RACING APPEALS AND DISCIPLINARY BOARD

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HEARING RESULT

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FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 13 February 2013

SUBJECT: **HEARING RESULT – TRAINER: ROBERT SMERDON**

Panel Mr Brian Forrest (Deputy Chair), Mr Darren McGee, Mr Jeremy Rosenthal.

Appearances Mr David Grace QC, instructed by Mr Peter Jurkovsky, appeared as Counsel for Mr Smerdon.

Dr Cliff Pannam instructed by Racing Victoria's James Ogilvy appeared on behalf of the Stewards.

Charge Breach of AR 175A

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.*

The charge relates to Mr Smerdon providing jockey Damien Oliver approximately $11,000 in cash on behalf of Mr Mark Hunter - the payment being for the settlement of a bet placed by Mr Oliver, via Mr Hunter, on the rival horse *Miss Octopussy* to win Race 6 at Moonee Valley on 1 October 2010.

Plea Not guilty.

Decision The Board finds the charge proved.

Mr Smerdon fined the amount of $10,000 - fine due on or before 31 March 2013.

Application to VCAT for a review of the decision dismissed and the RAD Board's decision and penalty affirmed.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

Victoria **13 February 2013**

RACING APPEALS AND DISCIPLINARY BOARD
(Original Jurisdiction)

Reasons for Decision

in the matter of trainer Mr Robert Smerdon

as heard on Thursday, 7 February 2013

Mr B. Forrest	Deputy Chair
Mr J. Rosenthal	Member
Mr D. McGee	Member

Appearances:

Dr C. Pannam QC & Mr D. Poulton for the Stewards
Mr D. Grace QC & Mr P. Jurkovsky for Mr Smerdon

Racing Victoria Stewards have charged licensed trainer Mr Robert Smerdon with a breach of AR 175A which reads:

> *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.*

Mr Smerdon has pleaded not guilty to the charge.

Background

A Stewards investigation into the conduct of jockey Damien Oliver, following media reports and a report from the Racing Integrity Commissioner in August/September 2012 revealed that Oliver had a $10,000 bet on credit to win on *Miss Octopussy* at the Moonee Valley night races on 1 October 2010. That night Oliver telephoned Mr Mark Hunter, a form analyst, from the jockey's room of Moonee Valley to place the bet for him. Hunter then rang Mr Laurie Bricknell, a retired bookmaker in Queensland, and arranged for him to make the bet. Bricknell made the bet through several corporate bookmakers. *Miss Octopussy* was the race favourite. She led throughout and won comfortably. Oliver rode the second favourite in the race, *Europa Point,* which finished second. The official win starting price of *Miss Octopussy* was $2.30 and *Europa Point* $3.80.

In early October 2010, Bricknell paid two cheques totalling $10,500, the proceeds of the bet placed by Hunter on behalf of Oliver, into Hunter's bank account. Hunter then in turn gave about $11,000 cash to Mr Smerdon to give to Oliver.

In a prepared statement Oliver gave Stewards on 12 November 2012, he admitted the bet and later receiving approximately $11,000 from Smerdon. Stewards charged Oliver with betting contrary to AR 83(c) (Charge 1) and using a mobile phone in the jockeys room without Stewards permission contrary to AR 160B(3) (Charge 2). Oliver pleaded guilty to both charges.

On 20 November 2012, Stewards disqualified Oliver on Charge 1 for eight months followed by two months suspension to ride in races and on Charge 2, a suspension of one month, to be served concurrently with the penalty under Charge 1.

Evidence

On 25 October 2012, Mr Hunter accompanied by his legal advisor was interviewed by Stewards. According to his evidence Hunter during 2010 provided speed maps and form analysis to a number of jockeys including Oliver and some trainers. Hunter informed the Stewards that he is also a punter and estimated his betting turnover as being around $1.5 million per year. Hunter is also a racehorse owner and operates a publicly advertised telephone tipping service on Victorian racing.

He told Stewards of the Oliver phone call, then telephoning Bricknell to put $10,000 on *Miss Octopussy* for him. The bet was on credit. He was aware jockeys are prohibited from betting and did not tell Bricknell the bet was for Oliver. Asked how he paid Oliver, "my memory is that I gave the money to Robert Smerdon to pass on" and why he gave the money to Smerdon "I'm in constant contact with him, friends with him and I don't know why Mr Smerdon. I couldn't give you a concrete reason why Mr Smerdon." In further evidence Hunter said Smerdon did not ask him what the money was for and he did not tell him. The bet for Oliver was a one-off he said.

