Arbitration CAS 2006/A/1040 Anthony Little v. Boxing Australia Inc. (BAI), award of 2 March 2006

Panel: Mr David Grace QC (Australia), Sole Arbitrator

Boxing
Selection for the Commonwealth Games
Discretionary powers of the Federation to amend or supplement the nomination criteria
Grounds for appeal

1. **Clause 1.2 of the BAI's Nomination Criteria for the Commonwealth Games providing that *"[t]hese criteria may be amended or supplemented by Boxing Australia Incorporated (BAI) and specifically where matters arise which have not been provided for in this criteria"* is facultative and, in a very real sense, legislative in nature. Its exercise is permissive rather than mandatory.**

2. **Clause 6.2 of the Criteria specifies that the *"sole grounds for any appeal are that this Nomination Criteria was not properly followed and/or implemented"*. A failure to comply with the discretionary power to amend or supplement contained in clause 1.2 of the Criteria cannot give rise to the failure contemplated by clause 6.2 of the Criteria. Clause 6.2 is designed to enable appeals to be mounted which are predicated on a failure to properly follow or implement the Criteria and <u>not</u> on a failure by BAI to amend or supplement the Criteria in some particular way or ways.**

Anthony Little, the Appellant, is an elite athlete in the sport of Boxing. At all material times he has been a member of, and has been contracted to, Boxing Australia Inc., the Respondent. The Respondent has Nomination Criteria (the "Criteria") and an Anti-Doping Policy (ADP) to which the Appellant has agreed to be bound under the contract between him and the Respondent. Contractually, Leonardo Zappavigna, the Affected Party, is in exactly the same position as the Appellant.

On 28 August 2005, the Respondent conducted the Commonwealth Games Selection Trials. The Appellant, aged 25 years, was eligible for and did enter those Selection Trials in the 60kg Weight division. His aim was to win the trial and thereby ensure selection in the team to represent Australia at the Commonwealth Games to be held in Melbourne in March 2006. In the final of his division, he was victorious against the Affected Party. Following that victory, he was issued with a "Doping Control Notification" by the Australian Sports Drug Agency (ASDA) requiring him to furnish a sample for drug analysis. The sample was duly provided and tested positive for metabolites of cannabis, a drug proscribed by the "World Anti-Doping Agency (WADA) Anti-Doping Code" – a Code adopted by the Respondent. The Respondent took proceedings against the Appellant alleging

an Anti-Doping Violation by the Appellant by reason of the positive drug test. Those proceedings were heard by the Court of Arbitration for Sport (CAS) on 18 January 2006. The CAS was constituted by the Honourable John Winneke Q.C. as Sole Arbitrator.

The CAS found relevantly as follows:

1. The Appellant had established, to the appropriate standard, that the cannabis was passively inhaled by him in August 2005 prior to the doping test and that he did not actively ingest cannabis.
2. That the cannabis ingested was not intended to enhance sport performance.
3. Accordingly, Article 13.3 of the Respondent's ADP governed the appropriate penalty.
4. In all the circumstances (described in the Reasons for the Award dated 28 January 2006) a warning and reprimand without imposing any period of ineligibility from future events was the appropriate penalty.
5. The provisions of Article 12 of the Respondent's ADP, which provide for *"automatic disqualification of individual results"*, would operate of their own force to automatically disqualify the Appellant from the benefits of the individual results obtained in the Selection Trials, with *"all resulting consequences"*. The Court added that *"presumably this includes the qualification of the athlete for selection in the Commonwealth Games, by dint of his results in the Trials. Whether, therefore, the athlete gains selection will ultimately have to be decided by those who have the relevant responsibility. It is not a matter for me"*.

The relevant clauses of the Respondent's Nomination Criteria for selection in the 2006 Australian Commonwealth Games Team are as follows:

1. Objectives

1.1 To identify and nominate to the Australian Commonwealth Games Association (ACGA), those Athletes who will achieve the best possible results at the 2006 Commonwealth Games.

1.2 These criteria may be amended or supplemented by Boxing Australia Incorporated (BAI) and specifically where matters arise which have not been provided for in this criteria. Any amendment or supplement to these criteria must be first approved by the ACGA. Any variation or amendment must be in writing given by the Acting Chief Executive Officer on behalf of the BAI and who will endeavour to give as much notice as possible to all persons affected by any amendment or supplement to these criteria.

