EQUESTRIAN AUSTRALIA APPEAL BOARD

Hearing date:	5 August 2018
Decision date:	8 August 2018
Appeal panel:	Judge Warwick Hunt, Chairperson Adam Casselden SC, Deputy Chairperson Ann Bonnor, Member
Decision:	1. Dismiss the appeal. 2. The decision of the Dressage Selection Panel announced on 19 July 2018, naming Mary Hanna, Kristy Oatley, Brett Parbery and Alexis Hellyer (and their respective horses) as the Australian Dressage Team for the World Equestrian Games 2018 is confirmed.
Parties:	Judy Dierks (appellant) Equestrian Australia (respondent)
Representation:	Simon Keizer, instructed by Key Point Law (appellant) Georgia Widdup (respondent)

REASONS

Background

1. On 19 July 2018, the Equestrian Australia Dressage Selection Panel (**DSP**) decided and announced the selection of the World Equestrian Games 2018 (**WEG 2018**) Australian Dressage Team (**Team**). The Team comprised the following riders and their horses:[1]

    a. Mary Hanna;

    b. Kristy Oatley;

    c. Brett Parbery; and

    d. Alexis Hellyer.

2. By notice of appeal dated 23 July 2018, Judy Dierks (**appellant**) appeals the 19 July 2018 decision of the DSP. The appellant contends that the relevant selection policy was not properly followed and/or implemented.[2]

3. The narrower grounds of appeal relied upon by the appellant are, in summary:

    a. that the WEG 2018 Dressage Selection Policy, as amended (or purportedly amended) in July 2018 (**July policy**), was invalid because:

        (i) it was not approved by the Board of Directors of Equestrian Australia (**Board**);

        (ii) it contravened an implied requirement in cl 13 that the power under that clause may only be exercised to deal with circumstances that the current policy does not provide for or does not deal appropriately with;

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[1] Statement Crabtree at [24]

[2] As is explained further below in these reasons, the question which is the relevantly applicable iteration of the relevant selection policy was an issue on appeal. However, the permissible ground of appeal is uniform across both relevant iterations: see cl 8.2.

(iii) the Board did not delegate its authority to approve it and in any event, it would be beyond the Board's power to so delegate its authority;

(iv) if the changes in the July policy were made to accommodate the ineligible member, they were made for an improper purpose; and/or

(v) the change to the WEG 2018 Dressage Selection Policy as amended in April 2018, which was the previous iteration of the July policy (**April policy**) was (or may have been) made by the High Performance Panel (**HPP**), not the DSP, and if so the change was not valid,

b. further, cl 13 of the April policy is invalid, as it is not within the Board's power to delegate the power to vary the WEG 2018 Dressage Selection Policy to the DSP, as the DSP is not a 'committee' within the meaning of cl 30.1(b) of the Equestrian Australia Constitution[3] (**Constitution**). Therefore any purported variation of the April policy by the DSP in reliance on cl 13 is invalid;

c. that the April policy was ratified and approved by the Board and is therefore valid, and therefore:

(i) the Team should have been selected in accordance with the April policy (and was not);

(ii) that one member of the selected Team did not satisfy the requirements in cl 5.1 or 11.1 of the April policy to be eligible for selection, and another member selected whose highest two scores at Nominated Events were not among the top four for eligible horse and rider combinations;

4. The appellant contends that as a consequence of these matters, the selection of the Team is void and that the DSP must re-select the WEG 2018 Australian Dressage Team in accordance with the April policy.

5. The appeal was originally set down to be heard on 1 August 2018. On that date, an Appeal Board was constituted, however one member recused himself following an

[3] Effective from 12 February 2010

application made by the appellant. The hearing of the appeal was relisted for 5 August 2018 with a freshly constituted Appeal Panel.

6. Despite cl 13 of the Appeal By-Laws, which states that the Appeal Board is not obliged to give reasons for a decision, the Appeal Board has determined to provide these written reasons for its decision to dismiss the appeal.

7. In her notice of appeal, in addition to her grounds of appeal, the appellant set out submissions as to the basis on which she contends the Team selection decision must be remade, referring to cll 5.1, 9.2, 10, and 11.1 of the April policy. She also set out reasons why she contends that cl 13 is invalid, and why she contends the power conferred by it was not properly exercised in the making of the July policy (if cl 13 is valid).

Jurisdiction

8. The appeal was made pursuant to cl 8 of the July policy or alternatively cl 8 of the April policy. Those provisions are relevantly identical and permit an appeal concerning non-selection for the WEG 2018 Team. Clause 8.2 provides that there will be one level of appeal only, with the sole grounds being that the (April or July) policy was not properly followed and/or implemented.

9. Clause 8 requires that any athlete who appeals their non-selection must lodge their notice of intention to appeal in writing within three working days of the date of the announcement of the Team. The appellant lodged a notice of intention to appeal within this timeframe.

10. An appeal is to be heard by an Appeal Board in accordance with the Equestrian Australia Appeal By-Laws (**Appeal By-Laws**).

Preliminary matters

11. The Chairperson of the Appeal Board made a number of preliminary determinations before the appeal was heard. On 27 July 2018, the Chairperson wrote to the appellant, the respondent and each member of the Team to advise of these preliminary determinations.

