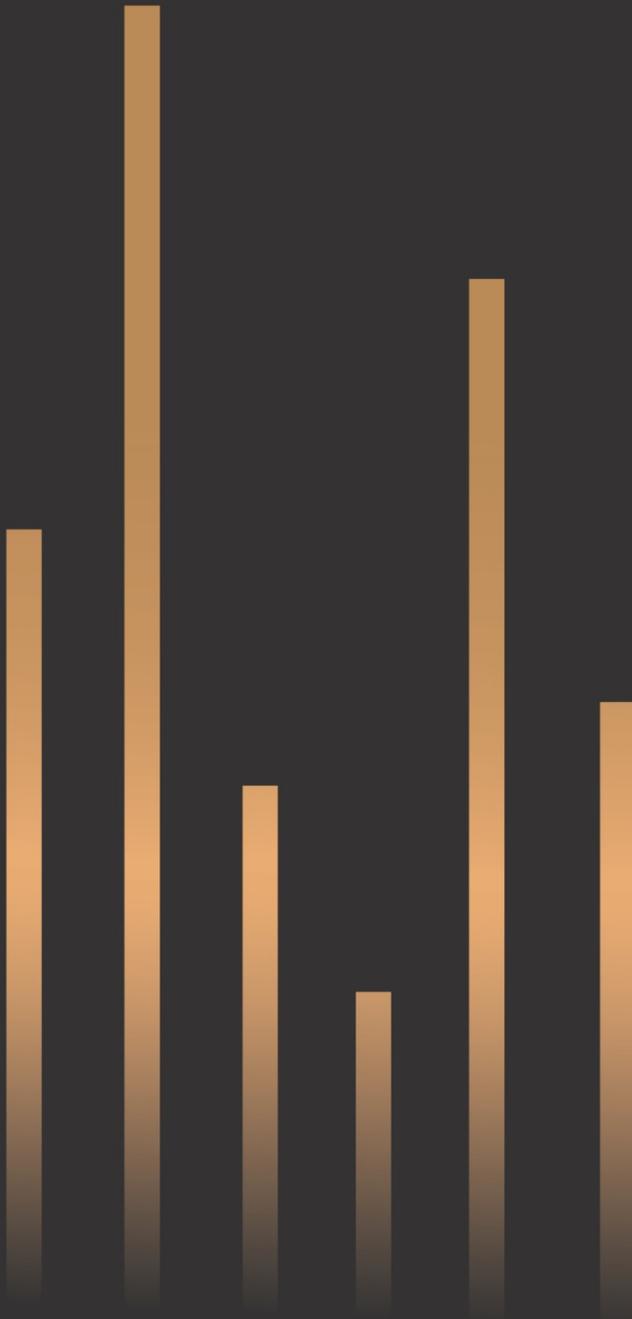




Australian Government

NATIONAL
SPORTS
TRIBUNAL

BENCH BOOK —2020



V1 – May 2020

CONTENTS

PART 1: INTRODUCTION	3
PART 2: GENERAL DIVISION	8
PART 3: ATHLETE ELIGIBILITY AND SELECTION DISPUTES	22
PART 4: DISCIPLINARY DISPUTES – INDIVIDUALS	30
PART 5: DISCIPLINARY DISPUTES – CORPORATE MEMBERS	34
PART 6: BULLYING, HARASSMENT AND DISCRIMINATION	38
PART 7: ANTI-DOPING JURISDICTION	44
PART 8: APPEALS DIVISION	82
APPENDIX: GLOSSARY	97

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 support 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, whose work *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.

Copyright

© Commonwealth of Australia 2020

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 Youth and 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 athlete support 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 support 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

¹ Third Edition, Cambridge University Press, 2017.

the [National Sports Tribunal Rule 2019](#) (**NST Rule**). These are disputes about the following matters: eligibility or selection disputes and disciplinary disputes.

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, namely eligibility or selection disputes, disciplinary disputes and disputes about bullying, harassment or discrimination. The CEO of the NST is also able to agree to sport-related disputes about other matters being the subject of an application for mediation, conciliation or case appraisal.
21. There are certain kinds of sport-related disputes that the CEO is not able to approve for arbitration. These are set out in the NST Rule, and include: most disputes arising in relation to remuneration under, or termination of, a contract for services, most employment-related disputes, disputes occurring in the field of play, anti-doping disputes, and disputes in which damages are being sought as a remedy.
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 sports' 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 Parts 3, 4 and 5 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 or 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, most 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. Olympic sports and smaller sports generally provide in their rules for ADRVs and other sport-related disputes to be adjudicated with by CAS, as well as in-house tribunals in some 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 permit disputes to be heard in the NST. As discussed above, the General Division of the NST will generally only hear disputes regarding eligibility or selection, or disciplinary disputes, but may hear other kinds of disputes where the CEO gives approval. 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 falls into one of the following categories: <ul style="list-style-type: none"> • eligibility, selection, disciplinary dispute • dispute approved by the CEO in writing 	
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 at paragraph 77 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 falls into one of the following categories: <ul style="list-style-type: none"> • eligibility, selection, disciplinary disputes, bullying, harassment, discrimination • dispute approved by the CEO in writing 	
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 at paragraph 77 below.

³ Section 28(1) of the NST Act.

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
 - 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, eg, by signing a membership form, or by signing an entry form when entering a race 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.

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

51. For the purposes of s 5(3), the *National Sports Tribunal Act 2019 – Specification of Sporting Body Instrument 2020 (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. 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. The written request to participate in the arbitration must be made within 7 days of receiving written notice from the 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 2020 (P&P Determination)*.

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

Participants in an ADR process

54. 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

55. 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

56. 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

57. 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

58. 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

60. Consent will ordinarily be evidenced by submitting an [Agreement to bring a dispute to the National Sports Tribunal](#) or a completed [Response to an application](#) (see question 6 which asks 'do you agree to the NST resolving this dispute').

Kinds of disputes

61. Only the following kinds of disputes may be referred to the General Division for arbitration or an ADR Process absent the written approval of the CEO.¹²

Types of disputes	Arbitration	ADR processes
Eligibility or selection disputes	✓	✓
Disciplinary disputes, including but not limited to disputes relating to disciplinary measures taken, or proposed to be taken, under a member protection policy;	✓	✓
Disputes about bullying, harassment or discrimination.		✓
Disputes relating to action taken, or proposed to be taken, by a sporting body against a constituent part of its sport, where the constituent part is a body corporate	✓	✓

62. For specific guidance on each of these types of disputes, see Parts 3, 4, 5 and 6 of the bench book.

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

¹² Specifically, the kinds of disputes outlined in s 7(1) of the NST Rule: see s 23(1)(c)(i) and s 24(1)(c)(i) of the NST Act.

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

63. Additionally, the General Division may arbitrate or conduct an ADR process in respect of other kinds of disputes if approval is given by the CEO in writing.¹³
64. Where an application is made to refer a dispute for arbitration, the CEO may only give approval if they are satisfied there are 'exceptional circumstances' justifying approval.¹⁴ The CEO does not need to be satisfied that there are exceptional circumstances before approving a dispute for ADR.
65. 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.¹⁵
66. The CEO cannot give approval to arbitrate in respect of certain kinds of disputes as set out below.¹⁶

Type of dispute	Description
Remuneration or contract for services	Disputes relating to remuneration or other benefits payable to an individual under a contract for services, or relating to the termination of a contract for services with an individual, except where those disputes arise in connection with an alleged breach of a disciplinary rule of the sporting body.
Employment dispute	Employment disputes, except where those disputes arise in connection with an alleged breach of a disciplinary rule of the sporting body.
Anti-doping dispute	Disputes that could be heard by the Anti-Doping division of the NST.
'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.

