

HEARING RESULT

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FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 17 October 2013

SUBJECT: **HEARING RESULT – DANNY NIKOLIC**

Panel Judge Russell Lewis (Chair), Mr Josh Bornstein (Deputy),
Mr Darren McGee.

Appearances Mr Paul O’Sullivan of O’Sullivan Saddington Lawyers appeared on behalf of
Mr Nikolic.

Mr Paul Holdenson QC instructed by Mr David Poulton of Minter Ellison
Lawyers appeared on behalf of the Stewards.

Charges 1 & 2 Breach of AR 175 (a)

*The Committee of any Club or the Stewards may penalise:
Any person, who, in their opinion, has been guilty of any dishonest, corrupt,
fraudulent, improper or dishonourable action or practice in connection with
racing.*

The charges relate to an incident that took place on Thursday, 8 November
2012 and Thursday, 29 November 2012 between Mr Nikolic and Racing
Victoria Steward Wade Hadley at a further hearing of Mr Nikolic’s review of
a decision of the RAD Board at the Victorian Civil and Administrative
Tribunal (VCAT).

Plea Charge 1 – guilty.
Charge 2 – guilty.

Decision **Charge 1** - Mr Nikolic convicted and fined the sum of \$10,000.

Charge 2 - Mr Nikolic convicted and the Board orders that Mr Nikolic not be
permitted to apply for a licence prior to 1 October 2015.

In the meantime the Board makes an order that Mr Nikolic is warned off
until midnight 30 September 2015.

Application to VCAT for review of the decision.

RAD Board decision affirmed, penalty set aside and following penalty imposed:

On Charge 2, Mr Nikolic is 'warned off (as that expression is defined in AR 1) for the period 17 October 2013 to 30 September 2014.

On Charge 1, in respect of the period of 1 October 2014 to 30 September 2015, should Daniel Nikolic apply for a jockey's licence, and should that application be granted, such licence shall include a condition that he not be permitted to ride in races for that period.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

TRANSCRIPT OF PROCEEDINGS

RACING APPEALS AND DISCIPLINARY BOARD

HIS HONOUR JUDGE R.P.L. LEWIS, Chairman
MR J. BORNSTEIN
MR D. McGEE

EXTRACT OF PROCEEDINGS

DECISION

JOCKEY: DANIEL NIKOLIC

MELBOURNE

THURSDAY, 17 OCTOBER 2013

MR P. HOLDENSON QC (instructed by Minter Ellison Lawyers) appeared on behalf of the RVL Stewards

MR P. O'SULLIVAN (instructed by O'Sullivan Saddington Lawyers) appeared on behalf of Mr D. Nikolic

CHAIRMAN: Daniel Nikolic, you have pleaded guilty to two charges laid under Australian Rule of Racing 175(a). The particulars of each charge are set out in the document headed Notice of Charges and I do not intend to repeat them.

In relation to Charge 1, the Board is satisfied that the words used were offensive and were, therefore, improper. Behaviour of this kind shows lack of respect for Mr Hadley himself and for the authority of his position. The image of racing is therefore tarnished and public confidence in the role of the Stewards is eroded.

In your case, the principle of specific deterrence is applicable, as well as the principle of general deterrence and denunciation of such conduct. The Board takes into account your plea of guilty, but is not convinced that you have exhibited moral contrition. The Board also takes into account the fact that the offending words were only heard by Mr Hadley and were spoken when you were under stress because of the litigation in which you were embroiled and other pressures of a personal nature.

This offence is clearly the lesser offence to which you have pleaded guilty and in the circumstances, and having heard the submissions of Mr Holdenson and Mr O'Sullivan, the Board is satisfied that a financial penalty is appropriate. You are therefore fined the sum of \$10,000.

In relation to Charge 2, you have committed a serious offence. The Board is satisfied that as a result of what you said and your actual conduct, you intimidated and threatened Mr Hadley. Aggravating features of this offence were that, having used foul and offensive language towards him which prompted Mr Hadley to move to another seat in the corridor, you returned with another male and again intimidated him by staring at him. A further aggravating feature was the fact that this offence occurred in the precincts of the VCAT building in circumstances where you were engaged in an appeal in respect of similar behaviour towards the chief steward, Mr Bailey.

Aside from the above, the following considerations apply in relation to this offence: the harm to the image of racing and the utterly disrespectful conduct shown to a steward who was present at VCAT as part of his duties. The principles of special and general deterrence apply, as does denunciation of what was appalling conduct.

In view of your dismal past record of similar offending and the fact that after you were dealt with in 2012 by the RAD Board for a similar offence - you offended again on 8 November and 29 November 2012 - the Board is unable to be confident that you will not reoffend. In the Board's opinion, the only appropriate penalty for this offence is a period of time out of racing. The Board orders that you not be permitted to apply for a licence prior to 1 October 2015. In the meantime, the Board makes an order that you be warned off until midnight, 30 September 2015.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z446/2013

CATCHWORDS

Application for Review as to penalty only; Guilty plea; Decision of the Racing Appeals and Disciplinary Board varied.

