

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE Z698/2014

CATCHWORDS

Domestic Animals – Restricted breed dogs – American Pit Bull Terriers – New standard – Conformation Criteria – Physical Characteristics Criteria – Supplementary Physical Characteristics Criteria – Burden of proof – Standard of proof – *Briginshaw* test – Assessment of dog.

APPLICANT: Jessica Gray

RESPONDENT: Brimbank City Council

WHERE HELD: 55 King Street, Melbourne

BEFORE: Justice Greg Garde AO RFD, President

HEARING TYPE: Hearing

DATES OF HEARING: 20-21 October and 11 November 2014

DATE OF ORDER: 10 December 2014

DATE OF REASONS: 10 December 2014

CITATION: Gray v Brimbank CC (Review and Regulation)
[2014] VCAT 1485

ORDER

1. Pursuant to s 51(2)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), set aside the decision of Mr Tim Christie, an authorised officer of the respondent made on 17 May 2012 to declare Mylo to be a restricted breed dog under s 98A(1) of the *Domestic Animals Act 1994* (Vic).
2. Declare that Mylo is not a restricted breed dog pursuant to the Standard for Restricted Breed Dogs approved pursuant to s 3(3) and (4) of the *Domestic Animals Act 1994* (Vic) published in the Victoria Government Gazette No S 22 on Friday 31 January 2014.



Justice Greg Garde AO RFD
President



APPEARANCES:

For the applicant: Mr A Albert of Counsel and Mr A Felkel of Counsel

For the respondent: Mr R Appudurai, solicitor

For the Minister for Agriculture and Food Security: Mr B Murray, solicitor¹

¹ Mr Murray appeared at the commencement of proceedings on 20 October 2014 and was subsequently excused.

REASONS

Introduction

- 1 The applicant is the owner of a dog called Mylo ('the dog'). On 7 May 2012, the dog was found wandering at large and was seized by Mr Tim Christie, an authorised officer of the respondent under s 80 of the *Domestic Animals Act 1994* (Vic) ('the Act'). Mr Christie believed that the dog was a restricted breed dog – an American Pit Bull Terrier. On 17 May 2012, Mr Christie made a declaration that the dog was a restricted breed dog under s 98A(1) of the Act ('the declaration').
- 2 At the time when the declaration was made, the operative standard for restricted breed dogs approved under s 3(3) and 3(4) of the Act was that published in the Victoria Government Gazette No S 283 on 1 September 2011 as amended by Victoria Government Gazette No S 32 on 10 February 2012 ('the Old Standard'). The Old Standard was applied by Mr Christie when he made the declaration.
- 3 The applicant sought review of the declaration by the Tribunal. On 23 August 2013, Senior Member Davis affirmed the declaration ('the previous determination')². This decision was based on the Old Standard.³
- 4 The applicant appealed to the Supreme Court of Victoria from the previous determination. On 6 February 2014, Rush J set aside the previous determination and remitted the matter to a differently constituted Tribunal to be heard and determined afresh.⁴
- 5 In the meantime, the Minister for Agriculture and Food Security had published a new standard and revoked the Old Standard. The new standard was published by Victoria Government Gazette No S 22 on Friday 31 January 2014 ('the New Standard').
- 6 On 5 June 2014, the applicant was given leave to withdraw her application for review filed on 12 June 2012.⁵ However, leave was granted on 22 July 2014 to make a further application for review in relation to the declaration.⁶ The further application for review was filed with the Tribunal on the same day.
- 7 Although made under the Old Standard, the declaration is to be reviewed under the New Standard.⁷

² *Gray v Brimbank CC (Review and Regulation)* [2013] VCAT 1459 (21 August 2012).

³ *Ibid.*

⁴ *Gray v Brimbank City Council* [2013] VSC 281.

⁵ *Gray v Brimbank CC (Review and Regulation)* [2014] VCAT 631.

⁶ *Gray v Brimbank CC (Review and Regulation)* [2014] VCAT 851.

⁷ *Gray v Brimbank CC (Review and Regulation)* [2014] VCAT 258; *Applebee v Monash CC (Review and Regulation)* [2014] VCAT 257.

The Old Standard

- 8 Part 1 of the Old Standard deals with American Pit Bull Terriers. It describes the physical features and characteristics of such a dog. It uses photographs, diagrams and depictions of dogs to illustrate the text. The photographs are taken from different directions and elevations to illustrate what is required.
- 9 The Old Standard proceeds on the basis that if a dog meets the description set out in the standard the dog is to be regarded as a restricted breed dog. The description addresses the physical characteristics of the dog including general appearance, head, neck, forequarters, body, hindquarters, feet, tail, coat, colours, height and weight.
- 10 The Old Standard does not state the extent to which correspondence is required with the description of each physical feature listed in the standard. In *Dudas v Monash City Council*,⁸ Kaye J held that the phrase “meets the description” at the commencement of the Old Standard does not, of itself, require conformity by the dog with each criterion specified in the standard. It was necessary that there be a substantial or high level of correspondence between the characteristics of the particular dog in question, and the description of those characteristics in the Old Standard. A low level of correspondence is not sufficient to satisfy the requirements of the Old Standard.⁹
- 11 Kaye J noted that some of the features of the dog, specified in the Old Standard, are described in general or non-specific terms, which require a degree of subjective assessment. Examples were the requirement that the neck be of ‘moderate’ length; the forelegs be ‘muscular’; and that the chest be of ‘moderate’ width. It was clear that the assessment of a dog by an authorised officer will often be open to debate.¹⁰
- 12 The construction of the Old Standard adopted by Kaye J has been applied in subsequent cases concerning the Old Standard.¹¹

The New Standard

- 13 The New Standard differs from the Old Standard in important respects.
- 14 Part 1 of the New Standard establishes a four step process. The first step is to determine where a dog is exempt under any of four Categories of Exemption. If the dog meets any one of the Categories of Exemption, the dog does not fall within the standard for the American Pit Bull Terrier breed.
- 15 There are then three Cumulative Requirements. The dog must meet:

⁸ [2012] VSC 578.

⁹ Ibid [91], [98]-[100].

¹⁰ Ibid [89].

¹¹ *Applebee v Monash City Council* [2013] VSC 481 [39]-[42]; *Applebee v Monash City Council (No 2)* [2013] VSC 680 [22] – [35]; *Gray v Brimbank City Council* [2014] VSC 13 [9]-[10].

- (a) not less than 3 of the Conformation Criteria; and
- (b) not less than 10 of the Physical Characteristics Criteria; and
- (c) not less than 10 of the Supplementary Physical Characteristics Criteria.

If one of the Cumulative Requirements is not met, the dog cannot be declared to be an American Pit Bull Terrier. If the dog is not exempt and meets the Cumulative Requirements the dog falls within the New Standard as an American Pit Bull Terrier Breed.

- 16 There are:
- (a) 5 Conformation Criteria of which a dog must meet not less than 3 to fall within the New Standard;
 - (b) 18 Physical Characteristics Criteria of which a dog must meet not less than 10 to fall within the New Standard;
 - (c) 19 Supplementary Physical Characteristics Criteria of which a dog must meet not less than 10 to fall within the New Standard.
- 17 The New Standard is satisfied only if the required number of the specific criteria in each of the Cumulative Requirements are present. This does not depend on a general comparison between the dog and the standard, or any overall impression of compliance as did the Old Standard.
- 18 The New Standard also uses photographs, diagrams and depictions to illustrate the text. The photographs are of a fibreglass model dog ('model dog') which is intended to display the physical characteristics of an American Pit Bull Terrier.¹² The New Standard relies on depictions to illustrate the location of anatomical features of the dog. There are measurement uncertainties in identifying the precise location within each anatomical feature where measurement is to commence or conclude, and some inconsistencies as to terminology.¹³
- 19 The New Standard retains the terminology, language and many of the depictions of the Old Standard. Neither the Old Standard or the New Standard require that the dog is dangerous, or has done anything wrong to any person or animal.

Construction of the New Standard

- 20 There are a total of 42 criteria listed in Part 1 of the New Standard. It is possible for a dog to be classified as an American Pit Bull Terrier if only 23 criteria are met. This is about 55% of the total number of specified criteria.

¹² Curiously the model is itself non-compliant in some respects for example as to length of tail (Figure 12), the absence of white feet (Figures 14 and 15) and the almond shaped (not round) eyes shown in a number of depictions.

¹³ eg Figure 1 – backskull (which includes the front of the skull) and Figure 4 – skull and the use both of the terms 'chest' (Figure 14) and 'forechest' (Figure 16).

Some criteria contain only one element. Other criteria contain multiple elements.

