TASMANIAN RACING APPEAL BOARD

Appeal No. 24, 25, 26 and 27 of 2023-24

Panel:	**Ms Kate Cuthbertson SC (Chair)** **Ms Amber Cohen (Deputy Chair)** **Dr Suzanne Martin (Member)**	**Appellant:**	**Mr Benjamin Yole** **Mr Tim Yole** **Mr Nathan Ford** **Mr Mitchell Ford**
Appearances:	**Mr Dominic Deayton and Mr Michael O'Farrell SC (on behalf of Tasracing Pty Ltd)** **Mr Damian Sheales and Mr Tim Purdey (on behalf of Appellant's Benjamin Yole and Tim Yole)**		
Heard at:	**Riviera Room** **Mezzanine floor** **Wrest Point Casino** **410 Sandy Bay Road** **Sandy Bay TAS**	**Rule:**	**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 45 days**
Date:	**15 May 2024**	**Result:**	**Upheld**

REASONS FOR DECISION

Introduction

1. On 15 May 2024, the TRAB heard 4 appeals concerning warning off notices issued by Tasracing Pty Ltd (Tasracing) on 19 April 2024 to each of the appellants, Benjamin Yole, Tim Yole, Mitchell Ford and Nathan Ford. 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 such a notice has a right of appeal to the TRAB.

2. Each of the notices directed the relevant appellant that they were not to enter racecourses controlled by Tasracing specified in a schedule attached to each notice for a period of 45 days. That period expired on 3 June 2024. It is regrettable that TRAB has not been able to deliver its decision prior to the expiration of the notices, but as must be apparent from the length of these reasons, the issues the appeals raise are complex. Further, each of the parties provided final written submissions on 4 June 2024 to address matters that arose during the course of the hearing. The TRAB has previously determined that it has no power pursuant to s 33 of the Act to suspend the operation of an order made pursuant to s 54 of the Act pending the hearing and determination of an appeal. This gap in its powers has the potential to cause real injustice to a range of appellants seeking to appeal decisions that do not constitute a "penalty" within the meaning of the Act but which are attended with significant consequences.

3. By way of background, each of the appellants had also previously been issued with warning off notices by Tasracing on 2 February 2024. Appeals were heard in respect of those notices on 19 February 2024. The TRAB on that occasion upheld those appeals on the basis that each of the

appellants had not been afforded natural justice: see *Appeal No. 17-20 of 2023-24 – Nathan Ford, Mitchell Ford, Ben Yole and Tim Yole – Preliminary Reasons for Decision*.

4. In respect of the notices the subject of these appeals, Tasracing issued letters to each of the appellants on 12 April 2024 attaching a proposed warning off notice and inviting each of them to show cause as to why Tasracing ought not make that decision. It was requested that the appellants provide their submissions by no later than 3.00pm on Thursday 18 April 2024.

5. Each of the appellants provided submissions in writing to Tasracing. The submissions filed in respect of Benjamin and Tim Yole were in substantially similar form. A joint submission was filed on behalf of Nathan and Mitchell Ford by their own solicitors.

6. On 19 April 2024, each of the appellants was advised by the solicitors for Tasracing that following consideration of their submissions, the Board of Tasracing determined to issue the warning off notices foreshadowed in their letters of 12 April 2024.

7. Appeals were lodged by each of the appellants in respect of those decisions on 19 April 2024 and in compliance with the time limit provided by s 29(3)(b) of the Act.

Warning off notices

8. The notices issued to each of the appellants notified that Tasracing had taken into account factual findings made by Mr Murrihy in a report dated 28 November 2023 (the Murrihy report). Each notice attached a copy of that report and set out the findings attributable to the appellant to whom each of the notices related. Having set out the relevant findings contained in the Murrihy report, each of the notices stated the following:

> *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 Mr Murrihy in the Murrihy report your continued attendance at any racecourse controlled by Tasracing has a real and substantial likelihood of damaging the integrity and reputation of the Tasmanian racing industry.*
>
> *Further, or in the alternative, 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 Mr Murrihy in the Murrihy report, it is necessary for Tasracing, as the authority responsible for:*
>
> - *promoting Tasmanian racing locally, nationally and internationally;*
> - *promoting the development of an efficient and effective racing industry;*
> - *developing and maintaining racing venues under its control;*
> - *issuing warning off notices from venues under its control –*
>
> *to exclude you from its racetracks while the matters raised in the Murrihy report are being investigated by an independent panel of stewards.*
>
> *We are satisfied that the findings of the Murrihy report have and will continue to have a real and substantial likelihood to damage to* (sic.) *the integrity and reputation of the Tasmanian Racing industry;*
>
> *We are further satisfied that conduct in which you engaged as found in the Murrihy report has and will continue to have adverse effects on:*
>
> - *the promotion of the Tasmanian Racing industry locally, nationally and internationally;*
> - *the promotion of an efficient and effective racing industry;*

- *the development and maintenance of racing venues under the control of Tasracing.*

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.

9. As noted above, each of the notices attached a schedule of racecourses controlled by Tasracing from which each of the appellants was directed not to enter during the period of the notice. Those racecourses are:

   (i) Ladbrokes Park Elwick;

   (ii) Ladbrokes Racing Centre Mowbray;

   (iii) Ladbrokes All Weather Spreyton and the Spreyton Training Centre;

   (iv) Carrick Park Pacing Club (also conducts meetings);

   (v) Burnie Harness Racing Club;

   (vi) North East Pacing Club;

   (vii) St Mary's Pacing Club.

The Murrihy report

10. On 27 March 2023, the Tasmanian Government announced an independent investigation and review into alleged team driving, racing fixing and animal welfare concerns, and the management of those issues by the Office of Racing Integrity. Mr Murrihy was appointed as a senior stipendiary steward in accordance with the Act and vested with the powers and obligations of that position to enable him to conduct the investigation. The terms of reference of that investigation and review relevantly are as follows:

    (i) Conduct an investigation of all circumstances surrounding the races referred to in the ABC media report of 26 March 2023 to determine compliance with the Australian Harness Racing Rules.

    (ii) Conduct an investigation into any other harness races from the past 3 years that may demonstrate team driving and/or race fixing that have not previously been subject to a decision by the Tasmanian Racing Appeal Board or other independent assessment (e.g. the Tasmanian Ombudsman or Tasmanian Integrity Commission) to determine compliance with the Australian Harness Racing Rules.

    (iii) Conduct an investigation into animal welfare conditions at the Yole Sidmouth Racing Stables to determine compliance with the Australian Harness Racing Rules.

11. Mr Murrihy completed his report on 28 November 2023. It is understood it was provided to government at that time but was not publicly released until 31 January 2024. The report indicates that public submissions were sought between 4 April 2023 and 2 May 2023. Under the heading "Scope and Limitations of the Inquiry", the report states the following:

    The ToR above sets out the independent investigation into matters of alleged team driving and/or race fixing, and serious animal welfare concerns relating to the harness racing industry. The scope of this investigation is broad. ToR 1-3 direct the investigation of certain circumstances and conditions to "determine compliance" with the AHRR….

    The culmination of the ToR is to provide a report to the government. ***This investigation review was not directed to lay and determine charges in respect of potential instances of***

non-compliance with the AHRR. The review has therefore not proceeded to determine formal charges and issue penalties.

As noted, ToR 1-3 require the conduct of an investigation into those matters to determine compliance with the AHRR. The investigation has been conducted by reviewing extensive race footage, inviting written submissions, conducting oral interviews, studying form histories, examining betting records and treatment records, and conducting a site visit of the Yole Sidmouth property. Where the investigation has made specific allegations against persons, they have been written to, setting out those allegations and requiring them to attend an interview. The investigation has also afforded those persons the further opportunity to make written or verbal submissions following those interviews.

Had ToR 1-3 specifically required the exercise of powers to lay and determine formal charges under the AHRR and proceed to issue penalties, a quite separate process to an investigation (for the purpose of preparing a report to the Government) would have been undertaken. If serious charges are laid under the AHRR (such as those relating to race fixing), then before the charges are determined the relevant steward(s) conduct an open hearing to provide the opportunity for the accused to cross-examine the witnesses on which the steward(s) rely. The accused may call their own witnesses to give evidence. This investigation review under the ToR had a much broader scope and was not conducted in this way. The determination of charges relating to race fixing can have serious consequences, including disqualification for those concerned. It is important that if charges are to be laid, they are heard and determined in a separate forum to this more general and wide-ranging inquiry.

