



Case number: NST-E23-62941

Case Title: Member v National Sporting Organisation

**Determination**

**National Sports Tribunal**

**General Division**

**sitting in the following composition:**

Panel Member

Mr Philip Corbett KC

**in the arbitration between**

**Member**

*(Applicant)*

In person

And

**NSO**

*(Respondent)*

Represented by CEO

## PARTIES

1. The Applicant in this arbitration is a Technical Official and member of the National Sporting Organisation (NSO). At the arbitration hearing the Applicant represented himself.
2. The NSO is responsible for the management and delivery its sport within Australia. At the arbitration hearing, the NSO was represented by the Chief Executive Officer of the NSO.

## INTRODUCTION

3. A dispute has arisen between the Applicant and the NSO regarding alleged breaches of the Child Safeguarding Policy (**Policy**) adopted by the NSO in May 2022. The Policy is binding upon all members and officials of the NSO including the Applicant. The Policy applies to all “Relevant Persons” although that term is not clearly defined in the Policy but is to be found in other documents adopted by the NSO at the same time as the Policy.
4. A preliminary conference with the parties was conducted by video conference on Friday 14 April 2023 to confirm the parties' agreement to the jurisdiction of the Tribunal and other procedural matters, including whether any witnesses may be required to give evidence. The Tribunal also informed the parties of the proposed process and procedures to be followed during the hearing and provided the parties with a running order for the hearing.
5. The arbitration hearing took place on 19 April 2023 by video conference conducted on the Webex platform.
6. At the commencement of the hearing, the parties confirmed the jurisdiction of the Tribunal and at the conclusion the parties also confirmed that they had no objection to the process and procedures adopted by the Tribunal at the hearing.
7. These are the Tribunal's findings and determination of the dispute.

## NST JURISDICTION

8. The jurisdiction of the National Sports Tribunal (**NST**) is in my view engaged by sections 23(1)(a), 23(1)(b)(i) and 23(1)(c)(i) of the *National Sports Tribunal Act 2019* (**NST Act**).
9. The NSO's Conduct and Disciplinary Policy (**CDP**) provides a mechanism where the NSO may engage the jurisdiction of the NST to hear and determine a dispute regarding alleged breaches of the Policy when referred by the NSO's Complaints Manager. However, that procedure was not followed on this occasion. Instead, the Applicant elected to commence this proceeding in the Tribunal by an Application Form dated 7 March 2023 (**Application**).
10. The NSO then filed a Response to the Application Form on 8 March 2023 (**Response**).
11. The parties then entered into an Arbitration Agreement on 3 April 2023 according to which the Applicant and NSO agreed in writing to arbitration of their dispute by the NST in the General Division (**Arbitration Agreement**).
12. Pursuant to section 13 of the NST Act the presiding member has been appointed by the Minister for Health by written instrument. Under section 23 of the NST Act, the presiding member was appointed by the CEO of the NST to conduct this arbitration in the General Division.

13. Pursuant to section 16(1) of the NST Act and rule 6 of the National Sports Tribunal Rule 2020, a Member of the Tribunal is obliged to notify the CEO of the NST of any conflict of interest in a matter to which he or she is appointed. There is no such interest to be notified.
14. 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.
15. In addition, section 28 of the NST Practice and Procedure Determination 2021 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 at its discretion.
16. Clause 10 of the Arbitration Agreement contains express terms to the same effect. I am satisfied that both parties have acted in good faith in the conduct of the arbitration.
17. No party requested that evidence be given 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 or the procedures adopted during the hearing.

## **THE POLICY and CDP**

18. On 4 May 2022, the NSO adopted the Sport Integrity Australia National Integrity Framework.
19. The Sport Integrity Australia National Integrity Framework contains a suite of policies including a template for the Policy and a Complaints Disputes and Disciplinary Policy (**CDDP**). A pro forma precedent for the CDP was also made available to the NSO to supplement the National Integrity Framework Policies if required. Relevantly these three policies were adopted by the NSO in May 2022, with minor amendments. I was provided with copies of those policies by agreement of the parties.
20. The Policy is summarised in the preamble. It provides that the NSO has a “zero-tolerance to child abuse and neglect in any form”.
21. Clause 3.1 of the Policy provides:

### **3.1 Requirements of Relevant Persons**

Relevant Persons must always:

- (a) comply with the requirements of Responding to Child Abuse Allegations in

Annexure A;

- (b) comply with the Child Safe Practices as set out in Annexure B;
- (c) report any concerns or allegations of Prohibited Conduct involving any Relevant Person or Relevant Organisation;
- (d) provide true and accurate information during Recruitment & Screening;
- (e) comply with all obligations that they are subject to under the Australian Child Protection Legislation; and
- (f) comply with all legislative obligations that they are subject to in relation to reporting of suspected Child Abuse or a WWCC.

