TASMANIAN RACING APPEAL BOARD

Appeal No 1 of 2018/19

Panel:	**Tom Cox (Chair)** **Kate Brown** **Rod Lester**	**Appellant:**	**Graeme McCulloch**
Appearances:	**Scott Quill on behalf of the Stewards**	**Rules:**	**Australian Racing Rule 178**
Heard at:	**Office of Racing Integrity** **1 Civic Square** **Launceston, Tasmania.**	**Penalty:**	**$2,500 wholly suspended for two years**
Date:	**23 October 2018**	**Result:**	**Appeal against fine and conditions upheld** **Penalty varied to reprimand**

REASONS FOR DECISION

1. On the 23rd October 2018 the Tasmanian Racing Appeals Board heard an appeal against the penalty imposed on trainer Graeme McCulloch for an offence under AR178. The appellant had presented the horse Windrider to race at the TTC meeting on 24th April 2018 and a pre-race swab had detected the prohibited substance Oripavine in Windrider's system. Windrider won the race he contested and was subsequently disqualified pursuant to AR177. The appellant was found in breach of AR178, and fined $2500, with the fine being wholly suspended for a period of 2 years.

2. The appellant's grounds of appeal were that both the fine and conditions were excessive given the circumstances.

3. It was accepted that the only logical explanation for the presence of the prohibited substance was that the horse had ingested some feed that had been contaminated by poppies or poppy material.

4. In determining the penalty imposed the Stewards had considered the fact that the appellant was a registered poppy grower, and that he had indicated that he would continue to grow poppies on his property notwithstanding this event, and that he had two previous positive swabs for Oripavine. The Stewards expressed the view to the Board that this fact necessitated a finding that the appellant bore some culpability for the contamination, and as a result the penalty imposed was appropriate.

5. The appellant's position was that the source of the contaminated feed was unknown, and whilst he conceded that it was likely that the contamination had come from his property, it was by no means certain, and in any event he had taken all reasonable measures to prevent any contamination entering the feed that was provided to his horses in training.

6. Horses trained by the appellant had returned positive swabs to Oripavine twice prior to the current infringement. The first instance was at some stage prior to 2005. As a result of this positive result, the Stewards conducted tests on the appellant's feed and determined that the most likely source of the contamination was oats. These oats had been purchased from a property at Cressy, and interestingly at that stage this property had never grown poppies. After the second positive swab in 2015 Stewards again tested the appellant's feed and could find no contamination. They again tested the feed after the current positive swab with the same result.

7. At some stage after the first positive swab the appellant changed his grain purchases from local grain to all mainland grain, however, this clearly had not prevented the further positive swab in 2015. Currently the only locally sourced feed used for his racehorses was chaff, both oaten and lucerne, that he produced on his property. The oaten chaff was produced from a paddock that had never grown poppies and the lucerne chaff was produced from a paddock that had grown poppies three years ago.

8. After this paddock had grown poppies three years ago it had the waste poppy straw windrowed and burnt in accordance with the processor protocols for minimising regrowth poppies. It was then cultivated and planted with grass. When the grass germinated the paddock was treated with a selective herbicide to kill broadleaf weeds and any regrowth poppies. It was used as a pasture paddock for two years and then sprayed with a non-selective herbicide prior to cultivation and planting with lucerne. When the lucerne germinated it was treated with a selective herbicide, again to address broad leaf weeds and any residue regrowth poppies. The first cut of the lucerne was harvested later in 2017 and chaffed. In that process the appellant also looked at the crop as it was cut to identify any poppies. None were observed. It was this first cut chaff that was being fed to Windrider, along with a variety of other grains and feed, prior to the positive swab in April 2018.

9. Subsequent to the positive swab on Windrider, the appellant stopped feeding this first cut chaff to his racehorses, and moved them onto second cut lucerne chaff only. However testing of the first cut chaff by Stewards did not reveal any contamination.

