
Karen Elphick
Law and Bills Digest Section

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Date introduced: 24 July 2019
House: House of Representatives
Portfolio: Youth and Sport
Commencement: A day fixed by proclamation or 6 months after the Act receives the Royal Assent.

Links: The links to the National Sports Tribunal Bill 2019 and to the National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019 can be found on the Bill’s home pages, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

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The Bills Digest at a glance

Background and Purpose

• In 2018 the Report of the Review of Australia’s Sports Integrity Arrangements (the Wood Review) recommended the formation of a National Sports Tribunal (NST). The Government agreed in principle with the relevant recommendations of the Wood Review.

• All sports in Australia currently resolve sporting disputes (including Anti-Doping Rule Violation matters) by private arbitration, whether through an in-house tribunal or the Court of Arbitration for Sport (CAS).

• The NST is intended to provide an effective, efficient, independent, transparent and specialist tribunal, as an alternative to CAS, for the fair hearing and resolution of sporting disputes.

Committee consideration

The Senate Standing Committee for Scrutiny of Bills expressed concern about the reversal of the onus of proof in clause 72. The Minister responded to the Committee on 23 August 2019.

Position of major interest groups

Most major interest groups support establishing the NST.

Key issues and provisions

• Australia’s National Anti-Doping Scheme (the NAD Scheme), set out in the Australian Sports Anti-Doping Authority Act 2006 (the ASADA Act) and Schedule 1 of the Australia Sports Anti-Doping Authority Regulations 2006, and the ASADA approved anti-doping policies of sporting bodies have a substantive effect on how anti-doping rule violations (ADRVs) hearings are conducted.

• Although the common law privilege against self-incrimination will be available in an arbitration hearing before the NST, and is theoretically available through statute in compulsory questioning conducted by ASADA; most athletes and support persons have waived this privilege through inclusion of the terms of their sporting body’s anti-doping policy in their membership or employment contract. Athletes, officials and support persons must submit to the rules and anti-doping policy of the sporting body if they wish to participate in the sport.

• The anti-doping policy of a sporting body must be approved by ASADA as a condition of accessing Commonwealth funding. ASADA provides a template anti-doping policy which contains onerous terms including the use of arbitration to settle disputes and waiver of the privilege against self-incrimination.

• The NST is an arbitration tribunal. The foundation of arbitral power is consent of the parties to settlement of the particular dispute by a third party. Arbitration in the NST is characterised as a contractual choice made by athletes and support persons; however, the use of arbitration to settle disputes is usually contained in the rules of a sport and in its anti-doping policy. There is some risk that the policy of WADA, ASADA and the Commonwealth makes arbitration in the NST mandatory. There is a case currently before the Federal Court on the question whether it is beyond the power of the executive and parliament to make arbitration mandatory.

• The Bill provides that members of the NST are appointed at the discretion of the Minister and must have expertise in one of several specific areas. However, the Wood Review recommended they be appointed by the Sports Integrity Agency, in consultation with the Minister, by specifically recruiting for required skills and expertise.
History of the Bills

The **National Sports Tribunal Bill 2019** (the 45th Parliament Bill)\(^1\) and the **National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019** (first Consequential Bill) were introduced into the House of Representatives on 14 February 2019. Debate on the second reading was adjourned and both Bills lapsed when the House was dissolved on 11 April 2019.

The **National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019** (the Consequential Amendments Bill) was introduced into the House of Representatives on 24 July 2019. The Bill is in very similar terms to the first Consequential Bill; however, **item 3** of the Bill proposes an amendment to Schedule 3 of the **Freedom of Information Act 1982**.

The **National Sports Tribunal Bill 2019** (the Bill) was introduced into the House of Representatives on 24 July 2019. The Bill is in very similar terms to the 45th Parliament Bill; however, several sections have been deleted and others added or amended with extensive renumbering throughout the Bill. The substantive changes are noted in the table below.

<table>
<thead>
<tr>
<th>Section in 45th Parliament Bill</th>
<th>Section in Bill</th>
<th>Nature of change</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 – Simplified outline of this Act</td>
<td>4 – Simplified outline of this Act</td>
<td>Dot points two and three are new insertions</td>
</tr>
<tr>
<td>—</td>
<td>6 - Application of this Act</td>
<td>Whole section inserted</td>
</tr>
<tr>
<td>26 – Arbitration of disputes in Anti-Doping Division or General Division</td>
<td>27 – Arbitration of disputes in Anti-Doping Division or General Division</td>
<td>Subsection (5) inserted</td>
</tr>
<tr>
<td>35 – Arbitration of disputes in Appeals Division</td>
<td>36 – Arbitration of disputes in Appeals Division</td>
<td>Subsection (5) inserted</td>
</tr>
<tr>
<td>40 – CEO’s determination about practice and procedure of NST in arbitration</td>
<td>41 – CEO’s determination about practice and procedure of NST in arbitration</td>
<td>Minor clarifying amendments to subsection (3) Subsection (4) inserted</td>
</tr>
<tr>
<td>Sections 42–43</td>
<td>Sections 43–44</td>
<td>Civil penalty provisions inserted in each section</td>
</tr>
<tr>
<td>—</td>
<td>Division 10 of Part 3 – Civil penalty provisions Section 48 – Civil penalty provisions</td>
<td>Division 10 of Part 3 and section 48 inserted</td>
</tr>
<tr>
<td>—</td>
<td>Division 11 of Part 3 – Infringement notices Section 49 – Infringement notices</td>
<td>Division 11 of Part 3 and section 49 inserted</td>
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</tbody>
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Purpose of the Bill

The purpose of the National Sports Tribunal Bill 2019 (the Bill) is to establish the National Sports Tribunal (NST) which the Government intends will provide an effective, efficient, independent, transparent and specialist tribunal for the fair hearing and resolution of sporting disputes.

The purpose of the Consequential Amendments Bill is to deal with consequential and transitional matters arising from the enactment of the National Sports Tribunal Act 2019.

Structure of the Bill

The Bill is divided into a number of parts.

Part 1 contains formal and preliminary material, including definitions.

Part 2 establishes the NST, deals with the appointment of members of the NST and sets out their duties.

Part 3 sets out which sporting disputes the NST will hear and provides processes for resolving different kinds of disputes.

- Division 2 describes who may apply to have a dispute heard by the Anti-Doping Division.
- Division 3 describes who may apply to have a dispute heard by the General Division. The CEO has a role in approving which disputes may be heard. There is also provision for some disputes to be resolved by mediation, conciliation or case appraisal. The practice in relation to alternative dispute resolution is found in Division 5.
- Division 4 requires the NST to conduct an arbitration when the application meets the statutory criteria and to provide a written determination.
- Appeals are dealt with in Division 6.
- Division 8 contains matters of procedure and civil and criminal penalties for failure to comply with notices to attend or provide information, refusal to be sworn or answer questions and giving false or misleading evidence.