2. Process of Nomination and Selection

2.1 Athletes must meet their state or territory criteria to be selected to compete in the 2006 Commonwealth Games Trials.

2.2 Athletes must compete in the 2006 Commonwealth Games Selection Trials (CGST) to be held 26 to 28 August 2005 at the Reggio Calabria Club in Melbourne to be eligible for nomination for selection to the 2006 Australian Commonwealth Games Team.

2.3 Winners in each Commonwealth Games weight category from the 2006 CGST will be nominated to the ACGA.

2.4 BAI reserves the right to withdraw any athlete nominated to the ACGA who does not attend all BAI approved compulsory training camps, national and international competitions.

2.5 In the event the winner is not available to be nominated through injury or illness, the runner up will be nominated.

6. Appeals

6.1 The appeal process concerning non-selection is two tier, with the appeal being first heard by the BAI Appeal Panel with any subsequent appeal to be heard by the Court of Arbitration for Sport. In all cases the appeal will be at the expense of the appellant.

6.2 The sole grounds for any appeal are that this Nomination Criteria was not properly followed and/or implemented.

6.3 Any appeal by a boxer against non-selection must be made to the BAI Appeal Panel.

6.4 Any appeal from a decision of the BAI Appeal Panel must be solely and exclusively resolved by the Court of Arbitration for Sport according to the Code of Sports-Related Arbitration. The decision of the said Court will be final and binding on the parties and it is agreed that neither party will institute or maintain proceedings in any court or tribunal other than the said Court.

7. Nomination of the Athletes to the ACGA

7.1 Athletes who win their Commonwealth Games weight category in the 2006 CGST will be nominated by the BAI Board to the ACGA for selection as a member of the 2006 Australian Commonwealth Games Team.

7.2 In the event of a withdrawal of both the winner and the runner up from being nominated to the 2006 Commonwealth Games Team, then the Selection Panel shall choose an athlete to be nominated from the entries in the 2006 CGST from the same weight category. This can also include a decision that a challenge bout takes place in accordance with Clause 4.

7.3 The Board will, upon receiving the Selection Panel's recommendation, decide according to the process set out in Clause 10.3, whether to approve or reject the selection and is not obliged to follow the recommendations of the Selection Panel.

7.4 The fact that an Athlete or Official is nominated to the ACGA does not ensure that the ACGA will select that person as a member of the 2006 Australian Commonwealth Games Team. Selection to the Team and to participate in events at the Commonwealth Games is at the discretion of the ACGA.

7.5 The ACGA will determine the date when it will announce the selection of athletes and officials in the 2006 Australian Commonwealth Games Team, and this date will be advised.

9. Jury

9.1 The appeal process concerning selection or non-selection in the Australian Team for the nomination or non-nomination of Athletes to the ACGA for selection as a member of the 2006 Australian Commonwealth Games Team will follow the process as detailed in Clause 6.

At the conclusion of the CAS hearing on 18 January 2006, lawyers for the Appellant wrote to the Respondent requesting that the Selection Criteria for selection in the Australian Team to compete in the Commonwealth Games ought to be amended or supplemented in the circumstances that had arisen. Those circumstances were outlined to have been that notwithstanding the Appellant's disqualification from the Selection Trials by reason of the finding against him of an Anti-Doping Rule Violation, the CAS had accepted that the inhalation was passive, was inadvertent and not intended, and did not have any enhancing effect. Furthermore, the Appellant was clearly the best fighter in his division, that he had overcome great adversity in pursuing his boxing career, was an outstanding young

man and a role model to young indigenous Australians. The Respondent was urged to amend the Criteria to achieve the aim of identifying and nominating the boxer who would achieve the best possible result at the Commonwealth Games. It was stressed that through no fault of his own, the Appellant had been disqualified from the Selection Trials even though the prohibited substances was incapable of producing a false result through enhanced performance.

