

Case number: NST-E24-444517

Case Title: Michael Freiberg & Kieran Murphy v AusCycling

Determination

National Sports Tribunal

General Division

sitting in the following composition:

Member Elisa Holmes SC

in the arbitration between

Michael Freiberg

Self-Represented

And

Kieran Murphy

Self-Represented

And

AusCycling

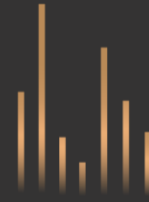
Represented by Marne Fechner, CEO, Anne Knight, National Integrity Manager & Donna Rae-Szalinski, AusCycling Director of Pathways

First Applicant

Second Applicant

Respondent

(collectively, the **Parties**).

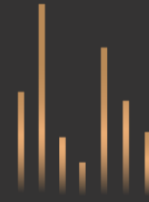


PARTIES

1. The First Applicant, Michael Freiberg, is a World Champion track cyclist, Commonwealth Games Gold and Silver Medallist and 2019 National Road Race Champion.
2. The Second Applicant, Kieran Murphy, has won multiple medals at World Championship track cycling events.
3. The First Applicant and Second Applicant (collectively, the **Applicants**) are tandem partners who compete in the men's Tandem Paracycling category, in both road and track events.
4. The Respondent, AusCycling (**AusCycling**) is the national sporting organisation (**NSO**) for the sport of cycling.
5. By Arbitration Agreement, dated 22 November 2024, the Parties agreed to refer their dispute to the National Sports Tribunal (**NST**) for determination (**Arbitration Agreement**).

NST JURISDICTION AND PROCEEDINGS BEFORE THE NST

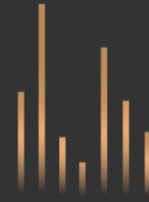
6. The NST has jurisdiction in this matter pursuant to section 23(1)(b)(ii) of the National Sports Tribunal Act 2019 (Cth) (**the Act**). The Parties have confirmed the jurisdiction of the NST in the Arbitration Agreement.
7. On 27 September 2024, the First Applicant filed its application with the NST.
8. On 30 October 2024, the Tribunal convened a Preliminary Conference with the Applicants and AusCycling.
9. At the Preliminary Conference, the Parties each requested that the Tribunal determine the proceedings based on their written submissions and documentary evidence, and without a hearing.
10. Pursuant to section 52 of the *National Sports Tribunal (Practice and Procedure) Determination 2024 (NST Determination)*, where the NST Member considers it appropriate to do so and all the Parties agree, the NST Member may determine the dispute without a hearing.
11. Prior to the signing of the Arbitration Agreement, the Parties engaged in an exchange of disclosure, whereby AusCycling provided the Applicants with documentation for the purposes of informing their submissions.
12. On 22 November 2024, the Arbitration Agreement was executed and as agreed by the Parties:
 - (a) on 25 November 2024, the Applicants filed submissions with the Tribunal;
 - (b) on 6 December 2024, AusCycling filed submissions with the Tribunal; and



- (c) on 10 December 2024, the Applicants filed submissions in reply with the Tribunal.
13. On 12 December 2024, the NST informed the Parties that the Member deemed herself sufficiently well-informed to decide the case based solely on the Parties written submissions and documentary evidence.
14. The Arbitration was governed by the NST Act, the *National Sports Tribunal Rule 2020 (NST Rule)*, and the NST Determination.

BACKGROUND AND SUMMARY OF THE APPLICANTS CASE

15. Whilst I have considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, I refer in this Determination only to the submissions and evidence that I consider necessary to explain my reasoning.
16. The Federal Government, through the Australian Sports Commission (**ASC**), provides financial support to athletes ultimately aimed at the pursuit of targets for the Olympic, Paralympic and Commonwealth Games. It has established a direct athlete income support Australian Institute of Sport (**AIS**) program, to determine which athletes in relevant sports will receive funding, involving Athletes being nominated by their National Sporting Organisation (**NSO**).
17. Athletes are nominated by their National Sporting Organisation (**NSO**). The ASC has published direct Athlete Income Support (**dAIS**) Guidelines (**dAIS ASC Guidelines**). The dAIS ASC Guidelines contain mandatory criteria for athletes to receive dAIS funding and provides for each relevant NSO to develop standards to which the dAIS ASC funding program is applied. Those standards are to contain criteria for “Podium, Podium Ready, Podium Potential, Developing and Emerging athletes” that set out (in clause 5.2):
- *Performance criteria against each dAIS level;*
 - *Annual benchmark events, World Championships, and other key selection events that may be considered as part of their assessment/reassessment process;*
 - *How the NSO will deal with Team and Relay athlete nominations for dAIS support;*
 - *Any additional performance standards or progression benchmarks that athletes will need to meet at each Athlete Categorisation level to be nominated for dAIS support;*
 - *Any qualifying criteria to assess athletes’ performances against the depth of competition at events being used for assessment;*



- *Any other non-performance-related factors that may be determining factors in the level of dAIS support offered;*
- *Associated Policies for dAIS eligibility, including Injury, Illness, Pregnancy, and Transition policies; and*
- *Appeals process.*

Any adjustments to the NSO frameworks must be agreed by the ASC before being applied.

