

NST-E23-364588

The Appellants v Gymnastics Australia

## Determination

### National Sports Tribunal

#### General Division

sitting in the following composition:

Panel Member

The Honourable Steven Strickland KC

in the arbitration between

#### **The Appellants**

*(Appellants)*

Represented by Gayann Walker of Counsel, instructed by Jackie Chan, Solicitor

And

#### **Gymnastics Australia**

*(Respondent)*

Represented by Alexandra Ash, CEO and Chris O'Brien, National High Performance Director

With

#### **Interested Party A**

*(Interested party)*

Represented by Kim Lacey, Authorised Representative

With

#### **Interested Party B**

*(Interested party)*

Represented by the parents of the athletes

## Introduction

1. This is an appeal by [REDACTED], [REDACTED], and [REDACTED] (“the Appellants”) against Gymnastics Australia (“GA”) for their non-selection (as a team) at the World Age Group Competition & Junior World Championships in Holon, Israel in March 2024.
2. That competition is an event sanctioned by the International Gymnastics Federation (“FIG”).
3. The Appellants were notified of their non-selection on 13 November 2023 by email from GA.
4. The Appellants then complied with all relevant requirements pursuant to clause 5.1 of Gymnastics Australia Selection Appeals Policy (“Appeals Policy”) to enable them to lodge a First Instance Appeal to the General Division of the National Sports Tribunal (see clause 5.1(a) of the Appeals Policy).
5. The Appellants duly lodged their appeal with the National Sports Tribunal on 17 November 2023.
6. Clause 4.3 of the Appeals Policy provides for “any interested party” to be a party to the selection appeal. There was agreement that the three gymnasts known as *Interested Party A* qualified as interested parties, but there was a dispute as to whether the three gymnasts known as *Interested Party B* qualified. At the pre-hearing conference held on 22 November 2023, the Tribunal determined that GA had misinterpreted clause 4.6 of the Appeals Policy and that Interested Party B qualified pursuant to clause 4.4(b) of the Appeals Policy. The interested parties were duly given notice of the appeal and provided with the opportunity to make written submissions.
7. On 23 November 2023 GA received notification from FIG that the 2024 Acrobatic Gymnastics World Championships and World Age Group Competitions would not proceed in Israel given the situation that applied in that region. The bidding to hold the event was reopened, and a final decision on the event was expected to be made by the end of January 2024. Despite this, all parties requested, and the Tribunal agreed, that the arbitration still proceed.

### **The Jurisdiction of the National Sports Tribunal**

8. The jurisdiction of the Tribunal is engaged by section 23(1) of the National Sports Tribunal Act 2019, and clause 5.2(a) of the Appeals Policy.
9. The Tribunal conducted a pre-hearing conference on 22 November 2023 and then briefly on 23 November 2023 which resulted in an Arbitration Agreement signed by the parties on 24 November 2023, 29 November 2023 and 4 December 2023 respectively.
10. Clause 8.5 of the Arbitration Agreement left it in the discretion of the Tribunal whether an oral hearing would take place. The Tribunal determined that an oral hearing was unnecessary, and that the arbitration would be conducted on the papers. On Thursday 14 December 2023 the parties were given notice of that determination and provided with the opportunity to submit otherwise. No response was received from any party. Accordingly, the arbitration has proceeded on the papers.
11. No party objected to the proposed arbitration or to the procedure adopted by the Tribunal for the purposes of the arbitration.

### **The Documents before the National Sports Tribunal**

12. At the pre-hearing conference held on 22 and 23 November 2023 a timetable was agreed for the filing of written submissions, relevant evidence and witness statements as follows:
  - 12.1 The Appellants to file and serve their documents by 5:00pm AEDT on Friday 1 December 2023.
  - 12.2 The Respondent to file and serve their documents by 5:00pm AEDT on Tuesday 5 December 2023.
  - 12.3 The Appellants to file and serve any material in reply by 5:00pm AEDT on Friday 8 December 2023.
  - 12.4 The interested parties to file and serve any material on which they intended to rely by 5:00pm AEDT on Wednesday 13 December 2023.
13. Prior to and at the pre-hearing conference, Ms Walker, Counsel for the Appellants, indicated that the Appellants proposed to engage “an internationally qualified FIG Brevet Judge” to comment on the “selection itself” and on “how judging operated at the Nominated Selection Event held on 5 November 2023”. Primarily for that purpose Counsel requested that GA provide copies of the video footage from the Nominated

Selection Event, and all “tariff sheets”. A tariff sheet is an illustrated declaration of the elements of difficulty which each group will be performing in their routine at the competition. During competition the tariff sheet is used by Difficulty Judges to follow along and confirm each element is performed correctly.

