RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 10 NOVEMBER 2021

APPELLANT MICHAEL HOOPER

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULES 86(o) and 86(f)(iii)

DECISION:

1. **Charges 1 and 2 – Appeals dismissed**
2. **Charge 1 – Severity appeal dismissed, 3 months suspension of licence imposed**
3. **Charge 2 – Severity appeal upheld, $300 fine imposed**
4. **25 percent of appeal deposit refunded**

1. The appellant, licensed trainer Michael Hooper, appeals against a decision of the IHP of GWIC of 24 September 2021 that he has breached Rules 86(o) and 86(f)(iii) and to impose upon him in respect of the first matter a period of suspension of three months, and in respect of the second matter, a fine of $1000 with $500 suspended for a period of 12 months on condition.

2. Charge 1

Relevantly, Rule 86(o) provides:

> "A person shall be guilty of an offence if the person (o) has, in relation to greyhound racing, done a thing which, in the opinion of the stewards, is improper, or constitutes misconduct".

That was particularised as follows:

> "(i) Was a registered trainer and a person bound by the Greyhound Racing Rules;
>
> (ii) On or about 25 June 2021 he was served with a Notice of Disciplinary Action suspending your registration;
>
> (iii) On 15 July 2021, whilst under a suspension and therefore subject to the impositions of a suspended person, did attend the Dapto Greyhound Club and permit to trial, the greyhound Cawbourne Taco of which, he was the trainer; and
>
> (iv) By permitting this greyhound to trial, whilst being a suspended person, is in the opinion of the stewards or Controlling Body, improper and constitutes misconduct."

Charge 2

The relevant parts of Rule 86(f)(iii) are as follows:

> "A person shall be guilty of an offence if the person (f) engages in contemptuous behaviour in any manner towards or in relation to (iii) the Controlling Body, or a member of the Controlling Body".

It was particularised as follows:

> "That on 15 July 2021, Mr Michael Hooper did engage in contemptuous behaviour towards the Controlling Body, or a member of the Controlling Body when participating in an interview with GWIC Stewards Mr Jason Hodder and Mr Nathan Meyn."

The particulars continued in that it was said that the words uttered were:

> "Because I've got the shits here, that's why the language isn't gonna be reduced. I'm sick of dealing with GWIC, you're fucking morons".

3. Before the stewards' inquiry conducted on 24 September 2021, the appellant pleaded not guilty, and by his appeal has maintained a denial of a breach of the rules.

4. The evidence has comprised the brief of evidence tendered on behalf of the respondent, which essentially contains the disciplinary hearing transcript of 24 September 2021, a transcript of interview of the appellant of 15 July 2021, the OzChase records in respect of, relevantly, ownership and trainer of the subject greyhound, and the decision appealed against.

5. The appellant has put in evidence statements of four witnesses who were not required for cross-examination, they being Frank Micalife, Dianne Hooper, Sam Agius and Bailey Dickinson. The appellant gave oral evidence and was cross-examined.

6. There are two charges, each of which is quite separate from the other in relation to the facts and the law to be considered, although arising essentially from the one event.

7. In respect of Charge 1, the appellant does not dispute the particulars that he was the registered trainer of the subject greyhound Cawbourne Taco on the relevant date. He does not dispute he was a person bound by the Greyhound Racing Rules. He does not dispute that on 25 June 2021 he was suspended. He does not dispute that on 15 July 2021 he was under suspension and subject to the impositions imposed upon a suspended person.

8. He disputes he attended the Dapto Greyhound Club and he disputes he permitted the subject greyhound to trial whilst he was the trainer. He therefore does not accept that he permitted his greyhound to trial and therefore engaged in misconduct.

9. The issues for determination, therefore, are identified.

10. The fact is that he had been suspended. He knew he was suspended. Mrs Hooper gives corroborative evidence that he withdrew from the acts of training of the subject greyhound. That he had been kept in the dark, to quote the evidence, as to the arrangements Mrs Hooper was making with the owner of the greyhound, Bailey Dickinson, because the suspension to which the appellant was then subject was occasioning him substantial stress and they did not want to increase his stress.