Giving regard to the ToR, it would not have been practical or appropriate to adopt these hearing procedures in delivering a report to the Government, particularly if it was done alongside a review of the matters required by ToR 4-7. As it was, the volume of material received and the issues raised in the course of the investigation were far more broad-ranging and complex than anticipated. It has meant that the review had to seek extensions of time so as to comply with the requirements of natural justice, to ensure participants were afforded procedural fairness as part of this inquiry and to deliver the final report.

Therefore, where this investigation expresses its determinations of non-compliance with the AHRR, it does so on the evidence which it has before it. It does not make positive findings on formal charges. Rather, it makes determinations of non-compliance with the AHRR based on the evidence before it and the enquiries it has made, noting it has afforded those who have faced allegations of non-compliance an opportunity to answer those allegations. These findings are not to be interpreted as positive findings which a steward would make upon the determination of a formal charge and to which penalties and consequences would attach.

(emphasis added)

12. Having stated those limitations, the report went on to state the following:

Following this report, and noting matters in this report which are of some gravity, the Tasmanian Government may choose to refer these matters to an authorised appointee who is empowered to investigate the specific matters and if deemed appropriate, proceed to lay and determine charges.

(original emphasis)

13. The report in its executive summary outlines the following:

More than 45 submissions were received and over 50 interviews were conducted as part of this investigation and review, pertaining to the ToR. Specifically addressing ToR 1 and 2, which require an examination of team driving and race fixing, the investigation relied on

race footage, the race histories of relevant horses, race betting data, interviews with and submissions from relevant participants, and the betting records of individuals.

It is important to acknowledge the inherent difficulty in proving team driving in harness racing. The investigation scrutinised allegations of team driving and race fixing in the two races mentioned in the ABC media report of 26 March 2023, as well as two additional races selected from more than 50 races from the past 3 years referred to in submissions. From these four races, two were determined to involve conduct non-compliant with the AHRR, while the remaining two races lack sufficient evidence to support a non-compliant determination. The specific findings for these four races are detailed in this report. A condensed list of 15 races with questionable race tactics referred to in submissions will be confidentially provided to the Tasmanian Government for consideration of further review by designated appointees.

When determining compliance with AHRR of animal welfare conditions at the Yole Sidmouth property (ToR 3), the investigation adopted a broad perspective that encompassed both the physical environment and potential mistreatment, but also any unlawful or indiscriminate administration of medications and substances, to horses. In reaching a determination of non-compliance with five rules namely AHRR 218, 218A(1), 193(3), 196B(1) and 196D(1) these assessments involved interviews with Yole stable employees, interactions with the trainer Ben Yole and stable foreman Tim Yole, and an analysis of the trainer's 2023 treatment logs.

For reasons set out under 'scope and limitations', this investigation does not make positive findings about non-compliance with the AHRR upon charges and to which penalties and consequences would attach. Charges have not been laid as part of this investigation. Rather, this investigation expresses determinations of non-compliance with the AHRR based on the material before it, noting this investigation has afforded those who have faced allegations of non-compliance an opportunity to answer those allegations.

(emphasis added)

14. Again, the report noted that the various findings of non-compliance with reference to ToR 1, 2 and 3 were matters of some gravity and referred to the Tasmanian Government for consideration. Again it was noted that the Tasmanian Government may choose to refer those matters to an authorised appointee empowered to investigate specific matters and if deemed appropriate, proceed to lay and determine charges.

15. The findings as relied upon by Tasracing in support of their determination to issue the warning off notices will be discussed below in the context of each of the relevant appellants' appeals.

Events subsequent to the Murrihy report

16. As previously noted, the Murrihy report was not publicly released until 31 January 2024. Since that date, an independent stewards' panel (Panel) has been appointed to investigate matters raised in the Murrihy report. The Panel was appointed on 22 February 2024. It has been directed to conduct an investigation pursuant to AHRR 180 to take any action available pursuant to appointments as stewards to remediate, penalise, or address specified matters as appropriate. The specific matters they have been asked to address concern the 15 races referred to the Government by Mr Murrihy that may involve questionable race tactics for consideration of further scrutiny and to take any actions appropriate and available under AHRR 181 and 183 and to review the findings of non-compliance with AHRR made by Mr Murrihy in his report.

17. The Panel handed down an interim report dated 10 May 2024 (Panel's report). The Panel's report was made public on 16 May 2024, that is the day after the hearings of these appeals were conducted. The Panel's report outlines that the Panel has examined and scrutinised the 15 races referred to Government by Mr Murrihy, together with related evidence and information. As a consequence of those investigations, the Panel formed the view that no investigation was warranted with respect to 8 of the 15 races as there was insufficient evidence or information that

any of those involved questionable race tactics. Of the remaining 7, a further comprehensive review was conducted, including interviewing the drivers and trainers among other enquiries. Following those further investigations, the Panel formed the view that there was insufficient evidence or information to take any further action to questionable race tactics with respect to 6 of the 7 races. For the remaining race, further enquiries are being conducted and the Panel reported that it expects to form a view about whether any further action is warranted in the coming weeks. It is not immediately apparent from the Panel's report, or indeed the Murrihy report, whether the 15 races concerned potential questionable race tactics involving the appellants or other participants in the harness racing industry. As at the date of publishing these reasons, the TRAB is not aware of what action, if any, is going to be taken in respect of the remaining race.

18. The Panel's report goes on to explain that the Panel will then investigate the matters the subject of the findings of non-compliance in the Murrihy report. The Panel's report identifies that the process adopted by them is completely different to that which was adopted to compile a report in accordance with the terms of reference given to Mr Murrihy. It indicates that the Panel will conduct its own process to gather and examine evidence which to date has not resulted in the laying of any formal charges under the AHRR. The Panel notes that if at some point in the future the Panel determines there is sufficient evidence to sustain a charge under AHRR, they will then determine the appropriateness of suspending licences under the AHRR. The Panel expects that work to be completed by 30 June 2024.

19. The day after the Murrihy report was publicly released, Tasracing issued warning off notices to each of the appellants. The notices were re-issued on 2 February 2024 to correct a typographical error. Those warning off notices directed the relevant appellant not to enter any racecourse controlled by Tasracing for a period of 28 days. The appellants were each invited to show cause why the notice should not be rescinded, and they were also advised of their appeal rights. In the case of each of those warning off notices, the appellants were not granted an opportunity to show cause why the notices should not be issued at all. Each of the appellants appealed the decision of Tasracing to issue the notices. As noted above, those appeals were upheld by TRAB on the basis that the appellants had not been afforded appropriate natural justice.

20. The parties were notified of those decisions on 23 February 2024.

21. On 20 February 2024, Tasracing wrote to the legal representatives of each of the appellants giving notice of their intention to issue new notices. Those letters (like those the subject of these appeals) enclosed a proposed warning off notice and each appellant was invited to show cause why the notices should not be issued. Each of the appellants was granted until 27 February 2024 to provide those submissions but that period was later extended to 29 February 2024.

22. Prior to the issuing of those foreshadowed warning off notice, application was made to the Supreme Court of Tasmania for an order restraining Tasracing from issuing the warning off notices until a further order and for a general order to show cause why the issue of the notices should not be restrained. The appellants each applied for relief in the nature of prohibition to, in essence, restrain Tasracing from acting in excess of jurisdiction. The substantive application was heard in the Supreme Court on 21 March 2024 and the decision delivered on 12 April 2024. In that decision, his Honour Justice Pearce dismissed the applications and discharged the general order to show cause and interlocutory injunctions: *Yole & Ors v Tasracing Pty Ltd* [2024] TASSC 17 (Yole & Ors). Subsequent to that decision, Tasracing commenced the process of issuing the warning off notices that are the subject of these appeals.

Section 54 of the *Racing Regulation Act*

23. Section 54 relevantly provides as follows:

> (2) Tasracing … may, if satisfied that there are grounds to do so, issue a person with a notice directing the person –

(a) not to enter, on a specified day or during a specified period, a specified racecourse under the control of Tasracing or the club; …

(3) A notice issued under subsection …. (2) is called a warning off notice.

(4) Without limiting their discretion under subsection … (2), … Tasracing … has grounds for issuing a person with a warning off notice if … Tasracing … knows or reasonably suspects that the person –

(a) is engaging in bookmaking without being registered as a bookmaker or bookmaker's agent; or

(b) habitually engages in unauthorised betting.