14. On 23 November 2023 the Tribunal determined that GA should not be required to provide copies of the video footage but that all tariff sheets should be supplied. At the time the Tribunal gave brief reasons for that decision and indicated that the Tribunal would provide more fulsome reasons in the reasons for the determination of the arbitration. The Tribunal now provides those reasons hereunder.
15. GA advised that there was video footage available, but that it is only ever viewed by the Judges if there is a challenge to the difficulty score as opposed to execution. Apart from that no video footage is seen by the Judges or relied on by them for any aspect of their scoring, which is completed “on the spot”. No challenges to any difficulty score were made at the Nominated Selection Event and all relevant competitors were awarded the difficulty score by the Judges as prescribed on the submitted tariff sheets. Thus here, the Judges did not view the video footage, and nor was any video footage ever viewed by the Selection Panel.
16. In these circumstances the Tribunal found that it would be inappropriate to now have the video footage viewed by an “expert” and an opinion provided when that exercise would not replicate the subjective exercise undertaken by the Judges who were present at the event and whose scoring was immediate.
17. There were also issues of procedural fairness involved. For example, there was no suggestion by the Appellants of wanting to have the Judges cross-examined as to their scoring in light of the expert’s opinion, yet that would have been entirely necessary. Indeed, it would have been expected that the Respondent would want to cross-examine the expert. And further, it seemed that the intention of the Appellants was not just to have the expert comment on their performance, but on all performances at the event. That plainly raised issues of proportionality.
18. The tariff sheets were provided by GA but in the end no expert evidence was presented by the Appellants, and those sheets were not referred to in their written submissions.
19. The parties, including the interested parties, complied with the timetable for the filing of documents. However, no witness statements were provided and that fed into the Tribunal’s decision not to have an oral hearing.

20. As regards other documents, prior to and immediately after the pre-hearing conference the Tribunal was provided with the following documents:
  - 20.1 The Application form and the annexure thereto.
  - 20.2 The FIG 2022-2024 Code of Points.
  - 20.3 Gymnastics Australia Constitution, 26 April 2023.
  - 20.4 Functional Statement – Acrobatics National Commission, 13 July 2021.
  - 20.5 GA Selection Policy Part A, 21.08.23.
  - 20.6 GA Selection Policy Part B, 2024 Acrobatic Gymnastics International Events, 26.07.23.
  - 20.7 GA Selection Policy Part B, ACR National and Development Squad 2023.
  - 20.8 GA Selection Appeals Policy, 29 September 2020.
  - 20.9 Reasons for Decision by GA's Acrobatic Gymnastics Selection Panel.
  - 20.10 ACR World Championships and World Age Group Competition Information Sheet.
  - 20.11 A document setting out the scores of each group at the nominated Selection Event.
  - 20.12 GA's Acrobatic Gymnastics Technical Regulations.
  - 20.13 Tariff sheets for each routine performed by the gymnasts noting that the copies of the tariff sheets used on the day of competition by the judges to take notes on are securely destroyed at the end of the competition.
  - 20.14 The GA Selection Meeting Minutes.
  - 20.15 A document from GA setting out the judging Panel composition and approval.
  - 20.16 A document from GA in relation to the eligibility of the second ranked team, Interested Party A.
21. The Tribunal needs to comment on the reply filed by the Appellants, and the written submissions of the interested parties.