On 1 November 2012 Stewards interviewed Mr Smerdon. As he recalled, Hunter called him asking if he could get some money to Oliver for him. Smerdon was unsure how Hunter gave the money to him - he could not recall how he actually got it. He did not know how much he was given but acknowledged it was a wad of notes. He did not ask Hunter what the money was for because "I didn't feel the need" Mr Smerdon said.

Some days later, after track work one morning, Smerdon requested Oliver come to his house where he gave him the money. This was, he said, the only occasion he passed money on to Oliver.

In oral evidence before the Board, Mr Smerdon said he did not know Hunter was a substantial gambler or that he placed bets for others. He was aware Hunter had a bet but no

knowledge of the scale of his bets. Hunter never told him the size of his bets on any horse including his own. He had no idea whether Hunter bet in hundreds or thousands.

Mr Smerdon said that over a twenty year period, Hunter has had only about five bets for him each of $200 or $300 probably at race meetings when he had no other avenue to place the bet himself.

In further evidence Mr Smerdon said he had no reason to suspect the money he gave Oliver was for a bet. He did not ask Hunter or Oliver what it was for, it was their personal business he said.

Consideration

Fundamental to the best interests of racing is that the wagering public and racing enthusiasts in general maintain confidence that licensed persons adhere to the Rules of Racing.

The public revelation of a jockey betting on a rival horse in the same race as his mount sends a disheartening message to any fair minded and informed member of the public about the integrity of racing because of the irreconcilable conflict between a jockey's responsibility to the connections of his mount and to persons wagering on the race, on the one hand, and to his own financial interests, on the other. The Rule prohibiting jockeys betting recognises the conflict.

A good deal of the Stewards evidence is circumstantial. In summary, the particulars of the Stewards case against Mr Smerdon is that his conduct was, and is, prejudicial to the image or interests or welfare of racing by facilitating or participating in illegitimate betting by jockeys. That although aware Mr Hunter is a substantial punter who places bets on behalf of others, Mr Smerdon did not ask or take any steps to inquire the reason for the payment to Mr Oliver in circumstances where he should reasonably have suspected the payment may relate to betting in breach of the Rules.

Briefly stated, it was Mr Smerdon's defence that his conduct was that of an innocent party, responding to a request of a friend, with no knowledge or suspicion as to the reason for the payment nor of Hunter's punting activities generally.

When interviewed by Stewards both Smerdon and Hunter were clear in certain recollections. The payment was a one-off and that Smerdon did not ask and Hunter did not inform him of the purpose of the payment. Both were vague in their recall how Hunter passed on the money to Smerdon which appeared odd in view of their certainty on other matters, particularly, that it was a one-off event, the sum of money involved – which is ascertainable at least in approximate terms by the size of the bundle - and given Smerdon's admission in

evidence given to the Stewards and the Board that he is not in the habit of holding or walking around with $10,000 in cash.

A related question as to whether Mr Smerdon ought to have suspected the purpose of the payment concerns Mr Smerdon's knowledge, or lack thereof, of Hunter's betting activities.

An initial observation of the Board in considering this question is that any doubt that Hunter was other than a substantial gambler on horse racing and places bets for others is dispelled by the immediacy with which he was able to arrange a credit bet of $10,000, ostensibly on his own behalf so far as Bricknell was concerned. Presumably Oliver for whom Hunter provided form services was aware of Hunter's betting capacity whereas Mr Smerdon, on his own evidence was totally unaware, other than to acknowledge Hunter has a bet.

What is known and acknowledged is that Hunter is a long time client of the Smerdon stable and has had an interest in many Smerdon trained horses. Hunter provides form analysis for Smerdon. They are also good friends, socialise together and enjoy each others home hospitality. In Mr Smerdon's words "I talk to him a lot" and Hunter, "I'm in constant contact [with Smerdon]," all of which suggests an obviously close bond.

The Board believes that during the period of their business and personal relationship, Mr Smerdon would have acquired an awareness that Hunter is a substantial punter and placed bets for others. Ordinary human experience of friends sharing a commonality of interest in and deep involvement with horse racing over a long period would not suggest otherwise.

In the opinion of the Board the true position is not as Mr Smerdon would have the Board believe but is more likely than not, that he knew Hunter was involved in gambling on racehorses to a significant extent.

Mr Smerdon also claimed he had no reason to suspect the money was the proceeds of a bet. In evidence before the Board he said that at the time it crossed his mind that the money may have been for a loan from Hunter to Oliver. Smerdon did not raise this theory in his evidence to the Stewards. Apparently, the thought did not enter his head that it may have been for a bet although the Board notes that when asked by Stewards, did he suspect [jockeys betting] goes on, he answered "I'd say so, yeah, yeah."

