

DECISION

Racing Integrity Act 2016, sections 252AH, 252BM

Review application number	RAP-137	
Name	Thomas Smith	
Panel	Mr K J O'Brien AM (Chairperson) Mr J McCoy OAM (Panel Member) Mr R Oliver (Panel Member)	
Code	Thoroughbreds	
Rule	Australian Rules of Racing 228(b) <i>A person must not engage in:</i> <i>(b) misconduct, improper conduct or unseemly behaviour</i>	
Penalty Notice number	PN-011277	
Appearances & Representation	Applicant	J Murdock KC
	Respondent	S McLeod KC instructed by Queensland Racing Integrity Commission
Hearing Date	31 March 2025	
Decision Date	10 April 2025	
Decision	Pursuant to 252AH(1)(b) the Racing Decision is Varied	
Case References	<i>Briginshaw v Briginshaw & Anor</i> 1938 60 CLR 336 <i>Sitek v Queensland Racing Integrity Commission</i> RAP – 89 <i>Sitek v Queensland Racing Integrity Commission</i> [2024] QCAT 188 <i>Re: Appeal Dean Watt and Adam Watt Racing Appeals Tribunal NSW</i> [2015]	

- [1] The Applicant, Mr Thomas Smith, is a licensed trainer of thoroughbred racehorses and has been for some five (5) years. Prior to obtaining his trainer's licence, he worked as a stable hand. All up he has about 10 years' experience in the racing industry. He is based in Rockhampton. For the purposes of training his horses he utilises the swim pool at the Rockhampton Jockey Club (RJC) training facilities.
- [2] On 22 July 2024 he took a yearling, Better Storm, to the facility to swim the horse in the pool. There is a photo of the pool¹ in the filed material and it shows what could be referred to as a race, leading to the pool where the yearling can then walk into the pool. Without being precise the race looks to be about 10 metres long with side walls of about 1.2 metres. The photo shows an individual comfortably leaning over the side wall with the top rail just below the armpits. The race is lined on the inside with rubber sheeting as a protective measure for the animals. At the end of the race it seems there is a ramp into the pool.
- [3] Better Storm was taken into the race and down to the pool entrance but was resistant to getting into the water edge. Over a period of about 30 minutes, Mr Smith applied a number of different techniques to "encourage" or "persuade" Better Storm to get into the pool, none of which were effective. They included using a piece of polythene pipe to strike him across the rear end and shoulders, prodding him with the poly pipe, and also using a stallion chain to force him forward. Hosing water to his head from a mains pressure hose was also used. It is obvious that during all of this Mr Smith became frustrated and agitated to a point where he punched Better Storm in the head in the vicinity of the lower jaw. Eventually the horse entered, or more like jumped, into the pool when hosed.
- [4] The conduct of Mr Smith was brought to the attention of Stewards and on 13 March 2025, after an inquiry at which Mr Smith was represented by senior counsel, he was charged with a breach of Australian Racing Rule 228(b). The Rule provides that:
- A person must not engage in:*
- (a) conduct prejudicial to the image, interest, integrity, or welfare of racing, whether or not that conduct takes place within a racecourse or elsewhere;*
- (b) misconduct, improper conduct or unseemly behaviour;*
- [5] Stewards decided not to rely on a more serious charge under AR 231(1)(a) which would require a finding of cruelty with a consequential higher standard of proof². We would observe in passing that some of the actions, particularly with jerking the stallion chain in quick succession may well have warranted such a charge.
- [6] By reference to various times on the video footage of the incident, particulars (or specifics) of the charge were in summary:
- (a) You struck the yearling on several occasions using the poly pipe on the gelding's rump and hind using force before striking the yearling across the neck with the poly pipe;*
- (b) You shortened the poly pipe to use it as a blunt force object and directly used it in the vicinity of the rib cage of the yearling;*
- (c) You attempted to pull a yearling forward for an excessive period of time resulting in the yearling rearing up and falling making heavy contact with the pool barrier petitions;*

¹ There is also a video of the incident which the Panel has viewed and which will be referred to later in these reasons.