(5) …

(6) Within 5 days after issuing a person with a warning off notice, Tasracing … is to forward a copy of the notice to the director.

(7) …

(8) A person who is issued with a warning off notice must comply with the notice ….

Penalty: in the case of –

(a) a first offence, a fine not exceeding 20 penalty units; and

(b) a subsequent offence, a fine not exceeding 30 penalty units or imprisonment for a term not exceeding 1 month.

(9) …

(10) If a person contravenes subsection (8) … -

(a) a police officer or an employee or agent of the club that issued the notice, using such reasonable force as may be necessary, may, depending on the offence, evict the person from the racecourse …; and

(b) a police officer may arrest a person without warrant.

(11) The issuer of a warning off notice may, by further notice, rescind the notice at any time if satisfied that there is no reason for it to remain in force.

(12) In their application to Tasracing … , the provisions of this section –

(a) extend to every racecourse that Tasracing … has control of at the relevant time, whether or not the racecourse is owned by Tasracing … or is at any other time subject to a right of public use or entry; and

(b) are in addition to and not in derogation of any powers that Tasracing … may have.

(13) Nothing in this section limits the right of Tasracing … to do, by means other than a warning off notice, either of the following:

(a) refuse its permission for a person to enter a racecourse under its control;

(b) withdraw its permission for a person to remain on a racecourse under its control.

(14) In this section –

specified, for a warning off notice, means specified in the notice.

24. In *Yole & Ors*, Pearce J stated the following in respect of s 54(2) of the Act:

    - Tasracing has express power to issue a warning off notice – at [3];
    - The warning off power conveyed by s 54 is expressed in broad terms and in terms which suggest that the discretion to issue such a notice is not limited by subject matter – at [35];
    - The text, context and purpose of the Act is not such as to require the express terms of s 54 to be read down to limit the power of Tasracing such that it is not to be exercised in respect of matters which concern "integrity" and breach or enforcement of the rules of racing – at [37]-[38];
    - If necessary to tie the exercise of power under s 54 to the general functions and powers of Tasracing, there could hardly be a factor more important to the development, promotion and viability of racing as a commercial undertaking than public confidence that it is conducted with honesty and propriety and with utmost regard to the welfare of the animals which participate in racing – at [38].

25. In *Heatley v Tasmanian Racing and Gaming Commission* [1977] 137 CLR 487 (Heatley), the High Court considered the power to warn off then reposed in the Tasmanian Racing and Gaming Commission under the *Racing and Gaming Act 1952*. His Honour Justice Murphy made the following observations at 495:

> *Section 39(3) does not express any restriction on the exercise of the power to warn off. It applies to persons generally. Members of racing clubs and their committees and controlling bodies are not exempt. But the power in section 39(3) like other powers, must be exercised in good faith, for the purpose for which it is conferred, and with due regard to the persons affected. Its purpose is to enable the exclusion of "undesirable persons" from racecourses as a measure in the control of racing (see* Stephen v Naylor *(1937) 37 SR (NSW) 127). The power could not lawfully be used to exclude persons for reasons unconnected with racing, such as their religious or political views. It could not be used arbitrarily or capriciously, for example, to exclude a person without any basis.*
>
> *The exercise of the power will probably have an adverse effect on the person and his reputation and possibly his livelihood. It would seriously alter his legal position. If he enters a racecourse, he becomes liable to the penalties in s 39(8). He may not lawfully enter a racecourse even if the club or owner of the racecourse wished him to enter and did all it could to confer on him a proprietary right to do so.*

26. In the leading judgment, Aickin J noted at 515-6 that the wide power then given by s 39(3) of the *Racing and Gaming Act 1952* enables it to be used for the protection of persons legitimately engaged in racing activities and of the general public, while at the same time adhering to the principles of natural justice. He held that fairness required that the person affected should, save in an emergency, be given notice by the issuer of the notice of its intention to do so and of the grounds for that proposed action and should be afforded an opportunity to make representations which must be considered before taking action.

Grounds of appeal

27. Each of the four appellants rely on three grounds of appeal in common. They are as follows:

    1. *The decision to issue the notice is an inappropriate exercise of Tasracing's discretion under s 54(2) of the Act in circumstances where:*
        (a) *The basis of the grounds relied on by Tasracing are alleged contraventions of the Australian Harness Racing Rules ("AHRR") referred to in the Murrihy report, which allegations are presently the subject of inquiry by an independent panel of stewards, who have the power to suspend [the appellant] pursuant to AHRR 183;*

(b) By reason of s 51(7)(c) of the Act, Tasracing is prohibited from investigating or enquiring into the alleged contraventions of the AHRR;

(c) Pursuant to AHRR 259(2), the consequence of the Notice is that [the appellant] is subject to the same prohibitions as a disqualified person;

(d) Tasracing has no express power to suspend licences or disqualify a licensed person;

(e) In issuing the Notice, Tasracing is destroying [the appellant's] rights and privileges as a licensed person, and also undermining confidence in the stewards' inquiry into the alleged contravention.

2. By reason of s. 51(7)(c) of the Act, it is not possible for Tasracing to properly afford [the appellant] procedural fairness in deciding whether to issue the Notice on the grounds of the alleged contraventions of the AHRR.

3. The Notice has been issued for an improper purpose.

28. In respect of the appellant, Tim Yole, a further ground is relied upon as follows:

4. Tasracing has failed to give proper consideration to the distinct nature of the allegations against Tim Yole, in particular, that no allegation of "team driving" is made against him.

29. Each of Nathan Ford and Mitchell Ford rely on an identical additional ground of appeal as follows:

4. Tasracing has failed to give proper consideration to the distinct nature of the allegations against [him], in particular, that no allegation other than "team driving" is made against him.

30. As can be seen, the grounds of appeal do not allege a denial of procedural fairness akin to that the subject of their previous appeal to TRAB. There is, however, a general allegation that it is not possible to afford procedural fairness in circumstances where Tasracing, pursuant to s 51(7) of the Act is not capable of performing the functions of a stipendiary steward or other racing official in its own right.

Nature of the appeals

31. Section 28(1) of the Act provides that a person may appeal to the TRAB if that person is aggrieved by the decision of Tasracing to issue the person with a warning off notice under s 54.

32. Pursuant to s 30(6) of the Act, on the hearing of an appeal, the TRAB:

(a) is to proceed with as little formality and technicality, and with as much expedition, as a proper consideration of the appeal permits; and

(ab) is to act according to equity, good conscience and the substantial merits of the case; and

(b) must observe the rules of natural justice; and

(c) may adjourn the hearing from time to time or from place to place as it thinks fit; and

(d) except as provided by the Act, may otherwise regulate its own proceedings.

33. Pursuant to s 30(6B), an appeal is to be heard and determined upon the evidence at the original hearing when the decision or finding appealed against was made, but, if the presiding member considers it to be proper, expert or other evidence may be required or admitted.

34. Finally, s 30(6D) provides that the TRAB:

    (a) is to make a full and thorough investigation in open court, without regard to the forms, requirements or solemnities that might have been appropriate in legal proceedings; and

    (b) may inform itself on any matter in such manner as it thinks fit, and admit any evidence considered by the presiding member to be relevant notwithstanding that that evidence would not be admissible in a court of law; and

    (c) may take into account any matters relating to, or to the administration of, racing that are within the knowledge or experience of a member of the TRAB or which have arisen in or as a result of other proceedings or appeals before the TRAB.

35. As an appeal by way of re-hearing, the TRAB is required to redetermine the issues raised upon the appeal as at the date of the re-hearing but upon the material before Tasracing at first instance. It is a re-hearing in the nature of that described in *Fox v Percy* [2003] 214 CLR 118 (Fox v Percy) at [22] per Gleason CJ, Gummow and Kirby JJ as:

    > *...not involve[ing] a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits.*

36. The TRAB in such cases is obliged to *"give the judgment which in its opinion ought to have been given in the first instance"*, while observing any limitations that exist in proceeding wholly or substantially on the records: *Fox v Percy* at [23]. The TRAB is, accordingly, obliged to conduct a real review of the matter and Tasracing's reasons for issuing a notice. It follows that determination of these appeals requires the TRAB to consider the basis upon which Tasracing issued the notices, conduct a real review of the information upon which it relied, and determine whether the information relied upon provided grounds for issuing the warning off notices pursuant to s 54(2).

37. As an appeal by way of re-hearing, the issues for determination are generally to be defined by the grounds of appeal[1]. Subject to the presiding member determining otherwise, the parties are to rely on the evidence before Tasracing when making their decision.