No reply was received to that letter with the result that on 27 January 2006, a lawyer for the Appellant wrote again to the Respondent requesting an amendment to the Criteria to enable the Appellant's selection to the Commonwealth Games Team and in the alternative, if the Respondent decided not to exercise its discretion in that way, that the only fair resolution of the matter was to order a *"box off"* between the Appellant and the Affected Party. A further period of time then passed during which there was no response by the Respondent. Meanwhile, on 28 January 2006, the CAS published its written reasons for the Award made orally on 18 January 2006. On 7 February 2006 a lawyer for the Appellant again wrote to the Respondent quoting parts of the Reasons of the CAS and asserting that the Appellant was:

> *"clearly the athlete who, in his weight division, will achieve the best possible result at the 2006 Commonwealth Games. His performance at the Commonwealth Games Selection Trials was entirely unenhanced by cannabis and was ingested without fault or intent … there is now no impediment to Boxing Australia exercising its discretion to amend the Nomination Criteria and select Mr. Little in the Commonwealth Games Boxing Team".*

On 7 February 2006, the Respondent nominated the Affected Party to the ACGA for selection in the team to compete in the relevant weight division. The ACGA has selected the Affected Party to compete in that division, subject to the result of this appeal to the CAS.

By letter dated 8 February 2006, Mr. Ted Tanner, Chairperson of the Respondent wrote to the lawyer for the Appellant and, inter alia, stated:

> *"Boxing Australia Inc has not recommended him* [Anthony Little] *to the Australian Commonwealth Games Association as a member of Australia's Boxing Team for the Melbourne 2006 Commonwealth Games…. The Board of Directors of Boxing Australia has great sympathy for Anthony in this matter but it has decided after seeking and receiving advice that as a result of his Court of Arbitration in Sport hearing Anthony has been disqualified from Boxing Australia Selection Trials for the Commonwealth Games and in view of the Selection Criteria cannot be selected. Boxing Australia is not prepared to alter the Selection Criteria as it believes to do so would create for Boxing Australia a potential legal liability…".*

By letter dated 10 February 2006 the Appellant lodged an Appeal pursuant to paragraph 6.3 of the Criteria in respect of the decision by the Respondent not to nominate him to the ACGA.

The Grounds of Appeal before the BAI Appeal Panel (the "Panel") identified two specific (but related) grounds, as follows:

1. That Boxing Australia failed to properly follow and/or implement the Nomination Criteria as prescribed in Clause 2 and Clause 1 of the Nomination Criteria.
2. That for the Nomination Criteria to have been properly followed and/or implemented, Boxing Australia would have sought and obtained the approval of the ACGA to amend the Nomination

Criteria which would have resulted in Mr. Little being nominated to the ACGA for selection in the Australian Commonwealth Games Team.

The parties to the appeal agreed that the appeal was to be determined on the papers without the need for a formal hearing. The panel published its reasons on 21 February 2006.

In order to properly understand the basis of the hearing before the CAS, it is necessary to set out the reasons of the members of the appeal panel in full. The appeal panel was comprised of three members, two of whom gave substantive judgements. The third agreed with the other two that both grounds of appeal should fail. The lead judgement was written by Mr. Simon Rubenstein. The relevant parts of his judgement appear hereunder:

The first ground of appeal

2.4 In relation to the first ground of appeal, it is noted that the lawyers for Mr. Little have not given any particulars of the allegation that Boxing Australia failed to properly follow and/or implement the nomination criteria as prescribed in clause 2 and clause 1 of the nomination criteria. There are no details provided as to why it is said that Boxing Australia failed to properly follow and/or implement the Nomination Criteria.

2.5 The first ground of appeal is dismissed. The reasons for this are as follows.

2.6 Clause 1 of the Nomination Criteria sets out the general objectives of Boxing Australia in introducing and applying the Nomination Criteria, and provides for a broad power of amendment of the criteria *"specifically where matters arise which have not been provided for in this criteria"*. Clause 1 does not prescribe any nomination and selection procedure. It prescribes the general objectives and the amendment power only. It follows that Boxing Australia did not fail to properly follow and/or implement the nomination criteria as prescribed in clause 1 of the Nomination Criteria, as there is no nomination criteria prescribed by that clause.

2.7 Clause 2 of the Nomination Criteria prescribes the nomination and selection procedure. Relevantly, clause 2.3 provides that the winners in each weight category at the Selection Trial will be nominated to the ACGA for selection for the Australian Commonwealth Games Team.

2.8 Article 12 of Boxing Australia's Anti-Doping Policy (the "Anti-Doping Policy") provides that a violation of the Anti-Doping Policy in connection with an In-competition test automatically leads to Disqualification of the individual result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes.

2.9 Mr. Little was found to have violated the Anti-Doping Policy. The circumstances underlying the violation are as set out in the CAS reasons. The sanctions imposed on Mr. Little under Article 13.3 of the Anti-Doping Policy did not include a period of ineligibility from any future events. This means that he is not ineligible from competing in the Commonwealth Games.