² *Briginshaw v Briginshaw & Anor* 1938 60 CLR 336

- (d) *You did forcefully strike the yearling in the lower right jaw region with a closed left fist;*
- (e) *You did use excessive force with the stallion chain on a number of occasions over an extended period of time until the yearling displayed adverse behaviour and attempted to run up the ramp;*
- (f) *You did direct a hose at the yearlings head resulting in the yearling displaying significant adverse reaction and subsequently making heavy contact with the pool barrier petitions on multiple occasions;*
- (g) *You failed to prevent licenced trainer Jessica Kuhn from continually applying the poly pipe persistently and at times with significant force resulting in the yearling becoming agitated and reacting in an adverse manner, resulting in the yearling turning away on a number of occasions and rearing and falling;*
- (h) *In your attempts to swim the yearling the methods and attempts were continued for an excessive period of time and did not offer the yearling any period of notable respite from continued pressure.*

- [7] After charging Mr Smith and hearing further submissions from Mr Murdock KC the Stewards found that each of the particulars were proved to the requisite standard and found Mr Smith engaged in improper conduct in breach of AR 228(b).
- [8] Submissions were then taken on the penalty to be imposed. After further deliberation the Stewards decided to impose a penalty of suspension of the Applicant's trainer's licence for a period six (6) months with three (3) of those months to be wholly suspended conditional upon Mr Smith not breaching any of the Rules of Racing for a period of 2 years.
- [9] Pursuant to Section 252AB of the *Racing Integrity Act 2016* Mr Smith now seeks a review of the orders made by Stewards on 13 March 2025³. In the review application Mr Smith puts forward a number of contentions going to the substantiation of the charge of improper conduct and penalty. They include:
- (a) *There was insufficient evidence to support a finding of improper conduct;*
 - (b) *Apart from abrasions on the hind hock the horse was unharmed;*
 - (c) *The activities were at all times supervised by the RJC (Rockhampton Jockey Club) pool supervisor who did not call a halt to attempt to have the horse enter the water;*
 - (d) *The evidence does not support a finding of intent to commit an improper action – intent being an essential element of the charge;*
 - (e) *No moral turpitude;*
 - (f) *Penalty manifestly excessive.*

The Stewards' Inquiry

- [10] The Stewards Inquiry commenced on 21 January 2024. Stewards permitted Mr Smith to be legally represented by Mr Murdoch. The primary evidence before the Stewards was a video recording of the events that occurred in trying to get Better Storm to go into the pool. Mr Smith was taken to each incident of concern and given an opportunity to comment.

³ Penalty Information Notice PN-011277

- [11] After hearing what Mr Smith had to say about his actions and comments on the content of the video, Stewards adjourned for a short period to consider that evidence. They then decided to proceed to charge him with a breach of AR 228(b). Particulars were then provided in support of each charge⁴. We shall return to his submission in respect of the charges later in these reasons.
- [12] Mr Murdoch raised as an issue that Mr Smith was not the person in charge of the facility but instead it was the supervisor of the pool who had the authority to stop what was occurring and was therefore responsible. The effect of this submission was that the responsibility for the safe handling of the yearling was the responsibility of the supervisor employed by the Rockhampton Jockey Club (RJC). It transpired that there were other witnesses to the incident, being staff members of the RJC, who appear in the video. To ensure fairness to Mr Smith, at the conclusion of the evidence on the first day, the Inquiry was adjourned so Stewards could take some further evidence from those employees.
- [13] On 24 January 2025 the Inquiry resumed and Stewards took evidence from those staff members. Ultimately, save to a comment about these witnesses expressing a view that they did not consider anything untoward occurred⁵, their evidence was not relied on in this review hearing.

Better Storm

- [14] To put matters into context it is necessary to say something about the horse in question.
- [15] Better Storm was a yearling colt at the time. He had been with Mr Smith since March 2024. Mr Smith told the Inquiry he “hadn’t been broken in⁶” but was in the process. Even so, Mr Smith said he was doing “track work” and “educational practice working”. He was doing long-reining work, meaning he was working on the lunge. The evidence given to the Stewards was a little confusing as recorded in the transcript but at the hearing Mr Smith clarified that the colt was being ridden under saddle and had been doing track work.
- [16] He could obviously float to get to the training facility. It seems he was tractable and there is no evidence that there were any difficulties in handling the yearling generally. This was the first occasion he had been to the pool to swim.
- [17] The video shows he was not a particularly large animal and two men behind him, as depicted near the end of the video, could move him forward a little.