Part 4 deals with the administration of the NST, including the appointment of a Chief Executive Officer (CEO) and the CEO’s functions and powers.

Part 5 contains further offences relating to obstruction of the NST, intimidation of witnesses and unauthorised use or disclosure of information. It also provides protection and immunities for members, legal representatives and witnesses.

The Consequential Amendments Bill has two schedules:


Schedule 2 provides application provisions to manage the transition of the National Sports Tribunal Act 2019 into law.
### Glossary

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>AAF</td>
<td>Adverse analytical finding</td>
</tr>
<tr>
<td>ADRV</td>
<td>Anti-doping rule violation</td>
</tr>
<tr>
<td>ADRV Panel</td>
<td>Anti-Doping Rule Violation Panel—a body created by the ASADA Act</td>
</tr>
<tr>
<td>AOC</td>
<td>Australian Olympic Committee</td>
</tr>
<tr>
<td>ASADA</td>
<td>Australian Sports Anti-Doping Authority – the Government has announced that ASADA will become Sport Integrity Australia.</td>
</tr>
<tr>
<td>ASADA Act</td>
<td>Australian Sports Anti-Doping Authority Act 2006</td>
</tr>
<tr>
<td>ASADA CEO</td>
<td>ASADA Chief Executive Officer</td>
</tr>
<tr>
<td>ASADA Regs</td>
<td>Australian Sports Anti-Doping Authority Regulations 2006</td>
</tr>
<tr>
<td>ASC</td>
<td>Australian Sports Commission—now known by the brand name Sport Australia or SportAUS</td>
</tr>
<tr>
<td>CAS</td>
<td>Court of Arbitration for Sport</td>
</tr>
<tr>
<td>Code</td>
<td>World Anti-Doping Code 2015 with 2019 amendments. All NSOs must have anti-doping rules and policies that comply with the Code.</td>
</tr>
<tr>
<td>COMPPS</td>
<td>Coalition of Major Professional and Participation Sports</td>
</tr>
</tbody>
</table>
| ICCPR        | International Covenant on Civil and Political Rights. Australia ratified the ICCPR in 1980 and it is in force, but it is not fully implemented domestically.  
| Macolin Convention | Council of Europe Convention on the Manipulation of Sports Competitions. Australia signed the convention on 1 February 2019 but has not yet ratified it.  
<p>| NADO          | National Anti-Doping Organisation |
| NAD scheme    | National anti-doping scheme. Authorised by the ASADA Act, the Scheme is contained in Part 2 of the ASADA Regs. |</p>
<table>
<thead>
<tr>
<th>NSIC</th>
<th>National Sports Integrity Commission—a generic name for body proposed in the Wood Review. The Government has said the body will be called Sport Integrity Australia.</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSO</td>
<td>National Sporting Organisation—a generic name for a peak governing body for a particular sport.</td>
</tr>
<tr>
<td>SIA</td>
<td>Sport Integrity Australia – the proposed peak body with responsibility for all sporting integrity matters. It has not yet been established.</td>
</tr>
<tr>
<td>SportAus</td>
<td>Sport Australia (the operating brand name of the Australian Sport Commission)</td>
</tr>
<tr>
<td>WADA</td>
<td>World Anti-Doping Authority</td>
</tr>
</tbody>
</table>

**Background**

**The Wood Review and Government Response**

In August 2017, the Government commissioned the Review of Australia’s Sports Integrity Arrangements to conduct a comprehensive examination of sports integrity arrangements. The Review was led by James Wood AO QC supported by an expert panel. In 2018, the Report of the Review of Australia’s Sports Integrity Arrangements (the Wood Review) made 52 recommendations across a range of reforms aimed at enhancing Australia’s capability to respond to threats to sports integrity.4

Three key agencies currently manage the Australian response to sports integrity issues:

- Australian Sports Commission (SportAUS)
- Australian Sports Anti-Doping Authority (ASADA)
- National Integrity of Sport Unit (NISU) within the Department of Health.

The Wood Review recommended the formation of a National Sports Integrity Commission (NSIC) and that it take over the sports integrity management responsibilities of SportAUS and the NISU. Other major recommendations included:

- improving several aspects of the process of dealing with doping violations
- establishing a National Sports Tribunal
- Australia becoming a party to the Council of Europe Convention on the Manipulation of Sports Competitions (Macolin Convention). Australia signed the convention on 1 February 2019 but has not yet ratified it.5

In Safeguarding the Integrity of Sport—the Government Response to the Wood Review (Government Response), the Government agreed, or agreed in principle, with most of the

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recommendations. The Government Response contains a table setting out the specific response to each recommendation of the Wood Review. The Government announced in February 2019 that it will establish the NSIC and it will be called Sport Integrity Australia (SIA). An initial package of three Bills implementing Stage One of the Government Response was introduced to Parliament in February 2019:

- the Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019—a Bills Digest was published in April 2019
- the National Sports Tribunal Bill 2019 and

The fourth Bill in the package, the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019, was introduced in April 2019. This Bill proposed that ASADA become Sport Integrity Australia.

The Government introduced a series of four Bills in the previous Parliament to implement stage one of the Government Response to the Wood Review into sports integrity arrangements. All the Bills lapsed when Parliament was dissolved on 11 April 2019. To date, only the two Bills dealing with the NST have been re-introduced.

**Sports governance and ‘sporting disputes’**

The Wood Review recognised that traditionally, ‘... sport runs sport, setting the rules for administration, competition and governance, including rules regarding integrity issues at international and national levels’. However, sport is now also a major industry, estimated to account for between 3% and 6% of world trade. The Coalition of Major Professional and Participation Sports (COMPPS) clearly identified their sports as businesses and told the Wood Review:

> Integrity is a major part of reputation. A sport cannot be the custodian of the sport without control of the matters affecting its reputation. If this is outsourced or delegated to an entity over which the sport has no control, then this is an effective ceding of its responsibility to govern the business. No major corporate such as a bank, airline or consumer retail business would do this. It would undermine the fundamental principle of the governance model of Australian sport – that it is the board, democratically elected by its members, who should govern the sport.

The commercialisation of the sporting environment together with the increasing product value and the social and cultural importance of high-profile sport has led to a growing incidence of sporting disputes; as evidenced by a growing caseload for the Court of Arbitration for Sport (CAS).

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8. Wood Review, op. cit., p. 56.


The Wood Review defined a ‘sporting dispute’ as a matter ‘occurring under the rules or policies of a sport that may result in a sanction or other adverse outcome imposed by the sporting organisation on an athlete or support person’. \(^{12}\)

When a participant breaks a rule of a sport (including an anti-doping rule), they may find themselves disqualified from an event or required to serve a period of suspension. Off-field behaviour may also give rise to a disciplinary issue resulting in a dispute between a player and their sporting organisation about how it should be resolved. Conflict might also arise if a participant (especially in medal sports) disputes their non-selection in a team or event. \(^{13}\)

For the purposes of the Wood Review, sporting disputes did not include commercial contract disputes or other legal actions primarily founded in tort or public law which are determined by courts. They did include:

- anti-doping rule violations (ADRVs)
- off field player behaviour
- salary cap breaches
- player eligibility and selection and
- competition manipulation.

