TASMANIAN RACING APPEAL BOARD

Appeal No 15 of 2019-20

Panel:	**Tom Cox (Chair)** **Kate Cuthbertson (Deputy Chair)** **Wendy Kennedy (Member)**	**Appellant:**	**Conor Crook**
Appearances:	**Steven Shinn (on behalf of the Stewards)** **Anthony O'Connell (on behalf of the Appellant)**	**Rules:**	**AHRR 245**
Heard at:	**Tasracing** **Glenorchy**	**Penalty:**	**Fine of $2,500**
Date:	**11 August 2020**	**Result:**	**Dismissed**

REASONS FOR DECISION

1. The appellant is a licenced A grade trainer and driver. On 6 June 2020, he attended the Launceston Pacing Club trial meet at the Mowbray Racetrack in Launceston. Harness trials had recommenced on 20 May 2020 following the shutdown of the entire racing industry due to the COVID-19 emergency. Racing proper did not resume until 14 June 2020.

2. Like the majority of businesses in the community, the racing industry introduced protocols that implemented WorkSafe Tasmania's COVID Safe minimum standards in order to manage the COVID-19 risk when its activities recommenced. In the context of harness racing trials, those protocols were contained in the "Tasracing COVID Safe Standard Operating Procedures: Harness Trials – Statewide".

3. The overall intent of the procedures was to ensure that trials were conducted at a racetrack with no more than 10 people in any one operational location of the racecourse facilities. Relevant to this matter, venue entry protocols were introduced. They provided that the venue would have only one designated entry/exit point and that photo ID must be presented by all persons seeking entrance. Each attendee at the racecourse was to be checked by security staff against the officially approved attendee list for the trial day. Each attendee was also to be fever tested at the venue entry. Any person who returned a temperature reading of more than 38˚ and/or submitted answers which indicated possible COVID-19 exposure were to be refused entry to the racecourse. The protocols further provided that trainers were to notify of attending stable hands by 4.00pm close of nominations day and that only

approved personnel listed would be allowed entry. The approved personnel list was to be sent to security at 5.00pm close of nominations day.

4. On 18 May 2020, the Office of Racing Integrity issued the following official direction under the Rules of Racing:

> "*Any person in attendance during racing activities in Tasmania must comply with all COVID-19 protocols.*"

5. That direction was expressed to be effective immediately. The notice to racing participants advised that non-compliance with the direction would relevantly be considered an offence under the provisions of AHRR 238 which states:

> "*A person shall not fail to comply with any order, direction or requirement of the controlling body or the Stewards relating to harness racing or to the harness racing industry.*"

6. Racing activities were defined in the official direction as including all forms of trials.

7. The appellant was attending the trials on 6 June 2020 as a freelance driver for the day. He was originally intending to go to the Mowbray Racetrack with Rohan Hillier, another trainer, and his two runners. According to the appellant, shortly before leaving to attend the racetrack, one of Mr Hillier's horses became unwell with colic and he was required to remain at home to monitor the mare's condition. It was decided that Mr Hillier's daughter, Makenna Hillier, then aged 17 and a holder of a stable hand licence, would attend in his place.

8. Shortly before arriving at the Mowbray Racecourse, the appellant and Miss Hillier realised that Miss Hillier would not be on the approved personnel list. The appellant says that Miss Hillier suggested that she would get into the float. The appellant says that he did not think this was a great idea, but nevertheless pulled up at the Mowbray Hotel to allow Miss Hillier to get out of the car and into the float.

9. There was no dispute that when the appellant entered the racetrack, he did not advise that Miss Hillier was in the float. He went through security, had his temperature taken as per the protocol and continued to tow the float to the staging area to unload Mr Hillier's horses.

10. When the appellant pulled over to allow Miss Hillier to get into the float, a cadet Steward, Ms Barr, was travelling to the racetrack two cars behind him. She saw someone get out of the car and get into the float. When she entered the racetrack she asked the medical attendant at the entrance how many people had been checked in the vehicle. She was told that there was only a driver in the car. Ms Barr then told security that she had seen another person in the float.

