

**IN THE MATTER OF THE APPEAL OF LICENCED TRAINER DARREN GRAHAM  
AGAINST THE DECISION OF THE STEWARDS GIVEN ON  
FRIDAY 1 DECEMBER 2017  
Racing NSW**

IN THE MATTER OF THE APPEAL OF LICENSED TRAINER DARREN GRAHAM  
AGAINST DECISION OF THE STEWARDS GIVEN ON THURSDAY 5 OCTOBER 2017

Racing NSW Offices  
Sydney

Hearing

Friday 1 December 2017

**APPEAL PANEL:** Mr T Hale SC (Convenor)  
Mr J Fletcher  
Ms J Madsen

**APPEARANCES:** D Graham – licensed trainer  
Mr T A Ryan, instructed by M Tutt (Miller Sockhill Lawyers), on  
behalf of Mr Graham  
Mr M Van Gestel (Chairman of Stewards) appeared on behalf of  
Racing NSW Stewards

**DECISION ON CONVICTION GIVEN ON THURSDAY 22 FEBRUARY 2018**

**CONVENOR**

1. On Thursday 27 July 2017 and Thursday 5 October 2017 the Racing NSW Stewards conducted an inquiry into a complaint made by licenced stable foreperson Ms Susan Robbins about the conduct and behaviour towards her by licenced trainer Mr Darren Graham at the Tweed River Jockey Club Race Course, also known as the Murwillumbah Race Course.
2. On Thursday 5 October 2017 the Racing NSW Stewards issued four charges against Mr Graham of breaching the Australian Rules of Racing (the Rules). He pleaded not guilty to each of them. The Stewards found him guilty of each charge namely:
  - a. Charge 1 – AR175(q) Improper Conduct on 20 June 2015
  - b. Charge 2 – AR175(q) Improper Conduct on 2 February 2016
  - c. Charge 3 – AR175(q) Improper Conduct on 19 April 2017

Charge 4 – AR175(x) Engaging in workplace harassment between the period 25 January 2014 and 19 April 2017

3. After considering submissions on penalty Mr Graham's licence was suspended for a period of 4 months and he was fined \$800.
4. Mr Graham has appealed to this Panel against the decision of the Stewards both on conviction and penalty. Pursuant to s.43(1) of the *Thoroughbred Racing Act* (1996) (NSW) the appeal is by way of a new hearing and fresh evidence in addition to, or in substitution for, evidence upon which the decision appealed against was made, may be given on the appeal.

## **THE HEARING**

5. The appeal was heard on 1 December 2017. Mr M Van Gestel, Chairman of Stewards, appeared on behalf of Racing NSW Stewards. With leave, Mr T A Ryan of counsel appeared for Mr Graham instructed by Mr M Tutt of Miller Sockhill Lawyers.
6. The Panel received into evidence as Exhibit A a bundle of documents which contained the transcript of evidence and exhibits before the Stewards. The Panel also received in evidence a number of photographs taken at the Murwillumbah Race Course, which became Exhibit "B", Exhibit 1A-H, Exhibit 2 and Exhibit 3. The Stewards called oral evidence from Ms Robbins, Ms Helen Gorton and Ms Carolyn Halliday. They each gave evidence via Skype from Murwillumbah. The sound quality was not always good, which presented the Panel and the parties' representatives with some difficulties in hearing all that was said by those witnesses. On occasions questions and answers had to be repeated. Mr Graham gave oral evidence in support of his appeal. His daughter, Angela Graham, also gave evidence on his behalf. They were each present at the Appeal and did not need to rely on Skype.
7. The evidence took most of the day leaving little time for submissions. This appeal raises a number of important issues, amongst other things, the issue of what constitutes work place harassment under AR175(x). In view of this and in view of the detail in the evidence and the difficulties with the Skype evidence, the Panel considered that it would benefit from a transcript and

written submissions. Accordingly, directions were made for a transcript to be provided to the parties and for the parties to supply written submissions to the Panel. Now that the parties and the Panel have the advantage of the transcript of the evidence, any difficulties with the Skype evidence have largely been overcome.

## **BACKGROUND**

8. Ms Robbins is a Licenced Stable Foreperson with Racing NSW. She is licenced to her husband Paul Robbins who trains out of Murwillumbah Race Course. Mr Graham has been a licenced horse trainer for in excess of 25 years. He also is based at Murwillumbah Race Course. Attached is Exhibit "B" which is a labelled photograph of part of the race course. It is attached as Annexure "1". Mr Graham has stables at the racecourse which are identified in the photograph. Most relevant are the series of tie up stalls which are identified in the photograph and which are in a semicircular configuration. Each of the tie up stalls contains 8 stalls. At the far left of the photograph are the Robbins tie up stalls which for convenience are referred to as "Stall No 1". Next to Stall No 1, the Robbins stall, and to the right are the Boyle tie up stalls (Stall No 2). Next to and to the right of Stall No 2 are the Graham tie up stalls. Mr Graham has two stalls which will be referred to as Stall No 3 and Stall No 4, and which are depicted in the photograph. Next to and to the right of Stall No 4 are the tie up stalls of Ms Carolyn Halliday (Stall No 5). Ms Halliday is the holder of a trainer's licence which she has held for about 10 years. She has always trained at Murwillumbah racecourse. Between Mr Graham's stalls No 3 and No 4 is an access way which gives access to various facilities behind the tie up stalls, including the float car park, Mr Graham's stables and the sand roll.
9. In front of the tie up stalls is a walkway which appears to be approximately 2 m wide. It is bounded by a white post and rail fence, which at various points contains openings onto a grassed area. A composite photograph which became Exhibit "2A" shows her tie up stalls in more detail. It is also attached as Annexure "2".

10. Ms Robbins generally attends the track 6 days a week. On each of those days she walks her horses to the track past Mr Graham's tie up stalls and later returns the horse or horses to her tie ups (Stall No. 1) passing Mr Graham's tie up stalls. Mr Graham generally uses his tie up stalls six days a week, sometimes seven. Ms Robbins and Mr Graham would generally see each other six days a week at the tie up stalls. They each arrive and leave at different times and generally they are only there at the same time for about an hour a day.
11. The relationship between Ms Robbins and Mr Graham was once good. They used to have daily friendly interactions and call out to each other. In 2014 their relationship soured and that daily friendly interaction ceased. The cause of breakdown in their relationship is not altogether clear. Ms Robbins had for a long time employed Ms Helen Gorton as a track work rider. Ms Gorton had been in a relationship with Mr Graham. It broke up acrimoniously. After the break up, Ms Gorton continued to ride for Ms Robbins. Clearly that affected the relationship between Mr Graham and Ms Robbins. Ms Robbins, however, thought that her relationship with Mr Graham had soured before the breakup. She thought it stemmed from Mr Graham's jealousy over her success with a horse called *Hora Sexta*. It is not necessary to explore further the cause of the souring relations of Ms Robbins and Mr Graham. It is not in dispute that since 2014 their relations have been poor and they rarely speak to each other. This is an important background fact to the resolution of the issues in the Appeal.

## **THE CHARGES**

12. The charges against Mr Graham are summarised above. They are factually complex. A copy of the charges are attached as Annexure "3". There is an overlap between charges 1, 2 and 3, on the one hand, and charge 4 of the other. The particulars of the charge of work place harassment under AR175(x) (Charge 4) include the factual allegations in charges 1, 2 and 3.
13. The charges are based upon the complaints of Ms Robbins. There are a total of 13 incidents of which she complained between January 2014 and

19 April 2017. Particulars (c) and (d) each contain complaints about three incidents of a similar kind. The alleged incidents are:

<b>Date</b>	<b>Charge 4 Particulars</b>
25.1.14	(a)
26.7.14	(b)
19.11.14	(c)
24.3.15	(d)
26.3.15	(d)
20.6.15	(e)
27.6.15	(d)
10.7.15	(f)
2.2.16	(g)
11.2.16	(h)
20.8.16	(i)
19.4.17	(c) )
19.4.17	(g) ) This may be treated as one incident

14. Mr Graham denies each of the factual allegations in the particulars on which the complaints are founded. It is therefore necessary for the Panel to make findings of fact about each of the thirteen allegations in the particulars.

