# RACING NEW SOUTH WALES APPEAL PANEL

## IN THE MATTER OF LICENCED TRAINER DARREN EGAN
## REASONS IN RESPECT OF
## PENALTY FOR BREACHES OF AR 233(c)

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| Appeal Panel: | **Mr P F Santucci – Convenor and Acting Principal Member** |
| | **Mr L V Gyles SC** |
| | **Mr J Murphy** |
| Appearances: | **Stewards: P. Sweney and J. Johnstone** |
| | **Appellant: J Bryant solicitor** |
| Date of Hearing: | **Written submissions received on penalty** |
| Date of Reasons: | **3 June 2024** |

## REASONS FOR DECISION ON PENALTY

1. **THE PANEL:** On 16 April 2024[1] the Panel handed down its reasons for decision in respect of the challenge to findings of guilt against three of the five charges laid under AR 233(c) in respect of alleged sexual harassment by the Appellant of a number of participants in the racing industry (the **substantive reasons**).

2. In the result the Panel found the Appellant, licenced Trainer Darren Egan, guilty of each of Charges 1, 4 and 5 (although the appeal was partially upheld in respect of some relatively immaterial particulars of Charges 1 and 5).

3. The Appellant only appealed the severity of the penalty for Charges 2 and 3.

[1] The reasons were first published on 16 April 2024 but were revised on 31 May 2024 to ensure anonymisation of the complainants in respect of all particulars and to correct typographical errors.

4. It now falls to Panel to determine the appropriate penalty for all five charges against AR233(c).

5. The conduct involved the Appellant sending text messages to five separate female jockeys who, from time to time, rode for the stable at which the Appellant worked as well as sending pictures of his genitals to two of the complainants.

6. The complete particulars of Charges 1, 4 and 5 are set out in the substantive reasons.

7. The particulars of Charges 2 are set out below in anonymised form.

**Charge 2**

The details of the charge being that you, licensed trainer Mr Darren Egan, did engage in sexual harassment of a person engaged in and/or participating in the racing industry by reason of the following particulars:

1. You are a licensed trainer with Racing NSW and are bound by, and required to comply with, the Rules of Racing.
2. Between 12 September 2022 and 9 November 2022 (both dates inclusive) you sent to licensed Approved Rider Complainant 2 by Facebook messenger a number of messages which included the following:

    ***12 September 2022 at 08.58pm***

    *"Hey, I just shit myselfBB".*

    *"Sorry that wasn't for you, but I thought I accidentally sent you a naughty photo of aomething(sic)".*

    ***28 September 2022 at 09.12am***

    *"Fuck, I could get myself into trouble looking at your photos on FB. If I was young again, I would comment on how good you look and I would ask you out for drinks."*

    ***9 November 2022 at 07.48am***

    *"If you had got hurt, I was going to ask you around for a spa.*

    ***9 November 2022 at 08.06pm***

    *"Hey, I really sorry about that message. I really don't mean anything by it. I should have added that I was only joking, nothing serious"'.*

3. Your conduct, as detailed above, amounts to sexual harassment of Complainant 2 who is engaged in and/or participates in the racing industry as you:

    (i) made remarks with sexual connotations relating to Complainant 2 and/or
    (ii) engaged in conduct of a sexual nature that was unwelcomed by Complainant 2, where you did so:

(iii) in circumstances where a reasonable person would have anticipated the possibility that Complainant 2 would be offended and/or humiliated and/or intimidated by the messages you sent to her.

8. The particulars of Charges 3 are set out below in anonymised form.

**Charge 3**

The details of the charge being that you, licensed trainer Mr Darren Egan, did engage in sexual harassment of a person engaged in and/or participating in the racing industry by reason of the following particulars:

1. You are a licensed trainer with Racing NSW and are bound by, and required to comply with, the Rules of Racing.
2. On 4 November 2023 and 9 November 2023, you sent to licensed Approved Jockey/Stable Foreperson Complainant 3 by Facebook messenger the following messages:

***4 November 2023 at 10.05pm***

*"Hi, I have to say you looked absolutely stunning today at [Race Course], not sure if your seeing anyone, if you are, he's one lucky bloke."*

