

Case number: NST-E22-166028

Case Title: Athlete v Wrestling Australia Limited

Determination

National Sports Tribunal

General Division

sitting in the following composition:

Panel Member/s Mr Christopher Johnstone (Presiding Member)

in the arbitration between

The Appellant Athlete *(Appellant)*

Represented by Mr Tony Dempsey of Dempsey's Law Firm

And

Wrestling Australia Limited *(Respondent)*

Represented by Mr Thomas Buterin instructed by Darren Kane of Advocatus Lawyers & Consultants

And

Athlete B *(Interested party)*

And

Athlete C *(Interested party)*

And

Athlete D *(Interested party)*

And

Athlete E *(Interested party)*

And

Athlete F *(Interested party)*

And

Athlete G *(Interested party)*



I PARTIES

1. The appellant in this proceeding, The Appellant Athlete (**The Appellant**), competes in the sport of wrestling and is current and financial member of the respondent, Wrestling Australia Limited (**WAL**). The Appellant is represented by their solicitor, Mr Dempsey.
2. WAL is a company limited by guarantee and is the national federation for the sport of Wrestling in Australia. It appeared through its Counsel, Mr Buterin.
3. The Appellant was not nominated by WAL to be considered by Commonwealth Games Australia ACN 629 915 448 (**CGA**) for selection as a team member to compete in their particular weight category in the sport of wrestling at the upcoming Commonwealth Games to be held in Birmingham, United Kingdom from 28 July to 8 August 2022. The Appellant appeals this “non-nomination” decision.
4. The named interested parties are all wrestlers who have been nominated by WAL to be considered for selection by CGA and whose interests might be affected to a greater or lesser degree pending the outcome of this appeal. Athlete B, Athlete D and Athlete E all appeared at the arbitration. Athlete B addressed the tribunal. Their submissions are considered below.

II INTRODUCTION

5. The Commonwealth Games is a multi-sport event held once every four years under the auspices of the Commonwealth Games Federation (**CGF**). The CGF is a company limited by guarantee, incorporated in the United Kingdom pursuant to the *Companies Act 2006 (UK)*, and according to its Constitution, is the supreme authority in all matters concerning the Commonwealth Games.
6. CGA is a company limited by guarantee incorporated pursuant to the *Corporations Act 2001 (Cth)*. CGA is the sports body for the Commonwealth of Australia which is affiliated with the CGF in accordance with the “Articles and Byelaws” of the CGF.
7. As noted above, the XXII Commonwealth Games are scheduled to take place in Birmingham, UK from 28 July to 8 August 2022.
8. CGA has adopted a by-law (called the Team Nomination, Selection and Appeals By-Law) which commenced on 15 October 2021 (**the By-Law**) which governs the manner in which nomination by individual sports are to be made, selection by CGA for the team to compete at the XXII Commonwealth Games following nomination as well as how athletes may appeal their non-nomination or non-selection.
9. For present purposes the following aspects of the by-law are pertinent.
10. Section 4.1 provides that for the Commonwealth Games, each National Sporting Organisation (called an NSO) may nominate athletes to be considered by the CGA for selection as a team member in respect of (relevantly) an “Open Athlete Allocation Sport” (which is defined to include the sport of Wrestling). The effect of by-law 4.1 is that despite a nomination by a NSO, only the CGA may select a team member, however any team member the CGA selects must have been nominated by an NSO.



11. Pursuant to section 4.2, each NSO is obliged to develop and adopt a “Nomination Policy” which is required to be prepared in accordance with section 5 of the by-law, including by containing a Nomination Criteria defined (in section 2) to be:

“...each sport-specific performance criteria and general eligibility criteria (which may include both subjective and objective criteria) that will be applied by the NSO in making its Nominations which must be compliance [sic] with the requirements set out in section 5.4 of this By-Law”.
12. Section 5.4 requires all “Selection Appeals” to be dealt with in accordance with the “Selection Policy”. This cross-reference seems to be an error as “Selection Appeals” is defined to mean appeals against selection by the CGA of a Nominated Athlete. Nothing turns on this.
13. Section 4 also is concerned with the contents of a relevant Nomination Policy. It prescribes, relevantly:
 - (1) each NSO must submit its Nomination Policy to the CGA for approval by 31 October 2021 (4.2(a));
 - (2) once a Nomination Policy is approved, it cannot be altered without the prior approval of the CGA (4.2(b));
 - (3) the Nomination Policy must be published on the relevant NSO’s website and social media channels, communicated to all potential Athletes and the NSO must ensure that it is adhered to (4.2(c) to (f)).
14. Section 4.3 of the by-law says (relevantly):

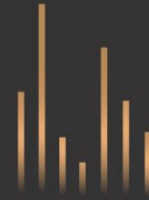
Each NSO must ensure that its Nomination Policy:

 - (a) is fair, reasonable, thorough, unambiguous, transparent and easy to understand;
 - (b) will be applied with fairness and without bias...;

...
15. Section 4.5 mandates a number of terms to be included in a Nomination Policy. Section 4.9 states that all “Nomination Appeals” must be dealt with in accordance with the Nomination Appeals Policy”.
16. Pursuant to section 4.6 (a), by no later than 17 December 2021, CGA is to advise each NSO of the number of athletes it has been allocated. NSOs are not permitted to nominate more athletes than the number of allocations issued.
17. CGA notified WAL by letter on 4 October 2021 that WAL may nominate up to six athletes to be considered for selection in the Commonwealth Games Team.

