



Arbitration CAS (Oceania Registry) A2/2016 Jo-Ann Lim v. Synchronised Swimming Australia Inc. (SSAI), award of 5 July 2016

Panel: The Hon. Justice Annabelle Bennett (Australia), Sole Arbitrator

Aquatics (synchronized swimming)

Nomination for selection and selection at the 2016 Olympic Games

Power of review of CAS in determining errors of law in the interpretation of nomination criteria of national federations

Distinction between nomination for selection, selection and participation in the Olympic Games

Citizenship requirement for qualification established in the FINA Rules

Denial of natural justice, de novo review by the CAS and referral to the previous instance

- 1. Pursuant to Article R57 of the Code a CAS panel has the power to review the facts and the law in determining whether there was an error on a question of law as to construction of the nomination criteria of a national federation and as to whether the previous instance has breached the rules of natural justice.**
- 2. There is a distinction between nomination for selection, selection and participation in the Olympic Games. While nomination imports the concept of selection to compete, the nomination criteria recognise that a person properly nominated may not be able to compete in a particular event or events. An athlete can be selected to compete but not actually compete in an event.**
- 3. The FINA Rules require that, when a competitor represents his or her country in a competition, he or she shall be a citizen, whether by birth or naturalisation, of the nation he or she represents and, if a naturalised citizen, shall have lived in the country for at least one year prior to that competition. Only athletes who are eligible to participate at the official FINA competitions in accordance with the FINA Rules are entitled to participate in the Olympic Games. The FINA Qualification System applies to actual competition and, in particular, an ability to compete at the Olympic Games. It does not in terms apply to nomination for selection to compete.**
- 4. The ultimate question in determining the consequence of the denial of procedural fairness is whether, as a result of the availability of an appeal, there was any practical unfairness. As long as an appeal to the CAS enables, in effect, a reconsideration of the questions of law and the relevant factual matters, there is no applicable practical injustice or unfairness and there is no purpose for referring the matter back to the previous instance for reconsideration.**

I. PARTIES

1. Ms Jo-Ann Lim (the “Appellant”) is a synchronised swimmer.
2. Synchronised Swimming Australia Inc. (“SSAI”) is the National Federation for synchronised swimming in Australia.
3. Ms Amber-Rose Stackpole is a synchronised swimmer.
4. The Australian Olympic Committee (the “AOC”) is the National Olympic Committee for Australia.

II. INTRODUCTION

5. The Appellant is seeking review of a decision of the Synchronised Swimming Australia Inc. Appeals Tribunal (“Appeals Tribunal”) dated 3 May 2016 by which the Appeals Tribunal affirmed a decision of SSAI nominating, among others, Ms Stackpole to the AOC for selection in the Australian synchronised swimming team to compete in the 2016 Olympic Games in August 2016.

III. FACTUAL BACKGROUND

A. Background Facts

6. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. 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 of the facts, allegations, legal arguments and evidence submitted by the parties in the proceeding, she refers in her Award only to the submissions and evidence she considers necessary to explain her reasoning.
7. In 2014, SSAI began preparing for the 2016 Olympic Games. The preparation programme involved its athletes participating in, among other things, several training camps and a number of national and international competitions.
8. On 10 November 2014, SSAI sent an email to twenty one of its athletes, including the Appellant and Ms Stackpole, stating that they had been “selected to be part of the extended National Squad for 2015” (“National Squad”).

9. At the time of this email, neither the Appellant nor Ms Stackpole were Australian citizens. Both women had applied to become Australian citizens so that they could then apply to the Fédération Internationale de Natation (“FINA”) to change their sport nationality to Australian. It was hoped that both women would be granted Australian citizenship in time to be able to, if selected, compete for the Australia at FINA-affiliated competitions and, ultimately, compete at the 2016 Olympic Games.
10. The Appellant’s Australian citizenship was granted on 30 April 2015 and Ms Stackpole’s Australian citizenship was granted on 30 March 2016.
11. From 26 to 28 June 2015, the National Squad, including the Appellant and Ms Stackpole, attended the Spanish Open, ASISA Trophy Synchronised Swimming Sabadell. Before this event, the Appellant had been granted Australian citizenship and had her sport nationality changed to Australian by FINA. However, Ms Stackpole had not yet been granted Australian citizenship and was unable to compete in this event as it would jeopardise her future application to FINA to change her sport nationality. Ms Stackpole therefore “pre-swam” her routine i.e. prior to the start of the competition, she swam her routine before the panel of judges, who then scored her performance.
12. From 1 to 5 September 2015, the National Squad, including the Appellant and Ms Stackpole, competed in the National Team Tech Individual as part of the Commonwealth Festival of Synchronised Swimming competition held in Perth. At this event, each athlete swam her individual components of the squad’s team routine. Ms Stackpole was able to compete in this competition as it was not a FINA-affiliated event.
13. On 4 April 2016, pursuant to clause 6.1 of the Australian Olympic Committee Olympic Team Selection By-Law (“By-Law”), the AOC approved SSAI’s set of criteria to determine which athletes it would nominate to the AOC for selection as a member of the Olympic team (“Nomination Criteria”).
14. From 4 to 6 April 2016, in accordance with the Nomination Criteria, selection trials for the synchronised swimming Olympic team were held in Perth (the “Selection Trials”). As set out in schedule 4 of the Nomination Criteria, the Selection Trials involved the selection of the main team, comprising the top nine athletes, and the duet team, comprising three athletes from the main team.
15. The Appellant ranked tenth at the Selection Trials and was therefore not nominated by SSAI to the AOC for the Olympic Team.
16. On 6 April 2016, pursuant to clause 4.1(3) of the By-Law, the twelve athletes who participated in the Selection Trials signed the “2016 Australian Olympic Team Consent to SSAI Shadow Team Membership”.