APPLICANT	Daniel Nikolic
RESPONDENT	Racing Victoria Limited
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Hearing
DATE OF HEARING	17 December 2013
DATE OF ORDER	18 December 2013
DATE OF WRITTEN REASONS	25 February 2014

Note

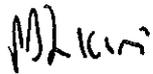
On 18 December 2012, following a hearing on 17 December 2013, the following Orders were made. Written reasons are now provided.

ORDER

It being noted that the Applicant Daniel Nikolic pleaded guilty to Charges 1 and 2 as set out in the Notice of Charges dated 21 May 2013:

- 1 The decision of Racing Appeals and Disciplinary Board made on 17 October 2013 in respect of Daniel Nikolic is affirmed to the extent that Daniel Nikolic is found guilty of breaching AR 175(a) in respect of each Charge.
- 2 The decision of the Racing Appeals and Disciplinary Board made on 17 October 2013 in respect of the penalty imposed on Daniel Nikolic is set aside and the following penalty is imposed:
 - (a) On Charge 2, Mr Nikolic is 'warned off' (as that expression is defined in AR 1) for the period 17 October 2013 to 30 September 2014.

- (b) On Charge 1, in respect of the period of 1 October 2014 to 30 September 2015, should Daniel Nikolic apply for a jockey's licence, and should that application be granted, such licence shall include a condition that he not be permitted to ride in races for that period.



Judge Jenkins
Vice President

APPEARANCES:

For Applicant

Mr P O'Dowd of Counsel instructed by
O'Sullivan Saddington Lawyers

For Respondent

Mr P Holdenson QC, instructed by Minter
Ellison Lawyers

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REASONS

NATURE OF APPLICATION

- 1 On 21 May 2013, Racing Victoria Limited (RVL) Stewards issued two charges against the Applicant, Daniel Nikolic, for alleged breaches of Rule 175(a) of the Australian Rules of Racing ('AR 175(a)') (the 'Charges').
- 2 The Charges arose out of two alleged incidents at this Tribunal, on 8 and 29 November 2012, when, during the hearing of charges relating to the Applicant threatening Chairman of Stewards Terry Bailey, the Applicant allegedly acted improperly by threatening Stipendiary Steward Wade Hadley.
- 3 The Racing Appeals and Disciplinary Board (the 'Board') heard and determined the Charges on 17 October 2013.
- 4 The Applicant applied to the Tribunal for a review of the Board's decision, as to penalty only. The Applicant indicated at the commencement of the Hearing on 17 December 2013, that he pleaded guilty to both Charges.
- 5 The Tribunal made final Orders dated 18 December 2013, by which the decision of the Board was set aside and new Orders made instead. The Tribunal indicated that written reasons would be provided. These are those reasons.

THE CHARGES

Charge One

The Stewards charge you with breaching AR 175(a) which reads as follows:

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

(a) Any person, who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing.

Particulars

1. You were, at all relevant times, a jockey licensed by RVL.
2. On 8 November 2012, you were present in a hearing room within the precincts of the Victorian Civil and Administrative Tribunal at 55 King Street, Melbourne, during the hearing of your review application lodged against a decision of the Racing Appeals and Disciplinary Board of RVL.
3. A Steward, Mr Wade Hadley, gave evidence for the RVL Stewards in the hearing room on that day.
4. After Mr Hadley had given his evidence, he left the witness box and commenced to exit the hearing room, and was required to pass close by you as he did so.
5. As he passed you, you stated words to the following effect:

'You're a disgrace.'

6. The above words were stated in a threatening, abusive and/or offensive manner.

7. Your conduct alleged in paragraph 5 constituted an improper action or practice in connection with racing.

Charge Two

The Stewards charge you with breaching AR 175(a) which reads as follows:

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

(a) Any person, who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing.

Particulars

1. You were, at all relevant times, a jockey licensed by RVL.

2. On 29 November 2012, you were present within the precincts of the Victorian Civil and Administrative Tribunal at 55 King Street, Melbourne, during the further hearing of your review application lodged against a decision of the Racing Appeals and Disciplinary Board of RVL.

3. At approximately 11.40 am, during a brief recess in the hearing, you approached a Steward and witness in the hearing, Mr Wade Hadley, who was seated outside the hearing room, waiting to give evidence at the hearing.

4. You sat down next to Mr Hadley and a conversation then ensued to the following effect:

Nikolic: 'You're going up in the world, aren't you?'

Hadley: [No reply]

Nikolic: 'You're going up in the world, aren't you?'

Hadley: 'I'm just trying to make a living.'

Nikolic: 'Well, I think you are going up in the world. We will see where it ends up.'

