

TASMANIAN RACING APPEAL BOARD

Appeal No. 15 of 2020-21

Panel:	Kate Cuthbertson (Chair) Kim Backhouse (Member) Wendy Kennedy (Member)	Appellant:	Mark Yole
Adviser:	Mike Stiles		
Appearances:	Anthony O'Connell (on behalf of the Appellant) Steven Shinn (on behalf of the stewards)	Rules:	AHRR 163 (1)(a)(iii)
Heard at:	Elwick Racecourse GLENORCHY TAS 7010	Penalty:	Suspension for 6 race dates
Date:	4 February 2021	Result:	Dismissed

REASONS FOR DECISION

1. The appellant was the driver of *Liberal Arden* in Race 2 Rare Earth 2200 metres at the Launceston Pacing Club on 24 January 2021. Following an inquiry into his drive which was held on 24 January 2021, Stewards found that the appellant had breached Australian Harness Racing Rule (AHRR) 163(1)(a)(iii) which provides:

- (1) *A driver shall not –*
 - (a) *cause or contribute to any –*
...
 - (iii) *interference.*

2. The particulars of the charge were as follows:

What the stewards allege here is that you as the driver of Liberal Arden in race two tonight at Launceston Pacing Club January 24th Sunday 2021. Between the 300 metres and the 200, or approximately as you entered the home straight on the final occasion, you have shifted from a peg line position to a position wide on the track when not clear of Mr Rattray's drive My Ultimate Romeo to your outside, and by your shift you have obliged him wider on the track which resulted in his sulky wheel contacting the legs of Gypsy Hustler, driven by Adrian Collins and as a result Gypsy Hustler has fallen to the track, and as well when it falls it also severely checks driver Ricky Duggan's drive Weerrock Harry which also falls.

3. The appellant pleaded guilty to the charge. Following hearing from the appellant, Stewards suspended the appellant's licence for six race meetings. Later during the inquiry, Stewards announced that the six-meeting suspension translated into a period of suspension which commenced at midnight on 25 January 2021 and expired at midnight on 13 February 2021. Stewards issued a notice to the appellant in accordance with that calculated period. On 29 January 2021, Stewards issued a replacement notice on the basis that they had incorrectly calculated the period of the suspension. The initial calculation to 13 February included two King Island race dates. The replacement notice stipulated that the suspension operated from midnight 25 January 2021 to midnight 19 February 2021. That latter period covered six race dates on the Tasmanian mainland.
4. This appeal relates to the penalty imposed. The appeal was heard on 4 February 2021. A harness racing adviser attended the hearing and provided advice to the Board on the drive the subject of the appeal. The Board dismissed the appellant's appeal against penalty on that date. These are the Board's reasons for doing so.

Penalty Notices

5. As noted above, two penalty notices were issued to the appellant in respect of the penalty imposed upon him by Stewards. On the night of the inquiry, Stewards imposed a six race meeting suspension. It was noted that the appellant was driving the following night and he was asked if he would like the penalty to commence after those races. Stewards then stated that the suspension would commence at midnight on 25 January 2021 to allow the appellant to drive at the race meeting the following night and expire at midnight on 13 February 2021. A notice was issued to the appellant to that effect. It later transpired that the six race meetings factored into the calculation of those dates included two meetings on King Island. Stewards had not intended to factor the King Island races into the penalty they imposed, so issued a fresh notice recalculating the period of suspension to cover six race meetings held on the Tasmanian mainland. The suspension was expressed in the new notice issued on 29 January 2021 to expire at midnight on 19 February 2021.
6. The appellant argued that Stewards were not entitled to rectify that error and that the first notice was the one that applied. In support of that submission, Mr O'Connell relied on AHRR 302 which provides as follows:

302 *The controlling body may take whatever measure it considers appropriate –*

- (a) *to prevent or overcome what it considers to be a corrupt, wrong or unfair practice affecting or likely to affect, any meeting, race or event or any other aspect of the harness racing industry;*
- (b) *to rectify an error which has occurred because of some mistake or mishap in the administration of these rules whether by itself, the Stewards, a club or any person.*