The Board rejects the loan theory as implausible.

In the opinion of the Board the facts and circumstances, in particular of the Smerdon/Hunter twenty year old association as described above provides compelling grounds from which to infer as a matter of probability that Mr Smerdon was unlikely to be oblivious to the reason for the payment to Oliver.

In evaluating the evidence, Mr Smerdon's assertion that he had no need to be told the purpose of the payment is open to differing interpretations. One, that regardless of what he may or may not have thought the payment represented, it was none of his business to inquire of either Hunter or Oliver, he was simply being respectful of their privacy. The other, that because of his suspicions as to the purpose of the payment it was unnecessary to be told.

The position the Board accepts as the more likely is not arrived at as a matter of conjecture but from a considered assessment of all of the evidence. The Board has reached the conclusion to the required degree of satisfaction that the weight of the whole of the facts and circumstances support an inference that Mr Smerdon ought reasonably to have suspected that the payment related to betting activity on behalf of Oliver.

The claims of Mr Smerdon that he had no reason to suspect that the purpose of the payment to Oliver was the proceeds of an improper bet, are not accepted by the Board.

It is common ground that Mr Smerdon took no step to determine the reason or purpose for the payment from Hunter to Oliver. Accordingly, and having regard to the above matters, the Board is satisfied that in making the payment to Oliver, Smerdon facilitated illegitimate betting by a jockey or demonstrated a preparedness to participate in or facilitate a transaction which could reasonably be suspected to relate to a breach of the Rules of Racing involving illegitimate betting by a jockey. Smerdon's lack of prior knowledge, involvement in the placing of the bet or the planning for the repatriation of the proceeds of the bet if successful is not relevant to this analysis, only to mitigation.

The final question for the Board's determination is whether for the purpose of AR175A Mr Smerdon's actions were prejudicial to the image or interests or welfare of racing.

Adopting the principles endorsed by Young CJ in the Supreme Court of New South Wales in *Waterhouse –v- Racing Appeals Tribunal* [2002] NSWSC 1143, in order for the Board to find that Mr Smerdon's actions were prejudicial to the image or interests or welfare of racing, the Board must be satisfied of three elements:

1. There must be an element of public knowledge of Mr Smerdon's conduct and its broader context.
2. There must be a tendency in Mr Smerdon's conduct to prejudice racing generally as distinct from his own reputation.
3. Mr Smerdon's conduct must be capable of being labelled as blameworthy.

As to the first limb of the test, the public exposure of the Oliver bet has attracted widespread media coverage, doubtless a reflection of his high profile in the industry. As a consequence of the conduct of the participants becoming publicly known there is the real prospect of creating in the minds of the public a negative impression of the integrity of racing.

As to the second limb, Mr Smerdon is in the top bracket of horse trainers in Victoria with an industry profile commensurate with that status. Because of his name and reputation in racing circles, once his involvement became known, the Oliver bet continued to attract media coverage for an episode which it is fair to say has been a poor advertisement for racing and detrimental to its interests.

In saying that the Board has kept in mind that Mr Smerdon's role in all of this was a comparatively minor one, acting as an emissary for Oliver and Hunter in facilitating the completion of the bet. However, in doing so he was a participant in what became a very public revelation of misconduct instigated by Oliver and assisted by others in breach of the Rules of Racing and as such is blameworthy to the requisite standard under the third limb of the test in *Waterhouse*.

For these reasons the Board finds the charge has been proved.

TRANSCRIPT OF

PROCEEDINGS

RACING APPEALS AND DISCIPLINARY BOARD

MR B. FORREST, Deputy Chairman
MR J. ROSENTHAL
MR D. McGEE

EXTRACT OF PROCEEDINGS

DECISION: PENALTY

TRAINER: ROBERT SMERDON

MELBOURNE

WEDNESDAY, 13 FEBRUARY 2013

MR D. POULTON appeared on behalf of the RVL Stewards

MR D. GRACE QC with MR P. JURKOVSKY appeared on behalf of Mr R. Smerdon

DEPUTY CHAIRMAN:

The Board has considered the submissions of Mr Poulton and Mr Grace on penalty. In view of all the matters raised on behalf of Mr Smerdon, including the testimonials, his standing in and contribution to the industry, as well as the fact of no relevant infractions, the decision of the Board is to impose a fine of $10,000, payable on or before 31 March 2013.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

