

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Euston* [2018] QCAT 421

PARTIES: **HEALTH OMBUDSMAN**  
(applicant)  
v  
**GREGORY SCOTT EUSTON**  
(respondent)

APPLICATION NO/S: OCR238-16

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 21 December 2018

HEARING DATE: 22 August 2018, 23 August 2018, 13 November 2018

HEARD AT: Brisbane

DECISION OF: Judge Sheridan, Deputy President

Assisted by:  
Dr T Chamberlain  
Dr H Moudgil  
Mr P Zimon

ORDERS:

- 1. The Tribunal finds in terms of charge 1 that Dr Euston had made statements which he knew or ought to have known were false, namely his denial that he had ever supplied dangerous drugs or that he had ever been in possession of dangerous drugs. Otherwise, the Tribunal finds the facts alleged in charge 1 not proven.**
- 2. The Tribunal finds charge 2 not proven.**
- 3. The Tribunal finds charge 3 proven.**
- 4. The proceedings are otherwise adjourned for further hearing on a date to be fixed.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – where the practitioner was charged and convicted on his own plea of guilty to various criminal charges relating to the unlawful supply and possession of a dangerous drug – where the practitioner was subject to conditions on his registration imposed by the Medical Board of Australia requiring drug testing of urine and hair samples – where a test result suggested the presence of methyl-amphetamine – where the practitioner denies having ever used methyl-

amphetamine – where it is alleged that the practitioner made a false statement and provided a false statutory declaration to the Australian Health Practitioner Regulation Agency – whether the practitioner provided false statements, and/or made statements which he knew or ought to have known were false and/or misleading, to the Australian Health Practitioner Regulation Agency

*Health Ombudsman Act 2013*, s 103(1)(a), s 104  
*Health Practitioner Regulation National Law (Queensland)*, s 5

**APPEARANCES &  
 REPRESENTATION:**

Applicant: K A McMillan QC instructed by the Office of the Health Ombudsman

Respondent: C Wilson, with G.J. Gibson QC on 13 November 2018, instructed by Synkronos Legal

**REASONS FOR DECISION**

- [1] On 12 December 2016, the Health Ombudsman referred to the Tribunal disciplinary proceedings against the practitioner, Dr Euston. The referral was made by the director of proceedings on behalf of the Health Ombudsman pursuant to s 103(1)(a) and s 104 of the *Health Ombudsman Act 2013* (**HO Act**).
- [2] The initial referral was amended on 8 May 2018 and on 22 August 2018 so as to incorporate different particulars of the charges brought.
- [3] Three charges are the subject of the referral. The charges arise from Dr Euston having been charged and subsequently convicted of offences of possession and supply of dangerous drugs pursuant to s 6 and s 9 of the *Drugs Misuse Act 1986* and Dr Euston's dealing with the regulator subsequent to his arrest on 19 October 2013.
- [4] The three charges can be summarised as:
  - (a) **Charge 1** – Between 24 October and 30 November 2013, Dr Euston made statements to the Australian Health Practitioners Regulation Agency (**AHPRA**) which he knew or ought to have known were false and/or misleading;
  - (b) **Charge 2** – On or about 7 March 2014, Dr Euston gave a false statutory declaration to AHPRA;
  - (c) **Charge 3** – On 5 December 2015, Dr Euston was convicted upon his own plea of guilty of four counts of unlawfully supplying a dangerous drug and three counts of unlawfully possessing a dangerous drug.
- [5] It is alleged that as a result of the conduct in the three charges Dr Euston has engaged in professional misconduct within the meaning of s 5 of the *Health Practitioner Regulation National Law (Queensland)*.

- [6] In respect of charge 1, the issues in dispute are whether the letter sent from his solicitors to AHPRA dated 29 October 2013 contained false statements. In that letter, Dr Euston denied:
- (a) any knowledge of the existence of the drugs alleged to have been discovered at his dwelling;
  - (b) that he has ever supplied dangerous drugs;
  - (c) that he has ever been in possession of dangerous drugs;
  - (d) that he has ever used 'ice'.
- [7] On 29 November 2013, a further letter was sent to AHPRA through Dr Euston's legal representatives stating that "Dr Euston relies on the 29 October submissions".
- [8] Charge 2 relates to statements made by Dr Euston in a statutory declaration dated 6 March 2014 that:
- (a) "I have not used methyl-amphetamine"; and
  - (b) "There is simply no evidence to conclude that I have been, or currently am, a methyl-amphetamine user or abuser and I reiterate that I have never used or abused this drug."
- [9] Dr Euston denies any statements made in his statutory declaration were false.
- [10] In respect of charge 3, Dr Euston admitted that he had pleaded guilty to, and was convicted of, the charges as alleged. In his response to the referral, Dr Euston admitted that the matter the subject of charge 3 may constitute professional misconduct or unprofessional conduct.

