Case number: NST-E22-245214

Case Title: Athlete v Polocrosse Australia

Determination

National Sports Tribunal

General Division

sitting in the following composition:

Panel Member Mr Bruce Collins KC

in the arbitration between

Athlete *(Applicant)*

Unrepresented

And

Polocrosse Australia *(Respondent)*

Represented by Ms Susan Rose, Director

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PARTIES

1. The applicant, the Athlete, has been a highly respected and talented polocrosse player who for a long period has been a successful senior and influential member of the Australian Polocrosse Team. The Athlete has been widely acknowledged as a valuable contributor to the international success of the Australian Team. The respondent, Polocrosse Australia Limited (Polocrosse Australia), administers and controls the sport of Polocrosse in Australia.

INTRODUCTION

2. The Athlete hoped to participate in an international women's polocrosse series against New Zealand to be held in Queensland in May 2022. The Athlete had been made aware by Polocrosse Australia that they were required to be vaccinated against COVID-19 before they could compete in that series. They were not vaccinated and on four occasions they forged Australian Government documents in order to show that they were vaccinated. On further occasions the Athlete lied to Polocrosse Australia, wrongly representing that they had been vaccinated. After a fair and thorough process, Polocrosse Australia imposed penalties and sanctions upon the Athlete who did not deny the charges laid against them.[1] The Athlete argues that the penalties and sanctions imposed by the Board were "manifestly excessive".

Basis of the jurisdiction of the National Sports Tribunal

3. The rules of Polocrosse Australia do not make provision for an appeal from the Board's decision in the present case. The parties are to be commended for agreeing upon a reference to arbitration invoking the provisions of Section 23 of the *National Sports Tribunal Act 2019* (the Act).

Proceedings before the National Sports Tribunal

4. The arbitrator appointed by the National Sports Tribunal made a number of written directions to the parties so as to ensure that the parties' written submissions covered all of the necessary issues. This course was taken particularly to assist the Athlete who was not at that stage formally represented by lawyers.

5. While the arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties, this Determination refers only to the submissions which are necessary to explain those reasons to the parties and to those persons legitimately interested and concerned with the issues involved. In particular, in the light of the manner in which the respondent structured its arguments, the arbitrator has focused detailed attention upon the evidence which was analysed by the Board of Polocrosse Australia when it considered the penalties and sanctions to be imposed.

[1] The Board's sanctions and penalties are set out in full at paragraphs 57 and 59 below.

REASONS

Introduction

6. On 24 August 2022, the Athlete lodged an application with the National Sports Tribunal for the arbitration of a dispute[2] relating to disciplinary sanctions imposed upon the Athlete by Polocrosse Australia. Although the Articles of Association and the rules of Polocrosse Australia did not confer any right of appeal or review from the decision of the Board of Polocrosse Australia that body agreed to permit the Athlete to seek the determination of a particular issue by an arbitrator appointed by the National Sports Tribunal pursuant to section 23 of the Act.

7. Once the application of the Athlete had been assessed as valid by the National Sports Tribunal it was agreed between the parties that it would proceed in the General Division of the National Sports Tribunal under s23 of the Act.

8. Thus the jurisdiction of the National Sports Tribunal is engaged by s.23(1)(b)(ii) and s.23(1)(c)(i) of the Act.

9. In order to perfect and initiate the process contemplated by those provisions of the Act, the parties entered into an arbitration agreement on 8 September 2022.

10. After making provision for the completion by both parties of a series of procedural directions, the last of which required the Applicant to file and serve any submissions and evidence in reply by 6 October 2022, the terms of the arbitration agreement contemplated that the proceedings would be heard after 15 October 2022. After some toing and froing, it was agreed that the application would be heard on Saturday 15 October 2022 after I had made clear that it should be heard as soon as possible. The application was heard on that day and I communicated my decision to the parties through the National Sports Tribunal on Friday 21 October 2022 indicating that detailed reasons would follow shortly. These are the reasons for the conclusions I have reached.

Other provisions of the Arbitration Agreement

11. The arbitration is governed by the Act, the National Sports Tribunal Rule 2020 and the National Sports Tribunal (Practice and Procedure) Determination 2021. The law applicable to the merits of the arbitration is the law of New South Wales. The parties acknowledged that the decision of the arbitrator will be final and binding on the parties and that there would be no right of appeal from the determination of the arbitrator.

12. Under the heading “Main Issues identified by the Parties” the parties recorded their agreement with the following statement:

> “6.1 The Parties seek a determination on whether the sanction imposed is manifestly excessive.
>
> 6.2 The Parties will make submission to the NST on whether, if the sanction is found to be manifestly excessive, the NST is to:

[2] As referred to in section 23 of the Act.

6.2.1 impose an alternative sanction; or

6.2.2 direct that the Polocrosse Australia Board reconsider the sanction"

13. It must be firmly borne in mind that the issue or the "dispute" referred to arbitration is encompassed solely and exclusively within the question whether the penalties and sanctions imposed upon the Athlete were "manifestly excessive". From that, two things follow. Firstly, that the arbitrator must take as read the factual findings and conclusions drawn by Polocrosse Australia and consider whether in the light of these findings and other relevant material the sanctions and penalties are "manifestly excessive". Second, the submissions of the parties must be confined to that single question.

14. A decision upon that question could not be made by the arbitrator unless he first formed his own view upon the evidence and independently determined what he considered to be an appropriate penalty. This procedure could not be implemented if the required determination was limited to a Wednesbury determination, which would be confined to expressing a view upon the question whether it was or was not open to the Board to impose the penalties it decided to be appropriate.

15. The literal and plain English meaning of the question for determination requires the arbitrator to form and express a view upon the severity of the penalty determined by the Board of Polocrosse Australia. The word "excessive" is one of comparative import and its operating effect in the present case is to call up an evaluation by the arbitrator of the sanctions the Board has decided to impose in the context of all the relevant surrounding circumstances. Viewed in that way the arbitrator will be required to form and express his own view of the appropriate penalty rather than exclusively basing his conclusion upon the application of the Wednesbury Test of unreasonableness.

16. This approach is confirmed by the balance of the parties' description of the issue referred to for the decision of the arbitrator. For example, if the arbitrator considers that the penalty is "manifestly excessive" then by the terms of the reference to the arbitrator he is then empowered to form his own views as to the appropriate penalty.[3]

17. That said, it is important to bear in mind that the touchstone of an invalidly imposed penalty by Polocrosse Australia is expressed as "manifestly excessive" and the effect of the inclusion of the word "manifestly" must be considered together with the word "excessive".

18. I do not consider that the arbitration authorities which deal with the meaning of the word "manifestly" are of great assistance to the present question. In particular, I do not consider that the references in those cases to the requirement that if should not be necessary to develop detailed legal argument to demonstrate error, have any application. In the present case where the word "excessive" is qualified by the word "manifestly" I consider that it means that at first sight the penalty imposed is clearly or plainly excessive or it is palpably too severe or so obvious that it "stands out" as excessive: it plainly went well beyond what was justified and appropriate.

[3] See paragraph 6.2.1 of the Arbitration Agreement.

19. Adopting that approach, if an arbitrator considered that perhaps the penalties in his or her view were a little on the high side, that would not be encompassed by the expression "manifestly excessive". That expression seems to accept that there will be shades of difference and that reasonable minds may differ upon the precise details of the penalties to be imposed. Accepting such nuances, means that a relatively minor difference of opinion as to penalty would not be regarded as "manifestly excessive". Such an approach also acknowledges the ever present existence of an acceptable range of penalties and the pre-eminent position of a knowledgeable well informed decision-making body set up by the sport in question to make such a decision.

20. Such an approach is consistent with the approach taken by the Courts to sentencing in criminal cases where the expression "manifestly excessive" is commonly used. I emphasise that in the present case I am not applying criminal law sentencing principles.

The proper formulation of an issue for determination

21. That said, I should express the view that in circumstances like the present where, by consent the parties agree to take a question to an arbitrator appointed by the National Sports Tribunal for the purposes of reviewing the decision, it is important to ensure that the referred question is one that properly arises as part of a well recognised review process. In addition, the question referred must be seen to be part of a "dispute" within the meaning of the relevant sections of the Act.[4] It follows that when formulating such a question it should align with and emanate from the form of the legal definition of the ground of review which would be available under the law if there was a right under the rules to seek review of the decision of which complaint is made. Of course, these difficulties will not arise where the sporting body has earlier signed on to the provisions of the Act. When that has been done the review procedure will be implemented in accordance with those provisions and the general law regulating applications to review the decisions of a national sporting organisation.

22. The formulation of a question which does not conform to those principles and which does not encompass those grounds upon which a decision may properly be reviewed may be unsatisfactory for a number of reasons. First, it wrongly expands the grounds of reviews. Second, it creates a new criterion of reviews. Third, it introduces a category of uncertain meaning. Fourth, it is unfair to those athletes whose actions are judged by existing recognisable standards. Fifth, such a practice creates unacceptable uncertainties for the sporting body in the administration of its disciplinary functions.

