RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

INTERLOCUTORY DECISION

20 APRIL 2022

APPELLANT KENNETH BURNETT

RESPONDENT GREYHOUND WELFARE AND INTEGRITY COMMISSION

ISSUE: WHETHER THE RESPONDENT COMPLIED WITH S 58(3) OF THE GREYHOUND RACING ACT 2017 (NSW)

DECISION:

1. **Ground 6 of the Notice of Grounds of Appeal rejected**
2. **Interlocutory application dismissed**

INTRODUCTION

1. This interlocutory decision requires a determination by the Tribunal whether the respondent, in determining a disciplinary outcome against the appellant, complied with s 58(3) of the Greyhound Racing Act 2017 (NSW) ("the Act").

2. The parties have agreed that the Tribunal should determine this issue before the case proceeds further.

3. The issue arises as a result of ground 6 of the appellant's grounds of appeal of 7 December 2021, which state:

> "GWIC Procedural Issues
>
> 6. The notice given by the GWIC did not comply with s 58(3) of the Greyhound Racing Act 2017 (NSW) and, therefore, the actions of the GWIC and the decision of the Independent Hearing Panel were not authorised by that section, and were prohibited by it.
>
> Particulars
>
> The notice did not contain notice of the proposed action in that it did not identify whether the proposed penalties were cumulative or concurrent or partly cumulative and partly concurrent and the GWIC refused or failed to answer the appellant's request for identification of the same."

4. This interlocutory determination is, by agreement of the parties, to be determined upon the written submissions. The appellant made his submissions on 23 February 2022, the respondent on 15 March 2022 and the appellant then made a final submission on 30 March 2022. The respondent's submission initially sought to supplement the written submissions with an oral hearing which was not opposed by the appellant but, after remarks by the Tribunal, the parties agreed on 8 April 2022 that the decision could be made upon the written submissions.

5. The issue can be distilled down to the question whether, if there are multiple charges for which adverse findings are to be made, it is necessary for the 58(3) notice to express whether the penalties are to be served concurrently or cumulatively or partly thereof.

6. The section in question is s 58(3) but it is necessary to have regard to the whole of s 58 and it is in the following terms:

> "58 Grounds for taking disciplinary action

(1) The Commission may take disciplinary action under this Division against or in respect of a relevant person if the Commission is of the opinion that the person—

(a) has contravened a provision of this Act, the regulations, the code of practice or the greyhound racing rules, or

(b) is not a fit and proper person to be registered (having regard in particular to the need to protect the public interest as it relates to the greyhound racing industry).

(2) Disciplinary action may be taken against or in respect of a relevant person even though the person is no longer registered or has not been convicted of an offence in respect of the contravention.

(3) The Commission is not to take any disciplinary action against or in respect of a relevant person under this Division without first giving the person notice in writing of the proposed action and a reasonable opportunity to be heard and to make submissions about the matter.

(4) Subsection (3) does not apply in respect of the taking of disciplinary action if the Commission is satisfied that the action must be taken as a matter of urgency because the contravention or failure concerned poses a significant threat—

(a) to public health or safety, or

(b) to the financial integrity of the greyhound racing industry as a whole in New South Wales."

7. By way of introductory summary, the appellant, having set out his submissions on the key facts, takes the Tribunal to the statutory scheme and then sets out what is required for compliance. The submission then continues on the effect of non-compliance and the impact that would have upon this appeal. The appellant raised a number of procedural fairness points.

8. The respondent in its submission takes issue with relevance of a number of the procedural points raised and addresses in detail the content of the particular notice in question, then addresses the proper construction of the subsection and submits that there has been compliance factually. There is then a further addressing of the points said to be irrelevant on procedural fairness and answers the submissions of the appellant. There is then a

concluding submission on future conduct varying as to the decision made on this interlocutory matter.

9. In his reply, the appellant addresses what are said to be reasons for what are submitted to be irrelevant procedural fairness matters, says that the respondent has not engaged with the key tests and fails to identify anything that would support its case.