17. On 6 April 2016, based on the results of the Selection Trials, SSAI sent an email to the AOC attaching a memo which listed the nine athletes (including Ms Stackpole) whom SSAI wished to nominate to the AOC for selection to the Olympic Team.
18. The parties agreed a chronology for the purposes of this appeal, relevantly:
 - 10 November 2014: SSAI advises athletes by email that they had been selected to be part of the extended National Squad for 2015. Both the Appellant and Ms Stackpole were included.
 - 30 April 2015: the Appellant was granted Australian citizenship.
 - 28 August 2015: the AOC sends SSAI a draft of the Nomination Criteria based on the version used by SSAI for the 2012 Olympic Games.
 - March 2016: Athletes were handed a document entitled 'Selection Policy, 2016 Olympic Synchronised Swimming Team and Duet'.
 - 30 March 2016: Ms Stackpole was granted Australian citizenship.
 - 4 April 2016: the AOC sends SSAI an email approving the final version of the Nomination Criteria.
 - 4 to 6 April 2016: Selection Trials for the Olympic Team take place.
 - 6 April 2016: all 12 athletes who participated in the Selection Trials sign the consent to SSAI Shadow Team Membership.
 - 6 April 2016: SSAI sends initial email to AOC listing the 9 synchronised swimming athletes nominated to the AOC.
 - 7 April 2016: SSAI decision to nominate athletes to the AOC pursuant to the 2016 Nomination Criteria.
 - 27 April 2016: Ms Stackpole receives a change of sport nationality to Australian from FINA, prior to the Olympic Games to be held in August.
19. The parties also provided the following agreed factual background, being 'the surrounding circumstances in which the meaning of the Nomination Criteria falls to be considered':

- a. since 2014, Ms Stackpole had participated (in the sense of trained, attended camps, and competing to the extent allowed under relevant FINA provisions) as part of the Australian training squad with a view to preparing for and ultimately competing in the 2016 Olympic Games;
- b. during 2014, 2015 and in 2016 prior to the Selection Trials, Ms Stackpole had not competed for Australia in FINA-affiliated events.
- c. Ms Stackpole would, if selected, compete for Australia once she became an Australian Citizen. It was hoped this would occur as early as 2014;
- d. when Ms Stackpole's citizenship application was not forthcoming as anticipated, she remained with the Australian training squad, hopeful that she would be granted citizenship in time to be able to, if selected, compete for Australia of FINA-affiliated competitions and, ultimately, compete at the 2016 Olympic Games;
- e. ### there is no sub-paragraph (e) in the Agreed Factual Background ###;
- f. once Australia had qualified to participate in the 2016 Olympic Games, SSAI began formulating what it described as its "selection policy". This document went through at least two versions that were distributed to all members of the Australian team;
- g. ### there is no sub-paragraph (g) in the Agreed Factual Background ###;
- h. Ms Stackpole became an Australian Citizen prior to the Selection Trials;
- i. subsequent to her Australian citizenship, and on the first day of the Selection Trials, the AOC approved the Nomination Criteria.

B. Proceedings before the Appeals Tribunal

20. On 8 April 2016, the Appellant sent an email to SSAI stating that she wished to appeal against her non-nomination for the Olympic Team.
21. On 28 April 2016, a hearing was held before the Appeals Tribunal.
22. At the hearing, the Appellant sought leave to rely on written submissions and a statutory declaration made by the Appellant dated 28 April 2016. The written submissions and statutory declaration were provided to SSAI and the Chair of the Appeals Tribunal three hours prior to the commencement of the hearing.

23. The Appeals Tribunal refused leave for the written submissions and statutory declaration to be tendered or relied upon by the Appellant at the hearing ‘by reason of procedural fairness’.
24. The Appellant also sought leave to be represented by counsel at the hearing. Clause 11.4(6) of the By-Law provides as follows:

the parties to an appeal will not be entitled to be represented by a barrister or solicitor save with the leave of the Appeals Tribunal which leave will only be given in exceptional circumstances and, if given, may be given unconditionally or on such conditions as the Appeals Tribunal thinks fit.

25. The Appellant submitted that there were a number of exceptional circumstances operating in favour of leave being granted, including the Appellant’s young age, and the complexity of the questions of construction of the Nomination Criteria.
26. The Appeals Tribunal granted leave for Ms Reg Graycar of counsel to appear and make oral submissions on behalf of the Appellant. The Appeals Tribunal noted that the Appellant’s young age was the ‘deciding factor’ in granting leave.
27. On 3 May 2016, the Appeals Tribunal issued its decision affirming the SSAI decision to nominate Ms Stackpole, among others, to the AOC for selection to the Olympic team.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. In accordance with the Code of Sports-related Arbitration (the “Code”) and the By-Law, on 5 May 2016, the Appellant filed an Application in the Appeals Division of the Court of Arbitration for Sport (“CAS”), Oceania Registry. The Application named SSAI as the Respondent.
29. On 10 May 2016, in accordance with Article R50 of the Code, SSAI requested that the proceeding be heard by a Sole Arbitrator. On 12 May 2016, the Appellant agreed to this request.
30. On 12 May 2016, the Appellant filed its Grounds of Appeal with the CAS Oceania Registry.
31. On 23 May 2016, the Appellant filed with the CAS Oceania Registry a copy of the written submissions that she had provided to the Appeals Tribunal on 28 April 2016, her Statutory Declaration dated 28 April 2016, an Appeal Brief and an Outline of Submissions.
32. On 24 May 2016, the President of the Appeals Arbitration Division confirmed the parties’ agreement to appoint Dr Annabelle Bennett AO SC as Sole Arbitrator.

33. On 30 May 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.
34. On 3 June 2016, in accordance with order 10.4 of the Order of Procedure, SSAI filed with the CAS Oceania Registry a statutory declaration of Brian Miller, President of SSAI dated 3 June 2016, a statutory declaration of Denise Curran, Director of SSAI dated 3 June 2016 and an Outline of Submissions.
35. On 6 June 2016, the Appellant notified the Tribunal that she took “issue with the majority of the material provided by Mr Miller as it [appeared] to be seeking to adduce new evidence which was not before the Tribunal below”.
36. On 6 June 2016, the parties signed the Order of Procedure.
37. On 6 June 2016, in accordance with order 10.6 of the Order of Procedure, Ms Stackpole filed a statement with the CAS Oceania Registry in her capacity as an interested party.
38. On 8 June 2016, the hearing was held at the CAS Oceania Offices in Sydney, Australia. The Sole Arbitrator was assisted by Ms Mary Flanagan, Solicitor in Sydney, Australia, and joined by:

For Jo-Ann Lim

- Ms Reg Graycar
- Mr David Prince

For Synchronised Swimming Australia, Inc.

