**RACING NEW SOUTH WALES APPEAL PANEL**

**IN THE MATTER OF LICENCED TRAINER DARREN EGAN**
**SUBSTANTIVE APPEAL IN RESPECT OF ALLEGED BREACHES OF AR 233**

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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: | **30 January 2024, final submissions received on 16 April 2024** |
| Date of Reasons: | **16 April 2024 (revised 31 May 2024)** |

**REASONS FOR DECISION (REVISED)**

**SUMMARY**

1. **THE PANEL:** The Appellant, licenced Trainer Darren Egan, was charged with five charges under AR 233(c) in respect of alleged sexual harassment by the Appellant of a number of participants in the racing industry. The conduct involved the Appellant sending text messages to five separate female jockeys who rode for the stable at which the Appellant worked as well as sending pictures of his genitals on two occasions.

2. At a hearing before the Stewards on 7 December 2023, the Appellant pleaded guilty to 2 of the charges. At the conclusion of the hearing he was found guilty in respect of the remaining 3 charges. A penalty was imposed by the stewards of a disqualification for 2 years.

3. The Appellant has appealed the severity of the penalty in respect of the two charges to which he pleaded guilty. He has appealed in respect of both the finding of guilt and severity of the penalty for the remaining 3 charges.

4. The Appellant has raised a number of jurisdictional objections in the alternative turning on the submission that the conduct was a private matter outside the remit of the Stewards, or was not conduct that was engaged in "while" the Appellant or the complainants were "participating" in racing.

5. To the substance of the charges to which he has pleaded not guilty, the Appellant did not dispute that the text messages or the images were sent. Rather the Appellant argued that properly viewed in context, including the existing friendship with some of the women, the Stewards would not be able to discharge their burden to establish (consistently with the principles in *Briginshaw*) that the conduct was of a sexual nature, was unwelcome, and was conduct in respect of which a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

6. Following the close of the hearing a copy of the transcript of the proceedings was received, including a mark-up provided by the Stewards showing corrections. On 12 March 2024 the Panel directed that the Appellant be given a copy of the audio recording in order to offer any comments or counter-proposals for the amendments.

7. The Panel received written submissions from the Appellant dated 8 February 2024 (**AS**), written submission from the Stewards on 15 February 2024, and written submission in reply from the Appellant dated 21 February 2024 (**AReply**).

8. The Stewards contended in writing that the Appellant's submissions on factual matters should be disregarded because they exceeded the leave given to address on particular topics. The Panel received further written submissions from the Appellant dated 16 April 2024 contending, among other things, that all written submissions should be considered. Those submissions accepted the Stewards' mark-up of the transcript.

9. The Panel has determined that it should read and consider all the submissions provided by the parties.

10. As will be apparent from the balance of the reasons we have given consideration to all of the submissions made by the Appellant.

11. The Panel has considered the totality of the material before it, and for the reasons that follow has found that the substance of each of the charges has been made out (with the exception of some minor matters in respect of Charge 1 and Charge 5 where the appeal will be upheld in respect of certain text messages) and the main substance of the Appeal should be dismissed.

12. The Panel will direct the Appellant to provide written submissions on penalty and the appropriate form of orders within 7 days of the date of these reasons.

## THE CONDUCT FALLS WITHIN THE SUPERVISION OF RACING NEW SOUTH WALES, AND WITHIN THE SCOPE OF THE AUSTRALIAN RULES OF RACING

### Australian Rules of Racing

13. It was rightly conceded that the Australian Rules of Racing apply to the Appellant as a licenced person at the time of his offending by means of his acceptance of the standing offer provided for in the rules: see AR 3; *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224 at [92].

14. The Australian Rules of Racing prohibit certain conduct, including sexual harassment. AR 233(c) prohibits "a person" from engaging in sexual harassment of a person "employed, engaged in, or participating in the racing industry".

15. That provision and the relevant definition is as follows:

> **AR 233 Other misconduct offences**
>
> A person must not:
> …
> (c) engage in sexual harassment of a person employed, engaged in, or participating in the racing industry.
>
> **AR 2 Dictionary**
>
> Sexual harassment means:
> (a) subjecting a person to an unsolicited act of physical intimacy; or
>
> (b) making an unsolicited demand or request (whether by demand or implication) for sexual favours from a person; or
>
> (c) making a remark with sexual connotations relating to a person; or
>
> (d) engaging in any other unwelcome conduct of a sexual nature in relation to a person,
>
> where the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so:
>
> (i) with the intention of offending, humiliating or intimidating the other person; or
>
> (ii) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

> The conduct described in paragraphs (b), (c) and (d) includes, without limitation, conduct involving the internet, social media, a mobile phone, or any other mode of electronic communication.

**The stewards had power to investigate the conduct and charges as they saw fit**

16. The Appellant argued that the Stewards were acting outside of jurisdiction to investigate the conduct by reference to AR 15 where it was submitted that the Stewards were only empowered to investigate matters "relating to racing". The Appellant argued that the *"conduct alleged is private conduct and that AR15(a) does not extend to conduct done in private where there is no connection to racing"*: AS [16].

17. In the Panel's view, focussing the analysis on whether the conduct was "private" is likely to distract. For example, nefarious conduct undoubtably caught by the rules may occur in private. Rather the relevant focus needs to be on the statutory wording that provides the source of the Stewards (and Racing New South Wales) power to investigate and charge participants in racing, and the wording of any particular rule.

18. Independently of the contractual jurisdiction conferred on Racing New South Wales by reason of the Appellant's participation in racing under ARR 3, the primary source of power is statutory.

19. Racing New South Wales (**RNSW**) is established by statute. The functions and powers of RNSW are set out in sections 13 and 14 of the *Thoroughbred Racing Act 1996* (NSW). The functions (defined to include powers: s 3) of RNSW include controlling and supervising horse racing (s13(1)(c)) and such functions as may be conferred or imposed by the Australian Rules of Racing (s 13(1)(f))

20. Racing NSW will be acting within the powers conferred by section 14 of the Act, by doing "*all things that may be necessary or convenient to be done for or in connection with the exercise of its functions*": s 14(1) of the Act. Those very wide words of power, are further explained (but not limited) in s14(2)(c) and (d) to include supervision of "*all other persons engaged in or associated with racing*"; and to "*inquire into and deal with any matter relating to racing"*.

21. In Reply the Appellant also submitted the Act did not "*give the Stewards the power to investigate the private lives of licenced persons if it is not related to racing*": AReply [15].

22. To enliven the statutory power in sections 14(2)(c) and (d) of the Act for Racing NSW to investigate a matter it is necessary only to demonstrate that a person was "engaged in or associated with racing" or that there is a "matter relating to racing": see *Racing New South Wales v Fletcher* (2020) 379 ALR 778 at [42]-[43].

23. In the present case the Appellant was engaged in or associated with racing. The relevant sexual harassment was conduct that related to racing by virtue of the fact that it was directed towards other participants in racing. In the Panel's view that alone is sufficient to bring it within the supervision and jurisdiction of RNSW, and the investigation was within the power and authority of the Stewards.

**ARR 233(c) is not limited to sexual harassment "in the course of participating" in racing**

24. The Appellant then makes a further argument. The Appellant says it was not enough for the complainants to be "participants" in racing, they instead need to be "participating" in racing at the time the events occurred.

25. The Appellant submitted in his written submissions that it was necessary for the Stewards to establish that each of the complainants were harassed *"<u>while</u> employed, engaged in or participating in racing <u>at the time of the alleged incidents.</u>"*: AS [17].

26. The Appellant says that because the text messages all occurred at times when the Appellant was not with the complainants at a racing related location (ie the stables) or during the course of training or riding, it was therefore not covered by the rules.

