



**Arbitration CAS (Oceania Registry) A3/2016 Tess Lloyd and Caitlin Elks v. Australian Sailing, award of 12 July 2016 (operative part of 27 June 2016)**

Panel: The Hon. Tricia Kavanagh (Australia), Sole Arbitrator

*Sailing*

*Nomination for selection to the 2016 Australian Olympic team*

*Challenge of a nomination decision made in accordance with the nomination criteria for bad faith, dishonesty or perversity*

*Error in law of a decision rendered by the previous instance and control by the CAS*

1. **A nomination decision made in accordance with the nomination criteria cannot be challenged absent bad faith, dishonesty or perversity. An appeal against such decision must show that the nomination panel did not give proper, genuine and realistic consideration to the nominations for the event, evidence that the decision was wrong. The matters should not go to the merits of the decision but examine whether the nomination panel gave a proper consideration to the relevant criteria.**
2. **There is no error in law if the previous instance opined as to the outer limits of the absolute discretion held by the nomination panel, considered all the steps taken by such nomination panel and found they had made a decision in accordance with the nomination criteria as required, and also gave reasons for the decision made.**

**I. PARTIES**

1. Ms Tess Lloyd and Ms Caitlin Elks (the “Appellants”) are athletes in the sport of sailing.
2. Australian Sailing (the “Respondent”), formerly Yachting Australia, is the National Federation for the sport of sailing in Australia.
3. The Australian Olympic Committee (the “AOC”) is the National Olympic Committee for Australia.
4. Ms Olivia Price and Ms Eliza Solly (the “Second Affected Party”) are also athletes in the sport of sailing.

## II. FACTUAL BACKGROUND

### A. Background Facts

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions and pleadings. Additional facts and allegations found in the parties' written submissions, pleadings and evidence are set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, she refers in her Award only to the submissions and evidence that she considers necessary to explain her reasoning.
6. The Appellants seek Australian Sailing's nomination to the AOC for selection to the 2016 Australian Olympic Team, as competitors in the Womens' 49erFX Class event (the "Event") at the Games of the XXXI Olympiad to be held in Rio de Janeiro, Brazil, between 5 and 21 August 2016 (the "2016 Olympic Games").
7. In this hearing before the Appeals Division of the Court of Arbitration for Sport (the "CAS"), the Appellants appeal the decision of the Australian Sailing Appeals Tribunal (the "AS Appeals Tribunal") dated 27 May 2016, in which their application for reconsideration of their non-nomination to the AOC for selection to compete at the 2016 Olympic Games was rejected (the "Decision").
8. The following chronology outlines the background to this appeal:

3/4 May 2016	The Appellants were informed by the Respondent of their non-nomination by AS to the AOC for selection in the 2016 Australian Olympic Team in the Event. There were no nominations made by the Respondent for the Event.
4 May 2016	The Appellants notified the Respondent of their intention to appeal their non-nomination by the Respondent to the AOC for selection in the 2016 Australian Olympic Team.
5 May 2016	The Respondent forwarded to the Appellants the Nomination Panel's Statement which provided reasons for their decision.
11 May 2016	The Appellants delivered to the Respondent their grounds of appeal against the Respondent's determination not to nominate them to the AOC for selection in the 2016 Australian Olympic Team.
18 May 2016	The Appellants filed submissions with the AS Appeals Tribunal in advance of their pending appeal hearing.
20 May 2016	The AS Appeals Tribunal Appeal Hearing was conducted in Sydney. There were two further applicants who did not appeal.

28 May 2016            The AS Appeals Tribunal Decision dated 27 May 2016 was emailed to the Appellants.

31 May 2016            The Appellants filed their application with the CAS.

9.            There is a Second Affected Party on the record, namely Ms Olivia Price and Ms Eliza Solly. Ms Price and Ms Solly were parties to the appeal before the AS Appeals Tribunal. Their appeal to the AS Appeals Tribunal was also unsuccessful. They do not press an appeal before the CAS. However, they make an application to be heard at the hearing of the Appellants' Appeal to CAS under clause 12.3 of the Australian Olympic Committee's Olympic Team Selection By-Laws (the "By-Laws") which state:

