TASMANIAN RACING APPEAL BOARD

Appeal No. 14 of 2019-20

Panel:	**Kate Cuthbertson (Chair)** **Suzanne Martin (Member)** **Wendy Kennedy (Member)**	**Appellant:**	**Douglas Nettlefold**
Appearances:	**Anthony O'Connell (on behalf of the Appellant)** **Steven Shinn (on behalf of the Stewards)**	**Rules:**	**AHRR 190 (1), (2) & (4)**
Heard at:	**Elwick Racecourse** **GLENORCHY TAS**	**Penalty:**	**Disqualification of *Blame it on Me* from subject race. Invoking of suspended fine of $1000 for a previous breach of the same rule (under the provisions of AHRR 256(c))**
Date:	**11 September 2020, reconvened on 3 March 2021**	**Result:**	**Appeal against conviction dismissed. Appeal against penalty upheld and penalty varied.**

REASONS FOR DECISION

1. The appellant, Mr Douglas Nettlefold, is the trainer of a harness racing horse *Blame It On Me* which was presented to race at the Launceston Pacing Club meeting on 5 January 2020. A post-race urine sample was taken from the filly after it won Race 2 on that date. Subsequent analysis by Racing Analytical Services Limited (RASL) detected the prohibited substance aminorex in the sample. Confirmatory testing conducted by the Racing Science Centre (RSC) confirmed the presence of aminorex in the urine sample. Aminorex is an amphetamine-like anorectic. It is usually present in horse urine as a metabolite of levamisole, which is used as a worming agent for animals.

2. The inquiry was conducted in respect of this matter on 14 May 2020 and 10 June 2020. During the course of the inquiry, Stewards issued a charge to the appellant pursuant to AHRR 190, which relevantly provides as follows:

> *(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.

(3) …

(4) An offence under sub-rule (2) … is committed regardless of the circumstance in which the prohibited substance came to be present in or on the horse.

3. As aminorex has an amphetamine-type action, it acts to alter the chemical uptake or re-uptake of neuro-transmitters at the central nervous system level in horses. As such, it is a prohibited substance pursuant to AHRR 188A(1)(a) as it is a substance capable of causing either directly or indirectly an action or effect, or an action and effect, within the nervous system of mammals.

4. Particulars of the charge were as follows:

CHAIRMAN: Part one you Mr Douglas Nettlefold are and were at all relevant times a trainer licensed by the Office of Racing Integrity Tasmania, and are a person bound by the Australian Harness Racing Rules. Two you were and are at all relevant times the trainer of the horse Blame It On Me, including when Blame It On Me was presented to compete in race two The Faithful Park Stud Stakes at the Launceston Pacing Club on the 5th of January 2020 and was declared the winner of that race. On the 5th of January 2020 you presented Blame It On Me to the race when not free of any prohibited substance, given that a. a post-race sample of urine was taken from Blame It On Me and b. aminorex was detected in the sample as evidenced by evidentiary certificate RS20/00143-D and the confirmatory certificate from The Racing Science Centre of RSC20-093.

5. The appellant pleaded not guilty to the charge. The transcript reveals that the appellant's not guilty plea was based on two premises. First, he gave evidence that he held the pan that collected the urine sample and, as a consequence, argued that the sample had not been properly obtained as he was not an appropriately qualified person to take a sample. Secondly, he argued that Stewards could not be satisfied that aminorex was in the horse's system at the time of the race or at the time the sample was taken. He suggested that some chemical process occurred subsequent to the sample being taken which caused aminorex to be detected.

6. Stewards found the appellant guilty of the charge.

7. Following receiving submissions from the appellant as to penalty, Stewards disqualified *Blame It On Me* from Race 2 in accordance with the requirements of AHRR 195. In respect of the aminorex charge, the guilty finding was noted and no further penalty was imposed. The appellant, however, had been found guilty under AHRR 190(2) on 2 October 2019 in respect of an arsenic positive involving the same filly. In that case, a fine of $2,000.00 was imposed with $1,000.00 of that fine suspended for 12 months provided that the appellant did not reoffend under the same rules. Given that the appellant had been charged with and found guilty of a breach of the same rule for the

aminorex offence, Stewards determined that it was necessary to invoke the $1,000.00 suspended fine pursuant to the provisions of AHRR 256(5)(c).