## **THE DIARIES**

15. Ms Robbins kept a work diary. She contemporaneously recorded in her work diaries each of the events the subject of the 13 complaints. Insofar as space would allow it, each incident was recorded against the date on which it occurred. Ms Robbins said that the entries were all entered on the day of the event. Counsel for Mr Graham did not challenge this. He did, however, challenge the accuracy of some of the entries. In cross examination he suggested to Ms Robbins that the purpose of the entries

“was to build up enough information to be able to go to the Stewards with”<sup>1</sup> and that “you have embellished things that you say have in fact occurred by trying to paint Mr Graham in as bad a light as possible”.<sup>2</sup> Ms Robbins denied both propositions.

16. I do not consider that the evidence supports such a finding. I accept that the entries were made contemporaneously and generally recorded Ms Robbins recollection of the recorded event (even though the entry might not be a complete account of what occurred). Part of the difficulty Mr Graham had in this Appeal was in overcoming the evidentiary force of the contemporaneous diary entries.

#### **SATURDAY 26 JULY 2014 (Charge 4 Particular (b))**

17. It is convenient to begin with the complaint about the incident on 26 July 2014. This is the second complaint. The first complaint concerned what Mr Graham had said to Ms Gorton about Ms Robbins six months earlier on 25 January 2014. The incident of 26 July 2014 was the first complaint about conduct by Mr Graham directly towards Ms Robbins.
18. On Monday 28 July 2014 Ms Robbins telephoned Racing NSW Investigator. Nick Ryan. In a formal memorandum he recorded, inter alia, the following:

ROBBINS further stated that Saturday 26 July 2014 she was verbally abused by GRAHAM with GRAHAM stating “Just watch yourself” and repeating it whilst working horses at Murwillumbah Racecourse. This was witnessed by two other licenced stable hands in Helen GORTON and Brian LAWSON.

19. The memorandum also recorded Ms Gorton’s complaint that she had been harassed for approximately 12 months and that she believed that this was a result of the dispute going back 12 months.
20. Ms Robbins contemporaneous diary entry stated:<sup>3</sup>

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<sup>1</sup> T33 line 636.

<sup>2</sup> T33 line 640.

<sup>3</sup> The entry was in fact in the space for Sunday 27 July 2014 because, as Ms Graham explained, there was insufficient room for the Saturday: T14.

Brian came over to talk to Helen and Myself then Darren walked up to us and threatened me twice "You better watch yourself". Helen was a witness as was Brian he told Darren to go away. Then my windscreen wipers were pulled out on my truck immediately after Darren walked past it<sup>4</sup>. Sick of being Harassed.

21. Both before the Stewards and before this Panel, Ms Robbins said that Mr Graham said "watch yourself: I'll get you" while looking and pointing at Ms Robbins with anger in his face.<sup>5</sup> She said that Mr Lawson touched Mr Graham on the shoulder and asked him to go away. Ms Robbins said that she remembers very clearly what happened "because it really upset me and I rang the Stewards up".<sup>6</sup> She said that she can remember Mr Graham saying the words "I'll get you" as "Clear as day".<sup>7</sup>
22. The evidence suggests that shortly before this incident, an owner by the name of Mr Kasawoki had an argument with an employee of Mr Graham in the feed shed. It seems that employee was Brian Lawson. Soon after Mr Graham saw Mr Lawson talking to Ms Robbins and Ms Gorton at Ms Robbins tie ups (Stall No.1). Mr Graham's understanding was that Mr Lawson was speaking to Ms Robbins and Ms Gorton about Mr Kasawoki. Mr Graham was at Stall No 3 at that time. He said that he walked past: "I just skipped down. I sort of jogged down there"<sup>8</sup> to where Mr Lawson, Ms Robbins and Ms Gorton were speaking. It was then, according to Ms Robbins, that Mr Graham made the threat the subject of the complaint. Ms Gorton gave evidence. Her evidence was entirely consistent with the evidence of Ms Robbins. Ms Gorton said that when Mr Graham approached he pointed at Ms Robbins and said to her "I'm going to get you. You need to watch it".<sup>9</sup>

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<sup>4</sup> The reference to the windscreen wipers may be ignored as it did not form part of the particulars of the charge.

<sup>5</sup> T37, t35

<sup>6</sup> T37 line 1850.

<sup>7</sup> T35.

<sup>8</sup> T111.

<sup>9</sup> T69-70.

23. Mr Graham's account of the incident was that he was at his tie ups (Stall No 3). He said he saw that there was a horse at Ms Robbins tie up stalls with a lead hanging down. He was at least 20m away. He said that he didn't want to see anyone hurt so he walked down fast to Ms Robbins tie ups and said "Watch out. Watch yourselves", but he was referring to the potential danger from the lead which he was pointing to. He said that he pointed to the lead and said "There's a lead down. Watch out for yourselves".<sup>10</sup>
24. Both Ms Gorton and Ms Robbins were adamant that there was no lead hanging down.<sup>11</sup>
25. I accept the evidence of Ms Robbins and Ms Gorton as to what occurred on 26 July 2014. I do not accept the contrary evidence of Mr Graham about this incident. I would go so far as to say that I positively disbelieve his evidence. My reasons may be summarised as follows.
26. Firstly, it is clear something occurred on Saturday 26 July 2014 which caused Ms Robbins to make the complaint to Racing NSW Investigators the following Monday. Ms Robbins was clearly very upset by what had occurred. On Mr Graham's account, what occurred was benign, if not inconsequential. It could not have led to Ms Robbins being so upset that she felt the need to contact Racing NSW to report the incident.
27. Secondly, Mr Graham's account is implausible. Since the souring of relations between Mr Graham and Ms Robbins in early 2014, or before, they rarely spoke to each other or had contact. Despite this, on Mr Graham's account, from more than 20m away Mr Graham saw the lead hanging down and out of concern for Ms Robbins and the other two participants in the conversation, was impelled as a matter of urgency to walk fast or jog to Ms Robbins tie up stalls to warn of the danger. This evidence may be seen as a somewhat clumsy attempt to put an innocent interpretation on words intended to be threatening.
28. Thirdly, Ms Robbins' account is generally consistent with the contemporaneous note in her diary. The fact that her oral evidence goes

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<sup>10</sup> T112: see also T94

<sup>11</sup> T15-16, T75.

