IN THE COURT OF ARBITRATION FOR SPORT

IN THE MATTER	of an appeal against the decision of the New Zealand Sports Tribunal
BETWEEN	**YACHTING NEW ZEALAND**
	Appellant
AND	**ANDREW MURDOCH**
	Respondent
AND BETWEEN	**YACHTING NEW ZEALAND**
	Appellant
AND	**SIMON COOKE & ALASTAIR GAIR**
	Respondents

Panel: Mr Alan Sullivan QC (Australia) President,
Sir Thomas Eichelbaum (New Zealand), and
Mr David A.R. Williams QC (New Zealand)

Counsel: R J Craddock QC, P W David and Ms J Carlyon for Appellant
R Brabant and K Littlejohn for Respondents
Ms G F Weir for interested parties Brown and Hunt

REASONS FOR AWARD RENDERED ON 2 APRIL 2004

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1. INTRODUCTION

1.1 These are the unanimous reasons for the Award we rendered on 2 April 2004 on a "further appeal" to the Court of Arbitration for Sport ("CAS") brought by Yachting New Zealand Inc. ("YNZ"). The appeal was brought pursuant to clause 6.6 of the YNZ Athens Olympic Games 2004 Nomination Criteria Regulation of 1 November 2003 against certain decisions of the Sports Disputes Tribunal of New Zealand ("the Tribunal") in March 2004. (Since the construction and interpretation of the Regulation is an issue on this appeal the relevant part of the Regulation (Part 4) is attached as Appendix 1 ("the Criteria")). On 2 April 2004 this CAS Panel heard the YNZ appeal and, after deliberations at the conclusion of the hearing, it issued the operative part of its Award (CAS Rule 59) allowing the YNZ appeal and restoring the original YNZ nominations.

The YNZ Nominations

1.2 On 28 January 2004 the Nomination Panel for YNZ met to consider nominations. Mr Pepper in the Laser Class and Mr Brown and Mr Hunt in the Men's 470 Class had been the winners in the Second Class Nomination Trial for the respective classes at the Olympic Trials Regatta held at Torbay, Auckland by YNZ on 16-26 January 2004 ("the NZ Class Nomination Trial"). The Nomination Panel, after considering their results of that and other regattas listed in Schedule B to the Criteria formed the opinion that Mr Pepper in the Laser Class and Messrs Brown and Hunt in the Men's 470 would finish in the top 10 in their classes in Athens. They accordingly nominated them to the New Zealand Olympic Committee ("NZOC") to be considered for selection to the Athens 2004 New Zealand Olympic team.

2. THE APPEALS TO THE SPORTS DISPUTE TRIBUNAL OF NEW ZEALAND

2.1 Mr Andrew Murdoch in the Laser Class lodged an appeal to the Tribunal on 12 February 2004. Messrs Simon Cooke and Alastair Gair in the Men's 470 class lodged an appeal to the Tribunal on 13 February 2004 ("the Appeals").

The Establishment of the Tribunal

2.2 It is appropriate at this point to mention the establishment and constitution of the Tribunal. In January 2001, there was a report to the Ministry of Justice from the Sport Fitness & Leisure Ministerial Taskforce. It recommended the

establishment of an agency called Sport and Recreation New Zealand and also it further recommended that the Ministry of Justice:

> "establish a Sports Disputes Tribunal which will: have a primary focus on national sport to assist National Sports Organisations to avoid lengthy and costly legal battles; ensure quality and consistent decision making for athletes in New Zealand sport; and credibility to the operation of elite sport in New Zealand and provide for appeals to the Court of Arbitration for Sport."

In August 2001 the Transition Board of Sport and Recreation New Zealand commissioned a review to determine if there was a need for a sports tribunal in New Zealand and if so, to determine how it could be established. The Review into the Establishment of a Sports Disputes Tribunal in New Zealand concluded there was a need for a Sports Disputes Tribunal in New Zealand.

2.3 In October 2002 the Sport and Recreation New Zealand Act was passed, establishing an agency called Sport and Recreation New Zealand Limited. Under section 8 of that Act, one of the functions of the Agency was to "facilitate the resolution of sports disputes between persons and organisations involved in physical recreation and sport". In accordance with that function and as recommended by the Review, the Sports Disputes Tribunal of New Zealand was established and its Rules were promulgated and came into force on 19 May 2003. We understand that the appeals to the Tribunal against the YNZ Panel nominations were the first matters heard and determined by the Tribunal.

Procedure for Tribunal Appeals

2.4 The procedure for appeals under the Criteria is set out at clause 6, Schedule D to the Criteria. Schedule D is attached as Appendix 2. It provides for an appeal to the Tribunal and for a further appeal to CAS. It is provided in Clause 6.5(e) of Schedule D that the appeal shall be determined in accordance with the Rules of the Sports Disputes Tribunal. Clause 6.5(f) provides that the decision of the Tribunal will be binding on the parties and subject to any right of review and/or appeal as set out in the Rules of the Tribunal and the Criteria, no party to the appeal may institute or maintain proceedings in any Court or Tribunal other than as specified in the agreement.

2.5 The available grounds of appeal to the Tribunal are set out in Clause 6.3 of Schedule D as follows:

"(a) The applicable Nomination Criteria was not properly followed and/or implemented

(b) The Athlete was not afforded a reasonable opportunity by [Yachting NZ] to satisfy the applicable Nomination Criteria; or

(c) The decision was affected by actual bias

(d) There was no material on which the nomination decision could reasonably be based."

The Grounds of Appeal against the YNZ Nominations

2.6 The grounds of each appeal, which were in virtually identical terms in both cases, were set out at length. They provided in material part as follows:

"(a) The Nomination Panel were required to be satisfied that the participant who obtained the highest placing in the Laser Class Nomination Trial met the Overall Criteria specified in Clause 4.7 of the YNZ Nomination Criteria.

(b) The Overall Criteria provision was not properly followed and/or implemented.

Particulars

(i) The Nomination Panel did not properly understand and apply the requirement of 4.6.1 of the Overall Criteria which stated that the Nomination Panel *must be satisfied* that each Participant and/or Crew *will*, in its opinion, achieve a top 10 placing in their class at the Games.

(ii) A correct interpretation and/or implementation of the Overall Criteria restricts the consideration of results of the participant being considered for nomination to only the regattas set out in Schedule B to the YNZ Nomination Criteria ...

(iii) A correct interpretation and/or implementation of the Overall Criteria in Clause 4.7, required the Nomination Panel to use all of the results of the regattas set out in Schedule B when deciding if they were satisfied a top 10 (or top half of the fleet) placed will be achieved at Athens by the nominated athlete, rather than basing that assessment on some of those regatta results being regattas where places within or close to the top 10 placings was achieved by Hamish Pepper.

(iv) The provisions of the Overall Criteria do not allow for the Nomination Panel to have regard to individual races within one or more of the regattas, only the overall regatta result.

(c) The Appellant has not been afforded a reasonable opportunity by YNZ to satisfy the applicable nomination criteria.

Particulars

(i) The YNZ Nomination Criteria provided that if the Nomination Panel was not satisfied that the participant which obtained the highest placing in the Laser Class Nomination Trial met the overall criteria specified in Clause 4.7, Clause 4.3.2A and Clause 4.7 (to the extent applicable) would apply in determining the nomination for the Laser Class.

(ii) Clause 4.3.2A provides that the Nomination Panel, if invoking that clause shall request the 1st participant in the Laser Class to participate in the 2004 ISAF Qualification Regatta and may also request the 2nd participant and the 3rd participant in the Nomination Trial to participate in the 2004 ISAF Qualification Regatta. The decision whether or not to nominate an athlete to NZOC from the Laser Class for the Athens Olympics would then be made after consideration of the results achieved at that regatta and application of the Overall Criteria in Clause 4.7.

(iii) By erroneously determining that the 1st placed participant in the Nomination Trial achieved the Overall Criteria in Clause 4.7, the Appellant (being the 3rd placed participant in the Nomination Trial has been prevented from securing nomination in accordance with the procedures set out in Clause 4.3.2A.

(d) There was no material available to the Nomination Panel on which the nomination decision could reasonably be based.

Particulars

(i) If the Nomination Panel had correctly applied the provisions of Clause 4.7 of the YNZ Nomination Criteria, it should have considered the regatta results only and not the results of individual races in a regatta.

(ii) Only the regatta results of regattas listed in Schedule B could be considered.

(iii) In considering whether the Overall Criteria could be satisfied, the Nomination Panel was required to consider all of the results attained in those Schedule B regattas the 1st placed participant competed in, and in so doing could not discount or put to one side those results which did not show the capability of a finishing result at the Athens Olympics of 10th or better (or in the top half of the fleet) and consider only those regatta results which in the Panel's opinion showed that capability.

(iv) In considering (overall) the material available as to the 1st participant's results in those Schedule B regattas, the Panel was required in order to be satisfied that the Overall Criteria could be met, to have regard to:

- the size of the fleet taking part in each particular regatta

- the quality of the fleet (by reference to ISAF World Rankings and recent performances of participants in the Class World Championships) and the participant's relative performance in that regatta to other participants ISAF ranked 10th or better or otherwise by virtue of a top 10 finish in the most recent World Championships for the Class, within the top 10 participants in the regatta.