10. Before turning to the facts in detail, the issue arises because the respondent sent out a notice purporting to comply with s 58(3) and indicated possible charges and facts to support them, and then indicating in respect of each matter a possible penalty and, in accordance with usual practice, invited submissions. It is common ground that the notice did not state whether, if matters were to be found established, and there were multiple such findings, the penalties would be concurrent or cumulative or part thereof.

11. Initially, there were four charges, the first of which was not found proven. The second related to disobeying a lawful order given by a steward, the third, that he engaged in contemptuous, unseemly etc language towards a steward, and the fourth was assault or interfere with a steward. The proposed notice set out for charges 1 to 4 proposed disciplinary action of suspension four months, disqualification four months, disqualification four months and disqualification 12 months respectively. The ultimate decision of 25 August 2021 led to the following penalties, namely, charge 2 disqualification four months, charge 3 suspension two months and charge 4 disqualification 12 months, all to be served concurrently.

THE FACTS

12. The Tribunal notes that the current bundle of evidence served by the respondent for the purposes of this appeal comprises 237 pages, not all of which was before GWIC at the time it made its determination on 25 August 2021. It appears that pages 1 to 110 are the relevant pages for the purposes of this matter. Each party has referred to the facts in submissions.

13. The appellant in his submission set out in detail over 32 paragraphs the facts upon which he says the Tribunal should make its decision. The respondent accepts that those are correct and non-contentious. Rather than seek to summarise those facts, they are set out in full as follows:

> "Facts
> 3. On 11 January 2021 Mr Reading, Acting Chief Steward of the GWIC, gave notice by email to Mr Burnett requiring him to show cause why the GWIC should not suspend his registrations "pending an enquiry into the allegations, citing Rule 86(g) of the Greyhound Racing Rules… that he shoved and abused the steward in charge of

the meeting on 10 January 2021 at Nowra, Steward Geoff Page" [R1–4].

4. Mr Burnett responded in writing on 14 January 2021 [R2–5].

5. On 15 January 2021, Mr Reading, Acting Chief Steward of the GWIC imposed an interim suspension on Mr Burnett's registrations pending an inquiry into the allegations [R3–8].

6. On 19 January 2021, Ms Alice Stafford, Legal Officer of the GWIC arranged for a summary report of the interim suspension action taken against Mr Burnett to be published on the GWIC website [R4–13].

7. On 7 May 2021, Ms Alice Stafford, then Acting Senior Legal Officer, Mr David O'Shannessy, Chief Inspector, and Mr Dean Degan, Senior Steward, of the GWIC wrote to Mr Burnett's then representative, giving notice that the GWIC "is considering implementing disciplinary action against" Mr Burnett ('the 7 May notice") [R5–17].

8. The 7 May notice informed Mr Burnett that the Integrity Hearings Panel ("IHP") would "consider and determine disciplinary action on behalf of GWIC in accordance with the Act."

9. The 7 May notice stated that the "purpose of this letter is to notify Mr Burnett of the investigation conducted by GWIC to date".

10. The 7 May notice enclosed a brief of evidence said to be "the documents upon which we rely upon in issuing this Notice. In issuing this Notice, we have reviewed and considered the evidence included within the brief".

11. The 7 May notice included a "summary of the evidence" which was said to be "supplementing the enclosed brief of evidence".

12. The summary of evidence stated propositions of fact of a type and in a manner that a prosecutor might advance or a tribunal might find after a hearing. The summary did not refer to inconsistencies in the evidence or exculpatory evidence (the Tribunal notes at this point this is a submission).

13. The 7 May notice then stated "[b]ased on the evidence above and contained in the brief served on your client with this Notice, we consider there to be reasonable grounds upon which Mr Burnett should be charged with following breaches of the GWIC Greyhound Racing Rules" and went on to prefer four charges, three of which (charges 2, 3 and 4) were the subject of the determination from which the present appeal is brought.