22. Clause 3.2 provides:

### **3.2 Requirements of Relevant Organisations**

Relevant Organisations must:

- (a) adopt, implement, and comply with the:
  - (i) Child Safe Commitment;
  - (ii) Child Safe Practices; and
  - (iii) Recruitment & Screening,
 including reviewing and amending those requirements from time to time;
- (b) comply with the 'Responding to Child Abuse Allegations' in Annexure A;
- (c) use best efforts to assist Relevant Persons to fulfil their responsibilities under this Policy;
- (d) recognise any Sanction imposed under this Policy; and
- (e) take all necessary steps to:
  - (i) enforce any Sanction imposed under this Policy and the Complaints, Disputes & Discipline Policy; and
  - (ii) procure compliance with the 'Responding to Child Abuse Allegations' in Annexure A.

23. Unfortunately, the definitions of "Relevant Person" and "Relevant Organisations" are not contained in the definition section of the Policy as adopted by the NSO but they are to be found in the CDP and the National Integrity Framework itself. The National Integrity Framework defines a "Relevant Person" as including any member, participant or volunteer coaches, officials, administrators and team and support personnel involved in a participating sporting organisation. The Applicant's role as a Technical Officer falls within that definition. Further, the Applicant has adopted the Terms and Conditions of Membership of the NSO which include an undertaking by him to be bound by and abide by the Constitution and Regulations of the NSO.

24. Clause 4.1 of the Policy describes Prohibited Conduct as follows

#### **4.1 Prohibited Conduct**

A Relevant Person or Relevant Organisation commits a breach of this Policy when:

- (a) they, either alone or in conjunction with another or others, engage in any of the following conduct against, or in relation to, a Child or Children in the circumstances outlined in clause 2.2:
  - (i) Child Abuse;
  - (ii) Grooming;
  - (iii) Misconduct with a Child;
  - (iv) request or infer that the Child keep any communication secret from their parents, guardian, carer, or other Relevant Persons such as a coach or administrator, or Relevant Organisation;
  - (v) supply alcohol, or drugs (including tobacco) to a Child;
  - (vi) supply medicines, except when permitted by law or with the consent of the parent, guardian, or carer of the Child and under a valid prescription for that Child and at the prescribed dosage; or
  - (vii) commit any act that would constitute Prohibited Conduct under the Member Protection Policy;
- (b) there is a breach of a requirement imposed under clause 3.1, or sub-clauses 3.2(a), 3.2(b) or 3.2(e)(ii));
- (c) they are involved in or have knowledge of and do not report a breach of clauses 4.1(a) or 4.1(b); or
- (d) they have engaged in an attempt to breach sub-clauses 4.1(a) (i), (ii), (iii), or (v).

25. Annexure B to the Policy contains a Child Safe Commitment Statement (**Statement**) by the NSO. Section 2 of that statement provides that a breach of the Child Safe Practices described therein is a breach of the Policy and will be managed by the CDDP.

26. Section 2.2 of the Statement is as follows:

#### **2.2 Professional boundaries**

- (a) Relevant Persons must act within the scope of their role (as specified in their position description or contract) when working with Children who are involved or have been involved in our sport. They must not:
  - (a) provide any form of support to a child or their family unrelated to the scope of their role (e.g., where there is no existing social, personal, or family relationship (e.g., financial assistance, babysitting, provide accommodation);
  - (b) use a personal phone, camera, or video camera to take images of

Children;

- (c) exhibit any type of favoritism towards a Child;
  - (d) transport Children unless specifically approved;
  - (e) give gifts/presents to Children other than the provision of official awards;
  - (f) engage in open discussions of a mature or adult nature in the presence of Children;
  - (g) discriminate against any Child, including on the basis of gender identity, culture, race, or disability;
  - (h) have one on one contact with a Child outside of authorised sport activities (includes direct contact such as in-person as well as indirect, such as by phone, or online); or
  - (i) accept an invitation to attend any private social function at the request of a Child or their family, where there is no existing social, personal, or family relationship.
- (b) If Relevant Persons become aware of a situation in which a Child requires assistance that is beyond the confines of that person's role, they should undertake any or all of the following at the earliest opportunity:
- (a) refer the matter to an appropriate support agency;
  - (b) refer the Child to an appropriate support agency;
  - (c) contact the Child's parent or guardian;
  - (d) seek advice from a Relevant Organisation.

27. Section 2.7 further provides:

## **2.7 Photographs of Children**

- (a) Children are to be photographed or videoed while involved in our sport only if:
  - (i) the Child's parent or guardian has provided prior written approval for the photographs to be taken or for the video footage to be captured;
  - (ii) the context is directly related to participation in our sport;
  - (iii) the Child is appropriately dressed and posed; and
  - (iv) the image is taken in the presence of other personnel.
- (b) Relevant Organisations and Relevant Persons must not distribute images or videos (including as an attachment to an email) to anyone outside our [sport] organisation other than the Child photographed or their parent, without organisational knowledge and approval.

