NST-E22-270631

Samuel Pretscherer v Motorcycling Australia

Determination

National Sports Tribunal

General Division

sitting in the following composition:

Panel Member Ms Bridie Nolan

in the arbitration between

Samuel Pretscherer *Applicant*

Represented by Peter Pretscherer, Authorised Representative
and Ms R.L. Gall of Counsel instructed by Simon Berry, Solicitor

And

Motorcycling Australia *Respondent*

Represented by Anthony Hynes, Manager, Legal & Insurance

PARTIES

1. The Respondent, Motorcycling Australia (MA) is the national governing body for the sport of motorcycling in Australia and is a Sporting Body as defined in the *National Sports Tribunal Act 2019* (NST Act). MA was represented before the Tribunal by Anthony Hynes, the National Manager of Legal & Insurance at MA.

2. The Applicant, Samuel Pretscherer is a motorcyclist and a member of MA. The Applicant was represented before the Tribunal by Peter Pretscherer, Authorised Representative and Ms R. L. Gall of Counsel instructed by Simon Berry, solicitor at Hilliard and Berry Solicitors.

INTRODUCTION

3. The dispute relates to a decision of MA following events arising during the 2022 Yamaha Australian Off-Road Championship.

4. On 17 July 2022, the Applicant competed in the 2022 Yamaha Australian Off-Road Championship organised by MA. The particular race relevant to the dispute was the Special Test 6 E1 Class (the E1 Class).

5. During this E1 Class race, another rider, Mr Stefan Granquist, fell. Whilst racing, the Applicant saw that Mr Granquist had fallen and considered he might be injured. He rode a short distance past Mr Granquist before returning to the incident to ask if help was needed. The Applicant was told by a spectator (another rider who was not competing) who was assisting Mr Granquist to go and get help.

6. The Applicant was the sixth rider to arrive at the incident. Another rider, Mr Blake Hollis, was the fifth rider to arrive at the incident and was waved on by the spectator.

7. The lap results for the E1 Class initially included Mr Hollis at 12:21.088 in 3rd place and the Applicant at 12:40.662 in 4th place.

8. The Applicant applied to the Clerk of Course (CoC) to be recompensed for the time lost in stopping to offer assistance to Mr Granquist and the CoC determined the lap time to be assigned to the Applicant. The amendment to the Applicant's lap time resulted in an advancement of the Applicant to 3rd place and demoted Mr Hollis to 4th place overall in the E1 Class.

9. Mr Hollis lodged a protest with the Steward to appeal the decision of the CoC in respect of the Applicant's lap time. The Steward did not conduct a hearing as is required under the MA General Competition Rules (clause 6.1.8.1) and dismissed Mr Holllis' protest.

10. Mr Hollis disputed the Steward's determination by lodging a Notice of Dispute with the Respondent (the Notice of Dispute), purportedly, in accordance with the Non-NIF Dispute and Complaint Resolution Policy (the DCRP).

11. The Notice of Dispute was received by Mr Hynes as the MA National Complaints Manager and an internal investigation was undertaken employing a specialist member of the MA Judicial Panel for independent review. The dispute and findings of the investigation were then referred to the MA National Officials Committee for review before being referred to the MA Decision Maker, as defined in the DCRP.

12. Upon reviewing the findings of the investigation, the MA Decision Maker (the Decision Maker) determined by a decision dated 12 September 2022 that the CoC and Steward had erred in their application of the MA General Competition Rules and upheld Mr Hollis' Notice of Dispute. The recompensed time the Applicant received for rendering assistance to Mr Granquist was significantly reduced (the Decision).

13. In accordance with clause 60 of the DCRP, the Applicant, as a person with a material interest in the Dispute had a right to lodge an appeal with "Sport Integrity Australia", viz., the Tribunal, which allowed him an appeal to the Tribunal's "Appeal Division" viz., the Tribunal's General Division, under s 23 of the NST Act.

PROCEEDINGS BEFORE THE NST

14. A preliminary conference for this matter took place on 21 September 2022. The preliminary conference was conducted by the NST CEO and addressed the administrative and logistical requirements necessary to proceed with the arbitration.

