting of the bar at 200mg per litre in urine was not relevant to the argument made by Mr Graham, (and, to the extent it appears to have been relied in conclusions drawn about AHRR r 191, in any event was not properly the subject of Professor Mills evidence—the proper construction of AHRR r 191 was a matter for the Tribunal not

¹⁴⁹ Transcript 3-9, lines 20–25.

¹⁵⁰ RFD [20].

¹⁵¹ Ibid [20].

expert evidence). Nor is it to the point whether analysis could or could not be performed. The reliability of the results of the testing process in view of the state of dehydration of the horse was the issue raised on the evidence and seriously argued by Mr Graham. The Tribunal was bound to consider and determine it. If the testing process produced results that were unreliable, then that was relevant to a determination of whether, for AHRR r191(7), any act or omission forming part of or, here, relevant to the process resulting in the certificate was materially flawed, and therefore, the certificates inadmissible.

[176] The Tribunal was entitled, of course, to accept the evidence of Professor Mills over other evidence presented, in respect of this issue but it was obliged to expose its reasons for doing so. In my respectful view, it has not done so. The Tribunal has not explained why it rejected the evidence of Mr Wenzel, nor Professor Chapman about the impact of urinary concentration because of dehydration on reliability of the results of the analysis performed. In respect of the latter, Professor Chapman expressed significant concerns about the effect of concentration on reliability of testing.¹⁵² Failure to have regard to evidence in relation to a material issue may constitute error of law,¹⁵³ in particular, it may indicate the decision-maker has not considered the evidence.¹⁵⁴ Adequate reasons will refer to the evidence which is important to the determination, and will set out material findings of fact, giving reasons for those findings and explaining the basis that the Tribunal has come to prefer one body of evidence over a competing body of evidence.¹⁵⁵

[177] In failing to deal with the evidence and the issue seriously raised and argued by Mr Graham, material to whether the certificate may have resulted from a process which is materially flawed and/or failing to give adequate reasons for doing so in finding certificates together constituted prima facie and conclusive evidence, I would respectfully find the Tribunal erred in law. Further, to the extent that the Tribunal found, in the alternative that the charge was established by proof in other ways, this issue was also relevant to each certificate and analysis and not dealt with in respect of that determination. I would find the Tribunal erred in this regard also.

The ‘false positive’ -- ‘organic vs inorganic’-- cobalt argument: did the Tribunal err in failing to consider a material issue?

[178] The Tribunal had before it a certificate from Dr Caldwell, an accredited veterinary surgeon, purportedly pursuant to s149 of the Racing Act, , stating: firstly, cobalt is a naturally occurring inorganic trace element and also exists in the structure of vitamin B12; and second, that inorganic cobalt can stimulate the formation of red blood cells and may result in enhanced aerobic performance.¹⁵⁶

[179] Mr Graham submits that the Tribunal erred in failing to deal with a significant issue raised by the evidence concerning the effect of testing the urine sample at extreme heat. In particular, evidence of Professor Chapman to the effect that the organic cobalt generated in the laboratory by the process of analysis itself may result in a ‘false positive’; and evidence of Mr Wenzel to the effect that the inorganic cobalt level (once

¹⁵² Transcript 3-33 to 3-39.

¹⁵³ *Nexus Adhesives Pty Ltd v RLA Polymers Pty Ltd* (2012) 97 IPR 160, [2012] FCAFC 135, [12] per North, Jacobson and Foster JJ.

¹⁵⁴ *Mifsud v Campbell* (1991) 21 NSWLR 725

¹⁵⁵ *Eagil Trust Co Ltd v Piggott-Brown* [1985] 3 All ER 119, 122. *Camden v McKenzie* (2008) 1 Qd R 39.

¹⁵⁶ Appeal Book, Vol 2, 291.

the organic cobalt present is discounted) in the testing sample was below the threshold at 78mg per litre in urine. Professor Chapman's evidence is that the organic cobalt molecule in the tightly bound molecular structure of vitamin B12 is freed from the molecule at the extreme heat applied during testing thereby resulting in a 'false positive' reading for cobalt if B12 is present in urine.¹⁵⁷