III NST JURISDICTION

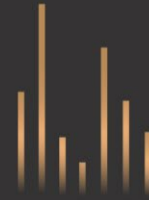
18. The Nomination Appeals Policy is set out in Schedule 1 of the By-Law.
19. Relevantly, the Nomination Appeals Policy permits an Athlete who is not nominated by their respective NSO for selection by the CGA (called the Non-Nominated Athlete) to apply to the National Sports Tribunal (**the Tribunal**) for arbitration of a Nomination Appeal (except where a specific Nomination Policy excludes such a right). This right of arbitration is called a “First Instance Appeal” to be heard in the General Division of the Tribunal in the first instance (See 7.1).



20. No party disputed that the Tribunal has jurisdiction to determine this arbitration.
21. A First Instance Appeal is to proceed in accordance with the process and procedure by which the Tribunal operates including as set out in the *National Sports Tribunal Act 2019 (Cth) (NST Act)*, the *National Sports Tribunal Rule (the Rule)* and the *National Sports Tribunal Practice and Procedure Determination (the Determination)*.
22. Section 8.1 of the by-law sets out the grounds on which a Non-Nominated Athlete may appeal their non-nomination. It provides:
- 8.1. A Non-Nominated Athlete (the Appellant) may bring a First Instance Appeal for hearing on one or more of the following grounds (which the Appellant bears the onus of making out):
- (a) that the Nomination Policy was not properly applied by the NSO with respect to the Appellant;
 - (b) the Appellant was not afforded a reasonable opportunity by the NSO to satisfy the selection criteria set out in the relevant Nomination Policy;
 - (c) the NSO was affected by actual bias in making its decision to not select the Appellant; and or
 - (d) there was no material basis on which the NSO's decision could be reasonably based.
23. Pursuant to section 11 of Schedule 1 of the by-law, the power of the Tribunal in a First Instance Appeal is limited to:
- (1) upholding the decision of the relevant NSO not to nominate the Appellant for selection to the Australian Commonwealth Games team; or
 - (2) overturning the decision of the relevant NSO not to nominate the Appellant for selection to the Australian Commonwealth Games team in which case the Tribunal is to direct the relevant NSO to reconsider and determine its position regarding the Appellant's eligibility and suitability for nomination for selection in light of the determination.
24. Section 11.4 of schedule 1 reiterates the requirement that in undertaking a reconsideration of eligibility for nomination the NSO must be observe the principles of natural justice.

IV CONSTITUTION AND CONDUCT OF THE TRIBUNAL

25. Pursuant to section 13 of the NST Act, the presiding member has been appointed by the Minister by written instrument as a Member of the Tribunal, and pursuant to section 23 of the NST Act and was appointed by the CEO of the Tribunal under instrument to conduct this arbitration in the General Division of the Tribunal.
26. Pursuant to section 16(1) of the NST Act and rule 6 of the Rule, 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.
27. Section 40 of the NST Act sets out general principles applicable to arbitration as follows:
- (1) In the arbitration:
 - (a) the procedure of the Tribunal is, subject to this Act, within the discretion of the Tribunal; and



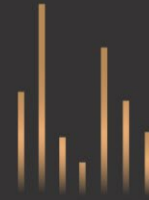
- (b) the arbitration must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit; and
 - (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
 - (2) The parties must act in good faith in relation to the conduct of the arbitration.
- 28. In addition, section 28 of the 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 and evidence is not required to be given on oath, although the Tribunal may require the administration of an oath in its discretion.
- 29. No party requested that any other party give any evidence on oath, and the Tribunal did not consider sworn testimony to be necessary for the proper disposition of this arbitration. No party objected to this course of conduct.
- 30. Specifically, the Tribunal indicated that in the absence of cross-examination and any submissions to the contrary, it intended to proceed on the basis that each document relied upon by the parties was true and correct and proof of the matters contained therein.
- 31. Further, no party objected to the procedure adopted by the Tribunal during the Arbitration.
- 32. Pursuant to section 29 of the Determination, the Tribunal may give directions as to the conduct of the arbitration. For this purpose, a preliminary conference was conducted by the NST Registry at 5.00pm on 17 June 2022 with all the parties, at which conference the date, time and place for the hearing of the First Instance Appeal was set and certain directions were made for the service of documentary evidence and submissions.
- 33. Without repeating those directions in full, section 6 of the by-law stipulates the time in which, following the lodgement of a Dispute Notice, that submissions and evidence to be relied on by the parties (together with the payment of the applicable fees) are to be lodged with the Tribunal.
- 34. No party took issue with the other's compliance with the directions made.