12. The preliminary determinations were that:

    a. Kristy Oatley, Mary Hanna and Alexis Hellyer were persons potentially affected by the disposition of the appeal. They were each served with notice of the appeal, and advised of the hearing details and an entitlement to appear at the hearing.

    b. Given the legal complexity of the issues to be resolved, international competition, training commitments and timeframe, each affected person was entitled to be legally represented in relation to the appeal and at the hearing. The appellant's application to be legally represented was granted on the basis of the legal complexity of the matter and the timeframe. In all those circumstances, EA was permitted to be represented by an advocate with legal qualifications.

    c. Brett Parbery and Shannon Goodwin were not considered to be affected persons. However, each of them was provided with notice of the appeal and advised that they were entitled to apply to be considered as affected persons, and to seek leave to appear and/or be legally represented.

13. Ms Hanna formally indicated to the Chairperson that she did not wish to attend or be represented at the hearing. No other communication was received by any other person who had been notified and no appearance was made by any of them.

14. As directed by the Chairperson, the appellant and the respondent both provided written submissions to the Appeal Board and each other in advance of the hearing (the appellant in addition to the matters set out in her notice of appeal).

15. In addition, the Appeal Board received:

    a. a statement of Maryjane Crabtree, the Chair of the DSP;

    b. an email thread between Ms Crabtree, Paul Ward (Chief Executive Officer, Equestrian Australia) and Board members commencing on 27 April 2018 and concerning amendment to the WEG 2018 Dressage Selection Policy (which were subsequently amended to form the April policy);

    c. an email thread between Ms Crabtree and Mr Webb, copying others, commencing on 29 June 2018, in relation to amendment of the April policy;

d. an email thread between Equestrian Australia (**EA**) and organisers of Falsterbo Horse Show (**Falsterbo**), commencing on 28 May 2018, in relation to qualification of Australia for entry to compete in Falsterbo and the subsequent determination of the Organsing Committee of Falsterbo to decline to accept the entry of an Australian team to compete there.

The hearing

16. The appellant was represented by Mr Simon Keizer of Counsel, instructed by two solicitors. The appellant was present and was accompanied, by leave of the Appeal Board, by her husband, her daughter and one of the owners of the horse that Ms Dierks rode in her contention for selection. EA was represented by Ms Georgia Widdup (the Chair of EA's Eventing Selection Panel who was understood to have legal qualifications) and Ms Maryjane Crabtree, who was a witness in her role as Chair of the DSP. Mr Chris Webb, EA's High Performance Manager attended. The Chairperson's associate acted as the secretariat of the Appeal Board and provided administrative support.

17. Immediately before the hearing commenced the appellant sought, in addition, leave to have two long term friends be present at the hearing. It was disclosed that one was a television journalist and the other was a journalist specialising in equestrian matters, particularly dressage. EA opposed leave being granted to permit their attendance. The Appeal Board declined to grant leave for the journalists to be present. In making this decision, the Appeal Board balanced considerations which included that:

    a. both journalists were members of EA and therefore were bound by the restrictions of commentary contained in cll 21 and 22 of the Appeal By-Laws;

    b. unlike a court, the proceedings were not attended by principles of open justice;

    c. there would be no formal transcript of the proceedings upon which any publication error might be corrected;

    d. the Appeal Board intended to issue written reasons for whatever decision it made, which would enable the public an opportunity to adequately appreciate the nature and course of the proceedings by which the issues on appeal were determined.

The appellant's opening and argument

18. Mr Keizer identified which of the grounds in the Notice of Appeal were pressed and which were abandoned. Most were pressed. By way of opening, Mr Keizer distilled to two the matters for the central consideration of the Appeal Board:

    a. the first was whether July Policy was validly enacted. It was indicated that the Appeal Board would be invited to accept a construction of various clauses of the Constitution that made it imperative that the Board of EA approve any selection policy as a By-Law of EA. If that argument was accepted, an inevitable outcome would be that relevant amendments in the July policy were invalid. The consequential relief sought was that the Appeal Board would remit the matter to the DSP with a direction that selections be made in accordance with the April Policy;[4]

    b. the second was that, if the July Policy was held to have been validly made, the selections announced on 19 July 2018 had not been the result of a proper implementation of the July policy. During the hearing, it was argued this was primarily because the DSP had not properly given cl 9.1 the degree of primacy in the selection process which its terms required.

The respondent's opening and argument

19. The respondent contended that the July policy (or earlier iterations of the Policy) did not require Board approval for validity. It was suggested that the Board's approval of the April Policy was for prudence, given significant stakeholder concerns about that amendment. Clause 13 of the April policy provided sufficient power for the DSP to make amendments to policy.

20. As to the effect on the appellant by the enactment of the July Policy, that should be seen as creating a perceived disadvantage for her, in that she had to compete for selection in a larger pool of eligible riders, now including Ms Oatley, but an unfairness had not been visited upon the appellant.

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[4] Pursuant to cl 11 of the Appeals By-Laws, the Appeal Board would only have power to confirm, reverse or modify the decision of the DSP. In the event, it was not necessary to explore what alternative relief to remittal the appellant may have sought.

21. The respondent contended the intended 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. The respondent rejected the appellant's construction of cl 9.1.