- 21 There are two possible approaches to the construction of Part 1 of the New Standard. The first approach is to construe Part 1 of the New Standard as requiring that each element in a criterion be met before that criterion is taken as satisfied. The second approach would cast a much wider net. A criterion would be taken as met if there was a substantial or high correspondence with that criterion. In the case of a criterion with multiple elements, there might be a substantial or high correspondence with that criterion even though one or more elements of the criterion was not met.
- 22 Under the second approach, a dog might be classified as an American Pit Bull Terrier even though there was only a substantial or high correspondence with a minimum of 23 out of the total of 42 criteria in Part 1 of the New Standard provided that the Cumulative Requirements were met.
- 23 The second approach would mean that a much wider range and significantly greater number of dogs would comply with Part 1 of the New Standard. It is obvious that a substantial or high correspondence with the description of an American Pit Bull Terrier in the Old Standard is a very different thing from a substantial or high compliance with only 23 of 42 criteria that make up the description of such a dog in the New Standard.
- 24 The purposes of the New Standard may be summarised as:
 - (1) to provide clarity to authorised officers in the identification of restricted breed dogs;
 - (2) to ensure that the assessment process can be conducted consistently by any authorised officer; and
 - (3) to introduce a linear approach for the assessment of a dog under the New Standard.¹⁴
- 25 Linear assessment is a step by step approach to the assessment of a dog, and entails the successive determination by an authorised officer:
 - (1) whether any exemption exists;
 - (2) whether the dog conforms with the measures and weights required for a dog to meet the definition of an American Pit Bull Terrier. These are unchanged from the Old Standard.
 - (3) whether the dog has the major anatomical features that are expected for an American Pit Bull Terrier, including strong build and well defined muscles in accordance with the Physical Characteristics Criteria; and

¹⁴ Department of Environment and Primary Industries: 'New Standard for Restricted Breed Dogs in Victoria, 2014. FAQs for Authorised Officers' ('the Guide').

- (4) whether the dog has the minor physical features which demonstrate that the dog has been bred and trained for the purpose expected of an American Pit Bull Terrier in accordance with the Supplementary Physical Characteristics Criteria.
- 26 If at any stage, the dog does not satisfy a sufficient number of criteria to meet the Conformation Criteria, the Physical Characteristics Criteria, and the Supplementary Physical Characteristics Criteria, the assessment process concludes, and the dog does not meet the requirements set out in Part 1 of the New Standard.
- 27 Review of the New Standard and the Guide does not suggest that the New Standard was intended to greatly expand the pool of dogs potentially caught by the New Standard. Rather the adoption of the New Standard was intended to clarify and simplify the assessment process.
- 28 These considerations point to the adoption of the first approach to construing the New Standard namely that the New Standard is to be construed as requiring that each element in a criterion be met before that criterion is taken as satisfied.
- 29 In *Isbester v Knox City Council*,¹⁵ the Court of Appeal observed:
- The common law recognised the owner of domestic animals as having an absolute property right, as with personal and movable chattels. The owner could maintain actions for conversion, or detinue or trespass to goods in respect of domestic animals, even if they strayed or were lost. In Victoria, the common law is modified by the Act in important ways.
- The general purposes of the Act are protective in character, and are ‘to promote animal welfare, the responsible ownership of dogs and cats and the protection of the environment’ by providing for:
- (a) a scheme to protect the community and the environment from feral and nuisance dogs and cats; and
- (b) a registration and identification scheme for dogs and cats which recognises and promotes responsible ownership; and
- (c) the identification and control of dangerous dogs, menacing dogs and restricted breed dogs; and
- ...
- (g) other related matters.¹⁶
- 30 The Court noted as to the role of VCAT and the Magistrates’ Court:
- The powers given by the Act to councils and authorised officers are limited and are defined in the Act.
- Both the Magistrates’ Court and the Victorian Civil and Administrative Tribunal (‘VCAT’) have significant roles to play in

¹⁵ [2014] VSCA 214.

¹⁶ *Ibid* [21] and [22] (citations omitted).

decision making under the Act, and offer a safeguard to ensure that dogs are not impounded or put down unless the requirements imposed by the Act are met. In turn, both jurisdictions are subject to appeals to, and judicial review by, the Supreme Court.¹⁷

- 31 In construing the New Standard, it is important to bear in mind that the standard affects the long standing common law right of ownership of a dog.¹⁸ The New Standard should be construed as interfering with the common law rights of the owner only to the extent necessary by the express words used in the New Standard or by necessary implication. This long standing principle of interpretation favours a conservative rather than a broad approach to the interpretation of the New Standard.¹⁹

DEPI Guide to the New Standard, 2014. FAQ for Authorised Officers.

- 32 The Guide gives inconsistent guidance as to how Part 1 of the New Standard is to be construed. In a number of paragraphs, the Guide speaks of the need for the dog to “substantially meet” the various requirements. However, on the final page, the Guide refers to *Dudas v Monash City Council*²⁰ as requiring “a substantial, or high level of correspondence between the material characteristics of the dog and the criteria specified in the Standard”. The Guide then states:

Therefore, the expectation is that the physical characteristic of the dog must meet the criterion specified in the Standard exactly as the Standard specifies or it must be determined that the dog does not meet this criterion.

- 33 The inconsistent statements contained in the Guide make it clear that the issue of the degree of compliance with each criterion, and each element of a criterion where there are multiple elements in a criterion was not well understood when the Guide was published. As a result, little or no assistance is obtained from the Guide itself as to the correct approach to be adopted when construing the New Standard.
- 34 In *Rexter v Hume City Council*,²¹ Judge Harbison concluded that the Standard was intended to apply on the basis that each element specified in each criterion in the Standard must be present. If an element required under a criterion in the Standard is missing, the dog does not meet that criterion.²² I concur and will also adopt this approach.

¹⁷ Ibid [24] and [25] (citations omitted).

¹⁸ Ibid [21]; *Gray v Brimbank CC (Review and Regulation)* [2014] VCAT 258; *Applebee v Monash CC (Review and Regulation)* [2014] VCAT 257; *Dudas v Monash City Council* [2012] VSC 578.

¹⁹ *D C Pearce and R S Geddes Statutory Interpretation of Australia* (Lexis Nexis, 7th edn 2011) [5.35] – [5.36] citing *Plaintiff S157/2000 v Commonwealth of Australia* (2003) 211 CLR 476, 492 (Gleeson CJ); and *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J).

²⁰ [2012] VSC 578.

²¹ *Rexter v Hume CC (Review and Regulation)* [2014] VCAT 501 (‘Rexter’).

²² *Rexter* [25]-[29].

Burden and Standard of Proof

- 35 There was agreement between the parties that the burden of proof of each criterion was on the respondent. There was also agreement between the parties that s 98A(4) of the Act which was inserted into the Act by s 29 of Act No 8 of 2014 did not apply to this proceeding.²³
- 36 The parties were also agreed that the *Briginshaw*²⁴ standard of proof applied to the proceeding having regard to the consequences of a finding that a dog is a restricted breed dog. The respondent did not advance any argument to the contrary. I will proceed on the basis agreed by the parties.
- 37 In *Karakatsanis v Racing Victoria Limited*,²⁵ the Court of Appeal approved a formulation of the ‘*Briginshaw*’ test as it applied to tribunals in the following terms derived from *Greyhound Racing Authority v Bragg*:²⁶
- The notion of ‘inexact proof, and indefinite testimony or indirect references [scil. inferences]’ needs to be translated to a comfortable level of satisfaction, fairly and properly arrived at, commensurate with the gravity of the charge, achieved in accordance with fair processes appropriate to and adopted by such a body.
- 38 As a result, I need to be satisfied as to the elements of each criterion to a comfortable level of satisfaction on the balance of probabilities consistent with the gravity of the allegations.

The Witnesses

- 39 There were four witnesses who gave evidence to the Tribunal. Three witnesses Mr Colin Muir, Mr Tim Christie and Mr Simon Parker gave evidence in a hot tub conducted on 20-21 October 2014. They were individually cross-examined and re-examined. Dr Ayerbe gave evidence on 11 November 2014. He was also cross-examined and re-examined.
- 40 The four witnesses met in conclave, and prepared a conclave report date 26 May 2014 expressing their agreement or disagreement as to each of the applicable criteria.
- 41 Mr Colin Muir has almost twenty years’ experience in owning, breeding and showing American Pit Bull Terriers. He is currently the President of the American Pit Bull Terrier Club of Australia and has been since 1995. He has acted as a show judge extensively throughout Australia and in New Zealand. He was appointed by the Minister for Agriculture to the selection pool for restricted breed dog review panels shortly after the commencement of the Act and remained a member until about 2010. He has been appointed

²³ Section 29 of the *Domestic Animals Amendment Act 2014* (Vic) assented to on 25 February 2014 does not apply to declarations made prior to the commencement date of that Act.

²⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336; see the discussion in *Volpe v Hume City Council (Review and Regulation)* [2013] VCAT 2179 [22] and [23].

²⁵ (2013) 306 ALR 125 [38] – [39] (Osborn and Beach JJA).

²⁶ [2003] NSWCA 388 [35] (emphasis omitted).

to numerous restricted breed dog review panels by the Minister. He is an organiser with the Australian Manufacturing Workers Union.

- 42 Mr Tim Christie is an animal management officer, and local laws officer with the respondent. He has completed an animal management training course together with other training and has over 23 years of experience with all kinds of animals including domestic animals.
- 43 Mr Simon Parker is a prosecution officer with the respondent. He has previous experience with the Hume City Council and has experience assessing dogs under the Old Standard as well as the New Standard. When at Hume City Council, he had extensive experience handling dogs as an animal management officer. He assists with the handling of dogs in his current role.
- 44 Dr Jack Ayerbe graduated with a Bachelor of Veterinary Science at the University of Melbourne and commenced practice in Australia in 1970. He established the Newtown Veterinary Clinic in Geelong in 1974. In his practice, he has been involved with many pure breed dog judges and breeders, as well as dog societies. He is an honorary life member of the RSPCA and has received an award for service to that society. He is the Patron of the Victorian Schnauzer Society, the Victorian Chow-Chow Society and the Geelong Kennel Club. He has conducted courses on animal ethics for the Department of Primary Industry's Bureau of Animal Welfare and served on animal ethics committees including the Ethics Committee of the CSIRO Animal Health Laboratories in Geelong.
- 45 Both parties sought to support their own witnesses and criticise opposing witnesses through cross-examination and submissions.
- 46 In relation to Mr Muir, Mr Appadurai elicited:
- (1) the dog shows judged by Mr Muir are not shows governed by the Australian Kennel Council or the Victorian Canine Association;
 - (2) Mr Muir is not authorised in Australia to judge American Pit Bull Terriers by any Australian authority other than his own club;
 - (3) there is a formal process internally within the American Pit Bull Terrier Club of Australia for persons who desire to be qualified to judge pit bull terriers;
 - (4) Mr Muir has not judged any breed other than American Pit Bull Terriers;
 - (5) the American Pit Bull Terrier is not recognised as a breed by Australian authorities such as the Victorian Canine Association (now known as Dogs Victoria);
 - (6) Mr Muir is opposed to breed specific legislation, and believes that the deed not the breed should be punished;

- (7) Mr Muir was opposed to any form of regulation that effectively operates as a racial profiling of dogs rather than dealing with issues based on the actions of the owner and dog irrespective of breed; and
- (8) Mr Muir and the Australian Pit Bull Terrier Club have strong views about punishing the deed and not the breed.

47 I accept that Mr Muir is a very experienced judge and assessor of American Pit Bull Terriers. I also accept that he is qualified to give expert evidence as to matters concerning the appearance of American Pit Bull Terriers under the Old Standard and the New Standard. While entirely opposed to the restricted breed dog legislation in Victoria, his observations and opinions were of considerable assistance to the Tribunal in reaching a conclusion. There is no reason based on his beliefs to reject his observations and opinions, or conclude that he is not a credible witness.

48 In relation to Mr Christie, Mr Albert elicited:

- (1) Mr Christie has not conducted any studies or research in canine anatomy;
- (2) he has completed a four day animal management training course at Animal Aid in Kilsyth and other short courses and training;
- (3) he has no experience in judging dogs;
- (4) he has completed a four or five hour course at the Department of Primary Industry concerning the standard and has experience in the field dealing with animals on a day-to-day basis;
- (5) he has never owned a pit bull and did not claim to be an expert on pit bulls;
- (6) he believes that what he has learnt put him in good stead to make the decisions that he has made in accordance with the standard;
- (7) he works in the same offices as Mr Parker directly opposite each other;
- (8) he has had minimal discussion with Mr Parker about the case; and
- (9) Mr Parker has had no dealings with Mr Christie's preparation or documentation.

49 Mr Christie's evidence is helpful to the Tribunal in reaching a conclusion. I accept that his observations are those of an honest and experienced officer in his appointment with the respondent.

50 In relation to Mr Parker, Mr Albert elicited:

- (1) Mr Parker has conducted no studies in canine anatomy;
- (2) apart from the training given by the Department of Primary Industry, he has no qualifications in the area of canine anatomy;
- (3) this course is a half-day course;

- (4) Mr Christie works in the animal management officer section of the respondent's office while he is located opposite the team leader;
- (5) while he knew that a declaration was to be made, Mr Christie did not ask for Mr Parker's opinion before it was made;
- (6) after Mr Parker was asked to represent the respondent at VCAT, he did speak to Mr Christie about the matter;
- (7) prior to May 2013 when he appeared for the respondent in a directions hearing at VCAT, he was fully conversant with the assessment made by Mr Christie under the Old Standard and knew what his conclusions were; and
- (8) despite very extensive effort it was not possible for the respondent to obtain an independent expert to look at the dog despite trying the RSPCA, the Department of Primary Industry, Dogs Victoria, and the University of Melbourne Veterinary Hospital.

51 I found Mr Parker to be an honest and direct witness. His evidence was helpful to the Tribunal in reaching a conclusion as to the application of the New Standard.

52 In relation to Dr Ayerbe, Mr Appadurai elicited:

- (1) Dr Ayerbe has never given evidence that a dog met the requirements of the Old Standard or the New Standard;
- (2) his views and those of the Australian Veterinary Association are to support any legislation that will control dogs which engage in unsociable behaviour;
- (3) he does not believe that the restricted breed dog legislation will prevent dog attacks;
- (4) in his view, the present legislation is unfair;
- (5) the American Pit Bull Terrier is not a pure breed - it is impossible to genetically identify the breed of a pit bull terrier; and
- (6) Dr Ayerbe has never found a dog that complies with the legislation.

53 I accept that Dr Ayerbe is qualified by training, study and experience to give expert evidence as to matters concerning the appearance of American Pit Bull Terriers under the Old Standard and the New Standard. The opinions held by Dr Ayerbe as to the undesirability of restricted breed dog legislation do not lead to the conclusion that his evidence is discredited or unreliable. To the contrary, while adopting a strict view of the interpretation of the New Standard, Dr Ayerbe's observations and opinions have made a valuable contribution to the Tribunal in coming to a conclusion as to the issues that arise under the New Standard. In a number of instances although not in others, I have accepted his observations and opinions as to the dog.

Expertise and opinion evidence

- 54 I accept Mr Albert's submission that neither Mr Christie nor Mr Parker are sufficiently qualified by training, study or experience to be accepted as expert witnesses. I also accept that their evidence cannot be said to be wholly or substantially based on their specialist or expert knowledge.²⁷
- 55 The respondent did not seek to comply in respect of the evidence of Mr Christie and Mr Parker with the requirements of the Tribunal's expert witness practice note PNVCAT2 for expert witnesses. Neither Mr Christie nor Mr Parker showed any awareness of the contents of the practice note or the duties of expert witnesses.
- 56 The evidence of Mr Christie and Mr Parker is to be treated in the same way as that of any lay witness. They can give probative evidence of what they saw and of what they did. They cannot give evidence on matters which require expertise. This is not to make any criticism of them. They are experienced council officers performing the difficult tasks given to them under s 98A of the Act.

View

- 57 On Friday 14 November 2014, I conducted a view of the dog at the Lost Dogs Home, 2 Gracie Street, North Melbourne for the purpose of better understanding the evidence presented to the Tribunal. I was able to view the dog from all directions and when standing, sitting and walking.
- 58 The view was of great benefit in better understanding the evidence. Each witness referred to the limitations in using photographs to show or depict features of the dog, the significance of the angle at which the photograph was taken and the possibility of obscuration or exaggeration depending on the way the photograph was taken.

Categories of Exemption

- 59 All witnesses agreed and the Tribunal finds that no exemption category applies to the dog.

Conformation Criteria: Height at withers from the ground for bitches and dogs is 43 centimetres – 53 centimetres.

- 60 All witnesses agreed at the conclave that the height of the dog at withers from the ground was between 43-53 cm, and that the dog met this criterion.
- 61 I accept this evidence and am satisfied to a comfortable level of satisfaction that the dog complies with this criterion.