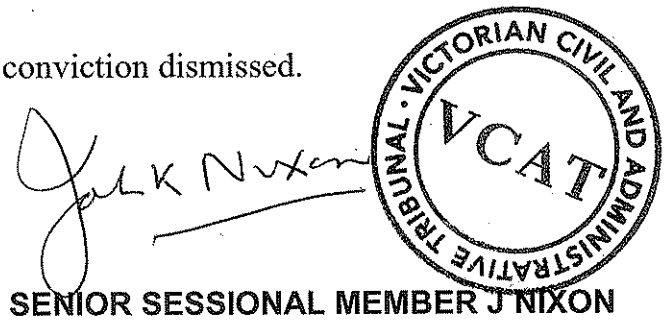
ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST VCAT REFERENCE NO.82/2013

APPLICANT:	Robert Smerdon
RESPONDENT:	Racing Appeals and Disciplinary Board
WHERE HELD:	Melbourne
BEFORE:	His Honour Senior Sessional Member J Nixon
HEARING TYPE:	Hearing
DATE OF HEARING:	13 May 2013
DATE OF ORDER:	6 June 2013

ORDER

Application re conviction dismissed.



HIS HONOUR SENIOR SESSIONAL MEMBER J NIXON

APPEARANCES:

For Applicant	Mr P Wheelahan
For Respondents	Dr C L Pannam QC

REASONS

1 On 24 January 2013, Racing Victoria Limited stewards charged Mr Robert Smerdon, a licensed trainer, with a breach of A.R.175(A). The rule states:

> 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.

Particulars, which were later amended, were provided by the stewards.

2 Mr Smerdon pleaded 'not guilty' to the charge. Following a hearing before the Racing and Disciplinary Board, the charge was found proven and a fine of $10,000 imposed.

3 On 12 March 2013, Mr Smerdon sought to review the decision of the Racing and Disciplinary Board on the basis that the decision was flawed and should be rescinded.

4 The Tribunal's functions in reviewing a decision of the Board are not appellate. On review, the Tribunal stands in the shoes of the original decision-maker and must determine the correct decision on the material before it. The review is conducted without any presumption as to the correctness or otherwise of the decision subject to review. The Tribunal is not confined to material upon which the original decision was made and may receive evidence or material which was not before the original decision-maker.

5 The Racing Victoria Limited stewards bear the onus of satisfying the Tribunal that the charge has been proved. The standard of proof is that enunciated in *Briginshaw v Briginshaw* 60 CLR 336. It is sufficient that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. Applying the *Briginshaw* standard I must be comfortably satisfied that the charge has been proved to the requisite standard.

6 By way of background, an investigation by Racing Victoria Limited stewards revealed that a leading jockey, Damien Oliver, had placed a $10,000 bet on credit to win on Miss Octopussy at the Moonee Valley night races on 1 October 2010. That night Mr Oliver telephoned Mr Mark Hunter, a form analyst and a man well versed in the racing industry for many years, from the jockey's room at Mooney Valley to place the bet on his behalf. Mr Hunter then said that he telephoned Mr Laurie Bricknell, a retired bookmaker, in Queensland and arranged the bet with him. Miss Octopussy, the race favourite, won the race comfortably. Mr Oliver rode Europa Point, the second favourite in the race and that horse ran second. The official starting price for a win on Miss Octopussy was $2.30. Mr Bricknell paid $5,625 into Mr Hunter's bank account on 5 October 2010 and paid a further $4,875 into Mr Hunter's account on 10 October 2010 – a

total of $10,500. Mr Hunter then gave about $11,000 in cash to Mr Smerdon for Mr Smerdon to hand on to Mr Oliver. In a prepared statement which Mr Oliver gave the stewards on 12 November 2012, he admitted placing the bet with Mr Hunter and later receiving approximately $11,000 from Mr Smerdon. So far as relevant, Mr Oliver was charged with breaching A.R. 83(c) which states:

> Every jockey or apprentice may be penalised –
>
> ...
>
> (c) if he bet, or facilitates the making of, or has any interest in a bet on any race or contingency relating to thoroughbred racing; or if he be present in the betting ring during any race meeting.

Mr Oliver pleaded guilty to that charge and on 20 November he was disqualified by the stewards on that charge for a period of 8 months followed by a 2 months suspension to ride in races.

