



NST-E23-329336

Member v Sporting Body

**Determination**

**National Sports Tribunal**

**General Division**

**sitting in the following composition:**

Panel Member

Mr Philip Corbett KC

**in the arbitration between**

**Member**

*(Applicant)*

Represented by a legal representative

And

**Sporting Body**

*(Respondent)*

Represented by a legal representative

## PARTIES

1. Member, the Applicant in this arbitration, is a member of Sporting Body and is a Nationally Accredited coach in the sport. In that capacity, he has been responsible for the supervision and coaching of numerous junior athletes. At the arbitration hearing, the Applicant was represented by Counsel who is a member of the National Sports Tribunal Legal Assistance Panel, instructed by solicitors.
2. Sporting Body, the Respondent in this arbitration, is the official National Sporting Organisation responsible for the management and delivery of the sport within Australia. At the arbitration hearing, the Respondent was represented by a solicitor. In attendance were the Chief Executive Officer and the National Integrity Manager of the Respondent.
3. This is an application by the Applicant to set aside proposed sanctions imposed on him by the Respondent following an investigation by Sport Integrity Australia (**SIA**) of alleged breaches of the National Integrity Framework Child Safeguarding Policy (**Policy**). The Policy was adopted by the Respondent in March 2022 and subsequently amended in April and December 2022. The parties agreed that the relevant policy under which the sanctions were made is the December 2022 edition.

## INTRODUCTION

4. The Policy is binding upon all members and officials of the Respondent including the Applicant. It is an important policy that dictates “a zero-tolerance policy to child abuse in any form”.
5. The Applicant filed the initiating Application to the Tribunal on 19 October 2023. A preliminary conference with the parties was conducted by video conference on 20 November 2023 where directions were given for the exchange of evidence and written submissions. The parties also entered into an Arbitration Agreement dated 1 December 2023 (**Arbitration Agreement**).
6. The arbitration hearing took place on 18 December 2023 by video conference conducted on the Webex platform.
7. At the commencement of the hearing, the parties confirmed the jurisdiction of the Tribunal and at the conclusion the parties also confirmed that they had no objection to the process and procedures adopted by the Tribunal during the hearing.
8. These are the Tribunal’s findings and determination of the application.

## NST JURISDICTION

9. The jurisdiction of the National Sports Tribunal (**NST**) is engaged by sections 23(1)(a), 23(1)(b)(i) and 23(1)(c)(i) of the *National Sports Tribunal Act 2019* (**NST Act**).
10. Clauses 7.4 and 7.5 of the Respondent’s Complaints Disputes and Disciplinary Policy (**CDDP**) adopted by the Respondent in March 2022 as part of the National Integrity Framework also provides a mechanism where the Respondent and SIA may engage the jurisdiction of the NST to hear and determine a dispute regarding alleged breaches of the Policy when referred by the Respondent’s Complaints Manager. The CDDP has been amended from time to time but the version that is dated April 2022 and which was relevant at the time of the alleged breaches of the Policy is the document under which the proposed sanctions were imposed.
11. Under section 13 of the NST Act the presiding member has been appointed by the Minister for

Health by written instrument. Under section 23 of the NST Act, the presiding member was appointed by the Deputy CEO of the NST to conduct this arbitration in the General Division.

12. Under section 16(1) of the NST Act and rule 6 of the National Sports Tribunal Rule 2020, a Member of the Tribunal is obliged to notify the CEO of the NST of any conflict of interest in a matter to which he or she is appointed. There is no such interest to be notified.
13. Section 40 of the NST Act sets out general principles applicable to arbitration as follows:
  - (1) In the arbitration:
    - (a) the procedure of the Tribunal is, subject to this Act, within the discretion of the Tribunal; and
    - (b) the arbitration must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit; and
    - (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
  - (2) The parties must act in good faith in the conduct of the arbitration.
14. In addition, section 28 of the NST Practice and Procedure Determination 2021 provides that the Tribunal may inform itself in arbitration in a variety of ways. Most importantly, the Tribunal is not bound by the rules of evidence and evidence is not required to be given on oath, although the Tribunal may require the administration of an oath at its discretion.
15. Clause 10 of the Arbitration Agreement contains express terms to the same effect. I am satisfied that both parties have acted in good faith in the conduct of the arbitration.
16. No party requested that evidence be given on oath, and the Tribunal did not consider sworn testimony to be necessary for the proper disposition of this arbitration. No party objected to this course of conduct, or the procedures adopted during the hearing.
17. As a preliminary matter, the Applicant submitted that the proposed sanctions to be imposed on him by the Respondent for the alleged breaches of the Policy were invalid and instead any sanctions should have been imposed by SIA or this Tribunal in accordance with clause 7.5 of the CDDP. The Respondent submits that notwithstanding the terms of the CDDP it has power to impose sanctions when directed by SIA to do so. Alternatively, it may do so under the terms of the Constitution of the Respondent. I agree with the submissions made by the Applicant as to the construction of the CDDP as it was at the time of the alleged breaches of the Policy and the imposition of the proposed sanctions. As a matter of construction, the power to impose sanctions under clause 7.2 of the CDDP for breach of the Policy following Assessment of a Complaint vests with SIA and the Tribunal. The Sanctions that may be imposed are listed in clause 7.5(c) of the CDDP and the factors to be considered are listed in clause 7.5(f). Regardless of whether the sanctions were valid or invalid, this Tribunal has the power to reconsider the sanctions and impose new sanctions after considering further evidence and submissions.
18. The Applicant also submitted that he was denied procedural fairness by SIA and the Respondent when the proposed sanctions were imposed because the Investigation Outcome Letter from SIA and the Breach Notice from the Respondent occurred simultaneously and he

was not allowed to make any submissions or put forward materials concerning an appropriate sanction and any mitigating or other factors relevant to determining an appropriate sanction. The Respondent says that there was no denial of procedural fairness and that numerous factors were considered before imposing the proposed sanctions. These included the severity of the alleged breaches and the importance of child protection to participants in the sport in the state/territory and elsewhere. Despite the overarching obligation to protect children who participate in the sport and the need for strict integrity, there is also merit in the Applicant's submission. Procedural fairness dictates that the person to be sanctioned be given a reasonable opportunity to be heard and if necessary present further evidence on the issue of sanction, especially if the sanctions to be considered are severe or may affect the livelihood and reputation of the relevant person. In this case, I do not need to determine the consequence of any failure to afford procedural fairness as this Tribunal (and the parties agree) may reconsider the proposed sanctions and impose new or alternative sanctions after the receipt of further evidence and submissions from an applicant. It is then for the Respondent as the Relevant Sporting Organisation to ensure compliance and enforcement. The jurisdiction of the Tribunal to impose appropriate sanctions in lieu has been correctly acknowledged by both parties and is consistent with their obligations under the NST Act and the Arbitration Agreement.