Hadley: [No reply]

Nikolic: 'Look at you, what a fine fucking specimen of a human being. You're all tarred with the same brush. You can't even make fucking eye contact.'

5. You then left the immediate area and Mr Hadley moved and seated himself further down the corridor from the hearing room.

6. You returned shortly thereafter in company with another man, located and then approached Mr Hadley, and then commenced staring at him.

7. Shortly thereafter, Mr Hadley moved from where you had been staring at him, and you followed him as he walked to the outdoor plaza in front of the Tribunal building.
8. Your words alleged in paragraph 4 were stated in an offensive and/or abusive manner.
9. Your conduct alleged in paragraphs 3-4 and 6-7 was calculated to threaten and/or intimidate Mr Hadley.
10. Your conduct alleged in paragraphs 3-4 and 6-7 constituted an improper action or practice in connection with racing.

BACKGROUND

- 6 The Charges first came before the Board on 20 June 2013 when, in response to preliminary challenges raised by the Applicant, the Board decided to:
 - (a) reject the Applicant's assertion that the Board is precluded from hearing the Charges due to lack of jurisdiction; and
 - (b) refuse the Applicant's application to dismiss or permanently stay the hearing of the Charges on the basis of apprehended bias.
- 7 The Applicant applied to the Tribunal for review of the decision of the Board rejecting those challenges. On 3 September 2013, the Tribunal heard the application for review; and on 12 September 2013, the Tribunal made Orders with written reasons, dismissing the application.
- 8 On 17 October 2013, the Charges were again brought before the Board for hearing. The Applicant pleaded guilty to both Charges. The Board's decision was as follows:
 - Charge 1 – Mr Nikolic convicted and fined the sum of \$10,000.
 - Charge 2 – Mr Nikolic convicted and the Board orders that Mr Nikolic not be permitted to apply for a licence prior to 1 October 2015.In the meantime the Board makes an order that Mr Nikolic is warned off until midnight 30 September 2015.

NATURE AND CONTEXT OF CHARGES

- 9 On 7, 8, 28 and 29 November and 11 December 2012, His Honour Judge Macnamara, Vice President of the Tribunal, heard the matter of *Nikolic v Racing Victoria Limited*.¹ That proceeding involved a review of the Board's decision to uphold a two year disqualification placed on the Applicant for threatening Racing Victoria Chief Steward Terry Bailey at Seymour on 4 September 2011. Judge Macnamara affirmed the decision of the Board.²

¹ (Occupational and Business Regulation) [2012] VCAT 1954.

² Upon hearing submissions as to determinations on 11 December 2012, Judge Macnamara modified the penalty on Charge 1 so as to record a period of one year's disqualification followed by one year's suspension.

- 10 The Charges, which are now the subject of review, arose from incidents which occurred during the hearing of the above case on 8 and 29 November 2012.
- 11 On the second day of that hearing before this Tribunal on 8 November 2012, Mr Hadley gave evidence in relation to what he had witnessed at the Seymour Racecourse on 4 September 2011. Immediately after he left the witness box, as he walked past the Applicant to leave the hearing room, the Applicant said the words in the manner described within the particulars subjoined to Charge 1.
- 12 On 28 and 29 November, the Applicant gave evidence and was cross-examined before the Tribunal. On 29 November 2012, during a short recess in the cross-examination, Mr Hadley said he was approached by the Applicant whilst he was seated in the public area in a corridor in the Tribunal building, immediately outside the hearing room. Mr Hadley subsequently gave evidence that he was working on a Stewards' report when he heard the Applicant make a clicking sound with his mouth. Mr Hadley said he heard the same sound a second time and the Applicant winked at him as the Applicant walked out the door of the hearing room. The Applicant then turned left, heading away from the King Street frontage of the building. Mr Hadley continued working on the Stewards' report on his iPad. Mr Hadley then became aware of the Applicant sitting beside him, one seat up from him on his left side, that is, on the King Street side. Mr Hadley continued checking his report. The Applicant then said the words in the manner described within the particulars subjoined to Charge 2.
- 13 The Applicant then walked away toward King Street, that is, to the front of the Tribunal building.
- 14 Mr Hadley then moved and seated himself further down the corridor from the hearing room and then made some notes on his iPad concerning what the Applicant had said to him.³ Shortly thereafter the Applicant returned, in company with another man. They located and then approached Mr Hadley and commenced staring at him. Shortly thereafter Mr Hadley moved from where the Applicant had been staring at him and the Applicant followed him as he, Mr Hadley, walked to the outdoor plaza area.
- 15 Subsequently, on the afternoon of 29 November, Mr Hadley gave sworn evidence to the Tribunal in the terms now set out within the particulars to Charge 2 as well as what had been said on 8 November immediately after he had finished giving evidence. In giving evidence concerning what was said to him by the Applicant, Mr Hadley twice described the manner in which the Applicant spoke to him as threatening.
- 16 On 19 February 2013, Counsel for the Applicant made in his submissions to Judge Macnamara, the following statement:⁴

³ Tab 19, p 187 line 10, p 188 line 20; Tab 20 p 13, 15-16.