7 An issue which arose for the first time in the course of this review related to the source of the cash which Mr Smerdon admitted that he had handed over to Mr Oliver. Mr Wheelahan submitted, inter alia, that the stewards had not proved to the required standard that the cash was the proceeds of a winning bet placed by Mr Hunter on behalf of Mr Oliver. There was, he submitted, a gap in the evidence. Mr Bricknell was extremely vague during a telephone interview with Mr Hitchcock, a steward, and equally vague in a police statement in which he said: 'I don't remember getting a telephone call from Mark about putting a $10,000 bet on for him' and 'I can't recall at all about any bets Mark placed with me for $10,000'. Yet Mr Bricknell paid two cheques into Mr Hunter's bank account within days of the race. Those cheques totalled $10,500. Mr Bricknell wrote a letter, dated 10 May 2013, in which he stated that he thought it was highly unlikely that these two cheques could be for one transaction as his usual practice was to write one cheque for the total amount of monies owed to someone. He added 'As previously stated, I do not recall 1 October 2010 and I do not believe the cheques I wrote we're [sic] for one bet on Miss Octopussy'. There is evidence from Mr Oliver that he placed a $10,000 bet on Miss Octopussy with Mr Hunter who in turn placed the $10,000 bet on that horse with Mr Bricknell. Settlement was made by the two cheques from Mr Bricknell totalling $10,500 being paid into Mr Hunter's account within 10 days of the running of the race. Having considered all the evidence, I am satisfied to the required standard, that the bet was made, the bet was settled after the horse won and the cash handed over by Mr Hunter to Mr Smerdon to pass on to Mr Oliver. I am satisfied that the cash was the proceeds of the winning bet which Mr Hunter placed on Mr Oliver's behalf. I do not accept Mr Bricknell's evidence on this issue.

8 I accept Dr Pannam's submission that for the stewards to prove a breach of A.R. 175(a), these elements must be proved to the requisite standard:

(a) the relevant 'conduct' must be identified;

(b) it must be objectively demonstrated that the 'conduct' so identified is prejudicial to the:

(i) image; or

(ii) interests; or

(iii) welfare of racing; and

(c) the 'conduct' had the potential to and did become public.

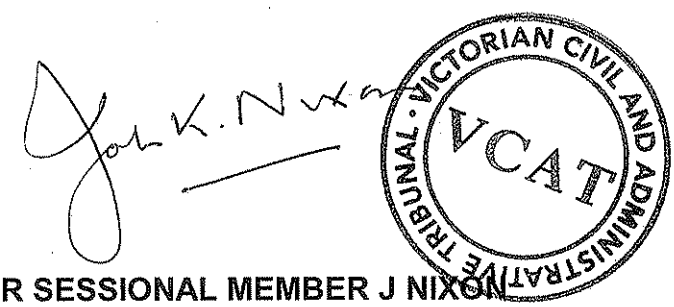
9 The conduct alleged in the present charge relates to Mr Smerdon, a prominent leading licensed trainer of many years standing, who bears a good reputation in the racing industry receiving some $11,000 in cash from Mr Mark Hunter, a form analyst, a client of the Smerdon stable and friend for more than 20 years, who asked Mr Smerdon to hand that cash to Mr Oliver, who as stated earlier, was a leading jockey. Mr Smerdon arranged for Mr Oliver to come to his, Mr Smerdon's, house where Mr Smerdon handed the cash to Mr Oliver. Mr Smerdon knew that Mr Hunter had a long-standing and significant involvement in the racing industry and, as a form analyst had prepared speed maps for a number of jockeys, including Mr Oliver. Mr Hunter had, on occasions, prepared speed maps for Mr Smerdon. The evidence established that there was a long-standing and very close relationship between Mr Smerdon and Mr Hunter, yet Mr Smerdon claimed that he was unaware at the relevant time that Mr Hunter was a substantial punter. It was not until he read a transcript of Mr Hunter's evidence where Mr Hunter stated that, at a guess, he would punt about $1.5 million a year that Mr Smerdon said that he became aware of the extent of Mr Hunter's betting. Mr Hunter, according to Mr Smerdon's evidence, had only placed a handful of small bets for Mr Smerdon when it was not convenient for Mr Smerdon to place those bets himself. Mr Smerdon was not told by Mr Hunter, nor did he ask him, why the cash was to be handed over to Mr Oliver or why he had been chosen to hand the money over to Mr Oliver. Mr Smerdon did not take any step to determine the reason or purpose for the payment of the cash to Mr Oliver. Mr Oliver, in a letter dated 10 May 2013, stated inter alia, 'I did not discuss with Mr Smerdon anything about the moneys I received. Nor was there anything in my conduct whereby Mr Smerdon would have any reason to suspect that the money was the proceeds of a bet'. Mr Smerdon said that he did not ask Mr Oliver what the money was for because he respected Mr Oliver's privacy, he did not regard it as his business. He was aware at the time that Mr Oliver had personal and family issues and the least likely thing to suspect, he said, was that the money was the proceeds of a bet by Mr Oliver. So far as Mr Hunter was concerned, Mr Smerdon said that he did not feel the need to ask Mr Hunter what the money was for as it was none of his business and so far as Mr Smerdon was concerned it was a common courtesy not to ask. Mr Wheelahan submitted that is wasn't incumbent upon Mr Smerdon to second-guess a man of Mr Oliver's standing, particularly in circumstances when it was know that Mr Oliver was having personal difficulties with his