- Mr Dominic Villa
- Mr Simon Merritt

For Amber-Rose Stackpole

- Ms Stackpole’s mother, by telephone

39. 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.

V. SUBMISSIONS OF THE PARTIES

40. The submissions of the parties will be dealt with in more detail in the consideration of the merits.

41. The Appellant's submissions are essentially, and in summary:

- The CAS has full power to review the facts and the law

The nomination of Ms Stackpole

- The Appeals Tribunal was in error in its construction of the Nomination Criteria as applicable by reason of the By-Law, which is an error of law. Further, its refusal to accept written submissions and evidence from the Appellant constituted procedural unfairness amounting to a denial of natural justice.
- Ms Stackpole did not satisfy the Nomination Criteria as required in the By-Law.
- The Nomination Criteria required that the person to whom they applied be an Australian citizen. To be eligible for selection, an athlete participating in selection trials must, relevantly, be and have been, a citizen of Australia.
- At the time that Ms Stackpole was "selected to compete" in relevant and necessary National and International competitions as a member of the National Squad, as required by the Nomination Criteria, she was not an Australian citizen.
- Ms Stackpole could not swim in FINA events as a member of the National Squad as she was not an Australian citizen, as required by FINA.
- SSAI had considered Ms Stackpole to be unable to compete as a member of the National Squad at National and International competitions prior to the nomination process and she was not eligible to compete in selection trials; therefore she was not "selected to compete" and was therefore unable to be nominated.

- “selected to compete” is a composite requirement that imports a purpose, the purpose being that, at the time of selection, the Athlete must actually have been able to compete in the competition.
- The criteria had to be applied objectively and could not be disregarded upon the “satisfaction of SSAI”, or disregarded at the discretion of SSAI by reason of the discretion provided in clause C of the Nomination Criteria, or otherwise.
- Ms Stackpole had not complied with a requirement, to be implied from a reading of the Nomination Criteria as a whole, that she had been nominated to a Team and Duet event in National and International competitions, and nomination to a solo event was insufficient.
- As at the time of the application of the Nomination Criteria, it was necessary for the Athlete to have demonstrated compliance with the applicable Qualification System as provided in the By-Law at a point in time prior to nomination, including compliance with the FINA requirement that she be an Australian citizen.
- At the time of nomination, Ms Stackpole had not complied with the FINA requirement as required by the Selection Criteria and Qualification System of the By-Law.

Denial of natural Justice/ denial of procedural fairness

- The Appeals Tribunal denied the Appellant procedural fairness by refusing to accept her written submissions provided to the Chair of that tribunal in advance of the hearing and in refusing to accept the Appellant’s statutory declaration, which largely consisted of correspondence between the parties.

42. SSAIs submissions are, in essence and in summary:

- The CAS has full power to review the facts and the law insofar as they bear upon the question of whether the Appeals Tribunal was in error on a question of law and to the extent that they are relevant to determining whether the Appeals Tribunal breached rules of natural justice.
- The Appeals Tribunal did not err in making findings for which there was no evidence as asserted by the Appellant, as the Appeals Tribunal is not bound by the rules of evidence and was entitled to accept information from SSAI, including by way of submissions, that was logically probative.

- It is necessary and permissible to consider the background facts as to the surrounding circumstances known to the parties, including as to Ms Stackpole's participation in the context of her application for Australian citizenship, in construing the Nomination Criteria.
- "On one view", the choosing of the Shadow Team and the nomination to the AOC for selection pursuant to the Nomination Criteria occurred simultaneously. While this scenario is "far from ideal" and not contemplated by the Nomination Criteria or the By-Law, it is not prohibited.
- Ms Stackpole was a member of the Shadow Team as that term is defined in the By-Law.
- The Nomination Criteria require that SSAI will only nominate those athletes who, to the satisfaction of SSAI, have been selected to compete at National and International competitions as a member of the National Squad. This does not focus on selection to compete in an individual event and can, in any event, only require membership of the National Squad for the purposes of International competitions.
- Accepting that "selected to compete" requires a determination of the purpose for which the Athlete has been selected, it is identified by reference to the potential capacity to compete, whether likely or merely possible and includes selection in anticipation of obtaining Australian citizenship by the time that the event takes place.
- Accordingly, Ms Stackpole was selected to compete at domestic and International competitions as part of the National Squad, as found by the Appeals Tribunal.
- In the alternative, compliance with the relevant criteria is not one of objective fact but to the satisfaction of SSAI, which was satisfied.
- The FINA Qualification System is irrelevant to the question of nomination but applies to the ability to compete at the Olympic Games.
- There is no requirement that the selection to compete in National or International competitions must have been in relation to the Duet or Team events.
- Clause C of the Nomination Criteria provides SSAI with an absolute discretion to have regard to extenuating circumstances in determining whether or not, to SSAI's satisfaction, an Athlete has satisfied the team participation requirements of the Nomination Criteria and delay in Ms Stackpole being granted Australian citizenship was such a circumstance.

- There was no error in the findings of the Appeals Tribunal.

Asserted breach of the principles of natural justice by the Appeals Tribunal

- The requirement to accord natural justice applied to all parties.
- By reason of the timing of the service of the Appellant's written submissions and the absence of an entitlement to have written submissions accepted by the Appeals Tribunal, together with the opportunity provided to, and availed of, by the Appellant's counsel to make detailed oral submissions, there was no denial of procedural fairness.
- There is no submission by the Appellant identifying significance in the material sought to have been adduced by way of statutory declaration to the Appeals Tribunal that was not otherwise before the tribunal.

43. Ms Stackpole's submissions are, in essence and in summary:

- She relies on submissions provided to the Appeals Tribunal. Some of the grounds before that tribunal are not relevant to the grounds before the CAS.
- As to the Nomination Criteria, Ms Stackpole was at all times a member of the Shadow Team.
- SSAI correctly followed the Nomination Criteria. As at the date of the Selection Trials, Ms Stackpole was a citizen of Australia and had met the requirements of the Nomination Criteria.
- Ms Stackpole had been "selected to compete" at national and international competitions in 2014 and 2015 as a member of the National Squad.
- The delay in Ms Stackpole receiving Australian citizenship was an extenuating circumstance and considered by SSAI to be so pursuant to clause C of the Nomination Criteria.
- Ms Stackpole will comply with the FINA requirements and the Qualification System at the time of her selection by the AOC to the 2016 Australian Olympic Team or, in the alternative and relevantly, will be eligible to compete at the 2016 Olympic Games pursuant to the FINA requirements.