11. Between Mrs Hooper and Mr Dickinson an arrangement was made for the greyhound to be trialled at Dapto Greyhound Club. The appellant says he did not engage in that arrangement.

12. The appellant's vehicle had a damaged cage. It had been installed by Mr Micalife and the appellant arranged with Mr Micalife to see him at the Dapto Showground for the purposes of the inspection of the vehicle. Mrs Hooper arranged for the greyhounds to be placed in the appellant's vehicle for the purposes of being driven to the premises of the owner Mr Dickinson.

13. It is also the fact that Mrs Hooper stated that prior to leaving their property that she said to the appellant that Bailey Dickinson had organised trials for his Cawbourne Taco and for Valentina Bale with the view that Bailey would take her to train, easing the burden at home, and that she asked the appellant not to in any way handle or touch the greyhounds, and confirms it was the appellant who said they were to be driven to Mr Dickinson's property on the way to Dapto.

14. The appellant drove his vehicle with the greyhounds to Mr Dickinson's property. A conversation occurred between the appellant and Mr Dickinson at that property. His reasons for the conversation were he decided, to quote him, to kill two birds with one stone. And Mr Dickinson said to the appellant, "Well, I'll come with you so I can trial and learn about these dogs." The appellant, therefore, drove with Mr Dickinson and the greyhounds to the Dapto Showground.

15. The appellant took no part in the presentation of the greyhound to actually trial. Mr Henderson, it appears, a steward, is stated to have said to Mr Dickinson that another greyhound known as Valentina Bale could not be trialled because it was in Mr Hooper's name, but the subject greyhound was stated by Mr Henderson to be Mr Dickinson's greyhound and he could trial it, and therefore Mr Dickinson proceeded to trial the greyhound. Mr Agius has essentially given corroborative evidence of that fact.

16. The first issue is whether the appellant attended the Dapto Greyhound Club or the Dapto Showground. It is not essential in a stewards' inquiry for precise and accurate particulars to be given, as might be expected in a criminal trial nor in other types of civil disciplinary proceedings. The words "attend the Dapto Greyhound Club" are particularised.

17. There is no evidence the appellant actually attended the Dapto Greyhound Club prior to his interview. He says he only ever attended the showground premises at relevant times. Whilst the particulars go on to say "and permit to trial", the Tribunal is of the opinion that the gravamen of the allegation to which the focus of the Tribunal's attention must be is not the fact of his attendance at the greyhound club but that it was a permission to trial at the greyhound club. Therefore, the charge is not dismissed on the

basis of a factual finding that the words “attend the Dapto Greyhound Club” are not established.

18. Did he permit the greyhound to trial? The appellant is quite adamant he took no part in that. The appellant has given evidence that it was his intention to transfer registration of the training of the greyhound that was in his name. He knew how to do it, he had done it before. It was intended it would go to Mr Dickinson. It was his intention to do it the following day.

19. The fact is that on 15 July 2021 the appellant was the trainer of the subject greyhound. As such, the rules prohibit him from trialling that greyhound. He does not dispute that. He says he did not do it, others did it.

20. The allegation against him is not that he did every act possible to be done in the conduct of a trial but that by his actions he permitted the trial to take place. It is to be borne in mind the Tribunal has found on the evidence his knowledge that the greyhound was to be trialled and when he arrived at the showground and the greyhounds were taken from his vehicle, he had at that stage knowledge of his suspension, knowledge that he was the trainer and knowledge that the greyhound was to be trialled.

21. The appellant has been at pains to point out before the stewards and on appeal that an owner can supplant the actions of a trainer and, as it were, take over. But it is the Tribunal’s opinion, reading the rules as a whole, that the fashion in which a relationship between an owner and trainer takes place, and the way in which greyhounds are presented at tracks for the purposes of competing or trialling, that there is still an ongoing obligation under the rules upon a trainer in relation to trialling because he cannot say, “I am absolved from responsibility for a greyhound registered in my name if someone else does something.” That, in the Tribunal’s opinion, goes to penalty, not to conduct.

