RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 28 OCTOBER 2020

APPELLANT LEONARDUS (LEO) VANDERBURG

GREYHOUNDS AUSTRALASIA RULE 86B(1)(a), 86B(1)(b), 86A

86B(1)(a) – 2 appeals on breach and penalty
86A – appeal on penalty
86B(1)(b) – appeal on breach and penalty

DECISION:

1. **Appeals against breaches dismissed, one appeal against penalty upheld.**
2. **86B(1)(a) – disqualification of 20 months, with 12 months wholly suspended for a period of two years on condition he does not breach Rule 86B in that 12 month period**
3. **86B(1)(b) – disqualification of six months, wholly suspended for a period of two years on condition he does not breach Rule 86B in that two-year period.**
4. **86A – no penalty**
5. **86B(1)(a) – disqualification of four years, with three years wholly suspended for a period of two years on condition he does not breach Rule 86B in that two-year period.**
6. **Each period of disqualification to be served concurrently.**
7. **That the periods of disqualification to be served concurrently commence on 30 June 2020 and that in respect of the determination of the end date, 54 days served under an interim suspension from 29 March 2019 to 22 May 2019 be taken into account as time served. The Tribunal notes that the disqualifications will expire at midnight on 6 May 2021.**
8. **$50 of appeal deposit refunded.**

1. The appellant appeals against a decision of GWIC to find he has on three occasions breached the rules of greyhound racing and in respect of penalty imposed for those three findings, and in addition, appeals against penalty imposed in respect of a fourth charge in respect of which he had pleaded guilty.

2. The evidence before the Tribunal has comprised a bundle of some 636 pages on behalf of the respondent GWIC and, in addition, a number of documents on behalf of the appellant which were attached to grounds of appeal, and those documents have comprised the Code of Conduct and Ethics for GWIC and, in addition, documents relating to Australian Law Reform Commission recommendations for DNA evidence, and various documents that touch upon NATA accreditation. In addition, the appellant required for cross-examination the inspector Ms Paprzycki-Baker.

3. The issues for determination, therefore, are in respect of charges 1, 2, and 4 breach in the first instance and then, if necessary, the issue of penalty in respect of those matters if found established, and, in any event, penalty has to be determined in respect of charge 3 to which he admitted the breach.

4. The charges and their particulars are long and will be annexed to this decision. Suffice it to say that they relate to the possession of items at a property where the appellant is a licensed trainer and breeder, contrary to the provisions of the rules.

5. There are two items in question. One is a lure and the other is a rope. In respect of the lure, the charges are in relation to breaches of 86B(1)(a), that is, use of the lure, and 86B(1)(b) in respect of the possession of the lure. The fourth charge is in respect of possession of the rope.

6. With a document of 636 pages, there are obviously a considerable number of facts. The Tribunal will deal with the key facts, as they are the ones necessary for the determination, and assess the challenges made by the appellant in the cross-examination and in the grounds of appeal and the submissions made today, which identify a number of issues of concern to the appellant.

7. In essence, the appellant challenges the evidence on the basis of contamination, the case on the basis that it cannot be taken by GWIC and failures in respect of the method of conduct of the inspectors, to paraphrase the grounds of appeal and submissions.

8. The appellant is a licensed trainer and breeder. He has done so for a considerable number of years. He operates out of the premises the subject of the inspectors' visit. The Chief Inspector of GWIC had

received what the Tribunal will describe as intelligence to the effect that he was able to observe images of greyhounds being teased by what appears to be an animal product. He was able to determine that the property in question, by reason of his resources, was the appellant's property.

9. Accordingly, on 8 January 2019, two GWIC inspectors attended the appellant's property unannounced for the purposes, as they described it, of an inspection. They, of course, were armed with the knowledge that Inspector OShannessy, the Chief Inspector, had given them. The two inspectors in question were Inspectors Turner and Paprzycki-Baker. Each of them wore video cameras. The Tribunal notes at this point there was a playing of the images to Inspector Paprzycki-Baker during her oral evidence and essentially for the majority of the time it was not possible to understand the audio but the images themselves were quite clear.

10. The issues that are of concern at the outset in respect of what happened on the day are that it is suggested in submissions that the inspectors were not trained. There is no formal training to which any reference has been made which they should have undertaken prior to engaging in their functions. In submissions no issue was taken with the transcription of the audio.

11. Inspector Paprzycki-Baker described her many years of experience as an inspector, both with Greyhound Racing South Australia and then with GWIC, before returning to South Australia. She satisfies the Tribunal that as a result of her many years of experience that she was able to undertake the functions that she did, gather the evidence that she did, operate the equipment that she did, such that it was able to produce a transcript, and to operate in respect of the seizure of items and the chain of custody to the extent that she describes it. As Mr Turner did not give additional evidence, his expertise is that set out in his statement that he had previously been an RSPCA inspector for 19 years. Each of them were appropriately appointed and authorised by GWIC to undertake the operation that they did.

12. Having arrived at the property, they identified themselves to the appellant and, as is the usual case, embarked upon some inquiries of him. In the course of their activities they were taken to the position where the subject lure of concern to Mr OShannessy was identified by the appellant. At this stage it is to be acknowledged that the appellant at all times cooperated with the inspectors, answered their questions and assisted them with their inquiries.