VI. JURISDICTION

44. 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.

45. It was common ground that clause 12 of the By-Law applied to this appeal. Clause 12.1 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.*

46. Article R57 of the Code provides that the CAS has full power to review the facts and the law. By clause 12.18 of the By-Law, the Panel has the power under Article R57 to review the facts and the law for the purposes of determining whether or not the Appellant has made out one or more of the grounds of appeal provided for by clause 12.10. Clause 12.10 of the By-Law provides for grounds of appeal where there was a breach of the rules of natural justice by the Appeals Tribunal or that the decision of the Appeals Tribunal was in error on a question of law.

47. The parties acknowledged in signing the Order of Procedure dated 6 June 2016 that the CAS has jurisdiction to determine this dispute pursuant to clause 12 of the By-Law.

48. The parties also acknowledged in the Order of Procedure that the dispute has been filed in the Appeals Division of the CAS and that the decision of the CAS will be final and binding on all parties.

49. The Sole Arbitrator, therefore, confirms that the CAS has jurisdiction to hear this appeal.

VII. ADMISSIBILITY

50. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

51. Clause 12.13 of the By-Law provides as follows:

An Athlete wishing to appeal to CAS against a decision of an Appeals Tribunal must serve a written Notice of Appeal to CAS, upon the chief executive officer of the NF or its authorised delegate, within 48 hours of the Athlete having received written notice of the Appeals Tribunal decision (or within such time as the chief executive officer or its authorised delegate may allow) and must then file a Statement of the Grounds of Appeal with CAS by no later than close of business 5 working days after serving the Notice of Appeal (or within such time as CAS may allow). An extension of time may be granted under this clause only in extenuating circumstances outside the control of the Athlete concerned.

52. The Appeals Tribunal's written determination was issued on 3 May 2016. The Appellant filed her application with the CAS on 5 May 2016 (i.e. within the deadline set forth in clause 12.13 of the By-Law). The Sole Arbitrator, therefore, considers that this appeal is admissible. It is not contended to the contrary.

VIII. APPLICABLE LAW

53. It was agreed by the parties under the Order of Procedure that the law applicable to the merits is the law of New South Wales.

IX. MERITS

A. Background

54. There is no challenge to the competency of this appeal. The Appellant is entitled to challenge the Appeals Tribunal decision on two bases:

- Error on a question of law;
- Denial of natural justice by the Appeals Tribunal.

55. The Appellant challenges on both bases. It is not in dispute that the grounds of appeal raise questions of law, being based on the asserted wrongful construction of the Nomination Criteria which, it is agreed, have contractual force as between SSAI and each of the Appellant and Ms Stackpole. The parties agree as to the appropriate principles of construction, being those set out in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (“Toll”).
56. The parties agree that the By-Law relevantly governs the nomination and selection of Athletes for the 2016 Olympic Games. The By-Law in effect as at the Tribunal hearing was dated 6 August 2015. A more recent version of the By-Law was published on 6 May 2016. The parties agree that there is no relevant difference for the purposes of this appeal. The By-Law states that, to the extent of inconsistency with the Code, the By-Law prevails.
57. There is no dispute that the appeal to the CAS complied with all relevant procedural rules.
58. SSAI nominates Athletes to the AOC to represent Australia at the 2016 Olympic Games. That must be done in accordance with the Nomination Criteria. The Appellant was not nominated for either the Team Event or the Duet Event. Ms Stackpole was nominated for each event. The Appellant has appealed that nomination pursuant to clauses 11 and 12 of the By-Law. There is no dispute that she is entitled to do so and has complied with relevant time restrictions. As an affected person, Ms Stackpole has participated in the appeal.
59. A number of grounds of appeal raised by the Appellant in the Appeals Tribunal are not pressed in this appeal from the Tribunal’s decision. The sole grounds of appeal against the decision of the Appeals Tribunal are governed by clause 12.10 of the By-Law, namely a breach of the rules of natural justice by the Appeals Tribunal or the ground that the decision of the Appeals Tribunal was in error on a question of law.
60. Pursuant to Article R57 of the Code and clause 12.18 of the By-Law, this Panel has the power to review the facts and the law in determining whether there was an error on a question of law as to construction of the Nomination Criteria and as to whether the Appeals Tribunal has breached the rules of natural justice. No relevant submissions were made to the contrary. There were submissions as to whether the Appellant needed to establish an error of law based upon findings for which there was no evidence but the parties accepted that the construction of the Nomination Criteria was a question of law, asserted error in which was a proper ground of appeal. It is therefore not necessary in this regard to consider questions of whether submissions before the Appeals Tribunal could properly amount to evidence in circumstances where the rules of evidence do not apply. In any event, there was agreement as to relevant factual matters for the purposes of the determination of this appeal.
61. The parties agree as to the principles of construction to be applied to the Nomination Criteria, including context and surrounding circumstances. It is interesting that SSAI submits that the document is “patently ambiguous” with internal inconsistency.

B. The relevant criteria

62. This case concerns both the Nomination Criteria and the Selection Criteria applied with respect to the Appellant and Ms Stackpole. There was a two stage process: nomination for selection; and selection.
63. Nomination of athletes for selection for synchronised swimming events at the 2016 Olympic Games is governed by the Nomination Criteria of the By-Law. These, in turn, relate to selection, governed by the By-Law and the Selection Criteria.
64. The By-Law provides for Nomination Criteria to be adopted by a National Federation (“NF”) for nomination to the AOC for selection as a member of the Australian Olympic Team. Selection Criteria are adopted by the AOC for selection of athletes as members of a particular Australian Olympic Team. Qualification Criteria are in respect of a particular Games, regarding eligibility to compete in those Games. The FINA Rules are such Qualification Criteria.
65. The By-Law relevantly defines the “Nomination Criteria” as *“the criteria in respect of a particular sport adopted by the NF controlling that sport in Australia for the nomination of Athletes to the AOC for selection as a member of a Team”* (emphasis added).
66. The By-Law provides that the Nomination Criteria be adopted within a reasonable time frame, with a guide being 12 months prior to its first nomination event for the relevant Games. This was not complied with in this case. No party has raised a relevant issue with the fact that SSAI only adopted the Nomination Criteria on about 4 April 2016. Further, the By-Law relevantly provides that the Nomination Criteria are subject to the Selection Criteria, which prevail in the event of inconsistency.
67. The Nomination Criteria are subject to the Selection Criteria and the Qualification Criteria.
68. SSAI had set out the selection protocols and procedures that it *“will follow”* to determine the athletes to be nominated to the AOC as the 2016 Olympic Synchronised Swimming Team and Duet, relevantly as follows:

To be eligible for selection the athletes participating in the Selection Trials must:

- *Be a citizen of Australia*
- ...
- *Have been selected to compete at National and International competitions as a member of the National Squad*

- ...
69. It is worth noting that there is no requirement that an Athlete had actually competed at National and International competitions as a member of the National Squad.
70. The Nomination Criteria for the Duet and Team Events are not identical. However, it is clear in each that the criteria are set out as being for the purposes of nomination to the AOC for selection to the 2016 Australian Olympic Team. In each case, it is stated that SSAI will only nominate athletes who “to the satisfaction of SSAI, have competed in the events or trials, completed the training regime and other attendance and team participation requirements as follows:
- (a) Have participated in all National Team camps unless excused for medical or personal reasons;
 - (b) Have been selected to compete at National and International competitions as a member of the National Squad; and
 - (c) Have been identified for nomination to the AOC in accordance with [the relevant protocol for selection]”.
71. With respect to these criteria, there is a further qualification. Under the heading: “Illness/Misadventure/Extenuating Circumstances”, clause C relevantly states:
- In considering the performances of Athletes at events, trials, training camps or other attendances required under clause B.1(1) and B.2(1) of this Nomination Criteria, the SSAI Selection Panel may in their absolute discretion give weight to extenuating circumstances.*
- For the purpose of this clause, “extenuating circumstances” means an inability to compete and/or attend events, trials, training camps or other attendances arising from:*
- (a) Injury or illness;
 - (b) Equipment failure (where applicable);
 - (c) Travel delays;
 - (d) Bereavement or disability arising from death or serious illness of an immediate family member; and/or
 - (e) Any other factors reasonably considered by the SSAI to constitute extenuating circumstances.
72. Additionally, for the Team Event, there is, relevantly, a requirement that SSAI will only nominate athletes who are members of the Shadow Team and those that it “honestly believes have met the requirements described in the Selection Criteria”. It is worth noting that honest belief rather than actual meeting of the requirements is all that is specified.
73. The “Shadow Team” includes those Athletes who are recognised by the AOC as potential members of a particular Team. The AOC will recognise an Athlete as a member of the Shadow Team if that person “is and continues to be eligible to participate in a particular Games as an Australian Competitor pursuant to the applicable Qualification System unless expressly agreed otherwise in writing by the AOC”. It is not suggested that the AOC so agreed in writing with respect to members of this Shadow Team.

74. It is clear that the Nomination Criteria refer to Athletes nominated to the AOC, for selection by the AOC for the 2016 Olympic Games, pursuant to the Selection Criteria.
75. Clause 7 of the By-Law provides for the Nomination of Athletes and, relevantly, clause 7.2 provides :
- In respect of nomination to the AOC for selection to a particular Team, each NF will only nominate those Athletes who have*
- (2) demonstrated that they have complied with the applicable Qualification System for the relevant Games (unless expressly agreed otherwise in writing by the AOC Selection Committee on Athlete by Athlete basis)*
- (3) met the applicable Nomination Criteria and in the case of team events or disciplines the team has qualified under the applicable Qualification System*
- (4) in the case of events or disciplines for individual Athletes met the applicable Nominations Criteria*
76. Clause 7.2 similarly refers to other requirements which must be completed as at the nomination to the AOC for selection.
77. The By-Law thus provides that the NF, here SSAI, will only nominate Athletes for selection “who have demonstrated” that they have complied with the relevant Qualification System and “who have met” the applicable Nomination Criteria. The Appellant contends that the provision that the Athlete must have met the Nomination Criteria must mean that Ms Stackpole must, at all times, have met those criteria and thus must at all times have been an Australian citizen. Bearing in mind that matters for compliance, including compliance with Qualification Criteria relating to event participation is also in the past tense and would not have had to have been fulfilled prior to the date of nomination for selection and would not have been fulfilled as at the date of selection to compete in necessary National and International competitions, the Sole Arbitrator does not accept that submission. Rather, the By-Law provides that the criteria must have been met as at the date of nomination to the AOC for selection.
78. As at that date, 7 April 2016, Ms Stackpole was an Australian citizen and, in that respect, fulfilled the Nomination Criteria.
79. Further, clause 8 of the By-Law concerns the Selection of Athletes and provides, inter alia, that selection will be conditional on the AOC Selection Committee confirming to its own satisfaction that the Athlete has met the Nomination Criteria and the Selection Criteria.
80. It is fair to say that the process that has occurred has been less than ideal. The Nomination Criteria were not finalised and approved by the AOC until the day of the Selection Trials although, as SSAI points out: “*the substance of the manner in which the Selection Trials were to be undertaken*” had been notified to the athletes in the months leading up to the Selection Trials, including the Draft Selection Policy.

81. It is also necessary to draw a distinction between nomination for selection, selection and participation in the Games. While nomination imports the concept of selection to compete, the Nomination Criteria recognise that a person properly nominated may not be able to compete in a particular event or events. It must also be recognised that the Appellant is relying upon the formal requirements of the Nomination Criteria, properly construed. The draft of that document may have been in contemplation when various acts took place and decisions were made but the criteria only came into force when approved by the AOC.
82. There is, however, a distinction to be drawn between those matters governed by the Nomination Criteria that are absolutes, such as the requirement that a person have Australian citizenship and those matters that are subjectively determined by SSAI. An example of the latter would be the evaluation of extenuating circumstances that precluded an athlete from attending an event or affected performance. SSAI submits that where an athlete has applied for Australian citizenship and there has been delay in approval of that application, this could amount to an extenuating circumstance within clause C.
83. An athlete can be selected to compete but not actually compete in an event. So much is not in dispute. The Appellant's submission is that an athlete cannot be selected to compete where it is apparent that the athlete is unable to compete, here because of a failure to comply with the citizenship requirement. SSAI accepts that the phrase "selected to compete" requires a determination of the purpose for which the athlete was selected. However, as it submits, identifying that purpose cannot be limited to an examination of the capacity of the athlete at the time of selection. Rather, it is to be identified by reference to the potential capacity of the athlete to compete as part of the Australian squad's development program, or at the time that the relevant event for which the selection is being made takes place. An athlete can have been said to have been properly selected to compete even if, at the time of selection, the athlete is injured and there is a possibility or a prospect of being able to compete at the time of the event.
84. Further, the Nomination Criteria refer to selection to compete, not the act of competing.
85. The Sole Arbitrator does not, however, accept SSAI's submission that the Nomination Criteria are to be construed not objectively but subjectively, as against the facts pertaining specifically to Ms Stackpole.