The Appeal

8. The appeal is against both conviction and penalty. It was initially listed before the Board for hearing on 11 September 2020. On that date, the appeal adjourned to allow the appellant an opportunity to refine his arguments and obtain expert evidence to support aspects of them. The appeal was listed again for hearing on 3 March 2021. The appellant pursued the following grounds of appeal which are produced in full:

   (1) That the urine swab taken from *Blame It On Me* at the LPC on 5/1/20 cannot be considered as it was not taken in accordance of the Harness Racing Rules. Part 12 (PROHIBITED SUBSTANCES) of the Rules, specifically subsection Testing Rule 189, does not empower anyone other than a Steward, Veterinary Surgeon or an appropriately qualified person to take or be involved in the swabbing process. In this particular case [the appellant] was not authorised under the Rules to be involved in the swab process, nor do the Rules provide that the Stewards can use their discretion to delegate any part of the swabbing process to any other party other than those aforementioned. In lodging this appeal reason, the appellant relies on the reasons given in TRAB Appeal 2 of 2019/20, Nettlefold specifically points 11, 12 and 14. Additionally, the reasons that the Stewards gave (page 109, lines 36 to 47) in relation to their power to direct [the appellant] to participate in the swab process are flawed given that:

      - The taking of swabs cannot be considered as part of a trainer's activity;
      - There is no evidence to suggest that Mr Nettlefold was appointed to participate in the swab process;
      - On the evidence before them, the Stewards cannot be comfortably satisfied that the Steward (Brydon) has acted within the Rules.

      Based on the above the circumstances relating to the process of taking the swab is materially flawed and fits the meaning of Rule 191(7).

   (2) That *Blame It On Me* cannot be considered to have been presented to race with a prohibited substance in its system as it was established at inquiry the horse ingested a weed (an organic substance). The racing laboratories reported on their evidentiary certificate the presence of an inorganic substance which demonstrates a material flaw in their testing procedures and if accepted by TRAB constitutes a material flaw in the testing process.

   (3) The penalty issued by the Stewards is manifestly excessive given that the Stewards determined that there was "no way that you [the appellant]

knew that you could have come across this positive" (transcript page 114, line 23 to 27). This determination resulted in no penalty being issued. Therefore, on that basis, the mischief of [the appellant] should be interpreted that he was not at all culpable. In the interest of fairness and justice, it is the appellant's contention that the Stewards erred in not using their discretion under rule 256(5)(c).

Background

9. *Blame It On Me* finished first in Race 2 on 5 January 2020. The appellant was advised by the Office of Racing Integrity that a urine sample taken from the horse following the race was positive to aminorex by letter dated 30 January 2020. A stable inspection was conducted on 4 February 2020. During the course of that stable inspection, the appellant requested that Stewards take samples of vegetation at his property. Samples were also taken of feed. In total, 6 plant samples and 5 feed samples were taken. Each of those were also analysed. One of the plant samples, labelled as "Unknown weed/carrot weed", was found to contain aminorex. Neither aminorex nor levamisole were detected in any of the other samples. The screening data of the plant sample containing aminorex was also found to contain barbarin. Barbarin is a known natural chemical constituent of certain plants and studies have suggested that barbarin may be chemically converted to aminorex by a process which is not yet well understood.[1]

10. There were no products located during the course of the stable inspection that contained levamisole. Stewards also took a further urine sample from *Blame It On Me* at the appellant's request during the course of the stable inspection. That sample was analysed and also found to contain aminorex.

Ground 1

Evidence regarding the taking of the urine sample

11. The evidence presented during the inquiry in respect of the collection of the urine sample from *Blame It On Me* included the following documentation:

    - A sample identity document relating to the taking of the urine sample which was signed by the appellant as a witness for the trainer. That signature is under the following declaration:

      > *"I, D. Nettlefold being the responsible person … have been in charge of the above animal and did witness the collection, packaging and sealing of the sample collected from this animal. I confirm that the seals, packaging and sample identity document all bear the same sample number. I am satisfied with the procedure I have witnessed and have signed the document in the designated area below as witness for the trainer."*

[1] Maylin, Fenger, Machin, Kudrimoti, Eisenberg, Green and Tobin, "Aminorex identified in horse urine following consumption of Barbarea vulgaris; a preliminary report", *Irish Veterinary Journal* (2019) 72:15, and reports cited in the article.

- A statement from Carol Ann Brydon, a stipendiary Steward employed with the Office of Racing Integrity (ORI) who was the swabbing steward on 5 January 2020 and conducted the swabbing of *Blame It On Me* on that date. The substance of the statement is discussed later in these reasons.

- A sample collection and custody authority form signed by Ms Brydon certifying that the samples collected from the Launceston Pacing Club on 5 January 2020 were taken in accordance with the prescribed guidelines issued by ORI.

- Sample login form confirming the receipt of samples by Mr Shinn on 5 January 2020 and confirming that they were sent to the laboratory on 6 January 2020.

