QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Queensland Racing Integrity Commission v Kadniak* [2017] QCATA 102
PARTIES:	**Queensland Racing Integrity Commission (Applicant)** **v** **George Kadniak (Respondent)**
APPLICATION NUMBER:	APL192-16
MATTER TYPE:	Appeals
HEARING DATE:	12 April 2017
HEARD AT:	Brisbane
DECISION OF:	**Justice Carmody**
DELIVERED ON:	25 September 2017
DELIVERED AT:	Brisbane

ORDERS MADE: THE APPEAL TRIBUNAL ORDERS THAT:

1. **The appeal is dismissed.**

2. **The parties are to exchange and file (with detailed supporting written submissions) any application for costs under s 102 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) by 4.00pm on 3 November 2017.**

3. **In the time allowed for the exchange of submissions, the parties can, of course, discuss an agreed order.**

4. **As to the exchange of submissions, it is ordered that:**

    (a) **George Kadniak is to file in the Tribunal two (2) copies and serve one (1) copy of any submissions in relation to costs he wishes to make, by 4:00pm on 13 October 2017.**

    (b) **Queensland Racing Integrity Commission is to file in the**

Tribunal two (2) copies and serve one (1) copy of any submissions in relation to costs it wishes to make, by 4:00pm on 27 October 2017.

(c) George Kadniak must file in the tribunal and give to Queensland Racing Integrity Commission any written submissions in reply on costs by 4:00pm on 3 November 2017.

(d) The application for costs will be determined on the papers by written submissions from the parties, and without an oral hearing, not before 6 November 2017.

CATCHWORDS: ASSOCIATIONS AND CLUBS – RACING CLUBS AND ASSOCIATIONS – DISQUALIFICATION FOR CONTROL RULE BREACHES – where greyhound trainer was disqualified for using prohibited substances – when certificates of analysis issued by the same laboratory or facility – where the Local Rules of Racing (Greyhound Racing) were amended between the time of the original offence and the appeal – where the industry practice for issuing certificates of analysis for prohibited substances differed from the Act and rules – where the respondent had a legitimate expectation that the industry practice would be followed

CIVIL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – where the judicial discretion does not extend to a tribunal with powers to dispense with the ordinary rules of evidence

Evidence Act 1977 (Qld) s 98
Racing Act 2002 (Qld) (current) ss 214, 215, 217, 222(2)
Racing Act 2002 (Qld) (as at 1 July 2014) ss 78(2), 79, 91(1), 91(5), 115(3), 132, 143(3)-(4), Sch 3
Statutory Instruments Act 1992 (Qld) s 32
Greyhounds Australasia Rules (GAR) r 1, 5, 6, 80(3), 80(5), 80(6), 83(3).
Local Rules of Racing (Greyhound Racing) (Qld) r 1, 18(2)

Alcan (NT) Aluminium Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27
Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd [1982] QB 84
Attorney-General (NSW) v Quin (1990) 170 CLR 1
Benham v Queensland Harness Racing Board [2004] QRAT 020
Bradley v Jockey Club [2005] EWCA Civ 1056
Bunning v Cross (1978) 141 CLR 54
Chapmans Ltd v Australian Securities Exchange Ltd (1996) 67 FCR 402
Con-stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226
French v Scarman (1979) 20 SASR 333
Gange v Sullivan (1966) 116 CLR 418
Harper v Racing Penalties Appeal Tribunal Western Australia [2001] WASCA 217
Kavanagh v Racing Victoria Limited [2017] VCAT 386
Lambourn v Racing Queensland Limited [2013] QCAT 699
Miller v Miller (1978) 141 CLR 269
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
Momcilovic v The Queen (2011) 245 CLR 1
Moratic Pty Ltd v Gordon [2007] NSWSC 5
Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363
New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France [1919] AC 1
Paponette v AG of Trinidad and Tobago [2012] 1 AC 1
Pearce v Button (1985) 60 ALR 537
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537
Police v Dunstall (2015) 256 CLR 403
Polycorpou v Australian Wire Industries Pty Ltd (1995) 36 NSWLR 49
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355
Queensland Racing Integrity Commission v Belford [2017] QCATA 42
R v Brewer; ex parte Renzella [1973] VR 375
R v Jacobson [1931] AC 466
R v Lobban (2000) 77 SASR 24
R v North and East Devon Health Authority; Ex parte Coughlan [2001] QB 213
R v Swaffield (1998) 192 CLR 159
R (Hill) v Institute of Chartered Accounts in England and Wales [2013] EWCA Civ 555
Re Minister for Immigration and Multicultural and

Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1
Stampalia v Racing Penalties Appeal Tribunal of Western Australia [1999] WASC 7
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418
Swinburne v David Syme & Co [1909] VLR 550
Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73
Waltisbuhl v Queensland All Codes Racing Industry Board [2016] QCAT 204
Wilson v First Country Trust Ltd (No 2) [2004] 1 AC 816

APPEARANCES and REPRESENTATION (if any):

APPLICANT/APPELLANT	Mr S Mcleod of Counsel instructed by Lander and Rogers Lawyers
RESPONDENT	Mr J Murdoch of Counsel and Mr T O'Brien of Counsel instructed by Attwood Marshall Lawyers

REASONS FOR DECISION

[1] The appellant[1] replaced Racing Queensland as the peak industry control body of racing within the state in 2016.[2] The respondent is a licensed greyhound trainer. Both parties are bound by contract to adhere to[3] the national (GAR) and the local (LR) rules[4] made under the *Racing Act 2002* (Qld) (the Act).[5]

[2] The LRs are incorporated into and complement the GARs to cater for jurisdictional variations.[6] They are statutory instruments[7] and commence on the day they are made.[8] The Act prevails over the rules to the extent of any inconsistency.[9] The 2002 Act was significantly amended in July 2016, and subsequent references to it are to the version current as at 1 July 2014.