- [180] He contends that Mr Wenzel's evidence was rejected by the Tribunal on the basis that his testing method had not been validated.¹⁵⁸ However, Mr Graham submits that Mr Wenzel gave unchallenged evidence that he checked the reliability of his testing results also by using another different technique to measure vitamin B12 and plasma. His evidence was in effect that because the results of both tests were 'essentially the same', he could be confident in his scientific approach and results.¹⁵⁹ Mr Graham submits that Professor Hibbert did not challenge the accuracy or reliability of Mr Wenzel's results.¹⁶⁰ As a consequence, he submits that the Tribunal was not entitled to ignore Mr Wenzel's test results, as, he says, it did.
- [181] In particular, he contends that the learned Member appeared to accept in paragraph [17] of the decision that B12 is not cobalt, but nevertheless concluded in effect that B12 fell within the definition of 'prohibited substance' under the AHRR, because absent superheating in the testing process, based on Mr Wenzel's evidence, the cobalt level was below the excepted level. Mr Graham alleges that thereby the learned Senior Member made a fundamental legal error because the charge was not a charge of presentation of a horse with B12 in its system, rather cobalt over the prescribed amount. Additionally, in finding at [18] that cobalt in organic form is an active component of B12, it is said that the learned Member erred because, as Mr Graham submitted to the learned Member,¹⁶¹ the evidence (of Professor Chapman) was to the effect that the cobalt atom in B12 is locked away in the chemical structure until freed through superheating during laboratory testing.¹⁶² The Tribunal's approach, he submits, confused and erroneously conflated the alleged effects of B12 and cobalt, and failed to deal with the 'false positive' point entirely. In making a statement to the effect that 'presumably' the threshold took account that some absorption of cobalt 'whether in organic or inorganic form,' the Tribunal ignored that the testing process employed resulted in the freeing of the cobalt atom from B12, thereby inflating the cobalt content and reading.
- [182] QRIC argues that the AHRR require testing only for the presence of cobalt in urine and therefore, a certificate is not required to distinguish between inorganic forms and organic in B12. Further, it denies that the Tribunal appeared to accept that B12 is not cobalt at paragraph [17]. It says the reasons for decision make it clear as at [19] that the Tribunal accepted that there is no distinction made between organic and inorganic cobalt in the AHRR. It accepted Professor Mills evidence that organic cobalt, '*in the form of vitamin B12, influences the production of red blood cells and as such is capable of directly or indirectly causing an effect within a relevant body system of a horse. Professor Chapman agreed but with the qualification that B12 affects the body system only when it is in a state of deficiency. Presumably the then permissible*

¹⁵⁷ Transcript 3-48, lines 13-24; 3-49, lines 16-27 and 3-52, lines 27-29.

¹⁵⁸ RFD [57]–[60].

¹⁵⁹ Transcript 3-16, lines 44-47 and 3-17, line 1.

¹⁶⁰ Relying upon Transcript 3-28, lines 28 and 31.

¹⁶¹ Appeal Books 452–453.

¹⁶² Transcript 3-46 to 3-49.

threshold of 200mg took account of the fact that there could quite properly be some absorption of cobalt whether in organic or inorganic form’ ¹⁶³

- [183] At its heart, it seems Mr Graham’s argument here is that the Tribunal was obliged to determine whether a material flaw in the process of the analyses undertaken by the various laboratories was established by the evidence of Mr Wenzel and Professor Chapman. In particular, whether super-heating urine during the processes of analysis resulted in a ‘false positive’ for cobalt (over the threshold amount in the AHRR) by releasing the component parts of vitamin B12 molecules, one of which is organic cobalt. As the argument goes, the release of the cobalt atoms from B12 molecules into the urine inflates the overall cobalt reading.
- [184] He argues that the cobalt attributed to the destruction of the B12 molecules ought not be taken into account because Mr Graham was not charged with presenting a horse with more than a prescribed amount of B12 in its system; therefore, the results of the analyses are materially flawed. Dr Caldwell referred to an haemopatopoetic agent that may stimulate the formation of red blood cells as inorganic cobalt, whereas the cobalt released from B12 on super-heating is organic cobalt. Mr Wenzel’s testing sought to separate the inorganic and organic cobalt, thereby demonstrating the significant contribution of organic cobalt to the reading.
- [185] The learned Senior Member rejected Mr Graham’s arguments about the significance of the organic vs inorganic cobalt distinction in paragraphs [17]-[19] of his reasons for decision, but without considering the issue of whether the act of superheating the urine in the process of analysis resulted in a ‘false positive’ result as contended by Mr Graham relying on Mr Wenzel’s evidence, and to an extent Professor Chapman’s evidence.
- [186] The ‘false positive’ argument was advanced in respect of and relevant to whether an act forming part of the process of testing or analysis resulting in the issue of the certificates was materially flawed within the meaning of AHRR 191(7) in that the process of analysis itself created a false positive reading for cobalt over the threshold because the horse had B12 in its urine. Again, the argument is also apposite in the Tribunal’s determination in the alternative that the charge was established in other ways. Evidence was presented that if urine is not superheated, the B12 molecule is disposed of in urine or faeces intact as B12, not as cobalt.¹⁶⁴
- [187] In my respectful view, the learned Senior Member did not acknowledge the false positive issue as raised on the evidence and seriously argued concerning the validity of the testing process, nor determine it. The Tribunal was bound to determine this issue material to the question whether an act in the process of the analysis resulting in the issue of certificates was materially flawed with the consequence that the certificate/s were inadmissible pursuant to s 191(7). It was also relevant to whether the charge was established by proof in other ways. If it was necessary to do so, in failing to do so, I would respectfully find that the Tribunal erred in law.

