

TASMANIAN RACING APPEAL BOARD

Appeal No 06 of 2021-22

Panel:	Ms Kate Cutherbertson	Appellant:	Mr Ismail Toker
Advisor:	Mr Chris Taylor		
Appearances:	Ms Louise Brooks and Mr Ross Neal (on behalf of the Stewards) Mr Anthony O'Connell (on behalf of the Appellant)	Rules:	AR 129 (2) – Failed to take all reasonable and permissible measures
Heard at:	Office of Racing Integrity Prospect Government Office 171 Westbury Road Prospect TAS 7250	Penalty:	Suspension for 6 Tasmanian race dates (commencing midnight 24/11/21 to midnight 19/12/21) – Stay of Proceedings Granted
Date:	4 March 2022	Result:	Quashed

REASONS FOR DECISION

1. The appellant, Mr Toker, was the jockey riding *Innocent Pegg* in Race 4 at the Devonport Racing Club meeting held on 18 July 2021. An inquiry was first convened on 28 August 2021 in respect of the appellant's ride. The inquiry adjourned and was reconvened on 16 November 2021. On that date, Stewards charged the appellant pursuant to AR129(2) with failing to take all reasonable and permissible measures throughout the race to ensure that the horse was given full opportunity to win or obtain the best possible place in the field. The appellant pleaded not guilty. The Stewards found him guilty and imposed a 6 race date suspension commencing on 24 November 2021.
2. The appellant appealed his conviction and penalty. A suspension of the penalty was granted by the Chairperson of the Tasmanian Racing Appeal Board (TRAB).
3. The appellant's grounds of appeal disputed the Stewards' conclusion that he had failed to take all reasonable and permissible measures during the course of the race. In addition, it was also argued that Stewards did not adhere to the requirements of rule 4.7 of the Tasmanian Local Rules of Racing (Local rules) when they reconvened the inquiry on 16 November 2021 and as a consequence the inquiry could not be determined as being held within those rules.
4. The appeal hearing commenced on 4 March 2022. At that hearing, the appellant sought leave to amend his ground concerning the conduct of the inquiry to the following:

“The Stewards did not continue to adhere to r.4.7 which was in place at the time of the inquiry.”

5. Essentially, the appellant argued that the Stewards’ panel conducting the inquiry was not properly constituted in accordance with the Local rules. The hearing of the appeal was adjourned to enable Stewards to obtain advice as to the jurisdictional issue raised by the appellant in this ground of appeal.
6. A directions hearing was later held and Stewards were directed to provide written submissions as to whether the Stewards’ panel was properly constituted for the purposes of the inquiry and, if not, the consequences of that in the context of their decision and this appeal. The Stewards’ legal representative indicated at the directions hearing that it was conceded the panel was improperly constituted, as a consequence Stewards did not wish to proceed with the hearing and that the decision ought be quashed.
7. These reasons are confined to the jurisdictional issue raised by the appellant’s appeal. For the reasons that follow, the Stewards’ decision of 17 November 2021 finding the appellant guilty of a breach of AR129(2) and imposing the 6 race date suspension is quashed.

Background

8. The relevant race meeting occurred on 17 July 2021. The Stewards’ report in relation to that race did not refer to any issues concerning the performance of *Innocent Pegg* or the appellant’s riding.
9. The inquiry was not convened in respect of the appellant’s ride until 28 August 2021. The transcript of the inquiry does not explain the delay. The Stewards’ panel comprised Dominic Tyson as Chairman with Gavin Griffin and Heather Edgecombe as Stipendiary Stewards. The inquiry commenced on that date, the race footage was viewed, and the appellant provided an explanation of his ride and answered some questions in respect of it. The Chairperson advised that they were adjourning the inquiry to enable Stewards to have a look at the whole race with everything in its “completeness” and that the appellant would be advised when the panel was to be reconvened.
10. The inquiry recommenced on 16 November 2021. The Chairperson noted at the outset of the reconvened hearing that Stipendiary Steward Heather Edgecombe had since resigned from the Office of Racing Integrity and, as a consequence, the inquiry had to continue with a panel of two. The Chairperson noted that “*normally we’d have three but she’s left so we’re down to two, so I’ve just got to advise you of that*”.
11. The inquiry continued in that fashion, and it was the Chairperson Dominic Tyson and Stipendiary Steward Gavin Griffin who ultimately issued the charge to the appellant, found him guilty of a breach of the rule and imposed the penalty upon him.

The Racing Regulation Act 2004 (the Act), the Australian Rules of Racing and the Tasmanian Local Rules of Racing

12. Pursuant to s.28(1)(b) of the Act, a person may appeal to the TRAB if the person is aggrieved by the decision of the Stewards to impose a suspension on the person. This was a minor appeal as it concerned a suspension for a period not exceeding 30 days: see s.3 of the Act. Stewards calculated the penalty they imposed would expire by 19 December 2021, which was 25 days after the commencement of the period of

suspension on 24 November 2021. As a consequence, the appeal was required to be lodged within 7 days after the taking of the relevant decision. That decision was made on 16 November 2021. The appeal notice and grounds of appeal were received by the Secretary of the Board on 22 November 2021.