***9 November 2023 at 7.26pm***

*"Hi, I wasn't coming on to you with my comments, I was just saying that you were looking beautiful. If I was coming on, I'd send you a few cock pics."*

3. Your conduct, as detailed above, amounts to sexual harassment of Complainant 3 who is engaged in and/or participates in the racing industry as you:

(iv) made remarks with sexual connotations relating to Complainant 3 and/or
(v) engaged in conduct of a sexual nature that was unwelcomed by Complainant 3,
where you did so:

(vi) in circumstances where a reasonable person would have anticipated the possibility that Complainant 3 would be offended and/or humiliated and/or intimidated by the messages you sent to her.

9. Before the Stewards the Appellant was given the following penalty:

(a) Charge 1 – 4 months disqualification

(b) Charge 2 – 4 months disqualification, reduced to 3 months for guilty plea

(c) Charge 3 – 4 months disqualification, reduced to 3 months for guilty plea

(d) Charge 4 – 12 months disqualification

(e) Charge 5 – 12 months disqualification

10. But having regard to the principle of totality of penalty the Stewards ruled that the total penalty imposed upon Mr Egan was that he be disqualified for a period 2 years.

11. The Appellant is entitled to a hearing de novo in respect of penalty. The Panel is entitled to take into account the penalty given by the Stewards but it does not form a starting point for the Panel's consideration.

**Appellant's submissions on penalty**

12. The Appellant made submissions at a general level in respect of parity between the conduct of the Appellant and conduct in other cases that he argued to be more grave than the present case.

13. The Appellant directed the Panel to the following cases said to provide useful parity examples:

    (a) Appeal Panel's Decision on Penalty in respect of Licence Trainer Michael Dwyer dated 18 August 2023, where Charges 3 and 5 involved physical touching of a stable hand on the backside and placing an arm around the waist of a complainant. Paragraphs 15 -18 of *Dwyer* considered the need for parity with the Tribunal decision of Mr Armati in *O'Neile*, and ultimately gave 3 and 4 month suspensions for Charges 3 and 5 that were considered to be low-mid range.

    (b) Racing Appeal Tribunal's decision in respect of Licenced Trainer Troy O'Neile dated 21 April 2023 which involved Mr O'Neil pleading guilty to saying to the complainant in that case "if you don't win on this horse, I'll jam your face up to my cock" while simultaneously thrusting his pelvis. The Racing Tribunal considered a six month disqualification was the appropriate starting point, but with discounts for subjective factors including that Mr O'Neil had been drinking (a rare occurrence for him) and it was found the actions were out of character, and he had shown remorse. Mr O'Neil was given four months suspension;

    (c) VCAT decision in *Bellman and Harness Racing Victoria* [2022] VCAT 249 that involved Mr Bellman pleading guilty to improperly interfering with a female driver (contrary to AR 231(1)(f)) by flicking his whip between the complainant's thighs. Mr Bellman received a 3 month suspension.

14. One of the central submissions repeated by the Appellant in respect of the objective seriousness of each offence is that his case does not involve the elements of touching that were found in *Dwyer*, and *Bellman*, nor was it in the physical presence of the complainants but was over text. Further it is emphasised that the conduct did not involve threats or intimidation, and neither was it conduct that could have put the complainants in immediate danger before a race in circumstances akin to those in *O'Neile* (where there was risk of distracting a rider with sexually inappropriate conduct immediately prior to a race).

15. The Panel accepts that there are factual differences with the offending in *Dwyer, Bellman, O'Neil* in particular the lack of physical touching or physical proximity to the complainants. We consider those matters further below.

16. The Appellant then made specific submissions with respect to objective seriousness of each charge based on the circumstances of the offending. We have reviewed those and taken those into account when dealing with each charge below.

17. In respect of the personal circumstances of the Appellant, it was submitted that he is 52 years old, he has been a licenced trainer for 16 years and involved in the racing industry for 37 years. It is also said that the Appellant comes before the Panel with a clean disciplinary record.

**Stewards' submissions on penalty**

18. The Stewards emphasised that the present case was one in which specific deterrence required substantial weighting. The Stewards argued that there has been no remorse, no contribution and no real acknowledgment of the wrongdoing.

