



NST-E24-4194

The Appellants v Gymnastics Australia

Determination

National Sports Tribunal

Appeals Division

sitting in the following composition:

Panel Members

Mr. David Grace AM KC (Presiding Member)
Miss Bronwen Knox OLY
Ms. Ann West

in the arbitration between

The Appellants

(Appellants)

Represented by Adrian Anderson and Gayann Walker of Counsel, instructed by Jackie Chan and Paul Horvath, Legal Representatives

And

Gymnastics Australia

(Respondent)

Represented by Chris O'Brien, National High-Performance Director and Interim CEO, and Ruby Bone, Executive Officer

With

Interested Party A

(Interested party)

With

Interested Party B

(Interested party)

Represented by a parent of one of the athletes

PARTIES

1. The Appellants, [REDACTED], [REDACTED], and [REDACTED], appeal the Determination of the National Sports Tribunal (“NST”) General Division in relation to the upholding of their non-selection (as a team) by Gymnastics Australia (“GA”) to compete at the World Age Group Competition and Junior World Championships in March 2024. That competition is an event sanctioned by the International Gymnastics Federation (“FIG”). GA is the governing body for the sport of gymnastics in Australia. Two teams of three gymnasts known respectively as Interested Party A and Interested Party B are Interested Parties. Another team, [REDACTED], were invited to be an Interested Party, but declined.

INTRODUCTION

2. The Appellants were notified of their non-selection on 13 November 2023 by GA. They then lodged a First Instance Appeal to the General Division of the NST pursuant to clause 5.1 of the GA Selection Appeals Policy (“SAP”) on 17 November 2023. Clause 4.3 of the SAP provides for any Interested Party to be a party to the selection appeal. The General Division of the NST accepted that the Interested Parties were qualified pursuant to the SAP to take part in the First Instance Appeal and to make written submissions.
3. Clause 5.2(b) of the SAP provides the grounds upon which a non-selected athlete may bring an appeal to the NST. The Appellants bore the onus of making out the grounds of appeal. The grounds of appeal relied upon by the Appellants in the First Instance Appeal were that Part A and/or Part B of the Selection Policy were not properly applied by GA with respect to the non-selected athletes and that there was no material on which GA’s decision could be reasonably based. The Appellants sought that the NST uphold the appeal and that if the appeal was upheld, there be a finding that there was such disregard for the proper application of Part B that a reasonable person would apprehend that it is unlikely that Part B would be applied properly by GA should the matter be referred back to it for re-selection, and that therefore the Panel determine the selection of the Appellants pursuant to the SAP. Alternatively, it was submitted that the Panel refer the matter back to GA with a direction that the Selection Panel not utilise the Nominated Selection Event

(“NSE”) in its determination given the irregularities in the judging Panel on the day. In response, GA sought that the NST dismiss the appeal. Interested Party A, the original selected athletes, supported GA’s position. Interested Party B, who were not selected, supported the position of the Appellants, in relation to their challenge to the alleged flawed approach of the Selection Panel.

4. The Sole Arbitrator in the First Instance Appeal determined that an oral hearing was unnecessary and that the Arbitration would be conducted on the papers. There was no objection to that course by the parties.
5. On 20 December 2023, the General Division of the NST advised the parties that the appeal was dismissed and detailed Reasons were published on 22 December 2023 in Determination NST-E23-364588.
6. Thereafter, in accordance with clause 5.3(a) of the SAP and within the time specified in the SAP, the Appellants lodged a Final Appeal to the NST Appeals Division. In that appeal, the Appellants appealed the Determination of the NST General Division on a single specified ground, namely that the Determination was incorrect in fact and in law. Pursuant to clause 5.3 of the SAP, the Appellants seek that the NST Appeals Division uphold the appeal and determine the selection of the Appellants or refer the matter back to GA with directions. The relief sought is essentially the same relief sought at first instance as outlined in paragraph 3 above. GA seeks a dismissal of the appeal. The Interested Parties maintain their original submissions, as outlined in paragraph 3 above.

NST JURISDICTION

7. GA has a written SAP which sets out the Selection Appeal process to be applied in respect of the selection of GA Teams that are formally selected under a GA Selection Policy. The SAP, read and applied with the Selection Policy Part A and the applicable Selection Policy Part B forms the GA Selection Policy for the applicable team. The GA Selection Policy exhaustively sets out the parameters, process and criteria (both eligibility and performance) that is applied to determine the selection of individuals for a Team (see clause 2 of the SAP). Clause 5 of the SAP sets out the appeal process in the case of non-

selection. Clause 5.2 of the SAP provides that a Selection Appeal must be heard in the General Division of the NST in the first instance (and specifies the grounds that may be relied upon). Section 23 of the National Sports Tribunal Act 2019 (Commonwealth) (“NST Act”) gives jurisdiction to the NST to arbitrate the dispute. The appeal may be brought on one or more of the following grounds (adopted to meet the circumstances of this case) which the non-selected athlete/team bears the onus of making out:

- (i) that Selection Policy Part A and/or Part B was not properly applied;
 - (ii) the non-selected athletes/team were not afforded a reasonable opportunity by GA to satisfy the Selection Policy Part A and/or Part B;
 - (iii) GA was affected by actual bias in making its decision to not select the non-selected athletes/team;
 - (iv) there was no material on which GA’s decision could be reasonably based.
8. First Instance Selection Appeals heard in the General Division of the NST proceed in accordance with the NST procedure (see National Sports Tribunal (Practice and Procedure) Determination 2021 (Commonwealth)) (“NST Determination”) except insofar as the NST procedure is inconsistent with a number of procedural matters set out in clause 5.2(f) of the SAP.
9. Clause 5.3 of the SAP provides for a second and Final Instance Appeal (Final Appeal), which appeal must be heard by the Appeals Division of the NST. Such an appeal may only be lodged by party to the First Instance Selection Appeal. A Final Selection Appeal heard in the appeals division of the NST proceeds in accordance with the NST procedure. Section 34(1) of the NST Act gives jurisdiction to the NST to arbitrate the appeal. The appeal heard in the Appeals Division of the NST proceeds in accordance with the NST procedure, except insofar as the NST procedure is inconsistent with a number of procedural matters set out in Clause 5.3(g) of the SAP. Further, an Arbitration Agreement entered into between all relevant parties and dated variously on 23 and 24 January 2024 agrees that the jurisdiction of the NST is engaged by Section 34(1) of the NST Act, and Clause 5.3(a) of the SAP. The parties agreed that the jurisdiction of the NST is engaged until resolution of the dispute. The parties accepted the appointment of the Panel to determine the dispute comprising David Grace AM KC (Chair), Bronwen Knox OLY and Ann West. The parties further agreed that the Interested Parties, were to be provided with

an opportunity to make submissions and give evidence and that the Tribunal may admit new evidence in accordance with Section 95(6) of the NST Determination.

