

**BETWEEN**

**Te Rina Taite**

Appellant

**AND**

**Swimming New Zealand**

Respondent

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**FORMAL DECISION WITH REASONS OF TRIBUNAL  
(FOLLOWING ADVICE OF DECISION DATED 30 MAY 2008)  
DATED 18 AUGUST 2008**

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**Hearing**

**Wellington 27 May 2008**

**Present:**

Te Rina Taite (Athlete – by teleconference)

Pam Feetham (in support of Appellant)

Andrew Blair (Counsel for Appellant)

Mike Byrne (CEO Swimming New Zealand (“SNZ”))

Clive Rushton (High Performance Programme Director  
SNZ)

Michael Smyth (Counsel for SNZ)

**Tribunal Members:**

Nicholas Davidson QC (Deputy Chair)

Timothy Castle

Ron Cheatley

**Registrar:**

Brent Ellis

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## **A. Introduction**

1. The Tribunal by formal advice of decision dated 30 May 2008 dismissed this appeal under urgency. The reasons for that decision are now set out.
2. Te Rina Taite ("*the Appellant*") appealed to this Tribunal against the decision of Swimming New Zealand ("*SNZ*") not to nominate a Women's 4 x 100 metres Freestyle Relay Team for the Beijing Olympic Games. She asserted that she should have been nominated and selected as a member of such a team.
3. No other swimmer appealed against the non-nomination of a relay team for this event, nor sought to join the appeal.
4. Ms Taite contended that the applicable Selection Criteria had not been properly followed nor implemented, and she otherwise had not been afforded a reasonable opportunity to satisfy the applicable Criteria. Her full grounds of appeal are discussed below.
5. SNZ denied the jurisdiction of this Tribunal to address the merits of the appeal as it said the appeal was brought out of time. It contended that there was a two day time limit for an appeal to be lodged following the decision made that no relay team be nominated.
6. Otherwise SNZ contended that the relevant Selection Criteria had been framed to ensure that any relay team that was nominated had achieved a time equal to or faster than the 12<sup>th</sup> fastest time at the World Championships in Melbourne 2007, namely 3:43.56 or faster. SNZ contended that the combined fastest time for swimmers who may have been considered for nomination and selection fell short of that mark as assessed at the 2008 New Zealand Youth & Open Championships. It refuted the contention that there was an unfairness in the opportunity provided to meet the standard.
7. The arguments for the Appellant and SNZ were developed in depth at the hearing, with Ms Taite attending by teleconference from the United Kingdom, in testing circumstances for her, over several hours. She gave her evidence,

and otherwise contributed in a dignified and constructive way. The Tribunal records its appreciation of the way in which the appeal was conducted by Ms Taite and her Counsel Mr Blair, and Mr Smyth as Counsel for SNZ.

8. While the appeal was dismissed, the issues raised by and for Ms Taite were testing, and likely instructive for future nomination and selection processes.

## **B. The Case for the Appellant – The Formal Appeal**

### **Formal Notice of Appeal dated 24 April 2008**

9. Ms Taite sent a formal and unequivocal Notice of Appeal to the Sports Tribunal dated 24 April 2008.

10. The Appeal was against “*non-nomination as a member of the Relay Team*”. She identified “*other potential members*” of the Relay Team who were not nominated who “*may be interested parties*”.

11. It referred to the Constitution of SNZ, and Rule 23.2 which records:

*“Where any member wishes to dispute his or her nomination by SNZ to the New Zealand Olympic Committee, SNZ and that member agree to refer that dispute to the sole and exclusive jurisdiction of the New Zealand Sports Tribunal for a final and binding decision”.*

12. The Notice of Appeal recorded that at the conclusion of the 2008 New Zealand Youth and Open Championships on 30 March 2008, SNZ nominated swimmers for selection and on the same day the NZOC named the team for the Beijing Olympics. The Notice of Appeal said that “*her non-nomination was not advised to her by SNZ on 30 March 2008*”.

