RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

MONDAY 26 SEPTEMBER 2022
TUESDAY 27 SEPTEMBER 2022

APPELLANT ALEXANDER VERHAGEN

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULES 86(o), 86(x), 86(ac), 106(1)(c) and 106(1)(d)
6 x plea of not guilty and severity
4 x severity

DECISION:

1. 1 x106(1)(c)) severity withdrawn by appellant

2. 1x 86(x) severity, charge withdrawn by respondent.

3. 2 x 106(1)(d) appeal upheld.

4. 1 x 86(o) appeal upheld

5. 3 x 86(x) appeal upheld

6. 1 x 86(x) severity appeal dismissed , disqualification 3 months from 26 August 2022

7. 1 x 106(1)(c) severity appeal dismissed, suspension of 4 months to commence 26 August 2022

8. Appeal deposit refunded

GUILT DETERMINATION HEARING 26 SEPTEMBER 2022

1. The appellant, who is a licensed breeder and owner, relevantly, appeals against decisions of GWIC of 18 August 2022 to find that he has breached a number of rules, and, at 25 August 2022, on those matters to impose penalty against him.

2. The appellant originally faced some 27 charges. Of those 27, he pleaded guilty to a number and not guilty to a number of others. A considerable number of them were found not proven or withdrawn. Adverse findings were made in respect of 16 matters where penalty was imposed.

3. In respect of those matters where adverse findings were made, on appeal, there have been some not guilty pleas and severity appeals and in other matters only severity appeals.

4. The first matters for determination by the Tribunal are in respect of the four groups of charges to which pleas of not guilty were made to the GWIC stewards and for which denials of breach of the rules have been maintained before the Tribunal. Those matters are numbered, respectively, 13, 17, 18 and grouped 23, 24, 25. As stated, the Tribunal only deals with those matters now.

5. The background to these matters is that the appellant has been licensed for over 20 years. He has a considerable number of kennels, and he described them as kennels being both whelping, breeding and racing. He has recently, on his evidence, spent $200,000 upgrading his facilities. There are still some areas to be upgraded.

6. The appellant suffered catastrophic injury approximately four years ago and is now wheelchair-bound as a result of the loss of a leg.

7. In respect of his operational matters about his kennels, he generally assists about the racing kennels because he cannot access all of them by reason of his disability, but is more active in respect of his breeding operation and kennels generally. He is usually assisted on a daily basis by his wife. Assistance and/or access is occasioned by a daughter and others from time to time.

8. The appellant has, over his 20 years, on his estimate, had greyhounds produce some 100 litters, certainly more than 50, and, indeed, in one period of 18 months, there were 24.

9. The Tribunal assesses the appellant as an experienced breeder and by that a person able to assess greyhounds and their welfare. The appellant

satisfies the Tribunal that where required he will obtain veterinary advice and has done so through a number of veterinary practices over time. The evidence establishes that he has used a Dr Saunders for some considerable period of time, and with some frequency, who at one stage was attending his kennels up to weekly. Dr Saunders is now a home-based vet at least one hour away from the appellant's premises. There is a Clarence Town vet approximately half an hour away, which the appellant uses. And there is a breeding veterinary practice known as Sires on Ice some two hours away. The relevance of that latter will be returned to.

10. The Tribunal first deals with **charge 13**. It was specified and particularised as follows:

> Particulars - Charge 13 (Rule 106(1)(d))
> That Mr Alexander Verhagen, as a registered Public Trainer and Breeder at all material times, between 25 May 2021 and 27 May 2021 failed to provide veterinary attention to greyhounds in his care or custody, with the circumstances being:
> (a) Between 25 May 2021 and 27 May 2021, the greyhound 'Princess Zesta' ("Greyhound") was in located at Mr Verhagen's registered kennel address at 16 Cook Drive, Swan Bay ("Property") and was in his care;
> (b) On 25 May 2021 the Greyhound whelped a litter of pups by caesarean-section at the Williams River Veterinary Clinic. The Greyhound then returned to the Property that same date;
> (c) Between 25 May 2021 and 27 May 2021, the Greyhound attacked all ten (10) pups in the litter;
> (d) At least two pups have survived the Greyhound's attack;
> (e) Mr Verhagen failed to provide veterinary attention to the pups that survived the Greyhounds attack; and
> (f) The pups subsequently died as a result of their injuries.

11. In essence, this matter involved the death of two pups and the charge, of course, is failing to provide veterinary attention, under the old Rule 106(1)(d).

12. The bitch that produced the 10 greyhounds was the subject of a caesarean operation. She was returned to the premises and was under observation for a number of hours where she was seen to have settled down with the pups and was mothering them well. An American muzzle was placed on the mother and she was left for approximately one hour.

13. When the appellant and his wife returned, they found eight of the pups dead and two, in their opinion, were presumed to be and appeared to be alive, showing some signs of being alive, making no noise but slight movement.

14. Perhaps the most graphic of images is before the Tribunal, and that is two photographs taken of the subject greyhounds whilst they were alive.

Those photographs depict two greyhounds that have literally been torn apart. There are explicit signs of damage about the head area. There are parts of internal organs and other parts of the greyhounds lying beside them and evisceration of the most substantial extent apparent.

15. To an inexperienced, untrained outsider, the nature of those injuries can only be described as catastrophic. They were such that both the appellant and his wife were devastated, and devastated to such an extent that, on his evidence, he could not have driven a vehicle, nor in his opinion could his wife.

16. He immediately, based upon his experience of some 20 years, formed an opinion that they could not survive. Objectively viewed, that opinion must be seen as open to him. There is no doubt they were very close to death. He formed an opinion he was not capable of saving them. He was of the opinion that any delay in attending to them would not lead to their survival. He said that they were not screaming in pain, did not appear to be in pain, but in fairness, both before the Tribunal, before the stewards' inquiry and at other times, he acknowledged that there obviously must have been pain.

