



NST-E24-197449

Lisa Jane Weightman v Athletics Australia

## Determination

### National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Ms Elisa Holmes

in the arbitration between

**Lisa Jane Weightman**

*(Applicant)*

Represented by Scott Buchanan, Legal Representative

And

**Athletics Australia**

*(Respondent)*

Represented by Peter Bromley, CEO; Simon Thompson,  
General Manager - Integrity, Governance & Risk; and  
Peter Hamilton, Chair of Selection Committee.

And

**Jessica Stenson**

*(Affected party)*

Unrepresented

And

**Genevieve Gregson**

*(Affected party)*

Unrepresented

And

**Sinead Diver**

*(Affected party)*

Unrepresented



## THE APPEAL AND THE PARTIES

1. The Applicant is an Australian marathon runner who was one of three female marathon athletes who obtained a quota place for the Paris Olympic Games following the application of the applicable Qualification System by World Athletics (the **Qualification System**). The Paris Olympic Games are due to take place between 26 July 2024 and 11 August 2024.
2. The Respondent is Athletics Australia (**AA**) whose selection committee (the **Selection Committee**) made a decision not to nominate the Applicant for one of the three quota places available for Australian female marathon athletes as a result of three athletes obtaining a quota place (the **Nomination Decision**). That decision was made on or soon before 10 May 2024. On 10 May 2024 the Applicant wrote to AA in respect of her non-nomination. AA responded on 10 May 2024 with a letter confirming her non-nomination. The Applicant wrote again on 13 May 2024 to which AA responded on 14 May 2024 affirming its decision.
3. The Affected Parties were each nominated pursuant to the Nomination Decision. Ms Gregson and Ms Diver, along with the Applicant, obtained quota places pursuant to the Qualification System. Ms Stenson (the only Affected Party to make substantial submissions) did not obtain a quota place, but she did meet the “performance standard” identified for women’s marathon and could, therefore, pursuant to the Qualification System, be given one of the three quota places by the Australian Olympic Committee (**AOC**) being a National Olympic Committee (**NOC**) for the purposes of the Qualification System.
4. The Applicant and AA provided written submissions, and the Applicant provided written statements. Ms Stenson provided a written statement and written submissions. The parties were content for the matter to be determined on the papers. Having considered the papers, I considered that I would be assisted by an oral hearing on one issue in particular, which is the subject of the Determination below insofar as it is concerned with the first ground of appeal.
5. That hearing took place by audio-visual link on 21 May 2024. All parties, including the Affected Parties, participated in the hearing. Given the urgency of this matter and of the desirability for nomination appeals to be determined as expeditiously as possible, the determination was made on the following day.
6. While I have considered all the facts, allegations, legal arguments and evidence submitted by the parties, I refer in this Determination only to the submissions and evidence I consider necessary to explain my reasoning in the very limited time available.

## NST JURISDICTION AND REGULATORY CONTEXT

7. Nomination and selection for the Olympic Games is governed by the Olympic Team Nomination and Selection By-Law (the **By-Law**). Relevant provisions are set out below in this Determination. Appeals are dealt with in clause 9 of the By-Law. Clause 9.6 is concerned with “Nomination Appeals”. First Instance Appeals to the General Division of the National Sports Tribunal (NST) are governed by clause 9.6(c). The clause sets out various procedural



requirements, which were followed in this case. Given the speed with which this Determination is being produced, the terms of the relevant provision are not set out in full.

8. Clause 9.6(c)(ii) sets out the ground on which an appeal may be brought and provides that the Appellant (Applicant in this case) bears the onus of making out those grounds.
9. The NST's jurisdiction to hear and determine this appeal is contained in section 23 of the *National Sports Tribunal Act 2019 (Cth)*. No objection was taken by either party to the NST's jurisdiction.