13. The grounds for appeal were advanced pursuant to this Tribunal’s Rule 38 (e) (i), that the applicable Selection Criteria had not been properly followed, and/or implemented. Alternative grounds were that natural justice was denied pursuant to Rule 38 (a), and SNZ otherwise acted outside its jurisdiction, pursuant to Rule 38 (b). The Appellant further contended that she was not afforded a reasonable opportunity by SNZ to satisfy the applicable Selection Criteria, under Rule 38 (e) (ii).

14. The appellant contended that she had 28 days to bring an Appeal under the Rules of this Tribunal as there was no cross-reference in those Rules to the procedures directly relevant to Olympic nomination.

### **C. SNZ Statement of Defence**

#### **Appeal out of time**

15. The Statement of Defence contested the jurisdiction of this Tribunal to hear the appeal, on the basis that it was lodged out of time. It asserted that a right of appeal under Clause 9.3.1 of the Agreement between SNZ and New Zealand Olympic Committee, ("NZOC") had to be brought by a written Notice of Appeal within 2 days of the (non) nomination date and that the appellant had agreed to comply with such formality. The nominations were made on 30 March 2008, thus constituting the "*Nomination Date*" according to SNZ. The nominations were announced in conjunction with NZOC selection.

16. SNZ contended that an email of 1 April 2008 sent to Mr Rushton by Ms Taite was simply an enquiry, and could not constitute a Notice of Appeal. So too SNZ alleged that a 2 April communication from Ms Taite was not a Notice of Nomination Appeal, and in any event was not received until 4 April so was time-barred.

17. SNZ placed some emphasis on the fact that on 18 April Ms Taite wrote to SNZ

*"... further to my letter sent on 2 April 2008 **I wish for this to be considered as my Non-Nomination Appeal as per Clause 9.3.1 as stated in the Application Nomination and Selection Process for the 2008 Beijing Olympic Games Agreement**". (Emphasis added).*

18. While this constituted a clear Notice of Appeal, SNZ says it was time-barred.

19. SNZ otherwise contended that the Selection Criteria had not changed since posting on the internet in December 2006, had been properly applied, and that there had been reasonable opportunity given to meet the criteria.

20. At the conclusion of the Statement of Defence for Appeal, SNZ recorded that the Appellant could not be nominated for the relay event because:

- "a. *The four fastest swimmers in the event have not met the Selection Criteria;*
- "b. ***Two other prospective members of the team have expressed no willingness to be nominated for the event (having already been nominated in other events)***". (Emphasis added).

#### **D. Issues**

21. The Tribunal has considered this appeal under the three broad categories of:

- (i) Jurisdiction;
- (ii) The Selection Criteria;
- (iii) The opportunity to meet the Selection Criteria.

##### **(i) Jurisdiction**

22. The Tribunal records here matters contained in written material put before the Tribunal, and the evidence and submissions given at the hearing. It heard from Mr Byrne CEO of SNZ and Mr Rushton as Chair of Selectors, together with Ms Taite, on questions of fact.

23. There are essentially two sub-issues involved. The first requires consideration of the relevant Rules as to the time within which an appeal may be brought. The second is to examine the material sent by the Appellant to SNZ, following the non-nomination, to characterise it as constituting a Notice of Appeal or otherwise.

24. The appeal is brought under Rule 23 of the Constitution of SNZ. Rule 23.2 provides that any such dispute is referred to the "*sole and exclusive jurisdiction of the New Zealand Sports Tribunal for a final and binding decision*".

