



Case number: NST-E25-191272

Case Title: Applicant v Gymnastics Australia

Determination

National Sports Tribunal General Division

sitting in the following composition:

Member: The Honourable Steven Strickland KC

in the arbitration between

Applicant

(Applicant)

Represented by Authorised Representative

And

Gymnastics Australia

(Respondent)

Represented by Alistair Edgar, CEO & Brett Murphy (Legal Representative)

And

Interested Party A

(Interested Party)

Represented by parent, and Daniel Maroske, Legal Representative

And

Interested Party B

(Interested Party)

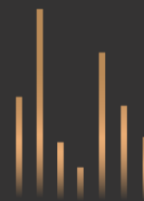
Represented by Authorised Representative

And

Interested Party C

(Interested Party)

Represented by Authorised Representative



INTRODUCTION

1. This is a first instance selection appeal being heard by way of arbitration by the Applicant from their non-selection by Gymnastics Australia (the **Respondent**) to the International Championships.
2. The Applicant was notified of their non-selection by the Respondent in early April 2025.
3. The Gymnastics Australia Selection Appeal Policy (**Selection Appeals Policy**) provides in clause 5.1(a) that a selection appeal cannot be commenced unless the provisions of clause 5.1 have been complied with. Although the NST Member has not been formally advised that this requirement has been satisfied, no party to this appeal has suggested otherwise.
4. On 7 April 2025, the Applicant lodged their application with the National Sports Tribunal (**NST**) seeking to appeal their non-selection.
5. Clause 4.4 of the Selection Appeal Policy provides for an “Interested Party” to be a party to the selection appeal. Three parties were identified as being in that category, namely Interested Party A and Interested Party C who are the two athletes selected to represent Australia at the International Championships, and Interested Party B who was selected as a non-travelling reserve for the Australian team, and they have all become parties to the appeal. As a result, they have received notice of the appeal and been given the opportunity to make submissions and give evidence. In that regard Interested Party A has filed submissions in the appeal, and through their authorised representative and their legal representatives appeared at the brief hearing convened by the NST on Thursday, 15 May 2025. Interested Party C appeared through their authorised representative at that hearing, but has filed no submissions. Interested Party B neither filed submissions nor appeared at the hearing.

NST JURISDICTION

6. The jurisdiction of the NST is engaged by section 23(1) of the *National Sports Tribunal Act 2019* (Cth) and clause 5.2(a) of the Selection Appeal Policy.
7. The NST conducted a pre-hearing conference on 24 April 2025 which resulted in an arbitration agreement signed by the parties variously on 7 May 2025, 8 May 2025, and 9 May 2025.
8. Pursuant to clause 52 of the *National Sports Tribunal (Practice and Procedure) Determination 2024* (Cth), where the Tribunal member considers it appropriate to do so, and all the parties agree, the Tribunal may determine the dispute without a hearing. There is a similar provision in clause 5.2(f)(iii) of the Selection Appeal Policy.
9. All parties agreed to have the matter determined on the papers without a hearing, and subject to one matter, the NST Member considered it appropriate to determine the matter in that way. That one matter was that the NST Member directed that the parties be available at the time initially fixed for a hearing, namely 10:00am on Thursday 15 May 2025, in the event the NST Member had any questions for any of the parties after receiving and considering all the submissions and the evidence.



10. That indeed occurred, and the NST Member held a brief hearing on Thursday 15 May 2025, to address certain questions to which he required answers. All parties except Interested Party B appeared at the hearing through their authorised representatives, and where appropriate their legal representatives.
11. No party objected to the proposed arbitration or to the procedure adopted by the NST for the purposes of the arbitration.

DOCUMENTS BEFORE THE NATIONAL SPORTS TRIBUNAL

12. At the pre-hearing conference, a timetable was agreed between the parties for the filing of written submissions, any witness statement(s), and any relevant evidence, and this timetable was incorporated in the arbitration agreement.
13. The timetable was set in light of the requirement that the determination by the NST Member had to be made by Tuesday 21 May 2025, which apparently is the date by which the members of the Australia team to compete at the International Championships had to be submitted to the International Federation.
14. The timetable was later amended slightly by agreement between the parties, and that amended timetable was complied with as follows:
 - 14.1. the Applicant filed their submissions, their witness statement, and their evidence in the form of exhibits to the submissions on Wednesday 30 April 2025;
 - 14.2. the Respondent filed its submissions and evidence in the form of exhibits to the submissions on Thursday 8 May 2025;
 - 14.3. Interested Party A filed their submissions and evidence in the form of an exhibit to her submissions on Thursday 8 May 2025; and
 - 14.4. the Applicant filed their submissions in reply together with a further exhibit attached thereto on Friday 9 May 2025.
15. The NST Member confirms that no submissions, witness statements or evidence was filed by either Interested Party B or Interested Party C.

THE GROUNDS OF APPEAL AND THE OUTCOMES SOUGHT

16. Clause 5.2(b) of the Selection Appeals Policy provides the grounds on which a Non-Selected Athlete may bring an appeal to the NST, noting that the Applicant bears the onus of making out the ground(s) of the appeal.
17. The Applicant here relies on all of the available grounds of appeal, namely:
 - 17.1. that Selection Policy Part A and/or Part B was not properly applied by Gymnastics Australia with respect to the non-selected athlete;



- 17.2. the non-selected athlete was not afforded a reasonable opportunity by Gymnastics Australia to satisfy the selection policy Part A and/or Part B;
- 17.3. Gymnastics Australia was affected by actual bias in making its decision to not select the non-selected athlete; and/or
- 17.4. there was no material on which Gymnastics Australia's decision could be reasonably based.
18. As for the outcomes, the Applicant seeks that the NST Member uphold the appeal in accordance with clause 5.2(h) of the Selection Appeals Policy. Then in that event, the final position of the Applicant as confirmed through their authorised representative during the brief hearing on Thursday 15 May 2025, is that the Applicant be included in the Australian team for the International Championships, and be nominated by Gymnastics Australia to compete in one of the available apparatus.
19. The Respondent seeks that the NST Member dismiss the appeal in accordance with clause 5.2(h) of the Selection Appeal Policy, and that outcome is supported by the only Interested Party who has made submissions, namely Interested Party A.

