



NST-E24-189691

Appellant v Water Polo Australia

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Professor Jack Anderson

in the arbitration between

Appellant

(Applicant)

Represented by Neha Dubey, Legal Representative

And

Water Polo Australia

(Respondent)

Represented by Darren Kane, Legal Representative and Tim Welsford, CEO

And

Interested Party A

(Interested party)

Unrepresented

Interested Party B

(Interested party)

Unrepresented



PARTIES

1. The Appellant (or **non-nominated athlete**) is an international-standard athlete who has represented Australia in the sport of Water Polo.
2. The Respondent, Water Polo Australia, (**the Respondent or WPA**) is the national sporting organisation for the sport of Water Polo in Australia.
3. The Interested or Affected Parties (or **non-nominated athletes**), Interested Party A and Interested Party B, are international-standard athletes who have represented Australia in the sport of Water Polo.

INTRODUCTION

4. The Appellant appeals (**the Appeal**) a decision by the Respondent notified to the Appellant on 6 May 2024 not to nominate him for the Australian Men's Water Polo Team for the 2024 Paris Olympics (**Olympics**).
5. The decision by the Respondent was based on the recommendations of a Team Selection Panel (**TSP**) appointed under clause 6.1 of the Nomination Criteria Paris 2024 Olympic Games Water Polo (**WPA Nomination Criteria**) and consisting of (per clause 6.2): a Selection Panel Chair and Convenor (The National Federation General Manager Performance); the National Head Coach for the relevant gender (or their replacement in the case of a conflict of interest); and an independent member appointed by the National Federation. In this instance, the TSP gave its recommendation after the Doha World Championships of 2024 and then, pursuant to clause 6.1 of the WPA Nomination Criteria, forwarded its nominations to the WPA CEO and Board for ratification.
6. The single ground of appeal pursued by the Appellant, and on whom the onus is in making it out, is by way of clause 9.1 of the WPA Nomination Criteria and invoking clause 9.6(c)(ii)(B) of the AOC Olympic Team Nomination and Selection By-law (**AOC Selection By-law**) – that the applicable Nomination Criteria were not properly applied by WPA.
7. In asserting that the WPA Nomination Criteria were not properly applied by WPA, the Appellant focused on the interpretation and application of clause 6.3(b) and clause 6.4 of the WPA Nomination Criteria. These clauses are referred to throughout this determination and thus are reproduced in full below:

6.3 The National Federation will nominate Athletes who, in the opinion of the Team Selection Panel, in its absolute discretion:

(a) will be most likely to contribute to the Australian team for the Sport achieving the highest competitive results at the Games; and

(b) is, and will remain a positive ambassador for the Sport, the National Federation and the Games.

6.4 In determining which Athletes best meet the criteria in clause 6.3, the Team Selection Panel may have regard to any, all or none of the following factors, in its absolute discretion and in no particular order:



(a) the consistency and quality of an Athlete's performances for a period of 36 months prior to the Nomination Date (Performance Period) against teams ranked in the top ten (10) according to the International Federation's World Rankings at the time of each performance. For the avoidance of doubt, not all performances during the Performance Period need to be considered and performances outside the Performance Period will not be considered;

(b) the consistency and quality of an Athlete's performances in domestic competitions and National Federation camps (if held) during the Performance Period. For the avoidance of doubt, not all performances during the Performance Period need to be considered and performances outside the Performance Period will not be considered;

(c) whether an Athlete contributes to the ideal composition and balance of the Australian team for the Sport at the Games, including but not limited to the positional coverage offered by the Athlete;

(d) the Athlete's adherence to the obligations contained in any current or prior WPA Athlete Agreement; and

(e) the Athlete's contribution to any current or previous Australian team both in and away from the competition environment. For the avoidance of doubt, in assessing an Athlete's contribution under this clause, the Team Selection Panel may consider the following factors: an Athlete's leadership capability, an Athlete's behaviour, the overall contribution of the Athlete to an Australian team's performance and the ability of the Athlete to demonstrate National Federation values and behaviours.