Part 4: Observations about the appeal on sanction

- [188] If the disciplinary charge should be established and I am wrong in my earlier findings, I make the following observations concerning the appeal against sanction.

¹⁶³ RFD [19].

¹⁶⁴ Transcript 3-47, lines 1-12.

[189] Mr Graham alleges material error in respect of the Tribunal's treatment of Mr Graham's culpability and application of the comparative cases, resulting in a sanction that is manifestly excessive.

[190] I observe that an appeal tribunal may only intervene and substitute its own decision where the original tribunal erred in exercising its discretion.¹⁶⁵

The Tribunal's decision on sanction

[191] The Tribunal observed the protective nature of the disciplinary process.¹⁶⁶ It went on to consider Mr Graham's degree of culpability or blameworthiness for the actions giving rise to the breach, disciplinary history, and conduct generally in respect of the disciplinary charges,¹⁶⁷ as well as the comparative cases.¹⁶⁸ Mr Graham's disciplinary history revealed only one relevant minor earlier breach relating to a horse treated with cortisone returning a positive swab resulting in admission by Mr Graham and a small fine.¹⁶⁹

[192] In respect of Mr Graham's culpability, the learned Member discussed *Wallace v Queensland Racing*¹⁷⁰ as referring to categories of cases, which in ascending order could justify a more severe penalty: where there is an innocent explanation for the presence of the prohibited substance; where there is no explanation for the elevated reading; and where the explanation demonstrates moral blameworthiness.¹⁷¹ The Tribunal noted that Mr Graham submitted that he had no explanation, but that it was likely caused by administration of Tripart containing B12 cobalt in organic form as 'an active component,' whereas QRIC submitted that Mr Graham was reckless.¹⁷²

[193] It appears that it was conceded by QRIC before the learned Member that Mr Graham administered Tripart for muscle issues the horse experienced on the advice of his veterinarian.¹⁷³ It appears Mr Graham's evidence to this effect was accepted by the Tribunal.¹⁷⁴ The Tribunal went on to say that it considered it 'difficult to draw firm conclusions' about the cause of the cobalt level, referring to expert evidence and various hypotheses presented by the experts.¹⁷⁵ The learned Member went on to find that Mr Graham had 'at the very least', been careless in management of the horse in the lead up to the race. This recklessness was attributed to three bases.

[194] First, Tripart was administered at three times the manufacturer's recommended dose. While done on the recommendation of the veterinarian, the vet had not, specifically, recommended it on the day before the race and gave evidence that he would not have done so because it would not be of any advantage.¹⁷⁶

[195] Second, the Tribunal concluded that there was no evident reason to administer it on the day before the race, because blood tests taken on 28 May 2015 suggested that the

¹⁶⁵ *Minister for Immigration v Li* [2013] HCA 18; (2013) 297 ALR 225; *Flegg v CMC & Anor* [2014] QCA 42, [15], [16].

¹⁶⁶ RFD [51].

¹⁶⁷ Ibid [53].

¹⁶⁸ Ibid [54], [65]–[66].

¹⁶⁹ Ibid [64].

¹⁷⁰ [2007] QDC 168.

¹⁷¹ RFD [53].

¹⁷² Ibid [55].

¹⁷³ Ibid [56].

¹⁷⁴ Ibid [64].

¹⁷⁵ Ibid [56]–[60].

¹⁷⁶ Ibid [60].

horse's 'AST levels' (an indicator relevant to the muscle issues it experienced) were 'within range'.¹⁷⁷ The learned Member considered that 'begs the question of why Tripart was administered on the following day.'¹⁷⁸

- [196] Third, Mr Graham as 'an experienced trainer' knew that cobalt was a significant issue in the racing industry and that he should be careful. The Tribunal stated that he did not take steps to ascertain the cobalt levels in the horse nor seek advice from the vet about the content or effect of his feeding regime, only afterwards closely checking the supplements and feeding regime for cobalt content and discovering cobalt listed on the feeding bags.¹⁷⁹
- [197] A variety of prior decisions in Queensland and interstate about the circumstances and penalty imposed on persons who had either administered a prohibited substance or presented a horse not free of a prohibited substance were discussed.¹⁸⁰ Although noting that suspension was not the 'usual penalty' in the more recent cases considered,¹⁸¹ the Tribunal considered that Mr Graham's case had 'some commonality' and was 'broadly analogous' to culpability in cases where suspension was imposed and for that reason said that a (severe) penalty of suspension was appropriate here.¹⁸²
- [198] It concluded that Mr Graham's licences both to train and to drive a horse should be suspended for 12 months.¹⁸³ It seems that the suspension of the licence to drive a horse was ordered to ensure integrity and public confidence in the racing industry and for reasons of general deterrence.¹⁸⁴

Did the Tribunal's exercise of discretion miscarry in determining sanction?