Mr Smith’s primary submission

- [18] Written submissions have been filed by both parties. In essence Mr Smith’s contends that:
- (a) Intent is an essential element of the charge. Therefore, there is an onus on Steward to be satisfied to the requisite standard that Mr Smith intended to engage in improper conduct. The evidence in support of each particular falls short, even accepting the conduct occurred, of establishing intent on the part of Mr Smith. In the absence of probative evidence of intent all the charge of improper conduct should be set aside.
- (b) Improper conduct, or impropriety brings into play notions of moral turpitude. As a consequence, the standard of proof under the Briginshaw principle is much higher. It follows therefore, that

⁴ Transcript of Stewards’ Hearing 21.01.2025 lines 759-812

⁵ Transcript of Stewards’ Hearing 03.03.2025 lines 313-317

⁶ Transcript of Stewards’ Hearing 21.01.2025 lines 199-217

having regard to the facts here, and the conduct complained of, the Panel could not be reasonably satisfied that the notion of moral turpitude was engaged.

- (c) The fact that the RJC had rules about the use of the pool and Mr Smith's conduct was not only supervised, but he was assisted by the employees of the Club, this conduct exculpates Mr Smith from any wrongdoing.
- (d) As we observe later in these reasons, we agree that there is nothing intrinsically wrong with the use of poly pipe. However, it is the manner of use that is in question. A similar submission is made with respect to the stallion chain and man handling the yearling from behind. All of the techniques may be appropriate, but it does depend on the circumstances and the disposition of the animal in question.
- (e) Mr Smith recognises that the question for the Stewards is whether the techniques went too far.

[19] As indicated we will have regard to these submission when addressing each particular of the charge.

The video evidence

- [20] Before dealing with the particulars we propose to make some further general observations about the incident. We were told by Mr Murdoch that Mr Smith is a young man of 26 years of age. He obviously has a keen and genuine interest in the racing industry. He has 12 horses in work, some spelling and some doing initial training. Therefore it is reasonable to expect he has knowledge of horsemanship and acts responsibility with working the yearlings in his care. He "breaks in"⁷ the young horses that come to him.
- [21] This was the first time Better Storm had been taken to the swim pool. He was brought into the race wearing a headstall and clipped to it was a long flexible pole so the handler could assist the horse down the race to the pool and guide it when swimming the circumference of the pool. This appears to be normal procedure.
- [22] At the very start of the process, as soon as the yearling got to the water, he stopped and after several attempts to pull him forward, Mr Smith was handed the poly pipe and was gently tapping him on the rear end to encourage him to go forward. There is nothing untoward about any of this.
- [23] The video shows that as the resistance sets in, the yearling's natural instincts manifest themselves and the resistance intensifies. The notion of "fight or flight" response instinct in animals (and humans) to stressful situations is a well-known and common knowledge. This is particularly so with animals and because horses are amenable to being trained for domestic use, it is necessary to obtain the animal's trust to subdue the natural instinct. Trust is critical in domesticising animals⁸.
- [24] What is apparent to us from the video, is that throughout the whole saga of trying to get Better Storm into the pool, he was reverting to the natural instinct of both fight and flight rather than trusting the handler and being compliant. The only part of the video where the yearling showed some ease is at the end when the two men were behind the yearling, both patting and scratching him to sooth the animal

⁷ Now not fashionable terminology for training young horses. They are not "broken" but are "trained" or "started" however it is still a convenient term to understand the process.

⁸ In case it is considered there should be some expert evidence on this, we rely on the many cases heard by this Panel, and in other tribunals, about horse behaviour and also common knowledge gained over one's life experiences.

and he can be seen licking or chewing his lips, a sign of acceptance. However, for the previous 28 or so minutes he was highly agitated.

[25] At no stage did Mr Smith engage in any conduct which could be regarded as attempting to gain the yearling's trust or acceptance of the situation. Instead he relied on brute force and aids to subdue the animal and get his own way, rather than give the yearling respite and engage in patience and true horsemanship. That is the gaining of trust, a training technique that ought to have been known to him. We might also add, the assistance he was getting from another trainer, Ms Kuhm and the supervisor of the pool, did nothing to ease the situation. Rather their actions seemed to reinforce the legitimacy of, and more or less encouraged, Mr Smith in his methods. The video demonstrates that Better Storm was under pressure for the full 30 minutes of the video footage.

[26] We will now turn to the particulars.