8. On acknowledging the TSP's absolute discretion in clauses 6.3 and 6.4 of the WPA Nomination Criteria, the Appellant submitted that the TSP had failed to give adequate consideration to the criteria or, alternatively, the TSP had taken into account irrelevant considerations outside the applicable criteria. Moreover, the Appellant submitted that in the context of the Appellant's "length, consistency and quality" of performance, the TSP should have selected the Appellant rather than a particular nominated athlete other than Interested Party A or Interested Party B (**Other Nominated Athlete**) for the Olympics.
9. The Appellant had, as was their right pursuant to clause 9.6(a)(iii) of the AOC Selection By-law, twice requested written feedback from the Respondent regarding the determination of the TSP not to nominate him. On the first occasion (7 May 2024), the request was general in nature; on the second occasion (9 May 2024), the request by the Appellant was more specific to the interpretation by the TSP of clauses 6.3(b) and 6.4 of the WPA Nomination Criteria.
10. The CEO of WPA provided such feedback by way of letter on the 8 May (**A Letter No 1**) and 10 May (**A Letter No 2**). In A Letter No 1, the CEO of WPA referenced (i) clause 6.4(a) and 6.4(c) of the WPA Nomination Criteria; (ii) that the specific feedback on the Appellant by the TSP was that he had an excellent work ethic and attitude and was a "team person" but that (iii) there was concern about the Appellant's ability to play in any position other than Centre Back at international level and that the Appellant had not demonstrated an ability to score goals at international level (0 goals at last 2 Benchmark Events).
11. In A Letter No 2, the CEO of WPA made reference to the TSP taking into account the following four points:



- *All field positions in water polo are required to play both attack and defense. Therefore, when reviewing athlete performances an athlete's ability to play at both ends of the pool is a significant consideration.*
 - *At the Paris 2024 Olympic Games only 13 athletes can be selected and should an athlete be unable to take to the pool on a match day due to illness or injury there is no ability to bring in a replacement player. Therefore, composition of the team was a major consideration - specifically the ability to cover all positions and perform should an athlete become ill or injured. Therefore, the utility value (ability of athletes to fill other team roles) an athlete brings to the team was a was a significant consideration.*
 - *An athlete's utility value is also important for managing team balance, workload and tactics during a match when the team has an athlete(s) on multiple major fouls or fouled out.*
 - *In summary, evaluating your strengths in defense against your weakness at the attacking end when playing Centre Back, combined with the utility value you bring to the team has resulted in the selection panel determining that you are not in the 13 players that make the ideal composition and balance of the team for the 2024 Paris Olympic Games.*
12. The Respondent, acknowledging the fraught and understandably emotional nature of nomination matters, nevertheless highlighted with reference to clauses 6.3 and 6.4 of the WPA Nomination Criteria that the TSP had an absolute discretion thereunder and thus the stated ground of appeal (the merits of which it, in any event, they disputed) should be dismissed summarily.

NST JURISDICTION

13. Pursuant to section 13 of the National Sports Tribunal Act 2019 (**NST Act**), the presiding member has been appointed by the Minister by written instrument as a Member of the Tribunal, and pursuant to section 24 of the National Sports Tribunal (Practice and Procedure) Determination 2021 (**NST Determination**), was appointed by the CEO of the Tribunal to conduct this arbitration under section 23 of the NST Act in the General Division of the Tribunal.
14. Pursuant to section 16(1) of the NST Act and rule 6 of the National Sports Tribunal Rule 2020, a Tribunal member is obliged to notify the CEO of the Tribunal of any conflict of interest in a matter to which he or she is appointed. There is no such interest to be notified in this case.
15. The jurisdiction of the NST to hear and determine the present dispute arises pursuant to section 23 of the NST Act which provides that where a dispute arises between a person bound by one or more constituent documents by which a sporting body (in this case the Respondent) is constituted, and one or more of those documents permit the dispute to be heard in the General Division of the National Sports Tribunal, the person (in this case the Appellant) may apply to the Tribunal for arbitration of the dispute.



