VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST VCAT REFERENCE NO. Z345/2019

CATCHWORDS

Review and Regulation – Harness Racing – charge of presenting a horse not free of a prohibited substance – TCO_2 – blood samples – incomplete seal on one side of security pouch containing sealed bottle with reserve samples in vacutainers – whether process resulting in the issue of certificate as to presence of prohibited substances was 'materially flawed' – whether charge otherwise proven – *Australian Harness Racing Rules* 190(1) and 191

APPLICANT	Jeff Tabone
RESPONDENT	Harness Racing Victoria
WHERE HELD	Melbourne
BEFORE	Senior Member E Wentworth
HEARING TYPE	Hearing
DATE OF HEARING	18 July 2019
DATE OF WRITTEN SUBMISSIONS	5 September 2019
DATE OF ORDER AND REASONS	31 October 2019
CITATION	Tabone v Harness Racing Victoria (Review and Regulation) [2019] VCAT 1701

FINDINGS

1 The Tribunal finds Charge 1 proven.

ORDER

1 An Administrative Mention is scheduled on **29 November 2019** by which date the parties are to advise as to the further conduct of the matter including whether the applicant continues to seek review of the decision of the respondent as to penalty and if so, the parties estimate of the time required for the hearing and consolidated available dates of all parties, legal representatives and witnesses.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL VCAT

E Wentworth
Senior Member

APPEARANCES:

For Applicant	Dr R Ingolby of Counsel
For Respondent	Mr A Anderson of Counsel

REASONS

Overview

1 This case is about whether Mr Jeff Tabone, as trainer, presented the horse 'The Thug NZ' to race at the Geelong harness racing meeting on 25 October 2018 not free of a prohibited substance, in breach of Rule 190(1) of the *Australian Harness Racing Rules* (**the Rules**).

2 This decision is about whether Harness Racing Victoria (**HRV**) have proved that the horse, on that day, had a total carbon dioxide (**TCO_2**) concentration in plasma of more than 36.1 millimoles per litre (**mmol/L**).

3 On 6 May 2019, the Harness Racing Appeals and Disciplinary Board (**the Board**) found Mr Tabone guilty of a charge of breaching Rule 190(1) (Charge 1) and imposed a three-year disqualification in respect of that charge. Other charges are not in issue in this case.

4 Although Mr Tabone pleaded guilty to the charge at the Board hearing, he now contests the charge in this application for review to the Tribunal.

5 In essence, Mr Tabone contends that HRV cannot rely on the certificates of the two laboratories that tested the primary sample and the reserve sample respectively, as to the concentration of TCO_2 in the blood of the horse, and cannot therefore prove the charge, because the certification process was materially flawed, within the meaning of Rule 191(7). In his submission, strict compliance with the requirements is necessary to prove the charge.

6 Mr Tabone relies on the fact, not in dispute, that the security satchel (also called sample pack) containing the primary sample and the reserve sample was incompletely sealed, with the result that there was a gap in the seal of the reserve sample pocket.[1] He also relies on the fact, not in dispute, that the incomplete seal was not noticed until the security satchel arrived at the first laboratory and was inconsistently recorded by the second laboratory; and other contended breaches of swab sampling protocols.

7 HRV contends that it can rely on the certificates because the process was not materially flawed: any process failures did not undermine the integrity and reliability of the sample that was taken. HRV contends that in any event the charge is established on the evidence. HRV relies on:

- Certificate RS18/18546-B of Racing Analytical Services Limited (**RASL**) dated 26 October 2018 that the sample tested (three vacutainers) (primary sample) yielded a TCO_2 result of 38.3 mmol/L, and alternatively direct evidence of the testing carried out and the results; and
- Certificate 49117R of the Queensland Racing Integrity Commission, Racing Science Centre (**QRSC**) dated 30 October 2018, that the

[1] Photographs showing the front and back of the satchel, and a view from above showing the opening in the seal were in evidence and are at Appendix A.

sample tested (three vacutainers) (reserve sample) yielded a TCO_2 result of 38.1 mmol/L, and alternatively direct evidence of the testing carried out and the results.

8 The issues for me to consider are:

- whether, for the purposes of Rule 191 of the Rules, headed 'Evidentiary Certificates', the certification process was materially flawed; and if so
- whether both certificates are affected or only one; and
- whether, even if one or both certificates cannot be relied under Rule 191, the Board can otherwise establish that the horse was presented not free of a prohibited substance.

Standard of proof

9 In disciplinary proceedings in which the allegations are serious, as in these proceedings, the Tribunal's approach to the standard of proof is as set out in *Briginshaw v Briginshaw.*[2]

10 The following passages from *Briginshaw*[3] articulate the relevant principles:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.
>
> No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal.
>
> But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.
>
> In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

---

2 (1938) 60 CLR 336.

3 (1938) 60 CLR 336 at p361-2, per Dixon J. [spacing inserted for emphasis]

11 It is well accepted that *Briginshaw* did not create a different standard of proof for serious allegations in civil cases.[4] The standard is not, as suggested in submissions on behalf of Mr Tabone, beyond reasonable doubt. But a finding that a person has engaged in fraudulent, criminal or other serious conduct should not be made lightly - it should not be based on 'inexact proofs, indefinite testimony or indirect inferences'.