*"If the Appeals Tribunal or CAS is of the view that the outcome of an appeal against non-nomination, re-nomination, non-selection or re-selection may affect the interests of any person in addition to the Appellants, it must, so far as is practicable, require that notice be given to such other person and will permit that person to participate in the hearing of the appeal as an affected party, to make submissions and to be bound by the award. The AOC is an interested party to any such appeal to CAS and the parties are required to provide the AOC with the relevant appeal papers and permit the AOC to participate and make submissions at the hearing of the appeal".*

10.           The Appellants objected to the application of Ms Price and Ms Solly to be heard in their Appeal as an Affected Party on the ground that Ms Price and Ms Solly have no standing in the substantive appeal, having elected not to themselves appeal. It was further contended, as Ms Price and Ms Solly have not been nominated, they are not an 'interested party' under the By-Laws and therefore cannot not be held to be an 'Affected Party'.
11.           The Sole Arbitrator determined that Ms Price and Ms Solly could not be heard on the merits of the Appellants' present appeal, but that there could be a further consideration of their application if there was a CAS decision for there to be a re-consideration, by the Respondent's Nomination Panel or CAS, of nominations for the Event. Ms Price and Ms Solly's representative was therefore permitted to remain present at the hearing.
12.           The Appellants bring their Appeal under clause 12.10(2) of the By-Laws, which allows an appeal if there was error of law on the part of the AS Appeals Tribunal, and in accordance with clauses 12.9, 12.11 and 12.18 of the By-Laws which address the nomination of persons/crews for referral to the AOC for selection to compete at the 2016 Olympic Games.

## **B. Proceedings before the AS Appeals Tribunal**

13.           The AS Appeals Tribunal held at [38] and [39]:

[38] *"Words in the Nomination Criteria must be construed objectively, by reference to their ordinary and natural meaning, in the context of the Nomination Criteria as a whole.*

[39] *“The Appeals Tribunal finds that the Nomination Criteria is unambiguous and clearly permitted YA, in the event no Baseline Performance was achieved by an eligible crew in a specific event, to consider making a nomination under clause 3(3)(c) at its absolute discretion. The Appeals Tribunal does not accept that such discretion was fettered by the following criteria set out in clause 3(3)(c)(ii). The use of the word ‘either’ clearly identifies two paths down which the Nomination Panel can proceed, firstly (i) to make no nomination to the AOC for the Event concerned, or secondly, in the alternative (as evidenced by the use of the word “or”), (ii) nominate a Crew to the AOC, upon forming an opinion in respect to the matters set out at clause 3(3)(c)(ii)(a) to (c)”.*

14. And at [40]:

*“There is no positive obligation for the Nomination Panel to nominate any crew under clause 3(3)(c). Indeed, the Appeals Tribunal construes clause 3(3)(c) as a discretionary opportunity for the Nomination Panel to nominate further athletes/ crews that have not achieved the Baseline Performance and could form a view to do so by taking into account “any and all matters it considers appropriate”. This phrase, on its ordinary meaning, grants the Nomination Panel broad discretion to consider what matters it considers relevant to forming an opinion to nominate or not nominate. Accordingly, the Appeals Tribunal finds that it was available to the Nomination Panel to make no nomination under clause 3(3)(c)(i)”.*

15. And at [41]:

*“The Appeals Tribunal finds that the Nomination Criteria is unambiguous and clearly permitted YA, in the event no Baseline Performance was achieved by an eligible crew in a specific event, to consider making a nomination under clause 3(3)(c) at its absolute discretion. The Appeals Tribunal does not accept that such discretion was fettered by the following criteria set out in clause 3(3)(c)(ii). The use of the word ‘either’ clearly identifies two paths down which the Nomination Panel can proceed, firstly (i) to make no nomination to the AOC for the Event concerned, or secondly, in the alternative (as evidenced by the use of the word “or”), (ii) nominate a Crew to the AOC, upon forming an opinion in respect to the matters set out at clause 3(3)(c)(ii)(a) to (c)”.*

16. And at [44]:

*“In the absence of bad faith, dishonesty or perversity, the fact that another person or panel may have arrived at a different result, or taken into account different matters, or even if the decision was found to be wrong, is insufficient to enable such an appeal to be successful”.*

17. And at [45]:

*“... in the Appeals Tribunal’s view, the First and Second Appellants’ first ground of appeal, that the Nomination Criteria was not properly applied or implemented is not made out”.*

18. And at [46]:

*“... the Nomination Panel considered a number of matters as set out in the Reasons, in forming the decision to not nominate any crew in the 49ers FX event. The Appeals Tribunal does not find that*