[3] GAR 83(2)(a) requires greyhound owners and trainers to ensure that a dog competing in a race is presented drug free. Liability for a so called presentation offence is strict; that is, it does not depend on proof of intention or other degree of fault. It can be committed negligently or even inadvertently.

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1 QRIC or the Commission.
2 *Racing Act 2002* (Qld) (current) s 222(2).
3 *R v Brewer; ex parte Renzella* [1973] VR 375.
4 *Local Rules of Racing (Greyhound Racing)* (Qld) (LR).
5 *Racing Act 2002* (Qld) ss 78(2), 91(1).
6 *Greyhounds Australasia Rules* (GAR) r 5-6.
7 *Racing Act 2002* (Qld) s 79.
8 *Statutory Instruments* Act 1992 (Qld) s 32.
9 *Racing Act 2002* (Qld) s 91(5).

[4] Proof of presentation rule breaches is facilitated by a statutorily prescribed system of certification under which a positive test result for a banned substance creates, not merely evidences, liability for a penalty. Thus, if a prohibited substance is detected in a sample, the person in charge of the greyhound "shall be guilty of an offence".[10]

[5] One of the respondent's dogs, Your Deal, put in a winning run at Albion Park on 12 October 2015. A pre-race urine sample later tested positive for an excessive quantity of cobalt. Cobalt[11] above a mass concentration of 100 nanograms per millilitre is a banned substance.[12]

[6] The stewards disqualified the respondent for 18 months based on his plea of guilty and the evidence of two certificates of analysis (Exhibits (Ex) 5 and 13) issued by different analysts from the same laboratory. Without the certificates there is no evidence of the concentration of cobalt in the system of the dog before the race.

[7] The respondent successfully appealed to the Queensland Racing Disciplinary Board (QRDB) by way of rehearing against both charge and penalty.

[8] The QRDB held, in effect, that facilitated proof of a contrary presentation by means of an analyst's certificate required conclusivity and as Ex 13 was a nullity because it was not issued by another drug testing laboratory, not even a prima facie case of breach of the presentation rule was made out.

[9] QRIC appeals the QRDB decision on two specific questions of law. The first is that QRDB misinterpreted the rules and wrongly excluded a conclusive certificate of analysis (Ex 13) by confusing a common practice with a mandatory rule of law. The second is an alleged failure to decide the effect of the substantial compliance proviso in s 352A of the Act.

[10] The central concerns of QCAT in exercising its appeal jurisdiction for disciplinary orders are whether the procedure was fair, the governing statute or legal principles, criteria, standards and tests were correctly understood, stated and applied to reasonable evidence-based probable primary facts or logical inferences, and that any judgment or discretion was exercised rationally and justly.[13]

[11] Stewards panels and appeal boards are comprised of trusted experts with relevant knowledge and experience of racing and are generally better placed than the tribunal to decide the relative importance of the central rules when they are contravened and what the proportionate penalty for proven breaches should be. They are not required or expected to reach a 'correct' decision but merely a legal, reasonable and proportionate one by fair means. Hypervigilant scrutiny or meddling with honest and

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10 GAR r 80(6), 83(3).
11 A performance enhancing trace element found in vitamin B12 supplements.
12 GAR r 1.
13 *Bradley v Jockey Club* [2005] EWCA Civ 1056.

reasonable but contestable decisions will seldom be in the overall public interest. Internal disciplinary processes will be given as much latitude as the principles of legality and fairness permit.

[12] As Sir Nicolas Browne-Wilkinson V-C said in *Croweley v Heartley*:[14]

> Sports regulating bodies ordinarily have unrivalled and practical knowledge of the particular sport … they … regulate. They cannot be expected to act in every detail as if they are a court of law. Provided they act lawfully and within the ambit of their powers, the courts should allow them to get on with the job they are required to do. It is important to look at the consequences of anything that appears to have gone wrong.

[13] Depending on the outcome it may be necessary to have a determination of the as yet undecided appeal by the respondent against the 18 month penalty. In the normal course the penalty issue would be referred back to QRDB. However, while the QRDB still has ongoing jurisdiction to deal with this matter,[15] it will, subject to further extensions of tenure, shortly go out of existence. Consequently, the matter may have to be finalised by the appeal tribunal itself.

The testing regime

[14] Racing stewards are empowered by GAR 79 to have any tests they deem necessary carried out in relation to a greyhound that has been entered for or has competed in an event.

[15] The test sample is to be sealed and delivered by the stewards to "an accredited laboratory" for storage.[16] The stewards may then direct that all or some of a stored sample be submitted for any test to determine whether any prohibited substance was present in the swabbed greyhound's system at any relevant time.[17]

[16] In October 2015 the Act required QRIC to give samples for analysis to an "accredited facility"[18] or "secondary facility"[19] in accordance with specified procedures[20] in Chapter 4.[21] Section 143 of the Act relevantly provides:

> (4) The control body must deliver the thing (eg a urine sample) for analysis to—
>
> (a) if the thing is to be delivered under an agreement between the control body and an accredited facility—the accredited facility that is a party to the agreement; or

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14 (1986) The Times (24 July).
15 *Racing Act 2002* (Qld) (current) ss 214, 215, 217.
16 GAR r 80(3).
17 GAR r 80(5).
18 *Racing Act 2002* (Qld) Sch 3: the term "accredited facility" is defined as a facility named in an accreditation certificate as an accredited facility.
19 *Racing Act 2002* (Qld) Sch 3: the term "secondary facility" is defined as a facility named in the accredited facility's accreditation certificate as a secondary facility for the accredited facility.
20 Published by the Racing Animal Welfare and Integrity Board.
21 *Racing Act* 2002 (Qld) ss 115(3), 132, 143(3)-(4); see also GAR r 80(3).

> (b) otherwise—another facility that has the capacity to analyse things relating to licensed animals if the delivery is approved by an integrity officer.