THE SELECTION POLICIES

20. The applicable Gymnastics Australia Selection Policy is in two parts, namely part A and part B.
21. Part A sets out the overarching policies and common criteria that apply to the selection of Gymnastic Australia's teams irrespective of the particular discipline. Part B, which was published on 11 December 2024, sets out the specific eligibility, the purpose of attending each event listed within the Selection Policy and the selection criteria for the selection of athletes (and coaches) to the Australian Gymnastics team to contest a number of events including the International Championships.
22. Relevantly, Part A provides as follows:

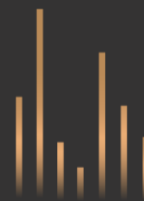
Clause 4.6 – The role of the selection Panel is to apply this Policy and the relevant Selection Policy Part B to select athletes for events in the relevant Gymnsport.

Clause 4.13 – The selection Panel shall document the process implemented and rationale from making its selection decisions.

23. Relevantly, Part B provides as follows:

Clause 2.3 – The Gymnastics Australia Selection Policy sets out the parameters, process and criteria (both eligibility and performance) that will be applied to determine the selection of athletes to the team for the event.

Selection Methodology



Clause 8.1 – The selection Panel will consider an athlete’s performance in the Nominated Selection Events, as outlined in appendix one.

Selection Process, Considerations and Performance Requirement

Clause 9.2 – When determining athletes to be selected, the selection Panel may consider the following:

9.2.1 - An athlete’s ability to contribute towards performance objectives as outlined in appendix three.

9.2.2 - Performance at events listed in appendix one. These events will be weighted at the discretion of the selection Panel. In the weighting of events, the selection Panel may consider several factors including but not limited to, recency of events and level of competition.

Code of Points

Clause 12.1 – 2025-2028 FIG RG Code of Points will be utilised for judging and scoring in all selection activities and decisions.

24. The Nominated Selection Events outlined in appendix one for the International Championships were:

24.1. International Event 1;

24.2. National Event;

24.3. International Event 2;

24.4. International Event 3; and

24.5. Further International Events.

Significantly, the National Championships was not included in the Nominated Selection Events.

25. In the relevant appendix, the performance objectives for the International Championships were, “to place in the top 3 rank of Commonwealth countries”.

26. Also relevantly, the maximum number of athletes to be included in the team for these Championships was three.

FACTUAL BACKGROUND

27. The Respondent is the national governing body for gymnastics in Australia.

28. The Chief Executive Officer of Gymnastics Australia duly appointed a selection Panel (the **Selection Panel**) for rhythmic gymnastics in accordance with Selection Policy Part A.



29. The Selection Panel met on Tuesday, 1 April 2025 to select athletes to represent Australia at the International Championships, and at other events not relevant to this appeal.
30. According to the document headed Selection Nomination Resolution: 2025 – 04 RG provided by the Respondent, it seems that there were thirteen junior athletes including the Applicant and the three Interested Parties who were eligible for individual selection to the Australian team for the International Championships.
31. In terms of the Nominated Selection Events referred to above, in respect of which the performances of the athletes had to be considered by the Selection Panel pursuant to Clause 8.1 of the Policy, the following was the position:

31.1. The Applicant performed at International Event 1 and at International Event 3, both major international events. In terms of Further International Events, they performed at the following:

- 31.1.1. Further International Event 1;
- 31.1.2. Further International Event 2; and
- 31.1.3. Further International Event 3.

The Applicant did not perform at the National Event because it was held at the same time as International Event 3. The former was an optional event, and the Respondent did not require athletes competing internationally at the time to attend this event.

In International Event 1, the Applicant was the best performing Australian athlete with the highest all-around score, and being beaten in only one event out of four individual events.

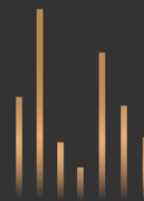
In International Event 3, the Applicant was the best performing Australian athlete with the highest all-around score and the highest in all individual events. Their rankings in the two events in which they competed were fourth and nineteenth.

The Applicant has had the highest performance results internationally of any Australian competitor this year, and they are the only athlete who has definitively demonstrated this season under the new Code of Points, that they can beat international competitors.

The Applicant is the only junior athlete in Australia to have made an international event final this year, namely at International Event 3 where they came fourth.

The Applicant is the only junior athlete in Australia this year to have definitively achieved a top no. 3 Commonwealth ranking. At International Event 3 they came first among the competitors from Commonwealth countries.

- 31.2. Interested Party A performed at the National Event where they achieved first place, but they did not perform at any international event in 2025.



- 31.3. Interested Party C performed at the National Event where they achieved second place, at one Further International Event in September 2024 (Further International Event 4), but they did not perform in any international events in 2025.
- 31.4. Interested Party B performed at the National Event where they achieved third place, but they did not compete in any international event in 2025.
32. To repeat, the relevant appendix to the Selection Policy Part B provided for a maximum of three athletes to be selected to compete at the International Championships.
33. The Selection Panel selected two athletes to compete at the International Championships, namely Interested Party A (apparatus) and Interested Party C (apparatus) with Interested Party B the non-travelling reserve.
34. It is necessary to set out the relevant parts of the minutes of the meeting of the Selection Panel on 1 April 2025, as provided by the Respondent and being exhibit no. 3 to the submissions of the Applicant, as follows:

Recommendation 1: the International Championships IND...