C. The FINA Rules

86. The FINA Rules also require compliance. They require that, when a competitor represents his or her country in a competition, he or she shall be a citizen, whether by birth or naturalisation, of the nation he or she represents and, if a naturalised citizen, shall have lived in the country for at least one year prior to that competition.

87. For this reason, Ms Stackpole was not able to compete in FINA competitions prior to April 2016.
88. Only Athletes who are eligible to participate at the official FINA competitions in accordance with the FINA Rules are entitled to participate in the Olympic Games to be held in August 2016. After April 2016, Ms Stackpole was so eligible and so entitled. Accordingly, the FINA Rules do not directly affect this appeal based on the application of the Nomination Criteria to selection for the Olympic Games.
89. The FINA Qualification System applies to actual competition and, in particular, an ability to compete at the Olympic Games. It does not in terms apply to nomination for selection to compete. Further, the FINA Qualification System provides that only athletes who are eligible to participate at the official FINA competitions are entitled to participate in the Olympic Games. It does not provide that an athlete must have participated in such competitions.
90. Accordingly, the FINA Qualification System does not apply at the time of the selection by the AOC of members of the Olympic Team.

D. The decision of the Appeals Tribunal

91. The Appeals Tribunal accepted that the Nomination Criteria should be construed objectively, by reference to their ordinary and natural meaning in the context of the criteria as a whole, citing *Toll*. There is no dispute that this was the appropriate approach.
92. Nevertheless, in its reasoning, the Appeals Tribunal referred to matters concerning the work of SSAI, its resources, its expectations and its reasons for various of the criteria. These extraneous considerations were not necessary for the Appeals Tribunal's conclusion.
93. The Appeals Tribunal did not accept that "selected to compete" required actual competition, or that it imported a requirement of ability to compete at the time of selection. It did not accept that the focus of the expression was on the word "compete". It accepted that Ms Stackpole had been selected to compete and that the events for which she was selected were capable of being considered National and International competitions for the purposes of the Nomination Criteria. It noted that "National and International competitions" are not defined or exemplified.
94. The Appeals Tribunal was of the view that "selected to compete" identifies a selection process whereby SSAI was required to turn its mind to select and identify such athletes that were considered to be the best to represent SSAI and as such be selected to compete. It gave as an example a person selected as a reserve who did not compete but would still satisfy the Nomination Criteria.

95. It rejected the Appellant's submission that only participation in the Duet or Team Competitions could satisfy a requirement to compete as a member of the National Squad, pointing out that there was no such requirement in the Nomination Criteria. It interpreted the phrase "to the satisfaction of SSAI" broadly, and including a discretion concerning a failure or inability to compete but did not need to consider the proper construction of the discretion in clause C of the Nomination Criteria.

E. Consideration of the Appellant's submissions and grounds of appeal

- a. *Did the Appeals Tribunal err in its interpretation of clause B.1(1)(b) and clause B.2(1)(b) of the Nomination Criteria with respect to the requirement that the person to be nominated for participation in a Duet or Team Event must have been selected to compete at National and International competitions as a member of the National Squad?*
96. The Appellant does not contend, and says that she did not contend before the Appeals Tribunal, that this requires the person actually to have competed.
97. The Appellant relies on a letter from Mr Miller of SSAI in which he stated that Ms Stackpole "was unable to be selected to compete in FINA events as a competitor within the Australian Team prior to Selection Trials" (emphasis added) as some sort of admission as to the construction of the Nomination Criteria. The terminology used by Mr Miller does not determine the construction; nor is it an admission that Ms Stackpole was improperly nominated to the AOC for selection.
98. The Appellant submits that as Ms Stackpole was considered unable to compete as a member of the National Squad at any National or International competition prior to the nomination process undertaken in early April 2016, before her Australian citizenship was confirmed, she was not eligible to compete in the Selection Trials, was therefore not "selected to compete" and thus was unable to be nominated.
99. This amounts to a submission that while she may have been "selected", she could not have been "selected to compete". Further, the submission as framed suggests that if SSAI, through Mr Miller, considered her unable to be selected to compete, she could not have been so selected in fact.
100. The Appellant submits that "selected to compete" is not satisfied by being selected and imports not only selection, but also selection for a purpose, being the purpose of competing and, further, selected in a particular capacity as a member of the National Squad for the purpose of competing at National and International competitions. She says that Ms Stackpole could not have been selected for that end purpose. The Appellant accepts that this does not require a person actually to compete but emphasises that at the time of selection, this purpose must have been present such that, at that time, the person was able to compete.