22. The purpose of a reply is to respond to the submissions made in this instance by the Respondent. However, it is not an opportunity to make a new submission or present new material; otherwise, the Respondent is seriously disadvantaged, because the Respondent has no opportunity to respond to the new submission or new material.
23. On that basis paragraph 13 of the reply together with all of the attachments in Appendix 1 will be disregarded by the Tribunal given they contain new material and a new submission.
24. The written submission by Interested Party B is flawed. It is an attempt to file an appeal on their own behalf rather than just supporting the appeal by the Appellants. For example, in the summary of their submissions they seek an outcome which goes beyond the outcomes sought by the Appellants, and they seek to introduce a ground of appeal which is not a ground relied on by the Appellants, namely "potential bias".
25. They also attach as annexure "B" their email to GA being their "First Instance appeal, Written Notice of Dispute of Non-selection". That was not proceeded with and it will be disregarded. In summary then the Tribunal will only take into account those matters contained in their submission which supports the Appellant's appeal.
26. With the written submission made by Interested Party A, the Tribunal notes that they have in effect responded to some of the new material contained in the Appellants' reply. Consistent with the Tribunal's ruling to disregard that new material the Tribunal will disregard the response to that material by Interested Party A. Apart from that the Tribunal will take into account those matters that are put by them in support of GA's response.

### **The Grounds of Appeal and Outcomes sought**

27. Clause 5.2(b) of the Appeals Policy provides the grounds on which a non-selected athlete may bring an appeal to the National Sports Tribunal, noting that the Appellant has the onus of making out the ground(s) of appeal.
28. The Appellants relied on two of the specified Grounds of Appeal as follows:
  - 28.1 Selection Policy Part A and/or Part B was not properly applied by GA with respect to the non-selected athletes.
  - 28.2 There was no material on which GA's decision could be reasonably based.
29. Pursuant to clause 5.2 of the Appeals Policy the Appellants seek that:

- 29.1 The National Sports Tribunal uphold the appeal in accordance with clause 5.2(h);
- 29.2 There be a finding that there was such disregard for the proper application of Policy B that a reasonable person would apprehend that it is unlikely that Policy B would be applied properly by GA should the matter be referred back to it (clause 5.2(k)(ii)); and
- 29.3 The arbitrator determine the selection of the Appellants (clause 5.2(k)); or
- 29.4 Alternatively to 29.2 and 29.3, the arbitrator refer the matter back to GA with a direction that the Selection Panel must not utilise the Nominated Selection Event in its determination given the irregularities in the judging Panel on the day.
30. The Respondent seeks that the National Sports Tribunal dismiss the appeal in accordance with clause 5.2(h) of the Appeals Policy.

### **Background facts**

31. The Respondent is the national governing body for gymnastics in Australia.
32. On 5 November 2023, the Appellants participated in the World Championships and World Age Competition Trial, conducted by the Respondent as the Nominated Selection Event for the World Age Group Competition and Junior World Championships Team selection.
33. The other teams to compete at the Nominated Selection Event were Interested Party A, Interested Party B and Team [REDACTED].
34. Team [REDACTED] was judged the top group for the relevant Division, meeting the All Around Score and minimum difficulty in each routine. Pursuant to clause 5(iii) of Selection Policy Part B they were automatically nominated for selection in the team. Interested Party A gained the second position and were nominated for selection in the team. The Appellants were not selected but were appointed as the non-travelling reserve team.
35. In terms of the scores, 0.07 separated Interested Party A from the Appellants. There is a dispute on the papers between the parties as to whether this difference comes from the execution score or the difficulty score. However, it is not demonstrated how the reason for the difference is of any consequence for the purposes of the appeal.

36. The Judging Panel on the day comprised eleven judges of whom five were FIG Brevet 4. One was FIG Brevet 3, one was FIG Brevet 2, one was Advanced Silver and three were Advanced Judges. The Chief Judge was Michelle Mason and the Difficulty Judge was Deborah Van Hagen. They were also on the approved Selection Panel.
37. The Selection Panel met on 10 November 2023 and reconvened on 13 November 2023. GA have provided the relevant extract of the minutes of the meeting on 10 November 2023 when the teams were selected for the subject event. There was no relevant discussion around this during the meeting on 13 November 2023, save to confirm the selections and thus no minutes of that meeting have been provided.
38. Relevantly the minutes of the meeting on 10 November 2023 provide as follows:

“...The ACR selection committee conferred virtually on Friday 10.11.23 to determine its recommendation to fill the positions for the World Age Group Competition.

The following was taken into consideration when making recommendation:

1. Eligibility.
2. Attendance at selection events.
3. Performance criteria.

Performance results taking in consideration:

- Nominated Selection Event (World’s Trial).
- Australian Gymnastics Championships.
- National Clubs Carnival.
- August National Squad Selection Event.
- Flanders International Acro Cup.
- Vergas International Acro Cup.
- Maia International Acro Cup.
- Budapest International Acro Cup.