25. Because there is no "*explicit procedure*" set out in Rule 23.2 for bringing a nomination appeal, and no cross-referencing to the procedures in Clause 9.3 of the Application, Nomination and Selection Process Agreement between the NZOC and SNZ, Mr Blair, Counsel for Ms Taite, contended that the Rules of the Sports Tribunal applied.
26. Mr Blair contended that the appeal is brought under Section 38(c) of the Sports Anti-Doping Act 2006 and Rule 37(a) of the Rules of this Tribunal.
27. Rule 38 of this Tribunal records "*the grounds for an appeal shall be those set out in the constitution, rules or regulations of the NSO or the NZOC (if the appeal is brought under Section 38(c) of the Act) or as set out in the agreement between the parties (if the appeal is brought under the provisions of Section 38(b) of the Act)*".
28. Rule 39(a) provides for the filing of an appeal with this Tribunal "... *within the time limits set out in the applicable constitution, rules or regulations of the NSO or the NZOC and in the absence of such time limits, within 28 days of the Appellant being notified of the decision against which the appeal is made*".
29. The Tribunal has a prescribed form, Form 3, for a Notice of Appeal, but the Tribunal does not take a strict view of the use of this form provided the essential elements of a notice of appeal are contained in a document lodged, being a clear indication of appeal, and sufficient particulars of the grounds upon which it is based.
30. So Mr Blair's argument is that the time limit is either set out in the applicable constitution, rules or regulations of the NSO or the NZOC, or otherwise the time limit is within 28 days of advice of a decision against which the appeal is brought. If this is correct, then clearly Ms Taite has lodged an appeal within the 28 day period.
31. Before moving to consideration of the SNZ response, the Tribunal notes the alternative argument for Ms Taite, that if clause 9.3.1 of the NZOC/SNZ agreement is to apply, then the Appellant's steps, viewed overall, were enough to satisfy the obligation to give written notice of appeal to the Chief

Executive of SNZ within two days of the nomination date (or non-nomination).

32. SNZ's contention, advanced by Mr Smyth, is that the Athlete Application Form for Nomination/Selection for the Beijing Games is an agreement with the athlete that any appeal against non-nomination must be exercised in accordance with the Application, Nomination and Selection Process Agreement between the NZOC and the NSO. "Athlete Agreement" between the Athlete and NZOC means the Athlete Agreement that any Athlete applying to be nominated and selected to the Team must fully complete and return to the NSO prior to the Nomination Date.
33. The Athlete Application Form for Nomination/Selection for the Beijing Games, records an agreement that any application "*will be considered and determined in accordance with the Application Nomination and Selection Process Agreement between the NZOC and the NZNSO, which agreement has been made available to me by the NSO and NZOC. In particular I acknowledge that any right of appeal and the process for such an appeal in relation to Nomination or Non-Nomination or Selection or Non-Selection must be exercised in accordance with that Agreement ...*". Ms Taite signed this on 23 August 2007.
34. That agreement is express. Clause 9.3.1(a) records "*an Athlete wishing to appeal must give written notice of appeal ('Notice of Nomination Appeal') to the Chief Executive of the NSO **within 2 days of the Nomination date***".
35. "**Nomination Date**" means the date, as specified by the NZOC, by which the NSO must submit particulars of each Athlete to the NZOC for consideration for selection to the Team, but the athletes were advised by e-mail of 24 February of the date nominations were to be advised, namely, 30 March 2008.
36. "**Selection Appeal**" means an appeal against selection or non-selection brought "*in accordance with Clause 9 of this Agreement*"; but Clause 9 includes Clause 9.2 for "*Nomination Appeals*".



37. The Tribunal has carefully considered the differing contentions. There is something to be said for Mr Blair's submission that if the appeal is made pursuant to the "*Constitution, Rules or Regulations*" of SNZ these do not set a time frame except by inferential reference to the Rules of this Tribunal and the 28 day period. However, the "*Athlete Application Form for Nomination/Selection*", contains an express acknowledgement that the right of appeal and the process for such an appeal must be exercised in accordance with the Application Nomination and Selection Process agreement between the NZOC and NSO.
38. Having regard to an immediate and express contractual reference to the circumstances in which an appeal may be brought, the Tribunal has concluded that this must prevail and any notice of appeal had to be **given in writing** within two days of the Nomination Date. Thus in effect the specified agreement is an over-ride to the general or default provisions of this Tribunal's rules. It would be odd if the contrary were to apply with the need for immediate challenge, affecting not only the rights of the athlete but as here the interests of other potential team members and the composition of a team.
39. This takes the Tribunal to the submission for Ms Taite, that the communications with SNZ were sufficient to constitute notice of appeal within the two days allowed.
40. After the trials concluded on 30 March 2008, Ms Taite returned to her New Zealand address in Fielding on 1 April, and reviewed the selection criteria. For the first time she says she saw the "*Selection Update*". She immediately e-mailed Mr Rushton of SNZ. The entirety of the e-mail should be read:

*"Hi, I realise you are probably quite busy at the moment, but could you maybe just explain why the women's 4 x 100 freestyle relay didn't qualify? I'm pretty sure I understand but I would just would like some clarification for my own peace of mind.*

*"Also just wondering when the amended changes to the criteria were made and when that was posted on the website (times to be done at trials), unfortunately I missed that one. Thanks, Te".*

41. The Tribunal takes this e-mail to be a question about why the relay team did not qualify, indicating that Ms Taite had some understanding but wanted clarification for *"peace of mind"*, and wanted to know when the amended changes to the criteria were made and were posted.