- (c) Images (digital or hard copy) are to be stored in a manner that prevents unauthorised access by others and will be destroyed or deleted as soon as they are no longer required.

Images are not to be exhibited online or in publications (annual report) without parental knowledge and approval (through a signed image consent form), or such images must be presented in a manner that de- identifies the Child. Any caption or accompanying text may need to be checked so that it does not identify a Child if such identification is potentially detrimental.

28. The application of Sections 2.2 and 2.7 of the Statement is central to this dispute.
29. The CDDP is in the form of the standard precedent available from Sport Integrity Australia as part of the National Integrity Framework. The CDDP provides the procedure to be followed by the NSO in the event of "Complaints" which are defined as a "formal notification relating to Prohibited Conduct by a Respondent of an Eligible Policy and which are lodged with Sport Integrity Australia". Eligible Policies are defined as including the Policy.
30. The CDDP provides for a Complaint Assessment process in section 5. It also requires SIA to make findings and determinations and recommend a resolution process (see clauses 6 and 7). The resolution process may involve a sequence of actions from "no action" to referral to an internal Tribunal, referral to the NST and/or "Sanctions". There is also an Appeals process including a right of appeal to the NST Appeals Division (clause 9.5).
31. The CDP (as opposed to the CDDP) is an alternative dispute resolution procedure that applies to all members of the NSO where there is a dispute arising from a breach of a policy dealing with the prohibited conduct and disciplinary measures that are either:
  1. Not covered by the National Integrity Framework; or
  2. Sport Integrity Australia has determined that the matter is best handle (sic) under a non-sporting National Integrity Framework Policy.
32. Clause 3.3 of the CDP permits the NSO to commence, at its discretion, a Disciplinary Action against a "Respondent" (which includes a member of the NSO). It may do so if it is "advised or becomes aware of an allegation or considers the Respondent has breached an Eligible Policy". The Policy is an Eligible Policy.
33. Clause 4 of the CDP allows the designated Complaints Manager of the NSO to assess a complaint or information to determine if it falls within the ambit of the CDP. If it does then the NSO may conduct an investigation (clause 4.2). After conducting an assessment and investigation the NSO may then make findings and determine a process for resolution. That process may involve:
  - (a) Alternative Dispute Resolution;
  - (b) Warning Procedure; or
  - (c) Breach Offer

As well as whether External Referral is appropriate (clause 5.1)

34. The Complaints Manager has sole and absolute discretion to determine the “Chosen Process” and may consult with other representatives of the NSO (including the Decision Maker). The Decision Maker is another person appointed by the NSO to make certain decisions in relation to alleged breaches of an Eligible Policy and must not be the Complaints Manager.
35. I have set this process out in some detail because of the rather complex process by which this dispute comes to the Tribunal and because of the infancy of these policies and procedures.
36. In this dispute, the Complaints Manager of the NSO elected to follow the process described as a Breach Offer as the most appropriate. Under clause 5.4 of the CDP, the Complaints Manager must refer the Alleged Breach to the Decision Maker who must determine the applicable Sanction or a discounted Sanction. Sanctions are described in clause 5.6(a) and 5.6(b) and include, but are not limited to:
  - (a) A reprimand;
  - (b) Verbal or written apology;
  - (c) Direction to attend counselling or training to address their behaviour;
  - (d) Suspended sentence and/or good behaviour period;
  - (e) Removal of accreditation;
  - (f) Removal of awards (such as life membership);
  - (g) Exclusion from a particular event or events, competition, or activity;
  - (h) Suspension of membership from the NSO or other Sport Organisation and any other Members or Affiliates;
  - (i) Suspension from such activities or events held by or under the auspices of the NSO or other Sport Organisation;
  - (j) Suspension for a specified period and/or termination of any rights, privileges and benefits provided by the NSO or other Sport Organisation;
  - (k) Expulsion from a Sport Organisation; and/or
  - (l) Any other form of discipline that is considered appropriate.
37. Clause 5.6 (c) provides that
  - 5.6(c) Without limiting the discretion afforded in clause 5.6(a), the following factors will be considered when determining the appropriate Sanction:
    - (i) The nature and seriousness of the behaviour or incidents;
    - (ii) The considerations (if any) of the Complainant;
    - (iii) The contrition, or lack thereof, of the Respondent;
    - (iv) Any Provisional Action taken in relation to the Alleged Breach;



- (v) The effect of the Sanction on the Respondent including any personal, professional, or financial consequences;
  - (vi) If there have been relevant prior warnings or disciplinary action against the Respondent; and
  - (vii) If there are any aggravating or mitigating circumstances.
- 38. As indicated, the CDP also provides for referral to the NST General Division and a right of Appeal to the NST Appeals Division.
- 39. This dispute involves two alleged breaches by the Applicant of the Policy which resulted in the NSO electing to pursue a Breach Offer process under the CDP and to offer him four sanctions.
- 40. The Applicant did not accept the alleged breaches or the sanctions and issued the Application seeking to have the issue of the breach and appropriate sanction determined by arbitration by the NST.
- 41. The NSO in the Response says that it was made aware on 13 January 2023 and 6 February 2023 of two alleged breaches of both 2.2 and 2.7 of the Statement by the Applicant during the NSO events held in August 2022 and February 2023. In the Response, the NSO proposed appropriate sanctions of:
  - (a) Restricted duties or access;
  - (b) Supervision and mandatory oversight;
  - (c) Mandatory education and programs;
  - (d) Temporary suspension from relevant event/entity/club until Mandatory education has been completed.