That the following athletes be selected to Australian Team for the International Championships IND... based on meeting the selection criteria as outlined in the relevant Selection Policy – Part B (in conjunction with Selection Policy – Part A):

The recommendation is as follows:

JNR IND

Interested Party A (apparatus)

Interested Party C (apparatus)

Interested Party B – non-travelling reserve

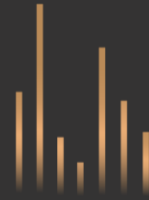
Junior Individual – Further International Event 5 & the International Championships

WCH – Can send up to 3 athletes. Selectors agreed it would be more beneficial to send 2 athletes which would allow them to compete 2 apparatus each.

Clear stand out in March National Championships – Interested Party A and Interested Party C.

Selectors noted that Interested Party A has no data other than the National Event – Selectors would like to see Interested Party A with an international competition under their belt prior to being selected. Selectors note that they haven't nominated for any other international events, so they are not going to be able to get any data points and policy doesn't allow to enforce overseas competition unless it is part of selection events noted and there is a clear link to selection.

Selectors considered the option of only sending one athlete which would be Interested Party C – whilst Interested Party C was 2nd at the National Event and does have a high score from Further International Event 4 and has represented individually the selectors



agreed as the policy reads it does allow for selection of Interested Party A as top ranked athlete at March National Championships and likely to face challenge if not selected. Although the AGC (Australian Gymnastic Championships) is outside the selection window if review results to provide further information of their abilities Interested Party A was the winner at this event also in 2024 and therefore has shown their performances haven't slipped.

Elsewhere in the minutes of the Selection meeting the following appears:

the International Championships – IND

Purpose: *To provide development opportunities to compete at an international event as aligned to their ILPP.*

Selection Event Considerations: *See appendix One of Selection Policy Part B.*

Performance Objectives: *To place in top 3 rank of Commonwealth countries.*

Team Numbers:

Athletes: *maximum of 3.*

This is a repeat of what appears in the relevant appendix to Selection Policy Part B.

It is also relevant to note that elsewhere in the minutes individual comments were made about the thirteen athletes eligible to be selected for the International Championships. The comment in relation to Interested Party A was as follows:

Clear standout at National Event.

Only has the one data point in the twelve-month window.

SELECTED – the International Championships.

The comment for Interested Party C was as follows:

Clear standout at National Event.

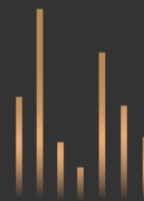
Has the top ranked score at an international event.

SELECTED – the International Championships and Further International Event 5.

*The comment for Interested Party B was simply “**SELECTED – Further International Event 5.**”*

*The comment for the Applicant was simply, “**SELECTED NON-TRAVELLING – Further International Event 5.**”*

The NST Member understands that International Event 5 was in fact cancelled.

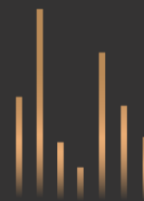


35. As referred to above, the Applicant was duly advised of their non-selection for the International Championships, and as a result of the Applicant presumably giving the required notice disputing their non-selection, as is also required under the Selection Appeal Policy, the Chief Executive Officer of the Respondent provided a response. It is necessary to set out that response in full as follows:

Non-Selection Appeal: The International Championships & Further International Event 5

Reasons for decision from GA Rhythmic Gymnastics Selection Panel – Vanessa Polglase, Danielle Le Ray, Kary Murray.

- 1. The Gymnastics Australia Rhythmic Gymnastics Selections Selection Panel (the Selection Panel) met on Tuesday 1 April to finalise selections for the Individuals to represent Australia at the International Championships and Further International Event 5.*
- 2. The purpose of the International Championships is to provide development and opportunities for athletes to compete at an international event as aligned to their Individual Learning and Performance Plans (ILPPs). The purpose of Further International Event 5 is to provide international competition opportunities and/or development opportunities for athletes to compete at an event as aligned to their ILPP.*
- 3. The Selection Panel performed its responsibilities in accordance with the Gymnastics Australia Selection Policy Part A (Part A) and the Gymnastics Australia Part B RG Junior Individual 2025 (Part B).*
- 4. In accordance with Part B, in determining Athletes to be selected, the Selection Panel may consider the following:*
 - a. An Athletes ability to contribute towards performance objectives.*
 - b. Performance at Events listed in Appendix One, weighted at the discretion of the Selection Panel. In the weighting of Events, the Selection Panel may consider several factors including but not limited to the recency of Events and level of competition.*
 - c. ILPPs of Athletes.*
 - d. In exceptional circumstances, the Selection Panel reserves the right to consider performance in Events outside of those listed in Appendix One.*
- 5. In making their selection, the Selection Panel considered the events as outlined in Appendix One of Part B and the results of Individuals at these events (Results Table attached).*
- 6. The Results Table indicates that the selected Athletes, in particular Interested Party C and Interested Party A, had substantially higher AA scores than all non-selected Athletes*



across multiple competition (national and international), and demonstrated greater consistency and progression through the season.

7. The third selected Athlete, Interested Party B, was the next ranked athlete, and (save for Interested Party C and Interested Party A) had a substantially higher score in their most recent event than all non-selected Athletes.