2.10 However, by virtue of the operation of Article 12 of the Anti-Doping Policy, Mr. Little was disqualified from the benefit of the individual results obtained at the Selection Trials. The disqualification meant that Mr. Little was no longer the winner of his weight category.

2.11 As:

(a) clause 2.3 of the Nomination Criteria provides that Boxing Australia will nominate the winners in each weight category to the ACGA; and

(b) regulation 18.2(6) of the Constitution of the Commonwealth Games Federation provides that one competitor only per weight division is permitted to be entered for competition at the Commonwealth Games, it follows that, upon his disqualification, Boxing Australia could not nominate Mr. Little to the ACGA (and was instead required to nominate whoever was ultimately declared the winner of the final bout upon the disqualification of Mr. Little).

2.12 The Appeal Panel understands that Boxing Australia has nominated Mr. Lenny Zappavinga, the Silver medallist and presumably the opponent of Mr. Little in the final bout, in place of Mr. Little. This is consistent with clause 2.3 of the Nomination Criteria.

2.13 It therefore follows that Boxing Australia did not fail to properly follow and/or implement the nomination criteria prescribed in clause 2 of the Nomination Criteria with respect to Mr. Little. The first ground of appeal must fail.

The second ground of appeal

2.14 In relation to the second ground of appeal, the lawyers for Mr. Little contended that in order for the Nomination Criteria to have been properly followed and/or implemented, Boxing Australia ought to have sought and obtained the approval of ACGA to amend the Nomination Criteria in a manner that would have permitted or resulted in Mr. Little being nominated for selection. The lawyers for Mr. Little have provided a proposal form of amendment to clause 2.3, and alternative forms for a new clause 2.3A. These are set out in the Proposed Amendments (see below).

2.15 This ground of appeal is premised on an implied assertion that clause 1.2 of the Nomination Criteria was not properly followed and/or implemented because for it to have been properly followed and/or implemented, the amendment power would have been exercised by Boxing Australia so as to alter the extant Nomination Criteria to permit the nomination of Mr. Little to the ACGA. The ground of appeal presumably arises from the fact that Boxing Australia has notified Mr. Little that it is not prepared to alter the selection criteria. This suggests that Boxing Australia has considered whether to amend the Nomination Criteria, and has decided that it should not.

2.16 This Appeal Panel doubts that it is empowered to entertain an appeal of the kind contemplated by the second ground of appeal.

2.17 An appeal to the Appeal Panel must be within the grounds identified in clause 6.2 of the Nomination Criteria. Clause 6.2 provides that *"the sole grounds for any appeal are that this Nomination Criteria was not properly followed and/or implemented"* (emphasis added). The Appeal Panel is therefore limited to considering appeals based on the application of the extant Nomination Criteria (that is, the Nomination Criteria that existed and that was applied) in a given factual situation or circumstance. The use of the word *"this"* before *"Nomination Criteria"* supports this conclusion.

2.18 Undoubtedly, the Appeal Panel would be empowered to consider an appeal based upon whether clause 1.2 had been properly followed or implemented in any given factual situation or circumstance. However, it is arguable that this is limited to whether the *"process"* prescribed by clause 1.2 has been properly followed or implemented. That is to say, whether or not the amendment *"process"* identified in the clause had been properly followed by Boxing Australia. This *"process"* includes the requirement that any proposed amendment or supplement be first

approved by the ACGA and that Boxing Australia endeavour to give appropriate notice to all persons affected by the proposed amendment.

2.19 However, it is unlikely that the Appeal Panel can consider the question of whether a particular amendment to the criteria should or should not have been made in any given factual situation or circumstance. The issue of whether a particular amendment to the criteria should not be made, and the form of any such amendment, is really a matter for discretion for Boxing Australia. It does not come within the scope of the permissible grounds of review as contemplated by clause 6.2.

2.20 In short, the Appeal Panel cannot entertain an appeal of the kind contemplated by the second ground of appeal which requires the Appeal Panel to consider whether the particular amendment proposed by the lawyers for Mr. Little ought to have been made by Boxing Australia. It is not a ground of appeal in which the Appeal Panel is required to consider whether clause 2.1 of the Nomination Criteria was properly followed and/or implemented in the circumstances, but rather is an appeal based on a contention that Boxing Australia ought to have sought approval for a particular amendment as proposed by the lawyers for Mr. Little. That Boxing Australia determined not to do so in a discretionary matter for it, and does not amount to a failure to properly follow and/or implement the Nomination Criteria.