[17] An "accredited laboratory" means a laboratory approved by the control body to perform tests on biological samples taken from or produced by a greyhound.[22] The Racing Science Centre (RSC) meets that description but other laboratories that are not "accredited facilities" may too.

[18] The RSC was the only accredited facility in Queensland at the time. Racing Analytical Services Limited Victoria (RASL) is an accredited secondary facility for RSC.

[19] Section 146 of the Act continues:

> (1) If a thing for analysis has been delivered to an accredited facility, a nominated person for the accredited facility must—
>
> (a) give a receipt for the thing in the way prescribed under a regulation; and
>
> (b) give the thing to an analyst at the accredited facility.
>
> (2) However, if the thing can not be analysed at the accredited facility within a reasonable time, the nominated person may, instead of giving the thing to an analyst at the accredited facility, deliver the thing for analysis to a secondary facility for the accredited facility.

[20] Under s 352A(2) of the Act, where there is a decision of a board on an accepted appeal against an appellable decision of a control body, and the control body relied on a relevant certificate of analysis, it is enough for the board to be satisfied that the method of taking and dealing with the sample was in substantial compliance with the requirements of s 143 of the Act.

[21] The uncontradicted evidence is that the method of taking and dealing with the sample taken from Your Deal on 12 October 2015 was in substantial compliance with the statutory requirements for ensuring the integrity of the sample.

[22] The Act does not prescribe any procedure for analysing samples, however s 147 requires the "accredited analyst"[23] who tested a sample (or received the results of an analysis conducted by a secondary facility for the accredited facility) to notify the "accredited veterinary surgeon"[24] (or integrity officer) and issue a certificate stating whether and what drug was found and, if asked, the quantity.

[23] GAR 81 states:

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22 GAR r 1.

23 *Racing Act 2002* (Qld) Sch 3: the term "accredited analyst" for an accredited facility means a person named in the accredited facility's accreditation certificate as an accredited analyst for the accredited facility.

24 *Racing Act 2002* (Qld) Sch 3: the term "accredited veterinary surgeon" for an accredited facility means a veterinary surgeon named in the accredited facility's accreditation certificate as an accredited veterinary surgeon.

> (1) Where a sample taken from a greyhound has been analysed by an accredited laboratory … **a certificate signed by an accredited laboratory officer**[25] **shall be**, without proof of the signature thereon, **prima facie evidence of the mattes contained therein** for the purpose of any proceedings pursuant to these Rules.
>
> (2) Where in any proceedings pursuant to these Rules it is necessary to prove that a substance is a prohibited substance or a permanently banned substance as defined in these Rules, a certificate signed by a veterinary surgeon, chemist or laboratory officer[26] approved by the Controlling Body, shall be, without the proof of signature, prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules.

[24] GAR 82 goes on to direct that on receipt of an analyst's certificate issued under GAR 81(1) the stewards "shall" officially notify the owner and trainer of the finding and that an inquiry is to be held into the circumstances of a sample discrepancy. Only the LRs deal directly with the issuing of a second certificate of analysis.

[25] LR 18(a) requires the stewards to advise the owner or trainer:

> …**that the second part of the Sample shall be sent to an accredited facility for confirmation** of the declared prohibited substance. Such confirmation will result in a Certificate of Analysis being issued.

[26] Notwithstanding the precise content and practical effect of the Act and official rules of greyhound racing, the prevailing greyhound racing practice up to October 2015 was for samples to be handed over to RSC after being split into A and B aliquots. If the A or primary swab tests positive the result is cross checked by analysis of the reserve, referee or B sample at another laboratory, such as RASL, as a precaution against false positives.

[27] Historical cases of alleged doping against two horse trainers have been discontinued by QRIC when it was discovered the similar procedures required by Australian Harness Racing Rules (AHRR 191(2)) and the Australian Rules of Racing (ARR 178D(7)) were not followed.

[28] On 27 November 2015, that is, between the initial inquiry on 12 October 2015 and the rehearing on 21 April 2016, LR 18 was amended to more closely reflect what actually happened in practice and to bring it into line with the AHRR and ARRs.[27]

[29] In its current form LR 18 reads:

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25 An "accredited laboratory officer" is undefined.

26 An accredited analyst for an accredited facility means a person named in the accredited facility's accreditation certificate as an accredited analyst for the accredited facility. An accredited veterinary surgeon for an accredited facility a veterinary surgeon named in the accredited facility's accreditation certificate as an accredited veterinary surgeon.

27 Amendments to AHRR r 191(2) were made on 25 August 2000; the ARR were amended on 1 May 2015 to include r 178D(7).

> (1) A certificate from a drug testing laboratory approved by the Controlling Body which states the presence of a prohibited substance in or on a greyhound at, or approximately at, a particular time, or in blood, urine, saliva, or other matter or sample or specimen tested, or that a prohibited substance had at some time been administered to a greyhound is prima facie evidence of the matters certified.
>
> (2) If another drug testing laboratory approved by the controlling body analyses a portion of the sample or specimen referred to in sub rule (1) and certifies the presence of the same prohibited substance referred to in sub rule (1) in the sample or specimen that certification together with the certification referred to in sub rule (1) is conclusive evidence of the presence of that prohibited substance
>
> (3) A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a greyhound at a meeting shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the greyhound was presented for a race not free of prohibited substances.

[30] Additionally, LR 18(7) now allows a control body, for "sufficient" reason, to authorise a different qualified analyst from the same "drug testing laboratory"[28] to supervise the analysis of both the A and B samples. In cases where the second test confirms the first certificate, the "further" positive certificate is conclusive evidence that the prohibited substance was present in or on the greyhound at the time the sample or specimen was taken.[29] There was no evidence capable of supporting a finding about the sufficiency of the reasons why the analysis of both samples taken from Your Deal were conducted by the same laboratory.