14. The 7 May Notice then stated the following:

Notice

You, and your client, are hereby notified GWIC is considering taking disciplinary action against Mr Burnett pursuant to section 58 and 59 of the Act in relation to the charges. The proposed disciplinary action is as follows:

> Charge 1 (Rule 86(ag)): To suspend the public trainer and breeder registration of Mr Burnett for a period of 4 months;
>
> Charge 2 (Rule 86(p)): To disqualify Mr Burnett for a period of 4 months;
>
> Charge 3 (Rule 86(f)(i)): To disqualify Mr Burnett for a period of 4 months;
>
> Charge 4 (Rule 86(g)): To disqualify Mr Burnett for a period of 12 months.

15. The 7 May Notice did not advise whether the proposed penalties were to be served cumulatively or concurrently.

16. The 7 May Notice then stated "[w]e now enclose an Election Notice requiring completion by Mr Burnett …" purporting to be compulsory.

17. The 7 May Notice purported to require Mr Burnett to make a binding election between the following options:

- admitting all the charges and accepting the proposed disciplinary action and agreeing to the disciplinary proceedings being conducted in writing — for which he was offered a benefit of a 25% reduction of each proposed penalty; or

- admitting all the charges but making submissions on why the penalties imposed should be less than those proposed and agreeing to the disciplinary proceedings being conducted in writing; or

- denying the charges, making submissions on the charges and agreeing to the disciplinary proceedings being conducted in writing.

18. The 7 May Notice also stated

> In certain circumstances we can arrange for submissions in relation to a disciplinary action matter to be made in person, via telephone or via video-conferencing software. Such circumstances may include the presentation of expert evidence or an inability to provide submissions or evidence in writing. Applications must be made in writing and received within the timeframe provided for a response to this Notice.

but made no provision for the questioning of adverse witnesses.

19. On 4 June 2021, the appellant's solicitor had a telephone conversation with Mr Matthew Tutt, GWIC Director of Legal and Compliance Services, which was in part to the effect that the appellant sought to be informed whether the proposed penalties were to be served cumulatively or concurrently.

20. On 11 June 2021, the appellant made submissions to the GWIC that charge 1 should be withdrawn (R12–123 refers).

21. On 15 June 2021, the appellant's solicitor wrote to the GWIC seeking a response to the submissions in respect of charge 1 before making further submissions [R14–128].

22. On 15 June 2021, Ms Erin Mulally, Legal Officer of the GWIC replied including relevantly as to whether the penalties will be concurrent or cumulative, the IHP has not made a final determination on this (this is usually outlined in the final Notice of Decision after considering all submissions made) [R15–132]

23. On 15 June 2021the appellant's solicitor wrote to the GWIC again requesting to be informed of the GWIC's position as to whether the proposed penalties would be served concurrently or cumulatively, including—

> If you are not in a position to advise us, then the proposed penalties present as uncertain and the Commission's representations on the Election Notice as to prospective disciplinary action may be read as unclear and uncertain in term of nature and effect. That the Commission's desire to foreshadow a penalty cannot be met. [R16–137]

24. On 16 June 2021 the GWIC replied to the effect that it required Mr Burnett to make all submissions he wanted to make on charges 2-4 and whether the penalties should be served concurrently or cumulatively.

25. On 16 June 2021, the appellant's solicitor wrote to the GWIC again requesting to be informed of the GWIC's position as to whether the proposed penalties would be served concurrently or

cumulatively, and if the GWIC still declined to provide this to give reasons [R19–152].

26. On 17 June 2021 the GWIC advised that the IHP would decide the question of cumulation or concurrency when it made its final decision (and otherwise declined to respond to the appellant's request) [R20–156].

27. On 22 June 2021, the appellant made submissions to the effect that the above procedure was not in compliance with s 58(3) of the Greyhound Racing Act 2017 (NSW) [R21–161ff, see esp pp 166-169].