### APPLICABLE RULES, GROUNDS OF APPEAL, AND OUTLINE OF PARTIES' SUBMISSIONS

10. As set out above and below, nomination and selection processes for the Olympic Games are governed by the By-Laws. Those By-Laws provide for and are expressly incorporated into the Nomination Criteria: Paris 2024: Athletics (the **Nomination Criteria**). The Nomination Criteria refers extensively to the Qualification System, which is published by World Athletics and which governs the number of places in each athletics event and how those places are to be allocated between NOCs. It also governs minimum standards or athlete participation (referred to as 'qualification standards').
11. The Applicant pursues two grounds of appeal. The first is that the Nomination Criteria was not properly applied and the second is that there was not material on which AA's decision could reasonably be based. For reasons upon which I expand below, I do not need to consider the second ground of appeal.
12. The essence of the Applicant's first ground of appeal is that clause 6.3 of the Nomination Criteria permits the Selection Committee only to nominate athletes whose performances earned a quota position (albeit, as I expand upon below, one which could be given to another "qualified" athlete if the NOC so decided) pursuant to the process contained in the Qualification System.
13. The Applicant also raised a second basis on which it said that the Nomination Criteria were not properly applied, that is, that the times achieved by the athletes in contention for nomination are critically important and overwhelmingly more important than other considerations. Although I do not need to consider this argument put in support of the first ground of appeal given my conclusion on the first argument, in circumstances in which the Nomination Criteria allow for factors other than time to be considered, I do not consider that the discretion thereby afforded to the Selection Committee ought to be confined in such a way. It may be that the matters put in support of this argument could be made in support of the second ground of appeal, but they do not give rise to a basis for finding that the Nomination Criteria were not properly applied.
14. Considerable material by way of evidence and submissions was put forward by the Applicant in support of the second ground of appeal. Material was also provided by Ms Stenson in support of the appropriateness of her nomination. Whilst I have considered this material, as a result of my conclusion in respect of the first ground of appeal (that is, that it should be allowed, and the decision should be referred back to AA for reconsideration), I do not need to determine that ground.



15. AA provided short written submissions and no evidence (as to which see further below). It opposed the grounds of appeal. It provided little analysis of the relevant provisions in opposition to the first ground. In opposition to the second ground of appeal, it provided what it said were reasons for its nomination decision by way of brief written submissions, but no evidence in respect of those reasons. [REDACTED]

[REDACTED] Whilst a representative of AA who was on the Selection Committee said at the hearing that the reasons given in the submissions (in the form of submissions) did reflect the Committee's reasons, given the matters referred to below, including the absence of the timely provision of reasons as required by the By-Law and the suggestion that its stated reasons in the form of submissions were amended, I decline to accept the material in the form of submissions as evidence [REDACTED].

16. The absence of evidence of the Selection Committee's reasons did not, however, impact on the outcome in respect of the first ground of appeal. It may, nevertheless, impact on the manner in which AA constitutes the Selection Committee to make the nomination decision following its referral pursuant to the orders set out below.
17. As I explain further below, AA's letter addressed to the Applicant which was required by the By-Law to contain its reasons for its nomination decision did not in fact contain any reasons. It was, however, evident from that letter that the Selection Committee did not consider the structure of the Qualification System, and in particular, that quota places were allocated to particular athletes, although the AOC (or AA on the AOC's behalf) could make a decision to substitute those athletes who obtained the quota place with other athletes who would instead take the quota place. It is evident from the letter and from submissions made in writing and orally that it considered that it simply had a choice between all "qualified" athletes, of which there were six.

## MERITS

### The first ground of appeal

18. The By-Law (which is incorporated into the Nomination Criteria by reason of clause 2.7 of that document) provides in clause 5.1(a) that:

*Where pursuant to a Qualification System the AOC is awarded athlete quota positions for a sport contested at a Games, the NF governing that sport may nominate Athletes to the AOC for selection to the Team for that Games.*

It is, therefore, assumed in the By-Law that "quota positions" (not defined in that document) are awarded to the AOC rather than to athletes.

19. There are a number of clauses in the By-Law which govern the Nomination Criteria, including clause 5.1(c)(i) which provides that an NF may only nominate athletes in accordance with the Nomination Criteria adopted pursuant to the relevant clauses of the By-Laws. Clause 5.2(b)(iii) provides that the Nomination Criteria adopted by an NF must "*comply with the Qualification System applying to the NF's Sport for the Games*".