8. While it is acknowledged that the Appellant had slightly higher AA than Interested Party B at the National Championships (the Appellant's AA was 0.2 points higher), it is noted:

- a. The National Championships was held close to 12 months ago.*
- b. While these results may be used for selection for Further International Event 5, they would not ordinarily be used for the International Championships (given they will have occurred more than 12 months prior to that event).*
- c. The more recent results of both Athletes in March 2025 (when Interested Party B had results 4.15 points higher than the Appellant) were given more weight.*

9. Amongst other matters, it has been submitted that the scores of the Appellant would have been higher, had they competed at the National Event, rather than at Further International Events. To this submission it is noted that:

- a. The National Event was noted as optional, and the Appellant chose to compete overseas.*
- b. The National Event was held in March, at a similar time to Further International Events, to give Athletes not going overseas the opportunity to post a score for consideration at the same point in their competition preparation.*
- c. All judges on the Selection Panel at the National Event are brevet level judges who have recently sat their exams, ensuring uniformity with and the same recent knowledge of judges overseas.*
- d. There was, notwithstanding they had competed in different Events, a substantial difference between the scores of Interested Party B and the Appellant at their most recent Events.*

36. The "Results Table" used by the Selection Panel was attached to the response, and is exhibit 4 to the Applicants submissions. It is also necessary to set out this table in full as follows:

[This table has been removed for publishing]

DISCUSSION

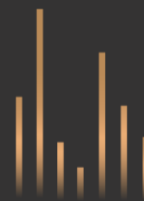
The first Ground of Appeal – That Selection Policy Part A and/or Part B was not properly applied by Gymnastics Australia with respect to the non-selected athlete



37. The submissions filed by the Applicant in support of this ground (and to a large extent in support of the other grounds as well) were difficult to follow in that, as pointed out by the Respondent, they were excessive in length, repetitive, and without any obvious structure to enable the other parties and the NST Member to easily address the points being made.
38. That said and doing the best that the NST Member can, in support of this ground it seems that the major issues raised are as follows:
- 38.1. the Selection Panel failed to consider the performances including the results and the rankings of and achieved by the Applicant in the Nominated Selection Events in which they competed;
- 38.2. the Selection Panel failed to properly or at all weight the Nominated Selection Events and, in particular, by failing to consider the level of competition;
- 38.3. the Selection Panel considered performances at an event not included in the Nominated Selection Events; and
- 38.4. the Selection Panel failed to consider the performance objectives of the International Championships.
39. Addressing these issues in turn, it is appropriate to address the first and second issues together, as follows.
40. As referred to above, clause 8.1 of the Selection Policy Part B provides that the Selection Panel will consider an athlete's performances in the Nomination Selection Events. Thus, it is mandatory to do so.
41. However, curiously at clause 9.2.2 of the Selection Policy it is expressed differently, namely, the Selection Panel may consider the performances at the events listed.
42. The latter is clearly inconsistent with the former, and introduces a discretion. Nevertheless, that should not alter how this is approached because there are now ample decisions of the NST based on the common law, explaining how a discretion in the context of a selection process is to be exercised (for example see *Athlete v National Sporting Organisation* NST-E24-290315, *Hogan v Triathlon Australia* NST-E23-47455 and *Georgina Collin v Paddle Australia* NST-E23-97851). For instance, it does not mean that the Selection Panel can apply that discretion in an arbitrary or capricious way, for example by deciding not to consider any of the factors identified in the selection process. Instead, the Selection Panel must act reasonably and objectively fairly in exercising the discretion and certainly must take into account all relevant matter. To adopt the language of the High Court in the celebrated case of *House v The King* (1936) 55 CLR 499, at 505, what is required in exercising a discretion is to not act upon a wrong principle, not allow extraneous or irrelevant matters to guide or affect the decision maker, not to mistake the facts, and to take into account material considerations.
43. In any event, the Respondent here has not suggested that the exercise of discretion by the Selection Panel in the selection process cannot be challenged.



44. I note though that the submissions made on behalf of Interested Party A do suggest that the Selection Panel has an “absolute discretion”, implying that how they have exercised that discretion cannot be interrogated. First, that overlooks clause 8.1 of the Selection Policy; secondly, nowhere does the Selection Policy give the Selection Panel an “absolute discretion”; and thirdly, even if it did, the exercise of that discretion can still be challenged.
45. Here it is plain that the Selection Panel failed to comply with clause 8.1 of the Selection Policy and/or failed to exercise its discretion pursuant to clause 9.2.2 of the Selection Policy reasonably in the selection process.
46. As can be seen from the minutes of the meeting of the Selection Panel, there is no reference whatsoever to the performances of the Applicant, and thus, there is nothing to indicate that those performances were considered either at all or in comparison with the performances of the selected athletes. There is also no attempt to weight the Nominated Selection Events nor the performances of the athletes eligible for selection, and particularly those of the Applicant and the selected athletes.
47. The performances of the Applicant in the Nominated Selection Events in which they competed were significant, not only per se, but in comparison to the performances of the selected athletes.
48. It is said by the Respondent in paragraph 6 of their submissions in response of the submissions of the Applicant that, in making their selection, the Selection Panel considered each athlete's performances at the Nominated Selection Events, and that is demonstrated by the table of results to which the Selection Panel had regard.
49. However, this is simply not correct. The minutes and the table of results do not reveal what is suggested in paragraph 6, and this is a lame attempt to justify the Selection Panel's selection process. First, the data on the table was not the results, it was just the scores; what was required to be considered by the Selection Panel was the performances of the athletes, and that is far more than the scores. For example, it includes the rankings of the athletes at the respective competitions. As an aside, if it was appropriate to simply consider the respective scores of the athletes in the events in which they competed, the table did not include the scores that they obtained at International Event 3. Indeed, both that Event itself, and the score and the ranking received in that event, were not included.
50. Secondly, the scores for the Domestic Event should not have been included in the table; that competition was not one of the Nominated Selection Events.
51. Thirdly, and this will be elaborated on shortly, the Nominated Selection Events were not weighted by the Selection Panel, and in particular the level of competition was not taken into account at all. To simply compare the scores at different events and do no more does not provide a fair or reliable comparison.
52. The failure by the Selection Panel to take into account the performances of the Applicant in the Nominated Selection Events in which they competed was a clear failure by the Selection Panel to apply the Selection Policies. The Applicant was ranked fourth in the finals of the [...] apparatus at International Event 3, and as referred to above, they were the best performing Australian athlete with the highest all-around score, and the highest score in all individual events at that



Event. Also referred to above, they became the only junior Australian athlete to have made an international final in 2025. There is no recognition of that in the minutes or the response. Pausing there, I note of course that the response cannot be a substitute for the minutes, and cannot be read as such.