19. The Stewards also emphasised that the outcome of the Racing Tribunal's decision in *O'Neile* was largely the result of subjective factors that had the effect of discounting the sentence imposed from a starting point of 6 months disqualification down to 4 months suspension. In that respect Mr O'Neile pleaded guilty, showed remorse, and could demonstrate the conduct was an isolated event due to his consumption of alcohol (which he drank infrequently because of a history of alcohol abuse in his family).

20. The Stewards emphasised that there are no such subjective factors here that would lead to a discount. Instead it was argued for the Stewards that there are factors which warrant a more onerous penalty be imposed because of the need for specific deterrence.

21. As with the Appellant, the Stewards also provided submissions on each charge that we have taken into account.

**Panel's consideration of the appropriate penalty**

*Objective seriousness and general deterrence*

22. The Panel accepts that the purpose of imposing penalties is to protect the image and integrity of, and participants in, the sport and industry of Racing. The purpose is not to punish the offender. It is necessary to have regard to the objective seriousness of the conduct, the need for general and specific deterrence, the pleas of guilty, the disciplinary history of the Appellant and his personal circumstances.

23. We also refer to without rehearsing the principles considered by the Racing Appeals Tribunal of New South Wales in *Amanda Turnbull v Harness Racing NSW* 30 September 2022 at [113]-[144] referring to the decision of the High Court Australia in *Building and Construction Commissioner v Pattinson* [2022] HCA 13, in which the Racing Appeals Tribunal confirmed it was appropriate to employ analytical tools associated with criminal sentencing such as totality, parity and course of conduct.

24. The nature of the charges being sexual harassment means it is likely to carry with it a high degree of objective seriousness (although we would not put it so high as to be "always" the case: cf *Dwyer* [9]).

25. Does the objective serious of this type of sexual harassment case warrant a starting point of disqualification rather than suspension?

26. The Panel is mindful of the difference between suspension and disqualification. Suspension would prevent the licenced trainer from carrying out his licenced function, and would for example prevent him from working even as a stablehand and from entering a mounting yard: see AR 267.

27. By contrast disqualification is more drastic. The licenced person is prohibited from participating in racing in almost any form. For example disqualification carries with it a prohibition on entry to a racecourse, or training complex; a prohibition on holding office at a racing Club; a prohibition on the person racing horses even as an owner; and a prohibition on the person from sharing in winnings, or opening or operating a betting account or transacting a bet: see AR 263.

28. In the present circumstances the conduct is objectively serious in respect of each charge. We respectfully agree and adopt the reasoning of the Racing Tribunal in *O'Neile* that the need for general deterrence of this type of conduct warrants the appropriate starting point to be disqualification not merely suspension: see *O'Neile* [60].

29. There is good justification for such a starting point. First it sends an appropriate message to the industry that such conduct will not be tolerated. Second, it recognises the insidious nature of the conduct, and the potential risk of ongoing harm and embarrassment that might be occasioned by a licenced person still participating in racing industry by, for example, attending race meetings, or holding office at a racing Club, if only a suspension were imposed. Third, it also recognises that such conduct is only ever successfully charged if complainants feel comfortable giving testimony to the Stewards. That object is well served by disqualification and the attendant exclusion from racing, if the testimony is ultimately accepted and leads to a conviction.

30. In summary, the starting point of disqualification demonstrates as a means of general deterrence that engaging in such conduct is likely to result in the total exclusion from both the professional and social aspects of racing. That is an appropriate means of protecting both racing industry participants, and the image and integrity of the sport.

31. It is therefore appropriate in the case of the Appellant being found guilty of the type of objectively serious sexual harassment involved in this case that the starting point for the penalty involves excluding the Appellant from not just his licenced professional participation in racing but also from the social aspects of the racing industry that will result from disqualification.

*Parity cases*

32. As to parity, *O'Neile's* case provides the most meaningful comparison. It is true that certain aspects of the Appellant's conduct are less serious than *O'Neile,* namely, the events did not occur in physical proximity of the complainants, and it did not occur immediately before a race.