Ms Crabtree's evidence

Purpose and formulation of the Policy

22. Ms Crabtree described the background to the formulation of the WEG 2018 Dressage Selection Policy (where referred to generally, **Policy**). She referred to the method of selection in policies that applied to selection of teams for the Rio Olympic Games and other recent Olympiads and World Games.[5] She stated that such a method had some serious issues, because the selection events were Europe-based, presenting difficulties for Australian-based combinations. It was difficult to find an event of suitable standing in the relevant qualifying periods with room in Grand Prix classes for the whole Australian squad, exacerbated by circumstances such as illnesses and injuries.[6]

23. Following feedback from riders and the Equestrian Australia Dressage Committee (**EADC**), the DSP decided to design a new process of selection for WEG 2018, which had regard to making it possible for Australian-based combinations to qualify without having to travel to Europe for selection events.[7] However, because this meant that results would not be directly comparable, criteria were devised to enable the DSP to evaluate scores, and assess performance and potential.[8] The Policy was developed with input from riders, the High Performance team at EA and the EADC. It was approved by the Board and issued on 3 July 2017.[9]

24. The Policy originally required combinations, during a preliminary selection period (**PSP**), to achieve at least three scores of at least 69% at events in 2018 with at least one foreign 5* rated judge.[10] Those who met this threshold were then expected to

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[5] Crabtree statement at [5]
[6] Crabtree statement at [6]
[7] Crabtree statement at [7]
[8] Crabtree statement at [7]
[9] Crabtree statement at [12]
[10] Crabtree statement at [8]

compete at specified "Nominated Events".[11] The DSP would consider performances at Nominated Events, with the intention that these Events would yield scores for consideration but also ensure competition at a high level to ensure currency of performance and commitment.[12] A range of broader considerations also applied which were designed to meet the overriding objective of selecting a team which would achieve the best possible result at WEG 2018.[13]

25. The language of the Policy was drafted with an aim of balancing between the different circumstances faced by riders based in Australia and the Northern Hemisphere.[14] The preliminary threshold could be met at local shows, and Nominated Events were spread in Australia, USA and Europe.[15] The EA sought to include European shows which were reasonably accessible, and which had organising committees that had a good relationship with Australia, with good fields and high calibre judges.[16]

26. Clause 13, which provides the DSP with the ability to amend the Policy, was included in the draft which went to the Board.[17] The DSP works with the EA through the High Performance Manager and his team.[18] As such, it is via that team that any amendment is endorsed and communicated to the dressage community.[19] It was not contemplated that once the original Policy was approved by the Board that any amendment would also require such approval, especially in time sensitive circumstances.[20] If this had been seen as being necessary, the Policy would have been drafted more broadly so as to be less likely to require amendment.[21] No prior selection policies (dressage or otherwise) have expressly required Board approval of amendments.[22]

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[11] Crabtree statement at [8]
[12] Crabtree statement at [8]
[13] Crabtree statement at [8]
[14] Crabtree statement at [10]
[15] Crabtree statement at [10]
[16] Crabtree statement at [10]
[17] Crabtree statement at [11]
[18] Crabtree statement at [11]
[19] Crabtree statement at [11]
[20] Crabtree statement at [11]
[21] Crabtree statement at [11]
[22] Crabtree statement at [11]

December 2017 amendments

27. Given the particularly severe weather conditions in Europe, the DSP felt that it had underestimated the difficulty for the European-based combinations to obtain (a) at least three scores of 69 and (b) three scores from Nominated Events, in the specified timeframe. Additionally, it became apparent that some Australian-based combinations were going to be pressed to conform to this schedule, notwithstanding the benefits of competing in Australia's summer.

28. Therefore, the DSP amended the policy (December iteration) to only require (a) at least two scores of 69% and (b) two scores from Nominated Events. Also, the Nominated Event list was changed. Capeln (Germany) had been postponed beyond the selection timeframe and was replaced by Falsterbo (Sweden). Australia was invited to Falsterbo in 2017. Ms Crabtree believes the updated Policy did not go to the Board for approval.

April 2018 amendments

29. 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.

30. 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 =/+69% before the PSP expired. This impacted combinations based in both Australia and Eurpoe. Some riders 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. The Nominated Event list changed as Rosendaal (Netherlands) was cancelled. It was replaced by Aachen (Germany), held in May 2018.

July 2018 amendments

31. The amendments in July 2018 were brought about because of the sudden news that Australia would not be an invited nation to compete at Falsterbo in Sweden.

32. 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.

33. 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 =/+69% score. But Ms Pearce had not competed in any Nominated Event. The DSP considered it was fairest to reduce the number of Nominated Events from two to one.

34. 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 =/+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.

35. 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

36. 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. The key criteria for each combination were performances in the Nominated Events, trend of performance over the season, consistency, international experience, ability to prepare and manage the balance of the campaign to WEG 2018, contribution to the team and potential to advance Australian dressage.

37. 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.

38. 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.

39. 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.

40. The appellant's 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. The appellant 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.

Whether the amendments to the July policy were validly made

41. The appellant submitted that the purported amendment to the Policy in July 2018 was invalid, such that the Policy that should have been (but was not) applied by the DSP was the Policy as amended in April 2018.

42. The essence of the appellant's argument that amendments to effect the July policy were invalid was that the Board was not permitted by the Constitution to delegate to the DSP the power to make those amendments.