### **Background facts**

- [11] Dr Euston graduated from University of Queensland with the degrees of Bachelor of Medicine and Bachelor of Surgery in 1995. He became a member of the Australian Medical Association that year and was registered with the Medical Board of Australia (**Board**) on 8 December 1995.
- [12] In 2004, Dr Euston was awarded a postgraduate diploma of Perioperative and Critical Care Echocardiography from the University of Melbourne and became a fellow of the Australia and New Zealand College of Anaesthetists. In 2005, he became a member of the Australian Society of Anaesthetists. Dr Euston completed his anaesthetic training primarily at the Royal Brisbane Women's Hospital and in November 2004, he joined Wickham Terrace Anaesthesia as a specialist anaesthetist, director and shareholder, becoming a board member in 2005.
- [13] Dr Euston continues to work fulltime in private practice.
- [14] On 19 October 2013, members of the Queensland Police Service (**QPS**) carried out a search of the home that Dr Euston had shared with his partner since around March 2001. During the search of his home, the QPS officers located drugs and other items. Dr Euston's telephone was seized during the search. His partner, who was also present

at the time of the execution of the warrant, immediately admitted to QPS that the drugs belonged to him.

- [15] At the time of the search warrant, Dr Euston's partner contacted Mr Coburn, a solicitor with the firm Peter Shields Lawyers. Mr Coburn arrived at the home within approximately 15 minutes.
- [16] At the conclusion of the execution of the warrant, Dr Euston was transported to the Charlotte Street Brisbane City Criminal Investigations Branch. Mr Coburn followed in his own car. An interview was conducted with Dr Euston but in accordance with Mr Coburn's instructions, Dr Euston did not make a statement to police. Dr Euston was charged with two counts of supplying dangerous drugs and one count of possessing a dangerous drug that night.
- [17] On 21 October 2013, QPS sent a notification to AHPRA informing them of the search warrant and of Dr Euston having been charged, also attaching a copy of the proposed charge list.
- [18] On 25 October 2013, AHPRA sent to Dr Euston a notice of proposed immediate action advising that the Queensland Medical Interim Notification Group proposed to suspend Dr Euston's registration and invited him to make submissions.
- [19] Dr Euston contacted Mr Coburn. At that time, Mr Coburn told Dr Euston that responding to the letter from AHPRA was not within his field of expertise and that he would forward the letter on to a colleague. Mr Coburn contacted Mr Litster of Synkronos Legal.
- [20] Under cover of a letter dated 29 October 2013, Synkronos Legal on behalf of Dr Euston sent a submission to AHPRA. In that submission, Dr Euston volunteered to submit to any testing regime required by AHPRA.
- [21] In fact, Dr Euston had already submitted voluntarily to drug testing from 25 October 2013. By email dated 30 October 2013, the legal representatives for Dr Euston sent to AHPRA a copy of Dr Euston's urine drug test results, which were clear.
- [22] On 1 November 2013, AHPRA sent a notice of decision to Dr Euston to take immediate action in the form of conditions on his registration, in particular conditions requiring attendance for urine drug screening and hair drug analysis together with a requirement for notification of those conditions to be given to any hospital at which Dr Euston is credentialed.
- [23] By letter dated 14 November 2013, Dr Euston was given details of the requirements in order to comply with the conditions imposed on 1 November 2013. The urine drug screening was required to be at a group 2 frequency of approximately 8 to 12 tests per month and the hair drug analysis at such frequency as determined by the Board. Pursuant to those conditions, Dr Euston was required to attend for his first urine drug test on 16 November 2013 and to provide his first hair specimen before 21 November 2013.
- [24] Under cover of letters from AHPRA dated 14 November 2013, the QML collectors were asked to collect a hair sample that was "at least a pencil width in thickness". In another letter in response to the question, "What length of hair is required for analysis" it was said, "6 mm from root (or as much as is available if shorter)."