28. On 7 July 2021, the appellant's solicitor wrote to the GWIC concerning media reports about the Haylen QC review of the GWIC' handling of the appellant's case (this being a review conducted before the case was supposedly decided) [R22–182].

29. On 9 July 2021, the GWIC replied including confirming the existence of the Haylen QC review and confirming that the decision-makers in the IHP [R23–184].

30. On 13 July 2021, the appellant's solicitor wrote to the GWIC concerning further public reports about the GWIC handling of the appellant's case [R25–191 and 193]

31. On 16 July 2021, the appellant's solicitor followed up the unanswered correspondence [R26–197].

32. On 16 July 2021 the GWIC decided to defer dealing with charge 1 pending further investigation but otherwise declined to answer any of the appellant's requests for information [R27–202].

33. On 21 July 2021 further submissions were made by the appellant, under protest, as to the procedure and the substance of Charges 2–4 [R31–211].

34. On 17 September 2021, Ms Alice Stafford, Acting Senior Legal Officer, Mr David O'Shannessy, Chief Inspector, and Mr Dean Degan, Senior Steward, of the GWIC wrote to the appellant's solicitor withdrawing charge 1 (copy annexed herewith).

35. On 25 August 2021, the GWIC issued the decision of Ms Alice Stafford, then Acting Senior Legal Officer, Mr David O'Shannessy, Chief Inspector, and Mr Dean Degan, Senior Steward, of the GWIC convicting the appellant of three charges and imposing penalties as follows—

Charge 1 (Rule 86(ag)): (not decided – later withdrawn)

> Charge 2 (Rule 86(p)): To disqualify Mr Burnett for a period of 4 months;
>
> Charge 3 (Rule 86(f)(i)): To suspend Mr Burnett for a period of 2 months;
>
> Charge 4 (Rule 86(g)): To disqualify Mr Burnett for a period of 12 months,
>
> with the penalties to be served concurrently taking into account the time already served under interim suspension [R34–225ff esp at 236]."

14. The respondent in its submission identifies particular factual matters in addition to those set out by the appellant and they will be referred to when dealing with the submissions.

15. One key fact might be noted at this point and that is that the Act and the Greyhound Racing Rules do not contain a default position as to whether multiple penalties are to be current or cumulative and the respondent's submission points out that in the other codes such provision is made in rules.

SUBMISSIONS ON IRRELEVANT MATERIAL

16. The respondent says that this determination of an interlocutory decision is limited to the s 58(3) issue and that the appellant has, in his submissions, raised a number of matters that are not relevant to that determination.

17. The appellant in his submission (paragraphs 47 to 57) raised matters under the heading "Want of procedural fairness at every stage in the GWIC process". Those matters fell under the principles of procedural fairness, requiring reasonable notice and a reasonable form of hearing. The key points raised are the submission that the respondent had determined the matter before it called for submissions, acted as though it were administering a penalty notice system, declined to disclose a report by Haylen QC, was compounded by bias, declined to give the appellant an opportunity to confront his accusers and failed to address the appellant's submissions. Accordingly, it was submitted that the decision should be declared unlawful and would be on judicial review, but accepts that a fair and proper hearing before the Tribunal can cure these defects.

18. The respondent says none of these matters can be raised on this interlocutory issue, and the Tribunal agrees.

19. Each of the procedural fairness arguments are capable of being cured on appeal. The remaining matters do not relate to the decision to be made here. The Tribunal will limit this decision to the 58(3) issue.