relationships. Likewise, Mr Wheelahan also submitted that it was not incumbent on Mr Smerdon to interrogate his friend of 20 years as to why he wanted to pass the money to Mr Oliver at that time. Not only did Mr Smerdon state that, in October 2010, he was unaware that Mr Hunter was a substantial punter, Mr Smerdon also said that at that time he was also unaware that Mr Hunter was a person who placed bets on behalf of other individuals apart from Mr Smerdon himself. These matters formed the subject of particulars alleged by paragraph 2 in the amended charge. Accepting that the particulars in paragraph 2(a) and 2(b) have not been established by the respondent, the question remains as to whether the charge can still stand. The respondent is not required to prove each and every particular alleged and in my judgment sufficient of the particulars remain for the charge to be established if supported by the evidence. Taking it step by step, paragraph 1 is not in issue. So far as paragraph 2 is concerned, in or about October 2010, Mr Hunter did ask Mr Smerdon to give some money to licensed jockey, Damien Oliver on Mr Hunter's behalf. Paragraph 3 has been established. So far as paragraph 4 is concerned, Mr Smerdon did not, at any relevant time, ask Mr Hunter or Mr Oliver, or take any step to determine, the reason or purpose for the payment from Mr Hunter to Mr Oliver. The remainder of paragraph 4, which alleges that, in the circumstances, Mr Smerdon should reasonably have suspected that the payment may relate to conduct in breach of the rules of racing is very much in issue. I am satisfied that paragraph 5 has been established by the evidence which I accepted. I will refer to paragraph 6 in due course. I return to the question whether the respondent has established that Mr Smerdon should reasonably have suspected that the payment may relate to conduct in breach of the rules of racing. I have considered the evidence and weighed the respective submissions on this issue and, in my judgment, alarm bells should have rung loudly and clearly in Mr Smerdon's mind when Mr Hunter asked him to hand over a bundle or wads of cash to a licensed jockey, Mr Oliver. Mr Smerdon was a very experienced licensed trainer who had been associated with the racing industry for several decades and he knew that Mr Hunter, a close friend for more than 20 years was also deeply involved in the racing industry and was a man who, amongst his other racing interests, prepared speed maps for a number of jockeys who included Mr Oliver. That man, Mr Hunter, gave Mr Smerdon a bundle of cash for the trainer to hand over to a licensed jockey. In all the circumstances, I am satisfied that Mr Smerdon should reasonably have suspected that the payment which comprised a wad of cash may, and may is the operative word, relate to conduct which was in breach of the rules of racing. Mr Smerdon was, at times, very evasive in his evidence on this issue and I do not accept his explanations for his failure to ask Mr Hunter or Mr Oliver or take any step to determine the reason or purpose for the payment from Mr Hunter to Mr Oliver.

10 I turn to the question whether the respondent has objectively demonstrated that Mr Smerdon's conduct was prejudicial to the image or interests or