43. These submissions were founded on a contention that power to amend the Policy, contained in cl 13 of the Policy, was itself invalid. Whereas, if cl 13 was valid, then amendments made by the DSP to Policy were not rendered invalid by absence of Board approval of those amendments. Clause 13 (in all iterations of the Policy) provided for variation, amendment or supplementation of the Policy by the DSP from time to time, "*including where matters arise for which there is no explicit provision in the criteria*". It required that any such variation etc be in writing, and that the DSP endeavour to give as much notice as possible to all affected persons.

44. To analyse the appellant's arguments it is necessary to consider the Board's functions in relation to amending policies and its powers of delegation, which are found in the Constitution.

Whether the Policy is a "By-Law"

45. Pursuant to r 31.1(a) of the Constitution, the Board may (*inter alia*) amend such "*by-laws, regulations and policies*" for the proper advancement, management and administration of equestrian sport as it thinks necessary or desirable. Rule 31.1(a) specifies that the Board may do this "*by itself or by delegation to a committee*".

46. Pursuant to r 31.2, which is titled "By-Laws Binding", all By-Laws are binding on the Company, the Branches and the Participating Members.

47. "By-Law" is defined in r 4.1 of the Constitution, and "*means any regulation made by the Board and having effect under Rule 31*".

48. The appellant contended that the Policy (in any of its iterations) was a "By-Law" within the meaning of r 4.1 of the Constitution because it was addressed to the proper

advancement, management and administration of equestrian sports and was intended to be binding on EA members.

49. We consider that the meaning of "By-Laws" in r 4.1 (and "by-laws" in r 31.1(a)) of the Constitution does not include the Policy, even if it was intended to be binding. There is no reference to "policies" in the definition, whereas it expressly refers to "regulations". Mr Keizer pointed out that nor does the definition refer to "by-laws" and therefore, on this approach, the term "By-Laws" where it appears in the Constitution would not actually include by-laws. We do not consider that that follows from the construction that we prefer. There is, for instance, a much better argument that the term "By-Laws" naturally includes by-laws than it does policies.

50. When one considers the rules that govern the making and operation of By-Laws in sub-rule 31 of the Constitution, it appears to be unlikely that they are intended to extend to policies that govern selection of WEG teams. Under r 31.4(a), every amendment or interpretation to a By-Law must be notified to each of the "Branches" in order to be binding. The "Branches" are bodies representing and controlling equestrian sport in each State: see r 5. If "By-Law" included all possibly relevant "policies", that would mean that full notice to all the Branches would be required in respect of every amendment to every such policy across every equestrian discipline. There was no evidence of the workability or otherwise of this. However, in view of the respondent's submission that Board approval for all WEG selection policy amendments would be unworkable (referred to below), we infer that this interpretation would be even more onerous.

51. Similarly, r 31.5 provides that Branches can repeal, amend or alter any "By-law". It is seemingly unlikely to be intended that Branches could do this with any WEG selection policy. Another example may be found in r 26.2, which provides the Chief Executive Officer with a broad power to manage Equestrian Australia Limited, "[s]*ubject to… the By-Laws*". It may be thought that in this context "By-Laws" would be unlikely to extend to selection policies.

52. Once it is accepted that the meaning of the term "By-Laws" does not include policies, then it would follow that the Policy is not "binding" on participating members under r 31.2. What effect that would have in the current context is not clear. There is, however, no other route for selection to the Australian Dressage Team for WEG 2018.

As such, we do not consider a negative answer to whether the Policy is "binding" to be necessarily fatal to its validity.

Delegation of amendment function

53. A finding that the Policy is not a By-Law does not fully address the question of whether cl 13 of the Policy is invalid. A function of amending by-laws, regulations *and* policies resides with the Board pursuant to r 31.1(a) of the Constitution. The Board is prohibited by r 30.2(c) from delegating functions imposed on it by the Constitution, to a committee of members or others.

54. Rule 30.1 of the Constitution provides that the Board of EA may by instrument in writing create or establish or appoint from:

    a. among members of the Board, committees of the Board to carry out duties and functions of the Board, and with such powers, as the Board determines (r 30.1(a)); and

    b. among its own members, the Branches, the Participating Members, or otherwise, committees 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 (r 30.1(b)).

55. It can be seen from the terms of cl 30.1 that two types of "committee" may be created or established of appointed by the Board. Under r 30.1(a), a committee of Board members may be created etc. Under r 30.1(b), a committee of Board members, Branches, Participating members "*or otherwise*" may be created etc. The appellant did not press the argument, originally made in writing, that the DSP was not a "*committee*" pursuant to r 30.1(b). We consider that concession to be correct.

56. Rule 30.2 of the Constitution relevantly provides that the Board may, in the establishing instrument (ie, the instrument which establishes a committee) delegate such duties, functions and powers as are specified in the instrument other than, in respect of a committee appointed under r 30.1(b), a function imposed on the Board by the Constitution (r 30.2(c)).

57. The respondent submitted that r 30.2(c) is not relevant and that the Board has the requisite power to delegate amendment of the Policy to the DSP, and that it did so by cl 13 of the Policy. The respondent also submitted that eight equestrian disciplines will

compete in WEG 2018, for which the selection of teams are all governed by selection policies. If it was required that every amendment to a selection policy had to be approved by the Board, there would have been constant need to engage the Board over the course of the last eight to twelve months. This, the respondent submitted, would have been unworkable.