²⁷ *Clark v Ryan* (1960) 103 CLR 486, 491-2; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 [85] (Heydon JA); *Applebee v Monash City Council (No 2)* [2013] VSC 680 [66]; *Gray v Brimbank City Council* [2014] VSC 13 [53], [54].

Conformation Criteria: Weight for bitches and dogs is 14 kilograms – 36 kilograms.

- 62 All witnesses agreed at the conclave that the dog's weight is between 26kg and 28kg.
- 63 I accept this evidence and am satisfied to a comfortable level of satisfaction that the dog complies with this criterion.

Conformation Criteria: Muzzle is slightly shorter in length to the skull, being 2:3 ratio of muzzle to skull.

- 64 All witnesses agreed at the conclave that the dog does not comply with this criterion.
- 65 I accept this evidence and find that the dog does not comply with this criterion.

Conformation Criteria: The overall outline of the breed indicates it to be slightly longer in length (point of shoulder to buttocks) than height (withers to ground). Bitches may be slightly longer than males.

- 66 As to the Confirmation Criteria, the New Standard refers to the depiction in Figure 1. This depiction locates the terms used in the New Standard on a depiction of a dog.
- 67 Mr Muir found that the dog does not comply. The overall outline shows the dog to be much longer in length (57cm) than height (50cm). The New Standard requires the dog to be "slightly" longer than high, and "slightly longer for bitches than dogs". He considered the dog to be more than slightly longer than high. Given that the dog was not a bitch, it did not comply. Dr Ayerbe found that the dog did not comply. He said that the dog was 56cm high, and 55cm long.
- 68 Mr Parker stated that the dog complies. The dog was 57cm in length and 51cm high. Mr Christie said that the dog complies. It was 54cm in length and 51cm high.
- 69 At the conclave, the witnesses sought to reconcile the different measurements of the dog. The dog was remeasured. The witnesses agreed that the height of the dog measured in accordance with the New Standard was 51cm. The length of the dog was measured twice in accordance with the New Standard. The first measurement was 55cm. The second measurement was 57cm. The conclave determined that the dog was longer than tall. The conclave was unable to determine whether the dog was "slightly longer in length" than height as required by the Standard.
- 70 The word 'slightly' as used in the Standard is a very good example of what Kaye J described in *Dudas v Monash City Council*²⁸ as a general or non-specific term which requires a degree of subjective assessment. Such an assessment of a dog by an authorised officer will often be controversial.

²⁸ [2012] VSC 578 [89].

- 71 In cross-examination by Mr Albert of Mr Christie, Mr Christie agreed that if the 51cm height was deducted from the 55cm length, the difference of 4cm amounted to about 8%. If the 57cm length was taken, the difference of 6cm amounted to 12% of the dog's height in percentage terms. In human terms, a person 183.6cm tall is 8% taller than a person around 170cm tall. Mr Christie agreed that a person of 190cm or 12% taller in height than a person of 170cm in height would be regarded as quite a bit taller – certainly more than slightly taller than the person of 170cm in height.
- 72 Mr Albert also cross-examined Mr Christie by reference to the evidence given by Ms Rosemary Walsh and Ms Emma Ellis, both Hume City Council officers, in *Rexter*.²⁹ Both Ms Walsh and Ms Ellis accepted in evidence in that case that if the length of a dog was 58cm and the height of the dog was 52.5cm the dog would be more than slightly longer than high. The difference between 52.5cm and 58cm was 5.5cm or about 11%. If the length of the dog were accepted as 55cm, there would be a 2.5cm or about a 5% difference. Mr Christie did not agree with the view of Ms Walsh and Ms Ellis, and maintained that in either instance the dog could be considered slightly longer.
- 73 Mr Parker was cross-examined in a similar way to Mr Christie. He agreed that in human terms a 184cm tall person was more than slightly taller than a 170cm tall person. He agreed that a dog of 52.5cm in height and 55cm in length or 5% longer than high was slightly longer. A dog that was 11% longer than high would be stretching his acceptance of slight. Moving beyond 10%, it became less likely that he would consider the dog to be slightly longer than high. However, Mr Parker was unwilling to accept any particular percentage as more than slight as he needed the dog in front of him to know.
- 74 The submissions made by Mr Albert are in substance:
- (1) the height of the dog as measured by the conclave is 51cm;
 - (2) the length of the dog measured in accordance with the New Standard is either 55cm or 57cm;
 - (3) it cannot be determined whether the length was 55cm or 57cm;
 - (4) the dog is more than slightly longer than tall, certainly if the 57cm length is correct;
 - (5) there is room for disagreement as illustrated by the opinions expressed by the Council officers in the *Rexter* case; and
 - (6) the Tribunal cannot be satisfied to the requisite degree that this criterion was met.
- 75 Mr Appudurai submitted in substance that:

²⁹ [2014] VCAT 501 [147] – [151].

- (1) the Macquarie dictionary definition of 'slight' gave the following meanings to the word:
 1. small in amount, degree, etc.: *a slight increase; a slight smell.*
 2. of little weight, or importance; trifling.
 3. slender; slim.
 4. frail; flimsy.
 5. ...
 6. ...
 - (2) the criterion in the Standard referred to "The overall outline of the breed indicates it to be slightly longer...";
 - (3) mathematical percentages are not decisive; and
 - (4) assessment is a matter of overall impression for the Tribunal.
- 76 The onus of proof is on the respondent to show on the evidence that the criterion is satisfied to a comfortable level of satisfaction on the balance of probabilities. It has not been established by the respondent that the dog is only slightly longer in length than height when measured in the manner specified by the New Standard. There is significant room for doubt and disagreement as illustrated by the conflicting evidence before the Tribunal.
- 77 The scope for disagreement and doubt is confirmed by two further considerations.
- (a) There are difficulties and uncertainties associated with the measurement of animals. One difficulty is to identify the precise point at which measurement is to commence. To some extent, the location specified in Figure 1 of the New Standard for the commencement or conclusion of measurement is akin to an area rather than a point. Another is that measurement process can be affected by movement of the dog, or by a lack of enthusiasm on the part of the dog for the measurement process.
 - (b) The New Standard does not provide any quantitative or percentage basis to make the required assessment. It is wrong to import any percentage basis for decision making when there is none in the New Standard. Nonetheless, on one measurement of the length of the dog the difference between height and length is around 12%.
- 78 For these reasons, I am not satisfied that this criterion is met. I certainly do not have a comfortable level of satisfaction on the balance of probabilities that the criterion is met.

Conformation Criteria: The distance from withers to the elbow and the elbow to the ground is generally equal.

79 At the conclave, the dog was measured and found to be 22cm from the withers to the elbow, and 29cm from the elbow to the ground. It was agreed that the dog does not comply.

80 I accept this evidence and find that the dog does not meet this criterion.

Cumulative assessment of Conformation Criteria

81 The result is that the dog has been shown to meet two of the Conformation Criteria. The dog has not been shown to meet three of the Conformation Criteria.

82 While these reasons could stop at this point because the Conformation Criteria are not met, the other criteria were fully addressed in evidence and by submissions. I will set out my conclusions accordingly.

General Appearance

83 The New Standard describes the general appearance of an American Pit Bull Terrier:

The dog's general appearance is a medium sized dog that is strongly built with well defined muscles. This breed is noted for its climbing ability and subsequent strength in its hindquarters.

The general appearance is not made a criterion in its own right. Its role in the New Standard must therefore be to inform other criteria.

Physical Characteristics Criteria: The head is proportionate to the dog.

84 As to this criterion, the New Standard refers to Figure 2. This is a photograph of the model dog taken from the side.

85 Mr Muir found that the dog complies. The head is proportionate to the dog as a whole, but appears heavy on a long neck. Dr Ayerbe found the dog does not comply. The head is oversize rather than proportionate.

86 Mr Parker stated that the dog complies. The head is in proportion to the dog overall in that it is not over or under sized in comparison to the size of the animal. Mr Christie said that the dog complies. The head is proportionate to the dog, not over or under.

87 At the conclave, three witnesses said there is compliance with Dr Ayerbe maintaining the dog does not comply.

88 The term 'proportionate' is not defined in the Standard. It is a general and non-specific term. In its ordinary usage, 'proportionate' may often mean 'corresponding in size or amount' to something else. I take this criterion in the New Standard to mean that the head is proportionate to the general body of the dog.

89 I accept the evidence of Mr Muir, Mr Parker and Mr Christie rather than that of Dr Ayerbe. I am satisfied that the head of the dog itself is not unduly large or unduly small by comparison with the body of the dog. I find that it is proportionate to the dog, and that this criterion is met.