welfare of racing. The respondent provided particulars. In determining this issue in favour of the respondent I have relied on statements in the judgment of Steytler P who delivered the judgment of the Court of Appeal in *Western Australia in Zucal v Harper* (2005) WASCA 76 as well as observations in the judgment of Young CJ in Eq. in *Waterhouse v Racing Appeals Tribunal* (2002) NSWSC 1143. In *Zucal* the Court of Appeal dealt with a rule which stated 'A person employed, engaged or participating in the harness racing industry shall not behave in a way which is detrimental to the industry'. Whilst the words are different to those in A.R. 175(a), I accept Dr Pannam's submission that the thrust is the same. In the judgment of the Court of Appeal Steytler P stated 'The words "detrimental to the industry" are wide and imprecise. However, they undoubtedly import a requirement of some injury to the industry itself, rather than merely to the reputation of the person engaging in the behaviour in question.' Later in the judgment His Honour said 'If a participant in the harness racing industry has a high profile in that industry, … then misconduct by that person which is public, or has the potential to become so, may, depending upon its nature and seriousness, have a detrimental effect, if only by association, on the industry itself. The question whether it was that capacity, is in each case, one of fact and degree.' *Waterhouse v Racing Appeals Tribunal* (2002) NSWSC 1143 is a decision dealing with the interpretation of what is now A.R. 175(a) and this case involved a licensed bookmaker placing bets in his betting records at ridiculous odds. In his decision Young CJ in Eq. acknowledged that there are situations where to create suspicion could amount to blameworthiness. 'The raising of suspicion which suspicion may reasonably be expected to get publicity, may qualify as blameworthiness'. His Honour referred to the fact that blameworthiness is not the equivalent of *mens rea*. He stated 'Where there was some wrong conduct or where the conduct would give rise to suspicion in the minds of a reasonable observer, when the conduct was publicised (if the bookmaker could reasonably assume that it would be) then the offence could be made out.' If one posed the question what would an ordinary member of the public who had an interest in racing think of the facts in this case where a prominent leading trainer is handed a large amount of cash, a wad of notes, by a friend who has a long-standing and close involvement in the racing industry and asked to pass on that cash to a leading licensed jockey and, without any enquiry being made, does so in private in the trainer's own home, I am satisfied that the member of the public would conclude that conduct such as that was just 'Not on!' or, as Dr Pannam submitted, all was not well with racing in Victoria. I consider that Mr Smerdon's conduct was blameworthy and his conduct, viewed objectively, was prejudicial to the image or interests or welfare of racing. As the Board noted in its reasons, the public exposure of Mr Oliver's bet attracted widespread media coverage and when the names of other participants became known to the public there was a very real prospect of a negative impression of the integrity of the racing industry being created in the minds

of members of the public. Not only did Mr Oliver have a high profile in the industry, so also did Mr Smerdon. Once Mr Smerdon's involvement became known the media coverage escalated and the conduct, which always had the potential to become public, became very public indeed, as demonstrated by the many newspaper articles which are in evidence. In conclusion, having considered all the evidence, I am comfortably satisfied that the respondent has established all elements of the charge and that Mr Smerdon was guilty of conduct which was prejudicial to the image or interests or welfare of racing. I therefore dismiss the application.



HIS HONOUR SENIOR SESSIONAL MEMBER J NIXON

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST VCAT REFERENCE NO.B82/2013

APPLICANT:	Robert Smerdon
RESPONDENT:	Racing Appeals and Disciplinary Board
WHERE HELD:	Melbourne
BEFORE:	His Honour Senior Sessional Member J Nixon
HEARING TYPE:	Hearing
DATE OF HEARING:	17 July 2013
DATE OF ORDER:	23 July 2013

ORDER

Application re penalty dismissed. Penalty confirmed. Fine of $10,000 payable on or before 24 August 2013.

HIS HONOUR SENIOR SESSIONAL MEMBER J NIXON

APPEARANCES:

For Applicant	Mr P Wheelahan
For Respondents	Mr J Ogilvy

REASONS

1 As stated in the applicant's submissions on penalty, Racing Victoria Limited Stewards charged Mr Robert Smerdon with a breach of Rule AR175(A). Mr Smerdon pleaded not guilty to that charge. Following a hearing before the Racing and Disciplinary Board, the charge was found proven and a fine of $10,000 was imposed. On 12 March 2013, Mr Smerdon sought to review the decision of the Racing and Disciplinary Board on the basis that the decision was flawed and should be rescinded. On 6 June 2013, I dismissed Mr Smerdon's application to review the finding of guilt. Mr Smerdon, as is his right, seeks a review of the penalty imposed by the Racing and Disciplinary Board.

2 I accept, of course, the statement set out in paragraph 4 of the applicant's submissions on penalty and add that the Tribunal's functions in reviewing a decision of the Board are not appellate.

3 The bottom line of Mr Wheelahan's submissions on the question of penalty on behalf of Mr Smerdon was that, in the particular circumstances of this case, the stigma of having the charge under AR175(A) proven was punishment enough. I will refer to Mr Wheelahan's submissions in due course.