10. Pursuant to Clause 8.1 of the Arbitration Agreement the parties accepted that pursuant to Section 95(5) of the NST Determination the Appeal would be conducted by way of re-hearing the Appeal, *“which is a re-consideration of the submissions and evidence before the NST General Division for the First Instance Appeal”*.
11. It was agreed that the Arbitration would take place on Tuesday 13 February 2024 and would be conducted by video conference. Provision was made in the Arbitration Agreement for the service of an Appeal Brief, a response to the Appeal Brief and any other documentation including evidence sought to be relied upon. All parties complied with the procedural directions, acknowledged in the Arbitration Agreement, for the provision of documentation.
12. It was agreed that the law applicable to the merits of the Arbitration would be the law of Victoria and that the Arbitration would be governed by the NST Act, the NST Rule 2020 and the NST Determination as provided for by Section 29 of the NST Act.
13. No party objected to the proposed Arbitration or to the Procedure adopted by the Tribunal for the purposes of the Arbitration on the Appeal.

FACTUAL BACKGROUND

14. On 5 November 2023, the Appellants participated in the World Championships and World Age Competition Trial, conducted by GA, the Respondent, as the Nominated Selection Event (“NSE”) for the World Age Group Competition and Junior World Championships Team Selection. The other teams who competed at the NSE were Interested Party A, the Interested Party B and [REDACTED].
15. [REDACTED] was judged the top group and pursuant to Clause 5.iii of Appendix One of Selection Policy Part B the top team was automatically nominated for selection to the

Team provided that it had reached the target all round score and minimum difficulty in each routine which it achieved.

16. Clause 5.iv of Appendix One of Selection Policy Part B provides as follows:

“Remaining pair/groups for each division will be considered for selection to the team based on their ability to achieve the performance targets with consideration given to the following:

- (a) Performance at nominated selection event
- (b) Performance at 2023 Australian Gymnastics Championships
- (c) Performance at 2023 National Clubs Carnival
- (d) Performance at 2023 National Squad Selection Event #2.
- (e) Performance at 2023 international club tours (e.g., FIAC or Vegas Acro Cup).”

17. GA has provided to the Tribunal the Reasons for the Decision of the Selection Panel. Paragraph 4 of those Reasons states as follows:

“4. The ACR Selection Panel met on Friday 10th November to consider their selections for the World Age Group Competition Team in accordance with the GA policies. The Selection Panel reconvened on Monday 13th to review all selections and to reconfirm consistency of approach when making selection.

- a) Ahead of the meeting the Panel has access to all policy documents and performance data.
- b) The following was taken into consideration when making recommendations:
 - i) Eligibility.
 - ii) Performance at selection event.
 - iii) Performance criteria.
- c) The Selection Panel reviewed the scores and ranking from the Nominated Selection Event (World’s Trial). The [REDACTED] Gymnastics Group gained automatic selection based on meeting the performance requirements set out in Appendix one of Selection Policy B, clause 5.(iii).
- d) From there, as per clause 9.2.2 of Selection Policy Part B, the Selectors discussed the weighting of events and when reviewing the performance data listed in Selection Policy Part B, Appendix One section 5 iv, noted that at no time in 2023 had all remaining groups competed heat-to-head until the Nominated Selection Event.

- e) In determining the group most likely to achieve the stated performance objective, the Selectors agreed that the Nominated Selection Event, would carry 100% weighting due to the recency of the event, the consistency of judging Panel for all participating groups, as well as the performances being completed on the same day and in the same session of competition.
 - f) As such, the second ranked group ([Interested Party A]) from the Nominated Selection Event was selected to the final position on the team.”
18. The Selection Policy Part B provided that up to two teams could be nominated and selected. This is in fact what occurred. As Interested Party A gained the second position they were nominated for selection. The Appellants were not selected but were appointed as the non-travelling reserve team. Only 0.07 points separated Interested Party A from the Appellants at the end of the NSE.
19. The judging panel at the NSE comprised 11 Judges of whom 5 were FIG Brevet 4, one was FIG Brevet 3, one was FIG Brevet 2, one was Advanced Silver and 3 were Advanced Judges. The Chief Judge was Michelle Mason and the Difficulty Judge was Deborah Van Hagen. They were both also on the Selection Panel.
20. The Minutes of the Meeting on 10 November 2023 when the teams were selected for the subject event were provided to the Tribunal. At the 13 November 2023 Meeting there was no discussion apparently in relation to selection other than the confirmation of the selections. The Minutes of the 10 November 2023 Meeting outlined that the selectors took into consideration eligibility, attendance at selection events and performance criteria and took into consideration performance results occurring at the NSE, Australian Gymnastics Championships, National Clubs Carnival, August National Squad Selection Event, Flanders International Acro Cup, Vegas International Acro Cup, Maia International Acro Cup and Budapest International Acro Cup.
21. The selectors noted the following matters in the Minutes:
- (a) The [REDACTED] [REDACTED] would be automatically selected as they met all the relevant criteria and were the top ranked team in the NSE;
 - (b) The [REDACTED] Group did not participate in the NSE and were not eligible for selection;
 - (c) The eligibility of all remaining groups were confirmed and each of their participations

at events as outlined in paragraph 17 above as set out in Selection Policy Part B Appendix 1 5.iv were considered;