(e) The results attained by the participant that has been nominated in all of those Schedule B regattas he competed in, giving appropriate weighting to regatta results to recognise the size and quality of the fleet, are such that no reasonable Nomination Panel could have concluded that the Overall Criteria set out in Clause 4.7 of the YNZ Nomination Criteria were met."

2.7 All appellants sought cancellation of the relevant decisions of the panel and a direction to the Nomination Panel that the provisions of Clause 4.3.2A were to be invoked and the Nomination Panel was to request the 1st, 2nd and 3rd placed participants in the Laser and Men's 470 Class Nomination Trials were to participate in the 2004 ISAF Qualification Regatta.

2.8 The Tribunal heard the appeals on 15-16 March 2004. It considered its decision overnight and delivered its decision orally on 17 March 2004. It provided its written decision on 19 March 2004.

3. THE DECISIONS OF THE TRIBUNAL

General Matters

3.1 The Tribunal first dealt with YNZ's objection to jurisdiction based on the wording of Clause 10.1 and Clause 6.3 of the Criteria. YNZ submitted that the Tribunal had no jurisdiction to hear the appeals of Mr Murdoch, Mr Cooke and Mr Gair because under those provisions an appeal by a sailor is against "the nomination or non-nomination" to the New Zealand Olympic Committee and the appeals in question were not against the appellant's "nomination or non-nomination". The Tribunal did not accept this argument. It said that it was fundamental that only one sailor or crew could represent New Zealand in any class at the Olympics. In the Tribunal's view, the words "against their nomination or non-nomination" must be construed broadly and include a sailor who has not been nominated because another competitor has in fact obtained the nomination (paragraph 18). The Tribunal considered that the construction urged upon it by YNZ would effectively deprive the appeal provisions of significant effect. Appeal rights would be restricted in a manner

which could not have been contemplated by YNZ and would run counter to the clear intention of that body to provide disaffected sailors with a proper, effective and fair right of appeal (paragraph 21).

3.2 The Tribunal then turned to the substantive grounds of appeal and offered observations on the role of the Tribunal. It noted (paragraph 33) that it was common ground between all parties that it was not the role of the Tribunal to substitute its views for those of the Nomination Panel on the merits of the decision as to whether the nominees would or would not achieve a top 10 placing in their class at the Olympics. The limited grounds of appeal set out in the Criteria were constructed in such a way as to direct the Tribunal's attention to matters of process and procedure. This was reinforced by the remedies which might be provided by the Tribunal if it allowed an appeal. The Tribunal then stated:

> "34. Mr David submitted that the members of the Nomination Panel were appointed by reason of their experience and expertise and for the purpose of bringing those qualities to bear on the nomination issue. It is fully accepted by the members of the Tribunal that they do not have the necessary expertise to "second-guess" the views of those who have this experience and expertise.
>
> 35. In this regard, the approach reflected in the appeal provisions and in the Tribunal's Rules is consistent with the approach consistently adopted in the Court of Arbitration for Sport (to which a limited right of appeal lies from this Tribunal) as demonstrated in such cases as CAS 96/153, *Watt/Australian Cycling Federation and Tyler-Sharman*; CAS 2000/A/260, *Beashel and Czislowski/Australian Yachting Federation Inc*; and CAS2000/A/284, *Sullivan/The Judo Federation of Australia Inc, The Judo Federation Inc Appeal Tribunal and Raguz*, to which we were referred. To adopt a similar observation in the *Watt/Tyler-Sharman* case, a tribunal such as this should be careful not to readily trespass into the selection process of a nomination panel which clearly embraces a wealth of experience and expertise it cannot possibly share."

3.3 The Tribunal then passed to its decisions in respect of the appeals and set out the unanimous views of its members. It began by making some preliminary observations (paragraphs 37 - 39). It said it found the resolution of three appeals "extremely trying" because of the importance of the issues to the sailors. It said it would fully appreciate the acute disappointment of those who did not obtain nomination. As a final preliminary observation the Tribunal said it was:

"... sympathetic to YNZ's attempt to provide a nomination process which is effective and fair to those sailors bent on securing nomination for the Games. However, while YNZ has endeavoured, and no doubt will continue to endeavour, to provide a process which is effective and fair, grievances are inevitable. Because we are dealing with a human activity it is equally inevitable that some of those grievances will prove to be justified. Such grievances cannot in fairness be ignored. The nomination decisions are too critical to those that are affected by them. If they are not vented before this Tribunal, those grievances, or at least some of them, will no doubt be pursued in review proceedings in the High Court. The resulting delay and high costs would be prohibitive and in no one's interest. YNZ is therefore to be commended for promoting an appeal process which is relatively accessible to interested parties and which will ensure that nomination decisions are made as promptly as possible and with fidelity to the applicable Nomination Criteria."

3.4 The Tribunal then passed to discuss the Criteria. Having considered the relevant provisions it was called upon to reconcile the wording of Clause 4.3.2(b) and the wording of Clause 4.7.1. It noted that under Clause 4.3.2(b) a panel was obliged to appoint the participant or crew who obtained the highest placing in the New Zealand class nomination trial "unless ...

> (b) The Nomination Panel considers that the Participant or Crew would not achieve the overall criteria specified in Clause 4.7 ..."

(Underlining of "unless" in original)

3.5 Clause 4.7 reads as follows:

> **"4.7 Overall Criteria**
>
> 4.7.1 In considering nominations for all Classes specified in clauses 4.3 to 4.5 inclusive, the Nomination Panel must be satisfied that each Participant and/or Crew will, in its opinion,
>
> (a) achieve a top 10 placing in their Class at the Games, or,
>
> (b) if less than 20 competitors or crews (as the case may be) in that Class at the Games, will achieve a place in the top half of the fleet in their Class at the Games.
>
> 4.7.2 Subject to clause 4.3.2A, the assessment as to whether the placing in clause 4.7.1 can be achieved, will be determined by the Nomination Panel considering the results of Participants and Crews in their relevant Classes at:
>
> (a) the regattas set out in **Schedule B** and,
>
> (b) if the Nomination Panel considers necessary, or as set out in clause 4.3.2A, requesting the participation of the relevant Participants and/or Crews in the 2004 ISAF Qualification Regatta, and assessing their results at such regatta."

3.6 It can be seen that clause 4.7.1 requires the panel to be satisfied that the participant or crew "will, in its opinion, (a) achieve a top 10 placing in their class at the Games". The Tribunal rejected the contention that the negative wording of Clause 4.3.2(b) was less stringent than Clause 4.7.1 and, if met, did not require or permit the panel to proceed to consider Clause 7.1 at all (paragraph 33).

3.7 The Tribunal entertained no doubt about the critical function of Clause 4.7 which it held was a dominant provision (paragraph 50). It said of this clause:

> "50. The Tribunal entertains no doubt about the critical function of clause 4.7. It is described as the "Overall Criteria" and is repeatedly referred to in the other clauses setting out the Nomination Criteria. It is a dominant provision, and for that reason the Tribunal has given close attention to its meaning. We believe that the requirement that the Nomination Panel must be satisfied that the participant or crew will, in its opinion, achieve a top 10 placing at the Games can fairly be described as a stringent requirement. The words "must be satisfied' and "will achieve" indicate this stringency. In context, the insertion of the words "in its opinion" does not add a great deal, if anything, to the requirement that the Panel "must be satisfied". It cannot legitimately be anyone else's opinion, and the standard is still a level of conviction which would meet the requirement that the Panel "must be satisfied' that the sailor "will achieve" the top 10."

3.8 The Tribunal then noted that Clause 4.7.2 set out how the panel was to assess whether the top 10 placing would be achieved. It considered that Clause 4.7.2 circumscribed the criteria to be taken into account in making the 4.7.1 assessment (paragraph 51).

3.9 The Tribunal considered that the stringency of the 4.7.2 requirement was intended. It held that it both defined and constrained the scope and extent of the subjective evaluation which is introduced into the Criteria (paragraph 52). It said it followed from this perception that the panel could not neglect or depart from the terms or stringency of the requirements of Clause 4.7 although it acknowledged that the panel must by implication be vested with a latitude as to what it might properly consider under the clause. It did not explain the route by which such latitude arose. In respect of the top 10 requirement the Tribunal held that it could not be satisfied without recourse to "hard evidence"; that is, a proper consideration of the result of the regattas set out in Schedule B.

3.10 The Tribunal said it was fully aware from the evidence that YNZ placed considerable stock on the fact that the criteria was essentially a first past the post system but considered the "first past the post system" could not be permitted to dilute the terms or stringency of the 4.7 requirements. Speculation, unverified assumptions, and optimism were excluded. Only hard evidence of a kind contemplated in Clause 4.7.2 could support the panel's conviction that the sailors would finish in the top 10. Their experience and expertise was to be brought to bear in that context and it was acknowledged that some latitude flowed from the fact that the panel's opinion was necessarily predictive (paragraphs 54-55).

3.11 The Tribunal then passed to discuss certain concepts or notions averted to during the course of the hearing in order to "bring out the essential meaning of 4.7". It discussed matters such as the capability of being placed in the top 10, the potential of a participant or crew to reach the top 10, and the consideration that the participant could be expected to improve their performance by the date of the Olympics. The Tribunal acknowledged that these matters were relevant but said they should not be over emphasised (paragraphs 56-59).

3.12 It concluded this section of its decision by saying that the examples it had discussed confirmed that any factor which involved an element of speculation or was based on an unverified assumption or which reflected a benign measure of confidence or optimism in the sailor's ability was clearly outside the latitude which the panel possessed (paragraph 60).