*the matters taken into account were outside the scope or criteria of either the provisions of clause 3(3)(c) and ‘any and all matters it (Nomination Panel) considers appropriate, or the matters/criteria set out in clause 3(3)(c)(ii)(a) to (c)’.*

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. In accordance with the Code of Sports-related Arbitration (the “Code”), on 31 May 2016, the Appellants filed an Application in the Appeals division of CAS and served on the Respondent and Affected Parties all By-Laws and nomination criteria to be relied upon in relation to the dispute.
20. On 31 May 2016, in accordance with Article R50 of the Code, the parties agreed that the proceeding be heard by a Sole Arbitrator.
21. On 5 June 2016, the Appellants filed with the CAS Oceania Registry and served on the Respondent its R51 Appeal Brief together with exhibits referred to.
22. By email dated 7 June 2016, the Appellants requested that the Honourable Dr Tricia Kavanagh serve as Sole Arbitrator.
23. On 13 June 2016, the CAS Court Office confirmed the parties’ agreement to appoint the Dr Kavanagh as Sole Arbitrator.
24. On 14 June 2016, a preliminary conference call was conducted between the parties and the Sole Arbitrator in order to determine the timetable and directions in relation to the proceeding.
25. On 15 June 2016, the Respondent filed with the CAS Oceania Registry and served on the Appellants and Affected Parties its R55 Answer together with exhibits referred to.
26. On 16 June 2016, the Second Affected Party filed with the CAS Oceania Registry and served on the Appellants, Respondent and First Affected Party, its submissions.
27. On 17 June 2016, the Appellants filed with the CAS Oceania Registry and served on the Respondent and Affected Parties further submissions in response to the submissions of the Second Affected Party.
28. On 17 June 2016, prior to the commencement of the hearing, the parties signed the Order of Procedure. The hearing was held at the CAS Oceania Offices in Sydney, Australia. The Sole Arbitrator was assisted by Mr. Manu Jaireth as *ad-hoc* clerk and joined by the following:

*For the Appellants*

- Mr. Mr James Mighell QC
- Mr. Paul Hayes

*For the Respondent*

- Mr. Edward Cox

*For the First Affected Party*

- Ms. Annabelle Williams

*For the Second Affected Party*

- Ms. Catherine Gleeson

29. At the start of the hearing, the parties confirmed that they had no objection to the composition of the Panel. At the conclusion of the hearing, the parties confirmed that their right to be heard had been fully respected.

#### **IV. SUBMISSIONS OF THE APPELLANTS**

##### **A. Grounds of Appeal**

30. The Appellants press four grounds in the appeal.
31. First, that the Nomination Panel did not have an unfettered or broad discretion to nominate for selection to the 2016 Australian Olympic Team those athletes it saw fit. On the proper construction of clause 3(3)(c) of the Australian Sailing Nomination Criteria (the “Nomination Criteria”) having regard to its purpose, the Nomination Panel had to take into account a consideration of the defined sub-section of performance criteria as outlined in the clause before deciding, in its absolute discretion, to nominate a crew or to not nominate a crew in accordance with the criteria.
32. It was further contended that the Nomination Panel, in its evaluation of the Appellants’ candidature for nomination to the AOC for selection in the 2016 Australian Olympic Team, was required to ‘proceed beyond forming [an] opinion not to nominate’ and further ought to have given ‘proper, genuine and realistic consideration to the criteria set out in clause 3(3)(c)ii of the Nomination Criteria’. The Nomination Panel should have given full and proper to consideration to clause 3(3)(c) as a whole before deciding whether or not to nominate the Appellants.
33. Secondly, it was submitted that clause 3(3)(c) of the Nomination Criteria does not permit the Nomination Panel to simply decide ‘no nomination’ without first having regard to the framework of considerations provided for by the clause, when read as a whole, in reaching its nomination decision. In order to reach the conclusion that no nomination be made, the Nomination Panel necessarily had to undertake some evaluation of the Appellants’

candidature. Clause 3(3)(c), read as a whole, provides the means for conducting that evaluation in the Nomination Panel’s decision-making process.