Sporting disputes are diverse and cover a wide range of seriousness. Some may have profound consequences for the athlete, support person, club or sport. It is, therefore, important that there are mechanisms for swift and fair resolution.

**Private arbitration**, the resolution of sporting disputes by and through the rules of the sport, is ‘now firmly established as the dispute resolution method of choice throughout the sports industry’. \(^{14}\) One reason for the choice of arbitration is that ‘maintaining organisational autonomy is a high priority for national and international sporting organisations’. \(^{15}\)

All sports in Australia currently resolve sporting disputes (including ADRV matters) by private arbitration, whether through an in-house tribunal or CAS. \(^{16}\)

**Current sporting dispute resolution arrangements**

**Dealing with ADRV matters**

The World Anti-Doping Agency (WADA) was established in late 1999 to promote and coordinate the fight against doping in sport internationally. \(^{17}\) WADA developed the World Anti-Doping Code (the Code) which first came into force in 2004. It is the core document that harmonizes anti-doping policies, rules and regulations within sport organisations and among public authorities around the world. \(^{18}\)

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13. Ibid.
15. Wood Review, op. cit., p. 56.
As governments were not bound by the [Code], in October 2005 the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the *International Convention against Doping in Sport*. Parties to this Convention (of which Australia is one), are required to implement the [Code].

ADRVs must be dealt with according to the obligations of the Code. The Code requires that any person issued an ADRV must be provided with a fair hearing:

For any Person who is asserted to have committed an anti-doping rule violation, each Anti-Doping Organization with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of ineligibility shall be Publicly Disclosed as provided for in Article 14.3.

WADA’s formal note to Article 8.1 points out that sporting bodies may develop their own rules for hearings:

Comment to Article 8.1: This Article requires that at some point in the results management process, the Athlete or other Person shall be provided the opportunity for a timely, fair and impartial hearing. These principles are also found in Article 6.1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* and are principles generally accepted in international law. This Article is not intended to supplant each Anti-Doping Organization’s own rules for hearings but rather to ensure that each Anti-Doping Organization provides a hearing process consistent with these principles.

The Code provides in article 13.2.1 that for international level athletes, the CAS Appeals Arbitration Division is the exclusive forum for appealing an anti-doping decision; however, the Code does not require that CAS is used for a first-instance hearing.

In Australia, ADRVs are also subject to statutory regulation through the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) and the *National Anti-Doping Scheme* (the NAD Scheme), contained in Schedule 1 of the *Australian Sports Anti-Doping Authority Regulations 2006*, which implements the Code. The relevant national Sporting Organisation (NSO) has responsibility for determining arrangements for the conduct of hearings for ADRVs.

Australian Government policy requires that for an NSO to have its anti-doping policy approved by ASADA, the policy must specify either CAS or an ASADA-recognised sport-run hearing body as a first-instance tribunal. Many have adopted the standard clause recommended by ASADA in the Sports Administration Body Anti-Doping Policy Template, which nominates CAS as the first-instance hearing body.

The main tribunal is the Court of Arbitration for Sport (CAS). There are also six National Sporting Organisations (NSOs) who have invested in developing internal integrity arrangements including their own arbitration tribunals: the Australian Football League (AFL), Rugby Australia, Cricket

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21. ‘Fair hearing’ has a particular meaning in international human rights law. The issue is discussed under ‘Key issues and provisions’ below.
Australia, Football Federation Australia (FFA), National Rugby League (NRL) and Tennis Australia.\(^{24}\) These are Australia’s biggest sports and, together with Netball Australia, they form COMPPS.\(^{25}\)

These COMPPS sports tribunals currently conduct first-instance ADRV hearings. Some COMPPS sports also have an internal appeal body between the first-instance hearing and the CAS Arbitration Appeal Division.\(^{26}\)

All athletes in Australia currently have the right to appeal first-instance ADRV decisions to the CAS Appeals Arbitration Division whether the decision under appeal is made by an in-house sport-run tribunal or the CAS Ordinary Arbitration Division (first instance). WADA also has appeal rights.\(^{27}\)

**Contractual binding of athletes and support persons to the Code**

The NAD Scheme requires Australian national level sporting organisations (NSOs) to adopt an anti-doping policy approved by the ASADA CEO.\(^{28}\) Once a sporting body adopts an anti-doping policy, all participants in that sport must adhere to it. The anti-doping policy is usually incorporated in the terms of membership of the sporting organisation and/or the employment contract for officials, athletes and support persons.

One of the intriguing effects of the [Code] and the NAD scheme is the inclusion of Australian sports that are neither Olympic nor international into an international anti-doping regimen. The same observation can be made in respect to athletes who are ‘merely club-players’. The reason for this inclusion lies in part with the aim of WADA to achieve a ‘unified and harmonised’ system.\(^{29}\)

Australian sport bodies are also subject to what has been called ‘soft’ coercion to adopt key national policies for sports integrity.\(^{30}\) The coercion operates in a variety of non-statutory ways:

- in order for athletes to compete at international level, the NSO must join or affiliate with the international sporting organisation and implement its sports integrity policies (which in practice means implementing the Code)\(^{31}\)
- to be eligible for Commonwealth government funding, a sporting organisation must be recognised as an NSO by Sport Australia\(^{32}\)
- to be recognised as an NSO, the organisation must meet certain criteria including:
  - The organisation is accountable at the national level for establishing and enforcing the key policies that underpin integrity in their sport, including
    - A current policy for harassment, discrimination, bullying, abuse, child safe and complaints that at a minimum are consistent with Sport Australia policy templates; and
    - A current anti-doping policy compliant with the World Anti-Doping Code and approved by the Australian Sports Anti-Doping Authority (ASADA) ...\(^{33}\)

\(24\). Ibid.  
\(25\). Coalition of Major Professional & Participation Sports (COMPPS), *Member sports*, COMPPS website.  
\(26\). Wood Review, op. cit., p. 11.  
\(27\). Wood Review, op. cit., p. 146.  
\(28\). Clause 2.04 of the NAD Scheme.  
\(30\). Ibid., pp. 411–412, 415.  
\(32\). SportAUS, ‘Recognition of National Sporting Organisations’, SportAUS website, n.d.  
Further influence is exerted when NSOs organise national competition. For example, the NSO may prescribe that athletes must be members of the NSO or of affiliated state or local bodies to be eligible to compete at national level. The state or local bodies must comply with the NSO anti-doping policy in order to affiliate or join.\textsuperscript{34}

Private arbitration is characterised as a contractual choice;\textsuperscript{35} however, sporting bodies, athletes and support persons are, in practice, \textit{compelled} by Commonwealth, ASADA and NSO policy to comply with anti-doping policies containing onerous terms in order to participate in sports.\textsuperscript{36}

The net effect is that all Australian athletes at state, national or international level, and many athletes at club level (through membership of affiliated sporting bodies), are subject to the Code. This is illustrated in \textit{Flowchart 1} below.