58. The respondent submitted that while the April policy was approved by the Board, that was because there was significant sensitivity in relation to the Policy, and there was then sufficient time and it was also considered to be beneficial to obtain Board approval. In short, Board approval was prudent but not necessary for the April amendments to be valid.

59. The express words of r 31.1(a) are that the Board can delegate functions under r 31.1(a) to a committee. It does not specify that such a committee must be a committee of Board members, and so does not expressly exclude a committee created etc under r 30.1(b). Given that this explicit permission of delegation is found in r 31.1(a) itself, we think that there is good reason to construe its specific terms as prevailing over the more general operation of r 30.2(c).

60. The appellant argued that the power to amend the Policy is a function imposed on the Board pursuant to r 31.1(a), so the Board may only delegate that power to a committee *of the Board* created pursuant to r 30.1(a). It followed, the appellant submitted, that the committee in r 31.1(a) is a reference to a committee *of the Board*.

61. The appellant's argument requires reading words into r 31.1(a) to significantly change and limit its literal meaning. It refers to a committee, unqualified as to what kind. The kinds of committee which can be created are provided under r 30.1. We can see no reason to read r 31.1(a) other than as it states.

62. Our preferred construction would not render r 30.2(c) inoperative. There are other powers imposed on the Board in the Constitution which would remain unable to be delegated. For example, determination of fees and levies under r 7.1(a) may be one. Finding a replacement Branch under r 9.5(a) may be another. This is sufficient to illustrate the point.

63. For these reasons, we find that the power to make and amend the Policy was properly delegated to the DSP in cl 13 of the Policy.

64. We note that this finding is consistent with evidence received as to the intention of the drafters of the Policy. In that regard, Ms Crabtree gave unchallenged evidence that had the DSP considered changes to the Policy would require Board approval, the Policy as originally promulgated would not have been drafted in such directive terms, requiring participation in a minimum set number of Nominated Events to be eligible for selection. The DSP would have reserved broader discretions for itself to avoid need for amendment and procedural delay occasioned by obtaining Broad approval.

65. The appellant pointed out that none of the other WEG 2018 selection policies permit the relevant selection panel to amend the policy. This may be accepted, but we did not consider it necessary to inquire into how those policies are otherwise administered.

66. We make a final observation in relation to this ground. The arguments proceeded on the premise that a policy for selection of a WEG 2018 team is a "policy" within the meaning of r 31.1(a). This may not necessarily be the case. Issues such as unworkability give reason to consider that the kinds of policies envisaged by r 31.1(a) are intended to be directed to the proper advancement, management and administration of the sport generally and that policies for a specific purpose of selection for a particular event are not within the purpose of r 31.1(a). Indeed, this would appear to be consistent with the terms of art 117 of the Equestrian Australia General Regulations. That is not to say that some manner of oversight by the Board would not otherwise be required or appropriate. But its role in that sense may be found, for example, in r 19, providing for powers of the Company to be exercised by the Board. Given our findings on the matters raised by the appeal, we have not considered it necessary to resolve this question.

Implied requirement to amend only for limited circumstances

67. The appellant pressed an argument that the July policy (or the amendment made to the April policy) contravened an implied requirement in cl 13 that the power under that clause may only be exercised to deal with circumstances that the current policy does not provide for or does not deal appropriately with.

68. While there may be some implied limitation not to exercise the amendment power in a capricious way, we do not think that the words of r 13 reflect the rather more constraining limitation argued by the appellant.

69. The text of r 13 is that the power may be exercised "from time to time". This is stated to "include" where matters arise for which there is no explicit provision in the criteria. But the amendment power is not limited to that circumstance.

70. Even if it was, there is no explicit provision in the criteria that deals with the sudden unavailability of a Nominated Event and the adverse effects that may flow from such a circumstance, to riders who relied upon that Nominated Event to achieve eligibility. Amendment of the Policy to accommodate this circumstance was, in our view, an amendment to deal with a matter that arose for which there was no explicit provision in the criteria.

The manner of the amendment in the July policy was not procedurally fair

71. As part of the first broad ground of appeal, the appellant submitted that amendment in July 2018 was attended by a lack of procedural fairness, because before the Policy was amended in July 2018, riders (or the appellant) were not given an opportunity to make representations about the amendments. The appellant referred to lack of consultation with the Board or with the affected riders, and that the amendment was made barely two weeks before the selection decisions were made.

72. Procedural fairness would ordinarily require observing due process when making decisions which affect a person's rights or interests in a direct or immediate way.[23] These principles have been held to apply to the conduct of trade unions and clubs in dealing with their members, although the extent to which the principles apply to the exercise of private power may be less clear, or less likely to be assumed, than the extent to which they apply to the exercise of public power.[24]

73. Accepting that eligible or potentially eligible riders were *prima facie* to be afforded natural justice in decisions by the DSP, a question is what is the nature and content of that obligation in the particular circumstances which arose at the end of June 2018 concerning Falsterbo.