19. For the assistance of the Respondent and SIA I observe that clause 7.5(f) of the CDDP does list the factors that "will be considered" by SIA when determining the appropriate sanction however there is no express obligation to extend "procedural fairness" to a respondent when considering those factors. Clause 5.3 expressly provides that SIA may conduct an Assessment of a Complaint under the Policy "in its absolute discretion" but clause 5.3(d) states that in conducting an Assessment SIA will comply with the rules of procedural fairness and will provide the Complainant and the Respondent a reasonable opportunity to be heard. Clauses 7.2(c) and (d) provide that where SIA determines to issue a Breach Notice (which is to include any proposed sanction for Alleged Breaches) the Respondent has the right to dispute the findings and have the Breach Notice findings referred to the Tribunal for hearing. Accordingly, there is no clear obligation in the CDDP to extend procedural fairness to the imposition of sanctions by SIA however in my view it is implicit in clause 7.5(f) of the CDDP that a respondent be allowed and should be allowed to present any mitigating or other factors relevant to the application of clause 7.5(f) before a final sanction is imposed. The obligation to extend procedural fairness is also to be found in the SIA Case Categorisation & Guidance for Sanctions dated January 2023 which guides sporting organisations as to the range of measures available when considering a breach of the Framework. The guide expressly states, "the application of sanctions and other measures must always adhere to due process, thereby enabling Respondents to be heard before sanctions are applied." Whilst these guidelines are not binding, they add weight to the Applicant's submissions and the need to provide a proper process before imposing sanctions, especially so if they have serious consequences on reputation and character.
20. Counsel for the Applicant correctly submitted that despite any denial of procedural fairness, the Tribunal may cure any denial of procedural fairness and determine the appropriate sanction based upon the materials and evidence presented to it at an arbitration hearing conducted under the NST Act (clauses 7.5 and 8.1 of the CDDP). I have taken this concession into account as a relevant consideration in the disposition of this application. So too the fact that these procedures and protocols are relatively new to all involved in the application of the Framework and the consideration of breaches of the Policy.

## THE ALLEGATIONS AND DISPUTE

21. On 6 April 2023, the Respondent wrote to the Applicant advising him of a complaint made against him in his capacity as Head Coach for the state/territory body of alleged breaches of the Policy. The complaint alleged that in December 2022 and at other times and on multiple occasions he had engaged in conduct in contravention of the Policy. The Respondent imposed Provisional Action of a temporary suspension from all coaching duties pending an investigation and assessment of the allegations by SIA. The Applicant's accreditation as a coach was also temporarily suspended. There was no restriction placed on the Applicant on participating in the sport as an athlete, but I was told at the hearing that the Applicant removed himself from the sport pending the outcome of the investigation. The Applicant did not dispute the Provisional Action taken pending the investigation.
22. On 12 July 2023 SIA wrote to the Applicant with particulars of 5 allegations of breach of the Policy and requesting his response. The allegations were:
  1. You showered at the same time and in the presence of Children.
  2. You engaged in discussions of a sexual nature in the presence of Children.
  3. You have spoken to Children in a manner that may be considered profane or sexual.
  4. You have engaged in playful touching (including hugging, rubbing on the belly and play fighting).
  5. You have messaged Children via text message outside of the scope of your role.
23. The Applicant replied in writing to these allegations and the conduct identified by SIA. His detailed submission to SIA which he declared true and correct was dated 30 August 2023 and was part of his statement of evidence relied on at the hearing by this Tribunal (Annexure JA1 pages 7-18).
24. On 18 October 2023 SIA notified the Applicant that it had finalised its investigation and determined that three of the allegations were substantiated. One was not. It appears that in reaching these findings, the allegations in paragraphs 2 and 3 above became a single allegation and that there was insufficient evidence to substantiate those allegations. Allegations 1, 4 and 5 were found substantiated based upon the Applicant's candid admissions.
25. The letter from SIA then explained that it was a matter for the Respondent to determine any sanction and referred to the SIA Case Categorisation and Guidance booklet dated January 2023 as a guide to possible sanctions.
26. On the same day the Respondent wrote to the Applicant informing him of sanctions that included a suspension of three years from all professional and volunteer roles in the sport, as well as participation as a player commencing 18 October 2023. After that period of suspension, it was proposed that the Applicant be permitted to participate in the sport as a coach and player on a two (2) year good behaviour "bond" and under strict supervision. There were also directions given that the Applicant undertake further education regarding the Policy. It is unclear whether any consideration was given to the period of suspension during the period of Provisional Action but at the hearing the Respondent submitted that it was. The letter was accompanied by a Breach Notice "issued under the National Integrity Framework" identifying

the three substantiated breaches of the Policy and the proposed sanctions.

27. The Applicant immediately disputed these findings and the proposed sanctions and sought referral of the dispute to the Tribunal.

### **THE POLICY and CDDP**

28. In March 2022, the Respondent adopted the Sport Integrity Australia National Integrity Framework.
29. The Sport Integrity Australia National Integrity Framework contains a suite of policies including a template for the Policy and the CDDP.
30. The Policy recites that it is part of the Respondent's commitment to "safeguarding and promoting the welfare of Children".
31. Clause 3.1 of the Policy provides:

#### **3.1 Requirements of Relevant Persons**

Relevant Persons must always:

- (a) comply with the requirements of Responding to Child Abuse Allegations in Annexure A;
- (b) comply with the Child Safe Practices as set out in Annexure B;
- (c) report any concerns or allegations of Prohibited Conduct involving any Relevant Person or Relevant Organisation;
- (d) provide true and accurate information during Recruitment & Screening;
- (e) comply with all obligations that they are subject to under the Australian Child Protection Legislation; and
- (f) comply with all legislative obligations that they are subject to in relation to reporting of suspected Child Abuse or a WWCC.