11. The security guard at the gate, Rick Franjic, ran down towards the parking area after the car and the float which were still in sight. He says that when he approached the horse float involved, he saw a young woman get out. He approached her, asked for her name and she told him her name was Makenna Hillier. Mr Franjic was responsible for checking names off the Tasracing list of approved attendees at the entrance. He checked the list and saw that her name was not on it. He rang Angela Barratt from Tasracing, informed her of the situation and was told that Miss Hillier was not permitted to stay at the racetrack. Shortly after, Miss Hillier left the area, went to the main gate and left the racetrack.

12. Another Steward, Benjamin Plunkett, spoke with the appellant later that day. In his statement he says the following:

> "*18. At the time I approached Mr Crook he was taking the gear off his horse.*
>
> *19. I explained to Mr Crook that I would need to get a statement from him regarding the incident that occurred earlier in the day when Miss Hillier was found in the float that he was towing.*
>
> *20. It was at that point Mr Crook explained that 'he was very embarrassed and that it was a silly mistake'.*
>
> *21. I asked Mr Crook if he could explain to me how the incident unfolded.*
>
> *22. Mr Crook explained that he was in charge of taking care of Rohan Hillier's two runners that morning. He'd set off from the stables at Beauty Point with Makenna Hillier, Rohan's daughter and the stables' stable hand. It was on their way to the track they thought that Makenna may not have been nominated as stable hand as per protocol, therefore she would perhaps not gain entry onto the course. So, it was decided that Makenna would get into the float on the way to the track in order to escape the security check.*
>
> *23. Mr Crook further explained that he had several drives during the day, and couldn't see how he could cope with the two runners without help, which led to the decision to try to sneak Makenna past security and onto the course.*"

13. An inquiry was held in relation to the incident on 17 June 2020. The appellant raised some issues with Mr Plunkett's statement. He disagreed that he had referred to being embarrassed and that it was a silly mistake. He says he told Mr Plunkett that it was stupid but did not use the words "silly" or "embarrassed". In respect of the matters at para.22 of Mr Plunkett's statement, he explained that he only came to be in charge of Mr Hillier's horses that day when Miss Hillier was escorted off the course. He had not originally intended to be in charge of those horses. No other objections were raised in respect of the statement.

14. During the course of the inquiry, the appellant agreed that he did not bring it to the medical attendant or security's attention that Miss Hillier was in the

horse float. He explained that Miss Hillier told him she knew she would not be on the list and it might be a good idea to get into the float because she would not otherwise be allowed in. The appellant says that he asked her whether that would be a great idea and she said "yes" to do it. He said that he did suggest to Miss Hillier that it might not be a good idea, but he did not try and stop her getting out of the car. The decision was made quickly, and he did not really think it through or as to what would come of it.

15. The appellant agreed that he was aware of the protocol restrictions that had been advertised and sent to industry participants by text. He explained that he received a text with the link and that he had read the official direction prior to the incident. He told Stewards that the whole situation was stupid, that he was aware of the protocol and that in retrospect he should have just rung up and got Miss Hillier on the list. He explained it was a last minute decision to take Miss Hillier to the racetrack, that he had nine other drives and was rushing and that if he had taken a minute of time he was sure he would have done things differently.

16. During the course of the inquiry it was also revealed that Miss Makenna had attended a trial on a previous occasion when she was not on the list and that a phone call was made to Tasracing and she was allowed entry. The appellant was not aware that this had occurred on a previous occasion.