53. And again, in International Event 1, the Applicant was the best performing Australian athlete (senior or junior) with the highest all-around score, and was beaten in only one event out of four individual events.
54. In recognising that the table only included qualifying scores, the Respondent submitted that that was necessary to ensure “consistency for all athletes” (paragraph 30a). First, that clearly misses the point. It does not provide the detail to the Selection Panel that is required by the Selection Policy; to repeat, what is required to be considered by the Selection Panel is the performances of the athletes in the Nominated Selection Events, and that does not mean just their scores, and for good reason, namely, the scores do not provide the complete picture of what the athlete has achieved at that event.
55. Secondly, that submission is in direct conflict with the submission of the Respondent to the NST Member in the *Aspire Group v Gymnastics Australia* NST-E23-142346) and which was accepted by the NST at [53], namely:

“GA submitted that a comparison of scores across different competitions in which the teams did not compete against each other is of limited utility and can produce anomalous results. This type of anomaly is something which sports which have a subjective element to them will always have to deal. As the Tribunal understood the submission of GA, the very fact that judges with the same accreditation will score routines differently (hence the use of multiple judges to produce an average score) means that the more important result is the individual placings within a competition considered along with the quality of the teams competing that provides a more reliable indicator as to how a team has performed rather than simply accepting the particular score achieved on a particular day at a particular event. For this reason, GA also considered the quality of teams competing in Athens (despite premier group placing 14th) as opposed to the teams in Tashkent where Aspire placed 5th.”

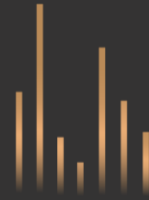
And also see what the NST said at [54].

56. Thirdly, this overlooks the need to also take into account the “performance objectives” of the International Championships, the subject of the selection process. Here, that was “to place in top 3 rank of Commonwealth countries”, and the Applicant achieved that at International Event 3, in the apparatus finals by ranking first among the participating Commonwealth countries.
57. It is also submitted by the Respondent that, in any event, “the rankings the respective athletes had obtained in the selection events” were known by the Selection Panel and formed part of its consideration.
58. However, the minutes reveal that that was only the case for the selected athletes. Their rankings in the one event in which they all competed, namely, the optional National Event, were referred to in the minutes and clearly taken into account, but to repeat, there is no mention at all of the

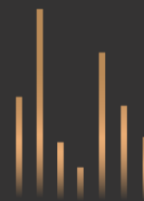


Applicant's rankings in the two major international events of the four Nominated Selection Events in which they competed. Thus, it is simply not apparent that their rankings were considered by the Selection Panel, and it is not open to the Respondent to rewrite those minutes in their submissions.

59. Then, there is paragraph 7 of the Respondent's submissions, where it is said that the Selection Panel looked beyond just the scores in its deliberations. The NST Member rhetorically asks where is that revealed in the minutes of the meeting? The answer is that it is not. Further, it is said that the Selection Panel is familiar with the Applicant and all relevant athletes and has seen them perform. However, the Selection Panel has not seen the Applicant perform during the relevant period for selection. In particular, the Selection Panel did not see them perform in the Nominated Selection Events in which they competed, and nor in any event in the 2025 season judged and scored under the 2025 Code of Points, noting the requirement in clause 12.1 of Selection Policy Part B. Then, there is this submission which has no basis in fact, namely, "the performances of the athletes, their progression over time, and each athlete's ability to contribute towards the Respondent's performance objectives were all properly considered by the panel." Again, an attempt by the Respondent to rewrite the minutes of the meeting.
60. Albeit that this document is not and cannot be a substitute for the minutes of the meeting, it is necessary to consider the response of the Chief Executive Officer of the Respondent to the enquiry made by the Applicant about their non-selection. That response is set out above, and the NST Member particularly refers to paragraph 6 thereof.
61. That paragraph is an embarrassment. The table of results merely reveals the scores of the eligible athletes in five events. Apart from the fact that it failed to include the scores of the Applicant in the finals at International Event 3, and that it included the scores from the Domestic Event which were not a Nomination Selection Event, it is pure hyperbole to contend that it revealed what is suggested in paragraph 6. In fact, it revealed nothing of the sort; it revealed the scores of Interested Party A in just one National Championships, and in no international event; it revealed the scores of Interested Party C in just one international event and one National Championships; and it revealed the scores of Interested Party B in just one National Championships. Indeed, as revealed in the minutes the Selection Panel decried the fact that Interested Party A had not competed internationally prior to being selected.
62. Further, and importantly, the table by no means "demonstrated greater consistency and progression through the season."
63. Moving on from the efforts of the Chief Executive Officer of the Respondent in the response to the Applicant, and the Respondent in their submissions to rewrite the minutes of the meeting and justify the Selection Panel's selection process, it is relevant to consider what is actually recorded in those minutes.
64. The minutes reveal that there was no consideration of the performances of the Applicant at the Nominated Selection Events in which they competed, and the selection was based almost entirely on the results of the optional National Event. Interested Party A and Interested Party B were described as the clear standouts at that Event, and despite the absence of any international competition by Interested Party A, they were selected on the basis of being the "top ranked athlete at the National Event".