17. He had no immediate form of pain relief available. The only pain relief that could have been of any use whatsoever could only have been prescribed by a vet. He said in relation to this and other matters that the vet was at least half an hour away, it was after hours, that the vet would require an appointment be made and that would lead to a further delay. He determined, on the basis of all of that evidence, that there was nothing more he could do. In other words, even if he set out to get to the vet, he did not believe he would get there in time.

18. He also gave evidence that each of these pups was worth something up to $10,000 each and that accordingly he would have done anything he could to have kept them alive because of that value to him.

19. There was some issue about his subsequent notification form and subsequent interview about how long they lived, and on that evidence the Tribunal is satisfied on what he said today on oath that they did not survive very long.

20. It is the case for the regulator that the severity of the injuries was such that veterinary attention should have been obtained and they could live long enough for that veterinary attention to be obtained, even though the vet was some 30 minutes away. It is the case for the regulator that he made no attempt to phone a vet or even make inquiries of a vet but simply waited for them to die. And that was not consistent with his experience in the industry.

21. In response for the appellant, emphasis was placed upon the fact that he could do nothing for their pain, they were barely alive, treatment was at least half an hour away, even if he could get a vet to open the practice at that time, and that they died promptly. And, finally, that any veterinary attention simply could not have assisted these greyhounds.

22. This is a failure under 106(1)(d) to provide veterinary attention. There is no doubt that veterinary attention was not provided.

23. The whole of the rule must be looked at: “A registered person must ensure that greyhounds, which are in the person’s care or custody, are provided at all times with veterinary attention” – and then these are the critical words – “when necessary”. And the offence provision is that it is the person being responsible at the relevant time who fails to comply.

24. In determining this matter, the Tribunal cannot lose sight of the gravity of the injuries which each of these pups received. As described, they were horrific.

25. The Tribunal is of the opinion that the conclusion reached by the appellant that there was nothing in reality that could be done to keep these greyhounds alive, that the prospect of taking them, if he could get to a vet within the half-hour possible – and he describes how neither he nor his wife were capable of driving them to a vet – that he formed an opinion that they simply were not able to survive.

26. The issue then becomes one of aspects of pain and suffering. The Tribunal accepts that at some stage these greyhounds must have been in excruciating pain. But at the time they were observed by the appellant, the evidence that is available to the Tribunal is that there were no visible signs of pain, they having reached a stage of near death. It is possible, and it is conjecture, that their injuries at that point were so severe that they were incapable of depicting pain to an observer.

27. Therefore, the aspects of rushing them off in the hope that the vet would be available is no more than that which, with hindsight, the appellant determined was not going to help.

28. The rule requires veterinary attention when necessary. The totality of the evidence is that any veterinary attention would not have saved these pups. At best, it would have alleviated pain and suffering and, as described, it is not established on the evidence that by the time they reached a vet, a minimum of half an hour away, if immediate veterinary attention was available – and on the evidence that appears to be highly unlikely – that there would have been any alleviation of pain and suffering.

29. The conclusion is these injuries were so horrific that the Tribunal accepts the appellant’s expertise and explanation and is not satisfied,

despite the gravity of the matter, that he has failed to ensure veterinary attention when necessary.

30. Charge 13 is dismissed.

31. The next matter is **charge 17**. Again, it is 106(1)(d). Again, it is a veterinary attention when necessary matter:

Particulars - Charge 17 (Rule 106(1)(d))
That Mr Alexander Verhagen, as a registered Public Trainer and Breeder, on 10 November 2021, failed to provide veterinary attention to a greyhound in his care or custody, with the circumstances being:
(a) On 10 November 2021 the greyhound 'Lana Caprina' ("Greyhound") was located at Mr Verhagen's registered kennel address at 16 Cook Drive, Swan Bay ("Property") and was in his care;
(b) On 10 November 2021 the Greyhound whelped a litter naturally at the property, whereby four of the five pups whelped were very small;
(c) Mr Verhagen contacted Mr Saunders, a registered veterinarian, who did not have the facilities to assist with providing treatment to the litter;
(d) Mr Verhagen failed to provide the litter with the veterinary attention needed, and they ultimately died.

32. On this occasion, again, it was a litter born. The evidence is that the whelping produced a number of greyhounds, one of which was very large, one of which was deformed, and three of which were very small.

33. The appellant formed the opinion that they were not normally formed. It is to be remembered that the appellant had been associated with whelping on many, many occasions. He was able, in the Tribunal's opinion, to form an opinion that these very small pups needed some help.

34. The rule which he is said to have breached required him to obtain veterinary attention when necessary. The rule does not say you have to take a greyhound to a vet to meet the terms of veterinary attention. It could be implied.

35. The simple fact is that the last of the pups was born about 6 am, they having been produced throughout the evening into the early hours of the morning, and making a decision not to ring his friend and the regular vet who attended upon him, Dr Saunders, that he would not ring Dr Saunders until 8 am. He did so.

36. Dr Saunders has given evidence to corroborate the appellant's version. It is that the evidence establishes, both on the appellant's evidence and Dr Saunders' evidence, that there was a general description of one of the greyhounds being deformed and of others being very small. A discussion took place whether the greyhounds should be put down, which would

require them to be taken to a vet, or whether an attempt would be made to see if they could survive.