27. The Panel rejects that submission.

28. The conduct amounted to sexual harassment by one licensed person of a number of other licensed participants in racing (being licensed two Apprentice Jockeys and a licensed Approved Rider/Stable Foreperson). We consider that that was sufficient to bring the conduct within the scope of ARR 233(c).

29. The first reason for that conclusion is as a matter of construction of AR 233(c). The Panel is of the view that the rule is cast in wide terms and is intended to cover sexual harassment that occurs in New South Wales between racing participants, without limit to where and when such harassment occurs.

30. ARR 233 ought not be read as requiring that the conduct itself must take place while the participants are engaged in racing. The immediate statutory context confirms that approach.

There is a clear difference between the scope and application of workplace bullying regulated by AR 233(b) ("while the person is acting in the course of his or her duties"), and the regulation of sexual harassment in AR 233(c). For convenience that provisions is as follows:

> **AR 233 Other misconduct offences**
> A person must not:
>
> …
> (b) engage in workplace harassment or bullying of a person **while the person is acting in the course of his or her duties** while employed, engaged in, or participating in the racing industry;
>
> (c) engage in sexual harassment of a person employed, engaged in, or participating in the racing industry.
>
> [emphasis added]

31. The drafter of the rules clearly intended to limit the scope of regulation of workplace harassment to matters that occurred "while" the person was "*acting in the course of his or her duties*". The absence of such a limit on the scope of the sexual harassment in ARR 233(c) is consistent with a more expansive scope.

32. Further the word "participating" in ARR233(c) should have a consistent meaning across ARR233(b) and (c). Given the presence of the other words of limitation in AR 233(b) it would lead to duplication if the word "participating" also implied the same limitation of "while participating" in AR 233(b).

33. A more harmonious reading is achieved by recognising that the word "participating" is not to be construed as conveying such a limitation in either of ARR233(b) or ARR 233(c).

34. The Panel's conclusion in that regard is fortified by having regard to the enactment of the *Anti-Discrimination Act 1991 (Qld)* (**Queensland Act**) which appears to be the statutory inspiration for the prohibition in AR 233. Notably, the Queensland Act explains that it was intended to achieve its purpose of promoting "equality of opportunity" by *"prohibiting*

*sexual harassment"*: s 117 Queensland Act. Section 118 then sets out that prohibition: "A person must not sexually harass another person".

35. Section 119 then contains a definition of sexual harassment that is in near identical terms to the definition of sexual harassment in the Australian Rules of Racing.

36. Notably the Queensland Act was seeking to impose a prohibition on sexual harassment anywhere in Queensland. It is not limited only to circumstances that are related to the workplace.

37. That is a clear point of distinction with the Commonwealth legislation. Section 28B of the *Sex Discrimination Act 1984* (Cth) makes it unlawful for: a person or fellow employee to "sexually harass" an employees or prospective employees (s28B(1) and (2), (7)); and extends to worker or persons conducting a business or undertaking (s28B(3), and (4), (6)). But in each case it is clear that the Commonwealth Act was regulating particular workplace relationships and settings

38. The Panel's view is that ARR 233(c) should be read as prohibition on sexual harassment of any person engaged in or participating in racing. The application of the prohibition is not predicated on the conduct occurring the course of a particular workplace setting.

39. Even if the Panel were wrong in its view about the generality of the prohibition contained in the rules, the facts of the present case bring it within the ambit of conduct that was within the course of the participation in racing. That will become clear with respect to certain complainants below.

40. But it is enough to identify that the communications in the present case often occurred as part of a chain of communication with certain complainants about racing related matters, the working and riding of horses, and rides that may be available to the complainants. Some examples include the text chain with Complainant 1 on at AB 119-127.

41. Another more brazen example is the Appellant's text message with Complainant 4 in which he feigns an apology for sending pictures of his own genitals, then offers to send further such

pictures if the Complainant is willing and in the very next sentence refers to potential upcoming rides (see text 10 February 2023):

> Hello beautiful, I didn't realise I sent you a cock pic, I'm sure it was for someone else. I am so fucking sorry, unless you want to see more lol. I'm trialling [horse] again next Wednesday if your available xx

42. It follows that the charged conduct is inextricably related to racing.

**Applicable principles for establishing sexual harassment**

43. As to the balance of the relevant principles, in order to demonstrate sexual harassment the Stewards must establish (noting that no case was alleged about subparagraph (a) of the definition) that:

    (a) the Appellant made unsolicited demands or requests for sexual favours (see Definition (b)); or

    (b) the Appellant made remarks with sexual connotations relation to a person (see Definition (c)); or

    (c) the Appellant engaged in other unwelcome conduct of a sexual nature in relation to a person (Definition (d)).

44. The satisfaction of those criteria does not require that the conduct be overtly sexually explicit. It is sufficient that material is suggestive of sexual matters, or conveys a double meaning that would satisfy the definition: *Vitality Works Australia v Yelda (No 2)* [2021] NSWCA 147 [36], [125].

45. Further, the satisfaction of any of those criteria in the definition does not involve an inquiry as to the Appellant's subjective intention in conveying the material or engaging in the conduct. Despite Mr Bryant's submission to the contrary (T 4025- 4034), intention is not a necessary element of establishing that remarks conveyed sexual connotations, or was unwelcome conduct of a sexual nature.

46. In respect of unwelcome conduct, so much was explained by the New South Wales Court of Appeal in *Vitality Works Australia v Yelda (No 2)* [2021] NSWCA 147. In that case, the employer had the intention of creating a work safety campaign concerning the proper use of lubricants for Sydney Water employees. A poster was created that said "Feel great – lubricate" accompanying a picture of the complainant in that case. Although the employee

had agreed to have photograph taken for the campaign she was not aware those words would be used. The Court of Appeal was satisfied in respect of the New South Wales statutory test for "other unwelcome conduct of a sexual nature" that the perpetrator's subjective intention formed no part of the test.

47. Accordingly, in assessing whether any of the matters in subparagraph (b)-(d) of the definition are satisfied it is no answer to the charge to demonstrate that matters of a sexual nature were conveyed "accidentally" or "unintentionally".

48. By contrast when assessing whether the conduct was unwelcome it is necessary to have regard to the complainant's state of mind: *Vitality Works Australia v Yelda (No 2)* [2021] NSWCA 147 [81]-[82].

49. Having established any of the subparagraphs (b)-(d) of the definition it was then necessary for the Stewards to establish that any of that conduct was engaged in either:

    (a) with the intention of offending humiliating or intimidating the other person; or

    (b) in circumstances where a reasonable person would have anticipated the possibility that the other person would have been offended, humiliated or intimidated by the conduct.

50. In the present case the Stewards only advanced the charges on the second of those two alternatives, and accordingly it was necessary for the panel to consider whether a reasonable person would have anticipated the possibility of offending, humiliating, or intimidating any of the complainants. That test is an objective one, by reference to the circumstances of the case.

**PROCEDURAL MATTERS AND EVIDENCE**

51. A number of separate procedural applications were heard in relation to this matter, including a stay application that was the subject of reasons published on 14 December 2023.

52. In the lead up to the hearing the Appellant requested that he appear by AVL video-link but objected to any witnesses called by the Stewards appearing by video given the gravity of the allegations made against the complainant.

53. It was necessary for the Panel to review the nature of the evidence called before the Stewards to understand the nature of the evidence that was likely to be called before the Panel.

54. In doing so it became apparent that before the Stewards the Appellant had been legally represented by the same solicitor Mr Bryant, and that Mr Bryant had had an opportunity to cross-examine each of the complainants.