⁴ Stewards folder Tab 22 page 5, line 35.

Can I say to Your Honour that Mr Nikolic through me does regret and is contrite in relation to the exchange that occurred with Mr Hadley and he accepts that [he] should not have [sic].

JURISDICTION OF THE STEWARDS, THE BOARD AND THE TRIBUNAL

- 17 Thoroughbred racing in Victoria falls under the control of Racing Victoria [the Respondent], a company limited by guarantee, pursuant to the *Racing Act 1958* (the 'Racing Act').⁵
- 18 The object of Racing Victoria is to develop, encourage and manage the conduct of thoroughbred racing. It is vested with legal capacity to exercise any powers and perform any functions conferred by or under the Racing Act; and any rules relating to the proper management of thoroughbred racing in Victoria, made by the Australian Racing Board.⁶
- 19 Stewards are appointed in accordance with the rules of a controlling body, defined to mean, in the case of horse racing, Racing Victoria; and Rules of Racing means the rules, for the time being in force, of Racing Victoria.⁷
- 20 The Rules place the supervision and control of race meetings in the hands of Stewards. Furthermore, s 5F of the Racing Act provides that:
- (1) The Rules of Racing apply to and may be enforced against—
 - (a) a person who is the holder of a licence, registration, permit or other authority issued by Racing Victoria; or
 - (b) subject to subsection (2), a relevant person.
 - (2) In relation to a relevant person, the Rules of Racing must provide that, if there is to be an investigation or inquiry in relation to horse racing or wagering or both under the Rules of Racing in which the Rules of Racing may be applied to or enforced against a relevant person—
 - (a) the investigation or inquiry must be initiated by a Steward; and
 - (b) in conducting the investigation or inquiry, the Steward must have reasonable grounds to suspect the relevant person—
 - (i) may have contravened the Rules of Racing; or
 - (ii) may be involved in a contravention of the Rules of Racing; or
 - (iii) may have knowledge or possession of information as to a contravention of the Rules of Racing—
because of—
 - (iv) the person's attendance at a race-meeting of horse racing in Victoria; or

⁵ The Respondent is certified under s 3A of the Racing Act by the State's Racing Minister and the modification of its constitution is restricted and controlled by s 3B of the Racing Act.

⁶ Constituted in accordance with AR 208.

⁷ Section 5E.

- (v) the person's participation in an activity in connection with or involving horse racing in Victoria or wagering on horse racing in Victoria.

- 21 Accordingly, in conducting inquiries, by force of the Rules, the Stewards are afforded the somewhat unique authority to investigate and sanction any person whom they find in breach of the Rules, that is, the one Panel of Stewards effectively investigate, prosecute, make determinations and issue certain penalties. While this role is entrenched in the Rules and well understood in the industry, it is apt to create tensions, most notably manifest in the case of the Applicant.
- 22 The Board for thoroughbred racing, is established under the Rules of Racing Victoria and given statutory standing by the Racing Act.⁸
- 23 The Board is constituted under LR 6A and derives its jurisdiction to hear and determine appeals under LR 6B and hear and determine charges of a serious offence under LR 6C. The Board is authorised to impose penalties set out under AR 196.
- 24 Section 83 OH(1) of the Racing Act provides that a person whose interests are affected by a decision of the Board may apply to the Tribunal for review of that decision. The Tribunal then exercises all the decision-making powers conferred on the Board. The Tribunal is not confined to the material upon which the original decision was made and may receive evidence which was not before the original decision-maker.⁹ A decision of the Tribunal becomes a decision of the original decision-maker (the Board).

PRIOR OFFENDING

- 25 A Chronology of Relevant Prior Offences compiled by the Respondent recites a woeful record of misconduct by the Applicant dating back to November 1997, comprising in summary:
- (a) Breaches of AR 83(a) in relation to abusive or acceptable language and comments;¹⁰
 - (b) Failing to comply with a lawful direction of the Stewards or otherwise acting without requisite permission, in breach of AR 175(g); AR 175(p) or AR 91;¹¹ and
 - (c) Improper behaviour occasioned by abusive, insulting and/or threatening language, in breach of AR 175(j) or AR 175A.¹²

⁸ Section 3, Part IIIB establishes a common registrar for the Board [for thoroughbred racing], the Board for Harness Racing Victoria and Greyhound Racing Victoria.

⁹ Section 51 of the *Victorian Civil and Administrative Tribunal 1998; Davidson v Victorian Institute of Teaching* (2006) 25 VAR 186.

¹⁰ 16 November 1997, fined \$400; 16 November 1997, fined \$500; 31 May 2000, severely reprimanded; 23 December 2009, reprimanded; 10 July 2010, fined \$300; 29 September 2010, fined \$300 [relating to consumption of alcohol]; 12 March 2011, reprimanded; also 4 September 2010, without charge, reprimanded for abusive conduct.