- [25] On 15 November 2013, the Committee sent a further notice to Dr Euston of an intention to suspend his registration and requested further submissions. The suspension was proposed due to concerns around further information received from police in relation to the criminal charges facing Dr Euston, as well as a concern that he may have been suffering from a health impairment, namely, a substance abuse disorder, which detrimentally affected or was likely to detrimentally affect his capacity to practise his profession. There was also a suggestion that he had been providing prescriptions to persons without adequately undertaking an assessment of their condition, thereby posing a risk to the health and safety of the public.
- [26] Under cover of a letter dated 29 November 2013, the legal representatives for Dr Euston provided further submissions to AHPRA. It was submitted that, pending determination of the criminal charges against Dr Euston, the conditions which had been imposed remained an appropriate response by the Board to the further information provided to AHPRA by the police. The suggestion that Dr Euston had been providing prescriptions to persons without undertaking an assessment of their condition was denied.
- [27] On 6 December 2013, the Board gave Dr Euston a notice of decision to take immediate action by way of the imposition of further conditions. Those conditions restricted Dr Euston from prescribing or administering any scheduled drug, save for those that he prescribed and administered for the purpose of providing anaesthetic or post-operative care of inpatients in a hospital or day-surgery environment. A further proposed condition was included, the effect of which was that Dr Euston would have been prevented from practising medicine until he had provided a hair sample which was sufficient for hair testing purposes. This was based on concerns that Dr Euston could not provide hair samples of sufficient length to enable the testing of the hair to be undertaken in accordance with the Board's protocols.
- [28] On 11 December 2013, AHPRA received a further submission on behalf of Dr Euston. Attached to the submission dated 11 December 2013 was a statutory declaration executed by Dr Euston on 6 December 2013. Dr Euston deposed to:
- (a) having, for more than 10 years, shaved his head and the rest of his body on a weekly basis and his face daily;
  - (b) at the date of presentation to QML on 21 November 2013, his hair having grown to approximately 5mm all over his body; and
  - (c) as of the date of the declaration, his hair having grown to approximately 10mm all over his body.
- [29] On 13 December 2013, Dr Euston was notified of the Board's further decision to suspend his registration until such time as he had provided to QML a hair sample which QML determined to be sufficient for hair testing purposes and the Committee having received confirmation of receipt of such sample. The Committee commented in its decision that the need for the condition arose because Dr Euston had presented for a hair sample test fully shaven. At the time of its decision, the Committee had the statutory declaration of Dr Euston dated 6 December 2013.
- [30] A further submission was sent by the solicitors for Dr Euston to AHPRA on 23 December 2013. In that submission, it was said that a hair sample test had been taken

that day by Dr Euston's treating general practitioner, Dr Wilson, and that the sample had been sent to a laboratory in South Australia for testing.

- [31] Dr Euston provided a further hair sample to QML on 13 January 2014. By letter dated 25 February 2014 from AHPRA, Dr Euston was provided with a copy of the test results. It was said that the 3mm of hair from the pubic region was tested and approximately 50 picograms of methyl-amphetamine per milligram was detected. Dr Euston was invited to provide an explanation for this result.
- [32] A letter was sent from the solicitors for Dr Euston to AHPRA dated 7 March 2014. The letter enclosed a further statutory declaration signed by Dr Euston dated 6 March 2014 explaining the basis upon which the presence of any methyl-amphetamine could have been found in the hair sample analysis. In the statutory declaration, Dr Euston deposed that:
- (a) he had not used methyl-amphetamine;
  - (b) in the six months prior to the sample date, being 13 January 2014, he had taken Selegiline as treatment for restless leg syndrome;
  - (c) he had used the last of this medication on 19 October 2013, prior to undergoing any urine drug screening;
  - (d) he had recently learnt that Selegiline metabolises to methyl-amphetamine and has been implicated in false positive hair tests in the past;
  - (e) in or around August or September 2013, he contracted a head cold and purchased Sudafed Sinus and Pain Relief over the counter at a pharmacy and consumed the entire 24 tablets over the course of five days; and
  - (f) the quantity of methyl-amphetamine found was significantly below international guidelines required to indicate methyl-amphetamine use or abuse and was most likely a false positive result.
- [33] Attached to the statutory declaration was analysis conducted by Dr Euston of the literature concerning hair testing with respect to the detection of methyl-amphetamine.
- [34] On 11 September 2015, almost two years later, Dr Euston was indicted on the following charges:
1. **Count 1** – On a date unknown between 23 May 2012 and 26 May 2012, the practitioner unlawfully supplied a dangerous drug to another person, namely methyl-amphetamine.
  2. **Count 2** – On or about 2 June 2012, the practitioner unlawfully supplied a dangerous drug to another person, namely methyl-amphetamine.
  3. **Count 3** – On 29 July 2012, the practitioner unlawfully supplied a dangerous drug to another person, namely methyl-amphetamine.
  4. **Count 4** – On or about 10 November 2012, the practitioner unlawfully had possession of a dangerous drug, namely methyl-amphetamine.
  5. **Count 5** – On or about 17 November 2012, the practitioner unlawfully had possession of a dangerous drug, namely methyl-amphetamine.
  6. **Count 6** – On or about 21 November 2012, the practitioner unlawfully supplied a dangerous drug to another person, namely methyl-amphetamine.