3.13 The Tribunal then discussed at some length the provisions of Clause 4.7.2 and the manner in which the assessment under Clause 4.7.1 must be determined. It decided that, although not expressly mentioned in Schedule B, it was permissible to have regard to the World Championships (paragraph 63).

3.14 It also held that the panel could look at the participant and crews overall result in the regatta and also have regard to the results in individual races in those regattas but the individual results should not be over emphasised. It also considered the weight to be given to qualifying races in gold or final fleet races (paragraphs 64-66). It concluded by saying in paragraph 67:

> "Finally, the Tribunal does not consider that clause 4.7 mandates any particular method or approach to the question of determining whether the Nomination Panel is satisfied that the participant or crew will achieve a top 10 placing. Clearly the methodology adopted must be sound and consistent with the Panel's task under clause 4.7. It must be sufficient to enable the Panel to discharge its responsibilities under that clause. In some cases, such as that of Sarah Macky, little in the way of analysis or methodology would be required. Yet in other cases the Nomination Panel may need to undertake a closer analysis and adopt a more sophisticated methodology in order to ensure that it can properly determine whether the criteria in clause 4.7 will be met."

The Decision of the Tribunal on the Murdoch Appeal

3.15 The Tribunal then turned to the appeal by Mr Murdoch. The Tribunal decided that it was impossible to reconcile the nomination of Mr Pepper with the Tribunal's interpretation of the Criteria. It said that the evidence on which the nomination was based was "minimal" (paragraph 83). The "hard facts" available under Clause 4.7.2 left little scope, if any, for the exercise of the Nomination Panel's experience and expertise. The Tribunal described two of the regattas considered by the selectors as "virtually worthless" and described Mr Pepper's performance in other regattas as "hardly impressive" (paragraph 84).

3.16 The Tribunal held that an analysis of the Nationals (a designated schedule B race) fell short of establishing with "any degree of certainty" that Mr Pepper would obtain a top 10 placing at the Athens Olympics (Paragraph 84). The Tribunal considered that there was an excessive reliance on individual races and that the Nomination Panel was also clearly influenced by Mr Pepper's potential and their belief that he would improve by the time of the Olympics (paragraph 89). The Tribunal considered that the Nomination Panel "improperly used factors" such as Mr Pepper's potential and that, at the time of the decision the Panel could not be satisfied on the material available that Mr Pepper would finish in the top 10 (paragraphs 85-86).

3.17 The Tribunal therefore cancelled the nomination of Mr Pepper and issued a direction under the power given in Clause 12.11.1(b)(ii)(b) of the Tribunal Rules that YNZ invoke the provisions of clause 4.3.2(a) of the nomination criteria and request that the first, second and third placed participants in the Olympic trials of the Laser class (ie, Messrs Pepper, Murdoch and Mr Nick Burfoot) participate in the 2004 Laser World Championships in Turkey in May 2004, with YNZ to then consider the nomination in terms of that clause (paragraph 89). It said it took this step because "the facts in this case and

the degree of departure from the Nomination Criteria are exceptional" and "it will also bring this matter to finality".

3.18 This Panel notes in passing that the opening words of 12.11.1(b)(ii) speak of "conclusively determining the issue of selection". The direction given by the Tribunal did not conclusively determine the issue of selection. As the Tribunal itself said, "We wish to emphasise that the Tribunal is not exercising a power of nomination or selection." The question which immediately arises is whether the Tribunal had the power to make the direction it did. Not surprisingly this direction came under heavy attack by counsel for YNZ in the hearing before us.

Decision of the Tribunal on the Cook and Gair Appeal

3.19 The appeal by Mr Cooke and Mr Gair was described as "more difficult". However, the Tribunal held that the Nomination Panel's analysis of Andrew Brown and Jamie Hunt's performances revealed "a number of shortcomings" in the justification of the YNZ nomination panel that they would finish in the top 10 at Athens. Individual races were considered in a way which suggested that the panel lost sight of the primary focus under clause 4.7.2. The same shortcomings in applying clause 4.7 were said to be present, although not nearly so marked (paragraph 91). The Tribunal said it was left with the impression that the Nomination Panel was overwhelmed with the notion that the Criteria were essentially a "first past the post" system and that the terms and stringency of 4.7 had been diluted. On this appeal the nomination decision was cancelled and the Nomination Panel directed to reconsider the nomination "in the light of interpretation of this decision" and having regard to any new material that has emerged in the course of the hearing. No detail was specified (paragraph 93). The Tribunal said that "the extreme step of issuing a direction" was not appropriate in this case.

4. PROCEDURAL MATTERS

Consent to Jurisdiction

4.1 At a preliminary conference (by telephone) convened by this CAS Panel on 30 March 2004 the parties agreed that the appeals brought by YNZ were a referral from the Criteria pursuant to clause 6.6 of Schedule D and that CAS had jurisdiction to hear the appeals. Clause 6.6.2 provides as follows:

"The sole grounds for any appeal to CAS against the decision of the Sports Disputes Tribunal are that:

(a) There was a breach of the rules of natural justice by the Sports Disputes Tribunal; or

(b) The decision of the Sports Disputes Tribunal was otherwise wrong in law."

YNZ did not assert a breach of Clause 6.6.2(a).

4.2 The parties agreed that the arbitration would be conducted by CAS according to the Code of Sports-related Arbitration and in particular the CAS Appeal Arbitration Procedure.

Grounds of Appeal against Tribunal Decisions

4.3 On this appeal YNZ contended in its Written Outline that:

"(a) The Tribunal was wrong to conclude, on the proper interpretation of the YNZ Criteria, that there was jurisdiction for it to hear the appeals by Messrs Murdoch, Cooke, and Gair.

(b) The Tribunal, while professing to review interpretation and process in accordance with its limited role, cancelled the nominations by the Panel after a process in which it breached fundamental legal principle, and substituted its view on the merits of the decisions under review for those of the expert selectors.

(c) The Tribunal, while adopting a "purposive" approach to some aspects of the Criteria, adopted an unnecessarily restrictive and stringent approach to the requirements of 4.7.

(d) Even on its own interpretation of the Criteria, the Tribunal became involved in weighing matters which were properly for the expert selectors. On the proper interpretation of the Criteria the matters found by the Tribunal to be potentially relevant were entirely for the Panel to consider.

(e) In any event, the Tribunal should not have removed the discretion from the Panel under 4.3.2A on the Murdoch appeal as regards the second and third place getters at the Trials."

4.4 For convenience we shall refer below to ground (a) as the primary jurisdiction point, grounds (b) and (d) as the role of the Tribunal point, ground (c) as the construction point, and ground (e) the relief point.

Applicable Law

4.5 The parties further agreed that the law of the merits, being the substantive law of the disputes, was the law of New Zealand in terms of CAS Rule 58.

The Panel notes in passing that it is of course permissible when applying New Zealand law to refer to the decisions of relevant overseas Courts and Tribunals which reflect principles of law which apply in New Zealand or which are plainly relevant and helpful in ascertaining or applying New Zealand law. In this respect the Panel considers that Australian decisions may often be of assistance. First, there is a considerable body of decisional law in Australia in the amateur sports law field especially as a result of the 2000 Sydney Olympic Games. The Tribunal cited some of the Sydney Olympics CAS cases in paragraph 35 of its decision along with the important decision of the New South Wales Court of Appeal in *Raguz v Sullivan* [2000] NSWLR 236; [2000] NSWCA 240. Secondly, in the field of professional sport, there is a trans-Tasman market and, as with Australasian trade practices laws, there is every reason to harmonise legal principles applicable in both countries: see *Dominion Rent A Car Ltd v Budget Rent A Car Systems* (1970) Ltd [1987] 2 NZLR 395, 407 (CA) and *Auckland Regional Authority v Mutual Rental Cars Ltd* [1987] 2 NZLR 647, 669-670. Nevertheless, it is clear that where there is applicable New Zealand authority, it should be accorded primacy and where Australian authority is cited this Panel needs to be satisfied that it is not materially different from New Zealand law.

Relevance of Contract Law

4.6 Clause 3 of the Criteria provides in relevant part as follows:

> "3. **PROCESS FOR NOMINATION**
>
> 3.1 **Pre-Nomination Conditions:** Before any sailor can be considered for nomination by Yachting NZ he/she must first:
>
> (a) Satisfy Yachting NZ's Chief Executive Officer that he/she meets the ISAF eligibility requirements under the ISAF Regulations (see **Schedule C** with extract from ISAF Regulations attached) and the IOC Charter (see **Schedule C** with extract from IOC Charter attached);
>
> (b) Complete, sign and return to the Chief Executive Officer the Yachting NZ Application Form attached as **Appendix 1** at the same time as the NZOC's Athlete Application Form (referred to in sub-clause (d) below);
>
> (c) Complete, sign and return the NZOC's Athlete Application Form attached as **Appendix 2** in the manner described in clause 3.2 of this Regulation; and
>
> (d) Complete, sign and return the NZOC's Athletes' Agreement in the manner described in clause 3.4 of this Regulation.

3.2 **NZOC Athlete Application Form:** The NZOC Athlete's Application Form must be completed, signed and returned ...

...

