

Case number: NST-E23-156958

Case Title: Oscar Dart v Triathlon Australia

## Determination

### National Sports Tribunal

#### General Division

sitting in the following composition:

Panel Member

Ms Elisa Holmes

in the arbitration between

**Oscar Dart**

*(Applicant)*

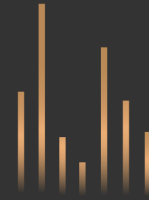
Represented by Mr Warwick Dalziel, authorised representative

And

**Triathlon Australia**

*(Respondent)*

Represented by Mr Tim Harradine, CEO



## PARTIES AND NST JURISDICTION

1. The Applicant, Oscar Dart, is a professional triathlete who nominated for selection for the upcoming World Championship Series event in Hamburg (**Hamburg Event**). He was not selected.
2. Triathlon Australia Limited is the governing body (or National Sporting Organisation, as such bodies are often called) for triathlon in Australia.
3. Jake Birtwhistle and Callum McCluskey were identified as potentially interested parties. They were notified of the appeal but did not take any part in it.
4. Selection for the Hamburg Event was governed by the World Triathlon Championship Series (WTCS) Selection Policy (**Selection Policy**). The Selection Policy provides under the heading of “Appeals”, at clause 11, that “[a]n Eligible Athlete [which description includes Mr Dart], who is not selected, may appeal that decision, under the Triathlon Australia (Fast Track) Appeals Policy, dated 2022” (**Fast Track Appeals Policy**).
5. The Fast Track Appeals Policy provides for “Non-Selected Athletes” (as defined in that Policy so as to include Mr Dart) to apply for a “Selection Appeal” (again, as defined in that Policy) by the General Division of the NST (clause 5.2). Clause 5 of the Fast Track Appeals Policy sets out the process for instigating such appeals. No objection has been taken by either party in respect of the process.
6. The NST’s jurisdiction to hear and determine this appeal is contained in section 23 of the *National Sports Tribunal Act 2019 (Cth)*. No objection was taken by either party to the NST’s jurisdiction.

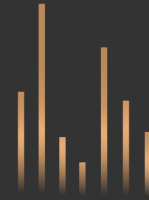
## FACTUAL BACKGROUND AND PROCEEDINGS BEFORE THE NST

7. Mr Dart was informed of his non-selection for the Hamburg Event on 13 June 2023 at 3:12 pm by way of letter from Daniel Mangano, Olympic Program Campaign Lead of Triathlon Australia (**Non-Selection Letter**).
8. The “reasons” provided in the Non-Selection Letter were limited to the following paragraph:

*“Unfortunately, in this instance, your nomination did not meet the automatic selection criteria. You were also assessed under the discretionary selection criteria; consideration was given to relevant matters set out in Clause 4.3.1 of The Policy, and discretion was not exercised. Consequently, you have not been selected for this event.”*
9. Three athletes received automatic nomination under the Selection Policy and two other athletes received discretionary nomination.
10. Mr Dart appealed against his non-selection by way of application to the NST dated 13 June 2023. The grounds for his appeal were summarised as follows:

*“I was not selected yesterday in the Hamburg WTS event despite meeting the automatic selection criteria of being in the top 60 on WT rankings and inside the top 4 ranked Australian athletes.  
[https://triathlon.org/rankings/world\\_triathlon\\_rankings/male](https://triathlon.org/rankings/world_triathlon_rankings/male)*

*Triathlon Australia decide to discretionarily exclude me from the team when there is no basis for this decision. The performance standards mentioned in 5.1 and 5.2 of*

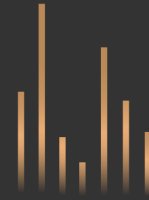


*the policy apply for discretionary selection where i have meet clause 4.2 of the policy as an automatic.”*

11. Mr Dart ultimately relied on clauses 5.2(b) (i) and (ii) of the Fast Track Appeals Policy, in particular on grounds that:
  - (i) the Selection Policy was not properly applied by Triathlon Australia with respect to the Non- Selected Athlete;*
  - (ii) the Non-Selected Athlete was not afforded a reasonable opportunity by Triathlon Australia to satisfy the Selection Policy*
12. The Tribunal has been assisted by two sets of submissions from Triathlon Australia dated 14 June 2023 and 15 June 2023 respectively, together with submissions from Mr Dart received on 14 June 2023. The parties agreed that the matter could be determined on the papers with no oral hearing.
13. On 16 June 2023 the Tribunal dismissed the appeal. This determination contains the reasons for that decision.