¹¹ 23 February 2010, fined \$5000; 29 June 2010, fined \$1000; 30 October 2011, reminded of obligations; 28 April 2012, fined \$400.

- 26 The Chronology also attached transcripts of three Stewards' Inquiries conducted on 13 February 2010; 4 September 2010; and 4 November 2010. Mr Bailey, Chief Steward, was the Chairman in each case.
- 27 In the first transcript, the Applicant makes allegations against Mr Bailey, to the effect that he had spoken, inappropriately, to the Press about the Applicant. Mr Bailey consistently denied the allegation.
- 28 In the second transcript, the Stewards were enquiring into the Applicant's behaviour in the scales area and a verbal exchange with Steward Montgomery. Both the Applicant and Mr Montgomery were questioned by the Stewards.
- 29 In the third transcript, the Stewards were enquiring into the Applicant's vest, which did not comply with the Rules, and his resistance to the Stewards' indication that the vest was to be confiscated. Both Steward Wilson, who took possession of the vest, and the Applicant were questioned.
- 30 In each of the above circumstances, the subject of grievance by the Applicant or enquiry by the Stewards, was of short compass and should have been disposed of very quickly. Instead, the interview with the Applicant rapidly degenerated into frequent interruptions and verbal abuse by the Applicant. Whatever the merits of his explanations, he conveyed an apparently abiding distrust and contempt for the Stewards and paranoia as to their ulterior motives in pursuing him at all. As a result, the Applicant said things in each Inquiry which made his position far worse and ultimately led to the sanctions of fines, a severe reprimand and suspension.
- 31 The Applicant had further altercations with the Stewards,¹³ resulting in a fine and reprimand. There then followed the fateful race at Seymour on 4 September 2012. This race had been preceded by intense publicity surrounding earlier race fixing allegations and the recent murder of the Applicant's trainer father-in-law.
- 32 Although not directly relevant to the Charges before the Tribunal, it is appropriate to recite the circumstances at the Seymour race meeting which gave rise to charges against the Applicant, which were ultimately heard on review by His Honour Vice President Judge Macnamara. The purpose of doing so is to illustrate a continuing pattern of belligerent behaviour by the Applicant toward Stewards, which in turn set the scene for the further offending behaviour (now the subject of the current Charges) which was committed during the period when the Seymour charges were before the Tribunal.
- 33 On 4 September 2012, the Chair of the Stewards' Panel and Mr Bailey were stationed in the main Stewards' tower, which is adjacent to the mounting yard. According to Mr Bailey, as he walked through the mounting yard

¹² 29 June 2010; 4 November 2010; and 4 September 2012.

¹³ Inquiries conducted on 12 March 2011; 30 October 2011; and 28 April 2012.

toward the tower in preparation for the running of Race 5, he saw the Applicant on his horse, being led towards the barrier. The Applicant looked at Mr Bailey, and stated in a firm tone: *'keep your eyes on the road, Terry'*. According to the Applicant, his remark was a joke and a reference to a well known television commercial for motor insurer AAMI which includes the line *'keep your eyes on the road, Rhonda'*.

- 34 Mr Bailey said that he made a notation of the Applicant's comment on his race book and in a subsequent written statement Mr Bailey said:

my first thoughts after hearing Mr Nikolic's comment was that 'I had better be careful driving home tonight'.

- 35 Following the running of Race 5 and the completion of the various post-race functions and formalities for the Stewards, Mr Bailey convened a Stewards' Inquiry in connection with the remark that the Applicant had made to him. Mr Bailey presided and took the lead. In his Reasons, Macnamara J described the Stewards' Inquiry of 4 September as follows:¹⁴

Mr Bailey put it to Mr Nikolic that the statement 'suggests some sort of threat'. Mr Nikolic's response was 'no, not at all, Terry, why, do you feel threatened?' Mr Bailey said 'I don't feel threatened at all but ...'. Mr Nikolic said 'well, why have you got me in here? Why have you got Bobby [that is Mr R.] in just then?...

Mr Bailey directed Mr Nikolic to take his feet off the table. Apparently, Mr Nikolic had placed his feet on the table at this stage. Eventually, Mr Nikolic said *'I can't elaborate any more. If you feel intimidated by that, you ... there must be something wrong.'* Mr Bailey then adjourned the hearing. Mr Nikolic was clearly annoyed that the matter had not been concluded. Mr Nikolic then turned to Mr Hadley, enquiring *'who are you sir'*. Mr Hadley identified himself. Mr Nikolic then asked *'what's your position'*. Mr Hadley explained that he was the Chairman of Stewards of Tasmania. Mr Nikolic explained that he wasn't familiar with Mr Hadley's face. Mr Hadley commented *'you've ridden in my State'*. Mr Bailey then repeated *'the matter is adjourned'*. Mr Nikolic replied *'yep. There's a lot of things adjourned, Mr Bailey.'*...