38. The power to issue a warning off notice pursuant to s 54(2) of the Act involves the exercise of discretion. Subject to Tasracing being satisfied there are grounds to do so or the specific grounds referenced in section 54(4), the Act otherwise does not provide any guidance as to the matters to be taken into account. Consequently, a decision-maker has some latitude as to the choice of decision to be made. So much has been noted by the High Court in *Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] 203 CLR 194, where Gleeson CJ, Gaudron and Hayne JJ at [204] noted:

    > *Discretion ... refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result". Rather the decision maker is allowed some latitude as to the choice of the decision to be made ... the latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion ... on the other hand, it may be quite narrow where, for example, the decision maker is required to make a particular decision if he or she forms a particular opinion or value judgement ...*

39. With those matters in mind, the TRAB considers that the determination of each of these appeals requires consideration of the following:

    - the basis upon which the notices have been issued; and

[1] *Boland v Boxhall* [2016] TASSC 30 at [9], Blow CJ.

- the impact of the warning off notices on the particular individual; and

- whether the issuing of the notice is appropriate in those circumstances.

40. The TRAB determined that it was relevant to take into account the Panel's report and provided each of the parties an opportunity to provide submissions. None of the parties objected to the TRAB taking that information into account. Indeed, the appellants in their submissions made application for the Panel's report to be taken into evidence.

Appellants' submissions

41. Like the grounds of appeal, the submissions of the appellants are aligned. They were all represented by the same counsel during the course of the hearing of the appeals.

42. The appellants did not initially provide written submissions in support of their appeal grounds but had each provided to Tasracing submissions in response to the invitations given to them to show cause why the warning off notices should not be issued against them. The appellants relied on those submissions in addition to matters raised during the course of the hearings.

43. In the submissions provided to Tasracing on behalf of Benjamin and Tim Yole, they noted the following:

    (a) The appellants are each licensed persons in harness racing;

    (b) The grounds of each of the warning off notices are based on findings outlined in the Murrihy report of non-compliance with the AHRR which "are not of the kind capable of sounding in the imposition of penalties pursuant to the AHRR".

44. While it has been held in the Supreme Court that Tasracing had the power to issue the warning off notices, they contend it is an inappropriate exercise of discretion as:

    - The matters raised by the Murrihy report and the subject of the warning off notices are being investigated by the Panel;

    - A decision whether to lay charges or to suspend the licence of any of the appellants pending an outcome of any investigation or inquiry under AHRR 183 rests with the Panel and no such decision has yet been made;

    - Tasracing is not capable of performing any function of a steward in its own right and in addition is not capable of investigating or enquiring into the matters raised in the Murrihy report pursuant to ss 51(7)(c) and (9) of the Act;

    - In the absence of a power to inquire and investigate the grounds of the proposed warning off notices and having regard to the existence of the Panel, it is argued it was an inappropriate exercise of the discretion to decide to issue the notices essentially because Tasracing cannot afford the appellants procedural fairness due to its inability to interrogate the merits of the findings set out in the Murrihy report;

    - The effect of the warning off notices is such that each of the appellants would be subject to the same prohibitions as a disqualified person which would be more severe than the consequences of a licence suspension which may be imposed by stewards pursuant to AHRR 183. That impact is as described in AHRR 259(1). The Director of Racing and other Australian harness racing controlling bodies consider the appellants to be warned off for the purposes of the AHRR and subject to the same restrictions as a disqualified person;

    - There is no evidence of an imminent prospect of the appellants engaging in unlawful conduct or conduct deleterious to the harness racing industry. The allegations raised in

the Murrihy report are historical and the appellants have all been participating in the industry in the intervening period;

- The issuing of warning off notices undermines confidence in the work of the Panel as it necessarily involves a degree of pre-judgement that the appellants have contravened the AHRR in circumstances where those same matters are being investigated and are yet to be the subject of charges, let alone proof and contraventions.

45. Separate submissions were made to Tasracing on behalf of Mitchell and Nathan Ford to the following effect:
    (i) That they have attended two stewards' inquiry days initiated by the Panel and have been cooperative in those investigations;

    (ii) No charges have yet been laid against either of them, nor have any adverse findings been made as a result of the Panel's inquiry;

    (iii) No action has been taken to suspend their licences pursuant to AHRR 183;

    (iv) Tasracing, having not heard any of the Panel's inquiry evidence, is effectively attempting to overrule the independent body which was established for the very purpose of hearing and properly determining the evidence. In those circumstances, the issuing of a warning off notice is "grossly misguided", particularly in light of the far more significant implications that flow from such an order due to the operation of AHRR 259 when compared with a rule AHRR 183 suspension;

    (v) The allegations in respect of the Fords are substantially different from those against the Yoles and it is wholly unfair and prejudicial to inflict the same consequences on them given those differences;

    (vi) There is no risk to the industry in circumstances where there are express and self-acknowledged limitations in the Murrihy report identified by the author of it himself;

    (vii) Tasracing is actively and openly attempting to bar the Fords from the industry pending an investigation which is being properly conducted by others and which has no scheduled end date for the duration of that inquiry period;

    (viii) There is no justification for the 45 day period specified in the notice;

    (ix) Tasracing is not a party to the substantive proceedings and not privy to any of the inquiry evidence;

    (x) The balance of convenience is in favour of retaining the status quo and not issuing or retaining a warning off notice pending the outcome of the independent panel's enquiries.

46. During the course of the appeal hearing, the appellants further made reference to recent rule changes ensuring that only a maximum of four horses from any one stable can participate in any race held during a race meeting. Accordingly, they submit this reduces the need for warning off notices in the circumstances. In respect of the animal welfare issues formed the basis of the determinations concerning the Yoles set out in the Murrihy report, it was asserted that the particular practices the subject of those determinations have been discontinued and were unlikely to be repeated. It was submitted that public confidence has been enhanced first by the rule changes and secondly by the Yole stable's changes in practice.

47. The appellants also emphasised during the hearing the duration of the current warning off notice and the potential for further notices to be issued given that Tasracing have indicated in those notices that they have determined that it is necessary to issue them to exclude the appellants from their racecourses while "*the matters raised in the Murrihy report are being investigated by an independent panel of Stewards*". Against that background, they argue there is no rationale for the 45-day period set in the current notices. The appellants also noted that no one is able to

provide a realistic timeframe for the finalisation of those inquiries. In light of the basis for notices being issued, this raises the prospect of a sequence of warning off notices being issued over an indefinite timeframe.

48. In this context, reference was made to the decision of Judge Jenkins in *Demmler v Harness Racing Appeals & Disciplinary Board (Review & Regulation)* [2015] VCAT 648. That case concerned the suspension of a trainer's licence by stewards pending an investigation and inquiry into the presentation of a horse with cobalt in its system. An application was made to VCAT to review the decision of the Harness Racing Appeals and Disciplinary Board which upheld the decision of stewards to suspend the trainer's licence pending the outcome of the inquiry. It was noted that the trainer involved was still under investigation and that no indication could be given as to when any charges would be laid. In that case, Judge Jenkins held that there was no compelling reason why the applicant ought be the subject of a licence suspension pending the hearing and determination of the charges which was then of indeterminate duration. In reaching that decision, Judge Jenkins noted that a suspension of a licence is an important mechanism, in appropriate circumstances, to maintain the integrity of the harness racing industry and to protect the health and welfare of horses generally. Judge Jenkins, however, noted it was a matter of weighing those factors against others such as whether the applicant had prior offending history, the delay involved and their personal circumstances and background.

49. Noting that Judge Jenkins was dealing with the imposition of a suspension pursuant to the AHRR, the appellants argued that, by analogy, similar considerations apply when determining whether to issue a warning off notice. It was argued that the appellants' circumstances are such that no one is able to identify when the Panel will reach the point of making decisions whether to lay charges against any of the appellants or when any such charges (if laid) would be finalised, which means that the conditions that may result in a warning off notice no longer being required are not currently able to be predicted.

50. The appellants also made submissions in respect of the impact of the orders on them which will be dealt with later in these reasons. The appellants essentially argue that imposing a warning off notice pending action being taken by the Panel is an improper purpose, particularly in circumstances where Tasracing have no special insight into what the Panel may determine, no capacity to investigate for themselves the substance of the allegations the subject of the determinations in the Murrihy report, and no indication that they have assessed the matters referred to in the Murrihy report to any particular standard.

