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RACING APPEALS AND DISCIPLINARY BOARD

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HEARING RESULT

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FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 16 March 2010

SUBJECT: **HEARING RESULT – JOCKEY: DANNY NIKOLIC**

Panel Mr Brian Forrest (Deputy Chair), Mr Stephen Curtain, Mr Jeremy Rosenthal

Appearances Mr Paul Holdenson QC appeared on behalf of the RVL Stewards.
Mr Paul O'Sullivan appeared on behalf of Danny Nikolic.

Charge Breach of AR 175(p) – [fail to comply with a direction of the Stewards].

The particulars of the charge being that Mr Nikolic failed to comply with a direction of the RVL Stewards made on 23 February 2010. That direction being to produce his mobile telephone to the Stewards for inspection of his contacts list.

Plea Not Guilty

Decision The Board finds the charge proved.

Mr Nikolic fined the amount of $5000 – fine due on or before 31 March 2010.

Georgie Curtis
Registrar - Racing Appeals and Disciplinary Board

Victoria **16 March 2010**

RACING APPEALS AND DISCIPLINARY BOARD
(Original Jurisdiction)

Reasons for Decision
in the matter of jockey Mr Danny Nikolic
as heard on Friday, 5 March 2010

Mr B Forrest	Deputy Chair
Mr S Curtain	Member
Mr J Rosenthal	Member

INTRODUCTION

On 26 February 2010, Racing Victoria Limited (RVL) Stewards charged licensed jockey Danny Nikolic with a breach of AR 175(p) of the Rules of Racing of RVL.

The Rule reads:

"AR 175. The Committee of any Club or the Stewards may penalise:

(p) Any person who fails or refuses to comply with any order, direction or requirement of the Stewards or any official."

The breach complained of was the refusal by Nikolic to comply with a direction of RVL Stewards made on 23 February 2010 to produce his mobile phone for inspection of his 'contacts' list.

On 2 March 2010, RVL Directors acting pursuant to Rule 6A (2)(e) of the Local Rules referred the matter to this Board for hearing and determination.

BACKGROUND

The ride of Nikolic on *Finishing Card* at Mornington on 8 January 2010 became the subject of an investigation which began on or about 13 January 2010. Stewards initially interviewed Nikolic on 28 January 2010 in relation to the ride focusing on betting activity on the race. Stewards again interviewed Nikolic on 23 February 2010 in relation to matters considerably broader than the ride and betting activity on the race. Concerns had been raised with Stewards following a Betfair alert on the betting activity of Neville Clements. During the second interview Stewards handed Nikolic a letter requesting production of his telephone records from 1 September 2009, later amended from 1 November 2009, to 31 January 2010. Nikolic provided mobile phone records on 16 February 2010. Next day, Minter Ellison, solicitors for the Stewards informed O'Sullivan Saddington, solicitors for Nikolic, that the

telephone records appeared to be incomplete and requested original records for both his mobile and home numbers or alternatively authority to obtain the records direct from the telephone provider.

During February the enquiry was broadened to include nine other rides of Nikolic from 13 November 2009 to 11 February 2010.

When interviewed by Stewards on 23 February 2010, Nikolic was questioned about telephone conversations with Clements and with another person on various dates as revealed in the telephone records Nikolic had provided. During this interview the Chairman of Stewards requested the names and numbers in Nikolic's mobile phone contact list in order to cross check the telephone records. Nikolic's solicitor, Mr O'Sullivan, who was present at the interview, considered the request to disclose the entire contact list unreasonable and queried the relevance of the request to the enquiry. Mr O'Sullivan proposed a compromise to the request by which Nikolic would show the Stewards numbers contained in the contacts list of the mobile phone which correlated with phone numbers contained in the telephone records if the Stewards identified those of interest to their investigation. This proposal was not accepted.

The powers of the Stewards to request production of a mobile phone is contained in AR 8(b) which reads:

"AR 8. To assist in the control of racing, Stewards shall be appointed according to the Rules of the respective Principal Racing Authorities, with the following powers:

> *(b) To require and obtain production and take possession of any mobile phones, computers, electronic devices, books, documents and records, including any telephone or financial records relating to any meeting or enquiry."*

The Australian Rules of Racing made by the Australian Racing Board apply uniformly in each State. Additionally, Local Rules, provided they are not inconsistent with the Australian Rules can be adopted by each State. In Victoria the Australian Rules of Racing, Local Rules and Rules of Betting constitute the Rules of Racing of RVL.

CONSIDERATION

The Stewards are given extensive powers under the Rules for their assistance in the control of thoroughbred racing and the protection of the integrity of racing. To the casual observer the extent of their powers may be surprising. For instance in the case of a licensed person Stewards have the power to enter and search premises (this includes vehicles) occupied by or under the control of a licensed person and used in any manner in relation to any licence,

see AR 8B, and to take possession of and remove any article or thing found as a result of the search: AR 8C.

The language of AR 8(b) is clear. The phrase "relating to" is to be interpreted according to its ordinary meaning taking into account its context and purpose in requiring a connection between the direction to hand over the phone and the enquiry.

Stewards may exercise the power conferred by AR 8(b) only in relation to a meeting or enquiry. It may not be exercised on a whim or for an unrelated reason.

For consideration in this case is whether the Stewards action in requesting the telephone is related to an enquiry or, as contended by Mr Smith SC, counsel for Nikolic, the Stewards are engaging in a fishing exercise unrelated to an enquiry. If Mr Smith's submission is correct the Stewards action would amount to an improper exercise of power.