37. In that regard, the evidence of Dr Saunders is that he knows the expertise of the appellant and his ability to handle pups that need help and was, in Dr Saunders' terms, familiar and knowledgeable as to what to do. Therefore, Dr Saunders' advice to the appellant – and the key fact of this particular matter is that he took that advice and acted on it – was that the greyhounds should be fed and kept warm. In that regard, nutrition was to be given, and it was a veterinary product available to the appellant called Di-Vetelact. Also, there was a desire to produce, which the mothering greyhound does not produce immediately, some colostrum which would cause the pups to perhaps thrive.

38. The appellant has given evidence, which has not been contradicted, that he used a hot water bottle and a towel to provide warmth. There was also the heating in the whelping box. And also he fed them with a dropper in an attempt to give them the nutrition that they needed, and he did so for some period of time.

39. Dr Saunders confirms the appellant's evidence that the nearest vet, at Clarence Town, did not have a humidicrib. Dr Saunders, who was more than an hour away, did not have a humidicrib. The only place where the pups could have been taken with a humidicrib was at Sires on Ice, some two hours away, and that was a breeding facility, not an emergency veterinary facility. It was after hours and a booking would need to be made. And, in any event, it was the appellant's uncontested evidence that any inquiry of that vet would inevitably lead to advice that they were too busy to do something on the spot.

40. The Tribunal accepts the totality of the evidence on behalf of the appellant that taking the three pups to a vet was not an immediate priority, he having taken veterinary advice and he having complied with that veterinary advice and done all that was deemed necessary by a vet.

41. There is some suggestion that he did not seek veterinary attention because he did not want to pay the bill for Clarence Town. That was what he said in his interview with inspectors some many months later. He has explained in relation to this matter and others that at the time he was stressed and not well. The Tribunal understands that. But it is that a person who wishes to have the privilege of a licence is required to deal with inspectors in a proper and forthright fashion, telling the truth and not seeking to mislead the inspectors.

42. He told them that the vet bill there was too large and implied that he would not take the greyhounds to a vet because he was not going to pay another bill there. That is the implication. The appellant has given sworn uncontested evidence that in fact he always paid his bills, they were large,

some $40,000 to $50,000 a year, and there is no evidence that he was in a distressed situation with his accounts at Clarence Town Veterinary Practice which would give any credence to the story he advanced to the inspectors.

43. The Tribunal does not hold that mis-statement to the inspectors or the stewards against him. The Tribunal accepts it was a heat-of-the-moment comment when he was cranky but does not excuse it.

44. The Tribunal, it has to say, struggles to understand the concerns of the regulator on all of those facts and circumstances. He sought veterinary attention, he followed it, he complied with it. It was not practical to go to the other places, Clarence Town or Sires on Ice. The Tribunal does not conclude, whilst he might have known they would not survive, that it could be they would not survive because he failed to take them somewhere and obtain an assessment of them as to whether they were going to survive or not.

45. The Tribunal does not find, as the submissions for the respondent invite, that he caused their death by his failures.

46. The Tribunal does not find that he has breached the rule because he did not provide veterinary attention when necessary. As stated, the Tribunal is satisfied quite to the contrary that he obtained the appropriate advice in all the circumstances and with all his experience.

47. Charge 17 is dismissed.

48. The Tribunal turns to **charge 18**, what has been described as the failure to provide roll bars:

Particulars - Charge 18 (Rule 86(o))
That Mr Alexander Verhagen, as a registered Public Trainer and Breeder, between 17 November 2021 and 18 November 2021 did a thing at his registered kennel address of 16 Cook Drive, Swan Bay ("property") that was negligent, with the circumstances being:
(a) On 17 November 2021 the greyhound 'Little Prospect' ("Greyhound") was located at Mr Verhagen's registered kennel address at 16 Cook Drive, Swan Bay ("Property") and was in his care;
(b) On 17 November 2021 the Greyhound whelped a litter of pups at the Williams River Veterinary Clinic. The Greyhound and its litter returned to the property that same date;
(c) Between 17 November 2021 and 18 November 2021, the Greyhound has rolled onto two pups in the litter, squashing them and causing them to die.

49. It is necessary to put the obligations on a trainer into context in assessing the evidence on this matter. And that context is this: that the

Greyhound Racing Act mandates that a breeder such as the appellant will comply with the Codes of Practice.

50. The Code of Practice mandates in clause 4.15 that the whelping area provided will be safe.

51. The regulator has published a number of industry guides. The only one in evidence is Industry Practice Code 17.0 entitled “Whelping boxes”. It is apparently dated January 2021, before this incident. The Tribunal reads from two key points as follows:

> “Whelping boxes should also have a rail which runs around the inside of the box, about 15 – 20 cms from the floor. The purpose of this ‘crush rail’ or ‘pigrail’ is to stop the dam rolling over on top of a young pup and crushing it against the wall.”
>
> And later:
>
> “Size
>
> A whelping box must be large enough to allow the dam to lie comfortably, and accommodate all the puppies for the first four weeks. Greyhounds tend to have large litters of six puppies or more, so require a large whelping box. For a single box, 1500mm by 1500mm is a minimum”.

The guide goes on to state for other boxes which are not relevant.

52. The size of the whelping box that the appellant had is not in evidence. The fact is that at the time of the conduct alleged against him, there was no crush rail available.

53. The case for the respondent is that on 5 January and 12 January of that year the appellant reported to the regulator that on each of those occasions a pup had appeared to have been crushed by its mother. That is the extent of the evidence in respect of that. Certainly, it is quite apparent there was no roll bar or crush rail present in the whelping box on those occasions.

54. It is said, therefore, that the appellant is armed with the knowledge of the possibility of pups being apparently squashed. In addition, it was the appellant’s evidence that he is aware that on other prior occasions the same thing has apparently happened. He could not be precise about the numbers, but it was not that many times, he said in cross-examination.