...

### **Discussion:**

### **12-18 Women’s Group**



The selectors observed the following:

- The top ranked group from the Nominated Selection Event was the group from [REDACTED] Gymnastics. As they achieved the All Around Score of 78.00 and minimum difficulty requirements in each routine, they would be automatically selected to the Team as outlined by the Selection Policy – Part B.
- Noted the [REDACTED] Group of [REDACTED], [REDACTED] and [REDACTED] did not participate in the Nominated Selection Event and did not complete an Application for Extenuating Circumstances meaning they are not eligible for selection.
- The Panel assessed the eligibility of all remaining groups and confirmed their eligibility.
- For the remaining three groups, the Panel noted participation at events as outlined in Appendix One of Policy B.
- In reviewing the performances at the outlined events, the Panel determined that at no time other than the Nominated Selection Event (World's Trial) did all groups in this category compete against each other at the same event.
- The selectors discussed the weighting of events and determined in priority order:
  - Head-to-head live competition provided the most reliable assessment of the performances of the groups under consideration and would carry the greatest weight. This was due to the teams being assessed by the same judging Panel on the same day which provided more consistency of results.
  - Recency of the events was important, and the more recent event should carry more weight.
  - With this in mind the Selection Panel agreed to weight the Nominated Selection Event at 100%.

In confirming their selections, the Selection Panel reiterated the following points at the end of the discussion:

- At the Nominated Selection Event, the remaining three groups went head-to-head under a common judging Panel and was the most recent competition.
- Selectors can determine weighting a competition in their application of the Selection Policy.

- The decisions is in keeping with the purpose of the event as per the Selection Policy.
- The decision is in keeping with the performance targets as per the Selection Policy.
- The Selectors recognised that it was a close decision between the four eligible groups and focused on the head-to-head competition.
- Selectors unanimously agreed to select Interested Party A who ranked 2<sup>nd</sup> at the Nominated Selection Event and select the 3<sup>rd</sup> ranked group from [REDACTED] to the non-travelling reserve position.”

39. GA has provided the reasons for the decision of the Selection Panel. Relevantly paragraph 4 of those reasons states as follows:

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

a) Ahead of the meeting the Panel had 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 head-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.”

### **The Selection Policies**

40. The applicable GA Selection Policy for the subject event is in two parts (A & B). Part A, which sets out the over-arching policies of GA towards selection for GA teams irrespective of the particular discipline, was approved by GA's CEO on 21 August 2023, and Part B which was specifically for 2024 Acrobatic Gymnastics International Events was approved by the CEO on 26 July 2023.

41. Relevantly, Selection Policy Part A provides as follows:

“2.2 This policy, read and applied with the applicable Selection Policy Part B and the Selection Appeals Policy, forms the GA Selection Policy for which GA formally selects a Team or Squad.

...

3.5 A Selection Policy Part B may be amended by GA at any time prior to selections being determined for an Event or Squad.

...

4.13 The Selection Panel shall document the process implemented and rationale for making its selection decisions.”

42. Relevantly, Selection Policy Part B provides as follows:

“2. This policy must be read and applied with GA's Selection Policy Part A and the Selection Appeals Policy, which together form the GA Selection Policy for the selection of the Team for the event(s) listed in clause 3.1.

...

7. This clause identifies the members of the Selection Panel.

...

- 8.1 The Selection Panel will consider a Pair or Group's performances in the Nominated Selection Events, as outlined in the relevant Appendix below.

...

- 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.

...

- 10.1 2022-2024 FIG Acrobatic Code of Points will be utilised in all selection activities and decisions.

43. Appendix One to Selection Policy Part B will be referred to where necessary, but for now the Tribunal highlights clause 5 i which provides:

"The requirements to be met by a pair or a group at the Nominated Selection Event in order to be considered for selection (Performance Requirements) are as follows and are subject at all times to adjustment in accordance with Clause 3.5 of the Selection Policy Part A."

And clause 5 iv which provides:

“Remaining pairs/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 of 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...”