THE STATUTORY SCHEME

20. Each party takes comfort from some of the provisions in the Act.

21. In particular, s11 provides that the principal objectives of the Commission are to promote and protect the welfare of greyhounds, safeguard the integrity of the industry and betting, and maintain public confidence in the greyhound racing industry. Other provisions provide for the making of rules and the taking of disciplinary action. The appellant sets out the whole of s 59, but the Tribunal only sets out hereunder the relevant parts of that section to this matter and they are:

> "59 Disciplinary action that may be taken
>
> (1) Any of the following actions may be taken by the Commission against or in respect of a relevant person—
>
> (a) suspending or cancelling of any of the following—
> (i) the person's registration…
> …
> (b) imposing a condition on the person's registration …
> (c) imposing a fine on the person not exceeding 200 penalty units,
> (d) disqualifying or warning off the person,…
> (f) prohibiting the person from participating in greyhound racing in any specified capacity,…
> …
> (h) such other action as may be specified in the greyhound racing rules.

WHAT DOES COMPLIANCE REQUIRE?

Appellant

22. In his submissions, the appellant addresses what is required for compliance with s 58(3).

23. It is submitted that what is required is notice of "the proposed action", but there is no definition of the word "action". It is submitted that the word is not at large and would not encompass starting a proceeding or procedure.

24. It is said that s 59 provides a limitation on the word action and that it means, therefore, a final step of imposing a particular penalty from the list of possible actions in s 59.

25. Therefore, it is submitted that s 58(3) requires the respondent to give notice before it takes action of the "proposed action" and therefore give the person a reasonable opportunity to be heard and make submissions about the matter.

26. The submission of the appellant then continues on aspects of procedural fairness, which the Tribunal has ruled are not relevant to this determination.

Respondent

27. In its lengthy and detailed reply, the respondent takes the Tribunal to a number of detailed facts and an interpretation of the notice given, and the determination of the legal point as to what is required for compliance.

28. The respondent submits that the actual notice about which there is complaint contained an email of 7 May 2021 from the respondent to the appellant's then solicitor under the title "Notice of proposed disciplinary action (with proposed penalty)". Enclosed with that email was the Integrity Hearings Panel letter of 7 May 2021, which the respondent says relevantly contained and referred to the following matters:

(i) "The notice is provided under s 58(3) of the Act and that GWIC is 'considering disciplinary action against your client' and identifies the brief of evidence which was enclosed and upon which it was stated 'containing the documents upon which we rely upon in issuing this notice'."

(ii) There is then a summary of evidence relating to the then four charges and it is submitted that is in effect saying "for the purpose of our considerations, here is what we summarise from the evidence we have gathered in relation to the matter", but does not pronounce that its summary is a final or fixed position in respect of the matter.

(iii) It is then said that based on the evidence in the brief that there "be reasonable grounds upon which Mr Burnett should be charged".

(iv) There is then set out the details of the sub-rules, the four charges and their particulars.

(v) It is then said that the letter goes on to say that the respondent is considering imposing in respect of each of the charges a disciplinary action under ss 58 and 59 as follows. Each of the proposed penalties for each of the four charges is then set out, and the Tribunal notes these were set out in this decision earlier.

(vi) The respondent emphasises that all this is under the title of "proposed disciplinary action" and therefore, as GWIC does not know at that point whether all charges will be sustained, or none of them, that it could not reasonably be expected to know whether, if there is more than one charge, there will be concurrency or cumulation required.

29. It is therefore said that the requirements of the notice of proposed action of the kind listed in s59 is not a notice as to how multiple actions, that is, multiple penalties, might be directed to be served if the occasion arises.

30. The submission continues that the notice invited submissions which would then be considered on both guilt and penalty.

31. Accordingly, it is submitted that these facts militate against a requirement to provide in the written notice of proposed disciplinary action in respect of multiple charges whether there is to be concurrency or cumulation.

32. The submission continues that an election notice is given and a specific invitation for submissions and that a 14-day period is allowed to attend to that election notice and submissions.

33. The respondent continues by saying that a purposive construction is required of the provision in the context of the Act as a whole. In that regard, it is said that the text of the legislation is clear and should be interpreted with a view to giving work to do to the three principal objectives in s 11. Therefore, it is said, an interpretation which furthers but does not detract from fulfilling the principal objectives should be found.