3.4 **NZOC Athlete's Agreement:** Every sailor who completes the NZOC Athlete's Application form and is certified by Yachting NZ under clause 3.3, must also fully complete, sign and return to the NZOC the relevant pages of the NZOC Athletes Agreement. ...

3.5 The Athletes Agreement once signed will only come into force if, and when, the sailor is selected by the NZOC to the New Zealand Team as set out in the Agreement."

4.7 The Athlete Application Form which is Appendix 2 to the Criteria states that:

"In requesting that I be considered for nomination and selection to the Team, I acknowledge, agree and declare that:

(a) I have been provided with access to a copy of the NZOC Nomination and Selection Criteria for the 2004 Olympic Games (including the Nomination Criteria for my sport) via the NZOC website www.olympic.org.nz. I agree to comply with and be bound by the terms of NZOC Nomination and Selection Criteria;

(b) I will abide by the terms and conditions of the NZOC Nomination and Selection Criteria and in particular acknowledge my right of appeal and the process for such appeal in relation to my nomination/non-nomination or selection/non-selection to the Team. I acknowledge that the process for such appeal overrides any right of appeal I might otherwise have had under the rules, policies, regulations or by-laws of Yachting NZ;

(c) If Yachting NZ Certifies this Form as correct, I will be required to complete, sign and return to the NZOC the relevant page(s) of an Athletes Agreement. I also understand that this will only come into force if and when I am selected by the NZOC to the Team."

In *Raguz v Sullivan* [2000] NSWLR 236; [2000] NSWCA 240 it was held that similar documents signed by athletes and the Judo Federation of Australia constituted an interlocking contract between the parties. The Court found that by signing individually a number of nomination forms and other documents, a framework of mutual promises had been entered into which bound all to one another. One of the mutual promises was to submit to arbitration to the exclusion of other avenues of legal recourse. In our opinion the same contractual analysis applies in the present case. Hence our consideration in paragraphs 5.12 – 5.15 below of established principles of contractual interpretation.

Proceedings in Public

4.8 In view of the fact that the proceedings before the Tribunal were held in public and its decision publicly notified, the Panel and the parties also agreed that, notwithstanding CAS Rule 43, the proceedings of this Appeal Panel would be open to the public and its Award made public. As to the question of media representation and presence at the hearing it was agreed that the general practice of the New Zealand High Court in such matters would be followed.

Other Procedural Matters

4.9 The Panel were anxious to ensure that any affected parties were notified of the proceedings. Accordingly, the parties undertook to serve a copy of the Order of Procedure on the interested parties and their counsel (as listed at the beginning of the decision of the Tribunal). A memorandum of counsel was received on 1 April 2004 confirming that service had been effected. Ms G F Weir appeared for Messrs Brown and Hunt at the hearing and made submissions on their behalf. A memorandum was also received from Mr Nick Burfoot.

4.10 In the memorandum of 1 April 2004, counsel also confirmed their agreement to the use on this appeal of any transcript of oral evidence taken before the Tribunal. Counsel also provided to the Panel a memorandum dated 29 March 2004 from the Chair of the Tribunal explaining some difficulties with transcription of some parts of the cross-examination. The Panel appreciated the courtesy of this memorandum, but there were no resultant problems since, as the Chair pointed out in the memorandum and as was made clear during the hearing before this Panel, no questions concerning the accuracy of any of the affidavits arose in the case.

4.11 The Panel received a written Outline of Case on Appeal from the Appellants on 30 March 2004 and a written Outline of Reply for the Respondents on 1 April 2004 (transmitted on 31 March 2004). At the hearing on 2 April 2004, there were comprehensive oral submissions from Counsel.

5. PRIMARY JURISDICTION

5.1 We now rehearse in greater detail the issue summarized in paragraph 3.1 above. The Criteria made the following provision for appeals:

> "10.1 Any participant who has satisfied clause 3 and is aggrieved by the Nomination Panel's decision not to nominate him/her or their Crew, may appeal the decision of the Nomination Panel in accordance with the NZOC Nomination Criteria and Selection Criteria (see extract on appeals in **Schedule D**)"

5.2 Clause 3 sets out the conditions to be satisfied before any sailor can be considered for nomination, which include the signing of an Athlete Application Form.

5.3 Schedule D ("Appeals") is an extract from the NZOC Nomination Criteria and Selection Criteria, relating to all sports covered by the NZOC. To the extent relevant, Schedule D provides as follows ("NF" being construed as meaning Yachting NZ):

> **"Appeal Procedure**
>
> 6.1 Any Athlete who applies to be nominated and selected to the Team and who completes and returns by the due date (or any other date agreed by the NZOC) to the NF an Athlete Application Form (which is certified by the NF), may appeal their nomination or non-nomination by the NF or their selection or non-selection by the NZOC, in accordance with the procedures set out in this document ("an Appeal").
>
> 6.2 This appeal procedure applies in lieu of the application of any rules, policies, regulations, bylaws or other appeal requirements of any NF which might otherwise apply to an appeal of the nature described in clause 6.1."

Clause 6, containing the grounds on which an appeal may be based, has already been set out at paragraph 2.5 above.

5.4 As is obvious, in some respects the two provisions quoted are inconsistent. We are unable to agree, as Ms Weir argued, that this conflict should be resolved on the basis that Schedule D is a general provision whereas Clause 10.1 deals with the specific case. Clause 1.3 of the Criteria provides:

> "This Regulation forms part of the NZOC's Nomination Criteria and Selection Criteria and to the extent of any inconsistency between this Regulation and that document, the latter will prevail."

Given the preferment conferred on Schedule D by Clause 6.2, Clause 1.3 and Clause 10.1 itself, the appropriate course is that this Panel should consider the jurisdiction issue in terms of the NZOC Nomination Criteria and Selection Criteria. Appellants need to bring themselves within clause 6 of the latter.

5.5 Before the Tribunal, and again in its case before us, YNZ argued there was no jurisdiction for the appeals, since neither appellant was appealing their nomination or non-nomination. Not having qualified either through a First Class Nomination Trial result, or by obtaining highest placing at the second Class Nomination Trial, they were ineligible for nomination. Since their appeals were not and could not be against their own non-nomination, they could only be regarded as against the nomination of another. The Criteria did not provide for such an appeal.

5.6 The effect of Mr Brabant's submission was that properly construed, the meaning of the expression "An appeal by an Athlete against their nomination or non-nomination to the NZOC by the NF" was that any sailor who took part in the trials and has not been nominated may appeal against the nomination of any sailor who has been nominated. No doubt the submission assumed that the sailor had completed the formalities required for nomination in accordance with Clause 6.1 of Schedule D. In Mr Brabant's contention the expression "their nomination or non-nomination" ought not to be taken literally, and was a shorthand way of expressing the concept for which he argued. As we understood it the submission was advanced as a matter of interpretation rather than on the basis of an implied term, although as Cooke J pointed out in *W R Clough & Sons Ltd v Martyn* [1978] 1 NZLR 313, 317 the two processes tend to merge.

5.7 On this issue, the Tribunal held:

> "...the words "against their nomination or non-nomination" must be construed broadly and include a sailor who has not been nominated because another competitor has in fact obtained the nomination. It is true that the appellants in question do not have a right to be nominated, and if they are to be nominated, will need to be given the opportunity to participate in another regatta. But the fact remains that they are sailors who have **not** been nominated. Mr Brabant gave added force to this view by placing the argument in the context of the ground of appeal contained in Rule 6.3(b) of Schedule D, that is, that the appellants were not afforded a reasonable opportunity to satisfy the applicable Nomination Criteria." (paragraph 18)

5.8 We do not find the reasons given by the Tribunal in this passage persuasive. If an appellant has not been nominated it does not follow he must be appealing against his non-nomination. As the Tribunal acknowledged, neither appellant had a right to be nominated. Thus they could not appeal against their "non-nomination". In ordinary language, in the absence of a right to be nominated it makes no sense to speak of an appeal against non-nomination.

Then, with respect, the argument referred to in the last sentence of the passage is circuitous. The perceived loss of opportunity is the opportunity to participate in the 2004 ISAF Qualification Regatta, which in the end would depend on the discretion of the nomination panel. If there is a right of appeal, and the appeal succeeds, and the appellant is within Clause 4.3.2A(a) of the Regulations (that is, had obtained second or third place in the second Class Nomination Trials) and the Nomination Panel requested the appellant to participate in the 2004 ISAF Qualification Regatta, an appellant would indeed have a further opportunity to satisfy the Nomination Criteria. But if the appellant is unable to bring himself within the jurisdiction for an appeal he has no right to any further opportunity to satisfy the Nomination Criteria and cannot claim to have been deprived of such an opportunity.

5.9 The Tribunal also found support for its conclusion in the wording of the grounds of appeal in paragraphs (a), (b) and (c) of Clause 6.3 of Schedule D. Referring to paragraph (a), that the applicable Nomination Criteria was not properly followed and/or implemented, the Tribunal said it was difficult to envisage how appeals could arise under this paragraph if restricted as YNZ argued. But appellants who were eligible for nomination could appeal against their non-nomination on the basis that the nomination panel had failed to nominate them because the panel had not correctly followed Nomination Criteria.

