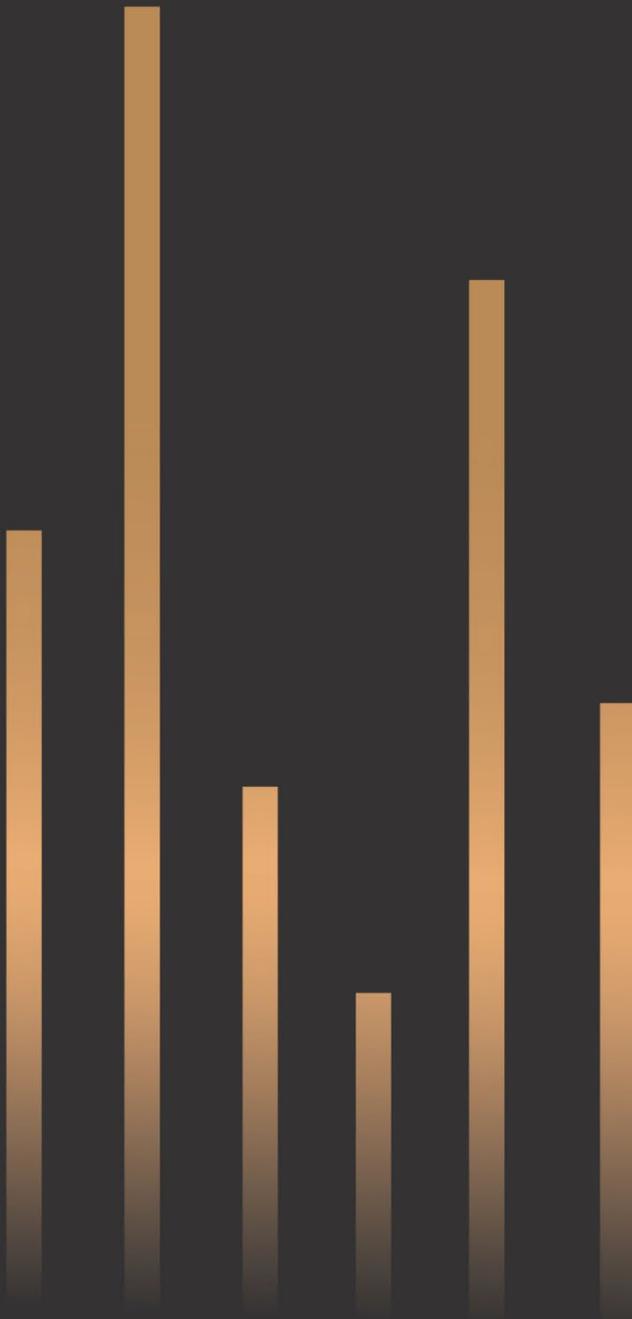




Australian Government

NATIONAL
SPORTS
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BENCH BOOK 2022



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PART 1: INTRODUCTION

About this bench book

1. This National Sports Tribunal (**NST**) bench book has been prepared to assist parties lodging or responding to applications, and Members in applying the legislative framework to matters, under the *National Sports Tribunal Act 2019 (NST Act)*. Information is provided to assist in the preparation of material for matters before the NST.

Disclaimer

2. The content of this bench book should be used as a general guide only, and only as the starting point for further legal research. The bench book is not intended to be an authority to be used in support in proceedings before the NST.
3. Precautions have been taken to ensure the information is accurate, but the Commonwealth does not guarantee, and accepts no legal liability whatsoever arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this bench book or on any linked site.
4. The information provided, including cases and commentary, are considered correct as of the date of publication. Any changes to legislation and case law will be reflected in updates to this bench book.

Case examples and decisions of other tribunals

5. Individual cases have been selected as examples to help users gain a better understanding of the issues covered. These cases should not be considered exhaustive. The case examples have been selected because they deal with specific issues. The case examples may not reflect all of the issues considered in the relevant decision – users must always refer to the original decision.
6. In this context, it should be noted that first instance decisions of the Court of Arbitration for Sport (**CAS**) and decisions of sport-run tribunals in Australia are generally not published. This is particularly the case in anti-doping matters. Accordingly, the bench book relies on cases from the Appeals Division of CAS, Sport Resolutions UK, the New Zealand Sport Tribunal (**NZNST**), and the American Arbitration Association (**AAA**). Where possible, cases involving Australian athletes and other personnel have been used.
7. This bench book is not a substitute for independent professional advice and users should obtain any appropriate professional advice relevant to their particular circumstances.
8. In many areas of Indigenous Australia, it is considered offensive to publish the names of Aboriginal and Torres Strait Islander people who have recently died. Users are warned that this bench book may inadvertently contain such names.

Links to external websites and acknowledgment

9. Where this site provides links to external websites, these links are provided for the user's convenience and do not constitute endorsement of the material on those sites, or any associated organisation, product or service.
10. The NST acknowledges the work of Paul David QC, *A Guide to the World-Anti Doping Code: the Fight for the Spirit of Sport*,¹ which provided a helpful reference point for Part 7 of the bench book.

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11. The content of the NST website, which includes this bench book, is copyright. Apart from any use as permitted under the *Copyright Act 1968* (Cth), all other rights are reserved.
12. You may download, display, print and reproduce this material in unaltered form only (retaining this notice) for your personal, non-commercial use or use within your organisation.

Overview of this bench book

13. This bench book has been arranged to reflect the process users are likely to follow in making an application to the NST. Issues that might arise at a particular point in the process will be addressed as they come up. As a result, this bench book might not deal with these issues in the same order as the NST Act.

About the NST

14. The NST has been established under the NST Act to provide an effective, efficient, independent, transparent and specialist tribunal for the fair hearing and resolution of sporting disputes.
15. The NST has a Chief Executive Officer (**CEO**) and Members, who are appointed by the Minister for Sport. The CEO is responsible for the overall administration of the NST, and for assisting the NST in the performance of its functions.
16. The NST has an Anti-Doping Division, a General Division, and an Appeals Division.
17. In the Anti-Doping Division, athletes or other persons may apply to the NST for arbitration of disputes relating to anti-doping policies of their sports. This would normally be where the athlete or other person has decided to have a hearing into an allegation that they have committed an anti-doping rule violation (**ADRV**).
18. In the General Division, persons can apply to the NST for arbitration of other sport-related disputes. The NST is able to arbitrate disputes of a kind that are set out in the [National Sports Tribunal Rule 2020](#) (**NST Rule**).

¹ Third Edition, Cambridge University Press, 2017.

19. In exceptional circumstances, the CEO of the NST may agree to the General Division of the NST arbitrating a sports-related dispute of a different kind.
20. In the General Division, persons can also apply to the NST for mediation, conciliation, or case appraisal of certain disputes.
21. There are certain kinds of sport-related disputes that the CEO is not able to approve for arbitration in the General Division. These are set out in the NST Rule and include: disputes occurring in the 'field of play' and disputes in which damages are being sought as a remedy. Furthermore, anti-doping arbitrations cannot be referred to the General Division; they must be heard in the Anti-doping Division
22. Anti-doping disputes and disputes occurring in the 'field of play' are also not able to be approved for mediation, conciliation, or case appraisal.
23. A party to an arbitration can appeal to the Appeals Division from a determination made in an arbitration conducted in the Anti-Doping Division or the General Division – where the parties have agreed to the appeal, or where a sport's policies or rules allow for it. Where the policies of the relevant sporting body allow for it, or where there is otherwise agreement, a person may appeal to the Appeals Division from a sporting body's decision or a sporting tribunal's decision in relation to an anti-doping dispute, or in relation to certain other sport related disputes.

Explanations of naming conventions and referencing

24. Key terms and acronyms are summarised in the glossary set out as an appendix to this bench book. Where the decisions of sporting tribunals from other jurisdictions are referenced, the bench book includes the full names of the parties, case number in the format used by the relevant tribunal, and decision date.

Definitions

25. Section 5 of the NST Act and s 4 of the NST Rule outline definitions for key terms. Where relevant, these definitions have been set out in the bench book.
26. In cases where terms are not defined, the bench book provides guidance as to how these terms could be interpreted by the NST. For example, in Part 3 of the bench book, potential definitions of the terms 'eligibility dispute', 'selection dispute' or 'disciplinary dispute' are outlined. However, this bench book does not provide a conclusive definition of undefined terms and is not a substitute for independent professional advice.

Arbitration

27. The National Alternative Dispute Resolution Advisory Council defines 'Arbitration' as a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.
28. Both in Australia and internationally, disputes arising in the context of sport have commonly been dealt with through an arbitration process. Currently, some professional sporting codes in Australia employ in-house dispute resolution tribunals to adjudicate ADRVs and breaches of other rules of the sport. Some also have

internal appeal mechanisms. These tribunals are constituted by experienced lawyers and others with sports medicine expertise or significant sporting backgrounds.

29. Generally, within their own rules, Olympic and smaller sports provide for ADRVs to be arbitrated in the NST. Through applicable policies, other non-doping matters may also be referred for arbitration in the NST, however some of these policies also provide for the use of in-house tribunals for some non-doping cases.
30. Before the NST can arbitrate a dispute, the parties to the dispute must agree to the dispute being referred to the NST for arbitration, unless the constituent documents of the sport (e.g. the Anti-Doping Policy) permit disputes to be heard in the NST. The jurisdiction of the NST's General Division is discussed in Part 2 of the bench book.

Other forms of ADR

31. The NST's General Division conducts other forms of alternative dispute resolution. These include:

Mediation

32. A mediation is where a neutral third party, called a mediator, assists the parties in conflict to negotiate a mutually acceptable agreement. In the NST, the mediator is a specialist NST Member from the alternative dispute resolution list.

Conciliation

33. Conciliation is a process where a neutral third party, called a conciliator, actively helps people in conflict to negotiate an agreement that they can all accept. A conciliation differs from a mediation in that the conciliator is empowered to advise the parties by suggesting terms of settlement and may actively encourage the parties to reach an agreement. In the NST, the conciliator is a specialist NST Member from the alternative dispute resolution list.

Case appraisal

34. Case appraisal is a process where a neutral third party, called a case appraiser, helps the parties resolve their dispute by providing a non-binding opinion on the facts and the likely outcomes. This non-binding opinion may also include advice regarding the parties' next steps. Case appraisals are conducted by members of the NST. The NST Member provides their opinion orally, unless the parties to the dispute have agreed, before the case appraisal, for the opinion to be provided in writing.

PART 2: GENERAL DIVISION

Application for arbitration of disputes

35. Sections 23 and 24 of the NST Act permit an application to the General Division for arbitration of a dispute where four requirements are met:

	Requirement	Explanation	
1	Dispute between certain entities	Dispute between: <ul style="list-style-type: none"> • a person and a sporting body OR • 2 or more persons where each person is bound by the sporting body's constituent documents.	
2	Authority to arbitrate	Constituent documents permit the dispute to be heard in the General Division OR parties agree to refer.	
3	Subject matter	The dispute is not one of the following kinds of disputes: <ul style="list-style-type: none"> • anti-doping disputes; • 'field of play' decisions made on the playing field; or • disputes of any kind in which damages as a remedy are being sought. 	
4	Applicant	Dispute between a person and a sporting body	Person or sporting body can apply
		Dispute between 2 or more persons	Sporting body can apply

36. In this context, a 'person' can be either a natural person, or a legal person – most relevantly, a 'person' may be a constituent body within a sporting body.
37. Where a dispute meets these requirements, and complies with the application process, the General Division of the NST must conduct an arbitration and make a written determination in relation to the dispute.²
38. Information about the application process is set out from paragraph 76 below.

² Section 27(1) of the NST Act.

Application for alternative dispute resolution processes

39. Sections 25 and 26 of the NST Act permit an application to the General Division for mediation, conciliation or case appraisal of a dispute (ADR processes) where four requirements are met:

	Requirement	Explanation	
1	Dispute between certain entities	Dispute between: <ul style="list-style-type: none"> • a person and a sporting body OR • 2 or more persons where each person is bound by the sporting body's constituent documents.	
2	Authority to conduct ADR	Dispute between a person and a sporting body	Person and sporting body agree to refer for ADR
		Dispute between 2 or more persons	2 or more persons agree to refer to ADR
3	Subject matter	The dispute is not one of the following kinds of disputes: <ul style="list-style-type: none"> • anti-doping disputes; or • 'field of play' decisions made on the playing field. 	
4	Applicant	Dispute between a person and a sporting body	Person or sporting body can apply
		Dispute between 2 or more persons	Sporting body can apply

40. As with applications for arbitration, a 'person' can be either an individual, or a constituent body within a sporting body.
41. Where a dispute meets these requirements, and complies with the application process, the General Division of the NST must conduct a mediation, conciliation or case appraisal of the dispute.³
42. Information about the application process is set out from paragraph 76 below.

Parties to a dispute or ADR

43. The General Division can only arbitrate a dispute, or conduct an ADR process, between:
- a person and a sporting body; or

³ Section 28(1) of the NST Act.

- two or more persons

where each person is bound by one or more ‘constituent documents’ by which a sporting body is constituted, or according to which a sporting body operates.⁴

Persons bound by constituent documents

44. The phrase ‘a person bound by one or more constituent documents’ is not defined in the NST Act.
45. The Explanatory Memorandum to the NST Bill provides that the phrase is intended to encompass any person who has agreed to be bound by the rules of the sporting body. A person may enter into such an agreement in various ways, e.g., by signing a membership form, or by signing an entry form when entering an event organised by the sporting body, and in doing so agreeing to be bound by the rules of the sport (pg. 28).
46. The Explanatory Memorandum gives examples of the sorts of documents that will typically be ‘constituent documents’, for example, policies, rules and by-laws to which a person agrees to be bound upon becoming a member of the sporting body (pg. 1).
47. This explanation is consistent with the dictionary definition of ‘constituent’ which is defined in the Macquarie Dictionary (online edition) to mean
- 1. (Adjective) serving to make up a thing; component; elementary: constituent parts.*
48. In the context of the NST Act, ‘constituent documents’ will be the key documents that establish a sporting body and contain rules to govern the sport’s operation.

Sporting body

49. A ‘sporting body’ is defined in s 5 of the NST Act to mean:
- a “national sporting organisation” for a particular sport; or
 - a body or organisation specified in an instrument under subsection (3).
50. A ‘national sporting organisation’ is also defined in s 5 of the NST Act to mean a sporting organisation that is recognised as being responsible for administering the affairs of the sport, or of a substantial part or section of the sport, in Australia by:
- the International Sporting Federation that has international control over the sport, or
 - the Australian Sports Commission.
51. For the purposes of s 5(3), the *National Sports Tribunal Act 2019 – Specification of Sporting Body Instrument 2021 (No. 1)* – specifies additional entities that are a ‘sporting body’ for the purposes of particular provisions of the NST Act. The entities that have been specified for the purposes of the General Division, and for appeals to the Appeals Division of decisions relating to other sport-related disputes, include peak national bodies and national multi-sport bodies. Each sporting organisation or

⁴ See s 23(1)(a), 24(1)(a), 25(1)(a) and 26(1)(a) of the NST Act.

body that is a State or Territory institute of sport, however described, is also specified to be a sporting body for the purposes of the NST Act. For further information as to the specification of sporting bodies, please refer to the Policy for Specifying a Sporting Body, which is available on our [website](#).

Other parties to the arbitration

52. In addition to the parties to the dispute, any other person permitted by the sporting body’s constituent documents may become a party by writing to the NST and advising that they wish to be a party to the arbitration.⁵

Dispute between	Parties	Additional parties to arbitration
Person and sporting body	<ul style="list-style-type: none"> • Person • Sporting body 	Any other person permitted by the constituent documents to participate in a hearing of a dispute of that kind who advises the NST in writing that they wish to be a party to the arbitration.
Two or more persons	<ul style="list-style-type: none"> • Two or more persons • Sporting body 	

53. An example of an additional party that may be permitted to participate in a hearing may include an affected athlete in a selection dispute (being an athlete who could possibly be displaced from the team if the appeal is successful). Notably, Sport Integrity Australia will also be such an additional party in matters arising under the National Integrity Framework.
54. The written request to participate in the arbitration must be made within 7 days of receiving written notice from the NST CEO of the application.⁶ The request must be made on the [approved form](#).⁷

⁵ Sections 23(2) and 24(2) of the NST Act.

⁶ Sections 22(c) and 23(2) of the NST (*Practice and Procedure*) Determination 2021 (**P&P Determination**).

⁷ Section 23(4) of the P&P Determination.

Participants in an ADR process

55. Participation in a mediation, conciliation or case appraisal process is limited to the initiating parties to the ADR process.⁸

ADR process between	Initiating parties
Person and sporting body	<ul style="list-style-type: none"> • Person • Sporting body
Two or more persons	<ul style="list-style-type: none"> • Two or more persons • Sporting body

Authority to arbitrate or conduct ADR process

56. The General Division may arbitrate a dispute if:
- one or more constituent document permits the dispute to be heard in the General Division, or
 - if none of the constituent documents permit the dispute to be heard in the General Division, the dispute is referred to the General Division of the NST by agreement in writing.⁹
57. The General Division may only conduct an ADR process where the dispute is referred to the General Division of the NST by agreement of the Parties in writing,¹⁰ even where the constituent document contemplates ADR as an option for such disputes.

Documents that permit the dispute to be arbitrated in the General Division

58. The General Division has authority to arbitrate a dispute if one or more constituent documents permits the dispute to be heard in the General Division. The types of documents that are constituent documents is explained [above](#).

⁸ Sections 25(2) and 26(2) of the NST Act.

⁹ Sections 23(1)(b) and 24(1)(b) of the NST Act.

¹⁰ Sections 25(1)(b) and 26(1)(b) of the NST Act.

By consent

59. Where the constituent documents do not permit a dispute to be heard in the NST and an agreement is required in writing, the dispute may be referred to the General Division for an arbitration or ADR process after consent is obtained as follows:¹¹

Dispute between	Consent required
Person and sporting body	Applicant person or sporting body will need to obtain consent of other party
Two or more persons	Sporting body will need to obtain consent of each person

CEO's power to approve arbitration or ADR of other kinds of disputes

61. The General Division may arbitrate or conduct an ADR process which is outside the scope of section 7 of the Rule if approval is given by the CEO in writing.
62. Where an application is made to refer a dispute for arbitration, the CEO may only give such approval if they are satisfied there are 'exceptional circumstances' justifying approval. The CEO does not need to be satisfied that there are exceptional circumstances before approving a dispute for ADR.
63. Exceptional circumstances may include where:
- the CEO is satisfied that the dispute has been in existence for a protracted period of time, and the parties to the dispute have made reasonable efforts to resolve the dispute, and the dispute will not be resolved in the reasonably foreseeable future.
 - the outcome of the dispute may set a precedent for dealing with similar disputes that may arise in the future.
64. The CEO cannot give approval to conduct an ADR in respect of anti-doping disputes or field of play disputes.¹²
65. Additionally, the CEO cannot give approval to arbitrate in respect of certain kinds of disputes as set out below.¹³

¹¹ Sections 23(1)(b)(ii), 24(1)(b)(ii), 25(1)(b), 26(1)(b) of the NST Act.

¹² Sections 25(4), 26(4) of the NST Act; s 9(3) of the NST Rule.

¹³ Sections 23(4), 24(4) of the NST Act; s 9(1) of the NST Rule.

Type of dispute	Description
Anti-doping dispute	Disputes that could be heard by the Anti-Doping division of the NST.
'Field of play' dispute	Disputes involving decisions made in the field of play (however described or occurring), by judges, referees, umpires, or other officials, who are responsible for applying the rules or laws of the particular game.
Damages dispute	Disputes of any kind in which damages as a remedy are being sought from another party to the dispute.

'Field of play' dispute

66. The CEO must not approve disputes regarding 'field of play' decisions made on the playing field (however described or occurring) by judges, referees, umpires, or other officials, who are responsible for applying the rules or laws of the particular game.¹⁴
67. The term 'field of play' is defined in the Oxford English Dictionary to mean: "the area within which play takes place."
68. An example of a 'field of play' dispute is OG 02/007, *Korean Olympic Committee / International Skating Union*, where the CAS affirmed that it would not review a 'field of play' decision merely because the applicant has disagreed with that decision.¹⁵ In its determination, CAS referred to a 'field of play' decision as a decision made on the playing field by a judge, referee, umpire or other official, who is responsible for applying the rules or laws of the particular game (at 20).
69. A 'field of play' dispute would involve an athlete contesting a field of play decision by a judge, referee, umpire, or other official, who are responsible for applying the rules or laws of a particular game.
70. 'Off-field' disputes will generally encompass incidents or issues that occur other than on the field of play, or after a game or event completes. See, for example, *Hunter and Kartsport New Zealand Inc* [STD 06/06](#) where the applicant was involved in a dispute after a presentation ceremony (see Part 4 below).
71. The degree to which 'off-field' issues or behaviour can be reviewed will depend on the contractual relationship between a member and the sporting body. Some sporting policies regulate 'off-field' behaviour only where there is a close nexus between the member and participation in competition. For example, the [Australian Flying Disc Association \(AFDA\) Code of Conduct](#) requires all players to behave appropriately when 'off-field', including at the fields before and after play, at a social function that is organised as part of a sanctioned event and when training with a representative team.

¹⁴ Section 9(2)(b) of the NST Rule.

¹⁵ See note to s 9(1) of the NST Rule.

72. Other sporting policies are broader in application, requiring members to behave in a way that does not bring the sport into disrepute.
73. There may be circumstances where an incident event that occurs on the 'field of play' will be within the jurisdiction of the NST. This may be where the conduct of an athlete breaches a behavioural code, rather than being the subject of a referee's decision. For example, in [Dean Bouzanis of Melbourne City FC \(2017\) \(Disciplinary and Ethics Committee of Football Federation of Australia\)](#), a racial slur made by a player during an A-League match was the subject of a disciplinary dispute.

Applicants

74. Where the dispute is between a person and a sporting body, the person or the sporting body may apply to the NST for arbitration or an ADR process in relation to the dispute.¹⁶
75. Where the dispute is between 2 or more persons, only the sporting body may apply to the NST for arbitration or an ADR process in relation to the dispute. The persons in dispute may not themselves apply to the NST for arbitration or ADR.¹⁷

Application process

Form of application

76. An application must be made in accordance with the approved form. The application must contain the information the form requires and must set out the reasons for the application.¹⁸
77. The [approved forms](#) can be downloaded from the NST website, including:
- NST Application Form.
 - NST Response Form.
 - NST Application to Join Existing Arbitration Form.
 - NST Application for a Notice.
78. Where there is more than one applicant, each applicant's details should be included on the application form.
79. An applicant and a respondent can commence proceedings in the NST together by each completing the respective applicant and respondent forms and submitting them to the NST.

¹⁶ Sections 23(1), 25(1) of the NST Act.

¹⁷ Sections 24(1), 26(1) of the NST Act.

¹⁸ Section 37 of the NST Act.

Application fee

80. An application must be accompanied by the application fee prescribed by the NST Rule.¹⁹ The current fees are set out below.