[31] Appeals by way of rehearing must apply the circumstances as they exist at that time and according to the law then in force so that the rights and liabilities of the parties are determined as at the date of the rehearing.[30] However, the general interpretive principle is that a statutory rule cannot be acted on after its repeal or amendment.

[32] This raises the technical question of whether the Board should have proceeded under the old (LR 18(a)) or the new (LR 18(1)-(7)) rules, but the appeal was argued and is decided on the basis of the presumption that laws regulating rights and duties do not apply retrospectively, that is, to past events.[31]

[33] In any event, the QRDB applied neither version of LR 18, but forced the QRIB to adhere to the prior practices, with the effect that Ex 5 was insufficient proof on its own and Ex 13 was devoid of evidentiary value because both certificates of analysis were issued by RSC.

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28 LR r 1: the term "drug testing laboratory" means an accredited facility under the Act; *Racing Act 2002 (Qld)* Sch 3 defines it as a facility named in an accreditation certificate as an accredited facility. Again RSC qualifies.

29 LR r 18(2).

30 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 106-08.

31 *Wilson v First Country Trust Ltd (No 2)* [2004] 1 AC 816.

[34] The legal correctness of the QRDB's decision depends on the requirements of LR 18(a), and the practical effect of the industry practice and Ex 8.

The context

[35] RSC received the pre-race urine sample (identified as sample 382770 – collected from Your Deal on 12 October 2015)[32] via courier on 13 October 2015. The primary (or A) portion was analysed sometime between then and 27 October 2015, while the reserve (or B) portion was isolated in secure storage until 5 January 2016.[33]

[36] The primary portion of Your Deal's pre-race urine sample was delivered by stewards to and later analysed by RSC in Brisbane.[34]

[37] Certificate of analysis 42614R (Ex 5) issued on 27 October 2015 by an "accredited analyst" and "accredited laboratory officer" recorded a positive result for the banned performance enhancer cobalt at a mass of more than the threshold amount, with a 99.7% certainty level.

[38] The Acting General Manager of Stewards and Integrity Operations for Racing Queensland was immediately notified of the discrepancy by letter and asked to contact RSC about arrangements for the delivery of the reserve portion of 382770 to RASL.[35]

[39] As obliged by GAR 82 and LR 18(a) the stewards served Ex 8 on the respondent on 30 October 2015, informing him of the finding and advising that the reserve portion of 382770 was being transferred to RASL for confirmation.

[40] Whether prompted by the mistaken belief that the change to LR 18 in November 2015 was in force or not (the reason does not really matter), RSC was directed by Racing Queensland on 4 January 2016 to have the reserve sample of 382770 analysed internally by an accredited analyst instead of being sent to RASL.[36]

[41] A different accredited analyst later issued certificate of analysis 43091R (Ex 13) confirming 42614R (Ex 5) on 28 January 2016.

[42] The QRDB upheld the appeal because although Exs 5 and 13 were to the same effect, and were signed by different accredited analysts, they were issued by the same testing laboratory which, according to the Board, meant:

> … the second certificate is therefore inadmissible in determining whether there is conclusive evidence of the fact that the greyhound was presented for a race not free of prohibited substances. … (the) first certificate is admissible and is

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32 Sample 382770.
33 Affidavit of Dr Karen Maree Caldwell, affirmed June 2016, [6]-[8], [10].
34 Ex 3, RSC V36, Record of Sample Custody and Dispatch, Protocol A.
35 Affidavit of Dr Karen Maree Caldwell, affirmed June 2016, [12].
36 Affidavit of Dr Karen Maree Caldwell, affirmed June 2016, [12]-[16].

> prima facie evidence. The second certificate is what is demanded and required for there to be conclusive evidence of that fact.
>
> The authorities throughout the history of drug related offences demand that there be two positive results … (with one) from the referee sample …[37]

The rival contentions

[43] QRIC does not dispute that the admissibility of a certificate of analysis to make out an alleged rule breach depends on substantial compliance with any stated pre-condition, or that any "sufficiently significant"[38] departure from prescribed testing procedures including the taking, storing or transporting of a pre-race blood sample deprives it of evidentiary value. QRIC submits, however, that as Ex 13 is a certificate of analysis issued by an accredited facility (which RSC is) substantiating Ex 5, it is conclusive evidence of the presence of excessive cobalt. QRIC's submission is that despite Ex 8 and historical testing practices being contrary to external confirmation of Ex 5 by RASL or another laboratory, this was not a pre-condition to Ex 13's admissibility or probative value.

[44] The respondent argues that (a) the rules as to testing need be read in the context of being part of a code adopting a strict liability regime in the form of the presentation rule; (b) the key phrase "shall be sent" in LR 18(a) irresistibly imposes duty on the regulator to deliver the B sample to an independent accredited facility – not just another analyst within the same facility – for corroborative testing if an A sample returns a positive result for a banned substance when tested; (c) the fact that RSC was the only accredited facility is irrelevant (even though, on his own argument a B sample certificate issued by RASL would have been a nullity); (d) the integrity procedures relating to the collection and storing of samples are the sole concern of s 143(3)(d), and the saving effect of s 352A is limited to collection and transferring samples and not to the analysis of samples; and (e) even if legally admissible Ex 13 is liable to discretionary exclusion.

[45] Mr Murdoch QC contends that the Act and both sets of rules constitute an inflexible multi-stage anti-doping code with minimum standards and built-in safeguards to protect owners and trainers against wrongful conviction for a no fault presentation offence by requiring confirmation of a positive test by an impartial body as a precondition to the admissibility of analysis certificates, especially those with presumptive or conclusive evidentiary effect.

[46] Thus, the questions the appeal raises are whether:

(a) Ex 13 was inadmissible for procedural irregularity because the same testing laboratory issued Ex 5, and should not have been accorded any evidentiary weight whatsoever by racing stewards; and

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37 Kadniak and Racing Queensland (9 May 2016) 3.

38 *Benham v Queensland Harness Racing Board* [2004] QRAT 020, 9.