15. During the preliminary conference, the parties agreed to adhere to the following timetable for the lodgement of evidence and submissions:

    a. MA to file with the NST Registry and serve on the Applicant all evidence that was before the Clerk of Course, the Steward and the MA Decision Maker (this had already been provided to the NST Registry alongside the application).

    b. The Applicant to file with the NST Registry and serve on the Respondent any written submissions, statements of evidence, bundles of documents, lists of authorities (if any) on which he intends to rely, and a list of witnesses he requires to be called (if any) by 5:00pm AEDT 7 October 2022.

    c. MA to file with the NST Registry and serve on the Applicant any written submissions, statements of evidence, bundles of documents, lists of authorities (if any) on which it intends to rely, and a list of witnesses it requires to be called (if any) by 5:00pm AEDT 14 October 2022.

    d. Mr Hollis was provided the opportunity to lodge submissions or evidence via MA. If he was to do so, MA's submission deadline was to be extended from 14 October 2022 to 21 October 2022. MA adhered to the former date as Mr Hollis did not provide any further evidence or submissions.

16. This timeline for the lodgement of submissions and evidence was documented in an arbitration agreement, executed by both parties on 4 October 2022.

17. The evidence and materials relied on by the parties is comprised in a consolidated and paginated bundle, which for convenience will be referred to in this Determination as the Hearing book. The pages of the Hearing book are consecutively numbered, commencing at page 1 and ending at page 182.

18. The formal hearing for the matter was conducted virtually on 21 October 2022.

19. No objection was made at the outset of the hearing to the composition of the Tribunal and at the adjournment of the hearing the parties confirmed that their procedural rights had been fully respected during the course of the hearing and proceedings more generally.

20. At the conclusion of the hearing on 21 October 2022, the Tribunal adjourned the hearing and made directions for the following further evidence and submissions to be made:

    a. In reference to the arbitration agreement, is this matter open to resolution by the NST on the grounds submitted by the Parties;

    b. On the assumption the answer to the above (a) is affirmative, whether Mr Hollis' complaint can be considered a dispute for the purposes of the relevant MA policy,

        i. The Tribunal invited MA to include any further material available to it as an annexure to its submissions in support of this direction;

    c. Whether the process adopted by Mr Hynes in referring the investigation to himself was appropriate and permitted under the relevant MA policy, and, if any, the consequences of such action;

    d. Whether it was open to the decision maker to make the decision in the circumstances, where ostensibly, he was only empowered to impose a sanction;

    e. Whether these considerations invalidate the decision, including the appropriate disposition of the proceedings by the NST and the appropriate head of power to do so; and

    f. Any further submissions relevant to these directions for which the parties were invited to make submissions.

21. The parties agreed to adhere to the following timetable for further submissions:

    a. MA to file and serve any submissions in accordance with the directions by 5:00pm AEDT 28 October 2022.

    b. The Applicant to file and serve any submissions in accordance with the directions by 5:00pm 11 November 2022.

    c. MA to file and serve any submissions in reply by 5:00pm AEDT 25 November 2022.

22. The final further evidence and submissions were received on 22 November 2022. The further submissions and evidence were not included in the Hearing book.

23. Following receipt of all evidence and submissions, the Tribunal proceeded to make a determination on the papers, finding it unnecessary to reconvene the hearing.

APPLICABLE RULES

24. The 2022 Yamaha Australian Off-Road Championship operated pursuant to the Supplementary Regulations, which provides for MA to conduct a number of meetings for solo Enduro motorcyclists across several classes.

25. The meetings were authorised by MA and held in accordance with the MA General Competition Rules which are contained in the 2022 Manual of Motorcycle Sport. By entering the event, all riders agreed to comply with all the relevant rules, regulations, by-laws, and instructions.

NST JURISDICTION

26. In the Arbitration Agreement dated 4 October 2022, the parties agreed the Tribunal's jurisdiction to deal with the dispute is engaged by s 23(1)(a), s 23(1)(b)(i) and s 23(1)(c)(i) of the NST Act and cl 22 of the DCRP.

27. The Tribunal noted that the parties may seek to argue that section 7(2) of the *National Sports Tribunal Rule 2020* (NST Rule) may apply, in that the dispute could be a dispute about a "field of play" decision under section 9(1) of the NST Rule and reserved the parties' right to advance such an argument at hearing.