The Rules

12 The relevant provisions of Rule 190 are:

> **Presentation free of prohibited substances**
>
> (1) A horse shall be presented for a race free of prohibited substances.
>
> (2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.
>
> ...
>
> (4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.
>
> (5) A horse is presented for a race during the period commencing at 8.00 a.m. on the day of the race for which the horse is nominated and ending at the time it is removed from the racecourse after the running of that race.
>
> ...

13 By the operation of Rule 188A(1)(b) (alkalinising agents) and 188A(2)(a) (exempt alkalinising agents) a TCO_2 concentration in plasma of more than 36.1 mmol/L is a prohibited substance.

14 Rule 191 is about evidentiary certificates. The relevant provisions of Rule 191 are:

> **Evidentiary certificates**
>
> (1) A certificate from a person or drug testing laboratory approved by the Controlling Body which certifies the presence of a prohibited substance in or on a horse at, or approximately at, a particular time, or in blood, urine, saliva, or other matter or sample or specimen tested, or that a prohibited substance had at some time been administered to a horse is prima facie evidence of the matters certified.
>
> (2) If another person or drug testing laboratory approved by the controlling body analyses a portion of the sample or specimen referred to in sub rule (1) and certifies the presence of a prohibited substance in the sample or specimen that certification

[4] See *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170. See also *Karakatsanis & Anor v Racing Victoria Limited* [2013] VSCA 305 (29 October 2013) at [29] and [37].

together with the certification referred to in sub rule (1) is conclusive evidence of the presence of a prohibited substance.

(3) A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse at a meeting shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the horse was presented for a race not free of prohibited substances.

...

(5) Sub rules (1) and (2) do not preclude the presence of a prohibited substance in or on a horse, or in blood, urine, saliva, or other matter or sample or specimen, or the fact that a prohibited substance had at some time been administered to a horse, being established in other ways.

(6) Sub rule (3) does not preclude the fact that a horse was presented for a race not free of prohibited substances being established in other ways.

(7) Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed.

15 In simple terms, the effect of those provisions of Rule 191 is that:

- One certificate of an approved person or laboratory certifying the presence of a prohibited substance in the sample tested is prima facie evidence of the presence of a prohibited substance [sub-rule 1];
- If a second approved person or laboratory analyses a portion of the same sample and certifies the presence of a prohibited substance in the sample, the two certificates together are conclusive evidence of the presence of a prohibited substance [sub-rule 2];
- A certificate which relates to a sample taken from a horse at a meeting shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the horse was presented for a race not free of prohibited substances [sub-rule 3];
- If, however, it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate was materially flawed, certificates do not possess evidentiary value nor establish an offence [sub-rule 7];
- Sub-rules 1, 2 and 3 do not preclude the fact that a prohibited substance was present or that the horse was presented for a race not free of a prohibited substance being established in other ways [sub-rules 5 and 6].

Legal framework

16 Both parties filed written submissions on the relevant legal principles. Because there was a dispute about the principles to apply, I consider those next.

Case law: 'Material flaw' and effect of non-compliance

17 Mr Tabone relied on the Queensland decisions of *Whitaker v Harness Racing Queensland* [2009] QRAT 14 and the later decision of *Gary Phillip Whitaker v Harness Racing Queensland* [2010] QCAT 693 (**the *Whitaker* cases**) to submit that:

- strict compliance with collection, custody and control procedures and protocols are required if a certificate of analysis is to be relied on;
- a failure to complete one of the required steps in the collection procedures means that there has not been substantial compliance with the collection procedures and the controlling body cannot rely on the certificate; and
- inability to rely on the certificate means that the charge cannot be proven. [5]

18 The omission in the *Whitaker* cases was the failure of the Stewards to take a step required under collection procedures, published by Queensland Animal Welfare and Integrity Board in 2008 under the then s 115(3) of the Queensland *Racing Act 2002* (**the Queensland Act**), and required to be adhered to under the then s 143(3).[6]

19 The Stewards did not take Step 7 of the Queensland procedures, which was:

> Place the three pocket security pouch inside the plastic bag that the sample bottles and associated equipment were delivered in. Staple the top of the plastic bag or seal with a heat sealer if one is available

20 The evidence was the Stewards had decided to abandon this step.

21 Section 143(3) of the Queensland Act was at the time:

> (3) If the results of the analysis are to be used by the control body for a purpose other than for research or survey purposes, the control body must take and deal with the thing for analysis under the integrity board's procedures mentioned in section 115(3) as in force at the relevant time.

22 The procedures were therefore mandated by the Queensland Act.[7]

---

5 Other Queensland cases to similar effect relied on and which concerned the meaning of 'substantial compliance' were 2005: *Smythe, K v Queensland Racing* [2005] QRAT 7 (urine sample); 2011: *Pomfrett v Racing Queensland Ltd* [2011] QCAT 137 (blood sample).

6 The Queensland Act has been amended since the *Whitaker* cases and a number of the provisions referred to in the cases have been repealed.

7 [2010] QCAT 693.

23 Each of the *Whitaker* cases, and other Queensland cases referred to by Mr Tabone, concerned the meaning of 'substantial compliance' in the then s 352A of the Queensland Act.

24 Section 352A, headed 'Integrity of the analysis of thing', enabled the certificate of analysis to be relied upon if it was proved there had been substantial compliance with requirements of s 143(3). It relevantly provided:

> (2) In making the decision, it is enough for the decision maker to be satisfied that the method of taking and dealing with the thing for analysis was in compliance with the requirements of section 143(3) to the extent that the integrity of the analysis was not adversely affected (***substantial compliance***).
>
> (3) Evidence of an accredited analyst or accredited veterinary surgeon, for an accredited facility, that the method of taking and dealing with the thing for analysis was in substantial compliance with the requirements of section 143(3), is evidence of that fact and, in the absence of evidence to the contrary, conclusive evidence of that fact.