¹³ Sections 23(1)(c)(ii), 24(1)(c)(ii), 25(1)(c)(ii), 26(1)(c)(ii) of the NST Act.

¹⁴ Sections 23(5) and 24(5) of the NST Act.

¹⁵ Sections 23(6) and 24(6) of the NST Act.

¹⁶ Sections 23(4), 24(4) of the NST Act; s 9(1) of the NST Rule.

67. Additionally, the CEO cannot give approval to conduct an ADR in respect of anti-doping disputes or field of play disputes.¹⁷
68. An 'employment dispute' is defined in the NST Rule to mean disputes in respect of which a remedy is available:
- under the *Fair Work Act 2009* or a general State industrial law within the meaning of s 26(3) of that Act
 - at general law for the breach of a contract of employment.¹⁸
69. An example of an employment dispute in respect of which a remedy is available elsewhere is a dispute concerning the termination of employment of a person.¹⁹

'Field of play' dispute

70. The term 'field of play' is not defined in the NST Rule, but is defined in the Oxford English Dictionary to mean the area within which play takes place.
71. 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.²⁰ 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).
72. A 'field of play' dispute would involve an athlete contesting a field of play decision.
73. '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).
74. 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 [Ultimate Australia 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.
75. Other sporting policies are broader in application, requiring members to behave in a way that does not bring the sport into disrepute.
76. 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

¹⁷ Sections 25(4), 26(4) of the NST Act; s 9(3) of the NST Rule.

¹⁸ Section 9(2) of the NST Rule.

¹⁹ See note to s 9(2) of the NST Rule.

²⁰ See note to s 9(1) of the NST Rule.

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

77. 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.²¹
78. 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.²²

Application process

Form of application

79. 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.²³
80. [Approved forms](#) can be download from the NST website, including :
 - Application form for dispute resolution
 - Anti-doping dispute application form
 - General sport-related dispute application form
 - Appeal application form
 - 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, as well as for all ADR matters).
81. Where there is more than one applicant, each applicant's details should be included on the application form.
82. It is not possible for an applicant and a respondent to lodge a 'joint' application to the NST (although the application fee can be split between the parties). Instead, 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.

²¹ Sections 23(1), 25(1) of the NST Act.

²² Sections 24(1), 26(1) of the NST Act.

²³ Section 37 of the NST Act.

Application fee

83. An application must be accompanied by the application fee prescribed by the NST Rule.²⁴ The current fees are set out below.

Application type	Mediation, Conciliation, Case Appraisal	Commence Arbitration	Application to join existing arbitration
Applicable fee	\$750	\$500	\$250

85. The application fee for a mediation, conciliation or case appraisal can be paid by:

- one party
- both parties together, apportioned as agreed between them.²⁵

86. The CEO may waive the application fee if he or she is satisfied that paying the fee would cause financial hardship to the applicant.²⁶ 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.

Time limit

87. 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.²⁷

88. 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.²⁸

89. 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.²⁹

90. The period of operation of the NST is limited to 2 years. An application for the arbitration of a dispute in the General Division must be made within 2 years of 19 March 2020 or a larger number of years prescribed by the NST Rule.³⁰

²⁴ Section 37(b) of the NST Act; s 11(1) of the NST Rule.

²⁵ Section 11(2) of the NST Rule.

²⁶ Section 11(3) of the NST Rule.

²⁷ Sections 38(1), 38(3)(a) of the NST Act.

²⁸ Sections 38(1), 37(3)(b) of the NST Act; s 12(2) of the NST Rule.

²⁹ Section 12(3) of the NST Rule.

³⁰ Section 38(5) of the NST Act.

Response

91. 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 receive a Notice of Commencement of Proceedings from the Registry.
92. Other parties must lodge a response within 7 days of receiving notice of commencement (unless a response has already been lodged).³¹ A copy of the approved form can be downloaded from the [NST website](#).

Interested party

93. Other persons or bodies may apply to be joined as a party to the dispute by lodging the approved 'interested party' [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

94. 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.³² At the preliminary conference, parties will 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.
95. 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

96. 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.

³¹ Section 23(1) of the P&P Determination.

³² Section 5(4) of the NST Rule.

97. Additionally, parties must act in good faith in relation to the conduct of the arbitration.³³
98. 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.
99. 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

100. 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.³⁴

Confidentiality

101. Hearing of an arbitration will be held in private.³⁵ The NST Member may give directions in relation to the persons who may be present at a hearing.³⁶
102. 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.³⁷
103. 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 its own initiative or on application by a party.³⁸

Termination or suspension of an arbitration

104. 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 is satisfied that the application for arbitration was vexatious

³³ Section 40(1) of the NST Act.

³⁴ Section 30 of the NST Act.

³⁵ Section 40(1) of the P&P Determination.

³⁶ Section 40(2) of the P&P Determination.

³⁷ Section 41(1) of the P&P Determination.

³⁸ Section 41(2) of the P&P Determination.

- if the NST 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.³⁹
105. The NST Member may make a direction to suspend an arbitration where the parties have made an application for an ADR process.⁴⁰
106. 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.⁴¹

Determination of arbitrations

107. 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.
108. In the General Division, determinations will only be published:
- a. with the parties' consent
 - b. where the determination has significant precedential value.⁴²
109. 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.⁴³
110. A summary of each General Division determination will be published, which will generally be de-identified.⁴⁴

³⁹ Section 27(4) of the NST Act; s 10(1) of the NST Rule.

⁴⁰ Section 10(2) of the NST Rule.

⁴¹ Section 10(3) of the NST Rule.

⁴² Section 56(2) of the P&P Determination.

⁴³ Sections 56(3), 56(4) of the P&P Determination.

⁴⁴ Section 57 of the P&P Determination.

Costs

111. 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.⁴⁵
112. The costs that the CEO can determine are not the costs between the parties (eg the costs of legal representation or of obtaining a medical report).
113. Rather, the CEO can determine the 'costs of the arbitration', being the costs incurred by the NST in conducting those processes.
114. 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.⁴⁶

Waiver

115. 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.⁴⁷

⁴⁵ Sections 46 and 47 of the NST Act; s 13 of the NST Rule.

⁴⁶ Section 13(2) of the NST Rule.

⁴⁷ Section 14 of the NST Rule.

PART 3: ATHLETE ELIGIBILITY AND SELECTION DISPUTES

116. 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.⁴⁸

Athlete eligibility and selection criteria

117. The NST Rule groups athlete eligibility and selection disputes together given the potential overlap between eligibility and selection issues.
118. For example, athlete eligibility and selection issues may be clearly separated by a sport's constituent documents or they may be considered together against a single set of criteria. Some selection policies include eligibility criteria, for example.
119. 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.
120. Disputes regarding eligibility and selection for other positions within a sporting body do not come within this category e.g. coach, manager or selector roles. However, the NST will have jurisdiction for such disputes where, in exceptional circumstances, the approval of the CEO in writing is obtained.⁴⁹

Eligibility criteria

121. In order 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.
122. Eligibility criteria may relate to an athlete's personal characteristics, such as citizenship, residency, sex or age. They may also require an athlete to have met prerequisites such as having achieved a minimum result or participated in certain events during a particular period of time. An athlete's continuing eligibility may also depend on fulfilling agreed conditions following their selection.

