11 November 2020

**DECISION**

**RACING VICTORIA**

**and**

**MR KERRIN MCEVOY**

**Date of hearing:** 9 November 2020

**Panel:** Judge John Bowman (Chairperson).

**Appearances:** Mr Robert Cram appeared on behalf of the Stewards.

Mr Des O’Keeffe appeared on behalf of Mr Kerrin McEvoy.

Mr Kerrin McEvoy appeared.

**Charge:** Australian Rules of Racing (AR) 132(7)(a)(ii) states subject to the other requirements in this rule prior to the 100 metre mark in a race, official trial or jump-out the whip must not be used on more than 5 occasions except where there have only been minor infractions and the totality of the whip use over the whole race is less than permitted under subrules (7)(a) and (b) and also having regard to the circumstances of the race, including distance and context of the race (such as a staying race or a rider endeavouring to encourage the rider’s horse to improve).

**Particulars of charge:** Kerrin McEvoy (Tiger Moth) pleaded guilty to breaching the provisions of AR132(7)(a)(ii)in that he used his whip on thirteen occasions prior to the 100 metres, which is 8 more than permitted. Mr McEvoy had his licence to ride in races suspended for a total of thirteen meetings to commence midnight 5 November, 2020 and to expire midnight 14 November, 2020. (3 metro, 10 provincial). Further, Mr McEvoy was fined $50,000. In assessing penalty the Stewards took into account his record, that he finished 2nd in the Melbourne Cup and the totality of his whip use.

**Plea:** Guilty

**DECISION**

Mr Kerrin McEvoy, you have at all times pleaded “guilty” to a breach of Australian Rules of Racing (“AR”) 132(7)(a)(ii), which in essence provides that the whip must not be used on more than five occasions prior to the 100 metres mark in a race. This relates to your ride on “Tiger Moth”, which finished second in Race 7, the Melbourne Cup, at Flemington on 3 November 2020. The margin of Tiger Moth’s defeat was a long neck. The Stewards alleged that you used the whip 13 times prior to the 100 metre mark and 8 times thereafter. That is not disputed, although you have submitted that you are not a heavy user of the whip, using it to encourage rather than strike in a heavy fashion.

At the request of yourself and Mr Des O’Keeffe, who was assisting you, I have viewed again the video of the race. I agree that for approximately the last 1400 metres, the race was run in something of a “stop start” fashion and that, particularly in the last 400 metres, there was much going on.

That may be so, but that does not excuse a fairly flagrant breach of the Rules. In my opinion, the video of the race is not a substantial factor.

In any event, the Stewards conducted an inquiry. As stated, you pleaded guilty. You were suspended for 13 meetings and fined $50,000. Your appeal is solely in relation to the issue of the fine.

I would make the following preliminary points. Firstly, it is not for this Tribunal to investigate or comment upon the issue of whether a particular provision in the Rules is right or wrong, fair or unfair. This Tribunal does not comment upon specific policy. It deals with the application of the Rules, not whether a particular Rule is good or bad. I have said this on several occasions in cobalt cases. Cobalt is a prohibited substance. Whether it should be, and attempts have been made to argue this, is not a question for the Tribunal. Similarly, policy issues on whips, whip use, the efficiency of padded whips and the like are not matters upon which the Tribunal can or should make public comment. The bottom line is that the whip Rule is what it is and shall be applied.

Secondly, there is considerable discretion and flexibility in relation to it. The penalty for a whip Rule breach is not fixed, as it is, for example, in cobalt cases, unless special circumstances exist. However, obviously the discretion as to penalty must be exercised properly and fairly.

Thirdly, the Tribunal is highly conscious of the need for consistency in relation to penalties. This is important for reasons of fairness and the appearance of fairness. I would refer to the observations made in the RAD Board decision concerning jockey Hugh Bowman in the 2018 Melbourne Cup. Amongst other things, it was there stated that we all should be very conscious of animal welfare, but that there should be consistency and parity in penalties. I would add the observation that in fairness, jockeys should know at least the approximate penalties that they may face for breaches of the Rule.

I turn now to the present case. Since 1 August 2020, protocols involving whip use have been in place. The Victorian Jockeys Association (“VJA”) took part in the drafting of these protocols. In relation to financial penalties, these have been running at approximately 50% of the 5% amount of stake money which jockeys receive. This was explained to me by Mr Cram in the recent case of Daniel Moor, who received a penalty roughly in accordance with this for his whip use when finishing fourth in the Group 1 Cantala Stakes on Derby Day. The financial penalty imposed on him by Stewards was just under 45% of the 5% of stake money.

On the same day, Fred Kersley rode the second placegetter in the main race, the Victoria Derby. His fine was 55% of the 5% stake money. In effect, his penalty was rounded out to $10,000. As far as I can see, there has been one other penalty of 55% and that is the highest percentage penalty that has been imposed.

The penalty imposed on you, Mr McEvoy, is just under 91% of the 5% of the stake money. That is a very large leap above the previous highs. I am not saying that the protocol excludes it. It does not. However, the general penalty has been approximately 50% of the 5% of the prize money, ranging up to 55% as stated.

I accept that the VJA sent the jockeys a reminder of the applicability of the whip Rule on the morning of Derby Day and the morning of Cup Day. Understandably, there was no suggestion in it that the percentage penalty could leap to 90%.

Further, Stewards visited the jockey’s room on Cup day and prior to the running of the Cup. Due to the restrictions and protocols operating because of the coronavirus, the Cup jockeys were divided into gold and green teams with separate rooms, as had been the situation for some time. Mr Montgomery visited the team in which you had been placed. I accept that what he said was similar to what Mr Cram told us he stated to jockeys by way of a warning in relation to riding and whip use.

If that is so, then there was no specific warning given that a financial penalty of the size imposed on you would be applied. To complicate matters further, I accept that you were not even in the room when jockeys were reminded of their obligations. Matters have been made more difficult by the coronavirus and I can understand how this might have occurred, but it is not a desirable situation.

I accept that no particular reminder was given to you, as you were absent and that the warnings that were given were general in nature. There was no particular statement that as much as 90% of the 5% of the stake money could be imposed by way of a fine.

In all of these circumstances, and bearing in mind the penalty imposed on Daniel Moor and Fred Kersley in Group 1 races only 3 days before, the lack of any specific reminder or warning given before the race, either generally or to you in particular, and principles of fairness and parity in penalties, the fine of 90.9% of the 5% of the prize money seems to me to be excessive. I repeat that this is no commentary or reflection upon the whip Rule, whip use generally or the importance of animal welfare. As stated, this decision is based upon issues of fairness and parity in penalties. Bearing in mind the amounts of prize money forfeited by jockeys by reason of breaches of the rule in principle Group 1 races only three days before and the existing protocol, you and other jockeys should have been alerted to the fact that there was going to be a leap of almost 64% (55% of prize money to almost 91%) in the forfeiture relating to the Group 1 Melbourne Cup. Had such a warning been given to you and to all jockeys, and given clearly, and a breach such as this committed regardless of the warning, the outcome of this appeal may have been different.

You have a very good record. However, you do have prior convictions involving this year’s Sydney Cup and the Melbourne Cup of 2018. In each instance the fine imposed was very modest, but this predated the protocols.

In all the circumstances, the appeal is allowed. The financial penalty is varied to one of $30,000, which is, in percentage terms, approximately 55% of the 5% stake money. Of course, the period of suspension remains.

Mark Howard  
Registrar, Victorian Racing Tribunal