- Toll Transport docket relating to the transport of the samples from ORI to RASL.

- Sample receipt document issued by RASL dated 6 January 2020 confirming receipt of the sample bearing the security document number V638401 and described as containing two urine and one control sample.

- A certificate of analysis issued by RASL dated 29 January 2020 and signed by David Batty, the Laboratory Director, confirming that the urine sample was shown to contain aminorex.

- A certificate of analysis issued by Racing Science Centre and signed by Samantha Nelis, the Principal Chemist, certifying that the sample was analysed as received, the seals were intact and the sample was showing to contain aminorex. The certificate also states aminorex was not detected in the associated control solution.

- A report from Racing Analytical Services relating to the certificate of analysis issued in respect of V638401 dated 24 February 2020.

12. Evidence was also received from Ms Brydon concerning the taking of the sample from *Blame It On Me*. In her evidence, Ms Brydon indicated that she had no independent memory of taking the sample from *Blame It On Me* on 5 January 2020. She first made a statement in respect of the matter on 17 April 2020. She gave evidence that she had taken hundreds of swabs in the period that elapsed between 5 January and 17 April 2020.

13. Ms Brydon's statement outlined that she was an experienced Steward in all areas of swabbing horses and had been swabbing horses for ORI since 2013. She gave evidence that she had received training from previous employees of ORI and had also been to Hobart for training. She did not have any formal qualifications related to her work as a swabbing steward but described herself as one of the most experienced swabbing stewards.

14. In her statement, Ms Brydon stated that her process for collection of urine is in accordance with the RASL document dated May 13, 2016 entitled "Guidelines for Sample Collection – Urine and Blood". During the course of the inquiry, she gave some confusing evidence regarding whether she was in fact aware of that specific document stating that she was "*maybe not aware of it*", that she could not recall that particular document and "*did not know how that had any bearing on the process that is used in the RAS[2] kit*".

15. In her statement, Ms Brydon indicated that the methods used to collect urine for analysis can vary for a variety of reasons due to horse behaviour which has to be determined at the time of collection. She outlined in her statement three variations to the process as follows:

    (1) standing in the box with the attendant who leads the horse around whilst she holds the pan to collect the urine;

    (2) Ms Brydon taking the horse from the attendant to lead the horse around until the horse urinates into the pan she is holding with her other hand in full view of the attendant. The horse is handed back to the attendant in order for Ms Brydon to continue with the swabbing process;

    (3) in circumstances where a horse is not comfortable with two people standing in the swab box or if it is a safety issue where the horse can be dangerous and it is agreed upon by the attendant, the attendant will keep hold of the horse and also hold the pan to collect urine whilst Ms Brydon fully watches the process. Once the horse has urinated, Ms Brydon then takes the pan from the attendant and continues with the remainder of the swabbing process.

16. Regardless of the method used for collecting the urine, Ms Brydon's evidence was that she was responsible for other aspects of the swabbing process including:

    a. putting a fresh pair of gloves on her hands;

    b. presenting the appellant with an unopened Urine Sample Kit for him to inspect to affirm that it was totally sealed;

    c. once the appellant advised he was content the kit was fully sealed, tearing open the bag in full view of the appellant;

    d. removing the control fluid bottle from the kit to rinse the urine pan with the control fluid by swishing it around in the pan and replacing the control fluid back into the control fluid bottle and placing the lid back on in full view of the appellant;

    e. placing the control fluid bottle back into the opened urine collection kit before placing it on the stall door between the swab box and the swab room in full view of the appellant;

[2] Presumably Racing Analytical Services

f. collecting the urine utilising one of the three methods set out at [15] above;

g. opening the two remaining sample collection bottles from the kit, thoroughly rinsing them with the control fluid from the control fluid bottle and then placing that solution back into the original control solution bottle and placing the lid back on in full view of the appellant;

h. pouring the collected urine taken from *Blame it on Me* from the urine pan into the two sample collection bottles that had been rinsed with the control solution and placing the lids tightly on both of those bottles in view of the appellant before thoroughly rinsing the urine collection pan with water;

i. showing the appellant the numbers on the urine collection kit including the numbers on the three tamper evident seals, the number on the security satchel the bottles are placed into and the number on the swab docket all matched. In this case the number was V638401;

j. once the appellant agreed all numbers matched, placing the bottle tamper evident stickers over the three bottles;

k. checking the freeze brand of *Blame it On Me,* confirming the horse presented was *Blame it on Me*;

l. completing the required details on to the security satchel and placing the two urine samples and the control fluid bottles into the security satchel and sealing it with the satchel's tamper evident seal;