[Shortly thereafter, when the Applicant remained in the vicinity of Mr Bailey]... Mr Bailey said that he received *'a barrage of abusive language'*. Mr Nikolic, he said, called him a *'cunt'* about 10 times. Mr Bailey said he didn't hear all that was said in detail but he did hear the statement *'we've all got families cunt and we know where yours live cunt'*. Mr Bailey said that he felt threatened and rattled. Once again he said that he wrote down what Mr Nikolic had said to him in his race book. Mr Bailey said that he felt *'rattled'*.

- 36 Thereafter there was a further altercation between the Steward Bailey and the Applicant when the Applicant is alleged to have refused to follow a

¹⁴ At paras 25–32.

direction and was then 'stood down' and another jockey took his place in the next race.

37 The charges laid as a result of the Applicant's behaviour on 4 September 2012 were as follows:

38 Charge 1: Breaching the Australian Rules of Racing AR 175(a), which provides:

Any person, who in [the stewards] opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action in connection with racing, may be penalised.

Particulars:

1. You are, and were at all relevant times, a jockey licensed by RVL.
2. On 4 September 2012, at a race meeting held at Seymour Racecourse, shortly before the running of Race 6, you approached the Chairman of RVL Stewards, Mr Terry Bailey, and directed abusive language towards him, which included describing him on multiple occasions as a 'cunt', and words to the following effect:

'We've all got families, cunt. And we know where yours lives, cunt.'
3. The above words were threatening to the safety of Mr Bailey and his family.
4. Your conduct alleged in paragraphs 2 to 3 constituted an improper action or practice in connection with racing.

39 Charge 2:

The Stewards charge you with breaching AR 175A which reads as follows:

Any person bound by these Rules who either within a racecourse or elsewhere in the opinion of the Committee of any Club or the Stewards has been guilty of conduct prejudicial to the image, or interests or welfare of racing may be penalised [amended 1/09/09].

Particulars

1. You are, and were at all relevant times, a jockey licensed by RVL.
2. On 4 September 2012, at a race meeting held at Seymour Racecourse, shortly before the running of Race 6, you approached the Chairman of RVL Stewards, Mr Terry Bailey, and directed abusive language towards him, which included describing him on multiple occasions as a 'cunt', and words to the following effect:

'We've all got families, cunt. And we know where yours lives, cunt.'

3. The above words were threatening to the safety of Mr Bailey and his family.
 4. Your conduct alleged in paragraphs 2 to 3 was and is prejudicial to the image and/or interests and/or welfare of racing.
- 40 The Board heard the charges on 21 September 2012. The Applicant contested both charges but was ultimately found guilty; and on 2 October 2012, he was sentenced to a two-year disqualification on both the charges to be served concurrently and back dated to 4 September 2012, as the date on which he was initially '*stood down*'.
- 41 Upon rehearing, Vice President Macnamara J, found, in relation to Charge 1 that:¹⁵

In the circumstances in which these words were said, I think Mr Bailey had every good reason to regard them as sinister and potentially as a threat. Because of the hostility between the men, they cannot have been some sort of joke. They are by their nature a warning and one may say a warning of what? The evidence shows that at least one homicide had been linked to the controversy swirling around Victorian racing generally and Mr Nikolic in particular. A taskforce of Victoria Police, renowned as the one that cracked a cycle of underworld tit for tat killings, had been tasked to investigate. The victim of the homicide was Mr Nikolic's former father-in-law. What in another context might have been seen to be mildly impertinent or simply confusing and perplexing, took on, quite reasonably for someone in Mr Bailey's position, the aspect of a serious threat.

... I believe Mr Bailey's account of this incident was more credible than the one given by Mr Nikolic that it was merely a harmless quip.

... Once one viewed Mr Nikolic's remark as a threat and not as a joke, it constituted a threat to the authority of the stewards. That authority could not but be impaired if a senior jockey could, without apparent immediate provocation, issue a veiled threat to the Chairman of Stewards with impunity.

Mr Bailey was in a difficult position. The seriousness of what might in another context have been a mere quip, derived from its being a threat. On the other hand, were Mr Bailey to give the appearance of having been intimidated, the exercise (the Stewards' Inquiry) intended as a re-assertion of stewards' authority would fail. In his approach to the Stewards' Inquiry, Mr Nikolic consciously or unconsciously played on Mr Bailey's dilemma. He repeatedly asked him '*do you feel intimidated, do you?*'. He engaged in acts of '*rebellion*' such as putting his feet on the stewards' table.