V MATERIAL BEFORE THE TRIBUNAL

- 35. As noted above, for the purposes of the conduct of the hearing, The Appellant and WAL filed written submissions with annexures. The Tribunal marked those documents as follows:
 - a. Exhibit 1: written submissions of appellant annexing relevant articles from newspapers and an unsigned document being the "2022 Australian Commonwealth Games Team Membership Agreement – Athlete";
 - b. Exhibit 2: written submissions of WAL annexing ten documents (called exhibits in that document) as follows:
 - i. Exhibit 1: Wrestling Australia's Nomination Criteria for the 2022 Commonwealth Games (**WAL Nomination Policy**);
 - ii. Exhibit 2: Results of Wrestling Australia's Senior National Championships held May 2022;



- iii. Exhibit 3: Minutes of the meetings of Wrestling Australia's Nominations Panel held on 28 April 2022 and 24 May 2022;
 - iv. Exhibit 4: List of Wrestling Australia's athletes nominated to CGA;
 - v. Exhibit 5: Wrestling Australia's Statement of Reasons dated 15 June 2022;
 - vi. Exhibit 6: CGA's Team Nomination, Selection and Appeal's By-Law;
 - vii. Exhibit 7: Statement of Rhea Duff, Secretary of Wrestling Australia, dated 19 June 2022;
 - viii. Exhibit 8: Statement of Yareni Guerrero, Nominations Panel Member, dated 19 June 2022;
 - ix. Exhibit 9: Schedule of competition results for Athlete B for 2021 and 2022;
 - x. Exhibit 10: Schedule of competition result for the Appellant and the six athletes nominated by Wrestling Australia for selection in the Australian team, for 2018 to 2022.
- c. Exhibit 3: submissions of The Appellant in reply;
 - d. Exhibit 4: Constitution, Regulations and Code of Conduct of the Commonwealth Games Federation dated July 2014;
 - e. Exhibit 5: the Index of Documents filed in the NST comprising:
 - i. the Application to the NST dated 16 June 2022 and the Arbitration Agreement dated 17 June 2022;
 - ii. the Initial Dispute Notice dated 14 June 2022;
 - iii. the By-Law
 - iv. the WAL 2022 Commonwealth Games Nomination Criteria
 - v. another copy of the CGA Athlete membership agreement;
 - vi. the letter from the CGA to WAL dated 4 October 2021 detailing the athlete allocation quota for WAL; and
 - vii. a list of Maximum athlete allocations available to CGA per sport event for the 2022 Commonwealth Games.
36. There was some debate as to whether Exhibit 4 was the current version of that document. During the course of the hearing, the Tribunal located a more recent version which the parties agreed was the current, in-force, version. The Tribunal stood down whilst Mr Dempsey and his client could consider the document. Upon reconvening, Mr Dempsey said that he did not wish to make any submissions on the basis of Exhibit 4 or the more recent version of that document.
37. Whilst the submissions and documentary evidence before the tribunal was extensive, in essence this appeal concerns the manner in which the WAL selectors applied the nomination



criteria in the WAL Nomination Policy, and in particular in how that policy was applied in respect of the selection of Athlete B.

38. The Nomination Policy, and its application are considered in Part VII below, however before turning to that policy, there are some limited additional preliminary matters which require discussion.

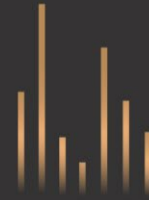
VI ADDITIONAL PRELIMINARY MATTERS AND ESSENTIAL ISSUE IN DISPUTE

39. *First*, there was some debate in the written submissions as to whether the relief sought by The Appellant in their application could be granted by the Tribunal. As noted at paragraph 23 above, the power of the Tribunal in an appeal of this type is limited. At the hearing the parties agreed that the power of the Tribunal did not extend beyond that contained in section 11 of Schedule 1 to the By-Law.

40. *Second*, notwithstanding that the proper respondent is WAL, and Mr Dempsey stressed that The Appellant's appeal was not against the selection of Athlete B *per se* as opposed to the decision of WAL, through its selectors, not to nominate The Appellant for selection, in reality it was inevitable that much of The Appellant's focus was on why, on their case, the selector's discretion to nominate Athlete B miscarried. The Appellant's complaint in this respect is set out in their initial Dispute Notice:

There was no material on which the Nomination Panel's decision could reasonably be based. The fact that Athlete B did not compete at the Pre-Nomination Event (thus rendering them ineligible for selection for the reasons expressed above) coupled with the fact no other athlete competed in that weight division at the Pre-Nomination Event means there was no reasonable plausible basis for making a decision to nominate Athlete B for selection. There was no material available to the Nominations Panel to form an opinion that Athlete B had one of the 6 best possible chances of producing a podium performance and winning gold.

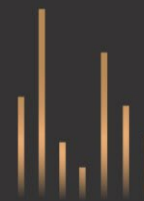
41. In his written submissions, Mr Dempsey expanded on these grounds by reference to the clauses in the WAL Nomination Policy set out in Part VII, but in essence, it is The Appellant's submissions that Athlete B was not eligible to be nominated for selection. It was not in dispute that Athlete B, registered to compete at the 2022 National Championships (being the Pre-Nomination Competition) in the relevant weight category, had their weight verified by the head referee at the championships, was ready willing and able to compete, but did not have an opponent (as emerged in oral submissions, due to injury). Hence, despite being awarded first place, they did not in fact wrestle another athlete for that place.
42. By contrast, The Appellant placed second at that same competition in the relevant weight category. Given that wrestling is a sport which matches competitors in weight classes and according to gender, The Appellant and Athlete B would never be competitors for the same position on a team. Their status as competitors is only because of the limited places offered by CGA to the sport of Wrestling as a whole.
43. What is important to observe in this context is that given the powers of the Tribunal, if it were to be determined that the nomination of Athlete B was made contrary to the WAL Nomination Policy and upon reconsideration, WAL did not re-nominate them, it would not necessarily follow that The Appellant would be the next athlete nominated by WAL.