(b) even if Ex 13 was admissible, was it still liable to exclusion as a matter of discretion?

Admissibility and weight

[47] Where the law spells out the conditions to be met for forensic admissibility, the regulator has the onus of demonstrating strict compliance before the evidence is legally capable of being accepted and acted on by a decision maker in proof of a disputed fact. Any imperative words must be obeyed to the letter. It has been repeatedly held that substantial noncompliance or irregularity can invalidate a step, the binding effect of the rules, or the exercise of a power conferred by them,[39] as well as totally excludes the benefit of being able to prove the facts it facilitates.[40]

[48] In the matter of *Hansen*,[41] for instance, the QRDB upheld an appeal by a trainer on the basis that a positive certificate was not issued by an accredited analyst. According to the Board –

> … there is no discretion to be exercised. Either the reception and analysis of the "B" sample complied with the requirements of the Act or it did not. This is a mandatory provision of the Act. It is not optional for Racing Queensland or any other authority to fail to comply … all necessary protocols and procedures in the legislation must be followed or the certificates are not admissible and of no value whatsoever.

[49] Likewise, in *Rochelle Smith*[42] the QRDB held that it would have been unfair and a denial of justice to allow the use of a B sample certificate where the reserve portion of the sample was initially analysed by a non-accredited facility then retested by an accredited laboratory.

[50] In *Kavanagh v Racing Victoria Limited*[43] horse owners objected to the admissibility of positive test results for cobalt because of the regulator's failure to comply with a rule of horse racing. The rule required an official laboratory to refer both the control and reserve portions to "another" official laboratory for confirmation as a condition to the acceptance of "the certified findings of both … laboratories as prima facie evidence" of the detection of a prohibited substance.[44]

[51] An official racing laboratory could only engage another approved testing laboratory to test for cobalt if it did not have the equipment to do so itself, provided it referred both the control and reserve portions of the sample.

[52] The procedure was intended to ensure that samples were separately tested by, at least, two approved scientific laboratories. That did not

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39 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537; *Gange v Sullivan* (1966) 116 CLR 418; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France* [1919] AC 1.

40 *Kavanagh v Racing Victoria Limited* [2017] VCAT 386.

41 Hansen and Racing Queensland, 30 August 2016, 5.

42 Rochelle Smith and Racing Queensland, 31 August 2016, 4.

43 [2017] VCAT 386.

44 Ibid [31].

happen. Justice Garde[45] concluded that the degree of noncompliance was too substantial to overlook and the certified results derived from such a significant departure from standard procedures could not be relied at all on by the regulator.

[53] Thus, the right question to ask of any drug testing procedure is whether a step taken is forbidden,[46] or conversely, was one omitted mandatory? Rules are made to be obeyed, not broken. If the control authority can choose whether and when to be bound by them, or ignore them at will, why have control rules at all?[47]

[54] Senior Counsel for the commission submits that LR 18(a) was either (a) strictly complied with because it only insists on informing the trainer of an initial discrepancy in the A sample and that the B sample was intended to be sent to "an accredited facility" (RSC); (b) the confirmation process was in substantial compliance with any mandatory procedural requirements and the unintended misinformation in Ex 8 that the second part of sample was to be sent to RASL for analysis is immaterial; (c) in any case, the suggested obligation to send the B sample to another "accredited facility" could not be practically complied with because in 2014 there was no "accredited facility" except RSC; and (d) even if the LRs did not permit the B sample to be tested by RSC, Ex 13 still has evidentiary value and corroborates the prima facie facts stated in Ex 5.

[55] The respondent identifies independent analysis by another testing laboratory as a precondition to the admissibility and probative value of Ex 13. He argues that LR 18(a) confers a basic right on the respondent to have a positive primary swab result separately verified by an 'honest broker' and that the denial of that right was aggravated by his client's detrimental reliance on the undertaking implied by past practice and the express terms of Ex 8 to have the A sample certificate independently verified.

[56] In my opinion, the key phrase in LR 18(a) is 'sent to'.

[57] The meaning of any expression used in a control rule is construed according to its text, context and objective purpose. It is ascertained from what a reasonable party bound by the rule would have understood it to mean.[48]

[58] Which of the reasonably possible uses it was meant to have in the context of LR 18(a) is a question of law. Interpretation principles require that where more than one constructional choice is reasonably open, ambiguous rules and the like (where neither proposed construction is incontestably right or wrong) are interpreted consistently with the one that

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45 President of VCAT.

46 *R (Hill) v Institute of Chartered Accounts in England and Wales* [2013] EWCA Civ 555.

47 *Chapmans Ltd v Australian Securities Exchange Ltd* (1996) 67 FCR 402.

48 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78]; *Alcan (NT) Aluminium Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27.

avoids or minimizes the encroachment of fundamental common law rights and freedoms.[49]

[59] On this basis either party's approach could safely be preferred without error. The best the tribunal can do in those circumstances is to apply the interpretation that best achieves the purpose of the control rules.

[60] LR 18(a) actually says nothing about what evidentiary effect a certificate of analysis issued by the accredited facility for a B sample 'sent to' it for confirmation has. Nor does it say where it expects it to be sent from. All it specifically dictates is "notification that the second part of the sample "shall be sent to an accredited facility for confirmation".

[61] The rule does not give any imperative direction to QRIC stewards to send the B sample to a different accredited facility. There is no logical reason why a B sample cannot be sent by RSC to itself for confirmation of a positive A sample result as long as scientific integrity is assured.

[62] It is reasonably arguable that LR 18(a) does not intend confirmatory testing to be conducted at the same place as the initial analysis and that the word "another" should be imported into the rule in front of "accredited facility". The flaw in that argument is that it wrongly assumes that A samples are only ever delivered to an "accredited facility" in accordance with s 143(4)(a) of Act. However s 143(4)(b) of the Act allows for delivery to "another facility" approved by an integrity officer, and the GAR's only envisage an A sample being given to an "accredited laboratory", which may or may not also be an "accredited facility".