**Ground 1: Improper Application of Selection Policy Part B with respect to the Appellants.**

44. The submissions of the Appellants in support of this ground can be summarised as follows:

- 44.1 The Selection Panel misapplied Selection Policy Part B by ignoring the events identified in clause 5 iv of Appendix One of Part B.
- 44.2 Clause 8 of Selection Policy Part B required a holistic consideration of not only the Nominated Selection Event, but the events in clause 5 iv as well. If that had been done that would have revealed the consistent performance history and documented ability of the Appellants to achieve the enumerated performance targets.
- 44.3 Although clause 9.2.2 of Selection Policy Part B provides the Selection Panel with discretion in terms of weighting the events based on recency and level of competition, it did not empower the Selection Panel to disregard the events in 5 iv.
- 44.4 To weigh the Nominated Selection Event at 100% effectively rewrites the policy, and if the competing athletes had known that they would have approached the competition differently.
- 44.5 The Selection Panel’s reliance on consistency of judging Panels is not a clause 9.2 consideration. In any event, it discounts the Appellant’s ability to demonstrate that they can perform well across a diversity of judging Panels.

- 44.6 The Selection Panel knew that applying a 100% weighting to the Nominated Selection Event benefited Interested Party A to the detriment of the other groups.
- 44.7 Weighting the Nominated Selection Event at 100% meant that the Appellant's international results were completely disregarded.
- 44.8 Given the recent decision of *Thorpe v Gymnastics Australia* (NST – E23 – 173421) GA is aware that near head-to-head competition is unlikely to be a sufficient basis to ignore other events.
- 44.9 The minutes of the selection meeting on 10 November 2023 failed to state who attended the meeting and who had input into the decision. Documenting attendance at a meeting is a basic governance principle. Further, there are no minutes of the meeting that took place on 13 November 2023 which is a contravention of clause 4.13 of Selection Policy Part A.
45. As can be seen, one of the primary complaints of the Appellants is the alleged failure by the Selection Panel to give consideration to the other events identified in clause 5 iv of Appendix One of Selection Policy Part B in order to assess each team's ability to achieve the performance targets.
46. GA respond by submitting that the Selection Panel did consider all events listed in clause 5 iv, however, the Panel determined that in identifying the Team most likely to achieve the performance objective the Nominated Selection Event should 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 the competition.
47. The Tribunal finds that this is in accordance with Selection Policy Part B.
48. Clause 8.1 provides that the Selection Panel will **consider** the performances in the Nominated Selection Events, as outlined in Appendix One. Clause 9.2 then provides as set out in paragraph 42 above.
49. The reasons at paragraph 4 indicate that this is what the Selection Panel did, and it was clearly within their discretion to weight the Nominated Selection Event at 100%.
50. This is also borne out in the minutes of the meeting on 10 November 2023, as set out at paragraph 38 above.

51. It is submitted by the Appellants that the Selection Panel failed to comply with clause 4.13 of Selection Policy Part A in that they did not document the process implemented and the rationale for making its decision. The Tribunal rejects that submission; the reasons and the minutes amply comply with this clause.
52. It is not an accurate portrayal of what occurred to submit that the Selection Panel “ignored” or “disregarded” the events identified in clause 5 iv. Indeed, the opposite is the case.
53. Nor is it open to suggest that to weigh the Nominated Selection Event at 100% effectively re-writes the policy. The policy allows for that to occur in the discretion of the Selection Panel.
54. Further, there is no material to suggest that if the competing athletes had known of that weighting they would have approached the competition differently; that is mere speculation.
55. The suggestion that reliance on consistency of judging Panels is not a clause 9.2 consideration is also ill-founded. Clause 9.2.2 allows for the Selection Panel in the weighting of events to consider “several factors including but not limited to, recency of events and level of competition. That does not exclude reliance on consistency of judging Panels as a factor.
56. The Tribunal rejects the veiled suggestion of bias in the allegation that the Selection Panel knew that the 100% weighting of the Nominated Selection Event benefited Interested Party A to the detriment of the other groups. For a start, there is no ground of appeal to that effect relied on by the Appellants, and there is no material presented to justify the allegation.
57. As for the Appellant’s international results, that of course was known to the Selection Panel in the context of their consideration of the events identified in clause 5 iv, but in their discretion they determined one reason for weighting the Nominated Selection Event at 100% was the recency of that event, the international event that the Appellant’s attended was in April 2023, which was eleven months prior to the World Age Group Competition.
58. The reliance by the Appellants on the decision of *Thorpe v Gymnastics Australia* is difficult to understand. It is suggested that the decision made GA aware that mere head-to-head competition is unlikely to be a sufficient basis to ignore the other events. Firstly, the Selection Panel here did not “ignore” the other events; secondly, the factual matrix

in *Thorpe* is entirely distinguishable from the factual matrix here, and it is difficult, if not impossible, to draw a comparison between the two; and thirdly, the Tribunal could not see where the proposition promoted was a finding by the Tribunal in that case such that it could be applied in this case.