13. Critically, in respect of charge 1, which is the requirement to prove a use of the lure, he was asked this:

"Have you been using any skins or anything?"

Answer: "I have been using a skin but it's an old coat. It used to be, what do you call it, yeah, it's just – I have to show you, anyway."

14. And he then took them to the place where this lure, as it is described in this decision, was located.

15. He said, in part,

"It's a woman's coat. I've got proof that I bought it – that I bought it, like, you know, but."

And then he said, in answer to this:

"So is this that lure that we would have seen?"

Answer: "Yeah, that's all I use. I just tie it up, and you can see it's a coat, it's a women's coat, that's what it used to be, so I just used to and cut it up."

Question: "So is this what you use to train your pups with?"

Answer: "That's all I ever use it. That's all I ever use."

16. There were then questions about it. It was examined. It was taken apart. At this point it is to be noted that neither inspector wore gloves. It turned out as a result of the oral evidence that a box of gloves was in fact in their vehicle.

17. There was conversation in respect of the item and there was an agreement to surrender it. It was then taken to the rear of the subject vehicle and it was placed in a brown paper bag. The appellant then signed a surrender notice for it and the brown paper bag was placed in the rear tray of the vehicle. It was not then sealed. The vehicle was then closed. The evidence is indeterminate as to whether it was locked, but it may not have been. They then returned to other duties, namely, checking microchips and dental status of other greyhounds at the establishment. It might be noted at this stage that that bag sat in the rear of the vehicle for some one and a half hours.

18. In conducting that examination of the greyhounds, there is no doubt that Inspector Turner handled the greyhounds' mouths, and it is not in issue that as a result of those actions saliva of dogs may have come on to his hands.

19. The search continued and a discovery was made of a yellow and blue rope shaped in a loop. It might be noted that the appellant had previously been cautioned and he was then cautioned again when that finding was made. He was asked:

> "Have you had an animal attached to this, Leo?"
>
> Answer: "No, never. No, I don't put anything on."
>
> Question: "Okay. So all I am seeing here is all dog hair, is that what you're telling me?"
>
> Answer: "I don't know what's exactly on there."
>
> Question: "See, there is lots of different types of fragments of fur."
>
> Answer: "Right."

20. The videoing continued with images also being taken by mobile phone, which have not been reproduced. There was then a discussion about rabbits on the property and the appellant immediately volunteered, as maintained, that there were rabbits on his property, that there had been pet rabbits kept in a cage in the shed. And then after various other conversations and other inspections of the property and at times at which Inspector Turner did not have exhibit bags in his possession, the parties returned to the back of the vehicle. The Tribunal notes that upon finding of the rope, as just described, and the conversation, as just set out, with the appellant, that the rope and other ropes and items were placed in brown paper bags, described in the statements of the inspectors as exhibit bags. The Tribunal notes they are brown paper bags which adequately meet the description exhibit bags.

21. The vehicle was returned to after some period of time and it was then attempted to seal, with the appropriate sealing tape, the various exhibit bags – critically, the one that contained the lure and the one which contained the rope. It appears that Inspector Paprzycki-Baker had forgotten the sealing tape. The video shows Inspector Turner then stapling closed the two critical bags. They were placed in the rear of the vehicle and the inspectors left, they drove to Ms Paprzycki-Baker's residence, she then signed Inspector Turner's notebook for taking possession, she placed the items in her garage in a sealed box, she removed them the next day, she took them to Taronga Wildlife Hospital where they were handed over to Dr Tong, a veterinary pathologist at that location. Attached to various documents of Dr Tong is a chain of custody history. The items were subsequently taken for DNA analysis and a chain of custody in respect of those items is given.

22. Dr Tong carried out an analysis of the items. She provided a preliminary report and then subsequently a certificate of expert evidence.

23. It is to be noted that other items were seized on another occasion, but nothing of any untoward nature was found in respect of those items and they are not the subject of charges and are disregarded. Likewise, some of the other items initially seized, upon which no incriminating material was found and which are not the subject of charge, are disregarded.

24. Critically, the issue is the lure. In respect of the lure it is Dr Tong's evidence that it comprised predominantly of animal-derived material, that this animal-derived material is in the form of prepared or tanned animal hide and fur, and that that would have been subsequently altered by a person such that the article could be used as a lure.

25. She said:

> "Based on my examination and expertise, I am not able to definitively determine the species of origin of the animal-derived material."

She said:

> "It is probable that the animal material originally came from a fox, given its macroscopic and microscopic appearance."

26. It was noted in her report, consistent with the subsequent examination, that DNA analysis was unsuccessful in determining the type of animal.

27. The Australian Centre for Wildlife Genomics, which carried out that DNA assessment, expressed the opinion in their report that the items had been under a tanning process and that that would degrade any DNA. However, it continued:

> "I agree with her assessment that the hide was genuine animal skin and hair which has been chemically or otherwise processed".

28. Dr Tong's finalised her statement on this item:

> "I remain strongly of the opinion that Exhibit 1 (lure) largely consists of animal-derived materials and that we are unable to determine species."