20. The Nomination Criteria for Athletics provides that AA may only nominate Athletes in accordance with the Nomination Criteria (clause 2.2). The overarching object of the Nomination Criteria is *“to nominate the athletes to the AOC for selection to the Team who the AA Selection Committee considers have the greatest potential to win a medal or finish in the top eight in their event(s) at the Games”* (clause 2.3).
21. Clause 4.1 provides that AA may only nominate an athlete *“where, pursuant to the Qualification System, the International Federation has awarded the AOC or the National Federation athlete quota positions or confirmed qualification for the athlete or relay team through the World Athletics official published list”*. *“Qualification System”* is defined as *“the eligibility, participation and qualification criteria for the Sport in respect of the Games issued by the International Federation, which can be found at the following URL ...”*. Clause 4 is headed *“Athlete Quota Positions”* which suggests that the phrases *“the AOC”* and *“the National Federation”* each describe *“athlete quota positions”*. The reference to *“confirmed qualification for the athlete”* as an alternative (indicated by the use of the word *“or”*) to quota positions indicates that reference to quota positions is used to describe something different to qualification. It is difficult to understand the point of this because the AOC cannot nominate an athlete other than where the International Federation has awarded the AOC a quota position. In my view, clause 4.1 should be taken to mean, in these circumstances, that AA may nominate an athlete who obtained a quota place as a result of their performances or an otherwise qualified athlete who the AA substitutes for a quota place (as to which see further below). It may also be intended to refer to the ability in some exceptional cases to nominate unqualified athletes (such as provided for in respect of the Marathon, and in respect of *“Universal Places”*).
22. Clause 6 contains the Nomination Criteria. Clauses 6.2 (which is headed *“Phase 1 – Initial Nomination”*) and 6.4 (headed *“Phase 3 – Final Nomination (Individual Events)”*) expressly do not apply to the marathon event. Clauses 6.5 and 6.6 similarly do not apply, on their terms, to marathon.
23. Clause 6.3 is headed *“Phase 2 – Marathon Nomination”*. It provides as follows:

*6.3 Phase 2 – Marathon Nomination*

- (a) *The National Federation may, in its absolute discretion, nominate athletes in the event / discipline of Marathon (hereafter, ‘the Marathon’) who obtain a quota place for the Games in the Marathon in accordance with the Qualification System. When exercising this discretion, the National Federation will consider all the following factors, in descending order of priority:*
- (i) *Athletes who achieve a top eight (8) finish at the 2023 Budapest World Athletics Championships in the Marathon an [sic] have displayed similar form by achieving consistent top 8 finishes in international competitions (if held) in the lead up to the Nomination Date for Marathon,*
- (ii) *each Athlete’s competitive record and demonstrated ability during the Qualification Period to plan their performances to peak at a major championship; and*



(iii) *any other factor, or combination of factors, which the AA Selection Committee considers relevant in nominating Athletes for the Marathon.*

(b) *For the avoidance of doubt, athletes who, when given international opportunities, repeatedly fail to meet or exceed the performance standard required to achieve a quota place for the Marathon, will not necessarily be nominated even if they have achieved the requirements of the Qualification System.*

[Emphasis added]

24. The plain and ordinary meaning of this clause, devoid of any context, is that only athletes who personally “*obtain a quota place*” may be considered for nomination by the Selection Committee. It is also evident that the clause intended to provide for the process set out in the Qualification System.

25. Section B of the Qualification System is headed “*Quota Places*”. It provides for a total number of quota places for each of men and women, and for a maximum number of athletes per event (being three in individual events). Under the heading of “Individual events”, the Qualification System provides:

*NOCs may enter up to three (3) qualified athletes for each event on the athletics programme. In addition, NOCs that fulfil the maximum quota per event can nominate a maximum of one (1) reserve of Ap alternate qualified athlete for the same event.*

26. It seems, therefore, from this clause, that it is anticipated there will be more “*qualified athletes*” than there are quota places, and that quota places “*belong*” to NOCs. As will be seen, however, there is significant inconsistency and ambiguity throughout the document in these respects.