Selection criteria

123. 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.
124. Other selection policies will require decision-makers to make subjective decisions by balancing a range of factors. For example, Rowing Australia's National Selection

⁴⁸ Sections 23(1)(c)(i); 24(1)(c)(i); 25(1)(c)(i); 26(1)(c)(i) of the NST Act and ss 7(1)(a) and 7(2)(a) of the NST Rule.

⁴⁹ Sections 23(1)(c)(ii); 24(1)(c)(ii); 25(1)(c)(ii); 26(1)(c)(ii) of the NST Act. Also, see Part 2 of the Bench Book.

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.

125. 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 as the International Association of Athletics Federations (**IAAF**)).

Athlete eligibility and selection disputes

126. 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.

127. 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.⁵¹

128. Different rules apply to the referral of athlete eligibility and selection disputes to the NST depending on the resolution method sought by the parties.

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 NST

129. In some cases, the basis on which an athlete can dispute an athlete eligibility or selection decision are set out in one of their sport's constituent documents.

130. Constituent documents are the key documents that establish a sporting body and contain rules to govern the sport's operation.

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

⁵¹ Sections 23(1)(c)(i); 24(1)(c)(i); 25(1)(c)(i); 26(1)(c)(i) of the NST Act and ss 7(1)(a) and 7(2)(a) of the NST Rule.

- Ordinarily, a person agrees to be bound by the constituent documents of a sporting body when they sign a membership form or enter a race organised by the sporting body.
 - A sport's constituent documents will generally include policies covering athlete eligibility and selection criteria e.g. where a sport's constitution requires members to abide by all policies of the sport in existence from time to time.
131. The sport's constituent documents may provide for a dispute regarding an athlete eligibility or selection decision to be:
- challenged via the sports own internal processes e.g. through a sporting tribunal or
 - heard in the General Division of the NST.⁵²
132. Where a sport's constituent documents provide for selection 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

133. Even where a sporting body's constituent documents do not permit a dispute to be heard in the General Division of the NST, or is silent on whether disputes can be heard, referral for arbitration can occur with the agreement of the parties to a particular dispute.⁵³

Alternative Dispute Resolution

134. 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 an athlete eligibility or selection 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.⁵⁴

Terms defined in sporting body's constituent documents

135. Additionally, the NST will only have jurisdiction in an athlete eligibility or selection dispute where the dispute falls within the definition of an athlete 'eligibility dispute' or 'selection dispute' as defined in the constituent documents of the sporting body.⁵⁵ No specific words are required to refer to a selection or eligibility dispute: it might also be referred to as a selection or non-selection appeal.
136. If the dispute does not come within the definition (however defined), or the term is not defined in the sporting body's constituent documents, the NST will only have

⁵² Sections 23(1)(b)(i) and; 24(1)(b)(i) of the NST Act.

⁵³ Sections 23(1)(b)(ii) and 24(1)(b)(ii) of the NST Act.

⁵⁴ Section 25(1), 26(1) of the NST Act.

⁵⁵ Sections 23(1)(c)(i); 24(1)(c)(i); 25(1)(c)(i); 26(1)(c)(i) of the NST Act and s 7(1)(a) and 7(2)(a) of the NST Rule.

jurisdiction where, in exceptional circumstances, the approval of the CEO in writing is obtained.⁵⁶

Referring athlete eligibility or selection disputes to General Division

137. The circumstances in which an athlete eligibility or selection dispute can be referred to the General Division, and the application process for referring the dispute, are outlined in [Part 2](#) of the bench book.

Reasons for the application

138. As part of their application, a person or sporting body must set out the reasons for their application to the NST.⁵⁷
139. Athlete eligibility and selection policies will often outline the bases upon which an athlete can challenge an eligibility or selection decision. For example, Sailing Australia's *Nomination Criteria for the 32nd Olympic Games for the sport of sailing* identifies four grounds on which an athlete can appeal their non-selection for that event.
140. More generally, the reasons why arbitration or an ADR process may be requested in relation to an athlete eligibility or selection decision could include:
- The criteria were not properly followed or implemented
 - The athlete seeking selection was not afforded a reasonable opportunity to satisfy the criteria, or to demonstrate that they satisfy the criteria
 - There was no material on which the athlete eligibility or selection decision could reasonably be based
 - The athlete eligibility or selection decision was unreasonable or irrational
 - The athlete eligibility or selection decision was affected by actual bias.
141. Where a sporting body's constituent documents provide for limited grounds of review of an eligibility or selection decision, an application to the NST can only be made on those, and not on any other, grounds.

⁵⁶ Sections 23(1)(c)(ii); 24(1)(c)(ii); 25(1)(c)(ii); 26(1)(c)(ii) of the NST Act. Also, see Chapter? 2 of the Bench Book.

⁵⁷ Section 37(d) of the NST Act.

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.

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>

PART 4: DISCIPLINARY DISPUTES – INDIVIDUALS

142. 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.⁵⁸

Disciplinary decision

143. 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
- 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)

144. 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

145. 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 of sanction.
146. A disciplinary dispute is a kind of dispute that can be referred to the General Division of the NST for arbitration or alternative dispute resolution.⁵⁹
147. Different rules apply to the referral of disciplinary disputes to the NST depending on the resolution method sought by the parties.

⁵⁸ Sections 23(1)(c)(i); 24(1)(c)(i); 25(1)(c)(i); 26(1)(c)(i) of the NST Act and ss 7(1)(b) and 7(2)(b) of the NST Rule.

⁵⁹ Sections 23(1)(c)(i); 24(1)(c)(i); 25(1)(c)(i); 26(1)(c)(i) of the NST Act and ss 7(1)(b) and 7(1)(c) 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 NST

148. In some cases, the bases on which an athlete can dispute a disciplinary decision are set out in one of their sport’s constituent documents.
149. Constituent documents are the key documents that establish a sporting body and contain rules to govern the sport’s operation. Ordinarily, a person agrees to be bound by the constituent documents of a sporting body when they sign a membership form or enter a race organised by the sporting body. A disciplinary policy, code of conduct or code of behaviour may form part of a sport’s constituent documents e.g. where a sport’s constitution requires members to abide by all policies of the sport in existence from time to time.
150. The sport’s constituent documents may provide for a dispute regarding a disciplinary decision 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.⁶⁰
151. Where a sport’s constituent documents provide for the dispute to be arbitrated by the NST, consent to refer the dispute is not required.

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

152. Even where a sporting body’s constituent documents do not permit a dispute to be heard in the General Division of the NST, or is silent on whether a dispute can be heard, referral for arbitration can occur with the agreement of the parties to the particular dispute.⁶¹

Alternative Dispute Resolution

153. 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 disciplinary dispute. The General Division of the NST will only have jurisdiction where the applicants are

⁶⁰ Sections 23(1)(b)(i) and 24(1)(b)(i) of the NST Act.

⁶¹ Sections 23(1)(b)(ii) and 24(1)(b)(ii) of the NST Act.

bound by a sport's constituent documents and agree in writing to refer the dispute for mediation, conciliation or case appraisal.⁶²

Referring disciplinary dispute to General Division of the NST

154. The circumstances in which a disciplinary dispute can be referred to the General Division, and the application process for referring the dispute, are outlined in Part 2 of the bench book.

Reasons for the application

155. As part of their application, a person or sporting body must set out the reasons for their application to the NST.⁶³
156. 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.