7. As a consequence of this rule, it was argued that only the controlling body had the power to reissue a notice to rectify the error made by Stewards. As a consequence, the later notice was said to be ineffective.
8. The Board was referred to an earlier occasion where a driver was suspended for a number of meetings and the calculated period of suspension did not take into account the King Island meetings. In that case, the driver involved regularly drove on King Island and, as a consequence, the Director of Racing issued a new notice at the request of Stewards because it was recognised that the driver involved was being penalised for more meetings than had been intended as a consequence of his regular participation in those King Island races. The Director of Racing exercised his discretion to intervene pursuant to AHRR 302(a) to overcome the unfairness occasioned by the Stewards' decision.
9. Part 15 of the AHRR deals with penalties. AHRR 256 sets out the penalties that may be imposed where a person is found guilty of an offence under these rules. No part of the rules requires that a notice in writing of the penalty be provided to the person upon whom the penalty is imposed. AHRR 303(1) provides that the controlling body may create, use and issue any form or document which it considers necessary or convenient to give effect to the rules. It may be inferred that the penalty notice forms utilised by Stewards in this case have been created and used in order to record the penalties imposed and provide a written form of notice of those penalties to interested parties for their own records.
10. Mr O'Connell argued there were two problems with the reissued notice. First, he argued that it had not been issued by the Director of Racing pursuant to AHRR 302(a) or (b) which provides that corrective action may be taken by the controlling body and not Stewards. Secondly, it was argued that King Island should not be treated differently from any other race meeting and ought be included in any calculation of the period of suspension regardless of whether the driver involved had any intention of driving at those meetings.
11. The Board does not accept these arguments. First, the provision of a notice is not something required by the rules. It would appear to be a form that has been generated to give effect to the rules and assist the controlling body and others interested in the regulation of racing to maintain records of the penalties imposed.
12. Secondly, AHRR 302 vests a discretion in the controlling body to take measures it considers appropriate. The terms of the provision are not expressed in such a way to confine the power to rectify errors to the controlling body.
13. In our view, AHRR 302 does not prevent Stewards from taking action to rectify errors that have occurred because of some mistake or mishap by them in the administration of the rules of racing. Stewards reissued that notice in order to give effect to the intent of the penalty that they handed down which

was clearly specified to be a six-race meeting suspension. The period of suspension they initially calculated had the effect of imposing a four-race meeting suspension upon the appellant who does not participate in the King Island meetings and which did not reflect the intention of the penalty imposed by Stewards.

14. As noted above, Stewards have the power to impose penalties on drivers they find have breached the rules. Further, Stewards' powers under the AHRR are broadly expressed and include:

15(1) Stewards are empowered –

(c) to entertain and determine all matters under question or in dispute at or arising out of a meeting or race, or concerning the meaning or application of these rules, or concerning any aspect of the harness racing industry;

...

(r) to suspend or disqualify any driver;

...

(ae) to do anything else reasonably necessary to the performance of their duties.

15. Those powers clearly include doing what is reasonably necessary to give effect to the penalties they impose including periods of suspension for a nominated number of race meetings. There is nothing in the rules that prohibits Stewards correcting their decisions or confines the circumstances in which they may do so such that they are prevented from doing so where they have made an error in the articulation of the penalty. As a consequence of their broad powers and the absence of an express prohibition, Stewards must be taken to have an implied power to correct mistakes. What AHRR 302 does is give the controlling body the option of stepping in and taking measures it considers appropriate where, for example, Stewards have made a mistake but have declined to rectify it or where a decision they have made gives rise to unfairness.
16. Thirdly, the key component of the Stewards' penalty decision was not the period of suspension advised, but the number of race meetings. The end date of the suspension initially pronounced by the Stewards was purportedly calculated by reference to that primary penalty. The error in that calculation was identified by Stewards and corrected very shortly after the first notice was issued.
17. Fourthly, although the practice of not including King Island race dates in the calculation of the end date of a period of suspension unless a driver regularly participates at those meetings is not one that is enshrined in the rules, Stewards are entitled to take such matters into account when calculating the effect of their penalties. If, for example, a driver was suspended for one race date and the next race taking place is one on King Island where a driver does

not ever go, it would be a nonsense to expect that penalty to have been served once that race meeting on King Island had concluded. This would have the effect of causing stewards to impose a penalty with no impact or require them to include a greater number of race meetings in the suspension they impose. Neither of those options are appropriate.

18. As a consequence, the Board accepted that the second notice issued by the Stewards was effective and properly reflected the penalty initially imposed upon the appellant following the inquiry.