34. The submission continues that s 58 does require the respondent to give notice of the disciplinary charges and notice of potential penalties for each of those charges, but does not require, in the case of multiple charges ultimately proved, to indicate whether they will be concurrent or cumulative.

35. The respondent again emphasises the submission that when the notice is given, it is not known whether multiple charges will be found and, if so, what disciplinary order might flow in respect of each of them.

36. The submission continues that s 58(3) does not require notice of how penalties are to be served, but rather the nature of the proposed penalties, and that nothing in the text of ss 58 or 59 require disclosure of how the penalties are to be served.

37. The submission continues that it is necessary for the respondent to give an indication of the potential type of penalty, or penalties, for each matter and that this was done.

38. Emphasis is placed upon the fact that the notice is required to, and in fact does in this case, invite submissions and an opportunity to be heard.

39. It is then said that the above provides a correct result from the text of the Act and a purposive interpretation.

40. The submission continues that there is nothing in the explanatory note for the introduction of the subject bill, nor the second reading speech, nor any case law which will provide any further guidance on the interpretation of s 58(3).

41. The respondent's submissions then go on to address the fact that the respondent did not fail to answer the appellant's requests in relation to the penalties proposed.

42. The submission seeks comfort from the email of 15 June 2021 to the appellant's solicitor where it was emphasised that a final determination has not been made. Further comfort is found from an email of 16 June 2021, inviting the making of all submissions and when they are made, the question of concurrent or cumulative will be considered. That is, the issue of concurrency or cumulation would be made with a final decision, but that on this point the appellant should make submissions.

43. Therefore, it is said that the respondent acted properly by inviting submissions on the very issue about which complaint is made.

WHAT IS THE EFFECT OF NON-COMPLIANCE WITH S 58(3)?

Appellant

44. The appellant's submissions raise this question and acknowledge that it is different to the other procedural fairness issues which he sought to raise.

45. It is said that s 58(3) provides an express requirement of the statute of the giving of the notice and an opportunity to be heard and that if this is not done, action may not be taken.

46. The submission continues that the respondent's failure and refusal to inform the appellant of the terms of the proposed penalty and its practical effect was a failure to notify him of its proposed action.

47. It is therefore submitted that without that compliance, the imposition of a penalty was not authorised and the respondent acted without power.

48. It is therefore submitted that this appeal must be upheld on the grounds that the respondent lacked power to take the action it did. Or, alternatively, the Tribunal must hold itself without jurisdiction on the grounds that there was never a valid action of the respondent from which an appeal could lie.

Respondent

49. In reply, the respondent seizes upon the fact that the appellant acknowledges that if he is successful in this interlocutory application, it would be open to the respondent to prosecute the appellant in fresh proceedings and that the respondent would do this.

50. The respondent also points out that in fact the ultimate decision in this case was concurrent penalties.

51. The respondent then invites the Tribunal to issue what might be described as a binding ruling to the effect that where notice of proposed disciplinary action is given in respect of multiple charges, that it is not necessary to indicate whether any likely penalties are to be concurrent or cumulative or partly thereof.

APPELLANT'S REPLY SUBMISSION ON THE ABOVE ISSUES

52. As set out above, the appellant again addresses procedural fairness and that the appellant was entitled to know whether the penalties were to be concurrent or cumulative.

53. The appellant submits that the objects of the Act do not support the respondent's submissions and statements of purpose alone are apt to mislead rather than inform construction. The construction task must be text-based and where there is a clear and unambiguous meaning, then it must be given effect.

54. The appellant continues that the respondent has not identified any legislation with the same text and does not really answer the questions posed by the appellant in his submissions.

DELIBERATION

55. It is necessary to find a purposive construction of s 58(3) when considered alone and then in the context of s 58 and then in the context of the Act as a whole. Focus must be upon the text.