- (d) At no time other than at the NSE did all groups compete against each other at the same event;
- (e) In relation to the weighting of events, it was determined in priority order:
 - (i) head-to-head live competition provided the most reliable assessment of the performances of the groups under consideration and would carry the greatest weight due to the teams being assessed by the same judging Panel on the same day which provided more consistency of results;
 - (ii) recency of the events was important and the more recent event should carry more weight;
 - (iii) the Panel determined to weight the NSE at 100 per cent.
- (g) In confirming their selections, the Panel reiterated that at the NSE, the remaining three groups went head to head under a common judging Panel and it was the most recent competition and that selectors can determine the weighting of a competition in their application of the Selection Policy. Further, that the decisions made were in keeping with the purpose of the event as set out in Selection Policy Part B Appendix 1 and also in keeping with the performance targets set out therein. The Panel recognised a close decision between the four eligible groups and focussed on the head-to-head competition and unanimously agreed to select Interested Party A who finished second at the NSE and select the Appellants as the non-travelling reserve team.

22. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties, the Panel refers in its Determination only to the submissions and evidence it considers necessary to explain its reasoning.

PROCEEDINGS BEFORE THE NST

23. At paragraphs 2 – 6 above, the history of the matter, in relation to the First Instance Appeal and the subsequent lodging of a Final Appeal to the NST Appeals Division, is set out.
24. Having received the Determination of the First Instance Appeal before the General Division of the NST on 22 December 2023, the Appellants lodged the requisite NST

Application Form to appeal to the NST Appeals Division on 23 December 2023 and paid the appropriate filing fee on the same date. The NST notified the parties of the appeal on 26 December 2023. This provided effective notice to the parties as required by the SAP.

25. At the Preliminary Conference held on 16 January 2024, the parties agreed that the matter would proceed by way of rehearing in accordance with Section 95(5) of the NST Determination.
26. Prior to the hearing on 13 February 2024, a preliminary issue arose as to whether new evidence sought be relied upon by the Appellants was admissible before the Appeal Tribunal. The matter arose in quite unusual circumstances. The material provided was asserted to rebut materials contained within GA's Submissions, namely the claim that seven FIG Brevet judges made themselves available for the NSE. These Submissions were filed prior to the Determination of the matter in the General Division at First Instance. This was the first time that issue had been raised and the Appellants sought to correct the issue by providing a number of emails which touched upon the issue.
27. The asserted relevance of the new evidence is to support the Appellants' fourth ground of appeal that GA failed to appoint appropriately qualified judges at the NSE in breach of Clause 7.4.2 of GA's 2023 Acrobatic Gymnastics Technical Regulations ("AGTR") and that the selection decision could therefore not reasonably be solely based on performance at the NSE. It was also asserted that the failure to appoint appropriately qualified judges at the NSE in breach of Clause 7.4.2 was an additional matter supporting the assertion that GA failed to reasonably exercise its discretion when giving 100 per cent weighting to the NSE. In its original submissions to the General Division of the NST in the First Instance Appeal, the Appellants submitted there was no material in which GA's decision could be reasonably based in circumstances where the judging panel at the NSE was not in compliance with GA's own policies. GA, in reply, contended that the judging panel was properly constituted and qualified under Clause 7.4.2 and that "*seven FIG Brevet judges made themselves available for the NSE*". The Appellants contest this and submit that at least five FIG Brevet judges had not even been approached by GA to judge at the NSE and therefore there were other suitably qualified judges available and that GA had not complied with Clause 7.4.2.

28. The Appellants submit that the materials should not have been excluded as the submission that GA had not complied with 7.4.2 of the AGTR was not a new submission and were produced in direct response to GA stating that seven FIG Brevet judges had made themselves available for the NSE. It is asserted by the Appellants that the new materials are directly relevant to its submission that there was no material on which the selection decision could reasonably be based in the event that the appointment of judges to the NSE was flawed.
29. The Chair of the Appeal Panel ruled on this matter on 12 February 2024 and determined that it would allow this new material to be received by the Appeal Tribunal in the particular circumstances of this Arbitration, but put the parties on notice that the weight to be given to the new evidence was a matter for the Tribunal's ultimate determination. In so ruling it was sought to be made clear that the significance of this material was a matter that would be determined ultimately by the Appeal Panel in its determination and that it was not to be assumed that the material had any particular significance.
30. The hearing was held by video conference on Tuesday 13 February 2024. Detailed oral submissions, that supplemented the written submissions that had been filed, were made by the Appellants, GA and Interested Party B. Interested Party A who had submitted written submissions to the NST General Division in the First Instance Appeal, did not appear or advance any further submissions. At the conclusion of the hearing the Panel determined it would retire for a short period of time to determine the course it would take in relation to the matter. After a short interval, the Panel reconvened the hearing and announced that the appeal would be dismissed with full reasons to be provided as soon as possible. The Panel briefly outlined the reasons why the appeal was dismissed. No objection was made at the outset of the oral hearing to the composition of the Panel and at the conclusion of the oral hearing the parties confirmed that their procedural rights had been fully respected.

THE RELEVANT EVIDENCE AND SUBMISSIONS OF THE PARTIES

31. The Appellants are young gymnasts who have achieved elite status in their sport at young ages. The Appellants are the current Australian National Champions in their Division. A full history of their competitive performances was included in the Submissions and those performances are impressive.
32. FIG schedules a combined World Championships (for Seniors) Event and World Age Group Competition and junior World Championships every 2 years in the sport of acrobatic gymnastics in the 12 – 18 years (females) Divisions. The World Events normally occur in the first or second quarters of the second calendar year, with domestic events in the calendar year preceding those World Championships and World Age Group Competitions being relevant to the selection process for the Australian National Squad and ultimately the National Team. The current cycle for these events both domestically and internationally is 2023 – 2024.
33. On 26 July 2023, GA published its Selection Policy Part B which informed all potential participants of the criteria and methodology to be used in selection for the international events.
34. Appendix One of Selection Policy B, which has been referred to above, sets out the list of events to be considered by the Selection Panel. It is important to set out the actual results of the various teams in the relevant competitions in the events listed under Clause 5.iv of Appendix One of Selection Policy B. Those results are hereunder:

Event	Team	Total Score
WCH/WAGC Trial (NSE)	Team [REDACTED]	80.88
	[Interested Party A]	80.37
5 November 2023	[The Appellants]	80.3
	[Interested Party B]	79.3
	Team [REDACTED] ([REDACTED]) (did not compete)	

Event	Team	Total Score
National Clubs	[Interested Party B]	79.21
	Team [REDACTED]	78.16
September 2023	Team [REDACTED] ([REDACTED])	78.05
	[Interested Party A]	74.69
	[The Appellants] (did not compete)	
Event	Team	Total Score
National Squad Selection 2	Team [REDACTED] ([REDACTED])	75.39
	Team [REDACTED]	72.87
August 2023	[The Appellants] (did not compete)	
	[Interested Party B] (did not compete)	
	[Interested Party A] (did not compete)	

Event	Team	Total Score
National Championships	[The Appellants]	80.94
	Team [REDACTED]	78.37
May 2023	[Interested Party B]	77.08
	[Interested Party A] (did not compete)	
	Team [REDACTED] ([REDACTED]) (did not compete)	
Event	Team	Total Score
6 th Vegas Cup	[The Appellants]	82.06
	[Interested Party B]	80.93
	Team [REDACTED]	77.71
March 2023	[Interested Party A] (no international competition)	
	Team [REDACTED] ([REDACTED]) (did not compete internationally due to injury)	

35. The above Table makes it clear that the opportunity for the teams to compete against each other in head to head competition was limited and only occurred on the one occasion at the NSE. At the National Clubs Event in September 2023, the Appellants did not compete. At the National Squad Selection 2 Event in August 2023, the Appellants, Interested Party B and Interested Party A all did not compete. At the 6th Vegas Cup in March 2023 Interested Party A did not compete. At the National Championships in May 2023 Interested Party A did not compete (that Trio only commenced competing in September 2023).
36. In head to head competition Team [REDACTED] won the NSE, came second to Interested Party B in the National Clubs Event, came second to another team in the National Squad Selection 2 Event and finished behind the Appellants in the National Championships and the 6th Vegas Cup. The Appellants came third at the NSE and won the National Championships and were the first Australian Team at the 6th Vegas Cup.
37. The result of the above analysis clearly revealed the selection conundrum facing the selectors.
38. At the NSE on 5 November 2023 there were eleven judges. Seven of the eleven judges

held FIG Brevet certification, one judge held an Advanced Silver qualification and the remaining three judges held Advanced qualifications.

39. The reasons for non-selection of the Appellants were provided to the Appellants by GA on 16 November 2023 and prior to the First Instance Appeal to the NST, GA provided the Minutes of the Meeting of the Selectors which was held on 10 November 2023. The contents of these documents have been referred to above.

SUBMISSIONS OF THE APPELLANTS

40. In its application upon appeal to the NST from the decision made by the General Division of the NST, the Appellants specified one ground of appeal, namely that the decision of the NST General Division was “*incorrect in fact and in law*”. No particulars were provided in the application as to why it was asserted that the decision was incorrect in fact and in law. Once the Appellants’ submissions were filed and served on 23 January 2024, the position of the Appellants became clear. In those submissions the Appellants relied upon four bases or grounds as to why the Determination of the General Division was incorrect in fact and in law.
41. The first ground relied upon was based upon the wording of Clause 9.2.2 of Selection Policy Part B. Clause 9 provides, inter alia, as follows:

“9 Selection Process, Considerations & Performance Requirements

- 9.1 The Selection Panel will meet as required to select Pairs/Groups and Coaches to the Team for the Event(s).
- 9.2 When determining Pairs/Groups to be nominated, the Selection Panel may consider the following:
 - 9.2.1 A Pair/Group’s ability to contribute towards performance targets outlined in the relevant Appendix below.
 - 9.2.2 Performance at the Nominated Selection Event as outlined in the event specific Appendix below and those listed in 5.iv. in Appendix 1 and 2. These Events will be weighted at the discretion of the Selection Panel. In the weighting of Events, the Selection Panel will consider several factors including but not limited to, recency of Events and level of competition....”

42. The contention of the Appellants was that in the weighting of the relevant events, the requirement that the selectors “will consider” various factors required consideration of at least those factors enumerated in the language of the Policy. One of the two mandatory factors that was said to be crucial was the level of competition at the relevant events and that the Reasons and Minutes of the Selectors at the Meeting demonstrated that the Selectors had failed to consider the level of competition at the Australian Championships and the Vegas Cup in weighting the relevant performances. Further, it was asserted that Clause 4.13 of Selection Policy Part A required the Selectors to document their rationale in making their decision and there is no mention of the factor of the “level of competition” in the Minutes or the Reasons. It was further asserted that the level of competition at the Australian Championships and Vegas Cup was a fundamental consideration which was overlooked by the Selectors in weighting those performances and therefore there was a misapplication of Selection Policy Part B. It was submitted that it could not be inferred, in all the circumstances, that this factor had been taken into account.
43. The next ground relied upon was that the Selectors had unreasonably exercised their discretion under Clause 9.2.2. It was asserted that the discretion in the weighting of performances is not unfettered and that the Selectors are required to exercise their discretion reasonably and in good faith. Reliance was placed on the decision in Iles v Shooting Australia CAS A1/2016 and the reasoning employed by the Sole Arbitrator at [57]. It was submitted that the decision to give zero weighting to the Appellants’ performance at the Australian Championships and Vegas Cup was “*patently unreasonable in circumstances where the Australian Championships is at the highest level of competition in Australia and resulted in the Appellants winning the Championships*”. Further, that the Vegas Cup is a high level international event and the Appellants’ silver medal demonstrated aptitude at an international competition that included several teams who would likely be representing their countries at the World Age Group Competition. In addition, it was emphasised that the performances at the Australian Championships and Vegas Cup were recent and that just 0.07 of a point separated the Appellants from Interested Party A at the NSE and that this demonstrated how close the scoring was and reflected less than one minimum executing scoring deduction (0.1). Further, the Australian Championships and the Vegas Cup were two of the five categories of selection events made known to aspiring competitors in Clause 5.iv of Appendix One of Selection Policy B.