55. In light of those matters on 25 January 2024 the Panel made a procedural ruling to the effect that the Panel would proceed on the basis of the transcript before the Stewards (subject to any submissions about that transcript either party wanted to make) and that any further cross-examination of the Stewards witnesses would require leave. That ruling was in the following form:

> …
>
> **As to the conduct of the hearing**. Consistently with section 43 of the Thoroughbred Racing Act 1996 the Panel considers it is appropriate to proceed on the basis of the transcript of the Stewards inquiry and the earlier cross-examination of the witnesses. Should any party wish to make any submission about the matters recorded in the transcript before the Stewards they are entitled to do so.
>
> Should either the Stewards (bearing the onus) or the Appellant wish to call further and fresh evidence they are entitled to do so, and any witness called will need to be available to be cross-examined on such evidence.
>
> However, the Appellant will need to seek leave to cross-examine any of the witnesses previously cross-examined before the Stewards, and will need to explain to the Panel what new or additional topics the Appellant considers it is necessary to explore in cross-examination.
>
> The reason for taking this approach is that having now reviewed the Appeal Book it is apparent to the Panel that at the earlier hearing before the Stewards the Appellant was legally represented by Mr Bryant, and on that occasion, Mr Bryant had an opportunity to cross-examine witnesses put forward by the Stewards. Fairness to the Appellant does not require that those witnesses be cross-examined again before the Panel on the same topics by the same legal representative of the Appellant. Moreover, doing so is likely only to produce inefficiency and inconvenience to all parties and the witnesses themselves.
> For the sake of practical arrangements however, each of the witnesses previously called by the Stewards should be ready and available for cross-examination by

MSTeams (or similar means) in the event that an application for leave to cross-examine is granted.

56. At the hearing of the appeal the Appellant objected to the course proposed by the Panel and in any event, made an application for leave to cross-examine two of the complainants.

57. The basis for seeking that leave can be summarised as:

    (a) The Appellant had an entitlement to a merits review or de novo hearing;

    (b) The Appellant had insufficient time to prepare for the previous cross-examination;

    (c) The Appellant called further evidence as to the context of the friendship in respect of Complainant 5, to the effect that on some occasions that Complainant had shared photographs of herself that went beyond an ordinary friendship because the photos depicted the complainant either on the scales depicting how much weight she had lost, or trying on clothes in positions that involved her covering her bare chest with her arms or hands. It was suggested that those matters were essential characteristics to explaining the nature of the friendship between the Appellant and Complainant 5 and that the friendship understood in that light would explain why the Stewards could not succeed in establishing that the conduct was "unwelcome". It was also said to be a matter that it was necessary to cross-examine the Complainant about, to further test her evidence (previously subject to cross-examination) that the conduct was unwelcome;

    (d) The Appellant called evidence about and wanted to cross-examine Complainant 1 about events he claimed happened on or about 8 November 2023, in which he claims Complainant 1 invited the Appellant to her house for drinks by way of telephone call, in which she asked the Appellant to pick up alcohol for her and a group of friends. It was said to be necessary to cross-examine Complainant 1 on the subject to demonstrate the nature of the friendship. The account itself had not been earlier raised in cross-examination before the Stewards. Moreover, it seemed inconsistent with text messages from the Appellant saying that he was at the RSL that same evening and wanted to buy her a beer. That text was then followed by a text from the Appellant saying "If I can't buy you a beer, maybe you should come around for a drink after

work …". It is difficult to reconcile the Appellant's account of those events with the contemporaneous text messages.

58. The Panel did not grant leave to cross-examine in respect of any of the witnesses. There were a number of reasons for taking that course. First, each of the matters was something that could have been the subject of cross-examination before the Stewards but was not. Although that alone was not fatal to the application, upon hearing the further evidence of the Appellant the Panel considered that even if all the matters attested to by the Appellant were to be accepted (which itself seemed doubtful) it was not evidence that was sufficiently cogent and material to displace the evidence (already cross-examined upon) that each Complainant found the conduct unwelcome.

59. Nothing in any of the evidence, including the additional evidence, suggested that these women welcomed the conduct. To the contrary all the evidence pointed to it being unwelcome, and this was consistent with the fact that each Complainant maintained their complaints and discomfort about the conduct before the Stewards.

60. On each occasion the messages were sent by the Appellant unprompted. The starkness of the Appellant's conduct left little room for the precise contours of the friendship or interactions with the Complainants to play a material role in the characterisation of the conduct.

61. Accordingly, in exercise of the broad procedural powers afforded to the Panel, it was not an efficient use of the Panel's time nor a fair course to adopt in respect of the Complainants to require their evidence to be tested again.

62. In those circumstances it is strictly speaking unnecessary for us to reach a final view on each of the details of the supplementary evidence given by the Appellant about his friendship or time spent with Complainants 5 and 3.

63. But we do find that a consistent problem with the entirety of the Appellant's evidence was his unrealistic grasp of both the nature of the conduct he was engaging in (asserting it not to be truly sexual) and a distorted sense of the basis upon which such conduct was in fact, or ever could be, welcomed by the Complainants (considering it was merely banter): see T1747 – 1871).

64. One example from the hearing is useful to repeat here. Following cross-examination the Panel asked the following questions of the Appellant (edited to anonymise the complainants) (T1786-1865):

ACTING PRINCIPAL MEMBER: But then on 4 February 2023 you say, “Is it wrong to say I want to pleasure you” and you then send a picture of yourself?

J. BRYANT: I don’t think picture’s in evidence.

ACTING PRINCIPAL MEMBER: Well, some sort of picture of you is sent, but you say, “Is it wrong to say I want to pleasure you?” Don’t you seem to be accepting that what you’re doing there is, in fact, crossing the boundary of friendship?

D. EGAN: [inaudible] was said to them and everyone that I am able to cross that line, that boundary line.

ACTING PRINCIPAL MEMBER: Sorry, you never meant to cross it, is that what you said?

D. EGAN: I’m just saying that line as a friendship, if I crossed that line and went too far, I would expect them to pull me up on it. Come to me and say, “Look, can you please, you’ve gone too far. Can you just, you know, cool it down” blah, blah, blah and which I then of course would have said, oh year, I respect that and, of course, I would have said, anyway, soon put a stop to it if they come to me and said that they were offended by it.

ACTING PRINCIPAL MEMBER: In respect to Complainant 5, on 25 August 2023 you say, “I feel like eating tasting pussy.” It seems to be directed to her and about her?

D. EGAN: Yeah.

ACTING PRINCIPAL MEMBER: On 25 August, “I’m lying in bed alone and bored. I woke up with a hard one and thought I’d make your trip entertaining.” That seems to be a sexual comment about her?

EGAN: Yes, but at the same time, like I’ve just been saying, it’s banter that’s been said between us in person. She knows where I was coming from in those comments, that it wasn’t a serious [inaudible] a joke that it’s gone on from the past and, you know, I brought it up and, naturally, I shouldn’t have. Like the same thing I said to before, if I cross that boundary line I would expect her to come to me and as friends, we were very good close personal friends, that she would have said, “Look, Darren, can we please, it’s gone too far, can you please put a stop to it.”

ACTING PRINCIPAL MEMBER: Well, she has told you in certain text messages to behave?

D. EGAN: To behave, yeah, that’s correct. Yeah, but that’s—

ACTING PRINCIPAL MEMBER: Yes?

EGAN: Yeah, that’s just, oh she behaves, tone it down, don’t, you know, go too far, but she, by saying behave doesn’t tell me that she was at a point of being that offended by it.

…

D. EGAN: So the line was there and I cross it, they’ll come to me, well, she would have come to me and told—

ACTING PRINCIPAL MEMBER: But isn’t it possible—

D. EGAN: —to behave, tone it down.

ACTING PRINCIPAL MEMBER: Isn’t it possible by sending these types of messages you made it difficult for someone to, in fact, clear the air as it were because you created an awkwardness by talking about your sexual desires?