Application type	Mediation, Conciliation, Case Appraisal	Commence Arbitration	Application to join existing arbitration
Applicable fee	\$500	\$500	\$250

81. The application fee for a mediation, conciliation or case appraisal can be paid by:
- one party
 - both parties together, apportioned as agreed between them.²⁰
82. Unless the application is urgent, application forms should be lodged absent of any fee payment. The relevant fee will become payable after the CEO or an authorised member of the Registry staff has assessed the application's validity.
83. The CEO may waive the application fee if he or she is satisfied that paying the fee would cause [financial hardship](#) to the applicant or other party responsible for paying the application fee.²¹ Where there is more than one applicant, the application fee must be paid unless the CEO has determined that paying the fee would cause financial hardship to all applicants.
84. In circumstances where an application fee has been paid for a dispute that the NST does not have jurisdiction to resolve, the CEO may refund the application fee.²²

Time limit

85. If a constituent document provides a time period in which an application for the arbitration of a dispute or conduct of an ADR in the General Division must be made, the application must be made within that period.²³
86. Otherwise, the application must be made within a reasonable period after the event, or the most recent of the events, that give rise to the dispute.²⁴
87. In deciding whether a period is reasonable, the CEO is to take into account:
- the period since the event, or the most recent of the events, that gave rise to the dispute
 - any other matter the CEO considers relevant.²⁵

¹⁹ Section 37(b) of the NST Act; s 11(1) of the NST Rule.

²⁰ Section 11(2) of the NST Rule.

²¹ Section 11(3) of the NST Rule.

²² Section 11(4) of the NST Rule.

²³ Sections 38(1), 38(3)(a) of the NST Act.

²⁴ Sections 38(1), 37(3)(b) of the NST Act; s 12(2) of the NST Rule.

²⁵ Section 12(3) of the NST Rule.

88. Currently the period of operation of the NST is limited to the end of 18 March 2023. An application for the arbitration of a dispute in the General Division must be made before the end of 18 March 2023 or any other time period prescribed by the NST Rule.²⁶

Response

89. Other parties to an application made to the NST will be notified in one of two ways:
- When they receive a copy of a completed application form from the applicant(s)
 - When they are notified by the Registry of an application that has been submitted
 - Other parties must lodge a response within 7 days of receiving notice of commencement (unless a response has already been lodged).²⁷ A copy of the approved NST response form can be downloaded from the [NST website](#).

Other parties to a dispute

90. Other persons or bodies may apply to be joined as a party to the dispute by lodging the approved [application form](#). Further details about eligibility are set out in the section [other parties to the arbitration](#).

Procedural management of the dispute by the NST

91. Before a dispute is allocated to an NST Member, the NST CEO or an authorised member of the Registry staff will convene a preliminary conference with the parties to the dispute, to promote the more efficient management of the dispute.²⁸ At the preliminary conference, parties may be encouraged to consider ADR in the first instance, as an alternative to arbitration. In cases where the parties want their dispute arbitrated, the CEO or Registry member will, in consultation with the parties, develop a provisional timetable and other arrangements for the conduct of the arbitration.
92. A high level overview of the steps in the arbitration process is set out in the [NST – Flow chart of major milestones and timeframes](#).

Conduct of arbitration

93. Section 40(1) of the NST Act sets out general principles relating to arbitration in the NST, including that:
- the procedure of the NST is, subject to the NST Act, within the discretion of the NST
 - the arbitration must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the NST permit

²⁶ Section 38(5) of the NST Act.

²⁷ Section 23(1) of the P&P Determination.

²⁸ Section 5(4) of the NST Rule. Section 23A of the P&P Determination (Preliminary Conference).

- the NST is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
94. Additionally, parties must act in good faith in relation to the conduct of the arbitration.²⁹
95. How the NST manages any arbitration it conducts, including pre-hearing conferences, directions, timeframes, witnesses, notices to produce etc., is detailed in Part 3 of Chapter 2 of the [P&P Determination](#).
96. Specific requirements that apply to arbitrations in the General Division only are set out in Chapter 4 of the [P&P Determination](#).

Evidence from ADR processes not admissible

97. Evidence of anything said, or act done, in an ADR process of a dispute before the NST is not admissible in:
- any Court or
 - any arbitration of the dispute unless agreed to by the parties.³⁰

Confidentiality

98. Hearing of an arbitration will be held in private.³¹ The NST Member may give directions in relation to the persons who may be present at a hearing.³²
99. A party may apply for a direction prohibiting or restricting the publication or other disclosure of information that relates to a dispute that is:
- evidence or information about evidence
 - information lodged with or otherwise given to the NST.³³
100. The NST Member can also give directions prohibiting or restricting the publication or disclosure of information tending to reveal the identity of a witness in a proceeding, or information otherwise concerning a witness. The NST Member can give directions about witnesses on their own initiative or on application by a party.³⁴
101. Irrespective of whether an order is made, parties to a dispute may be subject to implied obligations of confidentiality. For example, where a party to a dispute has been compelled to disclose information or documents for the purposes of the dispute, the other parties to the dispute can only use that information or those documents for the purposes of the dispute.³⁵

²⁹ Section 40(1) of the NST Act.

³⁰ Section 30 of the NST Act.

³¹ Section 40(1) of the P&P Determination.

³² Section 40(2) of the P&P Determination.

³³ Section 41(1) of the P&P Determination.

³⁴ Section 41(2) of the P&P Determination.

³⁵ Section 41 of the P&P Determination.

Termination or suspension of an arbitration

102. The NST Member may terminate or suspend an arbitration in the following circumstances:
- if the parties to the arbitration agree to the termination
 - if the NST Member is satisfied that the application for arbitration was vexatious
 - if the NST Member is satisfied that the subject matter of the arbitration is trivial, misconceived or lacking in substance
 - where criminal proceedings have been, or are, commenced in respect of conduct that is substantially the same conduct that is the subject of the dispute before the NST
 - where separate proceedings arising out of the same subject matter have been instituted in any other court or tribunal
 - where there is undue delay, without reasonable excuse, by the applicant in pursuing their application
 - where costs have not been paid.³⁶
103. The NST Member may make a direction to suspend an arbitration where the parties have made an application for an ADR process.³⁷
104. If the NST Member makes a direction to terminate a matter on the basis that separate proceedings arise out of the subject matter, the direction can be made on the condition that the termination only have effect once the other proceedings have been resolved in the other court or tribunal.³⁸

Determination of arbitrations

105. The NST Member will prepare a written notice of determination and the reasons for determination.³⁹ The parties will receive a copy of the written notice and reasons.
106. In the General Division, determinations will only be published:
- a. with the parties' consent
 - b. where the determination has significant precedential value.⁴⁰
107. Precedential General Division determinations will be published regardless of the consent of the parties. However, an opportunity to make submissions about redaction of the NST Member's reasons will be provided before publication.⁴¹

³⁶ Section 27(4) of the NST Act; s 10(1) of the NST Rule.

³⁷ Section 10(2) of the NST Rule.

³⁸ Section 10(3) of the NST Rule.

³⁹ Section 27(1) of the NST Act.

⁴⁰ Section 56(2) of the P&P Determination.

⁴¹ Sections 56(3), 56(4) of the P&P Determination.

108. A summary of each General Division determination will be published, which will generally be de-identified.⁴²

Costs

109. The CEO of the NST may make a determination in relation to charging a party or parties for the costs of an arbitration in any of the NST's divisions or the costs of alternative dispute resolution.⁴³
110. The costs that the CEO can determine are not the costs between the parties (e.g. the costs of legal representation or of obtaining a medical report).
111. Rather, the CEO can determine the 'costs of the arbitration', being the costs incurred by the NST in conducting those processes.⁴⁴
112. A cost determination made by the CEO may:
- a. Apportion the charges between the parties;
 - b. Provide that a party or parties be charged a portion of the actual or estimated fees of the arbitration; and
 - c. Require that a party or parties pay the charge prior to, or as a condition of, the dispute being listed for an arbitration or alternative dispute resolution.⁴⁵

Waiver

113. The CEO may waive or reduce a charge payable by a party for the costs of an arbitration if satisfied that requiring the party to pay a charge would cause them to suffer financial hardship.⁴⁶

Refund

114. Where the NST does not have jurisdiction to deal with the dispute that is the subject of an application, the CEO may refund the application fee.⁴⁷

Referral of a dispute to the General Division

115. Different rules apply to the referral of a dispute to the NST depending on the resolution method sought by the parties. Generally, the rules are to be found in the relevant policy (constituent document) of the sport.

⁴² Section 57 of the P&P Determination. See, e.g., [Decisions | National Sports Tribunal](#).

⁴³ Sections 46 and 47 of the NST Act; s 13 of the NST Rule.

⁴⁴ Section 46 of the NST Act.

⁴⁵ Section 13(2) of the NST Rule.

⁴⁶ Section 14 of the NST Rule.

⁴⁷ Section 11(4) of the NST Rule.

Resolution method	Referral mechanism
Arbitration	<ul style="list-style-type: none"> • Constituent documents permit dispute to be heard in the General Division of the NST; or • With agreement
Mediation Conciliation Case Appraisal	<ul style="list-style-type: none"> • With agreement only

Arbitration – sporting body’s constituent documents refer matter to the NST

116. In some cases, the basis on which a person can refer a dispute to the NST are set out in one of their sport’s constituent documents.
117. Constituent documents are the key documents that establish a sporting body and contain rules to govern the sport’s operation.
118. A constituent document is a set of rules that are part of the governing documents of a sport, and to which athletes of that sport are bound. This document may be a Constitution or may be referred to as Rules, Regulations, a By-Law or a Policy, or otherwise.
119. Ordinarily, a person agrees to be bound by the constituent documents of a sporting body when they sign a membership form or enter an event organised by the sporting body.
120. A sport’s constituent documents will generally include policies covering their rules e.g. where a sport’s constitution requires members to abide by all policies of the sport in existence from time to time.
121. Many sports incorporate their member protection policy into their constituent documents. For example:
- the Athletics Australia Member Protection Policy forms part of the sports By-Laws, which are made by the Athletics Australia Board under the sport’s Constitution for the purpose of giving effect to the objects of the Company. By-Laws are binding on Athletics Australia Members: see clause 35.2 of the Athletics Australia Constitution
 - Clause 4.2 of the Rowing Australia Constitution provides that ‘members agree that they are bound by this Constitution and agree to abide by the Constitution, the Rules and the Whole of Sport Policies’. The term ‘Whole of Sport Policies’ is defined to include:
‘sport policies which are mandated for use by sports funded by the Australian Federal Government and also other policies which are deemed to be appropriate for adoption by the whole of the sport for reasons of good governance. Examples of the nature of Whole of Sport Policies are anti-doping, supplement usage, member protection, bullying and harassment, discrimination, code of conduct, match fixing and privacy.
122. The sport’s constituent documents may provide for a dispute to be:
- challenged via the sport’s own internal processes e.g. through a sporting tribunal; or

- heard in the General Division of the NST.⁴⁸

123. Where a sport's constituent documents provide for disputes to be arbitrated by the NST, consent to refer a particular dispute is not required.

Arbitration – sporting body's constituent documents do not refer matter to NST

124. Where a sporting body's constituent documents do not permit a dispute to be heard in the General Division of the NST, or are silent on whether disputes can be heard, referral for arbitration can occur with the agreement of the parties to a particular dispute.⁴⁹

Alternative dispute resolution

125. A person and a sporting body, or two or more persons, can apply to the NST to undertake an alternative dispute resolution in relation to a dispute. The General Division of the NST will only have jurisdiction to undertake alternative dispute resolution where the applicants are bound by a sport's constituent documents and agree in writing to refer the dispute for mediation, conciliation, or case appraisal.

126. Where a sporting body's constituent documents provide for limited grounds of review of a decision, an application to the NST can only be made on those, and not on any other, grounds.

⁴⁸ Sections 23(1)(b)(i) and; 24(1)(b)(i) of the NST Act.

⁴⁹ Sections 23(1)(b)(ii) and 24(1)(b)(ii) of the NST Act.

PART 3: KINDS OF DISPUTES HEARD BY THE NST GENERAL DIVISION

Example of the kind of dispute heard by the NST: Athlete eligibility and selection disputes

127. A dispute regarding athlete eligibility or selection, however described in the constituent documents of the sporting body, is a kind of dispute that can be referred to the General Division of the NST for arbitration or alternative dispute resolution.

Athlete eligibility and selection criteria

128. Ordinarily, an eligibility dispute will concern an athlete's eligibility to participate in an event or eligibility to be selected in a team. A selection dispute will concern the decision to select one eligible athlete over another for an event, team or squad.
129. Disputes regarding eligibility and selection for other positions within a sporting body do not normally come within this category e.g. coach, manager, or selector roles, unless the sporting body's rules, or policies permit such disputes to be resolved by the NST.

Eligibility criteria

130. To participate in an event or be considered for selection to an Australian representative team or squad, an athlete may need to demonstrate that they meet certain eligibility or selection criteria. The eligibility criteria may be determined by the sporting body, by an International Sporting Federation or an event organiser.
131. Eligibility criteria may relate to an athlete's personal characteristics, such as citizenship, residency, sex, or age. An athlete's continuing eligibility may also depend on fulfilling agreed conditions following their selection.

Selection criteria

132. Many selection criteria or policies will determine selection based on objective factors, such as placings in an event or by achieving a certain benchmark or time.
133. Other selection policies will require decision-makers to make subjective decisions by balancing a range of factors. For example, Rowing Australia's National Selection Policy – Senior Team, lists primary and secondary selection criteria.⁵⁰

Primary criteria include:

- performance in trialling and competition specified in the Event Requirements
- current national and international performances.

Second criteria include:

- past national and international performances.
- the Athlete's current level of skill and physical fitness.

⁵⁰ Rowing Australia, [2020 Selection Policy Handbook](#).

- any current injury or condition, which will impair or prevent the Athlete's performance
 - factors relevant to crew combination, namely crew compatibility, technical compatibility, and team balance and harmony
 - relevant rowing conditions in relation to any trialling or results (e.g. wind and stream effects)
 - coach input
 - potential development of crew combinations for subsequent National Teams
 - equipment breakages or malfunctions
 - for lightweight and coxes only, maintaining specified weight profiles
 - for coxes only, consultation with rowers.
134. An athlete may need to comply with not only the criteria imposed by their immediate governing body, but also with those imposed by event committees, or national or international federations (such World Athletics).

Athlete eligibility and selection disputes

135. Athlete eligibility and selection disputes involve an athlete appealing against a decision of a sporting body or tribunal in relation to athlete eligibility or selection criteria, such as
- whether that athlete (or another) meets the relevant eligibility criteria
 - whether that athlete (or another) is selected for a team or squad.
136. An athlete eligibility or selection dispute is a kind of dispute that can be referred to the General Division of the NST for arbitration or alternative dispute resolution.

Case studies – Eligibility

Caster Semenya v IAAF – [2018/O/5794](#) (1 May 2019)

Ms Semenya challenged the IAAF Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development) (DSD Regulations). She contended the Regulations were invalid as they were discriminatory, unnecessary, unreliable and disproportionate.

The Regulations effectively required female athletes with XY chromosomes to reduce their natural testosterone levels to 5 nmol/L for a continuous period of at least six months in order to be eligible to compete in a Restricted Event. Ms Semenya regularly participated in Restricted Events – including 400m, 800m and 1,500m races at International Competitions.

According to CAS, any rules regulating who may participate in the female category must be rational, objective and fair. Although CAS accepted the Regulations were discriminatory, the Panel found by majority that the Regulations were a necessary, reasonable and proportionate means of achieving the IAAF's aim of preserving the integrity of female athletics in Restricted Events. A [media release](#) and the [full award](#) can be found on the CAS website.

Jo-Ann Lim v Synchronised Swimming Australia Inc – [A2/2016](#) (5 July 2016)

Ms Lim challenged the decision of Synchronised Swimming Australia Inc (SSAI) to nominate another athlete, Ms Stackpole, to the Australian Olympic Committee

(AOC) for selection in the Australian synchronised swimming team for the 2016 Olympic Games. The SSAI Appeal Tribunal affirmed the decision. Ms Lim sought a review of the Appeal Tribunal's decision in CAS.

Ms Lim submitted that Ms Stackpole did not satisfy the SSAI's Nominating Criterion that an athlete must be an Australian citizen to be eligible for nomination. She claimed Ms Stackpole was ineligible because she was not an Australian citizen when she participated in certain selection trials. A denial of natural justice was also claimed.

In determining its procedure, CAS held, pursuant to its rules and the SSAI by-law, that it had power to review the facts and the law in determining whether the Appeal Tribunal was in error on a question of law, or breached the rules of natural justice.

In respect of the dispute, CAS found that the AOC Olympic Team Selection By-Law only required an athlete to fulfil the Nominating Criteria at the date of their nomination. Because Ms Stackpole was an Australian citizen by that date, she was eligible for selection.

To the extent CAS found the Appeal Tribunal had denied Ms Lim natural justice in refusing to accept her written submissions in advance of the hearing, it held no practical unfairness resulted as the appeal enabled reconsideration of the issues. Ultimately, CAS agreed with the conclusion of the Appeal Tribunal and dismissed the appeal.

Case studies – Selection

Matthew Karwalski v Squash Australia – [A3-2014](#) (18 July 2014)

The athlete was not selected for the 2014 Australian Commonwealth Games squash team. His appeal to the Squash Australia Appeal Committee was not successful.

He then appealed to CAS. He claimed that the Appeal Committee had interpreted and applied the selection policy incorrectly, in that it had prioritised some criteria over others, and had considered some selection criteria out of sequence. CAS found that the Appeal Committee's interpretation was correct.

However, CAS found that the Appeal Committee has denied procedural fairness to the athlete, by failing to provide to the athlete for comment two documents which had informed the Appeal Committee's decision and which outlined the rationale for the athlete's non-selection. In addition, the Appeal Committee had failed to hear the athlete's appeal de novo as required by the selection policy, because it had simply read and endorsed the selection committee's decision.

CAS upheld the appeal and remitted the decision to the Appeal Committee.

Daniel Walker v Australian Biathlon Association – [2011/1/2590](#) (13 December 2011)

The athlete appealed to CAS a decision not to select him for the men's biathlon event team for the 2012 Winter Youth Olympic Games.

He claimed that the results of one particular race in which he participated should not have been taken into account when the Australian Biathlon Association (ABA) calculated athlete rankings, which informed the selection decision. This was because the race's length was shortened and it no longer met the description of a race that could be considered in the selection process. However, CAS found that the race organisers were permitted to change the length of the race at their discretion,

had exercised that discretion properly in response to unfavourable weather conditions, and that the fundamental characteristics of the event were not changed.

The athlete also disputed the ABA's interpretation of the word 'competitor' in the selection criteria, which impacted the calculation of athlete rankings. However, the Court found that the ABA's interpretation was correct, having regard to the purpose and object of the selection criteria, and the context of the word's use.

The Court dismissed the appeal.

Garth Shillito v Fencing New Zealand – [ST13/10](#) (1 September 2010)

Mr Shillito appealed to the NZNST against his non-selection in the Men's Open Sabre for the Commonwealth Fencing Championships 2010. One argument presented by Mr Shillito was that Fencing New Zealand had discriminated against him on the basis of age.

Fencing New Zealand claimed that the "age and future potential" of fencers needed to be taken into account. However, there was no reference to age (other than age grade) in the selection criteria. Mr Shillito argued his age was thus irrelevant (he was 50, and sought selection in a team with men in their 20s). Amongst other things, Fencing New Zealand stated for the Appellant "to be considered seriously for selection results he really needed to be better than the younger fencers".

While the Tribunal was troubled by these comments about age, the Tribunal found there was no obvious failure by the selectors to apply the performance-based selection criteria. The Tribunal stressed that age of itself cannot be used as a determinant of merit in selection decisions, except where "there is something about age which unquestionably sounds in a measure of performance".

Chris Jongewaard v Australian Olympic Committee – [2008/A/1605](#) (19 September 2008)

The athlete was nominated by Cycling Australia for selection to represent Australia in cycling at the 2008 Olympics. The AOC declined the athlete's selection because the athlete was subject to two criminal charges for striking a cyclist with his car. The AOC considered that the athlete did not satisfy the Olympic Team Selection Bylaw that made an athlete's selection conditional on the athlete having not engaged in publicly-known conduct which brought or would be likely to bring the athlete into disrepute or censure. The AOC therefore found the athlete ineligible for selection.

The athlete lodged an appeal to CAS on the ground in cl 11.6(2) of the Selection Bylaw that the AOC's decision was '...obviously or self-evidently so unreasonable or perverse that it can be said to be irrational'. CAS upheld the AOC's decision, having regard to the serious nature of the criminal charges and the publicity the athlete's incident had attracted.

NST cases

Sebastian Temesi v Judo Australia (7 July 2022, judo)

<https://www.nationalsporttribunal.gov.au/sites/default/files/2022-08/sebastian-temesi-v-judo-australia.pdf>

Sarah Cardwell v Squash Australia (13 May 2022, squash)

<https://www.nationalsporttribunal.gov.au/sites/default/files/2022-05/sarah-cardwell-v-squash-australia.pdf>

Hughes v Paddle Australia (3 May 2022, paddle)

<https://www.nationalsporttribunal.gov.au/sites/default/files/2022-05/hughes-v-paddle-australia.pdf>

Thompson and Bassett v Paddle Australia (3 May 2022, paddle)

<https://www.nationalsporttribunal.gov.au/sites/default/files/2022-05/thompson-and-bassett-v-paddle-australia.pdf>

Georgina Collin v Paddle Australia (3 May 2022, paddle)

<https://www.nationalsporttribunal.gov.au/sites/default/files/2022-05/Collin-v-Paddle-Australia.pdf>

Other cases

Tess Lloyd and Caitlin Elks v. Australian Sailing (12 July 2016, sailing)

<http://jurisprudence.tas-cas.org/Shared%20Documents/A3-2016.pdf>

Mitchell Iles v. Shooting Australia (30 June 2016, shooting)

<http://jurisprudence.tas-cas.org/Shared%20Documents/A1-2016.pdf>

Michael Rishworth and Luke Laidlaw v. Ski and Snowboard Australia (4 February 2014, alpine skiing)

<http://jurisprudence.tas-cas.org/Shared%20Documents/3473.pdf>

Amy Graham v. Equestrian Australia (18 July 2012, equestrian)

<http://jurisprudence.tas-cas.org/Shared%20Documents/2828.pdf>

Luke Michael v. Australian Canoeing (29 September 2009, canoeing)

<http://jurisprudence.tas-cas.org/Shared%20Documents/1561.pdf>

Luke Michael v. Australian Canoeing (4 June 2008, canoeing)

<http://jurisprudence.tas-cas.org/Shared%20Documents/1549.pdf>

Andrew Mewing v. Swimming Australia Limited (9 May 2008)

<http://jurisprudence.tas-cas.org/Shared%20Documents/1540.pdf>

Anthony Little v. Boxing Australia Inc. (2 March 2006, boxing)

<http://jurisprudence.tas-cas.org/Shared%20Documents/1040.pdf>

Melissa Martin v. Squash Australia (25 February 2006, squash)

<http://jurisprudence.tas-cas.org/Shared%20Documents/1028.pdf>

Miriam Manzano v. Ice Skating Australia (24 January 2006, ice skating)

<http://jurisprudence.tas-cas.org/Shared%20Documents/1020.pdf>

Berchtold/Skiing Australia Limited (19 February 2002, alpine skiing)

<http://jurisprudence.tas-cas.org/Shared%20Documents/361.pdf>

Example of the kind of dispute heard by the NST: Disciplinary disputes – individuals

135. A dispute regarding disciplinary action taken, or proposed to be taken, against an individual is a kind of dispute that can be referred to the General Division of the NST for arbitration or alternative dispute resolution.