34. Further, failure on the part of the Nomination Panel to refer to a relevant issue in the Nomination Panel Statement (being the record of the Nomination Panel’s decision as regards the Appellants), indicates that such issue was either overlooked or erroneously considered to be irrelevant by the Nomination Panel.
35. It was submitted that the Nomination Panel Statement reveals that it failed to follow or implement the Nomination Criteria, as required to be considered under clause 3(3)(c), for the following reasons:
  - a. it addresses raw event results and does not consider the results in the context of ‘nation placings’;
  - b. it did not consider whether the Appellants ‘achieved an overall top 10 nation place’ at the regattas specified in clause 3(3)(c)ii.b, by examining and analysing the available competition data arising from the eligible crews’ participation in these regattas which are as follows:

<b>Date</b>	<b>Event</b>	<b>Overall Place</b>	<b>Nation Place</b>	<b>Rio Entrance Place</b>
Jan 2014	World Cup Miami	16	11	11
Mar 2014	World Cup Mallorca	28	17	15
Apr 2014	World Cup Hyeres	21	12	11
May 2014	Kieler Woche	12	7	7
Jul 2014	European Championship (Helsinki)	15	10	8
Sep 2014	World Championship (Santander)	11	9	9

Jan 2015	World Cup Miami	6	6	6
Mar 2015	Eurosaf Palma	16	12	9
Nov 2015	World Championships ARG	14	12	12
Jan 2016	Sailing World Cup Miami	23	13	12
Feb 2016	World Championship (Clearwater)	14	11	10
Mar 2016	Eurosaf Palma	5	4	4
Apr 2016	European Championship (Barcelona)	14	12	10
Apr 2016	Sailing World Cup Hyeres	16	13	11

- c. it omitted reference to specific events falling within clause 3(3)(c)ii.a of the Nomination Criteria (operating to the Appellants' advantage), which informed the Nomination Panel's consideration of the Appellants' 'capability' of winning a medal at the 2016 Olympic Games and the results achieved by the Appellants in the above relevant events (eg. 2014 World Championships (9th nation) and 2015 Miami Sailing World Cup (6th nation)) which results would have qualified the Appellants for the Event;
- d. it erroneously compared the Appellants' performance and the performance of other Australian crews by the inconsistent and selective reference to data and circumstances, as evidenced in their selective comments/notes;
- e. it was selective and inconsistent in respect of comparisons made between the Appellants and other crews when considering fleet composition (i.e. size and quality)

at various events, in which both the Appellants and other crews competed, as is apparent from the AS 49erFX Olympic Nomination Events and Data Table (forming part of the Nomination Panel's Statement);

- f. the Nomination Panel, in its consideration on the impact on the entire Australian Olympic Sailing Team, determined the Appellants did not meet the necessary performance criteria, nor had prospects of success, and such a nomination therefore was likely to have a negative impact on the medal prospects of other crews. Such reasoning was inconsistent with the fact that the 49erFX boat and equipment were in Rio, this is the first time the Event is in the Olympic Games, and this young crew would benefit from the experience;
  - g. the Nomination Panel erred in its speculation regarding the possible performance of future crew combinations; and
  - h. the Nomination Panel did not consider the views of the independent coach or alternatively, such views were not accurately reflected in submissions by the Performance Director and Head Coach.
36. As a consequence of the Nomination Panel not properly applying the Nomination Criteria in their consideration of the Appellants' candidature for nomination (as addressed above), it was submitted that the AS Appeals Tribunal's determination that the Nomination Panel 'gave proper, genuine and realistic consideration to the [Nomination Criteria]' was an error.
37. Thirdly, the Appellants asserted that the Nomination Panel's Statement, given its irrelevant considerations and failure to properly assess the performance of the Appellants, made its decision erroneous. The Appeal therefore cannot be classed as a merits review. Central to the Appellants' challenge to the Nomination Panel's decision (as embodied within the Nomination Panel Statement) not to nominate them to the AOC for selection in the 2016 Australian Olympic Team, is that the Nomination Panel misapplied the Nomination Criteria to their case for nomination, an error of law.
38. Accordingly, the AS Appeals Tribunal's determination that the Appellants' challenge to the Nomination Panel Statement was an impermissible challenge to the merits, is in error.
39. Last, by not properly applying the Nomination Criteria to the Appellants' candidature for nomination, the Nomination Panel made an error of law, which accordingly rendered the Nomination Panel's Decision unreasonable. The AS Appeals Tribunal's rejection of the Appellants' submission that there was no material upon which the Nomination Panel's decision could be reasonably based (given the legal errors upon which such decision is founded), was also an error.