5.10 The Tribunal also relied on paragraphs (c) and (d), and concluded by saying that YNZ's restricted interpretation would deprive the appeal provisions "of significant effect". However, this seems to beg the question of the definition of the appeal right which the parties intended to confer. Further, it must be borne in mind that the appeal rights conferred by Schedule D are general in nature, being applicable to a number of different disciplines, each (one may assume) with its own set of rules regarding nomination. With yachting, the starting point is a set of Nomination Criteria which (subject to the "extenuating circumstances" provision) are strictly performance based, requiring a competitor (failing qualification through a first Class Nomination Trial result) to obtain highest placing at the second Class Nomination Trial to be eligible for nomination. There is nothing immediately incongruous in limiting the non-nomination appeal right to competitors who were eligible to be considered for nomination but, in the event, were not nominated.

5.11 The Tribunal also placed weight on the use of the word "decision" in paragraphs (c) and (d) ("the nomination decision") but we do not see this as adding anything to the meaning. Whether the appeal is described as against a nomination, or non-nomination, or against the decision making or not making that nomination, does not appear capable of affecting the standing required of the person appealing.

5.12 Since this issue depends upon the true construction of the Criteria which, for the reasons given in paragraphs 4.6 – 4.7 above, form part of the multi-partite agreement between the athletes and YNZ and the NZOC, it is appropriate at this point to discuss the prevailing principles of contractual interpretation under New Zealand law. Under New Zealand law, it is now well established that, for the purposes of construction:-

> "The words used are to be given their natural and ordinary meaning, having regard to what those words as used in a document would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."
>
> (*Mount Joy Farms Limited v Kiwi South Island Co-operative Dairies Limited* (unreported Court of Appeal CA 297-00 6 December 2001 at paragraph 38))

5.13 However, as noted, in the subsequent Court of Appeal decision in *Potter v Potter* [2003] 3 NZLR 145 at 156 - 157 care should be taken in construing the expression "all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" in the passage quoted above. In particular, as pointed out in *Potter v Potter*, it cannot be overlooked that the 'background knowledge' referred to can be relevant only where a number of stringent requirements are satisfied. Four of particular importance are:-

(a) Although a contract is to be interpreted in its factual setting, there is no justification for invoking rules which exist solely to resolve ambiguities in order to create an ambiguity which, according to the ordinary meaning of the words used in the document, is not there;

(b) Extrinsic facts can only be relevant if they are within the mutual contemplation of the parties. Thus, even an objective view of meaning is irrelevant if based on facts within the contemplation of one party alone;

(c) With the exception of known unilateral mistake, non est factum, and rectification, the subjective intentions of the parties are irrelevant; and

(d) Pre-contract negotiations are irrelevant except when they are used for the limited purpose of ascertaining what objectively observable facts, as distinct from intentions, must have been within the contemplation of both parties.

(See *Potter v Potter* at 156 - 157 paragraphs 32 - 34)

5.14 To a similar effect, although, perhaps, with different emphasis and more conservatively phrased (see *Potter v Potter* at 156 paragraph 32) is the decision of the Privy Council in *Melanesian Mission Trust Board v Australian Mutual Providence Society* [1997] 1 NZLR 391 (PC) at 394 - 395 where the Privy Council, on an appeal from New Zealand observed:-

> "The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to agreed to by their contract. Various rules may be invoked to insist interpretation in the event that there is ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail."

5.15 These general principles of construction apply equally in Australia (see, e.g. *Maggbury Pty Limited v Hafele Australia Pty Limited* (2001) 210 CLR 181 at paragraph 11; *Australian Casualty Co Limited v Federico* (1986) 160 CLR 513 at 520 - 521, 525; *Fitzwood v Unique Goal Pty Limited* (2002) 188 ALR 566 at paragraph 47).

5.16 We come back to the basic question of ascertaining the intention of the parties from the words they have used in their contract, considering the words in the context of the contract as a whole. Viewing the plain and literal meaning of the words, it is meaningful to give athletes a right of appeal against their own nomination because they may wish to challenge conditions

that have been imposed (see clause 6.2 of the Criteria); or in some sports, because they wish to contend they have been nominated for the wrong event. As one might expect there is a right of appeal against non-nomination but on the face of the words, the appellant would need to be eligible for nomination. Whether athletes not eligible for nomination should have a right of appeal seems to us to involve an issue of policy. The choice whether to confer a wide right of challenge, or be more restrictive, was for the governing body (here, the NZOC); and on the face of the wording, the decision was to confer only a limited right. It is not difficult to see reasons for such a conclusion; for example, a desire to keep selection processes as free as possible of legal procedures, and the need to achieve finality so that athletes can proceed with their preparation for the Olympics. No doubt there are also arguments for a different view but we have not found any persuasive reason why an expansive interpretation of the appeal right should be preferred when on the face of the wording, there is a contract incorporating a more limited approach.

5.17 Of course the intention of the parties needs to be collected from the whole of the contract; that is, the expressions in issue need to be considered in the total context. However, we do not find anything in the context that points to a wider construction than the plain meaning of the words. Generally, the provisions regarding nomination are precise and prescriptive. Likewise, the provisions governing appeals are detailed and specific. As our summary of Mr Brabant's argument shows, a considerable degree of expansion or implication is needed to make the appeal provision cover the instant case.

5.18 In the Tribunal's perception there was a clear intention on the part of YNZ to provide "disaffected sailors" with a prompt, effective and fair right of appeal. There cannot be any quarrel with prompt, fair and effective, but the expression "disaffected sailors" begs the question, how wide is the circle of the disaffected? The Tribunal further stated:

> "To all intents and purposes, the words "against the nomination or non-nomination" are to be construed as referring to the Nominating Panel's decision. If that construction requires a large and liberal interpretation, so be it." (paragraph 22)

We have difficulties with that approach. First, in a small but significant respect, the Tribunal has misquoted the critical words. The actual wording, "***their*** nomination or non-nomination" (our emphasis) is more difficult to read

as the Tribunal proposed. Further, the language the Tribunal uses is redolent of statutory interpretation. The issue here, as we have pointed out, is the ascertainment of the intention of the parties in a contractual situation. Finally, it is speculative to attribute to the parties to the contract (or even to YNZ alone if, as is not the case, its views alone were relevant) a desire for an expansive right of appeal rather than a restricted one. The expressions used in fact are to be found in a document (that is, Schedule D) issued by the NZ Olympic Committee. As we have already said, whether standing to bring an appeal is to be framed narrowly or broadly involves a matter of policy, and for an adjudicator, the starting point has to be the words used in their ordinary meaning, viewed in the context. There is no tenable basis for concluding that the parties meant the right of appeal to be a good deal broader than they chose to express.

5.19 We add that the critical wording - "... their nomination or non-nomination" - does not appear to be an invention of YNZ, or even of the NZ Olympic Committee. In relation to the Sydney Olympics in 2000 there was litigation regarding the non-nomination of a judoka; see *Raguz v Rebecca Sullivan* [2000] NSWLR 236; [2000] NSWCA 240. As quoted in that decision the appeal provision contained in the contract entered into by athletes referred to "any dispute regarding my nomination or non nomination". The fact that the wording has at least some degree of international provenance supports our belief that an issue of policy is involved in the breadth or otherwise of the framing of the right of appeal.

5.20 The appellants are unable to escape the consequences of the specific nature of the description of the appeal right as being against "their non-nomination". These appeals are not against their non-nomination, but against the nomination of others. We conclude that the Tribunal's finding of jurisdiction was wrong in law. There was no jurisdiction for these appeals.

6. THE CONSTRUCTION POINT – THE ROLE OF THE TRIBUNAL POINT

6.1 The conclusions which we have arrived at in respect of jurisdiction are sufficient to determine these appeals. However, even if we had concluded the jurisdiction matter differently, nonetheless we would have still upheld the appeals on what we have termed the role of the Tribunal point and the construction point (see paragraphs 4.3 and 4.4 above).

6.2 The Tribunal upheld appeals against the Nomination decisions of the Nomination Panel on two bases:-

(a) First on the ground that the Nomination Criteria were not properly followed or implemented by the Panel (see Clause 6.3(a) of Schedule D to the Nomination Criteria and paragraphs 83 - 86, 91 - 93 of the Reasons of the Tribunal);

(b) Secondly, although perhaps less clearly, upon the ground that there was no material upon which the Nomination decisions could reasonably be based (see Clause 6.3(d) of Schedule D to the Nomination Criteria and paragraphs 86 and 91 of the Reasons of the Tribunal).

6.3 As noted in paragraph 4.1 above, the sole ground for the appeal to CAS was that the decisions of the Tribunal were wrong in law. In our view, for the reasons which follow, each of the decisions of the Tribunal was wrong in law because either they involved a misinterpretation or misapplication of the relevant Nomination criteria and/or amounted to an impermissible review of the merits of the decisions of the Nomination Panel.

6.4 For present purposes the crucial provision of the Nomination Criteria is Clause 4.7 which we have set out in full in paragraph 3.5 above. Clause 4.7.2(a) contains an internal reference to Schedule B. So far as presently relevant, Schedule B states the following:-

> **"SCHEDULE B**
> **Clauses 4.6 and 4.7**
> The Regattas which may be taken into account .... in assessing the Overall Criteria (Clause 4.7) are as follows:
>
> **For all classes**
>
> Any ISAF Grade 1 ranking Regattas during the period 1 January 2003 to 31 December 2004 plus any of the following Regattas in respect of each class:
>
> (i) For 70 men
>
> | | |
> |---|---|
> | 2003 Sydney International Regatta | December 2003, Sydney |
> | 2004 Sail Auckland Regatta | February 2004, Auckland |
> | 2004 Class Nationals Regatta (if held separately to Sail | |

	Auckland Regatta)	February 2004
	....	
(vi)	Laser	
	2003 Sydney International Regatta	December 2003
	2004 Sail Auckland Regatta	February 2004, Auckland
	2004 Class Nationals Regatta (if held separately to Sail Auckland Regatta)	February 2004, Auckland "

6.5 We have noted in paragraphs 3.4 - 3.6 above how the Tribunal dealt with the difference in language between Clause 4.7 and Clauses 4.3.2 and 4.3.2A (see also paragraphs 48 - 50 of the Tribunal's Reasons). We agree with the Tribunal's approach in this regard.