44. It was perhaps for this reason that Mr Dempsey submitted (and Mr Buterin accepted) that the purpose of the appeal was not to determine who was the better wrestler.
45. *Third*, Mr Dempsey in his written submissions detailed the challenges which have confronted The Appellant in seeking nomination for the Commonwealth Games. In this respect, Mr Buterin stressed that WAL acknowledges The Appellant's efforts and the pride they have in wanting to compete for Australia.

VII WAL NOMINATION POLICY AND THE EXERCISE OF DISCRETION

46. Because of the manner in which The Appellant framed their appeal, it is necessary to set out a number of clauses of the WAL Nomination Policy.
47. These clauses are:
- 1.4 The Nomination Criteria will take effect on and from 20th July 2021, and will cease to be of effect at the conclusion of the 2022 Commonwealth Games on 8 August 2022 (inclusive).
 - 2.1.3 **Athlete** means a person who anticipates in the Sport, and who is recognised by Wrestling Australia or Commonwealth Games Australia as being available (subject to being eligible, as specified in this Nomination Criteria) for nomination to Commonwealth Games Australia for selection in the 2022 Australian Commonwealth Games Team pursuant to this Nomination Criteria.
 - 2.1.9 **Extenuating Circumstances** means:
 - 2.1.9.1 Injury or illness.
 - 2.1.9.2 Unavoidable travel delays.
 - 2.1.9.3 Bereavement or disability caused by the death of a spouse, de facto partner, child, parent, grandparent, grandchild or sibling.
 - 2.1.9.4 An unanticipated event occurring during the period of the Qualifying Event.
 - 2.1.9.5 Any other factors considered by Wrestling Australia to properly constitute extenuating circumstances.
 - 2.1.13 **Nomination Factors** means the factors and relevant considerations specified in **clause 8**.
 - 2.2 The following rules of interpretation apply to this Nomination Criteria:
 - ...
 - 2.2.2 The singular includes the plural, and vice versa.
 - 3.1 Wrestling Australia's objective, in enacting this Nomination Criteria and then nominating eligible Athletes to Commonwealth Games Australia for selection in the 2022 Australian Commonwealth Games Team, is to only nominate and select Athletes who Wrestling Australia considers to have the best possible chance of producing podium performances and winning gold medals at the 2022 Commonwealth Games.
 - 5.1 All Athletes wishing to be considered for nomination by Wrestling Australia to Commonwealth Games Australia must satisfy, and at all times continue to satisfy the conditions of eligibility referred to in this Nomination Criteria.
 - 5.2 For the purpose of this Nomination Criteria and any nomination decision or selection decision made in connection with this Nomination Criteria, an Athlete shall be determined as "eligible" if Wrestling Australia determines that it is satisfied, on reasonable grounds, that the Athlete:
 - 5.2.1 Is a current and financial member of Wrestling Australia.
 - 5.2.2 Is a "member in good standing" (or equivalent) of Wrestling Australia.



- 5.2.3 Does not have any unpaid debts owing to Wrestling Australia or any of its constituent bodies.
- 5.2.4 Has agreed to be bound by Wrestling Australia's rules and policies, including without limitation the Wrestling Australia Code of Behaviour.
- 5.2.5 Has not committed any breach of any anti-doping policy that the Athlete is subject to the jurisdiction of (or, for the avoidance of doubt, the Commonwealth Games Australia Anti-Doping Rules), except where the Athlete has already completed serving the sanction(s) imposed in relation to any such breach of any such antidoping policy.
- 5.2.6 Has complied with all reporting, testing and other requirements stipulated by Sport Integrity Australia under its anti-doping and integrity initiatives.
- 5.2.7 Has not, by their actions or omissions, brought themselves; Wrestling Australia; Commonwealth Games Australia, the 2022 Australian Commonwealth Games Team or the Sport into disrepute or censure.
- 5.2.8 Is an Australian citizen.
- 5.2.9 Is qualified and eligible to represent Australia in international competitions in the Sport, in accordance with the rules and policies established by United World Wrestling and the Commonwealth Games Federation, including without limitation the UWW Change of Nationality Rules.
- 5.2.10 Has completed all of the Sport Integrity Australia online education modules and requirements, as specified in the Wrestling Australia Education Plan.
- 5.2.11 Signed, and has since complied with the terms of the Team Agreement and any other documents and policies determined by Commonwealth Games Australia, Wrestling Australia, United World Wrestling or the Commonwealth Games Federation.
- 5.2.12 Competed in the Pre-Nomination Competition.
- 5.2.13 Attended, and participated in the Pre-Nomination Camps and Post-Nomination Camp.
- 5.2.14 Has submitted to, has undergone, and has met the specified and required standards determined by Wrestling Australia for any pre-nomination physical or other testing (sic) to be carried out on Athletes between 9 February 2022 and the Nomination Date (both dates inclusive).