Tasracing Submissions

51. Tasracing noted that in *Yole & Ors*, Pearce J indicated that it was entitled to rely on the factual substratum contained in the Murrihy report, it being noted that Mr Murrihy was "*a highly experienced person*" whose report was prepared after extensive investigations: [44].

52. Tasracing submitted that there is a clear distinction between the consequences that flow from a contravention of the AHRR and Tasracing's power to issue a warning off notice.

53. As to the assertion in ground 1 that Tasracing's decision to issue a warning off notice is inappropriate given the circumstances set out in sub-paras.(a) to (e) of the grounds, Tasracing submits that each assertion fails to recognise the distinction referred to above. Tasracing submits none of those circumstances justified a description of the decision as 'inappropriate'. The independent nature of Tasracing's power under s 54(2) means that it may be exercised regardless of whether or not the grounds upon which each notice is based are also matters being investigated by Stewards or someone else and whether Tasracing itself has any express power to investigate breaches or issue bans to licensed persons.

54. Further, contrary to the submissions of the appellants, Tasracing asserted in their initial submissions that a warning off notice issued by them pursuant to s 54(2) of the Act does not fall within the definition of a warning off under the AHRR. As a consequence, they submit that AHRR 259(1) does not apply to the appellants. Given the significance of this particular argument, it is discussed in further detail below.

55. Further, the Tasracing disputes that issuing the warning off notices undermines confidence in the Panel's inquiry. It is submitted that no particulars or evidence has been provided as to how that is so. In its submission, it is not to be presumed that the mere presence of the warning off notices impacts or affects the ability of the Panel to conduct the inquiry in any way.

56. As to ground 2, Tasracing submits that to the extent it suggests that it does not have jurisdiction to issue warning off notices to the appellants by virtue of their status as licensed persons, that argument ought be rejected and is inconsistent with the decision of Pearce J in *Yole & Ors*. Further, it submits that the ground again fails to recognise the distinct nature of Tasracing's power pursuant to s 54(2). In exercising that power, Tasracing does not perform the functions of a stipendiary Steward, nor is it involved in the enforcement of the AHRR. Tasracing points out that Pearce J rejected the proposition that its power to warn off a person in circumstances where there is credible evidence of conduct such as that set out in AHRR 218 and 218A depends on whether or not the person is licensed or whether Stewards or the Director of Racing also have power to deal with that person: see at [37].

57. Tasracing submits that the exercise of a power to warn off does not depend upon or relate to a contravention of any rule, noting that the grounds upon which a person can be warned off are not fettered by the Act, save that they must be reasonable. Finally in relation to this ground, Tasracing submit that there has been no attempt to identify how it has failed to afford procedural fairness to the appellants in the circumstances. It was noted that the appellants had been provided a reasonable opportunity to present their case and that the appellants were confined by the manner in which they chose to advance this ground in their submissions. It was noted, for example, nothing was put to Tasracing to refute the substance of Mr Murrihy's findings.

58. In respect of ground 3, it was noted that no attempt had been made to specify the asserted purpose of the notices which was said to be improper. In any event, it submitted the exercise of the powers was in accordance with Tasracing's statutory functions. It was noted that the power to warn off is not limited by an expressly stated purpose, save for the two specific examples set out in s 54(4). The only limitation to the exercise of the power is that the grounds upon which it is based must relate to the purpose of the Act: citing *Heatley* per Aiken J at 515-516. Consistently with the decision of Pearce J in *Yole & Ors*, it was submitted that the purposes for which the notices were issued and stated within them fell squarely within the purposes for which the power was conferred. It was noted that similar arguments had been rejected by his Honour in that case.

59. In respect of the additional grounds in the appeals brought by Tim Yole and the Ford appellants, it was submitted that there was no merit in those grounds. The basis upon which Tasracing issued the notices to each of those appellants, it submits, were objectively serious on any view. In the case of the Fords, it was submitted that the objective seriousness of the allegations were such that Tasracing was not required to be satisfied of anything more than the findings made by Mr Murrihy.

60. During the hearing of the appeal, Tasracing further submitted that the findings in the Murrihy report constituted *prima facie* evidence of contravention. The power under s 54(2) is not directed at imposing a penalty, but is in the nature of a discretion exercised in the public interest. As a body that controls racecourses, it is required to do so in a way that enhances the public interest. Tasracing identified that they were awaiting the outcome of the Panel's investigation and inquiry. In the interim, it was submitted it was entitled to issue the warning off notices in order to ensure the situation was monitored. Were Stewards to hand down a decision, it was indicated that Tasracing would review the ongoing need for the notices in light of any such determination.

Consideration

61. The determination of each of these appeals requires an assessment of the relevant circumstances as set out in the material before Tasracing in addition to any further material admitted by the TRAB to identify whether in each case it was appropriate for the relevant appellant to be issued with a warning off notice. The exercise of the relevant power, in TRAB's view, requires the

balancing of a number of competing considerations. Those considerations are addressed in the balance of these reasons.

Effect of Warning Off Notice

62. There was considerable debate during the course of the appeal as to whether a warning off notice issued by Tasracing is a warning off notice within the meaning of the AHRR. This is important because if it is, AHRR 259(1) provides that a person warned off, like a person the subject of a disqualification, cannot undertake any of the activities set out in that rule. Similarly, the definition of warning off under the AHRR dictionary provides that a person warned off is subject to the same prohibitions as a disqualified person mentioned in AHRR 259(1).

63. Warned off or warning off is defined in the AHRR dictionary as follows:

> "*A decision or penalty prohibiting a person from 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 the disqualified person mentioned in r.259(1).*"

64. Controlling body is also relevantly defined in the AHRR dictionary as an organisation which by convention, recognition or law is or is determined to be in control of harness racing in a State or Territory of Australia or in part of or the whole of the country.

65. It does not appear to be disputed that the warning off notices issued by Tasracing have been treated by the Director of Racing and Stewards (and controlling bodies in other jurisdictions) as a warning off notice within the meaning of the AHRR, thus resulting in the appellants being subject to the same restrictions as a person who is disqualified. Those restrictions are extensive. A disqualified or warned-off person cannot do any of the following:

    (a) associate or communicate with persons connected with the harness racing industry for purposes relating to that industry;

    (b) be a member or employee of the controlling body;

    (c) be an office holder, official, member or employee of a club;

    (d) enter a racecourse or any place under the control of a club or controlling body;

    (e) race, lease, train, drive or nominate a horse;

    (f) conduct breeding activities;

    (g) enter any premises used for the purposes of the harness racing industry;

    (h) participate in any manner in the harness racing industry;

    (i) permit or authorise any person to conduct any activity associated with the harness racing industry at his/her registered training establishment;

    (j) place, or have placed on their behalf, or have any other interest in, a bet on any Australian Harness Racing race;

    (k) associate with licensed persons connected with thoroughbred or greyhound racing industry, including but not limited to entering any premises owned or occupied by such licensed persons.

66. Those prohibitions are subject to the discretion vested in Stewards to remove one or more of the prohibitions where they form the opinion that the circumstances relating to the disqualified person have materially changed. Additionally, the controlling body may make determinations

waiving, varying or qualifying the prohibitions set out in AHRR 259. Failing to comply with AHRR 259 is an offence.

67. Tasracing argues that AHRR 259 is not enlivened in each of these cases. First, it submits that Tasracing is not a Controlling Body as defined under the AHRR. Tasracing argues that the control of harness racing is a function assigned to the Director of Racing pursuant to s 6(2)(a) of the Act. By contrast, Tasracing is designated control of thoroughbred racing pursuant to s 11(1)(s) of the Act. On that basis, it is submitted that the warning off notice issued under s 54(2) of the Act does not fall within the AHRR definition of warning off.

68. Section 6(2)(a) of the Act provides as follows:

> "*The Director is also responsible for –*
>
> *(a) controlling race nominations, acceptances, field selections, handicapping, barrier draws and scratchings in harness racing*".

69. Section 11(1)(s) assigns a similarly worded responsibility to Tasracing in respect of thoroughbred racing.

70. Each of those provisions are directed at particular aspects of the relevant code of racing. However, pursuant to s 11 of the Act, Tasracing has other responsibilities, including allocating race dates, race programming, developing and maintaining racing and training venues under its control, making the rules of racing having regard to the recommendations of the Director and setting licence and registration standards and criteria, again having regard to the recommendations of the Director. In TRAB's view, acceptance of Tasracing's argument would require acceptance that "being in control of harness racing in the State" is confined to those activities referred to in s 6(2)(a), that is relating to race nominations, acceptances, field selections, handicapping, barrier draws and scratchings in harness racing.