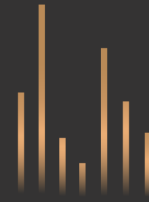
16. As stated in paragraph [6] above, the Appellant appeals (pursuant to clause 9.1 of the WPA Nomination Criteria and invoking clause 9.6(c)(ii)(B) of the AOC Selection By-law) on the single ground that the applicable Nomination Criteria were not properly applied by WPA. As per clause 9.2 of the WPA Nomination Criteria, any Appeal arising out of the WPA Nomination Criteria which is commenced under clause 9.6(c) of the AOC By-Law is to be heard in first instance by the NST General Division.
17. Section 40 of the NST Act sets out general principles applicable to NST arbitration as follows:
- (1) In the arbitration:*
- (a) the procedure of the Tribunal is, subject to this Act, within the discretion of the Tribunal;*
- (b) the arbitration must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit; and*
- (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.*
- (2) The parties must act in good faith in relation to the conduct of the arbitration.*
18. In addition, section 28 of the NST Determination provides that the Tribunal may inform itself in arbitration in a variety of ways. Most importantly, the Tribunal is not bound by the rules of evidence.
19. Section 52 of the NST Determination states that a Tribunal may determine a dispute without a hearing:
- (1) Where the Tribunal considers it appropriate to do so and all the involved parties to the dispute agree, the Tribunal may determine the dispute without a hearing.*
- (2) The Tribunal is to act in accordance with the terms of the relevant constituent document or agreement for the resolution of the dispute.*
20. Given the expedited nature of this matter; in line with section 52(1) of the NST Determination and clause 9.6(c)(v)(D) of the AOC Selection By-Law; and having obtained the consent of the Parties; the Panel Member decided on 16 May that the matter could be dealt with “on the papers” and by written submissions only and without the need for an oral hearing. As stated, the consent of the Parties was obtained, and no party objected to this course of conduct or otherwise to this Tribunal hearing and determining the outcome of the Appeal.

PROCEEDINGS BEFORE THE NST

21. The Appellant’s application to the NST was dated 10 May 2024. On 11 May 2024, the Member was allocated this matter and on verification of the Member’s declaration of no conflict of interest in this matter, the NST Registry supplied the Member with the Appellant’s application form; the WPA Nomination Criteria, the AOC Selection By-law, A Letter No 1; and A Letter No 2.



22. In the Appellant's application and accompanying correspondence, the Appellant requested four categories of documentation, which the NST directed should be provided – see paragraph [24] below.
23. As this was a First Instance Nomination Appeal for the 2024 Olympic Games, the NST's objective was to facilitate an expedited process and, in that context, the NST noted that originally a hard deadline (to complete the matter) of Tuesday 14th May had been provided by the Australian Olympic Committee. Initial directions by the NST on 10 and 11 May were based around that date. It later transpired that there was a softer deadline.
24. Subsequently, on 10 and 11 May 2024, the Parties were directed as follows (**the Directions**):
- a) Water Polo Australia to produce the documents requested by the Appellant by 9:00am AEST Monday 13 May 2024.
 - b) The Appellant to file with the NST and serve on the other parties, any submissions and evidence on which he wishes to rely on by 5:00pm AEST Monday 13 May 2024.
 - c) Water Polo Australia to file with the NST and serve on the other parties, any submissions and evidence on which they wish to rely by 5:00pm AEST Wednesday 15 May 2024.
 - d) Interested Party/ies (if any) to file with the NST and serve on the other parties, any submissions and evidence on which they wish to rely by 12:00pm AEST Thursday 16 May 2024.
 - e) The Appellant to file with the NST and serve on the other parties, any submissions and evidence on which he wishes to rely on in reply by 12:00pm AEST Friday 17 May 2024.
 - f) A short oral hearing (if any) will take place at a time nominated by the NST Member. Alternatively, the NST Member may consider the matter can be dealt with on the papers.
 - g) The NST will provide its decision at the conclusion of the oral hearing or by 5:00pm AEST Saturday 18 May 2024, with written reasons to follow, if not provided at the same time.
25. The Parties abided by the above Directions and otherwise greatly assisted the Member in the running of this matter and for which the Member is grateful.
26. With regard to the documents sought by the Appellant (para 24(a) above), the Appellant sought, and the Member agreed to order on 11 May 2024, that WPA supply the following:
- All notes, records and other documents in support of the Selection Panel's decision in selecting the Olympic team, what the Appellant called Category 1 documents;
 - [Category 2] All game statistics for all games in the Performance Period;
 - [Category 3] Swim test results for the Appellant and the Other Nominated Athlete from the Performance Period; and
 - [Category 4] Gym test results for the Appellant and the Other Nominated Athlete from the Performance Period.