m. completing the sample identity document with the required details including the horse's name, freeze brand, date, her name and signature and obtaining the appellant's declaration and signature as referred to at [11] above. A copy of the sample identity document was provided to the appellant before he left the swab stall;

n. placing the sealed security satchel into the swab collection bag in the swab room until the completion of the race meeting. The swab room is not left unattended at any time unless locked with locks supplied by ORI;

o. at the end of the night, Ms Brydon took all samples taken by her into the Stewards' room with the assistance of two others;

p. in the Stewards' room, all swabs were then taken out of the bag to be checked individually by the chairman ensuring all documentation matched the number on the sample collection bags;

q. the swabs were then placed back into a swab cooler bag where the custody and collection authority is signed by the chairman;

r. the bag was sealed and the swabs were then taken to ORI where the chairman signed the swabs in at the office.

17. During the course of questioning by the appellant, it was suggested to Ms Brydon that she could not be certain that the sample that was placed into the sample collection bottles was taken from *Blame It On Me*. She confirmed that she does not allow a horse to leave the swabbing box until its brand is checked and that there was no possibility that the sample had been taken from another horse.

18. The appellant indicated during the course of the inquiry that he had been holding the urine collection pan when the urine was collected. Ms Brydon did not dispute that this was the case, although she could not specifically recall that happening. She indicated that she would only hand over the urine collection pot to the trainer if they insist and that it depends on the horse's behaviour. She indicated her preference is to collect the urine herself without another person in the swabbing box. As at the time of giving her evidence and making her statement, she could not recall *Blame It On Me*'s manners or which method she used on the night.

19. When explaining that he had physically collected the urine sample himself, the appellant indicated that *Blame It On Me* tends to wander and do her own thing. He stated that there were time constraints on the night, that *Blame It On Me* was reluctant to urinate with people in the stalls and that he was instructed or directed to collect the urine himself by Ms Brydon. Ms Brydon did not dispute that had occurred. She stated, however, that when someone else is collecting the urine, they remain within her sight while that happens. The appellant further explained that he had been leading the horse around and she would not urinate, he then collected the urine then had to leave the box and hand the sample to Ms Brydon. He eventually agreed that he had taken the pan by the handle and definitely would not have put his hand in it but could not state how close to the pot itself his hand had gone. Ms Brydon indicated that in such circumstances she stands at the door ready to take the sample as soon as the horse has urinated. She stated that an attendant or trainer assists in this way in taking the urine sample about 25% of the time. This generally occurs as a result of a particular reason such as the horse being potty shy or where the horse shies at someone strange in the stall, but in all circumstances she stands at the door and watches.

20. Ms Brydon asserted that supervising the collection of urine in those circumstances was compliant with procedure and that in circumstances where she was required to take a swab from a horse she was required to do everything in her power to gain that urine.

21. The appellant also provided statements from two other witnesses confirming that he was involved in the collection of the urine. Logan Nettlefold, the appellant's son, recalled that the horse would not urinate, that the appellant was asked by Ms Brydon to take the swab and collect the sample and left the swab box. He stated that the horse urinated and the pot was handed back to the swabbing officer. Natalee Emery, the driver of the horse on the night, also gave a statement saying that she saw the swab being taken by the appellant. She indicated that the horse was taking a long time, that the

swabbing steward stood from inside the doorway of the smaller room and that the appellant handed the sample over after it was obtained.

Decision at inquiry

22. Against this background, the appellant argued that the taking of the sample did not conform with the rules and the results were therefore inadmissible.

23. He relied on this Board's decision in *Douglas Nettlefold* Appeal No.2 of 2019/2020 (Nettlefold) which he argued was authority for the proposition that the rules only permitted Stewards to take the swab. He particularly relied on para.14 of the *Nettlefold* decision which discussed the operation of AHRR 189(6). That rule relevantly provides:

> *(1) The Stewards may carry out tests and examinations to determine whether a prohibited substance was or is in or on a horse.*
>
> *(2) A test or examination may be made at any time and place.*
>
> *…*
>
> *(5) The connections of a horse shall comply with any directions relating to testing and examining given by the Stewards.*
>
> *(6) For purposes of testing and examining a horse the Stewards may use the services of a veterinary surgeon or other appropriately qualified person.*
>
> *(9) It is an offence for a person to fail to comply with a direction given under sub-rule (5) … or to interfere with or prevent or endeavour to interfere with or prevent the carrying out of a test or examination.*

24. At para.14 of the *Nettlefold* decision, the Board discussed the use of the word "may" in AHRR 189(6). They stated the following:

> *The* Acts Interpretation Act 1931*, s.10A provides that the word 'may' is to be construed as being discretionary or enabling, as the context requires. That is, that Stewards are permitted to use the services of a vet or other appropriately qualified person but it is at their discretion. Further it is implicit that if Stewards have the discretion to delegate that function, then they must have the power to carry out that function themselves.*

25. At para.17 of that decision, the Board also discussed whether formal training or qualifications were required of Stewards conducting the testing. In that case, the Steward involved was noted to have no formal training or qualifications in either the practical aspects of obtaining a sample, or in the compliance requirements around ensuring the integrity of the sample once taken, but had on the job training from when she commenced as a Steward and had a number of years of experience in the role. The Board noted that the term "training" implies a level of direction and guidance which was not indicated by the particular Stewards in their evidence. It was not necessary, however, to decide whether or not such hands-on training and experience

amounted to appropriate qualifications in that appeal as the person who took the sample was a Steward.

26. Referencing that decision, the appellant asserted that he had not been trained and had no qualifications regarding the swabbing procedures and had simply done what he had been directed to do. He later agreed that he knew how to hold the urine collection pan because he had seen it done before but emphasised he had never received any instructions on how to do so.

27. Stewards ultimately determined that the certificates of analysis from the sample taken from *Blame it On Me* were conclusive evidence of the presence of aminorex in the filly as the appellant had not proved there was any material flaw in the certification procedure or any act or omission forming part of the swabbing process. They stated that from their perspective, the person that took and directed the swab was Ms Brydon who they considered to be an appropriately qualified person. They regarded the appellant holding the pan as an instrument in the taking of the sample, not the person directing that the sample be taken. It was also noted that the appellant had signed the swab certificate indicating he was happy with the taking of the sample.

28. In reaching that conclusion, Stewards relied on AHRR 189(1) together with a number of sub-paragraphs of AHRR15(1) which relevantly provides:

> *(1) Stewards are empowered –*
>
> *(a) to direct and control at any meeting or racing the activities of officials, owners, qualifying/requalifying supervisors, trainers, drivers, bookmakers, clerks, persons attending horses and anyone else appointed, employed or engaged in or about the meeting or race;*
>
> *…*
>
> *(c) at any meeting or race to appoint or remove any person from or to any office, position, responsibility or task;*
>
> *…*
>
> *(ae) to do anything else reasonably necessary to the performance of their duties.*

Appeal submissions

29. The appellant essentially repeated the arguments he made during the course of the inquiry. He argued that his participation in the swabbing process amounted to a material flaw and that the certificates of analysis had no evidentiary value as a consequence.

30. The appellant referred to the definition of swab taken from the dictionary to the AHRR which provides:

'Swab' means the taking, or a procedure for the taking, of blood, urine, saliva or other matter or sample or specimen from a horse for the purpose of testing for the presence of a prohibited substance and 'positive swab' means that the swab, when tested, reveals such a presence.

31. Para.11 of the *Nettlefold* decision was also referred to where the Board noted that in Tasmania it is the role of the swabbing Steward to take swabs and process them for testing. It was submitted that involving the appellant in the process meant that the rules had not been complied with. It was not argued that the integrity of the sample was in any way affected by the appellant's involvement.

32. As the appellant was not formally appointed to participate in the swabbing process, it was submitted that his involvement proved that the certification procedure or an act forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed as provided by AHRR 191(7). As such, it was argued that AHRR 191(1) and (2) of the Rules did not apply as the certificates did not possess evidentiary value or establish an offence. It was also argued that there was an alternative available to Stewards where a horse does not co-operate, namely the taking of a blood test.

33. Stewards argued that the rules did allow Ms Brydon to get the appellant to hold the pan. In particular they relied on AHRR 189(5). It was noted that urine samples were preferred when testing for prohibited substances. The Stewards referred to *Blame It On Me*'s testing history which they said indicated she had some history of not giving urine. Stewards' powers under AHRR 15(1) were also relied upon. It was submitted that there was no material flaw in letting the appellant hold the pan as there was no suggestion that the integrity of the sample was at risk. This, combined with the analysis of the swab taken from *Blame it on Me* during the stable inspection at the appellant's request which detected the presence of aminorex and the detection of that same substance in plant material taken from the appellant's training premises, suggested that the process was not materially flawed.