⁶² Section 25(1) and 26(1) of the NST Act.

⁶³ Section 37(d) of the NST Act.

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.

PART 5: DISCIPLINARY DISPUTES – CORPORATE MEMBERS

157. 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.⁶⁴

Disciplinary action decision

158. 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

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

Constituting document or policy

160. Constituent bodies are bound by a sporting body's constitution and other rules.
161. By way of example, some sports have constitutions based on the Sport Australia [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.
162. Other rules or policies may enable sanctions to be enforced on member bodies. For example, the Football Federation of Australia's [National Disciplinary Regulations](#) provide for sanctions to be imposed on a club for team misconduct.

⁶⁴ Sections 23(1)(c)(i); 24(1)(c)(i); 25(1)(c)(i); 26(1)(c)(i) of the NST Act and ss 7(1)(c) and 7(2)(d) of the NST Rule.

163. Decisions relating to sanctions imposed under a sport's anti-doping policy are not disciplinary decisions.

Disciplinary dispute

164. A disciplinary dispute involves a constituent body appealing against a decision of a sporting body or sporting tribunal to impose a penalty or sanction for breaching the constituent documents or rules of a sporting body. The sanction or penalty can be immediate or prospective.
165. A disciplinary dispute is a kind of dispute that can be referred to the General Division of the NST for arbitration or alternative dispute resolution.⁶⁵
166. Different rules apply to the referral of disciplinary disputes to the NST depending on the resolution method sought by the parties.

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 NST

168. In some cases, the bases on which a body corporate that is a constituent part of a sport can dispute a disciplinary decision are set out in one of their sport's constituent documents. Instances in which a sport may take disciplinary action against a constituent part of that sport may also be set out in any agreement creating the relationship between the sport and the body corporate.
169. Constituent documents are the key documents that establish a sporting body and contain rules to govern the sport's operation. A disciplinary policy may form part of a sport's constituent documents e.g. where a sport's constitution requires members to abide by all policies of the sport in existence from time to time.
170. The sport's constituent documents may provide for a dispute regarding a disciplinary decision to be:
- challenged via the sport's own internal processes e.g. through a sporting tribunal.
 - heard in the General Division of the NST.⁶⁶

⁶⁵ Sections 23(1)(c)(i); 24(1)(c)(i); 25(1)(c)(i); 26(1)(c)(i) of the NST Act and ss 7(1)(c) and 7(2)(d) of the NST Rule.

⁶⁶ Sections 23(1)(b)(i) and 24(1)(b)(i) of the NST Act.

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

Arbitration – sporting body's constituent documents refer matter to NST

172. Even where a sporting body's constituent documents do not permit a dispute to be heard in the General Division of the NST, or is silent on whether a dispute can be heard, referral for arbitration can occur with the agreement of the parties to the dispute.⁶⁷

Alternative Dispute Resolution

173. A person and a sporting body, or a sporting body (in relation to two or more persons with their agreement), can apply to the NST to undertake an alternative dispute resolution in relation to a disciplinary dispute. The General Division of the NST will only have jurisdiction 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.⁶⁸

Referring disciplinary dispute to General Division of the NST

174. The circumstances in which a disciplinary dispute can be referred to the General Division, and the application process for referring the dispute, are outlined in Part 2 of the bench book.

Reasons for the application

175. As part of their application, a body corporate that is a constituent part of a sporting body must set out the reasons for their application to the NST.⁶⁹
176. A disciplinary policy may outline the bases upon which a member body can challenge a decision to impose disciplinary sanctions on the entity.
177. 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 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

⁶⁷ Sections 23(1)(b)(ii) and 24(1)(b)(ii) of the NST Act.

⁶⁸ Sections 25(1) and 26(1) of the NST Act.

⁶⁹ Section 37(d) of the NST Act.

- The disciplinary decision was affected by actual bias.

Case Studies

Guangzhou Evergrande FC v Asian Football Confederation (AFC) – [2017/1/5306](#) – (5 March 2018)

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.

PART 6: BULLYING, HARASSMENT AND DISCRIMINATION

178. This section of the Bench Book deals with bullying, harassment and discrimination. Most commonly, sporting bodies will have a member protection policy which will deal with the prevention and management of bullying, harassment and discrimination. In order to be recognised by the Australian Government, sports must have a current member protection policy compliant with the Sport Australia template.⁷⁰
179. A dispute regarding bullying, harassment and discrimination can be referred to the General Division of the NST for alternative dispute resolution.⁷¹
180. Bullying, harassment and discrimination disputes before the NST may overlap with criminal or civil proceedings concerning substantially the same conduct or subject matter.⁷²

What is bullying?

181. 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.
182. Whilst generally characterised by repeated behaviours, one-off instances can amount to bullying.
183. 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).⁷³

⁷⁰ See 2019-23 [Recognition Criteria](#)

⁷¹ Sections 25(1)(c)(i) and 26(1)(c)(i) of the NST Act and s 7(2)(c) of the NST Rule.

⁷² 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.

⁷³ Definition extracted from clause 6.9 of the Member Protection Policy template for national sporting organizations, [version 9.1](#) (dated April 2016).

What is discrimination?

184. 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
 - 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
185. 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.⁷⁴

What is harassment?

186. 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 above). The offensive behaviour does not have to take place a number of times, a single incident can constitute harassment.⁷⁵

Disputes regarding bullying, harassment or discrimination

187. An eligible bullying, harassment or discrimination dispute can only be referred to the General Division of the NST for an alternative dispute resolution process.⁷⁶ The NST is unable to conduct an arbitration in relation to an eligible bullying, harassment or discrimination dispute.
188. However should a bullying, harassment or discrimination dispute become a disciplinary matter, the NST is able to conduct an arbitration.

CEO can only approve arbitration in exceptional circumstances

189. In exceptional circumstances, the CEO may approve in writing the arbitration of a bullying, harassment or discrimination dispute by the General Division of the NST.⁷⁷ Exceptional circumstances may include where:
- the CEO is satisfied that the dispute has been in existence for a protracted period of time, 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.⁷⁸

⁷⁴ Definition extracted from clause 6.3.1 and Dictionary of the Member Protection Policy template for national sporting organisations, [version 9.1](#) (dated April 2016).

⁷⁵ Definition extracted from clause 6.3.2 of the Member Protection Policy template for national sporting organisations, [version 9.1](#) (dated April 2016).

⁷⁶ Sections 25(1)(c)(i) and 26(1)(c)(i) of the NST Act and s 7(2)(c) of the NST Rule. Bullying, harassment and discrimination disputes are not listed in the kinds of disputes that can be referred to the General Division of the Tribunal for arbitration: see ss 23(1)(c)(i) and 24(1)(c)(i) of the NST Act and s 7(1) of the NST Rule.

⁷⁷ Sections 23(1)(c)(ii) and 23(5), ss 24(1)(c)(ii) and 24(5) of the NST Act.

⁷⁸ Sections 23(6) and 24(6) of the NST Act.

Arbitration of disciplinary dispute

190. Alternatively, the NST can conduct an arbitration of a dispute relating to disciplinary action taken, or proposed to be taken, under a member protection policy of a sporting body relating to bullying, harassment or discrimination. For further information see the below section titled *Difference between bullying, harassment and discrimination disputes and 'disciplinary disputes'* for more information.

Referring bullying, harassment or discrimination dispute to General Division of the NST

191. The circumstances in which a bullying, harassment or discrimination dispute can be referred to the General Division, and the application process for referring the dispute, are outlined in Part 2 of the bench book.