23. To say as they do in paragraph 6.1 of the issues referred to arbitration, that "The parties seek a determination on whether the sanction imposed is manifestly excessive" can only require a determination by the arbitrator in this reference and nothing in the description of the "Main Issues identified by the Parties" specifically involves what has been described as the Wednesbury Test and in my view it would not be appropriate to equate "manifestly excessive" to the Wednesbury test. It can no doubt be argued that there is little if any difference between the two criteria however I have taken the approach that the parties' statement of the "Main Issues" is one which requires me to consider all of the evidence before the Board and come to a determination of the question whether the penalties are "manifestly excessive". This approach is confirmed by the language of paragraph 6.1 and 6.2.1 of the Arbitration Agreement

[4] See in particular section 23 of the Act.

which clearly envisages the arbitrator imposing an "alternative sanction" of his or her own. An arbitrator could only do so by considering and determining those issues for themself.

The course to be taken by the arbitrator

24. What I therefore propose to do is for the reasons I have expressed, furnish my own answer to the question whether the penalties were "manifestly excessive". This will furnish a literal answer to the question referred to me and will work fairness to both parties. Then, if and to the extent that if may be thought that a Wednesbury inquiry is mandated and because the second submission of Polocrosse Australia is expressly based on Wednesbury, I will also approach my determination from that viewpoint. In the present case the answer to those questions and the result of the determination will be the same while at the same time neither party is disadvantaged by any possible ambiguity or uncertainty concerning the question referred for my consideration.

25. In the present case, argument by both parties was confined to the question whether the penalties imposed were "manifestly excessive" although little attention was given to the precise meaning to be attributed to the expression. However, the respondent Polocrosse Australia relied upon appellate sentencing decisions upon the meaning of the expression "manifestly excessive" and I should make reference to those cases, copies of which were included in the Hearing Bundle at Exhibit 1.

26. I have adopted the view that the use of the word "manifestly excessive" in the question referred for my determination by the parties is intended to involve the notion that it must be shown that it was so obvious or so perceptible that the penalty imposed was excessive that it should be set aside on review. Was the penalty imposed "manifestly excessive?" A full knowledge of and a close appreciation by the Board of the Athlete's actions when measured against the legitimate objectives of Polocrosse Australia will provide the answer.

THE FACTUAL BACKGROUND: A DESCRIPTION OF THE ATHLETE'S CONDUCT

27. All of the players who hoped to be selected to represent Australia in the International Test Matches against New Zealand in Queensland in May 2022, were required to be vaccinated against the COVID 19 virus and to show proof of vaccination or to demonstrate that they had a valid exemption. These requirements of Polocrosse Australia were based on the then Queensland Government requirements.

28. The Athlete was aware of these clearly communicated requirements.

29. Each of the following pieces of evidence was before the Board of Polocrosse Australia and properly considered by the Board.

- On **21 December 2021** the Athlete was advised by letter from Mr Graham Lane, the President of Polocrosse Australia, that they had been selected in the National Women's Polocrosse team.

- On **1 March 2022** the coach of the Australian Women's team sent a text message to all Team Members which stated:

"Hi Everyone
Are we all doubled vaxxed" (sic)

- Later on **1 March 2022** after all the players except the Athlete had responded in the affirmative the coach sent a further text message to all players which read:

  "Thanks Ladies
  The PAA will be sending out details soon on what we need to provide as proof of vaccination"

- On **2 March 2022** at 8:32pm the Australian Women's Team Coach/the Nationals Coach sent an email to all team members which read:

  "Hi All
  Further to my previous emails [redacted] (the President of the Warwick Polocrosse Club) has advised all players and spectators alike are required to be vaccinated to attend the Warwick Barastoc weekend"

  Later that **same day,** one minute after the earlier email, the Australian Women's Team Coach/the Nationals Coach wrote to the related players and associates including the Athlete saying:

  "Hi
  Are you vaccinated?"

- On **2 March 2022** at 10.38pm that same day, the Athlete replied to the enquiry whether they was vaccinated by texting a large "tick" in a green box. This of course is a well known and well accepted method in social media of forwarding a brief message in the affirmative. It is fanciful to think or suggest otherwise.

30. After much prevarication, the Athlete finally agreed when questioned at the hearing, "Clearly that's how it reads" "(the green tick)". I have concluded that the green tick was a deliberately false statement made by the Athlete in answer to the question whether they were vaccinated. I have also concluded that the Athlete was not telling the truth when they said initially that they had not intended to communicate an affirmative answer by means of the green tick. At the hearing the Athlete agreed that by employing the green tick they were being "deliberately dishonest".

31. The obvious source of pleasure this positive reply gave to the enquirer was clear from her reply early the following morning (6.41am on **3 March 2022**):

> "Oh yay! Was getting worried as you "(the Athlete)" were the only one who hadn't answered". This reply was followed by the familiar caricature of a happy smiling face.

32. This reply and other acknowledgements of the receipt of their untrue statement must have borne home to the Athlete that their false statements had been of significance to those who had received and relied upon them.

33. On Thursday **17 March 2022** at 1.33pm the Athlete ("Hi X") was asked by the Australian Women's Team Coach/the Nationals Coach:

> "Can you please send me your COVID 19 Digital Certificate by email?"

- Later that day (**17 March 2022)** the Athlete was again informed by the Australian Women's Team Coach/the Nationals Coach that:

  "Just need the immunisation document now as well".

- On Sunday **20 March 2022** at 9.01am the Australian Women's Team Coach/the Nationals Coach requested the Athlete to:

  "Can you please email your immunisation history statement?"[5]

- At 11.18am the same day (**20 March 2022**) the Athlete replied:

  "Thought I already have.
  So they want my Pap smear test too? Who is requesting?"[6]

- The Australian Women's Team Coach/the Nationals Coach replied to the Athlete's message as follows:

  "Thanks X. I got (and passed on) your COVID 19 Digital Certificate.

  The request to provide the further information came from Polocrosse Australia.

  Are you able to email me through your immunisation history statement too (which I think you just download through Medicare/MyGov)?"

- On **22 March 2022** the President of the Warwick Polocrosse Club in Queensland where the Test Series against New Zealand was scheduled to be held, wrote to the members of the Australian Team including the Athlete informing them that:

  "In the Newsletter forwarded on 14 March, we have omitted to make mention of the Vaccination status of the event" [7]

[5] Page 404 of the Hearing Bundle Ex 1.
[6] Page 405 of the Hearing Bundle Ex 1.
[7] The Athlete had been advised of the requirement that she be vaccinated, on 2 March 2022. See the text from the Australian Women's Team Coach/the Nationals Coach at page 398 of the Hearing Bundle Ex.1.

At this stage, the Polocrosse event at Warwick's Morgan Park will be a "Fully Vaccinated Event – as in everyone attending will be required to display their certification at the entry to Morgan Park. All out advertising social media displays the vaccination status….."

- On **23 March 2022** the Australian Women's Team Manager wrote to the Polocrosse Team Members including the Athlete, by email stating that:

  "Here is some more information from [redacted] [the President of the Warwick Polocrosse Club] we are all OK on vaccination status but just be sure you (sic) friends and family are fully vaccinated if they plan to attend."

34. This email was a further confirmation to the Athlete that their earlier deception had been successful.

35. It can be seen that on at least nine separate occasions the Athlete had been clearly informed that they were required to be vaccinated against COVID 19 as a condition of their participation in the matches in Queensland.

36. On **2 April 2022** the Australian Team Manager wrote by email to all members of the Australian Team stating amongst other things that he had:

    "….passed on all our COVID information to Polocrosse Australia who is reviewing this information and they will come back to us if they need anything else"

37. On **3 April 2022** Mr Graham Lane the President of Polocrosse Australia wrote to the Athlete by email under the heading "Evidence of Vaccination Status". Relevant portions of the letter read as follows:

    "Dear Athlete

    We refer to your selection in Rosebrook Australian Women's Team for the Adina ANZAC Test Series in May 2022 and the recent communications from the Warwick Polocrosse Club that this is a "fully vaccinated" event.

    As you may be aware, this means that a condition of entry, all event attendees must be vaccinated with two or more doses of an approved COVID -19 vaccine or provide evidence of medical contraindications.

    The health and safety of our members, and our community at large is of paramount important to us. As the national governing body of our sport in Australia, we have obligations to ensure that these rules are met, and in particular, by those representing our sport, and our country.

    As a valued member of the Women's Team, we would like to thank you for providing the two documents received to date as evidence of your vaccination status, being the:

    1. COVID-19 Digital Certificate with a valid date of 10 Jan 2022; and
    2. Immunisation history statement as at 11 January 2022.

"As an immediate next step, we request that you please provide further documents evidencing your vaccination status, and in particular, documentation that addresses these issues. This may include a further copy of your immunization statement, downloaded on or from today's date".