In order to address that question, the Board must for the purpose of AR 8(b) firstly identify "the enquiry" and then determine whether the mobile phone "relates to" the enquiry so identified.

The questioning of Nikolic about his ride on *Finishing Card* at Mornington and the investigation of betting on the race was the commencement of the enquiry. The scope of the enquiry broadened to include nine Nikolic rides from 13 November 2009 to 11 February 2010, the betting on Betfair and an investigation of the relationship (if any) between Nikolic and other persons who have been or may be indentified as relevant to the betting information in the Stewards possession. Counsel for the Stewards, Mr Holdensen QC, indicated that investigations have not concluded and whether there are numbers and/or names in Nikolic's mobile phone who may assist in their investigation is yet to the determined. This is the enquiry to which the direction to produce the phone relates in order to determine whether there is evidence or otherwise of possible breaches of the Rules. The broadening of the scope of the enquiry is made abundantly clear in correspondence from Minter Ellison to Mr O'Sullivan and in the course of the Stewards' interviews with Nikolic and with five other licensed persons in the presence of Nikolic.

The Board accepts that the mobile phone relates to the enquiry for the purpose of AR 8(b). It is uncontested that Nikolic used the phone at times, and to speak to at least one person, material to the enquiry. That in itself, in the Board's view, is sufficient to establish the required nexus between the phone and the enquiry.

The Board also accepts, as submitted, that in fairness to the person concerned the Stewards have an obligation to articulate the subject matter of an enquiry in sufficient detail so that the relationship between the enquiry and the mobile phone (or other item, documents, or records

requested under AR 8(b)) is evident or may be reasonably inferred. The Board is satisfied that the Stewards have discharged their obligation in this regard.

At the hearing Mr Smith repeated the offer made initially by Nikolic's solicitor to co-operate in a "question and answer" type procedure with Stewards under which Nikolic would retain possession of his phone but provide the contact names within the phone that matched numbers nominated by the Stewards to be of interest to their investigation. It was submitted this was sufficient to satisfy the direction.

In the view of the Board, this does not satisfy the Rule as it stands. While that approach may, depending on the circumstances, be acceptable in a particular investigation, it does not detract from the right under the Rule, nor can it be said to be outside the scope of the Rule, for the Stewards to have physical possession of the phone. Further, it is immaterial that the Stewards may obtain by other means some or all of the information sought by them pursuant to a request made within the scope of AR 8(b).

A mobile phone is multifunctional, in effect a mini computer. Many phones show photographs, emails, communications and other documents. That a mobile phone may contain the numbers of a wide range of contacts and other information and materials of which only some may be relevant to the enquiry is accepted. However, once the nexus between the phone and the enquiry is established, the existence within the phone of information or materials which are not relevant or not apparently relevant to the enquiry does not constrain the scope of the Stewards' request or render the request improper.

It is also true that an ability to access such information impinges upon an individual's personal privacy.

Clearly some of the Rules impact upon the privacy of a jockey. The Rule under consideration is one example. Another is LR 36D whereby a Victorian based jockey is obliged to disclose medical information which ordinarily would be protected from disclosure by privacy legislation. To be licensed in Victoria, a jockey has to consent to be subject to and bound by the Rules of Racing of RVL. The express agreement to be bound by the Rules is a condition of the grant of a licence.

In the view of the Board, privacy considerations do not override a proper application of the powers contained in the Rules. They are not a ground for non compliance.

There is nonetheless an obligation on Stewards in the exercise of the powers at their disposal to do so respectful of individual privacy and in accordance with the requirements of RVL's obligations under privacy legislation.

Mr Smith further submitted that when considering the scope "of the Rule the Board will be cognisant that it is determining the scope or meaning of the Rule, not just as it may relate to Nikolic, but as it affects all persons associated with the industry. It is not the case that there can be one rule for Nikolic and another for others. If Stewards were held to have such a power it would not be limited to jockeys. It would extend to all licensed persons, all owners of racehorses and to all persons connected with the thoroughbred racing industry."

Given the apparent interest of the racing community in the issue under consideration, the Board makes the following observations in response to that submission.

The Rules apply to all licensed persons (see also AR 2 and LR 3). The proposition that the power would extend to "all persons connected with the thoroughbred racing industry" in the event of a ruling in favour of the Stewards is incorrect. The question of whether unlicensed persons are bound by the Rules is one of fact and degree depending on the particular circumstances, the test being whether the unlicensed persons have by their actions brought themselves within the purview of the Rules: *Stephen v Naylor (1937) 37 SR (NSW) 127*, since consistently adopted by courts and tribunals. Even if an unlicensed person brings him or herself within the purview of the Rules, it then needs to be established that a request made by the Stewards under AR8(b) relates to a meeting or enquiry.

Put simply, the average racegoer or punter has nothing to fear by the findings of the Board in relation to this matter.

Finally, if, as the submission appears to imply, Nikolic has been singled out for investigation, there is no evidence before the Board of improper motive.

CONCLUSION

The Board is satisfied that:

1. The direction of the Stewards to Danny Nikolic on 23 February 2010 to produce his mobile phone was properly made under AR8(b).

2. In refusing to produce his mobile phone Danny Nikolic is in breach of AR 175(p).

I certify that this and the preceding 4 pages are a true copy of the Reasons for Decision.

Georgie Curtis – Registrar ..... *Date* 16/3/10