Mr Smith's submission in respect of the particulars

[27] Each of the particulars to the charge is referenced to conduct at a particular time point on the video recording. We have carefully looked at the video and considered the submissions of the parties in respect of the conduct in respect of each particular. We therefore propose to deal with each of the submissions made by Mr Smith to the Inquiry and this Panel, and consider whether each particular is, in our opinion, substantiated.:

1. Using the poly pipe to strike the yearling on the rump, hind and neck with using force.

[28] Mr Smith's response to this particular is that firstly, there is no evidence of force. There is no evidence of bruising or other interference with the yearling's rump or hind area. Although not specifically said, we assume the same is said for the strike to the neck. Justification for the use of the poly pipe is that it is made available by the RJC at the swim for use by trainers for encouraging and persuading horses to enter the water. Therefore, conduct in using the poly pipe in these circumstances could not be regarded as improper conduct.

[29] Firstly, we accept that using a poly pipe for the management of large animals, yearlings and cattle, is an accepted practice. However, we do not accept it can be used indiscriminately, particularly with tractable yearlings, to force them into a situation with which they are unfamiliar. Poly pipe can certainly be used to block, encourage and persuade by gently prodding and tapping, as Mr Smith was doing at the beginning of the video, but to actually belt the animal with the pipe is entirely unnecessary as a means of persuasion, particularly on a young horse like this yearling.

[30] Secondly, we reject the submission that simply because the poly pipe was made available by the RJC, it was appropriate to use it the way shown in the video. We also reject that some responsibility should be attributed to the RJC by making it available. Although there is no evidence from the RJC, common sense dictates that the poly pipe is there to assist handlers to encourage yearlings to go forward when used judiciously. We see no reason to overturn the Stewards decision on this particular.

2. You shortened the poly pipe to use it as a blunt force object and directly used it in the vicinity of the rib cage of the yearling;

[31] It is evident that Mr Smith took hold of the poly pipe about 50cm from the end and used it as a blunt object to jab it into the side of the yearling to move it forward. When there was no reaction he did not persist. However, it is clear to us that this is not the intended use of the pipe, that is as a blunt

prodding instrument/aid. Although the yearling did not suffer a specific injury, the action was meant to inflict pain and the yearling's reaction demonstrates this outcome was somewhat achieved. We agree with the Stewards that this was improper conduct and harmful to the yearling.

3. Pulling the yearling forward for an excessive period of time resulting in the yearling rearing up and falling making heavy contact with the pool barrier petitions

- [32] This is seen at point 7:50 minutes into the video. Just prior to this Mr Smith is seen getting into the race and attaches what appears to be a lead rope to the headstall. He then tries to pull Better Storm forward with the lead and after a few steps, moves back to the outside of the race and using both the pole and the lead rope again tries to pull the yearling forward. At the same time a RJC staff member starts hitting the yearling on the back and rear end with the poly pipe. Soon after the sustained pressure of pulling the yearling and being struck continuously on the rear end, he rears up, and then flips over onto his back, and can be seen scrambling in the race before righting himself facing away from the pool.
- [33] Mr Smith contended at the time this was not excessive and because the sides of the race were padded, they allowed for an eventually like this. That may be so, but the circumstances here would indicate that up until this point, it was reasonably foreseeable that the yearling might do something unexpected because of the behaviour he was exhibiting when being forced forward. The time taken is relative to the task to be accomplished and the education of the animal. For a mature horse who had used the swim before, the time might be reasonable, but we re-iterate that this was only a yearling who had not been presented with a situation like this before.
- [34] In any event to allow matters to approach this extreme demonstrates poor horsemanship. Here, one would reasonably consider that there would be at the very least a pause to give the animal some respite and take it out of the race to allow it to settle. But unfortunately, he is immediately turned around to face the pool and the pressure of pulling him forward is further applied. The yearling continues to resist, does get up onto his hind legs and pulls back.
- [35] The video leaves no doubt that Mr Smith had no regard at all for the yearling's well-being. His use of excessive force together with the hitting with the poly pipe after about 10 minutes with no positive response from the yearling was improper at the very least. We agree with the Stewards' conclusions in respect of this particular.

4. Forcefully strike the yearling in the lower right jaw region with a closed left fist

- [36] This is evident on the footage and as Mr Smith admits he overreacted in a frustrating situation. It does not appear there was harm to the animal but it shows a lack of judgment. The circumstances should not have got to the point where both horse and trainer were both highly agitated.