Disciplinary decision

136. A sporting body or sporting tribunal may take or impose a disciplinary measure where a person contravenes the rules of the sporting body. This might include where a person breaches the sporting body's:
- member protection policy
 - requirements in the sport's constituent documents e.g. Disciplinary Policy
 - anti-match fixing policy
 - codes of behaviour (for athletes, coaches, spectators and parents)
 - illicit drugs and alcohol policy
 - medical treatment policy (e.g. blood and infectious diseases, needles, sedatives)
137. Decisions relating to sanctions imposed under a sport's anti-doping policy are not disciplinary decisions. Additionally, the NST has no jurisdiction in respect of ['field of play'](#) disputes.

Disciplinary dispute

138. A disciplinary dispute involves a person appealing against a decision of a sporting body or sporting tribunal to impose a penalty or sanction for breaching the rules of a sporting body. It can concern action taken or proposed to be taken. It may be a dispute restricted to the severity of the penalty or sanction.
139. A disciplinary dispute (provided that it is not an appeal from a sporting tribunal administered by the sporting body) is a kind of dispute that can be referred to the General Division of the NST for arbitration or alternative dispute resolution. Where a dispute is an appeal from a sporting tribunal administered by the sporting body the dispute will be referred to the Appeals Division in accordance with the process set out in [part 5](#).
140. Generally, the reasons why arbitration or an ADR process may be requested in relation to a disciplinary decision could include:
- The disciplinary policy was not properly followed or implemented
 - The disciplinary decision was unreasonable or irrational, including because for instance:
 - the impugned behaviour did not contravene a standard of behaviour, such that a sanction should not have been imposed
 - A penalty or sanction is excessive (or inadequate)
 - Mitigating factors were not adequately considered
 - Substantial new evidence is now available
 - The disciplinary decision was affected by actual bias.

Case Studies

Hunter and Kartsport New Zealand Inc [STD 06/06](#) (28 April 2006)

Mr Hunter was a competitor in Kartsport (go-cart) racing who was involved in a fight with several other Kartsport members after a prize giving ceremony. Subsequently, at a special committee meeting, Kartsport Nelson determined that Mr Hunter could not train or race at its track for one year after he apologised and paid for his share of property damage caused by the fight.

Kartsport NZ later wrote to Mr Hunter requiring his attendance at a hearing to determine any penalty it might impose for his behaviour following the prize giving. Mr Hunter sought a postponement of the hearing date, and its transfer to Christchurch, for the purposes of witness availability.

The hearing went ahead on the date originally set by Kartsport NZ, without Mr Hunter being present. Kartsport found Mr Hunter was in breach of two rules and imposed several penalties, including a 6 month license cancellation and \$500 fine.

Although the Tribunal found that Kartsport did have jurisdiction to consider the fight despite the fact that it took place after the prize giving, it held that Mr Hunter was denied natural justice. The Kartsport Nelson process had no official status but appeared to have 'considerably influenced' the Kartsport NZ process. Mr Hunter was not given particulars of the charges against him, and it was unreasonable in the circumstances to have refused an adjournment.

Paris Saint-Germain & Neymar Da Silva Santos Junior v Union des Associations Européennes de Football (UEFA) – [CAS 2019/A/6367](#) (17 February 2020)

On 6 March 2019, Paris Saint Germain (the Club) played a match against Manchester United. Mr Neymar Da Silva Santos Jr (Neymar) did not participate in the match because of an injury, but attended the match as a spectator.

After a particular on-field play, at the prompting of the Video Assistant Referees (VAR), the referee reviewed footage of the play and awarded a penalty to Manchester United. Shortly after the match, Neymar posted an image of the play to Instagram, accompanied by a statement in Portuguese. Although the parties disagreed on its precise English translation, the statement questioned the expertise of the VAR and the referee's decision, with the use of strong language and expletives. The statements were widely reported and commented on in the international press.

A disciplinary investigation with regards to the statements was launched by the UEFA. At the conclusion of its investigation the relevant disciplinary body suspended Neymar for 3 competition matches.

The Club and Neymar appealed the decision to the UEFA appeals body, but the appeal was rejected. The Club and Mr Da Silva Santos then appealed that decision to the CAS.

The CAS ultimately found that Neymar had engaged in abusive or insulting language directed at a match official, contrary to the relevant code of conduct. Referring to sanctions placed on players for similar conduct and the need for consistency, the CAS ordered that the sanction be reduced to a suspension of two competition matches.

Example of the kind of dispute heard by the NST: Disciplinary disputes – organisations

141. A dispute regarding disciplinary action taken, or proposed to be taken, against a part of a sporting body that is a body corporate is a kind of dispute that can be referred to the General Division of the NST for arbitration or alternative dispute resolution.

Disciplinary action decision

142. A sporting body or sporting tribunal may take or propose to take disciplinary action against a constituent part of its sport, where the constituent part:
- is a body corporate; and
 - contravenes a constituting document or policy by which the constituent body is bound.

Constituent bodies

143. The kinds of entities that may be constituent bodies, if incorporated, include:
- Member States/Territories
 - Affiliate Members
 - Clubs.

Constituting document or policy

144. Constituent bodies are bound by a sporting body's constitution and other rules.
145. By way of example, some sports have constitutions based on the Australian Sports Commission template constitution which relevantly contains clauses which deal with sanctions for discipline and termination of member states: clause 8. Relevantly, sanctions for discipline can occur where a Member body has:
- breached, failed, refused, or neglected to comply with a provision of the Constitution, the Policies or any other resolution or determination of the Directors or any duly authorised Committee; or
 - acted in a manner unbecoming of a Member or prejudicial to the Objects and interests of the Company or Sport, or both; or
 - prejudiced the Company or Sport or brought the Company or Sport or themselves into disrepute.
146. Other rules or policies may enable sanctions to be enforced on member bodies. For example, Football Australia's [National Disciplinary Regulations](#) provide for sanctions to be imposed on a club for team misconduct.
147. Decisions relating to sanctions imposed under a sport's anti-doping policy are not disciplinary decisions.

Case Studies

<p>Guangzhou Evergrande FC v Asian Football Confederation (AFC) – 2017/1/5306 – (5 March 2018)</p>
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At a football match in the AFC Champions League between Eastern SC and Guangzhou Evergrande Taobao FC ('Guangzhou FC'), spectators in the section of the ground reserved for Guangzhou supporters unfurled a banner containing the words "Annihilate British Dogs, Exterminate Hong Kong Independence Poison".

Guangzhou FC was charged with violating various articles of the AFC code which prohibited discrimination and which made football clubs legally responsible for the conduct of their spectators. The AFC Discipline and Ethics committee found that Guangzhou FC had violated these rules, and ordered the club to play two match without spectators and to pay a fine of \$22,500 USD within 30 days. Guangzhou FC appealed to the AFC Appeals Committee, who dismissed the appeal.

Guangzhou FC appealed to CAS, arguing that the AFC code had been applied erroneously, that the sanction was disproportionate, that various mitigating factors had not been taken into account and that the penalty should not have been increased on the grounds of club recidivism. The appeal to CAS was upheld in part: the component of the penalty by which Guangzhou FC was to be denied spectators at two matches was found to be disproportionate.

Example of the kind of dispute heard by the NST: bullying, harassment, and discrimination

148. Most commonly, sporting bodies will have a member protection policy which will deal with the prevention and management of bullying, harassment, and discrimination. To be recognised by the Australian Government as a National Sporting Organisation (**NSO**), the organisation must have enforceable and current policies, approved by Sport Integrity Australia, that address issues relating to bullying, harassment, and discrimination,⁵¹ for example, the member protection policy under the National Integrity Framework (**NIF**).
149. A dispute regarding bullying, harassment and discrimination can be referred to the General Division of the NST for alternative dispute resolution or for arbitration.
150. Bullying, harassment, and discrimination disputes before the NST may overlap with criminal or civil proceedings concerning substantially the same conduct or subject matter.⁵²

What is bullying?

151. Bullying is characterised by repeated, unreasonable behaviour directed at a person, or group of persons, that creates a risk to health and safety. Bullying behaviour is that which a reasonable person in the circumstances would expect to victimise, humiliate, undermine, threaten, degrade, offend or intimidate a person. Bullying behaviour can include actions of an individual or a group.

⁵¹ See [Recognition Criteria](#)

⁵² The NST may terminate or suspend an arbitration where criminal proceedings have been, or are commenced in relation to conduct that is substantially the same, or separate proceedings arising out of the same subject matter is instituted in another court or tribunal: s 27(4) of the NST Act; s 10(1) of the NST Rule.

152. Whilst generally characterised by repeated behaviours, one-off instances can amount to bullying.
153. The following types of behaviour, where repeated or occurring as part of a pattern of behaviour, would be considered bullying:
- verbal abuse including shouting, swearing, teasing, making belittling remarks or persistent unjustified criticism;
 - excluding or isolating a group or person;
 - spreading malicious rumours;
 - psychological harassment such as intimidation; or
 - cyber bullying (abusive, discriminatory, intimidating or offensive statements being made online).

What is harassment?

154. Harassment is any unwelcome conduct, verbal or physical, that intimidates, offends or humiliates another person and which happens because a person has a certain personal characteristic protected by State or Federal anti-discrimination legislation (see the list below). The offensive behaviour does not have to take place a number of times, a single incident can constitute harassment.⁵³

What is discrimination?

155. Unlawful discrimination involves the less favourable treatment of a person on the basis of one or more of the personal characteristics protected by state or federal anti-discrimination laws. For the purposes of determining discrimination, the offender's awareness and motive are irrelevant. The personal characteristics protected by various anti-discrimination laws may include:
- age
 - sex or gender
 - gender identity
 - intersex status
 - race, colour, descent, national or ethnic origin, nationality, ethno-religious origin, immigration
 - disability, mental and physical impairment
 - family/carer responsibilities, status as a parent or carer
 - marital status
 - pregnancy, potential pregnancy, breastfeeding
 - sexual orientation and gender identity
 - physical features
 - irrelevant medical record
 - irrelevant criminal record, spent convictions

⁵³ The NAD Scheme is contained in Sch 1 to the SIA Regulations.

- political beliefs or activities
 - religion, religious beliefs or activities
 - national extraction or social origin
 - lawful sexual activity
 - profession, trade, occupation or calling
 - member of association or organisation of employees or employers, industrial activity, trade union activity
 - defence service
 - personal association with someone who has, or is assumed to have, any of the above characteristics
156. Discrimination can be either direct or indirect:
- **Direct** discrimination occurs if a person treats, or proposes to treat, a person with a protected personal characteristic unfavourably because of that personal characteristic.
 - **Indirect** discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice that will disadvantage a person with a protected personal characteristic and that requirement, condition or practice is not reasonable.⁵⁴
157. The NST can conduct an arbitration of a dispute under a member protection policy of a sporting body relating to bullying, harassment, or discrimination.
158. The reasons why an alternative dispute resolution process may be requested in relation to a bullying, harassment or discrimination dispute could include:
- A bullying, harassment or discrimination complaint has been made under the sport's member protection policy and remains unresolved, including where:
 - The parties dispute the other party's version of events
 - A person alleges the complaint was improperly made
 - The parties' desire to resolve the complaint with the assistance of an independent third party.
159. By agreement, a mediation, conciliation, or case appraisal under the member protection policy could be conducted by the General Division of the NST of a complaint which relates to bullying, harassment, or discrimination. An Alternative Dispute Resolution List of NST Members specifies members with appropriate qualification and skills in this area.
160. If a complaint cannot be resolved using an alternative dispute resolution process, it may be referred for arbitration.
161. If the NST makes findings that an individual or organisation has breached the policy, disciplinary measures may be imposed.
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162. Disputes which are an appeal from disciplinary measures imposed by an internal tribunal administered by the sporting body can be referred to the Appeals Division of the NST for arbitration.

Case Studies

Liddick v Gymnastics Australia and Sport Integrity Australia [[NST - E21 - 148532](#)]

L was employed by Gymnastics Australia (GA) and was the National Coach for the Australian Women's Artistic Gymnastics Team. A former gymnast (the Complainant) made a number of allegations about L's conduct during the period between 2006 - 2012, under GA's *Supplementary Policy for the Management of Complaints relating to conduct covered by the 20/21 Australian Human Rights Commission Review into Gymnastics in Australia* (SCMP).

As provided for by the SCMP, the allegations were investigated by Sport Integrity Australia (SIA), which found five of them were substantiated. GA then issued a Breach Notice to L asserting breaches of the relevant member protection policies (MPP) in force at the time of the conduct and proposing a 6 month suspension, with 3 months to be suspended following a 3 month reintegration period.

L elected to contest the proposed sanction in the NST. SIA appeared as an interested party, and consistent with the SCMP, took the lead in presenting GA's position.

The NST considered the five allegations in detail. Two allegations were found to be proven on the balance of probabilities (applying the *Briginshaw* test) and so L had therefore breached the terms of the relevant GA MPPs in force at the time of the conduct. The conduct that was proven concerned L making statements to the Complainant and other athletes pertaining to their diet and their weight. The NST noted that the standards and mores in existence between 2006 – 2012 in relation to acceptable standards of treatment of children and young adults in elite sport were no different to the standards and mores of 2021. The NST also considered, in detail, the principles to be applied in determining a sanction. It determined a sanction of 4 months' suspension, to be wholly suspended for 2 years. L was also required to write an apology to the Complainant.

In the matter of Dean Bouzanis of Melbourne City FC (2017) (Disciplinary and Ethics Committee of Football Federation of Australia)

The athlete was referred to the Disciplinary and Ethics Committee of the Football Federation of Australia in relation to an incident which occurred in a Hyundai A-League match between Melbourne City and Melbourne Victory FC which took place on 4 February 2017. Mr Bouzanis was accused of using a racial slur (an offence under the FFA's constituent documents). The matter was referred to the Committee to determine whether the offence had been committed, and if so, what sanction should be imposed.

Mr Bouzanis accepted that he yelled the words "Fucking Gypsy" at the opposing player. The offence was committed. However, the Tribunal accepted that Bouzanis was unaware that this constituted a racial slur; that he was genuinely and profusely apologetic; and that he was undertaking a racism and cultural awareness program. For these reasons, Bouzanis was given the minimum possible sanction (5 matches).

**Example of the kind of dispute heard by the NST:
Contractual/Employment Dispute**

163. The National Sports Tribunal Amendment Rule 2021 broadened and clarified the types of dispute in respect of which an application can be made to the General Division of the NST for arbitration, mediation, conciliation or case appraisal, or to the Appeals Division of the NST.
164. A dispute regarding contractual or employment matters is now a kind of dispute that can be referred to the general division of the NST for arbitration or alternative dispute resolution.

Contractual and Employment disputes

165. Sports contracts often involve complex terms and large sums of money. Disputes may arise in relation to any form of contract between parties in a sporting context. This may include:
- Employment contracts
 - Endorsement contracts
 - Promotional/marketing contracts
166. Contracts in sport are legally binding agreements between two or more parties. As such, failing to comply with the terms of a contract, written or oral, without legitimate excuse, may constitute a breach of contract. A breach may include:
- Failing to meet performance standards
 - Failing to participate
 - Interference with other contracts
167. Generally, the reasons why arbitration or an ADR process may be requested in relation to a contractual and/or employment dispute could include:
- The terms of the contract were not properly implemented
 - Breach of a contractual term
 - A penalty or sanction is excessive (or inadequate)
 - Wrongful dismissal

PART 4: ANTI-DOPING JURISDICTION

Background

168. Australia is a signatory to the UNESCO International Convention against Doping in Sport (**UNESCO Convention**) and as such is required to adopt anti-doping measures that are consistent with the principles of the World Anti-Doping Code (**Code**).

World Anti-Doping Code

169. The Code is an international agreement, administered by the World Anti-Doping Agency (**WADA**), which provides the framework for harmonised anti-doping policies, rules and regulations within sport organisations and among governments. The Code specifies:
- acts that constitute an ADRV (**Anti-Doping Rule Violation**)
 - the framework for listing substances and methods prohibited for use in sport
 - sanctions that apply to individuals for committing ADRVs
 - procedures for managing a positive result from testing and for managing possible ADRVs arising other than from testing e.g. investigation, admissions etc; and
 - an individual's right to procedural fairness, including a fair hearing.
170. The Code is adopted by Signatories including the International Olympic Committee, International Paralympic Committee, national Olympic committees, international sporting federations, major event organisers, and national anti-doping organisations. NSOs submit to the Code either by being a signatory to the Code (for example, the Australian Football League), or through membership of an international sporting federation which itself is a signatory to the Code. Athletes and other personnel become bound by the Code through their membership of their sport, normally through signing a membership form or event entry form by which they agree to be bound by the (Code-compliant) anti-doping policy of the sport.
171. Sport Integrity Australia (**SIA**) is the Australian Government agency responsible for implementing Code-compliant policies and activities in Australia. SIA's powers and functions are specified under the SIA Act and the SIA Regulations,⁵⁵ including the National Anti-Doping Scheme (**NAD scheme**)⁵⁶. In summary, SIA has statutory authority to conduct testing of athletes, to undertake investigations into possible ADRVs, and to present material at sport tribunal hearings.
172. On 1 July 2020, the Australian Sports Anti-Doping Authority (**ASADA**) was subsumed into SIA. In addition to its broader integrity functions, SIA also undertakes the anti-doping functions previously undertaken by ASADA.

⁵⁶ The NAD Scheme is contained in Sch 1 to the SIA Regulations.

Anti-Doping Disputes

173. Ordinarily, an athlete or other person who makes an application to the NST to arbitrate an anti-doping dispute will first have gone through the statutory process set out in the SIA Act and the NAD scheme. Briefly, where an athlete returns a positive test (and the B sample, if analysed, has confirmed the A sample), or where the SIA CEO has evidence that an athlete or the other person has committed a possible non-presence ADRV, the SIA CEO will notify the person of the possible ADRV, setting out particulars of the allegation.⁵⁷ The person is then given an opportunity to respond.⁵⁸ The SIA CEO then considers whether an assertion of a possible ADRV should be made against the person. If the SIA CEO makes an assertion of a possible ADRV, they then advise the person and their sport of the SIA CEO's assertion by issuing a Letter of Charge.
174. Under the terms of the anti-doping policies of most Australian sporting bodies, the assertion by the SIA CEO of a possible ADRV is then the trigger for the sport to issue a Letter of Charge to the person for a breach of the sporting body's anti-doping policy.
175. SIA also undertakes functions on behalf of sporting bodies, as provided for in the anti-doping policies of those sporting bodies. Depending on the terms of the anti-doping policy, these functions usually include the issuing of Letters of Charge for breaches of the sporting body's anti-doping policy and presenting anti-doping cases on behalf of the sporting body in tribunal hearings.
176. To be recognised as an NSO in Australia, and consequently be eligible for government funding, a sporting organisation is required to be accountable at the national level for establishing, maintaining, and enforcing an enforceable and current anti-doping policy compliant with the Code and approved by SIA.⁵⁹
177. All NSO anti-doping policies replicate essential parts of the Code (for example, Art 2 of the Code, which sets out the ADRVs), such that when SIA is exercising its legislative functions in relation to ADRVs, it is, in parallel, often also enforcing the anti-doping policy of the relevant NSO.
178. If an athlete or other person is asserted to have breached the terms of an anti-doping policy (i.e., an ADRV is asserted against them) they will receive from their sport a notice (which may be referred to as a Letter of Charge) asserting a breach of the relevant provisions of the anti-doping policy of the sport.
179. Under the terms of the anti-doping policy, the athlete or other person can either choose to accept the violation and sanction, or apply for a hearing before a sport tribunal to dispute the assertion that they committed an ADRV, or dispute the sanction that the sport/SIA proposes to impose.
180. SIA, the national anti-doping organisation for Australia for the purposes of the Code, or WADA, or another Party (such as the International Federation (IF)), may also

⁵⁷ Section 13(1)(j) of the SIA Act and Section 4.08, 4.17, and 1.02A of the SIA Regulations.

⁵⁸ Section 14 (3) of the SIA Act.

⁵⁹ See [Recognition Criteria](#)

wish to dispute a sanction imposed by a sporting body, or dispute the failure of a sporting body to impose a sanction. This is discussed in more detail later in this bench book.

181. Art 8 of the Code provides that an athlete or other person who is asserted to have committed an ADRV is entitled, at a minimum, to a fair hearing within a reasonable time by a fair, impartial and operationally independent,⁶⁰ hearing panel. In respect of most Australian NSOs since 2021 the Anti-Doping Division of the NST is the hearing panel for the purposes of Art 8 of the Code.

Prohibited List

182. The List of Prohibited Substances and Methods (**Prohibited List**) is determined by WADA each year, under Art 4.3.3 of the Code. It provides for the substances and methods which are prohibited for use in sport, and in respect of which athletes and other personnel can be liable for ADRVs.
183. The Prohibited List identifies those substances and methods that are prohibited for use in sport. The list is divided into substances and methods that are always prohibited for use (that is, both In-Competition⁶¹ and Out-of-Competition), and those substances and methods that are prohibited for use In-Competition only.
184. Substances are also classed as either Specified or Non-Specified Substances. Specified Substances are those Prohibited Substances which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance.
185. Non-specified substances are those substances which are taken for the purpose of enhancing sport performance – for example, anabolic steroids are non-specified substances.
186. In 2021, a new category was added for Substances of Abuse, which includes recreational drugs frequently abused in society outside of the context of sport, for example marijuana and cocaine.
187. There are also some substances that are not prohibited generally but are prohibited for use in a particular sport.
188. The designation of the substance as Specified or non-Specified or a Substance of Abuse is not relevant to whether the ADRV was committed, but is relevant in the context of sanctions – for example:
- where a Presence ADRV (an ADRV based on the presence of a Prohibited Substance in a blood or urine sample provided by an athlete in an anti-doping test) involves a specified substance, the maximum period of ineligibility from sport will be 2 years, unless the Anti-Doping Organisation can prove that the athlete took the substance with the intention to improve their sport performance

⁶⁰ The Code defines 'operational independence'.

⁶¹ The Code defines 'in-competition'.

- where a Presence ADRV involves a non-specified substance, the starting point for the period of eligibility will be 4 years, unless the athlete can establish that they did not intend to enhance their sport performance
- where a Substance of Abuse is involved, it was used Out-of-Competition, and it is established it was not used for enhancing sport performance, the period of ineligibility will be 3 months, which can be further reduced to 1 month if the athlete completes an approved treatment program. To date, WADA has determined 4 substances of abuse⁶² – these, and the type of prohibited substance that they are, are as follows:
 - Cocaine (S.6a – Non-specified Stimulants).
 - Methylenedioxymethamphetamine (MDMA / “ecstasy”) (S.6b – Specified Stimulants)
 - Diamorphine (Heroin) (S.7 – Narcotics); and
 - Tetrahydrocannabinol (THC) (S.8 – Cannabinoids).