44. The Appellants submitted that it was incorrect for the Selection Panel to rely upon the consistency of the judging panel for all participating groups at the NSE and the performances of the NSE being completed on the same day and in the same session of competition. This was on the basis that it was inevitable that other competitions would have different judging panels and would be on different days and different sessions than the NSE. It was submitted that these were not valid reasons to exclude any weighting whatsoever of the performances in the Australian Championships and Vegas Cup. Finally, it was asserted that the fact that the Appellants and the Interested Party A competed against each other at the NSE may be a reason to give increased weighting to that event but it is no reasonable basis for giving no weight whatsoever to the Appellants' performances in the Australian Championships and Vegas Cup. The decision to do so was an unreasonable and improper exercise in the Selectors discretion, it was finally asserted.
45. The next ground relied upon was the asserted improper application of Clause 8.1 of Selection Policy B. Clause 8.1 provides that the Selection Panel will consider a group's performances in the nominated selection events, as outlined in Appendix One. It was submitted that two issues arose from the application of this particular clause. The first obliges the Selection Panel to consider all of the events in Appendix One and also requires the Selection Panel to consider performances in the Nominated Selection Events. Whilst it was conceded that Clause 9.2.2 allows the Selectors to weigh the events listed in Appendix One at their discretion, it was submitted that Clause 9.2.2 must be read consistently with the mandatory consideration of performances at the events referred to in Clause 8.1, which was mandatory. It was asserted that there was an absence of any active intellectual engagement by the Selection Panel in respect of the performances in all the Clause 5.iv Events and it was insufficient for the Selection Panel to simply note that not all teams had participated in the various events. A statement by the Selection Panel that they had considered the mandatory considerations does not mean that they have, as a matter of substance, it was submitted. Further, it was asserted that GA could have provided evidence, in the form of statements from the Selectors to confirm that they had considered the relevant performances, but they had chosen not to do so and that was a significant factor to be taken into account by the Appeal Panel.

46. Reliance was placed upon the apparent conclusion that the Selectors only had substantive regard to the NSE performances, as in the Selectors' Reasons, the Selectors stated that eligibility, performance at the Selection Event and performance criteria were taken into consideration whereas Clause 8.1 required performances at the Selection Events, not just the NSE, to be taken into account. Further, it was claimed that the methodology referred to in the heading to Clause 8.1 emphasised the need for the Selection Panel to look at the substance of the performances, for consideration to be given to the merits of the performances and reference to factors such as the level of competition. It was further submitted that the documentation provided to this Panel did not reflect any substantive consideration of the performances at the relevant events and that the ultimate weighting given to the NSE of 100 per cent evidenced the failure of substantive consideration of the relevant events and the Selection Panel had therefore erred.
47. The final ground relied upon was an assertion that the failure by GA to appoint all available FIG Brevet judges was a breach of the requirements of Selection Policy Part B.
48. Clause 10.1 of Selection Policy Part B provides that the 2022 – 2024 FIG Acrobatic Code of Points will be utilised in all selection activities and decisions.
49. It was asserted that because the FIG Acrobatic Code of Points requires judges at selection activities to have FIG Brevet qualifications, reinforced by the requests made of clubs who were attending the NSE, that they were required to bring one FIG Brevet judge, emphasised the need for a high level of judging. Reliance was placed upon Clause 2.3 of Selection Policy Part A which stated that the GA Selection Policy exhaustively sets out the parameters, process and criteria (both eligibility and performance) that will be applied to determine the selection of the relevant team.
50. Only seven of the eleven judges at the NSE held FIG Brevet certification. This was said to be in breach of the requirements of Selection Policy Part B and thereby a failure to properly apply that policy. It was submitted that it was unreasonable for selection to be solely based on the NSE in circumstances where the level of judging was not at its highest. It was submitted that the General Division of the NST erred in finding that Clause 10.2 of the Code of Points (judges to be in possession of a valid FIG Brevet) did not apply and that Clause 7.4.2 of the GA Technical Regulations instead applied. Clause 7.4.2 provides

that when an Australian Team Selection trial is held separate from any competition the National Judging Coordinator and National Technical Director will determine the structure of the judging panel: “*the judging panel, where possible, will consist of FIG Brevet judges supplemented by Advanced Silver judges.*” It was further submitted that the reference in the Code of Points to any contradiction between the Code of Points and the Technical Regulations which would result in the Technical Regulations prevailing did not apply in these circumstances because the Technical Regulations referred to in the Code of Points were the FIG General Technical Regulations not the GA Technical Regulations, with the consequence that GA did not properly apply Clause 10.2 of the Code of Points and that therefore GA could not reasonably base its selection decision solely on the NSE.

51. In the alternative, it was submitted that if Clause 7.4.2 of the GA Technical Regulations does apply, instead of Clause 10.1 of Selection Policy Part B, the appointment of the judges for the NSE was in breach of Clause 7.4.2 of the GA Technical Regulations, as outlined above. This was because three of the eleven judges at the NSE were neither FIG Brevet judges nor Advanced Silver judges and those three judges were given full judging positions on the Panel of judges, not any lesser positions. The new evidence sought be relied upon demonstrated that it was possible for other FIG Brevet judges who had not been appointed to have made themselves available for this judging role and therefore a failure to comply with GA Technical Regulation 7.4.2 was demonstrated. The consequence of that error was that the selection decision could not reasonably be based solely on the NSE.

52. Finally, it was contended that should this Appeal Panel find the appeal upheld, that the Panel exercise its authority pursuant to Clause 5.3(l)(ii) of the SAP to itself determine the issue of the Appellants’ selection because GA had such disregard for the proper application of Selection Policy Part A and/or Part B that a reasonable person would apprehend that it is unlikely that the Selection Policy Part A and/or Part B would be applied properly by GA if the decision regarding the Appellants’ non-selection was referred back to GA. In the alternative, it was submitted that, if the matter was referred back to GA for redetermination, that determination should be directed to properly apply Selection Policy Part B including due consideration of the Appellants’ performances at the Australian Championships and Vegas Cup.