- [199] Mr Graham argues that the Tribunal impermissibly found at paragraph [63] that he did not take steps to ascertain the cobalt levels in the horse to justify a finding of 'a considerable degree of carelessness'¹⁸⁵ affecting the degree of culpability. In doing so, it is submitted that the Tribunal implied that steps were available to Mr Graham to do so when there was not evidence to support such an (implied) finding. He submits that finding a fact in the absence of evidence is an error of law.
- [200] Further, in discussing treatment of the horse with Tripart at paragraph [63], the Tribunal said 'in circumstances' that as an experienced trainer Mr Graham:
- '...knew at the relevant time that cobalt was a significant issue for the racing industry and that he ought to be careful in its use and to some extent knew that his feeding and supplementation regime contained cobalt, he did not take any steps to ascertain the cobalt levels in the horse or seek the advice of his veterinarian Dr Lovell as to the content or effect of his feeding regime.'
- [201] However, Mr Graham submits that the findings as to the 'circumstances' had no basis in evidence: rather the evidence was that Mr Graham investigated and ascertained

¹⁷⁷ Ibid [61].

¹⁷⁸ Ibid.

¹⁷⁹ Ibid [63].

¹⁸⁰ Ibid [65].

¹⁸¹ Ibid [66].

¹⁸² Ibid [67].

¹⁸³ Ibid [70].

¹⁸⁴ Ibid.

¹⁸⁵ Ibid [61].

cobalt levels in supplements after the event¹⁸⁶ and his veterinarian had never considered B12 a primary source of cobalt.¹⁸⁷ Further, the product information for Tripart refers to B12 as a component, not cobalt.¹⁸⁸

- [202] Additionally, Mr Graham submits that Dr Lovell, who said he generally spoke to Mr Graham at least three times per week, knew exactly what he did to manage his horses and Mr Graham relies on his advice ‘a lot’.¹⁸⁹ Dr Lovell said in respect of B12 in Tripart that he had recommended that it be used more frequently than the manufacturer recommended to deal with the horse’s ‘very difficult muscle issue’,¹⁹⁰ and although he hadn’t recommended giving it the day before the race in issue, he wouldn’t necessarily have said not to do so.¹⁹¹ The muscle condition was an area of his expertise.¹⁹²
- [203] Mr Graham argues that the learned Senior Member, in finding that he was careless, relied upon administration in excess of three times the recommended dosage, even though the manufacturer’s instructions are expressed as a dosage level ‘or as directed by a veterinary surgeon’¹⁹³ in circumstances that Dr Lovell had recommended more frequent dosage.
- [204] Then in [62], the learned Member relies upon Mr Graham’s administration of Tripart even though a test result on 28 May 2015 indicated the horse had a normal test (for AST) for levels relating to the condition. The Tribunal considered that ‘begs the question of why’ it was further administered the following day. Mr Graham submits that this ignores Dr Lovell’s evidence of his advice ‘to continue the horse’s feeding supplementation and training regime and not to change things’¹⁹⁴ and discussions with Dr Lovell about the condition in the immediate lead-up to the race in issue.¹⁹⁵ Further, Mr Graham’s evidence that it was to help the horse recover because the horse was to race, after a rest of a month, on three times in a week, Saturday, Tuesday and Saturday.¹⁹⁶ It also ignores that the evidence that AST levels are normal between 194 to 440. The horse on 28 May had a reading at the high end of 399, after an April test result of 446; and March result of 459.¹⁹⁷ Further, Mr Graham submits that the evidence is clear that until this point, despite regular swabbing of his horses, no cobalt issues had arisen and he had no reason to consider there was a need to test for cobalt.
- [205] Mr Graham contends, the Tribunal because of its findings as to culpability, applied *Wallace* and imposed a sanction that was more severe than was justified on the evidence and is manifestly excessive such as to be erroneous at law. He submits that but for the finding of blameworthiness, which is a material consideration, a penalty of a fine would have been appropriate. Accordingly, Mr Graham submits that the penalty imposed is manifestly excessive.

¹⁸⁶ Transcript 1-58, lines 1-15; 1-56, line 38; 1-57, lines 39-40.

¹⁸⁷ Transcript 1-43, lines 43-44.

¹⁸⁸ Appeal Book 376.

¹⁸⁹ Transcript 1-42, lines 13-20.

¹⁹⁰ Appeal Book 376; Transcript 1-45, lines 38-41.

¹⁹¹ Transcript 1-48, lines 37-38.