90 I am satisfied to a comfortable level of satisfaction that this criterion is met.

Physical Characteristics Criteria: The general shape of the head is that of a blunt wedge, large and broad.

91 The New Standard refers to Figure 3. This shows a photograph of the model dog taken from above and a depiction of a dog from the front. A trapezoidal shape is shown around the head and muzzle of the dog as shown in the photograph and in the depiction to illustrate the blunt wedge.

92 There are two dimensions to be considered. One is vertical from above – the other is horizontal from the front.

93 Mr Muir found that the dog does not comply. Viewed from above, the sides of the skull are almost parallel with a rapid concave into the muzzle, which is also almost parallel until it reaches the nose leather. The long muzzle combined with a narrow head gives the impression of an almost brick shaped head rather than a blunt wedge. Dr Ayerbe found that the dog does not comply. The head is more pointed than shaped as a blunt wedge.

94 Mr Parker observed that the dog complies. The head exhibits the general shape of a blunt wedge, large and broad. Mr Christie said the dog complies. The head has the general shape of a blunt wedge, large and broad.

95 At the conclave, the two witnesses for the applicant said that the dog does not comply while the two witnesses for the respondent said that it did.

96 I accept the evidence of Mr Muir and Dr Ayerbe. The dog has a muzzle which presents from above as “pointy” rather than as a blunt wedge. Looked at from the front, the dog’s head does not present as a blunt wedge, large and broad. The lower part of the dog’s mouth is not nearly as wide as that of the model dog depicted in the New Standard.

97 I find that this criterion is not proved by the respondent and that the dog does not comply.

Physical Characteristics Criteria: The skull and muzzle are on parallel plains separated by a moderately deep stop.³⁰

98 The New Standard refers to Figure 4. This is a side photograph of the head and part of the neck of the model dog with an arrow directed towards the stop of the dog. There is also a depiction of a dog’s head indicating the location of the skull, stop and muzzle.

99 Mr Muir found the dog does not comply. Viewed from the side, the head and muzzle are not on parallel planes. The head rounds to about mid skull

³⁰ There is an error in the New Standard which refers to ‘plains’ but means ‘planes’.

and has a reasonably steep incline to the stop. The muzzle is relatively flat with at best a slight incline to the nose. Dr Ayerbe found the dog does not comply. Viewed from the side, the skull and muzzle are not on parallel planes. The stop is sloping and is quite deep.

- 100 Mr Parker stated that the dog complies. The skull and muzzle are on parallel planes. The two portions of his overall head are separated by a stop of moderate depth. Mr Christie said that the dog complies. The skull and muzzle are on parallel plains separated by a moderately deep stop.
- 101 At the conclave, the two witnesses for the applicant maintained that the dog does not comply while the two witnesses for the respondent said that it did.
- 102 I accept the evidence of Mr Muir and Dr Ayerbe. I am not satisfied that the skull and muzzle are on parallel planes. To the contrary insofar as planes can be identified, they will intersect. The plane of the skull is difficult to discern due to the domed or rounded nature of the skull whilst the muzzle is narrower than that of the model dog. It is hard to determine what is a 'moderately deep stop' due to the general, non-specific and subjective nature of the words moderately and deep.
- 103 I do not have a comfortable level of satisfaction that the dog complies with this criterion.

Physical Characteristics Criteria: The skull is large, fairly flat, broad and deep, slightly tapering towards the stop.

- 104 The New Standard again refers to Figure 4 which is a side view of the head and part of the neck of the model dog with an adjoining depiction.
- 105 Mr Muir found that the dog does not comply. The skull is not large. It is rather domed, rounding into the stop rather than tapering. Dr Ayerbe found that the dog does not comply. The skull is not large and tapers towards the stop.
- 106 Mr Parker said that the dog complies. The skull is large, while still in proportion to the entire dog. It is fairly flat and appears broad and deep. Examination from a profile angle also shows a slight tapering towards the stop. Mr Christie also said that the dog complies. The skull is large, fairly broad and deep, slightly tapering towards the stop.
- 107 At the conclave, the two witnesses for the applicant said the dog does not comply while the two witnesses for the respondent said that it did.
- 108 I accept the evidence of Mr Muir and Dr Ayerbe. The skull is not a large skull. It is much smaller than the skull of the model dog in the New Standard. The skull is domed and rounded in appearance, and curves into the stop. The skull is not 'fairly flat' as required by the New Standard.
- 109 I do not have a comfortable level of satisfaction that the dog complies with this criterion.

Physical Characteristics Criteria: Muzzle is broad, deep and powerful with a slight taper to the nose and falls away slightly under the eyes.

- 110 The New Standard refers to Figure 5. This is an angled photograph of the model dog's head. A depiction shows the location of the fall away.
- 111 Mr Muir found that the dog does not comply. The muzzle is narrow, but reasonably deep. There is no taper from the muzzle to the nose when viewed from the side or above. There is a slight fall-away. Dr Ayerbe found that the dog does not comply. The muzzle is not broad and powerful, and does not fall away under the eyes.
- 112 Mr Parker stated that the dog complies. The muzzle is broad, deep and powerful and a slight taper to the nose was evident. Mr Christie said that the dog complies. The muzzle is broad, deep, powerful with a slight taper to the nose and falls away.
- 113 At the conclave, the two witnesses for the applicant said that the dog does not comply. The two witnesses for the respondent said that it did.
- 114 I accept the evidence of Mr Muir and Dr Ayerbe. I am not satisfied that the muzzle is broad. To the contrary it is significantly narrower than that shown in the photograph of the model dog. I am not satisfied that the muzzle is deep and powerful. I am satisfied that the muzzle falls away slightly under the eyes. I accept that there is a slight taper from the muzzle to the nose when viewed from the side. Although meeting some elements, the dog does not comply with other elements particularly the requirement for a broad, deep and powerful muzzle.
- 115 I find that the dog does not comply with this criterion.

Physical Characteristics Criteria: There is a deep median furrow reducing in depth from stop to occiput.

- 116 The New Standard refers to Figure 6. This is an angled photograph of the head of the model and a depiction showing wrinkles, furrows and lips.
- 117 Mr Muir found that the dog complies. There is a median furrow deep at the stop reducing over the skull. Dr Ayerbe found that the dog does not comply. There is a shallow median furrow which does not reduce in depth from the stop to the occiput.
- 118 Mr Parker said that the dog complies. A deep median furrow was seen and felt reducing in depth moving from the stop to the occiput. Mr Christie also said that the dog complies. The dog has a deep median furrow reducing in depth from the stop to occiput.
- 119 At the conclave, three witnesses agreed that there was compliance with Dr Ayerbe maintaining that the dog does not comply.
- 120 I accept the evidence of Mr Muir, Mr Parker and Mr Christie for the reasons that they gave. I find that the dog has a deep median furrow reducing in depth from the stop to the occiput.

121 I have a comfortable level of satisfaction that the dog complies with this criterion.

Physical Characteristics Criteria: Cheek muscles are prominent but free of wrinkles.

122 The New Standard again refers to Figure 6 and to an adjoining depiction.

123 Mr Muir found that the dog does not comply. There is no visible musculature over the cheeks. Loose skin forming wrinkles is present. Dr Ayerbe found that the dog complies, and matches the description.

124 Mr Parker stated that the dog complies. The muscles are prominent in the dog's cheeks. They were free of wrinkles as required by the standard. Mr Christie said that the dog complies. The cheek muscles are prominent and free of wrinkles.

125 At the conclave, three witnesses agreed that there was compliance with Mr Muir maintaining that the dog does not comply.

126 I accept the evidence of Mr Muir that there is no visible musculature over the cheeks. While the dog has cheek muscles as all dogs do, they are far from prominent. They are not nearly as extensive as the cheek muscles shown on the model dog. The cheek muscles are free from wrinkles.

127 I find that the dog does not comply with this criterion as the cheek muscles are not prominent.

Physical Characteristics Criteria: When the dog is alerted wrinkles will form on the forehead.

128 All witnesses at the conclave agreed that the dog complies. When the dog is alerted, wrinkles form on his forehead.

129 I accept this evidence, and have a comfortable level of satisfaction that the dog complies with this criterion.

Physical Characteristics Criteria: Lips are clean and tight.

130 All witnesses at the conclave agreed that the dog was not compliant.

131 I accept this evidence and find that the dog does not meet this criterion.

Physical Characteristics Criteria: Teeth are large and a complete scissor bite ie. upper teeth closely overlapping the lower teeth and set square to the jaws.