28. At the hearing the Tribunal raised with the parties whether this matter was properly open to resolution by the Tribunal on the grounds submitted by the parties.

29. In supplementary written submissions dated 11 November 2022, the Applicant referred to cll 5 and 6 of the Arbitration Agreement and in particular noted cl 5.6 of the Arbitration Agreement which provided that he appealed the Decision. He submitted that the parties have agreed to refer all aspects of the Decision to the Tribunal and therefore the dispute as therein described was open to resolution by the Tribunal. MA submitted that the dispute was open to resolution by the Tribunal on the grounds submitted by the parties.

30. Clause 5 and 6 of the Arbitration Agreement set out the agreed grounds of the dispute:

> **5. Description of dispute**
>
> 5.1 The Respondent is the national governing body for the sport of motorcycling in Australia and is a Sporting Body as defined in the NST Act. The Applicant is a member of the Respondent.
>
> 5.2 At a race on 17 July 2022, the Clerk of Course determined the lap time to be assigned to the Applicant following the Applicant allegedly stopping to render assistance to a fallen rider.
>
> 5.3 Another rider, Mr Blake Hollis, lodged a protest to appeal the decision of the Clerk of Course. The Steward did not conduct a hearing and dismissed the protest.
>
> 5.4 Mr Hollis lodged a Notice of Dispute with the Respondent, MA, under the Policy to dispute the action taken by the Steward and, in turn, the Clerk of Course.
>
> 5.5 The MA Decision Maker, as defined in the Policy, determined that the Clerk of Course and Steward had erred and upheld Mr Hollis' Notice of Dispute, overturning the decision of the Clerk of Course.
>
> 5.6 The Applicant appeals the decision of the MA Decision Maker.
>
> **6. Main issues identified by the Parties**

6.1 The Parties seek a determination on whether the decision of the MA Decision Maker should stand.

6.2 The Applicant's view is that the MA decision should be overturned.

6.3 MA's view is that the MA decision should stand.

31. In my opinion, the Applicant's submission that the parties have agreed to refer all aspects of the MA Decision to the Tribunal and therefore, the dispute in that regard is open to Resolution by the Tribunal is not consistent with the agreement housed in clauses 5 and 6.

32. Although the parties agreed, as recorded in the Arbitration Agreement that clause 22 of the DCRP applied, this is not properly the mechanism by which the application to the Tribunal is permitted to be heard under the DCRP. So much was recognised by the Applicant in his supplementary submissions dated 11 November 2022, who observes the constraints on the referral imposed by cll 5 and 6 of the Arbitration Agreement.

33. Clause 22 of the DCRP provides that the Complaints Manager may, at any stage, refer a "Dispute" as to the Tribunal for determination in accordance with its processes, which as is explained further below pertains to the formal notification to MA of the allegation that the Steward and CoC acted in breach of the DCRP. This is not the MA decision, but is antecedent. As I have explained the dispute before me is the appeal from the MA Decision.

34. In my opinion, the jurisdiction of the Tribunal is in truth engaged by s 23(1)(a), s 23(1)(b)(ii) and s 23(1)(c)(i) of the NST Act, by virtue of rule 7(1)(b) of the NST Rules. The reasons for this conclusion are as follows.

35. The DCRP includes the following relevant provisions:

36. Section 3 provides definitions of key terms:

    a. **Complaints Manager** means the person appointment by the MA to receive and administer Disputes under and in accordance with this Policy or their delegate. The Complaints Manager must not be the same person as the Decision Maker for the relevant dispute.

    b. **Decision Maker** means the person appointed by the NA to make decisions, of the Complaints Manager, determining a Dispute under this Policy, or their delegate. The Decision Maker must not be the same person as the Complaints Manager for the relevant dispute.

    c. **Dispute m**eans a formal notification to MA of an Alleged Breach.

    d. **Alleged Breach** means an allegation or information that a Respondent has acted in breach of the CDRP.

    e. **Respondent** means the member that is the subject of a dispute.

    f. **Sanction** means a sanction imposed on a Respondent under **cl 53**.

37. Pursuant to cl 13 of the DCRP, a Dispute can only be made by an Applicant by completing a notice of dispute and submitting it to the MA. There was no contention between the parties when this was done by Mr Hollis and constituted the Notice of Dispute.