22. This appellant was aware the greyhound was going to be trialled. He was aware he was the trainer. He, therefore, did not take steps to prevent the greyhound trialling. Indeed, it must be found that he took positive steps because he drove the greyhound to the track, although he left it at the showground premises, but it was left there with the knowledge of and with the intention that it would be taken from his vehicle and go to trial.

23. “Permit” means, without consulting case law, to allow something to happen. As the Tribunal has said, it does not mean to allow every single step in a particular action to take place. The Tribunal finds that it was quite open to the appellant, with his duties as a trainer, to not permit the greyhound to trial because as a suspended trainer he could not do so.

24. In those circumstances, the actions, limited as they were – and many of his actions go to penalty, not guilt – the Tribunal is satisfied, and comfortably so, that he has engaged in a permission to trial.

25. The appellant has taken no issue as to whether his conduct, therefore, is improper and whether it therefore constitutes misconduct. The Tribunal has dealt with the issue of improper in numerous decisions, in this jurisdiction in particular in Absalom, 2 July 2013, where it was found that it is necessary to establish in all the circumstances of the particular case that the conduct lacked propriety.

26. The question of the appellant's intention goes to the issue of impropriety and, as was analysed in numerous decisions such as Absalom and Johnson in the thoroughbred racing code, 28 November 2012, it nevertheless is an objective test requiring consideration of all the circumstances as a reasonable member of the community would regard the conduct, but in particular, as was found in O'Connell v Palmer 53 FCR 429, that the actual intent or knowledge of the person themselves goes to their motivation which is, whilst not the ultimate test, relevant to what the objective reasonable person would consider.

27. The Tribunal is satisfied that that conduct, for a person who knew he was suspended and knew his obligations as a trainer, was improper. And again, misconduct has not been the subject of submissions. The Tribunal is satisfied it is misconduct.

28. Charge 1 is found proven.

29. The Tribunal dismisses the appeal against the finding of breach in respect of Charge 1.

30. The Tribunal turns to Charge 2.

31. The issue becomes one of determining whether there was contemptuous behaviour towards the Controlling Body. The appellant admits that the words in the particulars were uttered by him. The appellant takes issue – and thus his plea of not guilty before the stewards and the Tribunal – with the circumstances in which those words were uttered as being such that they cannot be used against him, to paraphrase his case.

32. There is no doubt that the words themselves were directed towards the Controlling Body, or members of the Controlling Body. The appellant has taken no issue in the proceedings that that was a contemptuous behaviour towards them and those matters do not need to be decided. The issue is whether the utterings by him can be used against him.

33. To paraphrase all of the submissions, it is that he was participating in a chat with a steward and not a formal interview, that he was not subject to a formal caution, that therefore in the circumstances, thinking he was having a chat and not having been formally cautioned, he was not engaging in an inquiry. And, in addition, he argues now – his amended submissions – that under the Surveillance Devices Act 2007 the conversation was not admissible against him.

34. The background to this matter is that the appellant states – and there is no agreement from steward Hodder – that Mr Hodder and he do not like each other, that they have a past history. The appellant has stated in his evidence and said to the IHP at the inquiry that he has previously been interviewed by Mr Hodder and been formally interviewed and the subject of a recording of that interview.

35. He says they have a history of numerous matters. He was deeply concerned that the conduct of the stewards on the night in question towards him was inflammatory and unnecessary, that they pursued him and that no reasonable steward would have engaged in that sort of conduct. He says the effect of that upon him was profound. And, indeed, he says accordingly he did not care what Hodder was putting to him or what the issues were about.

36. As to how the steward Mr Hodder became aware of the facts is not in issue. The interview establishes – and that is not the subject of challenge – that Mr Hodder and the appellant had a conversation at the grounds – a neutral term – it appears it was in the car park of the showground. The appellant says he was invited upstairs for a chat. He was not told he was to come upstairs for the purposes of a stewards' inquiry.