101. The Appellant adds further criteria to the construction of “selected to compete”, namely that AOC Selection Criteria which must be met, require the person to have met FINA requirements, which include FINA nationality. She submits that this criterion was not met at the time of nomination and, she submits, could not be met retrospectively. Further, the Appellant says that the requirement cannot be dispensed with by reliance on the reference to “the satisfaction of SSAI” which cannot, she says, apply to a requirement of the Nomination Criteria.
102. The selection policy that SSAI stated that it would follow to determine the athletes to be nominated to the AOC as the 2016 Olympic Team stated, relevantly, that “to be eligible for **selection**” (emphasis added) to the team, the athlete must be a citizen of Australia and **have been selected** (emphasis added) to compete at National and International competitions as a member of the National Squad. It also stated that the Selection Trials would take place in Perth from 4 to 6 April 2016 (by which time Ms Stackpole was an Australian citizen) and that Team and Duet selection would be made based on the results from these trials.
103. It should be noted that the relevant stage for the application of the selection policy was selection by the AOC, upon the nomination of SSAI. That is, the Nomination Criteria were applied for the purposes of nomination to the AOC for selection of the team for the Olympic Games.
104. The documents that applied to the selection of athletes by SSAI are, as accepted by SSAI, far from perfect in their drafting and the way in which they interact. This is compounded, or perhaps explained and elucidated, by the chronology of the finalisation of those documents. That is, the Athletes to be nominated to the AOC for selection to the Olympic Team would be chosen at the selection trials in April 2016. The Nomination Criteria would apply at those selection trials. This is consistent with the finalisation of the criteria immediately prior to the selection trials.
105. The Appellant accepts that the relevant time for determining qualification for nomination is the date of nomination. However, she seems to consider that the date for nomination is a time earlier than nomination to the AOC for selection, perhaps as at inclusion in the Shadow Team or as part of the National Team prior to the selection trials for the Olympic Games.
106. The Appellant submits that it is an implied term of the Nomination Criteria that, to be nominated in either category, the person must have met all of the requirements in relation to the Duet and Team Events. Further, she submits that the requirements must be met at the time of nomination and cannot be satisfied retrospectively. This seems to assume that the time of nomination is the time of past nomination to a particular event. She points out that clause 7.2(2) of the By-Law states that each NF will only nominate Athletes “who have demonstrated” compliance. She says that it follows that necessary compliance with the Qualification System is as at the date of such nomination.

107. Clause 7.2 provides for the nomination to the AOC for selection. That is the time at which the Athletes have to have fulfilled the requirements in clause 7.2. As at the date that the Athletes were so nominated, being after the selection trials, Ms Stackpole complied with the requirement that she was an Australian citizen. The Appellant has not established that Ms Stackpole failed to have met the applicable Qualification System.
108. Clause 8 provides for the selection of Athletes by the AOC Selection Committee according to the Selection Criteria. This must take place after nomination of the Athletes by the NF. For selection, the Athlete must have met the Nomination Criteria and the Selection Criteria, determined as at the time of the application of those criteria. In this case, the Nomination Criteria were applied after the selection trials when the Athletes were nominated by SSAI to the AOC.
109. The relevant time of the application of the Nomination Criteria is reinforced in the criteria themselves. They do not refer to the time of nomination to the Shadow Team or to the time of competition in a particular event but state that they are *“for the purposes of nomination to the AOC of Athletes for selection to the 2016 Australian Olympic Team”*.
110. Ms Stackpole had been selected to compete at National and International competitions as a member of the National Squad. Accepting the Appellant’s case that she was unable to, and did not, compete at those competitions, it is apparent that the criteria recognise that a person may be selected to compete and not be able to, and not in fact, compete at the necessary competitions.
111. Accordingly, at the relevant time, Ms Stackpole fulfilled the requirement in the Nomination Criteria that she be an Australian citizen. As has been pointed out above, the FINA requirements do not apply to the nomination for selection by the AOC.

b. Ms Stackpole’s actual participation

112. There is a dispute as to the evidence concerning Ms Stackpole’s actual participation in events.
113. Ms Stackpole was part of the training group and part of an extended National Squad. She was, however, prevented from swimming in FINA events but did swim in an individual Swim event and pre-swam her routines. The Appellant maintains that this was not governed by the Nomination Criteria for Duet and Team Events, relying on clauses B.1(1)(b) and B.2(1)(b).
114. SSAI submitted to the Appeals Tribunal that Ms Stackpole swam two solo events at international meetings and was judged by an international panel of judges. The Appellant contends that this cannot satisfy the Nomination Criteria when read as a whole because:
 - It is not evidence that she swam as part of the National Squad;

- It is not evidence that the event was a National or International Competition for purposes of the Nomination Criteria;
 - The Nomination Criteria refer to Duet and Team Events, not solo events;
 - In order to be selected for the Duet Event, the person must have been selected for the Team Event; and
 - In order to be selection as a member of the Team Event, the person must be a member of the Shadow Team.
115. It remained for the Appellant to establish that there was no such participation or to explain why the submissions of SSAI based upon asserted facts before the Tribunal should be rejected and she did not do so.
116. The Appellant also says that there was no evidence before the Appeals Tribunal that the events in which Ms Stackpole was “selected to compete” were capable of being considered National and International Competitions for the purposes of the Nomination Criteria. The Appellant sought such evidence which she says was not provided. She asked the Appeals Tribunal to draw the inference that such evidence would not have assisted SSAI.
117. There is an evidentiary dispute as to whether Ms Stackpole was selected to compete as a member of the National Squad in National or International events. SSAI points to submissions before the Appeals Tribunal asserting facts that it contends were logically probative to the effect that Ms Stackpole was selected to compete, at least, as a member of the National Squad at the Canadian Open in April/May 2014 and the Spanish Open in June 2015 and as a member of the National Team at the Commonwealth Festival of Synchro. She was ultimately unable to compete at the first two of these events because her citizenship application had not been determined and the FINA affiliation requirements applied. The verbiage by SSAI relied upon by the Appellant whereby Mr Miller of SSAI said that she was “unable to be selected to compete” cannot be determinative of the proper construction of the Nomination Criteria or be some sort of admission that the Appellant’s construction is correct.
118. The Appellant asserts that there is a lack of evidence that Ms Stackpole participated as a member of the National Squad or whether the event was in fact a National or International Competition. SSAI did refer to some evidence in this regard but in any event, it was for the Appellant to make out her case that there was no such participation. It is to be appreciated that there were difficulties with timing and the obtaining of evidence before the Appeals Tribunal but the Appellant did not seek to adduce such evidence in this appeal, despite the fact that one of the grounds of appeal was a denial of natural justice, including in this respect, by the Appeals Tribunal. SSAI did seek to adduce further evidence from Mr Miller in this appeal. The Appellant objected to this course and indicated that, if allowed, there would be

cross-examination. As it transpired, the parties agreed that much of the evidence would not be read and that there would be further agreed facts.

119. There is evidence that Ms Stackpole was selected to compete as part of the National Squad. As noted by SSAI, there is no exclusion for participation in solo events in the Nomination Criteria and no reason to draw such an inference. There is no requirement that, for nomination for a Duet or Team event, the Athlete have competed in Duet or Team events at National or International competitions. There was sufficient evidence that Ms Stackpole swam in international events as part of the National Squad, even if she pre-swam her routines. The SSAI points out that, strictly speaking, competition in national events cannot be as part of the National Squad and Ms Stackpole swam at such events.