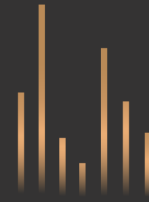
27. Paragraph B.3 is headed “Type of allocation of quota places” and provides that:

*Quota places are allocated to the athlete(s) by name in individual events. If an NOC has more than three (3) qualified athletes in individual events, the NOC can decide which of these athletes will receive the quota places.*

*Quota places are allocated to the NOC(s) in the relay, team events and, to some extent, also in the marathon (subject to conditions as described below).*

[Emphasis added]

28. The highlighted passages suggest a distinction between quota places allocated to athletes, and quota places allocated to an NOC. They also suggest a distinction between athletes qualifying on the one hand and obtaining quota places (awarded to a subset of those who obtain qualification) on the other. It is not clear what was intended by the reference to “*to some extent ... marathon*” save that, as will be seen below, it may be a reference to the fact that, for marathon, some athletes obtained quota places by 1<sup>st</sup> to 64<sup>th</sup> place on the so called “Road to Paris” list published by World Athletics and 14 others could “qualify” pursuant to the “General” “qualification process”, the terms of which seem to elide qualification and quota places (discussed further below). It may also be because under the heading of “Marathon” an NOC is given the power “*to reallocate a quota place to an unqualified athlete*” provided they achieve a maximum time in the specified window. In any event, the distinction seems of limited relevance



given clause B.3 (set out above) which provides that an NOC can decide which of any “qualified athletes” receive the quota places. In other words, the process provided for in clause D determines the number of quota places rather than the identity of the qualified athlete fulfilling that quota place.

29. There are 80 quota places available in the Marathon, as the first table in paragraph D.1 shows (although the evidence, including the “Road to Paris” webpage, suggested that this was increased to 88). The second table has a column headed “Qualification events” under which there is a heading of “Qualification process” and a specific section for “Marathon”. That section provides that:

*Any athlete ranked higher than the 65<sup>th</sup> athlete on the filtered Quota Place “Road to Paris” list on 30 January 2024, will be considered qualified:*

- *After 30 January 2024, the remaining 20% of the quota will be determined by the same two criteria outlined above, without displacing the athletes qualified per 30 January 2024.*
- *Any NOC may choose to reallocate a quota place to an unqualified athlete provided the athlete in the qualification window has achieved at least a 2:11:30h (men)/ 2:29:30h (women) performance.*

This passage appears again to elide qualification and quota places, since it refers to the top 64 athletes on the “Road to Paris” list as being qualified, but then assumes also that they have quota places because it then refers to “the remaining 20% of the quota”.

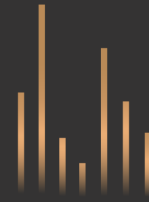
30. The “*two criteria outlined above*” seem likely to be the matters that appear under the “*General*” heading in the same column. That provides:

*An athlete can qualify in one of two ways:*

- *By achieving the entry standard (see section 1) within the respective qualification period outlined below. The entry standards, approved by the World Athletics Council in November 2022, have been determined in order to target the qualification of approximately 50% of the athletes. For the avoidance of doubt, any athlete achieving the entry standard will be deemed qualified, regardless of them being within the 50% or not.*
- *The remaining qualification places will be allocated on the basis of the World Athletics World Rankings within the ranking period.*

[Emphasis added]

31. The effect of this appears to be that any athlete that is in the top 64 athletes on the Road to Paris list obtain a quota place (and therefore “*qualify*”), together with 16 athletes who meet the “*entry standard*”. It is not clear how, if more than 16 athletes met the entry standard, it would be determined who obtained a quota place. It appears from the “*Road to Paris*” list that they were ranked in order of time achieved at a “*Qualification event*”.
32. There was evidence before the Panel to the effect that it was not anticipated by World Athletics that so many athletes would meet the “*entry standard*” in marathon in particular. This is



consistent with the passage in the first bullet point above which states that World Athletics anticipated that only 50% “*of the athletes*” (which one assumes to mean quota places) would qualify in that way. One consequence of this would be that those athletes who met the “*entry standard*” would not need to be ranked because their order in the quota place list would not matter.