38. As Mr Lane's letter makes clear, the Athlete had sent to Polocrosse Australia what they represented to be an Australian Government "COVID 19 – Digital Certificate" said to be valid from 10 January 2022. The terms of this document include the following statements:

> "This certificate shows your COVID-19 vaccination details as reported to the Australian Immunisation Register by your vaccination provider. It is available because you have received all required COVID-19 vaccinations"

Under the heading "COVID-19 digital certificate" followed by a large "tick" in a circle the document earlier prominently stated that:

> "This individual has received all required COVID-19 vaccinations"

39. The Athlete had altered the document to remove the name of the real vaccinated person and inserted "ATHLETE NAME".

40. This document was obtained by the Athlete in its genuine original form as the valid digital certificate of a real Australian citizen with a real vaccination history recorded in the document.

41. Hoping to be able to play in the Australian Women's team and in order to do so and meet the vaccination requirements of Polocrosse Australia they had obtained from friends of theirs the details of a website to which they could go for the purposes of downloading the virtual vaccination history of actual Australian citizens whose details had been completed and stored by the relevant Government Department. The Athlete did not have the permission of the person whose vaccination history was included on the record nor did they have the consent of the relevant Government Department to access such material least of all to alter its contents by forging a fictitious Commonwealth Government document. The four forgeries each took a significant time to be completed while the Athlete used their own computer to erase existing information from the document and thus made these documents whilst they were partially blank by inserting their own details.

- On **3 April 2022** Mr Graham Lane the President of Polocrosse Australia wrote (by email) to the Athlete thanking them "for providing the two documents received to date as evidence of your vaccination status". Mr Lane's letter then referred to the two documents which appear at pages 188 and 403 respectively, of the Hearing Bundle Exhibit 1. Both of those documents were forgeries practised by the Athlete. That is not and has never been disputed by the Athlete. Those two documents may be referred to as the first and second forgeries.

- On **4 April 2022** the Athlete and Mr Graham Lane had a telephone conversation which was prompted by Mr Lane's letter of **3 April 2022**.

42. The Athlete relies upon some notes they said that they made after this conversation. Even if I accepted that these notes were a truthful record of the conversation, which I do not, the contents of their notes do not do them any credit. In particular the following notes under the heading "Please Note" read as follows:

> "Not once did I mention being or not being vaccinated – throughout the whole correspondence (sic)
> Strategically trying not to allude to any facts.
> Trying to get a scope on how important
> I didn't feel comfortable to admit my wrong doing, or admit I was unvaccinated"

43. Although this conversation with Mr Lane was a prime occasion to do so, the Athlete clearly did not admit their earlier forgeries and deliberately permitted Mr Lane to continue to proceed upon the basis of the earlier misstatements. The telephone conversation with Mr Lane on **4 April 2022**, conducted in the context of Mr Lane's detailed letter of the previous day, was the moment the Athlete was clearly being asked to tell the truth. They elected not to do so and as will be seen went on to provide false documents to Polocrosse Australia on two further occasions.

- On **5 April 2022** the Athlete sent through additional documents to Mr Lane. Under the heading "evidence of Vaccination Status" the Athlete attached what they described as:

  "ATHLETE COVID 19 digital certificate 20220405.pdf and

  ATHLETE Immunisation history statement 20220405.pdf"

- In the Athlete's covering email on **5 April 2022** they said:

  "Hi Graham,
  Hope you trip is going well. I have downloaded the vacc paperwork as discussed.
  Hope they work this time?
  Let me know if you need anything else.
  X"

44. On **6 April 2022**, the Athlete replied to Mr Lane's letter to them dated that same day and attached a medical exemption for the vaccinations as they had the COVID 19 virus on 14 March 2022. That was some twelve days after they first made knowingly false statements to Polocrosse Australia.

45. In his second email to the Athlete on **6 April 2022** Mr Lane advised them that the "vaccination requirements for the Adina ANZAC Test Series" (in Queensland) will change. Only then at 10.19 am on **6 April 2022** did the Athlete admit to "providing false ones" ie proof of vaccinations. The Athlete said they had made a "wrong choice" and apologised "profusely for this misconduct":[8] They went on to refer to "the incorrect manner of their documents".

[8] At page 136 of the Hearing Bundle Ex 1.

- On **8 April 2022** the Board of Polocrosse signaled the prospect of any future determination when through its President it said:

  "Falsifying Australian Government (health) records is a very serious matter, and to my understanding, in relation to COVID-19, it constitutes a criminal offence in States and Territories across Australia, with potential penalties including fines and/or jail time.

  Members of the Australian polocrosse community are to act honestly and with integrity always. As a National representative of our sport, it is expected that your conduct will exemplify these values.

  Given the nature and seriousness of this matter, further investigation is required to determine what action, if any may be taken, including the extent to which this may impact your selection in the Australian Team for the Adina ANZAC Test Series."

- On **14 April 2022** Polocrosse Australia sent a Show Cause Notice to the Athlete.

- On **15 April 2022** the Athlete replied to the Show Cause Notice.

46. In a carefully expressed letter dated **3 April 2022** Mr Lane clearly stated his concerns which arose from "discrepancies" in the documents which he said were "highly unusual". Mr Lane set out in the letter the reasons for those conclusions, and he then requested the Athlete to "provide us with further documents evidencing your vaccination status, and in particular, documentation that addresses these issues".

47. On 5 April 2022, the Athlete forwarded two additional documents to Mr Lane as requested. Both these documents were deliberate forgeries constructed by the Athlete who has never disputed that they deliberately produced them in order to deceive the Board of Polocrosse Australia, its President, the manager and the coach of the National team. These two documents appear at pages 115 and 116 of the Hearing Bundle and may be referred to as the third and fourth forgeries prepared and disseminated by the Athlete for the purpose of deceiving Polocrosse Australia.

48. Each of the above communications from the Athlete was made within the period spanning from 2 March 2022 to 6 April 2022 and each separate action was carefully and deliberately conceived, prepared and executed by the Athlete for the purpose of deceiving Polocrosse Australia. The Board of Polocrosse Australia was fully entitled to conclude as it did[9] that –

> "this was a deliberate, calculated and conscious act of dishonesty on "(the Athlete)" part and displays a wanton disregard on "(the Athlete)" part of the obligation to act honestly

[9] See the Board's letter of 14 April 2022 which is at page 167 of the Hearing Bundle Ex 1.

and with integrity in "(their)" dealings with Polocrosse Australia, both as a Member in general and, in particular, as a national representative of Australian Polocrosse."

49. In my opinion, Mr Lane and the Board of Polocrosse were entitled to draw that conclusion which could not in any way be described as "irrational" or one "at which no reasonable person could arrive". At the hearing the Athlete admitted that their conduct amounted to "cheating".

50. At the meeting with the Board of Polocrosse on 20 July 2022 the Athlete continued to display an attitude which failed to acknowledge the gravity of their actions for at that meeting the Athlete trivialized their offences by describing them as a "piece of paper" and as the "wrong choice" and rhetorically asking whether "they really affect (sic) this sport in terms of was their (sic) any one hurt….."[10]

51. At the hearing before me the same sentiment apparently obviously still weighed upon the Athlete's mind when they repeated their view that what they had done was just "a fuck up".

52. The Board of Polocrosse Australia was clearly entitled to conclude as it did that the Athlete did not properly acknowledge, understand or accept the gravity of their repeated actions.

The question for the Board of Polocrosse Australia

53. The task which befell the Board was to consider the nature and character and the offensive features of the player's conduct and to measure the severity of that conduct of the player against the evident purposes to be served by the imposition of sanctions and penalties. It is sometimes said that the gauge of such an evaluation should be one of proportionality as the Board sees the matter. It is also said that it is not a question of a review body attempting to substitute its own view of what is proportional. In the opinion I have formed care must be taken not to import sentencing principles from the criminal law into the consideration of issues raised in a sporting appeal. Statements of principle set out in sentencing cases in the criminal law may perhaps yet, with great respect, be considered by analogy and may perhaps then helpfully inform a case such as the present where the parties have chosen the expression "manifestly excessive" as the criterion by which the penalties must be measured however, three points should be made in that regard. First, the Board of Polocrosse Australia has an undoubted discretion to determine the penalties which it considers to be appropriate. Second, the Board is well placed to make judgments as to what penalties are appropriate having regard to the legitimate objectives of Polocrosse Australia, the nature of the offences and the interests of the athlete. If I may respectfully adopt the language of Mr Justice Heydon,[11] when exercising its discretionary "(power to impose sanctions) the relevant decision maker should be true to its own perception of what degree of severity or leniency is appropriate". That said and for the reasons which are developed in greater detail later in these reasons I do not propose to approach the issues referred to me for determination as one to be made by reference to criminal law sentencing principles.

54. All of the material before me demonstrates to my satisfaction that the Board has fairly and carefully considered the penalties and sanctions to be imposed, and the Board's conclusions

[10] See the Board's notes of that meeting reproduced at page 453 of the Hearing Bundle Ex 1.
[11] *Hili v The Queen* (2010) HCA 45 at 29.

could not be described as "absurd" or "irrational" as those expressions are called up by an application of the Wednesbury Principles.[12] Nor could they on any view be described as "manifestly excessive".

55. The Board, through a number of well-expressed letters to the athlete and through the evidence of its President Mr Lane and the submissions of Ms Rose, a lawyer sitting on the Board, has clearly articulated the reasons for its decision and expressed those reasons in a manner which enables an arbitrator to properly apply the Wednesbury Test and to determine whether the decision under consideration is "absurd", or "so irrational that no reasonable person could arrive at such a result".