59. In relation to the submissions going to the minutes of the meeting of the Selection Panel, the first document in Appendix 1 to the written submissions of the Respondent identify who was present at the meetings on 10 November and 13 November. The second document in Appendix 1 records the withdrawal of [REDACTED] from the Selection Panel as a result of a conflict of interest. The absence of minutes for the meeting on 13 November 2023 is explained on the basis that the selection process was conducted on 10 November 2023 and not 13 November 2023.
60. In paragraph 15 of the reply of the Appellants they refer to the fact that at the meeting one of the attendees was “Hannah Catchpole” who was described as a “policy observer”, and suggest that because there is no explanation of that role, no reference to it in Selection Policy Part A or Selection Policy Part B, and no documentation of what role that person plays in selection, and further, as this person is not listed in the Selection Panel in clause 7 of Selection Policy Part B, the Selection Panel was improperly constituted, and there is a further breach of clause 4.13 of Selection Policy Part A. Frankly, the Tribunal does not treat this as a serious complaint and rejects the submission out of hand. The Tribunal proceeds on the basis that the Selection Panel comprised of Amy Jones, Michelle Mason and Deborah Van Hagen with the policy observer being nothing other than that, namely an observer.
61. Next, the Tribunal is compelled to address the queries raised in paragraph 17 of the reply of the Appellants.
62. First, given that the footer of the first document in Appendix 1 attached to the written submissions of the Respondent states “Circular Resolution Number 2023 – 04AR”, it is said that it is “unclear” whether in fact there was a meeting. However, the logic of this query is lost on the Tribunal and the Tribunal is not persuaded that the meeting did not take place.
63. Secondly, it is suggested that the first document has been altered since the date of the meeting because it refers to the Panel reconvening on 13 November 2023. However, what the Appellants overlook in this suggestion is that GA emphasise that this document and the second document in Appendix 1 were summary documents.



64. Thirdly, it is submitted that because the Selection Nomination Resolution does not identify who made the recommendation it did not comply with clause 4.13 of Selection Policy Part A. Again, the Tribunal rejects that submission; it is plain that the Selection Panel made the recommendation.

65. There is no merit in Ground 1 of the appeal.

**Ground 2: No Material upon which GA’s Decision could be Reasonably Based**

66. The Appellants provide two reasons why Ground 2 should succeed, as follows:

“First, given that the judging Panel was not properly constituted and qualified in accordance with GA’s own policies, the results relied upon by the Selection Panel were invalid. Thus, the Selection Panel’s reliance on those results could not and should not form the basis of a valid selection decision.

Secondly, an objective analysis of the results in both the Nominated Selection Event and 5 iv events shows that the Appellants are a superior trio to [Interested Party A].”

67. The starting point for the Appellants’ argument is clause 10 of Selection Policy Part B which provides that, “2022-2024 FIG Acrobatic Code of Points will be utilised in all selection activities and decisions”.

68. That Code of Points requires that judges have FIG Brevet qualifications, and because all of the judges at the Nominated Selection Event did not have that qualification, it is said that the judging Panel was not properly constituted, and thus the Selection Panel’s reliance on the scores given could not form the basis of a valid selection decision.

69. The Respondent does not deny that the Code requires that judges have FIG Brevet qualifications (article 10.2), but first says that the intention of clause 10 is for the Code to be utilised in relation to the skills and performance elements required by each pair/group, and not in relation to the qualification of judges given that the Nominated Selection Event was an Australian sanctioned event and not a FIG sanctioned event (which requires the Judges to be as per the Code). Secondly, in terms of the qualification of judges, GA’s 2023 Acrobatic Gymnastics Technical Regulations applied rather than the Code. Clause 7.4.2 of those Regulations provides as follows:

“The International Program judging Panel/s will consist of qualified FIG Brevet judges and Advanced Silver judges. Other judging roles ... can be filled by Advanced ... judges.