32. Clause 3.2 provides:

#### **3.2 Requirements of Relevant Organisations**

Relevant Organisations must:

- (a) adopt, implement, and comply with the:
  - (i) Child Safe Commitment;
  - (ii) Child Safe Practices; and
  - (iii) Recruitment & Screening,
 including reviewing and amending those requirements from time to time;
- (b) comply with the 'Responding to Child Abuse Allegations' in Annexure A;

- (c) use best efforts to assist Relevant Persons to fulfil their responsibilities under this Policy;
- (d) recognise any Sanction imposed under this Policy; and
- (e) take all necessary steps to:
  - (i) enforce any Sanction imposed under this Policy and the Complaints, Disputes & Discipline Policy; and
  - (ii) procure compliance with the 'Responding to Child Abuse Allegations' in Annexure A.

33. Unfortunately, the definitions of "Relevant Person" and "Relevant Organisations" are not contained in the definition section of the Policy as adopted by the Respondent but they are to be found in the CDDP and the National Integrity Framework itself. The National Integrity Framework defines a "Relevant Person" as including any member, participant or volunteer coaches, officials, administrators and team and support personnel involved in a participating sporting organisation.

34. Clause 4.1 of the Policy describes Prohibited Conduct as follows:

#### **4.1 Prohibited Conduct**

A Relevant Person or Relevant Organisation commits a breach of this Policy when:

- (a) they, either alone or in conjunction with another or others, engage in any of the following conduct against, or in relation to, a Child or Children in the circumstances outlined in clause 2.2:
  - (i) Child Abuse;
  - (ii) Grooming;
  - (iii) Misconduct with a Child;
  - (iv) request or infer that the Child keep any communication secret from their parents, guardian, carer, or other Relevant Persons such as a coach or administrator, or Relevant Organisation;
  - (v) supply alcohol, or drugs (including tobacco) to a Child;
  - (vi) supply medicines, except when permitted by law or with the consent of the parent, guardian, or carer of the Child and under a valid prescription for that Child and at the prescribed dosage; or
  - (vii) commit any act that would constitute Prohibited Conduct under the Member Protection Policy;
- (b) there is a breach of a requirement imposed under clause 3.1, or sub-clauses 3.2(a), 3.2(b) or 3.2(e)(ii));
- (c) they are involved in or have knowledge of and do not report a breach of clauses 4.1(a) or 4.1(b); or

(d) they have engaged in an attempt to breach sub-clauses 4.1(a) (i), (ii), (iii), or (v).

35. Annexure B to the Policy contains a Child Safe Commitment Statement (**Statement**) by the Respondent. Section 2 of that statement provides that a breach of the Child Safe Practices described therein is a breach of the Policy and will be managed by the CDDP.

36. Section 2.1 of the Statement is as follows:

### **2.1 Sexual misconduct**

- (a) Under no circumstances is any form of 'sexual behaviour' to occur between, with, or in the presence of Children.
- (b) 'Sexual behaviour' needs to be interpreted widely, to encompass the entire range of actions that would reasonably be considered to be sexual in nature, including not limited to:
  - (i) 'Contact behaviour' such as sexual intercourse, kissing, fondling, sexual penetration or exploiting a child through prostitution; and
  - (ii) Non-contact behaviour such as flirting, sexual innuendo, inappropriate text messaging, inappropriate photography or exposure to pornography or nudity.

37. Section 2.2 of the Statement provides:

### **2.2 Professional boundaries**

- (a) Relevant Persons must act within the scope of their role (as specified in their position description or contract) when working with Children who are involved or have been involved in our sport. They must not:
  - (ii) provide any form of support to a child or their family unrelated to the scope of their role (e.g., where there is no existing social, personal, or family relationship) (e.g., financial assistance, babysitting, provide accommodation);
  - (iii) use a personal phone, camera, or video camera to take images of Children;
  - (iv) exhibit any type of favoritism towards a Child;
  - (v) transport Children unless specifically approved;
  - (vi) give gifts/presents to Children other than the provision of official awards;
  - (vii) engage in open discussions of a mature or adult nature in the presence of Children;
  - (viii) discriminate against any Child, including on the basis of gender identity, culture, race, or disability;
  - (ix) have one on one contact with a Child outside of authorised sport activities (includes direct contact such as in-person as well as indirect, such as by phone, or online); or
  - (x) accept an invitation to attend any private social function at the request of



a Child or their family, where there is no existing social, personal, or family relationship.

- (b) If Relevant Persons become aware of a situation in which a Child requires assistance that is beyond the confines of that person's role, they should undertake any or all of the following at the earliest opportunity:
  - (i) refer the matter to an appropriate support agency;
  - (ii) refer the Child to an appropriate support agency;
  - (iii) contact the Child's parent or guardian;
  - (iv) seek advice from a Relevant Organisation.

38. Section 2.6 provides:

### **2.6 Use of electronic or online communications**

- (a) For any electronic or online communication with Children in our sport, we adopt a two- deep model, that is copy in the organization and a parent or guardian in all communication.
- (b) When communicating with Children, Relevant Organisations and Relevant Persons must ensure content is:
  - (i) Directly associated with delivering our services, such as advising that schedule event is cancelled;
  - (ii) Concise with personal or social content limited, only to convey the message in a polite and friendly manner;
  - (iii) Devoid of any sexualised language; and.
  - (iv) Not promoting unauthorised social activity or contact.

39. Section 2.8 provides

### **2.8 Physical contact with Children**

- (a) Any physical contact with Children must be appropriate to the delivery of our sports programmes or services and based on the needs of the child, such as assisting with the use of equipment, technique, treatment by a health practitioner or administering first aid:
- (b) Under no circumstances should Relevant Persons have contact with Children participating in our programmes and services that:
  - (iv) is overly physical (e.g. wrestling, horseplay, tickling or other roughhousing):
  - (v) is unnecessary; or
  - (vi) is initiated against the wishes of the Child, except if such contact may be necessary to prevent injury to the Child or to others...