- beyond her diary entry and beyond the investigator's record of her complaint does not lead to the conclusion that anything not recorded did not occur. Her evidence that Mr Graham said "I'll get you" is not inconsistent with her diary entry which recorded that Mr Graham "threatened me". But even if those additional words weren't said, the comment made by Mr Graham was clearly intended to be, and was, threatening and upsetting. Mr Graham's account is inconsistent with the diary entry. Also, as I have mentioned, it is inconsistent with the evidence of Ms Robbins and Ms Gorton that no lead was hanging down in the tie up.
29. Fourthly, Ms Robbin's evidence is supported by the evidence of Ms Gorton. As has been pointed out, she gave evidence that Mr Graham said to Ms Robbins: "I'm going to get you. You need to watch it". She also confirmed that there was no horse lead hanging down in the tie ups. I have no reason to doubt Ms Gorton's evidence of what occurred. She presented as a careful and truthful witness. The fact that she and Mr Graham may have had an acrimonious break up is an insufficient basis for a finding that she gave untruthful or exaggerated evidence about this incident.
  30. Fifthly, Ms Robbins impressed as an honest witness. She gave her evidence in a forthright manner without evasion or hesitation. She was clearly upset by Mr Graham's conduct towards her and wanted it stopped. No persuasive reason has been advanced as to why she would make up the evidence about Mr Graham's conduct or exaggerated it. Further, as I have mentioned, Ms Robbins account was supported by the evidence of Ms Gorton.
  31. Sixthly, Mr Graham created a poor impression as a witness. As I have previously observed, I felt that his evidence about this incident might be fairly characterised as a somewhat clumsy attempt to put an innocent interpretation on words intended to be threatening.
  32. In summary, I find that the incident of 26 July 2014 occurred in the way described by Ms Robbins and Ms Gorton. The facts in particular (b) to charge 4 are established.

**INCIDENT OF 20 JUNE 2015: Charge 1, Charge 4 Particular (e)**

33. It is convenient to next deal with the incident alleged to have occurred on 20 June 2015. This is another incident which was witnessed by a third party.
34. In her evidence, Ms Carolyn Halliday described what occurred. Ms Halliday, as will be recalled, is a licenced trainer and has been so for more than 10 years. She has Stall No 5. On Saturday 20 June 2015 she was standing in the walkway of her tie ups with one of her owners, Mr Michael Hayward. In her evidence before us, she said that she saw Ms Robbins leading a horse past Mr Graham's tie up stall (Stall No 3) in the direction of Ms Robbin's tie ups (Stall No.1). She said that Mr Graham was then standing at his tie ups with a horse facing the same direction as Ms Robbin's horse. As Ms Robbins and her horse passed Mr Graham, Mr Graham flicked Ms Robbin's horse with a lead rope. Her horse jumped forward. Ms Halliday had a clear view of what occurred. She was in no doubt that the flick of the lead rope on the horse's rump caused it to jump forward. Both Ms Halliday and Mr Hayward said to Mr Graham "We saw that"<sup>12</sup>. Ms Robbins recalls Ms Halliday calling out to Mr Graham: "I saw that"<sup>13</sup>
35. Mr Hayward did not give evidence before the Panel but gave evidence before the Stewards. He said:<sup>14</sup>

I saw Kim was taking the horses off the truck and was leading them in through the gap between Mr Graham's tie ups and Mr Graham was standing there with a horse and, as she went past, as Kim went past, he just gave it a flick with the lead and it shied at it and that was it.

36. In her evidence before the Panel, Ms Robbins candidly said that she did not see Mr Graham flick her horse with the lead. She said that she was very close to Mr Graham when she passed him. As she passed him her horse took fright and jumped forward pushing her into the white rail. She did not realise what had happened at first. She then heard Ms Halliday call out "I saw that"<sup>15</sup>. Ms Halliday and Mr Hayward came over and told her what had happened. In her diary entry Ms Robbins recorded the incident this way:

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<sup>12</sup> T80,

<sup>13</sup> T41

<sup>14</sup> Exhibit "A" page 49.

<sup>15</sup> T41

Darren stopped his horse in gap of stable. I squeezed past as I walked past he hit my horse with a lead. Carolyn Halliday and her owner Michael Hayward witnessed it.

37. Mr Graham denies that he flicked the horse. His evidence is that his horse “came out of the tie up a little bit quick and it jumped forward” and that “I think my horse jumping on the concrete may have spooked her horse to jump”.<sup>16</sup>
38. Ms Halliday and Mr Haywood had a clear view of what occurred. Both Ms Robbins and Mr Haywood said in evidence that immediately after the incident Ms Haywood called out to Mr Graham that she had seen what he had done. This evidence was not challenged in cross examination and is accepted. Why would Ms Halliday call this out if she hadn’t seen Mr Graham flicking Ms Robbin’s horse? Further, there was no challenge to the evidence that Ms Halliday and Mr Haywood immediately came to Ms Robbins to tell her that it was Mr Graham flicking the horse with his lead that caused Ms Robbins horse to jump forward. It is evidence of the spontaneous reaction to what they had seen.
39. The incident clearly occurred in the manner described by Ms Halliday and Mr Haywood. In his written submissions the appellant points to minor inconsistencies between the evidence of Ms Halliday and Mr Haywood. Those inconsistencies are of little significance. The substance of the evidence of Ms Halliday and Mr Haywood is consistent and there is no reason to doubt it. Ms Halliday gave her evidence clearly. She was an impressive witness. Her evidence is accepted as is the evidence of Mr Haywood (who did not give evidence before the Panel).
40. The evidence of Mr Graham is in direct conflict with the evidence of Ms Halliday and Mr Haywood. I do not accept Mr Graham’s account of what occurred. As I have mentioned, I formed a very low opinion of Mr Graham’s credibility.

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<sup>16</sup> T98.

41. Mr Graham's action on 20 June 2015 in flicking the rump of Ms Robbin's horse was not only a dangerous act, but it reveals a great deal about his attitude and behaviour towards Ms Robbins. His action was petty, nasty and vindictive. I agree with the evidence of Ms Halliday when she described what Mr Graham did as: "just disgusting that he did that to (inaudible). I think he just- its just a spiteful thing to do to her."<sup>17</sup> This incident, like the incident of 26 July 2014 assists the Panel in understanding the other incidents of which Ms Robbins complains.

### **25 JANUARY 2014: Charge 4 Particular (a)**

42. Ms Gorton gave evidence before the Panel of an occasion when she rode past Mr Graham's tie ups and Mr Graham said to her "You and your friend, Kim, the fat fucker". She reported this to Ms Robbins who entered an account of this incident in her diary on that date, 25 January 2014. The entry is recorded in these terms:

Darren told Helen "you and your friend Kim, the fat fxxer".

Lisa heard my name and plenty of F's

43. Mr Graham denied the incident and denied that he said these words. I do not accept his evidence. I accept the evidence of Ms Gorton. Her account is supported by the fact that she immediately told Ms Robbins what happened, and Ms Robbins recorded the incident in her diary.
44. However, for the reasons to which I will come, I do not accept that the conduct of itself amounts to evidence of work place harassment. Nonetheless, that Mr Graham said this to Ms Gorton on 25 January 2014 is significant. It demonstrates the ill will that Mr Graham had towards Ms Robbins. It strengthens the likelihood that the other incidents complained of did in fact occur in the way that Ms Robbins described them. The conduct of 25 January 2014 should be seen as part of a pattern of behaviour by Mr Graham.

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<sup>17</sup> T88.

**19 NOVEMBER 2014, 16 JUNE 2016, 19 APRIL 2017: Charge 4 Particular (c) and (j)**

45. The complaint in particular (c) is that on each of these occasions Ms Robbins was leading a horse or horses along the thoroughfare past the tie up stalls when she was impeded by Mr Graham who was blocking the way with one of his horses, by for example washing or unsaddling it in the walkway. On each occasion Mr Graham refused to move. Each of these occasions are recorded in Ms Robbins diary. Ms Robbins said that this often happens but only these three occasions of obstruction are relied upon. Ms Robbins diary recorded the incidents this way:

(i) 19 November 2014

I asked politely if Darren could let me pass as he was unsaddling his horse in the walkway as usual he does it to annoy. He told me to get out and walk in on the grass in mounting area. I said that was what tie ups are for.