Referral by agreement where bound by constituent documents

192. A person and a sporting body, or two or more persons, can apply to the NST in relation to a bullying, harassment or discrimination dispute. The General Division of the NST will only have jurisdiction where the applicants are bound by a sport's constituent documents and agree in writing to refer the dispute to the General Division of the NST.⁷⁹
193. A constituent document is a set of rules that govern a sport, and to which athletes of that sport are bound. Many sports incorporate their Member Protection Policy into their constituent documents.
194. 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.

⁷⁹ Sections 23(1)(b), 24(1)(b), 25(1)(b), and 26(1) of the NST Act.

Reasons for the application

195. As part of their application, a person or sporting body must set out the reasons for their application to the NST.⁸⁰ 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.

Difference between bullying, harassment and discrimination disputes and 'disciplinary disputes'

196. Where a complaint is received under a Member Protection Policy, clause 7.3 of the template provides that the complaint may be the subject of mediation.
197. By agreement, a mediation, conciliation or case appraisal under the Member Protection Policy could be conducted by the General Division of the NST where the complaint relates to bullying, harassment or discrimination. An Alternative Dispute Resolution List of NST Members specifies members with appropriate qualification and skills in this area.
198. If a complaint cannot be resolved using an alternative dispute resolution process, a sporting tribunal may be convened.⁸¹ This process cannot be conducted by the NST unless the CEO determines in writing that there are exceptional circumstances.
199. If the sporting tribunal or the NST makes findings that an individual or organisation has breached the policy, disciplinary measures may be imposed.⁸²
200. Disputes in relation to disciplinary measures taken or imposed under a Member Protection Policy can also be referred to the General Division of the NST for arbitration or alternative dispute resolution: see Part 5 of the Bench Book.

⁸⁰ Section 37(d) of the NST Act.

⁸¹ Clause 7.4 of the Sport Australia Member Protection Policy template.

⁸² Clause 9 of the Sport Australia Member Protection Policy template.

Case Studies

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 (this was 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, the player was given the minimum possible sanction (5 matches).

PART 7: ANTI-DOPING JURISDICTION

Background

201. 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

202. 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
 - an individual's right to procedural fairness, including a fair hearing.
203. 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. National Sporting 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 athlete support 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.
204. The Australian Sports Anti-Doping Authority (**ASADA**) is the Australian Government agency responsible for implementing Code-compliant policies and activities in Australia. ASADA's powers and functions are specified under the ASADA Act and the ASADA Regulations,⁸³ including the National Anti-Doping Scheme (**NAD scheme**)⁸⁴. In summary, ASADA has statutory authority to conduct testing of athletes, to undertake investigations into possible ADRVs, and to present material at sport tribunal hearings.
205. Ordinarily, an athlete or athlete support 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 ASADA Act and the NAD scheme. Briefly, where an athlete

⁸³ *Australian Sports Anti-Doping Authority Act 2006 (Cth)* and *Australian Sports Anti-Doping Authority Regulations 2006 (Cth)*.

⁸⁴ The NAD Scheme is contained in Sch 1 to the ASADA Regulations.

returns a positive test (and the B sample has confirmed the A sample), or where the ASADA CEO has evidence that an athlete or an athlete support person has committed a possible non-presence ADRV, the ASADA CEO will notify the person of the possible ADRV, setting out particulars of the allegation. The person is then given an opportunity to respond, before the matter is referred to the Anti-Doping Rule Violation Panel (ADRVP). The ADRVP then considers whether an assertion of a possible ADRV should be made against the person. If the ADRVP proposes to make an assertion of a possible ADRV, it is required to notify the person, and give them a further opportunity to respond. Once the ADRVP decides to make an assertion of a possible ADRV, it advises the ASADA CEO, who then notifies the person and their sport of the ADRVP's assertion.

206. Under the terms of the anti-doping policies of most Australian sporting bodies, the assertion by the ADRVP of a possible ADRV is then the trigger for the sport to issue an infraction notice to the person for a breach of the sporting body's anti-doping policy.
207. ASADA 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 can include the issuing of infraction notices for breaches of the sporting body's anti-doping policy, and presenting anti-doping cases on behalf of the sporting body in tribunal hearings.
 - On 1 July 2020, ASADA will be subsumed into Sport Integrity Australia (**SIA**). In addition to its broader integrity functions, SIA will also undertake the anti-doping functions currently undertaken by ASADA.
208. To be recognised as an NSO in Australia, and consequently be eligible for government funding, a sporting organisation is required to have and operate an anti-doping policy for their sport that complies with the Code, and that acknowledges ASADA's powers and functions under the ASADA Act and NAD scheme.
209. 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 ASADA is exercising its legislative functions in relation to ADRVs, it is, in parallel, often also enforcing the anti-doping policy of the relevant NSO.
210. If an athlete or support person is asserted to have breached the terms of an anti-doping policy (ie, an ADRV is asserted against them) they will receive from their sport a notice (which may be referred to as an infraction notice) asserting a breach of the relevant provisions of the anti-doping policy of the sport.
211. Under the terms of the anti-doping policy, the athlete or support 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 proposes to impose.
212. ASADA, as the national anti-doping organisation for Australia for the purposes of the Code, or WADA, may also 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 in Part 7 of this bench book.

213. Art 8 of the Code provides that an athlete or support 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 and impartial hearing panel. The Anti-Doping Division of the NST is capable of being a hearing panel for the purposes of Art 8 of the Code.

Prohibited List

214. 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 support personnel can be liable for ADRVs.
215. 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 prohibited for use at all times (that is, both In-Competition and Out-of-Competition), and those substances and methods that are prohibited for use In-Competition only.
216. 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.
217. Non-specified substances are those substances which are taken for the purpose of enhancing sport performance – for example, anabolic steroids are non-specified substances.
218. There are also some substances that are not prohibited generally, but are prohibited for use in a particular sport.
219. The designation of the substance as Specified or non-Specified 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 ADO can provide that the athlete took the substance with the intention to improve their sport performance
 - 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.

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

Application for arbitration of disputes

220. 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 athlete support person (e.g. coach, team doctor) A sporting body where the athlete or athlete support person is bound by the sporting body's anti-doping policy.
2	Authority to arbitrate	The anti-doping policy (approved by the ASADA 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 Athlete support person
4	Other entities that are, or may eligible to be, a party to the dispute	The ASADA CEO is always a party. 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 sport and WADA.

221. 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.⁸⁵
222. For the purposes of s 5(3) of the NST Act, the *National Sports Tribunal Act 2019 – Specification of Sporting Body Instrument 2020 (No. 1)* specifies as a class of 'sporting body' each sporting organisation or body that has an anti-doping that has an anti-doping policy approved by the ASADA 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.
223. In each of those circumstances, each sporting organisation or body that has adopted an anti-doping policy approved by the ASADA CEO is a sporting body as the term is defined in s 5(1)(b) of the NST Act.

⁸⁵ Section 27(1) of the NST Act.

224. Information about the application process is set out at paragraph [79] below.

Who is an athlete?

225. 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.

226. 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.

227. While the Code allows for the possibility that an anti-doping organisation might not necessarily test recreational level athletes, should such an athlete be tested and test positive to a Prohibited Substance, the recreational athlete will be subject to the same consequences as an elite athlete.

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...