**B. Relief**

40. It was submitted that, in terms of relief, the CAS should uphold the Appeal and the Decision should be set aside. The Appellants seek Orders that the determination of the Nomination Panel dated 5 May 2016, as regards the Appellants, be set aside, and that the CAS determine the issue of the Appellants' nomination, in accordance with clause 12.19 of the By-Laws. Alternatively, the Appellants seek that the matter be remitted to a Nomination Panel comprised of different persons for reconsideration, with a recommendation that the new Nomination Panel consider the merits of the Appellants' nomination by properly taking into account the Appellants' overall top 10 nation placings at those regattas specified in clause 3(3)(c)ii.b of the Nomination Criteria.
41. If the CAS determines the issue of the Appellants' nomination, then the Appellants seek an order of the CAS directing Australian Sailing to nominate the Appellants to the AOC for selection in the 2016 Australian Olympic Team.
42. Otherwise, the Appellants seek such costs to which they are entitled in respect of the Application, under clause 14 of the By-Laws.

**V. SUBMISSIONS OF THE RESPONDENT AND FIRST AFFECTED PARTY**

**A. Grounds of Appeal**

43. Counsel for Australian Sailing, supported by the representative Counsel for the AOC, submitted that the decision of the AS Appeals Tribunal on 27 May 2016 was correct. It was contended there was no error of law or denial of natural justice to support the appeal pursuant to clause 12.10 of the By-Laws.
44. It was submitted that:
  - a. the AS Appeals Tribunal was correct in concluding that, in the absence of a Baseline Performance, the Nomination Panel had an unfettered discretion not to nominate a crew. The words 'any and all matters it considers appropriate' are of the broadest possible import and unambiguously suggest an unfettered discretion;
  - b. the AS Appeals Tribunal approached the question of construction objectively and in accordance with proper principles;
  - c. the Nomination Panel plainly considered all of the considerations referred to in clause 3(3)(c) of the Nomination Criteria which are relied upon by the Appellants. The Nomination Panel's Reasons, dated 5 May 2016, set out in five paragraphs their reasons for declining to nominate the Appellants, each of which addressed the relevant criteria;

- d. accordingly, even if the AS Appeals Tribunal made an error in describing the theoretical outer limits of the Nomination Panel's discretion, that error could not rationally affect the decision of either the AS Appeals Tribunal or the Nomination Panel;
  - e. the Nomination Panel considered all the matters referred to in clause 3(3)(c) and it is submitted that no error of law has been demonstrated;
  - f. the Nomination Panel's reasons make it clear that 'nation placings' were considered in respect of the regattas referred to in clause 3(3)(c)ii.b of the Nomination Criteria;
  - g. the Nomination Panel's reasons make it plain that the submission of the Appellants' coach was considered; and
  - h. nothing in the characterisation of the results comparison suggests an irrelevant consideration or an error of law.
45. The AS Appeals Tribunal was correct in characterising the appeal as a factual and discretionary challenge to the Nomination Panel's decision.

## **B. Relief**

46. The Respondent submitted that absent any, or any relevant, error of law that the Appeal should be dismissed.
47. Further, if contrary to its submissions, a sufficient error of law was identified, the decision should be remitted to Australian Sailing for consideration by the Nomination Panel.

## **VI. JURISDICTION**

48. Article R47 of the Code provides as follows:

*"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".*

49. Clause 12.1 of the By-Laws provides as follows:

*"Any appeal or dispute regarding an Athlete's nomination or non-nomination by an NF to the AOC for an Australian Olympic Team or Australian Olympic Winter Team will be addressed according to the following procedure:*

- (1) *the appeal or dispute will be first determined by the Appeals Tribunal established by the NF controlling the relevant sport pursuant to clause 11; and*

(2) *any appeal from the determination of the Appeals Tribunal under clause 12.1(1) will be heard by the Appeals Arbitration Division of the CAS”.*

50. The parties acknowledged in signing the Order of Procedure dated 17 June 2016 that the CAS has jurisdiction to determine this dispute pursuant to clause 12 of the By-Laws.
51. Under clause 12.10 of the By-Laws, the sole grounds for any appeal against a decision of the Appeals Tribunal are:
- a. that there was a breach of the rules of natural justice by the Appeals Tribunal; or
  - b. that the decision of the Appeals Tribunal was in error on a question of law.
52. The parties also acknowledged in the Order of Procedure that the dispute was filed in the Appeals Division of CAS and that the decision of CAS will be final and binding on all parties.
53. The Sole Arbitrator, therefore, confirms that CAS has jurisdiction to hear this appeal.

