

## **REASONS –**

*In circumstances where the appeal made by Mrs Dierks relied on technical legal questions that are complex, Equestrian Australia has provided the following summary of Mrs Dierks' appeal, the background of the appeal and the decision of the Tribunal. Equestrian Australia has attempted to accurately convey the information in an accessible way however it encourages those members with a keen interest in this matter to read the full decision of His Honour Judge Hunt. A copy of the reasons is available on the Equestrian Australia website*

### **Background and evidence of the Dressage Selection Panel**

#### ***The Selection Policy and Amendments***

- 1) It was accepted by both Mrs Dierks and Equestrian Australia that there had been four versions of the Dressage Selection Policy for the 2018 WEG at Tryon:
  - a) The original policy dated July 2017 (**the WEG Policy**);
  - b) The first amended policy dated December 2017 (**The December Policy**);
  - c) The second amended policy dated April 2018 (**The April Policy**); and
  - d) The third amended policy dated July 2018 (**The July Policy**).

#### ***Mrs Dierks appeal***

- 2) Mrs Dierks appeal essentially came down to the following questions:
  - a) Whether the Board of Equestrian Australia (the Board) was required to approve all amendments to selection policies and whether an amendment made in the absence of such approval was invalid;
  - b) The circumstances in which the DSP was able to amend the Policy (and whether the amendment had been made for an improper purpose); and
  - c) Whether the DSP had correctly exercised its discretion in relation to the selection of Ms Hanna.

#### ***Evidence of the Dressage Selection Panel***

- 3) EA contended that the July policy (or earlier iterations of the Policy) did not require Board approval for validity and that Clause 13 of the April policy provided sufficient power for the DSP to make amendments to policy.
- 4) EA further argued that the discretionary process required by the Policy (in each of its iterations) had been followed and that an examination of the relevant scores and other relevant circumstances would confirm as much.
- 5) Ms Crabtree, Chair of the Dressage Selection Panel (DSP) gave evidence about the background to these amendments. In particular, Ms Crabtree gave evidence about:
  - a) the formulation of the WEG Policy and how it was designed to make it possible for Australian based combinations to qualify without having to travel to Europe; and
  - b) how the above fact would mean that results would not be directly comparable meaning

the DSP had to devise criteria to evaluate scores, assess performance and potential;

*The WEG Policy – July 2017 (the WEG Policy)*

- 6) the WEG Policy required combinations:
  - a) during a preliminary selection period (PSP) to achieve at least three scores of 69% (with one score achieved during 2018); and
  - b) riders who met this threshold were then expected to compete at three Nomination Events.
- 7) Ms Crabtree gave evidence concerning the application of the DSP's discretion in relation to considering performances achieved by those who had met the requirements of the PSP.

*The December Policy*

- 8) The amendments introduced by the December Policy came about after it became evident that:
  - a) the DSP had underestimated the difficulty for the European based combinations to achieve the minimum requirements after a severe winter;
  - b) notwithstanding the benefits of competing in the Australian summer, the Australian based combinations were also going to be pressed to meet the minimum requirement.
- 9) The DSP amended the policy (December iteration) to only require (a) at least two scores of 69% and (b) two scores from Nominated Events. The Policy did not go to the Board for approval.

*April 2018 amendments*

- 10) In mid-April 2018 the Policy was amended again. These amendments were approved by the Board. The amendments had the effect of extending the PSP from 30 April 2018 to 15 July 2018.
- 11) The April amendments were triggered by the concerns of some riders that they would be unable to comply with the requirement to obtain two scores of  $\geq 69\%$  before the PSP expired. This impacted combinations based in both Australia and Europe.
- 12) Ms Crabtree gave evidence that some riders (including Oatley) may have felt prejudiced by the April amendments, as they could have been more strategic with their campaign, but the DSP believed the change supported the purpose of having as large a pool of riders as possible from which to select the best possible team for WEG 2018.
- 13) The DSP notes that, but for the amendments introduced by the April amendment, Mrs Dierks would not have met the requirements of the selection Policy as she had not achieved two scores of 69% by 30 April 2018.