189. Article 10 of the Code sets out the sanctions to be applied for ADRVs and provisions for possible reduction of those sanctions.

When the NST has jurisdiction under s 22 of the NST Act

Application for arbitration of disputes

190. Section 22 of the NST Act permits an application to the Anti-Doping Division for arbitration of a dispute where four requirements are met:

	Requirement	Explanation
1	Dispute between certain entities	Dispute between: <ul style="list-style-type: none"> • An athlete or other person (e.g. coach, team doctor) and • A sporting body and/or the SIA CEO where the athlete or other person is bound by the sporting body’s anti-doping policy.
2	Authority to arbitrate	The anti-doping policy (approved by the SIA CEO) permits the dispute to be heard in the NST OR the parties otherwise agree to refer in writing the dispute to the NST.
3	Applicant	Athlete OR Other person
4	Other entities that are, or may be eligible to be, a party to the dispute	The SIA CEO is always a party. The sporting body. Other persons or organisations who are permitted by the anti-doping policy to be a party to the dispute – examples include: the International Federation for the

⁶² [WADA Guidance Note regarding Substances of Abuse under 2021 World Anti-Doping Code.](#)

	Requirement	Explanation
		sport, Australian Olympic Committee, Commonwealth Games Australia, Paralympics Australia, and WADA.

191. Where a dispute meets these requirements, and complies with the application process, the Anti-Doping Division of the NST must conduct an arbitration and make a written determination in relation to the dispute.⁶³
192. For the purposes of s 5(3) of the NST Act, the *National Sports Tribunal Act 2019 – Specification of Sporting Body Instrument 2021 (No. 1)* specifies as a class of ‘sporting body’ each sporting organisation or body that has an anti-doping policy approved by the SIA CEO. The specification of these organisations and bodies as a ‘sporting body’ is in relation to the provisions of the NST Act that deal with anti-doping disputes, i.e.:
- an application to arbitrate an anti-doping dispute: s 22
 - appealing an anti-doping determination: s 31
 - appealing decisions made by sporting bodies: s 32
 - appealing decisions made by sporting tribunals: s 33
 - provisions relating to these provisions.
193. In each of those circumstances, each sporting organisation or body that has adopted an anti-doping policy approved by the SIA CEO is a sporting body as the term is defined in s 5(1) (b) of the NST Act.

Application process

Form of application

194. An application must be made in accordance with the approved form. The application must contain the information the form requires and must set out the reasons for the application.⁶⁴
195. The [approved forms](#) can be downloaded from the NST website, including:
- NST Application Form.
 - NST Application to Join Existing Arbitration Form.
 - NST Application for a Notice.
196. Where there is more than one applicant, each applicant’s details should be included on the application form.

Application fee

197. An applicant for the arbitration of an anti-doping dispute is not required to pay an application fee. An entity that wants to apply to join an existing arbitration (for

⁶³ Section 27(1) of the NST Act.

⁶⁴ Section 37 of the NST Act.

example, as an interested party) is required to pay the application fee prescribed by the NST Rule.⁶⁵ The current fees are set out below.

Arbitration of anti-doping dispute	Application Fee	Application to join existing arbitration	Service Fee
Applicable fee	None	\$250	None for most sports

Time limit

198. If you are applying to the Anti-Doping Division, you must apply within the time period specified in your sporting body's anti-doping policy or if no time period is specified, within 21 days after the day you receive the Letter of Charge.⁶⁶ An athlete may also seek to dispute a sanction notice within 21 days of issue.
199. If you are appealing an anti-doping dispute decision to our Appeals Division, you must appeal within the time period specified in your sporting body's anti-doping policy or within 21 days of the date of the original decision.
200. The period of operation of the NST is currently limited to the end of 18 March 2023. An application for the arbitration of a dispute in the Anti-Doping Division must be made before the end of 18 March 2023 or any other time period prescribed by the NST Rule.⁶⁷

Other parties to a dispute

201. Other persons or bodies may apply to be joined as a party to the dispute by lodging the approved [application form](#). Further details about eligibility are set out in the section [other parties to the arbitration](#).

Who is an athlete?

202. Broadly speaking, a person will be an athlete for the purpose of the NST Act if they have agreed to the terms of the anti-doping policy for their sport.
203. At present in Australia, standard Code-compliant anti-doping policies of sports are generally expressed to cover all persons participating in a sport, even where they are participating as an athlete recreationally.

Disputes that the Anti-Doping Division deals with

204. The Anti-Doping Division deals exclusively with disputes between an athlete and their sporting body, or another person and their sporting body, as to whether the athlete or other person has committed an ADRV.

⁶⁵ Section 37(b) of the NST Act; s 11(1) of the NST Rule.

⁶⁶ Section 12(1) of the NST Rule.

⁶⁷ Section 38(5) of the NST Act.

205. There are certain other anti-doping disputes (e.g. an appeal by an athlete or SIA against a Decision to impose or lift a provisional suspension as a result of a provisional hearing) which will be referred to the Appeals Division of the NST.
206. The Code (and sporting body anti-doping policies that implement it) set out 11 ADRVs. These are discussed in more detail below.

Code ref	ADRV Description
Art 2.1	Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's sample
Art 2.2	Use or Attempted Use by an Athlete of a Prohibited Substance or Prohibited Method
Art 2.3	Evading, Refusing or Failing to Submit to Sample Collection
Art 2.4	Whereabouts Failures
Art 2.5	Tampering or Attempted Tampering with any part of Doping Control
Art 2.6	Possession of a Prohibited Substance or Prohibited Method
Art 2.7	Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method
Art 2.8	Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or Prohibited Method that is prohibited Out-of-Competition
Art 2.9	Complicity
Art 2.10	Prohibited Association
Art 2.11	Acts by an Athlete or Other Person to discourage or retaliate against reporting to Authorities

Legal issues common to all ADRVs

Standard of Proof is comfortable satisfaction

207. The entity that is seeking to prove that an athlete or other person has committed an ADRV bears the onus of establishing the ADRV – Code Art 3.1.
208. As to the standard of proof that applies to establishing an ADRV, Art 3.1 of the Code provides that:

...the standard of proof shall be whether the Anti-Doping Organisation has established an anti-doping rule violation to the **comfortable satisfaction** of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond reasonable doubt.

N, J, Y, W v Federation Internationale de Natation (FINA) – [CAS 98/209](#) (22 December 1998)

This matter concerned 4 swimmers who had appealed to the CAS against periods of ineligibility imposed by FINA following positive tests for the substance Triamterene. The CAS Panel described (at [13]) the standard of proof required of FINA:

...as high: less than criminal standard, but more than the ordinary civil standard. The Panel are content to adopt the test set out in K. and G. v IOC (CAS OG 96/003-004)....”ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made”. To adopt a criminal standard (at any rate where the disciplinary charge is not one of a criminal offence) is to confuse the public law of the state with the private law of the association...

Inna Dyubanok v. International Olympic Committee (IOC) – [CAS 2017/A/5474](#) (12 September 2018)

The athlete was a member of the Russian Ice Hockey team that had participated in the 2014 Sochi Winter Olympics. The allegation was essentially that the athlete had, in advance, provided a ‘clean’ sample of her urine that could be substituted for urine samples she provided at the Sochi Olympics, along with related conduct. This was part of a doping scheme allegedly involving 38 other athletes.

As the matter concerned ADRVs that did not involve a positive test for a Prohibited Substance, there was a significant focus on the burden, standard and means of proof. On the standard of proof, the CAS Panel (at [672] – [674]) drew together principles that had been developed in previous cases as follows:

672. The test of comfortable satisfaction “must take into account the circumstances of the case” (CAS 2013/A/3258). Those circumstances include “[t]he paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities ” (CAS 2009/A/1920; CAS 2013/A/3258).

673. The gravity of the particular alleged wrongdoing is relevant to the application of the comfortable satisfaction standard in any given case. In CAS 2014/A/3625, the panel stated that the comfortable satisfaction standard is

“a kind of sliding scale, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be ‘comfortable satisfied’” (sic).

674. It is important to be clear, however, that the standard of proof itself is not a variable one. The standard remains constant, but inherent within that immutable standard is a requirement that the more serious the allegation, the more cogent the supporting evidence must be in order for the allegation to be found proven. As the CAS Panel explained in CAS 2014/A/3630:

“... the standard of proof does not itself change depending on the seriousness of the (purely disciplinary) charges. Rather the more serious the charge, the more cogent the evidence must be in support”.

As a general principle, the more serious the allegation, the more cogent the proof that will likely be required.

Evidentiary burdens of proof

209. For some ADRVs, the Code places an evidentiary burden on the athlete or other person to rebut certain presumptions or establish certain facts. In those instances, the standard of proof that the athlete or other person is required to meet is the balance of probabilities. Once the athlete or other person meets that standard, the onus then moves to the anti-doping organisation to disprove the matter to the comfortable satisfaction of the hearing panel.
210. The most common circumstance where the onus of proof can shift is in the context of the Presence ADRV, where an athlete is seeking to challenge the validity of their positive test based on departures from the requirements of the sample collection process, or in laboratory procedures or analysis. This is discussed in the case note of CAS 2014/A/3487 – *Veronica Campbell-Brown v Jamaica Athletics Administrative Association and International Association of Athletics Federations*, in the section on Presence below.

Limitation periods for ADRVs

211. An Anti-Doping organisation has 10 years from the date of the alleged commission of an ADRV to notify, or make reasonable attempts to notify, the athlete or other person of the alleged violation. If this does not occur, proceedings in relation to an alleged ADRV cannot be commenced – Code Art 17.

Examples – tribunal not prepared to go beyond applicable limitation period, but different approaches taken to considering evidence

United States Anti-Doping Agency (USADA) v Johan Bruyneel, Pedro Celaya Lezama and Jose Marti Marti (AAA 7 190 0225 12/77)

This matter concerned allegations of doping against the team director, team doctor and team trainer of the United States Postal Service/Discovery Channel cycling team. At that time, the statute of limitations was 8 years, but USADA had included in its allegations of ADRVs violations that were alleged to have occurred more than 8 years previously. At first instance, the AAA declined to consider any allegations of ADRVs that had occurred beyond the limitation period. The AAA also declined to consider any evidence of events occurring beyond the limitation period, even where

those events were said to be connected to alleged ADRVs occurring within the limitation period.

For the anti-doping rule violations that occurred within the 8 year statute of limitations, the AAA imposed the following periods of ineligibility: 10 years for Mr Bruyneel, and 8 years each for Dr Celaya and Mr Marti Marti.

Johan Bruyneel v USADA – [CAS 2014/A/3598](#); Jose Marti Marti v USADA – CAS 2014/A/3599; World Anti-Doping Agency v Johan Bruyneel, Pedro Celaya Lezama and Jose Marti Marti – CAS 2014/A/3618

Messrs Bruyneel and Marti Marti appealed the AAA decision to CAS, as did WADA (which was seeking lifetime periods of ineligibility for each athlete support person).

CAS agreed that it did not have jurisdiction to deal with the ADRVs that had allegedly occurred more than 8 years previously, (and in Mr Bruyneel's case, prior to him signing up to an arbitration agreement with the US Anti-Doping Agency (USADA)). However, CAS held that it could consider evidence beyond the limitation period to the extent that it was '...materially related to – and relevant to – the assessment of the evidence as to the alleged facts relating to alleged anti-doping rule violations which occurred after...'

CAS dismissed the appeals from the support personnel and increased their periods of ineligibility. Mr Bruyneel and Dr Celaya had lifetime periods of ineligibility imposed, and Mr Marti Marti was awarded a 15-year period of ineligibility.

Where athlete or other person is asserted to have committed more than one ADRV at the same time

212. It is not uncommon for an anti-doping organisation to assert more than one ADRV in respect of the same conduct – for example, ADRVs of Presence and Use; or ADRVs of Possession and Attempted Use.
213. In the context in which the NST operates, the question of whether an ADRV has been committed is in substance a contractual question as to whether a particular term of the anti-doping policy of a sport has been breached. What this means is that the same conduct can result in the breach of more than one term of a sport's anti-doping policy (and therefore, more than one ADRV).
214. Below are some examples of cases where more than one ADRV has been asserted:

Presence and Use

Australian Sports Anti-Doping Authority on behalf of Australian Canoeing and the Australian Sports Commission v Tate Smith – CAS (Oceania Registry) [A1/2015](#)

In this matter, Mr Smith was found to have committed ADRVs of both Presence of a Prohibited Substance, and Use of a Prohibited Substance.

Possession and Attempted Use

215. These violations are often asserted together in the case where an athlete orders and pays for a Prohibited Substance online with the intention of using it. Examples of cases are discussed below, in the sections on Attempted Use and Possession.

Certain ADRVs are not able to be asserted together

216. In a series of decisions arising from allegations of systematic doping by Russian athletes at the Sochi Winter Olympics, CAS has held that there are some ADRVs that are not able to be asserted together. These are, relevantly:
- Use of a Prohibited Method and Tampering
 - Complicity and another ADRV. In other words, an athlete or other person cannot be complicit in the commission of their own ADRV.

Applicable law to the dispute

217. Code Art 26.3 states that ‘The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments.’ In practical terms, what this means is that to the extent a sporting organisation’s anti-doping policy implements the Code, domestic law concepts are not to be used in interpreting those terms.
218. That said, because an anti-doping dispute is in effect a contractual dispute, domestic law principles of contractual interpretation may be relevant. To this end, anti-doping policies may contain a ‘choice of law’ clause, whereby the parties choose the law of one State or Territory that will apply to any questions of contractual interpretation. Alternatively, the parties can separately agree, as part of the arbitration, to the law that will apply to those questions.

Anti-Doping Rule Violations

Code Art 2.1 - Presence of a Prohibited Substance or its Metabolites or Markers (Presence)

219. Presence is the most well-known ADRV, and it arises as a result of the detection of a Prohibited Substance (or its Metabolites or Markers) in a urine or blood sample provided by an athlete. Samples must be collected in conformity with the WADA *International Standard for Testing and Investigations (ISTI)*, and the analysis conducted by a laboratory accredited or approved by WADA, in accordance with the requirements of the *International Standard for Laboratories (ISL)*, and associated technical standards determined by WADA. A laboratory result revealing the presence of a Prohibited Substance is known as an adverse analytical finding (AAF).
- The Code does not enable a positive test to be determined by other forms of testing – e.g. hair testing or saliva testing, or through testing by laboratories not accredited or approved by WADA.⁶⁸
220. There are two elements to the Presence ADRV that an anti-doping organisation needs to establish:
- the person is an athlete; and

⁶⁸ Some anti-doping organisations are conducting dried blood spot testing – the relevant WADA technical document can be found here: [td2021dbs_final_eng.pdf \(wada-ama.org\)](https://www.wada-ama.org/td2021dbs_final_eng.pdf)

- the presence of a Prohibited Substance or its metabolites or markers in the athlete's urine or blood.
221. If these elements are established, the ADRV will be established. Intention is not relevant to the commission of this ADRV.
222. It is important to note that while the Code speaks in terms of 'strict liability' (see comment at Code Art 2.1.1), this does not mean the same thing that it does in Australian law. For example, under Australian law, there may be a defence to strict liability on the basis of reasonable excuse. This is not the case for the Presence ADRV. As Art 2.1.1 states:
- ...it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.
223. These matters may, however, be relevant to the athlete's sanction – see below at [275] onwards.

Proving the Presence of a Prohibited Substance

224. Code Art 3.2.2 provides that WADA accredited laboratories are presumed to have conducted sample analysis and chain of custody procedures in accordance with the ISL. This presumption is rebuttable – an athlete will rebut the presumption if they can show on the balance of probabilities that a departure from the ISL occurred that could have reasonably caused the AAF. The athlete must show on the balance of probabilities (i) that there was a departure from the ISL and (ii) that the departure could have reasonably caused the AAF.
225. Code Art 3.2.3 sets out a similar rebuttable presumption in relation to departures from other standards.
226. If the athlete succeeds in rebutting either of these presumptions, the anti-doping organisation is then required to prove, to the comfortable satisfaction of the hearing panel, that the departure from the relevant international standard did not cause the AAF.

Departures from international standards

227. Because the detection of a Prohibited Substance in an athlete's sample suggests the athlete has committed an ADRV, hearing panels will examine departures from the international standards carefully.
228. Further, some departures from these processes will automatically invalidate an AAF.
229. This includes the case where the athlete is denied the opportunity to have their B (urine) sample⁶⁹ analysed in either their presence or the presence of their representative.

⁶⁹ When they are collected, urine samples are split into two: the A sample and the B sample. This is done by the athlete as part of the sample collection process.

Example – where AAF invalidated**Kaisa Varis v International Biathlon Union (IBU) – CAS [2008/A/1607](#)**

Ms Varis provided a urine sample. Varis's A sample returned an AAF for erythropoietin (EPO). She requested that the B sample be tested. The IBU refused to give her an extension of time to enable her to arrange for her representative to attend the opening of the sample. The opening and testing of the B sample proceeded in the absence of Ms Varis' representative, and confirmed the presence of EPO.

The IBU argued that the departure from the ISL did not cause the B sample result.

The Panel considered that the IBU had acted unreasonably in denying Ms Varis' request, finding that her rights had been compromised. As a result, the B sample was not admissible as evidence of the ADRV, which meant the Presence ADRV was not able to be established. The CAS Panel noted that, '...an athlete's right to be given a reasonable opportunity to observe the opening [2008/A/1607g](#) or testing of a B sample is of sufficient importance that it needs to be enforced even in situations where all of the other evidence available indicates that the appellant committed an anti-doping rule violation'.

Example – where departures in the sample collection process meant that the hearing panel could not be comfortably satisfied of the Presence ADRV**Veronica Campbell-Brown v Jamaica Athletics Administrative Association (JAAA) and International Association of Athletics Federations (IAAF) – CAS [2014/A/3487](#)**

This case dealt with the operation of the presumption in Code Art 3.2.3, where there were departures from the International Standard for Testing (IST) (as it then was).

Ms Campbell-Brown was tested after an event. Because her first attempt to provide a urine sample resulted in her providing less than the minimum amount required for a sample, her sample was supposed to have been sealed in accordance with the mandatory 'partial sample' collection procedures in the IST. This was not done.

Ms Campbell-Brown's sample returned an AAF for hydrochlorothiazide (HCT), a diuretic prohibited for use in sport. Ms Campbell-Brown's evidence was essentially that she did not knowingly ingest HCT, and the departures from the IST could reasonably have caused the AAF.

The CAS Panel (at [155]–[156]) found that a shift in the burden of proof will occur:

'...whenever an athlete establishes that it would be reasonable to conclude that the IST departure could have caused the Adverse Analytical Finding. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the IST departure and the presence of a prohibited substance in the athlete's sample. For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible.

The Panel considers that this interpretation – which does not set the bar for a shift in the burden of proof to an unduly high threshold – strikes an appropriate balance between the right of athletes to have their samples collected and tested in accordance with mandatory testing standards, and the legitimate interest in preventing athletes from escaping punishment for doping violations on the basis of inconsequential or minor technical infractions of the IST.

The Panel found that Ms Campbell-Brown had established, on the balance of probabilities, that the departures from the IST could reasonably have caused her AAF. As a consequence, the IAAF was required to establish, to the comfortable satisfaction of the CAS, that the departures did not cause the ADRV. The IAAF was unable to do this, with the result that CAS allowed the athlete's appeal.

Code Art 2.2 – Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

230. As mentioned earlier, the ADRV of Use of a Prohibited Substance or Prohibited Method,⁷⁰ is commonly asserted with the Presence ADRV. This will generally be the case where the athlete has tested positive to a substance that is always prohibited – i.e. both in and out of competition. However, there are instances where an Anti-Doping Organisation (**ADO**) will pursue the ADRV of Use in the absence of an AAF and will rely on other evidence, such as admissions from the athlete, witness statements, documentary evidence, or conclusions drawn from longitudinal profiling.
231. To establish the Use ADRV, the ADO needs to establish, to the comfortable satisfaction of the hearing panel, that the athlete used a substance or method that is prohibited. It is not necessary for the ADO to establish that the athlete *knew* that the substance was prohibited. As with the Presence ADRV, the athlete's intent is not relevant to the question of whether the Use ADRV was committed.
232. The meaning of 'Use' is broad, and covers 'the utilisation, application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method'. In other words, the athlete does not have to administer the Prohibited Substance themselves to 'Use' the substance.

Example – Use of a Prohibited Substance

233. A common scenario in which Use of a Prohibited Substance is sought to be established in the absence of a positive test is in the area of blood doping, where it is difficult to reliably test for the presence of substances such as EPO. In particular, to try to detect Use, many ADOs have implemented Athlete Biological Passport (**ABP**) programmes, to monitor the blood values of athletes over time.
234. Any abnormalities in an athlete's profile are subject to examination by a panel of experts as to the potential cause; where there is agreement among the experts that the abnormalities are likely to have been as the result of doping, the ADO is required to assert an ADRV against the athlete.

International Association of Athletics Federations (World Athletics) v Abraham Kiptum – [SR/Adhocsport/95/2019](#) (5 November 2019)

This matter was heard by the World Athletics Disciplinary Tribunal (the secretariat for which is conducted by Sport Resolutions UK), and was one of a number of cases involving alleged blood doping by Kenyan long distance runners.

⁷⁰ Being any method or substance prescribed on the [Prohibited List](#).

World Athletics asserted the ADRV of Use of a Prohibited Substance and a Prohibited Method against the athlete, on the basis of abnormalities in his ABP profile.

The athlete denied that he had used EPO, and noted that he had never returned a positive test. He argued that the changes in his blood values could be explained by his living and training at altitude followed by a short time spent at sea level in order to compete in events, and his having donated blood on a number of occasions (though he was not able to provide evidence to substantiate this).

World Athletics argued, based on an assessment by a panel of experts, that the changes in the athlete's blood values were highly likely to be indicative of doping. The Tribunal agreed, noting among other things, the lack of evidence put by the athlete to substantiate his alternative explanations, and the fact that the movement in the athlete's blood values was consistent with the use of EPO (or another blood doping agent) in training for an event – i.e. using it during training, then ceasing to use it a few days before the event, to enable it to clear the athlete's system before testing.

Attempted Use

235. To establish an Attempted Use ADRV, the ADO must prove to the comfortable satisfaction of the hearing panel that the athlete had purposely engaged in conduct planned to culminate in the use of a Prohibited Substance or Prohibited Method.
236. In this context, intent is relevant – at least to the extent that the intent relates to the conduct relating to the planned use. There does not need to be a specific intent to enhance sport performance.