(ii) 16 June 2016

As usual Darren is blocking the walkway when his horse comes back in. I squeezed past after standing waiting while he takes bridle, saddle etc boots.... holding me up on purpose he said walk through the middle on the grass I said that's what tie ups are for. He does it every day.

(iii) 19 April 2017

D Graham is washing his horses on the walkway near his tie ups and the sand rolls. I walked up to go past him & his daughter he turned and shouted "why don't you go round on the grass" in a nasty voice. I said "why don't you use the wash bay" he then called me a "fxxking skank" SICK OF HIM.

46. At one level the incidents may appear to be trivial. Obviously enough, there will be occasions at a facility, such as this, when there will be conflicts in the movements of horses. A certain amount of give and take is required. The evidence of Ms Halliday is that when she is walking in the walkway towards Mr Graham when he is unsaddling a horse "Mr Graham always

moved out of the way for me”.<sup>18</sup> Ms Robbins said “I’m (the) only one he does it to. He doesn’t do it to anybody else”.<sup>19</sup>

47. The incident of 19 April 2017 was also witnessed by Ms Angela Graham, Mr Graham’s daughter. She recalls the incident. She said that she and her father were hosing their horse and that Mr Graham said to Ms Robbins “why can’t you go round on the grass”. This is consistent with the account recorded by Ms Robbins in her diary. The evidence however, also discloses that the grass was boggy due to the recent flooding. Ms Graham said that she did not hear her father say the words “fucking skank”.
48. Mr Graham said that he said to Ms Robbins “piss off and go back through on the grass. We are trying to fix this up”. He said that the horse moved sideways and she huffed and went around the horse.<sup>20</sup> Ms Angela Graham did not hear or did not recall Mr Graham saying “piss off” to Ms Robbins. She accepted<sup>21</sup> that it was possible that her father did use these words and call Ms Robbins a “fucking skank” but she did not hear it.<sup>22</sup> In these circumstances Ms Graham’s evidence is neutral on whether these words were said. I accept the evidence of Ms Robbins that Mr Graham spoke to Ms Robbins in the manner Ms Robbins described.
49. Ms Graham also said that during this incident that she tried to move her horse but was unable to do so. I accept her evidence, but that is not a complete answer to the complaint.
50. The fact remains that on each of the three occasions of which Ms Robbins complains Mr Graham was obstructing and impeding Ms Robbins use of the walkway and he was making no attempt to accommodate her. For all other users Mr Graham would make an attempt to move and accommodate the passage of the other horse. In the case of Ms Robbins he adopted an obstructionist and aggressive approach toward her which might be regarded as intimidating and threatening and which on 19 April 2017 was also offensive. The conduct is to be seen as part of Mr Graham’s pattern of behaviour towards to Ms Robbins.

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<sup>18</sup> T87.

<sup>19</sup> T47.

<sup>20</sup> T115.

<sup>21</sup> T142.

<sup>22</sup> T142.

**24 MARCH 2015, 25 MARCH 2015, 27 JUNE 2015: Charge 4 particular (d)**

51. These three incidents are of a similar character to those referred to in particular (c). The allegation is that on each of these three occasions Mr Graham, whilst sweeping out his tie up stalls, deliberately swept waste over Ms Robbins as she walked past. Ms Robbins dairy entries record the following:
- (i) Tuesday 24 March 2015  
Darren swept water out of tie ups onto mine and toby's legs.
  - (ii) The next day, Thursday 26 March 2015 she recorded:  
Darren swept dust on mine again. Toby baulked thinking he was going to sweep at him again.
  - (iii) Friday 27 June 2015  
I tried to walk past Darren while he was sweeping. He swept dirt on my shoes. I told him not to he said "walk around".
52. In her evidence before the Panel Ms Robbins said that on 26 March 2015 Mr Graham saw Ms Robbins coming and continued to sweep and that she believed he intentionally swept the material at her.<sup>23</sup> She said that she saw Mr Graham look at her directly before he swept towards her.<sup>24</sup> She also confirmed that on other occasions the sweeping was deliberate.<sup>25</sup> Ms Robbins said that when other trainers are sweeping out they will stop if a horse or someone is coming.<sup>26</sup>
53. Mr Graham said in his evidence that he had no recollection of any of the three occasions. He said that he had no recollection of ever sweeping dust or other material under Ms Robbins.<sup>27</sup> On his evidence he might have swept material towards Ms Robbins but it was not intentional and he has no recollection of doing so.

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<sup>23</sup> T19.

<sup>24</sup> T40.

<sup>25</sup> T41.

<sup>26</sup> T58.

<sup>27</sup> T120.

54. That evidence is inconsistent with the evidence of Ms Robbins in two respects. Firstly, with Ms Robbins evidence that on 27 June 2015 Mr Graham said to her “walk around”. This is recorded in Ms Robbin’s diary entry. If Mr Graham said this, and I accept that he did, he must have been aware of what he had done; intentional or not. Secondly, Mr Graham’s evidence is inconsistent with Ms Robbins’ evidence that on at least two occasions Mr Graham saw Ms Robbins coming and looked at her before he swept.
55. I accept the evidence of Ms Robbins. The particulars of the charge are established.

**10 JULY 2015: Charge 4 particular (f)**

56. Ms Robbins evidence is that on 10 July 2015 she was talking to Carolyn Halliday and another person by the name of Jane as they walked past Mr Graham’s tie ups. Ms Robbins diary entry records the following:

Darren Told me to “stop gossiping about him you ’f’ Thing. I said beg your pardon. He said you heard you f ... k ho.

57. She confirmed that the references in her diary were to “fucking thing” and “fucking hoe”. Ms Robbins said that at the time she was not talking about Mr Graham at all. She was talking about her mobile phone playing up.<sup>28</sup> Mr Graham denies that the incident occurred. I am satisfied that the incident did occur in the manner described by Ms Robbins. This particular of the charge is established.

**2 FEBRUARY 2016: Charge 4 particular (g), Charge 2**

58. The evidence of Ms Robbins is that on 2 February 2016 she was walking a horse past the tie up stalls that were occupied by Mr Graham who was exiting those stalls and Mr Graham said to her “get out of my fucking way”. Ms Robbins diary entry for 2 February 2016 is in these terms:

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<sup>28</sup> T23.

Walking my horse past Mr Grahams tie ups he came out behind me and muttered under his breath:

“Get out of the fxxking way”.

59. Ms Robbins said it was loud enough for her to hear what was said.<sup>29</sup>
60. Mr Graham said that he had no recollection of the event but said he would not have directly said something like that to her. He said that on occasions he might have said something like “watch out and get away a bit”.<sup>30</sup>
61. I accept the evidence of Ms Robbins and that the event occurred as she described it. This particular is established.

#### **11 FEBRUARY 2016: Charge 4 particular (h)**

62. Ms Robbins said that on 11 February 2016 she was talking to Carolyn Halliday when Mr Graham walked past her and said under his breath “Gossiping bitch”. Mr Robbins diary entry for 11 February 2016 is:

Darren under his breath called me a gossiping Bitch.

63. Mr Graham said that he did not remember such an incident. He said that he did not think it was possible that he would have said this to her.<sup>31</sup>
64. I accept the evidence of Ms Robbins and find that the words were said in the circumstances she described. This particular of the charge is established.

#### **20 SEPTEMBER 2016: Charge 4 particular (i)**

65. Ms Robbins diary entry for 20 September 2016 recorded:

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<sup>29</sup> T44.

<sup>30</sup> T99.

<sup>31</sup> T100.

Darren walked out of tie ups just as I walking past leading a horse pushed right in front of me and walked straight at me between the tie up and me.

Pig !!!

Adam Ivor witnessed it.