55. The second limb is that a mere few weeks before, a kennel inspection was carried out and at that kennel inspection, conversation took place with

the appellant by the inspectors as to whether the appellant had roll bars, and it was pointed out to him that he did not.

56. The evidence establishes that neither inspector said to the appellant, “You must have roll bars”, or “you should have roll bars”, or “we recommend roll bars”. At its highest, it was implied that he should have roll bars.

57. The inspectors issued a work direction. That work direction did not mandate the installation of roll bars.

58. A mere few weeks later the mother of the pups did something and, on inspection of the whelping box, the two pups appeared to have been crushed. They were squashed.

59. The evidence does not establish how that squashing took place. For example, did the greyhound squash them in the middle of the whelping box, at the same time or separately? Did she squash them up against the wall? It is simply not known.

60. The Tribunal cannot find that the intention of the crush rail is other than to prevent crushing against the wall, as the Industry Practice Guide says. There is nothing that the Tribunal can see that the installation of a rail running around the inside of the box 15 centimetres above the floor would, in the absence of evidence, prevent a greyhound from rolling over, as it were, in the middle of a 1.5m by 1.5m minimum size box. There is no evidence about those matters before the Tribunal. There is no evidence of how their squashing took place. Therefore, the failure to have the roll bar may or may not be critically important to the way in which these two greyhound pups died.

61. There is no doubt, in the Tribunal’s opinion, that a breeder of this experience should be aware of the believed minimum standards for whelping boxes. It is apparent that this appellant does not have recourse to the GWIC website on any regular basis to keep himself up to date with such things as Industry Practice Guides. There is, indeed, no evidence from him at all that he ever read an Industry Practice Guide or knew anything about it.

62. The standard expected of an experienced breeder is that that breeder will have, especially when armed with prior knowledge, taken all steps necessary to ensure the welfare of greyhounds by keeping them safe. But there is what might be described as novus actus interveniens, as the lawyers would call it, namely, an intervening act between the proper forming of that opinion and the death of these two pups. And that was the actions of the inspectors.

63. The inspectors did not, either orally or in the work direction, require the appellant to install a roll bar. When subsequently directed after the event, the appellant did so.

64. This is a negligence matter. The standard of care required, therefore, is, as described, that he should have done it. But coloured, on a test of negligence, by the fact that the experts – the inspectors – did not touch upon it at a level where the appellant formed the opinion that it was necessary to do so for the safety of his greyhounds.

65. The appellant has been at pains to point out that his prior experience, as described, is not such that he had a belief that a roll bar would provide the necessary protection to prevent this type of injury. It becomes, therefore, that whether, objectively viewed, the ingredients of negligence, which are invited and which have been summarised in providing a safe environment, are such that when he did nothing to prevent it, he has been negligent.

66. It is a strong case against him, but the Tribunal is much persuaded by the inspectors' actions and/or inactions in respect of the appropriate cautionary note to be given a mere short period of time before this incident took place. And the Tribunal is persuaded by the fact that he can be comforted in his belief by reason of the fact that when directed to do so, he immediately did it.

67. The Tribunal, therefore, is not satisfied by the respondent that the element of negligence which is invited is established.

68. Charge 18 is dismissed.

69. The Tribunal turns to **charges 23, 24 and 25**. In essence, these plead the same facts but for three different pups. This matter raises some intriguing modern breeding issues:

Particulars as amended on 18 August 2022 - Charges 23 (Rule 86(ac))
That Mr Alexander Verhagen, as a registered Public Trainer and Breeder at all material times, was neglectful or engaged in conduct that was dishonest, corrupt or improper in connection with the breeding or registration of greyhounds in circumstances where:
(a) On 25 October 2019, Mr Verhagen completed an application for registration of a litter, registering the greyhound now known as 'Sketchy Carter' (Ear Brand: NIDNH, microchip: 956000007849051) ("the greyhound") as sired by 'Fernando Bale' and born to 'Smiley Mulwee';
(b) On 17 August 2021 the Equine Parentage & Animal Genetic Services Centre issued a Certificate of DNA Analysis, confirming that 'Smiley Mulwee' and 'Fernando Bale' did not qualify as parents of the greyhound; and

(c) By registering the greyhound as a pup in a litter in which it did not qualify, Mr Verhagen engaged in conduct that was neglectful, dishonest, corrupt, or improper.

Particulars as amended on 18 August 2022 - Charges 24 (Rule 86(ac))
That Mr Alexander Verhagen, as a registered Public Trainer and Breeder at all material times, was neglectful or engaged in conduct that was dishonest, corrupt or improper in connection with the breeding or registration of greyhounds in circumstances where:
(a) On 25 October 2019, Mr Verhagen completed an application for registration of a litter, registering the greyhound now known as 'Lulu Smile' (Ear Brand: NIDNJ, microchip: 956000007854722) ("the greyhound") as sired by 'Fernando Bale' and born to 'Smiley Mulwee';
(b) On 17 August 2021 the Equine Parentage & Animal Genetic Services Centre issued a Certificate of DNA Analysis, confirming that 'Smiley Mulwee' and 'Fernando Bale' did not qualify as parents of the greyhound;
(c) By registering the greyhound as a pup in a litter in which it did not qualify, Mr Verhagen engaged in conduct that was neglectful, dishonest, corrupt, or improper.