#### MAIN SUBMISSIONS OF THE PARTIES

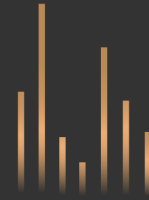
14. Mr Dart points out in his written submissions that he was in the top 4 ranked Australian athletes with a World Triathlon (**WT**) ranking of 54. By way of contrast, two athletes selected ahead of him had WT rankings of 69 and 82 and were the 5<sup>th</sup> and 6<sup>th</sup> ranked Australians respectively.
15. Mr Dart submits that he had not been given the same number of opportunities to race as the other two discretionarily selected athletes in order to meet the performance standards set out in clause 5.1 of the Selection Policy. He further submits that he was a “rapidly improving athlete” who had met the first requirement for automatic selection.
16. Underlying Mr Dart’s written submissions is the proposition that as a top 4 Australian athlete who is ranked in the top 60 in the world, he should have been considered ahead of the two athletes who in fact achieved discretionary selection. Although he did not meet the second criterion for automatic nomination, ie, he did not satisfy the performance standards in clause 5.1 of the Selection Policy, neither did the two discretionarily selected athletes, and neither of them met even the first of the two criteria for automatic selection.
17. Mr Dart, in his submissions, addressed the two non-exhaustive and discretionary matters which clause 4.3.1 of the Selection Policy states may be considered. In respect of performances at 2022 and 2023 WTCS and World Cup events, Mr Dart submits that he was not afforded sufficient opportunity to race in WTCS events. The two discretionarily selected athletes were afforded opportunities and did not demonstrate “performances in line with policy” in the course of those events. In the only relevant head to head, Mr Dart finished in 2<sup>nd</sup> position when one of the selected athletes finished 9<sup>th</sup>.
18. Mr Dart also submitted that he had a significantly improved world ranking in 2023. He submits that in the relevant period he “could only perform in the level of competition Triathlon Australia allowed [him] to race”. Despite this, Mr Dart said he steadily moved ahead in world rankings and ahead of other Australian triathletes.



19. Triathlon Australia submits that an athlete must satisfy all requirements under clause 4.2 of the Selection Policy to achieve automatic nomination. It says that whilst Mr Dart has met the first requirement – “being one of four top ranked Australian athletes on the WT Ranking, on the provision that athletes are ranked in top 60 of the WT Ranking” – he has not met the other because he has not met the performance standards outlined in clause 5.1.
20. In respect of discretionary nomination, Triathlon Australia submits that it is irrelevant to discretionary nomination that Mr Dart has met one of the two automatic nomination requirements. Triathlon Australia says its discretion was exercised properly and, in particular:
- Clause 4.3.1(a) lists WTCS and WTC events to be considered by the TAESC when they are exercising their discretion, with reference to clause 5.1 (a)-(b). The Appellant’s results were assessed at listed events in clause 5.1 and were considered to be less strong than McClusky and Birtwhistle.*
21. Triathlon Australia noted three WTC event results and said that it did not regard Mr Dart’s results as “a rapidly improving performance profile in line with clause 4.3.1(b)”. It noted that Mr Dart’s most recent WTC event result was his worst placed finish in 12 months. The selection committee noted his 53<sup>rd</sup> place at the 2022 U23 World Championship and did not find that sufficient to satisfy clause 4.3.1(b) either. Triathlon Australia observed that the Selection Policy does not suggest that an improving performance profile was to be assessed by reference to WT rankings.
22. In respect of Mr Dart’s argument that he was not afforded a reasonable opportunity to satisfy the Selection Policy, Triathlon Australia noted that it is not a requirement to have raced at a WTCS level to be selected for a WTCS race. Clause 4.3.1(a) of the Selection Policy lists WTCS and WTC events to be considered by the selection committee when exercising its discretion. Further, in assessing performances at WTCS events and WTC events, clause 5.1(b) and (c) only lists WTC performances. Mr Dart had the opportunity to race three World Cups in the previous twelve months.