25 The Queensland Racing Appeals Tribunal (**QRAT**) in *Whitaker*[8] described the purpose of s 352A:

> S 352A was intended to cover situations where there has been some irregularity which occurs in the course of collection or testing which is of an involuntary nature but does not ultimately affect the integrity of the sample.

26 In QRAT's view:

- This was not a case where the control body could rely on s 352A.
- Even though it may be a small step in the overall scheme of custody and control, it is nevertheless part of the protocol.
- Non-compliance with it was not accidental but deliberate.
- If the Stewards are to rely on the strict liability of the Rule to secure convictions, they do not have the right to alter the protocols no matter what their opinion of the efficacy of same. The protocols were mandated for strict compliance and not discretionary compliance.

27 The District Court set aside the decision of QRAT and remitted it to QCAT who considered the task required under s 352A at [14]-[19]:

> 14. It is, essentially, the submission of the Respondent that section 352A must be given some work to do or, put another way, there must be some tolerances within the protocol. "Substantial" compliance, rather than "strict" is all that is required. We agree that section 352A contemplates circumstances in which the protocol will not have been strictly adhered to but which will

8 [2009] QRAT 14 at [8].

have been adhered to in a way that amounts to "substantial compliance". It is not for us to analyse the collection procedures and attempt to envisage various circumstances in which certain conduct might amount to substantial compliance in order to test this theory. Rather, our task is to look at this particular conduct and see whether the compliance was substantial.

15. In our view, in order to meet that test, the non-compliance must be inconsequential. Whether the non-compliance is intentional or simply an oversight is not, for the purposes [of] section 352A, relevant. What is relevant is the impact of the non-compliance, and the degree it varies from what is required to comply with the protocol or step in the protocol.

16. Certainly, if the non-compliance affects the integrity of the sample then it cannot be saved. This seems to be the purpose of section 352A(3) which directs the decision-maker to the evidence of an analyst or veterinary surgeon on this very issue. Subsection 3 can only have been intended to require that analyst or veterinary surgeon to provide evidence as to matters within their expertise which go to the integrity of the analysis. In this case, Doctor Bruce Young has undertaken an exercise in his letter dated 20 July 2009 which goes beyond the relevant scientific enquiry, being the fact of compliance. There is nothing in his letter which indicates the integrity of the analysis has been affected. Therefore, we have had regard to that evidence but it does not impact our decision as to whether there has been substantial compliance with the collection procedures.

17. Step seven, like other steps in the procedure, is designed as a barrier to contamination or interference with the sample. Any sealing or securing of the sample in the plastic bag, provides a further step which anyone intent on interfering with the sample would need to overcome. It operates to provide a deterrent to such behaviour. Sealing the bag containing the sample also makes unintentional breaking of the other seals more difficult. These are at least some of the functions of sealing or otherwise securing the plastic bag. The Integrity Board have prescribed each of the nine steps, including step seven, and all have work to do.

Conclusion

18. In our view, each of the steps in the collection procedure is important in order to discharge the function of the protocol as a whole. Step seven requires packing and sealing, a two stage process, both of which have a function. One of those functions was not discharged because the package was not sealed or secured in any way. This transgression is not immaterial. We cannot, therefore, be satisfied that there has been substantial compliance with the collection process.

19. It follows from our findings that the certificate relied upon to evidence the contravention of section 190(1) of the Harness Racing Rules cannot be relied upon and there is no basis for the conviction.

Are the *Whitaker* cases the relevant law? No.

28 I agree with the submission of HRV that the *Whitaker* cases, and other Queensland cases referred to, are distinguishable and do not determine the issues in this case for the following reasons:

- The issue in the *Whitaker* cases was not whether the particular failure constituted a 'material flaw', under Rule 191(7), in the processes by which a certificate issued. Although QCAT at [18] uses the expression 'not immaterial', neither case refers to or considers sub-rule 191(7) or the phrase 'material flaw'.
- Instead, they were concerned with the meaning of 'substantial compliance' in a Queensland statutory provision in the context of a different statutory regime under which collection protocols were mandated by the Queensland Act.[9] There is no equivalent provision to s 352A in the *Racing Act 1958* (**Victorian Act**), nor are collection protocols mandated by the Victorian Act.
- The *Whitaker* cases are, in any event, inconsistent with *Vale v Queensland Racing* [2011] QCAT 642, which held that there must be evidence that something adversely affected the integrity of the sample.[10]
- They are inconsistent with the authorities on Rule 191(7) discussed below.
- To the extent that they are relied on as authority for the principle that inability to rely on the certificate means that the charge cannot be proved, they are inconsistent with the later Victorian Court of Appeal decision in *Racing Victoria Limited v Kavanagh* [2017] VSCA 334 (***Kavanagh***), which is authoritative and which determined that the analogous certification procedure in Rule 178D of the *Australian Rules of Racing* was a facilitative procedure which did not preclude conventional means of proof.[11]
- They are also inconsistent with the clear terms of Rule 191(6) – that Rule 191(3) does not preclude the fact that a horse was presented for a race not free of prohibited substances being established in other ways.