D. EGAN: Well, if we weren’t friends, yeah, of course, but we were friends, we would talk about anything and everything. So she would have—

> ACTING PRINCIPAL MEMBER: But do you understand there's a difference between friends who might joke and even might make jokes about sexual matters and there's a difference between that and then conduct that seems to be directed to a person, propositioning a person or making it seems as though there's circumstances where you would be open for them to reciprocate any sexual interest? You understand there's a difference between that and friendship?
>
> D. EGAN: Well, yeah, but the friendship has to come into where --, I wouldn't go to the person who lives next door to me and say that stuff. We're not friends. If I did say that, well then, yeah, sexual misconduct, harassment, yeah, for sure. And I know I shouldn't say that. With Complainant 5 and Complainant 4 it was just ongoing jokes, bit of banter, really, and I'm --, I understand what you're saying, but at the same time I believe as a friend that is, what's the difference to telling my mate a similar story, even though you don't want to upset them, but—

65. We found the Appellant to be an unimpressive witness in this regard.

66. It appears to the Panel that the Appellant attempted to mischaracterise his conduct and to deploy his friendship with two of the Complainants as an artifice to try to cover his wrongdoing.

67. We return to summarise our impressions of the Appellant at the conclusion of these reasons at paragraphs 151 to 159 below.

## FINDINGS IN RESPECT OF CHARGE 1

68. The Panel considers that it is appropriate in the circumstances to anonymise the names of the complainants. Both the Appellant and the Stewards agreed that was an appropriate course.

69. The charges have been described by the same numbering given by the Stewards, and the relevant complainant will be identified by reference to the charge number, so that Charge 1 relates to Complainant 1, etc.

70. In respect of Charge 1 the Appellant pleaded not guilty to the following charges (as edited to preserve anonymity):

1. You are a licensed trainer with Racing NSW and are bound by, and required to comply with, the Rules of Racing.
2. Between 15 October 2023 and 12 November 2023 (both dates inclusive), you sent to licensed Apprentice Jockey Complainant 1 by text message a number of messages which included the following:

> ***15 October 2023 at 12.08am***
>
> *"Come back to RSL*
>
> *Fuck, I won't go hugg uoutightnow*
>
> *Nothing sexual, just friends..*
>
> *That was go red some one Elsey."*

***15 October 2023 at 12.10pm***

*"Fuck, I must have been pretty drunk last night, I can't understand what I wrote to you…..How did you pull up."*

***9 November 2023 at 8.10pm***

*"Hi, I hope you don't think that I'm trying to fuck you or something by asking you out for a drink or asking you around for a drink, if I was single I would, for sure, I think your beautiful, I'm happy to stay friends and hang out and catch up for drinks and stuff. Although I was thinking about making sure you got into bed safely last night."*

***9 November 2023 at 8.16pm***

*"Sweet, when you hadn't replied earlier. I thought you might have thought I was trying to fuck you or something."*

***9 November 2023 at 8.17pm***

*"Good, I won't send you any cock pics then."*

***12 November 2023 at 10.00pm***

*"Was that you putting the bins out….*

*I'm not stalking , I promise, I was just driving home as you were walking back through the gate, I was going to stop, but it's getting late."*

3. Your conduct, as detailed above, amounts to sexual harassment of Complainant 1 who is engaged in and/or participates in the racing industry as you:

   (i) made remarks with sexual connotations relating to Complainant 1 and/or
   (ii) engaged in conduct of a sexual nature that was unwelcomed by Complainant 1, where you did so:

   (iii) in circumstances where a reasonable person would have anticipated the possibility that Complainant 1 would be offended and/or humiliated and/or intimidated by the messages you sent to her.

71. Extensive submissions were made on behalf of the Appellant that the text messages should not be construed as sexual in nature, and was not unwelcome (T4149 and following, AS [28]-[64]). We have read those submissions and the additional text messages tabulated by Mr Bryant in his written submissions.

72. The text message on 15 November 2023 at 12.08am was sexual in nature. In the context of asking the Complainant to come back to the RSL it introduces by use of the word "fuck" a desire to hug the Complainant. Used in that way the text conveys matters of a sexual nature, and implies a desire to be intimate with the Complainant. The clumsy attempt to disclaim "*Nothing sexual*" is not enough to mask the sexual implication being conveyed. The purported clarification that there was "*Nothing sexual"* only belied the fact the text had conveyed such matters, and likely indicated the desires of the Appellant as the author.

73. The text the next day trying to excuse the conduct on the basis of being drunk was not sexual in nature but takes nothing away from the sexual nature of the text message at 12.08am earlier that day (ie late in the preceding night).

74. Each of the three text messages sent on 9 November 2023 were sexual in nature. The first on 8.10pm deployed a tactic (common to some of the other impugned messages in the case) of trying minimise the sexual nature of what was being conveyed by framing it in the negative. In this case that was deployed by stating that he did not wish it to be thought "*I'm trying to fuck you"* by asking out the Complainant for a drink. That alone is enough to introduce matters of a sexual nature to the communication. By means of the standards set in rules of racing (and the standards of common decency) the Complainant was entitled to be free from being confronted in her work place by unprompted discussion of whether work colleagues wanted to be in a sexual relationship with her.

75. Worse still however, the same text message is followed up with hypotheticals that clearly convey an impression that the Appellant is open to engaging sexually with the Complainant by saying "*if I was single I would, for sure, I think your (sic) beautiful".* Again the Appellant states he is "happy to stay friends" but finishes by stating "*Although I was thinking about making sure you got into bed safely last night"*. The reference to thinking about the Complainant in bed at night, read in context of the balance of the text message, further conveyed matters of a sexual nature by implication.

76. Similarly, the later text on 9 November 2023 at 8.16pm can be read in the same context as raising sexual matters unnecessarily and out of the blue. In response to a text from the Complainant explaining she was "*Happy to have a drink as mates".*

77. Each of those matters was sexual. The Appellant tried to explain the entire exchange as setting boundaries about their relationship, and that there was nothing sexual about referring to the Complainant getting into bed. The Panel rejects that submission. The text message can only be read as referring to sexual matters unprompted by the Complainant. There was no need to set boundaries in that context. But even if there had been, the text message reads as though sexual matters are being raised to canvass the topic, not to set boundaries. In that context it is fanciful or feigned naivety to suggest that the reference to the Complainant in bed was something akin to a concern for the welfare of the Complainant.

78. The final text message on 9 November 2023 is overtly sexual in referring to "cock pics". It is again masked as a disclaimer to not send such pictures. But the problem with the message is

that the recipient 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. That text also belies the contrived nature of any supposed "boundary setting".

79. The text on 12 November 2023 falls in the category of being of a sexual nature but by means of innuendo or insinuation. Having referred to *"not stalking"* but that the Appellant had driven past at 10pm and seen the Appellant walking; the contact was completely unprompted. The preceding text exchange had happened at about 8 am the day before on 11 November 2023. The Panel is persuaded that read in the context of the Appellant's earlier exchanges, and in light of the fact it was unprompted contact at that time of night, the text message was conveying matters of a sexual nature.

80. As to whether the conduct was unwelcome and whether a reasonable person would have anticipated the possibility of offence or humiliation. Complainant 1 stated in evidence before the Stewards that she had always been polite to the Appellant but said she would not describe the relationship as "friendly", but she accepted she had seen and socialised with him at the RSL among a group of other people. But would not have gone with the Appellant to the RSL (AB581).

81. Further in her evidence the Complainant explained that she did her own communications for rides and didn't have a manager. And that the communication she had had with the Appellant about rides was not unwelcome (AB 582)

82. The Complainant explained that she did not invite the messages, and that she felt they were inappropriate *"considering I have to go to Mr [Name's] stable to ride trackwork and at the end of the day I'm only there to do a job."* The Complainant also said the text messages made her feel uncomfortable. She explained:

> *... we're all just doing our best to get rides and ride trackwork and hopefully get rides in doing that and, yeah, it just makes it harder, especially being a female I think. It's already quite hard anyway and then that on top of it, you just sort of don't really want to go there. You don't want to go and do it. And, yeah, I just don't think it is fair to put someone in that position.* (AB 579, Stewards Transcript 384-389)

83. In cross-examination she explained she felt the 15 October 2023 text message was "*humiliating*" that it was:

*random and out of the blue as we'd never had any contact before, and I don't go out that often. That's one, I'm usually riding on a weekend. So that's probably one of the only times I've seen Mr Egan out and yeah, it just seems, it was strange.*

84. The Appellant submitted that that evidence was "*false*", on the basis that the Complainant and the Appellant had earlier exchanged text messages on 11 October 2023: AS [31]-[32]. And it was said to not be out of the blue because *"it was not the first time they communicated"*: T4165. It was submitted on that basis the Stewards could not discharge their onus to establish that the conduct was unwelcome.