71. The notion of being in control of harness racing does not appear to be so confined. The making of the relevant rules of racing, allocation of racing dates, the maintenance and licensing of facilities are all matters that are directed at the control of racing. Similarly, there is nothing in the rules to suggest there is only one Controlling Body able to exist at any one time. What is apparent about the structure of the racing industry in this State is that a number of different entities undertake various different functions pursuant to either the AHRR or the Act, which impact the operation and control of harness racing.

72. Further, in TRAB's view, the definition of warning off is not dependent on who issues the notice, but is concerned with the subject matter of the direction contained within any such notice. It is notable that the AHRR definition does not specify who makes the decision, but whether it prevents the entry of a person on any racecourse or place under the control of a club or controlling body. Even if Tasracing is correct that it is not a Controlling Body, the question still remains whether or not the racecourses from which each of the appellants have been warned off are ones under the control of a club.

73. The structure of the racing industry in this State is such that race meetings are conducted by clubs generally on Tasracing racecourses. As conceded during the course of the appeal, a controlling club, namely the registered club for the time being in control of conducting a race meeting (see definition of controlling club under s 3 of the Act) is relevantly in control of a racecourse during any such meeting. Pursuant to s 36 of the Act, Tasracing may only hold a race meeting if authorised under s 44. Otherwise, meetings can be held by registered clubs or pursuant to a permit issued under s 38 of the Act. As conceded by Tasracing, it is the lessee of each of the racecourses set out in the schedule attached to the warning off notices other than the courses in Burnie, the north-east and St Mary's. Where it has a lease, it licenses a particular club to use the venue on the relevant race day. As noted previously, a racecourse cannot be used as a racecourse without being allotted a race day, a responsibility that is vested in Tasracing pursuant to s 11(1)(h) of the Act.

74. In its supplementary submissions dated 22 May 2024, Tasracing states as follows:

> "*2.10 It is correct to say that each of the clubs, the ORI and Tasracing have specific functions to perform in order to cause a race to be run at a specific racecourse on a particular day. For example, the ORI appoints stewards, who (as a matter of common ground) are an independent, but necessary entity for a racing event to take place. To the extent that each body is responsible for the control of a venue, or the functions to be formed at that venue, in that a race could not be run in the absence of one or more of them, each is a necessary constituent for the racecourse to operate. More than one person can be in control of the racecourse.*

75. Additionally, the appellants drew to TRAB's attention other material supporting that, for certain purposes, Tasracing is considered a Controlling Body in respect of harness racing. That material included various governance documents relating to the operations of the peak body Harness Racing Australia. One of those included its Rules of Association current as at 1 January 2021. Clause 3 of those Rules of Association provides that the members of the Council are, relevantly, Tasracing Pty Ltd jointly with Office of Racing Integrity being the controlling body for Harness Racing in Tasmania. At least from the perspective of Harness Racing Australia and its Rules of Association, Tasracing, together with the Office of Racing Integrity constitute the controlling body for harness racing in this State.

76. If there was any doubt about that, it is also relevant to consider the recent Equity and Participation Policy promulgated by Tasracing in respect of harness racing in Tasmania. The objective of that policy is to promote equity and participation and controls the percentage of horses trained by or under the effective control of an individual trainer that are able to constitute a race field. That policy provides that horses which are trained by or under the effective control of a trainer will not be selected to compromise more than 50% of the acceptances in any race field. The policy reserves the right of Tasracing to make the final determination in relation to any aspect of the interpretation of the policy. This policy was introduced on 1 July 2023.

77. Tasracing's rule and policy making powers mean, in TRAB's view, that it is an organisation which is in control of at least significant aspects of harness racing in the State. TRAB is satisfied that Tasracing constitutes a controlling body within the meaning of the AHRR and that the consequence of a warning off notice issued that prohibits the appellants from entering into racecourses controlled by Tasracing constitutes a warning off within the meaning of the AHRR. Consequently, AHRR 259(1) operates so as to impose the same restrictions upon a person who has been so warned off as are applied to disqualified people.

78. If TRAB is wrong about that, it is also satisfied that the racecourses at relevant points in time, that is when race meetings are conducted, are under the control of various race clubs who host those particular meetings. So much is conceded in our view in the submissions of Tasracing. As noted in their supplementary submissions, Tasracing licences a particular club to use a venue on a particular race day. Some licences are in writing, others are not. On that basis, there is no reason to doubt that the relevant clubs have effective control of the racecourse at those times.

79. Consequently, TRAB accepts the appellants' submissions that the warning off notices have considerable impact on each of the appellants. Not only do they prevent their entry onto a racecourse (which in the case of the driver appellants would effectively prevent them from carrying out any of their usual racing activities) but it extends to all of the matters set out in AHRR259(1).

80. It is relevant to bear in mind that the power pursuant to AHRR183(d) to suspend a licence or any other type of authority or permission pending the outcome of an inquiry, investigation or objection or where a person has been charged with an offence is not ordinarily subject to the same restrictions. Such a suspension does not engage AHRR 259(1).

81. Given Tasracing's position that AHRR 259(1) was not engaged when it issued its notices to each of the appellants, the inevitable conclusion is that it could not have properly considered the impact of those notices upon the appellants prior to issuing them.

Nature of the conduct identified in the Murrihy report

82. It may be accepted that conduct consisting of team driving and breaches of animal welfare rules are extremely serious, or as Mr Murrihy described, of some gravity. As noted by the TRAB in numerous decisions, the rules of racing are directed at ensuring so far as possible that races are conducted fairly, with integrity and with the welfare of the animals participating in racing treated as an absolute priority. Rules directed at preserving the integrity of races and ensuring that each race is run on its merits are critical to a credible racing industry. Those rules directed at ensuring the welfare of the animals participating in races are essential to the maintenance of the industry's social licence and are consistent with the broader community expectation that mistreatment of animals will not be tolerated.

83. Inevitably, breaches of such rules by participants casts a pall on the industry. They risk bringing the entire industry into disrepute. Consequently, those found in breach of the rules of racing that strike at the heart of the integrity of the racing industry or constitute serious breaches of animal welfare standards can expect to receive significant penalties directed at deterring them and others from similar conduct.

84. It is relevant to consider the impact on the industry of the conduct that was identified in Murrihy report when considering the appropriateness of the action taken by Tasracing in issuing the notices. However, in TRAB's view, it is also necessary to carefully consider the determinations set out in the Murrihy report including in the context of the limitations of those findings identified in the report.

Benjamin Yole

85. Benjamin Yole is the subject of the greatest number of determinations arising from the Murrihy report. Those findings include determinations of non-compliance with AHRR240(a)(i) and (ii) together with breaches of rules regarding animal welfare conditions, particularly AHRR218, AHRR218A(1), AHRR193(3) and (8); AHRR196B(1) and AHRRD(1). As noted above, TRAB accepts that such allegations are extremely serious and, where established, raise serious questions as to the integrity of harness racing in the State and the welfare of the animals participating in that industry.

86. At this point in time, Benjamin Yole has not been charged with any of those offences. Tasracing argues that Mr Murrihy's determinations are capable of establishing a *prima facie* case in each instance. The issue is whether that proposition ought be accepted in Benjamin Yole's case and, if so, whether it justifies the issuing of a warning off notice in the circumstances. Consequently, it is necessary to give further consideration to the detail of each of the Murrihy determinations as they relate to Benjamin Yole.

<u>Team Driving Determinations</u>

87. The Murrihy report outlines two findings that Benjamin Yole did not comply with AHRR 240(a)(i) and (ii), the first in respect of Race 2, the Find Us on Facebook Stakes conducted at Burnie on 7 October 2022 and the second concerning Race 3, the Bevan Lee's Butchery Stakes conducted by the Launceston Pacing Club on 19 August 2022.

88. R.240(a) relevantly provides as follows:

> "*A person shall not, whether alone or in an association with others, do, commit or suffer anything before, during or after a race which in the opinion of the Stewards or controlling body:-*
>
> *(a) may cause someone to be:*
>
> *(i) unlawfully advantaged, or*
>
> *(ii) unlawfully disadvantaged ...*".