132 All members of the conclave agreed that the dog complies with this criterion.

133 I accept this evidence and have a comfortable level of satisfaction that the dog meets this criterion.

Physical Characteristics Criteria: Ears are set high on the skull, not large and half pricked or rose shaped (ie folding backwards exposing the inner burr of the ear).

- 134 The New Standard refers to Figure 8. This is a photograph of the head of the dog showing high rose shaped ears. Three depictions illustrate the difference between rose ears, cropped ears and half prick ears.
- 135 Mr Muir found that the dog complies (if rose shaped ears comply, the language of the standard is not clear). The ears are set back, on the skull and set high. They are laid back half rose. Dr Ayerbe found that the dog does not comply. The ears are not set high on head.
- 136 Mr Parker stated that the dog complies. The ears are set high on the dog's skull, not large and expose the inner burr of the ear. They are rose ears. Mr Christie said that the dog complies. The dog has ears set high on the skull, not large and rose shaped.
- 137 At the conclave, three witnesses agreed that the dog complies with Dr Ayerbe maintaining that the dog does not comply. Mr Muir says that the dog only complies if rose shaped ears are acceptable. The conclave noted that the language used in the New Standard is unclear.
- 138 I interpret the criterion in the New Standard as requiring the following features:
- (1) the ears must be set high on the skull;
 - (2) the ears must not be large; and
 - (3) the ears must be half pricked or rose shaped.
- 139 I accept the evidence of Mr Muir, Mr Parker and Mr Christie as to this criterion. The ears of the dog are set high on the skull. They are not large. They are rose shaped. They fold back and expose the inner burr of the ear.
- 140 I have a comfortable level of satisfaction that the dog complies with this criterion.

Physical Characteristics Criteria: The neck is moderate length and with great strength, tapering from the head into the shoulders.

- 141 The New Standard refers to Figure 9. This is a side photograph of the model dog showing the neck and head. A depiction describes the neck as being moderate and elegant. The jawline is shown as well above the backline.
- 142 Mr Muir found that the dog does not comply. The neck is long and without great strength the dog appearing to have difficulty holding up the dog's head. There is no taper. Dr Ayerbe found that the dog does not comply. The neck is of more than moderate length, and does not demonstrate great strength. It does not taper from the head into the shoulders.
- 143 Mr Parker stated that the dog complies. The neck is of moderate length. Great strength was exhibited in the neck, in line with the overall strength of the dog. The neck tapers from the head and slows into the shoulders. Mr

Christie said that the dog complies. The neck is moderate and with great strength, tapering from the head into the shoulders.

- 144 At the conclave, the two witnesses for the applicant said that the dog does not comply. The two witnesses for the respondent said that the dog complies.
- 145 I accept the evidence of Mr Muir and Dr Ayerbe. The neck of the dog is more than of moderate length. It does not taper from the head onto the shoulders. The neck does not show great strength. The strength of the neck is significantly less than the apparent strength of the neck of the model dog in the New Standard.
- 146 I am not satisfied that the dog complies with this criterion.

Physical Characteristics Criteria: The neck must be free from loose skin or dewlap (loose, pendulous skin under the throat).

- 147 The skin on the neck of the model dog shown in the New Standard is taut and free of any sign of loose skin.
- 148 Mr Muir found that the dog complies. There is a small amount of loose skin under the throat but not to the extent of dewlap. Dr Ayerbe found that the dog does not comply. There is loose skin under the neck.
- 149 Mr Parker stated that the dog complies. He was not able to see or feel any loose skin on the neck. Mr Christie said that the dog complies. He said that the neck was free from loose skin or dewlap.
- 150 At the conclave, Mr Muir changed his position to non-compliance. He and Dr Ayerbe said that the dog did not comply. The two witnesses for the respondent said that the dog complies.
- 151 I accept the evidence of Dr Ayerbe and Mr Muir at the conclave. There is loose skin under the dog's neck. The neck is certainly not free of loose skin.
- 152 I find that the dog does not comply with this criterion.

Physical Characteristics Criteria: Forequarters of the dog have strong forelegs, well boned and muscular with elbows fitting close to the body.

- 153 The New Standard refers to Figure 10. This consists of two photographs of the model dog showing a front and side view. Strong muscular forelegs are prominent.
- 154 Mr Muir found that the dog does not comply. The forequarter has some visible musculature, but forelegs are lightly boned and held out at the elbows. Dr Ayerbe found that the dog does not comply. The forelegs are not strong and the elbows do not fit close to the body.
- 155 Mr Parker stated that the dog complies. He considered the dog to have strong forelegs, which are well boned and muscular. The dog's elbows fit closely to his body. Mr Christie said that the dog complies. The forequarters

have strong forelegs. They are well boned and muscular with elbows fitting close to the body.

- 156 At the conclave, the two witnesses for the applicant said that the dog does not comply. The two witnesses for the respondent said that the dog complies.
- 157 I accept the evidence of Mr Muir and Dr Ayerbe. The forelegs of the dog are plainly not nearly as strong as those shown in the model dog. The dog is not well boned and muscular. In addition, the dog's elbows do not fit close to the dog's body. Overall the dog is not nearly as strong as the model dog shown in the New Standard.
- 158 I find that the dog does not comply.

Physical Characteristics Criteria: The hindquarters are strong and muscular and are in balance with the forequarters. Thighs are well developed and muscular.

- 159 The New Standard refers to Figure 11. This is a side view of the model dog showing large, strong thighs.
- 160 Mr Muir found that the dog does not comply. The hindquarter has some visible musculature when flexed but not the extent that the muscles are well developed. The thighs are light in keeping with the rest of the dog. The hindquarter is wider than the forequarter and not in balance. Dr Ayerbe found that the dog does not comply. The hindquarters are out of proportion to the forequarters. The upper hindquarters are strong and muscular but the lower hindquarters are not. The thighs are well developed and muscular.
- 161 Mr Parker stated that the dog complies. Musculature and strength are found in the hindquarters. This gives them balance with the forequarters and is especially evident in the dog's well developed thighs. Mr Christie said that the dog complies. The hindquarters are strong and muscular and are in balance with the forequarters. Thighs are well developed and muscular.
- 162 At the conclave, the two witnesses for the applicant said that the dog does not comply. The two witnesses for the respondent said that it does.
- 163 I accept the evidence of Mr Muir and Dr Ayerbe. The upper hindquarters are strong and muscular. However, the lower hindquarters are not nearly as strong or muscular as the upper hindquarters. The thighs are well developed and muscular.
- 164 The dog has weak lower hindquarters. This is particularly significant as according to the New Standard the breed is noted for its climbing ability and subsequent strength in the hindquarters.³¹
- 165 I find that the dog does not comply.

³¹ New Standard page 3 'General Appearance'.

Physical Characteristics Criteria: The tail is set in line with the back and tapers to a point.

- 166 All witnesses agreed at the conclave that the dog met this criterion.
- 167 I accept this evidence, and have a comfortable level of satisfaction that the dog meets this criterion.

Physical Characteristics Criteria: The length of the tail should reach approximately to the hock joint.

- 168 All witnesses at the conclave agreed that the dog satisfies this criterion.
- 169 I accept this evidence and have a comfortable level of satisfaction that the dog meets this criterion.

Physical Characteristics Criteria: The coat is short, smooth, glossy and of a harsh texture, free of undercoat.

- 170 Mr Muir found that the dog complies. The coat is short, smooth, glossy and free of undercoat. There is no harshness. Dr Ayerbe found that the dog does not comply. The coat is short and free of undercoat. It is not glossy, but dull and greasy.
- 171 Mr Parker stated that the dog complies. The coat is short, smooth and glossy. The coat has a harsh texture and no undercoat is present. Mr Christie said that the dog complies. The coat is short and smooth, glossy and has a harsh texture, free of under coat.
- 172 At the conclave, three witnesses including Mr Muir agreed that the dog complies with Dr Ayerbe maintaining that the dog does not comply.
- 173 I accept the evidence of Mr Muir, Mr Parker and Mr Christie.
- 174 The coat of the dog is short, smooth and glossy. It has a harsh, rather than a fine texture, and is free of undercoat.
- 175 I have a comfortable level of satisfaction that the dog meets this criterion.

Cumulative assessment of Physical Characteristics Criteria

- 176 There are a total of 18 physical characteristics criterion. I hold that the dog complies with eight of these criteria whilst not complying with ten of the criteria. As compliance with a minimum of ten criteria is necessary, I find that the dog does not meet the Physical Characteristics Criteria.

Supplementary Physical Characteristics Criteria: Nose is large with wide open nostrils and may be of any colour.