6 Nomination Panel's Discretion

- 6.1 For reasons including those set out in **clause 3**, the Nomination Panel has absolute discretion in the nomination decisions made under this Nomination Criteria, having regard to the Nomination Factors.
- 6.2 In making nomination decisions the Nomination Panel may, in the exercise of its absolute discretion, apply a standard which calls for a value judgment and an overall assessment of the Nomination Factors. The Nomination Panel (and each member of the Nomination Panel) are expected to bring to account those matters within the Nomination Factors that they consider to be relevant to the determination, in order to achieve the objective referred to at **clause 3.1**.
- 6.3 When comparing Athletes' performances, and especially when comparing the performances of Athletes across different genders and across different weight classes within each gender, the primary function of the Nomination Panel's discretion is to determine the relative relevance of each of the Nomination Factors, and the relative weight attributable to each of them.
- 6.4 The Nomination Panel is required to exercise its absolute discretion:
 - 6.4.1 Prudently;
 - 6.4.2 With sound judgment;
 - 6.4.3 Reasonably and justly;
 - 6.4.4 In good faith; and
 - 6.4.5 For a proper purpose.
- 6.5 A member of the Nomination Panel must recuse himself or herself from taking any part in the making of a nomination decision under this Nomination Criteria in any circumstance where that



member is affected by bias, or where there would be a reasonable apprehension in the circumstances that the member is biased.

7 Pre-Nomination Competition

7.1 The Nomination Panel will take into account all of the performances of all eligible Athletes at the Pre-Nomination Competition, as a primary method of assessing which eligible Athletes would (if nominated for selection by Commonwealth Games Australia) have the best possible chance of producing podium performances and winning gold medals at the 2022 Commonwealth Games.

7.2 It is therefore vital and a definite requirement that eligible Athletes participate in the Pre-Nomination Competition if the Athlete wishes to be considered by the Nomination Panel, for nomination to Commonwealth Games Australia for selection in the 2022 Australian Commonwealth Games Team.

8 Nomination Factors

8.1 In determining the eligible Athletes who will be nominated to Commonwealth Games Australia for selection in the 2022 Australian Commonwealth Games Team, Wrestling Australia will nominate eligible Athletes who, in the opinion of the Nomination Panel in its absolute discretion:

8.1.1 Have the best possible chance of producing podium performances and winning gold medals at the 2022 Commonwealth Games.

8.1.2 Have met the eligibility requirements set out in **clause 5**.

8.2 In making its determination required under **clause 8.1**, the Nomination Panel must take into account the following Nomination Factors:

8.2.1 Athletes' performances in the Pre-Nomination Competition, and the level and standard of competition in each Athlete's weight division at that Pre-Nomination Competition.

8.2.2 Athletes' current national and international performances.

8.3 The Nomination Panel has an absolute discretion to determine in the case of each eligible Athlete, the relevant weightings applied to each criterion referred to in **clause 8.2**.

8.4 In any circumstances where the Nomination Panel considers that it is unable to make any or all nomination decisions based on a consideration of the Nomination Factors referred to in **clause 8.2**, the Nomination Panel may then also in its absolute discretion have regard to the following additional Nomination Factors:

8.4.1 Athletes' past national and international performances.

8.4.2 Each Athlete's current level of skill and physical fitness.

8.4.3 Any illness or injury suffered by an Athlete.

8.4.4 An Athlete's demonstrated ability of achieving, and contributing to team balance and harmony in an elite sports team environment.

8.4.5 An Athlete's demonstrated willingness to promote Wrestling Australia, Commonwealth Games Australia and the 2022 Australian Commonwealth Games Team.

8.4.6 An Athlete's demonstrated compliance with the rules of national and international events and competitions in the Sport, in which the Athlete has participated.

8.4.7 Input received from Athletes' coaches, where input from any coach must be limited by that coach to a written statement of no more than one (1) page in total length.

8.4.8 The commitment of each Athlete to achieve the objective specified in **clause 3**.

9 Extenuating Circumstances

9.1 In making its nomination decisions the Nomination Panel may, in its absolute discretion, have regard to Extenuating Circumstances.

...

9.5 This notice must be given by the Athlete as soon as practicable after the Athlete becomes aware that he or she will be unable to participate in the Pre-Nomination Competition because of Extenuating Circumstances, and in any event by no later than 24 hours after the commencement of the Pre-Nomination Competition.

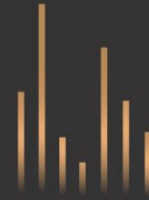


VIII GROUNDS OF APPEAL

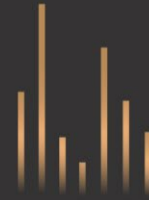
48. The Appellant's appeal is based on two non-exclusive alternative arguments:
- that in nominating Athlete B, WAL failed to have regard to the mandatory requirement for eligibility prescribed in clause 5.2.12 because Athlete B did not "compete" at the Pre-Nomination Competition (**"the construction argument"**); and
 - that there was no reasonable basis for WAL to determine that the pool of competitors in the weight divisions in which The Appellant and Athlete B would compete was likely to be shallow even though the standard of the top athletes in those divisions "is likely still to be quite high" (**"the reasonable opinion argument"**).