- The composition of judging Panel/s will conform to the prevailing FIG Code of Points. At National competitions modifications to this format may only be made by the National Judging Coordinator and National Technical Director at the written direction of GA Events and Integrity teams when there are not enough FIG Brevet judges available or other factors such as the need to balance the Panel with regards to Club/State.
- Where an Australian Team Selection Trial is held in conjunction with an International Program competition, the judges officiating on the Panels must be approved by the National Judging Coordinator and National Technical Director.
- 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. Other judging roles... can be filled by Advanced judges.”

70. GA explained in Appendix 4 to their written submission that Australia only has thirteen FIG Brevet acrobatic judges and when eleven are required for an event, it is often difficult to achieve that due to the judges being volunteers and having other commitments on any given day. That of course makes perfect sense.

71. In this instance only seven FIG Brevet judges made themselves available for the Nominated Selection Event, and the remainder of the judges had to be made up of Advanced Silver accredited judges and Advanced judges (with limited responsibilities such as only judging artistry – see clause 7.4.1 of the Technical Regulations).

72. Relevantly, in the introduction of the 2022 – 2024 Acrobatic Gymnastics FIG Code of points, the following appears:

“2. In cases of any contradiction between the Code of points and the Technical Regulations, the Technical Regulations will prevail.

...

6. National Federations may adjust the rules for internal events to meet their particular developmental needs.”

73. And further, as also explained by GA, when an athlete nominates for selection to a GA activity, they agree to be bound by all GA policies and processes including the Technical Regulations.
74. The Appellants also argue that two of the judges at the Nominated Selection Event, Michelle Mason and Deborah Van Hagen, held dual roles, Michelle as Chief Judge and Selection Panel member, and Deborah as Difficulty Judge and Selection Panel member, and this contravened the Code of Points meaning that the judging Panel was improperly constituted, and that the Selection Panel's reliance on the judges scores cannot stand, resulting in there being no material on which the decisions of the Selection Panel could be reasonably based.
75. This argument is based on the Code of Points where article 10.2 requires a judge to "hold no other responsibility during the competition". Immediately it should be noted that the article does not refer to "dual roles" but rather "other responsibilities"; there is clearly a difference.
76. In any event, in response GA make the following valid points. First, the Nominated Selection Event was not a FIG sanctioned event, and therefore article 10.2 of the Code did not apply. Secondly, and in any event, neither Michelle Mason nor Deborah Van Hagen were acting in the role of a selector on the day; they were independent judges with no affiliation with a club. It is not to the point that they were appointed to the Selection Panel in July 2023; it is a question of what responsibilities were being carried out on the day of competition, and clearly selection was not one of them.
77. The Tribunal rejects the submissions of the Appellant and finds that the judging Panel was properly constituted and qualified in compliance with GA's own policies. Thus, the Selection Panel were 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.
78. Pausing there, the Appellants also raise an argument based on article 11.18 of the Code which empowers the Chief Judge to "respond to any judge who stands to indicate an error in recording a mark". It is put in paragraph 35(a) of the Appellants' written submissions, that in the context of the claim that the judges' scores cannot stand when the judges were not qualified to give them, and thus there was no material on which the Selection Panel's decision could be reasonably based, that this is especially so where Michelle Mason, as the Chief Judge, was able to direct other judges on how to score. However, there is no suggestion in the material before the Tribunal that any judge stood

“to indicate an error in recording a mark”, and nor that the Chief Judge directed other judges on how to score. Thus, it is entirely unclear how this goes to supporting this ground of appeal.


79. Turning then to the second reason put as to why there was no material upon which GA’s decision could be reasonably based.
80. 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.”
81. Thus, given the justifiable approach that the Selection Panel took there was clearly material upon which their decision could be reasonably based. The selectors agreed Interested Party A would be the selected group having achieved the higher All-Around score at the Nominated Selection Event in head-to-head competition.
82. In these circumstances there is also no merit in this ground of appeal.

**The Tribunal therefore determines:**

1. The appeal be dismissed.

Date: 22 December 2023 (decision given 20 December 2023)

Signature:



The Honourable Steven Strickland KC