SUBMISSIONS OF INTERESTED PARTY B

53. Interested Party B supported the submissions of the Appellants and contended that the selection process was fundamentally flawed. Further, it was contended that this had a direct impact on Interested Party B because its results, experience and skills outweighed that of the Interested Party A. Interested Party B sought for the matter to be referred back to GA with a direction that the Selection Panel not utilise the NSE in determination of any selection for any groups and that the automatic qualification of the [REDACTED] [REDACTED] resulting from the NSE Event be revoked, for the same reasons.
54. Interested Party B also sought to rely upon potential bias at the NSE as an additional factor. There was no evidence relied upon to support this submission.
55. It is clear that Interested Party B are outstanding young gymnasts who have achieved bronze medals at the Vegas Cup in April 2023 and have performed very well in the various events outlined in the Table set out above. It was submitted on their behalf that an objective analysis would conclude that they are the superior trio to both Interested Party A and the [REDACTED] [REDACTED], to the extent that the Appellants and Interested Party B should be ranked one and two respectively. It was submitted that if the Judging Panel was incorrectly formed resulting in an irregularity of judging and results, there was no material in which GA's decision could be reasonably based for all the groups, not just the second position.

SUBMISSIONS OF GA

56. GA emphasised that there was only one nominated selection event and that the other events listed in Appendix One, Clause 5.iv were not selection events but rather events at which performances were to be considered. GA maintained that the Selection Panel did consider all the relevant events and the weighting given was an appropriate weighting in the exercise of their discretion. Further, GA maintained that the appointment of the judges was not in breach of any Policy or Regulation and that there was no basis for finding that that occurred. GA maintained that the judging panel was constituted in accordance with the GA Technical Regulations and had been the same method adopted at the 2023 Australian Gymnastics Championships and National Clubs Championships. Further, GA

emphasised that the NSE was not an FIG sanctioned event and as such the GA Technical Regulations were the prevailing policy for follow for domestic events.

57. In relation to the Minutes of the selection meeting held on 10 November 2023 and the criticism that the Minutes did not reveal the decision making process in any real detail, GA emphasised that the Minutes were a snapshot of what was discussed at the Selection Meeting and not a word-for-word account and further that Selection Policy Part A, Clause 4.13 was sufficiently observed in the documentation of the process implemented and rationale for making the selection decision.
58. In relation to the first ground that the selectors failed to consider the level of competition pursuant to Clause 9.2.2 of Selection Policy Part B, GA submitted that the Minutes revealed that the Selection Panel, in their discretion, deemed that the most objective data available came from the head-to-head comparison as it provided the most reliable assessment of the performances of the groups under consideration. GA emphasised that past performances do not guarantee the standard of current performances which is why the NSE was conducted and the recency of events was weighted accordingly. It was maintained that the Selection Panel did consider the various factors in respect of all of the events listed in Appendix One Clause 5.iv and it was open to them, in their discretion, to apply the weighting that it deemed appropriate.
59. GA also submitted that the Selection Panel was experienced and that it was not unreasonable to assume that the selectors would already have an understanding of the various levels of competition and have conducted their own research prior to the selection meeting so as to be prepared for the meeting and not, therefore, need to make explicit comments as to the respective levels of competition at the various events. It was reasonably open for the Selection Panel to use the most objective data available, that being the head-to-head comparison of the groups.
60. In relation to the second ground that the Selection Panel unreasonably exercised their discretion under Clause 9.2.2 of Selection Policy Part B, it was submitted that the Selection Panel exercise their discretion for good reasons and in good faith and that it was not unreasonable to use their most objective data available, being the head-to-head comparison, as it provided the most reliable assessment of the performances of the groups

under consideration and were the most recent performances. GA noted that the Australian Gymnastic Championships had occurred in May 2023 and the Vegas Cup in April 2023 which were 10 - 11 months prior to the scheduled world age group competition.

61. GA relied upon the decision of the NST General Division in Aspire Senior Rhythmic Gymnastics Group v Gymnastics Australia NST-E23-142346 where the NST General Division considered an allegation that there was no material on which GA's decision could be reasonably based (see paragraph 7 above) where the relevant parts of Clause 5.2 of the SAP are set out. At paragraph [40] of that decision it was stated that for an appeal based on Clause 5.2(b)(iv), to succeed, the Appellant must prove to the Tribunal satisfaction that there was no material on which the selectors could have based their decision. If there was some material, the Tribunal held, then subject to GA, through the selectors, acting reasonably in the manner in which GA's absolute discretion was applied, an appeal will fail.
62. In relation to the third ground, namely the alleged improper application of Clause 8.1 of Selection Policy Part B which requires the Selection Panel to consider performances in the nominated selection events, as outlined in Appendix One, GA emphasised that there was only one NSE and that the performances at all the additional events listed in Clause 5.iv of Appendix One were considered by the Selection Panel. GA reiterated that the head-to-head competition provided the most objective data available and was the most recent. GA emphasised that the Selection Panel was very experienced and would have been aware of the relative levels of competition and taken every relevant consideration into account and that there would be engagement in discussion of the events listed in Clause 5.iv. Although there is a reference to "Nominated Selection Events" in Clause 8.1 of Selection Policy Part B, it was clear, according to GA, that there was only one nominated selection event listed in Clause 5.iv of Appendix One and that the other events listed were not Nominated Selection Events but merely events to which consideration should be given in the exercise of discretion by the selectors.
63. GA again referred to the decision in Aspire (see above) where, at [58], the NST General Division had stated:
64. *"Further, when regard is had to Clause 9.2.2...which expressly confers on the Selection*

Panel the discretion of weighting to be given to the performances at the Selection Events, and the selectors who are experts in the field have in fact determined such weighting in a manner which is (at least) logical and sensible, it is difficult to see how the Tribunal could rationally conclude that the Selection Panel's approach to the selection decision was wrong to the point where it could be considered a misapplication of the Selection Policy."