33. This also explains the reference to remaining “*qualification places*” emphasised (by me) in the second bullet point above (in the General criteria). It is a surprising phrase in this context because the only places that were limited such that there could be “*remaining places*” were quota places. There was no limit on the number of athletes that could qualify in the sense of meeting the “*entry standard*”, although it was apparently assumed that there would be fewer athletes who met that standard than quota places available. For further context, each country was limited to three athletes, which explains why, despite this assumption (for athletics events generally, and specifically, on the basis of the evidence before me, for marathon) that there would be fewer qualified athletes than quota places, NOCs were entitled, pursuant to clause B.3, to decide which athletes received quota places if they had more than three “*qualified athletes*”. Although “*qualified*” is not there explained, given the heading “*Qualification events*” and “*Qualification process*” referred to above, it seems that it is a reference to the methods for qualification under the “*General*” heading referred to above, which are introduced by the phrase “*An athlete can qualify in one of two ways*”.
34. It is readily apparent that the use of “*quota places*” and “*qualification places*” and related terms in the Qualification System is inconsistent resulting in a lack of clarity that may be resolved only to some extent by reference to the assumption about the percentage of athletes who would qualify by meeting the “*entry standard*”.
35. The matter is not made much clearer in later sections of the Qualification System, although it does seem from that document that athletes who meet the “*entry standard*” are “*qualified*” athletes (because the list to be published is to include those who have “*achieved the entry standard plus the approved unqualified athletes*”). Under the heading of “*Confirmation Process for Quota Places*” in section E, the document states:

*Following the end of the qualification period, World Athletics shall confirm the number of athletes having achieved the entry standard plus the approved unqualified athletes and shall subsequently determine the athletes qualified by virtue of their World Athletics World Rankings position.*

*The list of qualified athletes for each event, and including the relay teams, shall be published in the Road to Paris on the World Athletics website on 2 July 2024.*

This does not clearly accommodate the process for the marathon of identifying quota places according to the “*Road to Paris*” list as at a particular date, although it might reasonably be assumed that athletes identified in that way are deemed to have qualified. Although the heading of this section refers to confirmation process “*for Quota Places*”, there is no reference to “*quota places*” in the description of that process, but only to listing “*qualified*” athletes. Similarly under the heading of “*Reallocation of Unused Quota Places*” in section F, NOCs are directed to inform World Athletics if they decline a “*quota place*” following the publication of the qualified athletes list.





36. Despite the ambiguity evident in the Qualification System, it is clear that where an NOC had more athletes who met the “entry standard” than quota places, it was a matter for that NOC to determine which qualified athletes filled those places.
37. Returning to the Nomination Criteria, it is silent about the process for determining which athletes should be given a “quota place” within the meaning of the Qualification System in circumstances in which more athletes qualify than the number of quota places available. Its terms assume that only those athletes who obtain a quota place are available for selection, disregarding the possibility of more qualifying athletes which would require the NOC (and therefore, in practice, AA through its Selection Committee) to determine which athletes should have those quota places. That is the situation that has come to pass.
38. The Applicant’s position, although put without reference to the context set out above, is that only athletes who obtained a “quota place” (in effect on behalf of the NOC) could be considered for nomination. That construction is consistent with the plain and ordinary meaning of the words used without reference to the context. However it is implausible, in practice, that the Nomination Criteria were intended to require the Selection Committee to ignore qualified athletes and to prevent it from engaging in the process anticipated by the Qualification System for determining which of those qualified athletes should have the quota places available to the NOC. The Qualification System assumes that the NOC (and therefore in practice the Selection Committee) will engage in that process. There is a “Qualification Period” both in the Qualification System and in the Nomination Criteria to enable athletes to qualify. The failure of the Nomination Criteria to express the process as one which is to determine the athletes which should fill the quota places, as contemplated by the Qualification System, is, in my view, a clear error.
39. Further, clause 6.3(a) of the Nomination Criteria expressly refers to quota places obtained “in accordance with the Qualification System”. The difficulty is that in order to determine which athletes obtain a quota place in accordance with the Qualification System requires the exercise of the Selection Committee’s discretion (referred to in the Qualification System as the NOC’s decision). In other words, it is the very process in which the Selection Committee must engage that determines the athletes to which the phrase in clause 6.3(a) refers.
40. Significantly, clause 2.3 of the Nomination Criteria provides that:
- The objective of this Nomination Criteria is to nominate the athletes to the AOC for selection to the Team who the AA Selection Committee considers have the greatest potential to win a medal or finish in the top eight in their event(s) at the Games.*
- The Selection Committee would be deprived of the ability to achieve or even pursue that objective if it was not capable of engaging in the process contemplated by the Qualification System of choosing which qualified athletes should fill the quota places.
41. This position is given some support from the fact that by and large it is assumed in relevant documents that “quota positions” are allocated to NOCs. This is so in the body of clause 4.1, and also clause 5.1(a) of the By-Law as set out above. It is also the effect of the Qualification System as described above, and is expressed in some of its terms. Although of little weight, it is also consistent with what the Affected Parties who appeared at the hearing said was the meaning assumed by athletes. That suggestion was not disputed by the Applicant. It is clear