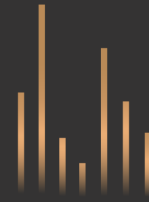
27. There was some correspondence between the Parties and with the Tribunal on the documents. In summary of that correspondence, WPA initially supplied the Category 2 documents to the extent that they provided cumulative statistics of the 2022-2024 World Championships. WPA also supplied the Category 3 and 4 documents but reserved the right to contest their relevance. On receipt of an undertaking from the Appellant's legal representative as to the confidential and sensitive nature of some of the data therein, WPA supplied the Category 1 documents to the Appellant. As part of that undertaking, the Appellant's legal representative agreed to redact some of her submissions and agreed not to disclose such information for any purpose other than the conduct of these proceedings or otherwise without first obtaining the consent of WPA.
28. On 16 May, the Appellant asked that as per the original order by the Tribunal, all game statistics for all games in the Performance Period (the category 2 documents) be supplied – those supplied by the Respondent had been time-specific. The Tribunal re-ordered that this be done and on 17 May WPA supplied same, even though it questioned the relevance of such documentation to the single ground of appeal at issue. WPA also stated that given the sensitive, comparative nature of the some of the documentation within category 2, that the Appellant and his legal representative agree not to disclose such information for any purpose other than the conduct of these proceedings or otherwise without first obtaining the consent of WPA.
29. WPA identified all nominated athletes on the Australian Men's Water Polo team as being potentially "Affected Parties", a term found principally in clause 9.5 of the AOC Selection By-law (otherwise known as, and the equivalent of, an interested party in other NST proceedings). The Appellant identified only one Affected Party – the Other Nominated Athlete. On 13 May, the Tribunal ordered that all nominated athletes be deemed Affected Parties. WPA supplied the Tribunal with contact details of all said Affected Parties but only two of them – Interested Party A and Interested Party B – indicated that they would seek such a status for the proceedings. Subsequently, neither Affected Party made any submissions to the Tribunal.
30. As noted at paragraph [20] above, no oral hearing took place, and the matter was dealt with "on the papers".
31. The Member communicated his short-form Determination to the NST Registry, for dissemination to the parties, on Saturday 18 May. A summary of that short form Determination is as below:

Dear Parties.

I refer to the above matter. Having read and considered the written submissions made by the parties, I have determined that the appeal should be dismissed.

The ground of appeal pursued by [the Appellant] by way of clause 9.1 of the Nomination Criteria Paris 2024 Olympic Games Water Polo and invoking clause 9.6(c)(ii)(B) of the AOC Olympic Team Nomination and Selection By-law – that the applicable Nomination Criteria was not properly applied by Water Polo Australia – has not been made out.

A full reasoned determination will be made available to the parties by Wednesday 22 May 2024.



32. The above date (Wednesday 22 May 2024) was in line with the timeline required by clause 9.6(b)(vi)(E) of the AOC Selection By-law.

FACTUAL BACKGROUND

33. In reaching this Determination, although the Member has considered all the facts, allegations, legal arguments, and evidence submitted by the parties, he refers in his Determination only to the submissions and evidence he considers necessary to explain his reasoning. Unless otherwise attributed, the quotations noted in the section below – main submissions of the parties – are taken directly from the Parties’ respective written submissions.