2.21 Alternatively however, in the event that such an appeal is one that the Appeal Panel can properly entertain, we would still dismiss this ground of appeal. The reasons for this are as follows.

2.22 In considering whether or not to amend the rules pursuant to clause 1.2 of the Nomination Criteria in the manner proposed by the lawyers for Mr. Little, two significant questions arise.

2.23 The first is whether Boxing Australia is empowered to make such a retrospective amendment or supplementation to the Nomination Criteria. The second question is, assuming that is has the power to make such an amendment, whether or not Boxing Australia ought to amend or supplement the Nomination Criteria in the manner proposed by the lawyers for Mr. Little.

2.24 In relation to the question of the power of Boxing Australia to make such an amendment, the Appeal Panel is of the view that, subject to the requirement that any proposed amendment or supplement be first approved by the ACGA and subject to the notification requirements, Boxing Australia does have the power to amend the Nomination Criteria with retrospective effect. The Nomination Criteria has no special status other than that of a policy of Boxing Australia, and Boxing Australia can amend its policies in any manner and way that it chooses (subject to the requirements). This is a matter for the discretion of Boxing Australia.

2.25 In relation to the question of whether Boxing Australia ought to have amended or supplemented the Nomination Criteria in the manner proposed by the lawyers for Mr. Little, we are of the view that, the fact that Boxing Australia determined not to do so, does not amount to a failure to properly follow and/or implement the Nomination Criteria.

2.26 In our view, the amendment power contained in clause 1.2 has to be exercised fairly including by extending fairness to persons affected by any proposed amendment or supplement to the Nomination Criteria. This is supported by the requirement that Boxing Australia endeavour to provide notice to persons affected by any proposed amendment. The requirement that the amendment power be exercised fairly is a vitally important one.

2.27 The amendment proposed by the lawyers for Mr. Little is unfair to Mr. Lenny Zappavinga. As a result of Mr. Little's disqualification, he was the winner of the weight category and was

nominated by Boxing Australia to the ACGA. As one competitor only per weight division is permitted to be entered for competition at the Commonwealth Games (refer to Regulation 18.2(6) of the Constitution of the Commonwealth Games Federation), if the amendment were to be implemented, Mr. Zappavinga would lose his place to Mr. Little. In light of the incurable unfairness to Mr. Zappavinga, it cannot be said that Boxing Australia ought to have sought and obtained the approval of ACGA to amend the nomination criteria in the manner proposed by the lawyers for Mr. Little.

2.28 While the objective of identifying and nominating athletes who might achieve the best possible results at the Commonwealth Games is an important one, it is not the only one that is relevant. We are of the view that having transparent Nomination Criteria that operate equally, impartially and fairly to all boxers is also important. The amendment proposed by the lawyers for Mr. Little would have retrospective application and would undo the nomination of a boxer already nominated to the ACGA. In all the circumstances, such amendment is unfair.

2.29. The second ground, being that the nomination criteria was not properly followed and/or implemented by virtue of Boxing Australia not having sought and obtained the approval of the ACGA to amend the nomination criteria in the manner proposed by Mr. Little's lawyers, is also dismissed. The appeal fails.

The second judgement was written by the Chairman of the Panel, John Searle. In a short judgement he said:

> I have read the reasons for decision given by Simon Rubenstein. I do not agree with his conclusion as stated in paragraph 2.16 – 2.20 that this Appeal Panel is not empowered to entertain this appeal. Clearly, the grounds for an appeal must fall within clause 6.2 of the Nomination Criteria which states that *"the sole grounds for an appeal are that this Nomination was not properly followed and/or implemented"*. I do not attach the same emphasis to the word *"this"* as was done by my learned colleague. Rather I take the view that an appeal which calls into question Boxing Australia's following and/or implementation of the Nomination Criteria, which I take to include the entire document so titled is an appeal that this panel is empowered to entertain. As the appeal calls into question Boxing Australia's following and/or implementation of clause 1.2 of the Nomination Criteria I consider that jurisdiction to entertain the appeal exists.
>
> However, I do agree with Simon Rubenstein that both grounds of appeal should fail. Furthermore I agree with the reasons given by Simon Rubenstein.