7. **Count 7** – On 19 October 2013, the practitioner unlawfully had possession of the dangerous drug cocaine and methyl-amphetamine and the quantity of the dangerous drug exceeded 2.0 grams.

[35] On the presentation of the indictment on 11 September 2015, Dr Euston entered a plea of guilty to each count.

[36] At the sentencing hearing on 4 December 2015, at which Dr Euston was represented by Mr Holt QC, Byrne J sentenced Dr Euston to three years imprisonment with immediate release on parole.

[37] Following the conviction, Dr Euston immediately withdrew from practice whilst awaiting the Board decision concerning his registration. By letter dated 7 December 2015, AHPRA were notified by the solicitors for Dr Euston of his change in criminal history.

[38] On 3 February 2016, Dr Euston was notified by AHPRA that the Board had decided to take no further action despite the change in criminal history. The Committee noted sufficient protection was provided for patient safety via the current conditions and the practitioner was required to continue to demonstrate fitness to practice via UDS and hair testing. The Committee noted, in terms of the positive hair test result and a possible breach of the restrictions, the high level of compliance by Dr Euston with his restrictions and of the need for further information and evidence to determine whether the test result was in fact a false positive result.

[39] Further submissions were made on behalf of Dr Euston on 26 February 2016 and 7 March 2016. The submissions again confirmed that there was no evidence to conclude that Dr Euston is or had ever been a methyl-amphetamine user and provided further details as to his diagnosis of restless leg syndrome and his use of Selegiline for that condition.

[40] By letter dated 27 July 2016, AHPRA notified Dr Euston of the decision of the Queensland Notification Committee of the Board following its investigation into the positive hair result. The Committee had determined there was no evidence to suggest the practitioner's positive hair test result on 24 February 2014 was due to the use of an illicit substance and determined to take no further action.

[41] Dr Euston continues to remain subject to the conditions previously imposed on 1 November 2013 and 6 December 2013. Apart from the positive hair test result in January 2014, all other UDS and hair test results have been negative.

### **Tribunal hearing**

[42] The parties requested that the Tribunal proceed to hear evidence in relation to the factual disputes between the parties and to make its findings with respect to the factual disputes prior to the parties providing evidence and submissions in relation to any sanction which should be imposed. The Tribunal agreed to proceed on that basis.

### **Charges 1 and 2**

[43] In relation to the false statements the subject of charges 1 and 2, the Health Ombudsman relies on the fact that Dr Euston pleaded guilty to the criminal charges

of possession and supply of dangerous drugs. Further, the Health Ombudsman tendered evidence, which evidence was not contested, of:

- (a) drugs having been found in a black box located in the walk-in robe of the bedroom of the house where Dr Euston was found sleeping at the time of the execution of the search warrant;<sup>1</sup>
- (b) Dr Euston's fingerprints having been found on certain items in the black box where the drugs were located during the execution of the search warrant; namely, a finger print on the metal surface of digital scales found inside the black box containing the drugs, a fingerprint on the underside of a plastic container lid found inside the black box containing the drugs, and a fingerprint on the side of the cash tin [black box];<sup>2</sup>
- (c) Other fingerprints were located on the black box but no other fingerprints were identified. The fingerprints of Dr Euston's partner, Mr Sadlier, were not identified;
- (d) The black box containing a box of Viagra with Dr Euston's name on it; and
- (e) Dr Euston's phone being found to contain text messages indicating that he had:
  - (i) engaged in negotiations to purchase drugs;
  - (ii) made arrangements as to when others could come to collect drugs; and
  - (iii) made arrangements for the payment to be made for the drugs being collected.