## **FACTUAL BACKGROUND**

- 42. The Applicant has been an accredited Technical Official and experienced member of the NSO. He is a volunteer and a very experienced Technical Official.
- 43. A Technical Official is responsible for ensuring the safety of participants in events and ensuring compliance with the rules of the sport and safety standards in the field of play. Technical Officials must be accredited and undergo an accreditation process. This involves an initial open book exam and then continuing education through practical experience and regular training provided by the NSO and the State Sporting Organisation (**SSO**). To be a Technical Official requires personal commitment, dedication to the task and a thorough knowledge of the rules and regulations of the sport.
- 44. All Technical Officials when undergoing accreditation are required to abide by a Code of Conduct under which they acknowledge that the NSO may take disciplinary action if a Technical Official breaches the Code of Conduct.
- 45. In his evidence and submissions to the Tribunal during the hearing, the Applicant described the complexity of his tasks, his dedication and commitment to the sport and the need to ensure the safety and wellbeing of all participants of all ages and officials.

46. In May 2022, the NSO announced the adoption of the National Integrity Framework. It did so by an email to members with the effective date of commencement. A copy of that email was sent to the Applicant at his email address. The Applicant does not dispute receipt of that email.
47. The email explained that the National Integrity Framework includes a suite of policies that could be found on the NSO's website. Links were provided to each of the policies, including the Policy. The email also included a message from the President of the NSO referring to the importance of the policies and that they were available on the NSO's website.
48. In August 2022, the Applicant was a Technical Official and Race Referee appointed to officiate an event in the first event that included a race for junior athletes. During that event, the Applicant took digital images of athletes competing in the event on his mobile phone. He says they were images of members of his extended family that were participating in the races that day. All of them are children who were participating in junior events. He then sent them to the mother of these athletes who is his cousin. The Applicant claims that he had permission to do so but not then in writing. He produced a letter from his cousin dated 30 March 2023 in which she states that she asked the Applicant to take photos of her children because she could not watch all of them compete. The author of the letter was not called to give evidence but the authenticity of the letter was not disputed by the NSO. The Applicant told me that he sent the images to his cousin but that he may still have one or two on his phone. He has never shared them publicly. He says he did not post them on social media or distribute them to others.
49. The Applicant also told me that it was quite common for Technical Officials to take images of athletes in the field of play and of any safety concern or incident that may occur and that Technical Officials and Race Referees compile a report at the end of each event. However, the images he took of the children on this occasion were not for that purpose.
50. On 13 January 2023, the Complaints Manager of the NSO was informed by email from Sport Integrity Australia that on 5 September 2022, a Complaint had been received that the Applicant had been observed taking photos of children participating in the first event. The email explained that SIA had investigated the complaint by seeking further information from the complainant and reported the matter to Police who were unable to take any further action.
51. On 19 January 2023, the NSO sent an email to several members of the NSO including the Applicant informing the recipients of the adoption by the NSO of the National Integrity Framework. The email referred to the commitment of the NSO to safeguarding officials, participants, Coaches and volunteers. The email also referred to the complaints handling model available to Sport Integrity Australia and the ability of SIA to assess, investigate and manage complaints across areas such as member protection, child safeguarding and competition manipulation. The email directed the recipients to the NSO's website for further information. The Applicant does not dispute that he was sent the email. The email then introduced the National Integrity Manager appointed by the NSO and invited recipients to contact him with any questions. The email did not refer to any alleged conduct but was by way of a general reminder and introduction of the newly appointed manager.
52. In February 2023, the Applicant attended the second event. He did so as a Technical Official for the adult events but was not delegated to officiate junior events. At that event, the Applicant admits taking digital images on his mobile phone of junior athletes participating in the junior event on Saturday. He told the Tribunal at the hearing and in his written submissions that he did so because he was excited by the fact that the event was the first of its kind held in that state and that he wanted to share this "first" with the SSO and the Technical Team. The

Applicant says that he was not aware that by doing so he would be in breach of the Policy.