33. However, there are a number of aspects of the Appellant's conduct that make it (taken in total) more objectively serious than *O'Neile*.

34. First, the conduct was motivated by the Appellant's desire for sexual gratification or at least to gauge sexual interest from the complainants. So much is clear from the text messages, and

pictures of himself. The Appellant engaged in a course of conduct that ranged from unwelcomed complements to graphic descriptions of sexual conduct, at all times intending to indicate a willingness to engage in sexual activities with each of the complainants (substantive reasons [74]-[75], [78], [103], [106], [121], [137],[155], [159]). To put it colloquially, the Appellant was always fishing for interest from the younger female racing participants.

35. Second, it was undertaken in a context where there was a power imbalance that provided the opportunity for the Appellant to be communicating with the complainants over text message, and done in the course of discussing opportunities to ride.

36. While the Appellant's submission is correct that the events did not occur "in" a workplace, in the sense of the physical location of the workplace, the conduct was no less serious than the conduct in *O'Neile* by reason of that fact taken alone. As we found in the substantive reasons each of Complainants 1, 2 and 3 were only dealing with the Appellant because of work-related matters, they were not otherwise friends (substantive reasons [157]).

37. The Appellant was in a more senior and perceived to be more powerful position compared with the complainants, by virtue of his ability to influence who may be riding a particular horse. We refer to our findings in the substantive reasons at: [40], [41], [81], [104]. It seems that the Appellant introduced discussion of sexual matters in the course of offering rides to at least one complainant in the hope of eliciting a response (substantive reasons [156]).

38. It is also true that the matter of *O'Neile* involved a power imbalance in the workplace between Mr O'Neile and the complainant in that case. But the facts of this case make it considerably more serious. Notably the offending in *O'Neile* was a one off, and there is no evidence from the Racing Tribunal's decision that suggests Mr O'Neile in fact took a sexual interest in the complainant. While that does not excuse the behaviour (rightly described by the Racing Tribunal as appalling (*O'Neile* [17]) it points to less grave offending than the present circumstances.

39. Third, the Appellant's conduct occured over an extensive period of time, and in the case of Complainant 4 and 5 it continued after the complainant expressly asked for the conduct to stop. It was not a "one off", nor "out of character". It was consistent and repeated conduct. The numerous requests for the Appellant to stop the course of conduct were ignored (substantive reasons Complainant 4 [119], [123]-[126]; Complainant 5 [140], [146]-[147]).

40. We return to consider each charge specifically by comparison to *O'Neile* for parity below.

*Specific deterrence*

41. As to specific deterrence. The Panel accepts the submission of the Stewards that this is a case in which specific deterrence weighs substantially in the need for a heavy penalty to be imposed. Relevant to this assessment were matters the Panel considered in its substantive reasons at [151] to [160] under the heading "Concluding Remarks".

42. The Appellant submitted that in respect of Charge 2 there was an apology text message that we should take into account saying on 9 November 2022 saying "*Hey, I'm really sorry about that message, I really didn't mean anything by it, I should have added that I was only joking nothing serious*": AB 12, and AS[22]

43. It was also submitted that in respect of Charge 3 there was an apology text, but it was frankly conceded in the Appellant's submission that the apology had the effect of "causing further harm": AS[31]. That was because the apology text message extracted in the particulars to Charge 3 on 9 November 2023 finished the supposed apology by saying "*If I was coming on, I'd send you a few cock pics*".

44. Considering those matters the Panel is willing to accept that there was some, although slight, contrition in respect of Charge 2. We reject the submission that there was contrition in respect of Charge 3, instead it was a text message designed to further raise the topic of the Appellant taking photos of himself.

45. The Panel otherwise agrees with the Stewards in respect of the most serious charges, being Charges 1, 3, 4 and 5, there has been no meaningful remorse and no understanding of the wrongdoing engaged in by the Appellant.

46. The Panel refers to the evidence before the Panel extracted in the substantive reasons at [64], in which the Appellant characterised the vulgar and sexualised behaviour in which the Appellant was attempting to solicit sexual engagement from complainants 4 and 5.