The Proposed Amendments referred to in paragraph 2.14 of the Panel's Reasons are set out hereunder.

1. Amend Clause 2.3 to commence, *"Subject to clause 2.3A"*.
2. Insert a new clause 2.3A as follows:

   "Where an athlete is disqualified as the Winner pursuant to Article 12 of the BAI's Anti-Doping Policy (the "Policy") and a period of ineligibility under the Policy is not imposed, the athlete shall, notwithstanding the disqualification, be selected and nominated to the ACGA for the athlete's weight category".

If the proposed clause 2.3A is not acceptable, then

"Where an athlete is disqualified as the Winner pursuant to Article 12 of the BAI's Anti-Doping Policy (the "Policy") and a period of ineligibility under the Policy is not imposed, the BAI may, notwithstanding the disqualification, select and nominate the athlete to the ACGA for the relevant weight category, if the BAI determines that the athlete will achieve the best possible results for that category at the 2006 Commonwealth Games".

On 23 February 2006 the Appellant appealed against the decision of the BAI Appeal Panel made 21 February 2006, against his non-selection to the team for the 2006 Commonwealth Games. The parties have agreed that the CAS has jurisdiction pursuant to clauses 6.1 and 6.4 of the Criteria to determine the matter contained in the application brought by the Appellant on 23 February 2006 against the Respondent. The Affected Party was listed in the application as being a person obviously having an interest in the proceedings and an entitlement to be heard.

The hearing was scheduled to take place on 2 March 2006 in Melbourne, Victoria, Australia.

LAW

1. The Appellant is an outstanding boxer who has successfully competed in the sport of boxing for a number of years. In August 2005 he won the Commonwealth Games Selection Trials in the lightweight division by defeating the Affected Party in the final. Upon the material presented to CAS it is clear that the Appellant is a fine young man, a role model to indigenous youth and a man of honesty and integrity.

2. After his win in the Selection Trial, he was drug tested and tested positive to cannabis. At a hearing before the CAS on 18 January 2006 conducted by the Honourable John Winneke AO QC, the Appellant admitted to having committed an Anti-Doping Rule Violation. The CAS on that occasion accepted that the Appellant had inadvertently ingested cannabis, that the cannabis was not performance enhancing and that there had been no intention on the part of the Appellant to use cannabis. In all the circumstances, the CAS imposed a penalty of a warning and a reprimand. Because the Anti-Doping Rule Violation occurred in competition the Appellant was subject to an additional penalty pursuant to Article 12 of the Appellant's Anti-Doping Policy. That Article provided for the disqualification of the results obtained in the competition in which the Appellant had tested positive to cannabis. Sometimes this Article, which is replicated in many of the Anti-Doping Policies of Sports Federations due to its inclusion in the WADA Code, has harsh and unexpected consequences. This is highlighted by the circumstances under consideration in this hearing. The cannabis inadvertently ingested by the Appellant was non-performance enhancing but the result of that ingestion was his disqualification from the Selection Trials. This had the result that the Affected Party, the boxer who the Appellant clearly beat in the trial, being elevated as the winner of the trial and thereby achieving the nomination by the Appellant to the ACGA as the Australian representative in the lightweight division.

3. Immediately after the CAS hearing on 18 January 2006 the lawyers for the Appellant wrote a series of letters to the Respondent requesting that in all the circumstances the Criteria be amended, in effect to allow the Appellant to be nominated to the ACGA notwithstanding that he was no longer the winner of the Selection Trial. Primary reliance was placed on clause 1.1 of the Criteria which set out the objective of the Respondent to nominate those athletes who would achieve the best possible results at the 2006 Commonwealth Games. This was said to have been an essential term of the contract between the Appellant and the Respondent and that the Respondent had an obligation to ensure that that objective was met. The way of achieving that in the circumstances of this case was to amend the Criteria in the manner sought.

4. It is clear that the Criteria and the Anti-Doping Policy are part of the contract between the Appellant and the Respondent. However, clause 1.1 of the Criteria is not the only term of the contract. The following provisions of the Respondent's Anti-Doping Policy are also relevant (as is the specific provision contained in clause 2.3 of the Criteria – see above):

"Article 3 - Obligations

3.1 The policies and minimum standards set forth in the Code and implemented in this Anti-Doping Policy represent the consensus of the broad spectrum of stakeholders with an interest in fair sport. The persons identified in Article 2 [including athletes] are bound by this Anti-Doping Policy as a condition of their participation and/or involvement in the sport.