The construction argument

49. The starting point for The Appellant is clauses 5.1 and 5.2. Clause 5.1 requires athletes to satisfy the conditions of eligibility in the Nomination Criteria. "Nomination Criteria" is defined to mean the WAL Nomination Policy as it applies from time to time.
50. Clause 5.2 requires WAL to be satisfied "on reasonable grounds" of 14 criteria before determining an athlete to be eligible for nomination.
51. The essential criterion for this appeal is 5.2.12.
52. Mr Dempsey, both orally and in written submissions, submitted that *"[t]here is nothing ambiguous in clause 5.2.12. If anything its meaning and purpose is only reinforced in Clause 7.2's clear and unequivocal statement regarding eligibility."*
53. Clause 7.2 is curious. The use of the terms "vital and a definite requirement that eligible Athletes participate in the Pre-Nomination Competition if the Athlete wishes to be considered by the Nomination Panel" is inconsistent with the test for eligibility – to be "eligible" an athlete is required to do certain things, one of which is to compete in the Pre-Nomination Competition, thus an "eligible Athlete" cannot participate (they must participate first, then satisfy the other conditions to become eligible). The same inconsistency is repeated in clause 7.1 with the repeated use of "eligible".
54. Mr Dempsey referred to WAL's letter to The Appellant dated 15 June 2022 in submitting:
- Wrestling Australia argue ...that Clause 5.1.12 ... is to apply only if an athlete can compete i.e. *if the athlete has opponents in their gender and weight classes to compete against*. [page 2 Pt 8] Yet Clause 5.1.12 does not contain that qualification. The sub clause is clear and unambiguous and therefore does not invite another interpretation that includes gender and weight classes.
In this regard we rely upon the settled authority from the High Court that the construction of a contract will be determined according to its text, context and purpose: *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47.
55. To counter this, Mr Dempsey referred to the Cambridge Dictionary which he submitted defines "compete" to mean "...to try and to be more successful than someone or something else; to take part in a race or competition". That definition may be accepted.
56. Mr Dempsey submitted that because "compete" is used in clause 5.2.12, it in fact required Athlete B to compete *against someone*. For Athlete B to be eligible to be nominated, it was not sufficient for them to be ready, willing and able to compete, but be thwarted by a lack of competition.



57. This argument continued by reference to clause 8.1 which he submitted, if read literally, would lead to the absurd result that the Nomination Panel could select “...*foreigners, illegal aliens and or drug cheats who have not served their banned sentence from competing in the Commonwealth Games*!”. This, the submission continued, would be inconsistent with the conditions to which each selected athlete would be required to agree in the 2020 Australian Commonwealth Games Team Membership Agreement.
58. During the course of submissions, the Tribunal discussed whether it was necessary to consider examples of potentially “absurd” selection outcomes which are irrelevant to the issue to be determined given the task of the Tribunal was to determine this appeal on the more confined basis of the alleged misapplication of the WAL Nomination Policy in the nomination of Athlete B. The concern being that it is not the task of the Tribunal to determine the meaning of every clause as it might apply in every circumstance, but rather, how it was applied in the relevant circumstance.
59. Mr Dempsey and Mr Buterin agreed that the Tribunal has a more limited function but, Mr Dempsey submitted, nevertheless, that that function did require the Tribunal to consider a modified version of clause 8.1 which would, in effect, limit the effect of the discretion reserved in the chapeau to that clause, to sub clause 8.1.1 only, such that Nomination Panel would have no discretion to determine whether the eligibility requirements in clause 5 had been met.
60. In this respect, Mr Dempsey relied on *Fitzgerald v Masters* (1959) 95 CLR 420 as authority for the proposition that words may be supplied where it is clearly necessary in order to avoid absurdity or inconsistency. Whilst that power is undoubted, *Fitzgerald v Masters* (at 437) is also authority for the proposition that:
- ...an instrument must be construed as a whole. Indeed it is the only method by which inconsistencies of expression may be reconciled and it is in this natural and common sense approach to problems of construction that justification is to be found for the rejection of repugnant words, the transposition of words and the supplying of omitted words...Many illustrations may be given of the circumstances in which these processes have been followed but to do so would add nothing to the rule that the intention of the parties is to be ascertained from the instrument as a whole and that this intention when ascertained will govern its construction.
61. Mr Buterin agreed that the syntax of clause 8.1 makes the clause somewhat difficult to read, but that the two subclauses should be read as cumulative as if a semi-colon and the word “and” appeared at the end of subclause 8.1.1.
62. To contextualise that submission to the relevant issue, I understood this argument to mean that clause 8.1.2 was intended to preserve a discretion of the Nomination Panel to determine whether the requirement of clause 5.2.12 had been met.
63. Mr Dempsey also pointed to clause 8.2, and in particular clause 8.2.1 as supportive of this strict interpretation of clause 5.2.12, and to counter this submission.
64. His submission was that clause 8.3 permitted the selection panel to exercise a discretion with respect to the weighting to be ascribed to the two elements in subclauses 8.2.1 and 8.2.2, but that nonetheless, both elements in clause 8.2 must be satisfied before that weighting could be ascribed.
65. The practical difficulty that such an approach to interpretation has, is that where (for example) an athlete is prevented from competing in the Pre-Nomination Competition, due to injury or illness, or perhaps, some other incident which physically prevented the athlete from attending,



WAL's discretion would not (on such an argument) be capable of being exercised to determine such an athlete as being eligible for nomination.