Example – attempted use where substance was seized and destroyed by authorities before analysis

International Rugby Board (IRB) v Troy and ARU – [CAS 2008/A/1664](#) (June 2009)

Two packages addressed to Mr Troy, an amateur rugby player, were seized by Australian Customs. The packages, from the US and the UK, contained a container of packets labelled as containing testosterone and one bottle labelled DHEA 200.

Mr Troy admitted to placing the orders, and told an ASADA (now SIA) investigator that had Australian Customs not seized the imports, he would have used the substances.

At first instance, the Australian Rugby Union (ARU) tribunal found that as it could not be comfortably satisfied that Mr Troy had ordered a Prohibited Substance, it could not be satisfied that he had committed the ADRV of Attempted Use.

The International Rugby Board (as it then was) appealed the ARU Tribunal decision to CAS. CAS found Mr Troy intentionally ordered products containing testosterone and DHEA. The CAS held that the ADRV of attempted use could be committed where it was not established that a Prohibited Substance was involved so long as the athlete had purposely engaged in conduct planned to culminate in the use of a Prohibited Substance.

Code Art 2.3 – Evading, Refusing or Failing to Submit to Sample Collection

237. To establish this ADRV, the ADO must establish to the comfortable satisfaction of the hearing panel that:
- the athlete was deliberately avoiding a doping control official to avoid notification for testing (evasion); or
 - where the athlete had been notified for testing – that the athlete, in the absence of a compelling justification – had refused or failed to submit to testing.
238. An athlete who is seeking to rely on the defence of a compelling justification is required to establish the existence of that compelling justification on the balance of probabilities.

Example – Motive for evasion irrelevant

Niksa Dobud v Federation Internationale de Natation – [CAS 2015/A/4163](#) (15 March 2016)

Mr Dobud, a water polo player, was found by the FINA Doping Control Panel to have committed the ADRV of evasion.

Mr Dobud appealed to CAS, claiming that it was a case of mistaken identity – he had not been at the address, and the person who had answered the door to the doping control personnel was his brother in law. The doping control officer (DCO) (who had tested him previously) believed that the man who answered the door (and then shut it again) was Mr Dobud. This was supported by contemporaneous evidence tendered to CAS, including in the form of emails from the doping control officer to their agency.

The athlete failed to establish on the balance of probabilities that the person who was at the door was his brother-in-law – in this context, the CAS panel noted (among other things) the lack of physical resemblance between the athlete and his brother-in-law.

Refusing or failing to submit to sample collection

239. In order to establish an ADRV based on a refusal or failure to submit to sample collection, the ADO must establish that the athlete was properly notified of the requirement to provide a sample, and of the consequences of not providing a sample.

Example – failure of doping control personnel to tell athlete not to leave doping control

WADA v CONI, FIGC and Cherubin – [CAS 2008/A/1551](#) (18 March 2009)

Mr Cherubin was an Italian football player. After a game, he was selected for testing. After being notified, he left the doping control station and returned to his team's changing room for a team discussion. He was out of sight for half an hour before returning, of his own initiative, to the doping control station to be tested.

Although the athlete had left the doping control station after notification when he was not supposed to, the CAS panel was not comfortably satisfied that he had refused or failed to submit to sample collection. The CAS panel found that the athlete had left

the doping control station without any doping control personnel telling him in a clear way that if he was to do so, it might result in an ADRV and sanction.

Example – the sample collection must be for an anti-doping purpose

Jared Higgs v Bahamas Football Association (BFA) [CAS 2018/A/5615](#) (25 March 2019)

The athlete appealed to CAS against a 4 year period of ineligibility imposed by the BFA for the ADRV of refusing, or failing to submit, to sample collection. The athlete had been advised in advance that a ‘doping test’ would occur on the following day, but had failed to attend for the test.

The BFA argued that the athlete had been ‘notified’ of the test, and did not have a ‘compelling justification’ for not attending for the test.

- The CAS Panel found, on the facts, that there had not been a ‘sample collection’ that the athlete was required to attend, and that the testing was for other than an anti-doping purpose. As a result, the athlete’s failure to attend for testing did not constitute an ADRV.

The reasons for the Panel’s finding included that:

- the BFA had not complied with the relevant parts of the FIFA ADR, the Code, and the ISTI. In particular, the athlete had been given prior notice of an out-of-competition test, whereas the rules require such testing to be performed with no advance notice
- no DCO or chaperone was present on the day of the sample collection, and the requirements of the sample collection process itself (including the formal notification requirements) had not been followed
- each member of the team was also required to undertake pre-competition medical testing – in the Panel’s view, the drug testing appeared to have been conducted for health and safety reasons
- on the day of the test, an official had sent a WhatsApp text to the athlete asking why he was not at the BFA office for a ‘medical’
- the provisional suspension letter to the athlete relevantly stated that the suspension was because of his ‘failure to report to BFA/Pre-Competition Testing’.
- The Panel went on to state that where there is doubt about whether a sample collection is for an anti-doping purpose, ‘...it must be assessed and interpreted from a reasonable person’s perspective whether the sample collection was conducted for anti-doping or other (permissible) medical purposes’. Further, the purpose of the test needs to be clear at the time of the test – the purpose of the testing cannot be substituted for another purpose after the event.

Meaning of the expression ‘compelling justification’

240. The expression ‘compelling justification’ has been interpreted strictly by anti-doping hearing panels.
241. In CAS 2005/A/925 *Laura Dutra de Abreu Mancini de Azevedo v FINA*, the Panel stated:

No doubt, we are of the view that the logic of the anti-doping tests and the doping control rules demands and expects that, whenever physically,

hygienically and morally possible, the sample should be provided despite objections by the athlete. If that does not occur, Athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing.

Troicki v International Tennis Federation – [CAS 2013/A/3279](#) (5 November 2013)

Mr Troicki was notified that he had been selected for a urine and blood test. While he provided the urine sample, he declined to provide a blood sample, stating that he felt unwell, and was concerned that he would faint if he gave blood. Although the DCO offered to allow him to lie on a bed to provide the blood sample, the athlete declined to provide the sample. The athlete stated that the DCO had told him that he did not have to do the test; this was disputed by the DCO. The International Tennis Federation Tribunal preferred the DCO's version of the events, and found that the athlete had not provided a compelling justification for failing to provide a blood sample. The athlete appealed to CAS.

The Panel accepted that there had been a misunderstanding between the athlete and the DCO as to what the DCO had said, which had left the athlete with the impression that there would be no sanction for him if he failed to provide the blood sample. However, the Panel went on to say:

However, notwithstanding the reasons for the misunderstanding which the Panel has set out, the Panel finds that whether the Athlete had a compelling justification for failing to provide a blood sample needs to be determined objectively. The question is not whether the Athlete was acting on good faith, but, whether objectively, he was justified by compelling reasons to forego the test.

The Panel went on to find that the athlete's 'subjective interpretation' of what the DCO had said to him could not constitute a 'compelling justification'; accordingly, he was found to have committed the ADRV of failing to comply with a request for sample collection.

Example - Athlete bears the onus of establishing the existence of a 'compelling justification'

Sarah Klein v ASADA and Athletics Australia (AA) – [CAS A4/2016](#) (25 May 2017)

In this case, the CAS Arbitrator affirmed the approach set out in the two cases above, noting that the test of 'compelling justification' was an objective test, and confirming that the athlete bears the onus for establishing the existence of a compelling justification.

Ms Klein had been selected for an in-competition doping test after competing in an event in Hobart. She had booked a flight to Melbourne and left the doping test before completion to catch her flight. Klein had submitted a list of matters said to constitute a 'compelling justification' for the violation, including:

- Klein's mental state was 'panicky'
- She was worried whether she would be able to get a taxi to the airport
- She was worried her colleagues would miss the flight
- She would miss training the following morning in Victoria if she missed her flight
- She had no accommodation booked in Hobart if she missed the flight.

Each of these matters was rejected by the arbitrator and were not considered either individually or as a whole to amount to a 'compelling justification' for failing or refusing to submit to sample collection.

Code Art 2.4 – Whereabouts Failures

242. An ADRV will be established where an athlete who is in a Registered Testing Pool (RTP) has incurred 3 missed tests and/or filing failures, as defined in the ISTI, within a twelve-month period.
243. The maximum sanction for a first whereabouts violation is 2 years' ineligibility from sport, while the minimum sanction (depending on the athlete's level of fault) is 12 months' ineligibility.
244. A violation under Article 2.4 requires consideration of the rules established under the ISTI for the provision of whereabouts information.
245. Athletes who have been identified by their international federation or anti-doping organisation to be included in an RTP must provide accurate and current location information for each three-month period from the designated filing date, and to keep that information up to date during the quarter. Failure to provide the information by the filing date will generally constitute a filing failure, so too may failures to keep this information up to date.
246. The information required to be filed by the athlete includes their location for a 60-minute timeslot for each day when the athlete will be available for testing (the whereabouts hour). If an attempt is made to test the athlete during their whereabouts hour and the athlete is not available for testing (e.g. because they are somewhere else), that will generally constitute a missed test.
247. While an athlete can delegate the task of filing whereabouts information, the athlete remains responsible for ensuring the information is correct.
248. The ISTI also sets out requirements for ADOs in notifying athletes – both of their inclusion in the RTP and the implications of that, and of whereabouts failures.
249. To establish the ADRV, the panel has to be comfortably satisfied of each whereabouts failure asserted to have occurred in the 12-month period.

Example – whereabouts information must be sufficiently specific to enable athlete to be located for testing

Karam Gaber v United World Wrestling – [CAS 2015/A/4210](#) (28 December 2015)

The CAS Panel confirmed that the whereabouts information filed by an athlete had to be sufficiently specific to enable any ADO with testing jurisdiction to locate the athlete for testing at any given day in the whereabouts quarter. In this context, the Panel noted that an athlete had to file sufficient information to enable the DCO to find the location, gain access to the location, and find the athlete at the location. Nominating a location that the DCO was unable to access – e.g. a private club – would likely lead to a filing failure.

Example – being available for testing during the whereabouts hour

Drug Free Sport New Zealand v Kris Gemmell – [CAS 2014/A2](#) (1 December 2014)

DFSNZ had asserted a whereabouts violation against Mr Gemmell, based on two missed tests and one filing failure. At first instance, the New Zealand Sports Tribunal had found that the requirements for the first of the missed tests had not been met – as a consequence, the Tribunal found that the whereabouts ADRV had not been established. The Tribunal found that in relation to the first missed test:

- The athlete (who was in bed asleep and had not heard the doorbell) was at the residence and therefore had made himself available for testing; and
- The DCO had not taken all reasonable steps to locate the athlete, short of giving advance notice to the athlete. The Tribunal formed this view on the basis that the DCO (who was a USADA DCO conducting the testing mission for DFSNZ) had not telephoned the athlete in the last 5 minutes of the whereabouts hour, as was USADA's practice.

DFSNZ appealed to CAS, which relevantly held that:

- being 'available' for testing is not synonymous with being 'present' at the whereabouts address. The fact that the athlete was asleep was not relevant - the Panel noted (at [92]) that '[a]thletes that place themselves in a position whereby they cannot hear or see a DCO who attends at a specified location during the time they have nominated for testing defeats the purpose of the rules and cannot be considered to have made themselves 'available'.
- The NZ Sports Anti-Doping Rules and the ISTI made clear that there was to be no advance notification of athletes. The mission order that DFSNZ provided to the USADA DCO also made clear that the testing was to be conducted on a no advance notice basis. These were the requirements that applied to the testing, and '[t]he fact that the testing was being carried out in the USA was irrelevant from a legal standpoint' (at [62]). Once it was accepted that the test was to be conducted with no advance notice, CAS was comfortably satisfied that the DCO had taken all reasonable steps to locate the athlete (relevantly, knocking on the door and ringing the doorbell periodically during the whereabouts hour, and checking around the back of the property).

Example – reasonable steps to locate athlete, negligent behaviour, and degree of Fault

World Athletics v Deajah Stevens [SR/092/2020](#) (9 July 2020)

The Athletics Integrity Unit (AIU) issued a Notice of Charge asserting that the athlete had committed a whereabouts violation based on three missed tests. The athlete appealed, arguing that in respect of the second missed test, the DCO had not taken all reasonable steps to locate the athlete for testing during the athlete's nominated hour. The Tribunal found that it was comfortably satisfied that the DCO had done all that was reasonable in the circumstances, including: making four phone calls to the athlete that were not answered; gaining access to the floor on which the athlete's apartment was located despite the building's security system, and knocking on the door of the apartment on 3 occasions during the hour.

The athlete then sought to establish, on the balance of probabilities, that no negligent behaviour on her part caused or contributed to her failure to be available

for testing for the second and third tests. In relation to the second missed test, the athlete claimed that her phone had run out of charge during the night. The Panel found that her behaviour in failing to keep her phone charged was 'manifestly negligent'.

Before the third missed test, the athlete had changed her phone number without notifying the AIU, which resulted in the DCO not being able to contact her. The athlete alleged that she had been the subject of harassment, including threatening phone calls and text messages – and so had changed her phone number. Because of her fear of further harassment, the athlete had initially been reluctant to give out her new number. The Panel found that her reluctance to give out her mobile number did not absolve her of negligence for failing to provide the number to the AIU.

The Panel then considered whether the standard period of ineligibility of two years should be reduced based on the athlete's degree of Fault. Applying the analysis of the degrees of Fault in *Cilic v International Tennis Federation* (see case summary below), the Tribunal found that the athlete's objective degree of fault was significant. However, in considering, subjectively, what could have been expected of the athlete in light of her personal capacities, the Panel accepted that she felt 'distress, fear and distraction' as a result of the harassment she had suffered. There was also no assertion that she had changed her number and intentionally then did not update her whereabouts information. In light of these considerations, and her extensive (and clean) testing history, the Panel reduced the period of ineligibility by 6 months.

The Panel also backdated the start of the period of ineligibility to 17 February 2020, which was the date on which the athlete requested an expedited hearing, and approximately 6 weeks before the AIU issued its Notice of Charge. The Panel found that the approximately 6 week period between 17 February and 30 March 2020 was a delay not attributable to the athlete.

Example – sanction where whereabouts violation is second ADRV

World Athletics v Luvo Manyonga [SR/289/2020](#) (11 June 2021)

The World Athletics Disciplinary Tribunal found that the athlete committed a whereabouts violation based on one missed test and two filing failures. This was the athlete's second ADRV – in 2012, the athlete had previously been subject to an 18 month period of ineligibility for the ADRV of Presence of methamphetamine. The Panel imposed a period of ineligibility of 4 years, calculated in accordance with the World Athletics Rules as follows:

- The standard sanction for a whereabouts violation is a 2 year period of ineligibility (Rule 10.3.2)
- Because this was the athlete's second violation, the standard sanction is twice that period, ie 4 years (Rule 10.7.1)
- The period of ineligibility is then the greater of:
 - (i) 6 months, and
 - (ii) a period between 3.5 years (ie the 2 year standard sanction + the period of ineligibility for the earlier Presence ADRV) and 4 years (ie twice the standard sanction) (Rule 10.9.1)

The Panel credited the time the athlete had already spent provisionally suspended against the period of ineligibility.

Code Art 2.5 – Tampering or Attempted Tampering with any part of Doping Control

250. Tampering is defined broadly, and essentially includes any conduct that subverts the doping control process, other than conduct that is the use of a Prohibited Method (covered by Code Art 2.2) during the results management process.
251. The definition of ‘Tampering’ in the 2021 Code is broader than that of its predecessors. The 2021 Code provides that the term ‘Tampering’ ‘...shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a Sample, affecting or making impossible the analysis of a Sample, falsifying documents submitted to an Anti-Doping Organization or TUE committee or hearing panel, procuring false testimony from witnesses, committing any other fraudulent act upon the Anti-Doping Organization or hearing body to affect Results Management or the imposition of Consequences, and any other similar intentional interference or Attempted interference with any aspect of Doping Control.’

Example – tampering with evidence for the purpose of subverting an investigation of ADRVs

Jeffrey Brown v USADA; Alberto Salazar v USADA [CAS 2019/A/6530 and CAS 2019/A/6531](#) (15 September 2021)

These cases concerned appeals to CAS by B (a doctor) and S (a coach) against findings by the American Arbitration Association (AAA). In addition to other ADRVs, the AAA found that B and S had engaged in Tampering within the meaning of the 2009 Code, including by engaging in conduct aimed at subverting USADA’s investigation of possible ADRVs on their part. USADA alleged numerous instances of Tampering, including:

- S sending athletes an email on 5 January 2012 stating that they did not have to declare on doping control forms that they had received L-carnitine injections, and that, if asked by doping control personnel, they should deny that they had an infusion
- B altering athlete records of L-carnitine intravenous infusions after being informed of USADA’s investigation, and before providing those records to USADA
- S not producing documents to USADA that he subsequently relied on in his tribunal proceeding.

On appeal, the CAS Panel noted that for conduct to constitute Tampering for the purposes of the 2009 Code, the conduct had to have the requisite purpose of subverting the doping control process. As the Panel noted, ‘[i]t could hardly be Tampering for the purposes of the 2009 WADC, for example, to bring improper influence to bear to prevail upon a person to go shopping.’

The Panel found that it was not comfortably satisfied that S’ 5 January 2012 email to the athletes constituted Tampering. The Panel found, as a factual matter, that the email exhibited S’ mistaken belief that injections of L-carnitine from a syringe were not prohibited, whereas infusions (of any amount) were prohibited. In fact, the position was that injections or infusions of more than 500 mls over a period of 6 hours were a prohibited method.

Similarly, the Panel found that S' failure to produce documents to USADA during the course of the investigation, but which he later relied on before tribunal proceedings, also did not constitute Tampering but rather were consistent with a robust defence.

- The Panel did however find that B and S had together engaged in a course of conduct designed to subvert USADA's investigation. This included B's alteration of athlete records of L-carnitine intravenous infusions before providing those records to USADA, and S and B creating a documentary narrative in an attempt to obscure the method of administration of those infusions (eg by describing them as 'special injections'). The fact that S and B were motivated by a mistaken belief that the infusions were prohibited did not take away from the fact that they had attempted to subvert USADA's investigation. As the Panel noted (at [411(d)]) in relation to S:

...it appears that Mr. Salazar had a genuine misconception that (in giving NOP athletes IV procedures by infusion bag rather than syringe) he had breached the WADC, when he (and they) had not. He did not need to do anything other than state what had happened: the NOP athletes were given compliant procedures. Nonetheless, Mr. Salazar intentionally misled USADA in order to prevent USADA from discovering (what he thought was, but was not in fact) an ADRV.

Example – obstruction of sample collection process, destruction of samples

World Anti-Doping Agency v Sun Yang and Federation Internationale de Natation (FINA) – [CAS 2019/A/6148 \(First Appeal\)](#) and [CAS 2019/A/6148 \(Second Appeal\)](#) (First Appeal 28 February 2020; Second Appeal 22 June 2021)

On 4 September 2018, a doping control officer accompanied by a blood collection officer and a chaperone attempted to collect blood and urine samples from the athlete, at his residence. Two blood samples were collected from the athlete, and the tubes containing the blood were sealed in glass containers. However, before the athlete's urine sample could be collected, the athlete discovered that the chaperone had covertly taken photographs of him on his mobile phone. This prompted the athlete to query the chaperone's credentials, and resulted in the doping control officer removing the chaperone from the mission. As the chaperone was the only male on the testing mission, there was no person to witness the athlete provide a urine sample.

In the meantime, the athlete and his mother had contacted members of the athlete's support personnel for advice. They advised the athlete that (in their view) the documentation shown to the athlete by the chaperone and the BCO did not comply with the relevant standards, and so the blood samples could not be taken away.

At first instance, the FINA Doping Control Panel relevantly found that the athlete had not committed either the ADRV of Refusing or Failing to Submit to Sample Collection, or the ADRV of Tampering. This was essentially on the basis that defects in the documentation provided by the testers meant that the athlete had not been properly notified of his obligation to provide a sample.

WADA appealed to CAS, alleging that the Athlete had committed the ADRV of Tampering, and, in the alternative, the ADRV of Failure to Comply with a request for sample collection. In both the first appeal and the reheard appeal, CAS found that the Athlete had committed the ADRV's of Tampering and Evasion.

The events of the evening were contested, but in both appeals, CAS found that DCO tried to warn the athlete that any removal of the blood samples could be considered to be a failure to comply with the sample collection process, and could give rise to serious consequences.

CAS also found on both occasions that the athlete instructed his security guard to break the glass containers, for the purpose of retrieving the tubes containing the blood samples. The athlete also tore up the doping control documentation. The DCO and BCO left the athlete's house with their equipment but without the blood samples.

251. Both CAS appeal panels also found that the Athlete had been properly notified of the sample collection and had been warned about the consequences of not complying. While the second appeal panel found that the sample collection process was 'not pristine', nor 'was it of a kind whose illegitimacy was so manifest that the Athlete's dramatic conduct could find compelling justification in the World Anti-Doping Code'.

252. In recent years, CAS has also dealt with a large number of tampering cases arising in the context of doping in Russian sport, in particular, at the Sochi Winter Olympics.

Example – substitution of urine (Use of a Prohibited Method) cannot also constitute Tampering

Anna Shchukina v International Olympic Committee – [CAS 2018/A/5511](#) (16 November 2018)

The athlete appealed to CAS against ADRVs of Use of a Prohibited Method (urine substitution) and Tampering with doping control. The allegation was essentially that the athlete had, in advance, provided a 'clean' sample of her urine that could be substituted for urine samples she provided at the Sochi Olympics, along with related conduct. This included providing her doping control paperwork to a third party to enable them to identify her samples, presumably to make the substitution.

CAS confirmed that conduct constituting Use of a Prohibited Method (and therefore a breach of Code Art 2.2) could not also constitute Tampering. Only those acts which are not already included in the definition of Prohibited Methods under Code Art 2.2 could come within Code Art 2.5.

Based on the information before CAS, it decided it was not comfortably satisfied that the athlete had engaged in the Use of a Prohibited Method. Accordingly, it also could not be comfortably satisfied that the athlete had engaged in tampering. In other words, the failure to prove the ADRV of Use of a Prohibited Method did not mean that the ADRV of Tampering was applicable.

This appeal was heard with appeals (the Sochi Appeals) from 38 other athletes (the Sochi Appellants) who had had ADRVs asserted against them based on the same set of facts. While separate appeal decisions were published, the reasoning in each decision is relevantly similar.

Example – conduct of another person is Tampering

WADA v Lyudmila Vladimirovna Fedoriva – [CAS 2016/A/4700](#) (15 May 2017)

In this case, Athlete K had been notified for testing by the DCO. Before he could provide a sample, he left the Doping Control Station (DCS). A short time later, a different athlete appeared, claiming to be Athlete K. Ms Fedoriva, who was Athlete K's coach, attempted to convince the DCO that the athlete at the DCS was Athlete K, and that the DCO should test the substitute athlete. The real Athlete K was located, was tested, and tested positive for a Prohibited Substance.

The CAS Arbitrator found that Ms Fedoriva had acted with the intention of subverting the doping control process. As Athlete K's coach, she knew what he looked like, and therefore was aware of the substitution. Further, she attempted to persuade the DCO to test the other athlete, on the basis that Athlete K would return a positive test.