56. These indicia of an unsound decision all may perhaps fall within the expression "manifestly excessive" which controls the only question which has been referred to me for determination by the Arbitration Agreement. However in structuring that reference the parties were not and could not have been conjuring up a new legal test and I have therefore also approached the issue to be decided as if I was required to determine for myself whether the sanction was "manifestly excessive" as well as if it was a Wednesbury question, which is whether the penalties and sanctions were irrational and of a kind to which no reasonable mind could arrive. In the present case whatever the difference if any may be, it does not affect the result, as I have formed the view that the penalties and sanctions imposed upon the Athlete could not be said to be "manifestly excessive". I have also concluded that it was open to the Board to conclude that the actions of the athletes were so egregious, so contrary to the canons of accepted behaviour in the general community and in the sporting community that they were in direct conflict with the legitimate objectives of Polocrosse Australia.

The decision challenged by the Athlete

57. Once the Board had properly considered all of the evidence and all of the Athlete's responses it imposed the following penalties and sanctions:

    (1) Removal from the Australian team for the 2022 Australia v New Zealand Test Series;

    (2) Suspension as a member for a period of 12 months/6 months should the Athlete meet certain make good obligations[13]; and

    (3) Ineligible for selection in a Polocrosse Australia squad or team for a period of 3 years.

58. In order to fully understand the precise effect of the sanctions imposed upon the Athlete, it is necessary to determine the number of matches which would be encompassed by the three year ban on selection. Accordingly, I requested the parties during the hearing to jointly work out an estimate of the number of international matches which might be scheduled and played during that period. The parties were content for me to proceed on the basis that the number of such matches prospectively, was no more than seventeen. That of course assumes that the

[12] *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.
[13] Paragraphs 7(d)-(f) of the letter from Polocrosse Australia to the Athlete dated 20 June 2022 at page 276 of the Hearing Bundle Ex 1.

Athlete would be selected in each of those matches. It should also be borne in mind that the Athlete thought that her high level of polocrosse days may be coming to an end.[14]

59. These penalties were based upon the Board's findings that the Athlete had contravened:

"a. clause 5.7(e)of the Constitution in that (they had) engaged in conduct that is unbecoming of a Member of Polocrosse Australia and which is prejudicial to the interests of Polocrosse Australia and the sport of Polocrosse

b. clause 7.2b(ii) of the Constitution in that (they had) engaged in conduct that is unbecoming of a Member of Polocrosse Australia and which is prejudicial to the interests of Polocrosse Australia and the sport of Polocrosse

c. clause 7.2(b)(i) of the Constitution in that (they had) engaged in conduct that has brought (them) into disrepute

d. clause 12 of the Polocrosse Australia Selection Policy in that (they had) failed to perform as a member of the Test Team to the standard expected by Polocrosse Australia both by the nature of the conduct on its own and by the contraventions of the Constitution set out".

60. I have firstly concluded that the penalties and sanctions imposed upon the athlete by Polocrosse Australia were not and could not be described as "manifestly excessive" having regard to the deliberate, grave and repeated deceptions they practised upon Polocrosse Australia, the team manager and the national coach, and the dangers of contracting a much feared virus they was deliberately prepared to place in the way of her team mates, other competitors and the community. The third element in the sanctions, amounting to a selection ban for seventeen matches does not outstrip the appropriate penalty for a series of deliberate, premedicated forgeries and calculated lies, conduct which would be roundly condemned by any reasonable observer.

61. If, as Polocrosse Australia has submitted, the appropriate test to be applied is the Wednesbury Test of reasonableness, then confining my consideration of that question to the material which was before the Board of Polocrosse Australia, I have firmly concluded that if was open to Polocrosse Australia to conclude that the sanctions and penalties imposed were justly and fairly warranted. Such a conclusion could not be described as "absurd", "irrational" or one which could not be reached by a "reasonable and rational person".

62. The decided cases show that the test to be applied upon the review of a discretionary decision such as the Board has made in the present case, has been expressed in numerous ways, for example in *Dickason*[15], it was said by O'Connor J that decisions would be reviewed if they were "absurd" or "unreasonable" or are decisions that "no reasonable man could come to", *Dickason*[16], or decisions which are contrary to "fundamental principles of common justice", *Dickason*[17], or are decisions "at (sic) which no reasonable man could honestly arrive" Dickason[18], or decisions for which there is "no evidence", *Lee v Showmen's Guild of Great*

[14] See the Athlete's letter at page 208 of the Hearing Bundle Ex.1.
[15] *Dickason v Edwards* (1910) 100 CLR 243.
[16] *Dickason v Edwards* (1910) 100 CLR 243.
[17] *Dickason v Edwards* (1910) 100 CLR 243.
[18] *Dickason v Edwards* (1910) 100 CLR 243.

Britain[19] or decisions affected by "Wednesbury unreasonableness"[20] or when the decision may be said to be "perverse".[21]

63. In *AFL v Carlton Football Club Limited*[22] where the authorities were collected, Hayne JA as he then was, said that he did not need to choose between those various expressions.

64. For the purposes of the present analysis, I may add the expression "manifestly excessive". In my view the Board's decision does not come close to offending any of those tests.

MAIN SUBMISSIONS OF THE PARTIES

The Applicant's Submissions

65. The Athlete is an intelligent and articulate woman. They had retained lawyers in the lead up to the hearing and decided to represent themself at the hearing. I have carefully read and considered all of the Athlete's earlier submissions in writing made to Polocrosse Australia including those prepared by their lawyers, as well as their written and oral submissions made in the arbitration.

66. Pursuant to directions I had earlier made, the Athlete delivered written submissions before the commencement of the hearing.[23]

67. The Athlete summarised their submissions that the sanctions imposed upon them were manifestly excessive as follows:

> "(i) I can only be sanctioned as a member of the Australian Polocrosse Team and not as a member of P.A.;
>
> (ii) The sanctions overall are in excess of power under that criterion and manifestly so;
>
> (iii) I cannot be sanctioned as a member of Polocrosse Australia as I am not or was not a member of Polocrosse Australia;
>
> (iv) I am a registered member of the XX Polocrosse Club which is a club in Western Australia. That club has me as a suggested player on the Polocrosse Australia database of registered players."

68. In their further detailed submissions the Athlete characterized their "offending behaviour" as "behaviour of a member of a National team".[24]

69. The Athlete said that they did not dispute the fact that a misrepresentation had been made and they said that an "apology and contrition" had been made in their email to Polocrosse Australia on 15 April 2022.

70. The Athlete made a suggestion of "apprehension of bias" on the part of the Board of Polocrosse Australia. This subject did not form part of the reference to arbitration. In any event

[19] Lee v Shomen's Guild of Great Britain.
[20] (1948) 1 KB 223 @ 229-230.
[21] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
[22] *AFL v Carlton Football Club Limited* (1998) 2 VR 546 @ 567-569.
[23] Those submissions appear at pages 610—614 of the Hearing Bundle Ex 1.
[24] The Athlete's submissions at page 610 of the Hearing Bundle Ex 1.

I have seen nothing in the materials in the Hearing Bundle to support an apprehended bias contention. The argument was not pursued at the hearing.

71. The Athlete then argued that although "4 discrete breaches" were relied upon by Polocrosse Australia it "was difficult if not impossible to reference the penalty to any individual breach" and that this is suggestive that "double counting" has occurred. The Athlete then went on to say that they accepted that "all at least the those breaches (sic) of the constitution can constitute one penalty". I do not consider that it was necessary for the Board to apply its penalties and sanctions specifically to each separate breach.

72. The Athlete then argued that as they had been removed from the National Team on 23 April 2022 the sanctions under the Polocrosse Australia Selection Policy "had been exhausted" and so it was argued "as (their) inclusion in the team ceased by operation of the Policy in 2024 (it being the next national championship) then a penalty beyond operation of the Policy is, unless determined otherwise, excessive".

73. Building upon that foundation, the Athlete contended that "as they were not and had never been a member of (Polocrosse Australia) they could not be sanctioned otherwise than under the Selection Policy.

74. What that submission fails to acknowledge is that members of a National Squad or Team have become subject to the constitution of Polocrosse Australia which is expressly called up by Clause 12 of the Selection Policy. It follows that a player's compliance with the Constitution of Polocrosse Australia is a consequence of membership of the National Squad or Team and is not confined in its origin to being a "member" of Polocrosse Australia. If for the sake of the argument those submissions were accepted, they can have no impact upon the penalties and sanctions imposed upon the Athlete.[25]

75. The first of the penalties, removal from the Australian Team for the imminent Series against New Zealand, is not challenged in isolation by the Athlete and there can be no question that as a member of the National Team, the Athlete could be removed from that Team by reason of their breach of Clause 12 of the Selection Policy as found by Polocrosse Australia.