[63] Overall, I think the main integrity control mechanism is analysis by an "accredited analyst" at "an accredited facility" and that admissibility depends on notification of the initial test result, not independent analysis. RSC is an "accredited facility" and Ex 13 is a certificate of analysis confirming the presence of cobalt in Your Deal's pre-race specimen issued by an "accredited analyst".

[64] Neither the Act nor the rules make the independent analysis of a B sample a condition of admissibility and the respondent has no common law right to insist on one. Accordingly, Racing Queensland met the precondition in LR 18(a).

[65] Thus, both Ex 5 and Ex 13 are admissible and, subject to any exclusionary discretion, have the evidentiary value the regime accords it; that is, double prima facie effect.

[66] When the law talks about evidence being prima facie it intends one of two meanings: either, it is weighty enough to entitle but not oblige a reasonable person or panel to decide the issue it relates to in favour of the party propounding it; or, it is so weighty that it cannot be reasonably

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49 *Momcilovic v The Queen* (2011) 245 CLR 1.

rejected unless countered by even more cogent facts or inferences. In other words, it is presumptive proof.[50]

[67] Evidence of a fact is conclusive when the fact must be found unless it is inherently improbable or incredible.[51]

[68] A prima facie certificate can be strengthened or weakened by corroborative or contrary evidence,[52] but according to Stratford J in *R v Jacobson,*[53] in the absence of further evidence "… prima facie proof becomes conclusive proof" and the party giving it discharges the onus of proving the relevant fact.[54]

[69] However, past decisions about the effect of a second certificate of analysis on the probative value of the first one are widely inconsistent. In *Lambourn v Racing Queensland Limited*,[55] for example, the A sample certificate recorded carbon dioxide (CO_2) levels that were in excess of the limit. The second certificate recorded a level slightly below the limit. Racing Queensland argued that the B sample result supported the prima facie effect of the A sample certificate.[56] The tribunal disagreed and held that the second certificate was not probative of the levels of CO_2 at all and the only evidentiary value it had[57] was to cast doubt about the prima facie value of the levels stated in the first.[58]

[70] In *Waltisbuhl v Queensland All Codes Racing Industry Board*,[59] by contrast, a CO_2 concentration of 37.1 mmol/L was reported in the first certificate, and the second certificate recorded a concentration of 36 mmol/L. The tribunal accepted that both certificates formed part of the evidence.[60] The first certificate was prima facie evidence of a breach under 191(1), (3) and (4) AHRR,[61] while the second made a conclusion that it was more probable than not that the horse was over the permitted level a more comfortable one to reach.[62]

[71] Most recently in *Queensland Racing Integrity Commission v Belford*[63] a trainer was charged under AHRR 190(1). He pleaded guilty and was disqualified for six months but on appeal the QRDB set aside the conviction altogether. There the B sample showed a CO_2 concentration 0.9 mml/L less than the A sample certificate (37.5 mml/L) and only 0.6 above the threshold. The QRIC claimed that the QRDB wrongly decided

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50 *Cross on Evidence*, vol 1 (at 200) [1605].
51 *Swinburne v David Syme & Co* [1909] VLR 550, 565.
52 *Harper v Racing Penalties Appeal Tribunal Western Australia* [2001] WASCA 217 [37].
53 [1931] AC 466.
54 Ibid 478-479.
55 [2013] QCAT 699.
56 Ibid [10].
57 Ibid [16].
58 Ibid [17].
59 [2016] QCAT 204.
60 Ibid [22].
61 Ibid [20].
62 Ibid [27].
63 [2017] QCATA 42.

the appeal on the mistaken basis that a conclusive certificate was necessary to prove the charge instead of whether the charge was proven on the totality of the evidence.[64]

[72] The tribunal rejected the proposition that conclusivity was necessary for a contravention finding and upheld the submission that the B sample was evidence supportive of the prima facie evidence of the A sample certificate. It reasoned:

> … [T]aking into account the statistical probability of the B-sample certificate being less that 36mmol/L … even on the criminal standard of proof, the results of the 2 samples are evidence beyond reasonable doubt that Mr Belford presented a horse with a TCO_2 level in excess of 36.0 mmol/L and, therefore, that he presented a horse with a prohibited substance.[65]

[73] In my opinion, Belford is closest to the mark and, assuming procedural regularity, each of Exs 5 and 13 are prima facie proof under GAR 81(1) that excess concentration of cobalt was detected in Your Deal's pre-race sample. Thus, there is no reason in principle why either or both are not sufficient evidence of a contrary presentation if they are unimpeached by other facts or competing inferences.

[74] To the extent the QRDB decided to the contrary it was in error, but that does not necessarily mean that it was not legally open to it to exclude Ex 13 and allow the appeal, despite the presumptive force of Ex 5.

Discretionary exclusion

[75] There is a specific discretion in s 98 of the *Evidence Act* 1977 (Qld) allowing courts to reject a compliant certificate if for any reason it appears in the interests of justice to do so.

[76] Otherwise admissible certificates tainted by some sort of misconduct are commonly excluded from court proceedings, for instance where some kind of built in procedural protection against defective scientific instruments or faulty certificates was cynically circumvented by investigating officials.

[77] In *Bunning v Cross*,[66] for example, the question for the High Court to answer was whether there was a discretion to exclude a regular blood alcohol certificate in a drink driving case because the test was demanded by police without legal authority. Similar evidence was rejected in *French v Scarman*[67] where police had deliberately refrained from doing all things necessary to facilitate a back up blood sample from a driver, contrary to a statutory obligation. The link between the presumptively conclusive breath analysis certificate and the police misconduct enlivening the exclusionary discretion, effectively sabotaged the only means of potentially rebutting the deemed accuracy of the certificate.

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64 Ibid [50].
65 Ibid [67].
66 (1978) 141 CLR 54.
67 (1979) 20 SASR 333.