56. The Tribunal is not assisted by any definitions of the actual words in the subsection in the Act.

57. The Tribunal is not assisted by the absence of any wording in the second reading speech or explanatory note when the bill was introduced. There is no known case law on the issue.

58. To the limited extent that other legislative provisions may have similar wording, and therefore assist, none is advanced by either party here.

59. The scheme of the Act is driven by s 11 objectives which relate to welfare, integrity and the public image of greyhound racing. Those particular provisions do not provide any guidance in finding a purposive interpretation for the subsection.

60. It is apparent, however, that the subsection is part of the disciplinary system provided by the Act and is aided by a consideration of the Greyhound Racing Rules generally.

61. The subsection is to be found in Part 6 Disciplinary provisions, Division 1 Disciplinary action by Commission, and this only contains four sections and s 58 and s 59 are set out above and s 57 and s 60 provide no assistance on a purposive interpretation.

62. The Tribunal finds that the requirements of Division 1 mandate, in conjunction with the rules, the giving of a person to be subject to action or discipline generally reasonable notice that the procedure is under way and then extend to them a right to be heard and make submissions.

63. The subsection when read as a whole mandates three steps and they are: notice of proposed disciplinary action, then a reasonable opportunity to be heard, then a reasonable opportunity to make submissions.

64. The notice of proposed disciplinary action is in respect of any disciplinary action.

65. Subsection 58(1) guides the operation of subsection (3) by allowing disciplinary action if the Commission is of the opinion that a person has contravened the Act, the regulations, the code of practice or the rules. That is, it is necessary to form an opinion before disciplinary action is taken.

66. However, that opinion and the taking of any final disciplinary action cannot take place until s 58(3) is complied with.

67. This provides a clear implication that an end result is achieved after taking the three steps mandated by subsection (3) and not before.

68. That is, on the issuing of the notice under s 58(3), it cannot be done on the basis that the Commission has formed a final opinion on disciplinary action required.

69. It is noted that s 59 lists a number of disciplinary actions that can be imposed. S59 is not read to require more finality in disclosure under s58 as submitted by the appellant. “Action” in s59 as a word can be distinguished from “action’ in the text of “proposed action” in s58(3).

70. The Tribunal is reinforced in those determinations by the process used by the Commission generally and here. That is, there is an investigation and the gathering of evidence and the making of a decision to proceed and then the adoption of the requirements of 58(3). That is, there must first be a preliminary view after a consideration of evidence and of possible charges and then the issuing of an appropriate invitation. It is apparent that the notice could not possibly be an indication of a final outcome. There could be no consideration of a final outcome because there must be a consideration of anything that takes place when a reasonable opportunity to be heard and make submissions is effected and then those matters are taken in to account.

71. Essentially, this is a procedural fairness issue. That is, the notice is issued and an invitation to have a say at a hearing or by submissions is to be extended.

72. The steps actually taken here and generally by the Commission involve the service of an election notice. This is not statutorily required. The Tribunal is satisfied from this and other cases that it is a streamlining of procedural steps required to be taken. It is not mandated and it is not prohibited. The use of an election notice is a sensible and practical way for many participants in the industry to see a simple process to finality of disciplinary action against them.

73. Therefore, the Tribunal determines that the purpose of s 58(3) and the giving of the notice of proposed action is a process to an outcome and not the outcome. It is facilitative of an outcome.

74. The fact that the notice identifies possible disciplinary action, that is, a penalty, is accepted by the respondent as a necessary step.

75. Therefore, the notice of proposed disciplinary action might be equated to a summons in other jurisdictions. That is, a decision is made to “prosecute” and a summons issues. That then gives the recipient an opportunity to attend and be heard and make submissions and then a decision is made. The notice of proposed disciplinary action is no different.

76. It is a notice of action not the final action.

77. Any other interpretation would not give the remainder of the words of the subsection any work to do. That is, if a final opinion had been formed, then

there would be no need to give reasonable notice of hearing and reasonable notice of a right to make submissions.