40. Section 2.10 further provides:

## 2.10 Change Room arrangements

- (a) Children should be supervised in change rooms whilst ensuring their right to privacy.
  - (b) A minimum of two relevant persons of the same genre as the group should always be present.
  - (c) Relevant persons must not shower or change at the same time as supervising groups of Children.
  - (d) Relevant persons must avoid one-to-one situations with a Child in a change room area.
  - (e) Relevant persons need to ensure adequate supervision in public change rooms when they are used, providing the level of supervision required for preventing abuse by members of the public, adult users, or general misbehavior, whilst also respecting a Child's privacy.
  - (f) Phones, cameras and recording devices are not to be used in changing rooms and in particular whilst Children are getting dressed.
41. The application of Sections 2.1, 2.2, 2.6, 2.8 and 2.10 of the Statement are central to this dispute. In particular, Sections 2.2(a), 2.8(b) 2.10(a) and (c).
42. The CDDP provides the procedure to be followed by the Respondent in the event of "Complaints" which are defined as a "formal notification relating to Prohibited Conduct by a Respondent of an Eligible Policy and which are lodged with Sport Integrity Australia". Eligible Policies are defined as including the Policy.
43. The CDDP provides for a Complaint Assessment process in section 5. It also requires SIA to make findings and determinations and recommend a resolution process (see clauses 6 and 7). The resolution process may involve a sequence of actions from "no action" to referral to an internal Tribunal, referral to the NST and/or "Sanctions". There is also an Appeals process including a right of appeal to the NST Appeals Division (clause 9.5).
44. The CDDP also has an alternative dispute resolution procedure that applies to all Members of the Respondent where there is a dispute arising from a breach of a policy dealing with prohibited conduct and disciplinary measures that are either:
- 1. Not covered by the National Integrity Framework; or
  - 2. Sport Integrity Australia has determined that the matter is best handled under a non-sporting National Integrity Framework Policy.
45. Clause 3.3 of the CDDP permits the Respondent to commence, at its discretion, a Disciplinary Action against a "Respondent" (which includes a Member of the Respondent). It may do so if it is "advised or becomes aware of an allegation or considers the Respondent has breached an Eligible Policy". The Policy is an Eligible Policy. However, the power to sanction following findings and a determination by SIA appears to be limited to either SIA or the Tribunal (clause 7.5). I was told at the hearing that the Respondent has now adopted a different form of CDDP that clarifies the jurisdiction of SIA and the Respondent to discipline but at the time of the sanctions the power to sanction and issue a Breach Notice was that of SIA and in the event of a dispute, the Tribunal (clauses 7.2 and 7.4 of the CDDP).

46. Sanctions are then described in clause 7.5(c) and 7.5(d) of the CDDP and include, but are not limited to:
- (a) A reprimand or warning;
  - (b) Verbal or written apology;
  - (c) Direction to attend counselling or training to address their behaviour;
  - (d) Suspended sentence and/or good behaviour period;
  - (e) Removal of accreditation;
  - (f) Removal of awards (such as life membership);
  - (g) Exclusion from a particular event or events, competition, or activity;
  - (h) Suspension of membership from the Respondent or other Sport Organisation and any other Members or Affiliates;
  - (i) Suspension from such activities or events held by or under the auspices of the Respondent or other Sport Organisation;
  - (j) Suspension for a specified period and/or termination of any rights, privileges and benefits provided by Respondent or other Sport Organisation;
  - (k) Expulsion from a Sport Organisation; and/or
  - (l) Any other form of discipline that is considered appropriate.
47. Clause 7.5 (f) provides that
- 7.5(f) The following factors will be considered when determining the appropriate Sanction:
    - (i) The nature and seriousness of the behaviour or incidents;
    - (ii) The considerations (if any) of the Complainant;
    - (iii) The contrition, or lack thereof, of the Respondent;
    - (iv) Any Provisional Action taken in relation to the Alleged Breach;
    - (v) The effect of the Sanction on the Respondent including any personal, professional, or financial consequences;
    - (vi) If there have been relevant prior warnings or disciplinary action against the Respondent; and
    - (vii) If there are any aggravating or mitigating circumstances.
48. As indicated, the CDDP also provides for referral to the NST General Division and a right of Appeal to the NST Appeals Division.
49. As mentioned above, SIA has published a National Integrity Framework Case Categorisation & Guidance for Sanctions (January 2023) for breaches of the National Integrity Framework. This is a general guide to organisations as to how to apply the framework and categorises low,

medium and high-level breaches.

## **THE HEARING, EVIDENCE AND SUBMISSIONS**

50. Before the hearing, the parties filed written submissions and relied on the documents and statements of fact referred to in those submissions. The Applicant filed two written statements. The first dated 1 December 2023 and the second (in reply to the submissions of the Respondent), dated 14 December 2023. The Applicant also relied on 7 personal references that refer to his good character and dedication to the sport. The Applicant did not seek to challenge the findings of SIA but said in his first witness statement that any breach was “inadvertent and unintentional”. He claims that he had limited awareness of the relevant policy documents prior to the investigation. He welcomed guidance and additional training and courses. He says that his physical and mental health has suffered during the period of suspension under the Provisional Action and his reputation and career have been compromised.
51. The Respondent did not file any witness statements or seek to challenge the evidence of good character. In the written submissions of the Respondent dated 14 December 2023, the Respondent relied on the CDDP, the Policy, the Applicant’s admissions and the correspondence from SIA dated 18 October 2023 in which SIA records its findings. The Respondent challenged the Applicant’s assertion that he had limited awareness of the relevant policy documents prior to the investigation. The Respondent asserts that the Applicant completed two courses on Child Safeguarding in 2019 for his coaching accreditation and that the mandate of the Respondent is to promote and enforce child safeguarding in the sport.
52. In reply the Applicant says he has no recollection of completing the courses asserted and claims that after making inquiries of the state/territory body, no records could be produced to him. Nevertheless, he is prepared to undertake further training.
53. At the hearing the parties were invited to tender any further evidence or documents to the Tribunal, both elected not to do so. The parties made oral submissions and neither sought leave to cross-examine either the Applicant, the referees or any representative of the Respondent.
54. The Tribunal asked the Applicant and the Respondent several questions regarding both the alleged breaches and the proposed sanctions. The Applicant confirmed that he had not undertaken the further reading or online modules directed in the Breach Notice but that he was ready willing and able to do so if the Tribunal directed him to do so. In answer to a question as to whether he now understands the importance and purpose of the Policy he said he did. He also said that he wished to continue to play the sport socially and competitively.
55. The Applicant by his counsel submitted that regardless of whether the sanctions are invalid the sanctions are too severe and inappropriate. The Applicant says that a suspension of 3 months commencing from 14 November 2023 from all professional and volunteer roles in the sport, including participation as a player is more appropriate especially given the 8 months period of Provisional Action commencing on 6 April 2023, which is ongoing. It was submitted that because the allegations of breach of the Policy about conversations of a sexual nature were not substantiated, they could not be considered when deliberating on any sanction and that there was no finding by SIA that the Applicant engaged in any sexual misconduct. He also says that any sanctions should take into account the Provisional Action imposed by the Respondent during the investigation, the evidence of good character that he has now placed before the Tribunal, his candour in and cooperation with the investigation and process. So too

the absence of any disciplinary action against the Applicant during a long and highly successful career as a coach and mentor.