10. Evidence presented at the Steward's inquiry indicated that there had been 14 positive swabs to Oripavine processed at Racing Analytical Services since 2005. Of these 14 positive swabs, 11 had been recorded in Tasmania and two of these related to the appellant's horses. There were at least two other trainers in Tasmania who had had multiple positives to Oripavine and neither of these trainers were involved in the growing of poppies.

11. The issue that the Board needs to address is to what extent the appellant could have minimised or eliminated the risk of contamination of his feed and whether he had taken all reasonable steps to do so. This would determine his level of culpability and the appropriateness of the penalty.

12. The available history of Oripavine positive swabs suggested that they invariably were assumed to have resulted from some form of feed contamination. The source of feed contamination appeared to be difficult to identify with testing consistently failing to isolate contaminated feed, however it appeared that there was no other explanation that made any sense. Various approaches to mitigate the risk of further contamination had been tried, but given that a number of trainers have had multiple positive swabs

it must be said that the effectiveness of mitigation procedures tried to date is questionable at best. It should, however, be noted that with 11 positives from Tasmania over the last 13 years it is a statistically small sample, with sporadic frequency, so it is very difficult to draw meaningful conclusions about actual risk factors, or indeed how trainers are meant to mitigate against those risks.

13. The Steward's proposition that had the appellant been prepared to stop growing poppies on his property his risk of having contaminated feed would have been reduced, and it would have also demonstrated a commitment to mitigate against that risk, is intuitively attractive, however in the Board's view it is little more than that. The facts are that in the last 13 years the appellant has had two of 11 positive swabs for Oripavine in Tasmania, with the other nine appearing to all come from trainers who are not involved in growing poppies; nor is the appellant the only trainer with multiple positive swabs during that period – there were two others named at the appeal hearing.

14. At the moment there is no certainty around what constitutes the risk factors. Given that state of affairs and the actions the appellant took to minimise the regrowth of poppies on his property and the other matters mentioned above, the Board is satisfied that in this case the appellant's efforts to control and eliminate regrowth poppies on his property were reasonable. The Board is also of the view that to require or expect the appellant to cease poppy production on his property whilst he has taken the steps he has and there is substantial uncertainty as to how the alkaloid is getting into feed would be unreasonable.

15. The current situation with respect to Oripavine is far from ideal. The prohibited substance rules are critical in efforts to preserve and enhance the integrity of the industry, and transgression of those rules is rightly regarded with the most seriousness. Typically, however, the Oripavine positives, and especially the more recent ones, seem to be characterised by situations where trainers have, notwithstanding their best efforts, been unable to prevent some contaminated feed from entering their feeding regimes. Whilst it is undoubtedly a serious offence it is difficult not to reach the conclusion in most instances that the culpability of the offender is low. What is also concerning is that, with no firm understanding of how contamination is occurring, trainers appear to be adopting a fatalistic view about the possibility of further positive swabs: that it is an issue of when rather than if, and they have no control or ability to prevent that occurring.

16. The Stewards also are in a difficult position with these cases. While they have no option but to disqualify the horses under AR177, they need to decide under AR178 if they are to proceed to charging the trainer, presumably considering some assessment of culpability. In the longer term it will be very difficult to provide consistently equitable outcomes for trainers who do not understand what is required to eliminate the risk, and at the same time protect the integrity of the industry from those who may seek to exploit a trend for lenient treatment of a particular offence.

17. In the short term at least, the Board is of the view that the management of this issue would be enhanced if there were a protocol for the acquisition, management and delivery of foodstuffs for horses in training. If trainers could demonstrate that the protocol had been followed there would be a presumption that they had taken reasonable steps to at least prevent contaminated feed being the source of a positive swab. Ultimately, though, it will be necessary to understand how and why alkaloids are contaminating horse feed.

18. After considering the circumstances in this case, the Board is of the view that the appellant's culpability was extremely low, and that it appropriate to impose a penalty that reflects the negligible culpability of the appellant. The appellant is reprimanded. The appeal is upheld and the decision to impose a fine quashed. It is noted that the horse was automatically disqualified and the prize money foregone.

19. Pursuant to s.34(2) of the *Racing Regulation Act 2004* the Board orders that the prescribed deposit be refunded in full to the appellant.