18. Additionally, under the heading of “Assessment Process and Funding Approval” the dAIS ASC Guidelines state:

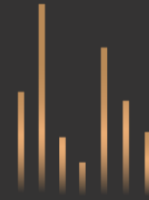
The ASC will assess dAIS nominations as follows:

1. *The ASC will advise (after consultation and agreement with NSOs) the number of dAIS Podium and Podium Ready allocations, and a total dAIS funding value for Podium Potential, Developing and Emerging allocations per financial year;*
2. *NSOs will nominate athletes based on the dAIS eligibility criteria;*
3. *The ASC dAIS Nominations Review Panel (dAIS Panel) will review nominations and recommend eligible nominations to the Funding Approver;*
4. *The Australian Institute of Sport (AIS) Director, as Funding Approver, may accept the determinations of the dAIS Panel and approve payments to athletes, or, if not accepted, will refer the determinations back to the dAIS Panel for discussion with the relevant sport.*

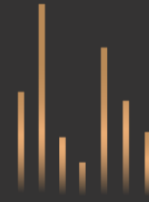
The dAIS Panel will comprise of:

- *Director, Performance Pathways and Programs, ASC – Chair;*
- *Director, Sport Strategy and Investment, ASC; and*
- *Consultant Sport Financial Advisory, ASC.*

The AIS Director’s decision is final in all dAIS matters, including: the approval of the funding, the funding amount to be awarded, and the Terms and Conditions of the funding.



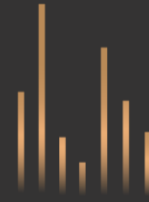
19. The ASC retains the discretion, as set out in clause 17 of the dAIS ASC Guidelines, to offer dAIS funding to athletes who have been nominated pursuant to relevant policies.
20. In the case of cycling, dAIS ASC Guidelines are implemented within the AusCycling Athlete Categorisation and Standards Process (Categorisation and Standards Process).
21. The Applicants allege that AusCycling impermissibly changed its Categorisation and Standards Process a short period before it nominated its cyclists to receive dAIS funding, via the ASC. The Applicants contend that due to the short notice period, this resulted in themselves being unable to amend their training programs as required to maximise their prospects of such nomination pursuant to new policy. Specifically, the First Applicant submits he (and Mr. Murphy) based their preparation to receive AusCycling dAIS funding nomination pursuant to version 3.0 of the Categorisation and Standards Process (**Version 3**), which was dated February 2023. AusCycling released version 4.0 of the Categorisation and Standards Process (**Version 4**) only a matter of weeks before a committee met to determine which athletes would be nominated and submitted to the ASC for categorisation and the subsequent receipt of dAIS funding.
22. The First Applicant, in his Application Form, seeks the following outcomes:
 - (a) The NST declare that AusCycling improperly amended their Categorisation and Standards Process Version 3 in February 2023;
 - (b) The NST recommend that the term “from time to time” in future Categorisation Policies be read down in favour of more specific clauses;
 - (c) AusCycling issue an official apology to the Applicant;
 - (d) The full determination is to be published by the NST on their website; and
 - (e) The NST order AusCycling to bear and reimburse the Applicant for all costs arising out of this arbitration process before the NST, including but not limited to, legal and arbitration costs.
23. Prior to nominating athletes for dAIS funding, all NSOs are required to develop a sport specific Athlete Categorisation Framework (**Framework**), in collaboration with the AIS Performance Pathways Teams and National Institute Network. Clause 5.2 of the dAIS ASC Guidelines provides that AusCycling’s sport-specific Framework should outline criteria for Podium, Podium, Ready, Podium Potential, Developing and Emerging athletes.
24. The AusCycling sport-specific Framework (**Framework Performance Standards**) is agreed in advance of athlete nominations, as part of the planning process for the next pinnacle event cycle of the sport. AusCycling categorisation plays an important part in (but is not determinative of) the allocation of dAIS funding by the ASC.