56. The Applicant does not challenge the direction that he undertakes a Child Safeguarding in Sport Induction Course and that he read the SIA Child Safety Practices Booklet and the SIA publication "Communicating Online with Children and Young People in Sport". All of which are referred to in the Breach Notice dated 18 October 2023. The Applicant says that he acknowledges the importance of the Policy. He also does not challenge the sanction that his participation as a player be on a two-year good behaviour bond with supervision from appropriate state/territory body personnel however he says that a three-year suspension from the date of the Breach Notice is harsh and disproportionate.
57. He further submits that:
  - (a) he made appropriate admissions to SIA as to his conduct and has shown contrition;
  - (b) that this the first time that he has been the subject of a complaint or a breach of the Policy;
  - (c) that he is of good conduct with an exemplary record of contribution to the sport;
  - (d) that the nature of the breaches of the Policy that were found to have occurred were on the lower end of the scale of seriousness; and
  - (e) the effects of the Provisional Action and the sanctions have had a profound effect on his reputation, mental and physical health.
58. The Respondent submits that it has followed due process and taken into account all relevant matters in consideration of the sanctions. It asserts that before formulating the sanctions it made discrete inquiries of other sporting organisations for precedents but for confidentiality reasons, it cannot disclose these inquiries or divulge other actions or incidents that it may be aware of including in the relevant sport. It says that it did take into account mitigating circumstances but that it does not accept the Applicant's contrition or lack of knowledge. It submits that Child Safeguarding has been at the forefront of sports administration and coaching since 1996 and the Respondent is concerned to protect any abuse of power or threat to children participating in the sport in the state/territory and elsewhere in Australia.
59. The Tribunal asked the solicitor on behalf of the Respondent questions about any ongoing or perceived threat to children participating in the sport in the state/territory and the mechanism by which a good behaviour bond could be policed and enforced.
60. No immediate threat was identified by the Respondent however there was a general level of concern due to the Complaint, the interest of the Complainants, the small sporting community in the local area and the limited facilities available to participants in the sport.
61. In answer to the Tribunal's concern as to the ability to police and enforce a "good behaviour bond" it was submitted that appropriate supervision is available and can be arranged by the state/territory body but that any breach of a bond would require further deliberation either by the Tribunal or the Respondent. It remains unclear to the Tribunal as to what conduct would amount to a breach of any bond and whether a breach of other aspects of the Policy or a minor breach would constitute a breach requiring that the sanctions be revisited or new sanctions imposed. It is also unclear as to any sanction or penalty that would necessarily follow any

breach of the bond.

62. In summary the Respondent's position is that:
- (a) The Respondent has power to impose sanctions following findings of a breach of the Policy by SIA and that power if not contained in the CDDP is to be found in the Respondent Constitution or the Respondent Conduct and Disciplinary Policy. In any event, this Tribunal has jurisdiction to impose sanctions;
  - (b) The Respondent is not required to extend procedural fairness in the determination of sanctions and it has given due consideration to the SIA Case Categorisation and Guidance for Sanctions booklet (**CCB**). It says that because of the appeal rights available to a relevant person, the Respondent should not need to consider a sanction in consultation with that person only to have the decision appealed;
  - (c) The aggravating and mitigating circumstances identified as considerations in the CCB are a guide but not mandatory considerations;
  - (d) The purpose of sanctions is primarily aimed at protecting an individual from harm and to provide a clear message that behaviour was unacceptable thereby acting as a deterrent;
  - (e) Even if the Respondent had been given personal references of good character by the Applicant and notwithstanding his timely admissions and commitment to further education and training, the Respondent was entitled to impose a sanction of a three year suspension to protect the Complainants and others from any further harm and to protect the integrity of the Sport in Australia;
  - (f) The Respondent rejects the assertion that the Applicant had limited awareness of the Policy. It accepts that the sanctions and Provisional Action have had an adverse effect on the Applicant's mental health and wellbeing but the interests of other participants and stakeholders in the sport outweigh his interests; and
  - (g) The Respondent considers that the offending conduct, in this case, should be categorised as "High" and that the suspension imposed is proportionate and reasonable.
63. In reply, the Applicant submitted that regardless of any direction from SIA as to jurisdiction to sanction the CDDP did not give the Respondent the power to sanction, the Respondent misunderstands the obligation to extend procedural fairness and the need to extend a reasonable opportunity to be heard, there is no evidence of how the decision to sanction was reached and the proposed sanction remains severe and inappropriate.
64. Both parties accept that there is no guiding precedent available to the Tribunal which could assist in determining an appropriate sanction in these circumstances.
65. At the conclusion of the arbitration hearing the Tribunal reserved its determination and offered to provide written findings and reasons.

## **FACTUAL FINDINGS**

66. The Applicant has had a long and successful career as an athlete and then as a coach of the

sport. Since 2004 he has coached and mentored many junior athletes and was appointed a "Head Coach" by the state/territory body in 2007. He has also served as a committee member and since 2012 has coordinated competitions in the local area and other events throughout Australia. The sporting community in the local area is relatively small and close knit. There are limited facilities locally, the Applicant coaches at multiple facilities and also volunteers much time to the sport throughout the state/territory.