MAIN SUBMISSIONS OF THE PARTIES

Appellant

34. The gravamen of the Appellant’s chief submission was fourfold in nature:
- a) that the TSP failed to give adequate consideration to the factors outlined in clause 6.3(b) and 6.4 of the WPA Nomination Criteria or, alternatively, that the TSP had taken into account irrelevant considerations;
 - b) that the TSP and the Respondent neither gave adequate consideration to nor justification of their application and interpretation of clause 6.4(c) of the WPA Nomination Criteria: whether an Athlete contributes to the ideal composition and balance of the Australian team for the Sport at the Games, including but not limited to the positional coverage offered by the Athlete;
 - c) that the TSP and the Respondent neither gave adequate consideration to nor justification of their application and interpretation of clause 6.4(e) of the WPA Nomination Criteria: the Athlete’s contribution to any current or previous Australian team both in and away from the competition environment, and including factors such as the Athlete’s leadership capability, an Athlete’s behaviour, the overall contribution of the Athlete to an Australian team’s performance and the ability of the Athlete to demonstrate National Federation values and behaviours;
 - d) that, in light of clause 6.4(a) of the WPA Nomination Criteria and given the length, consistency and quality of the Appellant’s performance, the TSP should have selected the Appellant rather than the Other Nominated Athlete for the Olympics.
35. With regard to the ground identified in paragraph 34(a) above, and noting the reasons given to the Appellant in A Letter No 1 and A Letter No 2, the Appellant stated that he had a distinguished club and country career, having been selected for Major Championship 1 and Major Championship 2 and playing a significant number of games for Australia. In the 2024, Australian Waterpolo League Finals Series in March, he scored a number of goals from various positions during finals and a number of goals overall in the league. Making a comparison, as WPA did, to the cumulative statistics of the 2022-2024 World Championships was, he alleged, skewed and did not reflect his performance given that there are a limited number of games at the World Championships only (whereas the Appellant had played and scored against top 10 ranked countries in a number of other high level tournaments during



that period) and, in any event, the statistics in question did not include Exclusions Gained, Blocks, Steals and Assists, all of which are metrics that better assess the Appellant's utility to the team from Centre Back.

36. The Appellant noted that, although WPA was concerned about the Appellant's ability to play in positions other than Centre Back and that he had not scored any goals in the last two Benchmark Events, this could, in large part, be explained by the Head Coach of the international men's team requiring the Appellant to play Centre Back (and even, on occasion, instructing the Appellant not to shoot) throughout the entire Performance Period in all international competitions.
37. In this, the Appellant argued that WPA could not reasonably suggest that (or at least has insufficiently explained why) it is concerned about the Appellant playing in other positions, or that the Appellant does not have the ability to play any other position, when it [WPA] "bears the sole responsibility (through the head coach) for confining [the Appellant] to playing as Centre Back for the past 36 months."
38. With regard to the ground identified in paragraph 34(a) above (contribution to composition and balance of team), the Appellant noted that Centre Back is a position that is uniquely placed in a team's overall requirements of balance, composition and strategy. As a position, it cannot be measured or statistically reduced to shots on goal and ought to be subject to metrics that better understand its role, such as Exclusions Gained, Blocks, Steals and Assists.
39. With regard to the ground identified in paragraph 34(c) above (contribution to team in and away from competition environment), the Appellant noted that he had been selected on two previous Olympic squads and "is considered a leader and mentor by many athletes in the team, undoubtedly because of his skills, experience and history with the team." He has been "extremely generous" in giving his time and profile to fulfil requests that support community engagement programs for Water Polo at state and national level, surf life saving clubs, Swimming Australia, etc.
40. With regard to the ground identified in paragraph 34(d) (comparison to the Other Nominated Athlete), the Appellant argued that on close analysis of the category 4 documents and the feedback criteria of the various TSP meetings are taken into account, and not specifically the selection matrix post the Doha World Championships, the Appellant's experience, attitude, and, generally, his athletic ability ought to have put him ahead of the Other Nominated Athlete and/or that the nomination of the Other Nominated Athlete over the Appellant has not been adequately explained or justified such that it can be seen as an unreasonable decision not to nominate the Appellant.
41. In the Appellant's reply submissions, which were principally concerned with the issue of the Respondent's absolute discretion under clause 6.3 and 6.4 of the WPA Nomination Criteria (a discrete but important matter addressed in the Merits section below), the Appellant reiterated that he was a strong and consistent high performer in both international and national games; he had contributed to the composition and the balance of the team, and to the extent he may not have, this was due to the express instructions of the head coach to only play at Centre Back throughout the Performance Period; he regularly contributed to the team outside of



competition through his involvement in educational and promotional activities; and that the statistical analysis used by WPA to compare his performance to the Other Nominated Athlete was either overly narrow in time, incomplete and, to the extent that it did exist, favoured the Appellant over the Other Nominated Athlete.

42. The remedy sought by the Appellant was, pursuant to clause 9.6(b)(ix)(B) of the AOC Selection By-law, one of remittal to the Respondent for reconsideration and redetermination.