\textbf{General (non-ADRV) sporting disputes}

Sporting disputes about matters not involving ADRV are usually dealt with in the rules of the club or sports controlling body or through civil courts where they involve contractual disputes. In these cases there is no additional general statutory regulation.\textsuperscript{37} In some instances, these disputes are currently resolved by sports-run internal tribunals or referred to the CAS Ordinary Division. The COMPPS sports have internal systems for the determination of general sporting disputes, although the mechanisms and procedures differ between sports.\textsuperscript{38} The Wood Review noted:

\begin{quote}
Anti-Doping Rule Violation (ADRV) matters are different from other sports disputes. The Code requires a principled process to be adhered to in all cases. Recognising that the context and vagaries of sporting codes can differ, there may be discernible benefit in sporting organisations retaining responsibility, should they wish, over how non-ADRV disputes are managed.\textsuperscript{39}
\end{quote}

The current arrangements for both ADRV and general sport dispute resolution are presented in a visual form in \textit{Flowchart 2} below.

\begin{itemize}
\item \textsuperscript{34} Thorpe, et al, op. cit., p. 412; Code, Article 20.3.
\item \textsuperscript{35} Wood Review, op. cit., p. 156; Thorpe, et al, op. cit., p. 423-4.
\item \textsuperscript{36} Wood Review, op. cit., p. 109.
\item \textsuperscript{37} Wood Review, op. cit., pp. 12, 145–6.
\item \textsuperscript{38} Wood Review, op. cit., p. 151 and Attachment 2.
\item \textsuperscript{39} Key finding 3, Wood Review, op. cit., p. 143.
\end{itemize}
Flowchart 1: National and international anti-doping arrangements

Flowchart 2: Current arrangements for ADRV and general sport dispute resolution.41

**CURRENT ARRANGEMENTS FOR ANTI-DOPING RULE VIOLATION AND GENERAL SPORT DISPUTE RESOLUTION**

**CAS APPEALS DIVISION**
(COURT OF ARBITRATION FOR SPORT)

**SPORTS – RUN TRIBUNAL**

APEALS BOARD (LIMITED SPORTS)

[ST INSTANCE DISPUTES (INCLUDING ADRV'S)

**CAS**

[ST INSTANCE ADRV MATTERS

[ST INSTANCE GENERAL DIVISION

**APEALS BOARD**

AFL, NRL, RA, FFA, CRICKET AUSTRALIA, TENNIS AUSTRALIA

**NON-ADRV MATTERS**

**SPORTS**

ADRV MATTERS

ALL OTHER SPORTS

The World Anti-Doping Code requires that there be direct access to the appeals division of CAS on agreement of both parties.

41. Ibid., p. 164.
Weaknesses in the current arbitration arrangements

The Wood Review noted several shortcomings in the current arbitration arrangements.

- private tribunals do not have powers to compel witnesses to appear and give evidence
- unlike court judgments, arbitration decisions do not form binding precedents for future hearings. CAS proceedings are held in private and decisions and reasons are confidential
- where sports run in-house tribunals to deal with ADRV there is concern that this might give rise to bias
- small sports cannot run in-house tribunals and must rely on CAS. The cost of CAS arbitration can be high and there can be lengthy delays in obtaining decisions.

Wood Review recommendations

The Wood Review found:

Notwithstanding the ongoing availability of recourse to the Court of Arbitration for Sport Ordinary Division and internal sports tribunals, there is merit in establishing a separate National Sports Tribunal that can offer a timely, transparent, cost-effective and consistent resolution process to athletes, support personnel and sports.

In our view, it would be preferable to establish the proposed NST by way of statute, with jurisdiction for ADRV matters mandated through the NAD Scheme, and arising through contractual agreements between athletes and sporting organisations.

One of the principle benefits of establishing the NST as an independent statutory authority is that powers can be vested in the tribunal that cannot be made available to a private arbitral agency such as the CAS or the sports’ in-house arbitral tribunals.

The Wood Review agreed with ASADA’s proposal that the NST be modelled on the Fair Work Commission set up by the Fair Work Act 2009 (Cth).

Recommendations 26–37 of the Wood Review deal with the NST and are summarised below. Recommendation 30 refers to the National Sport Integrity Commission (NSIC). The NSIC is not yet established, however, the Government has announced it will be established and named Sport Integrity Australia (SIA): wherever the recommendations refer to the NSIC, SIA is substituted.

Fundamental structural requirements for NST

- To be an improvement on current arrangements, the NST must be cost effective, have an efficient procedure, publish decisions, and have pre-eminent arbitrators appointed by application and selection by SIA in consultation with the Minister for Sport (recommendation 30).

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42. Wood Review, op. cit., p. 147–150.
43. Key finding 6 in chapter 5, Wood Review, op. cit., p. 143.
44. Wood Review, op. cit., p. 156.
45. Ibid.
46. Ibid.
47. Ibid., pp. 16–17, 143–144.
• The NST should be an independent arbitral tribunal for sports matters, established as an independent statutory authority with powers underpinned by legislation. It should not be subject to ministerial direction except in limited circumstances (recommendations 26, 27, 29).

• The NST should have an Anti-Doping Division and a General Division for first-instance hearings. It should offer an Appeal Division and there should be a further avenue of appeal to CAS whenever that is required by the Code (recommendation 30).

**NST powers**

• The NST should have coercive powers to order witnesses to appear and give evidence, and produce documents or things. It should be able to inform itself independently of the parties submissions (recommendation 28).

**Anti-doping matters**

• The Anti-Doping Division of the NST should have a *conditional ‘opt-out’ jurisdiction*. This means it would be the default hearing body for anti-doping matters except where a sporting organisation has an SIA approved internal dispute resolution tribunal. However, in an anti-doping matter, the person should be entitled to have their matter heard in the NST where justice requires (recommendations 32 and 33).

• SIA will only award sports controlling body status (and funding) when a sporting organisation’s nominated tribunal for resolution of an ADRV is either the NST or another approved tribunal under the conditional ‘opt-out’ system (recommendation 35).

• Where the NST conducts the first-instance hearing for an anti-doping matter, an appeal can be heard by the NST Appeal Division or the CAS Appeals Arbitration Division at the option of the aggrieved person, subject to the rules of the sport (recommendations 34).

**Other sport disputes**

• The General and Appeals Divisions of the NST should have an *‘opt-in’ jurisdiction*. This means the NST should have jurisdiction to resolve other sport disputes when persons and bodies have elected through contractual arrangements to have disputes of particular types resolved by the NST (recommendation 36).