67. The written references that he has produced to the Tribunal all speak of the Applicant in glowing terms and acknowledge his dedication and commitment to the sport. They also speak of the fact that his involvement in junior programs and training and that he has in the past been respectful and appropriate. They speak of his professionalism and of the loss to the sporting community that has been caused by his suspension. Three of his referees are former junior athletes who have been coached and mentored by the Applicant. All referees are shocked by the allegations and sanctions.
68. The Applicant has also suffered physically and mentally because of the investigation and sanctions. His personal reputation has been compromised. He says he has made full disclosure to his employer, which was no doubt difficult and embarrassing for him. Equally traumatic has been the step of obtaining personal references from the seven referees who have provided written references. The findings by SIA and sanctions proposed by the Respondent have caused and will cause significant damage to his reputation in the sport and as a coach. The proposed suspension as a player will also affect his physical health and diagnosed diabetes.
69. The Tribunal also accepts the submission made on behalf of the Applicant that SIA made no finding of "sexual misconduct" and that it would be incorrect to categorise his conduct in that way. The allegations in relation to the use of inappropriate discussions and use of language were also not substantiated and cannot be taken into consideration when determining sanctions.
70. When confronted with the allegations against him the Applicant responded to SIA in a frank and candid manner. He regrets his behavior and says that he is now aware of and understands the requirements of the Policy and that he takes it very seriously. When met with Provisional Action on 6 April 2023 he immediately withdrew from participation in his chosen sport and all coaching commitments. I have taken the period served under the Provisional Action as a relevant consideration in determining the appropriate sanction.
71. The Respondent as a national sporting organisation is duty-bound to protect junior athletes from any form of abuse or misconduct. So too the integrity of the sport. The Policy is clear and there is to be zero tolerance for non-compliance. The Respondent, like many sporting organisations, face challenges in communicating the terms and breadth of the Policy to members and participants in their sport. I accept that it has tried to do so to the best of its ability. The fact that the Applicant says he had limited awareness of the scope of the Policy and in particular sections 2.2(a), 2.8(b) 2.10(a) and (c) is unacceptable, especially for an accredited coach of junior athletes. Regardless of any previous practices and well-meaning intention to educate and mentor junior athletes the Policy is designed to protect and prevent conduct that is now no longer considered socially acceptable or appropriate. The intent of the Policy is to protect Children who participate in sport and to encourage participation. It is also intended to give parents and guardians comfort that those entrusted with the care of Children are bound by strict Rules.

72. The Applicant accepts these principles and understands the gravity of them. By his own admission in his response to SIA he concedes breach of the Policy and has shown contrition.
73. There is no evidence presented by the Respondent to persuade me that the Applicant is other than of good character or that despite his evidence to the Tribunal, he in fact had a thorough understanding of the Policy and deliberately intended to breach or ignore it. However, the Tribunal must be mindful of the interests of the Complainants and other stakeholders and for the need for specific as well as general deterrence.

#### **POWERS OF THE TRIBUNAL**

74. Under clause 10.16 of the Arbitration Agreement, the parties agree that the Tribunal's determination in this arbitration will be final and binding on the parties.
75. Clause 7.5 of the CDDP provides that where a Respondent is found to have committed a breach of an Eligible Policy, the NST has absolute discretion to determine the appropriate sanction to be imposed on a Respondent, including a combination of measures to be imposed and the terms and the period of any measure.
76. Clause 8.1 of the CDDP provides that where arbitration is sought in the NST General Division the NST shall have the power to determine whether a sanction is imposed and, if so, what sanction in accordance with clause 5.6 of the CDDP. There are many options available, and this reflects the many subjective and objective considerations that are to be considered under clause 7.5(f) of the CDDP.
77. Accordingly, it is open to this Tribunal to not make any sanction, to adopt the proposed sanctions suggested by the Respondent, or to substitute alternative sanctions in the circumstances. This includes "any other discipline that it considers appropriate".
78. There are limited previous decisions of the Tribunal that consider breaches of the Policy of this kind. In *Member v National Sporting Organisation* [2023] NST E23 62941 the Tribunal considered breaches of a policy in substantially the same terms as the Policy regarding breaches of the prohibition of taking digital images of Children engaged in sporting events. In that case, the Tribunal suspended the applicant for three months from officiating sports involving Children and directed the applicant to complete an online education course. However, the offending in that case was in the range of low to mid-level breach of the policy. The facts in this arbitration are different. The Tribunal does not consider the breaches to be in the low to mid-range level. Sanctions are required that must be proportionate and determined in accordance with clause 7.5(f), (g) and (h) of the CDDP.

#### **CONSIDERATION AND CONCLUSION**

79. The Tribunal is not satisfied that under the CDDP, the Respondent had the power to sanction upon referral of findings made by SIA. The CDDP dictates that any sanction must be made by SIA or the Tribunal. If the respondent to an investigation disputes the sanctions imposed by SIA then the Respondent must refer the matter to the NST for arbitration (clause 7.4). The Tribunal is also satisfied that the Respondent did not extend procedural fairness to the Applicant when determining the proposed sanctions. There was no evidence from the Respondent as to how the decision made was reached, the facts or mitigating factors considered and the decision to sanction was delivered simultaneously with the findings of SIA. Whilst consideration may have been given to the interests of the Complainants and others and the severity of the substantiated conduct, the Applicant should have been given the opportunity



to be heard on an appropriate penalty.