5. Using excessive force with the stallion chain on a number of occasions over an extended period of time until the yearling displayed adverse behaviour and attempted to run up the ramp

- [37] This is one of the most troubling aspects of this whole incident. A stallion chain is a length of chain with a clip on one end and O-ring at the other. It is attached to a lead rope then fed through the headstall and in this case, was looped over the horse's nose and clipped to the other side of the headstall. It is used to control a fractious animal. The chain being looped across the horse's nose can be pulled down

to apply painful pressure across the area between the nose and eyes to command obedience. It is not a prohibited piece of equine equipment (such as a stock whip) nor does it have any utility in encouraging a horse to go forward. It is simply a control device.

- [38] The chain was handed to Mr Smith by Ms Kuhn. Mr Smith then applied the chain at about point 14:40. Once applied he then snaps down on the lead rope causing the chain to bite across the yearling's nose. He continues to snap down on the chain at least 40 times in quick succession with the yearling continuously jerking his head up with each snap down. It gets to the point where the yearling gets up on his hind legs as though to rear up but is controlled by the chain with a vigorous snap down. We should point out the yearling only reared when under extreme pressure.
- [39] It is submitted on behalf of Mr Smith that with respect to the use of the wording "excessive force" that is a value judgment because there are no objective criteria of what is 'acceptable force'. With respect to that submission, one need only look at the reaction of the horse to form an objective opinion as to what is excessive. The yearling was clearly distressed by the constant snapping down of the chain. The animal was obviously experiencing pain and as any horseperson would conclude, the very purpose of the chain is to inflict pain. We do not consider the absence of criteria of what is 'excessive force' in the Rules is relevant to the objective facts of what is seen on the video. Reference is made to a rearing bit, again the same comments apply. It is not a piece of equipment to encourage a horse to go forward but as its name states, to control a horse from rearing up, particularly with a rider on board.
- [40] Some justification for the use of the stallion chain was made by reference to their use at the barriers on race days, as well as other control equipment such as anti-rearing bits. In our view that is completely different. Firstly, the horses on race days are familiar with the environment because of previous track work and barrier trials. Secondly, they are to control the management of the animal not used as a specific aid to make them go forward, although that is the end result when they get locked into the starting barrier. The analogy is not applicable to these circumstances.
- [41] Once again, the reference to extended period must be considered in the context of what was trying to be achieved. It is evident that about halfway through the video that the horse was starting to get up a sweat, indicating stress. To alleviate that he was hosed down. As noted above after about 8 minutes he not only reared up, but also fell on his back. It was fortunate he was not seriously injured.
- [42] We agree with the Stewards that the use of the chain was at the very least improper conduct and may well have supported the more serious charge. It was a very poor attempt to control the yearling and make him go forward into the pool.

6. Directing a hose at the yearling's head resulting in the yearling displaying significant adverse reaction and subsequently making heavy contact with the pool barrier petitions on multiple occasions

- [43] We accept the submission that horses generally enjoy being hosed down and being sprayed around the head. Many will open their mouths to savour the fresh water. It is commonly seen after a horse has been in work. It is almost mandatory to hose down after work to remove residual salt from the horse's sweat. However, that is not what was occurring here. The hose was being used as another means of pressure to force the yearling forward. There was sustained hosing of his head which, the video shows, was causing distress. Even at the end of the video, it did have the effect of forcing the horse into the pool. Unlike the horse taken into the pool by Ms Kuhn in the hope of Better Storm following, he ultimately just jumped forward rather than walk in with ease and trust. Often a horse pauses and will "paw" at the water before getting in, that did not occur here.

[44] Whilst being hosed, and in his agitated state, he did make rough contact with the side walls of the race. No harm came to the yearling but it does demonstrate his state of distress.

[45] Once again we agree with the Stewards, that the circumstance of the use of the hose in this instance was aggressive and improper.

7. You failed to prevent licenced trainer Jessica Kuhn from continually applying the poly pipe persistently and at times with significant force resulting in the yearling becoming agitated and reacting in an adverse manner, resulting in the yearling turning away on a number of occasions and rearing and falling

[46] There is a complaint in Mr Smith's submission that this particular should be rejected because Ms Kuhn was not called to give evidence. We reject the proposition because the video evidence speaks for itself.