65. The only reference to any other event being relevant was to Interested Party C's "high score from the Further International Event 4". Elsewhere in the minutes, as referred to above, it was noted by the Selection Panel that Interested Party C "has the top ranked score at an international event". That highlights the absence of any reference to the significant results achieved by the Applicant at International Event 3. Indeed, it is apparent that those results top what Interested Party C achieved internationally at the Further International Event 4.
66. In the circumstances, there is a clear failure by the Selection Panel to properly apply the Selection Policies with respect to the Applicant. Not only was there a failure to consider their performances at the Nominated Selection Events in which they competed, but there is no evidence of any weighting of those Events by the Selection Panel. In this instance, that was essential given that there were no head-to-head performances by all of the eligible athletes in any of the Nominated Selection Events, and in particular no head-to-head performances as between the selected athletes and the Applicant.
67. As referred to above, the level of competition is specifically identified as a factor to be considered in the selection process.
68. In that regard, it is plain that International Event 3 and International Event 1, in which the Applicant competed, should have been weighted higher than the optional National Selection Event in which the selected athletes competed. They are both major international events for junior rhythmic gymnastics, with the National Federations from over twenty countries sending their leading athletes to compete at International Event 3.
69. That rendered the excellent performances of the Applicant at those Events highly relevant and needing to be taken into account, and given greater weight than the performances of the selected athletes at the optional National Championships where there were no leading international competitors, no competitors from any of the leading Commonwealth gymnastic countries, and only nine Australian athletes.
70. The NST Member again refers to [53] and [54] of the reasons for the determination in the Aspire case.
71. The extent of the failure by the Selection Panel to consider and to appropriately weight the excellent results of the Applicant at the two major international events in which they competed is revealed by the concern by the Selection Panel that Interested Party A had not competed internationally prior to being selected.
72. The NST Member cannot in all consciousness leave this aspect of the matter without referring again to the further attempts by the Chief Executive Officer of the Respondent, and the Respondent itself, to justify the selection process of the Selection Panel in this regard.
73. In paragraph 7 of the response of the Chief Executive Officer it is said that Interested Party B had a "substantially higher score in their most recent event than all non-selected athletes," however, that is a misguided exercise of simply comparing the scores of this athlete in the optional National Championships with the scores of the Applicant in International Event 3. It disregards the Respondent's own submissions in the Aspire case and disregards entirely the level of the actual

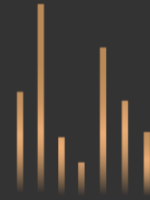


performance of the Applicant at International Event 3, and the weighting that should be applied to it. And, the same mistake is made in paragraphs 8 and 9 of the response.

74. As for the Respondent, I refer again to paragraph 6 of the Respondent's submission wherein the Respondent sets out what the table of results indicates. However, again, this is an attempt to draw a comparison between just the scores of the athletes, and as referred to above that misses the point entirely. It is performances that must be considered, and there needs to be a weighting of the events.
75. The same difficulty arises in the opening sentence to paragraph 8 of the Respondent's submissions.
76. In the circumstances the NST Member finds that the first two complaints raised by the Applicant are clearly made out.
77. Turning to the third issue raised, namely that the Selection Panel considered the scores at an event not included in the Nominated Selection Events.
78. This complaint is also made out.
79. The Domestic Event was not a Nominated Selection Event, yet the scores of all eligible athletes for selection to the International Championships were included in the Results Table used by the Selection Panel for the purposes of selecting the athletes for the International Championships team.
80. And that is revealed in the minutes of the selection meeting. Indeed, even though the Respondent in paragraph 8 of their submissions, and again at paragraphs 30 and 31, boldly, and incorrectly, asserted that the Selection Panel did not consider the respective athletes' performances at the Domestic Event, the Respondent went on to use those results in an attempt to justify the Selection Panel's decision!
81. Further, the NST Member notes that at paragraph 5 of the response of the Chief Executive Officer of the Respondent to the Applicant, it is conceded that the Selection Panel considered all of the events in the table which clearly included the Domestic Event.
82. Next, there is the fourth issue raised by the Applicant, namely, the Selection Panel failed to consider the performance objectives of the International Championships.
83. The NST Member has dealt with this issue already in the context of considering the first two issues raised, and as can be seen, this complaint is also made out.

The Submissions of Interested Party A

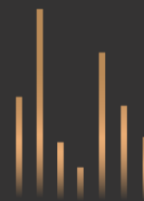
84. Before turning to the outcome of this appeal, the NST Member needs to comment on the submissions made on behalf of Interested Party A.
85. Those submissions sought the dismissal of the appeal, but they were decidedly unhelpful and provided little assistance in determining this appeal.



86. The NST Member has already referred to the wholly incorrect submissions as to the discretion that the Selection Panel has when determining athletes to be selected, and I will not repeat that here.
87. A curious submission made in paragraph 16, was that the absence of a detailed consideration of the performances of the Applicant in the minutes, does not suggest that they were not considered by the Selection Panel, and the reason for the failure of the minutes to mention anything about the performances of the Applicant can be explained by the fact that the minutes “focussed on those athletes who were to be selected”. The obvious comment here is that it behove the Selection Panel to consider the performances of all eligible athletes in order to then determine who should be selected.
88. Exhibit 1 to the submissions provided details of Interested Party A competition background and a comparison to the Applicant’s performances over time, but this was irrelevant in so far as it went beyond the performances of Interested Party A at the one Nominated Selection Event in which they competed.
89. That analysis of the issues raised by the Applicant clearly demonstrates that the Selection Policies were not properly applied by the Respondent, and thus this first ground of appeal has merit requiring the appeal to be upheld. Indeed, if the Selection Panel had applied the policies correctly, the Applicant should have been selected to complete at the International Championships.