85. The Panel rejects that submission. First, understood in context the Complainant at no time held out that she had not met, had not communicated, or had not socialised with the Complainant. To suggest as much is to erect a straw man of the Complainant's evidence.

86. Rather, understood in context, the evidence was that it was "*out of the blue*" (ie unprompted, and unsolicited) for a text message conveying sexual matters to occur after *"one of the only times"* the Complainant had *"seen Mr Egan out"*. The evidence acknowledges that the Complainant and the Appellant had had contact, but it is the sexual matters that were unprompted.

87. Further, that was not the only basis upon which Complainant 1 suggested that the conduct was "unwelcome". Complainant 1 also gave evidence that she felt *"uncomfortable"* because she "*had to go in there the next morning and ride"* (AB583, Stewards Transcript 558-570).

88. Accordingly, in light of that evidence the Panel is satisfied that the 15 October text message was both unwelcome, and falls foul of the reasonable person test. There was simply no evidence upon which a reasonable person could have formulated the view that it would be appropriate to send such a text message. Sending matters of a sexual nature "out of the blue" in those circumstances means that the reasonable person would have anticipated it was likely to, not just possible that it would, offend or humiliate Complainant 1.

89. In respect of the text message on 9 November, again under cross-examination the Complainant was resolute that she felt "uncomfortable", and had tried not to engage. It was put to the Complainant that because she had used the smiling emoji and said that she was "*happy to have a drink as mates*" that she was not in fact uncomfortable.

90. The Complainant gave the entirely plausible explanation that (AB 584, Stewards Transcript 630-633):

*I'm in a position where I've got a career to look after as well. I want to try and play it with a straight bat and I've got to go into that barn the next day and ride horses to train, get rides and do those things, Like - ... - we're in a position where we've got to keep, we've got to try and not upset the apple cart as much as possible because trainers will just throw their toys out of the cot and you won't get anything*

91. The Complainant also gave evidence under cross-examination that she found the text messages on 9 November to be inappropriate, and explained "*Yeah, but why is he laying it out there for me to -, There's been no introduction for him to say something like that…. Or speak like that"* (AB 585, Stewards Inquiry Transcript 671-675).

92. Again, the fact that these matters were raised out of the blue and were unprompted means that a reasonable person would have anticipated they were likely to offend or humiliate Complainant 1, or that this was, at a minimum, possible.

93. In respect of the 12 November 2023 text message suggesting the Appellant had driven past the Complainant's residence the Complainant gave evidence under cross-examination that for the Appellant to be driving home from the track to his own house he would travel on the same street as the Complainant but he had no need to go past the Complainant's actual house (AB 586, Stewards Inquiry Transcript 723-724).

94. It was suggested to the Complainant in cross-examination that if the Appellant was actually stalking the Complainant he would not have raised the topic of stalking in the text message. In response the Complainant made the astute observation that it was not possible to apply a strictly logical reading to the text messages given that the Appellant had a habit of raising the topic of sex only to disclaim that he was doing so (AB 587, Stewards Inquiry Transcript 797-799).

95. The Panel is satisfied that, when taken in the context of the other text messages, and the time of day at which the message was sent, that a reasonable person would have anticipated the *possibility* that Complainant 1 could have been offended, humiliated, or in particular, intimated by such a text message.

96. However, the Appellant placed heavy reliance on the concession made by Complainant 1 under cross-examination that she did not believe that she was sexually harassed by the 12 November 2023 text message (AB 588, Stewards Inquiry Transcript 812-819).

97. In light of that concession, the Panel does not find sexual harassment is made out in respect of the 12 November 2023 text message.

98. To summarise our conclusions in respect of Charge 1, the Panel finds:

(a) Charge 1 is made out in respect of the first of the text messages on 15 October at 12.08am, and all three messages on 9 November 2023;

(b) Charge 1 is <u>not</u> made out in respect of 15 October 2023, 12.10pm text message, and the 12 November 2023 text message.

99. To that limited extent the appeal in respect of Charge 1 is partially upheld, but Charge 1 is substantially otherwise made out.

**FINDINGS IN RESPECT OF CHARGE 4**

100. In respect of Charge 4 the Appellant pleaded not guilty to the following charges (as edited to refer to Complainant 4):

4. You are a licensed trainer with Racing NSW and are bound by, and required to comply with, the Rules of Racing.
5. Between 18 April 2022 and 28 October 2023 (both dates inclusive) you sent to licensed Apprentice Jockey Complainant 4 by Facebook messenger or text message a number of messages which included the following:

***<u>18 April 2022 at 06.21pm</u>***

*But hey, if all you want is a fuck buddy, I'm always free, no strings attached… Very discreet"*

***<u>18 April 2022 at 11:22pm</u>***

*"Hey, I'm sorry, I shouldn't ask you to be a sex buddy, even though I'd love to fuck you".*

***<u>19 April 2022 at 03:28am</u>***

*"Hey, I'm sorry, I shouldn't be saying anything about wanting to fuck you, where are friends and I'd like to stay friends"*

***<u>19 April 2022 at 07:50am</u>***

*"Unless you want to fuck me"*

***<u>4 February 2023 at 08:11pm</u>***

*"Is it wrong to say I want toi pleasure you xx"*

***(Picture sent)***

***<u>10 February 2023 at 03:33pm</u>***

*"Hello beautiful, I didn't realise I sent you a cock pic, I'm sure it was for someone else. I am so fucking sorry, unless you want to see more lol. I'm trialling [horse] again next Wednesday if your available xx".*

***<u>22 June 2023 at 12.10 pm</u>***

*"I don't want you to think I would try anything, just friends, being friends"*

*"Although friends with benefits (only joking)"*

***25 October 2023 at 09:48pm***

*"I know I shouldn't text you, but I'm lying in bed all alone, and naked, and I'm missing someone, and It's not Kylie, she's not home yet, but I'm sure you would make a good replacement one day"*

***28 October 2023 at 02:32pm***

*"Have fun at work, I hope you don't think that I'm trying to get you alone to try and seduce you, we are friends , I'll never try to fuck you, not saying that I wouldn't love to go down on you and slide my cock into you, sorry, I shouldn't be saying that, we are friends, so I wouldn't try and instigate anything".*

6. On 4 February 2023 you sent to Complainant 4 by Facebook messenger a photograph of your genitals with the accompanying message *"is it wrong to say I want to pleasure you xx".*

7. Your conduct, as detailed above, amounts to sexual harassment of Complainant 4 who is engaged in and/or participates in the racing industry as you:

(iv) made an unsolicited request for sexual favours from Complainant 4 and/or
(v) made remarks with sexual connotations relating to Complainant 4 and/or
(vi) engaged in conduct of a sexual nature that was unwelcomed by Complainant 4, where you did so:

(vii) in circumstances where a reasonable person would have anticipated the possibility that Complainant 4 would be offended and/or humiliated and/or intimidated by the messages and photograph you sent to her.

101. To start with the photograph first. In respect of Charge 4, the Appellant took issue with whether the Stewards could prove that a picture of the Appellant's genitals was sent to Complainant 4.

