

The direct evidence before the Tribunal was that the Stewards have abandoned the practice of either heat sealing or stapling the last of the plastic bags in which the samples are sent for analysis. This step is required by the protocols dealing with the collection procedures.

The relevant step in the protocol document is Step 7 which requires that the plastic bag containing the security pouch and samples be sealed by heat sealer or stapled. It seems that the Stewards have simply decided to abandon this step.

The Respondent tendered a letter from Dr Young of the Racing Science Centre confirming:

I am advised that the person in charge of the licensed animal who witnessed the taking of the samples has stated that the top of the plastic bag was not heat sealed or stapled as required by Step 7 of the Appendix 3 of the Procedures.

He then goes on to detail the procedure for opening the secured bags at the Racing Science Centre and the requirement to note in writing any non-compliance on the Record of Sample Custody and Dispatch document accompanying the samples. He draws the conclusion because there was no notation that the bag must have been correctly sealed. He then expresses what in effect is a legal opinion as to whether there has been substantial compliance with the procedures. His evidence is at best secondary evidence of what took place and is not determinative of the issue. The direct evidence before the Tribunal was that the bag in question was not stapled or heat sealed.

The Tribunal finds that the bag in question was not correctly sealed as the direct evidence before the Tribunal establishes.

Section 352A provides:

352A Integrity of analysis of thing

(1) This section applies to any of the following decisions—

- (a) a decision of a control body about taking disciplinary action relating to a licence, which action is reliant on a relevant certificate about the results of the analysis of a thing;
 - (b) a decision of an appeal committee on an appeal against a decision of a control body's steward for which the steward relied on a relevant certificate about the results of the analysis of a thing;
 - (c) a decision of the tribunal on an appeal against a decision of an appeal committee mentioned in paragraph (b);
 - (d) a decision of the tribunal on an appeal against a decision of a control body's steward for which the steward relied on a relevant certificate about the results of the analysis of a thing.
- (2) In making the decision, it is enough for the decision maker to be satisfied that in taking and dealing with the thing for analysis, the control body has substantially complied with the integrity board's procedures (the **relevant procedures**) mentioned in section 115(3) as in force at the relevant time.
- (3) In considering whether there has been substantial compliance with the relevant procedures, the decision maker must have regard to the evidence of an accredited analyst, or accredited veterinary surgeon, of an accredited facility about whether substantial compliance with the relevant procedures has not adversely affected the integrity of the analysis.
- (4) In this section—
relevant certificate means a certificate mentioned in section 147(3).

In this case Mr Callaghan SC argued that the integrity of the sample was not in any way affected by the non-compliance and evidence was provided from Dr Young of the Racing Science Centre to support his contention that there was or must have been substantial compliance as provided by the legislation.

Section 115(3) of the *Racing Act* charges the Racing Animal Welfare and Integrity Board with

developing and adapting procedures about the way things for analysis are to be taken and dealt with; and publishing the procedures and amendments of the procedures in a way prescribed under a regulation

The procedures described as the “Collection Procedures – Racing Animal Welfare and Integrity Board” are contained in the document published pursuant to s 115(3) and effective from 1 May 2008.

Step 7 of the relevant procedure is

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

The issue is not whether the sample was or was not possibly tainted or contaminated.

The control body has the benefit of statutory provisions which shift the onus of proof and deem a licensee to be guilty of an offence where it is demonstrated that a horse is presented for racing at a time when it had in its system a prohibited substance. Sample collection procedures have been formulated, and custody and control procedures have also been formulated, to ensure that the point is reached where the integrity of the sample is not in question. Substantial compliance will be determined on each set of facts in each case where testing procedures are challenged.

The Stewards of their own volition have abandoned one of the steps in the chain of custody and control and are seeking to rely on s 352A to maintain that the procedures are adequate to support a finding based upon the analysis of the sample.

S 352A was not designed to provide the Stewards with a decision-making capacity in relation to non compliance with established procedures. The control body has the benefit of the Rules which mandate a finding of guilt where a positive swab is returned. However to get to that stage it has to be shown that the procedures have been complied with.

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.

It is the view of the Tribunal that this is not a case in which the control body can rely on s 352A and even though it may be a small step in the overall scheme of custody and control it is nonetheless part of the protocol and non compliance with it was not accidental but deliberate. The Stewards, if they are to rely on the strict liability of the Rule to secure convictions, 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.

The Tribunal does not accept that this case falls within the ambit of s 352A and finds that the collection, custody and control procedures have not been substantially complied with, and the finding of the Stewards to convict was not sustainable.

The appeal is allowed and the deposit ordered refunded.

Leo Williams AO
Chairman

Brockwell Miller
Deputy Chairman

Dennis Standfield
Member