Respondent

43. The Respondent's submissions were, in brief, that the WPA Nomination Criteria provided the TSP with absolute discretion with regard to the application of clauses 6.3 and 6.4. This discretion gave the TSP the ability to weigh or balance the various factors in clause 6.4, for example, against each other or not at all, as the TSP saw fit. The Respondent stated that in light of this clear, absolute and express discretion, the onus on the Appellant weighed heavily to show that the Respondent had failed to properly apply the various clause 6 WPA Nomination Criteria and/or had taken into account irrelevant criteria.

44. The Respondent disputed the various grounds submitted by the Appellant (summarised in paragraph 34 above) which alleged that there was a failure to properly apply the Nomination Criteria. The Respondent submitted that it need go no further than simply stating that it contested the Appellant's submissions because of the overriding and absolute discretion granted to the TSP under clause 6.3 and 6.4 of the WPA Nomination Criteria. In short, as the TSP had complied with its obligations under the Nomination Criteria, it had properly, reasonably and, ultimately, in its absolute discretion, nominated the athletes who, in the TSP's opinion, would be most likely to contribute to the Australian Men's Water Polo Team achieving the highest competitive result at the Olympics; and, unfortunately, the Appellant was not one of them.

MERITS

45. There are two key and interrelated aspects to this matter. The first is what is the nature and extent or scope of the TSP's "absolute" discretion under clause 6.3 and (especially) 6.4 of the WPA Nomination Criteria; and the answer to that question acts as a gateway to the second question – were the applicable WPA Nomination Criteria properly applied by the TSP?

46. The Respondent's submission, which WPA admitted could be described at times as "dogmatic", is that the TSP's application of, and compliance with, the WPA Nomination Criteria must, in any interpretation of clauses 6.3 and 6.4 of the Criteria, be seen in light of the express and absolute discretion given to TSP under such clauses. Even though the Respondent disputed as a point of fact the Appellant's contentions about which specific nomination criteria might or might not have been applied to the Appellant's advantage or disadvantage; the Respondent took the view that given the TSP's absolute discretion, the need to refute the Appellant's specific contentions was obviated by that discretion.

47. The Appellant, especially in his reply submissions, expressed some frustration at this; in effect stating that the Respondent had sought to draw the veil of "absolute discretion" over this matter and basically say to the Tribunal and the Appellant that there was nothing further

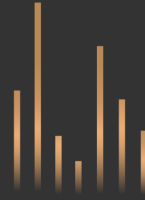


to see here, thus sidestepping the need to directly address the Appellant's ground of appeal – that the Nomination Criteria were not properly applied by WPA.

48. But the Respondent's submission was more nuanced than the Appellant suggested. The use and interpretation of the term absolute discretion must be interpreted in its context. The Respondent is not stating that the discretion in the WPA Nomination Criteria gives the TSP effective immunity from review – if it did there would be little point in the AOC Selection By-Law providing rights of appeal. What absolute discretion means in this context is that the TSP has the right to weigh the various criteria in clause 6.3 and, especially, 6.4 against each other as they see reasonably fit and with the ultimate goal, as required under the WPA Nomination Criteria, of nominating the athletes who they think, as a collective, as a team, will give Australia the best chance in the men's water polo competition at the Olympics. The Appellant may well think that the TSP ought to have given more weight to his experience, his contribution to the sport as a whole and/or ought to have taken into account that he could play in other positions and that his goal scoring record, outside World Championships is better than suggested and that his athletic/gym stats are better than the Other Nominated Athlete etc; but, the Respondent's position was that the TSP was, in their absolute discretion, entitled to look at very same criteria and data (and did look at and interpret the same criteria and data), albeit arriving at a different outcome.
49. It must also be stated that, in any event, the absolute discretion given to the TSP under the WPA Nomination Criteria is neither unreviewable by a Tribunal such as this nor can the TSP's use of it be unfettered.
50. In, arguably, the most celebrated administrative law case of all - *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, esp at 229-230) - Lord Greene MR stated as follows:
- “Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.”
51. *Wednesbury* is an established feature of Australian administrative law. Applying such principles to this matter means that the decision of the TSP – its absolute discretion notwithstanding – could be upset if proven to be unreasonable, in the sense that the Member considers it to be a decision that no reasonable body could have come to.
52. This threshold of review is usually quite high: it would have to be shown that the TSP acted in a manner that was irrational, illogical, and not based upon findings or inferences of fact supported by logical grounds. The Appellant's contention is that the threshold has been crossed on the single and simple ground that the applicable Nomination Criteria were not properly applied by WPA or at least not properly justified or explained to the Appellant by the TSP such that the matter should be remitted to the TSP.