---

9 See *Williamson v Harness Racing Victoria* [2013] VCAT 1864 at [133], discussed below, as to the role and status of the Victorian HRV Swab Sampling Policy and Procedures.

10 'The tribunal requires more than mere suspicion and supposition; it requires clear evidence that something adversely affected the integrity of the sample. There is no such evidence here', [31].

11 [2017] VSCA 334 [79]-[83], per Maxwell P; McLeish JA and Cavanough AJA concurring at [100] and [170] respectively.

29 I agree with the submission of HRV that, together with *Kavanagh*, the following cases are directly relevant to the decision I have to make and set out the principles to be applied in this case when considering whether there was a material flaw in the certification process:

- *Williamson v Harness Racing Victoria* [2013] VCAT 1864 (***Williamson***);
- *Appeal of Mr Roy Roots,* Racing Appeals Tribunal NSW 6 July 2012 (***Roots***); and
- *Appeal of Mr Michael Shadlow,* Greyhound and Harness Racing Appeals Tribunal NSW, 29 November 2006, Thorley J (***Shadlow***).

30 Each of those cases considered the meaning of 'material flaw' in Rule 191(7) and in each case considered that, for a flaw to be material, either individually or in aggregate, it was required to be something that undermined the integrity of the sample.

31 In *Williamson* at [133]-[134], Judge Jenkins considered the role and status of the HRV Swab Sampling Policy and Procedures (**SSPP**), and what is required for there to be a 'material flaw' under Rule 191(7):

> 133 While the SSPP do not bear the status of Rules, they clearly set out a detailed set of guidelines for the taking of blood and urine samples, which are designed to ensure that samples will be free from contamination and identified with the correct source.
>
> 134 Accordingly, in considering the evidence as to breaches of the SSPP, the essential question in each case is whether such breaches, in the context of other evidence, either alone or in aggregate, constitute material flaws so as to undermine the integrity and reliability of the sample which was taken.

32 In *Williamson*, the applicant sought to rely on 12 breaches of the SSPP[12] as establishing that the process by which the certificate was issued was materially flawed.

33 Her Honour concluded that none of the identified breaches of the SSPP, either individually or in aggregate, constituted material flaws which in any way could reasonably undermine the integrity or reliability of the sampling procedure, having regard to the other evidence, which she accepted. That other evidence included evidence that the swabbing sample was at all times kept under observation and there was no evidence during the sampling procedure of likely contamination.[13]

34 In *Roots*, the Racing Appeals Tribunal NSW also referred to integrity of the process in the sense of a possibility or likelihood of contamination. At [23], after considering a number of other cases:

---

12 Set out in paragraphs [95]-[118] of the decision.

13 [148]-[149].

> It is therefore necessary to prove more than a failure to comply with guidelines and/or protocols. It is necessary to prove that the failure or failures caused the material flaw in the sampling process and therefore demonstrates a lack of integrity in the sampling process.

35 On the evidence before it, the Racing Appeals Tribunal's view was that even if the alleged failures occurred, there was no evidence to establish contamination as a result of them, whether individually or collectively. At [48]-[49]:

> At its highest Mr [Roots'] case is based upon conjecture. The evidence does not go to credible facts linking the failures with contamination.
>
> … Further, if there were flaws, then the evidence does not establish that they were material. They are not material, in its plain English meaning, because they do not go to establish contamination or the possibility of it.

36 In *Shadlow*, at p 2, Thorley J observed:

> The whole function and purpose of this exercise is to provide the analysing laboratory with a bodily sample the integrity of which cannot be challenged. True it is that not securing the outer [security] bag is a flaw, but we do not think it was material because, as Mr Callaghan SC opined, nothing otherwise in the evidence suggests that the samples which were analysed were in any way reduced in their integrity. It is for that simple reason that we would reject the submissions put so earnestly on behalf of the Appellant.

37 In considering the evidence in this case, I apply the principle set out in *Williamson* above, namely: did any breaches, in the context of other evidence, either alone or in aggregate, constitute material flaws so as to undermine the integrity and reliability of the sample which was taken. More is required than a failure to comply with guidelines or protocols.

Evidence in this case

Witness called by Mr Tabone

38 Mr Tabone called Dr Stephen Roberts to give expert evidence.

39 Dr Roberts is a registered veterinary practitioner, semi-retired. Dr Roberts' qualifications are Bachelor of Veterinary Science and Post Graduate Certificate in Business Management. He is the current President, Veterinary Practitioners Board, ACT; an accredited race day track veterinarian with Racing NSW; and an accredited FEI[14] swabbing steward. He is member of the Australian Veterinary Association (life member) and Equine Veterinarians. Dr Roberts gave his opinion on the processes in this case, and the standards that in his view should apply, referring principally to Racing NSW guidelines.

---

14 Fédération Equestre Internationale.

Witnesses called by HRV

40 HRV obtained witness statements from and called:

Sampling and chain of custody

- Dr Simon Pearce, veterinary practitioner and on course veterinarian at the Geelong harness racing meeting on 25 October 2018. Dr Pearce obtained the blood sample in question, V484968, from the horse.
- Kylie Harrison, Senior Steward with HRV, who worked at the Geelong harness racing meeting on 25 October 2018, and who took possession of a portable refrigerator containing, amongst others, blood sample V484968, and transported it to the HRV offices in Flemington.
- Russell Anderson, Investigative Steward with HRV, who, the next day, conveyed the swab samples, including blood sample V484968, from the HRV offices to RASL and delivered them to Lisa Kendall.