AHRR 191(7)

34. The scheme of the prohibited substance rules including the meaning of AHRR 191(7) was analysed in *Tabone v Harness Racing Victoria (Review & Regulation)* [2019] VCAT 1707. That case concerned an argument that the certification process was materially flawed because the security satchel containing the primary sample and the reserve sample was incompletely sealed resulting in a gap in the seal of the reserve sample pocket. The incomplete seal was not noticed until the security satchel arrived at the first laboratory and was inconsistently recorded by the second laboratory. There were other contended breaches of the swab sampling protocol. In considering the consequences of these alleged breaches, the Tribunal first noted that a finding that a person has engaged in serious conduct including breaches of the prohibited substance rule should not be made lightly in that it should not be based on "inexact proofs, indefinite testimony or indirect inferences" citing *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336

at 361-2 per Dixon J. The effect of AHRR 191 was described by the Tribunal at [15] as follows:

> *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 test 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 proven that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of the certificate was materially flawed, certificates do not possess evidentiary value or 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].*

35. In *Tabone*, the Tribunal considered that the following cases set out the principles to be applied when analysing whether there had been a material flaw in the certification process:

    - *Williamson v Harness Racing Victoria* [2013] VCAT 1864;
    - *Appeal of Mr Roy Roots*, Racing Appeals Tribunal New South Wales, July 2012;
    - *O'Connor and Appeal of Mr Michael Shadlow,* Greyhound & Harness Racing Appeals Tribunal New South Wales, 29 November 2006, Frawley J.

    In each of those cases it was 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.

36. In *Williamson*, Judge Jenkins considered the role of the particular swabbing policy and procedure that applied in the context of what is required for there to be a material flaw. He noted that while the procedures did not bear the status of rules, they did set out guidelines for the taking of such samples designed to ensure the samples are free from contamination and identified with the correct source. In his view, when considering evidence of breaches

of the relevant policies and procedures, the question to ask in respect of any such breaches is "*whether such breaches, in the context of other evidence, either alone or in aggregate, constitute material flaw so as to undermine the integrity and reliability of the sample which was taken*": at [133]-[134]. In that case, Judge Jenkins did not consider the breaches constituted a material flaw having accepted other evidence which included that the swabbing sample was at all times kept under observation and there was no evidence during the sampling procedure of likely contamination.

37. Similarly in *Roots*, an argument that a failure to comply with guidelines and protocols led to a material flaw was also rejected on the basis that the evidence presented by the participant did not go to "*credible facts linking the failures with contamination*". As such, the flaws were held to not be material "*because they do not go to establish contamination or the possibility of it*" at [38]-[49].

Testing procedure rules and guidelines

38. The relevant rules in respect of sample collection are contained in AHRR189, the relevant parts of which are set out at paragraph [23] above. Further, AHRR15 sets out the powers of stewards, some relevant parts of which are set out at paragraph [28] above. In addition, AHRR 15(1)(k) provides that stewards are empowered to test in such manner as they consider appropriate any horse. The Harness Racing Policies and Procedures issued by ORI do not provide any further policies or procedures in respect of testing horses for the presence of prohibited substances. RASL have, however, issued guidelines for sample collection in respect of the sample kits that they provide. The most recent iteration of those guidelines was issued on 13 May 2016. They say very little about the role of particular personnel in the collection of samples and are principally directed at the way in which the kits themselves are handled and the samples treated once obtained. Relevantly to the issues raised on this appeal, the guidelines provide that urine is to be collected in preference to blood except when TCO2 testing is required. The guidelines further provide that if a urine sample cannot be collected, a blood sample must be taken.

39. In respect of the collection of urine samples, the RASL guidelines provide that the witness (trainer, competitor, owner or representative) should be given the opportunity to view the whole procedure. In respect of the actual collection of the urine, the guidelines simply state: "collect the urine in the collection pan". Nothing in the guidelines refers to the identity of the person required to hold the collection pan.

40. In *Nettlefold*, having considered the rules referred to above and the dictionary definition of "swab", at para. 11, the Board concluded that in Tasmania it is the role of the swabbing steward to take swabs and process them for testing. At para. 12, the Board noted:

> "*It is clear from the rules that:*

- *Stewards are empowered to test or examine any horse that they consider appropriate at any time or place;*

- *Urine may be taken from a horse for the purpose of testing and examining;*

- *For the purposes of testing or examining, Stewards may use the services of veterinary surgeon or other appropriately qualified person."*

41. Further, at para. 14, it was noted that the use of the word "may" in AHRR189(6) is important insofar as Stewards had the discretion to utilise the services of a vet or other appropriately qualified person, but that it was at their discretion.

42. The previous *Nettlefold* decision is of limited assistance in this particular case. The issue at play there was whether a Steward who had not received any formal training was empowered to take a urine sample from a horse. In that case, the Board was not considering arguments of the type now raised by the appellant.