Example – filing false whereabouts information

Drug Free Sport New Zealand v Ciancio – [ST 03/14](#) (24 June 2015)

Mr Ciancio was an Olympic weightlifter. Relevantly, he was accused of evasion of sample collection, and tampering with the sample collection process, by giving false and misleading information as to his whereabouts through providing a false whereabouts address.

On 35 occasions between July and October 2013, attempts were made to locate Mr Ciancio for testing at his residential address. Each time, shortly before the scheduled testing time slot, he changed his whereabouts information to a property in Kulnura, New South Wales, which was a 37-acre block 100 km away from his residential address. The Kulnura address was listed as Mr Ciancio's work address, but his neighbours had never seen Mr Ciancio at or entering the property.

The Tribunal was not satisfied that the Kulnura address was actually Mr Ciancio's work address. Even if it was, the Tribunal found there to be a clear obligation on Mr Ciancio to be available – being just 'somewhere' on a 37-acre block was not sufficient to meet that responsibility. The Tribunal concluded that Mr Ciancio was 'engaged in a systematic and ongoing plan to avoid the clear requirements to which he was subject'.

Code Art 2.6 – Possession of a Prohibited Substance or a Prohibited Method

253. Code Art 2.6 provides for 2 violations – possession by an athlete (Code Art 2.6.1), and possession by an athlete support person (Code Art 2.6.2).
254. To establish either violation, the ADO must establish to the comfortable satisfaction of the hearing panel *any* one of the following (all of which are elements of the definition of Possession in the Code):
- the actual, physical possession of a Prohibited Substance or Prohibited Method
 - constructive possession by means of exclusive control over a Prohibited Substance or Prohibited Method, or over the premises where the substance or method exists
 - constructive possession (where there is no exclusive control) by knowledge of the presence of a Prohibited Substance or Prohibited Method, and an intention to exercise control over it
 - the purchase of a Prohibited Substance or Method, including by electronic or other means.
255. While the ADO does not have to establish that an athlete intended to use a Prohibited Substance or Prohibited Method, establishing the violation will require the ADO to prove that the athlete or other person had knowledge of the Prohibited Substance or Method, unless it can be established that the person has constructive possession of the substance or method by means of 'exclusive control'.

Example – actual possession

Australian Sports Anti-Doping Authority, on behalf of the Australian Sports Commission and Golf Australia v Daniel Nisbet – [CAS A2/2009](#) (2 February 2010)

Mr Nisbet was found to have committed the ADRV of possession of a Prohibited Substance, following the seizure by Australian Customs of items from his luggage which contained a Prohibited Substance purchased overseas.

Example – consideration of the concept of ‘possession’; ‘other acceptable justification’

Johannes Eder v International Olympic Committee (IOC) – [CAS 2007/A/1286](#); **Martin Tauber v IOC** – CAS 2007/A/1288; **Jurgen Pinter v IOC**; **Jurgen Pinter v IOC** – CAS 2007/A/1289 (4 January 2008)

Eder, Pinter and Tauber (‘the Athletes’) were selected to compete as cross-country skiers for the Austrian national team at the 2006 Winter Olympics held in Turin. Mayer was the team’s trainer at the 2002 Winter Olympics. Mayer was sanctioned in May 2002 for his role in performing blood transfusions on two Austrian skiers at the 2002 Winter Olympics. He was declared ineligible to participate in future Olympic Games up to and including the 2010 Winter Olympics. Despite the sanction, Mayer was accommodated in Pragelato, in close proximity to the accommodation of the Athletes during the 2006 Winter Olympics.

The Athletes were staying together in a house, along with another member of their team (Diethart). Their coach (Hoch) was located nearby, in a house with the team director (Gandler).

Before the 2006 Winter Olympics, the Fédération Internationale de Ski (FIS) announced that it would be imposing five-day protective bans in cases where athletes’ haemoglobin levels were tested at higher than the specified threshold. Tauber brought with him a device for measuring haemoglobin levels (a haemoglobinmeter), which each of the Athletes used. In response to the FIS announcement, Eder self-administered a saline infusion in the presence of Hoch to reduce his haemoglobin values. Mayer had advised Eder that a self-administration of saline would be effective in reducing his haemoglobin values.

In February 2006, the Italian police raided the accommodation and individual rooms of the Athletes. Eder had an intravenous saline drip with needle, Tauber had a haemoglobinmeter, microcuvettes for haemoglobin value testing, single use and butterfly needles, and an infusion pack; and Pinter had four used single-use syringes with tubing, showing traces of blood and a further five boxes of single-use syringes. The Italian police later raided the residence of Hoch and Gandler and found more equipment of a similar nature.

The IOC Executive Board determined the Athletes to have committed violations of Use of a Prohibited Method, Possession, and Administration. The Athletes appealed to CAS.

Relevantly, Tauber and Pinter argued that to establish possession, the FIS had to be interpreted as requiring the athlete to possess all of the equipment necessary to perform the Prohibited Method.

The CAS Panel generally disagreed, taking into account the circumstances of the case, including: that the athletes collectively possessed all of the items needed to

perform the Prohibited Method, that their coach had disposed of used medical equipment, and that Mr Mayer was providing advice to the team. The Panel stated:

On the one hand, the Panel is of the view that it would not be sufficient to justify a charge under Article 2.6.1 if an athlete were merely in possession of, for example, one single syringe – even though such an item would be viewed suspiciously in the absence of a reasonable explanation or a recognised therapeutic use exemption (“TUE”). At the other extreme, the Panel considers Tauber’s and Pinter’s interpretation of “possession” to be unworkable and counter-productive to the fight against doping. The Panel is of the view that Possession of a Prohibited Method is proved where it can be shown to the comfortable satisfaction of the Panel that, in all the circumstances, an athlete was in possession, either physical or constructive, of items which would enable that athlete to engage in a Prohibited Method.

Given each of the Athletes freely used Eder’s haemoglobinmeter while all staying at the same accommodation, CAS found it unlikely the Athletes were not aware of the medical equipment in each other’s possession. As a result, CAS found that each of the Athletes constructively possessed those items found in the physical possession of their fellow Athletes. As these items would enable an athlete to use a Prohibited Method, the Athletes were found to be in breach of article 2.6.

Example – coach found not to exercise exclusive control over room where Prohibited Substances were kept

Marinov v Australian Sports Anti-Doping Authority – [CAS 2007/A/1311](#) (26 September 2007)

Mr Marinov was the head coach of the Australian weightlifting team. In a police search of a house in which Mr Marinov was residing but did not own, three packets containing anabolic steroids, a Prohibited Substance, were found in his bedroom. The owner of the house was charged with several criminal offences, including the trafficking of anabolic steroids. There was no evidence that the packets were the property of Mr Marinov or that he had placed them in his room. The Australian Weightlifting Federation (AWF) charged Mr Marinov with trafficking in a Prohibited Substance under their anti-doping policy. Under the AWF policy at the time, ‘trafficking’ was defined by reference to conduct relating to Prohibited Substances which included ‘accepting, possessing, holding... other than for personal use’. Mr Marinov was considered to be in ‘possession’ of Prohibited Substances by the AWF.

CAS found that ‘possession’ (as the ADRV was at that time) involved the custody or control of the thing allegedly possessed, with knowledge of its presence. There was no evidence as to how the packets came to be in Mr Marinov’s room and he had denied having seen the packets when residing in the room. Moreover, Mr Marinov could not be described as having exclusive control of the room and its contents, and others had access to the room, most notably the owner of the house. There was also insufficient evidence to establish that Mr Marinov must have been able to see the drugs in his room, where the drugs were situated on a shelf in a wardrobe, and identify that they were a Prohibited Substance. ASADA was unable to establish Possession to the comfortable satisfaction of the panel, and so Mr Marinov’s appeal was allowed.

Example – Constructive Possession found despite athlete not exercising exclusive control over room where Prohibited Substances were kept

IAAF v Qatar Athletics Federation and Musaeb Abdulrahman Balla – [CAS 2018/A/5989](#) (6 June 2019)

This matter concerned an appeal to CAS by the IAAF (now World Athletics) against the decision of the disciplinary tribunal of the Qatar Athletics Federation that there was insufficient evidence to establish an ADRV.

Following an earlier surveillance operation which uncovered evidence that B and his coach were disposing of evidence of use of prohibited substances in garbage bins away from their hotel, Spanish police executed a search warrant on the hotel rooms of B and his coach. In B's room (Room 120), the police found two bags – a Nike bag which contained EPO and a plastic bag containing B's photographic ID (Nike bag), and a black sports bag containing 3 used syringes.

B shared the hotel room with Y, another athlete, and therefore did not have exclusive control over the premises. In order for B to be found to have constructive possession over the prohibited substance, the Panel had to be comfortably satisfied that: (i) B knew about the presence of the prohibited substances in his hotel room; and (ii) that B intended to exercise control over those substances. It was not necessary for the Panel to be satisfied that the prohibited substances were owned by B.

The Panel was comfortably satisfied that B knew about the presence of the prohibited substances in the hotel room. This was on the basis of the following:

- at the time police notified B of the search, he gave them an incorrect hotel room number (Room 211) and roommate, in an attempt to cause them to search that room instead
- while waiting at the hotel for his room to be searched, B maintained that he was staying in Room 211 and denied that he was staying in Room 120. When B realised that Room 120 was to be searched, he became very nervous
- B had initially told police that his passport was at the Qatari embassy – however, it was found in his bedside drawer in Room 120.
- On the question of whether B intended to exercise exclusive control over the prohibited substances, B initially claimed that the Nike bag belonged to Y, his roommate. Y consistently denied owning the bag. B's evidence as to Y's ownership of the bag and knowledge of its contents was inconsistent, which led the Panel to doubt its veracity. Further, B had not attempted to call Y as a witness – as a result, the Panel was satisfied that there was no evidence that the bag belonged to Y.
- The Panel found that B had access to the Nike bag. This was on the basis that the Nike bag had inside it a plastic shopping bag containing ID photographs of B, which he had (by his own admission) brought to Spain for visa purposes.
- The Panel also found a connection between the black sports bag containing the 3 syringes (which B did not deny was his) and the Nike bag. B claimed that he had used the syringes to inject Voltaren but was unable to provide any evidence as to his treatment regime, the number of syringes he originally had, or whether he, or someone else, had bought the syringes. The Panel was satisfied that Nike bag operated as a 'storage bag' for prohibited substances while the black sports bag operated as a 'waste bag' in which the used products and syringes could be temporarily stored until they could be disposed of away from the hotel). Given that B

had control over the black bag, it followed that B must also have had control over the Nike bag. Following from this, the Panel found that B had constructive possession of the prohibited substances, noting that:

- ...there are abundant tiny pieces of reliable and corroborated evidence and information that add up to a clear picture of an Athlete that tried persistently to divert from the search of his room, because he was hosting and controlling a system of storage and waste disposal for medical products (including Prohibited Substances) in his room and, thus, had constructive possession of the Nike-bag and the Prohibited Substances contained therein. What added to this picture was that most of the Athlete's submission were contradictory, evasive or incoherent.
- The Panel imposed a period of ineligibility of 4 years, with B receiving credit of 2 years and 9 months for the period he had been provisionally suspended.

Code Art 2.7 Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method

256. The Code defines 'trafficking' as follows (emphasis added):

Selling, giving, transporting, sending, delivering or distributing (or *Possessing* for any such purpose) a *Prohibited Substance* or *Prohibited Method* (either physically or by any electronic or other means) by an *Athlete*, *Athlete Support Person* or any other *Person* subject to the jurisdiction of an *Anti-Doping Organization* to any third party; provided, however, this definition shall not include the actions of "bona fide" medical personnel involving a *Prohibited Substance* used for genuine and legal therapeutic purposes or other acceptable justification, and shall not include actions involving *Prohibited Substances* which are not prohibited in *Out-of-Competition Testing* unless the circumstances as a whole demonstrate such *Prohibited Substances* are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.

257. In particular, it is important to note that the Trafficking or Attempted Trafficking of Prohibited Substances to any third party, including a person who is outside sport, will constitute an ADRV.

258. There are very few cases concerning Trafficking or Attempted Trafficking; this may possibly be because the conduct that amounts to trafficking for the purposes of the Code is often also conduct in breach of the criminal law, and so is generally dealt with in that context.

Examples – Trafficking cases

UK Anti-Doping v Philip Tinklin and Sophie Tinklin – [SR/0000180201](#) (28 May 2014)

Mr Tinklin pleaded guilty in criminal proceedings to conspiring to supply anabolic steroids. His daughter, who was an amateur boxer, had also been charged with offences, but her charges were essentially withdrawn. Subsequent to this, UK Anti-Doping (UKAD) issued notices asserting ADRVs to Mr Tinklin and his daughter. These included the ADRV of Trafficking.

Mr Tinklin argued that he was not subject to the jurisdiction of the sport, as he was not a coach, and had not signed up to be a member of the sport. UKAD argued (and the Tribunal agreed) that the lack of a direct contractual link between the sport and a

person would not prevent a contractual link being implied through the conduct of the individual, in accepting the application of the rules. In Mr Tinklin's case, his involvement in assisting his 5 children (who were all involved in boxing) to prepare for competitions, and transporting them to boxing events, was sufficient to enable him to be regarded as an athlete support person for the purposes of the relevant anti-doping policy.

Although there was no direct evidence that Mr Tinklin had trafficked anabolic steroids, the Tribunal was comfortably satisfied that he had committed the ADRV of Trafficking, based on the evidence that had underpinned the criminal case against him, and imposed a lifetime period of ineligibility.

Drug Free Sport New Zealand v Daniel Milne – [ST 11/14](#) (28 November 2014)

Mr Milne was a weightlifting coach who had offered prohibited substances to a young weightlifting athlete. The athlete had told another coach what had happened, which led to an investigation. When confronted with the violation, Mr Milne admitted that it had occurred, and so the question at the hearing was the appropriate sanction, in light of the fact that the ADRV of trafficking has a minimum sanction of 4 years. The tribunal noted that the length of sanction in such cases was 'fact and circumstance specific'. In the present case, the tribunal balanced aggravating factors such as the fact that the conduct had occurred within an athlete – coach relationship, against mitigating factors such as the fact that Mr Milne had admitted the conduct, and his past positive contribution to his sport, to arrive at a sanction of 6 years' ineligibility.

Example – 'giving' a Prohibited Substance does not include the administration of the Prohibited Substance in relation to trafficking

Jeffrey Brown v USADA; Alberto Salazar v USADA [CAS 2019/A/6530](#) and [CAS 2019/A/6531](#) (15 September 2021)

These cases concerned appeals to CAS by B (a doctor) and S (a coach) against findings by the American Arbitration Association (AAA). In addition to other ADRVs, the AAA found that B and S had engaged in Trafficking within the meaning of the 2009 Code. Relevantly, the AAA had found that:

- S had committed the ADRV of Trafficking, by giving his sons Testosterone (in the form of a gel) as part of an excretion study to determine whether and to what degree Testosterone was detectable in a urine test
- B had committed the ADRV of complicity in the Trafficking of the Testosterone by S.

On appeal to CAS, the Panel found that S had not committed the ADRV of Trafficking by administering the Testosterone to his sons.

The Panel found that while the dictionary meaning of 'giving' includes 'administration' and 'supply', the definition of 'giving' in the definition of Trafficking is to be construed in light of the class of activities in which it appears (ie 'selling, giving, transporting, sending, delivering or distributing'). Construed in that way, 'giving' denotes the passing of property from one person to another, and is distinguishable from acts of administration or the application of substances by one person to another.

As S had not committed the ADRV of Trafficking, it followed that B had not committed the ADRV of Complicity in Trafficking.

Code Art 2.8 – Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is prohibited Out-of-Competition

Example – administration of substances by coach of a football team

WADA and FIFA v Cyprus Football Association and others – [CAS 2009/A/1817](#) (26 October 2010)

This case concerned an appeal by WADA against decisions of the Cyprus Football Association (CFA) arising out of doping at football club APOP Kinyras. In 2008, several players for the club underwent testing, which resulted in AAFs. An investigation report by the CFA revealed that approximately one hour before the start of each game in 2008, the team's coach, E, would give the 11 starting players 2 white pills. The players passed a number of anti-doping tests while taking these pills. E told the players they were caffeine and vitamins. In mid-2008, the coach changed the type of pills to cylindrical pills with a brown-beige colour.

In late-2008, doping controls showed the presence of Oxymesterone, an anabolic steroid and Prohibited Substance, in samples provided by two of the players. The CFA recommended reduced sanctions for the coach and relevant players, supposedly on the basis that they had given substantial assistance to the investigation. WADA appealed to CAS.

CAS found the players to have committed a doping violation and there was no basis to establish No Significant Fault given the pills were taken blindly and without question. Their sanction was instead reduced under the FIFA cooperation rule (which had different wording from the WADA substantial assistance provision at 10.6.1).

CAS found that E had administered the players a Prohibited Substance and could not establish No Significant Fault. He had obtained the pills from a source unrelated to the producer and made no enquiries with a doctor as to their content. Although E had provided assistance to the investigation through providing the pills for testing and having explained the circumstances in which he obtained the pills, this was not sufficient to have his sanction reduced under the cooperation rule. He had not named the supplier of the pills and had not provided help leading to the exposure or proof of an ADRV by another person. The period of ineligibility for E was 4 years.

Code Art 2.9 – Complicity

259. Under the Code, the ADRV of Complicity constitutes, 'Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an ADRV, attempted ADRV or violation of Article 10.12.1 by another Person.'

Examples of conduct constituting Complicity

WADA v Jamaludin and Ors – [CAS 2012/A/2791](#) (24 May 2013)

Six athletes were advised by their coach of a doping test the following day and were told to avoid the test. They were also told to use their friends' urine for analysis at

any subsequent medical examination. The athletes subsequently avoided the test. The athletes were later found to have committed the ADRV of Evasion (Article 2.3).

The coach was found to be in breach of Article 2.8 (Complicity) by advising the athletes to provide their friends' urine for testing and rescheduling flights for the athletes to avoid upcoming tests. CAS imposed a period of 10 years' ineligibility on the coach.

International Ski Federation v. Andrus Veerpalu 2020/ADD/7; International Ski Federation v. Andrus Veerpalu 2020/ADD/13 (17 March 2021)

V was an athlete support person with 'Team Haanja', which was a sponsored team of Estonian cross-country skiers. V, along with the coach (A) was involved with a blood doping scheme run by a German doctor (S). The conduct came to light following a police raid at the Nordic Ski World Championships in Seefeld (Austria) on 27 February 2019.

In these matters, the CAS Panel found that V, an athlete support person, had at different times engaged in conduct constituting Complicity, as follows:

- between 4 - 6 December 2016 – that he intentionally aided and assisted the doping practice of members of 'Team Haanja' by purchasing IGF-1 (a Prohibited Substance) at an Austrian service station and then delivering it to members of the team in Italy for them to use before a competition
- in February 2019 – that he was actively involved in the conduct of blood doping on a member of the team by: organising access to his room to enable the doping to take place, and by storing equipment used for blood doping in his room.

Example – Athlete cannot be complicit in the commission of own ADRVs

Anna Shchukina v International Olympic Committee – [CAS 2018/A/5511](#) (16 November 2018)

The Athlete appealed to CAS against ADRVs of Use of a Prohibited Method (urine substitution) and Tampering with doping control. The allegation was essentially that the athlete had, in advance, provided a 'clean' sample of her urine that could be substituted for urine samples she provided at the Sochi Olympics, along with related conduct. This was part of a doping scheme allegedly involving 38 other athletes.

The CAS Panel found that, even if the Athlete was aware of a doping scheme allegedly operating at the Sochi Games among other athletes, her mere participation in the scheme in her own interest would not be sufficient to constitute assistance and encouragement in an ADRV committed by other athletes. The Panel found that 'complicity' is dependent upon a separate ADRV committed by a third person. Article 2.9 does not capture a situation where an athlete simply covers up their own ADRV, even if the covering up is part of a larger doping scheme.

Code Art 2.10 – Prohibited Association

260. An athlete or other person will commit the Prohibited Association ADRV if (after receiving written warning from their ADO), they continue to associate in a professional or sport related capacity with the other person:

- who is serving a period of ineligibility from sport for an ADRV, or
- who is not subject to the authority of an ADO, but who has been found, either in a criminal process or disciplinary process, to have engaged in conduct that

would have constituted a breach of anti-doping rules, if the person had been subject to such rules.

261. The ADRV need not have been committed by the other person in that capacity. For example, the other person might have been found to have committed an ADRV while they were an athlete and had a period of ineligibility imposed on them. Any athlete or other person who associates with them during their period of ineligibility will be at risk of committing the Prohibited Association ADRV.
262. By way of another example, a doctor might have been disciplined by their professional body for prescribing steroids to athletes in circumstances where the athlete had no medical reason to be prescribed steroids. Had the doctor been subject to the authority of an ADO, this conduct would likely have constituted Trafficking of Prohibited Substances. An athlete or athlete other person would not be able to associate with the doctor for the period of the sanction, or 6 years from the disciplinary decision, whichever period is longer.
263. Under the 2021 WADC, for an ADO to assert the Prohibited Association ADRV against an athlete or other person, there is no longer a requirement for the ADO to have previously written to the athlete or other person warning them of the status of the person (banned person) they are associating with. It will be sufficient for the ADO to establish to the comfortable satisfaction of a hearing panel that the athlete or other person *knew* of the status of the banned person.
264. There may be circumstances in which the athlete or other person is associating with the banned person in a non-professional or sport related capacity, or the athlete or other person is unable to avoid associating with the banned person. For example, a minor athlete might not reasonably be able to avoid associating with their parent who is a banned person.
265. If the ADRV is asserted, the athlete or other person is required to establish on the balance of probabilities that any association with the banned person is either *not* in a professional or sport-related capacity, or that the contact could not have been avoided.
266. WADA maintains a [Prohibited Association List](#) on its website.

Examples – pre-2021 content of prior notification to the athlete or other person

Anna Knyazeva-Shirokova v RUSADA [CAS 2020/A/6986](#) (6 April 2021)

Rudolf Verkhovyykh v RUSADA [CAS 2020/A/6987](#) (6 April 2021)

Andrey Isaychev v RUSADA [CAS 2020/A/6988](#) (6 April 2021)

These matters all arose from similar facts, and were determined by the same CAS Sole Arbitrator. Each athlete was coached by K, who was subject to a lifetime period of ineligibility. The athletes were aware of K's lifetime ban, but were of the understanding that K could continue to coach them unofficially.

The issue in each case was whether – before RUSADA had asserted the prohibited association ADRV – each athlete had 'previously been advised in writing' by an ADO of K's status as a banned person and the potential consequences of continuing to associate with him.

Isyachev and Knyazeva-Shirokova

Immediately before their participation in the 2018 Russian Championships, these athletes signed a form signifying their acknowledgment that the mere presence of the listed disqualified coaches (which included K) might be regarded as a prohibited association violation by the athlete, and subject to a sanction of 1 – 2 years.