76. Accepting for the sake of the argument, and as the Athlete contends, that they are not a member of Polocrosse Australia, then "suspension as a member" can have no impact upon them – there was no membership from which they could be suspended and no question of the penalty or sanction being "manifestly excessive" can arise. As the Athlete's solicitors have stated, the Athlete was a member of Polocrosse Australia since 8 April 2022.[26] They were therefore amenable to the powers of the Board of Polocrosse Australia in respect of the future period of three yeas commencing on 13 May 2022. I agree with the submission made by Polocrosse Australia that for the purpose of imposing that penalty, it does not matter that the Athlete became a full financial member of Polocrosse Australia on 8 April 2022, they had already been made subject to the Selection Policy which in turn by Clause 12, called up breaches of the Constitution of Polocrosse Australia.

77. The Athlete then submitted that the proposed suspension periods are manifestly excessive as they go beyond protection of the game and are punitive. She contended that the purpose of

[25] See paragraph 16 on page 9 above.
[26] Letter from Andrews Legal, 29 April 2022 reproduced at page 233 and following of the Hearing Bundle Ex 1.

penalties is to "protect the institutions and or the persons intersecting with those organisations and or professions" and "penalties are not applied as personal admonishments".

78. The Athlete then argued that the suspension imposed a penalty upon their club as well as themself and that it "inflict(ed) reputational damage in the broader context" and said that while the protective element does usually cause reputational damage such must be proportional.

79. The Athlete submitted that the circumstances were a "one off" because of an error of judgment and again argued that the sanctions were punitive.

80. When considering the Athlete's submissions I have also taken into account all of their correspondence with Polocrosse Australia, their reference to other disciplinary penalties, the oral submissions made directly to the Board of Polocrosse Australia and their lawyer's letters to the Board.

81. Finally, I should record "the Athlete's explanation for what occurred, in their own terms:

> "I personally wouldn't have done any of this misrepresentation if I had the confidence of being treated fairly by Polocrosse Australia. That confidence doesn't exist – myself and other Australian representatives have been removed from Australian Teams or threatened to be removed in several instances previous to this by Polocrosse Australia Board members when personal situations have arisen, for example but not limited to:
>
> A. Requesting family be included and present during our World Cup Campaign in 2011 (refer to Appendix 1 of the Athlete's Submission 15th September 2022).
>
> B. Former Australian Players being removed from our Australian Team for their horse dying.
>
> C. Myself and younger sister threatened to being removed from our Australian Team as late for the training sessions, excused for attending their mothers funeral.
>
> And therefore I behaved out of character.

82. There is no evidence before me to support this allegation, which I do not accept in any event. Further it does not fall within the terms of the parties' referral to arbitration.

83. Polocrosse Australia has emphasised that one of the matters it took into account when considering the appropriate penalties and sanctions to be imposed upon the Athlete was that they had not properly acknowledged the severity of their conduct. In their evidence at the hearing the Athlete said that "no one was hurt" and that, as events turned out, the change in vaccination requirements meant that vaccination was "not needed anyway at that time". The Athlete said that the Board members including Ms Rose were "not being honest" and "surely they can overlook a fuck up". These contentions do not reflect well on the Athlete and reinforce the view of the Board that they had not either understood or acknowledged the gravity of their conduct.

The Polocrosse Australia Submissions

84. At the forefront of the submissions Polocrosse Australia emphasised that the sole issue to be determined by the arbitrator is whether the sanctions imposed upon the Athlete were "manifestly excessive".

85. Accordingly, so the respondent submits, there are no factual matters to be determined in this arbitration and that the determination of the question whether the sanctions imposed are manifestly excessive needs be determined on the basis of the factual findings that were made by Polocrosse Australia.

86. Polocrosse Australia submitted that the test of what is "manifestly excessive" is one which sets the bar very high.

87. Having made that submission Polocrosse Australia thus relied upon a number of decisions in sentencing appeals and in particular upon statements that in a sentencing context where the result of the Court's order is "unreasonable or plainly unjust" the sentence may be reviewed.

88. However Polocrosse Australia then submitted that based upon *Associated Provincial Homes Ltd v Wednesbury Corporation*[27] as explained in *AFL v Carlton Football Club Limited* (supra note 22), the penalties and sanctions were not "manifestly excessive".

89. The respondent's submissions then turned to examine the principles applied in the appellate cases which examined the basis upon which the sentences imposed by a trial judge could be reviewed on appeal.

90. I have formed the view that the respondent's submissions have both mixed and conflated criminal law sentencing principles with the Wednesbury test. That is not the approach required in the conduct of sporting appeals where the Wednesbury test embodies the correct analysis without the addition of a gloss from the criminal law.

91. In so far as the respondent has relied upon sentencing cases it is nevertheless important for me to emphasise that in the view I have formed, an application of criminal law sentencing principles would not in any event result in the sanctions in the present case being described as "manifestly excessive".

92. Polocrosse Australia then submitted that I should give due deference to the assessment made by Polocrosse Australia of the necessary penalties and sanctions. I have done this at each level of my analysis.

93. The respondent then submitted that in the present appeal the question of whether Polocrosse Australia had the power to impose the sanctions in question, has not been referred for arbitration. I accept that submission and in any event, as Polocrosse Australia has submitted, I have concluded that the respondent's power to exclude players from representative teams is derived from the absolute discretion that the respondent has over the membership of those teams, as the national governing body that conducts the teams.[28]

94. I also accept the submissions of Polocrosse Australia that the alleged contraventions of clauses 5.7(e) and 7.2(b)(i) of the Constitution of Polocrosse Australia require that the conduct of the applicant the Athlete involved conduct that was unbecoming of a member of Polocrosse Australia and was also prejudicial to the interest of Polocrosse Australia and the sport of polocrosse.

[27] (1948) 1 KB 223.
[28] See paragraph 18 of the respondent's written submissions.

95. That is plainly the case in these proceedings when the test in *Darcy v AOC*[29] is applied. In that case the Court of Arbitration for Sport concluded that "bringing a person into disrepute is to lower the reputation of a person in the eyes of ordinary members of the public to a significant extent". The Board was entitled to conclude that the proven conduct of the Athlete was of that character; indeed it is difficult to conceive of actions which could further lower the Athlete's reputation once her conduct had been properly considered. It is not possible to discern any redeeming features in the Athlete's conduct.

96. The Board of Polocrosse Australia based its decision upon the sanction which it considered appropriate on the factual findings which are set out in the letter dated 13 May 2022 which was forwarded to the Athlete. It was open to Polocrosse Australia to make the findings set out in this letter and except for the question whether the penalties were "manifestly excessive" it was not suggested otherwise.

97. The respondent then referred to the detailed evidence of Mr Graham Lane. I have set out Mr Lane's evidence concerning the matters considered by Polocrosse Australia later[30] in these reasons so it is unnecessary to repeat that evidence. To the extent that the question referred to me for determination requires me to form my own view of what was "manifestly excessive" or accept Mr Lane's evidence. To the extent to which I was required to apply the Wednesbury Test I have based my conclusions upon proof of the matters the Board took into consideration when deciding upon the appropriate penalty.

98. The respondent argued that the objectives of disciplinary sanctions include the protection and advancement of Polocrosse Australia's views and objectives by "denouncing misconduct and making clear to relevant persons such as participants, sponsors and financial supporters, that the conduct is not approved or condoned" by Polocrosse Australia.

99. It was open to Polocrosse Australia to make the findings which are set out in the letter of 13 May 2022.

100. In its submission, Polocrosse Australia emphasised that it was "firm that premeditated cheating will not be tolerated" at the hearing. The Athlete admitted that her conduct was cheating and that they had deliberately and repeatedly engaged in that conduct.

101. Polocrosse Australia responded to the Athlete's membership submission by pointing to the fact that the Athlete's "non-membership" is not an issue in the arbitration. This is undoubtedly so however in order to enable the Athlete to be aware that all their arguments have been considered even though the parties have not referred the membership question to arbitration, I make the following observations. There can be no doubt that they were paid up as a full financial member on 8 April 2022. By doing so the Athlete agreed to be bound by the disciplinary provisions of the Constitution and it does not matter that the offending conduct occurred before that time if the conduct was of the prescribed character. It would be an absurd result if a player who has represented Australia for a long period and who at the end of that period, committed serious if not criminal breaches of the Constitution, then paid their membership dues after continually conducting themself as a member, could not be disciplined

[29] CAS 2008/A/1539.
[30] See paragraphs 103 and following.

for offences committed prior to paying their membership fees, when the penalties and sanctions were imposed after such fees were paid.

102. In my opinion it was open to Polocrosse Australia to form and act on the view that in order to achieve and maintain (if not restore) the trust and confidence of Government, the public, sponsors, parents and competitors (and I would include Federal and State Governments) that it was necessary to impose firm sanctions. It was legitimate for Polocrosse Australia to begin its consideration of the sanctions to be imposed by looking at the severity of the serial offences and their possible consequences. It was also open to Polocrosse Australia to conclude that the requirement that the athlete should be disciplined was a relevant factor in the decision to impose sanctions. I have formed this view based upon my examination of all the evidence including the statement of Mr Graham Lane.