[44] In response to the allegation that Dr Euston must have had knowledge of the drugs being in the house, Dr Euston admitted that drugs had been on the premises some 12 months previously but gave evidence of having drawn "a line under drugs being present in the house in late November 2012".<sup>3</sup> He said that following that, "I was not aware there were any drugs in the house."<sup>4</sup> On the night of the execution of the search warrant, Dr Euston's partner had made an immediate admission that the drugs belonged to him.

[45] In evidence, Dr Euston admitted to the presence of his fingerprints on certain items in the black box. He said he was not surprised his finger prints were located on the contents in the black box. He admitted he knew of the scales and had handled them before and said the containers were the same as containers which they had in the kitchen. Dr Euston admitted to being involved in illicit drug-related activity in the past in terms of the supply and possession charges.

[46] Dr Euston said there had been discussions between Mr Holt QC, his counsel in the criminal proceedings and the DPP about the possession charge. Dr Euston referred to the legal advice he had been given, which was to the effect that as he was the home

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<sup>1</sup> Affidavit of Robert Andrew La Presle, dated 18 May 2018, p 2.

<sup>2</sup> Affidavit of Randall Stuart Martin, dated 17 May 2018, p 3.

<sup>3</sup> Transcript of Proceedings, *Health Ombudsman v Gregory Scott Euston* (Queensland Civil and Administrative Tribunal, OCR238-16; Judge Sheridan, Dr H Moudgil, Dr T Chamberlain, Mr P Zimon, 22 August 2018) P1-88, ll35 (**Day 1 Transcript of Proceedings**).

<sup>4</sup> Ibid.

owner there was a risk that there could be a deemed possession. He confirmed that despite his plea so as to avoid a trial, he had no knowledge of the drugs located in the house.

- [47] His evidence as to the advice given is supported by the evidence of Mr Holt QC as contained in his statement dated 2 October 2018, attached to his affidavit dated 12 October 2018.
- [48] As to the statements regarding Dr Euston never having supplied or been in possession of dangerous drugs, in evidence Dr Euston accepted the statement was not true and admitted to knowing it was not true at the time the letter was sent.<sup>5</sup> Dr Euston referred to the fact that Mr Coburn had, on numerous occasions, stressed to him the importance of not saying anything to anyone about the charges, and if pushed to comment, he should deny all matters relating to the charges. In giving evidence, Dr Euston said those statements were made following legal advice that he should deny the charges the subject of the charge list and that he considered that the letter was consistent with the advice that he had been given.
- [49] Dr Euston said he was told by his legal advisers this was the submission that had to be made. Dr Euston said, “Mr Coburn had indicated that anything I say about those charges may harm my criminal defence.”<sup>6</sup> Dr Euston said he was very worried, at that time, about the criminal charges. Dr Euston admitted that they were very serious criminal charges.
- [50] In relation to the statement regarding whether Dr Euston had ever used ice, the Health Ombudsman also relied on:
- (a) the transcript of the sentencing hearing and the sentencing remarks of Justice Byrne;
  - (b) the words used by Dr Euston in the text messages retrieved from his mobile phone;
  - (c) the hair drug test results obtained from the specimen taken on 13 January 2014; and
  - (d) the expert evidence of Marc Grabowski in relation to the positive hair drug test result.
- [51] Dr Euston was questioned at length regarding the statement that he had never used methyl-amphetamine. In particular, he was questioned in relation to the instructions he had given to his legal representatives in relation to his use of methyl-amphetamine.
- [52] In answering questions regarding his alleged use of ice, Dr Euston admitted to having taken cocaine and ecstasy. He said he had taken cocaine once. He said the last time he had taken ecstasy was in February, March 2012, prior to that the New Year of 2012 and prior to that, not since university.
- [53] Dr Euston gave evidence that he had never instructed Mr Holt QC that he used methyl-amphetamine. Dr Euston said he was very careful with that instruction. Dr Euston

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<sup>5</sup> Day 1 Transcript of Proceedings, P1-89.