Particulars as amended on 18 August 2022 - Charges 25 (Rule 86(ac)):
That Mr Alexander Verhagen, as a registered Public Trainer and Breeder at all material times, was neglectful or engaged in conduct that was dishonest, corrupt or improper in connecting with the breeding or registration of greyhounds in circumstances where:
(a) On 25 October 2019, Mr Verhagen completed an application for registration of a litter, registering the unnamed female greyhound (Ear Brand: NIDNF, microchip: 956000007840365) ("the greyhound") as sired by 'Fernando Bale' and born to 'Smiley Mulwee';
(b) On 15 December 2021 the Equine Parentage & Animal Genetic Services Centre issued a Certificate of DNA Analysis, confirming that 'Smiley Mulwee' and 'Fernando Bale' did not qualify as parents of the greyhound;
(c) By registering the greyhound as a pup in a litter in which it did not qualify, Mr Verhagen engaged in conduct that was neglectful, dishonest, corrupt or improper.

70. Simply put, the facts are that the appellant had a dam which was sent to Sires on Ice for insemination. Insemination took place. Other actions may or may not have taken place. The dam was returned to his premises, whelped six pups, and by a prior arrangement with a Mr Ivers, three of those pups were given to Mr Ivers.

71. The pups had been maintained at the appellant's kennels. Access to those kennels was available to his wife, his daughter and two others, on an occasional basis.

72. Some six to eight weeks later, the required vaccinations were administered and later the greyhounds were ear branded and microchipped.

73. The three pups left the appellant's premises ear branded and microchipped, went to Mr Ivers, who subsequently disposed of them, and another person, with one, having regard to the form of Smiley Mulwee and expecting it to race well and it didn't, determined to breed it and had DNA testing carried out.

74. As a result of that DNA testing, the other two greyhounds were tested and it was established that when the appellant completed the notification of registration of the breeding for the three and stating that the sire was a greyhound known as Fernando Bale, it was not in fact the father of the greyhounds, and the mother, Smiley Mulwee, was not in fact the mother of the greyhounds.

75. That meant that whatever happened prior to the whelping and whatever happened after the greyhounds left the appellant's premises does not need to examined.

76. The issue is what happened from the moment of whelping until the ear branding and/or microchipping.

77. In respect of ear branding, the totality of the evidence is such that the Tribunal is satisfied that the ear branding of the pups could not have been changed. As to the microchip, there is some vague evidence from the appellant about the capacity for a microchip to be removed or fall out, but that when the greyhounds left his premises, they were tested under microchip testing and the microchips that were there were the numbers subsequently tested with DNA certification. So that is not an issue that the Tribunal finds falls in favour of the appellant at all.

78. It is that there is simply no evidence of what happened from the whelping to the time they left. It is not known. The appellant has no explanation. Not unsurprisingly, the regulator has tried to find an explanation and cannot. Various possibilities have been suggested, namely, that the greyhounds were swapped.

79. The evidence is noted that there was a rumour about only three pups being born and not six, but there is no evidence to put weight to that rumour, and it has not formed part of the proceedings before the Tribunal.

80. It is, at the end of the day, the Tribunal simply does not know, the regulator does not know, it is the evidence of the appellant that he does not know, what happened. Was there a mix-up of the pups? Was there nefarious activity which has not been charged? It is not known.

81. What is left is the charge that was laid, and it is negligence. And it is negligence in completing a form and stating that the three pups had the breeding history set out on that form. And it is apparent they did not.

82. What then is the act of negligence? It is the case for the appellant, who bears no burden, that it was his genuine belief at the time he completed the form and lodged it that it was correct.

83. What is there to establish that in his mind he failed to make due inquiry or failed to take other steps that a responsible breeder notifying the regulator in a matter as important as breeding should have done? There is nothing advanced other than the fact that he was negligent when he completed the form because he must have had some sort of mix-up which he should have done something to avoid.

84. But what is that something he should have done to avoid, on the evidence, it not being a case where he has acted corruptly or criminally or otherwise. It is that it must focus upon what was in his mind when he completed the form, and that can only be gleaned from the evidence before the Tribunal. And there is nothing that has been established by the regulator that establishes that he failed to meet a duty of care, that he could have done anything, because he did not know about it, which is as high as the evidence can go.

85. It could well be that this appellant has engaged in the most improper conduct. Two things: firstly, that is not alleged against him and, secondly, it is not able to be established on evidence.

86. He has no prior matters of improper behaviour prior to this group of matters that all came together. And there is no reason why his inability to provide an explanation should be rejected on the evidence before the Tribunal, which would mean that he failed to do something or he did things he should not have done when he completed that form.

87. The ingredient of negligence in completing the form is not established.

88. Charges 23, 24 and 25 are dismissed.

PENALTY DETERMINATION HEARING 27 SEPTEMBER 2022

89. Yesterday, the Tribunal determined appeals against the finding of breach of the rules in respect of this appellant and stood over until today the question of penalty in respect of three matters.

90. At the commencement of today's penalty hearing, **charge 27** was withdrawn by the respondent. That means that when considering the issue of penalty on matters 14 and 21, the Tribunal notes that there were originally 27 matters, as it expressed yesterday, and of those, 15 were the subject of penalty orders, and the balance being either not proven or withdrawn. Of the six matters that were for hearing, each of them was

found to be dismissed. In **charge 9**, the severity appeal was withdrawn by the appellant.

91. In dealing with the last two matters, the Tribunal has regard, as the submissions for the appellant have correctly pointed out, that there needs to be a consideration of totality. Whilst it is open to address these matters on the basis that they were all individual offences, some were linked in a minor way. But at the end of the day, a determination of penalty in total must not be oppressive.

92. The Tribunal is about to deliver a decision in a harness racing appeal in which for the first time the principles identified by the High Court in Australian Building and Construction Commissioner v Pattinson [2022] HCA 13 were brought to attention and in that other jurisdiction an invitation extended to the Tribunal to apply the principles from it.

93. This is the first GWIC, or greyhound-related, appeal and in fact will be the first occasion on which the Tribunal has expressed views about the Construction case, or Pattinson, as it is becoming known. It has been applied a number of times, the Tribunal was told in the harness racing appeal, in the courts.