66. As Mr Buterin submitted, clause 8.4 of the WAL Nomination Policy deals with such a situation. It expressly contemplates a circumstance where “...*the Nomination Panel considers that it is unable to make any or all nomination decisions based on a consideration of the Nomination Factors referred to in clause 8.2...*”.
67. Mr Dempsey referred to this clause as applying only to a “*force majeure*” type of situation where, for example, due to COVID 19, the Pre-Nomination Competition could not be held at all. He submitted that the use of the plural possessive in clause 8.2 was deliberate and should be read to apply only to all athletes, whereas the singular possessive in limited parts of clause 8.4 should also be read as drawing a distinction as between when and how the discretion of the Nomination Panel ought arise.
68. Leaving aside the irony of asserting strict interpretation of certain clauses when urging reconstruction of others, the reality is that that submission is inconsistent with the rules of interpretation preserved in clause 2.2.2.
69. It seems to the Tribunal that this is not the intention of the WAL Nomination Policy. Approaching the WAL Nomination Policy from the well-settled perspective that every provision of a private document must be read together and construed with the others, so as to render, as far as possible, the provisions harmonious with the other (*Sidle v Queensland Trustees Ltd* (1915) 20 CLR 557, 560-561; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, [16]), Mr Buterin pointed to clause 9, not because there was any suggestion that “Extenuating Circumstances” applied to either The Appellant’s non-nomination or Athlete B’s nomination, but merely as evidence that the intention of the WAL Nomination Policy was to preserve to an athlete the opportunity to satisfy the eligibility criteria even if that athlete was “*unable to participate in the Pre-Nomination Competition because of Extenuating Circumstances*”.
70. Mr Buterin’s primary submission is that the Tribunal need not go so far as to consider the effect of clause 9 to construe clauses 5 and 8 because, as he submitted (and Mr Dempsey accepted), Athlete B did all they could to compete at the Pre-Nomination Competition. Having regard to the discretion in clause 8.1, WAL submits, that is sufficient and the Nomination Panel was correct, and empowered, to conclude that Athlete B did compete.
71. In fact, as WAL also submitted, the evidence demonstrated that Athlete B participated in an exhibition match against another athlete from a different weight category.
72. Mr Dempsey submitted that “participate” and “compete” mean different things, and that the exhibition match fell into neither category.
73. In the opinion of the Tribunal, Mr Buterin’s primary submission ought be accepted. Athlete B by attending, weighing in and being verified by the head referee at the Pre- Nomination Competition met the intention of clause 5.2.12. In doing so, they “participated” for the purposes of clause 7.2. The fact that they were awarded first place because they did not have a competitor is a quirk of competition. In this respect they were in the same position as any person in any sport who, in preparing to compete against an opponent, ultimately does



not end up competing because of injury or illness suffered by that opponent, at whatever time prior to competition. As Athlete B pointed out in their own submissions, their fate could just as easily have been visited upon The Appellant who (as it turned out) had only one competitor in their division. Accepting for what it is worth, the value of that submission, in the Tribunals view, the text, context and purpose of the WAL Nomination Policy is to reserve to WAL, through the Nomination Panel, a discretion to determine the eligibility of athletes in circumstances such as those which affected Athlete B.

74. Whilst it is of information value only, WAL, through the statement of Ms Duff, also led evidence of a number of athletes who it considered to have competed in various events where the athlete did not have a competitor in the same weight class.
75. In the opinion of the Tribunal, the discretion vested in the Nomination Panel extended to determining whether Athlete B “competed” for the purpose of clause 5.2.12 and there was no evidence that the requirements of clause 6.4 were not met in making that determination.
76. If however the Tribunal is wrong in that respect, then the Tribunal also considers that clause 8.4 would apply in any event to the discretion exercised by the Nomination Panel in that the Panel could consider itself “unable” to make a nomination decision based on “a consideration of the Nomination Factors” in so far as they applied to Athlete B, and therefore was permitted by that clause to consider the other factors listed in subclauses 8.4.1 to 8.4.8 in determining Athlete B to be eligible for nomination.
77. It follows that The Appellant’s appeal on the basis of the construction argument fails.
78. The Tribunal adds that, were it necessary to consider, it would not hold that WAL could rely on the exhibition match undertaken by Athlete B as constituting “competing” at the Pre-Nomination Competition. Quite simply, had Athlete B had an opponent, that match may, or may not, have gone ahead. But either way it was not a match which could have (or did) have any bearing on the winner of their weight division at that tournament.