53. On 6 February 2023, the National Integrity Manager of the NSO was informed of the Applicant's behaviour at the event by a member of the NSO's staff. On 8 February 2023, the Integrity Manager sent an email to Sport Integrity Australia advising that he was in discussion with the CEO of the NSO and seeking legal advice regarding the next steps.
54. On 21 February 2023, the National Integrity Manager of the NSO was informed in an email from Sport Integrity Australia that in the absence of a formal complaint, it would not take any further action. The email did not invite a formal complaint but instead recommended that the NSO consider provisional action under its Code of Conduct. Whilst there was no mention in the email of the NSO taking Disciplinary Action under the CDP, it was open for the NSO to then do so as Sport Integrity Australia had declined to pursue the complaint under the National Integrity Framework.
55. On 27 February 2023, the NSO sent an email to the Applicant notifying him that the NSO had received information about Alleged Breaches under the Policy (**Breach Letter**). The letter took the form of Schedule 3 of the CDP which is the precedent form of letter for a "Breach Offer" under clause 5.4 of the CDP and included proposed "Sanctions". Those sanctions were in the same form as the sanctions proposed by the NSO in the Response.
56. The Applicant refused to accept the offer and filed the Application. The NSO filed the Response and the parties entered into the Arbitration Agreement. The hearing was expedited and heard on 19 April 2023.

## SUBMISSIONS OF THE PARTIES

57. The Applicant submits that any breach of the Policy was innocent and inadvertent. He says that the digital images he took at the first event were for the benefit of family members and were not posted or distributed publicly or on any social media platform.
58. He says that there was a lack of due diligence by the NSO in informing volunteer officials of the obligations and duties contained in the Policy.
59. He also says that the NSO should have banned the use of personal devices by officials when in uniform and made the child safeguarding details known. He acknowledges that he has now received training regarding the Policy and the duty to report potential breaches as a result of recent training he received from the NSO in February 2023.
60. The Applicant also acknowledges in his written submission to the Tribunal dated 4 April 2023 that he received two emails from the NSO regarding the Policy but he says that the NSO did not require volunteer officials to confirm that they were aware of the specific detail of the Policy.
61. He then adds that the NSO has also breached section 1.3(e) of the Policy (which refers to the NSO requiring volunteers to indicate in writing that they have read and committed to the Child Safe Practices contained in the Policy).
62. The Applicant submits that there was a lack of procedural fairness by the NSO in failing to communicate the reports of his conduct to him and to be heard as to those complaints before sending the Breach Letter. He is also critical of the lack of communication both written and verbal regarding his options under the Breach Letter. He says he felt bullied and coerced to accept the offer contained in the Breach Letter but he gave no specific example or evidence

of such conduct.

63. The Applicant also takes issue with several procedural aspects of the Breach Offer process adopted by the NSO. He queries whether the Complaints Manager and the Decision Maker from the NSO were the same person and queries whether Sport Integrity Australia has reviewed or amended the Policy since it was adopted.
64. In summary, the Applicant says that he acknowledges the importance of the protection of children but his conduct was unintentional and inadvertent. He asks that the NST direct the NSO provide him with a written apology to undo any damage to his professional reputation and reputation in the sport.
65. The NSO submits that the Applicant has acknowledged receipt of the emails regarding the adoption of the National Integrity Framework. It says that at all times before sending the Breach Letter, it was complying with the obligations imposed on it by the National Integrity Framework and Sport Integrity Australia and could not disclose any complaints made until they were investigated and dismissed by Sport Integrity Australia.
66. The NSO relies on the admissions as to the conduct alleged against the Applicant that he took digital images of children participating in events and relies on the terms of the Code of Conduct, the NSO's Social Media Guidelines, the Technical Officials resources page published on the NSO website, the annual Membership Declaration that members of the NSO are required to make upon renewal of membership and to the summary of the Policy published on the NSO's website.
67. In oral submissions at the hearing, the CEO for the NSO also relied on the fact that the conduct alleged was considered by the NSO to be of the "utmost seriousness" and that the NSO had endeavoured to resolve the dispute amicably and sensibly via the Breach Offer procedure. He emphasised the high level of responsibility of a Technical Official even though the Applicant was acting as a volunteer and a valued member of the organisation. He noted that the Applicant had an exceptional knowledge of the sport and that "ignorance was no excuse" (which I understood to mean ignorance of the Policy).
68. On the issue of sanction, the written submissions of the NSO were silent but at the hearing, its CEO said that the NSO was intending to seek to restrict the Applicant from officiating events involving children for six months. He said that he believed that the NSO remained open to discussing other aspects of the proposed sanctions if the Applicant had agreed to the Breach Offer.
69. The Applicant filed written submissions in reply to the written submission of the NSO. His reply submissions are dated 12 April 2023.
70. In those written submissions the Applicant exhibited digital images published on various Facebook pages of children participating in the sport's events. He claimed that the images had been taken after the adoption of the Policy and without recourse to or action against the person or persons that took the images. He also referred to other more specific allegations made against him contained in correspondence from Sport Integrity Australia to the NSO that recorded the complaints allegedly made about him. I do not regard it as necessary to set out those allegations or the Applicant's response to them as the allegations are unverified and not relevant to the fundamental issues in this dispute.
71. The Applicant also submits that the NSO was aware of the failings in its communications with

members regarding the Policy and the lack of training provided. He submits that for the NSO to sanction him they must also take action against all of the other Technical Officials that have taken photos and breached the Policy. He says he has not breached the Code of Conduct and no particulars of breach of the Code have been provided to him. So too concerning the Social Media Guidelines.