43. There is no doubt that Stewards are empowered to test horses for the presence of prohibited substances by reason of AHRR 15(1)(k) and 189(1). The rules and guidelines are silent as to who must hold the collection pan at the time the urine sample is taken. This may be because it is recognised that there are occasions when horses are uncooperative and unable to provide a sample unless a person with whom they are familiar is in their close proximity rather than a swabbing steward who is likely to be a stranger.

44. The appellant's argument suggests that his involvement in holding the pan meant that the Steward involved did not carry out the test. The Board does not accept that argument. The carrying out of the test or examination is not confined to the moment of collection but encompasses the whole of the process. In this case, the facts suggest that the Steward involved, Ms Brydon, carried out the test. She was responsible for obtaining the kit, opening the kit, attempted to collect the urine sample from *Blame It On Me* and, when that failed, utilised the assistance of the appellant who she kept under observation. In the Board's view, the test was carried out in a way that is contemplated by the rules.

45. If we are wrong about that, in any event, the process has not been demonstrated to have been materially flawed. It is necessary to give consideration to all of the evidence when assessing whether or not there has been a material flaw in the process, and then consider whether or not that evidence undermines the integrity and reliability of the sample which was taken. In this case, the evidence points to the sample being reliable. The presence of aminorex in the horse's system is consistent with the presence of the plant material on the appellant's property that was also found to contain that substance. Further, a later sample taken from *Blame It On Me* also contained aminorex. There is no suggestion that the sample taken by Stewards during their stable inspection was in any way affected by the sorts

of issues raised by the appellant in this case. The appellant's evidence is that he held the pan when the sample was taken from the horse following the race and did not place his hand inside it. He did not suggest that the aminorex was transferred from him to the collection pan. In fact, he eschewed such a suggestion during the course of the inquiry and the appeal hearing. In those circumstances, there are no credible facts that suggest that the sample had been contaminated or was in any other way unreliable or lacking in integrity. Ground 1 is dismissed.

Ground 2

46. This ground asserts that there must have been a material flaw in the testing of the urine sample.

47. During the course of the hearing of the appeal, Ms Nelis, who conducted the confirmatory testing at RSC of the urine sample taken from *Blame It On Me,* was made available for further questioning. The appellant's questioning of Ms Nelis was directed at two issues. First, the appellant suggested that because the assumed source of the aminorex was a plant found on the appellant's property and therefore an organic compound, the presence of aminorex, which the appellant described as an inorganic compound, was inconsistent with that source. This contention appears to be based on an assumption that an inorganic compound cannot be derived from an organic compound. Secondly, the appellant suggested that the laboratories had incorrectly identified aminorex in the sample when the substance could have been norcotinine.

48. In addressing the first contention, Ms Nelis questioned what the appellant's definition of organic was. Aminorex, the chemical formula for which is $C_9H_{10}N_{20}$ is, in her view, an organic compound as it is a carbon-based compound. Ms Nelis gave evidence that as far as she was aware, aminorex has been reported to be found in plant material and is also able to be administered directly. It is a substance with multiple sources. Ms Nelis also confirmed that her laboratory was asked to test for the presence for aminorex, that the laboratory performed a liquid chromatography-mass spectrometry (LCMS) analysis consistent with the guidelines outlined in their quality system and that the substance detected met all the criteria required by the Association of Official Racing Chemists (AORC) to enable her to confirm the presence of aminorex in the sample.

49. In respect of the second contention, it was put to Ms Nelis that norcotinine has the same chemical formula of $C_9H_{10}N_{20}$. The appellant questioned how the laboratory was able to differentiate between that substance and aminorex. During the course of the hearing of the appeal, Ms Nelis looked up the chemical composition of norcotinine and identified that its structure was entirely different from that of aminorex. She described aminorex as having "*an oxygen in its five membered ring and a nitrogen in its five membered ring and having a primary amine functional group of the five membered ring*". She also noted that aminorex has no heteroatoms in its phenyl ring. Norcotinine, on the other hand, has a nitrogen on its primary phenyl ring, whereas

aminorex has a clean phenyl ring. Further, norcotinine has a single nitrogen in its five membered ring and does not have a primary amine group. It also has a double bonded oxygen.

50. The upshot of this analysis is that norcotinine is structurally quite different from aminorex. As a consequence of the difference in their structures, according to Ms Nelis, it would be unlikely for the two structures to elute at exactly the same retention time and have exactly the same fragmentation pattern. As a result, it would be unlikely that norcotinine would produce a false positive for aminorex when run through the testing conducted by RSC.