The evidence of the President of Polocrosse Australia

103. Mr Graham Lane has been the President of the Board of Polocrosse Australia since May 2019. Mr Lane gave detailed evidence in his statement which was not challenged, concerning the nature and the subject of the Board's consideration of the penalties and sanctions, if any, which the Board might impose upon the Athlete. In considering this evidence I bear in mind that the Athlete did not at the time challenge or disagree with any of the descriptions of their conduct in the disciplinary notice which the Board had sent to the Athlete on 13 May 2022.

104. In his explanation of the Board's approach Mr Lane said: "the nature and extent of the conduct of the Applicant that supported the contraventions found by the Board was a significant matter. The Applicant had engaged in a series of deliberate and conscious acts of dishonesty towards Polocrosse Australia in connection with their membership of the Test Team. On five occasions they provided information and documents to Polocrosse Australia that they knew were false to mislead it as to her vaccination status".[31]

105. Mr Lane then set out his view that: "This was serious misconduct in my view, particularly from an experienced senior member of a national representative team of Polocrosse Australia. Polocrosse Australia expects that its members will act honestly and with integrity in their dealings with it, but in particular expects that its national representatives will exemplify these values. The Applicant as a national representative is given prominence and prestige by their selection by Polocrosse Australia and by this close association, the impact that their conduct can have on the interests and reputation of Polocrosse Australia required them to be held to the highest standards".[32]

106. Mr Lane also emphasized that "the Applicant had on four occasions fraudulently altered official Australia Federal Government documents to falsify information about their vaccination status. Mr Lane said that the fact that the Applicant was willing to falsify Government documents to mislead demonstrated a complete lack of regard for their obligations of honesty generally and for their obligation to act lawfully"[33] and said that "what was particularly concerning to (him) about their conduct was that when they were directly confronted with (the Board's) suspicions about the authenticity of the information and documents that they provided, and therefore had

[31] See paragraph 41 of Mr Lane's statement at page 389 of the Hearing Bundle Ex.1.
[32] See paragraph 42 of Mr Lane's statement at page 389 of the Hearing Bundle Ex.1.
[33] See paragraph 43 of Mr Lane's statement at page 389 of the Hearing Bundle Ex.1.

an opportunity to admit their wrongdoing, they instead provided further false information and produce two more fraudulently altered official Australian Federal Government documents".[34]

107. What was also of importance to Mr Lane and the Board was the purpose of the conduct of the Athlete. Mr Lane said that "the purpose of the conduct of the Applicant was also a significant matter. It was undertaken in an attempt to enable them to participate in the Test Series in circumstances where that participation would be in breach of the then COVID-19 Rules of the Queensland Government, which had been put in place for the protection of the health of the general public during a pandemic, including vulnerable persons. In this respect the Applicant did not obtain a relevant vaccination exemption until 26 April 2022, nearly two months after they first represented that they were fully vaccinated and eligible to participate in the Test Series. The conduct of the Applicant also had the potential to undermine the safety of participants in, and attendants of, the Test Series, given the greater risk of infection in unvaccinated individuals".[35]

108. Mr Lane said that "in considering the conduct of the Applicant, an important matter was the explanation that they gave for their behaviour. I understood that they did not want to get vaccinated because of their perceived concerns about the risk in getting the vaccine, but the only explanation that they appeared to give for their multiple deceptions and falsified documents was that they did not want to miss out on playing in the Test Series. As this was a Test Series that at the time of their conduct they had no right to participate in as they were neither double vaccinated nor had a relevant exemption, this explanation in Mr Lane's view reflected very poorly on them. Another important matter to which (the Board) had regard was the need to protect the reputation of Polocrosse Australia as being a sport that is well governed and whose participants are law abiding and honest in their participation. In my view this is important for ensuring the propagation of the sport but also to maintain the high reputation that the sport has with the Federal and State Governments. Polocrosse Australia is the recipient of various government funding for activities, including from Sport Australia, and the ability of the sport to continue to obtain this funding is dependent on Polocrosse Australia maintaining a good reputation".[36]

109. In the view formed by Mr Lane "the conduct of the Applicant …. had the clear potential to damage the reputation of Polocrosse Australia and the sport in Australia if the sanctions imposed did not make clear the extent of its disproval of their conduct. The conduct of the Applicant, and the sanctions that were imposed for that conduct, were in my view likely to become known to many people. Even if this was not the case, any sanctions imposed by Polocrosse Australia in my view had to be one that made clear that the conduct of the Applicant fell well short of the standards that the sport expects.[37]

110. It was said by Mr Lane that "this consideration particularly applied in respect of the Applicant's membership of current and future national representative teams of Polocrosse Australia, the act of selection of a player is an endorsement and association by Polocrosse Australia and to continue to select a player after serious misconduct of this kind, without a significant period of suspension being served, would suggest that Polocrosse Australia accepted low standards of

[34] See paragraph 44 of Mr Lane's statement at page 389 of the Hearing Bundle Ex.1.
[35] See paragraphs 45 & 46 of Mr Lane's statement at pages 389-390 of the Hearing Bundle Ex.1.
[36] See paragraphs 47 & 48 of Mr Lane's statement at page 390 of the Hearing Bundle Ex.1.
[37] See paragraph 49 of Mr Lane's statement at page 390 of the Hearing Bundle Ex.1.

behaviour in its senior national representatives. This would in my view inevitably damage the reputation of Polocrosse Australia and the teams in which the person participated".[38]

111. Mr Lane said that "another factor that I considered was the need to ensure that any sanction imposed acted as a real deterrent to other players who may be tempted in the pursuit of some personal interest to be less than honest in their dealings with Polocrosse Australia. This required the sanctions to be imposed to be meaningful".[39]

112. It was Mr Lane's assessment that given the serious nature of the misconduct the Applicant had engaged in, that the interests of Polocrosse Australia required the sanction imposed on the Applicant to be a significant one. Mr Lane said that "this was the view that was shared by all other members of the Board".[40]

113. Mr Lane considered that in his view "the sanction had to be substantially greater than simply removing the Applicant from the Test Team for the May Test Series. He considered that the Board had no choice other than to remove them from the Test Team, as they had deliberately misled Polocrosse Australia in an attempt to participate in the Series when they were at that time not eligible given their unvaccinated status and lack of vaccination exemption. Mr Lane also considered that given that their conduct demonstrated behaviour that was well below what was expected of national team representatives, and that their misconduct directly related to their participation in a national team, that a significant period of exclusion from national team participation was also warranted. While it would have been open to Polocrosse Australia to simply exercise its discretion to not select the Applicant, it was important, Mr Lane considered that a clear period of selection ineligibility was included in the sanction".[41]

114. In Mr Lane's view "that sanction should include a period of suspension from participation generally in polocrosse, albeit for a shorter period. Representative selection is a privilege not a right and given how serious the misconduct of the Applicant was, I considered that exclusion from general participation in polocrosse was warranted. This would ensure that the sanction functioned as both as effective deterrent and denouncement of the conduct, given the wider public impact that a suspension from general participation would have. I understood the impact that a period of suspension from general participation and ineligibility for the national team would have on the Applicant, given their love of playing, and passion for, the game but I thought it was required given their conduct. One issue that Mr lane and others on the Board had was whether the Applicant understood the seriousness of their conduct and was truly remorseful and contrite for what the Athlete had done. Mr Lane said that the Board was concerned that they did not, given their persistent contention that being removed form a Test Team that they were ineligible for at the relevant time was a sufficient sanction. It was for this reason that the Board gave the Applicant an opportunity to reduce their general participation ban by six months by giving training programs and providing formal written apologies for their conduct. Conducting the programs and providing the apology would in our view be an effective way for the Applicant to demonstrate their remorse. The Applicant was unwilling to accept these conditions, which would appear to reflect their lack of understanding of the very serious nature of their misconduct. This appears to continue to be the case given that in the notes that

[38] See paragraph 50 of Mr Lane's statement at pages 390-391 of the Hearing Bundle Ex.1.
[39] See paragraph 51 of Mr Lane's statement at page 391 of the Hearing Bundle Ex.1.
[40] See paragraph 52 of Mr Lane's statement at page 391 of the Hearing Bundle Ex.1.
[41] See paragraph 53 of Mr Lane's statement at page 391 of the Hearing Bundle Ex.1.

the Applicant made of their meeting with the Board on 20 July 2022, they records themself as saying that the sanction that was imposed on them was "for a piece of paper!".[42]

115. Overall, Mr Lane said "the Board in its considerable gave careful consideration to each of the matters raised by the Applicant in their submissions, including their character references. The character references were to their credit and in the absence of this material the Board would have likely imposed a longer participation ban. The Board also considered the two sanctions that the Applicant put forward as comparable, in professional US sports for players using false COVID-19 vaccination documents. The sports in which these players participated are very different to the sport of polocrosse in Australia and the interests of the relevant governing bodies appear to be very different to the interests of Polocrosse Australia that the sanction imposed is protecting. Unlike those examples, the Applicant in this case is a senior member of a national representative team conducted by the national governing body – Polocrosse Australia – and the relevant conduct is in respect of their membership of that team. There is also a clear difference to a suspension imposed on a professional athlete given the financial impact that the suspension has. It was my view and that of the Board that it was difficult to derive much assistance from other cases as they each depend on their own facts. After considering the matters set out above and other factors, I reached the view that the sanction that should be imposed on the Applicant was that set out in paragraph 36. This was my assessment as President of Polocrosse Australia of the sanction that needed to be imposed on the Applicant in order to maintain and enhance the standards and reputation of Polocrosse Australia. This was a view shared unanimously by the other members of the Board. It was deeply disappointing to me that we were required to impose such a significant sanction on a prominent and significant player of polocrosse in Australia but I was similarly deeply disappointed that a player of the Applicant's stature had displayed such a lack of honesty and integrity in their dealings with Polocrosse Australia".[43]

116. I have concluded that the Board of Polocrosse Australia evidently gave careful and proper consideration to all relevant matters and did not allow itself to be distracted by irrelevant matters. Each of the conclusions drawn by Mr Lane and by the Board were directly referrable to the elements of the offences which have been proved, which have not been challenged and which do not form part of the remit to me as the National Sports Tribunal.