• The NST General Division should provide arbitration, mediation and conciliation services, and the right of appeal to the proposed NST Appeals Division (recommendation 37).

The arrangements recommended by the Wood Review are set out visually in *Flowchart 3* below. The Government agreed in principle with all the recommendations relating to the NST and stated it would set up the NST as a two year pilot to establish demand, costs, effective operations, and types of cases it will deal with, before agreeing to permanent arrangements.  

The Bill implements most of the Wood Review recommendations. Elements not implemented are discussed under the heading *Key issues and provisions* below.

Flowchart 3: Arrangements for ADRV and general sport dispute resolution.  

PROPOSED ARRANGEMENTS FOR ANTI-DOPING RULE VIOLATION AND GENERAL SPORT DISPUTE RESOLUTION

1. "By pass" Provision World Anti-Doping Code 8.5
2. International Level Athletes exclusive appeal right to CAS WADC 13.2.1
3. Sports without appeals tribunals may access NST appeals division
4. "Leave" provision to access NST at discretion of sport
5. Further access to CAS Arbitration Appeals Division dependent on sport rules
6. WADA appeal provision applies throughout

Committee consideration
As at 9 September 2019, no Select Committee had been asked to examine the Bill. 50

Senate Standing Committee for the Scrutiny of Bills

Comment on the 45th Parliament Bill
The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) commented on the 45th Parliament Bill in Scrutiny Digest 2 of 2019 and noted two concerns. 51

Reversal of the evidential onus of proof
Clause 69 of the 45th Parliament Bill contained an offence for unauthorised disclosure of protected information. A number of exceptions were provided to this offence, including where the disclosure was for the purposes of the Bill, or was done in the performance of the NST’s functions, duties or powers. These exceptions (or offence-specific defences) reversed the onus of proof by placing an evidential burden on the defendant to prove the exception. The Scrutiny of Bills Committee noted that provisions ‘that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence’, interfere with the right to be presumed innocent until proven guilty. 52

The Scrutiny of Bills Committee noted that it expects any reversal of the burden of proof to be justified. It noted that the Guide to framing Commonwealth offences, infringement notices and enforcement powers provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

• it is peculiarly within the knowledge of the defendant and
• it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. 53

The Scrutiny of Bills Committee considered that the Explanatory Memorandum did not provide sufficient justification for the use of offence specific defences. 54

Clause 69 of the 45th Parliament Bill has become clause 72 in the Bill. The provision is unchanged, but the Explanatory Memorandum for that section has been slightly expanded. 55

50. At its meeting on 31 July 2019, the Senate Selection of Bills Committee deferred consideration of whether to refer the Bills to a committee for inquiry. Senate Selection of Bills Committee, Report, 4 2019, The Senate, Canberra, 31 July 2019.
52. Ibid., 54.
53. Attorney-General’s Department, A guide to framing Commonwealth offences, infringement notices and enforcement powers, September 2011, p. 50.
54. Senate Standing Committee for the Scrutiny of Bills, Scrutiny digest, 2, 2019, op. cit., p. 54.
Immunity from liability

Clause 70 of the 45th Parliament Bill provided NST members with the same protection and immunity as a Justice of the High Court; barristers, solicitors and witnesses also have the same protections as they would have before the High Court. The Scrutiny of Bills Committee observed:

... if a bill seeks to provide immunity from liability, particularly where such immunity could affect individual rights, this should be soundly justified. The committee notes that the Tribunal is not exercising judicial powers, rather the powers are arbitral in nature. The explanatory memorandum provides no explanation as to why it is necessary that the Tribunal have the same level of protection or immunity as proceedings in the High Court, nor does it provide any similar examples from other Commonwealth legislation.56

That clause has been renumbered in the Bill as clause 73, and the Explanatory Memorandum has been substantially expanded in relation to that provision.57

Comment on the Bill

The Scrutiny of Bills Committee comment on the Bill in Scrutiny Digest 4 of 2019 on 31 July 2019. The Scrutiny of Bills Committee did not raise concern with clause 73, indicating that it is satisfied with the expanded explanation of the provision in the Explanatory Memorandum to the Bill. However, the Committee reiterated concern about the reversal of the onus of proof in clause 72.

While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.58

The Scrutiny of Bills Committee requested:

... the Minister’s detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offence, and requests the minister’s advice in relation to this matter.59

The Minister’s response was received by the Committee by 23 August 2019 but has not to date been published.60

Policy position of non-government parties/independents

As at the date of writing this Bills Digest, it appears that no non-government parties or independents have publicly indicated a position on the Bill.

Position of major interest groups

The statutory regulator, ASADA, fully endorses the Government Response, including the formation of SIA.\(^6\) There are four other groups of stakeholders representing different perspectives.

**COMPPSS sports—want to retain in-house tribunals**

COMPPS submission to the Wood Review noted that each sport it represents has ‘now established its own integrity unit with responsibility for managing [anti-doping rule violation] ADRV processes’.\(^6\) The COMPPS sports wish to retain their internal tribunals. The conditional opt-out jurisdiction proposed by the Wood Review and adopted in the Bill will allow continued use of their internal tribunals provided the ASADA CEO continues to approve use of the tribunals.

**Major event organisers and small sport NSOs—support formation of the NST**

Quite a few Olympic and Commonwealth Games sports are small in terms of participant numbers, and their NSOs are correspondingly small. They do not have the size, expertise or funding to set up internal disciplinary tribunals.\(^6\)

*Australian Olympic Committee*

The AOC supports all the recommendations of the Wood Review, ‘As for Anti-Doping Rule Violation matters, the AOC fully supports the establishment of a National Sports Tribunal and generally on the basis proposed’.\(^6\) It commends the Government Response but questions whether the Government has committed sufficient funding.\(^6\) The AOC sees the establishment of the National Sports Tribunal (NST) on a two-year trial basis sitting comfortably with the ongoing role of the Court of Arbitration for Sport, under the World Anti-Doping Code. It also welcomes the signing of the *Macolin Convention*.\(^6\)

*Commonwealth Games Australia*

Commonwealth Games Australia (CGA) supports the consolidation of existing Federal Government functions in sports integrity under a new agency – Sport Integrity Australia – and the conduct of a two-year pilot of a new National Sports Tribunal. CGA also supports the signing of the *Macolin Convention*. CGA President Ben Houston said the National Sports Tribunal will benefit Commonwealth Games member sports, many of whom struggle with the resourcing in this area.\(^6\)

*Paralympics Australia*

Paralympics Australia welcomes the Government Response. CEO Lynne Anderson said:

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\(^6\) AOC, *AOC welcomes integrity review and national sports plan*, media release, 1 August 2018.

\(^6\) Ibid.