29. She then turned to her Exhibit 2, which is a piece of rope configured into a tightening loop or noose.

30. She observed that attached to the rope were a moderate number of fine animal hairs. She said that those hairs were exclusively found attached

to the knotted and looped portions of the rope, sparing in comparison to the rest of the length of rope. She expressed an opinion:

> "The most probable explanation for the selective presence of these hairs in the knotted and adjacent loop portions of the rope is that the animal from which these hairs were derived was in close contact with the looped and knotted portion of the rope and that during contact there was some mechanism which caused exfoliation of hairs. Such a mechanism would have had to involve friction between the rope and the animal fur and that friction would need to involve both the inside and outside of the looped portions of the rope. A configuration of the rope as a tightening loop or noose in consideration of the distribution of the hairs on the rope makes it very likely that the hairs came to be present there by an animal or a body part thereof being within that loop itself, with the loop at least partially tightened."

31. She continued:

> "It is my opinion that it would be unlikely for natural environmental exposure of the rope to local populations of animals, for example, feral European rabbits, to lead to the distribution of hairs on the rope as they were presented to me."

32. The rope was sent for DNA analysis and it was found to contain, amongst other things, hairs of European rabbit.

33. The facts are captured by that summary.

34. The challenges to the conclusions drawn by the GWIC determiners are to be found in the grounds of appeal.

35. The grounds take issue that at the time of the conduct there was some problem for GWIC because there is no determinate time in which the use occurred and it may not have been within the legislative province of GWIC to do that which they did and conduct the hearing and impose the penalties that they did. That submission has not been expounded in any great legal detail on behalf of the appellant, who was assisted by an unqualified person in the law, Mr Phillips, who appeared by leave of the Tribunal by consent. Some of the issues were about the reference to Local Rule 86A about approval of lures in certain circumstances.

36. But those matters ignore transitional provisions and statutory provisions transferring powers. In the absence of more detailed submissions, the Tribunal is satisfied that GWIC had the statutory power to, had adopted the rules in the appropriate fashion, stood as necessary in the shoes of any reference to GRNSW contained in the rules or elsewhere, and that that ground of appeal is not made good.

37. The next major challenge is to the DNA evidence. There are two threads to that.

38. Firstly, that a detailed submission is made drawing upon criminal law analogies and various expressed documents and opinions in case law about the caution with which DNA evidence must be used and, indeed, how it is used. Those matters are accepted as being a summary extracted, on behalf of the appellant, from what might otherwise be described as literally thousands of documents and cases which have analysed DNA and its use in law and not just criminal law. These, of course, are not criminal proceedings, they are civil disciplinary proceedings. However, the principles are not different. Caution has to be used. DNA is not an answer in itself. The whole of the evidence must be considered. The Tribunal proposes to do so.

39. A second thread relates to non-NATA accreditation. There is no evidence at all adduced on behalf of the appellant that indicates why the accredited laboratory of The Australian Centre for Wildlife Genomics has not got the appropriate NATA accreditation. It says it does. And there is no evidence at all that Dr Tong's testing, which was done by what is not a NATA-accredited laboratory, it appears, because she has not said it is in the evidence, it may be, would require that that DNA evidence be rejected.

40. In any event, is there otherwise, if the Dr Tong's and The Australian Centre for Wildlife Genomics' evidence was to be rejected, evidence to support the conclusions upon which the respondent relies? The Tribunal is not persuaded by the appellant, by evidence or submissions, that the nature of the NATA accreditation or its absence means that the opinions and findings expressed by each of those two laboratories cannot meet the balance of probability test.

41. The next challenge, a more lengthy one, is to sample handling. These inspectors have not undertaken, it appears, any formal training, or there is no evidence that they have. The Tribunal has referred to their expertise. The challenge on sample handling goes to the actual conduct of the inspectors and failures there and in respect of an inability of the regulator to establish the appropriate chain of custody.

42. Dealing firstly with the handling processes. As expressed, the inspectors did not wear gloves. How is that material to the determination here. Firstly, it is said that the regulator cannot, on balance of probabilities, eliminate contamination. How, however, is that contamination submission relevant to the actual evidence? And, secondly, the same issues arise, and the same analysis is required, in respect of chain of custody.

43. Dealing with the latter first, the Tribunal is satisfied that the totality of the evidence establishes a chain of custody from the time of seizure to examination by the last laboratory on DNA testing, such that the evidence cannot be rejected on the basis there is a failure in the chain of custody. If nothing else, there is no evidence adduced on behalf of the appellant that it would establish such a failure. At best, it is suggested that there may be a gap in what is stated to be part of the necessary chains of custody and the focus there was upon the transmission from Inspector Turner to Inspector Paprzycki-Baker.

44. Having regard to Inspector Turner's evidence – and it is contained in his notebook – of him handing over the exhibit to Inspector Paprzycki-Baker, her signing his notebook for it, her expression in her statement that she did so and she took possession of it from him, satisfies the Tribunal there was no break in the chain of custody at that point.

45. At each of the other points in the matter there is a clear chain of custody, from the taking of possession of the lure and its surrender, in any event, by the appellant, and the taking and seizing and its surrender, in any event, by the appellant of the rope are such that up until the time they were placed in the back of the vehicle the chain of custody is intact.