13. After hearing an appeal, the Board may affirm, vary or quash the decision that was the object of the appeal or, if the appeal is made under s.28(1)(b), as this one was, it may, if it considers it just to do so, refer the matter to Stewards for re-hearing if satisfied the appellant did not engage in the conduct that prompted the making of the decision but may have engaged in some other conduct that would have justified the respondent making another decision against the appellant.
14. The Act provides that Rules of Racing are not statutory rules, instruments of a legislative character for the purposes of the *Subordinate Legislation Act 1992* or subject to s.47(3), (3A), (10) or (11) of the *Acts Interpretation Act 1931*: s.111(1).
15. Stewards are appointed pursuant to s.51 of the Act. Section 51(1)(a) provides that Stewards are appointed “*to enforce the Rules of Racing of one or more codes of racing*”. AR19(f) provides that in Tasmania, Stewards’ powers and functions are conferred on them solely by the Rules. Pursuant to AR20, those powers include:
 - (a) *... investigate, inquire into, hear and determine matters relating to the conduct of all ... licensed persons or registered persons; and*
 - (h) *to inquire at any time into the running of any horse within the jurisdiction of the same PRA.*

In this State, the PRA is TasRacing Pty Ltd: AR2.

16. Pursuant to AR22, Stewards have the following powers in relation to investigations and inquiries:
 - (a) *to investigate and/or inquire into any matter in connection with racing, including without limitation any matter in connection with any race meeting; ...*
 - (b) *to hear and make determination in relation to any matter in connection with racing, including without limitation:*
 - (i) *any matter in connection with any race meeting ...*
17. AR24 provides that Stewards have the power to penalise any person who breaches the rules. AR25 provides that any decision made by a panel of Stewards must be done so with a majority vote. If voting is equal, the Chairman of that panel shall have a casting vote. The Australian Rules of Racing do not otherwise address the constitution of a panel of Stewards.
18. Those matters are addressed by the Tasmanian Local Rules of Racing.
19. Local r.4.2 provides:

There must be at least three Stewards appointed acting at every provincial and or country meeting. These Stewards shall form a quorum. Where at any meeting that conducts Class A and Class B restricted races, the meeting may be conducted by one or more Stewards. In the event of only one

Steward being in attendance, that Steward will be appointed as the Chairman of Stewards. Should there be less than three Stewards so appointed present at any of such meetings, competent and willing to Act, the Director shall nominate Stipendiary Stewards to bring the number of Stewards up to three.

This rule was effective from 16 December 2015.

20. Local r.4.7 provides as follows:

The Stewards may inquire into any incident at any race meeting...and take appropriate action against any person or persons found guilty of any breach of the Rules and also take any action deemed necessary in respect of any horse in accordance with the Rules. The Stewards referred to in this rule, shall be members of the panel of Stewards appointed under the Racing Regulation Act 2004 and shall comprise not less than three in number. (emphasis added)

21. Local r.4.8, however, provides as follows:

The Stewards may inquire into any incident at any race meeting ... and take appropriate action against any person or persons found guilty of any breach of the Rules and also take any action deemed necessary in respect of any horse in accordance with the Rules. The Stewards referred to in this Rule, shall be members of the panel of Stewards appointed under the Racing Regulation Act 2004.

This latter rule was also effective as of 16 December 2015.

22. Local rr.4.7 and 4.8 are in identical terms but for Local r.4.7 providing that a panel of Stewards shall comprise not less than three in number. Both of those Local rules were in force at the time of the inquiry the subject of this appeal.

23. The appellant's appeal raises the following questions:

- (a) must an inquiry into any incident at any race meeting and any action taken against a person found guilty of any breach of the rules be undertaken by a panel of Stewards of not less than three in number?;
- (b) if yes, is the decision of an improperly constituted panel of Stewards able to stand or is it liable to be set aside?

Stewards Submissions

24. The submissions made on behalf of the Stewards did not address the apparent conflict between Local rr.4.7 and 4.8. On one reading, Local r.4.8 permits Stewards to inquire into an incident at a race meeting and take appropriate action against a person found guilty of any breach of the Rules provided the Stewards are those appointed under the *Racing Regulation Act*. The term "panel of Stewards" is not defined. The only reference to the term in either the Local Rules of Racing and the Australian Rules of Racing are contained in the Local rr.4.7 and 4.8 and AR25. A panel in the context of Local rr.4.7 and 4.8 appears to refer to the pool of Stewards appointed pursuant to s.51(1)(a) in respect of the relevant code of racing. AR25 does not impose a requirement that a specified number of Stewards make decisions or constitute a panel. It does, however, provide how decisions are to be arrived at where

more than one steward is involved. Only Local r.4.7 requires a minimum of three Stewards to conduct any inquiry or take any action in respect of any breach of the Rules.