37. The issue then becomes whether part or any of the interview is admissible. The Tribunal is of the opinion that it is necessary to have regard to the contents of that document to determine its admissibility. The document is a transcript of an audio recording. The document starts off at 10:46 pm. There is conversation by Mr Hodder on a telephone and other sounds are recorded. The interview starts with the critical words:

> "MR HODDER: Sorry about that. As I said, the time is now 10:47 pm, 15/7/2021, at Dapto racetrack, upstairs in the stewards' room. With me I have Mr Michael Hooper and we also have steward -----
>
> MR MEYN: Nathan Meyn.
>
> MR HODDER: Mr Hooper, the reason I wanted to talk to you tonight was just to clarify your attendance at the track tonight.
>
> MR HOOPER: Yep.

MR HODDER: Before we go into that, I'll just – I had a conversation with you downstairs.

MR HOOPER: Yep.

MR HODDER: I'll just adopt that onto the record now so it's accurate. I approached you between races 9 and 10 outside the kennel complex."

There is then a conversation about the activities outside the room.

38. The Tribunal notes that the nature of the questions asked by Mr Hodder, both in clarification of what occurred outside the stewards' room and generally, related to the appellant as a suspended person attending for the purposes of greyhounds being trialled. It was not a chat about extraneous issues. There was conversation about transfer of the greyhounds. There was then specific acknowledgement by the appellant, not referred to earlier but noted again, that Mr Dickinson "wants to trial them because he wants to take over". A conversation about a transfer the following day. And then issues about the appellant not caring, which he has confirmed in his oral evidence today.

39. He then goes on to state, page 8 of the transcript:

"MR HOOPER: Oh, fucking please."

And other words.

And later:

"MR HODDER: For a start, how about we reduce the language.

MR HOOPER: Because I've got the shits here, that's why the language isn't gonna be reduced. I'm sick of dealing with GWIC.

MR HODDER: Well, for a start -----

MR HOOPER: You're a bunch of morons."

Later, Hodder says to him:

"Now, all this interview is, is to establish why you were here."

And later, page 17 of the transcript:

"MR HOOPER: You have not even a fucking shadow of a doubt about what I'm going there to say.

MR HODDER: Can you get rid of the language again?"

Later:

"MR HOOPER: We're in a private circumstance here.

MR HODDER: Well, we're not. We're having a formal interview that's being recorded."

Later:

"MR HOOPER: It's not a formal interview.

MR HODDER: Well, it's a formal interview?

MR HOOPER: Well, it's not. I don't consider it, we're having a conversation."

There were then further matters.

40. Extracted from that are some keywords: stewards' room, reference to a steward, to talk to you tonight, I'll adopt that onto the record, and the general conversation as just summarised.

41. The Tribunal is of the opinion that it was patently obvious to the appellant, despite his denials, that he was being the subject of an interview by a steward in a stewards' room at a racing facility.

42. The appellant has given sworn evidence today that he saw no recording device. The appellant submits, and correctly so, that the transcript makes no reference to any caution to him, and makes no reference to the fact that a physical recording by a surveillance device was to take place. At its highest, Hodder said, "I'll just adopt that onto the record now so it's accurate." That is the highest it can be put that there was an indication of formality at that point. The Tribunal is satisfied that the balance, as stated earlier, of the interview contained the necessary formalities.

43. The facts being established, it is a question of whether they can be used against him.

44. The starting point for a consideration of that is the Greyhound Racing Act. That provides, in section 55, in the power in GWIC to make rules. The appellant takes no issue with the power to make rules, nor that rules have been created, nor that he is bound by those rules. It is necessary to look

through those rules. In this case, the appellant's licensing documentation has not been put into evidence to prove his acceptance of the rules as a condition of his licensing. In those circumstances, those matters are ignored.

45. There is no doubt that stewards Hodder and Meyn were officers of the Controlling Body as defined in Rule 1 of the Greyhound Racing Rules.

46. Rule 86 provides for a person to be guilty of an offence, and (e) is critical. (e) states: "refuses or fails to attend or to give evidence at an inquiry", etc.

47. It is to be noted at this stage that the rules have been written in a way, unlike the other codes, which does not distinguish an investigation or steps preliminary to an inquiry from an inquiry itself. The rules, therefore, when read as a whole – and the Tribunal will touch upon further rules to support this conclusion – are such that there is no investigation stage as such formally in the rules, but that once the stewards embark upon a course of conduct, they are in fact in an inquiry stage.