Analysis and opinions as to integrity of the samples

- Paul Zahra, Scientific Manager at RASL. Mr Zahra's qualification is Bachelor of Science (Applied Chemistry) (Hons). He is a Member of the Royal Australian Chemical Institute and a member of the Association of Official Racing Chemists. He gave evidence about the receipt of the sample V484968 from HRV, its analysis, sending the reserve sample to QRSC, his opinion about the results and the integrity of the sample.
- Dr Karen Caldwell, Acting Manager, Veterinary Sciences at the QRSC, which is a business unit of the Queensland Racing Integrity Commission. Her qualifications are Bachelor of Veterinary Science and Bachelor of Laws. Dr Caldwell gave evidence as to the receipt of the sample V484968 from RASL, the background to the notations to do with the seals and her opinion as to the integrity of the sample tested.
- Dr Richard Cust, registered veterinary practitioner and Veterinary Consultant to HRV for over 40 years. Dr Cust's qualifications are Bachelor of Veterinary Science (Hons) and Advanced Diploma in Agriculture (Hons). Dr Cust is a member of the Australian College of Veterinary Surgeons by examination; Royal College of Veterinary Surgeons and the Australian Institute of Agricultural Science.

41 All witnesses were cross-examined.

Documentary evidence

42 Documentary evidence and relevant evidence of witnesses in relation to the documents included:

Sampling and chain of custody

- RASL Sample Identity Document V484968 identifying sample V484968 as a blood sample taken from 'The Thug NZ' at 6.14pm on 25 October 2018 at the Geelong track. It is witnessed by Dr Pearce and by Mr Tabone, as having witnessed 'the collection, packaging and sealing of the sample collected from the animal and confirms that the seals, packaging and sample identity document all bear the same sample number'.
- Swab Chain of Custody Form for Geelong track on 25 October 2018 on which:
    - Dr Pearce certifies that he has collected 6 blood samples and 6 urine samples, that there were no collection anomalies/issues and that the samples and their respective Sample Identity Documents were kept in a secure manner until lodged with the officiating stewards at 10.35pm on 25 October 2018.
        - I note here that Dr Pearce acknowledged that there was an anomaly which he did not notice but should have noticed and recorded, namely the incomplete seal on the sample pack for V484968; and that it was incorrect to circle 'No' on the question 'Were there any collection anomalies/issues?' on the swab chain of custody form.
    - Kylie Harrison certifies that she has received 12 swab samples and their associated Sample Identity Documents from veterinary surgeon Dr Pearce and that the samples remained in her custody until they were delivered to the HRV Stewards Department at 11.59pm on 25 October 2018.
        - I note here that Ms Harrison acknowledges that she did not notice the incomplete seal on sample pack V484968
- Swab Collection Form: Geelong 25/10/18 recording that blood sample V484968 from 'The Thug NZ' was collected at 6.14pm.
- HRV Sample Receipt Log recording that Ms Harrison logged in 6 TCO_2 samples and 6 urine samples from that day's Geelong meeting at 11.57pm on 25 October 2018; and that Russell Anderson delivered those samples to RASL on 26 October 2018 at 8.02am.
        - I note here that Mr Anderson acknowledges that he did not notice the incomplete seal on sample pack V484968
- RASL Sample receipt dated 26 October 2018 at 8.04am recording 6 samples including V484968 delivered by Russell Anderson and received by Lisa Kendall of RASL.

Status of the seal and analysis

- RASL Record of Receipt dated 26 October 2018 at 8.04am noting in respect of V484968 that the sample is intact but the 'reserve sample pocket not completely sealed'.
    - I note here that this document is the first time in the chain of custody that the incomplete seal has been recorded.
- RASL non-compliant kit report dated 26 October 2018 re sample V484968 recording the following 'Non-compliance – Outer Package': 'Reserve sample pocket not sealed fully'.
- Three photographs of the front, back and top of the sample pack V484968 labelled 'V484968 RS18/18546-03 26/10 2018 [signature]' reproduced at Appendix A.[15] The photograph of the back of the pack shows a remnant of silver film of uneven width across the left side pocket, which contains a screw top bottle with a seal labelled V484968.
- RASL letter to Dr Caldwell of QRSC dated 29 October 2018 re dispatch of a container by courier; noting that the container contains a blood specimen V484968, asking that it be analysed for total carbon dioxide concentration, and asking that on receipt details of date and time received and whether security seals intact be completed and a copy of the document emailed back to RASL.
    - As first returned by QRSC, it has the following:
        - 'Security seals intact: Intact'
    - As next returned by QRSC, after a conversation with RASL:[16]
        - 'Security seals intact: Intact: bottle seals

          Security seal of bag: incomplete seal'
- Certificates of analysis for sample V484968:
    - RASL 26 October 2018. Result: TCO_2 (mmol/L) 38.3. 'Status of samples: Seals on bottles intact. Security pouch incompletely sealed.'
    - QRSC 30 October 2018. Result TCO_2 38.1 mmol/L. 'Status of Sample: The sample was analysed as received. Security seal of bag was not intact. Seals of sample bottle were intact.'

---

15 Evidence of Paul Zahra established that the photographs were taken before the reserve sample was sent by RASL to QRSC.