25. There is no apparent explanation for Local r.4.8. It is described as having been amended effective 16 December 2015. In terms of its application to inquiries and taking action in respect of an incident at any race meeting, it is indistinguishable from local r.4.7 but for Local r.4.7 stipulating a minimum number of Stewards comprising a panel.
26. In my view, the only way that Local rr.4.7 and 4.8 can be interpreted harmoniously is to regard Local r.4.7 as qualifying the operation of Local r.4.8, that is Stewards inquiring into any incident at a race meeting and taking appropriate action against any person or persons found guilty of any breach of the Rules must be members of a panel of Stewards appointed under the *Racing Regulation Act* and comprise not less than three in number. Stewards accept that is the case. If Local r.4.8 was intended to have a different operation, it is not apparent from the text of the rules. Further, there is nothing apparent from the context of the Local rules to suggest that it operates independently of Local r.4.7. Further, it is not expressed to have amended the operation of Local r.4.7.
27. What does this mean for the decision made by the two Stewards in this case?
28. In their submissions, Stewards referred the Board to the decision in *Muto v Shepparton City Council* [2018] VSC A73. At [47]-[50], Kyrou JA (with whom McDonald AJA agreed), set out the following relevant legal principles:
 47. *A statutory requirement that a court or tribunal be constituted in a particular manner for a specified class of proceeding is, generally speaking, jurisdictional in nature. Where this general principle applies, if the court or tribunal in question is not constituted in the prescribed manner, it lacks jurisdiction in relation to that class of proceeding and any order that it purports to make is invalid. This is because the statutory requirement is not a matter of procedure but relates fundamentally to the constitution of the decision-making body itself.*
 48. *Where a statute confers jurisdiction on a court or tribunal to hear and determine a particular type of proceeding, the court or tribunal must be constituted in the prescribed manner for both the hearing and determination of such a proceeding. This is because, in such a case, the court or tribunal does not have jurisdiction to hear the proceeding without determining it (unless the proceeding is discontinued prior to its determination) or to determine the proceeding without conducting a hearing. In other words, the jurisdiction to hear and determine the proceeding is part of a single adjudicative process and cannot be bifurcated.*
 49. *There are good reasons for this principle. The proceeding cannot be determined as an isolated act. The determination must be informed by the evidence adduced, and the submissions made, by the parties during the hearing. Likewise, the hearing of the proceeding is not an end in itself but is part of the process of making a determination. Further, the court or tribunal may, during the hearing, make rulings — such as rulings on the admission or exclusion of evidence — which may have a decisive impact on*

the final determination of the parties' substantive rights. Thus, it needs to be properly constituted when making such rulings.

50. *In order to comply with a statutory requirement that prescribes the manner in which a court or tribunal is to be constituted to hear and determine a proceeding, the court or tribunal must be properly convened from the commencement of the hearing. The parties must be given notice of the hearing and the hearing must be conducted according to law. Where, for the purposes of a proceeding, a court or tribunal is not constituted in the prescribed manner when it hears that proceeding, ordinarily it will not have jurisdiction to determine the proceeding even if, at the time of the determination, it is constituted in the prescribed manner. This is so unless the relevant statute expressly or impliedly provides to the contrary.*
29. Those principles are equally applicable to the requirements imposed concerning the proper composition of a panel of Stewards conducting an inquiry and taking action against a person found guilty of any breach of the Rules. In accordance with the above principles, the requirement that three Stewards constitute the panel is jurisdictional in nature. Nothing in the Local rules expressly or impliedly provides that a panel of Stewards constituted other than in accordance with Local r.4.7 has jurisdiction to determine the proceedings it was conducting. Accordingly, the Stewards lacked jurisdiction in relation to the conduct of the inquiry when it reconvened on 16 November 2021 with only two members. Although it was properly constituted when it first convened, it was required to remain properly constituted throughout the course of the proceedings. This is because the proceedings were not determined prior to the adjournment and the inquiry being reconvened on 16 November 2021. It follows that the Stewards did not have jurisdiction to charge the appellant and find him guilty of a breach of AR129 and did not have jurisdiction to impose the penalty that they did. Its order imposing a penalty upon the appellant was invalid.
30. As a consequence, the Board orders that the decision of Stewards made on 16 November 2021 finding the appellant guilty of failing to take all reasonable and permissible measures contrary to AR129(2) and imposing the six race date suspension is quashed. Pursuant to ss.34(1A) and (2)(e), the whole of the appellant's prescribed deposit is to be refunded to him.

DATED: 5 December 2022