3.2 Roles and responsibilities - Athletes:

3.2.1 must be knowledgeable of and comply with all anti-doping policies and rules applicable to them.

3.2.2 must read and understand the Prohibited List as it relates to them;

(…)

3.2.4 must take full responsibility, in the context of anti-doping, for what they ingest and use;

(…)

3.4 Roles and responsibilities - BAI must:

(…)

3.4.6 adopt and implement Anti-Doping policies and rules which conform with the Code, the AIBA, AOC, ACGA and the ASC Anti-Doping Core Provisions;

(…)

Article 5 - Anti-Doping Rule Violations.

The following constitute Anti-Doping Rule Violations:

5.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen.

5.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the Athletes part be demonstrated in order to establish an anti-doping violation under Article 5.1.

(…)

Article 12 - Automatic Disqualification Of Individual Results.

A violation of this Anti-Doping Policy in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes".

5. The proposed amendment of the contract in the manner proposed would have the effect, intended or otherwise, of circumventing the impact of Articles 3, 5 and 12 of the Respondent's Anti-Doping Policy and thereby place the Respondent in possible breach of its obligations pursuant to Article 3.4.6 of the Policy.

6. Clause 6.2 of the Criteria specifies that the *"sole grounds for any appeal are that this Nomination Criteria was not properly followed and/or implemented"*. It was submitted by the Appellant that clause 1.1 of the Criteria in combination with the claimed clear superiority of the Appellant over the Affected Party required the Respondent to give careful consideration to its undoubted power under clause 1.2 to amend the Criteria. It was submitted that because there was no evidence that the Respondent did give that careful consideration, the Nomination Criteria had not been properly followed and/or implemented. However, in the opinion of the CAS, that consideration by the Respondent is not part of the Nomination Criteria. The Respondent was correct in submitting that clause 6.2 of the Criteria was:

> *"never intended to encompass an appeal against an omission or refusal by the Respondent to exercise its power under clause 1.2 of the Nomination Criteria to retrospectively amend or supplement the Nomination Criteria. Clause 1.2 is facultative and, in a very real sense, legislative in nature. Its exercise is permissive rather than mandatory".*

7. A failure to comply with the discretionary power to amend or supplement contained in clause 1.2 of the Criteria cannot give rise to the failure contemplated by clause 6.2 of the Criteria. The CAS agrees with the Respondent that clause 6.2 *"is designed to enable appeals to be mounted which are predicated on a failure to properly follow or implement the Criteria and not on a failure by the Respondent to amend or supplement the Criteria in some particular way or ways"*. To accept the argument of the Appellant would essentially involve finding that in all the circumstance the Respondent was compelled to make the amendment sought and a failure to do so amounted to a failure to properly follow and/or implement the Criteria and a breach of its contractual obligation to the Appellant. That contention cannot be upheld. Mr. Simon Rubenstein, who gave the lead judgement of the Panel, was correct in his reasoning process in this respect.

8. Even if the above conclusion was wrong, it could not be concluded that the Respondent did not give proper consideration to the matters raised in the letters forwarded to the Respondent by the Appellant's lawyers. A fair reading of the 8 February 2006 letter from the Respondent to the Appellant reveals that the Respondent gave consideration to the matters raised in those letters and exercised its discretion not to amend the Criteria pursuant to clause 1.2. The way it expressed itself, and the reason given for not exercising its discretion in the way sought by the Appellant, does not evidence, reveal or conceal any failure on the part of the Respondent to act in an appropriate manner or act inconsistently with its contractual obligations. It is inconceivable, given the matters raised in the letters from the Appellant to the Respondent, that the Respondent did not carefully consider all relevant matters. The Respondent was entitled to

exercise its discretion in the way it did. There was no compulsion on its part to exercise its discretion in the way urged upon it by the Appellant and any failure to do so could not amount to a failure to properly follow and/or implement the Criteria. Clause 1.2 of the Criteria is clearly permissive and not mandatory. There could therefore be no failure within the terms of clause 6.2.

9. Accordingly, the Appeal is dismissed.

The Court of Arbitration for Sport rules:

1. The Appeal by Anthony Little against the failure of the Respondent to nominate him to the Australian Commonwealth Games Association for selection in the Australian Team to compete in the 2006 Commonwealth Games, is dismissed.

(…).