89. Each of the findings made in the Murrihy report refer to conduct alleged to have been engaged in by Ben Yole, in the case of the 7 October 2022 race, in association with Nathan Ford and Mitch Ford and in relation to the 19 August 2022 race, in association with Nathan Ford, that may have caused one horse to be unlawfully advantaged and another horse to be unlawfully disadvantaged. As can be seen above, the relevant aspect of AHRR 240(a) is directed at the potential advantage/disadvantage that may be caused to "someone". In each of the findings made in the Murrihy report concerning Benjamin Yole (and Nathan and Mitchell Ford), the particulars are directed at the alleged advantage or disadvantage that may have been caused to particular horses.

90. For the purposes of the exercise of the power pursuant to s 54(2), however, the manner in which the non-compliance was articulated by Mr Murrihy is sufficient to identify the relevant conduct. Like Tasracing, in assessing whether the determinations warrant the issuing of the warning off notice, the TRAB has only had regard to the material set out in the Murrihy report and has not, for example, considered the footage of those races for itself.

91. In respect of the 7 October 2022 race, it is apparent that Mr Murrihy had regard to race vision of the race, knowledge of the track, race history of *On My Oath* which was said to have been disadvantaged and vision of a subsequent race involving *On My Oath*. Mr Murrihy outlines in his report that consideration was given to written submissions made by Benjamin Yole who stated he did not recall giving any specific driving instructions before the race to any driver. He also did not believe he backed either horse and there is no suggestion in the Murrihy report of evidence to contradict that. The report goes on to outline that both Nathan and Mitchell Ford gave evidence that there were no driving instructions or pre-arrangements. Mr Murrihy's analysis of the race vision indicated that Mitchell Ford, who was driving *On My Oath* and had established a lead over the race favourite *Juniper* from the start of the event, appeared on a number of occasions to turn his head and look backwards in the direction of *Juniper*, which was running second. The race vision also apparently indicated that *Juniper* was then driven forward with Mitchell Ford taking hold of *On My Oath*, allowing *Juniper* to cross and assume the lead uncontested. The race history of *On My Oath* did not indicate it would be disadvantaged by leading the race and a review of vision of a subsequent race on the same track indicated that *On My Oath* was driven to lead all the way and won by over 7 metres.

92. Against this background, the Murrihy report states as follows:

> *However giving regard to the vision of the race and the vision of the subsequent win of* On My Oath *(when it led all the way at Burnie on 28 October 2022), together with the absence of any credible explanation for the actions of and tactics adopted by Mitch Ford in a race conducted on the leader-advantaged Burnie track, it is determined that Mitch Ford acted in concert with Nathan Ford by giving up the lead so as to cause* Juniper *to be unlawfully advantaged and* On My Oath *to be unlawfully advantaged.*"
>
> *The investigation did not find it credible that Ben Yole gave no instructions to the drivers of his starters. Together with his endorsement, when questioned, of the tactics of Mitch Ford behind* On My Oath*, it gives rise to a more probable inference that the unlawful advantaging of Juniper and the unlawful disadvantaging of* On My Oath *was at the instruction of, or by arrangement with the trainer.*

93. It is immediately apparent from the above discussion that Mr Murrihy relied on inferential reasoning in forming the view that there had been instructions given by Ben Yole. In light of the fact that there were no admissions by any of the parties that there had been such instructions and his description of the circumstances giving rise "*to a more probable inference*" this raises considerable questions about the safety of relying on that particular determination at least in so far as it relates to Benjamin Yole. The circumstances as described may justify a suspicion, but there is insufficient information contained in the Murrihy report to warrant a conclusion that there is *prima facie* evidence that Benjamin Yole did in fact provide those instructions to either or both of Mitchell Ford or Nathan Ford or that he had advance knowledge that Mitchell Ford intended to hand up to *Juniper* in the event that his horse obtained the lead.

94. In respect of the 19 August 2022 race, the Murrihy report outlines that the investigation had regard to, but was not limited to, an interview with the driver of *South Shore* (NZ), Corey Bell, who gave evidence that Benjamin Yole gave him instructions that "*I just need you to do this for me because Nathan's* [the driver of the other relevant horse *Eippermill*] *– you know I don't want to lose Nathan as a driver or you know, a mate*" and "*You've just got to hand up to him because he reckons he can win.*" The vision of the relevant race was also considered, together with the race history of *South Shore* (NZ) which confirmed its gate speed, winning on four occasions when leading from its next eight race starts. During the course of that investigation, Nathan Ford stated he had not spoken to Ben Yole about the race and Ben Yole denied instructing Corey Bell to hand up to Nathan Ford indicating that "*The horse is trained by his partner, Sir. Yeah, I don't do favours for anyone, Sir*". Again, Mr Murrihy indicated that the circumstances as well as the material identified raise a more probable inference in favour of a finding that the unlawful disadvantaging of *South Shore* (NZ) and the unlawful advantaging of *Eippermill* was at the instruction of Ben Yole.

95. In addition to the race footage, this finding relies substantially on the evidence provided by another participant, Mr Bell. As noted, none of the parties had an opportunity to cross-examine any of the other witnesses during the course of the investigation. The finding at least relies in part on an apparent acceptance of Mr Bell's evidence in preference to that given by Mr Yole and potentially also Nathan Ford. No express reasons are given for preferring that evidence, though it may be inferred that the account appears to be supported by Mr Murrihy's interpretation of the vision.

96. Given the significant reliance on the evidence of another participant who was not the subject of cross-examination, the TRAB considers that some caution ought be exercised before accepting that finding as a basis for taking the exceptional step of issuing a warning off notice with all that entails.

Animal Welfare Determinations

97. The first of the adverse welfare findings concerns a determination that Benjamin Yole did not comply with AHRR218 in that in the period between 28 August 2022 and 3 September 2022 he failed to comply with his responsibilities to properly care for the welfare of a 2-year-old horse, *Blings On Fire*. The evidence concerning that allegation relates to information provided by a former stable employee and driver of Benjamin Yole who stated that on or about 1 September 2022 it was discovered by stable employees that a tongue-tie had not been removed from that horse subsequent to its race on 28 August 2022. The employee alleged that the tongue-tie got left on for four days. He stated that when it was taken off the horse "*looked like it was going to die and it wouldn't eat, like it was really skinny, and its tongue was obviously sore*". The matter was brought to the attention of Tim Yole. However, the horse was presented to race on 3 September, where it finished last. An examination by the race club veterinarian was ordered by stewards, but no abnormality was reported after that race.

98. During the course of the investigation, Tim Yole stated that he thought it would be very unlikely it would have happened and that he did not remember any such conversation occurring. He also said that it had not been mentioned to him by Benjamin Yole. Benjamin Yole in turn indicated that he found it inconceivable that a horse could have a tongue-tie on for three days and no person removed it. He pointed to the fact that after a race a horse passes through the hands of its strapper, the float driver and whoever unloads it off the float.

99. In reaching his determination, Mr Murrihy indicated that he preferred the evidence of the former employee/driver which he found credible. He determined that the evidence was supported by the absence of any other credible explanation for the subsequent poor performance of *Blings on Fire*, who was beaten by a huge margin on 3 September 2022 and was found to be sound upon examination subsequent to the race by the Club's veterinary surgeon.

100. The evidence relied upon by Mr Murrihy given by the employee that the horse (as of two days prior to the race) looked like it was going to die and was really skinny, is difficult to reconcile with the evidence that it appeared to be "sound" on a subsequent examination after the race by

the Club's veterinary surgeon. The inconsistency with these two scenarios does not appear to have been the subject of any consideration, or certainly not the subject of any consideration outlined in the report. In those circumstances, the TRAB considers it necessary to approach that determination with some caution.

101. Finding 7 found a non-compliance with AHRR 218A(1) by Benjamin and Tim Yole, in that they systematically arranged for a selected number of horses to be brought to the wash bay area at the Sidmouth property prior to the horses being loaded onto horse transports to race at race meetings and that while they were tied up and fitted with blinds and ear plugs, both of them deployed physical and vocal abuse including making loud and excessive noises to frighten and/or terrorise the horses. It is alleged that this practice involved pulling down the blinds and ear plugs and using a harness whip, encased in a plastic bag to exacerbate the noise, to wave around the horses and/or to strike them in the region of the rump and hind legs whilst loudly shouting at them.