Paralympics Australia also supports the concept of a new National Sports Tribunal, which is proposed to hear anti-doping rule violations and other sports disputes, and resolve them in a consistent, cost-effective and transparent manner. 68

Elite professional athletes—some want non-Code regimes

**Australian Athletes Alliance**

The Australian Athletes Alliance (AAA) is the peak body for Australia’s elite professional athletes, through eight major player and athlete associations that cover professionals in cricket, AFL, netball, basketball, football, rugby league, rugby union and horse-racing (jockeys). 69

AAA asked the Wood Review to endorse sport-specific, differentiated, anti-doping and sanction regimes—an approach which would result in those regimes not being Code-compliant. 70 The Wood Review saw no merit in that approach:

In our view, there is no overall benefit from changing the present policy and thereby creating a dual system in Australia for national-level athletes. No evidence has been submitted to the Review which would warrant such an amendment to current anti-doping arrangements.

The independence and objectivity inherent in applying the Code to all Australian sports makes for a simpler, clearer and consistent anti-doping system, beyond the reach of internal sport politics and collective bargaining.

Accordingly, we do not agree with AAA’s argument regarding the reach of the Code in relation to sanctions or the ‘fit’ of the world anti-doping system overseen by WADA. Our view is that penalties under the Code are sufficiently flexible to allow for effective application in a professional team-sports environment. 71

Consultation by the Wood Review was with sporting bodies, not athletes, with the exception of AAA. 72 The Athletes’ Commission of the AOC has a function internal to AOC and did not make any submission to the Wood Review. The role of the Athletes’ Commission is to ‘advise the AOC Executive on all matters relating to the Olympic Movement from an athlete’s perspective’. 73

It is not clear if the interests of bodies such as OAC, CGA and Paralympics Australia and the interests of the athletes and support persons are aligned in this context.

**Athlete support persons – support formation of NST and no in-house tribunals**

**Exercise and Sports Science Australia**

Exercise and Sports Science Australia (ESSA) is an accrediting body for professional support personnel and sports scientists.

ESSA supports the findings and recommendations within Chapter 5, particularly Recommendation 30 ... ESSA proposes the Government consider that all athletes whether they be Olympic or non-Olympic; professional athletes playing in major team or individual sports (e.g. the Australian Football League, the National Rugby League, Tennis Australia) or athletes involved in other sports be subject to the same

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69. Australian Athletes Alliance (AAA), ‘Who we are’, AAA website.

70. Wood Review, op. cit., p. 110, citing Submission 25.


73. AOC, ‘Athletes’ Commission’, *AOC website*. 

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stringent requirements and penalties; and that all national sporting tribunals, including those of professional sports cede jurisdiction to the National Sports Tribunal.

ESSA strongly supports one cost effective accessible system that should apply to all high performance athletes, irrespective of the sport and governance models of international sports federations that Australian National Sporting Organisations need to comply with.  

Financial implications

Although the proposed NST is a new Tribunal, according to the Explanatory Memorandum, there will be no net cost to Government. In terms of the NSOs, some smaller sports see financial benefit in having access to a nationally resourced sports tribunal.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights considers that the Bills does not raise human rights concerns.

Key issues and provisions

There is no express Commonwealth constitutional power to legislate in the subject areas of sporting disputes, doping in sport, or sports integrity generally. Clause 6 identifies that the Parliament would be relying on paragraph 51(xxix) of the Constitution (the external affairs power) to establish the Anti-Doping Division. The external affairs power is activated by Australia’s obligations under the International Convention Against Doping in Sport and provides a firm foundation for legislation to implement the Code. The Bill also relies heavily on express consent to the jurisdiction of the NST and consent to jurisdiction through contract.

Two key issues need further explanation

The Explanatory Memorandum is too concise to provide clear guidance to Parliament on two important points:

- whether an athlete or support person will have an effective privilege against self-incrimination when appearing before the NST and

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75. Explanatory Memorandum, National Sport Tribunal Bill 2019, p. 2.
76. Commonwealth Games Australia, op. cit.
77. The Statement of Compatibility with Human Rights can be found at pages 3–7 of the Explanatory Memorandum to the Bill.
whether the NST could be vulnerable to a challenge on the grounds that it may exercise the ‘judicial power of the Commonwealth’ and therefore breach a long standing constitutional principle of separation of powers

For simplicity and brevity, this Digest only addresses those two issues in the context of the Anti-Doping Division. It was not possible in the time available to consider how the issues may impact the General Division or Appeal Division. However, given that the jurisdiction of the General Division is ‘opt-in’ and not governed by a prescriptive statutory regime, the potential for the two issues above to cause difficulty in the General Division is considerably lower. Any issues in the two first-instance Divisions will flow through to the Appeal Division.

**Australia’s national anti-doping scheme**

The NAD Scheme is created and administered by the ASADA CEO under authority of the *Australian Sports Anti-Doping Authority Act 2006* (the ASADA Act); it is found in Schedule 1 of the *Australian Sports Anti-Doping Authority Regulations 2006*. The provisions of the:

- World Anti-Doping Code 2015 with 2019 amendments (the Code)
- the NAD Scheme and
- the ASADA approved anti-doping policies of sporting bodies

have a substantive effect on how anti-doping rule violations (ADRVs) arbitration proceedings are conducted. It is important to consider the entire scheme for investigating, asserting and contesting ADRV to properly understand how an ADRV arbitration hearing in the NST will operate.

Section 2.04 of the NAD Scheme requires a ‘sporting administration body’—which is defined as a national sporting organisation for Australia—to have in place an anti-doping policy that complies with the mandatory provisions of the Code.  

<table>
<thead>
<tr>
<th>NAD Scheme anti-doping rule</th>
<th>Sanction in Code for violation of rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.01A Presence in athlete’s sample of prohibited substance, or metabolites or markers. (Code article 2.1) The penalty is strict liability—clause 2.01A(3).</td>
<td>Ineligibility for 4 years OR 2 years if person can prove ADRV did not involve a specified substance and was not intentional—article 10.2.</td>
</tr>
</tbody>
</table>

The scope and effect of the NAD Scheme and the NSO anti-doping policies must be taken into account when considering the effect of the Bill. The full suite of Government legislative proposals—which include changes to the ASADA CEO’s powers—to implement the Wood Review may be better considered together.

The NAD scheme anti-doping rules and sanctions

Division 2.1 of the NAD Scheme sets out the anti-doping rules, which are the same as the ten ADRV listed in Article 2 of the Code. Table 1 below lists the ADRV and the corresponding sanctions.

Table 1. ADRVs and prescribed sanctions

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80. ‘Sporting administration body’ is defined in section 4 of the ASADA Act.