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[23] *Kioa v West* (1985) 159 CLR 550

[24] *Forbes v NSW Trotting Club* (1979) 143 CLR 242 at 259 (Barwick CJ), 264-265 (Gibbs J), 273 (Stephen J), 275 (Murphy J)

74. We first observe that the amendments to effect the July policy were not, at least in their terms, directed only to the appellant's rights and interests. The decision to make those amendments was not made by reference to matters concerning the appellant. The fundamental rule, expressed in traditional terms, generally concerns orders or decisions which will deprive a person of some right, interest or legitimate expectation of a benefit.[25] "Right or interest" in this formulation is understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to propriety rights and interests.[26] The phrase "legitimate expectations" extends to decisions which do not concern deprivation of legal right or interest.[27] However, the duty does not necessarily attach to decisions that do not affect the rights, interests and expectations of an individual in a direct and immediate way.[28] A decision which attracts the duty is one which directly affects the person individually and not simply as a member of the public or a class of the public.[29] A decision which is truly a policy decision does not attract the duty.[30]

75. The decision by the DSP was a policy decision but on the evidence, it was made to accommodate the interests of riders entered to compete at Fritzens, and particularly Ms Pearce who was most adversely affected by Falstero becoming unviable.

76. The class of persons affected by the decision was confined but in the context in which it was made, it did concern a diverse range of interests. Accordingly, we think the decision was attended by a duty to accord natural justice, but with quite reduced content. That content was likely further confined given that the amendment was not to 'selection criteria' but to 'eligibility criteria'. It did not disentitle any rider from eligibility, including the appellant.

77. The Appeal Board heard evidence that the amendment was made in urgent circumstances. We accept that there was an urgency to the amendment. The content of what is required by procedural fairness may be adjusted in situations of urgency. In

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[25] *Kioa v West* at 582 (Mason J)
[26] *Kioa v West* at 582 (Mason J)
[27] *Kioa v West* at 582 (Mason J)
[28] *Kioa v West* at 584 (Mason J)
[29] *Kioa v West* at 584 (Mason J) citing *Salemi [No 2]* (1977) 137 CLR at 452 (Jacobs J)
[30] *Kioa v West* at 584 citing *Salemi [No 2]* at 452 (Jacobs J)

view of the nature of the amendment, the circumstances, and that the appellant's rights and interests were not directly or immediately affected, we consider that the DSP was not obliged by rules of procedural fairness to provide the appellant an opportunity to be heard on the amendment.

78. In making this finding we have had regard to a concession by Mr Keizer that the appellant would not have done anything differently if she had been consulted in relation to the amendment. This concession appears to be consistent with the evidence in relation to the progression of the relevant seasons. By the end of June 2018, the last Nominated Event in Australia had been held, at Boneo over 14-16 June 2018. That was the appellant's third Nominated Event. The European winter had been particularly severe and the reason for earlier amendments was to reflect the difficulty for European-based combinations to achieve eligibility (although some Australian-based combinations were also pressed).[31] The Appeal Board heard that Europe-based riders had in fact recognised that the policy overall was fair for Australian-based riders, when the policy was being formulated.

If the amendments were to accommodate Ms Oatley, they were for an improper purpose

79. As the uncontroverted evidence to which we have referred shows, the amendment to the Policy in July 2018 was primarily to address a prejudice to the riders who had entered to compete in Falsterbo and most particularly, Ms Pearce. At the hearing, Ms Crabtree rejected in clear terms any proposition that the July policy was brought into effect for the purpose of making Ms Oatley eligible.

80. While the DSP were aware that Ms Oatley would benefit from the amendment, they viewed that as incidental. Indeed, the evidence showed that the DSP saw incidental benefit to Ms Oatley as a factor weighing against the amendments in July 2018. The evidence does not establish that the amendments were made to accommodate Ms Oatley.

Whether the relevant policy was properly followed or implemented

81. The appellant contended that the process which the DSP followed was unfair. She contended that the Policy was clear on its face that riders were required to first, meet

[31] Statement Crabtree at [13]

clear minimum requirements during the PSP and secondly, compete in two Nominated Events, from which the two highest scores from the Grand Prix test would count. Riders knew there was a possibility that qualification events would not go ahead, and rode their campaigns accordingly. The appellant submitted in effect that when the Policy was amended to reduce the requisite Nomination Events to one after Falsterbo ceased to be an option as a Nomination Event, the qualification landscape changed in a way that was unfair to her.

82. To understand this submission it is necessary to understand first, the selection process under the Policy and secondly, how the July amendment affected that process.

Selection process under the Policy

83. It is apparent from reading the Policy, and EA confirmed at hearing, that the Policy is intended to implement, essentially, a three stage process for selection for WEG 2018. The first is the PSP, the purpose of which is to set a threshold for eligibility. The second is the requirement for participation in a Nominated Event (or, prior to July 2018, at least two Nominated Events). The third stage involves an exercise of discretion by the DSP to select a team from the pool of riders that is formed by the first two stages.

84. Following the April amendment, which extended the PSP, the first two stages overlapped temporally. Evidence was heard that the extension of the PSP was to aid the purpose of selecting the best possible team, and to enable some riders to use scores at relevant Nominated Events, if =/+69%, to also serve as PSP scores.

85. The third stage in which the DSP exercises its discretion is plainly not residual in nature, in the sense that it is not a discretion which remains available to the DSP to select or not to select a rider notwithstanding that the rider has met the eligibility criteria.[32] That is, the first and second stages do not prescribe 'selection criteria' but rather, provide for eligibility for consideration for selection. That is not to say that results from those stages are irrelevant to selection. The relevance of those results is discussed below. Mr Keizer accepted for the appellant that the Policy did provide for a third discretionary phase of the selection process but there were some constraints of the exercise of that

[32] cf *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241 at 264-265

discretion, based on his suggested interpretation of cl 9.1 of the Policy (discussed below).