The Arbitrator was not comfortably satisfied that the form constituted prior notification to the athletes for the purposes of the ADRV. In each case, the athlete had been required to sign the form a few minutes before their race, and there was no evidence that the content of the form was explained to the athlete. Furthermore, the form did not, on its terms, warn the athletes that they were prohibited from associating with K, or the sanctions that might be imposed if they continued to associate with K.

For the purposes of the pre-2021 Article 2.10, the fact that the athletes independently knew of K's disqualifying status was not of itself sufficient to establish that they had previously been notified in writing of that fact.

Verkhovykh

Some months before RUSADA asserted the prohibited association ADRV against V, a RUSADA investigator had a meeting with V at which V prepared a statement dictated to him by the investigator. V's statement relevantly said that he knew that K had been disqualified as a coach, and that it had been explained to him that the participation of K in his sport preparation will be considered as prohibited association and could result in disqualification as it is a breach of 'All Russian Anti-Doping Rules'. V's statement also attested that he had written it himself.

The CAS Arbitrator was comfortably satisfied that V's statement met the requirements of Art 2.10, including the requirement that V had previously been notified in writing of K's disqualifying status and the possible consequences of continuing to associate with him. This was the case despite the fact that V (and not RUSADA) had written the statement.

V also claimed that he could not avoid the association with K, as to do so would result in financial consequences. However, the Arbitrator found that the possibility of financial consequences could not form a reasonable justification for his continued prohibited association with K.

Code Art 2.11 – Discourage or Retaliate Against Reporting to Authorities

267. Where such conduct does not otherwise constitute a violation of Article 2.5 of the Code, any act which threatens or seeks to intimidate another Person with the intent of discouraging the Person from the good-faith reporting of information or any retaliation against a Person who has provided evidence or information that relates to an alleged ADRV or alleged non-compliance with the Code, an ADO, law enforcement, regulatory or professional disciplinary body, hearing body or Person conducting an investigation for WADA or an ADO is prohibited.
268. Retaliation, threatening and intimidation include an act taken against such Person either because the act lacks a good faith basis or is a disproportionate response.
269. Retaliation would include, for example, actions that threaten the physical or mental well-being or economic interests of the reporting Persons, their families or associates.

270. Retaliation would not include an ADO asserting in good faith an ADRV against the reporting Person. For purposes of Article 2.11, a report is not made in good faith where the Person making the report knows the report to be false.
271. Article 2.11 is intended to protect Persons who make good faith reports and does not protect Persons who knowingly make false reports.

Sanctions for ADRVs

Disqualification of results

272. Where an Athlete is tested In-Competition and is subsequently found to have committed an ADRV in connection with that test, their results from that Competition are automatically disqualified, and all medals, points and prizes forfeited, except as provided in Article 10.1.1. (Code, Art 10.1)
273. In addition, the ruling body for the Event has the discretion to disqualify all of the athlete's results in that Event, with all medals, points and prizes won in the Event forfeited, except as provided in Article 10.1.1. (Code, Art 10.1)
274. Factors to be included in considering whether to Disqualify other results in an Event might include, for example, the seriousness of the Athlete's anti-doping rule violation and whether the Athlete tested negative in the other Competitions. (Code, Art 10.1)
275. If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified, unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation. (Code Art 10.1.1)
276. Further, all other results since the date of the violation up to the commencement of a provisional suspension or period of ineligibility may also be disqualified, unless fairness requires otherwise. (Code, Art 10.8)

Examples – reduction of the period of disqualification of results

Ekaterina Galitskaia v International Association of Athletics Federations (IAAF) [CAS 2019/A/6167](#) (6 April 2021); Svetlana Shkolina v IAAF [CAS 2019/A/6166](#) (6 April 2021)

These cases both concerned ADRVs of Use that had been asserted against the athletes following the investigation by Professor Richard McLaren into the allegations of state-sponsored doping made by Dr Grigory Rodchenko, the former Director of the then WADA-accredited laboratory in Moscow. At first instance, the Sole Arbitrator found that each athlete had committed the ADRV of Use of a Prohibited Substance, and imposed a 4-year period of ineligibility, based on the aggravating circumstance of their involvement in a wider doping scheme. The Sole Arbitrator also disqualified the results of the athletes, and ordered the forfeiting of medals, points and prizes for the following periods:

- G – between 15 July 2012 – 31 December 2014
- S – between 16 July 2021 – 28 July 2015.

On appeal, the Panel reduced the periods of ineligibility to 3 years for G and 2 years and 9 months for S, finding that there was no evidence in either case that the athlete knew that they were part of a wider doping scheme or enterprise.

The Panel awarded a lesser reduction to G, on the basis that there was evidence that she had used multiple (6) prohibited substances.

On the issue of the disqualification of results, both athletes relevantly argued that if any of their results were to be disqualified and prizes, etc forfeited, this should be limited to the period for which there was evidence for their ADRVs. In G's case, that was the period between 15 July 2012 – 26 July 2013, while in S's case, the relevant period was between 16 July 2012 – 30 July 2013.

In G's case, the Panel maintained the period of disqualification determined by the Sole Arbitrator. This was on the basis of evidence that G would have continued to derive a competitive advantage from her use of the (multiple) prohibited substances for some time after her last documented use of those substances.

In S's case, the Panel accepted evidence that S would have continued to derive a competitive advantage from her use of the prohibited substances. That said, the Panel considered that in the circumstances, it was appropriate to reduce the period of disqualification, so that it ended on 31 December 2014 (instead of 28 July 2015).

Standard periods of ineligibility for ADRVs

277. The standard periods of ineligibility for the ADRVs of Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method are as follows:
- where a non-Specified substance is involved – 4 years (Code, Art 10.2.1) unless the Athlete or Other Person establishes on the balance of probabilities that the violation was not intentional, in which case the standard period of ineligibility is 2 years. (Code, Art 10.2.2)
 - where a Specified substance is involved – 2 years (Code, Art 10.2.2), unless the ADO establishes on the balance of probabilities that the violation was intentional, in which case the standard period of ineligibility is 4 years. (Code, Art 10.2.1.2).
278. For Evading, refusing or failing to submit to Sample collection, and for Tampering or Attempted Tampering with any part of a Doping Control, the standard period of ineligibility is 4 years. (Code, Art 10.3.1). If the Athlete can prove, on the balance of probabilities, that their failure to submit to Sample collection was not intentional, the standard period of ineligibility is 2 years. (Code, Art 10.3.1)
279. For a Whereabouts violation, the standard period of ineligibility is 2 years, but this can be reduced to 12 months depending on the Athlete's degree of Fault. (Code, Art 10.3.2)
280. For the violations of Trafficking or Attempted Trafficking of a Prohibited Substance or a Prohibited Method, and Administration or Attempted Administration of a Prohibited Substance or Prohibited Method, the standard period of ineligibility ranges from 4 years to a lifetime, depending on the seriousness of the violation. (Code, Art 10.3.3).

281. For the violation of Complicity, the standard period of ineligibility is between 2 years and lifetime ineligibility, depending on the seriousness of the violation. (Code, Art 10.3.4.)
282. For the violation of Prohibited Association, the standard period of ineligibility is 2 years, but this can be reduced to 12 months depending on the Athlete or Other Person's degree of Fault, and any other circumstances of the case. (Code, Art 10.3.5).
283. For the violation of Acts Discouraging or Retaliation Against Reporting, the period of ineligibility ranges from 2 years to lifetime, depending on the seriousness of the violation (Code, Art 10.3.6).
284. The period of ineligibility in any particular case will likely be different, depending on the ADRV, and any defences or avenues for reduction that might apply.

Ways in which periods of ineligibility might be reduced or suspended

285. The Code and sports anti-doping policies that implement the Code set out a number of ways in which a period of ineligibility might be able to be reduced or suspended. These include:
- the defences of No Fault or Negligence (Code, Art 10.5), and No Significant Fault or Negligence (Code, Art 10.6)
 - providing substantial assistance in discovering or establishing ADRVs (Code, Art 10.7.1)
 - admitting an ADRV in the absence of evidence that it occurred (Code, Art 10.7.2)
 - timely admission after being confronted with evidence of an ADRV of Evading or refusing or failing to submit to Sample collection, or the violation of Tampering or Attempted Tampering with any part of Doping Control (Code, Art 10.7.3)
 - early admission and acceptance of sanction (Code, Art 10.8.1).

Recreational Athletes and Protected Persons

286. The 2021 Code provides for greater flexibility in the sanctions that can be imposed on recreational athletes and Protected Persons found to have committed ADRVs.
287. A Protected Person is an athlete or other person:
- under the age of 16, or under the age of 18 who is not included in an RTP and has never competed in any international event in an open category; or
 - who for reasons other than age, has been determined to lack legal capacity under their national legislation.
288. A Recreational Athlete is a new category of Athlete in the Code. In Australia, SIA (as the National Anti-Doping Organisation) defines who is to be considered to be a Recreational Athlete. However, a person cannot be a Recreational Athlete if, in the previous 5 years before committing an ADRV, they:
- were an international-level or national-level athlete;
 - represented a country in an international event in an open category; or

- been in an RTP or other Whereabouts Pool maintained by an International Federation or a National Anti-Doping Organisation.

Examples – Recreational Athletes Possessing prohibited substances (before the 2021 Code and at present)

289. The following cases illustrate the approach taken by the STNZ in cases involving Possession of a Prohibited Substance by a Recreational Athlete, before and after the implementation of the 2021 Code:

Drug Free Sport New Zealand v XYZ – [ST 12/18](#) (4 March 2019)

In this matter, XYZ had been identified by Medsafe New Zealand (the New Zealand medical regulatory body) as having ordered dianabol and clenbuterol online. Both substances are prohibited for use in sport at all times. At the time XYZ ordered the substances, he was a recreational member of two sports. Based on the evidence of his purchases and his sport membership, Drug Free Sport New Zealand (DFSNZ) instituted proceedings in the Sports Tribunal of New Zealand (STNZ) for the ADRVs of Possession and Use. Specifically, DFSNZ alleged that XYZ was bound by the Sports Anti-Doping Rules (SADR) through his membership of Surf Life Saving New Zealand, which itself had adopted the SADR.

While the STNZ found that XYZ had committed the violations, it expressed concern about the application of the rules to persons who were recreational athletes, observing that:

If the current framework is to be maintained there is a need for the public generally, and importantly recreational sporting participants to know and understand that everyone who has any sporting connection can be called to account in exactly the way that high profile elite professional athletes are...

In this case, the STNZ imposed a period of ineligibility of 2 years, with credit of 6 months for timely admission of the ADRVs, and a further 6 months for delay not attributable to the athlete.

Sanctions for multiple violations

290. Where an athlete or other person has previously been sanctioned and is then found to have committed a second ADRV, minimum periods of ineligibility apply. (Code, Art 10.9.1)
291. Where an athlete or other person commits a third ADRV, the standard period of ineligibility is a lifetime. (Code, Art 10.9.2). Where the athlete or other person is able to establish a defence of No Fault or Negligence or No Significant Fault or Negligence, or the third violation is a Whereabouts violation, the period of ineligibility will range from 8 years to a lifetime. (Code, Art 10.9.2). There may be further reductions of the period, for a reason set out in Code, Art 10.7 – for example, the provision of Substantial Assistance in discovering or establishing Code violations.
292. If two or more violations are asserted against an athlete or other person (e.g. Presence and Use), the violations will be considered together as a single first violation, with the sanction being based on the violation that carries the more severe sanction. (Code, Art 10.9.3.1)

Principle of *lex mitior*

293. Normally, an allegation of an ADRV will be dealt with in accordance with the rules that were in place at the time of the commission of the alleged ADRV. However, if more lenient rules as to sanction take effect by the time the matter is heard, those new rules will be applied – see Code Art 25.2. This is known as the doctrine of *lex mitior*.

Kurt Foggo v National Rugby League – [CAS A2/2011](#) (3 May 2011)

This case concerned an appeal by Mr Foggo against a sanction of 2 years' ineligibility for the ADRV of Presence of 1,3-dimethylpentylamine. At the time of Mr Foggo's violation, the substance was classed as a non-specified substance, and the NRL imposed the mandatory sanction of 2 years' ineligibility from sport.

By the time Mr Foggo's appeal was before CAS, WADA had changed the designation of 1,3-dimethylpentylamine to a specified substance. This meant that an athlete could have their period of ineligibility reduced if they were able to establish that they did not intend to enhance their sport performance. The CAS appeal panel held (at [12]) that the doctrine of *lex mitior* applied, with the consequence that it was able to take into account Mr Foggo's evidence that he had not intended to enhance his sport performance, and to reduce his period of ineligibility to 6 months.

World Anti-Doping Agency v Sun Yang and Federation Internationale de Natation (FINA) – [CAS 2019/A/6148 \(First Appeal\)](#) and [CAS 2019/A/6148 \(Second Appeal\)](#) (First Appeal 28 February 2020; Second Appeal 22 June 2021)

In this matter, Mr Sun Yang (the athlete) was found by CAS (both on his First and Second Appeals) to have committed the ADRVs of Tampering with the doping control process, and Evasion of Doping Control.

In the First Appeal, because of the intentional nature of the ADRV, the athlete was unable at that time to rely on a reduction based on No Significant Fault or Negligence. In June 2014, the athlete had received a 3-month period of ineligibility.

Accordingly, the athlete's Tampering and Evasion violation constituted his second violation. At that time, because the minimum period of ineligibility for tampering is 4 years, and this was the athlete's second violation, his period of ineligibility was doubled, to 8 years.

In the Second Appeal, the CAS Panel took into account the more flexible sanction regime in the 2021 WADC for athletes committing a second violation and imposed a sanction of 4 years and 3 months. The sanction comprised 4 years for the Tampering and Evasion ADRVs, plus 3 months (the length of the sanction for his first ADRV). The Panel also backdated the start date of his sanction to 28 February 2020 (the date of the First Appeal Decision).

No fault or negligence

294. Where an athlete against whom a violation has been asserted establishes no fault or negligence in respect of the violation, '...the otherwise applicable period of ineligibility will be eliminated'. (Code, Art 10.5)
295. If an athlete establishes no fault or negligence, and then commits a second violation, the prior violation will not count, for the purposes of counting multiple violations. (Code, Art 10.7.3).

296. It is rare for an athlete or other person to establish No Fault or Negligence. To establish no fault or negligence, the athlete or other person must be able to establish:
- if the violation is that of Presence – how the Prohibited Substance got into their system, unless the athlete is a Protected Person or a Recreational Athlete, and
 - that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule.
297. The comment to Art 10.5 makes clear, for example, that sabotage of an athlete's food or drink by a competitor is (even if established) unlikely to result in the elimination of a sanction based on no fault or negligence.

Example – Presence ADRV likely caused by contaminated meat

Canadian Centre for Ethics in Sport (CCES) v Dominika Jamnicky; Dominika Jamnicky v CCES – [CAS 2019/A/6443](#) and [CAS 2019/A/6593](#) (9 July 2020)

The athlete, who had tested positive for Clostebol, argued that the substance entered into her system through eating meat, either in Australia or in Canada.

The first instance tribunal found that the athlete had committed the ADRV of Presence and imposed a reprimand. CCES appealed to CAS against the sanction, and the athlete cross-appealed against the finding of the ADRV.

The appeal panel was comfortably satisfied that the ADRV of Presence was made out. The main issue was that of the appropriate sanction, which first required consideration of the question of how the substance had entered the athlete's system.

CCES accepted that the athlete had not intentionally committed the ADRV.

After considering a range of possibilities, the Panel was satisfied on the evidence before it that the consumption of meat '...is the only reasonably possible and credible explanation for the athlete's AAF and is more likely than not to have occurred'. As a result, the athlete had established, on the balance of probabilities, that the Clostebol had entered her system through the consumption of meat containing the substance.

The Panel was also satisfied that the athlete '...did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution' that she had, in either Australia or Canada, ingested meat containing Clostebol. In coming to this finding, the Panel rejected CCES' submission that to establish this proposition, the athlete was required to identify the specific piece of contaminated meat. Accordingly, the athlete had established No Fault or Negligence, and therefore no period of ineligibility was imposed.

Example – ingestion of Prohibited Substance through contact with another person

World Anti-Doping Agency v Gil Roberts – [CAS 2017/A/5296](#) (12 January 2018)

Mr Roberts tested positive for the substance Probenecid. He claimed that, unbeknownst to him, his girlfriend had taken medication containing the substance, and he had ingested the substance through kissing her.

At first instance, the American Arbitration Association found that the Probenecid in Mr Roberts' system was as a result of him kissing his girlfriend, with the result that a finding of No Fault or Negligence was made (which meant that there was no ADRV recorded).

WADA appealed to CAS, arguing in essence that on the evidence put by the athlete, it was not possible for the athlete to establish on the balance of probabilities that the substance had entered his body through him kissing his girlfriend.

The CAS appeal panel, applying previous CAS jurisprudence, held (at [52]) that where it is asked to consider several alternative explanations for the ingestion of a Prohibited Substance, but it is satisfied that the athlete's explanation is more likely than not to have occurred, the athlete will have met the evidentiary burden. The Panel adopted the observation in earlier cases that '...it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred.'

No Significant Fault or Negligence

298. It is more common for athletes or other personnel to succeed in reducing their period of ineligibility on the basis of No Significant Fault or Negligence. (Code Art 10.6).
299. To establish No Significant Fault or Negligence, the Athlete or other person must establish:
- (if not a minor, and the violation is that of Presence) on the balance of probabilities, how the Prohibited Substance got into their system, or for Use or Possession, how the violation occurred; and
 - that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the ADRV.

Cilic v International Tennis Federation – [CAS 2013/A/3327](#) (11 April 2014)

Mr Cilic tested positive for a metabolite of the Prohibited Substance nikethamide, which is a specified substance prohibited in-competition only. The Prohibited Substance was contained in some glucose tablets that Mr Cilic's mother had bought when he was running low on glucose. Mr Cilic had checked the packet, and thought that the reference (in French) to 'nikethamide' on the packet was to the vitamin nicotinamide ('nikotinamid'). The ITF Tribunal at first instance had found that Mr Cilic's level of fault was quite high, on the basis that he had not checked the ingredients by reading the packet or the material inside, nor had he made any other checks. The Tribunal imposed a period of ineligibility of 9 months; Mr Cilic appealed to CAS.

The CAS Panel recognised the following degrees of fault: (i) significant degree of or considerable fault; (ii) normal degree of fault; and (iii) light degree of fault.

In deciding the level of an athlete's degree of fault, CAS then went on to consider fault from both an objective and subjective perspective, as follows:

- objectively, what degree of care could have been expected from the athlete in the circumstances of the violation?
- subjectively, what could have been expected of the athlete in light of his or her personal capacities?

Objective factors that CAS considered relevant included: that the athlete had asked his mother to buy the glucose and the evidence was that she had checked with the pharmacist that the glucose was safe for use in sport; the athlete read and noted the ingredients; the athlete took the tablets for a short period only, pending his trainer bringing to him his usual glucose.

Subjective factors weighing in favour of the athlete included his relatively limited French; the fact that he had taken glucose over a long time without incident (which led him to being less aware of the dangers involved); when he read the ingredients, assumed the substance was the vitamin he could use, not a Prohibited Substance.

Taken together, CAS agreed that Mr Cilic had a light degree of fault, and, with the mistake as to substance, his subjective capacity to comply with his objective duty was reduced. CAS imposed a 4-month period of ineligibility.

Aggravating Circumstances

300. If there are Aggravating Circumstances in an Athlete's case, they may receive a longer ban from sport than a standard sanction.
301. Aggravating circumstances can include, but aren't limited to:
- using or possessing multiple prohibited substances or methods
 - committing multiple anti-doping rule violations
 - Repeat offending.

Example - Aggravating circumstances justifying a lifetime period of ineligibility

United States Anti-Doping Agency v Geert Leinders – [AAA No. 77-20-1300-0604](#)
(16 January 2015)

Dr Leinders, the former coach of the Rabobank cycling team, was found by the AAA to have committed the following ADRVs: possession of multiple Prohibited Substances and Prohibited Methods; trafficking of Prohibited Substances and/or methods; administration or attempted administration of Prohibited Substances and/or methods, and assisting, encouraging, aiding, abetting, covering up and other complicity involving ADRVs.

Because all of the doping violations arose from the same factual circumstances and were dealt with together, they were collectively treated as if they were a first violation, with the starting point for the sanction being the violation that carried the more severe sanction. In this case, the sanctions for the ADRVs of trafficking and administration of Prohibited Substances were the most severe. The sanction range for these violations was 4 years up to lifetime ineligibility, depending on the seriousness of the violation.

USADA had sought a lifetime period of ineligibility. The AAA, in considering the factors relevant to determining a longer sanction, noted the following (at [118]):

Anti-doping arbitration panels have determined that the following aggravating factors are relevant in determining whether a sanction longer than the prescribed four-year minimum period of ineligibility is appropriate and should be imposed on athlete support personnel: “lead[ing] an athlete into danger of using prohibited substances” rather than “being a watchdog when it comes to prohibited substances” (USADA v. Drummond, AAA No. 01-14-0000-6146 (2014) at p. 22-23); existence of “multiple violations and seriousness of the offences” (Bruyneel at 231-232); “provid[ing] substantial help for multiple third-party anti-doping rule violations” (Hoch v. FIS & IOC, CAS 2008/A/1513 (2009) at 8.8.4); being “at the apex of a conspiracy to commit widespread doping ... spanning many years and many riders” (Bruyneel at 229); “act[ing] in bad faith and with a view to dissimulating doping practices” (WADA v. Jamaludin, et al., CAS 2012/A/2791 (2013) at p. 14); “acting intentionally when undertaking the serious anti-doping violation he committed” (Jamaludin at p. 36); “long-time experience in his position” (Jamaludin at p. 37); “under[taking] seriously deceptive and obstructive actions” (Jamaludin at p. 37); being in a position “which presents him to young men and women as a trusted advisor and confidant” (USADA v. Stewart, AAA No. 77 190 110 10 (2010) at p. 6); “administration of highly dangerous substances, which presented a risk of grave injury or death to any athlete who used the substances (Stewart at p. 6); and “the need to send a clear and deterring message to other athlete support personnel” (USADA v. Block, No. 77 190 00154 10 (2011) at 9.6”).

Applying these principles to the present case, the AAA found that a lifetime period of ineligibility was appropriate, taking into account a range of factors, including Mr Leinders’:

- position of trust in the team, both as team physician and director
- commission of multiple serious ADRVs
- possession, trafficking and administration of ‘highly dangerous’ Prohibited Substances and Methods without any legitimate medical need, which presented a risk of grave injury or death to the athletes who used them
- provision of ‘substantial and improper’ assistance to multiple athletes to obtain and use Prohibited Substances
- having acted intentionally, e.g. through possessing testosterone disguised in a vitamin container, writing false medical certificates for an athlete, and assisting the same athlete with blood doping during the 2007 Giro D’Italia
- having undertaken ‘seriously deceptive and obstructive actions’ by engaging in the above conduct
- having been ‘at the apex of a conspiracy to commit widespread doping...spanning many years and many riders’ in his capacity as team doctor and a director of the team.