## MERITS

23. Triathlon Australia provided no substantive reasons to Mr Dart for his non-selection before this appeal was instigated. Although in this case the Selection Policy did not require the provision of reasons, it is easy to understand why a higher ranked athlete who misses out on selection in a World Championship Series event in circumstances in which two lower ranked athletes are selected might feel aggrieved, particularly in the absence of the provision of any reasons by the governing body.
24. The provision of reasons is particularly important in a professional context in which an athlete’s livelihood may depend on the outcome of selection decisions. It is an important discipline for decision-makers in order to ensure the careful, even and transparent application of criteria. Significantly, athletes are given the right to challenge selection decisions, and the likely success or otherwise of such challenges (which, as in this case, often need to be made at very short notice) depends on the reasons of selection committees. In the absence of any reasons, athletes cannot reasonably assess their position including to determine whether or not to exercise their right to appeal because they do not know how the selection criteria have been

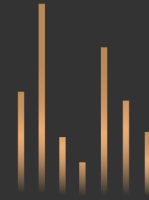


applied to arrive at a result which excluded them from selection. It is impossible, for example, for an athlete to determine if the Selection Policy was properly applied or if the decision was infected by actual bias in the absence of reasons. As I stated above, this concern may be particularly acute in circumstances in which a non-selected athlete is higher ranked than other selected athletes.

25. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, Kirby J described the importance of reasons (at [105]) as:

*that they amount to a “salutary discipline for those who have to decide anything that adversely affects others”. They encourage “a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making” ... In many cases they promote the acceptance of decisions once made ... They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions. Where the decision effects the redefinition of the status of a person by the agencies of the State, they guard against the arbitrariness that would be involved in such a redefinition without proper reasons. By giving reasons, the repository of public power increases “public confidence in, and the legitimacy of, the administrative process”.*

26. Although his Honour made those observations in the context of an administrative decision, the points apply with similar force to selection decisions in the context of professional sport.
27. As is often the case in appeals against selection decisions by national sporting organisations, Triathlon Australia provided reasons for its selection decision in response to Mr Dart’s appeal. Those reasons, although not provided by way of evidence, sworn or otherwise, explain Triathlon Australia’s selection decisions, including Mr Dart’s non-selection.
28. The Selection Policy provides for automatic nomination and for discretionary nomination. Automatic nomination is provided for by clause 4.2. There is no dispute between the parties that whilst three athletes did qualify for automatic nomination, Mr Dart did not. Similarly, it is not in dispute between the parties that Mr Dart was in the top 4 ranked Australian athletes (the first criterion for automatic nomination) but he did not meet the performance standards in clause 5.1 (the second criterion for automatic nomination).
29. Clause 4.3 of the Selection Policy provided that:
- a. *Any remaining positions not nominated automatically (including athletes who are ranked in the top 4 Australians but not in the top 60 of the WT Rankings for WTCS events, and in the top 70 for the WTCF and the POTE), will be nominated via discretion.*
    - i. *In exercising its discretion in nominating athletes for selection in events listed in **clause 1.1**, the TAESC may consider any relevant matter, ensuring that nominations align with **clause 1.2**. The TAESC may consider the following factors:*
      - 1. *athlete performances at 2022 and 2023 WTCS and World Cups (including assessment of the quality of field in any relevant event) in line with clause 5.*

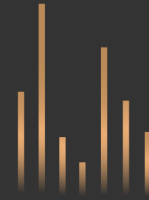


2. *if the athlete has a low or no World Triathlon ranking with a significantly improving performance profile over the previous 12 months;*
3. *if the athlete is returning from an enforced period out of competition but has a past history of elite performances in WTCS;*
4. *injury/illness history and status.*

*ii. This discretion is absolute and need not be exercised.*

30. There is some awkwardness in the drafting: in the chapeau the reference to “positions” in the opening phrase is said to “include athletes who are ranked in the top 4 Australians ...”. It seems from the full context that this is intended to mean that any remaining positions following automatic nominations may be filled by athletes not eligible for automatic nomination by way of the exercise of the selection committee’s discretion. The category of athletes referred to in parentheses is simply one category of athletes not automatically selected. The discretion is unlimited, but the selection committee may (but need not) consider the matters in clause 4.3 (a)(i).
31. The discretion is extremely broad, although it must be exercised with the “objective” set out in clause 1.2 in mind. In particular, clause 1.2.1 provides that:

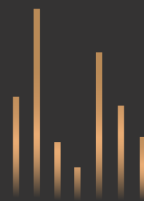
*“The primary objective of this Policy is to nominate Athletes whom TA considers have the ability to medal or play a team role in winning a medal at the events listed in clause 1.1.”*
32. In exercising their discretion the selection committee should have this objective in mind, and one would expect the reasons for discretionary selection would refer and relate to it. There is no requirement for the selection committee to place particular weight on inclusion of any athlete in the top 4 ranked Australians (being the first criterion for automatic nomination) or on world ranking generally, although one might expect these matters to be at least relevant.
33. In the reasons provided in its submission to this Tribunal, Triathlon Australia explained that it focused on the discretionary factor in clause 4.3.1(a) of the Selection Policy which provided that it may consider “athlete performance at 2022 and 2023 WTCS and World Cups (including assessment of the quality of field in any relevant event) in line with clause 5”. Clause 5.1 provides that performance standard in the previous 12 months in one top 20 WTCS finish, one top 5 finish in a WTC race or two top 10 WTC finishes would be considered.
34. Triathlon Australia did not take into account the matters referred to in clause 4.3.1 (b) or (c) because it did not consider that any of the three athletes in contention had a significantly improving performance profile over the previous 12 months, and none of them were returning from an enforced period out of competition.
35. The reasons for Mr Dart’s non-selection were summarised as follows:



*The non-selection of the appellant for nomination to World Triathlon for the Hamburg World Triathlon Championship Series was based on the following:*

- (a) His failure to meet any of the performance standards used when assessing athlete readiness for a World Triathlon Championship Series as per clauses 4.3.1(a) and 5.1 of the Policy.*
- (b) His performances at a World Cup Level have slipped from 2022 – 2023.*
- (c) His World Triathlon Ranking has increased as a result of points obtained at Continental Cups. Continental Cup results are not assessed under 4.3.1(a) or 5.1.*
- (d) Even though WT Rankings are relevant for automatic selection, they are not listed in the policy as a factor for consideration when the TAESC is exercising their discretion.*

36. The statement in (d) in the quoted passage is literally true, although it is difficult to see why world rankings would not be relevant even if not determinative. There is no statement by Triathlon Australia, however, that it ignored world rankings, and indeed the reference to world rankings in (c) suggests that Mr Dart's world ranking was considered. It is apparent that the selection committee placed particular weight on the specifically articulated matters contained in clause 5.1 of the Selection Policy. In the exercise of its absolute discretion, it considered that the nomination of the two athletes nominated in the exercise of Triathlon Australia's discretion was consistent with the objective in clause 1.2.
37. In these circumstances, on the basis of the reasons and explanation provided by Triathlon Australia after the instigation of Mr Dart's appeal, Mr Dart has not established that Triathlon Australia did not properly apply its Selection Policy with respect to Mr Dart.
38. In respect of Mr Dart's complaint that he was not afforded a reasonable opportunity by Triathlon Australia to satisfy the Selection Policy, it is apparent that Mr Dart relies on his non-selection for other events specifically referred to in clause 5.1. This is a common basis for appeals founded on the absence of a reasonable opportunity to satisfy results-oriented criteria, but it is rarely successfully deployed. This is because, to use the circumstances of this case, this is an appeal from Mr Dart's non-selection for the Hamburg Event and not from his non-selection in any other event. There is no evidence before the Tribunal about the circumstances of and reasons for Mr Dart's non-selection in other events. In any event, as Triathlon Australia submitted, it was not mandatory for Mr Dart to have performed in other WTCS events in order to be selected for the Hamburg Event. Further, he was in fact afforded the opportunity to compete at a number of other relevant events.
39. For these reasons, Mr Dart has not established that he was not afforded a reasonable opportunity by Triathlon Australia to satisfy the Selection Policy.



**THE TRIBUNAL THEREFORE DETERMINES: 1.**

Appeal dismissed.

Date: 20 June 2023 (decision given 15 June 2023)



Ms Elisa Holmes