16 Evidence of Dr Caldwell that it is QRSC's practice to record the security seals as intact if the sample bottle cannot be removed from the pocket, and that the additional details were added after RASL called to discuss their record that the bag had an incomplete seal. This is discussed further below.

Swab sampling procedures

- HRV Swab Sampling Policy and Procedures, date last reviewed March 2017.
- Racing NSW In-competition equine urine and blood sample collection Standard Operating Guidelines. Updated May 2018.

Observations on the witnesses and their evidence

43 Submissions on behalf of Mr Tabone criticised what was said to be the attitude of HRV's witnesses at the hearing – that they failed to acknowledge the seriousness of the error and took a 'no retreat, no surrender' approach which, it was submitted, compounded the seriousness of the error.

44 On my observation of the witnesses, the criticism is unwarranted. The chain of custody witnesses were candid in acknowledging that they had failed to notice the incomplete seal and that to do so was a mistake.

45 Similarly, Mr Zahra, Dr Cust and Dr Caldwell were asked about whether, in their opinion, the incomplete seal affected the integrity of the sample, and they gave their opinion – that it did not. Their evidence is considered further below.

46 Dr Roberts gave evidence, not only about the process in this case and whether the integrity of the sample was affected, but also on what he considered to be defects in the HRV SSPP document and processes, comparing them unfavourably to the Racing NSW guidelines he provided and his experience as an FEI swabbing steward.

47 Those criticisms included the use of the word 'should' in the HRV document, compared to the word 'must' in the Racing NSW document for certain steps; that the Racing NSW document requires the use of a Sampling Kit Security Bag (as opposed to the portable refrigerator used by HRV) and an audit of the sampling kits and their contents; and that it has more detailed requirements for various stages.

48 I agree that there are differences in the two documents and in the way security of samples is approached.

49 Whether one is more effective than the other is an inquiry beyond the scope of these proceedings. My role is not to decide what the rules should say but what they do say, and decide the case before me on its facts, applying the relevant legal principle, namely whether any flaws in the process in this case, including the incomplete seal, in fact undermined the integrity and reliability of the sample analysed.

50 I note one difference, however, that would have relevance when considering the significance of an incomplete seal on a security satchel – called a sample pack in the NSW document. Unlike the HRV process, screw cap bottles are not included in a NSW sample kit and the Racing NSW guidelines do not provide for the vacutainers to be in a sealed screw cap bottle before being placed in the pockets of the sample pack. The NSW

guidelines require only that the vacutainers be placed in the two pockets before the bag is sealed.[17] As discussed below, the fact that the vacutainers in the reserve sample pocket were in a sealed screw cap bottle marked with the sample number, and there was no evidence that the seal had been tampered with or removed, was an important factor in this case.

Findings on the evidence: breaches of the HRV Swab Sampling Policy and Procedures? Yes.

51 On the basis of the sample identity document witnessed by Mr Tabone, and the chain of custody evidence, I find that the sample V484968 was taken from the horse 'The Thug NZ' and that each of the two screw top cap bottles placed in the security satchel contained three vacutainers of blood from the horse at the time the bottles were sealed with a tamper-proof seal.

Failure to seal

52 HRV does not dispute that the reserve sample pocket of the security satchel, which contained the samples tested by QRSC, was not completely sealed by Dr Pearce, the veterinarian who took the blood samples from the horse. Dr Pearce incompletely peeled off the silver film which covered the adhesive strip on that side of the satchel.

53 Dr Pearce's omission is a breach of step 8 in the SSPP Blood Collection Guidelines:

> Remove as much trapped air as possible from pockets, peel the tap off the back of the flap to expose the adhesive and press the flap down firmly to seal the 3 pockets of the Security Satchel.

54 I find on the evidence that Dr Pearce sealed completely 2 of the 3 pockets, and incompletely sealed the reserve sample pocket. I accept his evidence that it was inadvertent.

Other matters relied on by Mr Tabone

55 I agree that by failing to notice the incomplete seal, Dr Pearce also omitted the requirement on page 2 of the SSPP:

> If any unusual circumstances arise during the collection procedure or processing of any documentation, a note is to be made regarding the circumstances and the matter is to be brought to the attention of the Stewards as soon as possible.

56 Dr Pearce also incorrectly circled 'No' on the Swab Chain of Custody form on the question 'Were there any collection anomalies/issues?'.

57 I find that Dr Pearce otherwise complied with his obligations under steps 1-12 of the blood collection guidelines. In particular:

- After placing three vacutainers of blood in one sample collection bottle and three vacutainers in the other, he secured each bottle with

[17] [2.4.4 contents of the blood sample pack, and 2.5.3 contents of TCO_2 sample pack].

the screw top cap, placed a security seal bearing the sample number V484968 across each of the two sample bottles and pressed them firmly down both sides of the bottle.

58 Ms Harrison and Mr Anderson's failure to notice the incomplete seal on the V484968 security satchel was, as they acknowledge, an omission on their part. While the question about anomalies is in the part of the swab chain of custody form that the veterinary surgeon completes, it should have been noticed and recorded. I agree that it is a breach of the HRV SSPP that it was not done.

59 HRV submitted that it was notable that Mr Tabone did not notice the incomplete seal either, and certified that he had witnessed the collection, packaging and sealing of the sample and was satisfied with the process.

60 It is the case that, looking at the photographs, the remnant silver film is not visible from the front of the pack and so might have been easy to miss. But it remains a breach that the seal was incomplete and that was not recorded.