102. Accordingly, a copy of a photograph sent to Complainant 4 was tendered and marked as Exhibit 3. It was then accepted by the Appellant that the photograph was a picture of the Appellant's genitals and had in fact been sent to Complainant 4 (T2833- 2870).

103. Exhibit 3 depicts the Appellant's penis accompanied by the words in text (sent on 4 February 2023) "*Is it wrong to say I want toi (sic) pleasure you xx"*.

104. The conduct of sending the photograph and accompanying text message is self-evidently a remark with sexual connotations relating to Complainant 4 within subparagraph (c) of the definition, and conduct of a sexual nature that, as we explain below, was unwelcome conduct within the meaning of (d). To the extent necessary the Panel would also be willing to characterise it as an unsolicited request for sexual favours (subparagraph (b)) given the text and context of the photograph imply a request to engage in sexual contact with the Complainant (although clothed in the language of the Appellant offering sexual favours).

105. The Appellant tried to justify the sending of the picture and text message by reason of a text message he sent six days later on 10 February 2023 (already extracted above), that contained a feigned apology and further raised the topic of him sending more pictures.

106. The conduct is itself further sexual harassment. We reject any suggestion that this amounted to a genuine apology. We further reject the submission that the original picture and text message on 4 February was sent unintentionally to Complainant 4: AS [105]. That submission reflects poorly on the credit of the Appellant. It is clear from the text message on 10 February 2023 that the Appellant was offering to send more "*unless you want to see more lol."* as a way of raising the topic again to try to gauge any interest from the Complainant.

107. The Complainant was emphatic at the time that the conduct was unwelcome, when on 10 February 2023 Complainant 4 responded:

> *No Darren it was really inappropriate to send to me but I can forgive and forget, you cant send me these things especially being an apprentice. I am happy to trial [horse] again if it works out not sure what else I have yet at this stage but put my name down anyway*

108. As to the balance of the text messages. These can be dealt with in short order because the language is explicit, and is self-evidently, in each case conduct of a sexual nature relating to Complainant 4 (within the meaning of subparagraph (c) of the definition), and unwelcome (within the meaning of subparagraph (d)). Additionally, the Panel is satisfied each one can be characterised as an unsolicited demand or request for sexual favours, because in each text message the Appellant suggests directly engaging in sexual activities with Complainant 4 (or discusses the same topic by means of a feigned apology, or attempted disclaimer).

109. No real attempt was made by the Appellant to suggest that the conduct was not sexual in nature and not directed to the Complainant.

110. Rather the submissions were directed to challenging the Stewards case that the conduct was unwelcome and that a reasonable person would have anticipated the possibility of offending or humiliating Complainant 4.

111. As to unwelcomeness and the reasonable person test, the Appellant through his solicitor in submission emphasised the friendship between himself and Complainant 4 as being the central basis upon which the Panel would be satisfied that even if the matters were sexual in nature they could not be unwelcome nor would a reasonable person anticipate

offence. In this respect the Appellant emphasised that the Appellant and Complainant 4 had known each other for approximately 12 years, and would often socialise together, and that they had a friendship that included "jokes" and "banter": AS[69].

112. There were two problems with both the submission and the cross-examination in this respect by the Appellant. First, while Complainant 4 accepted that the friendship included jokes or banter, she concluded by saying, *"I will joke will all my friends like that, male or female, but they never become inappropriate like has happened in this circumstance"* (AB609, Stewards Inquiry 1880-1883).

113. As to the submissions and cross-examination that the Appellant may have "blurred the lines" of their friendship, that was only a matter that would tell against the Appellant's case and demonstrated the inappropriateness of the conduct. Complainant 4 in cross-examination noted that maybe the Appellant thought there was more to catching up for a drink but was emphatic that "*I never said that there was more to it and for male and female friends should be able to catch up and have a drink without being hit on when you don't want it*": (AB 610, Stewards Inquiry Transcript 1894-1896).

114. As to the suggestion under cross-examination that some of the text messages could be explained as poor attempts at humour Complainant 4 explained (AB 610, Stewards Inquiry Transcript 1921 – 1924):

> *I don't think you joke about those things. They're very explicit messages. Probably at the time I was, oh, it's you know a job, but it isn't. You know is unsolicited and unwelcome and that's not a joke. You can't joke about those sorts of things.*

115. Having reviewed the evidence and the submissions the Panel rejects the submission that the friendship with Complainant 4 explains any of the conduct, or undermines the Steward's case that the conduct was unwelcome.

116. To the contrary, we are satisfied all of the conduct was unwelcome. To put it in Complainant 4's own words when asked if the conduct was unwelcome, and offensive or humiliating, in respect of the photograph she said (AB 607, Stewards Inquiry Transcript 1765-1769):

> *Yes, absolutely [it was unwelcome]. It was not welcome at all. I trial his horse the week before and then got that. Yeah, it actually did quite upset me because I think well maybe, yeah, maybe it's nothing to do with my riding ability and, yeah,…*

117. As to the balance of the conduct as a whole the Complainant explained in her evidence to the Stewards Inquiry (AB 607 1775- 1796):

> *I just think they made me feel uncomfortable. I wouldn't say intimidated. I've never felt threatened or anything like that, but they're more, they're not a joke and they would always make me feel uncomfortable and a bit gross about myself.*
>
> *…*
>
> *Yes, its's offensive behaviour because I've never, there's no initiation. It was a really good friendship, but that's the boundaries of the friendship being pushed and it would always upset me and it was offensive. You know, you don't, I wouldn't want to receive that from anyone, let alone someone I consider a friend.*
>
> *…*
>
> *Offended, yes definitely. Slight bit of humiliation, yeah, just to think that's, yeah, it's gonna be something that makes me feel uncomfortable and to think that I'm okay with that, you know.*

118. Moreover, the material was again very explicit (discussion of "*fuck buddy"* on 18 April, *"unless you want to fuck me"* on 19 April 2022, and then the photograph and caption about pleasuring) and completely unprompted and unsolicited. Taken together any reasonable person would have anticipated the conduct was likely to offend or humiliate – as it clearly did.

119. On 19 April 2022 Complainant 4 wrote to the Appellant "*Darren stop (2 laughing emoji)"*, and again "*We are friends ok I'll just pretend I didn't read all of that ok ha ha"*.

120. It was submitted for the Appellant that because Complainant 4 used the laughing emoji and wrote "ha ha" that "*she found the text messages amusing by way of two emojis and did not directly condemn the conduct*": AS [101].

121. The Panel rejects that submission. First, the text message in response makes clear that the text messages were unwelcome, that the Complainant considered they "*are friends*", and in that context, these explicit messages were inappropriate and crossed the boundaries of friendship. That is consistent with the suggestion of pretending to never have read the messages in the first place. As the Complainant explained in her evidence to the Stewards there was a deep disappointment on the part of the Complainant, that the Appellant, as someone she considered a friend in what was otherwise a relatively small town, would transgress the boundaries of friendship for his own attempt to gauge interest in sexual matters or for his own sexual gratification.

122. Second, and contrary to the submission of the Appellant, there is no need on the part of the Complainant to provide "*firm condemnation of the conduct*" (AS [102]) in order for it to be unwelcome, or otherwise amount to sexual harassment. The use of the laughing emoji and the "ha ha" are entirely consistent with Complainant 4 having been placed in an awkward, unfair and humiliating position, and trying her best to graciously save the friendship by use of text or symbols that conveyed humour despite the conduct being unwelcome.

123. Although not an essential ingredient in satisfying the reasonable person test, the Panel finds that the 19 April 2022 messages should be read as an express direction that the conduct was unwelcome and should stop, and is a further reason both the reasonable person, and the Appellant specifically, ought to have known the conduct would offend or humiliate.

124. Similarly, from 10 February 2023 Complainant 4 expressly replied telling the Appellant the conduct (being text messages and this time a photograph) was unwelcome and inappropriate. Nevertheless, the Appellant continued to send the unsolicited and unwelcome material on 22 June 2023, 25 October 2023, and 28 October 2023.