120. Thus, this ground of attack on Ms Stackpole's nomination for selection fails.

c. SSAI's discretion pursuant to Clause C of the Nomination Criteria

121. The Appellant also contends that clause C of the Nomination Criteria cannot be called in aid by SSAI as providing complete discretion to excuse Ms Stackpole from compliance with the Nomination Criteria. Such an inability is not, she says, an extenuating circumstance within the meaning of that term, being generally an unanticipated event affecting the participation or performance of a person who is otherwise fully eligible to participate. Additionally, she submits that such a wide reading of clause C as advanced by SSAI and adopted by the Appeals Tribunal, disregards the necessity to comply with the Qualification System and the Selection Criteria.

122. SSAI will only nominate athletes who have "*to the satisfaction of SSAI*" competed in relevant events or trials and completed other training and attendance requirements. This is the context in which the requirement of having been selected to compete at National and International competitions as a member of the National Squad appears in clause B.1 and B.2. This is the context in which the discretion of SSAI provided for in clause C applies to the additional criteria imposed by SSAI. Clearly, that clause applies primarily to performance and attendance.

123. It is not necessary to decide whether delay in the processing of a citizenship application which prevents performance is an extenuating circumstance within clause C. It is the case that the examples provided in clause C largely concern subjective matters such as injury or illness but they do extend to third party matters such as bereavement.

124. Ms Stackpole was selected to compete at the various competitions as a member of the National Squad. Had her citizenship application been approved earlier, it is reasonable to conclude that she would not have pre-swum her routines but would have competed fully.

125. It could well be said that an Athlete who attended all relevant events for the purpose of competing but who was unable to compete or perform at events through no fault of her own could be said to be reasonably considered as subject to an extenuating circumstance with respect to the criteria in B.1 and B.2. On that basis, the discretion provided for in clause C could be exercised.
126. Clause C could not apply to relieve an athlete of the citizenship requirement of the Nomination Criteria as at the date of nomination to the AOC for selection for the Olympic Team. However, by that date, Ms Stackpole was an Australian citizen.
127. One of the Appellant's grounds of appeal, Ground 3, related to an assertion that Ms Stackpole was not, or was not properly, a member of the Shadow Team. This also related to her citizenship, and the Appellant provided submissions as to the process and timing of such selection. It would seem that this complaint would also relate to the Appellant. The ground was abandoned at the hearing.

d. Conclusion

128. It follows that the appeal does not succeed. While the Sole Arbitrator does not agree with some of the reasoning of the Appeals Tribunal, the Sole Arbitrator agrees with its conclusion as to Ms Stackpole's compliance with the Nomination Criteria. It follows that the appeal should be dismissed.

F. Natural Justice

129. The Appellant claims that she was denied procedural fairness by the Appeals Tribunal. In essence, she relies upon the fact that the Appeals Tribunal refused to accept the written submissions that had been sent to the Chair of the tribunal in advance of the hearing. There is no dispute that the Appeals Tribunal is required to observe the principles of natural justice (clause 11.4(1) of the By-Law).
130. One difficulty with the procedure that applied is that a decision is only made by the Appeals Tribunal as to whether the Appellant could be legally represented at the hearing itself. The difficulties with this situation are readily apparent and likely to lead to procedural unfairness.
131. In the present case, the timing of the provision of written submissions from SSAI and Ms Stackpole, the fact that those submissions appeared to have been written with the benefit of legal advice, the timing of the retention by the Appellant of legal representation and the intervening public holiday, worked to the Appellant's distinct disadvantage.
132. The fact that the Appellant's written submissions were only forwarded to the Chair of the Appeals Tribunal and not to each of the members is standard practice. If a requirement were

to be imposed that the parties send all documentation to each member of the tribunal, that should have been made clear to the parties.

133. It can be accepted that the timing of the provision and service of the Appellant's written submissions was not satisfactory for the purposes of the consideration of those submissions by the Appeals Tribunal and by SSAI and Ms Stackpole as an interested party. It is also the case that the Appellant was afforded the opportunity to make oral submissions and, in effect, read out the written submissions at the hearing.
134. However, while the Appeals Tribunal may reasonably have taken the view that this was sufficient to enable the Appellant to advance her submissions orally, in the circumstances where the written submissions had been prepared and proffered to the tribunal and where the other parties had provided written submissions for the Appeals Tribunal's consideration, it is hard to understand why the Appeals Tribunal rejected the Appellant's written submissions at the conclusion of the hearing and before the delivery of the decision. Any disadvantage to the other parties could easily have been cured by the opportunity to provide written submissions in response. This would be appropriate even if there had been an objection from the other parties, although it would seem that there was no such objection to a later provision of the submissions. Further, the issues of construction were reasonably complex and the Appellant was at a disadvantage by not having her written submissions before the Appeals Tribunal for its consideration prior to the provision of the decision and reasons, where the other parties had such an advantage.
135. It is also not apparent why an adjournment, even a short adjournment, could not have been granted to enable SSAI to consider the Appellant's submissions and, if Ms Stackpole, as the only notified interested party, had not received them, to arrange for such receipt and consideration.
136. It follows that the Appellant was denied procedural fairness, or natural justice, by the Appeals Tribunal.
137. The Appellant recognises that the ultimate question in determining the consequence of the denial of procedural fairness is whether, as a result of the availability of this appeal, there was any practical unfairness. As there is no dispute that this appeal enables, in effect, a reconsideration of the questions of law and the relevant factual matters for the purposes of the construction and application of the Nomination Criteria, there is no presently applicable practical injustice or unfairness. In particular, there is no purpose in referring the matter back to the Appeals Tribunal for reconsideration.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Ms Jo-Ann Lim on 5 May 2016 against the decision rendered by the Synchronised Swimming Australia Inc. Appeals Tribunal (“Appeals Tribunal”) on 3 May 2016 is upheld in part, in that there was a denial of natural justice on the part of the Appeals Tribunal. All remaining aspects of the Appeals Tribunal’s decision dated 5 May 2016 are maintained and Ms Jo-Ann Lim’s appeal in this respect is denied.
2. (...).
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.