72. The Applicant also claims that he has been defamed and portrayed as a criminal. He says that he should also be treated differently from employees of the NSO because he is a volunteer and has not signed an employment contract. He repeats that there was no intent on his part to breach the Policy and criticises the NSO for a failure to provide adequate training.
73. At the hearing and in his oral submissions in reply, the Applicant again admitted breach of the Policy but repeated that it was not intentional, his and others' knowledge of the Rules and regulations of the sport were evolving and that no sanction should be placed upon him in the circumstances of this case.

## THE HEARING

74. At the hearing, the parties adopted their written submissions and relied on the documents and statements of fact referred to therein and produced to the Tribunal.
75. The parties were also invited to tender any further evidence or documents to the Tribunal but both elected not to do so. The Applicant was invited to make further submissions and a statement to the Tribunal to inform it of any additional matters. The Applicant made a brief opening statement and the NSO's CEO was invited to ask the Applicant any questions regarding his submissions and his opening statement to the Tribunal but he did not wish to do so. The Tribunal then asked the Applicant several questions regarding both the alleged breaches and the sanctions. The NSO's CEO was invited to ask any questions arising from those questions. He asked two clarifying questions regarding the photographs attached to the submissions of the Applicant filed in reply to the submission of the NSO.
76. The NSO's CEO then made an opening statement and submission. The Tribunal then asked the NSO's CEO questions about the procedures followed by the NSO and the sanctions referred to in the Breach Letter. The Applicant was invited to ask questions. He did not wish to do so.
77. The Tribunal then reserved its determination and offered to provide written findings and reasons.
78. During his opening statement, the Applicant admitted that by taking digital images of children participating in the two NSO events in August 2022 and February 2023 he had breached the Policy.
79. The NSO's CEO also conceded that the Breach Letter was vague and unclear as to the proposed "Sanctions" and the duration of those sanctions. He acknowledged that the intent of the NSO in sending the Breach Letter was to commence dialogue with the Applicant as to an appropriate penalty for breach.
80. The Tribunal was not provided with any of the digital images taken by the Applicant and I was told by the Applicant that he has destroyed them. He also assured me that he did not share them or publish them on any social media platform.
81. The Applicant showed genuine contrition for his actions and was candid with the Tribunal regarding his lack of knowledge of the details of the Policy.

82. The Tribunal asked both parties if they were aware of any precedent or other Disciplinary Action taken for breach of the Policy or any similar policy adopted by any other national sporting organisation but they were not. I am not aware of any similar dispute nor aware of any determination by the NST on the issue of a breach of the National Integrity Framework and the Child Safeguarding Policy.

### **POWERS OF THE TRIBUNAL**

83. Under clause 10.15 of the Arbitration Agreement, the parties agree that the Tribunal's determination in this arbitration will be final and binding on the parties.
84. Clause 5.6 of the CDP provides that where a Respondent is found to have committed a breach of an Eligible Policy, the Decision Maker, NST and the Hearing Tribunal have absolute discretion to determine the appropriate sanction to be imposed on a Respondent, including a combination of measures to be imposed and the terms and the period of any measure.
85. Clause 6.1 of the CDP provides that where arbitration is sought in the NST General Division the NST shall have the power to determine whether a sanction is imposed and, if so, what sanction in accordance with clause 5.6 of the CDP. There are many options available and this reflects the many subjective and objective considerations that are to be considered under clause 5.7(c) of the CDP.
86. Accordingly, it is open to this Tribunal to not make any sanction, to adopt the proposed sanctions suggested by the NSO, or to substitute alternative sanctions in the circumstances. This includes "any other discipline that it considers appropriate".
87. The Applicant in his submissions sought an apology from the NSO for its conduct in sending the Breach Letter and in seeking to sanction him for breach of the Policy. In my view, the CDP does not allow for such a remedy as the power to require either a verbal or written apology is limited to the power to order a Respondent to give such an apology and not the sporting organisation. In any event, this is not a case where an apology by the NSO is required or appropriate.