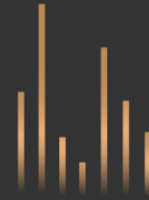
25. By way of summary, the Applicants submit:
- (a) *To receive financial support for the 2024 Paralympics, the Applicant received instructions from AusCycling staff that they would need to be categorised under the then AusCycling Athlete Categorisation and Standards Process (categorisation) which the Applicant was told by AusCycling was available on-line.*
 - (b) *At the start of 2023, the Applicant viewed the Athletics Categorisation and Standards Process online which had been updated (Version 3.0).*
 - (c) *Based on what was prescribed in Version 3.0 the Applicant made plans to achieve the relevant targets which included conducting trials in Australia to determine the probability of achieving the targets under international race conditions.*
 - (d) *Determining that the relevant categorisation targets were achievable, the Applicant incurred financial costs to attain the Version 3.0 targets.*
 - (e) *At the end of the 2023 season, AusCycling amended the categorisation document (September 2023 Version 4.0) without providing sufficient notice of the amendments which directly impacted the Applicant's ability to be properly and fairly considered by the AusCycling Panel (convened around 6th November 2023) to determine which cyclists would be considered for financial assistance.*
26. However, the First Applicant was not prevented, as part of his tandem team, from competing at the 2024 Paralympics by reason of his non-categorisation under the AusCycling Categorisation Matrix. The First Applicant submits that he competed at the 2024 Paralympics under the "Individual" banner and finished the event, with the Second Applicant, as the world ranked number two ranked Paracycling tandem team.

MERITS

27. The Applicants articulate their complaints in their written submissions, much of which are beyond the Applicants Application.
28. Further, many of the matters raised in the Applicants submissions are in the nature of evidence that is clearly (and often expressly) in dispute. Although the NST's procedure is designed to avoid unnecessary formality, when a Party wishes to rely on facts that are or are likely to be contentious or not self-evident on the face of documents, it is appropriate for those facts to be contained in witness statements (however informal) made by a person who is in a position reliably to inform the NST of the relevant matters. That enables the opposing Party to engage with and respond to that evidence through the provision of its own witness statements and potentially through cross-examination of the relevant witness. It also provides a basis for a decision upon disputes of fact between the Parties.



29. I did not find it necessary to determine the contentious factual matters in this case given the scope of the Application, the essence of the Applicants complaint, and the scope of the NST's jurisdiction. However, had I been required to form a view on the factual matters asserted in the Applicants submissions (and in some cases also in the Respondents submissions), I would not have had the basis to do so.
30. I deal below with the individual matters raised in the Applicants submissions.
31. Firstly, the Applicants submit that the release of Version 4 of the Categorisation and Standards Process by the Respondent was contrary to clause 1.3 of Version 3 of the Categorisation and Standards Process, which provided that:
- “[t]he Framework Performance Standards (refer Appendices) are reviewed on an annual basis for each discipline.”*
32. I do not accept the Applicants contention. Clause 1.3 does not, on its own terms, preclude amendments at other times by AusCycling. In addition, as the Applicant himself observes, clause 6 of Version 3 of the Categorisation and Standards Process states that:
- “AusCycling may amend this Categorisation Policy from time to time. Amendments will be communicated on the AusCycling Categorisation website [...]”*
33. Clause 1.3 of Version 3 of the Categorisation and Standards Process refers to “the Framework Performance Standards (refer Appendices)”, whilst clause 6 refers to “this Categorisation Policy” (being Version 3 of the Categorisation and Standards Process). Whilst the former may be taken to refer only to the specific standards set out in the appendices, the latter, in my view, refers to the entire document, including its appendices. Version 3 of the Categorisation and Standards Process could be amended at any time by AusCycling, but that the Framework Performance Standards contained therein, would be formally reviewed by AusCycling at least once a year.
34. In any event, the Framework Performance Standards within Version 3 of the Categorisation and Standards Process were altered by AusCycling insofar as its application. As the Respondent explains in its submissions (at [19]):
- “AusCycling’s categorisation of athletes in accordance with the Framework occurs annually around relevant benchmark events, as follows:*
- (a) April – following National Championships for Emerging and Developing athletes; and*
- (b) October / November – following World Championships for Podium, Podium Ready, Podium Potential athletes.”*

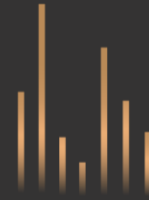


35. There is a sound basis for the timing and undertaking of AusCycling reviewing its Categorisation and Standards Process. In reference to the Respondents submissions:

[15] “[...] This ensures AusCycling (and the AIS) are looking at the most up to date global competition data when considering future categorisation / athlete potential and associate funding”; and

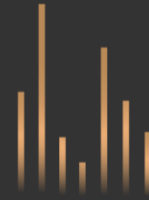
[24] “While AusCycling appreciates that amendments to the Framework may by their nature benefit some athletes and be detrimental to others, such amendments are necessary in order to ensure that, for example, athletes categorised as “Podium Ready” under the Framework are in fact performing at a level commensurate with that designation when compared to their counterparts on the international stage”.