[47] This particular harks back to the earlier one about the horse rearing and falling over onto its back. The point here is that Mr Smith was, at that stage, on notice that this could occur again. The cause of this is Mr Smith pulling the yearling forward with the stallion chain, and Ms Kuhn hitting the horse around the hind legs and then vigorously whacking it very hard across the rump. At this point the yearling rears up, strikes out with his forelegs and again falls over backwards with his legs over the side fence. Although just out of vision, he scrambles to get upright but does so and is immediately pulled forward again by Mr Smith.

[48] After this does not work, the yearling turns to face away from the pool and is hosed down again with the hose directed to his head. Further attempts are made to walk him to the pool. At this stage there is a pause as Ms Kuhn then takes her horse down the race into the pool.

[49] Once her horse is at the entry to the pool and in the water, further attempts are made with Better Storm. It is here that a gentler approach is adopted. A commonly used technique of two men, arms interlinked behind the horse try to walk him down towards Ms Kuhn's horse⁹. At the same time the two gentlemen are trying to sooth the horse by patting and scratching him, which as we have noted above, had some positive and calming effect.

[50] After this did not work the hose was deployed again. However, things did settle down somewhat and the yearling, from then on, appeared more relaxed.

[51] Of all the conduct this appears to be the most distressing for the yearling. Being pulled forward with the stallion chain across the nose, obviously painful, and being hit hard with the poly pipe across the rump is without doubt improper conduct. We agree with the Stewards finding on this particular.

[52] Particular eight (8) is a catch all particular encompassing the entire episode. It does not add anything to the above.

Summary of findings in respect to the particulars.

[53] Although the Stewards did hear from the three employees who assisted Mr Smith at the pool, they chose not to rely on that evidence at the hearing and therefore it was not included in the evidence before this Panel¹⁰. However Mr Murdoch did rely on the statement by Steward Tickner¹¹ that:

⁹ This method is frequently seen trying to get a horse into a float or truck.

¹⁰ Transcript of Stewards' Hearing 13.03.2025 lines 326-329

¹¹ Ibid at lines 313-317

In saying that, Stewards, I believe Mr Larkins has mentioned to yourself, Mr Murdoch, that we would be prepared to accept that there were interviews conducted of Mr Smith, Mr Vague¹² (sic), Mr [Burnell] and Mr Warner, and that no concerns were raised at that time of the original interviews in relation to the conduct of Mr Smith.

- [54] The effect of this, it is submitted, is that we should consider that nothing untoward happened at the pool which would give rise to any concern. We reject that submission. The video footage demonstrates to our reasonable satisfaction that although they, Vagg et al, may have been of that view, that was not the view of the Stewards, nor is it ours and it is entirely inconsistent with the vision.
- [55] At the hearing of the appeal, Mr Smith gave some further evidence as to the yearling's disposition after these events. He said on return to his box, he drank and was fed. Overnight all his feed was eaten and the next day he worked well. He had no obvious consequence from the trauma of the day before. This evidence was led to satisfy the Panel that there was no adverse psychological consequences. That may or may not be the case. No other evidence was relied on, particularly from a Veterinarian on the point. We therefore accept, without making any finding of a psychological nature, that the animal behaved normally thereafter. There was some minor physical damage which is shown in the photographs. However, we find this could have been avoided. The lack of residual specific harm is not decisive in this case. What is important is the manner in which Mr Smith treated the yearling and clearly, he was subjected to distress and physical pain from the use of the stallion chain and the poly pipe. Also, he showed signs of distress when the hose was directed to his head for a significant period without respite.
- [56] We have considered Mr Smith's submissions in respect of each particular and formed our own opinion as to whether they are substantiated. Having viewed the video, we reiterate that the facts speak for themselves and we cannot see how the Stewards could have concluded otherwise. We agree that improper conduct as particularised has been substantiated to the requisite degree.