- 177 All witnesses agreed at the conclave that the dog complies with this criterion.
- 178 I accept this evidence and have a comfortable level of satisfaction that the dog meets this criterion.

Supplementary Physical Characteristics Criteria: Eyes are medium in size, round in shape and set low in the head – not prominent.

- 179 Mr Muir found that the dog does not comply. The dog's eyes are set just below mid foreface and slightly high. They are medium in size and almond shaped. Dr Ayerbe found that the dog does not comply. The eyes are medium in size and almond in shape, not set low in the head and are not prominent.
- 180 Mr Parker stated that the dog was non-compliant. The eyes are medium in size and set low in his head and are not prominent. However, he was not satisfied that his eyes can be characterised as round. Mr Christie said that the dog complies. The eyes are medium in size, round in shape and set low in the head. They are not prominent.
- 181 At the conclave, three witnesses agreed that the dog does not comply with Mr Christie maintaining that the dog does comply.
- 182 I accept the evidence of Mr Muir, Dr Ayerbe and Mr Parker. I am satisfied that the eyes are medium in size and not prominent. However, I am satisfied that they are almond shaped and not round. They also appear to be too high to be described as "set low in the head".
- 183 I am not satisfied that the dog complies with this criterion.

Supplementary Physical Characteristics Criteria: Neck has a slight arch over the crest.

- 184 All witnesses at the conclave agreed that the dog satisfies this criterion.
- 185 I accept this evidence and have a comfortable level of satisfaction that the dog meets this criterion.

Supplementary Physical Characteristics Criteria: The forelegs are set moderately well apart and in a straight line to the ground.

- 186 The New Standard refers to Figure 14. Figure 14 contains a photograph which shows the model dog's forelegs to be very straight. A depiction shows the model dog's elbows tight to the body, and legs generally perpendicular to the ground. Figure 1 shows that the foreleg extends from the elbow to the forefoot and includes the forearm and the pastern.
- 187 Mr Muir found that the dog does not comply. The forelegs are set moderately well apart (narrow dog). The forelegs turn out at the wrist through the pastern and do not form a straight line to the ground. Dr Ayerbe found that the dog does not comply. Viewed from the front, the forelegs are not set well apart and are not in a straight line to the ground.
- 188 Mr Parker stated that the dog complies. When positioned in an erect, yet relaxed stance, the forelegs are set moderately well apart and in a straight line to the ground. Mr Christie said that the dog complies. The forelegs are set moderately well apart and in a straight line to the ground.

189 At the conclave, the two witnesses for the applicant said that the dog did not comply. The two witnesses for the respondent said that the dog complies.

190 I accept the evidence of Mr Muir and Dr Ayerbe. The forelegs of the dog are not in a straight line to the ground. The forelegs turn out at the wrist having what was described at the hearing as Queen Anne legs reflecting the style of Queen Anne furniture. I accept that the legs turn out at the pasterns, and are not straight to the ground as shown in Figure 14 of the New Standard.

191 I find that the dog does not comply with this criterion.

Supplementary Physical Characteristics Criteria: The legs are straight with some flexibility in the pasterns.

192 The New Standard refers to Figure 14 which shows the legs generally straight including the pasterns. The depiction is to like effect.

193 Mr Muir found that the dog does not comply. The dog is down in the pasterns at the front which gives little flexibility. The legs viewed from the front and side are not straight with the legs turning forward and outward at the wrist. Dr Ayerbe found that the dog does not comply. The legs are not straight.

194 Mr Parker stated that the dog complies. The legs are straight with some flexibility in the pasterns. Mr Christie said that the dog complies. The legs are straight with some flexibility in the pasterns.

195 At the conclave, the two witnesses for the applicant said that the dog did not comply. The two witnesses for the respondent said that the dog complies.

196 I accept the evidence of Mr Muir and Dr Ayerbe. The dog's legs are not nearly as straight as those of the model dog shown in Figure 14 or those in the adjoining depiction. I accept the evidence of the applicant's witnesses that the dog is down in the pasterns at the front. This is clearly visible in the photographs taken by the witnesses. The forelegs of the dog turn forward and out at the wrists.

197 I am not satisfied that the dog complies with this criterion.

Supplementary Physical Characteristics Criteria: The body has a deep chest of moderate width.

198 The New Standard refers to Figure 14. Both Figure 14 and the adjoining depiction show the depth and width of the chest. The chest protrudes below the dog's body in a prominent manner.

199 Mr Muir found that the dog does not comply. The chest is of moderate width in the context of this dog. It is shallow without depth. Dr Ayerbe found that the dog does not comply. The chest has great width.

200 Mr Parker stated that the dog complies. The dog had a deep chest of moderate width. Mr Christie said that the dog complies. The dog's body has a deep chest of moderate width.

- 201 In the conclave, the two witnesses for the applicant said that the dog did not comply. The two witnesses for the respondent said that the dog complies.
- 202 I accept the evidence of with Mr Muir and Dr Ayerbe. I am not satisfied that the dog has a deep chest. The dog's chest is not nearly as prominent or conspicuous as that of the model dog shown in the New Standard. It does not hang nearly as low. The term 'moderate' is general, non-specific and largely subjective. It is hard to determine whether the dog's chest is of greater or lesser width than moderate. I am not satisfied that the dog's chest is of moderate width.
- 203 Overall, I am satisfied that the dog does not comply with this criterion.

Supplementary Physical Characteristics Criteria: The pasterns short and fairly straight but with flexibility.

- 204 The New Standard refers to Figure 15. This consists of a photograph of the forelegs and another of the rear legs of the model dog.
- 205 Mr Muir found that the dog does not comply. The front pasterns are short and down without flexibility. The rear pasterns are long and generally held completely erect. Dr Ayerbe found that the dog does not comply. The pasterns are not straight.
- 206 Mr Parker stated that the dog complies. The pasterns are short and fairly straight but with some flexibility in the pasterns. Mr Christie said that the dog complies. The forelegs are straight with some flexibility in the pasterns.
- 207 At the conclave, the two witnesses for the applicant said that the dog did not comply. The two witnesses for the respondent said that the dog complies.
- 208 I accept the evidence of Mr Muir and Dr Ayerbe. The pasterns are not straight. I am not satisfied that they are short or flexible. The front pasterns are much more angled than those of the model dog shown in Figure 15.
- 209 I find that the dog does not meet this criterion.

Supplementary Physical Characteristics Criteria: The forechest should not extend far beyond the point of shoulder or below the elbow.

- 210 The New Standard refers to Figure 16. This shows the forechest not extending to any significant extent beyond the point of the shoulder or below the elbow. The depiction identifies the location of the forechest and point of the shoulder.
- 211 Mr Muir found that the dog does not comply. The forechest is some distance inside the point of shoulder and drops below the elbow. Dr Ayerbe found that the dog complies and matched the description. However, at the conclave he considered that the forechest was below the point of the shoulder resulting in non-compliance.
- 212 Mr Parker stated that the dog complies. He was able to determine that the forechest does not extend far beyond the point of shoulder. It is approximately in line with the point of shoulder. Mr Christie said that the

dog complies. The forechest did not extend far beyond the point of the shoulder or below the elbow.

- 213 At the conclave, the two witnesses for the applicant said that the dog does not comply and the two witnesses for the respondent said that the dog complies.
- 214 I accept the evidence of Mr Parker and Mr Christie. Because of the modest size of the forechest, it does not reach the point of the shoulder and does protrude beyond the point of the shoulder. The forechest does not extend below the elbow.
- 215 I am satisfied to a comfortable level of satisfaction that the dog complies with this criterion.

Supplementary Physical Characteristics Criteria: The dog is well ribbed back with moderate tuck up (concave underline of the body curving upwards from end of the ribs to waist).

- 216 Mr Muir found that the dog does not comply. The dog is well ribbed back and has a more than moderate tuck. Dr Ayerbe found that the dog complies. It matches the description.
- 217 Mr Parker stated that the dog complies. The dog's back is well ribbed. The tuck up that is evident is moderate in its degree. Mr Christie said that the dog complies. The dog has a well ribbed back with a moderate tuck. The concave underline of the body curves upwards from the end of the ribs to the waist.
- 218 At the conclave, three witnesses agreed that the dog complies with Mr Muir maintaining that the dog does not comply.
- 219 I accept the evidence of Mr Muir. The dog has a well ribbed back. It has a tuck up much greater in degree than that shown in Figure 18 of the New Standard. This raises the issue as to what is a 'moderate tuck' and what is a greater than moderate tuck. The term 'moderate' is general and non-specific with a significant subjective element. My view is that the extent of the tuck of the dog exceeds moderate, and is very pronounced even severe.
- 220 Overall, I am not satisfied to a comfortable level of satisfaction that the dog complies with this criterion.