36. It is apparent that by updating the Framework Performance Standards shortly after relevant international competition, the Respondent seeks to make sure the Framework Performance Standards reflect the current international cycling environment.
37. I note that the Respondent submits in its submissions, that the Applicants would not have received funding even under an application of Version 3 of the Categorisation and Standards Process. That is contested by the Applicants. I do not need to decide this issue for the purposes of the dispute in light of my other findings.
38. The Applicant submits that he had a legitimate expectation that the Framework Performance Standards within Version 3 of the Categorisation and Standards Process would not be changed within a twelve (12) month period. For the reasons set out above, I do not consider that any such reasonable expectation arises, even assuming that the Respondent is bound by principles of legitimate expectations (being, in substance, a matter of procedural fairness). In addition, as the Respondent points out, a similar pattern of revision had been adopted in at least the previous year.
39. The Respondent submits that there can be no legitimate expectation because the allocation by the ASC of dAIS funding is entirely discretionary. Whilst I accept that the ASC has retained for itself a discretion, there may be a legitimate expectation that the ASC (being a government agency) will apply the published ASC dAIS Guidelines when allocating such funding. There can, however, be no legitimate expectation of the receipt of any amount of a dAIS funding by athletes within NSOs. Similarly, the Respondent is likely to be contractually bound to apply its published Categorisation and Standards Process. As I have set out above, I do not consider that the Applicants have established a failure by the Respondent to correctly apply either the Categorisation and Standards Process or the ASC dAIS Guidelines.



40. I do consider, however in general terms, that given the significance of, and in some cases dependence on, funding to athletes, it is obviously desirable that, to the extent reasonably possible, NSO funding or dAIS funding are allocated based on their nomination and selection criteria being published sufficiently well in advance by the NSO. This is best practice, to allow athletes the opportunity to establish their eligibility. That said, the receipt of NSO funding or dAIS funding is not an entitlement athletes can expect, and the provision of Federal Government Funding or dAIS funding via the NSO, and the ASC, is intended to enhance Australia's performance at events including the Olympic and Paralympic Games. It is not intended to constitute individual reward.
41. Secondly, and relatedly, the Applicant submits that there is ambiguity between clauses 1.3 and 6 of Version 3 of the Categorisation and Standards Process, in respect of the timeframes within which the Framework Performance Standards could be amended which, is alleged, should be resolved by giving its clause 1.3 precedence. For the reasons set out above, I do not accept this submission.
42. Thirdly, the Applicants submits that by AusCycling "retrospectively" amending the Framework Performance Standards within Version 3 of the Categorisation and Performance Standards seven (7) months into a twelve (12) month review cycle, and after the international cycling competition season had concluded, the Applicants were denied procedural fairness, on grounds of unreasonableness and unconscionability. Again, for the reasons set out in respect of the first argument, this is not accepted.
43. Fourthly, the Applicant submits that the Respondent failed to provide reasonable notice of amendments made to Version 3 of the Categorisation and Performance Standards, which resulted in its release of Version 4 of the Categorisation and Performance Standards. This is put in several ways, including by alleging the Respondent failed to satisfy their legitimate expectations, via AusCycling acting with unconscionability and procedural unfairness. The Applicant also criticises the Respondents failure to notify its cyclists of such amendments other than through its website. The Applicant contends within its submissions:

[0037] "It is unreasonable to suggest that the only means of communication for changes to the Categorisation Policy solely is the AusCycling Categorisation website, with no further requirements for notification procedures. This places an unreasonable expectation on individuals to check the Categorisation Website for changes and updates to the Categorisation Policy. No reasonable person would expect an athlete to check a website daily to ensure they are relying on the most recent Categorisation Policy, particularly when the Framework Performance Standards have been published by an NSO and clearly outline an annual review of those standards."