The Rule and "improper" conduct

- [57] Mr Murdoch sought to import into the reference to "improper conduct" of AR 228(b) the notion of moral turpitude. Therefore it is the highest level of impropriety, consistent with its use in, for example, AR 131 which deals with the welfare of the horse, including cruelty. He submits the evidence here does not establish, to the requisite standard, that Mr Smith's conduct can be characterised at that higher level of moral turpitude. We do not agree with that submission. AR 228(b) applies to the conduct of all licencees generally and does not necessarily include moral turpitude. Whereas Rules like AR 131 refer to specific situations in relation to the welfare of animals, particularly cruelty, which would import the notion of moral turpitude. As noted below at [62] improper conduct has to be considered in the circumstances the particular case.
- [58] At the hearing Mr McLeod KC rightly pointed out that AR 228 applies to all licencees and the drafters of the legislation used particular terminology depending upon the conduct inquired into. Another example is "carelessness" when considering the Rules relating to how a jockey rides a horse in a race. We accept this to be the case.
- [59] As for intent, it was submitted that we must look at what Mr Smith was intending to do with the yearling, that was getting him into the pool. It is submitted that Mr Smith was not intending to cause

¹² Mr Vagg

the horse harm or distress. We consider this argument to be somewhat artificial. What he intended was to get Better Storm into the pool by whatever means necessary, as is demonstrated on the video. We reject the contention that intent is an element to be established in respect of each particular and refer to statement at [68] below.

- [60] The Stewards charged Mr Smith under AR 228(b), alleging his conduct was improper. It is not alleged that the conduct was “misconduct” or “unseemly behaviour”. There has been some discussion about the meaning of “improper” in previous cases. In *Sitek v Queensland Racing Integrity Commission*¹³ the Applicant removed his runner Divine Falls from the designated race day stabling area without seeking permission from the Stewards at the Bundaberg racecourse. The reason for doing so was to render help to a person he was caring for in Brisbane. He had driven to Bundaberg that morning. In considering whether the conduct was improper this Panel said:

The real difficulty in the Panel's view is whether this conduct is such to fall within the meaning of AR 228(b), in particular whether it constitutes improper conduct. The ordinary meaning of improper in this context is that of being “unbecoming, unseemly or indecorous”. The meaning is supported by the context in which the word is used in the Rule. We have great difficulty in seeing how the incident described falls within that meaning.

- [61] Consideration was given to that statement in another case involving Mr Sitek where he was seen riding a fractious stallion onto a float bareback without any safety gear onto a float in a suburban street in Hendra¹⁴. The stallion in question only had a bridle with a short rein, no headstall or any other gear to control it, such as a stallion chain. In that case the Queensland Civil and Administrative Tribunal distinguished the Panel’s decision on the facts to hold that Mr Sitek’s conduct was improper:

In my view the conduct here is different. As Mr Murphy pointed out, the Hendra precinct is a well know area for stabling also walking and exercising thoroughbreds at the nearby Doomben and Eagle Farm racetracks. If confined to riding bareback without safety gear then it is improper in common parlance. I don't agree it need be confined to the above specific words, it can also include simply wrong and against a rule. It must be considered in the circumstances of the case. It was certainly improper for him to be seen riding that way even though he considered it the best way to deal with the situation. It was also improper for him not to have the appropriate equipment for handling the colt in a suburban area, or anywhere for that matter.

- [62] Another useful statement about improper conduct is the Watt decision of the Racing Appeals Tribunal NSW:

The Tribunal finds that the “improper” test here is to be assessed on an objective assessment of the evidence, considering the facts and circumstances of the conduct. It is a question of fact. Intent to act improperly does not have to be proved. The issue of whether it was improper is governed by the proof of the particulars alleged and they have to be assessed.

- [63] This in our view is a common sense statement to be applied and does not import the notion of intent which can be critical in the prosecution of some criminal offences. The Rules have a regulatory function to govern the conduct of licensees taking into account the various degrees of seriousness of the conduct.

¹³ *Sitek v Queensland Racing Integrity Commission* RAP-89

¹⁴ *Sitek v Queensland Racing Integrity Commission* [2024] QCAT 188

Circumstances of the Applicant

[64] Mr Smith is embarking on a career as a licensed trainer in the racing industry. As already noted, he has horses in work and is respected in the local area. He has provided a number of references which speak of his commitment and good character. They also speak of his professionalism and the exceptional level of care he gives to horses he is training¹⁵.

[65] Of particular assistance is the reference from Dr Brad Johnstone of BNJ Equine Vets. He is aware of the current charges and has given the reference with that in mind. He speaks highly of Mr Smith's contributions to racing and the training of horses but also the development of young riders. He has observed how he approaches his training of horses with professionalism and responsibility. Dr Johnstone went on to say:

While acknowledging the seriousness of any matter under the Australian Rules of Racing, I also believe it is important to consider Thomas's longstanding contributions and his ongoing dedication to the industry. He has consistently demonstrated a commitment to mentoring others, upholding animal welfare, and maintaining the standards expected of a racing professional.