53. The issue of absolute discretion notwithstanding, ultimately, the Appellant’s case was that, on a largely subjective and (understandably) biased interpretation of the data in favour of the Appellant – his experience, contribution to the team and sport overall, capacity to play in other positions if asked etc – the TSP got this nomination wrong; they should have nominated the Appellant instead of the Other Nominated Athlete and, moreover, the TSP did not explain its decision making process properly to the Appellant and should now be asked to reconsider it.
54. In contrast and having reviewed the submissions and all the data and methodology used by the TSP, the Member considers the decision made by the TSP and communicated to the Appellant on 6 May 2024, was one that was reasonably made and one that was rational and supported by fundamentally logical grounds. Moreover, it was one that was clearly explained to the Appellant in A Letter No 1 and A Letter No 2.
55. In addition, and as this Tribunal has stated in previous like cases, an absolute discretion given to a nomination panel is not unfettered. In *Georgina Collin v Paddle Australia* (NST-E23-97851, 4 May 2023) that applicant was not selected by that respondent in certain events for the 2023 Canoe Slalom Senior World Cup. As here, the applicant in *Collin* appealed the non-selection decision on the ground that the selection criteria had not been properly followed and/or implemented, and specifically that the respondent had not considered relevant matters relating to her selection.
56. The Tribunal in *Collin* considered case law relating to discretion, including the NST decision in *Hogan v Triathlon Australia* (NST-E23-47455, 24 February 2023) another selection dispute involving claims of bias and improper use of discretion.
57. In *Collin* and *Hogan* it was stated, in summary, that “absolute” discretion is to be informed by the objectives and aims of the nomination/selection policies, as well as the factors to which the Selection Panel may have regard as articulated in such policies, and that its discretion must be exercised in good faith, in accordance with the terms of the selection policy, and in a manner that is not unreasonable, arbitrary or capricious. It follows that if a Selection Panel does not consider matters relevant to the decision before it, that is, if a Selection Panel does not consider matters specified in the Nomination/Selection Policy and/or takes into account irrelevant matters (outside the criteria in the Nomination/Selection Policy), then the Selection Panel’s discretion can be deemed to have been unreasonably exercised and the matter remitted or set aside and substituted etc.
58. Applying the test summarised in paragraph [57] above, the Tribunal in *Collin* found that the respondent had not considered matters specified in the policy. The appeal was allowed, and the decision was remitted to the respondent with directions. In *Hogan*, the Tribunal determined that there was no evidence that the exercise of discretion by Triathlon Australia was miscarried (nor bias). Accordingly, the Tribunal had no power to substitute a different selection decision to the decision made by Triathlon Australia.
59. Applying the test summarised in paragraph [57] to the stated case, the Member concludes that that the TSP’s “absolute” discretion was clearly informed by the objectives and aims of the WPA Nomination Criteria – to nominate the team or squad that would give Australia its best chance in men’s water polo at the Olympics. The TSP exercised its discretion in good



faith, in accordance with the terms of, and relevant matters within, the WPA Nomination Criteria, and in a manner that was not unreasonable, arbitrary or capricious. Accordingly, the Tribunal denies the remedy of remittal sought by the Appellant.

THE TRIBUNAL THEREFORE DETERMINES:

1. The Appeal is dismissed.
2. The Appellant has not discharged the onus upon him that, pursuant to clause 9.6(c)(ii)(B) of the AOC Olympic Team Nomination and Selection By-law, the applicable Nomination Criteria – found in clause 6 of the Nomination Criteria Paris 2024 Olympic Games Water Polo – were not properly applied by the Respondent.
3. Subject to the exercise of clause 9.6(c)(vi)(F) of the AOC Olympic Team Nomination and Selection By-law, this is a full, final, and binding Determination of the Nomination Appeal in this matter.

Date: 21 May 2024

Jack Anderson

Professor Jack Anderson