Supplementary Physical Characteristics Criteria: The back is broad, strong, firm and level and with a slight incline at the withers.

- 221 The New Standard refers to Figure 17. This side photograph of the model dog shows the characteristics referred to in the criterion. A depiction shows the location of the back, loin and croup.
- 222 Mr Muir found that the dog does not comply. The back is narrow for a lightly built dog. It is firm with a slight incline at the withers. It is not level, dropping from the withers, into the back and rising to a roach over the loin then rounding into the buttocks. Dr Ayerbe found that the dog complies.

- 223 Mr Parker stated that the dog complies. The back itself is broad, strong, firm and level. There was a slight incline at the withers. Mr Christie said that the dog complies. The dog's back is broad, strong, firm and level and with slight incline.
- 224 At the conclave, three witnesses agreed that the dog complied with Mr Muir maintaining that the dog did not comply.
- 225 I accept the evidence of Mr Muir. The back of the dog is broad. However, it is not strong in appearance, nor is it firm or level. It is significantly different from the back of the model dog shown in Figure 17. There is a slight incline at the withers.
- 226 I do not have a comfortable level of satisfaction that this criterion is met.

Supplementary Physical Characteristics Criteria: The loin is short and deep with a slight slope to the croup.

- 227 The New Standard refers to Figure 17 as illustrating this criterion. A depiction shows the location of the back, loin and croup.
- 228 Mr Muir found that the dog does not comply. The loin is long and without much depth (greater than normal (exaggerated) tuck). Dr Ayerbe found that the dog does not comply. The loin is comparatively long in comparison with the body.
- 229 Mr Parker stated that the dog complies. It has a short but deep loin with a slight slope evident towards the croup. Mr Christie said that the dog complies. The loin is short and deep with a slight slope to the croup.
- 230 In the conclave, the two witnesses for the applicant said that the dog did not comply. The two witnesses for the respondent said that the dog complies.
- 231 I accept the evidence of Mr Parker and Mr Christie. The dog's loin is short and deep. There is a slight slope to the croup.
- 232 I have a comfortable level of satisfaction that the dog complies with this criterion.

Supplementary Physical Characteristics Criteria: The hock joint should be well bent and the rear pasterns close to the ground perpendicular and parallel to each other.

- 233 The New Standard refers to Figure 18. This consists of two depictions. The second depiction shows the hock joint well bent and the rear pasterns close to the ground, perpendicular and parallel to each other.
- 234 Mr Muir found that the dog generally complies. The hock joint is well bent, rear pastern slightly long, but perpendicular and parallel. There was a slight cow hock. Dr Ayerbe found that the dog does not comply. The pasterns are not close to the ground nor perpendicular or parallel to each other. The hock joints are over bent.

- 235 Mr Parker stated that the dog complies. The dog had a well bent hock joint with rear pasterns close to the ground, perpendicular and parallel to each other. Mr Christie said that the dog complies. Hock joints are well bent and the rear pasterns close to the ground perpendicular and parallel to each other.
- 236 At the conclave, Mr Muir considered that the dog's cow hock of the rear legs meant that the dog could not comply.
- 237 As a result, the two witnesses for the applicant said that the dog did not comply. The two witnesses for the respondent said that the dog complies.
- 238 I accept the evidence of Mr Muir and Dr Ayerbe. I find that the hock joint is well bent. The rear pasterns are close to the ground. The rear pasterns are perpendicular. The dog however has cow hock shown by the outwards splay of the dog's feet. The rear pasterns are not parallel to each other.
- 239 I do not have a comfortable level of satisfaction that the dog complies with this criterion.

Supplementary Physical Characteristics Criteria: The feet are round and in balance with the size of the dog, well arched and tight.

- 240 All witnesses agreed at the conclave that the dog did not comply.
- 241 I accept this evidence and find that the dog does not comply with this criterion.

Supplementary Physical Characteristics Criteria: The pads are hard and well cushioned.

- 242 All witnesses at the conclave agreed that the dog does not comply.
- 243 I accept this evidence and find that the dog does not meet this criterion.

Supplementary Physical Characteristics Criteria: Nails are strong.

- 244 Mr Muir found that the dog complies. Dr Ayerbe found that the dog does not comply. Mr Parker and Mr Christie said that the dog complies.
- 245 At the conclave, three witnesses agreed that the dog complies with Dr Ayerbe finding the dog does not comply.
- 246 I accept the evidence Mr Muir, Mr Parker and Mr Christie that the nails are strong. I accept that the dog has strong nails on all feet.
- 247 I have a comfortable level of satisfaction that this criterion is satisfied.

Supplementary Physical Characteristics Criteria: At rest the tail is carried low and when excited may be carried raised.

- 248 All witnesses at the conclave agreed that the dog complied with this criterion.
- 249 I accept this evidence and have a comfortable level of satisfaction that the dog meets this criterion.

Supplementary Physical Characteristics Criteria: White feet and a splash of white on the chest on solid coloured dogs.

- 250 The model dog photographed in the New Standard does not have white feet. It does not have a splash of white on the chest despite being a solid coloured dog.
- 251 Mr Muir found that the dog complies noting its unusual colour. Dr Ayerbe found that the dog did not comply. The feet are not 100% white.
- 252 Mr Parker stated that the dog complies. It has a majority tan colouration. White markings are present on all of the dog's feet. It has a white splash extending upwards from the forechest and a small white marking on the muzzle beside the nose. Mr Christie said that the dog complies. It displayed white feet and a splash of white on the chest on solid colour.
- 253 At the conclave, three witnesses agreed that the dog complies with Dr Ayerbe finding the dog does not comply.
- 254 I accept the evidence of Dr Ayerbe. While the dog has two and one half toes on each front foot which are splashed with white, it does not have white feet overall. The dog has a splash of white on the chest. It is a solid coloured dog.
- 255 The New Standard requires "white feet". The dog has a splash of white on some toes of each front foot, but not white feet. The New Standard requires white feet overall and not just a splash of white on some toes.
- 256 I find that the dog does not comply with the criterion.

Supplementary Physical Characteristics Criteria: The eye rims are the same colour as the skin colour.

- 257 Figures 13 and 14 of the Standard show the model dog with similar coloured eye rims as skin colour.
- 258 Mr Muir found that the dog complies. Dr Ayerbe found that the dog does not comply. The rims are not the same colour as the skin.
- 259 Mr Parker stated that the dog complies. Overall the skin colour is a shade of pink. This shade corresponds as the same colour as the eye rims. Mr Christie said that the dog complies. The eye rims are the same pink colour as the skin.
- 260 At the conclave, three witnesses agreed that the dog complies with Dr Ayerbe finding the dog does not comply.
- 261 I have carefully examined photographs of the colour of the rims around the dog's eyes. During the inspection the dog was paraded both inside under artificial light and outside under natural light in order to be able to better understand the colour of the dog's skin and eye rims under different light conditions.
- 262 I accept the evidence of Dr Ayerbe. I am not satisfied that the dog has the same coloured eye rims as his skin.

263 I do not have a comfortable level of satisfaction that the dog complies with this criterion.

Supplementary Physical Characteristics Criteria: The arches over the eyes are well defined but not pronounced.

264 Mr Muir found that the dog complies. Dr Ayerbe found that the dog does not comply. There are no arches over the eyes.

265 Mr Parker and Mr Christie found that the dog complies. The arches over eyes are well defined but not pronounced.

266 At the conclave, three witnesses agreed that the dog complies with Dr Ayerbe finding that the dog does not comply.

267 I have reviewed the evidence and the photographs. I have viewed the dog during the inspection. I am not satisfied that the dog has well defined arches over the eyes. I accept Dr Ayerbe's evidence that there are no arches certainly no well-defined arches.

268 I do not have a comfortable level of satisfaction that the dog complies with this criterion.

Cumulative assessment of Supplementary Physical Characteristics Criteria

269 There are a total of nineteen Supplementary Physical Characteristics Criteria. I am satisfied that the dog complies with six of these criteria. It does not comply with thirteen of the criteria.

Conclusion

270 The result is that the dog:

- (1) is not subject to any exemption category;
- (2) complies with two of the five Conformation Criteria;
- (3) complies with eight of the eighteen Physical Characteristics Criteria;
and
- (4) complies with six of the nineteen Supplementary Physical Characteristics Criteria.

271 The dog is not a restricted breed dog as defined by Part 1 of the New Standard.



Justice Greg Garde AO RFD
President