38. Pursuant to cl 16 of the DCRP, initial assessment of the Dispute was made upon receipt of the Dispute by the Complaints Manager who was to initially determine whether any of the matters set out in cl 16 applied. In this case the Complaints Manager proceeded pursuant to cl 16.8 of the DCRP to determine that the Dispute had been properly submitted under the DCRP in which case he was to proceed to deal with the Dispute under the policy.

39. Pursuant to cl 17, the Complaints Manager has "an absolute discretion" to determine the matters in cl 16 and any decision "is final and binding". In exercising that discretion, the Complaints Manager may (but has no obligation to) seek any further information, or make such further enquiries, as necessary.

40. Clause 20 provides, if after consideration of the matters in cl 16, the Complaints Manager determines that the Dispute can properly be dealt with under the Policy, and the MA having received the application fee (if applicable), the Complaints Manager must determine which of the following procedures is appropriate to attempt to resolve the Dispute: Conciliation, Minor Breach Procedure, Breach Offer, Investigation & Decision or the Tribunal, as well as referral to an external agency under cl 47 of the DCRP.

41. Clause 21 provides that the Complaints Manager has the "sole and absolute discretion" to determine the chosen Process.

42. Pursuant to cl 35, which falls under the heading "Investigation & Decision", if the Complaints Manager has determined that the Investigation & Decision is the most appropriate process, which in this case he did, the Complaints Manager may choose to conduct or instruct MA's external legal counsel to conduct or coordinate, either an internal investigation, in which case an appointed representative within the sport, will be chosen by the Complaints Manager to investigate, or an external investigation in which case the Complaints Manager must appoint a party, external to the sport, to investigate using the Terms of Reference outlined in Schedule 4.

43. Clause 36 provides that if an appointed investigator, whether internal or external, will, in accordance with the investigation procedure in Schedule 4, investigate the Notice of Dispute and make findings as to whether the allegations are proven to the standard of proof.

44. Clause 37 provides that upon receipt of the investigator's findings, the Complaints Manager must refer the Dispute and the investigator's findings to the Decision Maker.

45. Clause 38 provides that the Decision Maker must decide, based on the investigator's findings, the applicable Sanctions to be imposed.

46. Without setting out the lengthy provisions of cl 53 and thereby cl 54 of the DCRP, Sanctions are limited to various disciplinary measures such as reprimand, warning, disqualification, forfeiture of points, suspension from activities, the imposition of conditions or restrictions on membership, penalties, expulsion, or any sanction as the person imposing it considers appropriate. A Sanction is imposed after having given consideration to factors such as the seriousness of the behaviour, whether a member knew or should have known that their behaviour was in breach of the policy, contrition, the effect of the Sanction, prior warnings or disciplinary actions against the member and mitigating circumstance.

47. In circumstances where the relevant Dispute identifies the CoC and Steward as the Respondents, as having occasioned a breach in the prescribed decision-making procedure,

that the imposition of a Sanction is wholly inappropriate and unwarranted choice of process for the proper disposition of the dispute. Indeed, no decision to impose a Sanction was made.

48. Rather the Decision finds no support in the Investigation and & Decision Process. It is for this reason that, for reasons to which I will shortly come, I consider that the Complaints Manager's decision to refer the Dispute for investigation under this procedure to be legally erroneous and unreasonable. I am satisfied that this error infected and invalidated the entire MA Decision.

49. Likewise, an Investigation, as prescribed by the DCRP, properly conducted, required adherence to the provisions of Schedule 4 the CDRP, which were indubitably, not followed. This failure augments my conclusion with respect to the invalidity of the MA Decision.

50. As to unreasonableness, it is well established that a decision made in breach of a contract may be reviewed on the grounds of reasonableness and is thereby voidable.

51. In *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 4 All ER 639 (*Braganza)* it was observed that an implication concerning the manner in which a contractual discretion may be exercised was one that was drawing closer to the principles applicable to judicial review. Lady Hale referred at [22] to the decision of *Rix LJ in Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116, in which His Honour referred to a decision-maker's discretion being limited, as a matter of necessary implication, by concepts of good faith and honesty and the need for the absence of arbitrariness, capriciousness, perversity and irrationality, akin to *Wednesbury* unreasonableness, and emphasised at [31] that any implication of a term of reasonableness would depend on the terms of the contract.