66. In her oral evidence Ms Robbins expanded upon this and said that Mr Graham was leading a horse and he came straight out of the tie up with the horse walking straight at her.<sup>32</sup> She said “he was coming straight at me. He was looking straight at me. I had to change direction, otherwise his horse would have (inaudible) just back away”.<sup>33</sup>
67. Mr Graham said that he had some recollection of this event.<sup>34</sup> He denied that he deliberately headed his horse towards her. He said he was coming back from the wash bay and that “you could misinterpret it that she walked towards me too”.<sup>35</sup>
68. I accept the evidence of Ms Robbins and find that the event occurred in the manner in which she described it. In coming to that conclusion I take into account Mr Graham’s pattern of behaviour towards Ms Robbins.

### **Conclusions on the evidence of the witnesses**

69. As I have explained, on material issues the evidence of Ms Robbins, Ms Gorton and Ms Halliday was in direct conflict with the evidence of Mr Graham. I have found Ms Robbins, Ms Gorton and Ms Halliday to be credible and truthful witnesses and I have accepted their evidence. By contrast I did not find Mr Graham to be a credible witness. I have already expressed my views about some of the unsatisfactory aspects of his evidence. I gained the impression that in giving evidence he was principally concerned to deny the allegations and emphasise that he had done nothing wrong rather than to honestly tell the Panel what had occurred. This led him to adopt the position that, as he understood it, after 28 July 2014 (the date of Ms Robbins complaint to the RNSW investigators about the threats on

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<sup>32</sup> T25-26.

<sup>33</sup> T46.

<sup>34</sup> T129.

<sup>35</sup> T129.

26 July<sup>36</sup>) nothing unusual occurred between him and Ms Robbins and that he didn't think anything happened that could be any basis for a complaint. He said that he just kept to his normal business.<sup>37</sup>This approach led him to his denials about the incident of 20 June 2015, particular (c), when he flicked Ms Robbin's horse and his denial about the threats he made on 26 July 2014, particular (b). I consider that his evidence was so lacking in credibility that unless it was on an uncontentious matter, it would be unwise for the Panel accept his evidence unless corroborated by other evidence.

### **Factual conclusions on the evidence**

70. For the foregoing reasons I find that each of the factual matters the subject of the particulars and charges are established. Having made those findings it is necessary to consider whether in the circumstances the various charges have been made out.

### **CHARGE 4: Workplace harassment AR 175(x)**

71. It is convenient to deal firstly with Charge 4 concerning workplace harassment since most of the evidence and submissions are directed to that charge.
72. AR175(x) which first became operative on December 2010 provides:

*The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise...[any] person who in their opinion is guilty of workplace harassment of a person while the latter is acting in the course of his duties when employed, engaged or participating in the racing industry".*

AR1 defines workplace harassment in these terms:

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<sup>36</sup> Exhibit A page 16 of the exhibits before the Stewards.

<sup>37</sup> T131.

**"Workplace harassment"** means behaviour of one person towards another person with whom he has a workplace connection which:

- (a) is unwelcome to and unsolicited by the person who is the subject of the behaviour;
- (b) the person subject to the behaviour considers to be offensive, intimidating, humiliating or threatening; and
- (c) a reasonable person would consider to be offensive, humiliating, intimidating or threatening

*However, reasonable management action taken in a reasonable way by the person's employer in connection with the person's employment is not workplace harassment*

- 73. The Stewards have established the facts necessary to support each of particulars (a)-(j), the issue is whether under the rule, Mr Graham is guilty of the workplace harassment of Ms Robbins within the meaning of AR175(x).
- 74. In Mr Graham's written submissions he submits that there is no relevant workplace connection between Mr Graham and Ms Robbins so as to engage the definition of workplace harassment under the Rules. He submits that for there to be a workplace connection there must be an employment relationship between the parties, or at least a relationship akin to an employment relationship. This, he submits, is supported by the exemption to the definition which exempts reasonable management action taken in a reasonable way by the person employed with the person's employment. He submits that to come within the definition it is not enough for the persons to undertake their own work related activities at the same location.
- 75. I do not consider that the definition should be read in this restricted way. The words "workplace connection" in the definition are words of wide import. Certainly, they apply to a connection between employees of the one employer or to the connection between employer and employee. But the words are not limited to such a relationship, even though the exemption applies only to a relationship between and employer and employee.

76. The definition of “workplace harassment” must be read with and in the context of AR175(x), being the rule in which the words “workplace harassment” appear and to which the definition applies<sup>38</sup>. AR175(x) makes it plain that workplace harassment is not limited to a relationship akin to an employer/employee or employee/employee relationship. The rule is intended to provide protection to any person who is acting in the course of his or her duties “when engaged or participating in the racing industry”. The rule first refers to a person who is “employed” in the racing industry. This is a reference to a very specific relationship. The rule then refers to a person who is “engaged” in the racing industry. This is a more general description. Finally the rule refers to a person “participating in the racing industry”, which is an even more general category. The words “participating in the racing industry” are not defined although the term “a participant in racing” is defined in AR1 to include:

**“a participant in racing”** is defined in AR1 to include:

- (a) a trainer;
- (b) any person employed by the trainer in connection with the training and care of horses;
- (c) a nominator;
- (d) a rider;
- (e) a rider’s agent;
- (f) any person who provides a service or services connected with the keeping, training or racing of a horse.

77. AR2 is also relevant to an understanding of AR175(x). AR2 provides that “any person who takes part in any matter coming within these Rules thereby agrees with the Australian Racing Board and each and every Principal

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<sup>38</sup> see *Kelly v The Queen* (2004) 2018 CLR 216 per McHugh J at [103] in relation to a matter of statutory interpretation

*Racing Authority to be bound by them*". Although there may be some exceptions, as a general proposition a participant in racing will be taking part in a matter coming within the Rules.

78. AR175(x) proscribes behaviour by a person bound by the Rules towards another person if that behaviour comes within the definition of "workplace harassment", but only if that other person is at the time acting in the course of his or her duties when employed, engaged, or participating in the racing industry. The behaviour is, however, only proscribed under the rule if the persons have a "workplace connection".
79. The very nature of racing is that at a workplace, generally a race course or stables, there will be interaction between licensed persons who do not have any employment relationship with each other, for example jockeys, trainers and stable hands will mix on the race course or at the stables. AR175(x) is but one rule pursuant to which the Principal Racing Authority accepts a responsibility and has a power to manage the interaction between those licensed persons to protect them from workplace harassment by other licensed persons.
80. The language of the rule does not support the restrictive interpretation for which Mr Graham contends. Nor is there any policy reason revealed in the Rules to support such a restrictive interpretation. Nor should the words "workplace connection" be narrowly construed; for example, I do not see that the proscription on the behaviour is limited to the actual workplace of the persons. It may apply to behaviour outside the workplace as long as there is a workplace connection between the persons at the time, such as during the transportation of horses.
81. In summary:
  - (i) Mr Graham was a licensed trainer who is and was bound by the Rules, in particular AR175(x);
  - (ii) The alleged behaviour by Mr Graham towards Ms Robbins was while Ms Robbins was acting in the course of her duties as a licensed foreperson;
  - (iii) The behaviour had a workplace connection because at the time of the behaviour Mr Graham and Ms Robbins were both acting in the course of their duties as trainer and licensed foreperson out or near the tie up stalls at Murwillumbah racecourse.