102. In reaching that determination, regard was had to evidence given by seven former stable employees of race day practices involving the horses in the wash bay area at the property. In their response to those allegations, both Benjamin and Timothy Yole are reported to have admitted to the practice described by stable employees, but stated that it occurred about once a month, rather than as often as alleged, that it lasted 5 to10 seconds in duration, and that no physical contact was made by the whip encased in the plastic bag, but rather contact was with the wall of the wash bay. They also stated the practice had been discontinued at least 12 months ago. By way of explanation, they submitted that their conduct was equivalent to the actions of a driver towards a horse in the latter stages of a race. Each denied that it constituted abuse or bad, cruel or unfair treatment of a horse.

103. Given the apparent admissions made by both Benjamin and Timothy Yole, this allegation clearly can be given more weight. On the other hand, there is no information in the report suggesting that conduct was continuing. This, in TRAB's view, is a matter to consider in relation to the utilisation of the power pursuant to s 54(2) of the Act.

104. The remaining animal welfare allegations concerning Benjamin Yole can be usefully dealt with together. They concern determinations that he administered intraarticular injections to horses within eight clear days of the commencement of their races between 4 November 2020 and 1 April 2023 in breach of AHRR 196D(1) and, in conjunction with Tim Yole in the period between 1 April 2020 and 1 April 2023:

    a. systematically administered, or caused to be administered by stable employees, medication in a form of oral pastes given over the tongue to multiple horses prior to their loading onto the horse transports to be taken to race that day at Tasmanian race meetings in breach of AHRR193(3), (7) and (8) which prohibits the administration of any medication to a horse on race day prior to the horse running in a race; and

    b. administered intravenous injections to horses nominated to race within one clear day of such a race, contrary to AHRR196B.

105. Each of those determinations relies substantially on the evidence given by former stable employees of the practices undertaken at the Yoles' Sidmouth property. In their responses to each of the allegations, both Benjamin and Timothy Yole denied engaging in various breaches of the Rules. Both identified the difficulty in advancing any evidence in respect of their alleged non-compliance in the absence of particularisation of dates and horses. Both submitted that:

    "*As the allegations are broad and vague and lack in any real details (that is to a particular date and horse) it is difficult for me to advance any evidence that stands apart from my own testimony;*".

106. It is not clear from the report if any precise evidence was given as to the exact nature of the oral pastes or substances that were administered either intravenously or via intraarticular injection. Both Benjamin and Timothy Yole admitted that treatments were administered to horses but

denied that they ever did so in non-compliance with the withholding periods set out in the various rules. Clearly, as a result, the determinations have been based on the acceptance of the evidence of the former stable employees in preference to the evidence given by either Benjamin or Tim Yole. The Murrihy report does not expressly explain why that evidence was preferred, though it is apparent that the consistency of that evidence was a relevant consideration. It is in the context of such determinations that the absence of an opportunity to cross-examine the witnesses upon whom Mr Murrihy relied assumes some importance. Again, the TRAB considers that caution should be exercised when relying on such determinations.

Impact on Warning Off Notice on Benjamin Yole

107. It is beyond doubt that the warning off notice has and will continue to have considerable impact on Benjamin Yole. He is completely unable to undertake any of his usual activities in the harness racing industry. Given the nature of his training responsibilities, TRAB accepts that it will take some time to be able to get horses back into form and on the racecourse if the restrictions to which he is currently subject are removed. In the meantime, considerable cost is associated with maintaining horses on his property. TRAB has been advised that Benjamin Yole has already closed his stable in Victoria because of the original warning off notice and that being subject to such a notice in the future may force him to transfer his interest in up to 60 horses for a nominal value. TRAB was told he is expending approximately $20,000.00 per week in feed in circumstances where he is unable to achieve any income from the horses in his care. TRAB accepts that the impact upon him of the warning off notice is very significant.

108. TRAB also notes that the Panel anticipates it will form a view as to whether any charges will be laid in respect of the Murrihy determinations by 30 June 2024. To date, the Panel has not identified circumstances that would warrant the utilisation by them of the power to suspend pursuant to AHRR 183 pending the hearing and determination or any inquiry that may be held.

109. In light of all of the above matters, the impact of the warning off notice and the considerable uncertainty attaching to whether there will be any findings in the future that would support the imposition of penalties by Stewards who are charged with enforcing the rules of racing, TRAB considers the circumstances such that it is inappropriate for a warning off notice to be issued. The appeal in respect of Ben Yole is upheld.

Mitchell Ford

110. Mitchell Ford is the subject of one determination of non-compliance with AHRR 240(a)(i) and (ii) concerning the race on 7 October 2022. The matters referred to at [91] to [93] above are also relevant. It is notable that Mitchell Ford was the driver of *On My Oath* and is identified in the Murrihy report as looking back and appearing to take hold to hand up the lead to *Juniper*. While such conduct would constitute a breach of rules such as AHRR 149(1) or (2), a breach of AHRR 240(a) requires something more. Breaches of rules such as AHRR 149(1) and (2) are routinely dealt with by Stewards and by the TRAB and, while serious, do not usually sound in penalties in excess of 6 race dates. The TRAB considers that issuing a warning off notice where there is considerable uncertainty as to what penalty the conduct may warrant is such that it is not satisfied that it is appropriate for such a notice to be issued with its associated consequences. This is particularly acute in Mitchell Ford's case who is the subject of only one such finding.

111. As noted in Mitchell Ford's submissions to Tasracing, he has been a highly successful driver in his short career. There is no suggestion of like offending in his history and no more recent allegations. He derives his entire income from driving.

112. In addition, TRAB has been advised that Mitchell Ford is currently the subject of a licence suspension which concludes on 25 June 2024. In those circumstances, it accepts it is currently unnecessary for Tasracing to issue a warning off notice to Mitchell Ford. For the foregoing reasons, the appeal in respect of Mitchell Ford is also upheld.

Nathan Ford

113. Nathan Ford is a subject of two determinations related to team driving in the Murrihy report. In respect of the 7 October 2022 determination, the issues identified at [91] to [93] above are also relevant. It is one thing to identify that Nathan Ford took an opportunity to take the lead when it was allegedly handed up to him. But establishing that he did so in concert with either or both of Mitchell Ford and Benjamin Yole requires something more which, in light of his denials, would appear difficult to establish on the footage alone. The TRAB considers it inappropriate to rely on that determination for the purpose of the issuing of a warning off notice.

114. In addition, it is noted that in respect of the 17 August 2022 race, the Murrihy report does not outline any direct evidence that Nathan Ford was involved in any discussions with the witness Corey Bell concerning race tactics. The evidentiary basis for a conclusion that he acted in concert with Ben Yole is somewhat lacking, at least in so far as that evidence is outlined in the Murrihy report.

115. TRAB also accepts that the current warning off notice has considerable impact on Nathan Ford. He is also a driver who relies on his income from the harness racing industry. He too has not been the subject of any like allegations in the past. Again, it is not clear that the warning off notice is either necessary or desirable in the circumstances where there are currently no charges pending and no clear indication as to when they may be preferred, if at all. The appeal in respect of Nathan Ford is also upheld.

Tim Yole

116. The allegations of non-compliance concerning Tim Yole relate to the allegations of non-compliance with AHRR218A, AHRR193 and AHRR196B discussed at [101] to [106] above. Notably, he is not the subject of the entirety of the animal welfare allegations outlined in the Murrihy report. Similarly, the TRAB considers that there is a need to exercise caution in relying on those determinations in the case of Tim Yole. Again, the TRAB is not aware that Tim Yole has any relevant prior matters or that there has been any recent conduct suggesting that a warning off notice is warranted.

117. For those reasons, TRAB also upholds the appeal in respect of Tim Yole.

Conclusion

118. The appeals brought by each of the appellants is upheld in full. The TRAB has reviewed all of the material before Tasracing together with the additional information contained in the Panel's report. Accepting that the determinations relate to serious conduct, the limitations of those determinations as referred to in the Murrihy report together with the additional matters outlined above warrant a more cautious approach than that undertaken by Tasracing in issuing the warning off notices. The TRAB is not satisfied that those determinations, with their limitations, constitute sufficient grounds to exercise such a power particularly in light of the other circumstances and matters identified in these reasons.

119. Pursuant to s.34(1) of the Act, the TRAB quashes the decisions of Tas Racing to issue a warning off notice pursuant to s.54(2) of the Act on 19 April 2024 directing each of the appellants to not enter onto the racecourses set out in the schedules attached to the notices. Pursuant to s.34(2)(e) the whole of the prescribed deposit paid by each of the appellants is to be refunded to them.

DATED: 6 JUNE 2024