

# TASMANIAN RACING APPEAL BOARD

Appeal No. 17, 18, 19 and 20 of 2023-24

<b>Panel:</b>	<b>Ms Kate Cuthbertson SC (Chair) Ms Amber Cohen (Deputy Chair) Mr Rod Lester (Member)</b>	<b>Appellant:</b>	<b>Mr Nathan Ford Mr Mitchell Ford Mr Benjamin Yole Mr Tim Yole</b>
<b>Appearances:</b>	<b>Mr Dominic Deayton and Mr Michael O'Farrell SC (on behalf of Tasracing Pty Ltd) Mr Matthew Hammond (on behalf of Appellant's Nathan Ford and Mitchell Ford) Mr Damian Sheales and Mr Time Purdey (on behalf of Appellant's Benjamin Yole and Tim Yole)</b>		
<b>Heard at:</b>	<b>Riviera Room Mezzanine floor Wrest Point Casino 410 Sandy Bay Road Sandy Bay TAS</b>	<b>Rule:</b>	<b>Warning-off notice issued by Tasracing Pty Ltd pursuant to section 54(2)(a) of the Racing Regulation Act - not to enter any racecourse controlled by Tasracing Pty Ltd in Tasmanian for a period of 28 days</b>
<b>Date:</b>	<b>19 February 2024</b>	<b>Result:</b>	<b>Upheld</b>

## **PRELIMINARY REASONS FOR DECISION**

1. On 19 February 2024, the TRAB heard four appeals concerning warning-off notices issued on 2 February 2024 to the appellants Benjamin Yole, Timothy Yole, Mitchell Ford and Nathan Ford by Tasracing Pty Ltd (Tasracing). The notices were issued pursuant to s. 54(2) of the *Racing Regulation Act 2004* (the Act). Pursuant to s 28(1)(a) of the Act, a person aggrieved by a decision of Tasracing to issue the person with a such a notice has a right of appeal to the TRAB.
2. What follows are TRAB's brief reasons for upholding the appeals and quashing the warning-off notices in each case. More detailed reasons will be provided as soon as possible, but given that the TRAB Chairperson had earlier decided that she did not have the power to suspend the operation of the warning-off notices pending the hearing and determination of the appeal, it was important to deal with the matter in an expedited fashion given the significant impact of the notices on each of the appellants.
3. Each of the notices directed the relevant appellant that they were not to enter any racecourse controlled by Tasracing in Tasmania for a period of 28 days from the date of the notice. That period expires on 1 March 2024. Each of the appellants had also been issued with a like notice on 1 February 2024, but Tasracing identified a typographical error and in an abundance of caution they reissued the notices correcting the errors. Consequently, each of the appellants has

been prevented from entering any racecourse controlled by Tasracing in Tasmania since that time.

4. Pursuant to AHRR 259(1), a person warned off is subject to the same restrictions as a disqualified person. Those restrictions are extensive. They prevent a warned off person from, relevantly, associating or communicating with persons connected with the harness racing industry for purposes related to that industry, entering a racecourse or any place under the control of a club or Controlling Body, racing, leasing, training, driving or nominating a horse, entering any premises used for the purposes of the harness racing industry, participating in any manner in the harness racing industry, permitting or authorising any person to conduct any activity associated with the harness racing industry at his registered training establishment or associating with licensed persons connected with other racing codes including not being permitted to enter any premises owned or operated by such licensed persons.
5. For the purposes of the AHRR, “warned off” or “warning off” relevantly means a decision prohibiting a person entering any racecourse or place under the control of a club or the Controlling Body and a person “warned off” shall be subject to the same prohibitions as a disqualified person mentioned in AHRR 259(1). “Controlling Body” for the purposes of AHRR relevantly means an organisation which by convention, recognition or law is or is deemed to be in control of harness racing in Tasmania. Tasracing, pursuant to s. 11 of the Act, has a number of functions which have the character of controlling harness racing in this State, including by allocating race dates, race programming, developing and maintaining racing and training venues under its control, making the Rules of Racing, and setting licence and registration standards and criteria. See also Local Rule 6 of the AHRR. It follows that while the warning-off notices remained in force each of the appellants was subject to the restrictions set out in AHRR 259(1) together with being expressly prohibited by the notices from entering a racecourse controlled by Tasracing.
6. Each of the appellants is a licensed person. Benjamin Yole is an A-Grade trainer. Mitchell Ford and Tim Yole are A-Grade Drivers. Nathan Ford is a B-Grade driver. Each of those licenses afford the appellants certain rights, privileges and responsibilities. Each of the appellants derives their livelihood from their activities as licensed persons in the harness racing industry. It is uncontroversial that the warning-off notices prevent each of the appellants from participating in the harness racing industry in any capacity which has had a significant financial impact on them all. As a licensed trainer, the impact on Benjamin Yole is particularly acute. There are time frames for nominating horses to start in races. It will take time to get the horses in his care fit to race again as he has not been able to undertake any training activities.
7. The notices issued to the appellants stated:

*We are satisfied that we have grounds to issue this Notice to you on the basis that, in consequence of the factual findings made by Ray Murrphy in the enclosed Final Report dated 28 November 2023, your continued attendances at any racecourse controlled by Tasracing has a real and substantial likelihood of damaging the integrity and reputation of the Tasmanian racing industry.*

*Particularly in making our decision to issue this Notice, we have taken into account the following factual findings made by Mr Murrphy:*
8. Each of the notices then set out in summary form the determinations made by Mr Murrphy in his report in respect of the person to whom the notice was issued. In Benjamin Yole’s case, these determinations concerned non-compliance with AHRR 240(a)(i) and (ii) in respect of two races in August and October 2022, AHRR 193(3) and (8), 196B(1), 196D(1), 218 and 218A(1). The determination cited in respect of Mitchell Ford concerned non-compliance with AHRR 240(a)(i) and (ii) in respect of the October 2022 race. The determinations relied upon in respect of Nathan Ford concerned non-compliance with AHRR 240(a)(i) and (ii) in the course of the August and October 2022 races. Finally, the determinations relied upon in respect of Tim Yole concerned non-compliance with AHRR 218A(1), 193(3) and (8) and 196B(1).

9. The notices then went on to state:

*Due to the seriousness of the findings of the Murrphy Report and the real and substantial likelihood of damage to the integrity and reputation of the Tasmanian racing industry, this Notice has immediate effect.*

*We invite you to show cause why this Notice should be rescinded and note that, pursuant to section 28(1)(a) of the RRA, you may appeal against this Notice to the Tasmanian Racing Appeal Board.*

10. It is not disputed that the allegations which prompted the State Government to commission the Murrphy investigation and report have been in the public domain since March 2023. Although the Final Report was presented to the State Government in November 2023, it was not publicly released until 31 January 2024. It is not disputed that the notices were issued without giving any of the appellants the opportunity to be heard as to why the notices should not be issued.
11. Tasracing justified proceeding to issue the notices without giving the appellants an opportunity to be heard on the basis that the Murrphy report has received significant media coverage in Tasmania and throughout Australia and that this has significantly damaged the reputation of the Tasmanian racing industry. In particular, they say the Report and associated media coverage have called into question the integrity of the Tasmanian harness racing industry. They assert that the seriousness of the findings set out in the Murrphy report and the likelihood of damage to the reputation and perceived integrity of the racing industry was such as to constitute an emergency situation. The reference to an “emergency situation” is borrowed from the decision of Aickin J in *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487. Further they assert that the circumstances gave rise to the public interests and purposes that the Act seeks to protect and permits them to be taken into account as legitimate considerations.
12. During the hearing of the Appeal, Tasracing confirmed they had never issued warning-off notices in the past. They also confirmed that in reaching the view that they had grounds upon which to issue the notices they relied on the Murrphy report and no other material. Finally, when questioned as to why the notices were issued for a 28-day period, Tasracing explained it was expected that would be sufficient time for a panel of stewards to be constituted to commence inquiries to consider whether there had been breaches of the rules. The decision to establish a panel of stewards and the undertaking of any inquiry is not one within the current functions and powers of Tasracing. It is not clear what Tasracing intends to do if no such inquiries are commenced or if the panel is formed but no action is taken to suspend the appellants’ licences pending the hearing and determination of the inquiries by the time the operation of the notices expires.
13. The appellants have each relied on a number of arguments in support of their appeals. Their principal arguments are:
- a. they were denied natural justice by Tasracing; and
  - b. the purported basis on which the notices were issued did not exist as no factual findings were made by Mr Murrphy in his report.
14. The TRAB accepts that the appellants were each required to be afforded natural justice by Tasracing when issuing the notices. The TRAB also accepts that those rules are flexible. The key principle of natural justice that is engaged by the appellants in these appeals is whether they have been afforded an opportunity to be heard. Tasracing relies upon the invitation set out in the notices that each appellant may show cause as to why the notice should be rescinded as affording the necessary right to be heard in the circumstances of the case. The appellants point out that the invitation did not provide a timeframe for showing cause or what form that should take, for example a hearing or written submissions.
15. Even accepting that there are occasions where it may be necessary to take urgent action to issue a notice before affording a person the opportunity to be heard (in whatever form), the TRAB is not satisfied that Tasracing’s approach was appropriate in the circumstances of these cases. The following non-exhaustive list of matters are relevant to that conclusion:

- a. The appellants are licensed people. They have rights and privileges distinct from those of unlicensed people;
  - b. A warning-off notice has the effect of destroying those rights and privileges while the notice is in force;
  - c. The functions and powers associated with the granting, renewal, suspension and cancellation of licences are vested in the Director under the Act. There is no suggestion in the Act or the AHRR that the requirement to afford a licensed person procedural fairness in the context of the exercise of the Director's functions and powers relating to licensing has been displaced;
  - d. While Tasracing has a rule making power, they are not vested with any express functions or powers relating to the enforcement of the Rules of Racing. That function principally resides with the Director and stewards (see s. 6(2)(d) of the Act) and is exercised in circumstances where a licensed person is afforded the right to be heard during the course of an inquiry;
  - e. It may be accepted that Tasracing is rightly concerned that the racing activities undertaken in this State are undertaken with integrity and to protect the reputation of the industry to the extent that it can. Tasracing, however, is not vested with the principal integrity functions related to enforcement of the Rules of Racing, including by way of imposition of penalties, and the licensing of participants;
  - f. While the determinations made by Mr Murrhly in his report constitute factual findings, they are not of the kind capable of sounding in the imposition of penalties pursuant to the AHRR;
  - g. There was no information before the TRAB to suggest that there was an imminent prospect of the appellants engaging in conduct deleterious to the racing industry occurring in the days or weeks following the publication of the Murrhly report if such notices were not issued;
  - h. No consideration appears to have been given by Tasracing to the distinct nature of the allegations concerning Timothy Yole. It may be accepted that they were not insignificant matters, but they do not concern the sorts of allegations of "team driving" and the like that were the subject of the determinations made by Mr Murrhly in respect of the other appellants.
16. Against that background, the TRAB has concluded that issuing a warning-off notice for a not insignificant period prior to affording an opportunity to be heard or "show cause" why the notice should not be issued did not afford the appellants appropriate natural justice. The approach of Tasracing was distinct from that acknowledged in *Heatley* as perhaps being appropriate in a true emergency: see p. 515. Here, the appellants were invited to show cause why the order ought be *rescinded*, not an opportunity to show cause why it should not be issued at all. The TRAB is, further, not satisfied the circumstances were such that they could properly be described as a true emergency in the sense contemplated by Aickin J in *Heatley*. The appeal is upheld and the decisions of Tasracing to issue warning-off notices are quashed.
17. Although it was not the subject of express argument during the appeal and is not necessary to decide this matter, the TRAB also considers there is a real question whether it is appropriate for Tasracing to issue warning-off notices against licensed persons on grounds that fall squarely for consideration in the context of the functions and powers of the Director and stewards. It is notable that the examples provided in s 54(4) of the Act as constituting grounds for issuing such notices relate to the conduct of unregistered bookmakers or their agents or activities undertaken without appropriate authorisation. The power to issue a notice is one that should be (and is) exercised rarely. Where the Act and Rules of Racing vests express powers and functions in others to ensure the integrity of the industry and enforce the rules, it is arguably inappropriate for another body, without those express functions and powers, to do so by way of a side-wind, particularly in circumstances that bypass the ordinary rights to be heard associated with conventional approaches to dealing with such concerns.

**DATED: 23 FEBRUARY 2024**

Disclaimer - The result of the above-mentioned appeals are finalised and will not charge. These reasons have been produced until such time as full individual written reasons are able to be provided.