86. In providing for selection as a matter of discretion (from a pool of eligible riders), the Appeal Board heard that the Policy is unusual (although the concepts are familiar to competitors) in that its approach appears not to have been utilised for recent Olympic or WEG selection. Ms Crabtree explained in her written and oral evidence, that the reasons the discretionary stage was introduced derive significantly from the fact that competitive Australian riders are based largely either in Europe or Australia. Selecting a team from riders who are so dispersed has proven to be difficult. Requiring Australian-based riders to travel to Europe to compete in the same shows as European-based riders, to be able to more clinically 'rank' Australian riders, imposes its own hardship upon Australian riders (and horses). For these reasons, the DSP sought to introduce a system which enables Australian-based riders to achieve selection whilst remaining in Australia.

87. While the Policy refers to the three stages and sets out factors for eligibility, and relevant considerations in exercise of the selection discretion, with respect to the drafters the process could be more clearly explained in the Policy. Those who are not accustomed to interpretation of policy documents may be forgiven for failing to appreciate the role and significance of the discretionary stage. For example, the PSP is provided for in cl 4; the Nominated Events are provided in cl 5, but important factors which bear on the exercise of the discretion are contained much later in the document, in cl 10. Clause 3 provides a helpful overview but could better emphasise the discrete and significant nature of the discretion. Scope for misconception may particularly be so given that prior to this Policy, riders were mostly accustomed to a selection process which engaged with ranking and selection criteria (a "marks based" approach which is not reflected in any iteration of the Policy, on the available evidence). There was evidence of consultation with riders before formulation of the Policy, although not of how Ms Dierks herself understood the process to work.

How the July amendment affected the selection process

88. The appellant did not cavil with the overarching intention of the Policy to select the best possible team. The heart of the appellant's contention about the unfairness of the process lay in the fact that because of the July amendments, Ms Oatley became eligible for inclusion in the pool from which the DSP would select the team. Each rider who

wished to seek qualification knew what they had to do; knew of the risk that shows may not go ahead; may have chosen to take risk by leaving eligibility qualification to later shows; or did not compete in enough Nominated Events (under the April policy, two). But, the appellant contended, Ms Oatley albeit with full knowledge of the necessity to compete at two Nominated Events, chose to only compete at one show of five possible events in Europe and thus placed herself outside the bounds of selection.

89. The appellant contended that by changing the Policy in July, in a way that benefitted Ms Oatley because it meant she was included in the pool, other eligible riders (specifically, the appellant) were disadvantaged because each eligible rider's chances of selection from that pool were proportionately diminished.

90. During the hearing, it was suggested on behalf of the appellant that EA could have made alternative amendments to the April policy which could have avoided potential unfairness to Ms Pearce but excluded Ms Oatley. Those options were not further explored by the appellant, however, and no alternative device was identified which would have been consistent either with the overarching aims of the Policy or with procedural fairness in relation to Ms Oatley.

Whether increasing the size of the pool occasioned procedural unfairness to the appellant

91. We do not accept that there was either inherent or latent unfairness to the appellant in effecting the amendment to the July policy.

92. First, the increase in pool size as a consequence of that amendment did have a degree of diminishing effect on the likelihood of selection of any one rider in the pool although presumably that likelihood varied between riders depending on how strong were the discretionary factors for each. But eligibility for the pool did not amount to selection and there was no adverse effect upon Ms Dierks' eligibility which was occasioned by the amendment. Mr Keizer conceded that the July policy, if validly enacted, did not impose upon the appellant a need to change any competition or qualification plans.

93. Accordingly, in our view, that the pool of eligible riders in relation to whom the DSP could exercise their discretion widened did not of itself occasion procedural unfairness to Ms Dierks. Indeed, we understood Mr Keizer to accept that if the July policy was validly enacted it had a proper purpose to avoid unfairness to Ms Pearce. And if that had occurred, the pool may have enlargened to include Ms Pearce.

94. Secondly, while Ms Oatley did not seek to participate as a party to the appeal proceedings, Ms Crabtree gave uncontroverted evidence of sufficient details of Ms Oatley's campaign that we do not accept that Ms Oatley chose only to compete in one Nominated Event. By the end of June 2018, when two Nominated Events remained, she had only competed in one Nominated Event, at Wiesbaden on 18-21 May 2017.[33] She had entered to compete at Fritzens, over 29 June-1 July, but had apparently withdrawn on veterinary advice.[34] The Appeal Board heard evidence that it was hoped Ms Oatley might amend her plans to compete at Falsterbo. In the event, Falsterbo fell through and ceased to be an option for Ms Oatley to count towards eligibility.

Misapplication of discretionary factors

95. As part of this ground of appeal, the appellant contended that, notwithstanding the terms of the discretion as prescribed by cl 10 of the Policy, the effect of cl 5.1 was to require that Grand Prix scores from Nominated Events should be given predominant weight in the exercise of the selection discretion. It was submitted that the expression in cl 5.1 that scores from the Grand Prix were "*to count*" evoked a requirement to place particular weight on those scores.

96. We do not accept that cl 5.1 operates in that fashion. We reach this view having regard to the text of cl 5.1, its context, and the reasons given in evidence for the way that it is drafted.