Disputes that the Anti-Doping Division deals with

230. The Anti-Doping Division will deal exclusively with disputes between an athlete and their sporting body, or an athlete support person and their sporting body, as to whether the athlete or support person has committed an ADRV.

231. There are certain other anti-doping disputes (eg an appeal by an athlete against the imposition of a provisional suspension by the sporting body, or by ASADA against the decision of a sport not to take forward an ADRV) which will be able to be appealed directly to the Appeals Division of the NST. We discuss those matters in more detail in [Part 8: Appeals Division](#).

232. The Code (and sporting body anti-doping policies that implement it) set out 10 ADRVs.⁸⁶ 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

Legal issues common to all ADRVs

Standard of Proof is comfortable satisfaction

235. The entity that is seeking to prove that an athlete or support person has committed an ADRV bears the onus of establishing the ADRV.

⁸⁶ Following WADA's latest review of the Code, it is to be updated with effect from 1 January 2021 to increase the number of anti-doping rule violations to 11. The new violation (Art 2.11) will be *Acts by an Athlete or Other Person to Discourage or Retaliate Against Reporting to Authorities*.

236. 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

237. For some ADRVs, the Code places an evidentiary burden on the athlete or support person to rebut certain presumptions or establish certain facts. In those instances, the standard of proof that the athlete or support person is required to meet is the balance of probabilities. Once the athlete or support 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.
238. 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

239. 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 support 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 athlete support person is asserted to have committed more than one ADRV at the same time

240. 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.
241. 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 sports anti-doping policy (and therefore, more than one ADRV).
242. 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

243. 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

244. In a series of decisions arising from allegations of systematic doping by Russian athletes at the Sochi 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 support person cannot be complicit in the commission of their own ADRV.

Applicable law to the dispute

245. Code Art 24.3 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.
246. 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

Presence of a Prohibited Substance or its Metabolites or Markers (Presence)

247. 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 – eg hair testing or saliva testing, or through testing by laboratories not accredited or approved by WADA.

248. There are two elements to the Presence ADRV that an anti-doping organisation needs to establish:

- the person must be an athlete; and
- the presence of a Prohibited Substance or its metabolites or markers in the athlete's urine or blood.

249. If these elements are established, the ADRV will be established. Intention is not relevant to the commission of this ADRV.

250. 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.

251. These matters may, however, be relevant to the athlete's sanction – see below at [313] onwards.

Proving the Presence of a Prohibited Substance

252. At present, 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.

253. Code Art 3.2.3 sets out a similar rebuttable presumption in relation to other standards.

254. 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

255. 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.

256. Further, some departures from these processes will automatically invalidate an AAF.

257. This includes the case where the athlete is denied the opportunity to have their B (urine) sample⁸⁷ analysed in either their presence or the presence of their representative.

⁸⁷ 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 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

258. As mentioned earlier, the ADRV of Use of a Prohibited Substance or Prohibited Method⁸⁸ is commonly asserted with the Presence ADRV. This will generally be the case where the athlete has tested positive to a substance that is prohibited at all times – ie 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.
259. 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.
260. 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

261. 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.

⁸⁸ Being any method or substance prescribed on the [Prohibited List](#).

262. 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.

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 – ie 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

263. To establish an Attempted Use ADRV, the ADO has to 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.
264. 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 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)⁸⁹ appealed the ARU Tribunal decision to CAS. CAS found the 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

265. To establish this ADRV, the ADO has to 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.
266. 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.

⁸⁹ Now known as World Rugby.

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

267. In order to establish an ADRV based on a refusal or failure to submit to sample collection, the ADO has to 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.

Meaning of the expression ‘compelling justification’

268. The expression ‘compelling justification’ has been interpreted strictly by anti-doping hearing panels.
269. 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

270. 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.
271. The maximum sanction for a whereabouts violation is 2 years' ineligibility from sport, while the minimum sanction (depending on the athlete's level of fault) is 12 months' ineligibility.
272. A violation under Article 2.4 requires consideration of the rules established under the ISTI for the provision of whereabouts information.
273. Athletes who have been identified by their international federation or anti-doping organisation to be included in a 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, as may failures to keep the information up to date.
274. 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 (eg because they are somewhere else), that will generally constitute a missed test.

275. While an athlete can delegate the task of filing whereabouts information, the athlete remains responsible for ensuring the information is correct.
276. 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.
277. 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 – eg 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).

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

278. 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). Code Art 2.5 provides that it includes, '...without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organisation or intimidating or attempting to intimidate a potential witness.'
279. The term 'Tampering' is defined in the Code as 'Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing; misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring.'

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](#) (28 February 2020)

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 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.

The 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. However, under pressure from the athlete, one of either the DCO or the BCO handed the glass containers to the athlete. The athlete then instructed his security guard to break the glass containers, for the purpose of retrieving the tubes. The athlete also tore up the doping control documentation. The DCO and BCO left the athlete's house with the broken glass containers but without the tubes. While the tubes themselves were not broken, they could no longer be analysed as the chain of custody was broken.

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.

As the Tampering violation carried the more severe sanction, CAS considered it first. Among WADA's arguments was that, irrespective of whether the sample collection personnel had been properly authorised, or had properly identified themselves to the athlete, the refusal to allow samples to be removed would always constitute Tampering. The CAS Panel did not entirely agree with WADA's argument, observing that (at [208] – [209] (emphasis in original)):

In the view of the Panel, it cannot be excluded that serious flaws in the notification process, or during any part of the Doping Control process, could mean that it might not be appropriate to require an athlete to subject himself to, or continue with, a sample collection session. Rather, they could invalidate the sample collection process as a whole, so that an athlete might not be perceived as having tampered with the Doping Control, or as having failed to comply with the sample collection process. In the view of the Panel, this could only be in the most exceptional circumstance.

On the other hand, the Panel is conscious that as a general matter, athletes should not take matters into their own hands, and if they do, they will bear the risk of serious consequences. The proper path for an Athlete is to proceed with a Doping Control under objection, and making available immediately the complete grounds for such objection. In the view of the Panel, it must be emphasised that any athlete who questions whether notification requirements have been properly complied with would be well-advised not to refuse or abort the sample collection process, but rather to complete the sample collection process under protest and document the reasons of such objection in as much detail, and as early, as possible.

In any case, the CAS Panel found that the athlete had been properly notified, in accordance with the requirements of the International Standard for Testing and Investigations.

The CAS Panel then went on to consider whether the athlete had any other 'valid justification' for failing to comply with the sample collection process. In this context, the athlete claimed that he had lost trust in the sample collection personnel after he discovered the chaperone had covertly taken photographs of him. In the CAS Panel's view, the mere fact that the chaperone had acted inappropriately was not valid justification for the athlete to not allow the blood samples that he had already given to be taken away.

The CAS Panel also rejected the athlete's argument that the DCO had, of her own initiative, agreed to terminate the sample collection session, or that it was her suggestion that he take and destroy the blood samples. The Panel found:

In such circumstances, the Panel does not find it unreasonable that the DCO, being in the athlete's house, in the presence of his bodyguards and collaborators, may have felt that she had no option but to accept the Athlete's impositions. In such circumstances, the duty of the DCO was to warn the Athlete about the possible consequences of his actions. As set out above, she complied with that duty.

The Panel found (at [339]), on the evidence before it, that the athlete had acted with the intention of preventing the DCO leaving his house with the blood samples that had already been collected, and those actions comprised intent. Following on from this, the Panel was comfortably satisfied that the athlete had committed the ADRV of Tampering.