17. Having heard the evidence, the Stewards decided to charge the appellant pursuant to AHRR 245 which provides as follows:

> "*A person shall not direct, persuade, encourage or assist anyone to breach these rules or otherwise engage in an improper practice.*"

18. The particulars of the charge were as follows:

> "*You on the morning on the 6th of June 2020 have assisted another person, that being Miss Makenna Hillier to breach an Australian Harness Racing Rule, in that you as the driver of a vehicle towing the horse float with two horses have stopped that vehicle which has assisted Miss Hillier to get out of that vehicle and get into the float, and also by failing to bring to the attention of the security guard at the entrance to that track, that Miss Hillier was in the float you also assisted her there in gaining admittance to the track.*"

19. The appellant pleaded guilty to that charge. Miss Hillier was charged and pleaded guilty to a breach of AHRR 238.

20. Prior to proceeding to penalty, Stewards stated the following to both the appellant and Miss Makenna:

> "*As I think everyone in this room is well aware of the serious nature of things as they stand at the moment and as they stood on the 6th of June in regard to the COVID-19 situation here in Tasmania and around the world and that the protocols were put into place to safeguard the health and wellbeing of participants, and as well to minimise as best as possible the risk involved in for example, exceeding the numbers of people on the racetrack at the time*

which affects social distancing. I would think that everyone is fully aware of how strict the protocols were, or are put into place by the Director of Health here in Tasmania and accordingly both Tasracing and ORI have tried to adhere to that as best as they could. Of course the other situation that faces us at that time was that racing had been suspended here in Tasmania already and that everyone in the industry clearly was placed at a massive disadvantage there, in many not being able to derive any income or whatever, and that the importance of adhering to these protocols put out by Tasracing and as evidenced by the notice that ORI put out the very seriousness of the situation that by everybody following the protocols that were put into place by Tasracing with the ultimate approval of the Director of Health that breaches of these protocols certainly could lead to some negative action being taken by the Director of Health. The deal was that these protocols were extremely strict, initially put into place for us to allow trials but the implication there is that any failure to follow those protocols certainly could result in the Director of Racing, Director Health rather taking away his approval of us to have trials and moving forward to have racing.

21. Having set that scene, the appellant was invited to make submissions in respect of the breach of the rules. The appellant highlighted that he had lost income for 2½ months due to COVID-19 as he had been unable to drive any horses which was the sole source of his income. He also made brief reference to other cases he was aware of that concerned breaches of COVID-19 protocols. Those cases will be discussed later in this decision. He explained that ordinarily his income from driving ranged between $800.00 to $1,600.00 a week depending on whether he has one or two meetings. He later also told Stewards that he did not feel that he was responsible for Miss Hillier or in a position to "boss her around" as she was only 6 or 7 years younger than him.

22. In imposing penalty, Stewards stated as follows:

"*Yeah Mr Crook you can tell by the delay that there's been lots of discussion arriving at what the appropriate penalty would be here. The Stewards have taken into account your guilty plea, the remorse you are showing, they have taken into account that the seriousness of this offence and that had you not assisted in it could never have taken place in the first place. You know had you not pulled over, had you have alerted the security guard this could never have happened, we've taken that into consideration. We've taken into consideration what your approximate earnings would be, weekly. We've also taken into consideration that due to the shutdown of racing that you haven't had the opportunity of any income for the last 2½ months. The Stewards had considered weighing up disqualifications, suspensions, fines, the Stewards felt that a fine would be the most appropriate. The initial thoughts and for a starting point was in the vicinity of a $5,000.00 fine, but as I said they've taken into consideration those points that I enunciated at first. And I guess an extra consideration or an additional thing that was considered was that Makenna Hillier is 17 years old and you're an adult and how much of a responsibility we should place considering how much responsibility you should have had in not letting this happen, but taking away all the things that are mitigating for you from the starting point of around $5,000.00,*

Stewards have determined that it's a $2,500.00 fine, no suspension, a $2,500.00 fine and against that you have the right of appeal."