46. In any event, on that point the appellant gave no evidence to the GWIC inquiry, nor has there been any evidence from anybody on this appeal, that whilst the bag containing the lure was in the back of the vehicle, that anybody else had access to the property, or could have had access to the property, or was known in the past to have access to the property, and would thereby have likely involved themselves in opening the rear of that vehicle, opening the then unsealed bag and doing something to the exhibit contained in it – the lure – such that it would be contaminated. It is beyond speculative. There is nothing about that point of the chain of custody in which there is a failure by the respondent to prove its continuity.

47. There is then from the time they drove off from the appellant's property to the time it was last assessed for DNA a meeting of chain of custody requirements.

48. What then of other contamination? There is no doubt that they did not wear gloves. There is no doubt that Inspector Turner, in all probability, had saliva on his hands. Saliva on his hands makes no difference to the issue of the lure. The lure itself involved animal product. The appellant himself admitted that. The presence of dog saliva on it is relevant to use but he admitted he used it for training and the O'Shannessy photos showing its use with dogs at the property confirms that. There is no evidence inspector Turner handled dogs before he bagged the lure. So contamination makes no difference to the result. There is no point in a

submission being made that he is lacking of education or 71 years of age and the like. He says that he bought the coat from a Mrs Green, and Mrs Green has given a letter contained in the bundle, to the effect that it was an animal fur and she sold it to the appellant. There is some suggestion that she thought it may have been synthetic, but that is met by other evidence.

49. The handling failures, if any – and the Tribunal makes no such finding in respect of the lure – are such that it can have nothing to do with anything that may have led to a relevant contamination. The chain of custody findings just made are equally applicable to the contamination argument. In other words, the appellant took them to the lure, they looked at the lure, there had been no handling of the dogs at that stage such that there would be any saliva contamination. Nor is there any evidence whatsoever that anything about the property at the time the inspectors were engaging in that conduct could have meant that somehow and by some unknown reason the make-up of that lure somehow became contaminated. It is almost a nonsensical argument.

50. The lure was, as it was subsequently examined, found to be made up of an unknown animal. That was the condition it was in when it was used by the appellant, as he admitted, and that was the condition it was in when he surrendered it to the inspectors after they had indicated they were seizing it. That was its condition when it was placed in the exhibit bag. It was not afterwards interfered with.

51. The next issue on contamination is in respect of the rope. What was examined there was, by observation of the inspectors, fur. There was a suspicion it was rabbit fur. Questions were then asked of the appellant about rabbits and he put in issue that rabbits were on his property. There is no evidence that the mere presence of the rabbits on the property meets the expert evidence of Dr Tong as to the rabbit hairs found within that part of the loop, which the Tribunal has described and read into evidence.

52. A considerable number of documents were placed before the GWIC inquiry about moulting rabbits, rabbit hair floating through the air and matters of that nature. Each of those matters remain undisturbed. The Tribunal accepts the appellant's evidence, supported by photographs, that rabbits inhabit this property. The Tribunal accepts that rabbits as pets were kept in one of the holding sites on the property, although some time ago. The Tribunals accepts that all of those matters mean that it was open to rabbits to move about within the area where this rope was discovered.

53. But that evidence is not supported by any expert answer to the opinion of Dr Tong. No challenge has been taken to her expertise, and it is

substantial. She has set it out in her certificate of expert evidence and the Tribunal accepts she has the expertise, by training and experience and her practical work, in identifying those matters which she did. In the absence of some link – and it is to be borne in mind that the appellant carries no burden – but in the absence of anything that can answer Dr Tong's evidence, it must remain unchallenged.

54. The other arguments advanced are the failures by the inspectors, each of which would go to sample handling. There were no standard operating procedures set out for the inspectors at the time. There were no such procedures established for evidence collection, evidence transit, evidence storage, chain of custody and continuity, training of inspectors, and the use of body-worn cameras. There was no standard operating procedures manual for inspectors.

55. It is said that there was a breach of the code of conduct. That is not established evidentially.

56. Accepting the submission in the grounds of people as just outlined, the Tribunal has assessed what therefore would flow from the actions of the inspectors which would cause doubts to be raised about the evidence, both on a chain of custody and contamination basis. Those matters, established as they are by the appellant – and they on the appellant's side are to be commended for their research and their preparation of the detailed submissions – do not, however, establish as set out that those matters, or the absence of them, that from the evidence of the inspectors and observations of the one video image the Tribunal can come to a conclusion that those matters have led to any failure in respect of the steps taken by the inspectors to properly gather their evidence or have it assessed by experts.

57. There was one minor point about wrong time contained on the video footage, but nothing turns upon that. Whilst it has not been expressed in evidence, it could be open to conclude that they simply did not set the time and date correctly before they operated their cameras.

58. Each of those matters embrace the challenges embarked upon by the appellant in his submissions and as they were advanced to the inspectors.

59. It is necessary to turn then to each of the charges and determine whether their necessary ingredients have been established.

60. In respect of charge 1, a breach of 86B(1)(a), it is necessary to establish firstly that the appellant is a registered public trainer and breeder. He does not dispute that; the evidence establishes he is.