6.6 In our view, the Panel had to be positively satisfied that the criteria set out in Clause 4.7 were met notwithstanding that Clauses 4.3.2 and 4.3.2A, read in isolation, might suggest that trial winners were to be nominated **unless** the Nominal Panel considered those trial winners would **not** achieve the Overall Criteria specified in Clause 4.7.

6.7 Exhibit 1 (being the 'Summary Notes' of the Meeting of the Nomination Panel held on 24 January 2004) and the Affidavits of the members of the Nomination Panel confirm, in our opinion, that the Nomination Panel approached its task in the knowledge that the overall criteria set out in Clause 4.7 had to be satisfied by the relevant trial winners. Thus, for instance, the last sentence of the third paragraph of Exhibit 1 notes the advice given to the Nomination Panel at their meeting that they "must ensure each trial winner participant/crew satisfies the 'overall criteria' in each case".

6.8 Of central importance for the present appeal is the proper construction of Clause 4.7 of the Nomination Criteria. Questions relating to the construction of a contract are questions of law and the proper law of this contract is the law of New Zealand. The New Zealand principles of contractual interpretation have been discussed in paragraphs 5.12 – 5.15 above.

6.9 In accordance with what was stated by the Privy Council in the *Melanesian Mission Trust Board* case *supra* at 394 - 395, Clause 4.7.1 of the Nomination Criteria cannot be read in isolation from Clause 4.7.2 which is in mandatory

terms. Clause 4.7.2 requires the Panel to form its opinion for the purposes of Clause 4.7.1 by **considering** the results of the trial winner at, relevantly, the Regattas set out in Schedule B. Clause 4.7.2 specifically contemplates the Panel making an **assessment** of the results achieved at those Regattas.

6.10 Clause 4.7.2 is silent as to whether the considerations or factors there listed are the sole or exclusive ones which can be taken into account by the Panel for the purpose of forming the requisite opinion pursuant to Clause 4.7.1.

6.11 Whether Clause 4.7.2 is intended to state exhaustively the relevant factors or considerations to be taken into account or not is obviously a question of construction to be determined according to the general principles of construction to which we have already referred (see, e.g. *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39 - 40; *Sykes Lanham, Tracey & Esser, General Principles of Administrative Law*, 4th Ed (Butterworths 1997) at p119 (paragraph 1010)). Although *Peko-Wallsend* is an administrative law case nevertheless in the field into which we are venturing, administrative law decisions provide very useful guidance, by way of analogy, to the correct approach to be taken (see, for instance, *Beloff 'The Impact of Public Law on Sports Law'* (2003) Journal of the Commonwealth Lawyers' Association 51 - 54).

6.12 Bearing in mind the construction principles to which we have referred, the actual language employed in Clause 4.7.2, the scheme for nominations set out in Clauses 4.3 - 4.9 and in the context of looking at the contract comprised by the Nomination Criteria as a whole, we conclude that, as a matter of construction, the considerations or factors set out in Clause 4.7.2 of the Nomination Criteria were intended to be stated exhaustively. The consequence is that it would have been impermissible for the Panel to have regard, **outside the context of consideration and assessment of the Schedule B Regatta results**, to factors or considerations other than those specified in Clause 4.7.2.

6.13 We have emphasised words in the preceding paragraph deliberately. Obviously in **considering** the results in the specified Regattas for the purposes of Clause 4.7.2 in order to form the **assessment** required the Panel needed to have regard to the relevant circumstances in which those results were achieved. As we will explain in more detail below, having regard to such circumstances and other pertinent matters for the purposes of

considering the results in the specified Regattas does not mean that the Panel infringed the obligation only to have regard to the matters specified in Clause 4.7.2.

6.14 Although there appear to be some indications to the contrary (see, e.g. paragraphs 53 - 59 of the Reasons of the Tribunal) overall, in our opinion, the Tribunal correctly regarded the considerations or factors listed in Clause 4.7.2 as the sole ones to which the Nomination Panel was entitled to have regard, that is an exhaustive list of such considerations (see, e.g. paragraphs 60 - 62, 73, 85 of the Tribunal's Reasons). However, we consider that the Tribunal took a too restricted view of what matters the Nomination Panel were entitled to take into account in considering, on an exclusive basis, the Regatta results set out in Schedule B.

6.15 One Regatta which is not expressly listed in Schedule B is the 2003 World Championships. Like the Tribunal (see paragraph 63 of its Reasons) we regard this as a startling and inexplicable omission. It is hard to imagine a more reliable or valuable measuring stick than the results at the 2003 World Championships and this appears to be reflected by the prominence attached to the World Championship results in the Nomination Criteria (see Clause 4.2 of the Nomination Criteria).

6.16 Conformably with ordinary principles of contractual construction, words may generally be supplied, omitted, or corrected, in an instrument where it is clearly necessary to do so in order to avoid absurdity or inconsistency or to correct an obvious mistake (*Fitzgerald v Masters* (1956) 95 CLR 420 at 426 - 427, *Westpac Banking Corporation v Tanzone Pty Limited* [2000] NSW CA 25 at paragraphs 18 – 21, 37; *Homburg Hautimport BV v Agrosin Private Limited* [2003] 2 WLR 711 at 729 (paragraph 53), 722 (paragraph 23); see also *Investors Compensation Scheme Limited v West Bromich Building Society* [1998] 1 WLR 896 at 912 - 913; *Glynn v Margetson* [1893] AC 351).

6.17 Looking at the priority which the Nomination Criteria attached to performance of the World Championships, the obvious status of those Championships and their seemingly great relevance to any Nomination decision, it is plain to us, as it was to the Tribunal, that they were mistakenly omitted from Schedule B. Having regard to the principles of construction to which we have just referred, we consider that the Tribunal was correct to read Schedule B as if it included a reference to the World Championships.

6.18 This conclusion however does not, in any way, detract from the reasoning which otherwise suggests that the considerations or factors listed in Clause 4.7.2 are to be construed as being an exhaustive list. Having corrected the mistake, by including the World Championships in Schedule B, the proper conclusion remains that, as a matter of construction, the Regattas referred to in Schedule B, as amended, were intended to be the only ones to which the Nomination Panel could have regard.

6.19 From what we have said so far it is apparent that there are significant areas in which we are in broad agreement with the approach adopted by the Tribunal. But, as will appear from what follows, there are also other significant aspects of the Tribunal's reasoning with which we are unable to agree and which result in us coming to a different conclusion on this question to that reached by the Tribunal.

6.20 As the legal principles to which we have referred make plain, and as the Tribunal recognised (paragraph 50 of its Reasons), it is necessary to give 'close attention' to the wording of Clause 4.7 and, in our view, especially to that of Clause of 4.7.2. That sub-clause specifically acknowledges that the opinion to be formed by the Panel for the purposes of Clause 4.7.1 will be based on an **assessment** by that Panel of whether a top ten placing at the Athens Games can or will be achieved by **considering** the results of the trial winners at the relevant Regattas.

6.21 It is clear from the chosen language read in the light of the context (especially that the Nomination Panel is an expert body with the ability to assess and evaluate yachting regatta results having regard to the circumstances in which they were achieved) that the Nomination Panel in **considering** the Schedule B regatta results is not confined to a mechanistic or statistical viewing of the 'raw' results achieved at those regattas. Rather, given the predictive nature of the opinion which the Nomination Panel is obliged to form and the fact that there are so many variables which may affect results in individual regattas, it is apparent that the raw results achieved at various regattas need to be considered by the Panel in the light of its collective extensive expertise, experience, skill and knowledge in order to arrive at its predictive assessment of whether a top ten placing would be achieved.

6.22 The task of the Nomination Panel is to predict whether a particular crew or individual will achieve a particular placing at the Athens Games. To make this prediction, the Panel must confine itself to the Schedule B Regatta results but necessarily, in our opinion, must subjectively interpret those results in the light of a variety of factors well known to, and appreciated by, persons possessing the experience and expertise of those comprising the Panel but which may be unknown or little known or even regarded as of marginal relevance by others who lack the relevant expertise.

6.23 Unsurprisingly, the evidence establishes that the Nomination Panel was chosen because its members were regarded by Yachting NZ as the persons best able to interpret the Regatta results with the view of forming the opinion required by Clause 4.7.1 in the light of their very great experience and expertise (see paragraph 7 of Mr Wickham's Affidavit of 27 February 2004).