48. An inquiry does not mean, when the rules are read as a whole, the type of inquiry, as it is more formally identified, as took place with the IHP on 24 September 2021. The Tribunal is satisfied that when Mr Hodder spoke to the appellant in the showground car park that he was in an inquiry stage making inquiries. The Tribunal is satisfied when he conducted the interview at 10:47 pm on 15 July 2021 that he was in the inquiry stage. Therefore, under 86(e), the appellant could not refuse to attend or give evidence. That is not the issue here. But it places upon him that burden of participation.

49. Rule 90 sets out an establishment for inquiries. Sub rule (1) empowers "the stewards may require the attendance of and giving of evidence by any registered person who is the subject of an inquiry". And sub rule (3) provides that that inquiry is subject to Rule 92.

50. Rule 92(1) says:

> "The stewards may regulate their own procedure and are not bound by formal Rules and practices as to evidence, but may inform themselves as to any matter in such manner as they think fit."

Sub rule (2):

> "The hearing of the inquiry shall as far as practicable be recorded by shorthand or such recording apparatus or such other means as the Controlling Body or Stewards determine and the record of any proceedings shall be retained for a period of 12 months…".

51. There is, therefore, an acceptance by his taking of a licence as a trainer that he is bound by those rules. Those rules require him to participate in an inquiry and enable the recording of that inquiry.

52. Is there, therefore, some means by which, if the appellant is correct that it was not some formal process and that he was not cautioned, his admitted words cannot be used against him?

53. In his written submissions he called in aid the Evidence Act. Two things about that. Firstly, the Evidence Act itself applies to courts. A stewards' inquiry is not a court. The Tribunal is not a court. The Evidence Act, therefore, on the face of it, does not apply. Two things. Rule 92(1) says that, essentially, although not using precise words, the stewards are not bound by the rules of evidence; but, secondly, the Racing Appeals Tribunal Regulation of 2015 provides in clause 16(1):

> "The Tribunal, when hearing an appeal, is not bound by the rules of, or practice as to, evidence but may inform itself of any matter in such manner as it thinks fit."

54. Therefore, the provisions of the Evidence Act do not apply. However, as is stated in numerous superior court authorities, that does not mean that the principles which flow from it are to be ignored in a civil disciplinary tribunal. Whilst they are not binding, they provide clear and unambiguous guidance as to how procedural fairness is to be exercised and as to how fairness is to be exercised towards the person who subsequently becomes the subject of a charge as a result of an inquiry or, in other cases, investigation process.

55. The relevant parts of the Evidence Act, which were not directly referred to by the appellant but which require consideration, are to be found in sections 138 and 139.

56. Firstly, S.138 – and it is for guidance only, as stated – says that evidence that was obtained improperly or in consequence of an impropriety is not to be admitted unless the desirability of admitting it outweighs the undesirability of admitting it. Numerous other tests are established. For example, subsection (3). It is necessary to have regard to probative value, importance of the evidence, the nature of the relevant offence, gravity of the impropriety, whether it was deliberate or reckless, whether it breached any of the International Covenant on Civil and Political Rights, which is not argued by the appellant and not further examined, and whether there is any difficulty of obtaining the evidence without impropriety.

57. S.139 goes on to raise issues of the necessity to caution. Here, there was no arrest, so subsection (1) is irrelevant. And subsection (2) applies to an investigating official, not defined in the Evidence Act or the Interpretation Act, and it says:

> "(a) the questioning was conducted by an investigating official who did not have the power to arrest the person".

So, that is to be considered. And:

> "The statement by the appellant was done after the investigating official formed a belief that there was sufficient evidence to establish the person has committed an offence, and before that statement was made a caution was not given."

58. It is noted that section 139 then goes on in various parts to exclude breaches where the Australian law requires the person to answer questions put by an investigating official.

59. The Tribunal is not persuaded that the rules can be said to be an Australian law. It has not been argued, it does not need to be decided for other reasons. That is an issue for another day.