82. The next question is whether the behaviour of Mr Graham towards Ms Robbins met the description in each of (a), (b) and (c) of the definition. Each of (a), (b) and (c) must be met in order that workplace harassment is established. I think that the requirements of (a) are clearly established. Clearly the behaviour of Mr Graham was unwelcome to and unsolicited by Ms Robbins. Whether or not the requirements of (b) and (c) are established will be addressed below. It is also clear that the proviso to the definition has no application in the present circumstances.
83. In the written submissions made on behalf of the Stewards, the point is made that AR175(x) is framed in a similar fashion to s.789FD of the *Fair Work Act, 2009* (Cth) which is in these terms:

**789FD When is a worker bullied at work?**

(1) A worker is **bullied at work** if:

(a) while the worker is at work in a constitutionally-covered business:

(i) an individual; or

(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

84. On behalf of Mr Graham it was submitted that AR175(x) is in very different terms to s.789FD. He also referred us to the *Workplace Harassment Human Resources Policy of the Queensland Health Department*, which in item 7.1 adopts language which is similar to the definition in AR1. We were also referred to s.22B of the *NSW Anti-Discrimination Act, 1977*.
85. On behalf of the Stewards, it was submitted that authorities in relation to s.789FD are of assistance in applying rule AR175(x). Reference was made to the decision of the Fair Work Commission in *Amie Mac v Bank of Queensland Ltd & Ors* [2015] FWC 774, where Vice President Hatcher identified a list of features which may constitute bullying.

**[99]** Ms Mac's case involved the proposition that Ms Hester, Ms Van Den Heuvel, Mr Thompson, Ms Locke and Ms Newman had bullied her at work - that is, either individually or as a group had repeatedly behaved unreasonably towards her - in placing

her on a PIP and in commencing to implement the PIP. However, the overall nature of Ms Mac's case in this respect was somewhat elusive. It was not suggested by her that the identified individuals were acting with malice or sinister intent, or had conspired in some way to cause detriment to Ms Mac. During a *longueur* in the hearing, I attempted to draw up a list of the features at least some of which one might expect to find in a course of repeated unreasonable behaviour that constituted bullying at work. My list included the following: intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination. However, no instance of behaviour of this nature has been alleged against Ms Hester, Ms Van Den Heuvel, Mr Thompson, Ms Locke or Ms Newman in the Points of Claim. Although Dr Jetnikoff's report, from which I have earlier quoted, indicated that Ms Mac had reported to him some perception on her part of victimisation and targeting by Ms Van Den Heuvel, that did not feature in the evidence that Ms Mac gave at the hearing.

86. We were also referred to GC [2014] 6986- Fair Work Commission, which was recently confirmed in *Brown v Park Beach Bowling Club Ltd & Ors* in which Commissioner Hampton said at [45]:

*“The concept of individuals ‘repeatedly behaving’ unreasonably implies the existence of persistent unreasonable behaviour but might refer to a range of behaviours over time. There is no specific number of incidents required for the behaviour to represent ‘repeatedly’ behaving unreasonably (provided there is more than one occurrence), nor does it appear that the same specific behaviour has to be repeated. What is required is repeated unreasonable behaviour by the individual or individuals towards the applicant worker or a group of workers to which the applicant belongs.”*

87. These decisions, of course, explain what is meant by “repeatedly behaves unreasonably towards the worker” within the meaning of s.789FD of the *Fair Work Act*. These decisions relate to provisions which are textually very different from AR175(x). I think the only assistance that can be derived from these decisions is the adopted analytical approach to construction of a provision addressing a similar problem to the Rule.
88. The general approach to the construction of the AR175(x) is the general approach to the construction of any document, which is to understand the

meaning of the text in its context.<sup>39</sup> This requires the words of the definition of “work place harassment” to be read into the substantive rule and then to construe the substantive rule in its extended sense in its context, bearing in mind its purpose and the mischief that it was designed to overcome.<sup>40</sup>

89. AR175(x) and the definition of “work place harassment” is in contrast to the offence of sexual harassment under AR175(y), and the definition of sexual harassment in AR2, which is directed to particular acts or conduct. Subclause (a), (b), (c) and (d) of the definition refer to “an ... act”, and “unsolicited demand or request”, “making a remark” and “engaging in ... conduct”. It makes no reference to *behaviour*. The offence under AR175(q) applies both to conduct (“misconduct”) and “improper conduct” and behaviour “unseemly behaviour”. There seems to be a distinction in the Rules between the meaning of conduct and behaviour.
90. AR175(x), with its extended definition of work place harassment, is directed to behaviour rather than conduct: “behaviour of one person towards another person”. The meaning of behaviour is wide enough to encompass repeated acts, which establishes behaviour: “Manner of conducting oneself; bearing; manners”<sup>41</sup>; “Manner of behaving or acting”<sup>42</sup>. It is not necessary to consider whether an isolated act might constitute behaviour within the meaning of the rule.
91. Particular acts conduct by one person towards another person might in isolation be annoying but hardly “offensive, humiliating, intimidating or threatening” or “misconduct or improper conduct”. However, when part of a pattern of behaviour the conduct might meet the description of “work place harassment”. The policy of AR175(x) is to proscribe such behaviour in order to protect licensed persons acting in the course of their duties.
92. The Stewards contend that the behaviour by Mr Graham towards Ms Robbins, which constitutes the work place harassment, is evidenced and

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<sup>39</sup> *Day v Sanders; Day v Harness Racing NSW* (2015) 90 NSWLR 764 at [67], which concerned the Australian Harness Racing Rules.

<sup>40</sup> See *Kelly v The Queen* (2004) 2018 CLR 216 per McHugh J at [103], which concerned statutory construction. A similar approach is to be adopted in the construction of a contract: see Lewison and Hughes: *The Interpretation of Contracts in Australia* at [5.11]. It is to be noted that the Rules apply both by statute (the *Thoroughbred Racing Act*) and contract (AR2),

<sup>41</sup> The Shorter Oxford Dictionary

<sup>42</sup> The Macquarie Dictionary-Revised Third Edition

established by the 13 incidents between 25 January 2014 and 19 April 2017 in particulars (a)-(j), each of which I have found to have been established on the evidence. In combination, this is said to establish a pattern of behaviour towards Ms Robbins over that period which meets the description of work place harassment contrary to AR175(x). What should not be ignored is the anticipation in Ms Robbin's mind of further such incidents at her workplace, the racecourse. The harassment has, or is likely to have, a continuing impact, even on days when there was no incident.

93. I do not consider that the first of the incidents relied upon, particular (a), can evidence such behaviour. In the circumstances, what Mr Graham said to Ms Gorton about Ms Robbins on 25 January 2014 could not properly be regarded as behaviour by Mr Graham towards Ms Robbins. However, as I have earlier said, this evidence is nevertheless relevant as it demonstrates Mr Graham's hostility to Ms Robbins. However I do consider that the incidents in particulars (b)-(j) establish that the behaviour by Mr Graham towards Ms Robbins between 26 July 2014 and 19 April 2017 amounted to work place harassment within the meaning of rule.
94. The incident of 26 July 2014, in particular (b) was clearly intimidating and threatening. The incidents in particular (c), being the refusal to clear the thoroughfare around the tie up stables was intimidating and threatening. It must be viewed in the context of the other established incidents in the particulars. Further, Mr Graham's actions of 19 April 2017 were accompanied by abusive and offensive language "why don't you piss off on the grass" and "fucking skank". On these occasions Mr Robbins was walking her horse and Mr Graham blocked her path with his horse. He would not move although he always did so for others. His refusal to move was an act of aggression and hostility towards Ms Robbins and clearly intended to be seen as such. It was not just a case of causing mere inconvenience.
95. The incidents in particular (d), in which Mr Graham deliberately swept out his stables onto Ms Robbins as she walked past should be seen, in the context of the other incidents as intimidating and threatening, if not humiliating.