51. The appellant was unable to point to any expert reports or peer reviewed studies that suggested that false positives for aminorex were produced by norcotinine or that these two substances had been confused when analysing samples taken from animals. He referred to a website that identified norcotinine as being present in some plants. But that appeared to be the extent of the information that he had obtained.

52. The evidence given by Dr Nelis simply confirmed that the sample she tested contained a substance, aminorex, that matched the guidelines issued by AORC when run through the particular testing undertaken by RSC in respect of that substance. Nothing raised by the appellant displaced the results of that testing.

53. The Board is satisfied that the certificates of analysis from RASL and RSC identified the presence of aminorex in a sample. The appellant has not demonstrated that there was a material flaw in the analysis process. As a consequence, ground 2 is dismissed. The result of that conclusion and the dismissal of ground 1 means that pursuant to AHRR 191(3), the certificates issued by RASL and RSC conclusively establish that *Blame it on Me* was presented to race on 5 January 2020 not free of a prohibited substance.

Ground 3

54. As noted above, Stewards determined that it was necessary to activate the suspended portion of a fine that had been imposed in respect of the appellant's previous prohibited substance offence. AHRR 256(5)(c) provides that if an offender breaches any term or condition imposed during a period of suspension then, *unless the Stewards otherwise order*, the suspended penalty thereupon comes into force and penalties may also be imposed in respect of any offence constituted by the breach. As can be seen from the terms of the rule, Stewards have the option to not activate the suspended portion of a penalty in the event of a breach.

55. The penalty imposed in respect of the earlier prohibited substance offence was a fine of $2,000.00 with $1,000.00 of that fine wholly suspended for 12 months "provided [the appellant] did not reoffend under the above rules". The reference to "the above rules" was to AHRR 190(1)-(2) and (4). Clearly Stewards found the appellant guilty of a further offence under AHRR 190(1)-

(2). The subsequent offence occurred within 12 months of the imposition of the original penalty which was imposed on 2 October 2019.

56. In relation to penalty, the Stewards noted the following:

> "*the stewards feel that the conviction that you're found guilty of that offence be recorded, however no penalty shall be applied in relation to this offence. And we feel that that's the case given the circumstances, given that there was no way in which you could have, we feel there's no way that you knew that you could have come across this positive, okay? So that's how we've come to that conclusion Mr Nettlefold.*"

57. When considering whether to activate the suspended fine, the Stewards referred to AHRR 256(5)(c) and determined that "*given that you have been charged and found guilty under the same rule for this offence Stewards this time feel it is necessary to invoke that $1,000.00 suspended fine*".

58. Stewards do not appear to have considered the option of exercising their discretion not to activate the suspended part of the fine imposed in 2019. In the Board's view, this was an error. The circumstances of this case are extremely unusual. At the time of the offence, there was no general understanding in the racing community that the ingestion of plant material could result in the detection of aminorex in a horse's system. It would appear that Stewards were also ignorant of this possibility. The appellant through his own research identified this possibility and the evidence given by various scientists involved in the analysis of samples in this case confirmed that the ingestion of certain plant material can result in such positive results. Plant material containing the precursor substance barbarin and aminorex was located on the appellant's property.

59. This case may be distinguished from arsenic cases where participants are now well aware of the risk that ingestion of or contact with arsenic treated timbers can result in a horse testing positive to a prohibited substance. The appellant's ignorance of the risk of his horse returning a positive reading for aminorex is understandable. In the circumstances it would have been unreasonable to have expected him to take steps to avoid that risk.

60. In the circumstances, the Board determined that the circumstances presented in this case were such that Stewards should have ordered that the suspended penalty imposed in October 2019 not come into force.

Conclusion

61. The Board exercising its powers under s.34(2) of the *Racing Regulation Act 2004* (the Act) affirms the decision of Stewards that the appellant is guilty of presenting *Blame it on Me* to a race at the Launceston Pacing Club on 5 January 2020 not free from a prohibited substance. The decision of Stewards not to make an order pursuant to AHRR 256(5)(c) that the suspended penalty imposed in October 2019 not come into force is quashed. The Board orders that the penalty imposed upon the appellant by Stewards on 2 October 2019 and upheld by the Board in its decision in *Nettlefold* Appeal No.2 of 2019 not

come into force as a consequence of the appellant's breach of the conditions of the suspension on 5 January 2020.

62. As the decision of Stewards has been varied, the appellant is ordered to forfeit 25% of his prescribed deposit to the Secretary of the Department pursuant to s.34(2)(d) of the Act. The appellant is also ordered to pay 25% of the cost incurred in the preparation of the transcript to the Secretary of the Department pursuant to ss.34(4A) and (4B)(c) of the Act.