Furthermore, because of the intentional nature of the Tampering ADRV, the athlete could not seek to reduce his sanction by arguing No Significant Fault or Negligence.

280. In recent years, the 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 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 athlete support 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

286. 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).
287. To establish either violation, the ADO has to 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.
288. 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 support 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 – athlete support person 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.

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

291. 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.

292. 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.

293. 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.

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 ARDVs 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.

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

302. 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.'

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.

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

307. An athlete or support 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 an athlete support 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.
308. The ADRV need not have been committed by the athlete support person in that capacity. For example, an athlete support 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 support person who associates with them during their period of ineligibility will be at risk of committing the Prohibited Association ADRV.

309. 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 support 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.
310. Before an ADO can assert the Prohibited Association ADRV against an athlete or athlete support person, the ADO must have previously written to the athlete or support person warning them of the status of the athlete support person (banned person) they are associating with.
311. Also, the athlete or support person must be reasonably able to avoid associating with that person. For example, a minor athlete might not reasonably be able to avoid associating with their parent who is a banned person.
312. If the ADRV is asserted, the athlete or support person is required to establish that any association with the banned person is *not* in a professional or sport-related capacity.
313. WADA maintains a Prohibited Association list: https://www.wada-ama.org/sites/default/files/resources/files/asp_list_updated_2020-04-10.pdf

Sanctions for ADRVs

Disqualification of results

314. 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. (Code, Art 10.1)
315. In addition, the ruling body for the Event has the discretion to disqualify all of the athlete's results in that Event, will all medals, points and prizes won in the Event forfeited. (Code, Art 10.1)
316. 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)

Standard periods of ineligibility for ADRVs

317. 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 Athlete Support 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 10.2.3), 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).
318. 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)
319. 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)
320. 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).
321. For the violation of Complicity, the standard period of ineligibility is between 2 and 4 years, depending on the seriousness of the violation. (Code, Art 10.3.4.)
322. 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 Athlete Support Person's degree of Fault, and any other circumstances of the case. (Code, Art 10.3.5).
323. 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

324. 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 10.4), and No Significant Fault or Negligence (Code, Art 10.5)
 - providing substantial assistance in discovering or establishing ADRVs (Code, Art 10.6.1)
 - admitting an ADRV in the absence of evidence that it occurred (Code, Art 10.6.2)

- 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, 10.6.3)
- applying a combination of the above methods, but not so as to reduce the period to less than one quarter of the otherwise applicable period of ineligibility (Code, Art 10.6.4).

Sanctions for multiple violations

325. Where an athlete or support person has previously been sanctioned and is then found to have committed a second an ADRV, minimum periods of ineligibility apply. (Code, Art 10.7.1)
326. Where an athlete or support person commits a third ADRV, the standard period of ineligibility is a lifetime. (Code, Art 10.7.2). Where the athlete or support 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 10.7.2)
327. If two or more violations are asserted against an athlete or support person (eg 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 10.7.4.1)

Principle of *lex mitior*

328. 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.

No fault or negligence

330. 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 10.4)
331. 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).
332. It is rare for an athlete or support person to establish No Fault or Negligence. To establish no fault or negligence, the athlete or support person has to be able to establish:
- (if not a minor and the violation is that of Presence) how the Prohibited Substance got into their system, 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.
333. The comment to Art 10.4 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.

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

338. It is more common for athletes or support personnel to succeed in reducing their period of ineligibility on the basis of No Significant Fault or Negligence. (Code Art 10.5).
339. To establish No Significant Fault or Negligence, the Athlete or support person has to 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.

Example – Ignorance, youth and propensity to accept direction from family members does not justify reduction based on no significant fault

Australian Sports Anti-Doping Authority (ASADA) on behalf of Cycling Australia v Jeone Park – [CAS A2/2015](#) (17 March 2016)

Mr Park was a Korean professional cyclist who was a member of Cycling Australia at the time of the alleged ADRV. In August 2014, he fell off his bike while competing in a race in Korea. The day after the event, Mr Park felt unwell. That evening, Mr Park's father took him to his cousin's home. The cousin was a trained nurse. She suggested that an IV infusion of grape syrup and vitamins might assist in making Mr Park feel better. The father, after checking the substances in the proposed infusion with the cousin, advised his son that it did not contain any substances banned under the World Anti-Doping Code. Mr Park's sister took a photo of his arm with the IV needle inserted and the IV fluid and posted it to Facebook.

At the relevant time, the Prohibited List prescribed as a Prohibited Method 'Intravenous infusions and/or injections of more than 50 mL per 6 hour period except for those legitimately received in the course of hospital admissions or clinical investigations.'

Mr Park accepted that a violation (Attempted Use of a Prohibited Method) had occurred, but argued that as he was a minor at the time of the violation and his conduct was largely the result of the actions of the adults around him, any period of ineligibility should be reduced to 1 year under article 10.5.2 on the basis of No Significant Fault or Negligence.

CAS did not agree that the circumstances justified such a reduction. Mr Park was a scholarship athlete who regularly competed in events and championships, and had undertaken anti-doping training conducted by his State scholarship body and by ASADA. On that basis, this was not a circumstance in which he could reasonably claim a lack of knowledge about the prohibited status of IV infusions.

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, eg 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.

Example – Effect of commission of second violation, and inability to reduce sanction based on no significant fault or negligence

World Anti-Doping Agency v Sun Yang and Federation Internationale de Natation (FINA) – [CAS 2019/A/6148](#) (28 February 2020)

In this matter, Mr Sun Yang (the athlete) was found by CAS to have committed the ADRV of Tampering with the doping control process.

Because of the intentional nature of the ADRV, the athlete was unable 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 violation constituted his second violation. Because of 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.

PART 8: APPEALS DIVISION

Application for arbitration of disputes

357. Broadly, the NST's Appeals Division can receive applications for arbitration of a dispute about:⁹⁰

	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 sporting 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

358. 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.⁹¹

⁹⁰ Sections 31-35 of the NST Act.

⁹¹ Section 36(1) of the NST Act.

Anti-Doping appeals

Appeals from the NST's Anti-Doping Division

359. 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:

	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 <p>OR</p> <ul style="list-style-type: none"> • the athlete/support person, the sporting body and ASADA 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

360. 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 ASADA CEO	
2	Policy binds relevant person	Athlete/support person is bound by that anti-doping policy	
3	Decision	Sporting body makes a decision in relation to the athlete/support 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 <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/support person, the sporting body and ASADA CEO agree in writing that the appeal can be made (written agreement) 	
6	Applicant	Where anti-doping policy permits appeal to NST	Athlete/support person, ASADA CEO or any other person or body permitted by the anti-doping policy
		Where written agreement that appeal can be made	Athlete, support person, ASADA 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

361. 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 ASADA 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/support person is bound by that anti-doping policy	
4	Decision	Sporting tribunal makes a decision in relation to the athlete/support 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/support person, the sporting body and ASADA CEO agree in writing that the appeal can be made (written agreement) 	
6	Applicant	Where anti-doping policy permits appeal to NST	Athlete/support person, ASADA CEO, sporting body or any other person or body permitted by the anti-doping policy
		Where written agreement that appeal can be made	Athlete/support person, ASADA CEO, sporting body or any other person or body specified in the written agreement as being able to appeal.