60. The onus to establish that the investigating official had formed an adverse opinion is to be read in the light, not in the bold harsh facts of section 139, but on the basis of the totality of the rules and the power of a steward to require a person to participate. The absence of a caution – and that is established – is, in the Tribunal's opinion, not required.

61. Firstly, the Evidence Act does not apply and therefore it is not mandated.
But, more importantly, that on a fairness issue the requirement for the appellant to participate entirely in the interview and to answer questions supplants what would otherwise be the test that would preclude Mr Hodder from continuing his questioning if he had formed the opinion that there had been a breach, and that could well have arisen as a result of the conversation he had in the car park. But the Tribunal is of the opinion that in those circumstances the material is not to be excluded on that basis.

62. It then becomes a consideration of whether there was an impropriety. That is dealt with by the fact that in the Tribunal's opinion, the Evidence Act provisions not applying, that for the same reasons of the obligations upon a licensed person to assist and participate and answer questions at an inquiry, that the continued conduct of steward Mr Hodder in asking the questions that he did in the circumstances that he did do not comprise an impropriety.

63. The Tribunal is, contrary to the opinion of the appellant, satisfied that the opening remarks made by Mr Hodder to the appellant, despite his subjective belief to the contrary, which he has reflected upon to the stewards on that occasion and before the IHP inquiry and on appeal that it was not a formal

interview, cannot stand in the face of the facts. Simply, he was in a stewards' room, he was being interviewed by stewards, he knew it was going onto the record. It was at a race track. Those matters make it quite clear, in the Tribunal's opinion, there was no impropriety. The fact that subsequently it was clarified for the benefit of the appellant that in fact it was a formal interview does not detract from the fact that it was, from its beginning, a formal interview by way of an inquiry, as described earlier.

64. There is, therefore, in the Tribunal's opinion, no impropriety and no failure for admission of the evidence for lack of caution. In any event, should the Tribunal be wrong in respect of the failure to caution, then it would only activate the equivalent of the consideration of 138 and a consideration of the same types of issues that 138(3) enlivens, namely, taking into account all of the matters in 138(3) read onto the record earlier. The Tribunal is of the opinion it was probative, important, having regard to the nature of it and the gravity of the impropriety, and there was no deliberateness or recklessness about the conduct, and that the difficulty of obtaining evidence by stewards is well known, so that the discretion would nevertheless be exercised if there was a finding of impropriety that the evidence would otherwise be admitted, both under the provisions of the Greyhound Racing Rules, the Racing Appeals Tribunal procedural matters, and, if the Evidence Act had applied, under the Evidence Act, in any event.

65. The last issue for consideration is whether it is nevertheless excluded by the Surveillance Devices Act.

66. The appellant calls in aid section 7.

67. What has not been addressed by either party is whether this was a private conversation or not. Private conversation is defined in section 4, the Definitions section. It is as follows:

> "private conversation means any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only –
>
> (a) by themselves, or
>
> (b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so, but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it might be overheard by someone else."

68. And "overheard by someone else", does not mean as it was taking place.

69. The Tribunal is satisfied it was not a private conversation. The Tribunal is satisfied that a conversation by a steward in the circumstances of an inquiry is not a private conversation.

70. In any event, should it be that, section 7, if it was enlivened, provides relevantly under (1): “A person must not use a listening device” – and there is no issue that whatever was used was a listening device – “to record a private conversation”.

71. But it does not apply under subsection (3)(a) if all of the principal parties to the conversation consent, expressly or impliedly, to the listening device being used.

72. The Tribunal is satisfied, when the rules are taken as a whole, that a licensed person attending upon a stewards’ inquiry, as the Tribunal has found, despite the appellant’s views to the contrary, that there is an implied consent. It was not necessary for the steward to state to the appellant, “I am going to record this” and then obtain an express consent to do so. In many cases, that is done. But it is not, in the Tribunal’s opinion, for the purposes of the Surveillance Devices Act, essential. There was an implied consent in the circumstances of this case, in the circumstances in which it took place and where it took place and the participants in it. It is, therefore, that if it was a private conversation – and the Tribunal has found to the contrary – that it nevertheless is not excluded by section 7 because of the operation of section 7(3)(a).