[66] On the basis of these references we consider that the occurrence at the RJC pool was likely a one-off incident and unlikely to be repeated. These proceedings alone, irrespective of penalty imposed, are a salutary lesson in the consequences of the mistreatment of animals.

Penalty considerations.

[67] The Racing Integrity Commission Penalty Guidelines for Queensland thoroughbred racing say clearly that the purpose of a penalty is essentially threefold. Firstly, to maintain standards of integrity and animal care in the Thoroughbred code. Secondly, to provide general deterrence to the industry by ensuring that penalties imposed on an individual for a rule breach are sufficiently serious to discourage other participants from breaching the rule, and thirdly, to provide specific deterrence to the individual contravening the rule, that is the penalty imposed on an individual for a breach must be sufficiently serious to discourage the particular individual from engaging in similar conduct.

[68] The guidelines indicate that the imposition of a penalty involves a balance between the severity of the offence, the need for deterrence to the individual concerned and the industry participants generally, as well as a consideration of any mitigating factors. The guidelines then set out a number of considerations which may be relevant in that regard. They include:

- The circumstances of the offense
- The degree of culpability. The degree of personal or moral blameworthiness of the person accused of the breach. The more culpable the conduct, the more severe the penalty should be for both the general and specific deterrence point of view;
- An early plea of guilty is a mitigating factor and may result in a lesser penalty being imposed
- Frequency with which a person participates in racing;
- Disciplinary record. A record of rule breaches by a licenced individual, including the circumstances and penalty imposed for each offence. A good record with few offences is a

¹⁵ Exhibit 1 – Referees: Brendan Fenlon (28.03.2025); Kellie Rawlinson; Tom Acton (24.03.2025); Keith Adams and Bill Reid.

mitigating factor and a poor record with regular breaches may be regarded as an aggravating factor.

- [69] The circumstances of the present offence have been set out above, and there is no need to repeat them here. However, we consider that the treatment of Better Storm in all the circumstances went far beyond what would be expected of a horseperson acting in the best interests of the animal.
- [70] Despite the submission that Mr Smith acted with the acquiescence of the RJC staff member in charge of the pool, we reject the notion that this somehow lessens his culpability. He was at all times the decision maker of how to manage the yearling, except perhaps when Ms Kuhn volunteered the stallion chain. But, once placed on the headstall, it was Mr Smith who then used it to inflict pain on the animal. We find he is totally responsible for what occurred at the pool.
- [71] We note that apart from some minor race day infringements, Mr Smith has no notable breaches of the Rules. This is a mitigating factor and we treat this as a first offence against the Rules. In relation to penalty, we also note that Mr Smith is not charged with the more serious offence of animal cruelty under AR 231.
- [72] We are conscious of the fact that he has horses in work, an apprenticed jockey, and an employed stable hand. A suspension will have a significant impact on those who rely on him for their livelihood, not just the owners of the horses in his care. It will also impact him financially.
- [73] Having said that, it is difficult to downplay what is shown in the video footage. This yearling was handled very badly particularly with the stallion chain.
- [74] We have come to the view that a suspension is certainly warranted in this case but because of the mitigating factors it should be wholly suspended. However, to properly reflect the seriousness of the conduct and as a deterrent measure we also consider a fine is appropriate. Together with the fine we propose to impose a suspension of 6 months to be wholly suspended for a period of 12 months. We also propose to impose a fine of \$5,000.00 which we consider reflects the seriousness of the breach.

Orders

- [75] In accordance with section 252AH (1)(b) of the Racing Integrity Act 2016, the order of the Panel in respect of Penalty Notice PN-011277 is to vary the racing decision by substituting a penalty of:
- [76] The Thoroughbred Trainer Riding Own Trackwork – Renewal, Thoroughbred Trainer – 6 month suspension of license to be wholly suspended for a period of 12 months on the provision that Mr Thomas Smith does not breach any Rule contained within Part 9 of the Australian Rules of Racing during that period.
- [77] The applicant be fined \$5,000.00 to be paid within 30 days of the receipt of this decision. Such period may be extended by written agreement with the Queensland Racing Integrity Commission