Other/general appeals

Appeals from the NST's General Division

362. 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 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

363. 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	Subject matter	The dispute falls into one of the following categories: <ul style="list-style-type: none"> • Eligibility/selection and disciplinary • Dispute approved by the CEO in writing 	
4	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) 	
5	Applicant	Where constituent document permits appeal	The person, sporting body or any other person or body permitted by one or more constituent documents
		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

364. 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, specifically:
- Athlete eligibility or selection disputes;
 - disciplinary disputes, including but not limited to disputes relating to disciplinary action taken, or proposed to be taken, under a member protection policy
 - disciplinary disputes relating to the disciplinary action taken, or proposed to be taken, by a sporting body against a constituent part of its sport, where the constituent part is a body corporate.⁹²
365. An appeal cannot be brought from an Alternative Dispute Resolution process conducted by the NST.
366. 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.⁹³
367. The CEO cannot give approval to arbitrate an appeal in respect of certain kinds of disputes as set out below, subject to relevant exceptions.⁹⁴

⁹² Section 8 of the NST Rule.

⁹³ Section 35(7) of the NST Act.

⁹⁴ Section 35(6) of the NST Act; s 9(1) of the NST Rule.

Type of dispute	Description
Remuneration or contract for services	Disputes relating to remuneration or other benefits payable to an individual under a contract for services, or relating to the termination of a contract for services with an individual, except where those disputes arise in connection with an alleged breach of a disciplinary rule of the sporting body.
Employment dispute	Employment disputes, except where those disputes arise in connection with an alleged breach of a disciplinary rule of the sporting body.
Anti-doping dispute	Disputes that could be heard by the Anti-Doping division of the NST (see Part 7 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.

368. An 'employment dispute' is defined in the NST Rule to mean disputes in respect of which a remedy is available:
- under the *Fair Work Act 2009* or a general State industrial law within the meaning of s 26(3) of that Act
 - at general law for the breach of a contract of employment.⁹⁵
369. An example of an employment dispute in respect of which a remedy is available elsewhere is a dispute concerning the termination of employment of a person.⁹⁶
370. The term 'field of play' dispute is considered in [Part 2](#) of the bench book.

Definitions

371. 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.

⁹⁵ Section 9(2) of the NST Rule.

⁹⁶ See note to s 9(2) of the NST Rule.

Sporting tribunal administered by a sporting body

372. 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

373. An application must be made in accordance with the approved form.⁹⁷ The application must contain the information the form requires and must set out the reasons for the application.⁹⁸
374. [Approved forms](#) can be download from the NST website, including :
- Application form for dispute resolution
 - Appeal application form
 - 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).
375. Where there is more than one appellant, each appellant's details should be included on the form.

Application fee for appeals

376. An application must be accompanied by the application fee prescribed by the NST Rule.⁹⁹ The current fees are set out below.

Application type	Commence Arbitration	Application to join existing arbitration
Applicable fee	\$1,500	\$250

378. The CEO may waive the application fee if he or she is satisfied that paying the fee would cause [financial hardship](#) to the applicant.¹⁰⁰ 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.

⁹⁷ Sections 31(3), 32(3), 33(3), 34(3), 35(3) and 37(a) of the NST Act.

⁹⁸ Sections 37(c) and 37(d) of the NST Act.

⁹⁹ Section 37(b) of the NST Act; s 11 of the NST Rule.

¹⁰⁰ Section 11(3) of the NST Rule.

Time limit

379. 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.¹⁰¹
380. 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;¹⁰² and
 - for all other disputes – within 30 days of the date of the decision or determination being appealed.¹⁰³

Parties to the appeal

381. 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 arbitration• the applicant (if not a party to the arbitration)
	<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/support person• sporting body• ASADA CEO• the applicant (if not already a party)

¹⁰¹ Section 38(4)(a) of the NST Act.

¹⁰² Section 38(4)(b) of the NST Act and s 12(4)(a) of the NST Rule.

¹⁰³ Section 38(4)(b) of the NST Act and s 12(4)(b) of the NST Rule.

Type of matter	Appealable dispute	Parties
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 the applicant (if not a party to the arbitration)
	<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 the applicant (if not already a party)

382. 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.
383. Other parties must lodge a response within 7 days of receiving notice of commencement (unless a response has already been lodged).¹⁰⁴ 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 'interested party - application to join a dispute' [form](#) and meet the following criteria:

¹⁰⁴ Section 23(1) of the P&P Determination.

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

384. 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.
385. Additionally, parties must act in good faith in relation to the conduct of the arbitration.¹⁰⁵
386. 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

387. 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.¹⁰⁶

¹⁰⁵ Section 40(2) of the NST Act.

¹⁰⁶ Section 95(1) and 94(4) of the P&P Determination.

388. 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.¹⁰⁷
389. 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.¹⁰⁸ In an appeal from the General Division, the NST Member is not to admit new evidence unless:¹⁰⁹
- 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

390. 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.¹¹⁰
391. 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.¹¹¹
392. 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 its own initiative or on application by a party.¹¹²

¹⁰⁷ Section 95(2) and 95(5) of the P&P Determination.

¹⁰⁸ Section 95(3) of the P&P Determination.

¹⁰⁹ Section 95(6) of the P&P Determination.

¹¹⁰ Section 40 of the P&P Determination.

¹¹¹ Section 41(1) of the P&P Determination.

¹¹² Section 41(2) of the P&P Determination.

ADR processes

393. No provision is made for ADR processes within the NST's Appeals Division.
394. 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 relating to the dispute unless agreed to by the parties.¹¹³

Termination or suspension of an arbitration

395. 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.¹¹⁴
396. The NST Member may make a direction to suspend an appeal where the parties have made an application for an ADR process.¹¹⁵
397. 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.¹¹⁶

Determination of appeals

398. 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

399. 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.¹¹⁷
400. The costs that the CEO can determine are not the costs between the parties (eg the costs of legal representation or of obtaining a medical report).

¹¹³ Section 30 of the NST Act.

¹¹⁴ Section 36(4) of the NST Act; s 10(1) of the NST Rule.

¹¹⁵ Section 10(2) of the NST Rule.

¹¹⁶ Section 10(3) of the NST Rule.

¹¹⁷ Section 46 of the NST Act; ss 13(4) and 13(5) of the NST Rule.

401. Rather, the CEO can determine the 'costs of the arbitration', being the costs incurred by the NST in conducting those processes.
402. 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

403. 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.¹¹⁸

Waiver

404. 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.¹¹⁹

¹¹⁸ Section 13(6) of the NST Rule.

¹¹⁹ Section 14 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
ARU	Australian Rugby Union
ASADA	Australian Sports Anti-Doping Authority
ASADA Act	<i>Australian Sports Anti-Doping Authority Act 2006</i>
ASADA Regulations	<i>Australian Sports Anti-Doping Regulations 2006</i>
AWF	Australian Weightlifting Foundation
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

Acronym	Meaning
DSD Regulations	<i>IAAF Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development)</i>
EPO	Erythropoietin
FFA	Football Federation of 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
MRP	Match Review Panel
NAD Scheme	<i>National Anti-Doping scheme</i>
NSO	National sporting organisation
NST	National Sports Tribunal
NST Act	<i>National Sports Tribunal Act 2019</i>
NST Bill	<i>National Sports Tribunal Bill 2019</i>
NST Rule	<i>National Sports Tribunal Rule 2019</i>
NZNST	New Zealand National Sports Tribunal
P&P Determination	<i>National Sports Tribunal (Practice and Procedure) Determination 2020</i>
Prohibited List	List of Prohibited Substances and Methods

Acronym	Meaning
RTP	Registered testing pool
SIA	Sports 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