that the athletes assumed that any athlete that achieved the qualification standard would be in contention for nomination and subsequently selection, thereby receiving one of the AOC's quota places for marathon.

42. The Nomination Criteria document is unfortunately drafted in such a way that assumes there will be no qualified athletes who do not obtain a quota place. This may be explained by the assumptions attributed to World Athletics referred to above. Nevertheless, in my view it should be interpreted in such a way that allows the Selection Committee to engage in the process contemplated by the Qualification System (in accordance with which the Selection Committee is bound to act by reason, inter alia, of the terms of clause 6.3(a)) of deciding which qualified athletes (that is, athletes who have met the "entry standards" or, to put it another way, have "qualified") should be nominated to fill the AOC's quota positions. In doing so it should apply the criteria set out in clause 6.3(a) of the Nomination Criteria. To interpret it otherwise would give the Selection Committee no discretion at all other than to choose not to fill the quota places. It seems implausible that that was the intention in circumstances in which there were a number of (in this case six) qualified athletes, and it is inconsistent with the underlying objective set out above.
43. The process the Selection Committee should undertake is first, to identify those athletes who achieved quota places (in this case, three athletes). It should then identify any other athletes who qualified because they met the "entry standards" referred to above (in this case three other athletes). Having done that, it should then apply the criteria in clause 6.3(a) to determine which of all of the qualified athletes should be nominated to fill the quota places, pursuant to clause B.3 of the Qualification System.

#### **Non-provision of reasons**

44. Clause 9.6(a)(iii) of the By-Law provides as follows:
  - (i) *Within 24 hours of the Chief Executive of the NF receiving a Non-Nominated Athlete's notice of dispute in accordance with clause 9.6(a)(ii), the Chief Executive of the NF must provide the Non-Nominated Athlete with a written statement of the NF's reasons for not nominating the Non-Nominated Athlete.*
45. AA did not comply with the requirement in that clause. The document it provided purportedly in satisfaction of the requirement to provide reasons (being a letter dated 10 May 2024) did not in fact contain any reasons at all. That letter merely said the objective in clause 2.3 was considered along with the "*specific points related to the marathon at 6.3*". It then listed the athletes who had been nominated. The first time reasons were provided was by way of submissions in response to the submissions provided by the Applicant in this matter.



Further, an issue was raised in the Applicant's reply submissions about an amendment to a relevant part of AA's submissions which was made by the provision of a second version which was to be substituted for the first. It was submitted that the change constituted the removal of a



reason that was given in the earlier version but removed in the later version. This change indicates some uncertainty or lack of clarity in respect of the real reasons of the Selection Committee, particularly when coupled with the failure to provide reasons as required by the By-Law.

46. For all of these reasons, I am not prepared to accept the relevant factual matters contained in the submissions as evidence.
47. As set out above, the By-Laws are expressly incorporated into the Nomination Criteria. The failure to provide reasons when required is itself, therefore, a failure to apply the Nomination Criteria.
48. The requirement to provide reasons is not a hollow one. In *In Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, Kirby J described the importance of reasons in this way (at [105]):

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

49. Although his Honour made those observations in the context of an administrative decision, the points apply with similar force to decisions of the kind with which I am here concerned.
50. In order to understand why they were not nominated, a non-nominated athlete is entitled to be told what matters were taken into account, how those considerations were applied or, to put it another way, why the application of those matters resulted in their non-nomination. Considerable discretion is given to selection committees, who are experts in the relevant sporting activity, and experienced in the selection of athletes and the factors relevant to performance at elite level competitions. Reasons do not need to be tens of pages in length. A page or two may suffice.
51. There are other practical reasons why the provision of reasons is important. In the circumstances in which nomination decisions are made, communicated and, in some circumstances, challenged, there is very little time for an athlete to decide whether or not to appeal a non-nomination decision. Non-nominated athletes are entitled to be given the reasons (rather than just a list of the matters considered and a conclusion) in order quickly to consider their position in respect of an appeal, and to obtain advice. The provision of the reasons may in fact deter athletes from appealing because they would at least know why they were not nominated and, given the discretion available to members of nomination and selection committees, they may, depending on the circumstances, properly be advised against appealing.