4 Mr Ogilvy, for the respondent, as did Mr Pulton before the Board, in his submissions, stressed that although Mr Smerdon played a secondary role and was a minor player, nonetheless, he played a part in an affair which caused severe damage to the image of racing in Victoria. Mr Ogilvy repeated Mr Poulton's submission that Mr Smerdon had engaged in conduct which was corrosive to the integrity of racing. Mr Smerdon, he submitted, failed to meet the standard reasonably expected of a senior experienced licensed trainer and, by acting as he did, an ordinary member of the public, who had an interest in racing in the circumstances to which I referred in paragraph 10 of my earlier judgment, would undoubtedly form a very negative impression of the racing industry. Mr Ogilvy acknowledged that Mr Smerdon had a long and distinguished career in the racing industry, for more than 30 years, without any relevant infractions, but nonetheless, the offence seriousness was such that the penalty imposed by the Board was appropriate, given all the circumstances. Mr Ogilvy referred to the submission advanced by Mr Grace QC who led Mr Smerdon's defence before the Board. Following an indication by the Deputy Chairman that the Board was not minded to affect Mr Smerdon's licence Mr Grace, after acknowledging that indication, then stated: 'So the submission is a fine of no greater than $11,000 and a reprimand. That would be an appropriate penalty, bearing in mind the unique circumstances of the case, to send a message to other trainers who have found themselves in a like situation and

to the community that there has been a significant penalty imposed'. Mr Grace's submission followed earlier submissions by Mr Poulton who sought a very substantial fine: 'We would put it in the tens of thousands, not the thousands of dollars, as being the appropriate penalty, given the level of publicity and the seriousness of the offence'. Mr Wheelahan, who was not involved in the earlier proceeding, submitted that Mr Grace's submission on penalty was put in error and not on instructions. Mr Wheelahan acknowledged that Mr Grace appeared with Junior Counsel and that no step was taken to correct the alleged error. I will not say any more on that issue and will determine this applicationi in accordance with the statement contained in paragraph 4 of the applicant's submissions on penalty.

5 I turn to submissions made on Mr Smerdon's behalf. I confirm, as stated in my original judgment, that Mr Smerdon is a prominent leading licensed trainer of many years standing who bears a good reputation in the racing industry. I accept Mr Smerdon's history in the industry as detailed by Mr Grace before the Board. I acknowledge his summary of the references provided by John Alducci, Colin Alderson, Ross Lanyon, Barbara Saunders and Dr McKellar. In addition, a reference from Mike Symonds is now in evidence and I have taken the relevant part of that document into account. I accept that Mr Smerdon has joined with other trainers to raise money for charity and accept that he is a strong family man. I also accept that paragraph 5 of the submission accurately sets out the basis on which I found the charge proven and acknowledge that blameworthiness is not the same as *mens rea*. In summary, this was a case which involved a failure on Mr Smerdon's part to make any enquiry. Mr Wheelahan stated, as is the case, that almost 3 years has elapsed since Mr Smerdon passed the money on to Mr Oliver. Certainly there has been delay, but much of that delay can be attributed to the fact that it was cash which Mr Smerdon received from Mr Hunter and which he passed on to Mr Oliver in his, Mr Smerdon's, house and that made the offence even more difficult to detect. I have not lost sight of the fact that neither Mr Oliver nor Mr Hunter was charged with this offence. Mr Oliver was charged with a more serious offence while Mr Hunter, whose role was more significant than that played by Mr Smerdon, provided crucial information to the Stewards which contributed to the prosecution of Mr Oliver.

6 I have considered and weighed all the submissions on the question of penalty. I regard the offence seriousness as high and as I endeavoured to say in my original judgment not only Mr Oliver, but Mr Smerdon as well had a high profile in the racing industry. As I said then and repeat now, once Mr Smerdon's involvement became known, the media coverage escalated and conduct which always had the potential to become public became very public indeed, as demonstrated by the numerous newspaper articles which are in evidence. The publicity was, as Mr Ogilvy submitted, indeed corrosive to the integrity and image of racing. Denunciation and

general deterrence are particularly important matters to consider and balance with Mr Smerdon's good character in the overall sentencing equation. I do not accept that no further specific deterrence is required in this case. Whilst specific deterrence is of far lesser weight than denunciation and general deterrence in the circumstances of this case and while I accept that Mr Smerdon is an intensely private person, nonetheless, as a leading trainer and racing identity, he has at all times an ongoing obligation to adhere to uphold the standards of the industry. I do not accept Mr Wheelahan's submission that, in the particular circumstances of this case, the stigma of having the charge under AR175(A) was punishment enough. To accede to that submission would fail to take the seriousness of the offence into proper account and fail to give appropriate weight to the sentencing considerations of denunciation and general deterrence in particular. I regard the fine of $10,000 imposed by the Board as an appropriate and just penalty and, accordingly, I dismiss the application to review the penalty imposed by the Board.

HIS HONOUR SENIOR SESSIONAL MEMBER J NIXON