73. In those circumstances, there is no reason under the Surveillance Devices Act to exclude the interview in its entirety.

74. There is, therefore, in combination of those matters when considered together, having considered them separately, no reason why a combination of the rules, the Evidence Act, the Surveillance Devices Act, when taken together, lead to any reason why, in the Tribunal’s opinion, it would be wrong to admit that interview as being evidence against the appellant on this appeal.

75. In the circumstances, therefore, the appellant not contesting that the words were used nor that they were contemptuous, those words are admitted into the hearing.

76. It is, therefore, that the particulars are established, the breach of the rule is established.

77. As a formality, the Tribunal, regardless of no challenge, is satisfied that the words uttered in the circumstances in which they were uttered, whilst it may be relevant to penalty as well, were contemptuous and that they were

directed to the Controlling Body and/or its members and it was in an interview.

78. The Tribunal finds Charge 2 established.

79.The Tribunal dismisses the appeal against the finding of breach in respect of Charge 2.

SUBMISSIONS MADE IN RELATION TO PENALTY

80. The issue for determination is penalty in respect of the two breaches found by the Tribunal.

81. The respondent, the regulator, seeks that the penalties considered appropriate by the IHP be imposed. They were, in respect of Charge 1, a suspension of three months, and, in respect of Charge 2, a fine of $1000 with $500 suspended for a period of 12 months on condition.

82. The necessity in determining penalty is to have regard to the civil disciplinary nature of these matters, not to punish, but to provide a protective order. It is that in determining that protective order it is necessary to have regard to what message must be given to this individual person that the type of conduct in which the appellant has engaged requires that there be an understanding of wrong conduct and not to be repeated and, secondly, that the message to the industry at large is that that type of conduct will carry with it the consequences considered appropriate.

83. The appellant's subjective circumstances are limited. The appellant made no attempt to update his personal circumstances in the nature of the submissions he made on penalty, to which the Tribunal will return. It is that he has been a trainer since April 1993, a substantial period of time, for which he is entitled to a substantial benefit. That benefit is somewhat reduced by the fact that he has a disciplinary history in respect of not dissimilar conduct, recent, and for which he was, relevant to the adverse finding, subject to a suspension at the time he engaged in this conduct.

84. There has been no plea of guilty before the IHP or before the Tribunal. No discount is therefore available for what the Tribunal considers to be appropriate on objective seriousness by reason of that.

85. He is entitled to a deduction for the length of time he has served in the industry, but that again is then reduced by the fact that, as stated, he was on a suspension for not dissimilar conduct.

86. The objective seriousness of these matters is less than that which the Tribunal might otherwise find.

87. In respect of Charge 1, the Tribunal is satisfied that the conduct in which the appellant engaged was not all of that which might relate to the presentation of a greyhound to trial by a suspended person. Objectively, the Tribunal, on seriousness, accepts that the appellant had withdrawn, essentially, from the training role, that his wife was acting in conjunction with Mr Dickinson, the owner, to try and have the greyhound trialled, that it was intended to transfer it. The mischief is he had not done so. That he in fact took no active part in the trialling itself. His conduct to which the adverse finding was made was driving the greyhound to the Dapto Greyhound Club facility and in the knowledge that it was to trial. His permission, as found, was therefore at the lower end of the scale and the penalty is to reflect that.

88. The message to be given, however, is, consistent with the nature of the penalty, one which requires a more substantial message by reason of the fact that he was actually under suspension. That is not to double-dip against him in the sense that the offence itself was to engage in conduct under suspension, but that it reflects the objective seriousness of what he did that he was in fact suspended.

89. The charge 2 is also, in the Tribunal's opinion, to be viewed at the lower end of the scale. The words uttered, as found to be contemptuous, were uttered in an interview room with only two stewards present and no member of the public. They were not published beyond that room. They were not broadcast in a way which would itself bring the industry into disrepute.

90. Critically, they were not directed at the stewards. Whilst the stewards are officers of GWIC, the Controlling Body, nevertheless it is that the Controlling Body itself was not otherwise represented by its Board members and the like. It is, therefore, in the Tribunal's opinion, a matter to be viewed at the lower end of the scale.