52. In *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30 at [132], Edelman J recognised that the implication of reasonableness was not unique to statutes. He observed that a contractual clause that empowers one party to act to the detriment of another has been construed as requiring the person on whom the power is confirmed to reach a decision reasonably and with fair dealing having regard to the interests of the parties and the provisions and purposes of the contract, objectively ascertained. His Honour also observed that the precise content of any implied duty of reasonableness will depend on the circumstances and the construction of the instrument (or contract) as a whole and be influenced by expressions such as contained in CDRP such as "their sole and absolute discretion": at [133].

53. Edelman J referred also to his earlier decision in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825; 329 ALR 1 wherein he noted the English approach by reference to *Braganza* and accepted there may be good reasons to adopt an approach to reasonableness implications concerning contractual discretions that mirror the reasonableness requirement for judicial review. His Honour went on to state that he doubted there would be a general limitation upon an implied qualification of reasonableness such that the obligation applied only to circumstances of irrationality or where the outcome is so unreasonable that no reasonable power holder could ever have acted in that way, and that the existence and content of the implication in any case will depend on the context: at [1011]-[1015].

54. In *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639; [2016] NSWCA 30 at [39]-[49] it was explained and accepted that broad contractual discretions must be exercised reasonably. In *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233

(*Jones*), Gleeson JA (Macfarlan and Meagher JJA agreeing) rejected the adoption of Wednesbury unreasonableness as applying to contractual discretions: at [121]. However, in Jones at [3], Macfarlan JA expressed the opinion that the application of the test stated by Gleeson JA at [121] would produce different results to the Wednesbury test "in few, if any, cases". See also *Bupa Hi Pty Ltd v Andrew Chang Services Pty Ltd* [2018] FCA 2033 at [123] per Lee J to the same effect.

55. As I have early explained, the Applicant to the Tribunal is a person described in cl 60 of the DCRP as being a person with a material interest in the Dispute who lodged an "Application for an Appeal" with MA. By reason of cl 63.1 – 62.3 of the DCRP, an appeal under cl 60 of the CDRP, is constrained to a review by the Tribunal by arbitration of the following:

    a. a determination, to the Standard of Proof, whether any Ground of Review (as applicable) is available and proven,

    b. in so doing the Tribunal must not rehear the matter or the merits of the facts of the Notice of Dispute;

    c. the Tribunal may remove or change a Sanction imposed on a Respondent, or alternatively impose a sanction on a Respondent in accordance with clause 53; and

    d. the review is otherwise undertaken in accordance with the Tribunal's legislation.

56. The grounds of review are contained in an email styled "Appeal decision Hollis/ MA" dated 19 September 2022 addressed to the Complaints Manager of MA. They read as follows:

> We wish to appeal your decision in the Hollis Dispute on the following grounds:
>
> - It was clearly stated and pointed out in the mornings riders [sic] briefing (due to an incident the day before) that if you stop to help or render assistance you will be given your fastest time for the day.
> - Sam rode back and stopped to render assistance as witnessed and stated by Jeremy.
> - When Sam went past he thought Stefan looked unresponsive and this was the reason he went back.
> - Sam was told to get help and then rode to alert Chris Grey (clerk of Course) who was unaware of the incident at this stage, he then informed Les McMahon who ran to the accident site and was first to arrive.
> - We believe Les McMahon and Stefan Granquist (injured rider) were not interviewed as part of the investigation.
> - The severity of Stefan's injuries (a severely broken leg) we believe also warranted Sam turning back. (see photos of damaged bike)
> - All results have been posted and none were marked as provisional including ones posted on national television.
> - Your determination states "Blake is reinstated his 3rd Place". This is not the case as Blake was never awarded 3rd.
>
>   Sam was presented with 3rd on the day.
> - What process was followed in getting to this decision ? Re protest/appeal time allowance etc. I note we have 7 days to reply, yet received this determination nearly 8 weeks after the event.