<sup>6</sup> Day 1 Transcript of Proceedings, P1-82, 17.

said in the conference with Mr Holt QC prior to the sentencing, Mr Holt QC had asked him a number of specific questions. Dr Euston said Mr Holt QC had asked him if he had used ecstasy to which he had said yes. Dr Euston said he was asked if he had used cocaine to which he had said yes. He was also asked about marijuana, to which he said yes. He said he was also asked about methyl-amphetamine to which he said no.

- [54] Dr Euston said he had also raised the issue of his use of methyl-amphetamine with Mr Holt QC at the first adjournment of the sentencing hearing “because I had concerns about how the offending was being characterised.”<sup>7</sup> Dr Euston said that Mr Holt QC told him “he’s going to be as delicate as he can with those submissions. He is going to be as careful as he possibly could with that.” Dr Euston said he accepted the advice of Mr Holt QC. Dr Euston said Mr Holt QC said to him that he would not make a submission directly that he was a user of methyl-amphetamine. Dr Euston did not accept, when asked, that Mr Holt QC had made any submission that he had used methyl-amphetamine in the sentencing process.
- [55] Dr Euston accepted that the Crown were pressing, in relation to a number of counts on the indictment, commerciality.
- [56] Eventually, Mr Holt QC was called by Dr Euston to give evidence before the Tribunal. Dr Euston’s representatives had not previously indicated that they would call Mr Holt QC and it was only following prompting by the Tribunal as to the possible consequences that might follow if he were not called that an affidavit from his counsel was filed. This unfortunately necessitated an adjournment of the hearing. Mr Holt QC was required for cross-examination.
- [57] Mr Holt QC accepted in his statement tendered in this tribunal that, in his sentencing submissions, where he had referred to “the drugs that are going to be used by him”,<sup>8</sup> those words on their face suggest that it was Dr Euston who was going to use those drugs. In context, the drugs being discussed were methyl-amphetamine.
- [58] Mr Holt QC accepted that he did have a recollection that Dr Euston had raised with him during one of the adjournments of the sentencing hearing that he had a concern about his perception that Mr Holt QC had suggested he had been a user of methyl-amphetamine. In his statement, Mr Holt QC suggests that he has a memory of being surprised by the concern because he had previously understood that Dr Euston’s acceptance that he had used drugs (albeit on a very limited basis) extended to methyl-amphetamine. Mr Holt QC referred to a written record of instructions held by Mr Coburn in which he believed there was a reference to the use of methyl-amphetamine in the same context as cocaine.
- [59] During the hearing, a call was made for production of those notes. They were not produced on the basis they did not exist. In his statement, Mr Holt QC says he understands that Dr Euston says he had never given the instructions, and Mr Holt QC says he has no reason to doubt that.

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<sup>7</sup> Transcript of Proceedings, *Health Ombudsman v Gregory Scott Euston* (Queensland Civil and Administrative Tribunal, OCR238-16; Judge Sheridan, Dr H Moudgil, Dr T Chamberlain, Mr P Zimon, 23 August 2018), P2-14, 117 (**Day 2 Transcript of Proceedings**).

<sup>8</sup> Transcript of sentencing hearing, P11-29, 113.