61 As for the notation made by QRSC when it received the sample pack – that the seals were 'intact', I accept Dr Caldwell's evidence, which was not contradicted, that it is QRSC's protocol to record the seal as 'not intact' if the deficiency in the seal would allow for the bottle to be removed, and that in this case it was determined that the adhesive strip was sealed such that the bottle could not be removed.

62 Looking at the photographs takes it no further, in my view. A gap is evident, but it does not appear to extend across the whole of the pocket. The width of the remnant film narrows from about half way across the pocket. It looks as if the seal is intact over approximately half of the pocket, but it is not possible, in my view, to say with certainty from looking at the photographs alone whether or not the screw cap bottle could be removed from the pocket. I give weight, however, to the evidence about the decision made by QRSC and the basis of it.

63 Relevantly, the photographs show that the sealed sample bottle was intact in the reserve sample pocket and that the seal marked V484968 was on the bottle before it left RASL; and the evidence is that the seal remained intact when it was received by QRSC. Whether or not the bottle could be removed, I find that it had not been removed when it arrived at QRSC. In other words, whether or not it could have been removed, it was not removed.

64 I do not consider that it is a flaw in the process that QRSC later added to the information on the copy letter returned to RASL after RASL contacted them. Doing so provided better information about the status of the seals on the sample pack and the bottle respectively.

65 Dr Roberts was critical of the QRSC protocol and said that QRSC should not have proceeded with the analysis, consistent with his view that any flaw in the process undermines the integrity of the whole process. The question

remains, however, whether the incomplete seal, and other matters established, undermined the integrity and reliability of the sample, such that Rule 191(7) precludes the certificates having the relevant evidentiary status. I make findings about that question next.

Did any breaches, either alone or in aggregate, undermine the integrity and reliability of the sample which was taken? No.

66 Dr Robert's opinion was in summary that:

- The incomplete seal meant that the reserve (or B) sample was not sealed off which in turn compromised the integrity of the reserve sample and the integrity of the whole sample.
- The integrity of both samples is essential.
- If integrity of the process is compromised, there is no point testing any of it – the processes must be followed.

67 He acknowledged in cross-examination that the seal on the screw cap bottles was a tamper-proof seal but said in his evidence in chief that it "wouldn't take much imagination" to see how the samples in the bottle could be altered.

68 When asked for more information, Dr Roberts said that it would not be necessary to take the bottle out of the pouch to alter the samples in the bottle, nor would it be necessary to open the cap – you could drill through the cap with a fine gauge needle, penetrating the cap and then the vacutainers and then withdraw blood from the vacutainer and replace it with other blood. He acknowledged that he had never seen it done.

69 Mr Zahra, Dr Caldwell and Dr Cust were all of the opinion that the fact that the seal numbered V484968 on the reserve sample bottle was intact at the time of testing by QRSC meant that the integrity of the reserve sample had not been compromised.

70 Mr Zahra said that the scenario described by Dr Roberts had been put to him on a number of occasions and they had tried it at RASL. They tried all the gauges used and still had trouble getting the needle through the cap. Any such attempt would leave an obvious hole in the seal. And apart from the difficulty of getting a syringe through the cap, it would also require manoeuvring it into all three of the vacutainers. He therefore considered the scenario to be highly unlikely. Further, the TCO_2 test is a test for a gas. Penetrating the vacutainers would release some or all of the gas, changing the levels.

71 Mr Zahra said that in this case there was no evidence of any attempt to penetrate the seal, which was intact. Moreover, the results of analysis of the primary sample and the reserve sample were consistent, strongly suggesting they were from the same sample.

72 I acknowledge Dr Roberts' expertise as a veterinary surgeon including as a race day track veterinarian with Racing NSW and an FEI swabbing steward.

73 I have given more weight, however, to the opinion of Mr Zahra, as an experienced analysing chemist, who has also undertaken the experiment, as to the improbability of the scenario described being executed successfully and being executed without leaving any evidence of the attempt. Further, I accept Mr Zahra's opinion as the significance of the consistent results.

74 I find that the scenario described is highly unlikely, and there was no evidence that it had been attempted in this case.

75 I acknowledge, as submitted by Mr Tabone, that Dr Roberts as a witness is independent of the HRV collection and analysis process.

76 Dr Roberts' opinion that any flaws in the process compromise the integrity of the samples, and that integrity of both samples is essential for the results to be relied on, does not, however, accord with the framework of Rule 191, nor with the principles in *Kavanagh*:

- Rule 191 envisages that there may only be one certificate issued.
- Rule 191(7) requires any flaw to be 'material'.
- Rule 191(5) and (6) allow for the charge to be established in ways other than by one or more certificates.
- The Rule does not preclude conventional means of proof.

77 I have therefore given more weight to the combined opinions of Mr Zahra, Dr Caldwell and Dr Cust, as to whether any flaws in the process had, in the circumstances of this case, affected the integrity of the reserve sample.

Finding: primary sample analysed by RASL

78 Rule 191 contemplates that one certificate of analysis may be able to be relied upon as prima facie evidence in a case.

79 Mr Zahra's evidence, which I accept, is that the pocket containing the primary sample was completely sealed and contained a sealed bottle which in turn contained three vacutainers of blood. The incomplete seal did not in any way undermine the integrity and reliability of the primary sample analysed by RASL.

80 I am satisfied that Dr Pearce's failure to incompletely remove the silver film on the security satchel was a flaw in the process affecting only the *reserve* sample.