[0038] *Accordingly, there was a failure to provide fair and reasonable notice and communication to the Applicant about changes to the Framework Performance Standards which had a material detrimental impact on the Pair.”*

45. This submission is somewhat at odds with the submission that the amendments to the Categorisation and Performance Standards were made at a time which was too late for athletes to respond. In any event, the Categorisation and Performance Standards made clear that AusCycling’s website would be the mechanism for any changes to be notified. The Respondent submitted:

[23] *“When updates to the Framework are approved by the AIS they are published on the AusCycling website, circulated to the NIN and provided to National Coaches and NIN Coaches who have the direct line of contact with the athletes. Those Coaches then decide which athletes should be nominated for categorisation. Relevantly, for present purposes, national Coach David Better nominated the Applicants for Podium Potential level categorisation [...].”*

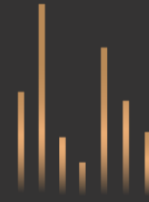
46. Fifthly, the Applicant submits that the Respondent did not properly apply version 4 of the Categorisation and Performance Standards. In particular, misapplication is evident within the email sent on 5 December 2023 to the Applicants by AusCycling’s Para Technical Director, stated below:

[0044] *“Due to Kieran having a Podium Ready categorisation previously, that the re-entry level to come back onto categorisation needs to be at the same level or higher. The Benchmark Event performance was deemed to be of a Podium Potential Level.”*

47. As explained above, this argument is outside of this application. Further, it is firmly disputed by the Respondent. None of the Parties have put evidence before me with which the opposing Party could engage, or on which I could rely, to establish their respective positions. It is for the Applicants to establish their grounds for challenging the Respondents decision or actions. They have not put forward an evidential basis on which this argument could succeed, even if it were within the scope of the Application. I note in any event that, as the Respondent submits, there was no provision within Version 4 of the Categorisation and Performance Standards to the effect that cyclists must re-enter the program at the same level or higher.

48. Sixthly, the Applicants make several allegations of serious misconduct on the part of the Respondent. Within submissions, the Applicant provides that:

“[0048] The Applicant believes that AusCycling had no intent on administering a fair categorisation process [...].”



“[0050] The inappropriate application of fictional selection criteria and the retrospective modification of award cutoff levels is an extreme violation of the Corporations Act; this is regardless of if the changes were approved by the promotion partner; being a private entity or the ASC. Retrospective modification of the document is a violation of section 18 of the Australian Consumer Law [...]”;

[0054], the Applicants believe that the Respondent’s Chairman acted in “clear violation of his duties under the Corporations Act.”; and

“[0065] The Applicant alleges that AusCycling have engaged in conduct that constitutes fraud under Victorian Law. By categorising Wootton and Zaccaria as an active tandem pair at the Podium Ready level, despite evidence suggesting they are not currently competing together, AusCycling have misrepresented material facts to the Australian Sports Commission (ASC) to secure additional funding.”

49. These allegations made by the Applicant are well outside of the scope of the Application, and are strongly refuted by the Respondent. There is, in any event, insufficient evidential foundation for such serious allegations. Whilst it is true that the ASC dAIS Guidelines contemplate the provision of an appeal process, the Respondent has in-effect provided such an appeals process by engaging with the Applicants (as described in the Respondents submissions) and, in particular, by agreeing to the matter being arbitrated by the NST. In any event, this complaint is outside of the scope of the Application as are, a fortiori, the allegations of serious misconduct which are not supported by any evidence before me.

50. Seventhly, the Applicants submit that a statement made within the Respondents 2024 Sport Specific Matrix – Draft Version 1.0 – January 2024 (Sport Specific Matrix), was:

[74] “[...] materially false and intended to mislead the tribunal.”

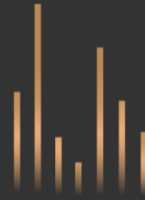
This statement referenced above follows as identified within the Applicants submissions:

[75] “The sport-specific matrix is agreed in advance of athlete nominations, as part of the planning process for the next pinnacle event cycle.”

51. I do not accept that there is any evidence of the Respondent deliberately misleading the NST. The statement within the Respondents Sport Specific Matrix alleged to be misleading is in-fact true.

52. The Applicants further submit that the below statement from the Sport Specific Matrix was false. This statement being:

[73] “The statements referred to in the “request for information” (outlined below) were a summary of process AusCycling and the AIS went through in agreeing the sport-specific matrix – they are not published anywhere.



53. It is not clear if the Appellants intend to allege that that statement above is false or, that it is not true that the Respondent and the AIS went through the process to which the proposition refers. In any event, I have no basis to find that either is untrue or misleading, let alone deliberately so.
54. For these reasons, I decline to funding the relief sought in the Application, and I dismiss the Application.

THE TRIBUNAL THEREFORE DETERMINES:

1. The application is dismissed.

Date: **23 December 2024**



Member Elisa Holmes SC