The Second Ground of Appeal – The Applicant was not afforded a reasonable opportunity by the Respondent to satisfy the Selection Polices

90. The submissions in support of this ground centre around the claim by the Applicant that the Respondent set the National Event at the same time as International Event 3, and that prevented them from competing at the National Event.
91. The relevance of that in the Applicant’s case is their submission that the Selection Panel, in selecting the members of the team for the International Championships, effectively only considered the results of the eligible athletes who competed at the National Event, and gave no consideration to the performances of the Applicant at International Event 3.
92. As is apparent, the NST Member is persuaded that that was the case, and that as a result the Selection Policies were not properly applied to the Applicant, and for that reason the appeal must succeed. Thus, although the Applicant was prejudiced in the selection process applied by the Selection Panel by not being able to compete at the National Event, that process has been found to be deficient and will be remedied. Accordingly, it is unnecessary to further consider this ground of appeal.
93. For completeness though, the NST Member indicates that it is not persuaded by the submissions of the Respondent at paragraph 18, that the Respondent could not have scheduled the National Event at a time that it did not clash with one of the other Nominated Selection Events, namely, International Event 3. Indeed, it was inappropriate for the Respondent not to do so given that it



was logical to give all eligible athletes the best opportunity to compete in as many of the Selection Events as possible.

94. That said, the NST Member sees it as unnecessary to make any comment on the dispute between the Applicant and the Respondent as to the timing and extent of the Applicant's knowledge of the fact that there would be a clash between the National Event and International Event 3.

The Third Ground of Appeal – The Respondent was affected by actual bias in making its decision to not select the Applicant

95. This ground can be disposed of relatively easily.
96. The ground requires the Applicant to satisfy the NST Member that the Respondent was affected by actual bias in not selecting them.
97. That requirement does not seem to be appreciated by the Applicant, and certainly there is no evidence that has been put before the NST Member that there was actual bias in the decision making.
98. The point here is that the requirement is to demonstrate actual bias rather than just a reasonable apprehension of bias. It may be that the Applicant could make out a case for the latter, but that is not what is required to succeed in this ground of appeal.
99. The claim of actual bias carries a heavy onus; it requires cogent evidence, and the allegation must be distinctly made and clearly proved. As was said by North J in *Sun Zhan Qui v Minister of Immigration and Ethnic Affairs* (1997) 91 FCR 71 at 134, "Actual bias exists where the decision-maker has prejudged the case against the applicant, or acted with such partisanship or hostility as to show that the decision-maker has a mind made up against the applicant and was not open to persuasion in favour of the applicant."
100. (Also see Gleeson CJ and Gummot J in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [35]-[36], *R v Rich* [2009] VSC 32, *Valdez v Frazier* (No. 2) [2016] FamCAFC 55, *NACB v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 236).
101. The enquiry is wholly subjective and requires analysis of the likely or actual thought processes of the decision-maker. There was no analysis of that process here and to repeat, no evidence provided to support a finding of actual bias, and thus this ground of appeal must fail.

The Fourth Ground of Appeal – There was no material on which the Respondent's Decision could be reasonably based

102. The submission of the Applicant here is that of the Nominated Selection Events, the Further International Events were mandatory to be selected for the International Championships, and the National Event was optional to aid in the selection for the International Championships. Thus, it is said, selection could not be achieved by an athlete who only competed at the National Event.

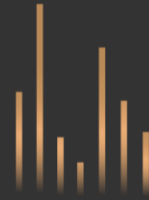


Accordingly, given that Interested Party A only competed at the National Event, their results there did not provide material on which their selection could be based.

103. The Applicant attempted to make the same case in relation to Interested Party C, but they did compete in an international event that was a Nominated Selection Event, namely in the category of Further International Events. The Applicant was thus incorrect in suggesting otherwise.
104. In any event, the NST Member finds that the submission of the Applicant is not a correct interpretation of the Selection Policies. Even though the National Event was optional, it was clearly one of the Nominated Selection Events, just as each of the Further International Events were. Thus, the results achieved at that Event did provide material on which selection could be based.
105. That says nothing though about the circumstance of the Selection Panel effectively only relying on the results of the National Event, and failing to take into account the performances of the Applicant at Further International Events in which they competed.
106. Thus, although it is strictly the case that there was material on which the decision could be based, it is plain that that material was insufficient to be the basis for the selection decision, and that perhaps emphasizes the requirement in the ground that there needs to be no material on which the decision could be reasonably based. It could be argued that therefore the ground is made out, but there were no submissions made by any party addressing this point, and thus it is inappropriate for the NST Member to look to determine it in this appeal.

THE OUTCOME

107. Given the success of the first ground of appeal, the appeal must be allowed.
108. Pursuant to clause 5.2(i) of the Selection Appeals Policy, subject to clause 5.2(k), where an appeal is upheld, the Tribunal must refer any subsequent decision regarding the Applicant's non-selection, or if required any broader decision regarding selection of the team for the event, back to the Respondent for reconsideration and redetermination.
109. However, notwithstanding clause 5.2(i), pursuant to clause 5.2(k), the Tribunal may itself determine the issue of the Applicant's selection, or any broader decision regarding selection of the team for the event where the Tribunal determines that:
 - (i) it would be impractical to refer the selection decision for re-determination to the Respondent given the time available; or
 - (ii) in making its original decision, the Respondent had such disregard for proper application of the Selection Policies that a reasonable person would apprehend that it is unlikely that the Selection Policies would be applied properly by the Respondent if the decision regarding the Applicant's non-selection was referred back to the Respondent.
110. On Thursday 15 May 2025, and in order to comply with clause 5.2(l) of the Policy, the NST Member directed that the parties file submissions, if any, in relation to whether, in the event the



appeal is allowed, the Tribunal may itself determine the issue of the Applicant's selection or any broader decision regarding selection of the team for the event.