47. The Appellant considered it was necessary for the complainants to tell him if his conduct was crossing a "boundary line", and attempted to characterise his behaviour as "jokes" and "banter" (substantive reasons [64], [113]-[116]). The Appellant's abdication of responsibility for his own conduct (substantive reasons [155], see also [133]) demonstrates a lack of remorse, and the need for specific deterrence.

48. The most cursory review of the text messages sent to Complainants 4 and 5 demonstrates they were not a joke and not banter and remained graphic sexualised conduct, motivated by a personal desire for sexual gratification on the part of the Appellant, intended to gauge the sexual interest of the complainants (substantive reasons [74]-[75], [78], [103], [106], [121], [137],[155], [159]).

49. The absence of remorse and insight again is a point of difference from *O'Neile*.

*Course of conduct*

50. As to course of conduct it is important to recognise that it is not appropriate simply to tally up the total number of text messages or images sent. Some of the exchanges occurred around about the same date or involved one course of conduct relating to a particular date. But it should also be recognised that the same complainant was confronted with multiple instances of sexual harassment across different dates.

51. Additionally, it is important to recognise that there are five separate complainants. That is a matter that suggests some of the penalty should be served cumulatively and not concurrently (see *Dwyer* [22]). That issue is best dealt with in the consideration of totality of sentence.

*Subjective factors*

52. Little was advanced by the Appellant by way of subjective factors. We note (and it does not seem to be disputed) that he has an otherwise clean disciplinary record. We also take into account that the Appellant has worked for a long time in the racing industry.

53. We would infer that his primary working experience is within the racing industry and he may struggle to find work as easily outside of racing, or at least struggle to find work that was equally fulfilling.

54. We have taken into account the clean disciplinary record of the Appellant. But that is a factor that carries little weight in respect of repeat offending over some years, where that offending enlivens the distinct need to impose a penalty that will be protective of all racing participants and the image and integrity of the industry. In particular here, the penalty needs to demonstrate that the racing industry takes seriously the right of young women entering the sport to seek and obtain riding opportunities free from sexual harassment.

55. Bearing in mind the matters discussed above we turn then to consider the appropriate penalty for each charge

*Charges 2 and 3*

56. Charges 2 and 3 were the only charges to which the Appellant pleaded guilty. We accept the appellant's submission that these two charges should be graded as low in objective serious and less serious than the conduct in *O'Neile.*

57. The conduct in each of Charges 2 and 3 involved unwelcome comments motivated by the Appellant's sexual interest in the complainants.

58. In respect of Charge 2 it also involved the suggestion that the Appellant had been looking through the Complainant's facebook stating "Fuck I could get myself into trouble", and referring to wanting to comment on the photographs. It was subsequently followed up by reference to inviting the Complainant around for a spa. In context we consider that to be conduct of a sexual nature that was unwelcomed.

59. Charge 3 was limited to unwelcome comments. However, it was then followed in the supposed apology text by reference to the Appellant sending "cock pics". Again in a manner consistent with other offending that was done by overtly disclaiming an intention to send such pictured. However, we find it was part of a course of conduct intended to introduce the topic of the Appellant's lurid photographs of himself for the purpose of gauging the interest of the Complainant in receiving such photographs. As we said in relation to Charge 1 (substantive reasons [78]) Complainant 3 should never have to read or be confronted with any reference to the Appellant's genitals, lest still the notion that the Appellant was photographing himself in a sexually explicit way.

60. Weighing those factors we consider the offending in Charge 3 was at about the same level as Charge 2.

61. It is also fair to say that the effect on Complainant 3, while not to be ignored, was at the lower end of the spectrum for this type of offending.

62. There was some degree of contrition in respect of Charge 2 but not in respect of Charge 3.

63. We consider each of Charges 2 and 3 was less serious than Charge 1.

64. For that reason we consider that the appropriate starting point should still be disqualification, but it ought to be only a 3 month disqualification (rather than the 6 months in *O'Neile*).

65. We consider some discount is required for plea of guilty, and we think a 1 month discount is appropriate.  But no other subjective factors warrant a greater discount. The slight contrition

in respect of Charge 2 is not sufficient to justify a different outcome between Charges 2 and 3.