The Inquiry

19. The Stewards' report in respect of race 2 notes that Stewards questioned the appellant regarding an incident that took place entering the home straight on the final occasion where two other horses, *Gypsy Hustler* and *Weerrook Harry* both appeared to be severely checked with both horses falling, dislodging their drivers.
20. During the course of the inquiry, it was noted that the main recipient of the interference, the driver Mr Collins, had been transported to hospital for x-rays for his ankle. It was later ascertained that Mr Collins' ankle was broken as a result of being dislodged from his sulky. *Gypsy Hustler* was also euthanised as a consequence of the injuries when she fell.
21. During the course of the inquiry, the Chairman put his observations of the race to the appellant and another driver in the race, Mr Rattray, in the following terms:

Around the final turn Mr Yole I think you were behind the leader, Mr Rattray you were behind Mr Yole. Adrian Collins was one out one back, he was on Gypsy Hustler, and then just as they're about to straighten I felt that you Mr Rattray were able to get out from behind Mr Yole and get up outside him. As they came into the straight, and I have almost a head on view, it appeared that Mr Yole you had started to shift away from the peg line to the inside of Mr Rattray, and I notice that Mr Rattray's horse started to shift up from inside you and ultimately it appeared that his sulky and Mr Collins' horse had contacted the sulky. Mr Rattray was almost dislodged and of course Mr Collins, his horse fell, he was dislodged from the sulky and then another one checked there behind them was Ricky Duggan who was dislodged also.

22. Mr Rattray was questioned about what had occurred:

Round the corner I had Mr Collins to me outside, that was alright. Just as we rounded the corner I thought that Mr Yole was coming up the track. I was outside his wheel at that time I thought, and I just run out of room in the finish and I had to yeah ultimately come wider on the track. Mr Collins was on my outside and yeah that happened. Just felt that I ran out of room.

23. The appellant agreed with both the Chairman's observations and Mr Rattray's evidence. He stated as follows:

Yep pretty much what you've outlined. Mr Hillier was to my outside, he hung down the track a little bit, so as he done that I elected to restrain and try to go round his wheel. As I've done that I was concentrating on clearing his wheel and I hadn't noticed that Mr Rattray had covered my wheel, eased him up the track when obviously not clear to do so. Just didn't see him, yeah we all know what happened so.

24. After viewing the film, Mr Rattray indicated that he did call out to the appellant, but thought he was "over-heard" by Mr Collins. The appellant confirmed that he heard a call, but by the time he realised it was too late.
25. In his submissions to Stewards regarding penalty, the appellant said he did not have a lot to put to them regarding penalty as it was

"...just a pure accident. As you can see I was watching the wheel in front of me trying to get around that and this has happened. Yeah not really much I can put".

26. In arriving at penalty, Stewards considered that the carelessness involved was in the mid to high range and that the interference that occurred was definitely high. With respect to those matters and taking into account the appellant's guilty plea they arrived at a penalty of a six-race meeting suspension. The major consideration in arriving at that penalty was the degree of carelessness and the degree of interference. It was noted that the slight move involved could have killed somebody.

Appellant's Submissions

27. It was submitted by the appellant that the degree of carelessness involved in the appellant's drive was on the low side. It was, however, acknowledged that the level of interference was high. The latter was an unavoidable conclusion given the extent to which other horses and drivers were impacted by the interference. Having addressed the Board in respect of the film, Mr O'Connell submitted that there was minimal shifting by the appellant and that the horse's head was turned inward which was indicative of the appellant trying to protect Mr Collins. It was submitted that the drive involved 'fractions' and that the appellant was trying to do the best for everyone. Ultimately it was submitted that the appellant was concentrating on Mr Hillier to his inside and did not realise that the appellant had come onto his wheel. The appellant, however, admitted error and pleaded guilty.
28. It was submitted that he showed remorse at an early stage. His level of remorse and cooperation was reflected in the length of the transcript of the inquiry which only extended to six pages. The appellant submitted that Stewards did not properly take into account the appellant's early plea of guilty and remorse. It was submitted that this was not a case where the appellant showed no care for anyone else.
29. It was also submitted that the appellant had a good record. He had last been suspended in December 2020. It was noted that he had a very good record given the number of drives he has. In the 2018-2019 racing year, the appellant

had 527 drives. In the 2019-2020 racing year he had 415 drives. The lower number of drives was a consequence of COVID-19 affecting the racing calendar.