*July 2018 amendments*

- 14) The amendments in July 2018 were brought about because of the sudden news that Australia would not be accepted to compete at Falsterbo in Sweden.
- 15) By the end of June, 2018 the appellant, Ms Hanna, Mr Parbery, Ms Hellyer and Ms Goodwin

had achieved two scores of 69% or more, and had competed in at least two Nominated Events. However, the European-based riders had two remaining Nominated Events, Fritzens and Falsterbo. Ms Oatley, Ms Burgess and Ms Pearce were entered for Fritzens and Ms Hanna, Ms Burgess and Ms Pearce were to compete at Falsterbo.

- 16) On 28 June 2018, the DSP became aware that the Falsterbo Organising Committee would not accept the Australian team. The news was completely unexpected. A request for reconsideration was declined. The DSP convened urgent telephone conferences to discuss the combinations affected by being unable to compete at Falsterbo. Ms Hanna had already competed in two Nominated Events although another strong score would be desirable. Ms Burgess needed another score  $\approx$  69% score. But Ms Pearce (who had achieved one score of more than 69%) had not yet competed in any Nominated Event. The DSP considered it was fairest to reduce the number of Nominated Events from two to one.
- 17) The news was received and teleconferences took place while Ms Pearce and Ms Burgess were preparing to leave for Fritzens and in transit. The DSP felt it was imperative that they were informed that Falsterbo was no longer an option as soon as possible, and that Ms Pearce in particular be informed that an amendment was proposed that would mean she still had an opportunity to achieve eligibility, but only if she scored  $\approx$  69% at Fritzens. (In the event, she did not achieve eligibility.) The DSP sent the proposed amended Policy to EA for endorsement and publication as a matter of urgency.
- 18) In amending the Policy, the DSP had regard to the potential perception that an amendment had been made to benefit Ms Oatley. She had entered Fritzens but had withdrawn on veterinary advice, and had only competed in one Nominated Event (Wiesbaden). An impact of the amendment was that Ms Oatley achieved eligibility. However, the DSP determined that this should not inhibit an amendment aimed at building a strong pool from which to select a team.

### *Selection of the Team*

- 19) After the scores from Fritzens were published, the DSP met by telephone several times between 1 July and 18 July 2018 to discuss selection from the six eligible combinations.
- 20) The key criteria for each combination were:
  - a) performances in the Nominated Events;
  - b) trend of performance over the season;
  - c) consistency;
  - d) international experience;
  - e) ability to prepare and manage the balance of the campaign to WEG 2018;
  - f) contribution to the team; and
  - g) potential to advance Australian dressage.
- 21) Selection was not based on a simple ranking of scores achieved at Nominated Events. Factors such as the size and calibre of the relevant field, presence of multiple national teams and atmosphere generally can influence performance and outcomes. The DSP did look at numerical scores in various ways, including by ranking averages of the performances of different combinations (limited in accuracy given different numbers of events for different riders) highest and lowest scores from the Nominated Events and scores from

2017 and 2018.

- 22) Ms Oatley had the highest average score, all achieved at high-calibre international competitions. She had the highest Federation Equestrian Internationale (**FEI**) ranking and highest outright score. Her scores were consistent and her trend was steady. She had demonstrated ability at international level over a long period and a proven ability to produce a strong performance at an international event. Over the 2018 season she had not scored less than 69%, and had three scores over 70%, including 72.543% at Hamburg. The DSP believed (and at the hearing still believed) that of all the qualified combinations, she had the potential to achieve the highest Australian score at WEG 2018.
- 23) Ms Hanna had mixed scores, confounded statistically by the fact that she posted the most scores in the pool. The DSP was conscious that she lost the opportunity to post a score at Falsterbo. She has vast international experience and a known ability to perform consistently well at that level. Her 2018 scores were strong, with two scores of 70.3% in Australia and Europe. She has a history of rising to a championship occasion, including at the Rio Olympics where she placed higher than Ms Oatley, both on the same horses as in the campaign for WEG 2018.
- 24) Mrs Dierks scores showed an improving trend in 2018. She met the eligibility criteria in the last event of the extended PSP. She did not achieve a score of 70% or more this season. Competing against other Australian riders at the Australian Nominated Events, each of the others (Mr Parbery, Ms Hellyer, Ms Goodwin) recorded a win. Mrs Dierks had the lowest minimum score, and the lowest maximum score of all the eligible combinations. She has international experience, but not since 1994. The DSP placed weight on a very low score in 2018, and potential to post another very low score in a high pressure environment. The appellant scored 56.043% at Willinga Park in February 2018 (the foreign 5\* judges scoring her lower than this on average). The DSP felt that of the six eligible combinations, the appellant was the most likely to achieve the lowest score at WEG 2018.