¹⁹² Transcript 1-42, lines 30-47.

¹⁹³ Appeal Book 376.

¹⁹⁴ Appeal Book, Vol 2, Affidavit of Lovell, 281, [17]; Transcript 1-46.

¹⁹⁵ Transcript 1-48, lines 20-25.

¹⁹⁶ Transcript 1-57, lines 13-16 and lines 35-37.

¹⁹⁷ Appeal Book 77-78, 85-89.

- [206] QRIC questioned Mr Graham about whether he tested for cobalt, and he did not contend that he could not do so.¹⁹⁸ It says he can't now complain that he was unable to do so. It submits that the Tribunal's findings were open on the evidence, and that Mr Graham was 'reckless at best', because he knew his feeding regime contained cobalt¹⁹⁹ and that his supplementation regime contained cobalt,²⁰⁰ and he developed them without Dr Lovell's advice,²⁰¹ despite knowing that cobalt was an issue in the racing industry and a prohibited substance.²⁰² He administered Tripart at three times the recommended dose.²⁰³
- [207] In determining Mr Graham's level of culpability in committing the charge, in paragraphs [57]-[59] the learned Member considered expert evidence given in the proceeding. Having done so, he said it was 'difficult to draw firm conclusions as to the cause of the recorded level of cobalt.'²⁰⁴ After considering the various hypotheses of the experts, the learned Member said he could not determine what caused the level.²⁰⁵ As discussed earlier, he went on to say that he was satisfied of considerable recklessness for three reasons. I now discuss each of these three reasons in turn.
- [208] First, because of the administration of Tripart at three times the manufacturer's recommended dosage: when Dr Lovell had not recommended it the day before the race, and Mr Graham had not previously administered that equivalent level of Tripart to a horse. As Mr Graham contends, these findings do not reflect the manufacturer's recommended dosage instructions fully, as they do refer in the alternative to dosage as directed by a veterinary surgeon, in circumstances that Dr Lovell had directed the higher dose, even though not specifically the day before the race; and further, in circumstances that Mr Graham's evidence was that he did not know that Tripart contained cobalt, as opposed to B12.
- [209] Second, there was no reason to use it given the AST levels were in normal range on 28 May 2015. However, the Tribunal did not consider Mr Graham's evidence that gave an explanation: Dr Lovell had said not to change anything, the horse was to race three times in a week, and he thought it would help the horse to recover.
- [210] Third, Mr Graham knew cobalt was an issue for the racing industry and that he ought to be careful but did not take steps to ascertain cobalt levels in the horse or advice as to his feeding regime, having only closely checked for cobalt after the elevated reading. However, the evidence was that until this point, Mr Graham had no cause to consider he had a reason to test because, despite regular swabbing, his horses had been clear of cobalt issues. Further, he did not know that Tripart contained cobalt, as opposed to B12.
- [211] Having regard to the evidence referred to by Mr Graham, which was not rejected by the Tribunal although it did not refer to it, the Tribunal's findings paint a picture that is not consistent with the evidence of Mr Graham and Dr Lovell. In my view, the evidence overall does not support a finding of considerable carelessness. Of course, the Tribunal was entitled to reject that additional evidence if it had reason to do so. Its

¹⁹⁸ Transcript 1-59.

¹⁹⁹ Transcript 1-57, line 45 and 1-58, line 13.

²⁰⁰ Transcript 1-58, line 40.

²⁰¹ Transcript 1-58, line 1.

²⁰² Transcript 1-59, line 5.

²⁰³ Transcript 1-57, line 25.

²⁰⁴ RFD [57].

²⁰⁵ Ibid [60]

reasons for decision do not disclose that it did so or that it considered there was a basis for it to do so. Alternatively, if it did so, it failed to give adequate or any reasons for doing so. Either way, I would respectfully find, if it was necessary to do so, that the Tribunal erred in this respect.