- 42 His Honour upheld the Board's finding of guilt but varied the sentence to a 12 month disqualification followed by 12 months suspension.
- 43 The Seymour charges are another example of a discrete transgression, being the covertly threatening comment directed at Mr Bailey while being led to

¹⁵ At paras 95, 97, 99, 100.

the barrier, escalating out of all proportion during and surrounding the Stewards' Inquiry on the same day. It is unfortunate that Mr Bailey, the object of the initial offending comment, took the lead in the Inquiry. Indeed, one can only speculate as to the likely different outcome if the Applicant had a legal representative or other spokesperson on his behalf at the Inquiry and Mr Bailey stood aside so that he and the Applicant could have been questioned by other members of the Panel. Given the Applicant's known petulant nature it was inevitable that he would handle the Inquiry badly. This is no excuse for his behaviour, which was deeply offensive and disrespectful. However, the Applicant's breaches of the Rules on the earlier occasions described above flowed to a greater extent from verbal exchanges within and following the Stewards' Inquiries themselves, rather than the behaviour of the Applicant at a race meeting. Accordingly, the occurrence of much of the Applicant's recent prior appalling behaviour in the face of a Stewards' Panel, must be seen in the context of a jockey who appears increasingly unable to control his reactions, particularly when he perceives that he is being harshly treated or unfairly singled out, relative to other jockeys. Again, this in no way seeks to diminish or excuse the Applicant's seriously inappropriate behaviour. However, I accept his Counsel's characterisation to the effect that the misbehaviour at the Stewards' Inquiry on 4 September 2012 and during the Tribunal hearing in November 2012, reflects a continuum of the same grievance harboured by the Applicant.

FACTORS RELEVANT TO SENTENCING

- 44 There is no question, as submitted by Respondent's Counsel, that the position and authority of the Stewards, in the horse racing industry, is critical to ensuring that all participants conduct themselves in an orderly and proper manner, in accordance with the Rules of racing. Their roles embody two primary objectives: first, to ensure that the industry is free of any misconduct; and secondly, to ensure that members of the public are sufficiently confident that the industry is free from misconduct and will therefore want to participate in the industry.
- 45 It is paramount that the authority and integrity of the Stewards not be eroded or undermined. To this end, it is imperative that there not be a public perception that the Stewards:
- (a) cannot or do not perform their functions; or
 - (b) that they are not impartial in performing their functions; or
 - (c) that they have been compromised in performing their functions.
- 46 While there may be a degree of leniency shown in the robust exchange between jockeys on the field, the Stewards, in the proper exercise of their powers and functions, are entitled to be afforded courtesy and respect and, in particular, not be subject to verbal attacks, abuse, intimidation or covert threats.

- 47 The conduct, the subject of both Charge 1 and Charge 2, is the culmination of a sequence of behaviour in face of the Stewards' Panels which evidences a preparedness and indeed propensity on the Applicant's part to:
- (a) Respond to proper enquiries by a Steward with further questions;
 - (b) Deal with the Stewards' Panel in an argumentative and confrontational manner; and
 - (c) Utter personal abuse and use covertly threatening language toward the Stewards.
- 48 All of the above behaviour is intolerable and clearly holds up the authority of the Stewards to ridicule and contempt. It is this kind of behaviour which was the subject of charges before the Tribunal in November 2012 and which resulted in the sanctions determined by Macnamara J. As previously indicated, the conduct giving rise to these earlier charges merely provides relevant background and context to the current charges.
- 49 Mr Hadley gave evidence before the Tribunal with respect to the charges arising from the Applicant's conduct committed on 4 September 2012, involving threatening words and conduct directed at the Chief Steward, Mr Bailey. In that context, I accept that Mr Hadley is more likely to have understood the comments made to him, on both 8 and 29 November, as intimidating and threatening and hence more upsetting to him. I accept that the initial comments... 'you're a disgrace'...made to Mr Hadley at the conclusion of his evidence, could only have been intended to intimidate and reflect adversely upon Mr Hadley's honesty and integrity. The further comments and conduct of the Applicant on 29 November falls into an even graver category by reason that:
- (a) They occurred after the Applicant became aware that Mr Hadley had reported the first incident;
 - (b) The Applicant gave the appearance of seeking out Mr Hadley, to the point of stalking him;
 - (c) By engaging in similar defiant and insulting behaviour toward a Steward who was merely performing his duties, the Applicant demonstrated, at that stage, no insight or remorse for his earlier behaviour toward Mr Bailey; and
 - (d) The comments, within the confines of the Tribunal and during the period of a hearing involving charges against the Applicant, manifested a defiant and contemptuous attitude not only toward the duties of a Steward but also toward the proper process and procedures being conducted at the Tribunal, which was affording the Applicant his right and entitlement to a rehearing.
- 50 In view of the above circumstances and the nature and history of the Applicant's prior offending, the sentencing principle of specific deterrence assumes particular significance. In view of the importance of protecting the

integrity of the horse racing industry and its reliance upon the proper exercise by Stewards of their investigative and adjudicate functions, general deterrence and denunciation of the Applicant's conduct are also important objectives in imposing an appropriate sanction.