96. The incident in particular (e) of 20 June 2015, when Mr Graham struck the rump of Ms Robbins horse resulting it taking fright and pushing Ms Robbins against the white rail, should also be seen as threatening and intimidating.
97. The offensive and insulting language Mr Graham aggressively used towards Ms Robbins, which is the subject of particulars (f), (g) and (h), were instances of Mr Graham's pattern of behaviour towards Ms Robbins which was offensive, humiliating, intimidating and threatening.
98. The incident in particular (i) on 20 September 2016 in which Mr Graham walked his horse directly towards Ms Robbins resulting in her for having to alter her course further demonstrated a pattern of behaviour towards Ms Robbins which met the description of workplace harassment. In particular it demonstrated intimidating or threatening behaviour.
99. At the time Ms Robbins made her first complaint to the investigators on 28 July 2014 she was clearly upset. Her subsequent recording of events in her diary demonstrated her concern about Mr Graham's behaviour towards her. She made the present complaint, the subject of this appeal, because "I just wanted Mr Graham to leave me alone".<sup>43</sup> Ms Halliday said that Ms Robbins always came to her when Mr Graham did things to her. Ms Halliday said that Ms Robbins "was just really upset at what was happening to her". She said that "she's had enough".<sup>44</sup>
100. In my view both the subjective and objective tests in (b) and (c) of the definition of work place harassment have been established.
101. I would therefore dismiss the appeal on conviction in relation to charge 4 and confirm the decision of the Stewards that Mr Graham was guilty of contravention of AR175(x).

#### **CHARGE 1**

102. The Stewards convicted Mr Graham of three breaches of AR175 which is in these terms:

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<sup>43</sup> T11.

<sup>44</sup> T88

*The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise...[a]ny person who in their opinion is guilty of any misconduct, improper conduct or unseemly behaviour*

103. Charge 1 concerned the conduct the subject of charge 4 particular (e), that is the striking of the rump of a horse Ms Robbins was walking as it passed Mr Graham. This led to the horse taking fright and pushing Ms Robbins up against the white rail. My findings in relation to that are set out at 4 above.
104. In their written submissions, the Stewards refer to the decision of this Panel in the matter of *Dacey* before Mr J Hiatt in 2014 in which he adopted the views of Victorian RAT Judge R Nixon (*Appeal Jockey S Jennings (1991) Victorian R.A.T Judge R Nixon*) as to what constitutes improper conduct. There his Honour said:

*“The Panel in its deliberations will have regard to authoritative decisions of the Racing Appeals Tribunal to what conduct amounts to improper conduct. In respect of standards of conduct expected of licensed persons it is recognised such persons are granted certain rights; it is a privilege to be granted a licence and along with the grant are certain duties and one is to uphold the good name of racing and another is to comply “with the duty to behave in an appropriate manner”. Conduct which is wrong and a departure from the proper standards is improper conduct”*

105. I respectfully accept what his Honour said as useful in determining what constitutes misconduct, improper conduct or unseemly behaviour within the meaning of AR175(q).
106. In my view Mr Graham’s conduct amounted to misconduct and/or improper conduct. Accordingly, I agree with the decision of the Stewards.
107. Therefore, in relation to Charge 1, the appeal should be dismissed and the decision of the Stewards confirmed.

## **CHARGE 2**

108. Charge 2 concerned the subject matter of Charge 4 particular (g).
109. In relation to Charge 2, I agree with the written submissions on behalf of Mr Graham at [83]-[84]. I do not consider that of itself swearing at Ms Robbins in the way that Mr Graham did constitutes improper conduct within the meaning of the AR175(q)..

110. I would therefore allow the appeal and dismiss Charge 2.

### **CHARGE 3**

111. Charge 3 is based upon the facts in Charge 4(j). For the reasons given in relation to Charge 2, I do not think that of itself saying to Ms Robbins “why don’t you piss off on the grass” amounts to misconduct. However, I consider calling Ms Robbins a “fucking skank” does cross the line and does amount to misconduct or improper conduct, if not unseemly behaviour.

112. I would therefore dismiss the appeal in relation to Charge 3 and confirm the conviction by the Stewards.

**MR J FLETCHER:** I agree with the reasons and proposed orders of the Convenor.

**MS J MASDEN:** I agree with the reasons and proposed orders of the Convenor.

### **FURTHER DIRECTIONS**

113. The Panel having dismissed the appeal in relation to Charges 1, 3 and 4, it will be necessary to hear submissions on the appeal against severity of penalty in relation to those charges. Directions need to be made for the hearing of this aspect of the appeal. We will leave it to the parties to determine whether this second stage of the appeal should be by way of a further hearing or by written submissions and to agree on any necessary directions for the hearing. If no agreement can be reached we will determine the course to be taken.

114. There are two additional matters the Panel would wish to raise. In considering penalty, we are not in any way constrained by the penalty imposed before the Stewards. The appeal is by way of a new hearing and the Panel may vary the decision of the Stewards by substituting any decision that they could have made.<sup>45</sup> We recognise that on appeal the Stewards would not normally argue for a more severe penalty. However, the nature of the charges in this appeal, particularly Charge 4, are unusual. If the Stewards propose to do more

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<sup>45</sup> *Thoroughbred Racing Act 1996 s.43(1),s.44(1)(b).*

than simply seek the dismissal of the appeal on severity and propose to argue for a more severe penalty they should give the Appellant clear notice and provision should be made for this in the directions. We are not inviting such an approach. However, without yet having the benefit of submissions on penalty and without having formed anything other than a preliminary view, we can see that on the evidence to date a case may well be available to be made by the Stewards that the penalty in relation to Charge 4 is too lenient. If such a submission is to be made by the Stewards, fairness would require that the Appellant has adequate and clear notice of this. It would be desirable that any such notice be accompanied by a summary or outline of the Steward's proposed submissions.

115. The second matter relates to an issue which may go to the mitigation of penalty. Again, the Panel has formed no view about this other than it is an issue that the parties might wish to consider. If there were administrative procedures or restrictions that could be imposed on Mr Graham, voluntarily or otherwise, that would restrict his contact with Ms Robbins (at no inconvenience to her), this may go some way to resolving the problem caused by Mr Graham's conduct towards Ms Robbins and may be a basis for the mitigation of the penalty that would otherwise be imposed. We do no more than raise this as a matter for consideration. It may very well be that the suggestion is impractical.

## **SUMMARY OF ORDERS**

116. It follows that the following order should be made:

- a) The appeal in relation to charges 1, 3 and 4 be dismissed and the conviction by the Stewards of 5 October 2017 is confirmed.
- b) The appeal in relation to charge 2 is allowed, the decision of the Stewards is set aside and the charge is dismissed.
- c) Directions are to be made for the hearing of the appeal on severity of penalty in relation to charges 1,3 and 4

## **SUMMARY OF ORDERS – 1 March 2018**

117. In accordance with order 3 above, submissions were made by the parties.

The Panel notes that following their decision of 22 February 2018 dismissing the appeal in relation to charges 1,3 and 4 and confirming the conviction by the