30. Given his relatively good record, the appellant questioned where Stewards started when imposing penalty. Other Stewards' reports were referred to one of which involved the imposition of a three race date suspension for interference caused when a driver shifted up the track for a considerable period. Here, by contrast, it was submitted that the shifting out was marginal. Another of the Stewards' report concerned a driver who was suspended for four race meetings in respect of an interference during the course of a feature race.
31. The appellant acknowledged that a six-meeting suspension was not outside the range for a breach of AHRR 163(1), but was inappropriate in all the circumstances of the case. It was submitted that four races would be appropriate taking into account all of the relevant factors.
32. It was also submitted that the applicant's main source of income was from driving. His wife had lost her job during COVID-19 and the pair had recently had a new baby. The impact of the suspension for six race meetings was considerable given the financial obligations of the pair. The appellant had missed out on the Burnie Cup and, if the penalty stood, would also miss out on the Carrick Cup.
33. It was noted that the appellant was horrified after the incident, had been tearful and helped Mr Collins into the ambulance.

Stewards' Submissions

34. Stewards submitted that there are always going to be financial implications when suspensions are imposed. It was submitted that Stewards try to take all of the relevant factors into account, however, some financial consequences go with the territory of the imposition of such penalties. Ultimately, the high degree of interference which caused injury to a driver and two fallen horses, including one that had to be euthanised, was the key consideration in imposing the penalty.
35. The level of carelessness involved was said to be high and reflected in the appellant's admissions that he had not noticed the driver to his outside. Stewards noted that the appellant admitted that he did not look to his outside and had not checked to see if there were any legs there in circumstances where that is usually the most dangerous spot during the course of a race. Stewards did not accept that the appellant's shift was minimal. They submitted that experienced drivers were expected to look to their outside.
36. Stewards referred to penalty guidelines for New South Wales. In that jurisdiction, 28 days is the usual suspension imposed and the penalty increases if a driver is dislodged or makes contact. It was noted in that jurisdiction that races are usually held most days.

37. In arriving at their decision, Stewards were mindful that no one could recall an incident occurring in recent times that had resulted in such significant consequences. It was acknowledged that the usual penalty imposed for interference was in the region of four-race meetings. The serious consequences of this particular interference warranted a higher penalty.
38. Although Stewards did consider the appellant's guilty plea, in their view it was such a clear case that the plea was a function of the appellant bowing to the inevitable. It was, however, accepted that the appellant was remorseful and Stewards were mindful of the impact of the race on his state of mind.

The Race Patrol Film

39. The Board has carefully considered the race patrol film. We do not accept the appellant's categorisation of his drive as involving a slight shift. In our view, the shift that caused the interference was approximately half a sulky width. The interference occurs in the final stages of the race. The appellant had been in the one back position on the pegs for the bulk of the race. At the critical stages of the race, he appears to restrain in order to get a position behind Mr Hillier's drive. He is clearly focussed on where Mr Hillier's drive is and shifts out having restrained sufficiently to be clear of Mr Hillier's wheels to his front. At no stage does he take any notice of the rest of the traffic. In shifting out, he does not look to his outside and fails to notice that Mr Rattray's drive is on his back wheels. Mr Rattray is forced to take evasive action which results in the legs of Mr Collins' drive effectively being taken out from under him, causing his horse to fall and another horse to be interfered with.
40. The Board considers the level of careless to be considerable in the circumstances. It was a tight race and it must have been appreciated by the appellant that other drivers would be looking to come forward to put their horses in the best possible place. The consequences were catastrophic, resulting in the death of one horse and physical injury to another driver.
41. In those circumstances, the Board did not consider the penalty imposed to be excessive in the circumstances. The penalty was one that reflected the need to deter drivers from taking unacceptable risks that can cause injury to horses and drivers, particularly in the final stages of a race. It is acknowledged that the appellant is an experienced driver and has a good record for someone who drives as frequently as he does. Nevertheless, the significance of the incident could not be ignored.
42. The appeal is dismissed and the decision of Stewards is affirmed. Fifty percent of the appellant's prescribed deposit is to be forfeited to the Secretary of the Department pursuant to s.34(1A) and (2)(a) of the *Racing Regulation Act 2004* (the Act). The appellant must also pay fifty percent of the cost of the preparation of the transcript pursuant to s.34(4A) and (4B)(a) of the Act.