- [212] I would accept that the findings made about the degree of Mr Graham's culpability go directly to the sanction to be imposed and that if not for the impugned findings of blameworthiness, the sanction imposed would have been in a lower range. Accordingly, I would respectfully find that the sanction imposed is legally unreasonable and that the exercise of the Tribunal's discretion in determining sanction miscarried. To the extent that the error, is properly characterised as error of mixed fact and law, I would grant leave to appeal if it was necessary to do so.
- [213] Therefore, if it was necessary, and if I was wrong as to the other errors made by the Tribunal relating to substantiation of the disciplinary charge, in the alternative, I would allow the appeal in respect of sanction.
- [214] The Tribunal considered it was unable to determine the cause of the high cobalt reading vis a vis the feeding regime and the Tripart.²⁰⁶ That said, the feeding regime was long-standing and applied not only to the horse but other horses, none of whom had a high cobalt reading from other samples. Accordingly, it is reasonable to conclude and I would do so that on the balance of probabilities the Tripart, whether by reason of accumulation or administration on the day before, was the likely cause of the high cobalt reading.
- [215] I would see no reason not to accept the evidence of Dr Lovell about his recommendations to Mr Graham as to dosage of Tripart, noting also that he wouldn't necessarily have recommended that it not be used on the horse the day before the race. I would also see no reason to reject Mr Graham's explanations, including that no other horses that returned positive cobalt tests in order to alert him to an issue with his feeding regime and that he did not know that Tripart contained cobalt as opposed to B12. Further, I would observe that the horse's AST levels had reduced to a normal but still high level only in the couple of days before the race after a month of rest. This does not suggest to me that the long-standing and difficult muscle issue has resolved, only that after much treatment and rest, it has come back to a more acceptable level. Instead, I would consider it reasonable to infer based on the evidence that work has the potential to cause the condition to flare again. Accordingly, in context of a horse about to undertake 3 events in a week, we would accept that there was nothing untoward in Mr Graham's decision to give the horse Tripart on the day before the race, given that he did not understand it to contain cobalt.
- [216] The packaging for Tripart refers to containing vitamin B12, not cobalt. I would again accept that only after the disciplinary allegation did Mr Graham come to know that B12 contains cobalt.
- [217] I observe also that the events occurred at a point in time shortly after the then recent inclusion of cobalt above 200mcg/L in urine as a prohibited substance in the AHRR, (indeed, so recent that RSC was not an accredited facility to test for it at that time).
- [218] Accordingly, based on the levels of culpability identified in *Wallace*, I would find Mr Graham is less culpable than a person who is reckless or even careless.

²⁰⁶ RFD [60].

- [219] I have considered the sanctions imposed in other presentation cases. I have had particular regard to relevant Queensland cases. In *Scott v QRIC (No 2)*²⁰⁷ where a cobalt level of some 280mcg/L was established and the trainer was moderately careless, knew her regime contained cobalt and did not seek veterinary advice, and had two prior offences, a 3 month suspension and fine of \$6000 was imposed. In *Hooper v QRIC*,²⁰⁸ there were 3 separate charges relating to different horses and race days. Cobalt at 339 to 400 mcg/L due to supplements in excess of the manufacturer's recommendations due to lack of care. Mr Hooper had a lengthy disciplinary history, including for a prohibited substance conviction. A disqualification of 12 months was imposed for each offence, three months for each to be served concurrently or an overall disqualification for 30 months.
- [220] In this case, Mr Graham's culpability is less than both of the cases discussed. His penalty should certainly not be more than Ms Scott's, who unlike Mr Graham, did not seek veterinary advice and was moderately careless. Mr Graham's degree of culpability was less. That said, strict liability is imposed for a presentation offence.
- [221] In light of those findings, if it was necessary to do so, I would impose a penalty of 10 weeks suspension on his licences.

²⁰⁷ [2018] QCAT 301.

²⁰⁸ [2017] QCAT 326.

Annexure A: Mr Graham's Grounds of Appeal

The decision is erroneous in law, in particular;

1. The facts found by the learned Senior Member were not sufficient to establish, to the requisite Briggenshaw(sic) standard, the case against Mr Graham; that he presented the horse Mafuta Vautin to race with a prohibited substance in its system, namely cobalt, above 200 ug per ML, in urine.
2.
 - (a) The finding of a level of cobalt above the threshold, is contradicted by the expert evidence; including the results obtained by Mr Wenzel's analysis show that 82% of the cobalt reported on analysis was "false positive." It was false because, as explained in Professor Chapman's oral evidence, the alleged level above 200ug per ML in urine was caused by the testing laboratory super heating an aliquot of the urine sample to the extreme temperature at which B12 molecules in the urine were torn apart; so that each of the single cobalt atoms which were tightly bound in a B12 molecule were released as free cobalt. The freed cobalt was thereby included in the results of analysis. The decision impermissibly ignored the evidence that in urine vitamin B12 is excreted intact: Chapman's 4th report filed 10 September 2018. The false positive issue was ostensibly not considered and consequently legal error occurred;
 - (b) The decision that the horse Mafuta Vautin was presented to race with a prohibited substance within its body system, ostensibly ignored or overlooked the relevant evidence that cobalt (in organic form) is not a haematopoietic agent within the definition of prohibited substance in AHR188A(l)(b).
3. The decision maker ostensibly overlooked the significant evidence in Professor Chapman's 4th Report filed 10 September 2018, in which he says of Wenzel's results:

These results show conclusively that Mafuta Vautin returned a "false positive" urine swab to cobalt on 30 May 2015 at Albion Park, Brisbane for two reasons:

 - o Cobalt contained within vitamin B12 contributed to almost all the cobalt detected.*
 - o Mafuta Vautin was dehydrated at the time the urine sample was collected on 30 May 2015 at Albion Park, Brisbane.*
4. The decision accepted the evidence of Professor Hibbert to disregard the results of the analysis undertaken by Mr Wenzel at the Royal North Shore Hospital in Sydney. This was in error because Professor Hibbert did not challenge Mr Wenzel's results. Professor Hibbert's attack was confined to the lack of peer validation of Mr Wenzel's methodology. The criticism was dealt with in response by Mr Wenzel who gave evidence that he was confident that he had sufficiently verified the reliability of his methodology. There was no evidence before the Senior Member that contradicted the analytical results of Mr Wenzel's testing.
5. The decision failed to observe and apply Chapter 4, particularly sections 147 and 149) of the *Racing Act 2002* ("the Act"). The Certificates of Analysis relied on by the Respondent were non-compliant with those statutory requirements and, accordingly, should not have admitted into evidence.

6. The Analyst's Certificate signed by Mark Jarrett on 26 June 2015, was erroneously admitted into evidence and relied on by the Senior Member. The Certificate declares that the analysis of the sample at the Racing Science Centre ("RSC") was conducted between 1 June and 26 June 2015. Contrary to that evidence the Senior Member erroneously found that the analysis was undertaken on 25/26 June 2015. Under the *Public Service Act 2008*, s26(l)(h), Mr Jarrett, as a member of the public service, in a position of "public trust" who was required to act honestly. Hence, it was not open to the Senior Member to disregard Mr Jarrett's declaration as to the period over which the analysis took place.
7. The finding of the Senior Member that no analyses took place before the NATA approval on 25 June 2015 is contrary to the unchallenged evidence before the tribunal. The finding is erroneous in law in that it is directly contradicted by the RSC's own records of pre 25 June 2015 analysis which were in evidence. In particular, the document headed C13 SCREEN SINGLE which is the second sheet in EX9, (and which was signed As Analyst by Warwick Turner, Senior Chemist on 3 June 2015, states, among other things:

- (a) Sample 15-15615 was analysed as per the stated method as a single and the result is listed in the table for Cobalt. The method stated in the box headed "Isolation Method" is:

Inorganic Elements by ICPMS

- (b) The result in the same form is expressed in red print as:

SUSPECT FLAG FOR COBALT

- (c) The penultimate page in EX9 contains an email dated 3 June 2015 (2.05pm) from Kate Sievers, Senior Chemist, Quality, RSC, to seven other RSC personnel asking them to note:

Sample number 15-15615 is under investigation in the laboratory for Cobalt. Check V36.

- (d) A further email from one of the recipients Kim Duffy at 4.29pm on 3 June 2015, addressed to the sender and other recipients of the first email said:

Sample below has been isolated V36 checked and location changed in L1MS.

8. (a) The decision maker ostensibly overlooked the evidence which contradicts the respondents evidence that the A portion of the urine sample was analysed overnight on 25/26 June 2015. The evidence was that:

The C13 sample movement record records the A portion of sample 379206 (laboratory number 15-15615) was sent to the ISO freezer on 3 June 2015 after the screening analysis took place. It was taken out of the freezer to SC(Q) Senior Chemist Quality on 26 June 2015.

The deposit of the sample on 3 June 2015 was signed for and witnessed.

The release of the sample on 26 June 2015 was signed for and witnessed.

This documentary evidence made at the time strongly suggests on the evening of 25 June 2015 the A portion of the sample remained in the freezer.

- (b) As shown in paragraph [26] of the Reasons, the Senior Members proceeded on the basis that the aliquot of the sample analysed on 25/26 June 2015, was a different aliquot from that subjected to screening analysis. Having regard to the evidence cited in ground 8(a) above, that basis of reasoning was reliant on a false premise.
9. The decision relies on cases from other States to support findings that, if the Certificates of Analysis are materially flawed and thereby inadmissible, the results of the analysis which lays behind the Certificates can be relied on in any event. The error is established by these factors:
- (a) The cases from other jurisdictions are distinguishable because the Queensland racing codes had, at the material time, their own unique statutory regime to regulate the integrity of racing animal swabbing and swab analysis;
 - (b) Chapter 4 Integrity Control of the Act, as then applicable, was mandatory in prescribing the measures to protect the integrity of the swabbing and testing regime in the racing codes. The relevant parts in the chapter were;
 - Part 1 Racing Animal Welfare and Integrity
 - Board Part 2 Accreditation of facilities
 - Part 3 Disciplinary proceedings relating to accredited facility
 - Part 4 Dealing with and analyses of things
 - (c) As a statutory requirement, the provisions of Chapter 4 prevailed over the provisions in the Australian harness Racing Rules (“AHR”) by reason of s91(5) of the Act where there is an inconsistency;
 - (d) The Senior Member fell into error by failing to give full force and effect to AHR191, sub-rule (7) in circumstances where the Senior Member was obliged by the sub-rule to exclude the Certificate of Analysis because they do not possess evidentiary value and cannot establish a breach of the rules. Rejection of the Certificates was required because the certification procedure and acts and omissions forming part of and relevant to the process resulting in the issue of the certificates, were materially flawed; and
 - (e) In any event, there was no evidence from the analysts who conducted the tests which were said to be evidenced by the Certificates.
10. The decision is contrary to law in that it relies on the confirmatory Certificate of Analysis from the ChemCentre in circumstances where the Certificate of Analysis