## **VII. ADMISSIBILITY**

54. Under clause 12.10 of the By-Laws, subject to clause 12.9, any appeal by an Athlete against non-nomination to the AOC must be made to the Appeals Tribunal. Any appeal must accord with the following procedure:
- a. the Appellants must serve a written Notice of Appeal upon the chief executive officer of the relevant NF or its authorised delegate within 48 hours of the Appellants having received written notice of the decision against which the appeal is made (or within such time as the chief executive officer of the relevant NF or its authorised delegate may allow); and
  - b. the Appellants must serve a written notice of the Grounds of Appeal, accompanied by a non-refundable deposit of \$100 payable to the NF, upon the Chief Executive Officer of the relevant NF or its authorised delegate, by no later than the close of business 5 working days after serving the Notice of Appeal (or within such time as the chief executive officer of the relevant NF or its authorised delegate may allow).
55. Clause 12.10 of the By-Laws provides that where an Athlete wishes to appeal a decision against non-nomination and the relevant National Federation so agrees in writing, the appeal to the Appeals Tribunal may be directly referred to the Appeals Arbitration Division of CAS and in which instance the Grounds of Appeal must be one or more of the grounds described in clause 12.5 and the CAS panel will be vested with the powers of the Appeals Tribunal. In such instance,
- a. the appeal will be solely and exclusively resolved by CAS according to the Code of Sports-Related Arbitration and applying the law of New South Wales.

- b. CAS may extend the time limits set out in clause 12.6;
  - c. the provisions of clause 12.12 will apply to any such appeal in so far as they are relevant;
  - d. there will be no subsequent appeal from the decision of CAS; and
  - e. the parties consent to the Grounds of Appeal, the names of the arbitrators and the date for hearing being made public and the award and the reasons being made public.
56. The Sole Arbitrator confirms that the Parties have complied with the above By-Laws and that the appeal is admissible.

#### VIII. APPLICABLE LAW

57. The Nomination Panel was empowered to determine nominations from Australian Sailing to the AOC for selection to the 2016 Olympic Games. The Panel therefore was under a duty to take into account relevant considerations, set out in the Nomination Criteria, and it could not exercise its discretionary power without regard to the merits of the Appellants' case (*Minister for Immigration and Ethnic Affairs v Tagle* (1983) 67 FLR 164 at 171).
58. The failure of the Nomination Panel to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing, in this appeal, the Appellants, to seek a review (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 ("Peko-Wallsend").
59. What factors a decision-maker is bound to consider in making the decision is determined by the construction of the instrument, in this appeal, the Nomination Criteria, conferring the discretion. Where the instrument confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined (*Peko-Wallsend* at 39).
60. But, where a consideration has not been taken into account and the discretion is unconfined, the decision-maker is not bound to consider all matters unless the scope and purpose of the instrument requires it (*Peko-Wallsend* at 40).
61. There is a limited role in a review of an administrative decision. Where the decision-maker has properly followed and implemented matters in an instrument and has given proper, genuine and realistic consideration to them there can be no error (*Peko-Wallsend* at 40).
62. Generally it must be acknowledged that selectors are chosen because of their experience and expertise:

So too in the context of administrative law, a court [read Appeals Tribunal] should proceed with caution when reviewing an administrative decision on the ground that it

does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits (*Peko Wallsend* at 42).

63. In the absence of bad faith, dishonesty or perversity an appeal can only succeed where there was no ‘proper genuine and realistic consideration’ to the overall needs of the team (*Zhang v Canterbury Council* (2001) 51 NSWLR 589 at [62]; see also *Andrew Mewing v Swimming Australia Ltd* (CAS 2008/A/1540 [4]-[24])).