- [60] Under cross-examination, Mr Holt QC was not prepared to say with absolute certainty that Dr Euston had raised his concerns with him at the sentencing hearing because “I didn’t make note of it and it was three years ago”, but Mr Holt QC said that he did have a memory of him doing so. He says this was because these instructions were different to what he understood to be the position.
- [61] In re-examination, Mr Holt QC confirmed that the way in which he understood the relationship to exist in terms of the instructions that he had been given, and the discussions that he had had, was that “Mr Sadleir was the user, in effect, not Dr Euston”.<sup>9</sup> He said that he did have a genuine memory of the conversation with Dr Euston.
- [62] It was never suggested to Mr Holt QC that he was not telling the truth about what Dr Euston said to him on the day of the sentencing hearing.
- [63] In her submissions, Ms McMillan QC for the Health Ombudsman submitted that Dr Euston had failed to call witnesses on this issue (namely, Mr Sadlier and Mr Coburn) who might have been expected to corroborate his story. It was submitted that the Tribunal should draw an inference that the uncalled evidence would not have positively assisted Dr Euston’s case.
- [64] As the submission correctly states, the unexplained failure to call a witness, only allows the inference to be drawn that the evidence would not support a party’s case. It does not allow an inference to be drawn that there is or would be conflicting evidence to that of Dr Euston or Mr Holt QC, if the witnesses were called. Moreover, the relevant issue as to use of drugs by Dr Euston, as far as the lawyers were concerned, was based on submissions made by Mr Holt QC, who was called as a witness. On the evidence, Mr Sadlier had admitted from the outset the drugs were his. No submission was made as to how any further evidence from Mr Sadlier would affect the end result.
- [65] Dr Euston was asked questions regarding the text messages he had sent and in particular text messages which it was said indicated that he was a user of ice. These text messages referred to were contained in the written schedule of facts tendered at his sentencing hearing. The annexures to that schedule extracted various text messages relevant to the proof of the counts with which he had been charged.
- [66] It was put to Dr Euston by counsel for the Health Ombudsman that, based on his position that he had never used methyl-amphetamine, he would not have much experience about the quality of methyl-amphetamine. Dr Euston agreed to this proposition. Counsel then referred to the following text message exchange:
- ... You tell him you have the wax. Is wax a euphemism for methyl-amphetamine?---One of many.
- ....
- But it was of poor quality, so you knew enough about it to know it wasn’t of good quality?---Only from what I was told from where I got it from.

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<sup>9</sup> Day 1 Transcript of Proceedings, P1-29, 143.

[67] Counsel also referred to a text message in which Dr Euston said that the drug he supplied was “some of the best I’ve seen in Bris”. It was suggested to Dr Euston that, based on the content of the text messages he had sent, he conveyed that he had a fair degree of knowledge of methyl-amphetamine in Brisbane. Dr Euston denied this, and maintained that the text messages were “exaggerated, foolish and over talk, but that was what I was conveying”. It was his evidence that he was “the man in the middle”, and a lot of what he said “was big talk. It was repetition of what I was told, stupid talk”.

[68] Counsel for the Health Ombudsman then referred to a text message that Dr Euston had sent a friend to whom he was selling methyl-amphetamine, in which he stated:

As for issues u r having mate - .... As a friend I’m going to be blunt and say ‘use less product’ and issues will go – if you weren’t a mate then I wouldn’t give a fuck and risk your wrath at my honesty

Anything more than 1/2 a day for me and a few I know led to a total vanishing of life b4 my eyes.<sup>10</sup>

[69] It was put to Dr Euston that this text message had been sent in the context of a transaction involving methyl-amphetamine. Dr Euston’s evidence was that the text related to count 5 namely, possession of methyl-amphetamine. [query this sentence] He stated, “It’s not in the context of me taking methyl-amphetamine. It’s in the context of the only reference point I had, which was ecstasy”.<sup>11</sup>

[70] In terms of the hair drug test results, in response to the expert evidence of Marc Grabowski tendered by the Health Ombudsman, an affidavit of Dr Grahame Caldwell was tendered on behalf of Dr Euston.

[71] In his evidence, Dr Euston explained the positive hair drug test result as having been caused by his taking of the drug Selegiline for his restless leg syndrome.

[72] Dr Euston said that whilst he could not recall where he had obtained a script for Selegiline, it was likely that he had self-prescribed and he believes that it would have been somewhere between 2008 and 2010. He admitted that he had not discussed the use of Selegiline with his treating general practitioner, Dr Wilson, until his visit with Dr Wilson in November 2013. He said that he had discussed his restless leg syndrome with Dr Wilson at that time as he required further drugs for that condition. He said he had said to Dr Wilson that his preferred drug was Madopar. He had expressed the view to Dr Wilson that he found “Selegiline wasn’t so good”.

[73] When Dr Euston was questioned about seeking independent advice regarding his restless leg syndrome, Dr Euston admitted to having now changed his behaviour. He admitted to previously not necessarily seeking independent advice with respect to such conditions and to self-prescribing but that now matters such as his restless leg syndrome, all go through his general practitioner.

[74] Dr Euston was also questioned as to why, in completing the drug history section of the hair drug testing form in December 2013, he had not included in the list Selegiline.

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<sup>10</sup> Supplementary affidavit of Craig Allan Johnston, dated 23 May 2018, p 33.