52. It is important to bear in mind the critical nature of nomination and selection decisions to athletes. For many athletes, their nomination or non-nomination for the Olympic (and other) Games is one of the most significant occurrences in their lives. It impacts significantly on their chosen endeavours which for many, in current times, also constitutes their livelihoods.
53. The provision of reasons is also an important discipline for decision-makers. In many endeavours, including sporting activities, those charged with the task of making decisions such as nomination decisions have experience of and association with those athletes in contention, and of the sport generally. It is particularly important in these circumstances for decision-makers to ensure the careful, even and transparent application of criteria, and to identify, even amongst themselves, how the application of criteria, and factors taken into account, apply to the athletes in contention. This is not just to protect against express bias, or even unconscious bias, but also to guard against the very human fallibility of acting on assumptions and mistaken understandings, and to fail consciously to consider each matter in the context of each athlete.
54. The pressure involved in making nomination and selection decisions should be acknowledged. These are matters, though, which reinforce the importance of reasons, both in order to ensure the robustness of the process, and to provide fairness to athletes.
55. As a result of:
- a. the failure to provide reasons as required by the By-Laws and, by incorporation of those By-Laws, the Nomination Criteria (itself sufficient to make out the first ground) [REDACTED] and the apparent change in position with respect to the reasons identified above; and
  - b. the absence of any evidence of the specific application, or even awareness, of the process for identifying athletes whose performance attracted quota places, subsequently identifying other qualified athletes, and determining if other qualified athletes should be substituted for those athletes who obtained a quota place,

I am satisfied that the Applicant's first ground of appeal is made out in that the Nomination Criteria were not properly applied and that the appeal should be allowed in respect of the first ground.

56. I consider that the matter should be remitted to the Selection Committee to consider in light of the Nomination Criteria, the Qualification System, this Determination, and the submissions made by both the Applicant and Ms Stenson in respect of the matters in favour (and against) respective athletes' nominations. It should, of course, consider all relevant matters within the bounds of the Nomination Criteria.
57. I do not consider that clause 9.6(b)(vi)(C) of the By-Law applies, in particular, that it would be impractical to refer the issue of non-nomination back to AA or that AA had such disregard for the proper application of the Nomination Criteria that a reasonable person would apprehend that it is unlikely that the Nomination Criteria would be applied properly by AA on a remittal.
58. Athletics Australia may consider it appropriate, if permissible within the relevant rules and guidelines, and if reasonably practicable within the time allowed, to convene a new Selection Committee, independent from the original Committee, for that purpose in order to avoid any concerns in relation to bias that any athlete may have. I am not in a position to make a specific



order about this because no submissions were made orally about the appropriate course in the event that I allowed the appeal (in addition to those already provided in writing) and I am, therefore, unaware of whether or not there are any genuine practical or other constraints preventing this course. It is, however, obviously desirable as a matter of fairness if circumstances allow.

59. I note clause 9.6(c)(vi)(G) of the By-Law which provides that where a matter is referred back to the National Federation, it “*must observe the principles of natural justice*”.

### **Second appeal ground**

60. As a result of my decision and consequent orders in respect of the first ground of appeal I do not need to consider the second ground. It is inherently preferable for those with knowledge and experience in athletics, including marathon, to assess athletes’ performances and other matters relevant to athlete nomination pursuant to the Nomination Criteria. It would be appropriate for the Selection Committee that makes the fresh nomination decision to consider and take into account the submissions made by the Applicant and by Ms Stenson.

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

1. *The appeal is upheld.*
2. *The matter is remitted to Athletics Australia for reconsideration in accordance with this Determination.*
3. *Following the reconsideration, reasons should be provided to the parties, including the Affected Parties, to these proceedings.*

Date: 23 May 2024



Ms Elisa Holmes