23. This appeal concerns the severity of that penalty.

Appellant's Submissions

24. It was submitted on behalf of the appellant that the penalty imposed was manifestly excessive in the context of all of the evidence. It was noted that the conduct concerned the appellant stopping the car which enabled Miss Hillier to get into the float and then lying at the gate about the number of people at the car. It was noted that the appellant had pleaded guilty at the first opportunity. The starting point of a $5,000.00 fine was said to be too high.

25. It was noted that Miss Hillier received a 3 week suspension and that $5,000.00 appeared to be close to three weeks' worth of earnings for the appellant. It was suggested that the appellant had been placed in an awkward position by the circumstances that had arisen that evening and that in effect, Miss Hillier had badgered him into allowing her to get into the horse float. It was described as spontaneous conduct.

26. It was put to the appellant that the conduct was also dangerous in that allowing someone to travel any sort of distance in a horse float was attended with considerable risk. This was not disputed. It was, however, submitted on behalf of the appellant that the cadet Steward who was two cars behind the appellant was in some way blameworthy because she did nothing to stop the conduct from occurring. This submission is not accepted. The facts suggest that given the traffic conditions and location where the appellant pulled over, it would not have been practicable for Ms Barr to get out of her car and investigate. She was later held up by traffic herself and advised those conducting duties at the gate what she saw as soon as she could.

27. In respect of the COVID-19 issues, it was submitted on behalf of the appellant that by 6 June 2020, COVID-19 was not a big issue in the north of Tasmania. This submission was also not accepted by the Board.

28. The appellant also referred to the Board's decision from 2007 in respect of Mark Everett. That concerned Mr Everett jumping the outside of the rail of the mounting yard and walking to the grandstand to watch a race in which his horse was entered on 30 September 2007. His actions on that day breached race day bio security protocols that had been put in place by Racing Services Tasmania and the Tasmanian Thoroughbred Racing Council on 31 August 2017 as the result of an outbreak of equine influenza in Australia that month. Mr Everett pleaded guilty to the breaches of the rules and was fined $2,000.00 for refusing to comply with any order, direction or requirement of the Stewards or any officials. That is an offence equivalent to AHRR 238. He appealed against the imposition of that penalty. It was noted in the decision that Mr Everett was aware of the biosecurity protocols in place at the race

meeting and that he had breached them and was sorry for doing so. He had previously attended another racecourse the week before and perceived that the biosecurity measures in place at that meeting were stricter than on this occasion. In dismissing the appeal against the severity of the fine, the following was stated:

> "*The Board takes the view that this was a serious breach. The extreme effect that the outbreak of equine influenza has had, and potentially may still have, on the horse racing industry is commonly known. The consequences of spread of the disease in Tasmania would be dire. The protocols were put in place to minimise the risk of that occurring. This offence occurred at the time when publicity about the potential damage that the disease could cause was at its highest. Mr Everett plainly didn't think carefully enough about his actions. We accept that he is now sorry for what he did. We have taken into account Mr Everett's contrition and his plea of guilty.*"

29. The Board ultimately held that the $2,000.00 fine imposed properly reflected the seriousness of that breach.

30. In referring to that previous decision, it was not made clear how the appellant thought this case assisted his argument that the penalty imposed in respect of his breach was manifestly excessive.

Stewards' Submissions

31. Stewards noted that the appellant was fully aware of the protocols that were in force. It was noted that breaches of the protocols that had enabled the industry to restart posed an extreme risk to the whole industry. Stewards took the view that the appellant had an opportunity to counsel Miss Hillier against sneaking into the racecourse in the circumstances. Instead he chose to pull his car up and enable her to get out and get into the float. On that basis, Stewards submitted that the appellant's culpability was as great, if not greater than that of Miss Hillier. This was particularly so in light of his knowledge of the protocols and his experience of them being implemented on previous occasions.