65. In relation to the fourth ground alleging that the appointment of judges was in error due to GA not approaching all available FIG Brevet judges to sit on the judging panel, GA emphasised that the NSE was not an FIG sanctioned event and that the reference in Clause 10.1 in Selection Policy Part B (in reference to the Code of Points) is in relation to skills and performance elements required by each pair/group and that further, in administering domestic events in Australia, the relevant GA Technical Regulations are followed. Emphasis was placed upon Introduction Clause 6 of the FIG Code of Points which states that National Federations are able to "*adjust the rules for internal events to meet their particular developmental needs*". It was further submitted that it is was not possible for a full panel of eleven FIG Brevet judges to be utilised for domestic events in Australia where there are only thirteen available to choose from. Judges utilised for domestic events are responsible for their own expenses to travel to and from these events and their accommodation, they are volunteers, and it could not be expected that all such judges would be available for any particular event. Further, on the same date as the NSE there was a club event being run in Queensland at which Queensland based FIG Brevet Judges were judging that resulted in fewer judges being available for the NSE.
66. GA submitted that none of the grounds of appeal could be made out and that the appeal ought to be dismissed.

SUBMISSIONS OF INTERESTED PARTY A

67. As noted above, Interested Party A had provided written submissions to the NST General Division in the First Instance hearing and did not participate in the Appeal hearing. Interested Party A submitted to the NST General Division that GA had made the correct decision based upon the information they had at hand.
68. In its submissions, Interested Party A emphasised that the Selection Panel included

experts and that they were persons of integrity.

69. In relation to the formation of the judging panel for the NSE, it was submitted that the approach adopted by GA was consistent with the approach used for the National Championships and the National Clubs Championships.
70. In relation to the formation of the judging panel at the NSE, it was submitted that the appointment of the Panel was consistent with the approach used for domestic events and there was no issue with the judging competence. It was submitted that the results of all domestic events would need to be voided if it was held that the judging panel was invalidly appointed and that 36 selected athletes for the World Championships would be affected.
71. It was submitted that GA followed the correct selection process and a fair and informed decision was made.

THE MERITS –

Ground 1: Failure to consider the level of competition pursuant to Clause 9.2.2 of Selection Policy Part B.

Ground 2: Unreasonable exercise of discretion under Clause 9.2.2 of Selection Policy Part B

72. It is convenient to discuss these grounds together.
73. The Panel has looked carefully at the provisions of the SAP, Selection Policy Part A and Selection Policy Part B and all other relevant Regulations and Code of Points. Clause 9.2.2 of Selection Policy Part B provides that the Appendix One Clause 5.iv Events, will be *“weighted at the discretion of the Selection Panel. In the weighting of Events, the Selection Panel will consider several factors including but not limited to, recency of events and level of competition.”*
74. The Panel has also carefully considered the contents of the Minutes of the Selection Panel Meeting on 10 November 2023 and the written Reasons for Decision of the Selection Panel. Paragraph 4 of those written Reasons has been set out above at paragraph 17.

75. The various arguments of the parties concerning whether or not the selectors considered all relevant factors including the level of competition have been canvassed above. The Minutes and Reasons make clear, in the opinion of the Panel, that the level of competition was considered and that all relevant factors were considered. This was the clear inference to be drawn from the documentation.
76. It was open to the selectors to assign 100 per cent weighting to the NSE in the exercise of their discretion. The reliance by the selectors for that decision was sound. The selectors were entitled to give 100 per cent weighting due to the recency of the event, the consistency of the judging panel for all participating groups, as well as the performances being completed on the same day and in the same session of competition. To do so was not unreasonable.
77. The Panel rejects the submission by the Appellants that it was incumbent upon the selectors in their Minutes and in their Reasons to articulate in any greater detail their intellectual thought processes that allowed them to reach the decision that the NSE would carry 100 per cent weighting.
78. The Panel is conscious of the decision by the CAS in Iles, referred to above and the comments made at [57] therein. The Panel accepts that the exercise of discretion is not unfettered and is governed by principles of good faith and reasonableness both as to process and result. There is nothing in the decision of the Selection Panel to suggest that they did not exercise their selection decisions in good faith and reasonably. Further, there is no inference that can be drawn that all the relevant factors were not taken into account in circumstances where it was clear that the selectors were cognisant of the various aspects of the Selection Policy Part B and particular Appendix One. Indeed, in the Reasons for Decision, Appendix One Clause 5.iv is specifically mentioned with the rider that "*at no time in 2023 had all remaining groups competed head-to-head*" until the NSE. The Minutes also refer to all the events.
79. The Panel is satisfied that all the relevant factors were considered and that the selection decision made by the selectors was open to them to make in all the circumstances and was made in good faith and reasonably. In this regard, due regard must be had to the experience and expertise of the selectors and the responsibilities they are given by GA to

discharge.

80. Accordingly, these two grounds cannot be upheld.

Ground 3: Improper Application of Clause 8.1 of Selection Policy Part B

81. This ground relies upon an alleged failure to observe the mandatory requirement that the Selection Panel *“will consider a pair or group’s performances in the nominated Selection Events, as outlined in the relevant appendix below”*.

82. The essential gravamen of this ground is that given the mandatory nature of Clause 8.1 there was a need for the Selection Panel to exhibit some *“active intellectual engagement”* in respect of the performances in the Clause 5.iv events and that it was insufficient for the Selection Panel to simply note that not all the teams had participated in the various events. What was emphasised was that the Selection Panel by merely stating they had considered the mandatory considerations, did not mean that they had, as a matter of substance done so. Reliance was placed upon paragraph 4b. of the GA’s selectors’ Reasons where they stated:

“The following was taken into consideration when making recommendation:

- i. Eligibility*
- ii. Performance at selection event*
- iii. Performance criteria.”*

The use of the singular “event” in ii. above was emphasised.

83. It was submitted that the Selection Panel had shown no sign of the required considerations and mere statements that they had considered the Clause 5.iv events did not reflect any substantive consideration of the performances at those events, and that the ultimate weighting given to the NSE of 100 per cent, evidenced a failure to give substantive consideration to all the Clause 5.iv events.

84. To the contrary, the clear inferences and conclusions to be drawn from the Minutes and the Reasons is, in the Panel’s opinion, that all the listed events were taken into account and considered.