42. It is difficult to construe this as a notice of appeal. There is an element of dissatisfaction about what occurred, but in substance this is an enquiry, not a notice of appeal.

43. The reply from SNZ, of the same day, was straightforward:

*"Simple, the women's 4 x 100 FR wasn't fast enough"*

44. The e-mail went on to assert that no amendments to the Selection Criteria were made after December 2006, when FINA published their "A" and "B" times. Mr Rushton asserted that the criteria remained the same from December 2006, and then added that *"the first line of the OG (Olympic Games) criteria states the selection meet is the 2008 Opens"*.

45. Ms Taite responded promptly by letter of 2 April 2008 addressed to Mr Byrne as CEO of SNZ.

46. In the Tribunal's view this letter of 2 April does constitute a well developed argument regarding the circumstances of there being no Women's 4 x 100 metre freestyle relay team selected, and why Ms Taite should have been part of such a relay team.

47. While the matters raised are expressed in a more deliberate way in the formal Notice of Appeal which followed, and the argument before this Tribunal, it is clear that Ms Taite was complaining about the circumstances in which three elite swimmers who represented New Zealand at the 2007 World University Games were not available for the event, and that one of those swimmers had posted a time that would have made the team eligible for Beijing. Ms Taite

said she thought there was no advice "to all potential members" of the relay team of what would be required to qualify a team, and in the circumstances that certain elite swimmers would not be available. The chance of Amaka Gessler of the Canterbury team being part of an exhibition team to try to make up the shortfall in the time required and two other "potential members" not swimming the freestyle leg of the Auckland Regional Medley relays, left it all on the shoulders of Ms Taite to achieve the time stipulated by SNZ as required for nomination of a team.

48. Further, this letter went on to refer to the team Selection Criteria and the Selection Update, and complains about the lack of opportunity being given to meet the criteria, and goes further to enquire as to the circumstances in which the Selection Criteria were updated. With reference to the criteria, Ms Taite identified a reference to "a relay team will be selected providing: ...", her essential point being that the criteria published in December 2006 did not require a "requalification". Instead, her contention was that a relay team would be selected providing New Zealand had qualified by finishing in the Top 12 teams at the World Championships in Melbourne 2007 and there were four nominated relay team members who had achieved a FINA "B" time between 15 March 2007 and 15 July 2008. This is discussed further under "The Selection Criteria".

49. The Tribunal concludes that there is no doubt there was sufficient contained in this e-mail to constitute a Notice of Appeal. While not expressed as such, it sought investigation by the "Board" as soon as possible, and noted that the FINA qualifying period did not end until 1 July 2008. It sought "a thorough review of the relay team nominations". It also referred to "opportunities" for meeting the requirements for qualification.

50. It is with some reluctance that the Tribunal concludes that the **receipt** of this letter on 4 April being outside the time limited by Clause 9.3.1(a), and without the power of this Tribunal to extend time in these circumstances means that the appeal is time barred. The Tribunal has reached this conclusion because nominations (and selections) were announced on 30 March 2008, and this was known to Ms Taite as the nomination date. While

something was made of the definition of “*the Nomination Date*” on the evidence it is without doubt that Ms Taite knew of the nominations being announced on 30 March.

## **(ii) The Selection Criteria**

51. The Tribunal does not strictly need to consider this issue, but it would be unfair to the Appellant, and to SNZ, not to set out its views in this regard.

52. SNZ contended that the selection criteria did not change after being posted on SNZ and NZOC websites in December 2006.