125. On 28 October 2023 Complainant 4 responded: "*No Darren you shouldn't have [sent that message] you were lucky I was having a sleep. I'll stop in after work*"

126. As we have stated, although not essential to establishing the charge, the failure to cease sending messages despite the express requests are matters that will be relevant to the penalty to be given to the Appellant, and makes the conduct in this regard more grave.

127. For those reasons Charge 4 is made out and the appeal on Charge 4 must be dismissed.

**FINDINGS IN RESPECT OF CHARGE 5**

128. In respect of Charge 5 the Appellant pleaded not guilty to the following charges:

> 8. You are a licensed trainer with Racing NSW and are bound by, and required to comply with, the Rules of Racing.
> 9. Between 9 May 2022 and 9 September 2023 (both dates inclusive) you sent to licensed Approved Rider/Stable Foreperson Complainant 5 by Facebook messenger or text message a number of messages which included the following:
>
> ***9 May 2022 at 03.59pm***

*"Hi, I hope I haven't crossed the line by saying I'll have a spa ready for you after track work, if I do ever go to far, pull me up on it, sometimes I can go to far without realising it….Don't want to hurt the friendship."*

*"Haha, no, unless you want me to jump in the spa with you, only joking lol."*

***13 June 2022 at 06.52am***

*"Fuck its nice and warm in bed."*

*"Haha, I could be rude and say, it would be nice if you could join me, but I'm behaving myself and I shouldn't say that, because we are friends and it would be awkward with Kylie here as well lol."*

***28 June 2022 at 09.19am***

*"Thanx, I owe you heaps, I might even give you a massage one day if you want one…."*

***28 June 2022 at 01.05pm***

*"Hey, don't know why I said I'll massage you, I've just woken up- and read what I sent to you, I shouldn't be saying that stuff, sorry."*

***28 July 2022 at 11.38am***

*"Haha, no pills for me, been playing for 15 to 20 and still no cum can't show you a photo of this one and I know we are friends and I know you probably don't want here about me pulling my cock, so I apologise if it offends you."*

***29 July 2022 at 11.50am***

*"My heart was racing, but after today, a dick pick might cheer you up (I won't send you one, unless you want one, jokes)."*

***8 September 2022 at 04.44pm***

*"Hey, I forgot to say something earlier (I love you) nah nah only joking, as a friend I do. Nah was just going to tell you that I was going to kiss you the other when my horse won, but I stopped myself because [name] was right there and she would of freaked out thinking something was happening..*

*It was only going to be kiss on the cheek, although I would have gone for the lips first lol."*

***18 October 2022 at 12.05pm***

*"Hey I'm glad I spoke to you, because I was about to send you a text, that might have been a little sexual, nothing like a dick pick, just something about pleasuring you on my birthday, I'll probably leave it up to your imagination, you where I live if you want to act on it."*

*Always behaving, I'm just playing, I would never send you a dick pick or do anything to ruin our friendship, you know that."*

***1 March 2023 at 05.09pm***

*"Oh shit I'm sorry, I shouldn't have sent you that snapchat. Sorry sorry"*

***4 April 2023 at 09.51am***

*"Fucking cat just woke me up with half a fat one, and I didn't send you a snapchat of it, now it's rock hard and I'm being well behaved, no photos, I love our friendship and won't fuck it up with cock pics."*

***25 August 2023 at 10.56am***

*''I feel like eating tasty pussy."*

***25 August 2023 at 11.02am***

*"I'm lying in bed alone and bored, I woke up with a hard one and thought I'd make your trip entertaining."*

***25 August 2023 at 11.10am***

*"OK, and I'm not hopeless, I'm really good and I love eating pussy."*

*"OK I'll stop."*

***9 September 2023 at 03.22pm***

*"Fuck that, you're sick and you can't go. Because I'm a good friend, I could make you feel better by letting me eat you out, then I'll have your cold and feel sick, I'm only joking."*

***9 September 2033 at 03.25pm***

*"I said I'm only joking, but it would be nice, ok, no more, I'm behaving."*

***9 September 2023 at 07.01pm***

*"I'm sorry, I shouldn't have wrote something so silly, I won't do it again."*

10. On 2 January 2023 at 8.57am you sent to Complainant 5 by text message a photograph of your genitals.

11. Your conduct, as detailed above, amounts to sexual harassment of Complainant 5 who is engaged in and/or participates in the racing industry as you:

    (viii) made an unsolicited request for sexual favours from Complainant 5 and/or
    (ix) made remarks with sexual connotations relating to Complainant 5 and/or
    (x) engaged in conduct of a sexual nature that was unwelcomed by Complainant 5,

    where you did so:

    (xi) in circumstances where a reasonable person would have anticipated the possibility that Complainant 5 would be offended and/or humiliated and/or intimidated by the messages and photograph you sent to her.

129. Dealing first with the photograph. In respect of Charge 5, the Appellant took issue with whether the Stewards could prove that a picture of the Appellant's genitals was sent to Complainant 5.

130. Accordingly, a copy of a photograph sent to Complainant 5 was tendered and marked as Exhibit 4. It was then accepted by the Appellant that the photograph was a picture of the Appellant's genitals and had in fact been sent to Complainant 5 on 2 January 2023.

131. The explanation offered before the Stewards inquiry (AB 631), that the photograph had been sent to show the Complainant where the Appellant said he was kicked in the groin, and therefore the photograph was not in fact sexual.

132. Even if the Panel were to accept the explanation that the photograph depicts some red swelling on the upper left leg, and that the marks resulted from a kick (about which it is not necessary to make a final determination) the image is nevertheless sexual. It was not essential for the photograph to include the Appellant's penis, nor for his genitals to be exposed in order to provide the photograph of the supposed injury to his leg.

133. The Panel is satisfied that the conduct was unwelcome conduct of a sexual nature in relation to Complainant 5. The evidence of the photograph being unwelcome overlaps with the evidence concerning the conduct including the text messages being offensive.

134. In respect of the text messages to Complainant 5, there are three text messages that do not convey sexual matters being:

(a) 28 June 2022 text message apologising for sending a message discussing an offer of a massage;

(b) 1 March 2023 text message conveying an apology for a snapchat image with no evidence as to the content of the snapchat message itself;

(c) The final message on 9 September 2023, apologising for the sending two earlier text messages that day referring to the Appellant's desire to perform oral sex.

135. As to the balance of the messages the Panel does not considers it is necessary to provide extensive reasons in respect of each of the messages to Complainant 5. Given that they refer (often overtly) to sexual matters they can each be characterised as conduct that is sexual in nature and directed to the Complainant. Some are by inuendo or indirect reference, for example the reference to having a spa together on 9 May 2022, and the reference to being

in bed on 13 June 2022, and the reference to the massage on 28 June 2022. The clumsy attempts to downplay the sexual nature of the messages (for example on 18 October 2022, 28 and 29 July 2022) does not insulate the text messages from being characterised as sexual.

136. Moreover, many of the messages can be construed as sexual remarks about a person, for example, the reference on 8 September 2022 to loving the Complainant and wanting to kiss her on the lips, and on 25 August 2023 11.02 am where the sexual content is described (*"woke up with a hard one"*) and then directed to the Complainant ("*thought I'd make your trip more entertaining"*).

137. Others of the messages that meet both of the criteria (c) and (d) of the definition in the ARR, can also be described as unsolicited demands for sexual favours, for example the numerous reference to the Appellant's engaging in oral sex, on 25 August 2023, and 9 September 2023. The Panel concludes that such conduct falls within subparagraph (b) of the definition as unsolicited requests for sexual favours even though the language of the text messages are expressed as the Appellant offering sexual favours. That is because on each occasion the context makes clear that the Appellant is seeking the opportunity to engage in, and seek sexual contact with, the Complainant such as to fall within the definition.