## IX. MERITS

64. The AS Appeals Tribunal rejected the appeal of the Appellants, and in doing so was required to consider the Decision the Nomination Panel as to the effect of Clause 3(3)(c) of the Nomination Criteria for the making of a nomination to the AOC for the selection for the 2016 Olympic Games in the 49erFX Class Event.
65. The Appellants contended that the AS Appeals Tribunal, in its consideration, made an error of law in its interpretation of the powers held by the Nomination Panel. Further, on an analysis of the decision of the Nomination Panel, that it misdirected itself in its consideration of the relevant criteria, failed to consider relevant matters, took into account irrelevant matters, and erred in doing so.
66. Under the scheme outlined in clause 3 of the Nomination Criteria, if no crew achieved a particularised Baseline Performance, as defined in clause 3(2), the Nomination Panel had to turn to stage 2 of the nomination process. This required the Nomination Panel, at its absolute discretion, to make a further decision, taking into account ‘any and all matters it considered appropriate’. Under clause 3(3)(c)i, it could decide to make no nomination. Alternatively, it could nominate a crew to the AOC, guided in its decision-making by the criteria under clause 3(3)(c)ii.a, b and c.
67. Under that clause (clause (3)(3)(c)ii.a, b and c), the Nomination Panel had to consider whether a crew was ‘capable of winning a medal in the 2016 Olympic Games’; or would benefit from the experience of the 2016 Olympic Games to develop skills for the 2020 Olympic Games (provided the crew was likely to finish in the top 10 nation places at the 2016 Olympic Games); and/or is a strong medal prospect for the 2020 Olympic Games (based on the recommendations of the Performance Director and the Head Coach) and/or whether the crew demonstrated achievement at the top 10 nation places at nominated regattas in 2015 and 2016, and take into account the potential impact on the chosen crews.
68. Given this criteria, it was submitted that there was an error of law in the AS Appeals Tribunal’s Decision when it said at [39]:

*“... the Nomination Criteria is unambiguous and clearly permitted AS, in the event no Baseline Performance was achieved by an eligible crew in a specific event, to consider making a nomination under clause 3(3)(c) at its absolute discretion”.*

69. The Nomination Panel holds an unfettered or unconfined discretion under the terms of the clause but, in the use of that discretion, the scope and purpose of the instrument (the Nomination Criteria) requires some consideration for there to be a proper decision.
70. The Appellants contended that in the above reasoning, the AS Appeals Tribunal made an error of law. It is asserted that the Nomination Panel had to make an assessment of the Appellants' performance under clause (3)(3)(c)ii before it could determine whether or not to nominate a crew under the clause. It was contended that the absolute discretion was therefore fettered by the clause.
71. The proposition is rejected. When a discretion is unconfined or unfettered, as was the discretion held by the Nomination Panel (the clause required it to 'take into account any and all matters it considered appropriate'), the Nomination Panel, within the use of its discretion, had to consider such matters as the scope and purpose of the relevant instrument required (read Nomination Criteria). While the decision is made in the 'absolute discretion' of the Nomination Panel, the clause simply provides a guideline for a proper consideration of a crew's performance, under the relevant criteria applicable to that consideration, as well as other particularised matters in the clause. Such considerations do not in any way fetter the absolute discretion. Rather, if a relevant consideration is not taken into account in the making of the decision, it could be an abuse of the discretion.
72. The Appellants contended that the Nomination Panel had first to consider whether it could nominate a crew under the criteria outlined in clause (3)(3)(c) before it could determine, even in the use of its absolute discretion, not to nominate a crew. Further, it was asserted that a crew's 'Baseline Performance' was not then the issue, but a crew's performance had to be reconsidered under the criteria specified in clause (3)(3)(c)ii. The 'misdirection' of the Nomination Panel was:
- a. that in its reconsideration of the Appellants' performance under clause (3)(3)(c), the relevant nation places considered should have been those places in consideration of the nations competing at the 2016 Olympic Games, not the nation places considered by the data attached to the Nomination Panel's Statement;
  - b. that it had to consider all relevant regatta events when considering the Appellants' capability;
  - c. that it considered unfairly only selected events;
  - d. that it made unnecessary comparatives with other crews; and
  - e. that it was inconsistent in its consideration of the Appellants' ability to integrate with the selected Sailing Team.
73. However, the regattas to be considered were nominated in clause (3)(3)(c). The Appellants contended that the clause required that relevant performance should be assessed as the crew's

place within nations solely competing at the 2016 Olympic Games, not their nation place (see the data recorded in the table set out at [35] above). The Appellants' proposition narrows the reading of clause (3)(3)(c)ii.a and b, to a consideration of regatta data only related to nation competitors it speculates will be competing at the 2016 Olympic Games. It is difficult to accept the Appellants' proposition.