91. The question is whether the message to be given to this appellant can be reduced by anything he has said in his favour on the penalty submissions. It is fair to say the appellant accepts no blame whatsoever for his conduct. He expresses no remorse or contrition. To the contrary, it may be said that he came out with all guns blazing, both against the regulator and those appearing for it, and against the Tribunal in respect of the finding it has made. He simply cannot accept he was at fault. Everyone else was at fault, not him.

92. The Tribunal makes it quite clear that it does not consider there should be any loss of leniency by reason of his criticism of the Tribunal. The Tribunal is more robust than that. Even though in his concluding remarks he called the Tribunal an idiot, that is not a matter to which the Tribunal has regard.

93. He described himself as being “pissed off”. That is not an expression usually associated with a person expressing remorse or, as it were, throwing themselves on the mercy of the Tribunal to reduce penalty against him.

94. But his remarks were made in this context, that he has a genuine belief – and the Tribunal accepts it – that he is being singled out and others who he believes are breaching the rules are not. The Tribunal does not determine whether that is correct or not. It does not have to, it does not have the facts which would enable it to do so. But it goes to the belief of the appellant and the frustration he felt when he engaged in the conduct in the stewards’ inquiry in uttering the words that he did about the Controlling Body.

95. It is emphasised that there is nothing before the Tribunal, in its opinion, to justify that he is entitled to express himself to it or to the stewards in the way he did because of that belief. But it drove him. The Tribunal accepts he was frustrated. The Tribunal accepts that he believed at the time he was being singled out, that he was being chased, as he described it, through the car park. As to the correctness of that or not, it does not have to be determined. It was his belief. It provides a reason why. And it is reflected quite clearly in the way he expressed himself to those two stewards, in the way in which he expressed himself to the IHP, and, it is noted, even to Mr Birch, who was the Chairman of that particular hearing, that he had a go at him, to paraphrase it, by accusing him of bias and the like. That is a reflection of the anger.

96. The appellant almost concluded his remarks before he got to calling the Tribunal an idiot by indicating that he had had it with this industry, that he has done with greyhound racing, he will look after them as pets and then send them to their death. Well, if that is the way he feels, then the message to be given to him must be one which reflects that attitude.

97. The appellant essentially suggests no alternative penalty. He says there is no breach to be found against him, he should not be subject to any penalty. The Tribunal does not agree. It is quite appropriate that the message to be given to him is one which is required to indicate quite clearly to a person with no remorse or contrition that they cannot engage in that type of conduct and expect to remain a participant in the industry.

98. Likewise, in expressing his frustration with the industry by the words uttered to the stewards, the objective seriousness warrants that there be a penalty.

99. Absent a plea of guilty, absent any contrition or remorse, absent any suggestion that a heavier penalty is warranted, the Tribunal, having regard to the precedents that have been referred to in the written submissions of

Sanchez, Stojanov, Irwin, Barrett and Burnett, forms an opinion that the suspension of three months the IHP considered appropriate for Charge 1, the breach of Rule 86(o), particularly having regard to his past history, is an appropriate penalty.

100. The Tribunal imposes a period of suspension of three months for charge 1.

101. The severity appeal in respect of that part of the penalty process is dismissed.

102. In respect of the charge 2, the Tribunal comes to a different conclusion to that of the IHP. The Tribunal does not consider that a starting point penalty, subsequently reduced by a bond, of $1000 clearly reflects the circumstances in which this conduct occurred. It is open to the Tribunal to consider a greater penalty than it does because of the appellant's attitude and his lack of remorse and contrition, but in the circumstances the Tribunal is of the opinion that a fine of $300 is appropriate. It does not consider that should be suspended.

103. A penalty of $300 is imposed for charge 2

104. The appeal against severity in respect of Charge 2 is upheld.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

105. In respect of the appeal deposit, the Tribunal notes that the majority of time taken up in this matter was in respect of findings whether the two rules were breached. That was unsuccessful on appeal.

106. In respect of penalty, one of two penalties was found to be favourable.

107. As tokenistic as it is, the Tribunal orders 25 percent of the appeal deposit refunded.