61. Secondly, that he had used the item in connection with greyhound training, education or preparation to race or racing. The images gathered by Inspector OShannessy establish that without any other consideration. The appellant's admissions to the inspectors that he used it, as has been summarised earlier, establishes that ingredient.

62. The third element is that the item itself had part of an animal. The evidence of Dr Tong establishes that.

63. And lastly was it as a lure used to entice or excite? The answer is it was a lure. The evidence establishes that, as just summarised, and by the admissions of the appellant. The evidence of the appellant and Mr OShannessy also establish that the lure was so used to entice or excite.

64. Each of the ingredients of charge 1 are established.

65. Charge 2 requires proof that the appellant again is a licensed trainer and breeder and that is established.

66. Secondly is an issue of possession. No submissions or factual matters have been made to enable a finding that the appellant was not the possessor of the lure. His own admissions establish that. No evidence was advanced to indicate that someone else may have possessed it. The only issue is that the appellant possessed it and the respondent satisfies the Tribunal of that fact.

67. The remaining matters to be established are that that possession occurred and the greyhounds are trained, kept or raced. As just established in respect of charge 1, that is found established.

68. And next, the possession was of any part of an animal. As just established in respect of charge 1, that is found established.

69. And next, there has to be established a purpose of it being used as a lure to entice or excite or encourage. As just found in respect of charge 1, those ingredients are established.

70. The respondent satisfies the Tribunal of each of the ingredients of charge 2.

71. Next is charge 4. That requires proof that, firstly, the appellant is a registered public trainer and breeder and, as found, that is established.

72. Next is an issue of possession. Again, for the same reasons in respect of the rope, which is the subject of charge 4, there is no other matters established on the issue of possession which would cause the respondent to fail to establish possession in the appellant.

73. Also, that that possession took place on his property as identified in the particulars. That is established on all the evidence.

74. And it has to be established that that property is one where greyhounds are trained, kept or raced. That element is established.

75. The next point is an establishment of "any part of an animal". The part of an animal which has been particularised is the hair of rabbit. As established, the Tribunal is satisfied, for the reasons it examined in respect of the evidence and Dr Tong's evidence, that contained within the looped and knotted portion of the rope were hairs of rabbit, and there is no evidence that would prevent the respondent establishing, on the expert evidence of Dr Tong, that that was present by reason of a tightening of the portions of the rope around something upon which rabbit hair was contained. And as Dr Tong opined, it would be part of a body of a rabbit, if nothing else. Accordingly, that element of the ingredient of charge 4 is established.

76. The respondent satisfies the Tribunal of each of the ingredients of charge 4.

77. In respect of the appeal against the adverse findings in respect of charges 1, 2 and 4, the appeal is dismissed.

SUBMISSIONS MADE IN RELATION TO PENALTY

78. The issue for determination is penalty in respect of the four charges preferred against the appellant, three of which have now today been found proven and the last of which has been a plea of guilty at all times.

79. The provisions of a finding of a breach of Rule 86B are placed in one of the more serious categories of breaching of the rules by reason of the provision in the rule that upon matters being found proven by way of conviction, then there is a mandatory minimum period of disqualification of 10 years unless special circumstances exist whereupon a lesser penalty may be imposed. That is a reflection of the rule-maker's belief that heavy penalties are appropriate for this conduct.

80. The GWIC determination provided in respect of the first matter 20 months' disqualification, 12 months suspended; the second, 10 months, six suspended; the third, no penalty; and the fourth, four years' disqualification with three years suspended.

81. The submissions for the respondent today are that those are the appropriate penalties and the Tribunal should come to the same

conclusion. The appellant submits that, for various reasons, lesser penalties should be appropriate.

82. Some matters can be quickly disposed of.

83. Firstly, in respect of the third charge, which in essence is clearly described as a backup to charges 1 and 2, which is an 86A matter, which is possession of a non-approved lure, no penalty is suggested. It is not suggested that the Tribunal should come to any other conclusion, and that matter will not be further canvassed.

84. The second issue is a finding of special circumstances. On 6 May 2020, GWIC determined that special circumstances had been found. It can almost be said they were fairly generous in respect of that determination but the Tribunal is not asked to make any other finding.

85. It is not necessary, because the Tribunal has just given a lengthy determination, to revisit the facts and circumstances on objective seriousness in any detail.

86. Suffice it to say that in determining special circumstances, the following matters, summarised, were found. In respect of the lure, lower end of the scale because it was a coat and there was not knowledge that it was of an animal type. In respect of the last charge, it was found to be in the mid range because the rabbit hair was present on the rope. Also in special circumstances, 40 years' disciplinary history with some matters referred to, but regrettably there were previous positive swab matters. That seems to the Tribunal to virtually eliminate entirely 40 years of good character. Nevertheless, it was found as a special circumstance. Also, aged 71 with medical conditions and found, because COVID matters as of May, to be a vulnerable person. And, in addition, both the appellant and his wife had at that time suffered from family loss. In addition, the financial impact.

87. Each of those matters when taken individually and collectively led to a finding of special circumstances. The Tribunal is not asked to add to nor subtract from that list, it is asked to adopt it. Having regard to those submissions, notwithstanding the Tribunal's views about his disciplinary history – the Tribunal doesn't share it is a good one – those special circumstances will not be disturbed.