53. The Olympic “*Selection Criteria and Standards*” reads:

*“FINA recently published their A and B standards for Beijing 2008 and have explained the system as follows:*

*“The qualifying times for Beijing were calculated as follows:*

*“A. Standard average 16<sup>th</sup> place on world rankings 2004/5 (except 200m breaststroke women and 200m individual medley women).*

*“B. Standard + 3.5%*

*“The times for 200m women’s breaststroke and 200m women’s individual medley were adjusted as these average times were slower than Athens.’*

*“SNZ has adjusted the qualifying standards for Beijing 2008 accordingly and they have been approved by NZOC.”*

### **“Relays:**

*“A relay team will be selected providing:*

*“1. All **nominated** relay members have achieved a FINA “B” time in their respective stroke in an approved FINA competition between 15 March 2007 and 15 July 2008.*

*“2. NZL qualifies by finishing in the top 12 teams at the World Championships, Melbourne 2007, or NZOC receives an invitation from IOC/FINA as a*

*result of NZL being one of the fastest other four nations in the 15 months preceding the Olympic Games.*

- “3. *In the event of qualification through 2, the invitation will be accepted providing the time of the relay is equal to or faster than the 12<sup>th</sup> time from Melbourne 2007.*”

...

***"Exceptions***

...

- “5.2 *The Selectors may, at their sole discretion, request a time-trial to verify the swimmer’s return to fitness at a time and place of their choosing. The Head coach of the respective competition will be invited to the time-trial.*”

54.A Selection Update was posted on the NZOC and NZS websites in the week of 8 March. It reads:

***"SELECTION UPDATE***

***"Relays at Olympic Trials***

*"NZ has three relays pre-qualified for Beijing – W4x100FR, W4x200FR and M4x100MR. For NZOC selection these relays have to **re-qualify** at the Trials equal or faster than 12<sup>th</sup> in Melbourne 2007 using compiled times from individual events (allowing 0.65 for each takeover) **or** an actual relay time.*

*"The other three relays (M4x100FR, M4x200FR, W4x100MR) have to do an **actual relay time** which places in the world top 16 (FINA requirement) **and** is equal or faster than 12<sup>th</sup> in Melbourne 2007 (NZOC requirement). To facilitate this SNZ will enter NZ relays in the regional relay events at Trials (as we did for Athens 2004) to offer qualification opportunities for Beijing.*

*"Selection of the four NZ swimmers will be made by the SNZ Selectors during the Trials. Two of the relays (M4x200FR and W4x100MR) have individual events which are concluded by the time the relay is swum. The M4x100MR, however, is scheduled*

*before the individual 100m Freestyle. The Selectors will compile statistics for the selection of the NZ team during the Olympic Trials taking into consideration performances back to the IOC/FINA deadline of 15 March 2007. Swimmers will be asked to indicate their availability to swim the relay at the Trials **and** to swim the relay in Beijing in the event of qualification.*

*“The Selectors decision regarding the makeup of the three relays will be final.*

*“Clive Rushton  
Chair SNZ Selectors”*

55. SNZ contended that NZOC have always stipulated that “*qualification*” of a New Zealand team does not guarantee nomination or selection for Beijing, referring to the NZOC “*Eligibility, Qualification, Nomination and Selection for the Beijing Olympic Games Team 2008 policy*”, and Clause 2.5 of the NZOC Selection Policy for the 2008 Beijing Games and the 2010 Vancouver Games.

56. The document “*Eligibility Qualification Nomination and Selection for the Beijing Olympic Games Team 2008*” records:

“NOTE:

1. It is important to understand that “*qualifying*” for the Games does not necessarily equate to “*selection*” into the NZ Team because the NZOC Standards which frequently exceed the IF Qualifying Criteria.
2. In some sports, performance in top level qualifying events, qualify NZ a place in the Games, but not necessarily for the individuals responsible for achieving that place e.g. NZL qualifies both some sailing classes and YNZ then determines the individuals to represent NZL in the Olympics competition.
3. NSOs have their own qualifying criteria and set of athlete expectations which athletes must initially meet. Such sports specific policies include provisions for ‘extenuating circumstances’ where athlete performance may be impaired by injury or acceptable absence from important events.”