81 The RASL certificate can therefore be relied on as prima facie evidence of the matters certified, under Rule 191(1) and prima facie evidence, under Rule 191(3) that the horse was presented for the race not free of a prohibited substance.

Findings: reserve sample analysed by QRSC

82 I am satisfied to the required degree that the incomplete seal on the reserve sample pocket did not, in this case, undermine the integrity or reliability of the reserve sample for the following reasons:

- The reserve sample pocket seal was left open in part, but as assessed by QRSC not so as to enable the sealed screw cap bottle containing the three vacutainers to be removed.
- In any event, there was no evidence that another sealed screw cap bottle containing vacutainers of blood had been substituted for the one Dr Pearce put in the reserve sample pocket. To the contrary, the tamper evident seal on the screw cap bottle in the reserve sample pocket bore the correct sample number V484968 and bar code. The weight of the evidence supports a conclusion that the sample tested by QRSC was the sample taken by Dr Pearce, V484968, identified as being taken from 'The Thug NZ' on 25 October 2018 and witnessed by Mr Tabone.
- Importantly, the sealed screw cap bottle had a tamper evident seal. If anyone had attempted to open the screw cap so as to remove or tamper with the vacutainers inside, the seal would have been disrupted. The seal was intact in its entirety.
- There was also no evidence that anyone had attempted a procedure of the sort described by Dr Roberts – of puncturing the seal and the cap and then penetrating one or more of the vacutainers inside to remove or substitute blood.
- Even if there were a real possibility of carrying out the procedure without any evidence of penetration of the seal, cap and vacutainers, which is highly unlikely, there was no evidence of any such tampering, and no other evidence of contamination.
- Further, the consistency of the results from the primary sample and the reserve sample weighs strongly against any such tampering, or sample substitution, or contamination.

83 As to the other, additional, matters relied on by Mr Tabone, I agree that the multiple failures to notice and record the incomplete seal until it arrived at RASL are flaws in the process.

84 Together with the incomplete seal, the flaws relied on by Mr Tabone might well have failed the principles applied in the *Whitaker* cases, which Mr Tabone submits apply here. But the *Whitaker* cases were decided under a different statutory regime and for the reasons discussed above are not determinative in this case.

85 I am not satisfied that of themselves or in aggregate, they undermine the integrity and reliability of the reserve sample particularly in the context of:

- the evidence that the tamper evident seal on the screw cap bottle containing the vacutainers, which identified the sample as V484968, was on the screw cap bottle when Dr Pearce placed it in the reserve sample pocket and when QRSC removed the bottle from the reserve sample pocket, and
- the lack of evidence that the seal had been removed, the screw cap opened, or the bottle and vacutainers otherwise tampered with.

86 After considering the evidence carefully, my view is that, although there were procedural flaws, I am not satisfied that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of the QRSC certificate was materially flawed.

Can both certificates be relied on? Yes.

87 I find under Rule 191 that the RASL Certificate and the QRSC Certificate are individually prima evidence and together conclusive evidence of the matters certified and of the fact that the horse was presented for the race not free of a prohibited substance.

88 I am also satisfied for the following reasons that, independently of the evidentiary value of the certificates, HRV has proved the charge.

Has the HRV otherwise proved the charge? Yes.

89 As submitted by HRV, even if it is precluded from relying on one or both of the certificates, there is in this case sufficient evidence for the Tribunal to be satisfied to the required degree that Charge 1 is proven, including the evidence summarised above on the question of whether there was a material flaw in the process:

- The chain of custody evidence establishes that sample V484968 was taken from the horse on 25 October 2018 at approximately 6.14pm and delivered to RASL on 26 October 2018 at approximately 8.04am.
- Mr Zahra's evidence and supporting documents establish that:
  - the screw cap bottle containing the three vacutainers of blood tested by RASL was sealed with a tamper evident seal and the individual pocket containing that sample was completely sealed;
  - RASL tested the blood in the vacutainers using RASL method number TCO2LAB which yielded a TCO_2 result of 38.3 mmol/L; and
  - the sample pack containing the reserve sample – in a sealed screw cap bottle containing three further vacutainers of blood and identified as sample V484968 – was photographed before being sent to QRSC on 29 October 2018.
- Dr Caldwell's evidence and supporting documents establish that:

- sample number V484968 was received by QRSC from the RASL on 29 October 2018;
- the seal at the top of the pouch containing the reserve sample was not completely sealed as a section of the silver film which covers the adhesive strip had not been completely removed, but there was insufficient opening for the screw cap bottle to be removed;
- the tamper evident seal on the screw cap bottle was intact; and
- the sample was analysed as received using Laboratory Chemical Analysis Manual Section 17, which yielded a result of a total plasma carbon dioxide concentration of 38.1 mmol/L.

- The matters discussed above in relation to whether there was a material flaw in the process support a conclusion that there was no evidence of any tampering with or contamination of either sample.

Next steps in the proceeding

90 Having found the charge proven, the question of penalty remains. I will schedule an administrative mention – a date by which the parties are to write to the Tribunal and advise as to the further conduct of the proceeding. Mr Tabone is to advise whether he seeks review of the penalty decision made by the Board, and if so, the parties are to provide their available dates for a further hearing before me.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL VCAT

E Wentworth
Senior Member

Appendix A

V484963

R918 / 18546-03

26/10/2018

V484968

RS18/18546-03

26/10/2018