[78] It is also settled that in addition to the powers to stay or dismiss proceedings for abuse of the legal process there is a general or residual common law discretion of uncertain scope authorising courts to exclude any category of probative evidence where reception in a legal proceeding would make the hearing an unfair one.[68] The relevant concept of unfairness includes protection against forensic disadvantages caused by the admission of evidence derived by illegal, improper or unfair official means, the loss of statutory or fundamental common law procedural rights, or the use of the evidence that cost too much to obtain having regard to contemporary community standards and values.[69]

[79] The functional purpose of the fairness discretion is to guard against wrongful conviction and undeserved punishment where the adjudicative process was somehow compromised by, for example, the loss of contrary evidence or a defendant's inability to effectively challenge the veracity of prima facie cogent evidence. The test is whether there is an unacceptable risk of injustice or substantial forensic prejudice.

[80] Overriding admissibility principles by exercising an exclusionary discretion is not something to be done lightly. It can have the unintended negative effect of defeating, instead of enforcing, the law exactly as it is written. Analyst's certificates complying with prescriptive testing procedures are a satisfactory means of proof with presumptive (if not conclusive) evidential effect in racing regulatory and disciplinary proceedings and, except in limited circumstances, it is not for decision makers to undercut their forensic role.

[81] The loss of favourable evidence makes a proceeding unfair[70] – at least, from a respondent's point of view – especially where, as here, the disputed evidence is unassailable unless rebutted. However, the mere possibility of injustice or prejudice is usually insufficient to engage a court's residual unfairness discretion.

[82] In *Police v Dunstall*,[71] for instance, the High Court unanimously reversed the decision of a majority Full Court of the Supreme Court of South Australia excluding a police analyst's certificate to prove a failed breath test for unfairness. A botched reserve blood test deprived the driver of the possibility of challenging the evidentiary value of the prosecution's certificate.

[83] The High Court held that there is no statutory right to a blood test under the scheme and any prejudice is the product of road traffic policing, not any failure on the part of the authorities. The Court accepted in principle that probative, not overly prejudicial, evidence not illegally or improperly obtained could conceivably be excluded because of the inability to effectively call its credibility into question. This applies only where the

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68 *R v Lobban* (2000) 77 SASR 24.
69 *R v Swaffield* (1998) 192 CLR 159, [52]-[56].
70 *Police v Dunstall* (2015) 256 CLR 403, 422 [41].
71 (2015) 256 CLR 403.

suggested unfairness stemmed from an error beyond the defendant's control and there was an unacceptably high risk of injustice.

[84] The driver in Dunstall was deprived of a possible defence through no fault of his own but failed to demonstrate vitiating unfairness.

[85] The opposite result in French v Scarman is explained by the fact that the police breached a positive a duty to assist the verification process and, contrary to public policy and community expectations, deliberately impeded it instead.

[86] In *R v Lobban*[72] an alleged drug haul was mistakenly destroyed by police before the defence had a chance to examine it. Where the analyst has not been cross-examined on the opinions stated in the impugned certificate, accepting and acting on legally obtained evidence will not make a trial relevantly unfair.

[87] Lobban too is distinguishable from French v Scarman because the police action was unintended and the veracity of the certificate was not an issue at the trial.

[88] However, it is extremely doubtful whether a disciplinary review tribunal has the same kind of discretions available to it as common law courts do.[73]

[89] Although they have been held to be of broader application[74] the decided cases dealing with the overall fairness or regulating the admission of illegally obtained evidence are almost entirely criminal (or at least, summary) in nature. Neither apply to civil litigation as strictly or in the same way.

[90] It is highly unlikely that a body able to relax or dispense with the common law restrictions on evidence is invested with any power (or duty) to limit that freedom by discretion. Any exclusionary discretion QCAT has derives solely from QCAT Act ss 28(1), (2) and (3)(a), rather than from idiosyncratic notions of forensic fairness or by analogy with expedient adversarial procedures developed by the courts for entirely different purposes.

[91] Hence, in *Stampalia v Racing Penalties Appeal Tribunal of Western Australia*[75] a trotting trainer complained of procedural unfairness because she was deprived of the opportunity to have her own tests carried out on blood samples. She failed to show that the stewards offer for her to witness the analysis of the second sample (which she declined) was "such a departure from fair dealing" as to constitute a breach of the rules of natural justice.

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72 *R v Lobban* (2000) 77 SASR 24.

73 *Polycorpou v Australian Wire Industries Pty Ltd* (1995) 36 NSWLR 49.

74 cf *Miller v Miller* (1978) 141 CLR 269 (a family law dispute). See too *Pearce v Button* (1985) 60 ALR 537, 551-553 per Pincus J.

75 [1999] WASC 7, [30]-[32].

[92] That is not to deny, however, the authority of the QRDB to intervene as a matter of fairness[76] to give practical expression to the rule of policy that a public body should adhere to established practice or procedures.

Disappointed expectations

[93] It has long been recognised in English law that there may be circumstances where "to frustrate … expectation is so unfair that to take a new and different course will amount to an abuse of power".[77] Once a legitimate expectation has been established the burden falls on the public authority to justify departing from it.[78] The longer and more rigid the practice, and the more sudden a departure from it without consultation, the more likely it is to constitute unfair treatment.

[94] As Laws LJ noted in *Nadarajah v Secretary of State for the Home Department*:[79]

> … where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which … takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles … Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held in their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.

[95] The legitimate expectation we are considering here derives from the dual conditions of conclusivity and independent confirmation of a positive test to prove a presentation offence against a greyhound owner or trainer.

[96] The issue is whether an uncontradicted and strictly compliant statutory certificate admissible as prima facie evidence of the offence is liable to rejection because it does not meet historical industry standards.

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76 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 12-13.

77 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 214.