57. Clause 2.5 of the NZOC Selection Policy for the 2008 Beijing Games and the 2010 Vancouver Games records:

*“the NSOs agree that the Standards and Procedures set out in the sports specific criteria may exceed those stipulated by the IF/IOC.*

*Accordingly it is accepted that an athlete may not necessarily be considered eligible for selection for the NZ team, even though they may have achieved the standard stipulated by the IF/IOC, unless he/she fulfils the relevant criteria and/or achieves the relevant sports specific standards that are agreed to between the NSO and the NZOC”.*

58. It can be seen that there was no reference in the Criteria to a Women’s 4 x 100 Relay event taking place at the Trials after individual events. Such opportunity was directed at the Men’s 4 x 100 FR, Men’s 4 x 200 FR and the Women’s 4 x 100 MR. These teams had not qualified through any of the avenues in Clause 2 of the Selection Criteria.

59. Mr Rushton and Mr Byrne gave evidence and said that the Appellant and other swimmers at the Trials had three chances to post qualifying times prior to the Women’s Regional Medley Relay event. That was the last opportunity to make up the 0.57 shortfall which existed taking the fastest compiled times. Mr Rushton spoke to the coaches for the Appellant, Amaka Gessler and Lauren Boyle about this, and Jan Cameron spoke to Hayley Palmer’s coach. Ms Palmer and Ms Boyle elected not to swim in the Medley event. **They could not be required to do so.**

60. In summary SNZ contends that the Selection Criteria were properly followed and/or implemented because Clause 3 of the Criteria required relay teams who had “pre-qualified” for the Games to achieve a time equal to or faster than 12<sup>th</sup> place at Melbourne, and the applicant and the three other faster swimmers had failed to collectively meet that standard. The requirement for “re-qualification” was thus said to have been always part of or implicit in the Selection Criteria, and there was no deviation in the Selection Update, but specification of the need to “requalify” the specific team.

61. Mr Blair submitted correctly that there is the clear obligation for all nominated relay members to have achieved a FINA "B" time, and that the Criteria are satisfied, as there was a potential relay team of four swimmers with "B" times, and that a New Zealand team qualified in Melbourne. However, in the Tribunal's view, that contention lacks a critical component of form being brought to account, and the specifics of team membership.
62. The Appellant was not a member of the Melbourne team, and the Tribunal concludes that it cannot be the case that simply because a team finished in the Top 12 in Melbourne 2007, **automatically a relay team would be selected**, even if made up of entirely different personnel. That would defy logic.
63. Further, the Criteria specify that all who are nominated have achieved a FINA "B" time, not that achieving such time will result in nomination.
64. It is important to separate the issue of Selection Criteria from the opportunity to meet those criteria. The Tribunal concludes that requalification was required and not achieved to the standard set by the Selectors. Even if the Selection Update did not apply, the Tribunal concludes that there must be read into the Selection Criteria a clear inference that there had to be a performance standard met, as to time. This is drawn from consideration of all the documents available to the athlete, rather than a focus on the "*Selection Criteria and Standards: Beijing 2008*" where the construction is difficult, and where the Tribunal does not accept the SNZ submission as to the circumstances in which the time for Melbourne is brought to account so readily as SNZ contends. Rather, the Tribunal accepts that the consideration of an achieved time is derived by necessary inference in the fact that a **new team** is being made up, New Zealand has on the face of it "*qualified*" only in the sense of its placing in Melbourne, but the **actual** team must achieve a performance standard which is assessed for the purpose of deciding nomination and selection.
65. Thus with an express reservation about the unfortunate wording of the Selection Criteria which should not open up such debate about the meaning,



the Tribunal accepts that the Selection **Criteria** were properly followed and implemented.

**(iii) Opportunity to meet the Selection Criteria**

66. This has caused the Tribunal some concern, beginning with the interpretation of the Selection Criteria, discussed above.