- Proving that a fast time was possible despite ongoing track wear we attach a copy of Kyron Bacons times across the tests that are remarkably similar.
- We have paid the fee as per your email but also note it says we need to notify SIA and pay a fee to them to lodge this appeal?
- Finally we believe Sam acted correctly and fairly in the best interest of the sport.
- On a side note Sam has subsequently suffered a season ending accident at the last AORC in Kingston SE.
- The timing of your decision in the week leading into this round questionable.

57. The power to be exercised by the Tribunal under cl 62 of the DCRP is not amenable to the analysis required by the Grounds of Review. It is also not available when the relevant object of the Appeal is not the imposition of a Sanction.

58. Accordingly, the Appeal does not come before the Tribunal under cl 22 of the DCRP. Indeed, in his referral of the matter to the Tribunal, the Complaints Manager purportedly referred the review to the Tribunal under cl 41 of the CDRP. Clause 41 of the CDRP provides where an Applicant or Respondent is dissatisfied with the decision of the Decision Maker under cl 38, the dissatisfied party must, within seven days of being notified of the decision under cl 42 give notice of the dissatisfaction together with the grounds for such in writing to the Complaints Manager. Upon receipt, under cl 42, the Complaints Manager must refer the Dispute including the investigators findings and the Decision Maker's decision, to the Tribunal for arbitration.

59. The purported review to the Tribunal under cl 41 of the DCRP was brought by neither the Applicant, Mr Hollis, nor the Respondent, the COC or Steward, the subjects of the Decision, but by a third interested party, Mr Pretscherer. Indeed, Mr Hollis was asked if he wished to participate in the Tribunal proceedings, but declined. Therefore, the Complaint's Manager's grounds for the purported referral were incorrect.

60. Accordingly, the referral purportedly made pursuant to the DCRP is not validly made. Despite the parties' agreement, as recorded in the Arbitration Agreement at clause 3, as to the source of the Tribunal's jurisdiction, this does not preclude me from determining how the Tribunal's jurisdiction is actually engaged.

61. In my opinion, the dispute between the parties as framed by cll 5 and 6 of the Arbitration Agreement arises for determination by the Tribunal pursuant to s 23 (1) (b) (ii) of the NST Act, by reason of the fact that none of the constituent documents by which MA is constituted permits the dispute to be heard in the General Division of the Tribunal, yet the Applicant and MA have agreed in writing to refer the dispute to the General Division of the Tribunal on the terms framed in cll 5 and 6 of the Arbitration Agreement.

62. For reasons, different to those I have outlined hereto, the Applicant submits that in the hearing and determination of the dispute in relation to the Decision, the Tribunal is exercising the power of private arbitration such that the Tribunal's power as an Arbitrator depends on the agreement between the parties usually embodied within the contract: s 23(3) of the NST Act. There is no basis, he submits, for the Tribunal to consider that its powers are constrained in the same manner as a Court (or other decision-making body) may be in matters of administrative review. He submits that the Tribunal does not act in such a limited capacity and it is plain that it is not how this Dispute has been run before the Tribunal, noting the parties were ordered to serve

evidence and documents on which they intended to rely, and such statements were served, and cross-examination of witnesses was permitted and occurred.

63. The Applicant submits therefore, that the Tribunal should resolve the dispute by:

    a. determining whether the Decision should be set aside; and

    b. if it finds that it should be set aside then the Tribunal should substitute its own decision.

64. In so substituting the Tribunal's own decision, the Tribunal, he submits, can have regard to all evidence and submissions before it and determine whether in accordance with the "Riding brief note" the Applicant was entitled to his fastest lap time for the day, for that run. He submits that the Tribunal is in just as good a position as the Steward or Decision Maker in that regard and that the position is that the Tribunal should find that the Applicant was entitled to his fastest lap time for the day, being 11.59287.

65. For the reasons that I have set out above, I am satisfied the Applicant's submissions are correct in so far as they suggest I have the power to set aside the Decision. However, I am not satisfied that the parties have agreed that the Tribunal is entitled to stand in the shoes of the original Decision Maker and substitute its own decision for his.

66. By clauses 6.2 and 6.3 of the Arbitration Agreement, the parties expressed their positions that, variously, the Decision should be overturned or, alternatively, the Decision should stand. The parties have agreed to the binding and enforceable nature of the outcome of the Arbitration (see clause 11.14) and intended by signing the Arbitration Agreement to be bound by the terms of the Agreement (cause 11.15).