138. There is some attempt in the written submission of the Appellant to point to other text messages (eg on 9 May 2022) that are said to confirm that Complainant 5 "*welcomes the text message and find the exchange of text amusing*": AS[73]. The example given was a response by Complainant 5 "*Oh no it's okay, I know you didn't mean anything like that by it. Well I think anyway ha ha ha."*

139. The Panel rejects that submission and characterisation of that text. The fact that the Complainant from time to time tried to minimise the conduct and brush it off by indicating laughter, is equally consistent with, as we find, the Complainant feeling uncomfortable with the conduct in which her friend has clearly traversed the boundaries of friendship.

140. The Panel is satisfied that the text messages and the photographs were unwelcome. Complainant 5 had told him on text message to "*behave*" on 18 October 2022. Again the Appellant submitted that the use of the laughing emoji meant that the Complainant *"welcomes the text message and finds this exchange amusing"*: AS [83]. We reject that submission.

141. As found for the other complainants the use of humour was a way of deflecting the situation, in circumstances where the Appellant was continually referring to the closeness of their friendship in the context of sexually inappropriate behaviour saying in response *"I would never send you a dick pick or do anything to ruin our friendship, you know that*": text 18 October 2022.

142. Of course, that was untrue as the Appellant did in fact send such photographs. But moreover, it was in the context of the Appellant using the friendship with the Complainant as the opportunity to send such messages that it was necessary for the Complainant to try to brush off the conduct graciously.

143. The Appellant in written submissions emphasised the language used by Complainant 5 from time to time indicated that the text messages were not unwelcome or a reasonable person would not have anticipated the possibility of offence or humiliation: AS [67]. That was said to be substantiated because in certain text messages Complainant 5 had used an "x" or and "xx" to finish a text message on a number of occasions, or had used the word "fuck" or the word "cunt" on a number of occasions: AS [67]. The Panel rejects that submission the use of those words in context never signalled that Complainant 5 was open to receiving matters of a sexual nature that were sent by the Appellant. The mere fact that they were used from time to time does not demonstrate a friendship in which the Complainant welcomed the sharing of matters of a sexual nature.

144. As Complainant 5 explained before the Stewards (extracted below) the Appellant's conduct was an affront to their friendship.

145. Complainant's 5 express evidence to the Stewards was that each of the messages and photographs was uninvited (AB 613, Stewards Inquiry T2130).

146. Complainant 5's evidence was that the conduct was offensive and annoyed her (AB614, Stewards Inquiry T2140). That evidence was tested under cross-examined but was only fortified by the answers given. When asked in cross-examination if the Appellant ever blurred the lines of the friendship, Complainant 5 explained "*No. I repeated many times that*

*we were only friends and I was not interested in anything more"* (AB616, Stewards Inquiry T 2228-2240).

147. Moreover, Complainant 5 was emphatic that she found the conduct offensive. Complainant 5 further explained:

> *As time went on and I continued to tell him to stop and, you know, I didn't want him to ruin our friendship, I would become more and more offended each time he continued to do it.* (AB 616, Stewards Inquiry 2259-226)

148. It is also apparent from the context of each of the text message chains that we have reviewed that the conduct was unwelcome and a reasonable person would have anticipated the possibility of offence or humiliation. In none of the text messages charged by the Stewards can the Appellant point to a precursor conversation or even hint of explicit sexual matters being discussed in the communications with Complainant 5.

149. That absence of context for the discussion of sexual matters makes it likely that the reasonable person would anticipate the possibility of causing offence in the circumstances. So too would the graphic nature of the words used to convey the sexual conduct. This was not conduct that was open to be misread. It was repeatedly and overtly sexual.

150. Accordingly, the Panel's conclusions on Charge 5 are as follows:

(a) the appeal in respect of Charge 5 will be partially upheld in respect of the text messages on 28 June 2022 at 1.05pm; 1 March 2023; and the final message on 9 September 2023 at 7.01pm.

(b) Charge 5 is otherwise made out in respect of the balance of the text messages and the photograph, and the balance of the appeal in respect of Charge 5 should be dismissed.

**CONCLUDING REMARKS**

151. In the Appellant's mind he seems to have convinced himself that in respect of the three charges to which he pleaded not guilty he has done no wrong, because he did not attempt to physically touch any of the Complainants and in his mind (wrongfully) believes none of them told him to stop or indicated unwelcomeness.

152. One of the Appellant's principal defences - that he would have expected others to tell him if his conduct was unwelcome - cannot be accepted. First, that is not the standard of sexual harassment contained in the Australian Rules of Racing. To adopt such an approach would be to limit the conduct that is prohibited by the rules to only those matters immediately complained about *to the perpetrator*. ARR 233 does not require a person to formally put a perpetrator on notice that the conduct is unwelcome, nor that they have been offended or humiliated by the conduct.

153. To the contrary, the rule is drafted in such a way as to recognise that it is frequent in human interaction that the unwelcome remarking or raising of matters of a sexual nature, perhaps even subtly, may draw little immediate reaction to the face of the perpetrator. Precisely because the conduct is unwelcome and the person is offended or humiliated a complainant may be instantly undesirous of discussing the topic, irritated, or even hostile at the thought of having to engage in the topic any further with the perpetrator.

154. Second, the Appellant's justifications for his conduct as either banter, or not involving a sufficient rebuffing from the complainants to be "unwelcome" were unbelievable and we found him an unsatisfactory witness in that regard.

155. The Appellant's justifications involve an abdication of responsibility for his own conduct, by seeking to impose the burden on each of the Complainants to supervise the Appellant's conduct to alert him if it transgressed the boundaries of their ordinary workplace relationship or friendship. All the while the Appellant's pattern of behaviour indicated a consistent willingness to transgress those boundaries for the purpose of gauging or soliciting sexual interest.

156. It will be relevant to penalty to observe that the Appellant's conduct seems to have been deliberately calibrated to provoke discussion of sexual matters with other racing participants in circumstances where it was unprompted and unwelcome. It appears to the Panel this was done in the hope of signalling to each of the Complainants that the Appellant would welcome a sexual relationship if any of them were willing to reciprocate.

157. In respect of Complainants 1, 2 and 3, it should be noted that each of these women only dealt with the Appellant over the telephone because of work related matters.

158. It will also be apparent that the Appellant was in a position of power in the workplace compared to each of those Complainants as they were people whose careers could benefit

from obtaining further rides and trackwork from one of the trainers in town for whom the Appellant worked.

159. In the circumstances of at least Complainant 4 it appears to the Panel that the harassment occurred in the context of holding out the possibility of riding work, such as to maintain the interest of the Complainant in continuing to converse with the Appellant over text message. There may be other instances that will go to the gravity of sentencing should any party wish to make submissions on that matter relevant to penalty.

160. The conduct described in these reasons has no place in the racing industry. It has no place in any industry.

161. The Stewards have already made their submissions on Penalty.

162. The Panel directs the Appellant to put on written submission on penalty on all charges (including those to which a guilty plea was entered) and any submissions on the appropriate form of orders, within 7 days of the date of these reasons.

163. Should the Stewards wish to, they are directed to file any reply submissions on penalty or the form of orders 7 days after receiving the submission of the Appellant.

164. It will be apparent that the Appellant was only successful in minor and in context, inconsequential aspects of the appeal. For that reason it is appropriate that the appeal deposit is forfeited.

165. Orders will be formally made at the conclusion of the reasons on Penalty. For now it is enough to foreshadow that the Panel considers the appropriate order is that the appeal be partially upheld in respect of Charge 1 and Charge 5, the appeal is otherwise dismissed and the appeal deposit is forfeited. Should any party have submissions to make on the form of orders that can be done at the time of submissions on penalty.

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(* revised on 31 May 2024 to anonymise certain material, and correct typographical errors.)