94. The Tribunal has determined on this penalty decision that it will not embark on the detailed analysis that will fall in that appeal, which is in fact Amanda Turnbull v Harness Racing NSW, which will be delivered reasonably soon.

95. Suffice it to say that the Tribunal has expressed for a long time that penalty is a civil disciplinary determination, it is not an issue of punishment. The Tribunal's function is to find a message to be given to this appellant, the industry and others generally which will indicate the consequences that will flow from certain type of conduct. It is necessary to have regard to facts at the present time but look to the future.

96. There are many other principles. They do not need to be canvassed in this appeal. Suffice it to say that the Tribunal notes that the High Court said at 9:

> "… the purpose of a civil penalty is primarily … the promotion of the public interest … by deterrence of others."

97. As the Tribunal will note in Turnbull, it has surrendered its ground in respect to the use of the word message rather than deterrence. Because if the High Court is going to use it, then obviously it must be appropriate for civil disciplinary penalties regardless of the Tribunal's view that it is not.

98. The criminal law principles have no part to play in the determination of this matter. There must be a penalty, as described, which makes it clear

that it is not acceptable to breach rules as a cost of doing business. Deterrence, as expressed, is focused on the future, and those are the necessary principles in that case relevant to today.

99. What then are the appropriate civil disciplinary penalties for this appellant?

100. The first matter is **Charge 14**:

Particulars - Charge 14 (Rule 86(x))
That Mr Alexander Verhagen, as a registered Public Trainer and Breeder at all material times, made a false statement to a GWIC Inspector in the execution of their duty, in circumstances where:
(a) Between 25 May 2021 and 27 May 2021, the greyhound 'Princess Zesta' ("Greyhound") was in located at Mr Verhagen's registered kennel address at 16 Cook Drive, Swan Bay ("Property") and was in his care;
(b) On 25 May 2021 the Greyhound whelped a litter of pups by caesarean-section at the Williams River Veterinary Clinic. The Greyhound then returned to the Property that same date;

(c) Between 25 May 2021 and 27 May 2021, the Greyhound has attacked all ten (10) pups in the litter;

(d) At least two pups have survived the Greyhound's attack;

(e) Mr Verhagen failed to provide veterinary attention to the pups that survived the Greyhounds attack; and

(f) During an interview with Inspector Barrow and Inspector Turner on 9 November 2021, Mr Verhagen stated that he took the pups that had survived the Greyhound's attack to the vet in circumstances where he was aware that this was a false statement.

101. It is noted that the first matter is an appeal against a disqualification of 3 months. And it relates to a false statement to an inspector in the course of duty.
102. It is the Tribunal's opinion, and that of the regulator, that such conduct must be the subject of substantial deterrence. It is the fact that the industry cannot operate if licensees who have the privilege of a licence feel that they can get away with making false statements to evade detection of offences.

103. Here, the facts are that the appellant had a greyhound which produced a litter, two of that litter died as a result of the injuries they had and were the subject of a charge, and the other eight were not subject to a charge, so all 10 in the litter died.

104. The appellant was spoken to by inspectors and he said this:

> "I took them to the vets.
>
> Question: Is that the same day?
>
> Answer: Yeah."
>
> And later:

> "Answer: I'm only guessing, it could have been the next day some time. But anyway, they – the vet said they're all, you know, the injuries they've got, they'll be lucky to make it and they didn't."

105. Questioned again about it possibly being the next day and then questions about whether the pups were in pain. And then he was questioned:

> "How come you waited till the next day?
>
> Answer: Well, I don't even know whether – I can't recall whether it was the next day or that day."

106. The appellant accepts that they are false statements. As determined yesterday, he did not take the two pups to a vet, and the Tribunal set out in considerable detail the reasons why he did not, and they are not repeated.

107. The statement was made to an inspector some six months after the pups had died. It was a time when the appellant told the stewards' inquiry that he was frustrated and under stress, and he had earlier referred to other disabilities from which he was suffering at the time of the kennel inspection. It was his belief it was only kennel inspection, but he was asked questions in relation to other matters. The Tribunal sees nothing in his favour in respect of that.

108. He has submitted that the death of the pups was a harrowing experience. The Tribunal accepts that. But this was six months after the event that he made the false statement.

109. The appellant does not establish to the Tribunal's satisfaction that aspects of frustration or stress or the harrowing experience that the death of the pups occasioned provided any justifiable reason for the lie – the falsehood – to the inspector.

110. The gravity of the matter is not that he did not gain anything from it. There was nothing to be gained. The Tribunal agrees with that submission. But it was what he potentially sought to avoid. That is, in his sure knowledge as a 20-year experienced trainer and breeder of substantial numbers of litters, that he was lessening the gravity of his conduct in the eyes of the regulator by saying that he had undertaken veterinary examination or arranged it on behalf of the two pups. That is where the false conduct has an element of seriousness about it.

111. But the regulator relies upon another ingredient of seriousness, and that goes to objective seriousness of his conduct, and that is the inspectors were then required to undertake investigations. They inquired of the

veterinary practices, and it is said they made other inquiries which are not in evidence. There is no doubt that they did so.

112. That sending of the inspectors on a fruitless trail must have been known to the appellant when he uttered the words that he did, the Tribunal having determined his frustration and stress or any other disabilities he then had would not have caused him to offer that falsehood.

113. On an objective seriousness basis, therefore, the Tribunal considers that he has not displayed that he should continue to have the privilege of a licence. The industry cannot operate on the basis of lies to stewards. The office of steward is too important in the racing codes and the privilege of a licence takes with it not just the obligation to comply with the rules, and a specific rule about telling the truth to stewards, but it carries with it that moral obligation to ensure that stewards are not subject to false information which causes them to waste their time. It is, therefore, a serious breach.