### **CONSIDERATION AND FINDINGS**

88. I have no doubt, having heard from him at the hearing, that the Applicant is passionate and committed to safeguarding and promoting the welfare of all athletes when participating in the sport. He spoke openly and candidly about the importance of safety both in and outside the field of play. His commitment to the sport as a volunteer is not disputed by the NSO and was openly acknowledged by the NSO's CEO.
89. I also accept that the Applicant was not aware that the act of taking digital images of Children, even family members, was a breach of the Policy because he was not then aware of the specific terms of the Policy. Since both of the incidents, he has received training from the NSO in February 2023 regarding the Policy and some aspects of it. No doubt by participating in this arbitration, he is now more aware of the total prohibition contained in the Policy and of its importance.
90. At the commencement of the hearing in his opening statement the Applicant conceded that he had breached the Policy by taking the images. That was a proper concession to make and in accordance with the obligation of parties before the Tribunal to act in good faith and cooperate with the NST Member, as arbitrator, and with the Parties<sup>1</sup>. I have taken that into account when considering whether to impose any sanction. I have also taken into account the Applicant's

candour about and contrition for his conduct.

91. Having made that concession one of the two issues in this dispute no longer required further determination, namely that the Applicant had breached clauses 2.2 and 2.7 of Annexure B of the Policy as alleged in the Breach Letter.
92. However, should that concession have been made inadvertently or without knowledge of the effect of it, I find in any event that the Applicant had breached both clauses 2.2 and 2.7 of the Policy by taking images of Children participating in an NSO's event whether inadvertent, unintentional, or otherwise. The language used in clauses 2.2 and 2.7 is clear. A Relevant Person (whether an employee or volunteer) must not use a personal phone, camera, or video camera to take images of Children involved in or that have been involved in the sport. The intention of the clause is also clear. Members of a Sporting Organisation are not permitted to take images of Children unless they comply with the strict requirements of clause 2.7.
93. Clause 2.7 provides that Children are to be photographed or videoed while involved in sport only if the Child's parent or guardian has provided prior written approval for the photographs to be taken or the video footage to be captured (clause 2.7(a)). There are also further constraints placed upon the photographer contained in clause 2.7 regarding the use and storage of those images.
94. Concerning the first alleged breach by the Applicant in August 2022 at the first event I accept that written consent may have been forthcoming from his cousin after the event but that does not remove the need to obtain written consent from a parent or guardian before taking the images. The obligations are strict and the Policy is clear. Consent must be in writing and openly and expressly obtained. Use is then strictly regulated by clauses 2.7(b) (c) and (d) of the Policy.
95. Having established the breach there are several observations and findings to be made about the procedure that was followed by the NSO under the CDP and the submissions made by both parties. I do so for the sake of completeness and by way of guidance to the parties.
96. Once informed of an Alleged Breach of the Policy, it was open to the NSO to have elected ADR or the Warning Procedure before the Breach Offer. It elected to pursue the Breach Offer. I find that there is no express requirement in the CDP that the NSO extend procedural fairness in the investigation and assessment of whether to commence Disciplinary Action under clause 3.3 of the CDP however in my view it would be advisable to inform the Respondent of the information received and/or complaint in writing and allow the respondent to be heard before proceeding with disciplinary or other action. That does not appear to have occurred here. The CEO believes that there may have been some mobile telephone calls between the former Complaints Manager of the NSO and the Applicant but there is no evidence that any formal steps were taken to better understand the alleged breaches and the Applicant's explanation of them. The Applicant says that he was not made aware of the allegations against him until he received the Breach Letter on about 27 February 2023. The concept of notification (albeit limited to "Complaints" as opposed to "information") is contained in clause 4.5 but is not mandatory with mere "information". Nevertheless, if the Respondent is given proper notice of them and then allowed to be heard then the NSO would be better informed when considering the various options available under clause 5.1(a)(ii) as to appropriate Disciplinary Action. In particular, whether ADR or a Warning Procedure, Breach Offer, or External Referral is appropriate.
97. Once the decision has been made to adopt the Breach Offer process then a Breach Letter in

the form of Schedule 3 must be clear and precise in the terms of the offer made and capable of unequivocal acceptance by the Respondent. That was not the case here. I find that the Breach Letter was vague and unclear as to the terms and duration of the proposed Sanctions. The NSO conceded that it was unclear and was intended to be an invitation to negotiate. I accept the Applicant's criticism of the communication he received from the NSO in that regard but do not consider it to amount to a failure to provide him with procedural fairness in the circumstances.