88. It is then a matter of revisiting objective seriousness generally in respect of these matters. That also requires consideration of the message to be given to this appellant and the industry to reflect the seriousness of these matters and to indicate a loss of the privilege of a licence that may follow.

89. The Tribunal accepts that the lure was an old coat, that there was some ignorance associated with it, that it had been bought and used not with a view, apparently, of the having it as animal product, but simply as something which was thought to be innocent. That does make it a lower end of the scale of objective seriousness. It does of itself become a special circumstance, it must be said, to consider that a 10-year mandatory minimum would not truly reflect the conduct in which he engaged.

90. As to the rabbit hairs on the rope, the Tribunal has rejected the submission that they may have somehow gotten there by innocent means. That is a much more serious matter. The Tribunal would not be greatly comforted that that would necessarily be a mid-range matter for a simple possession, but that was the finding that GWIC made. It is not asked to disturb it. It was one of the findings for the purposes of the special circumstances and the Tribunal will adopt that finding.

91. Objective seriousness alone now mandates, because of special circumstances, that something less than 10 years is appropriate.

92. The Tribunal is informed by precedent in determining objective seriousness.

93. The first matter to which the parties took the Tribunal was Howard, a decision of December 2019. Again, an old fur coat, which also is associated with synthetic rags, and it was on a lure in a bullring. Apparently there were substantial medical circumstances which subjectively caused the penalty to be less, and six months was imposed with four months suspended on 12 months' good behaviour.

94. The second matter was Winter, where there was equine animal product found together with synthetic material on lures on the property. Again, in this matter, as it was in Howard, special circumstances were found and a 12-month disqualification was imposed with six months suspended.

95. The third matter of Kimber, involved a lure with rabbit and possum. Apparently there were substantial mitigating circumstances and three years' disqualification was imposed with two years suspended.

96. It has to be said that that decision in Kimber carries with it much more serious connotations than on the case here. And the matter of Howard, as the appellant submits, has a colour of appropriateness to the matter. In the end, precise objective circumstances do not have to be canvassed, but it was only six months' disqualification.

97. The subjective factors need also to be considered because they contain within them some matters that go to objective seriousness. And they are

the length of time in the industry and no prior baiting-type matters, the Tribunal does not use the word live baiting – or, alternatively, the use of lures which simply should not be used and for reasons which need not be set out in this determination.

98. The objective seriousness, in the Tribunal's opinion, is appropriately assessed by GWIC for the same reasons as it is assessed, by the Tribunal. The Tribunal agrees that possession of the lure is less serious, objectively low, and, as expressed, considers the objective seriousness of the rope to be greater. There is a connotation of rabbits being attached to that in a loop fashion, and whether they were then used is not the issue for determination.

99. The other subjective factors – and they are to some extent embraced in the special circumstances, but they need to be referred to again – are the fact is there was no plea of guilty to these matters, but, as the GWIC officers determined, there was cooperation and admissions made and that assisted the finalisation of the matter and had some utilitarian value associated with it.

100. The Tribunal is not of the view that substantial leniency should be granted for the full 40 years of his association with the industry because he has prior prohibited swab matters for amphetamines and for cobalt, and the last of those was only in 2017. Those are not considered, therefore, to be matters which enable a further reduction on mitigating factors.

101. It is said he has contributed to the industry and is a person otherwise of good character. He is supported in that by number of referees.

102. The first of which is the President of Richmond Ex Servicemens' Soccer Club, May 2020, Mr Boyd. Known him for 40 years through soccer. He says he is of a good nature, of moral character, honest and trustworthy.

103. The next is by Kevin Gillies, councillor, Blacktown City Council, 1 June 2020. Previously licensed in the 70s and 80s. Used to visit the appellant's premises. He has not witnessed or become aware of any incidents and they have in fact had discussions about controls of the industry prior to the appellant coming under adverse notice. He is satisfied that the appellant would not otherwise be involved in any activity that would impact on his career and livelihood.

104. The next is by Kristy Harper, 2 June 2020. She is employed at NSW GBOTA. She has been an owner and breeder. The appellant has been training her dogs. She has a good relationship with him. Finds him to be extremely professional, communicative and focused on a high level of care for his greyhounds. She is a regular visitor to his property to make

those observations. The greyhounds are always in a good condition and well cared for. They respond positively to him because of that. She says she has never seen anything untoward at the property, or ever been left with feelings of concern.

105. The next is by Peter Chippindale of 2 June 2020. Himself being a former registered owner and attendant. Known him for seven years, he has trained for them. He is always impressed with the extreme care and attention provided to pups and is a regular visitor to the property to make those observations. He describes the appellant as a person with a very good knowledge of industry requirements, always impressed with his professionalism and caring approach to looking after his greyhounds and would recommend him as a trainer.

106. The next is by Bill Thorn, 30 May 2020. He has been an owner trainer, now retired. He has known him for 25 years. He knows him as honest, reliable, trustworthy and without doubt one of nature's true gentlemen. He is a fine upstanding citizen and "a man by whom I am quite proud to be called a friend".

107. It is quite apparent from those references that the appellant maintains in the community, some of whom are formerly licensed persons or otherwise associated with the industry, and that is important, associations with persons who are prepared to stand by him.