67. It is true that Ms Taite and the other "*fastest swimmers at the trials*" had three chances to post qualifying times prior to the Women's Regional Medley Relay event. The times achieved were:

<b>Athlete</b>	<b>Regional Freestyle relay</b>	<b>100 metres freestyle heats</b>	<b>100 metre freestyle final</b>
<b>Hayley Palmer</b>	55:62	55:59	55:30
<b>Amaka Gessler</b>	58:11	57:05	57:07
<b>Te Rina Taite</b>	57:65	56:53	56:67
<b>Lauren Boyle</b>	DNS	57:96	57:20

68. These combined fastest times with allowance for change-over totalled 3:44.13, slower than the required time derived from the World Championships. The medley relay represented the last opportunity to make up the 0.57 differential. As we have already said, Mr Rushton spoke to the coaches of Ms Taite, Ms Gessler and Ms Boyle to explain what was required and Jan Cameron spoke to the coach of Ms Hayley Palmer. Ms Palmer and Ms Boyle elected not to swim in the regional medley relay and there was no power to compel their so doing. While Ms Taite swam in the regional medley event, her time was slower than in the heats of the individual freestyle.

69. For the Men's 4 x 100 FR, SNZ said the selection requirements were irrelevant as different, but asserted that "*their job was harder since they only had one opportunity to qualify*".

70. On the evidence before it, the Tribunal accepts that Ms Taite became aware of the requirements in the Selection Update at least during the trials. She reviewed the Selection Criteria on 1 April, and read the Selection Update.

Although she says that she regularly consulted the website, she had not seen the Update beforehand.

71. However, Ms Taite should have realised before the trials the need to assemble a new relay team from those willing to compete in Beijing. It is a curiosity of this appeal that others who may have been expected to challenge the non-nomination of a team did not do so. Be that as it may, in these circumstances of "*requalifying*" or "*qualifying*" a relay team to a time required by the Selectors, the Tribunal considers that SNZ could have done more in facilitating that process. It went to some trouble to provide teams that had not "*pre-qualified*" the opportunity to do so. In this case, **early and clear** communication of the requirements to all potential team members, and facilitating discussion between those athletes and their coaches, would have been desirable. The Tribunal considers that while on the face of it there was an opportunity **at the trials**, in a composite way, to make up a team, some coordination was required, well beforehand, to ensure the best chance of nomination. However, the need for a qualifying standard met by a team willing to compete was reasonably inferential. The athletes and coaches have their part to play, and here, if there had been the will of others one would have expected coordination.

72. In saying this, the Tribunal has essentially adopted Mr Byrne's explanation that the final team, if selected, had to replicate the form shown in Melbourne to demonstrate its competitiveness in the event. While there has been some comment about the lack of coordination, the Tribunal does accept that the selectors in consultation with the CEO Mr Byrne distributed the Selection Update to all coaches at the 2008 NZ Age Group Championships. That was on 4-8 March, and the posting on the website was about the same time. Then as Mr Rushton explained, at the trials it became apparent that the four fastest swimmers over the 100 metres freestyle were Hayley Palmer, Amaka Gessler, Te Rina Taite and Lauren Boyle. When it was apparent there was only one opportunity left to post a time which allowed qualification, the coaches were spoken with, as to their entering the regional medley relay event. Mr Rushton says that no-one suggested an exhibition 4 x 100 FR team should compete in the medley relay so Ms Taite and Ms Gessler could swim a

freestyle leg. But Ms Palmer and Ms Boyle chose not to swim the medley relay. They could not be compelled. This circumstance is one that may have been at least considered prior to the trials, because it seems odd to this Tribunal that the situation should have developed in this way. In short, SNZ should have ensured all athletes understood well in advance the requirement to requalify at the trials, and there should have been some degree of coordination by SNZ as to the best prospect of achieving that, particularly when a potential team was close to the mark.

### **E. Disposition**

73. The appeal is dismissed, but not without the matters raised by the Appellant having troubled the Tribunal. The complex mix of documents which are to be read by an athlete to understand the entirety of the nomination and selection process could be improved upon, in the Tribunal's view. Selection Updates as late as occurred here may be warranted by particular circumstances, but in general carry risk of late notice and thus challenge. While the appeal is dismissed, the Tribunal considers that whilst she may not have achieved anything for herself, Ms Taite was entirely justified in bringing the appeal to proper scrutiny of the nomination process adopted by SNZ; and for the purpose of future nomination and selection policy processes, and documentation.



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**NICHOLAS DAVIDSON QC (Deputy Chair)**

**For the Tribunal: Timothy Castle**

**Ron Cheatley**