The reasonable opinion argument

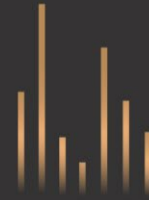
79. In this respect, The Appellant points to the reasoning of WAL in its statement of reasons dated 15 June 2022 (marked as exhibit 5 to the submission of WAL being exhibit 2 in the Appeal), and the minutes of the meeting of the Nomination Panel dated 28 April 2022 (exhibit 3 to exhibit 2 in the Appeal). In particular, in the minutes the Nomination Panel recorded:

The WSC deliberated at length regarding the 6th and final athlete to be selected. In considering all Nomination Factors the WSC highlighted the

limited medal potential of remaining athletes in terms of their current readiness compared to the prospective standard of the CWG. Whilst it is recognised by the WSC that the relevant weight divisions could be the shallowest divisions at the CWG, having low depth in divisions is likely to reduce the total number of medals awarded, therefore neutralising this perceived benefit – particularly when considering that the standard of the top athletes in each of those divisions is likely to still be very high. The WSC therefore prioritised consideration across all Nomination Factors in determining the final athlete selected. In doing so **Athlete B** was the 6th and final athlete selected.

80. In its statement of reasons, WAL said:

The Nomination Panel met on 24 May 2022. Having regard to the Nomination Criteria and the results achieved by athletes at the Pre-Nomination Competition, the Nomination Panel determined to shortlist a total



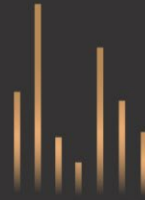
of ten (10) athletes for potential nomination to CGA. Those athletes include the six nominated athletes, you and three other non-nominated athletes.

The Nomination Panel then applied its absolute discretion in assessing each shortlisted athlete, using the below table and having due regard for the Nomination Factors specified in clause 8.1 of the Nomination Criteria, exercising the absolute discretion in making nomination decisions, which is conferred on the Nominations Panel by the Nomination Criteria and especially clause 6:

81. WAL went on in that statement to refer to the above reasoning from the minutes and then said:

The Nominations Panel further noted and took duly into account that the Athlete B (sic) was prohibited from "competing" at the Pre-Nomination Competition through no fault on the part of the athlete, for the reason that Athlete B (sic) did not have any opponent in their weight and gender classification, to compete against. The Nominations Panel considered that it would be a strained and manifestly unfair reading of the Nominations Criteria, to hold against the athlete the fact that they were ready, willing and able to compete in the Pre-Nomination Competition in circumstances where they did nonetheless have no opponent to compete against in their weight and gender division.

82. Both the minutes and the statement of reasons included a table which depicted WAL's "assessment of the short-listed athletes against [the] Nomination Factors". It is unnecessary to reproduce that table.
83. Mr Dempsey made a number of submissions about the minutes and this reasoning.
84. As to the table, Mr Dempsey submitted that it was of limited utility because the absence of a key meant that the colour coding was unexplained, and that if red were to be taken as indicating a negative, then, in so far as it applied to The Appellant and to other wrestlers, it was wrong. The difficulty with that submission is that once the truth of the contents of a document are accepted, as both parties did, and once The Appellant indicated, through Mr Dempsey, that they did not wish to cross examine any person from WAL, there can be no basis for this Tribunal to determine that what is set out in that table is in fact wrong.
85. In reality, as Mr Dempsey submitted, this was not The Appellant's major ground of complaint. The main thrust of the submission is the determination made that the relevant weight divisions *"could be the shallowest divisions at the CWG, having low depth in divisions is likely to reduce the total number of medals awarded, therefore neutralising this perceived benefit – particularly when considering that the standard of the top athletes in each of those divisions is likely to still be very high."* Mr Dempsey submitted that this opinion could not reasonably have been formed (and thus the discretion was not exercised in accordance with subclauses 6.4.1, 6.4.2 or 6.4.3). The Tribunal did not understand Mr Dempsey to have submitted that the Nomination Panel acted either in bad faith or for an improper purpose contrary to subclauses 6.4.4 or 6.4.5. In any event, for such a submission to be sustained, clear evidence is required, of which there is none.
86. Again however, the difficulty with the submission is that there is a complete absence of any evidence to the contrary or cross-examination to test the reasonableness of the conclusion reached by WAL. The main point seems to be that having regard to the date on which the opinion of the Nomination Panel was expressed, it "could not have known" the standards of the wrestlers likely to compete in the divisions.
87. *First*, there is no evidence as to what was known or unknown by the Nomination Panel at that point in time. There is no basis for this Tribunal to conclude that the Nomination Panel could not have known the facts about which it speculated.



88. *Second*, and in any event, read in context, all that WAL was intending to say was that both weight divisions were, in its opinion, each likely to have a lesser number of competitors but that the standard of the best competitors in each was still likely to be high. The Tribunal understands this opinion to be expressed for the purposes of identifying one factor which it considered relevant when exercising its discretion for the purposes of making a nomination decision for the purposes of clauses 3.1 and 8.1.1. There does not seem to be any reason why this Tribunal should hold that the manner in which WAL through the Nomination Panel has gone about making its decision in so far as that decision affected Athlete B and The Appellant was wrong as a matter of law, because, at the point in time that it was made, because the actual competitors likely to be selected by other nations to compete in those divisions at the Commonwealth Games was not known.
89. For these reasons, the appeal on the basis of the reasonable opinion argument also fails.

CONCLUSION

90. It follows that the decision of WAL is upheld.

THE TRIBUNAL THEREFORE DETERMINES:

1. The appeal is dismissed.

Date: 21 June 2022



Christopher Johnstone