108. Importantly, the references to nothing untoward on the property and a caring approach to well-looked-after and well-trained greyhounds is a fair reflection of the appellant's history, despite the failures which have been referred to in that history, and they do go strongly to subjective factors in his favour.

109. The Tribunal does not propose to embark upon a determination of appropriate objective serious starting points and then determine deductions for mitigating and subjective circumstances. Those matters were canvassed in considerable detail by GWIC. It asks that its determination be maintained. The appellant asked it be reduced.

110. The determination that the Tribunal has come to in respect of charge 1, the use matter, is that the penalty imposed of 20 months, with 12 months wholly suspended for a period of two years on condition he does not breach Rule 86B in that period, is an appropriate penalty.

111. The Tribunal differs from the opinion formed by GWIC in respect of charge 2, the possession matter. As canvassed in submissions on penalty, the Tribunal considers that you cannot use a lure (86B(1)(a)) unless you possess it contrary to 86B(1)(b). There is, as it were, a commonality of conditions to be satisfied in 86B(1)(a), which means to

some extent (1)(b) is duplicitous. In that matter the Tribunal has determined that, consistent with decisions made in other jurisdictions, a penalty can nevertheless be considered appropriate.

112. The penalty is varied by reducing it to a period of disqualification of six months, which will be wholly suspended for a period of two years on condition he does not breach Rule 86B in that two-year period.

113. In respect of charge 3, as set out in the reasons for determination, no penalty is imposed.

114. In respect of charge 4, the much more serious matter, as the Tribunal has reflected upon, the Tribunal is of the opinion, forming its own opinion in respect of the facts and circumstances, particularly having regard to the fact it has made a decision itself today, that the determination of four years' disqualification is appropriate. It is a much more serious matter. It is well outside the bounds of the parity cases to which reference has been made. And again it is appropriate that, as determined by GWIC, three years of that be wholly suspended for a period of two years on condition he does not breach Rule 86B within that two-year period.

115. The last matter for the Tribunal to determine requires consideration of what might be called totality. In other words, whether, as the rules require, each of these penalties be served cumulatively unless otherwise determined. GWIC determined they be concurrent. There is no submission to the contrary.

116. Having regard to all of the facts and circumstances, the Tribunal is satisfied, again looking at principles of totality, that that periods of disqualification are appropriately served on a concurrent basis.

117. The last matter for determination to the extent it is an obligation upon the Tribunal is to determine starting and end points having regard to the fact that there were interim suspensions and the like.

118. The Tribunal orders that the periods of disqualification to be served concurrently commence on 30 June 2020 and notes that in respect of the determination of the end date, 54 days served under an interim suspension from 29 March 2019 to 22 May 2019 be taken into account as time served. The Tribunal therefore notes that the disqualifications will expire at midnight on 6 May 2021.

119. The effect of that determination is that the severity appeal in respect of charges 1, 3 and 4 is dismissed. The severity appeal in respect of charge 2 is upheld.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

120. Application is made for a refund of the appeal deposit. That is opposed.

121. In support of the application, special circumstances as to age, loss of income and vulnerability by reason of COVID preventing other income being earned are advanced.

122. It is the Tribunal's usual approach to matters such as this that when there is only a minor finding of a reduction in penalty after an adverse finding on pleas of not guilty, that any reduction be token because there were three charges contested and in respect of those only one was the subject of a minor reduction from 10 months to six months in disqualification, there be a forfeiture of the deposit.

123. The Tribunal notes the special circumstances that were found and does not revisit all of those. It accepts that many in the community are struggling financially at the moment. It acknowledges that this regulator requires all the money it can possibly have to adequately carry out its functions, itself no doubt adversely affected by COVID as well.

124. In the circumstances, there cannot be a full refund. It would just not be consistent with precedent, it would be unfair to other appellants who are generally not in greatly different circumstances to this appellant.

125. The Tribunal orders $50 of the appeal deposit refunded.

ANNEXURE – THE CHARGES AND PARTICULARS

Charge 1 – Rule 86B(1)(a), GWIC Greyhound Racing Rules

R86B Offences relating to luring and baiting

(1) A person who, in the opinion of the Stewards or Controlling Body-

(a) uses in connection with greyhound training, education or preparation to race, or racing, any live animal, animal carcass or any part of an animal whether as bait, quarry or lure, or to entice, excite or encourage a greyhound to pursue it or otherwise;

[***R86C(1)**: "training" shall include, in addition to those activities otherwise defined as "training" in the Rules, any activities whereby a greyhound is exposed to any item for the purpose or effect, or that would have the likely effect, of enticing, exciting or encouraging it to pursue, entice or excite, or that causes such reaction from a greyhound.*

R1: "train" or "training" shall mean the preparation, education or exercise of a greyhound to race or trial.]