117. In particular the Board took into account each of the factors described by Mr Lane in the correct context of the connection each factor bore to the objectives of Polocrosse Australia.

118. The Board was also profoundly influenced by the leadership position occupied by the Athlete and their high profile in the sport. This approach was taken not for the purpose of or to have the effect of ameliorating the Athlete's position but with a firm eye upon the reputational damage to the sport if its most recognized and distinguished face at the top of the sport was shown to be a forger and a cheat who was prepared to lie directly to the National Coach and the National President.

[42] See paragraphs 54 & 55 of Mr Lane's statement at pages 391-392 of the Hearing Bundle Ex.1; This statement may be likened to what the athlete said on two occasions during the hearing when she described her actions as amounting only to a "fuck up".
[43] See paragraphs 56-58 of Mr Lane's statement at pages 392-393 of the Hearing Bundle Ex.1.

Arbitrator's conclusions as to the process and procedure followed by the Board of Polocrosse Australia

119. Whilst no challenge is made to the form and the fairness of the procedures adopted by the Board and whilst the sole issue in this arbitration is whether the penalties and sanctions imposed upon the Athlete are "manifestly excessive" nevertheless the attention to detail and the obvious care taken by the Board when arriving at its decision upon the sanctions and penalties to be imposed are a relevant background feature to the enquiry whether those penalties and sanctions were "manifestly excessive". In particular, each of the indicia and descriptions of the manner in which the Board approached its task enable its response to be measured against the elements of the Athlete's conduct.

120. The examination of the aims and objectives of Polocrosse Australia enables a proper evaluation of the actions of the Athlete and whether they provide a proper basis for the penalties and sanctions applied against the Athlete. That evaluation is not to be carried out in a vacuum, if must be made in the light of the aims and objectives of Polocrosse Australia.

121. Those aims and objectives are relevantly stated in the following terms:

Objects:

The Objects of the Company shall be:

(a) act as the national federation for Polocrosse in Australia and to act as the sole Australian affiliated member of IPC; represent Australia in all dealings with the IPC and other overseas Polocrosse association on all matters pertaining to Polocrosse;

(b) co-ordinate and standardize within Australia and, to the extent applicable, internationally the mode of playing Polocrosse and the rules according to which Polocrosse is played;

(c) conduct, encourage, promote, further the interests of, advance, control and manage all levels of Polocrosse in Australia and, to the extent applicable, internationally interdependently with Members and others;

(d) coordinate and regulate within Australia the playing, teaching, stimulation, encouragement and administration of Polocrosse;

(e) act as the final arbiter on all matters pertaining to the playing, teaching, stimulation, encouragement, administration and discipline of Polocrosse within Australia;

(f) promoting the formation within Australia (either singularly or in such groupings as the Company considers desirable) State Associations, Sub-Associations and Clubs all affiliated directly or indirectly with the Company;

(g) standardize constitutions, rules and by-laws of all Member States, Member Sub-Associations and Member Clubs;

(h) adopt, formulate, issue, interpret and amend Policies for the control and conduct of Polocrosse, including:

(i) standardizing the grading of players of Polocrosse;
(ii) standardizing the qualification for appointment of persons to act as umpires and other officials of games of Polocrosse;

(iii) regulate participation in games of Polocrosse sanctioned by the Company; and
(iv) regulating umpiring and officiating at games of Polocrosse sanctioned by the Company.

(i) encourage the provision and development of appropriate facilities for participation in Polocrosse;

(j) maintain and enhance standards, quality and reputation of Polocrosse for the collective and mutual benefit and interests of Members and Polocrosse;

(k) promoted the sport of Polocrosse for commercial, government and public recognition and benefits;

(l) be the only body entitled to prepare and enter Australia teams in International Polocrosse competitions;

(m) promote, control, manage and conduct Polocrosse events, competitions and championships;

(n) encourage and promote widespread participation in Polocrosse and physical activity;

(o) use and promote the Intellectual Property;

(p) have regard to the public interest in its operations;

(q) provide an environment that enables Australian communities, in particular rural and regional communities and families to participate in Polocrosse in a collective endeavour with a spirit of community and family;

(r) protect Australian heritage and knowledge by preserving Polocrosse as a uniquely Australian developed sport having regard to Australia's rural heritage; and

(s) undertake other actions or activities necessary, incidental or conducive to advance these Objects.

122. Those issues and objectives were properly relied upon by the Board of Polocrosse Australia and no challenge was made to the evidence of Mr Lane whose statement set out in detail how and in what manner the Board was influenced by those objectives when it imposed the sanctions and penalties upon the Athlete.

123. Clause 7.1 of the Constitution of Polocrosse Australia (dated 17 February 2022) provides under the heading "Grievances and Discipline of Members", as follows:

> "7.1 Jurisdiction
>
> All members will be subject to, and submit unreservedly to, the jurisdiction, procedures, penalties and appeal mechanisms of "(Polocrosse Australia)" whether under the Policies or under this Constitution".

Under the heading "Policies" clause 7.2(b) of the Constitution relevantly provides:

(b) The Directors in their sole discretion may refer an allegation (which in the opinion of the Directors is not vexatious, trifling or frivolous) by a complainant (including a Director or a Member) that a Member has:

(i) breached, failed, refused or neglected or comply with a provision of this Constitution, the Policies or any other resolution or determination of the Directors or any duly authorized Committee; or

(ii) acted in a manner unbecoming of a Member or prejudicial to the Objects and interests of the Company or Polocrosse, or both: or

(iii) prejudiced the Company or Polocrosse or brought the Company or Polocrosse or themselves into disrepute,

for investigation or determination either under the procedures set down in the Policies or by such other procedure and/or persons as the Directors consider appropriate.

Clause 5.7 of the Constitution relevantly provides:

(d) A Member must treat all staff, contractors and representatives of the Company with respect and courtesy at all times.

(e) A Member must not act in a manner unbecoming of a Member or prejudicial to the Objects and interests of the Company or Polocrosse, or both.

Clause 12 of the Polocrosse Australia Selection Policy (7 March 2017) provides as follows:

"12. Removal from a selected squad or team

(a) Any Participant who fails to perform as a member of an squad to the standard expected by the National Selectors or Executives of the PAA shall at the discretion of the PAA executive be removed from a national squad or team. Such circumstances may include (but not necessarily so):

- Breaches or fails to observe this Policy, the PAA Constitution or Regulations; or
- By reason of illness or injury is unable to perform to the required standard in the opinion of the National Selectors or the team coach (after having received advice from a medical practitioner); or
- Breaches or fails to fulfill a requirement of the PAA Anti-Doping Policy; or
- Breaches or fails to comply, fulfill and observe the requirements in the deed of agreement.
- Is ineligible for selection, or continued membership, of the national squad or national team as the case may be.

(b) Any Participant may be removed from the national squad or team by the National Selectors in consultation with the team coach, team medical advisor or the PAA as the circumstances may require. This may include situations where the Participant has failed to sustain his or her performance levels and attitude, have first been discussed with the Participant and the Participant had been given the opportunity to attain those performance levels within a reasonable time.

124. Again, although issues related to the powers and jurisdiction of the Board were not referred to me for determination it is important for me to record that in my opinion the powers and the

jurisdiction of the Board of Polocrosse Australia fully supported the Board's decision to impose the penalties and sanctions which are the subject of the present proceedings.

Arbitrator's findings concerning the Athlete's credit arising out of the hearing

125. In two significant respects I have not accepted the evidence of the Athlete. The first concerns the telephone conversation the Athlete had with Mr Graham Lane on 3 April 2022. The second concerns the evidence the Athlete gave in the present hearing on the subject of the given "tick" by which the Athlete intimated their affirmative response to the question whether they had been vaccinated.

126. Although the hearing was expressly limited to the question whether the penalties and sanctions imposed were "manifestly excessive", the Athlete chose to accuse Mr Lane of "dishonesty" and to assert that they had not said anything in the telephone conversation about being or not being vaccinated.