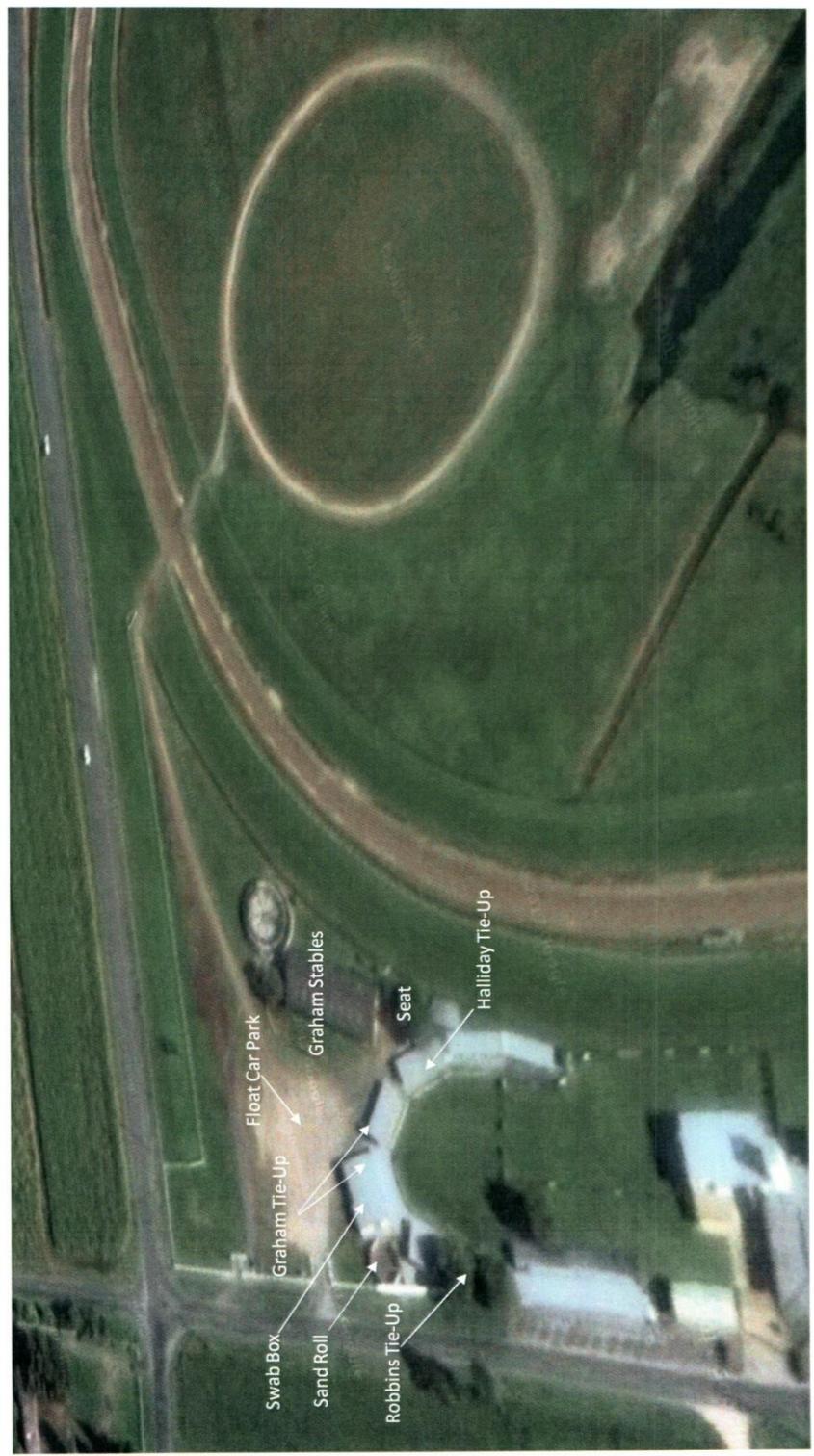
Stewards of 5 October 2017, Mr Graham withdrew his appeal against the severity of the penalty in relation to those charges. As a consequence, the Panel makes the following orders:

1. In relation to Charge 3, the penalty of a \$500 fine is confirmed.
2. In relation to Charge 1 and Charge 4, the four month suspension of Mr Graham's trainers licence is confirmed.
3. In accordance with the provisions of AR196(6)(a) the commencement of the penalty is deferred to commence on Wednesday 7 March 2018 and to expire on Saturday 7 July 2018 on which day Mr Graham may resume training.
4. The appeal deposit is forfeited.

Annexure 1

EXH 'B'

MAP OF MULWILLUMBAH RACE COURSE



## Annexure 2



Annexure 3

AR175(q)

Licensed trainer Mr Darren Graham you are hereby charged with 3 charges of improper conduct under AR175(q)

**AR 175.** *The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise;*

*(q) Any person who in their opinion is guilty of any misconduct, improper conduct or unseemly behaviour.*

Charge 1

The particulars of the charge being that on the morning of Saturday 20 June 2015 at Murwillumbah racecourse, you licensed trainer Mr Darren Graham did conduct yourself in an improper manner in that as licensed stable foreperson Mrs Susan Robbins walked a horse past you in the thoroughfare of the tie up stalls, you did strike that horse on the rump area resulting in its taking fright and pushing Mrs Robbins up against a white rail, such actions jeopardising the safety of both Mrs Robbins and yourself.

Charge 2

The particulars of the charge being that on the morning of Tuesday 2 February 2016 at Murwillumbah racecourse, you licensed trainer Mr Darren Graham did conduct yourself in an improper manner in that as licensed stable foreperson Mrs Susan Robbins walked a horse along the thoroughfare past the tie up stalls you were occupying, you did exit those stalls behind her and direct words to the effect of "Get out of my fucking way" towards her.

Charge 3

The particulars of the charge being that on the morning of Wednesday 19 April 2017 at Murwillumbah racecourse, you licensed trainer Mr Darren Graham did conduct yourself in an improper manner in that when stable foreperson Mrs Susan Robbins approached you, whilst you were hosing a horse in the thoroughfare in the tie up stalls, you did direct words to the effect of "Why don't you piss off on the grass" and "Fucking skank" towards her.

AR175(x)

Licensed trainer Mr Darren Graham you are hereby charged with a breach of AR175(x) for engaging in the workplace harassment of licensed Stable Foreperson Mrs Susan Robbins whilst she was employed, engaged and participating in the racing industry at the Murwillumbah Racecourse, between 25 January 2014 and 19 April 2017 by reason of one of, or any combination of two or more of the following particulars:

- a) On the Saturday 25 January 2014 you did refer to Mrs Robbins as a "fat fucker" to licensed stablehand Ms Helen Gorton.
- b) On Saturday 26 July 2014 you did direct words to the effect of "Watch yourself" towards Mrs Robbins.
- c) On Wednesday 19 November 2014, Thursday 16 June 2016 and 19 April 2017 you did refuse to clear the thoroughfare around the tie up stalls resulting in Mrs Robbins use of such stalls being impeded.

- d) On Tuesday 24 March 2015, Wednesday 25 March 2015 and Friday 27 June 2015 you did, whilst sweeping out your tie up stalls, sweep waste over Mrs Robbins as she walked past.
- e) On Saturday 20 June 2016 you did, as Mrs Robbins walked a horse past you in the tie-up stall area, strike that horse on the rump area resulting in it taking fright and pushing Mrs Robbins against a white rail.
- f) On Friday 10 July 2015 you did direct words towards Mrs Robbins to the effect of "You fucking heard you fucking hoe"
- g) On Tuesday 2 February 2016 you did, as Mrs Robbins walked a horse past the tie up stalls you were occupying, exit those stalls behind her and directed words to the effect of "Get out of my fucking way" towards her
- h) On Thursday 11 February 2016 you did direct words to the effect of "Gossiping bitch" towards Mrs Robbins.
- i) On Tuesday 20 September 2016, in the thoroughfare around the tie up stalls, you did walk a horse directly towards Mrs Robbins resulting in her having to alter her course or be struck by you and / or your horse.
- j) On Wednesday 19 April 2017 you did direct words towards Mrs Robbins to the effect of "Why don't you piss off on the grass" and "Fucking skank".