6.24 Undoubtedly, in our view, it was expected by Yachting NZ and sailors seeking Nomination that the Nomination Panel, in interpreting the Regatta results, would bring to bear their collective experience, expertise, skill and knowledge. This is an expectation which is shared by the law. As stated by Sir Laurence Street C.J. in *Kalil v Bray* [1977] 1 NSWLR 256 at 261, in the context of an expert disciplinary tribunal:-

> "The tribunal was, in my view, entitled to draw upon its own expert resources from within its membership in identifying the evidence relevant to the forming of an opinion .... and in the further step of actually forming such an opinion.
>
> It would be unreal to expect the members of the tribunal .... to fail to use their expert knowledge in resolving any matter (which falls within their expertise) arising in proceedings before the tribunal. The tribunal is in truth an expert panel and as such it needs no expert evidence on the matters within its particular field of expertise ...."
>
> (See also *Hall v NSW Trotting Club* [1977] 1 NSWLR 378 at 386 - 387; *Howe v Rosier* - unreported decision of Adams J of the NSW Supreme Court - 21 December 2001 - BC 200108185 at paragraph 27).

6.25 The Court of Arbitration for Sport has also recognised this proposition. In *Emma Carney v Triathlon Australia* - an award of CAS (comprised of Jolson QC, Cripps QC and Young QC) delivered on 4 September 2000 at paragraph 64, the Panel stated:-

> "In our view, the appellant's criticisms of the reasons tended to lose sight of the fact that (the Nomination Panel) is an expert sporting body which is entitled to bring its own knowledge, experience and expertise to bear in assessing the performances of athletes ...."

6.26 In the present case, in our view, the evidence afforded by Exhibit 1 and the Affidavit evidence of the various members of the Nomination Panel (which, it is common ground, was not undermined in any significant way by cross-examination) demonstrates conclusively that the Panel did apply their expertise, experience, skill and knowledge to the task of assessing the raw results achieved by the trial winners at the Schedule B Regattas (including the World Championships). They relied upon their expertise to give varying weight to the numerous factors to be taken into account in assessing and considering those results. They took into account the circumstances in which the relevant results were achieved by the particular participants, the nature of the competition, fleet size and other 'varying factors' affecting the different Regattas or performance at those Regattas. They were, in our opinion, entitled to do so.

6.27 Having so gone about their task, the Nomination Panel then felt able to come to the positive opinion required by Clause 4.7.1 of the Nomination Criteria. In our opinion, the approach adopted by the Panel, on the evidence before us, was an appropriate one and conformed with the Nomination Criteria. The Tribunal, however, took a different view.

6.28 Regrettably, and reluctantly, we consider that the Tribunal erred in law in coming to that different conclusion.

6.29 As noted in paragraph 3.9 above, the Tribunal's major grievance with the approach adopted by the Panel was that the Panel had no or insufficient 'hard evidence' upon which it could form the requisite opinion for the purposes of Clause 4.7.1 (see paragraphs 53, 54 and 83 of the Tribunal's Reasons). Before considering this finding in detail it is appropriate to note that a requirement of "hard evidence" in relation to predictive judgments is problematical: see Cross on Evidence, 7th New Zealand Edition, 2001 at page 179, paragraph 5.12 citing *Fernandez v Government of Singapore* [1971] 2 All ER 691,696 (PC) and *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385,391. See also *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 at paras 117 – 120.

6.30 The basis for this finding of the Tribunal seems to be that there was no 'proper consideration of the results of the Regattas set out in Schedule B' by the Nomination Panel (paragraph 53 of the Reasons). In turn, the Tribunal's finding that there was a failure by the Nomination Panel to give 'proper'

consideration to the Regatta results seems to be derived from the following express or necessarily implicit conclusions of the Tribunal:-

(a) That the Nomination Panel paid too much weight to performances in individual races at Regattas rather than to the overall results achieved at those Regattas when the 'primary requirement' was to have regard to the overall results at those Regattas (paragraph 64, 65, 85 and 91 of the Reasons);

(b) That the Nomination Panel paid too much weight to the results in qualifying races at such Regattas rather than to results in Gold or Final Fleet Races (paragraphs 66 and 91 of the Reasons);

(c) In respect of the Laser Class nomination, that there was minimal evidence (based on results at the Regattas) upon which the Panel could form the requisite top ten placing opinion (paragraphs 83 - 85 of the Reasons).

6.31 We consider, with respect, that these criticisms by the Tribunal of the Nomination Panel are fatally flawed. Indeed, as we shall explain further below, the Tribunal, with respect, appears to have trespassed into the forbidden field of reviewing the decisions of the Panel on the merits as opposed to determining whether the Nomination Panel, as a matter of law, breached the contract by not properly following the Nomination process or by acting so unreasonably that the Panel's decisions should not stand.

6.32 Clause 4.7.2 does not in express terms require the Nomination Panel as a 'primary requirement' to have regard to the overall results of the Regattas as opposed to looking at individual race results within a Regatta. Obviously the overall Regatta results will be of importance but that does not mean that, in certain circumstances, individual race results within a Regatta may not have equal or even greater significance. Whether that is so or not is really a question for expert determination. It was an unwarranted gloss, in our opinion, on the chosen language in Clause 4.7.1 and 4.7.2 to so interpret those words as to introduce a 'primary requirement' which is not otherwise expressed.

6.33 In considering the Regatta results in order to assess whether the trial winner would achieve a top ten placing at the Athens Games there is no doubt that the Nomination Panel had a duty to give 'proper genuine and realistic consideration' to the Regatta results (see, for example, *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at 601 (paragraph 62); *NIB Health Funds Limited v Private Health Insurance Administration Council* (2002) 115 FCR 561 at 598 (paragraph 155); *Aronson & Dyer*, *Judicial Review of Administrative Action*, 2nd Ed, p225). However, that consideration was not confined simply to the raw results achieved. Rather it was to be informed by the knowledge, skill, expertise and experience of the Nomination Panel so that they could properly assess those results for the purposes of forming their Clause 4.7.1 opinion.

6.34 In our opinion, on the evidence before us, the Panel did give proper consideration to the Regatta results and to the race results within those Regattas in the sense explained above and thus properly implemented the Nomination Criteria. The Tribunal's reasoning, with respect, seems to substitute its own views of the merits of the assessment of those results for that of the Panel. This is impermissible and, in our view an error of law (see *Bruce v Cole* (1998) 45 NSWLR 163 at 186; *Australian Football League v Carlton Football Club Limited* (1998) 2 VR 546 at 558 -559; *McInnes v Onslow Fane* (1978) 1 WLR 1521 at 1535; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 579 (paragraph 195); *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 627 (paragraph 43); *NZ Vegetable Growers Federation v Commerce Commission* (1988) 2 TCLR 582,589 and *Ali v Deportation Review Tribunal* [1997] NZAR 208,222).

6.35 Further, in our opinion, the Tribunal erred in law in concluding that the Panel placed too much weight on individual race results rather than overall Regatta results or in placing too much weight on qualifying race results rather than on Gold or Final Fleet Races.

6.36 Once more, ordinarily, a non-expert bystander might think that overall Regatta results or Final Fleet Races were of more significance than individual race results or qualifying race results. But that is not necessarily so and there may be many factors, which only an expert can properly consider, which would belie such an intuitive assessment. As the Tribunal correctly concluded, individual race results or results in qualifying races were

not irrelevant for the purposes of Clause 4.7.2. The Tribunal's criticism is with the weight which the Panel attached to such results. But the weight to be attached to such matters is, quintessentially, in our view, a matter for the expertise and experience of the Nomination Panel.

6.37 The Nomination Criteria themselves do not assign any particular weight to be attached to any particular aspect of the results achieved at the specified Regattas. In the absence of the Nomination Criteria specifying the relative weight to be attached to various considerations then, as a matter of law, that was a matter for the Panel alone (see *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 41 and *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 at 635). On the facts of the present case it could not be said that "it is clear that the weight given to the matters so considered is so lopsided that in truth no appropriate weighing process has been conducted" (per Lee J in *McPhee v Minister for Immigration & Ethnic Affairs* (1988) 16 ALD 77 at 79; see also *Re Moore; Ex parte Bulk Handling Limited* (1982) 56 ALJR 697).

6.38 Put shortly, the fact that an expert decision-maker has given more weight to a relevant factor than a non-expert Tribunal (or court) would have done is not in itself a ground for upsetting the decision (*Minister for Industry v Western Mining Corp Limited* (1985) 7 FCR 67; *Sykes et al, General Principles of Administrative Law*, 4th Ed, p117).

6.39 The Tribunal was especially critical, in the case of the Laser Class Nomination, of the Nomination Panel having regard to, or attaching weight to, regattas which it regarded as 'virtually worthless' (paragraph 84 of the Reasons of the Tribunal'). The Tribunal based its finding that the two Regattas were 'virtually worthless' upon a phrase used by one of the Nomination Panel, Mr Sowry, in his Affidavit dated 10 March (paragraph 8). However, with respect, we consider that the Tribunal took this evidence out of context. Paragraph 8 of Mr Sowry's Affidavit was a response to a criticism that the Nomination Panel had failed to take into account Mr Pepper's ISAF ranking. That paragraph pointed out, **for the purposes of the ranking system only**, that two of the four Regatta results were virtually worthless. It did so in the context of pointing out 'shortcomings of the ISAF ranking system'. It is, with respect, a long and impermissible stretch to conclude or

infer that the results in those two Regattas were 'virtually worthless' for the task confronting the Nomination Panel.

6.40 In analysing the race Regatta results itself in order to determine whether or not the Panel gave undue weight to one factor as opposed to another it seems to us inevitably and impermissibly the Tribunal unwittingly trespassed into a domain reserved for the original decision-makers. That constituted an error of law.