127. Before dealing with that allegation I should record that although that issue was beyond the remit of the arbitration I had on this and other occasions taken the approach that I should give the Athlete some leniency as they were not legally represented at the hearing. Nevertheless, I formed the view that the allegation must be dealt with fairly to Mr Lane by giving him an opportunity to squarely deal with it in evidence before me even though the Athlete had earlier advised that they did not require Mr Lane to be present at the hearing.

128. Mr Lane was immediately called to give evidence in reply to the allegation the Athlete had made. Mr Lane was a careful and conscientious witness who impressed me as having a clear recollection of the conversation and was able to point to the circumstances attending the conversation which placed its terms firmly in his memory. I unreservedly accept Mr Lane's evidence of the conversation which was also set out in two unanswered emails to the Athlete.

129. The Athlete faced a number of insuperable difficulties when they continued to assert their version of the conversation.

130. The first of those was the email sent by Mr Lane to the Athlete on 5 April 2022 at 6.32am in which Mr Lane referred to the Athlete having said on 3 April 2022 in their telephone conversation that they had received one vaccination.

131. Then, at 9.32am on 6 April 2022 in his email to the Athlete, Mr Lane again referred to the Athlete's statement in the recent telephone conversation that they had received one COVID 19 vaccination.

132. Neither of those emails was contradicted by a reply from the Athlete.

133. The final difficulty standing in the way of acceptance of the Athlete's evidence of the telephone conversation with Mr Lane, is the fact that after they had given what they described as careful instructions to their lawyers, Andrews Legal, that firm did not suggest in the detailed letter to Polocrosse Australia that Mr Lane's version of the telephone conversation was incorrect. Mr Thomas said that they had read the Andrews Legal letter of 29 April 2022 to Polocrosse Australia before it was sent.

134. It is therefore essential that I direct myself to ensure that I do not allow those findings to be factored back into the earlier consideration of Polocrosse Australia of the appropriate penalties

and sanctions to be imposed upon the Athlete and then used as a later confirmation of the Board's conclusions.

135. Similarly, I must ensure that I do not allow those conclusions to influence in any way my conclusions that the penalties and sanctions were not "manifestly excessive". In other words I have altogether excluded my conclusions on credit based upon the Athlete's evidence at the hearing from my consideration of whether the penalties imposed earlier by Polocrosse Australia were manifestly excessive.

136. It would be unfair to the Athlete if credit findings arising out of this hearing were considered to have the effect of reinforcing or buttressing the earlier decision on sanctions made by the Board. In particular when considering the Wednesbury Test any credit finding made by me as a result of anything said or done during the hearing can have no bearing upon the question whether the earlier decision of the Board was "irrational" within the meaning of the Wednesbury principle.

Publication

137. I have carefully considered the question whether this award should be published under the terms of section 56 of the Act. I consider that the Award should be published.

138. My reasons are as follows. Firstly the National Sports Tribunal now sits permanently at the apex of Australian sporting organisations and together with Sport Integrity Australia, plays an important role in the development, expression, application and enforcement of Australian sporting values. It is these values which have for many decades deservedly placed Australia in a highly respected position in the eyes of the sporting world. It follows that any dispute which essentially involves a question of general importance and application concerning fundamental personal and sporting values and the integrity of athletes, may be considered worthy of publication by reason of the decision having "precedential value" as that expression is used in section 56 of the Act.

139. Secondly, the present case concerned the purposeful attempts by Polocrosse Australia at a national and international level, to ensure that an international health crisis which was causing the deaths of many thousands of people, was handled in a safe, responsive and effective manner and in accordance with the clearly and frequently expressed directions of public and governmental authorities.

140. Thirdly, the parties have deliberately requested the arbitrator appointed by the National Sports Tribunal, to express his own view upon the question whether the penalties and sanctions imposed were "manifestly excessive". It is both important and a useful adjunct to the proper administration and conduct of sporting disciplinary procedures, for a general sporting readership to be made fully aware of the careful manner in which Polocrosse Australia dealt with the issue and to know the considered views of the National Sports Tribunal arbitrator, in relation to such matters of special and general significance.

141. Fourthly, that evident purpose is underscored in the present case by repeated statements by the athlete which continued to relegate the entirety of their serial conduct between 2 March 2022 and 6 April 2022 to "a piece of paper"; "the manner of any documents" or as just a "fuck up". Their conduct was considerably more than that and a reasoned statement by the National

Sports Tribunal arbitrator upon that issue will play an important part in the setting and maintenance of national sporting standards.

142. Fifthly, the National Sports Tribunal is a relatively new organisation and it is making great headway in its objectives of bringing all national sporting organisations under its umbrella. In this particular case the processes structured by section 23 of the Act constitute a useful and effective method by which a national sporting body may agree with an athlete to refer a "dispute" to a National Sports Tribunal arbitrator in circumstances where no right of appeal or review was conferred by the rules of the National Sports Tribunal. For that essentially and fair procedure to operate efficiently it is necessary for the parties to agree to frame the dispute in a manner which gives expression to a recognized ground of review.

143. In the present case the parties' formulation of the issue necessarily involved a mixing or conflation of sentencing principles with the Wednesbury principle and thus presented for determination by the arbitrator a new and unknown ground of review. That choice threw up the possibility of confusion between those sentencing principles and the Wednesbury principles. The legal submissions made by Polocrosse Australia clearly contended that both criminal sentencing principles and the Wednesbury principle applied.[44]

144. The importance of the Wednesbury principle in sporting appeals of this type cannot be overstated. The principle is time-hallowed and familiar to all in the sporting community.[45] One of the special virtues of the principle is that it recognises and respects, within set limits, the decisions of sporting bodies which generally have special knowledge and experts in the subject matter.

145. So, when the parties to a sporting "dispute"[46] sit down to formulate a description of the "dispute" which is to be referred to an arbitrator for determination they should express themselves in the familiar terms of existing legal principles and refrain from formulating an issue or "disputes" in terms which do not encompass or express an existing ground of review available under the general law. Earlier in those reasons I have referred to the problems which can arise if such a course is followed.

146. Sixthly, as the present case has shown, there is not a great deal of guidance offered by sporting bodies in the field of 'comparable' penalties or sanctions in disciplinary cases. The present case may offer some useful guidance upon that question and in particular upon the relationship between the nature and character of penalties and sanctions in the achievement and maintenance of the essential aims and objectives of any national sporting body.

147. Bearing in mind that the Board of Polocrosse Australia was at one stage content to agree that the Athlete's name should not be published, I consider that it is appropriate to continue to apply that sentiment. Polocrosse Australia should be permitted to make public to its community the sanctions and penalties which have been imposed and to refer to the Athlete in that context. As to the publication of these reasons, the Athlete's name should be redacted from any version or summary. These reasons are lengthy, however in view of the importance of the decision to the

[44] See paragraphs 10, 11, 12, 13, 14, and 15 of the Respondent's written submissions dated 5 October 2022.
[45] See for example *Marton v Australian Taekwondo CAS 2021/A/8089.*
[46] See the language of section 23 of the Act where the word "dispute" is separately used.

Athlete personally, and to Polocrosse Australia, I have considered that detailed reasons were essential.

CONCLUSION

148. I have considered the question referred to arbitration by the parties for determination in three alternative ways in order to ensure that all possible approaches to the question have been examined, so that the parties' submissions are fully treated and so that any ambiguity or uncertainty in the manner in which the question has been framed does not result in wasted resources or delay the final resolution of the real issue in dispute.

149. Following that approach led me to accepting the facts upon which the Board of Polocrosse Australia based the decision and then to furnishing my own answer to the question whether the penalties and sanctions were "manifestly excessive". Then in the alternative I considered the question as a Wednesbury question. Finally I examined the respondent's sentencing submissions. All three approaches led me to answer the question referred to me in the negative.

Collateral allegations made by the Athlete

150. At the hearing the Athlete made an allegation of dishonesty against Mr Lane and Ms Rose, a member of the Board of Polocrosse Australia and a lawyer representing Polocrosse Australia in the arbitration.

151. Such allegations are not a necessary part of the issues referred to me for determination, and there is no evidence to support them. During the hearing I advised both parties that I did not propose to dwell upon the allegation against Ms Rose. The allegation of dishonesty against Mr Lane by the Athlete has been dealt with earlier in these reasons.

THE TRIBUNAL THEREFORE DETERMINES:

1. I answer the Question or dispute referred to me for determination:

    1. Whether the penalties and sanctions imposed by the Board of the Respondent upon the application by its letter of 24 August 2022 were "manifestly excessive? **Answer: No**

    2. It is therefore unnecessary for me to consider whether in any way, the steps contemplated by paragraphs 6.2, 6.2.1 or 6.2.2 of the reference are required to be implemented.

2. Accordingly, I adjudge, determine, declare and award that the application for determination made to the National Sports Tribunal on 24 August 2022 should be dismissed.

3. Section 46 of the National Sports Tribunal Act makes specific provision for the making of rules for and in relation to the CEO of the National Sports Tribunal charging one or more of the parties to an arbitration for the costs in conducting the arbitration and apportioning the charge between one or more of the parties and waiving the whole or part of the charge. It is therefore inappropriate for me to make any order or award as to the costs of the arbitration.

Date: 23 November 2022

Mr Bruce Collins KC
Sole Arbitrator