98. The Breach Letter was not given in accordance with clause 5.4 of the CDP because it did not state the sanction to be imposed in terms that could have been accepted by the Applicant. It also did not comply with clauses 5.4(iii). Therefore the Applicant was entitled to file his Application and was justified in so doing. If the NSO intended to commence a dialogue with the Applicant regarding appropriate sanction or other disciplinary action then it was open to it to pursue ADR or Warning under the CDP. So too, Mediation, Case Appraisal, or Arbitration by the NST either under the CDP or the jurisdiction of the NST generally.
99. By electing to take the Breach Offer path the NSO was then required to be clear in the terms of the offer it was inviting the Applicant to accept (and whether the sanction would be publicly disclosed) and it did not do so in the Breach Letter or otherwise.
100. Having invoked the jurisdiction of the NST and establishing that there was a breach of the Policy it is open to this Tribunal to consider and if thought appropriate impose a sanction or sanctions.
101. In considering whether to do so I have taken into account that the Applicant says that the breach was inadvertent due to a lack of knowledge of the terms of the Policy. Nevertheless, the purpose and importance of the Policy and the Child Safeguarding Policy in the National Integrity Framework are clear. The fact that the Applicant believes that others within the NSO have or may have breached the Policy does not absolve him of a lack of knowledge of the Policy or its importance.
102. I note that during his oral submissions, the Applicant emphasised the importance of making the sport "safe, fair and fun". The purpose of the National Integrity Framework, the Sport Integrity Australia Child Safeguarding Policy and the Policy is consistent with and supports that philosophy.
103. I am also satisfied that the NSO brought to the Applicant's attention the Policy and the implementation of the National Integrity Framework. It also made the content of those policies available to all members and participants in the sport. The Applicant is critical of the lack of information available and a lack of training but is incumbent on all officials and especially those persons charged with regulation and compliance with the rules of a sport to be familiar with newly adopted rules and policies such as the National Integrity Framework.
104. I have also taken into account the Applicant's concern for his professional and personal reputation and his desire to defend himself against what he considers to be an unnecessary and disproportionate response to what he considers to be an innocent and inadvertent breach of a relatively new policy. Nothing was submitted to me or tendered to the Tribunal by the NSO to the effect that the Applicant is other than a respected and appreciated contributor to his sport and the organisation. Further, there was nothing presented to me to suggest that the use of the images was for some improper purpose. There was also no evidence of any prior warning or disciplinary action taken against the Applicant. The Applicant was entitled to feel



distressed by notification of these allegations in the Breach Letter and the NSO's CEO acknowledged that they would be distressing to the Applicant.

105. I have also taken into account the mitigating circumstances relied on by the Applicant and that he has told the Tribunal that he has destroyed the images, he did not publish any of the images on social media, has since received some training regarding the Policy and is committed to child and athlete safety and wellbeing. I have also taken into account that clauses 2.2 and 2.7 of the Schedule do not allow officials to take images that may assist them to perform their functions as Technical Officials and for the preparation of post-race technical reports. However, that was not the admitted purpose of the images on this occasion.
106. Nevertheless, the importance of the Policy is paramount to all sports that agree to adopt the Safeguarding Policy, as is the obligation to report and take action concerning any breach of it.
107. In the circumstances and taking into consideration all of the relevant matters identified in clause 5.7 of the CDP and the oral and written submissions of the parties I find that a sanction by way of a direction that by 1 July 2023 the Applicant register for and undertake appropriate further education regarding the Child Safeguarding Policy of Sport Integrity Australia and that the Applicant be suspended from participation as an official in any NSO event involving Children for 3 months from the date of this determination is an appropriate sanction for the Applicant in the circumstances. For the sake of clarity, the Applicant is not suspended from officiating any event involving adult athletes but only those events where participants may be two or more children or young persons, who are under the age of 18 years. The course of education proposed is the online eLearning course offered by Sports Integrity Australia on its education platform "Play by the Rules" entitled "PBTR Child Safeguarding and Protection" (<https://www.playbytherules.net.au/got-an-issue/community-child-safe-sport/child-protection-and-safeguarding-online-course>). Upon completion of that course of education the Applicant is to confirm in writing that he has done so to the NSO.

#### **THE TRIBUNAL THEREFORE DETERMINES:**

1. The Applicant was in breach of clauses 2.2 and 2.7 of the Policy by taking digital images of Children participating in the NSO's events in August 2022 and February 2023.
2. The Breach Letter and Breach Offer provided to the Applicant on 27 February 2023 were vague and unclear and therefore not capable of acceptance by the Applicant. It was not given in accordance with clause 5.4(c) of the NSO's CDP.
3. Having submitted to the jurisdiction of the NST General Division it is open to the Tribunal to impose an appropriate sanction under the CDP for breach of the Policy.
4. The Applicant must register for and complete before 1 July 2023 the online education course offered by Sport Integrity Australia entitled "PBTR Child Safeguarding and Protection" and then provide satisfactory evidence in writing to the NSO that he has completed that course of further education.
5. The Tribunal determines that the Applicant's accreditation to officiate any NSO event involving the participation of a Child or Children (that means a person or young person or two or more children or young persons, who are under the age of 18 years) be suspended for three calendar months from the date of this determination.

Date: 27 April 2023

A handwritten signature in black ink, appearing to read 'Philip D Corbett', with a stylized flourish at the end.

Philip D Corbett KC

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<sup>i</sup> See also Section 40 of the NST Act and the General Obligations contained in Determination 32 of the *National Sports Tribunal Practice and Procedure Determination 2021* (Cth).