Particulars:

That Mr Leonardus Vanderburg, a registered Public Trainer and Breeder has used in connection with greyhound training, education or preparation to race or racing any part of an animal as lure or to entice or excite or that causes such reaction from a greyhound, in circumstances where:

- An item found on Mr Vanderburg's property situated at [address redacted] on 8 January 2019, comprised of:
    - 750 x 365 x 125 mm piece of red to tan-coloured fur and skin ("**hide**");
    - 1890mm in length, 10mm diameter aqua-coloured rope tied firmly around the hide; and
    - A 1-2mm diameter piece of fine orange string tied around hide skin, with pieces of similar string loosely stuck to the furred side of the hide; and
- Forensic examination by a Veterinary Pathologist definitively determined the hide is genuine animal skin and hair and despite the preparation/tanning process, the hairs are of animal origin and not consistent with synthetic fibres; and
- DNA analysis of part of the hide, visually "saliva stained", revealed DNA of domestic dog.

Charge 2 – Rule 86B(1)(b), GWIC Greyhound Racing Rules

R86B Offences relating to luring and baiting

(1) A person who, in the opinion of the Stewards or Controlling Body-

(b) attempts to possess, or has possession of, or brings onto, any grounds, premises or within the boundaries of any property where greyhounds are, or are to be trained, kept or raced, any live animal, animal carcass or any part of an

animal for the purpose of being, or which might reasonably be capable of being, or likely to be, used as bait, quarry or lure to entice or excite or encourage a greyhound to pursue it;

Particulars:

That Mr Leonardus Vanderburg, a registered Public Trainer and Breeder has possessed at his property situated at [address redacted] where greyhounds are trained, kept, or raced any part of an animal for the purpose of being used as lure to entice or excite or encourage a greyhound to pursue it, in circumstances where:

- An item found on Mr Vanderburg's property on 8 January 2019, comprised of:
    - 750 x 365 x 125 mm piece of red to tan-coloured fur and skin ("**hide**");
    - 1890mm in length, 10mm diameter aqua-coloured rope tied firmly around the hide; and
    - A 1-2mm diameter piece of fine orange string tied around hide skin, with pieces of similar string loosely stuck to the furred side of the hide; and
- Forensic examination by a Veterinary Pathologist definitively determined the hide is genuine animal skin and hair and despite the preparation/tanning process, the hairs are of animal origin and not consistent with synthetic fibres.

Charge 3 – Rule 86A, GWIC Greyhound Racing Rules

R86A Approved types of lures

A person shall only use or have in their possession at any place where greyhounds are, or are to be kept, trained or education or prepared to race, or racing, a lure that is approved by the Controlling Body.

[***LR86A****: (1) For Rule 86A, GRNSW approves a lure that: (a) is made up of synthetic materials only; and (b) may contain an audible device. (2) For the purposes of this Rule, "synthetic materials" means non-animal derived materials".*]

Particulars:

That Mr Leonardus Vanderburg, a registered Public Trainer and Breeder has used and/or had in his possession at his property situated at [address redacted] where greyhounds are kept, trained or raced or racing a lure that is not approved by GWIC, in circumstances where:

- An item found on Mr Vanderburg's property on 8 January 2019, comprised of:
    - 750 x 365 x 125 mm piece of red to tan-coloured fur and skin ("**hide**");
    - 1890mm in length, 10mm diameter aqua-coloured rope tied firmly around the hide; and
    - A 1-2mm diameter piece of fine orange string tied around hide skin, with pieces of similar string loosely stuck to the furred side of the hide; and

- Forensic examination by a Veterinary Pathologist definitively determined the hide is genuine animal skin and hair and despite the preparation/tanning process, the hairs are of animal origin and not consistent with synthetic fibres; and
- DNA analysis of part of the hide, visually "saliva stained", revealed DNA of domestic dog, consistent with Mr Vanderburg's admissions he has used the hide as a lure.

Charge 4 – Rule 86B(1)(b), GWIC Greyhound Racing Rules

R86B Offences relating to luring and baiting

(1) A person who, in the opinion of the Stewards or Controlling Body-

(b) attempts to possess, or has possession of, or brings onto, any grounds, premises or within the boundaries of any property where greyhounds are, or are to be trained, kept or raced, any live animal, animal carcass or any part of an animal for the purpose of being, or which might reasonably be capable of being, or likely to be, used as bait, quarry or lure to entice or excite or encourage a greyhound to pursue it;

Particulars:

That Mr Leonardus Vanderburg, a registered Public Trainer and Breeder has possessed on his property situated at [address redacted] where greyhounds are trained, kept or raced any live animal, animal carcass or any part of an animal, in circumstances where:

- A yellow and blue rope 785mm long and 7mm in diameter (Exhibit 2) was found on Mr Vanderburg's property tied to an arm of a metal rail in a shed ("**rope**");
- The rope was found to be knotted at one end in a loop and the long end of the rope threaded through the loop to form a self-tightening loop;
- DNA analysis of sampled fine hairs attached to the rope (samples AM306_03 and AM306_04), disclose the presence of European rabbit / domestic rabbit; and
- Evidence of a Veterinary Pathologist that the presence of these hairs was from rabbit being in close contact with the looped and knotted portion of the rope and that during contact there was some mechanism which caused exfoliation of hairs. Such a mechanism would have to involve friction between the rope and the animal fur and that friction would need to involve both the inside and outside portions of the rope. The configuration of the rope as a tightening loop (or noose) in consideration of the distribution of the hairs on the rope makes it very likely that the hairs came to be present there by an animal, or a body part thereof, being within the rope loop itself with the loop at least partially tightened.