6.41 Further, in respect of the Laser Class Nomination (and, it seems, also in respect of the Men's 470 Class Nomination) the Tribunal appears to have based its conclusion also on the view that there was no material on which the Nomination decision could be reasonably based (see, especially, paragraphs 83 - 85 of the Tribunal's Reasons). We consider that the Tribunal also erred in law in reaching this conclusion.

6.42 Doubtless, in reaching this finding, the Tribunal had in mind Clause 6.3(d) of Schedule D of the Nomination Criteria which provides for an appeal where "there was no material on which the Nomination decision could reasonably be based". It is true that the language of Clause 6.3(d) of Schedule D differs from Clause 6.4(c) which provides as a ground for appeal against non-selection that "the selection decision was obviously or self-evidently so unreasonable or perverse that it can be said to be rational." However, as recognised by Hayne JA in *Australian Football League v Carlton Football Club Limited* [1998] 2 VR 546 at 568 – 569, in substance there is little, or no, difference, as a matter of law, between these two formulations. Under either formulation, to upset the relevant decision, a court or tribunal must find that the decision was an irrational one or affected by what is commonly known as *Wednesbury unreasonableness* (see also *Air Zealand Limited v Mahon* [1983] NZLR 662 (PC); *Edwards v Bairstow* [1956] AC 14 at 29; *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546 (CA) at 563).

6.43 To prove a case of this kind requires 'something overwhelming'. The decision must be so absurd that it indicates that the decision-maker 'has taken leave of his senses'. The decision must be 'so perverse', 'absurd' or 'outrageous in its defiance of logic' that it could not have been contemplated that such a decision could be made by a reasonable Nomination Panel (*Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537 at 545, 552). Put another way, more closely aligned to the actual

language used in Clause 6.3(d) of Schedule D to the Nomination Criteria, a decision can be overturned if there was no information available to the decision-maker on which reasonable and honest minds **could possibly** reach the conclusion reached (per Tadgell JA in *Australian Football League v Carlton Football Club Limited* [1998] 2 VR 546 at 558; see also Hayne JA at 565; *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546 (CA) at paragraph 63).

6.44 In our respectful view, it was not open to the Tribunal to conclude, on the facts of the present case, that the Nomination decisions were so irrational or so unreasonable in the sense explained by the case law. It is not an error of law to make a wrong finding of fact (see, e.g. *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 154 (paragraph 44)). Further, as observed by Finkelstein J in *Gamaethige v Minister for Immigration & Multiculutural Affairs* (2001) 183 ALR 59 at 63 (paragraph 19):-

> "The cases show that it is very difficult to establish '*Wednesbury unreasonableness*'. A .... decision-maker is often guilty of faulty or erroneous reasoning, but it is not easy to prove that he has taken leave of his senses. And this is what is required to establish that ground."

6.45 With respect, the Tribunal's criticism of the Nomination Panel appears to be that the Panel's reasoning was faulty or erroneous. That is an insufficient basis upon which to interfere with the Panel's decision. Once more, it seems to us that the Tribunal has unwittingly fallen into the error of trespassing into the merits of the decision actually made rather than satisfying itself as to whether the exceptionally high threshold for finding *Wednesbury* unreasonableness or error in either the *Edwards v Bairstow* or *Mahon v Air New Zealand* sense has been reached.

6.46 It is crucial, in our view, to bear in mind the distinction between whether or not a decision was a 'reasonable' one and whether one agrees with the decision on the merits. In the former case, review is permissible. In the latter case it is not. The distinction is neatly and accurately summarised, to our minds, in the speech of Lord Hailsham in *Re W (an infant)* [1971] 2 All ER 49 at 56 where His Lordship said:-

> ".... It does not follow from the fact that the test is reasonableness that any court is entitled simply to substitute its own view for that of the (decision-maker). In my opinion, it should be extremely careful to

> guard against this error. Two reasonable (decision- makers) can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. The question in any given case is whether a [decision] comes within the band of possible reasonable decisions and not whether it is right or mistaken. Not every reasonable exercise of judgment is right, and not every mistake in the exercise of judgment is unreasonable. There is a band of decisions within which no court should seek to replace the individual [decision maker's] judgment with [its] own."

6.47 To the same effect is the joint judgment of Gummow and Hayne JJ in *Abebe v The Commonwealth* (1999) 197 CLR 510 at 579 (paragraph 195). Their Honours quoted with approval a passage from the Judgment of Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35 – 36 which makes precisely the same point as made by Lord Hailsham in *Re W* and, in that context, emphasised the distinction between "a contention that depends upon the Court reviewing the **merits** of the Tribunal's decision rather than the **process** by which it arrived at its conclusion". According to their Honours, it was not permissible to review the merits of the decision.

6.48 In our view, a perusal of the Tribunal's reasoning reveals that it fell into the error of seeking to review the merits of the Nomination Panel's decisions rather than the process by which those decisions were arrived at.

6.49 As we have said, the Nomination Panel did have regard to the results in the specified Regattas and, as the Affidavit evidence shows, applied their experience and expertise to those results in the context in which they were achieved so as to form the opinion that the trial winners would achieve a top ten placing in their respective classes at the Athens Olympics. (See, e.g. the Affidavit of Mr Nicholas dated 27 February 2004 at paragraphs 7, 8, 10 – 13; the Affidavit of Mr Wickham dated 27 February 2004 at paragraphs 7, 12, 14; the Affidavit of Mr Beck dated 27 February 2004 at paragraphs 2, 3, 4, 5 – 8; the Affidavit of Mr Sowry dated 10 March 2004 at paragraphs 2, 3, 4, 5, 7 and 9).

6.50 Having reviewed the materials, we do not believe that it was open to conclude that in reaching the relevant Nomination decisions it was obvious that the Nomination Panel acted irrationally or unreasonably in the manner necessary in order to overturn those decisions. For ourselves, we see no failure by the Panel to follow the Nomination Criteria and also we do not consider the Nomination decisions made to be ones in respect of which there was no material upon which the decisions could be reasonably based.

6.51 Accordingly, in our opinion, the Tribunal erred in law in deciding to overturn the relevant decisions of the Nomination Panel in respect of the Laser Class and the Men's 470 Class even if, contrary to the views we have earlier expressed, the Tribunal had the jurisdiction to hear appeals against those Nomination decisions.

7. THE DIRECTION OF THE TRIBUNAL ON THE MURDOCH APPEAL

7.1 Since the appeal succeeds on both jurisdictional and substantive grounds it is not necessary to address this matter at length. We have adverted to it in paragraph 3.17 – 3.18 above.

7.2 The Rules of the Tribunal provide that in appeals relating to selection or non-selection the Tribunal may:

> "(i) allow the appeal and as a matter of usual practice, but in the discretion of the Tribunal, refer the question of Selection back to the National Sports Organisation and/or the New Zealand Olympic Committee for determination in accordance with the applicable Selection Criteria;
>
> (ii) allow the appeal and conclusively determine the issue of Selection of the Appellant if:
>
> (a) it would be impractical to refer the question of Selection back to the National Sports Organisation and/or the New Zealand Olympic Committee in the time available in which entries to the relevant event or competition are to be submitted; or
>
> (b) there has been such disregard of the Selection Criteria by or on behalf of the National Sports Organisation and/or the New Zealand Olympic Committee that a reasonable person could reasonably conclude that it is unlikely that the Selection Criteria will be properly followed and/or implemented."

7.3 Counsel for YNZ submitted that the Tribunal's flawed approach "culminate[d] in an extraordinary decision to make a declaration – not provided for in the Rules – to remove discretion from the Panel – apparently on the basis that Panel cannot be trusted in this case". We uphold the submission of YNZ that the direction was a nullity. Clause 12.11.1(b)(ii)(b) may only be exercised where the Tribunal decides to conclusively determine the issue of selection itself. Plainly it did not purport to do this in the present case. Rather it directed YNZ to request the first three place getters in the Olympic trials to participate in the 2004 Laser World Championships. YNZ was then to decide upon a nomination.

7.4 Moreover, the power can only be exercised if the Tribunal comes to the view, under subclause 12.11.1(b)(ii)(b), that the performance of the Nomination Panel has been so unsatisfactory that it could not be trusted to follow the Nomination Criteria on a reference back. In some parts of its decision the Tribunal appears to have decided that such was the case. It said that the degree of departure from the nomination criteria were exceptional (paragraph 88). However, as pointed out by counsel for YNZ, this finding does not sit easily with the fact that on the Cooke and Gair appeal the Tribunal considered the performance of the Nomination Panel was sufficient to avoid the need for the extreme step of issuing a direction (paragraph 93). In addition, in another part of its decision (paragraph 39), the Tribunal said that YNZ had endeavoured, and would no doubt continue to endeavour, to provide a process which was effective and fair.

7.5 It follows from our review of the performance of the Nomination Panel that, even if it had erred in any of the ways suggested in the appeals against its nominations (see paragraph 2.6 above) so as to result in a successful appeal, there was no proper basis thereafter for a clause 12.11.1(b)(ii)(b) direction from the Tribunal on the Murdoch appeal. That power is reserved for exceptional cases of which this was not one.

DATED at Sydney this 27th day of April 2004

Made as at Lausanne for and on behalf of the Panel

Alan Sullivan QC
President