<sup>11</sup> Day 2 Transcript of Proceedings, P2-18, 124-25.

- [75] His evidence was that he had put down everything that he had taken in the one and a half centimetre “hair frame time” which he calculated at six weeks. It was then put to him that this was “just a confection [of his] to get around a test that was obviously positive for methyl-amphetamine”. Dr Euston did not accept that suggestion.

#### **Analysis of evidence**

- [76] The Tribunal found Dr Euston to be a reliable and truthful witness. The Tribunal accepts that Dr Euston was not a user of methyl-amphetamine and that he had at all times given instructions to his legal representative that he was not a user of methyl-amphetamine. He gave evidence in a forthright manner. He conceded a large number of matters which were against his interest, particularly his admissions to having been involved with drugs.
- [77] Dr Euston was deliberative and careful in his answers in a way that suggested he was telling the truth. He was not evasive in his answers but was firm in his rejections of what became the main issue of disputation, namely, whether he was a user of ice.
- [78] His evidence in relation to what he told Mr Holt QC was consistent with the evidence of Mr Holt QC and Mr Holt QC was not challenged about the truthfulness of his evidence.

#### **Expert evidence**

- [79] The Health Ombudsman relied on the positive hair test result as independent evidence that Dr Euston was a user of methyl-amphetamine. The positive hair test results followed the performance of a hair test analysis by Forensic Science South Australia (FSSA) on a chest hair sample taken by Dr Wilson on 23 December 2013 and a pubic hair sample taken by QML on 13 January 2014. Both chest and pubic hair samples were tested.
- [80] Mr Grabowski was the appointed Forensic Scientist for FSSA and he had prepared a three-page Toxicology report on 13 January 2014 on the chest hair sample taken by Dr Wilson. The result of the analysis was that the hair segment contained approximately 50pg/mg of methyl-amphetamine. No other drugs were detected.
- [81] An affidavit of Dr Grahame Caldwell dated 18 July 2018 was filed on behalf of Dr Euston. Dr Caldwell is the Director of the Division of Toxicology, Director of Chemical Pathology, Esoteric Testing and Clinical Director of Prenatal Testing at Douglass Hanly Moir (DHM) Pathology.
- [82] In his report, Dr Caldwell said it is well recognised that the metabolism of Selegiline “may produce a positive result when a specimen is tested for the presence of methyl-amphetamine.” Dr Caldwell said that although the possibility of illicit substance abuse cannot be absolutely excluded, the use of the prescription medication Selegiline is entirely sufficient to account for the results obtained in both the QML and FSSA reports.
- [83] Dr Caldwell emphasised that the positive finding was significantly lower than the cut-off level of 200pg/mg recommended to identify drug use in both the Society of Hair Testing (SOHT) and European Guidelines for Workplace Drug and Alcohol Testing in Hair (EWDTS). Dr Caldwell was critical of the 20pg/mg reporting cut-off used by FSSA.

- [84] Dr Caldwell also expressed concern that FSSA are not able to distinguish through their testing the l-isomer and the d-isomer of methyl-amphetamine. If that testing had been available then the absence of the d-isomer would have favoured the declared use of Selegiline.
- [85] Both experts gave evidence at the hearing and were cross-examined. It was accepted that two segments of hair had been tested with each test producing the same result. Both experts agreed that the concentration detected was very low. They also both agreed that the relevant time frame was between six to eight months prior to the time of the sample collection.
- [86] Importantly, they both agreed that the positive test of 50pg/mg could have been because of the use of the prescription drug Selegiline.
- [87] The Tribunal having accepted Dr Euston's evidence as to his having used Selegiline, the Tribunal does not accept that the positive hair test result can be interpreted as evidence that Dr Euston had used methyl-amphetamine.

### **Conclusion**

- [88] The Tribunal finds in terms of charge 1 that Dr Euston had made statements which he knew or ought to have known were false, namely his denial that he had ever supplied dangerous drugs or that he had ever been in possession of dangerous drugs. Otherwise, the Tribunal finds the facts alleged in charge 1 not proven.
- [89] The Tribunal finds charge 2 not proven.
- [90] The Tribunal, as is accepted by Dr Euston, finds charge 3 proven.
- [91] The proceedings are otherwise adjourned for further hearing on a date to be fixed.