111. In compliance with that direction:

111.1. the Applicant had no objection to the NST Member making the determination itself if the appeal was upheld;

111.2. the Respondent submitted that if the appeal is upheld, the matter should be referred to the Selection Panel given that the Respondent is in a position to reconvene the Selection Panel and make a decision in advance of the date by which the members of the team had to be submitted;

111.3. the authorised representative of Interested Party C supported the submission of the Respondent; and

111.4. the legal representatives of Interested Party A submitted that if the appeal is upheld, the matter should be remitted to the Selection Panel. It was said that given the ability of the Respondent to reconvene the Selection Panel in the time available it is not impractical for the matter to be remitted, and "the evidence before the Tribunal does not support a conclusion that clause 5.2(k)(ii) has been enlivened."

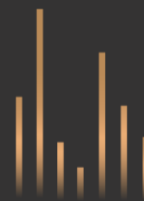
111.5. For completeness, the NST Member records the further submissions made on behalf of Interested Party A, namely:

111.5.1. that if the Tribunal determines the issue of the Applicant's selection it would be open for the Tribunal to make that selection decision based on the substantial evidence and submissions before it. Were the Tribunal to determine that the Applicant warrants selection based on the evidence before it, the Tribunal is arguably also able to determine the appropriate apparatus as well. While it would be open to the Tribunal to ask the Selection Panel to select the apparatus, it is noted that this would have the same practical outcome and present the same timing challenges as remitting the matter back to the Selection Panel to reconsider the decision. For that reason, it submitted that remitting the matter back to the Respondent is the preferred course; and

111.5.2. that if the Tribunal determines the matter itself and selects the Applicant to compete in an apparatus, the selection of Interested Party A should not be altered.

112. As indicated above, the appeal will be allowed, and the NST Member finds that it is appropriate to determine the issue of the Applicant's selection itself.

113. Although the NST Member accepts that if the matter was remitted, the Respondent could reconvene the Selection Panel such that a decision could be made in time, the Selection Panel would not have before it the NST Member's reasons for allowing the appeal. Without those reasons, the Selection Panel would not know why the NST Member has decided that the Selection Policies were not properly applied by the Respondent with respect to the Applicant.

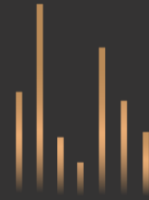


Those reasons will not be available in time to allow a reconvened Selection Panel to redetermine the matter on a fully informed basis and comply with the relevant time constraints.

114. Thus, the NST Member determines that it is impractical to refer the matter back to the Respondent given the time available.
115. That is sufficient to allow the NST Member to determine the matter itself, but the NST Member remarks that the Selection Panel had such a disregard for the proper application of the Selection Policies that the NST Member does have doubts about whether that would change if the decision was simply referred to the Respondent for redetermination.
116. The NST Member speculates though that the Selection Policies might be properly applied if the NST Member's reasons were available to the Selection Panel, and that highlights that if there had been time it would be necessary for the Selection Panel to have those reasons before any redetermination.
117. In terms of the determination of the NST Member, apart from allowing the appeal, it will be that the Applicant be included in the Australian team for the International Championships.
118. As for the apparatus in respect of which the Applicant is to compete at those championships, in accordance with the Applicants final position, that is to be an apparatus determined by the Respondent.
119. Further, in order for the determination of the NST Member to be complied with by the Respondent, the current selection will need to be amended by removing one apparatus from the two allocated to one of the currently selected athletes, and the decision as to which apparatus is to be removed and allocated to the Applicant is to be made by the Respondent with the result that the Applicant will be allocated one apparatus, one of the selected athletes will be allocated two apparatus, and the other selected athlete will be allocated one apparatus.
120. For completeness, the NST Member disagrees with the submission made on behalf of Interested Party A that to have the Selection Panel select the apparatus for the Applicant would have the same practical outcome and present the same timing challenges as remitting the matter back to the Respondent. That is not a decision that can only be made following the receipt by the Respondent of these reasons. That decision was able to be made virtually immediately following the provision of the NST Member's determination to the parties on Friday, 16 May 2025.
121. The NST Member notes that there was a typographical error in the determination forwarded to the parties on Friday 16 May 2025. The relevant clause of the Selection Appeals Policy was incorrectly identified as clause 5.3(k) when it should have been clause 5.2(k). Further, with the availability of the reasons now, there is a need to change the tense in paragraph 1 of the determination from the reasons "are not yet available" to they "are only now available". These issues have been remedied in the determination that follows.


THE TRIBUNAL THEREFORE DETERMINES:

1. The Appeal be allowed.



2. Pursuant to clause 5.2(k) of the Gymnastics Australia Selection Appeal Policy it is appropriate for the Tribunal to determine the issue of the Applicant's selection, given that the reasons for this determination are only now available to the parties and that renders it impractical to refer the redetermination back to Gymnastics Australia in the time available.
3. The Applicant be included in the Australia team for the International Championships, and the apparatus in respect of which the Applicant is compete at those championships be determined by Gymnastics Australia, albeit that will also amend the current selection by removing one apparatus from the two allocated to one of the currently selected athletes.

Date: 20 May 2025 (Determination given 16 May 2025)



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The Honourable Steven Strickland KC