was inadmissible by reason of the following uncontested matters:

- (a) The ChemCentre was not at the material time, an accredited facility or accredited secondary facility within the meaning of the Act;
 - (b) There was no evidence of authorization made by an integrity officer (per s143(4)(b) of the Act) to send the sample to the ChemCentre;
 - (c) The Act mandated that the control body deliver the thing for analysis to such a facility as described in (a) and (b) above: s143(4) of the Act “the control body must deliver the thing for analysis”;
 - (d) The Act s 115(3) required the Racing Animal Welfare and Integrity Board to develop or adopt procedures about the way things for analysis are to be taken and deal with. The relevant procedures are contained in the Bundle of materials before the Senior Member at 601-646;
 - (e) Consistent with the requirements of s143(4)(a) and (b) of the Act, the procedures required analyses at an accredited facility; see diagram 2 - Overview of the Procedures for looking and dealing with things for analyses: and
 - (f) The provisions of s352A(l) of the Act were not enlivened so as to make the Certificate of Analysis from the ChemCentre admissible.
11. The Certificates of analysis which were otherwise non-compliant with the provisions of the act, were not, as erroneously found by the decision rescued by AHR191(6). Further, AHR191(7) as a provision of a statutory instrument operates to prevent the non-compliant Certificates of Analysis being admitted into evidence.
12. The Senior Member erred in law by accepting into evidence the Certificates of Analysis:
- | | |
|------------|---|
| RSC | Bundlep 65 |
| ChemCentre | Bundlep 72 |
| RSC | Bundlep 83 |
| RASL | 8 March 2018 (Affidavit Silvestri EX6 attachment) |
- (a) on evidence (Ross Wenzel’s Report of 26 July 2018) the sample taken from Mafuta Vautin was so compromised by the state of dehydration of the horse that the urine sample was incapable of yielding a reliable cobalt reading on analyses; and
 - (b) there was no evidence to contradict the finding of Ross Wenzel as to the state of the sample.
13. The confirmatory RASL Certificate has no evidentiary value and was erroneously admitted into evidence. Through Senior counsel, the respondent advised the Senior Member that it was the A portion of the urine sample which went to RASL. But the official record tracing the movement of the A sample at the RSC does not record the A sample coming out of the storage freezer at a time proximate to the sample going

to RASL: Supplemental Bundle TAB 4. The RASL Certificate should not have been admitted by the Senior Member because it is unclear what sample went to RASL. Going on the official record it cannot have been the urine A sample from Mafuta Vautin;

14. (a) The decision misinterpreted, and misapplied, AHR191(2) in that the Certificate of

Analysis from the RSC Bundle p83 was admitted into evidence against the Applicant when the Certificate was not, as required by AHR191(2), certified by the person who conducted the relevant analysis for which results are reported in the Certificate;

(b) Paragraphs [24] and [25] of the reasons demonstrates that the Senior Member erroneously interpreted AHR191(2) to mean that the approval contemplated by the rule was from NATA when on the proper construction of the rule, the approval was to be from the relevant harness racing control body.

15. The penalty assessed by the Senior Member was so manifestly excessive as to be erroneous in law. In particular;

- (a) The penalty is inconsistent with prevailing penalty standards in prohibited substance presentation cases, which utilize fines in comparable cases of trainers falling into error when feeding supplements from reputable suppliers under veterinary advice;
- (b) The penalty was not reflective of the objects and purposes of the rules of harness racing; the weight of evidence was that cobalt was not performance enhancing in horses and it is not harmful to the health of horses. This demonstrates that the Senior Member failed to have any regard to that evidence;
- (c) The penalty is contrary to the principles established in the Wallace case in that it erroneously rated the level of culpability of the Appellant;
- (d) The penalty is so manifestly excessive relative to penalty precedents for cobalt cases in other Australian jurisdictions in which the Australian Rules of Harness Racing operate, that it demonstrates a failure to exercise the sentencing discretion according to law; and
- (e) The penalty is so manifestly excessive in relation to penalty precedents in other horse racing jurisdictions that it demonstrates a failure to exercise the sentencing discretion according to law.