67. Therefore, as I have found, the Tribunal's jurisdiction is predicated upon the parties' agreement, only, it is not within the Tribunal's purview to stray beyond the ambit of the parties' agreement as framed by the Arbitration Agreement and substitute the Tribunal's decision for that of the Decision Maker. Indeed, given the basis upon which I consider that the Decision ought be set aside, and the observations I have made as to the inappropriateness of any of the methods of dispute resolution contained in the DCRP, it would not be open to the Tribunal to embark upon a decision-making process akin to a review de novo on the Notice of Dispute.

68. In my opinion, the unsuitability of the processes contained within the DCRP to deal with the Notice of Dispute confirms that the dispute that it raised was not a Dispute for the purposes of the DCRP.

69. This mandates another basis upon which the Decision should be set aside.

70. For completeness, I should also outline that due to the nature of the dispute, the parties were entitled to argue that s 7(2) of the NST Rule may apply, in that the dispute could be a dispute about a "field of play" decision under section 9(1) of the NST Rule. In its original referral to the Tribunal, the MA did so contend.

71. The Applicant made submissions regarding the operation and effect of rule 9(1)(b) of the NST Rule. He submitted that it is necessary to construe this rule in accordance with the ordinary rules of statutory construction and requires a consideration of the text having regard to the

context and purpose of the legislation: *SZTAL v Minister for Immigration & Border Protection* (2017) 262 CLR 362 [14].

72. First, he submitted that the relevant decision was not made "on the field of play". The Decision was made following an investigation (which included interviews with various persons) and handed down almost two months after the relevant race.

73. Second, he submitted that the Decision Maker was not a judge, referee, umpire, or other official who was responsible for applying the rules or laws of the particular game.

74. Third, he submitted that the challenge to the decision is based on a breach of the DCRP, and that therefore, the complaint by the Applicant is properly understood as a dispute about an investigation and decision process that occurred under the DCRP, and that to find that the circumstances I have hitherto described, constituted a decision in the "field of play" would ascribe an overly broad interpretation, unwarranted and unsupported by the text, context and purpose of the legislative regime. It would unduly limit the jurisdiction of the NST to determine sporting disputes and weaken its role as an "efficient, independent, transparent and specialist tribunal for the fair hearing and resolution of sporting disputes".

75. Following the hearing, both parties agreed the Tribunal's jurisdiction was not impacted by s 9(1) of the NST Rule, which provides:

> For the purposes of subsections 23(4), 24(4) and 35(6) of the Act, the CEO must not approve the following kinds of disputes:
>
> …
>
> (b) 'field of play' decisions **made on the playing field** (however described or occurring) by **judges, referees, umpires or other officials**, **who are responsible for applying the rules or laws of the particular game**;

76. As the emboldened words indicate, the Tribunal's jurisdiction is excluded in respect of decisions made "on the playing field" by "judges, referees, umpires or other officials" who are responsible for applying the rules or laws of a particular game.

77. The relevant decision maker from whom this review lies, was none of these things, and, as the Applicant correctly submits, was fulfilling another distinct function under the DCRP with respect to investigations following a Notice of Dispute.

78. Accordingly, in all the premises, I am satisfied that the Tribunal is acting within jurisdiction by continuing to proceed to determine the Application.

DETERMINATION

79. The Tribunal has considered all the facts, legal arguments and evidence submitted by the parties, but has referred in this Determination only to the submissions and evidence it considers necessary to explain its reasoning.

80. Further, in coming to my determination, I have had regard to the submissions made by the parties, none of which specifically addresses the matters upon which decision has turned,

despite my having squarely raised these issues with the parties at the hearing and directed them to provide further submissions on several matters.

81. For the reasons that I have hitherto set out in considering the Tribunal's jurisdiction, I am satisfied that the Decision should be set aside. Likewise, for the same reasons, I decline to go further and substitute my own decision for that of the Decision Maker.

THE TRIBUNAL THEREFORE DETERMINES:

1. The Decision be set aside.

Date: 24 February 2023

B. K. Nolan

Bridie Nolan