78 See, for example *Paponette v AG of Trinidad and Tobago* [2012] 1 AC 1, [37].

79 [2005] EWCA Civ 1363, [81].

[97] It is clear enough that before the 2016 amendments to the greyhound racing rules formalised it, the practice embedded in Queensland was that conclusivity was required to establish presentation via certificate, and not even two prima facie certificates (either alone or in combination) were regarded as sufficient for that purpose. A second certificate was conclusive of a presentation offence if, but only if, the A sample result was confirmed by a corresponding finding in a B sample when independently tested by another laboratory.

[98] QRIC concedes the existence of the former protocol but does not accept that it overrides LR 18(a) or has any bearing on Ex 13's admissibility.

[99] The common law estoppel by convention prevents the Commission from denying customs or promises governing sample analysis in any proceedings even if all parties know that they diverge from formal rules. To this extent the QRDB was within its rights, if not bound, to decide the respondent's liability on the basis of the informally adopted (not the formally prescribed) procedures.

[100] In *Amalgamated Investment & Property Co Ltd (In liq) v Texas Commerce International Bank*,[80] Lord Denning MR explained that parties are bound by the "conventional basis" on which they (mutually) conducted their affairs because "… it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract – when it would be inequitable to do so, having regard to dealings which have taken place between (them)".[81]

[101] In *Con-stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*,[82] an insurer paid insurance premiums through an insurance broker who did not account for them to the underwriter. The insurer sought to recover the misappropriated premiums from the insured, raising estoppel by convention as a defence on the basis that the parties' "business relationships were conducted on the footing that the broker alone was liable to the insurer".[83] The claim of estoppel by convention failed because the assumed state of affairs was an assumption as to the legal relationship between the parties and not as to any fact.

[102] As the High Court explained:

> Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted on by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying.[84]

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80 [1982] QB 84.

81 *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, 121.

82 (1986) 160 CLR 226.

83 Ibid 244.

84 Ibid.

[103] The pre-existing practices acknowledged the self-evident vulnerability of owners and trainers faced with a presumptive scientific finding of liability for a strict liability presentation offence and their total reliance on the regulator to protect them from a false positive result by faithfully following the procedures for independently testing the reserve sample over which they have no control. In civil law terms the nature of the relationship between the parties imposes a duty of care on the regulator not to assume unacceptable integrity risks in conducting tests that potentially seriously adversely affect the economic and reputational interests of a trainer. Actual detriment is arguably not necessary.[85]

[104] The role of the independent analysis of the reserve sample is not just to shield greyhound owners and trainers against human or handling error or contamination, but to guard against the risk of cultural, institutional or systemic anomalies that might sully the initial testing.

[105] The respondent may not have had a right to insist on independent analysis, but in light of his known reliance on the control body's past practices and the undertaking in Ex 8 the principles of natural justice entitled him to be at least notified and consulted about the decision to test the B sample 'in-house' instead of sending it away to Victoria, so that he could decide whether or not to take any restraining or alternative remedial action.[86]

[106] Ex 8, by contrast, expressly represented (or if you like, promised) that the A sample test result would be verified or rebutted by an independent facility in line with the industry custom. There was a representation giving rise to a legitimate expectation that the declared intention[87] or general policy implied by repeated conduct would continue to apply. This, in my view, led to natural justice requirements[88] such as being notified, consulted or heard in opposition to any proposal in a particular case. The failure of racing officials to meet this commitment by not telling the respondent until after the confirming analysis had been conducted may be contrary to the hearing rule or, as the respondent contends, give rise to discretionary exclusion.

[107] The respondent was powerless to protect his own procedural rights and trusted the applicant to do that on his behalf by following standard procedures or by giving him advance warning of any planned change so he could challenge or stop it before it was a *fait accompli.*

[108] The respondent's detrimental reliance on the misleading statement of intention in Ex 8 deprived him of any chance he had of having the B sample analysed by a laboratory of his own choice or persuading Racing Queensland to follow normal procedures. This put him at the unfair forensic disadvantage in a strict liability case of not being able to

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85 *Moratic Pty Ltd v Gordon* [2007] NSWSC 5, per Brereton J.

86 cf. *Stampalia v Racing Penalties Appeal Tribunal of Western Australia* [1999] WASC 7.

87 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

88 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 20-21.

effectively rebut the mutually reinforcing presumptive effect of Exs 5 and 13.

[109] In these circumstances it is unacceptable for the control body to take forensic advantage of its own default. Even though Ex 13 is strictly admissible, the balance of the relevant public policy considerations do not favour allowing it to prove the respondent's liability for a presentation offence by a conclusive certificate of analysis. It is immaterial that the odds are that if standard procedures were followed the accuracy of Ex 5 would have been corroborated.

[110] In my view, it was legally open to the QRDB to reject Ex 13 on the basis of past custom and hold that notwithstanding its prima facie effect Ex 5 was insufficient proof of a presentation breach, despite what either LR 18(a) strictly required before November 2016 or LR 18(7) permitted after that date.

[111] Accordingly, the appeal is dismissed.

Costs

[112] The parties are to exchange and file (with detailed supporting written submissions) any application for costs under s 102 QCAT Act, by:

4.00pm on 3 November 2017.

[113] In the time allowed for the exchange of submissions, the parties can, of course, discuss an agreed order.

[114] As to the exchange of submissions, it is ordered that:

George Kadniak is to file in the Tribunal two (2) copies and serve one (1) copy of any submissions in relation to costs he wishes to make, by:

4:00pm on 13 October 2017.

Queensland Racing Integrity Commission is to file in the Tribunal two (2) copies and serve one (1) copy of any submissions in relation to costs it wishes to make, by:

4:00pm on 27 October 2017.

George Kadniak must file in the tribunal and give to Queensland Racing Integrity Commission any written submissions in reply on costs, by:

4:00pm on 3 November 2017.

The application for costs will be determined on the papers by written submissions from the parties, and without an oral hearing, not before **6 November 2017**.