80. Having considered the clear breaches of the Policy, the clear words used in the Policy (sections 2.6, 2.8 and 2.10) it is appropriate that the Tribunal impose sanctions on the Applicant including a suspension from coaching or officiating the sport. In the circumstances the suggested three-month suspension that was submitted as appropriate by the Applicant's counsel is inadequate as the Tribunal does not consider the breaches of the Policy to be low to mid-level.
81. In the circumstances of this case, suspension from participation in the sport as a player or athlete is not appropriate, noting of course that the Applicant told the Tribunal that he now understands the Policy and the gravity of it. If he was to breach the Policy again as a player, or coach or official, in particular sections 2.6, 2.8 and 2.10 then this Tribunal would expect any further sanction to be severe and possibly permanent. In reaching this conclusion the Tribunal is conscious of the effect of suspension as a player on the Applicant's health and mental wellbeing. The Tribunal has also taken into consideration his voluntary withdrawal from the sport during the period of Provisional Action and the positive statements of good character and endorsements given by senior members of the sporting community. Further, when viewed objectively the Applicant does not now pose a genuine risk of harm to junior athletes when playing the sport (see *Yves Jean-Bart v FIFA* [2020] CAS (A/7331))
82. The Tribunal also notes that the Applicant has not undertaken any further course of training or formal education regarding the Policy since the findings made by SIA but is willing to do so. The Tribunal has the power to direct that he does so if it is appropriate that further education be part of any sanction.
83. The Tribunal has also considered whether a "good behaviour bond" with supervision is an appropriate disposition in the circumstances. Especially given the relatively small community and facilities available locally. As indicated at the hearing there are practical as well as logistical concerns about policing and enforcing "good behaviour" bonds or even "suspended" sanctions although the CDDP and Arbitration Agreement would certainly allow sanctions of that kind (clause 7.5(c)(iv)). The Tribunal has also considered as relevant the importance of the Policy and the need for general deterrence. The practical reality is that should the Applicant be found to have breached the Policy again and was to be disciplined then, as has been said previously, the consequences would be severe. A good behaviour bond appears unnecessary given the Applicant's acknowledgment of the importance of the Policy, commitment to further education and the period of suspension that will be imposed on him as a coach and official.
84. After considering the period of Provisional Action (8 months), the evidence presented to the Tribunal at the arbitration hearing, the evidence of good character and the good faith that the Applicant displayed in his dealings with SIA, the Respondent and this Tribunal, the Tribunal finds that the Applicant be suspended from coaching or officiating the sport at all levels and the Applicant's accreditation to coach the sport be suspended for a period of eighteen (18) months commencing from the date of this decision (clause 7.5(h) of the CDDP), together with a direction that the Applicant immediately undertake further education and training offered by SIA. Upon completion of the period of suspension the Applicant must undertake such further training or steps as may be required by the rules of the Respondent to obtain accreditation as a coach including as a coach of junior athletes.
85. The course of education proposed is the online eLearning course offered by Sport Integrity Australia on its education platform entitled "Safeguarding Young People in Sport" and that the Applicant be directed to read all of the resources available and published on the SIA website

<https://www.sportintegrity.gov.au/resources#toc4> under the heading “Resources - Safeguarding for Children and Young People”.

#### **THE TRIBUNAL THEREFORE DETERMINES:**

1. The Respondent did not at the time of imposing proposed sanctions on the Applicant have power under the CDDP to impose sanctions following an investigation and findings by SIA.
2. The Respondent failed to extend procedural fairness to the Applicant when determining the proposed sanctions identified in the Breach Notice dated 18 October 2023.
3. The Tribunal has jurisdiction to impose sanctions on the Applicant in accordance with clause 7.5 of the CDDP and the Arbitration Agreement.
4. The Applicant must register for and complete before 1 February 2024 the online education course offered by Sport Integrity Australia entitled “Safeguarding Young People in Sport” and then provide satisfactory evidence in writing to the Respondent that he has completed that course of further education within 7 days of completion.
5. The Applicant is directed to read the resources published on the Sport Integrity Australia website <https://www.sportintegrity.gov.au/resources#toc4> under the heading “Resources - Safeguarding for Children and Young People”
6. The Applicant is suspended from coaching or officiating the sport and his accreditation as a coach from the Respondent be suspended for a period of 18 months from the date of this decision.

#### **COSTS AND PUBLICATION**

86. Each party sought orders that the other pay be charged the costs of this Arbitration. The power and discretion to charge costs of an arbitration conducted under the Act vests with the CEO of the Tribunal (Section 46 of the NST Act and Part 7 of the NST Rules). The Arbitration Agreement also provides that costs be determined by the NST CEO (Paragraph 9.2). Given that there has been a measure of success by both parties in clarifying the issues and the power to sanction and there has been a reduction in the term of the suspension imposed the outcome of the arbitration is equally balanced.
87. The parties also made submissions as to whether the decision of the Tribunal should be published or remain confidential. Alternatively, if it is to be published for precedent value then the reasons be redacted appropriately so as to “de-identify” the applicant and any Complainant. The Applicant submits that these reasons should remain confidential. Alternatively, appropriately redacted. The Respondent submits that the reasons should be published without redaction. Again, these are matters for determination by the CEO of the NST. Paragraph 10.14 of the Arbitration Agreement provides that the proceeding is to be confidential and paragraph 10.15 provides that publication of the NST’s determination will be in accordance with s56 and s57 of the NST Practice and Procedure Determination. Section 56 of the NST Practice and Procedure Determination provides that the CEO is not to publish a determination of a dispute in the General Division but that the Tribunal Member and CEO may agree to publication if there is precedential value. Section 56(4) allows for redaction as appropriate. The CEO may call for further submissions if the determination is to be published with redactions (s 56(3)).

Date: 21 December 2023

NST-E23-329336

Member v Sporting Body

**Supplementary Determination**  
**National Sports Tribunal**  
**General Division**  
**sitting in the following composition:**

Panel Member

Mr Philip Corbett KC

**in the arbitration between**

**Member**

*(Applicant)*

Represented by a legal representative

And

**Sporting Body**

*(Respondent)*

Represented by a legal representative

1. On 21 December 2023, the Tribunal delivered a determination in this arbitration. In that determination, the Tribunal held that the Applicant is suspended from coaching or officiating the sport and his accreditation as a coach from the Sporting Body (**‘the Respondent’**) be suspended for a period of 18 months from the date of that decision.
2. After delivering the determination the Respondent sought clarification from the Tribunal as to whether the Applicant was to be suspended from acting as an “administrator” of the sport as well

as from coaching and officiating. In an email to the Tribunal dated 8 January 2024, the Respondent explained that the Applicant had previously held roles as:

- Team Manager of a Team
  - Strength and Conditioning Trainer
  - Chaperone for a junior Team
  - Committee member or Board Director
3. The original sanction imposed on the Applicant by the Respondent in the letter to the Applicant dated 18 October 2023 (Arbitration Bundle pages 10-11 and 186-187) (**Breach Notice**) was a suspension of three (3) years from all “professional and volunteer roles in the sport such as administration, coaching and officiating as well as participation as a player starting from the date of this letter”.
  4. The parties did not directly address the Applicant’s role as an “administrator” at the arbitration hearing however there was some evidence in paragraphs 12 and 16 of the Applicant’s statement (Arbitration Bundle page 74) that he had served until 2023 as a committee member and was Vice President in April 2023 until he stood down. There was also reference to his role as a Team Manager, Tour Manager and Coordinator of competitions in the personal references tendered by the Applicant in his evidence to the Tribunal.
  5. In the original Provisional Action letter from the Respondent to the Applicant dated 6 April 2023 (Arbitration Bundle page 169) provisional action in the form of “a temporary suspension from all coaching duties with the state/territory body and the Respondent and a temporary suspension of the Applicant’s Coaching Accreditation was imposed while the Complaint was being Assessed”.
  6. The provisional action imposed was taken into account by the Tribunal when determining the appropriate sanction to be imposed for the admitted breaches of the Policy. So too, that the Applicant had withdrawn from participation in the sport at all levels pending the assessment of the complaints made against him.
  7. To address the clarification sought by the Respondent, the Tribunal sought further written submissions from the parties.
  8. The Applicant, by his solicitor, made a further submission in an email dated 10 January 2024. In that email it was submitted that the determination of the Tribunal did not prevent the Applicant from acting in an administrative function but he conceded that the coaching prohibition placed on him would prevent him from acting as a chaperone and a strength and conditioning trainer. It was also submitted that the prohibition on officiating the sport would not prevent the Applicant from remaining on the Committee. For the avoidance of doubt, the Applicant submitted that he was prepared to provide an undertaking that, if he is permitted to remain on any Committee, then he will use his best endeavours to eliminate any contact with any person under 18 years of age.
  9. The Respondent made a further written submission to the Tribunal dated 11 January 2024. In that submission, the Respondent says that it included a prohibition on “administrative and professional roles” in its Breach Notice because “there are many roles in [the sport] that sit outside the banner of coaching and officiating which involve child-related duties and intersect with children and young people’s professional boundaries. Additionally, [the sport] encompasses several leadership roles such as Board and Committee roles that require a commitment to moral,

ethical and professional standards and the Applicant has failed to meet these standards within the safeguarding breaches.”

10. The written submission went further to refer to the Respondent’s “Safeguarding Children and Young People Policy” (which commenced in November 2023 but was not before the Tribunal at the hearing) and the “Recruitment and Screening and Training Recommendations” which are in substantially the same form as Annexure C to the Policy (Arbitration Bundle page 35-36 and 138-139). It was submitted that because the Applicant would not meet the appropriate standards for these child-related positions, he would not meet the criteria necessary to hold administrative roles in the sport, in particular, he would not satisfy the interview and reference checks regarding previous disciplinary action. Furthermore, it was submitted that with Board and Committee roles, the Applicant had failed in his duty of care to the health and wellbeing of children and young people and has “not adhered to the integrity and professional standards that would be expected of someone in this leadership role”.
11. In conclusion the Respondent submitted that the Applicant should not be involved in any child-related position while he is on suspension nor any leadership role in the sport. In relation to any future role, the Applicant will be required to meet all “Safeguarding Recruitment and Training Criteria and National Integrity Framework expectations post the conclusion of the sanction period”.

### **Consideration**

12. In the determination dated 21 December 2023, the Tribunal found that the Respondent did not extend procedural fairness to the Applicant when determining the proposed sanctions contained in the Breach Notice. The proposed sanction of a prohibition on administrative roles is a matter about which the Applicant was entitled to be heard. So too any allegation that the Applicant has not made an appropriate commitment to “moral, ethical and professional standards” and has failed in his “duty of care” to the health and wellbeing of children and young people. They are serious allegations that should not be made lightly unless there is clear evidence of intentional wrongdoing.
13. The Tribunal found that there were, on the Applicant’s admission, clear breaches of the Policy that warranted a suspension from coaching and officiating the sport for a further period of 18 months from 21 December 2023. The Tribunal also directed that the Applicant register and complete a course of further education on Safeguarding Young People in Sport. The Tribunal also considered evidence of good character and the candor with which the Applicant approached the investigation conducted by SIA and the hearing before the Tribunal. It did not find that there had been a breach of any “duty of care” or a failure to adhere to any moral, ethical or professional standards as an administrator. The findings of SIA, which were based on the balance of probabilities, were that the Applicant had breached the Policy on three occasions. In his response to SIA, the Applicant admitted to conduct alleged against him in his capacity as a coach of young athletes and when supervising the participation of young adults in the sport. There was no specific allegation made about his conduct as an “administrator” of the sport but as a “Relevant Person” (and “Individual Member” and “Participant”) within the meaning of the Policy, the Applicant is clearly bound by it and any further iterations of the Policy adopted by the Respondent. The Applicant acknowledged the gravity and importance of the Policy in his evidence to the Tribunal.
14. In paragraph 81 of the Determination made 21 December 2023, the Tribunal warned of the consequences of any future breach of the Policy by the Applicant. In his written submission by

email dated 10 January 2024 the Applicant accepted that the current suspension extends to his participation in the sport as a chaperone and a strength and conditioning trainer. The Tribunal also considers it appropriate following receipt of the further submissions to suspend his participation in the sport as a Team Manager of any participants under the age of eighteen years.

15. As to whether he should be permitted to resume his role as a member of the Committee, that is a matter for the state/territory body (or the "Relevant Organisation" appointing him) and whether the role of a Committee member is "Child-Related Position". If it is a "Child Related Position" then under the Recruitment, Screening and Training Recommendations contained in the Policy (as amended in November 2023) the Applicant must satisfy those criteria (properly applied) before resuming or appointment to that role. So too any other position that may be a Child-Related Position. It is not for this Tribunal to anticipate or speculate as to those roles without appropriate evidence. Hence it would not be appropriate to suspend the Applicant from participating as an "administrator" if there is no evidence of a genuine risk of harm to junior athletes when playing the sport, especially in circumstances where the Applicant is now aware of the gravity of the Policy and is currently suspended from coaching and officiating.
16. Whether, the Applicant is suitable in the future to hold leadership roles or other roles in the sport is a matter for consideration at a future time and must be based on consideration of the merits of any application and the criteria contained in the Policy as adopted by the Respondent from time to time.

#### **Further Determination**

#### **THE TRIBUNAL FURTHER DETERMINES:**

1. The Applicant is suspended from acting as a chaperone of participants in the sport under the age eighteen (18) years for a period of 18 months from 21 December 2023.
2. The Applicant is suspended from acting as a strength and conditioning trainer in the sport for a period of 18 months from 21 December 2023.
3. The Applicant is suspended from acting as a Team Manager of participants in the sport under the age of eighteen (18) years for a period of 18 months from 21 December 2023.
4. The Applicant's future participation in any "Child Related Position" in the sport be assessed in accordance with the Appendix 2 and Appendix 3 of the Respondent's Safeguarding Children and Young People Policy (November 2023) or any future amendment thereof.