66. Accordingly, we consider the appropriate penalty to be 2 months for each of Charges 2 and 3.

*Charge 1*

67. The conduct in respect of Charge 1 consists of what can roughly be described as two separate incidents of sexual harassment comprised of numerous text messages that first occurred on 15 October and separately on 9 November (noting the appeal in respect of 12 November 2023 was upheld in favour of the Appellant). That makes it repeat offending and not a one off incident with Complainant 1.

68. Again this conduct was engaged in for the purpose of gauging sexual interest from the Complainant and furthering the Appellant's own sexual interest in the Complainant. The discussion of sending "cock pics" can be described in equal terms to that of *O'Neile* as appalling.

69. We note that the effect on the Complainant was a sense of humiliation and feeling uncomfortable such that it became an issue for Complainant 1 to manage, while trying to maintain a good relationship with the Appellant to "get rides and trackwork" (substantive reasons [82], [83], [90]).

70. While reasonable minds may differ we consider the conduct to be mid-to-low range, and slightly less objectively serious than the conduct in *O'Neile* (where it occurred in person, involved physical thrusting and occurred before the race).

71. For that reason we think the penalty for the offence should be slightly lower than starting point of 6 months disqualification for the conduct in *O'Neile.*

72. When one considers the need for specific deterrence, and the absence of compelling subjective factors that would warrant a discount we consider an appropriate penalty is 4 months disqualification.

*Charge 4*

73. Charge 4 is far more objectively serious than Charges 1, 2 and 3, and more serious than the conduct in *O'Neile*. It involved an image of the Appellant's genitals accompanied by the text "is it wrong to say I want to pleasure you xx". It also involved numerous graphic text

messages: see eg 28 October 2023, that was clothed in the language of an apology or retraction, but was in truth a continued (and unrelenting) repetition of the same conduct.

74. Charge 4 involves a number of separate incidents, on 18 April 2022, separately on 19 April 2022, 4 February 2023, 10 February 2023, 22 June 2023, 25 October 2023, and 28 October. It clearly represented a pattern of repeated behaviour and was not a one off.

75. It was also conduct that continued after numerous requests for the conduct to stop (substantive reasons [107], [119], [123]-[126]).

76. It was conduct motivated by the sexual intentions of the Appellant and was sent for his own gratification.

77. Each of these factors makes it substantially worse than the *O'Neile* offending, and the conduct should be described as mid-to-high range offending. That means a higher starting point than the 6 months disqualification in *O'Neile* is necessary. We consider a starting point in the range of 10 -12 months is appropriate for mid-to-high range offending.

78. It should not be thought that higher range offending is reserved only for physical touching. The damaging and unsettling effect of sending graphic images directed at a complainant, with the immediate suggestion of sexual gratification of the perpetrator should not be minimised. The use of graphic images and words sent electronically might often, as in this case, be more serious and cause greater distress to the complainant than unwanted but fleeting physical contact (see by contrast the touching on the backside or placing of an arm around the waist in *Dwyer*).

79. The effect on Complainant 4 was serious. She was made to feel uncomfortable in her work place. She was left in the same predicament of trying to maintain a professional image to further her career and continue to ride, but was left to try to manage the Appellant's ego in rebuffing his continual and repeated advances. She was also let down by someone she considered a friend.

80. The Appellant has shown no remorse. Worse still he has disputed that the conduct was unwelcome and remained defiant under cross-examination that the text messages were in fact welcome and could be seen as attempts at humour.

81. To the contrary the need for specific deterrence means that a penalty at the higher end of our starting range of 10 to 12 months is appropriate. The subjective factors do not require any discount be applied.

82. Taking those matters collectively we consider an appropriate penalty is 12 months disqualification

*Charge 5*

83. Charge 5 was also at the most serious end of the charges and constitutes mid-to-high range offending. Many of the comments made about the conduct in Charge 4 apply to Charge 5.

84. The text messages were again extremely graphic. The image of the Appellant's genitals was only marginally less graphic and had no accompanying text.

85. But the conduct was more extensive and more often repeated in respect of Complainant 5. The conduct involved numerous repeated incidents over 9 May 2022, 13 May 2022, 28 June 2022, 28 July 2022, 29 July 2022, 8 September 2022, 18 October 2022, 4 April 2023, 25 August 2023, 9 September 2023.