114. What then is to be found by aspects of parity?

115. In that regard, the Tribunal was taken to a Commission decision of Francis, undated, a starting point of 12 months, false statement on a registration application. Boyd, Tribunal, 8 October 2021, false statements by a trainer. Starting point of 12 months' disqualification. Mabbott, Tribunal, 30 November 2021, where 4 months' disqualification was imposed. And that involved false declarations in an application for renewal of registration and failing to disclose criminal offences, which were of graver import there than here, of corruption of betting outcomes, and also that he had been disqualified from the harness racing industry. There the 4-month disqualification was considered appropriate.

116. The appellant has a number of subjectives which were summarised in considerable detail yesterday, and each of those are taken into account and entitle him to some recognition, although he did have a prior cobalt-related matter some years ago.

117. It was also the fact that this conduct occurred in the context of numerous visits and kennel inspections and other conduct. The appellant must have known that he was under supervision, whether he liked it or not, and one can understand his frustration, but that goes with the territory of having the privilege of a licence in an integrity and welfare field.

118. The appellant admitted the breach by pleading guilty to the stewards. They considered 25 percent was an appropriate discount, and so does the Tribunal.

119. It is quite apparent from the Construction Commission case that the Tribunal, in looking to the future, has to have regard to that aspect of

deterrence to ensure the public interest is appropriately protected for the benefit of this industry.

120. The ultimate conclusion is that the stewards were, in all probability, not manifestly excessive in their determination, but relatively generous in it and not misguided. The Tribunal is not deciding on the correctness or otherwise of their decision, but it merely reflects the regulator's opinion of what an appropriate penalty was, consistent with precedent, but based upon the facts and circumstances of this case.

121. Without applying mathematical formulae – and, indeed, there is discouragement in the High Court case from doing that – it is that at the end of the day the Tribunal determines that the period of disqualification that the stewards found to be appropriate squarely meets the Tribunal's opinion of an appropriate penalty for the conduct for the reasons expressed.

122. Accordingly, the Tribunal imposes a period of disqualification of 3 months.

123. The severity appeal in respect of that charge is dismissed.

124. The second matter is **charge 21**:

Particulars as amended on 18 August 2022 - Charge 21 (Rule 106(1)(c)) That Mr Alexander Verhagen, as a registered Public Trainer and Breeder at all material times, failed to provide kennels constructed and of a standard approved by the Controlling Body and which are kept in a clean and sanitary condition at his registered address at 16 Cook Road, Swan Bay ("Property"), with the circumstances being

1. On 9 November 2021, GWIC Inspectors attended at the Property to conduct a kennel inspection;

2. During the inspection the following deficiencies were identified with the kennels at the Property: a. A large build up of fur, dirt and debris in kennels that were yet to be cleaned;

b. Lack of clean, hygienic and dry bedding for all greyhounds;

c. A kennel in an outdoor yard with an A frame shelter that was open on two sides, thus not providing shelter from the weather;

d. A piece of tin leaning against a fence used as shelter for two greyhounds in an outdoor yard numbered '10'. The tin had sharp edges and provided limited shelter from the weather;

e. The outdoor yards, of which there are 16, had large holes, exposed sharps such as tin and star pickets;

f. Food waste present in the outdoor yards;

g. Lack of clean water containers; and

h. A carport like structure, open on three sides, used as a kennel area. The carport had dirt flooring, which was unable to be cleaned, with bedding placed atop the dirt.

3. As a result of that inspection Mr Verhagen was issued with written work directions to address the deficiencies identified;

4. On 29 November 2021 GWIC Inspectors again attended at the Property to conduct a kennel inspection;

5. During the inspection the following deficiencies were identified with the kennels at the Property: a. Lack of clean, hygienic and dry bedding for all greyhounds;

b. Food waste present in the kennel area;

c. Two carport like structures being used as a kennel areas. The areas had dirt flooring and were unable to be cleaned. Two of the three greyhounds in this area did not have any bedding.

125. Particular 5(b) was not pressed.

126. This involved a failure to do what he was told to do as a result of the kennel inspection on 9 November. The inspectors had been to his premises in the past and he had been the subject of kennel inspections and work directions in the past. This was nothing new to him. It was known to the appellant, and squarely so, and that he was, firstly, under observation but, secondly, that the nature of his operation was subject to scrutiny.

127. This is a welfare issue, not an integrity issue. Welfare is a primary consideration for greyhounds. And those with the privilege of a licence, such as a trainer and breeder, must go completely out of their way to ensure the welfare of their greyhounds.

128. It is not suggested that this appellant has neglected the welfare of his greyhounds, it is the potential for doing so by reason of the failures identified by the inspectors at the second kennel inspection some weeks later. It is to be remembered the facts also indicated the greyhounds appeared to be happy and in good condition and otherwise well-kept. So, it is not that there was a consequence of his failures, but it is the potential for it.

129. The remaining matters are a lack of clean, hygienic and dry bedding for all greyhounds and two carport-like structures being used as a kennel area, with dirt flooring unable to be cleaned and a lack of bedding.

130. The work direction was canvassed in some detail in the original decision and is not repeated.

131. The Tribunal considers that the aspects of welfare identified by the stewards in their decision is that the appropriate civil disciplinary penalty must carry with it a form of loss of privilege. Again, parity is relied upon.

132. It was that there is also the fact that the appellant has not admitted this breach to the stewards but has done so before the Tribunal. He is

entitled to recognition of the fact that he did not put the regulator to its burden of proof in respect of this matter but has maintained here it is a severity appeal only before the Tribunal. That would not entitle an appellant to a full 25 percent discount, and certainly the utilitarian value before the Tribunal carries with it, often expressed in terms when more mathematical considerations are given, probably 10 to 15 percent.