81. Where an ADRV is strict liability, it is not necessary that intent, fault, negligence or knowing use on the athlete’s part be demonstrated in order to establish that ADRV. Once the defined act or omission is proved, the ADRV is established. See for example Subclause 2.01A(2) NAD Scheme.
<table>
<thead>
<tr>
<th>NAD Scheme anti-doping rule</th>
<th>Sanction in Code for violation of rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.01B Use or attempted use by an athlete of a prohibited substance or a prohibited method. (Code article 2.2) Penalty is strict liability—clause 2.01B(3).</td>
<td>Ineligibility for 4 years OR 2 years if person can prove ADRV did not involve a specified substance and was not intentional—article 10.2.</td>
</tr>
<tr>
<td>2.01C Evading, refusing or failing to submit to sample collection (Code article 2.3)</td>
<td>Ineligibility for 4 years OR 2 years if person can prove ADRV was not intentional—article 10.3.1.</td>
</tr>
<tr>
<td>2.01D Whereabouts failures (Code article 2.4)</td>
<td>Ineligibility for a usual period of 2 years reducible to a minimum of 1 year depending on athlete’s degree of fault—article 10.3.2.</td>
</tr>
<tr>
<td>2.01E Tampering or attempted tampering with any part of doping control (Code article 2.5)</td>
<td>Ineligibility for 4 years OR 2 years if person can prove ADRV was not intentional—article 10.3.1.</td>
</tr>
<tr>
<td>2.01F Possession of prohibited substances and prohibited methods (Code article 2.6)</td>
<td>Ineligibility for 4 years OR 2 years if person can prove ADRV did not involve a specified substance and was not intentional—article 10.3.2.</td>
</tr>
<tr>
<td>2.01G Trafficking or attempted trafficking in a prohibited substance or prohibited method (Code article 2.7)</td>
<td>Ineligibility for a minimum of 4 years up to lifetime depending on seriousness of violation. If substance trafficked to a minor by a support person, lifetime ineligibility. Conduct reported to judicial bodies—article 10.3.3.</td>
</tr>
<tr>
<td>2.01H Administration or attempted administration of a prohibited substance or prohibited method (Code article 2.8)</td>
<td>Ineligibility for a minimum of 4 years up to lifetime depending on seriousness of violation. If substance trafficked to a minor by a support person, lifetime ineligibility. Conduct reported to judicial bodies—article 10.3.3.</td>
</tr>
<tr>
<td>2.01J Complicity (Code article 2.9)</td>
<td>Ineligibility for a minimum of 2 years up to 4 years depending on seriousness of violation—article 10.3.4.</td>
</tr>
<tr>
<td>2.01K Prohibited association (Code article 2.10)</td>
<td>Ineligibility for a usual period of 2 years reducible to a minimum of 1 year depending on person’s degree of fault—article 10.3.5.</td>
</tr>
</tbody>
</table>

**Jurisdiction and procedure for arbitration in the NST Anti-Doping Division**

There are four stages an ADRV goes through to final determination. The first stage is an investigation by the ASADA CEO. The second stage is the process for the ASADA CEO to issue notice of an ADRV. During this process the person suspected of an ADRV can make submissions to
the ASADA CEO and the Anti-Doping Rule Violation Panel (ADRVP). Once the ADRV notice is issued, the person may make an application for arbitration. The fourth stage is the arbitration hearing.

**Stage 1: ASADA CEO conducts an investigation**

**ASADA CEO’s coercive investigatory powers**

It is the NAD Scheme which authorises the ASADA CEO to conduct investigations into suspected ADRVVs and to issue ADRV notices. When a doping incident is suspected, ASADA investigates and provides a brief of evidence to the ASADA CEO.

Section 13A of the *ASADA Act* and clause 3.26B of the NAD Scheme authorise the ASADA CEO to give a person a disclosure notice requiring the person to:

- attend an interview to answer questions
- give information of the kind specified in the notice
- produce documents or things of the kind specified in the notice.

At the moment, the CEO can only give the notice if the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme and three members of the ADRVP agree that the CEO’s belief is reasonable. In the lapsed *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019* (lapsed ASADA Amendment Bill 2019) the Government proposed changing the standard for issue of the notice and removing the need for anyone to agree with the CEO.

Any person can be compelled to attend an interview—they do not have to be suspected of wrongdoing. The only requirement is that they may have relevant information. Potential witnesses and third parties can be compelled to attend interviews or provide documents.

**Privilege against self-incrimination during investigation**

The common law privilege against self-incrimination is an absolute right that can only be abrogated by statute or waived by consent. Subsection 13D(1) of the *ASADA Act* provides that, during an investigation, a natural person (not a corporation) does not have to answer a question or give information if that might incriminate the person or expose them to a penalty.

That statutory protection is undermined, however, by the terms of the ASADA approved anti-doping policies incorporated into the membership rules of sporting bodies and into athlete

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83. The ADRV is established by section 40 of the *Australian Sports Anti-Doping Authority Act 2006* (the ASADA Act). Members are appointed by the Minister (section 43).

84. See item 13 of Schedule 1 to the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019*. The proposed amendments would have also enabled the CEO to compel a person to attend an interview, give information, or produce documents when the CEO reasonably suspects that the person has information, documents or things that may be relevant to the administration of the NAD scheme. The proposed amendments were discussed at pages 20–22 of the *Bills Digest*. That Bill lapsed and has not to date been reintroduced.

85. Item 50 of Schedule 1 to the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019* proposed to repeal and replace subsections 13D(1) and (2) of the *ASADA Act*, which would have abolished the protection against answering questions or producing information and substituted an amended protection against use of that information against the person in criminal proceedings. Information provided could still be used in proceedings under the *ASADA Act* or the ASADA Regs (and therefore the NAD scheme), and for prosecution for providing false or misleading information (sections 137.1 and 137.2 of the *Criminal Code*). The information was not to be used in a prosecution for any other offence. See K Elphick, *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019*, Bills digest, 73, 2018–19, Parliamentary Library, Canberra, 1 April 2019, p. 22.
contracts. For example, the Anti-Doping Policy of the ASC, which covers the Australian Institute of Sport, states:

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**ASC Anti-doping policy 2015**

**ARTICLE 6A NON-ANALYTICAL INVESTIGATION PROCESS**

6A.2.3 All Persons bound by this Anti-Doping Policy and the ASC must assist, cooperate, and liaise with ASADA in relation to any investigation into a potential anti-doping rule violation (or the ASC where it has approval by ASADA to conduct its own investigation or be involved in an ASADA investigation). Specifically, all Persons must cooperate with and assist ASADA or the ASC (where relevant), including by:

- attending an interview to fully and truthfully answer questions;
- giving information; and
- producing documents or things,

in an investigation being conducted by ASADA or the ASC (where relevant), even if to do so might tend to incriminate them or expose them to a penalty, sanction or other disciplinary measure.

*For the avoidance of doubt, the common law privileges against self-incrimination and self-exposure to a penalty are abrogated by this Article.* [emphasis added]

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Anti-doping policies such as these are incorporated in conditions of membership or athlete and support person contracts, so joining a sporting organisation or accepting an employment contract may involve waiving the privilege against self-incrimination. The legal position is discussed further below under the heading ‘Inquisitorial procedure and self-incrimination’.