### ***Final Consideration***

- 25) Mrs Dierks's arguments that the July amendment was invalid are technical legal arguments, and are addressed in paragraphs 41 – 94 of the Reasons. Her assertion that the discretion was misapplied is addressed in paragraphs 95 – 110 of the Reasons. Essentially they can be summarised as follows:
- 26) Mrs Dierks asserted that the selection policy is a "By-Law" under the EA Constitution and can only be amended by the Board. The Tribunal held that this was not the case, the definition of By-Law does not refer to policies. Amendment of a By-Law requires not only approval by the Board, but notification to each of the Branches, which, in the context of selection policies for each of the eight disciplines would be unworkable.
- 27) Also compelling, if selection policies were in fact By-Laws, they could be amended, repealed or altered by the Branches, which cannot have been the intention. Rather, the Tribunal accepted that the DSP is a committee established under rule 30.1 of the Constitution, to "...carry out such duties and functions and with such powers as the Board determines in respect of the management and administration of Equestrian Sports". Such committees

may comprise members (not confined to Board members) and the establishing instrument can delegate such duties functions and powers as are specified in the instrument.

- 28) The Tribunal could find no construction of the words of the Constitution that supported Mrs Dierks's assertion that the power to amend the policy could not also be delegated by the Board, and held that the power to amend the policy was validly delegated to the DSP (subject to the stated requirement that the amendment be in writing, and made with reasonable notice). The fact that the April amendment had been put to the Board, (in circumstances permitting that step in the timeframe), was prudent, but not necessary.
- 29) Mrs Dierks also asserted that a requirement should be implied that the power to amend could only be exercised to deal with circumstances the current policy did not provide for or properly deal with. While finding no support in the language of the Constitution for such an implied term, the Tribunal noted that the circumstances of the sudden unavailability of the last Nominated Event was in any event a matter that arose for which there was no explicit provision.
- 30) Mrs Dierks asserted that the July amendment was procedurally unfair. The Tribunal noted that the July amendments were not directed only to Mrs Dierks's rights and interests. They accepted that the context gave rise to urgency. The amendment did not disentitle any rider from eligibility, including Mrs Dierks. The Tribunal held that in view of the nature of the amendment, the circumstances, and that Mrs Dierks's rights and interests were not directly nor immediately affected, the DSP was not obliged by procedural fairness to provide her with an opportunity to be heard on the amendment. It was conceded by Mrs Dierks's lawyers that she would not have done anything differently had she been consulted.
- 31) Mrs Dierks asserted that the July amendment was made for the improper purpose of accommodating Ms Oatley into the pool for selection. The Tribunal rejected this, accepting the uncontroverted evidence that the July amendment was made to address prejudice to the riders who had been entered for Falsterbo. Mrs Dierks asserted that because the July amendment meant that Ms Oatley was included in the pool, other eligible riders were disadvantaged because each eligible rider's chances of selection from that pool were proportionately diminished. The Tribunal found that broadening the eligibility for the pool did not amount to selection itself, and that there was no adverse effect upon Mrs Dierks's eligibility, and therefore no unfairness was visited on her.
- 32) Mrs Dierks asserted that the DSP misapplied its discretion (which effectively resulted in the inclusion of Ms Hanna in the team). She asserted that the words of clause 5.1 of the policy in respect of the Nominated Events "with the scores of the Grand Prix test **to count**" (emphasis added) evoked a requirement to place a predominant weight to the scores from the Nominated Events over other considerations. The Tribunal did not accept this construction of the language of the policy, accepting the uncontested evidence that the purpose of the drafters behind the words "to count" was to address historical confusion over what scores (that is, the Grand Prix, not the Freestyle or the Special) would be considered. The Tribunal noted the breadth of the discretion granted to the DSP in its endeavours to select the team capable of the best possible result at WEG 2018, including to "place a greater emphasis on one or more of the considerations". The scores from the Nominated Events are a relevant, probably mandatory and important consideration, but not a predominant consideration. The Tribunal also accepted the proposition that a simple

ranking of scores from Nominated Events would not be fair or indicative given they derived from different competitions with different judging panels. The Tribunal found that the scores from the Nominated Events had been properly taken into account.