133. The regulator is concerned that it is some 12 months after earlier conduct as described by the Tribunal was detected and there were concerns about it, and failures in respect of it, and here the appellant is again failing in respect of his conduct.

134. The Tribunal is asked to consider parity cases and precedent, and those that are given are the matter of Miller, a Commission decision of 27 September 2019. There were 13 breaches for housing greyhounds in trailers rather than proper housing which had been appropriately constructed and maintained, and he received an 18-month disqualification in total. It is uncertain how that was calculated. Suffice it to say that the Tribunal notes disqualifications.

135. Some comparisons can be made from the conduct here to there in that the appellant was in the process of renovating his kennels, that he had expended in total some $200,000 in that renovation and the kennels are now considered to be of appropriate standards, as the Tribunal understands evidence elsewhere. But that because he was rebuilding, it was necessary to use the carport as described, which, it is accepted now by the plea of guilty to the Tribunal, did not meet the appropriate standards because it could not be cleaned, etc.

136. The effect of the inspection was to find a lot of water about the premises. They were muddy and wet and therefore it makes the fact that the greyhounds were required to be on a dirt floor, which could not be cleaned properly, of concern, although the evidence does not go so far as to say the greyhounds, for bedding purposes, were in fact the subject of any moisture penetration.

137. Also, there is the fact that there were originally eight work directions, and of those only two remained for consideration by the stewards and the Tribunal. He is entitled to the benefit, because he was criticised on the fact that he had previously failed, that he had cured six of the eight concerns of the stewards, and it is now his evidence that his kennels are fully compliant and that remedial action is relevant to the issue of the necessary level of deterrence to which he must be subject.

138. The hygiene relates to having newspaper on the floor in various areas and a cleaning up of that. That was a matter where the Tribunal was not persuaded that a level of deterrence of any great level was required, it was a measure that this appellant chose to adopt to find a practical means,

allowing for his disability, for cleaning of the kennels. There is, of course, the issue that he could not reach one of these kennels by reason of his disability.

139. The Tribunal agrees with the respondent's submission that whilst he was rebuilding he should have made more appropriate arrangements. It is not necessary to canvass a range of those arrangements.

140. The Tribunal goes back to issues of parity. Gould and Fahey, decision of GWIC, 22 August 2019. A failure to simply bring kennels up to date. Penalties of 18 months reduced to 6 months to be served and 12 suspended, and 15 months with 9 months to be served and 6 suspended were considered appropriate, noting these matters were suspensions.

141. There are then two Greyhound Racing Victoria matters, one of which is Harvie, where there were makeshift kennels, not dissimilar to here, as it were, with damaged wire and tarpaulins and dirt floors. He got a 6-month suspension. The matter of Green, again Victoria, 21 September 2021, unhygienic kennels, ripped bedding, rubbish or faeces and grass and weeds all built up, and a 6-month suspension. The matter of Russell, again Victoria, 27 July 2021. Kennels not compliant with the Code of Practice, and a suspension of 3 months. And that was on a plea of not guilty.

142. Therefore, the precedent matters clearly establish the view of the regulatory bodies that a suspension is appropriate for this type of conduct.

143. The Tribunal describes it as a welfare case. There are some ameliorating circumstances here which, in the Tribunal's opinion, reduce the extent to which the message of deterrence is required to be given on that public interest consideration to this appellant, particularly looking to the future, as he has cured all of these matters, but it is that he is to receive, as it is described, a civil disciplinary penalty for yet another occasion on which his kennels were not to standard.

144. The Tribunal does not see any reason why the determination of the stewards – and it is for the Tribunal to determine for itself – was in error in their considering from the regulator's point of view that a 4-month suspension was appropriate. The Tribunal is of the same opinion.

145. In those circumstances, a 4-month suspension for charge 21 is imposed.

146. That means the severity appeal is dismissed.

147. There is one remaining matter and that is the issue of cumulative or concurrent, and it would be anticipated that matters such as this, being of a different type, would be served cumulatively.

148. As canvassed with the parties in opening submissions, the Tribunal has formed the opinion, consistent with the parties' submissions, and in particular taking into account the principle of totality, with all of those remaining penalties to which the appellant has been subject, although successful on some, and seeing there is a very minor nexus between the two aspects of the conduct – and that certainly is they occurred on the same date, 9 November, as it were and subsequently later – but that nexus is so thin it would not carry any weight whatsoever.

149. There is also the aspect of administrative difficulties of trying to find how to make cumulative a penalty of disqualification and then a suspension because of the loss of licence that travels with a disqualification.

150. In the circumstances, the Tribunal orders they be served concurrently.

151. As no stay was granted in this matter, the Tribunal orders that each penalty, as agreed between the appellant and the regulator, is to commence on 26 August 2022.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

152. Application is made for a refund of the appeal deposit.

153. The hearing before the Tribunal has comprised contested findings from the stewards below and in each of the matters in which a contest was engaged, the appellant has been successful.

154. The Tribunal notes that the majority of the work in preparation and in the deliberations in respect of that have taken much more than the time spent, despite the assistance with the submissions on penalty and on the penalty hearing, and the fact that the two remaining penalty appeals were not successful has played a much smaller part.

155. Having regard to the small sum involved, to seek to impose some percentage between 50 percent and 100 percent to reflect those factors, it would seem to the Tribunal to be unnecessary. The majority of the concerns of the appellant in relation to the length of loss of privilege are far outweighed in respect of the defended matters, as it were, than they were in the penalty matters.

156. In those circumstances, the appeal deposit is ordered to be refunded.