PART 5: APPEALS DIVISION

Application for arbitration of disputes

302. Broadly, the NST's Appeals Division can receive applications for arbitration of a dispute about:⁷¹

	Type of matter	Appealable disputes
Div. 6 Subdiv A	Anti-doping	<ul style="list-style-type: none"> • a determination made in the NST's Anti-Doping Division • a decision made by a sporting body (in some situations) • a decision made by a sport's internal anti-doping tribunal
Div. 6 Subdiv B	Other/General	<ul style="list-style-type: none"> • a determination made in the NST's General Division • a decision made by a sporting tribunal administered by a sporting body in relation to a dispute prescribed in the NST Rule or approved by the CEO

303. Where an application meets the requirements for one of the disputes outlined above, and complies with the application process, the Appeals Division of the NST must conduct an arbitration and make a written determination in relation to the dispute.⁷²

Anti-Doping appeals

Appeals from the NST's Anti-Doping Division

304. Section 31 of the NST Act permits an application to the Appeals Division for arbitration of a dispute arising out of a determination made in the NST's Anti-Doping Division where three requirements are met:

⁷¹ Sections 31-35 of the NST Act.

⁷² Section 36(1) of the NST Act.

	Requirement	Explanation	
1	Determination	NST Anti-Doping Division has made a determination in relation to application for arbitration	
2	Authority to arbitrate	<ul style="list-style-type: none"> Anti-doping policy concerned permits appeal to the Appeals Division from the determination OR <ul style="list-style-type: none"> the athlete or other person, the sporting body and SIA CEO agree in writing that the appeal can be made (written agreement) 	
3	Applicant	Where anti-doping policy permits appeal to NST	Party to the previous arbitration or any other person or body permitted by the anti-doping policy
		Where written agreement that appeal can be made	Party to the previous arbitration or any other person or body specified in the written agreement as being able to appeal

Appeals from an anti-doping decision made by a sporting body

305. Section 32 of the NST Act permits an application to the Appeals Division for arbitration of a dispute arising out of an anti-doping decision made by a sporting body where six requirements are met:

	Requirement	Explanation
1	Anti-doping policy	A sporting body has an anti-doping policy approved by the SIA CEO
2	Policy binds relevant person	Athlete/other person is bound by that anti-doping policy
3	Decision	Sporting body makes a decision in relation to the athlete/other person bound by the anti-doping policy
4	Can be decided without a hearing	The decision is of a kind that the World Anti-Doping Code provides may be made without a hearing - for example, a decision by a sporting body not to proceed with an asserted anti-doping rule violation.
5	Authority to arbitrate	<ul style="list-style-type: none"> Anti-doping policy permits appeal to the Appeals Division from the decision OR

	Requirement	Explanation	
		<ul style="list-style-type: none"> if decision is of a kind that the World Anti-Doping Code permits an appeal from AND the athlete/other person, the sporting body and SIA CEO agree in writing that the appeal can be made (written agreement) 	
6	Applicant	Where anti-doping policy permits appeal to NST	Athlete/other person, SIA CEO or any other person or body permitted by the anti-doping policy
		Where written agreement that appeal can be made	Athlete, other person, SIA CEO or any other person or body specified in the written agreement as being able to appeal

Appeals from an anti-doping decision made by a sporting tribunal administered by a sporting body

306. Section 33 of the NST Act permits an application to the Appeals Division for arbitration of a dispute arising out of an anti-doping decision made by a sporting tribunal administered by a sporting body where six requirements are met:

	Requirement	Explanation	
1	Anti-doping policy	A sporting body has an anti-doping policy approved by the SIA CEO	
2	Sporting Tribunal	The anti-doping policy permits disputes to be heard by a sporting tribunal administered by the sporting body	
3	Policy binds relevant person	Athlete/other person is bound by that anti-doping policy	
4	Decision	Sporting tribunal makes a decision in relation to the athlete/other person bound by the anti-doping policy	
5	Authority to arbitrate	<ul style="list-style-type: none"> Anti-doping policy permits appeal to the Appeals Division from the decision <p>OR</p> <ul style="list-style-type: none"> if decision is of a kind that the World Anti-Doping Code permits an appeal from AND the athlete/other person, the sporting body and SIA CEO agree in writing that the appeal can be made (written agreement) 	
6	Applicant	Where anti-doping policy permits appeal to NST	Athlete/other person, SIA CEO, sporting body or any other person or

	Requirement	Explanation	
			body permitted by the anti-doping policy
		Where written agreement that appeal can be made	Athlete/other person, SIA CEO, sporting body or any other person or body specified in the written agreement as being able to appeal.

Anti-doping decisions that might be the subject of an application to the Appeals Division

307. The types of matters that might be the subject of an application to the Appeals Division relevantly include a determination of the NST Anti-Doping Division, or of an internal tribunal of a sport, that:
- an ADRV was committed,
 - no ADRV was committed
 - imposes a sanction for an ADRV (which the applicant alleges was excessive, or, conversely, insufficient)
 - imposes, or lifts, a Provisional Suspension as a result of a Provisional Hearing.

Provisional Suspension decisions

308. Article 7.4 of the WADC provides that where an athlete returns an Adverse Analytical Finding for a non-specified substance or method, or an Adverse Passport Finding, the ADO responsible for managing the result must impose a Provisional Suspension on the athlete. This is commonly referred to as a ‘mandatory provisional suspension’. In this circumstance, the ADO is also required to give the athlete the opportunity for a Provisional Hearing either before or after the suspension is imposed, or an expedited final hearing of the substantive matter (the ADRV) promptly after the imposition of the Provisional Suspension.

Circumstances in which mandatory Provisional Suspension might be lifted

309. There are some circumstances in which a mandatory Provisional Suspension may be lifted – these include where:
- the athlete demonstrates to the hearing panel that the ADRV is likely to have involved a Contaminated Product
 - the ADRV involves a non-specified Prohibited Substance that is also a Substance of Abuse and the Athlete can establish an entitlement to a lesser period of eligibility as a result
 - following CAS jurisprudence, the athlete is a Protected Person – (see the case involving the Russian ice skater Kamila Valieva below).

Example – Protected Person – mandatory Provisional Suspension is treated as if it were a voluntary Provisional Suspension

CAS OG 22/08 International Olympic Committee (IOC) v. Russian Anti-Doping Agency (RUSADA); CAS OG 22/09 World Anti-Doping Agency (WADA) v. Russian Anti-Doping Agency (RUSADA) and Kamila Valieva; CAS OG 22/10 International Skating Union (ISU) v. Russian Anti-Doping Agency (RUSADA), Kamila Valieva and Russian Olympic Committee (ROC) [CAS Ad Hoc Award OG 22 08-09-10](#) (17 February 2022)

These matters concerned appeals by the IOC, WADA and the ISU against the decision of the RUSADA Disciplinary Anti-Doping Committee (DADC) to lift the provisional suspension of V, a 15 year old figure skater who had returned an AAF for Trimetazidine, a prohibited (and non-specified) substance.

V's Sample had been collected on 25 December 2021, but had not been reported as an AAF until 7 February 2022, by which time, V had begun competing at the Beijing Winter Olympics. On 8 February 2022, RUSADA imposed a mandatory provisional suspension on the athlete. The following day, the DADC lifted the suspension, following a provisional hearing.

The CAS Panel declined to reinstate the provisional suspension. In that context, the Panel found that there was a gap in the WADC (reflected in the Russian ADP), namely that the provisional suspension provisions (unlike the sanction provisions) did not take account of the status of Protected Persons.

Where the ADRV does not involve a Substance of Abuse, and the Protected Person is able to establish No Significant Fault of Negligence, the potential sanctions for the ADRV range from a reprimand, to a maximum of 2 years' ineligibility, depending on the degree of Fault.

However, the WADC provides for a mandatory provisional suspension for a non-specified substance, unless the athlete can demonstrate that the violation involved a contaminated product. The effect of this was that a Protected Person could be subject to a provisional suspension from sport that lasts for longer than the period of ineligibility that is ultimately imposed on them once the matter is dealt with by a hearing panel.

In the present case, the Panel determined that in a case involving the mandatory provisional suspension of a Protected Person, that provisional suspension should be treated as if it were a voluntary provisional suspension. In the circumstances of the case, it was appropriate not to impose the provisional suspension so as to prevent her from competing in the Beijing Winter Olympics.

Other/general appeals

Appeals from the NST's General Division

310. Section 34 of the NST Act permits an application to the Appeals Division for arbitration of a dispute arising out of a determination made in the NST's General Division where three requirements are met:

	Requirement	Explanation	
1	Determination	NST General Division has made a determination in relation to an application for arbitration	
2	Authority to arbitrate	<ul style="list-style-type: none"> One or more constituent documents permit appeal to the Appeals Division from the determination OR <ul style="list-style-type: none"> the parties to the arbitration agree in writing that the appeal can be made (written agreement) 	
3	Applicant	Where constituent document permits appeal	Party to the previous arbitration or any other person or body permitted by one or more constituent documents
		Where written agreement agree that appeal can be made	Party to the previous arbitration or any other person or body specified in the written agreement as being able to appeal

Appeals from a decision made by a sporting tribunal administered by a sporting body

311. Section 35 of the NST Act permits an application to the Appeals Division for arbitration of a dispute arising out of a decision made by a sporting tribunal administered by a sporting body where five requirements are met:

	Requirement	Explanation	
1	Dispute	Dispute between (i) a person bound by one or more constituent documents by which a sporting body is constituted or accordance to which a sporting body operates and (ii) a sporting body	
2	Decision	A sporting tribunal administered by the sporting body makes a decision in relation to the dispute	
3	Authority to arbitrate	<ul style="list-style-type: none"> One or more constituent documents permit appeal to the Appeals Division from the decision OR <ul style="list-style-type: none"> The person and the sporting body agree in writing that the appeal can be made (written agreement) 	
4	Applicant	Where constituent document permits appeal	The person, sporting body or any other person or body permitted by one or more constituent documents

	Requirement	Explanation	
		Where written agreement that appeal can be made	The person, sporting body or any other person or body specified in the written agreement as being able to appeal

Subject matter of disputes

312. Only certain kinds of disputes may be the subject of an application to the Appeals division for arbitration under s 35 of the NST Act.
313. An appeal cannot be brought from an Alternative Dispute Resolution process conducted by the NST.
314. Other kinds of disputes may be the subject of an appeal where the relevant dispute is approved by the CEO in writing if satisfied there are “exceptional circumstances” justifying approval.⁷³
315. The CEO cannot give approval to arbitrate an appeal in respect of certain kinds of disputes as set out below, subject to relevant exceptions.⁷⁴

Type of dispute	Description
Anti-doping dispute	Disputes that could be heard by the Anti-Doping division of the NST (see Part 4 of the bench book)
‘Field of play’ dispute	Disputes occurring in the field of play, however described or occurring.
Damages dispute	Disputes of any kind in which damages as a remedy are being sought from another party to the dispute.

316. The term ‘field of play’ dispute is considered in Part 2 of the bench book.

Definitions

317. The following relevant terms are defined in Parts 1 and 2 of the Bench Book.
- Persons bound by an anti-doping policy
 - Persons bound by constituent documents
 - Sporting body.

⁷³ Section 35(7) of the NST Act.

⁷⁴ Section 35(6) of the NST Act; s 9(1) of the NST Rule.

Sporting tribunal administered by a sporting body

318. A sporting tribunal administered by a sporting body is a hearing body established under one or more constituent documents of a sporting body or the anti-doping policy of a sporting policy.

Application process

Form of application

319. An application must be made in accordance with the approved form.⁷⁵ The application must contain the information the form requires and must set out the reasons for the application.⁷⁶
320. [Approved forms](#) can be downloaded from the NST website, including:
- Application form for dispute resolution
 - Agreement to bring a dispute to the NST (to be completed where a sporting body's rules do not recognise the NST to deal with the type of dispute in question).
321. Where there is more than one appellant, each appellant's details should be included on the form.

Application fee for appeals

322. An application must be accompanied by the application fee prescribed by the NST Rule.⁷⁷ The current fees are set out below.

Application type	Commence Appeal	Application to join Appeal
Applicable fee	\$1,500	\$250

323. The CEO may waive the application fee if he or she is satisfied that paying the fee would cause [financial hardship](#) to the applicant.⁷⁸ Where there is more than one appellant, the application fee must be paid unless the CEO has determined that paying the fee would cause financial hardship to all appellants.

Time limit

324. If an anti-doping policy or other constituent document provides a time period in which an application to the Appeals Division of the NST may be made, the application must be made within that period.⁷⁹

⁷⁵ Sections 31(3), 32(3), 33(3), 34(3), 35(3) and 37(a) of the NST Act.

⁷⁶ Sections 37(c) and 37(d) of the NST Act.

⁷⁷ Section 37(b) of the NST Act; s 11 of the NST Rule.

⁷⁸ Section 11(3) of the NST Rule.

⁷⁹ Section 38(4)(a) of the NST Act.

325. Otherwise, applications must be made to the Appeals Division within the following time periods:
- where the relevant dispute relates to an anti-doping matter – within 21 days of the date of the decision or determination being appealed;⁸⁰ and
 - for all other disputes – within 30 days of the date of the decision or determination being appealed.⁸¹

Parties to the appeal

326. Under the NST Act, certain persons or bodies will automatically become parties to an appeal.

Type of matter	Appealable dispute	Parties
Anti-Doping	<ul style="list-style-type: none"> • a determination made in the NST’s Anti-Doping Division: s 31 	<ul style="list-style-type: none"> • the parties to the original arbitration • an applicant who was not a party to the original application but entitled to appeal under the Anti-Doping Policy e.g. WADA
	<ul style="list-style-type: none"> • a decision made by a sporting body: s 32 • a decision made by a sporting tribunal: s 33 	<ul style="list-style-type: none"> • athlete/other person • sporting body • SIA CEO • an applicant who was not a party to the original application but entitled to appeal under the Anti-Doping Policy e.g. WADA
Other/General	<ul style="list-style-type: none"> • a determination made in the NST’s General Division: s 34 	<ul style="list-style-type: none"> • the parties to the arbitration • an applicant who was not a party to the original application but entitled to appeal under the Anti-Doping Policy e.g. WADA
	<ul style="list-style-type: none"> • a decision made by a sporting tribunal: s 35 	<ul style="list-style-type: none"> • the person • the sporting body • an applicant who was not a party to the original application but entitled to appeal under

⁸⁰ Section 38(4)(b) of the NST Act and s 12(4)(a) of the NST Rule.

⁸¹ Section 38(4)(b) of the NST Act and s 12(4)(b) of the NST Rule.

Type of matter	Appealable dispute	Parties
		the Anti-Doping Policy e.g. WADA

327. Parties other than the party who made the application will be notified of an application made to the NST in one of two ways:
- When they receive a copy of a completed application form from the applicant(s)
 - When they receive a Notice of Commencement of Proceedings from the Registry.
328. Other parties must lodge a response within 7 days of receiving notice of commencement (unless a response has already been lodged).⁸² A copy of the approved 'response to an application' form can be downloaded from the [Tribunal website](#). Other persons or bodies can become a party to the appeal if they lodge the approved 'application to join a dispute' [form](#) and meet the following criteria:

Type of Appeal	Persons or bodies who may become a party
Anti-Doping Appeals	<ul style="list-style-type: none"> • If anti-doping policy permits appeal to the Appeals Division, any other person or body permitted by the policy • otherwise, any other person or body specified in the written agreement
Other Appeals	<ul style="list-style-type: none"> • any other person or body permitted by the constituent documents that permit an appeal to the Appeals Division • otherwise, any other person or body specified in the written agreement

Conduct of arbitration/appeal

329. Section 40(1) of the NST Act sets out general principles relating to arbitration in the NST, including that:
- the procedure of the NST is, subject to the NST Act, within the discretion of the NST
 - the arbitration must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the NST permit
 - the NST is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
330. Additionally, parties must act in good faith in relation to the conduct of the arbitration.⁸³

⁸² Section 23(1) of the P&P Determination.

⁸³ Section 40(2) of the NST Act.

331. A high level overview of the steps in the appeal process is set out in the [NST – Flow chart of major milestones and timeframes](#).

Hearings on appeal

332. If the parties to the appeal agree that an appeal can be decided without a hearing, and the NST is satisfied that it would be appropriate to do so, the NST may determine the appeal by reference only to the documents lodged by the parties.⁸⁴
333. Otherwise, the NST is to conduct the appeal by way of a rehearing, unless the appeal is from the General Division and:
- the constituent documents or other separate agreement referring the dispute to the NST provide otherwise; or
 - the basis of the appeal is such that a rehearing would be inappropriate.⁸⁵
334. In an anti-doping appeal, the NST Member has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the determination or decision appealed against was made.⁸⁶ In an appeal from the General Division, the NST Member is not to admit new evidence unless:⁸⁷
- it is permitted by the constituent documents or other separate agreement referring the dispute to the Appeals Division;
 - all the parties agree; or
 - the NST Member is satisfied that exceptional circumstances warrant the admission of new evidence.

Confidentiality

335. Appellate hearings before the NST will generally be held in private, but the NST Member may give directions as to the persons who may be present.⁸⁸
336. A party may apply for a direction prohibiting or restricting the publication or other disclosure of information that relates to a dispute that is:
- evidence or information about evidence
 - information lodged with or otherwise given to the NST.⁸⁹
337. The NST Member can also give directions prohibiting or restricting the publication or disclosure of information tending to reveal the identity of a witness in a proceeding,

⁸⁴ Section 95(1) of the P&P Determination.

⁸⁵ Section 95(2) and 95(5) of the P&P Determination.

⁸⁶ Section 95(3) of the P&P Determination.

⁸⁷ Section 95(6) of the P&P Determination.

⁸⁸ Section 40 of the P&P Determination.

⁸⁹ Section 41(1) of the P&P Determination.

or information otherwise concerning a witness. The NST Member can give directions about witnesses on its own initiative or on application by a party.⁹⁰

ADR processes

338. No provision is made for ADR processes within the NST's Appeals Division.
339. Evidence of anything said, or acts done, in an ADR process of a dispute in the General Division of the NST is not admissible in any arbitration (including an appeal) relating to the dispute unless agreed to by the parties.⁹¹

Termination or suspension of an arbitration

340. The NST Member may terminate or suspend an arbitration (including an appeal) in the following circumstances:
- if the parties to the arbitration agree to the termination;
 - where separate proceedings arising out of the same subject matter have been instituted in any other court or tribunal
 - where criminal proceedings have been, or are, commenced in respect of conduct that is substantially the same conduct that is the subject of the dispute before the NST;
 - where there is undue delay, without reasonable excuse, by the applicant in pursuing their application
 - where costs have not been paid.⁹²
341. The NST Member may make a direction to suspend an appeal where the parties have made an application for an ADR process.⁹³
342. If the NST Member makes a direction to terminate a matter on the basis that separate proceedings arise out of the subject matter, the direction can be made on the condition that the termination only have effect once the other proceedings have been resolved in the other court or tribunal, or by the CAS.⁹⁴

Determination of appeals

343. The NST Member will prepare a written notice of determination and the reasons for determination. The parties will receive a copy of the written notice and reasons.

Costs

344. The CEO of the NST may make a determination in relation to charging a party or parties for the costs of an arbitration in the Appeals Division.⁹⁵

⁹⁰ Section 41(2) of the P&P Determination.

⁹¹ Section 30 of the NST Act.

⁹² Section 36(4) of the NST Act; s 10(1) of the NST Rule.

⁹³ Section 10(2) of the NST Rule.

⁹⁴ Section 10(3) of the NST Rule.

⁹⁵ Section 46 of the NST Act; ss 13(4) and 13(5) of the NST Rule.

345. The costs that the CEO can determine are not the costs between the parties (e.g. the costs of legal representation or of obtaining a medical report).
346. Rather, the CEO can determine the 'costs of the arbitration' (including an appeal), being the costs incurred by the NST in conducting those processes (also referred to as service fees).
347. A cost determination made by the CEO may:
- a. Apportion the charges between the parties;
 - b. Provide that a party or parties be charged a portion of the actual or estimated fees of the arbitration; and
 - c. Require that a party or parties pay the charge prior to, or as a condition of, the dispute being listed for an arbitration or alternative dispute resolution.

Relevant matters in making a costs determination

348. In making a determination in relation to costs in the Appeals Division, the CEO must have regard to the nature of the person or entity who instituted the appeal.⁹⁶

Waiver

349. The CEO may waive or reduce a charge payable by a party for the costs of an arbitration (including an appeal) if satisfied that requiring the party to pay a charge would cause them to suffer financial hardship.⁹⁷

Refund

Where the NST does not have jurisdiction to deal with the dispute that is the subject of an application, the CEO may refund the application fee.⁹⁸

⁹⁶ Section 13(6) of the NST Rule.

⁹⁷ Section 14 of the NST Rule.

⁹⁸ Section 11(4) of the NST Rule.

APPENDIX: GLOSSARY

Acronym	Meaning
AAA	American Arbitration Association
AAF	Adverse analytical finding
ABA	Australian Biathlon Association
ABP	Athlete biological passport
ADO	Anti-doping organisation
ADR	Alternative dispute resolution
ADRV	Anti-doping rule violation
AOC	Australian Olympic Committee
ANADP	Australian National Anti-Doping Policy
ARU	Australian Rugby Union (now Rugby Australia)
ASADA	Australian Sports Anti-Doping Authority
ASADA Act	Australian Sports Anti-Doping Authority Act 2006
ASADA Regulations	Australian Sports Anti-Doping Regulations 2006
AWF	Australian Weightlifting Federation
CAS	Court of Arbitration for Sport
CEO	Chief Executive Officer of the National Sports Tribunal
CFA	Cyprus Football Association
Code	World Anti-Doping Code
DCO	Doping control officer
DCS	Doping control station
DFSNZ	Drug Free Sport New Zealand
DSD Regulations	IAAF Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development)
EPO	Erythropoietin
FFA	Football Federation of Australia (now Football Australia)
FIS	Federation Internationale de Ski
FINA	Federation Internationale de Natation
HCT	Hydrochlorothiazide
IAAF	International Association of Athletics Federations
IBU	International Biathlon Union
ISL	International Standard for Laboratories
IST	International Standard for Testing (superseded)
ISTI	International Standard for Testing and Investigations

Acronym	Meaning
MRP	Match Review Panel
NAD Scheme	National Anti-Doping scheme
NIF	National Integrity Framework
NSO	National Sporting Organisation
NST	National Sports Tribunal
NST Act	National Sports Tribunal Act 2019
NST Bill	National Sports Tribunal Bill 2019
NST Rule	National Sports Tribunal Rule 2019
NZNST	New Zealand National Sports Tribunal
P&P Determination	National Sports Tribunal (Practice and Procedure) Determination 2020
Prohibited List	List of Prohibited Substances and Methods
RTP	Registered testing pool
SIA	Sport Integrity Australia
SADR	Sports Anti-Doping Rules (New Zealand)
SSAI	Synchronised Swimming Australia Inc.
STNZ	Sports Tribunal of New Zealand
UKAD	UK Anti-Doping
UNESCO Convention	UNESCO International Convention against Doping in Sport
USADA	US Anti-Doping Agency
WADA	World Anti-Doping Agency