78. The notice properly identified disciplinary actions that could flow, being of the type, or one of the types, in s 59. That was not an improper preliminary determination because it was based upon a preliminary consideration of the brief and the principles of civil disciplinary penalties on the material then known to the respondent but not the final material upon which a decision would be made.

79. Section 59 is silent as to the need to specify concurrent or cumulative by any express or implied words. Therefore, the notice of disciplinary action under subsection (3) is not mandated to be expressed with any reference to concurrent versus cumulative, but that only arises when a consideration of a disciplinary action for multiple charges and findings thereon arises. The Tribunal is reinforced in that conclusion because the Commission would not know the outcome of multiple charges and whether they would be proven, the facts actually established and upon which penalty would be based and whether there will be multiple charges for which disciplinary action is required.

80. The consideration, therefore, of concurrent versus cumulative arises under the principles of civil disciplinary penalty considerations and is not mandated by the Act or the rules and is not guided by any consideration by Parliament in passing the Act or the rule-makers in making the Greyhound Racing Rules, and it appears neither of those entities turned their minds to the question. The absence of any consideration in the second reading speech and the explanatory note is confirmatory of this.

81. That provides reinforcement in the conclusion that the necessity to specify concurrent or cumulative does not arise in the subsection (3) notice.

82. The Tribunal is further reinforced in that conclusion by the fact that the Commission will not be required to specify how penalties will be served when issuing the notice because it has not yet reached that determination stage. The respondent accepts the need for notice of each individual disciplinary action be set out - the Tribunal therefore does not have to analyse if this is required.

83. Accordingly, the Tribunal determines that the respondent, the regulator, the Commission, has complied with all that is required by s 58(3) when considered, in the context of 58 generally, and in Division 1 of the Act specifically.

84. As a matter of fact, the respondent made it clear to the appellant throughout the process, as set out in the factual matters above, that it would deal with the issue of concurrent versus cumulative in its final decision-

making processes and expressed on several occasions the right to the appellant to make submissions on that issue and, in fact, the appellant did so.

85. There is, therefore, no need to consider the other issue raised on the submissions of the effect of non-compliance with s 58(3) and the submissions thereon.

86. That is so because the Tribunal finds the respondent has complied with s 58(3).

87. Therefore, the Tribunal concludes that the penalty process as determined in this matter was authorised and within power.

CONCLUSION ON GROUND 6 OF THE NOTICE OF APPEAL

88. The Tribunal determines that the respondent has complied with the requirements of s 58(3) in its notice of proposed disciplinary action.

89. The Tribunal finds that the respondent was not required to specify in that notice whether penalties, if found proven, and if found proven on a multiple basis, were to be served concurrently or cumulatively.

90. The respondent adequately dealt with the appellant's complaints about the lack of specificity in the notice and did not refuse any request to specify, or any circumstances where it might be required to specify, concurrent or cumulative because it made perfectly clear to the appellant that he could make his submissions on that point, invited him to do so and he did.

91. Therefore the particulars pleaded to support ground 6 are not make good.

92. Therefore, the Tribunal finds that the notice of proposed disciplinary action complied with s 58(3) of the Act.

93. Therefore, the Tribunal finds that the Independent Hearing Panel was empowered to decide the issues in this case.

CONCLUSION ON INTERLOCUTORY APPLICATION

94. The Tribunal was invited to make a preliminary determination that the appeal not proceed because the respondent lacked power to take action it did or that there was no jurisdiction to hear the appeal.

95. For the reasons set out above the Tribunal finds against the appellant on the interlocutory issues.

BINDING RULING

96. The Tribunal declines to issue a class type ruling or binding ruling on the need to specify concurrent or cumulative in a s58(3). This decision reflects the determination on the issues raised in this case and does not purport to deal with all possible issues that other cases may identify on s58(3).

ORDERS

97. Ground 6 of the Notice of Grounds of Appeal is rejected.

98. The interlocutory application is dismissed.