32. Stewards referred to two decisions from other jurisdictions concerning breaches of COVID-19 protocols during the course of their submissions. Those decisions had been briefly referred to by the appellant during the course of the inquiry. The first was a Stewards' decision in respect of Joe Zappulla dated 21 March 2020. It related to a breach of protocols set by Harness Racing Victoria, which prohibited a person who was not an essential staff member or licence holder connected with a horse competing at the meeting from entering the stabling area. The precise details of what Mr Zappulla did on that occasion are not set out in the decision. However, it is apparent that the restrictions had only been enacted the day before and this played a part in arriving at a penalty of $500.00.

33. The second case concerned the behaviour of an apprentice jockey, Zoe White, in Queensland who failed to adhere with a direction to self-quarantine. In breach of a direction given to her to self-quarantine, she rode track work at

the Rockhampton Jockey Club on 1 April 2020. She was charged with a failure or refusal to comply with an order, direction or requirement of the Stewards or an official. Following a plea of guilty, she was disqualified for a period of 6 months. In arriving at that penalty, Stewards took into account that her negligent actions put the health, safety and livelihood of the entire industry at risk. Miss White sought a review of that penalty and it was reduced to one of 3 months' disqualification.

34. Stewards submitted that they had very little by way of precedent to guide them in arriving at the appropriate penalty. In their view, it was appropriate to impose a penalty that sent a clear message to the industry that breaches of these very important protocols could not and would not be tolerated. The penalty required needed to reflect the risk to the whole of the industry of breaching such protocols. Those risks included risks to health of participants and the prospect of the industry as a whole being shut down again if any outbreaks were to occur in the wider community or at any racing location. Although it was accepted that the appellant had been denied income over the period that racing had been suspended, that was so for the entirety of the industry.

35. It was noted that since racing had resumed, the appellant had had a successful first two weeks and was likely to have earned in excess of $4,000.00 in that period.

Consideration

36. The context in which the appellant's conduct occurred was extremely aggravating for the following reasons:

- the entire industry had been shut down as a result of the COVID-19 crisis for in excess of 2 months. This shut down had considerable impacts on the livelihoods of a number of participants in the industry, including the appellant, and no doubt had wider effects on the Tasmanian economy;

- significant planning was required to be undertaken in order for the industry to restart. That planning included the implementation of protocols to protect racing participants and the general community from the risk of the spread of COVID-19. Those protocols were not onerous. They required minimal forethought and planning and it is evident that there was a degree of flexibility exercised by authorities when faced with last-minute changes to nominations of approved personnel;

- unlike the equine influenza biosecurity concerns that formed the background of the Everett case, a serious outbreak of COVID-19 had occurred in Tasmania and resulted in a number of deaths. The seriousness of the disease, its consequences for those who contracted it and the impact of outbreaks on economies throughout the world could not have been lost on the appellant;

- that the appellant assisted Miss Hillier to hide in the float only supports the conclusion that he well understood what protocols were in place;

- assisting Miss Hillier to get into the float so that she could get into the racetrack undetected enabled her to engage in very dangerous behaviour. The carriage of a person in a towed float, let alone one containing two harness racing horses, was fraught with its own risk.

37. The Board takes the view that the assistance the appellant provided to Miss Hillier in breaching the rule which required her compliance with the direction issued by Stewards was brazen. It was appropriate for Stewards to impose a penalty that not only deterred the appellant, but sent a very clear message to the industry that breaches of these important protocols could not be tolerated. The industry needs to understand the risks that are faced if such protocols are ignored.

38. In the circumstances, the penalty imposed by Stewards has not been shown to be manifestly excessive. The appeal against penalty is dismissed.

39. The Stewards' decision to impose a $2,500.00 fine upon the appellant is affirmed.

40. Pursuant to s.34(1A) and (2) of the *Racing Regulation Act 2004*, 50% of the appellant's prescribed deposit is to be forfeited to the Secretary of the Department. Further, pursuant to s.34(4A) and (4B)(a), 50% of the cost incurred in the preparation of the transcript is required to be paid by the appellant to the Secretary of the Department.