86. Again, the conduct was repeated despite requests to stop (substantive reasons [140], [146]-[147]).

87. It remains clear the conduct was for the Appellant's own sexual gratifications.

88. All of this means the offending was more serious than *O'Neile* and warrants the higher starting range of 10 to 12 months for mid-to-high range offending.

89. Again, there was no remorse in respect of this serious offending. The Appellant's cross-examination of the Complainant before the stewards (we infer on instructions) only led to the Complainant to clarify and explain just how unwelcome the conduct was and instead. In the hearing before the Panel and despite having the benefit of the evidence of the Complainants before the Stewards, the Appellant remained defiant under cross-examination that the conduct was welcome or was banter.

90. The Appellant has demonstrated no insight into the wrongfulness of his offending.

91. Accordingly, the need for specific deterrence is high, and subjective factors do not justify a discount. A penalty at the higher end of the range is appropriate.

92. Taking those matters into account we consider it to be on par with the offending in Charge 4 and also consider the appropriate penalty to be 12 months.

*Totality*

93. Having considered each of the charges individually, it remains important for the Panel to consider the totality of the penalty imposed to ensure that the imposition of a cumulative sentence is not incommensurate with the gravity of the whole of the offending, and remains consistent with the protective purpose of imposing the penalty.

94. In the present case the cumulative sentence is as follows:

    (a) Charge 1 – 4 months disqualification

    (b) Charge 2 – 2 months disqualification (reduced from 3 for a guilty plea)

    (c) Charge 3 – 2 months disqualification (reduced from 3 for a guilty plea)

    (d) Charge 4 – 12 months disqualification

    (e) Charge 5 – 12 months disqualification

    (f) Totalling 2 years and 8 months disqualification

95. The Appellant submitted that the penalties should be served concurrently (and not cumulatively) "*due to the charges relating to the same type of conduct*": AS [21]. The Appellant also cited *Dwyer* in support of the proposition that it would be appropriate to do so even where there are multiple complainants.

96. The Panel rejects that submission. First, it appears the point was considered but not decided by the Panel in *Dwyer*, who deferred to the more lenient approach of the Stewards in that case (which has not been adopted here): see *Dwyer* [22]. In light of that we consider we are unconstrained by considerations of parity.

97. In the present case while the conduct was similar it occurred on various different dates, and on multiple occasions with the multiple complainants. For that reason we do not think it would be appropriate nor reflect the magnitude of the offending for the whole of the penalties to be served concurrently.

98. However, the Panel is mindful of the drastic consequences of disqualification and not mere suspension. We consider that it is appropriate to reduce the cumulative penalty imposed to be only 2 years disqualification in total. We consider the protective purpose of the penalty will

be achieved by exclusion of the Appellant from racing for that 2 year period. But no longer is required. Any longer than 2 years would be incommensurate with the offending.

99. In the result we have reached the same final conclusion as the Stewards on penalty. For that reason the appropriate order is that the appeal in respect of severity of penalty be dismissed.

**Final Orders**

100. It remains to make final orders.

101. We note that the Appellant obtained a stay of part of his earlier penalty, and have not been asked to factor that into the final orders to be made by way of stipulating dates. Accordingly, if further clarification or adjudication is required to decide the precise start or end time of the penalty, the parties have leave to send proposed orders to the Panel.

102. Absent any further variation the Panel makes the following orders:

(1) Appeal in relation to Charges 1 and Charge 5 be partially upheld in respect of the particulars referred to at paragraphs [98], [150] of the substantive reasons dated 16 April 2024 (revised 31 May 2024).

(2) Appeal in respect of Charges 1, 4 and 5 in respect of breaches of AR233(c) be otherwise dismissed.

(3) Findings of guilt on the balance of Charges 1, 4 and 5 are confirmed.

(4) Appeal in respect of severity of penalty for Charges 1, 2, 3, 4 and 5 be dismissed.

(5) The period of 2 years disqualification imposed by the Stewards is confirmed.

(6) Appeal deposit be forfeited.

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