85. This Panel can find no basis upon which it could be concluded that the Selection Panel did not observe the requirements of Clause 8.1. This ground cannot be upheld.

Ground 4: Erroneous appointment of judges at the NSE

86. The Appellants' submissions in relation to this ground are, in the opinion of the Panel, fundamentally flawed. Clause 10.1 of Selection Policy B provides that the FIG Code of Points "*will be utilised in all selection activities and decisions*". The Appellants contend that the FIG Code of Points requires judges at selection activities to have FIG Brevet qualifications. As a matter of interpretation the FIG Code of Points exhibits no such requirement in relation to a domestic event and particularly a domestic National Selection Event. Section IV of the FIG 2022 – 2024 Code of Points refers to the composition of judges' panels at various international competitions. Article 9 of Section IV makes it clear that the composition of judges' panels specified therein are not relevant to the appointment of judge at domestic competitions. It is clear that Article 10.2 specifying that judges are obliged to be in possession of a valid FIG Brevet only applies to international competitions.
87. The Introduction to the Code of Points, Clause 6, provides that National Federations may adjust the rules for internal events to meet their particular developmental needs.
88. The Code of Points provides detailed requirements that must be applied in respect of the judging of performances in competition. The Panel is of the opinion that the reference in Clause 10.1 of Selection Policy Part B is a reference to those technical judging requirements for scoring, definition of elements, application of tables of faults and penalties etc. that appear in the Code of Points. It is not a reference that requires judges at selection activities to have FIG Brevet qualifications.
89. The Appellants relied upon Clause 2.3 of Selection Policy Part A set out above and asserts that because only 7 of the 11 judges held FIG Brevet certification there was a breach of Clause 10.1 of Selection Policy B. Therefore, there was a failure to properly apply Selection Policy Part B and it was unreasonable for selection to be solely based on the NSE in those circumstances because of the improper composition of the judges panel. The assertion that the NST General Division was in error in finding that Clause 10.2 of the Code of Points did not apply cannot be accepted. The NST General Division was correct

in finding that Clause 7.4.2 of the GA Technical Regulations instead applied. The content of that clause is set out above and it cannot be said that GA proceeded in error by its National Judging Coordinator appointing the judges in the manner that occurred. After all, each of the participating groups were subject to exactly the same judging panel and there was no evidence that there was inappropriate judging or incompetent judging at the NSE. Insofar as this was an additional basis upon which it was submitted that Ground 2 was supported, the Panel does not accept that the appointment of the judging panel and its composition was in error and does not accept that it was therefore unreasonable for the selection to be solely based on the NSE in those circumstances.

90. The alternative submission relied upon in support of this ground by the Appellants was that if Clause 7.4.2 of the GA Technical Regulations applies, that, in any event, the appointment of the judges for the NSE was in breach of that Clause. The new evidence produced to the Appeal Tribunal, it was contended, demonstrated that it was possible for additional FIG Brevet judges to be appointed and therefore there was a demonstrated failure to comply with Clause 7.4.2. It was asserted that the consequence of that error was that the selection decision could not reasonably be based solely on the NSE because the composition of the Panel was erroneously selected.
91. The Panel finds there is no substance in this ground.
92. The Panel finds that the judging panel was properly constituted and that GA made sufficient attempts to constitute a proper panel, including requesting clubs to provide their own FIG Brevet judge to participate in the judging panel. The judging panel was properly constituted and qualified. It must be understood that the small number of FIG Brevet judges available to participate in competitions in Australia is compounded by the fact that there was another major competition occurring in Queensland on the same day as the NSE. Therefore, there must be some allowance given in respect of the inability to appoint a full complement of FIG Brevet judges. The Selection Panel, in the opinion of this Panel, was entitled to rely on the scores given by the judging panel in making their selection decisions, meaning that there was clearly material on which those decisions could be reasonably based (as was found by the NST General Division at [77]). In the circumstances, the Panel finds there was no demonstrated failure to comply with Clause 7.4.2 and there is no basis therefore for a finding that the selection decision could not

reasonably be based solely on the NSE.

93. The Panel finds that this ground of appeal cannot be upheld.

CONCLUSION

94. The Panel endorses the conclusion at [80] made by the NST General Division where it was stated:

“There is no doubt that the Appellants’ results for the events other than the Nominated Selection Event exceeded those of [Interested Party A] for example, but that is not to the point. The Selection Panel were well aware of those results including that the Appellants were the current Australian gymnastic champions, however, as GA submit at paragraph 36 of their written submissions in response, “the selectors deemed that the most objective data available came from the head to head comparison as it provided the most reliable assessment of the performances of the groups under consideration.” Further, “past performance does not guarantee standard of current performance which is why the Nominated Selection Event was conducted, and recency of events was weighted. This is evident as the [REDACTED] Gymnastics Group ranked first at the Nominated Selection Event yet they were not the current Australian gymnastics champions.”

95. The Panel finds that the approach taken by the Selection Panel was clearly open to it and the decision was reasonably based. In making team selections in this and other sports, Selection Panels undertake and discharge a heavy responsibility. Generally, Selection Panels, in exercising a discretion, are aware of the need to act fairly and reasonably. Provided the exercise of discretion observes the principles of good faith and reasonableness both as to process and result, there can be no challenge to the exercise of discretion in a particular way. There can be no basis in the circumstances of this case for any suggestion that the exercise of discretion was not done in good faith and was not reasonable both as to process and result in the ultimate decision that was made.

96. The Panel adopts the observations made in Aspire (see above paragraph 63), where the NST General Division in a case that dealt with an approach adopted by selectors where the selectors had found that head-to-head live competition provided the most reliable assessment of the performances of the groups under consideration and as such would carry the greatest weight, that it could not be said that this approach could be rationally concluded to be “wrong to the point where it could be considered a misapplication of the Selection Policy”.

97. These comments are germane to this Appeal.

98. Accordingly, for the reasons outlined above, the Appeal must be dismissed.

The Appeal Tribunal therefore determines that the Appeal be dismissed.



**David Grace AM KC
Presiding Member**



Bronwen Knox OLY



Ann West

Dated: 15 February 2024