Circumstances in Mitigation

- 51 Applicant's Counsel sought to place the offending conduct in the context of a somewhat rugged and confronting industry where, on the race track at least, jockeys typically speak to each other in a manner which might offend normal sensibilities. While this may well be the case, the Applicant was not charged with abusing fellow jockeys. Indeed, I am not aware of any complaint having ever been made about verbal interactions per se during the course of a horse race, which did not otherwise involve reckless or inappropriate behaviour by a jockey in handling a horse during the race.
- 52 I accept Counsel's characterisation to the effect that the horse racing industry is a very tough industry and not for the fainthearted. However, all jockeys are subject to the same rules and standards of behaviour. While some personalities have less difficulty in controlling their emotions and reactions appropriately, than others, there is not a more lenient set of rules which apply to jockeys merely because they have a naturally volatile nature. Equally, it is no answer that the Applicant is inclined to speak to Stewards in the same manner in which he might speak to another jockey. Stewards perform a particular role which require them to enforce the Rules of racing in a fair, consistent and unbiased manner. Other racing participants must not behave in a manner which does or may appear to be directed at influencing the proper performance of the Stewards' duties or reflect upon such performance in a manner designed to disparage, discredit, humiliate or undermine such performance. The 'rugged and confronting' banter which may take place between jockeys is seriously inappropriate when applied to a Steward, whilst performing his official duties.
- 53 The Applicant is currently 39 years of age and has been riding for 23 years, constituting his entire adult career. He is a Group 1 winning jockey and, as such, has achieved some public profile.
- 54 The Applicant is now some 15 kg heavier than his ideal racing weight. Accordingly, he does not hold any realistic ambition to resume his racing career. However, he does intend to relocate to Queensland and perform track work for his brother, who is a licensed trainer.
- 55 The Applicant is now divorced from his wife who has relocated to Sydney with their six old daughter. Counsel submitted that the Applicant was proud to have afforded his family a generous settlement but he is distressed by the separation from his daughter.
- 56 In mitigation, the Applicant's Counsel submitted that:
- (a) The Applicant pleaded guilty to both Charges before the Board. He also, through his Counsel, apologised to the Tribunal in the hearing

before His Honour Judge Macnamara. I accept that both of these factors weigh significantly in the Applicant's favour;

- (b) The remark which gave rise to Charge 1, namely: 'you're a disgrace' has been accepted as having been made in a whisper or low voice with the Applicant's hand over his mouth. By doing so, the Applicant was not intending to broadcast his comment to any member of the public. Even accepting this description, the remark constitutes a serious insult to Mr Hadley, which reflects upon his honesty and integrity and his capacity to perform his duties, without fear or favour;
- (c) The remarks which gave rise to Charge 2, were said after Mr Hadley had given his evidence and accordingly could not properly be characterised as threatening or intimidating. For the reasons stated above, I reject this submission;
- (d) The Charges do not warrant a sanction as severe as that imposed following the five-day contested hearing before Macnamara J. In this case, once legal challenges were determined, the Applicant pleaded guilty at the earliest opportunity. I accept this submission;
- (e) The Applicant has been deprived of his capacity to earn an income for the past year where he has no particular skills or training for any other occupation. I accept that this is a relevant factor to take into account in the totality of sentencing since 4 September 2012; and
- (f) The financial penalty imposed by the Board for Charge 1 is particularly severe and not consistent with financial penalties imposed for comparable offences. As indicated during the hearing, I agree with this submission and consider that the appropriate sanction should be directed at limiting the Applicant's right to operate as a licensed jockey.

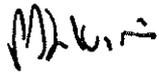
CONCLUSION

57 The sanctions imposed by Macnamara J contemplated that the Applicant would remain disqualified for 12 months and then be eligible to be subject to a suspended licence, which would have given him the ability to seek approval to perform track work only. In the event, the Applicant has not applied for another licence and so has remained disqualified since 4 September 2012. I propose to effectively extend the sanctions contemplated by Macnamara J by a further 12 months. Accordingly, I propose that the Applicant will remain disqualified until 30 September 2014, and thereafter any jockey's licence granted to him shall include a condition that he not be permitted to ride in races up to 30 September 2015, thus limiting him to track work only.

58 I make this determination having particular regard to:

- (a) The Applicant's plea of guilty before the Board and the Tribunal;

- (b) The importance of specific deterrence, in light of the Applicant's history of defiant, abusive and insulting conduct toward Stewards;
 - (c) The importance of general deterrence and denunciation of conduct, in protecting the position and authority of Stewards and their critical role in enforcing the Rules of racing;
 - (d) The circumstances of the subject offending, constituting a continuum of behaviour referable to the incidents on 4 September 2012; and
 - (e) The effect of the totality of sanctions since 4 September 2012.
- 59 The Decision of the Board has been set aside and Orders made to the above effect.



Judge Jenkins
Vice President