97. The relevant paragraph of cl 5.1 states as follows:

> "*The DSP will consider the results, of combinations which have expressed interest, from nominated shows in Australia, Europe and North America. Combinations will be required to compete at least one of these shows with the scores from the Grand Prix test to count.*"

98. The opening words reflect the discretion that in selecting a team the DSP would consider the results from nominated shows. (As such, we consider that the results from

[33] Statement Crabtree at [16]
[34] Statement Crabtree at [19]

those shows constituted a mandatory consideration which the DSP was required to take into account in selecting a team.)

99. The second sentence contains the crux of the 'second stage' requirement to compete in Nominated Events. That is, a requirement to compete in at least one Nominated Event.

100. There is some ambiguity to how the Grand Prix score is "to count". On one view, the only requirement under cl 5 was participation in a Nominated Event. On another, cl 5 required participation in a Grand Prix at a Nominated Event. However, it appeared to be accepted at hearing that riders understood they were to compete in the Grand Prix at Nominated Events in order to be eligible for selection. We consider this is correct, and cl 3.4 makes that clear. It states, by reference to cl 5, that combinations had to have competed in the Grand Prix in at least one of the Nominated Events. The issue raised by the appellant, was that the words "*to count*" required the DSP to place predominant weight on those Grand Prix scores in making its selection from the eligible pool of riders.

101. We find the argument to be reasonable, but having regard to the Policy as a whole, we are not persuaded that the Nominated Event Grand Prix scores carried predominant weight. That is not to say that they ought not be viewed as a relevant consideration, or even an important relevant consideration deserving considerable weight.

102. Clause 10 is titled "Discretionary Considerations". The first sentence states that combinations to be selected would be identified by the DSP "*in its sole and absolute discretion*", aiming to achieve the best possible result at WEG 2018. The next sentence starts "[w]*ithout in any way limiting the discretion*", and then sets out factors which the DSP would take into account.

103. Specifically in relation to relative weight of various factors, cl 10.1 states that the DSP has discretion to "*place a greater emphasis on one or more of the considerations when selecting combinations for WEG 2018*".

104. Clause 10.3 lists a number of considerations. None of them specifically refers to the Grand Prix scores from Nominated Events, although the first consideration in particular - "demonstrated experience and/or success at international events" – may be thought to draw on such scores and other results.

105. Clause 10.4 refers to an expectation that riders will compete in Grand Prix Special and/or Grand Prix Freestyle classes at shows they attend.

106. Clause 9.3 refers to consideration by the DSP of results from Nominated Competitions [sic, Nominated Events]. In that regard, cl 9.3 states that a range of factors will bear on consideration of those results, including the level of the competition, the consistency of performance, an improving trend, and more recent results.

107. In our view, two matters emerge from a review of the Policy as a whole. The first, is that the discretion is intended to be very wide. It is not intended to be unduly constrained by any particular factor. The second is that Grand Prix scores from Nominated Events are a relevant consideration, and probably a mandatory and important consideration. But we consider that to state that those scores are to be given predominant weight would be to overstate the matter.

108. The respondent explained the meaning of "to count" in cl 5. The drafters of the Policy included the words because historical experience showed some confusion when more general words of "scores from competition" were used. The drafters were endeavouring to make it clear that combinations had to compete in the Grand Prix at Nominated Events, and then in weighing discretionary factors to select the team, the DSP would take into account the scores from those tests. It may be thought that cl 5 could be clearer in that respect.

109. Evidence was received about how the DSP took scores into account in the exercise of its discretion. In relation to the appellant, the DSP looked at scores (which presumably included the Grand Prix scores from Nominated Events) to find that she had an improving trend in 2018. The DSP also considered her scores relative to scores obtained by other Australian riders at the same Nominated Events, and placed weight on a very low score in 2018. The evidence received referred to various other factors that the DSP referred to, in relation to the appellant and also in relation to Ms Oatley and Ms Hanna. Ms Crabtree gave evidence that a simple ranking of scores achieved at Nominated Events would not be fair or indicative given they derived from different competitions with different judging panels. It was apparent, however, that scores factored strongly in the deliberation process and were analysed in several different ways.

110. For these reasons, we find that the Grand Prix scores from Nominated Events were not, under the terms of the Policy, a discretionary factor which was to be given predominant weight. Further, we find that the evidence establishes that those scores were taken into account in the selection process. There is no evidence establish that those scores were given insufficient weight such to invalidate the selection process.

FINAL CONSIDERATION

111. As a result of the analysis and findings set out above the Appeal Board is satisfied that the amendments to the Policy resulting in the July policy were validly made within power properly delegated to the DSP. Further that there was not a failure to provide procedural fairness to the appellant (or any other riders) in the enactment of the July policy.

112. We further consider that the DSP properly exercised its discretion under the July policy in making the selection of the Team that was announced on 19 July 2018 and that the selection of the Team as announced should stand.

ORDERS

113. We make the following orders:

1. Dismiss the appeal.

2. The decision of the Dressage Selection Panel announced on 19 July 2018, naming Mary Hanna, Kristy Oatley, Brett Parbery and Alexis Hellyer (and their respective horses) as the Australian Dressage Team for the World Equestrian Games 2018 is confirmed.

Amendments

11 August 2018: "Board" amended to "Appeal Board" in [6], [14], [16], [17], [18], [77], [78], [86], [94], [111].

"Tribunal" amended to "Board" in [15].