74. As Counsel for the AOC contended, had the Appellants achieved up to 10<sup>th</sup> place in a nominated event as recited in clause (3)(3)(c)ii.b, they would have been nominated. The data related to their performance in a number of events was pressed on appeal as informing AS Appeals Tribunal and this Appeals Tribunal of the 'capability' of the Appellants to win a medal. However, other factors, as well as their performance, had to be given weight under the criteria enunciated in clause (3)(3)(c)ii.a, b and c.
75. The Nomination Panel's Reasons dated 5 May 2016 set out in five separate paragraphs its consideration of the criteria required under clause (3)(3)(c). It held:
- a. that there was no performance that indicated to the Nomination Panel that the Appellants showed any real prospect of a medal;
  - b. that there was insufficient evidence that the Appellants were likely to finish in the top 10 places at the 2016 Olympic Games;
  - c. that there was no support from the Head Coach and Performance Director, though the Appellants' Coach's submission that they were a strong medal prospect was given consideration;
  - d. that the Appellants failed to achieve a top 10 nation place in the specified events under the clause; and
  - e. that the impact on the Sailing Team of the inclusion of a crew with no qualifying performance or prospects was likely to have a negative effect.
76. It was contended that the proper consideration was not the Appellants' prospect of success but, under the clause, whether they were 'capable' of earning a medal, and that a finding that the Appellants had 'no performance that showed any real prospect', as considered by the Nomination Panel, was not the required test. While the proper test required an assessment not of the Appellants' 'prospect' of success, but rather an assessment of their 'capability' (a different test), the Nomination Panel applied its mind both to the issue of the Appellants' performance in specified events particularised in the clause, and in other events, and the Appellants' chance of success in earning a medal. It also considered the other criteria enunciated in sub-clauses b and c of the clause.
77. A Nomination Decision made in accordance with the Nomination Criteria cannot be challenged 'absent bad faith, dishonesty or perversity' (CAS 2008/A/1540 at 24). The appeal was properly characterised as a factual and discretionary challenge to the Nomination Panel's

decision (at [43] of the AS Appeals Tribunal Decision). It has not been shown that the Nomination Panel did not give 'proper, genuine and realistic consideration' to the nominations for the Event. There is no evidence that the decision was wrong, and I accept that there is no error of law. Many of the matters raised go to the merits of the decision, not whether the Nomination Panel gave a proper consideration to the relevant criteria (CAS 2008/A/1540 at 24).

78. The AS Appeals Tribunal found the Nomination Panel considered each of the relevant criteria for nomination as required under clause 3(2) and clause 3(3)(c). The Nomination Panel did not make its decision solely in the use of its absolute discretion as asserted. The Nomination Panel considered all the relevant criteria in making its discretionary decision. It did consider the Appellants' performance in the nominated events and in other events. It did not consider the data relied upon by the Appellants and which in both appeals the Appellants urged reliance. This data urged upon the both Appeals Tribunals was not available to the Nomination Panel, was designed by speculation and related to Nation Placement, in events (not nominated), of nations allegedly competing at the 2016 Olympic Games in the Event. The Nomination Panel was at liberty to consider all matters it considered appropriate including its selection of data in the consideration as to the Appellants' performance. While the Nomination Panel did not consider the 2016 Miami result or the 2014 World Championships, they considered 10 results over the 2015 and 2016 relevant period (not 2014) including from their data sheet the nominated events and other events. Given the absolute discretion held by the Nomination Panel, their consideration showed no bias. It did not consider irrelevant matters nor did it fail to consider matters relevant under the Nomination Criteria.
79. The AS Appeals Tribunal, in its reasoning at para 39, opined as to the outer limits of the absolute discretion held by the Nomination Panel. It also considered all the steps taken by the Nomination Panel and found they had made a decision in accordance with the Nomination Criteria as required, and also gave reasons for the decision made.
80. There was no error of law by the AS Appeals Tribunal as it relates to the Appellants. Each ground of appeal therefore fails.
81. The Appeal is dismissed.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules:**

1. The appeal filed by Ms Tess Lloyd and Ms Caitlin Elks on 31 May 2016 against the decision rendered by the Yachting Australia Appeals Tribunal on 27 May 2016 is dismissed.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.