**Stage 2: Issue of the ADRV notice**

If the ASADA CEO believes there is a possible ADRV, the ASADA CEO notifies the athlete or support person and gives them ten days to make a submission. The ASADA CEO collates the material and passes it to the ADRVP.

If the ADRVP is satisfied that there has been a possible ADRV, the ASADA CEO notifies the athlete or support person and gives them ten days to make a submission to the ADRVP. If, after considering the submission, the ADRVP is still satisfied there has been a rule violation, it asserts the ADRV and authorises the ASADA CEO to give notice of the ADRVP’s decision to the athlete or support person.

The athlete or support person then either accepts the ADRV notice or contests it in a tribunal. If they take no action, they are deemed to accept the ADRV notice.

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88. Rules 4.04 and 4.06 of the NAD Scheme at Schedule 1 to the *Australia Sports Anti-Doping Authority Regulations 2006* (ASADA Regs).
89. Rule 4.08 of the NAD Scheme at Schedule 1 to ASADA Regs.
90. Rules 4.09–4.11 of the NAD Scheme at Schedule 1 to ASADA Regs. The *Wood Review* at pp. 134–135 recommended the removal of the ADRV from this process (recommendation 24). This was proposed in Part 1 of Schedule 1 to the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019*, introduced by the Government into the last Parliament. That Bill lapsed and has not to date been reintroduced. If that Bill is reintroduced unchanged, the proposed future process will be that a suspected doping incident will be investigated by SIA. If the SIA CEO is satisfied there has been a rule violation, the SIA CEO will issue an ADRV notice and the person will accept it or apply for ‘arbitration’ in the NST Anti-Doping Division, or another authorised Tribunal: for example, CAS or an ‘in-house’ tribunal. The process will not allow an appeal to the Administrative Appeals Tribunal in relation to the decision by the SIA CEO to issue the ADRV.
Stage 3: The person issued the notice applies for arbitration

Division 2 of Part 3 of the Bill deals with the jurisdiction of the Anti-Doping Division; that is, it explains who may apply for arbitration and for what type of dispute.

Characterisation of a contested ADRV notice as an ‘arbitration’

ADRVs are characterised in this Bill as a subset of sporting disputes. It is not legally incorrect to describe a contested ADRV notice as a ‘dispute’, but it is an awkward conceptualisation—like saying that a person charged with a criminal offence is in dispute with the Crown. An ADRV notice asserts that a person has breached the NSO’s anti-doping policy—they are effectively accused or ‘charged’ by ASADA with sporting misconduct. Nevertheless, the terminology is consistent with the discussion and recommendations of the Wood Review.

Jurisdiction of the Anti-Doping Division

Clause 22 prescribes which ‘disputes relating to anti-doping policies’ may be arbitrated. The core of the anti-doping jurisdiction of the NST is that a dispute may be arbitrated if either: the anti-doping policy of a sporting body specifically permits arbitration of a dispute by the Anti-Doping Division; or, all relevant parties agree in writing to refer the dispute to the Anti-Doping Division.

In more detail, Division 2 will only apply when:

• a sporting body has an anti-doping policy that has been approved by the ASADA CEO and
• an athlete or support person is bound by the anti-doping policy and
• a dispute arises in relation to the athlete or support person;

then, if the sporting body’s anti-doping policy:

• permits disputes of a particular kind to be heard in the Anti-Doping Division of the NST, and the dispute is of that kind, then subclause 22(1) permits the athlete or support person to apply to the NST for arbitration of the dispute

• does not permit the particular kind of dispute to be heard in the Anti-Doping Division of the NST, but the Code provides a form of hearing for that kind of dispute, then:
  – if the athlete or support person, the sporting body and the ASADA CEO agree in writing to refer the dispute to the NST,
  – subclause 22(2) permits the athlete or support person to apply to the NST for arbitration of the dispute.

The Bill appears to adopt an ‘opt-in’ jurisdiction which requires parties’ consent to jurisdiction either by contract or by express written consent. This would remove any constitutional difficulty in applying the Code to athletes who might not otherwise be bound (for example, State or club athletes) if the Commonwealth had to rely only on the external affairs power and the provisions of the Code to establish jurisdiction.

The Bill effectively places continuation of COMPPS sports’ in-house tribunals in the hands of the ASADA CEO. COMPPS sports will be able to retain their in-house jurisdiction over ADRVs only by:

• having an anti-doping policy which is not approved by ASADA (and forgoing NSO status and Commonwealth funding) or
• maintaining an ASADA approved anti-doping policy nominating their own tribunal for first-instance hearings.
This approach accords with the conditional ‘opt-out’ jurisdiction recommended by the Wood Review in recommendations 32–35.\(^91\)

**Stage 4: The Anti-Doping Division arbitration hearing**

Once a valid application is made in the correct form and within certain time limits, **subclause 27(1)** provides that the NST must conduct an arbitration.\(^92\) **Part 3 Division 8** deals with the manner of conducting the arbitration.

**Coercive powers to obtain evidence**

**Clause 42** gives NST members coercive powers usual for fact-finding statutory tribunals. A member may give a written notice requiring a person:

- to appear and give evidence or
- to provide information or to produce documents or things.

The notice must give at least 14 days’ to comply and must set out the consequences of not complying. Failure to comply with a clause 42 notice is an offence punishable under **clause 43** by a maximum sentence of 12 months imprisonment or a maximum civil penalty of 60 penalty units (currently $12,600).\(^93\) The 45th Parliament Bill did not include civil penalties.\(^94\)

**Parties to the arbitration**

For an Anti-Doping Division arbitration, **subclause 22(3)** provides that the parties are:

- the athlete or support person who has been issued the ADRV notice
- the sporting body
- the ASADA CEO and
  - any other person or body that is permitted by the sporting body’s anti-doping policy to participate **and** has given the NST written notice that they wish to be a party (**paragraph 22(3)(d)**).
  - if the hearing is conducted on the basis of the written consent of all parties, any other person or body specified in that agreement who has given the NST written notice that they wish to be a party (**paragraph 22(3)(e)**).

The NAD Scheme in rules 1.02A(3) and 4.13, and the approved anti-doping policies, make clear the function of the ASADA CEO in the hearing is analogous to a prosecutor.

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\(^91\) Wood Review, op. cit., p. 17.

\(^92\) One limitation of **subclause 38(5)** is that any application must be made before the end of the two year pilot period for the NST.

\(^93\) Section 4AA of the **Crimes Act 1914** provides that a penalty unit is currently equal to $210.


\(^95\) ASC, **Australian Sports Commission anti-doping policy**, op. ci., pp. 37–39 [emphasis added].
8.5 Right to attend hearings

The international federation, the National Federation, WADA and, where applicable, the Australian Olympic Committee, Australian Paralympic Committee, Australian Commonwealth Games Association, and relevant State Institutes of Sport/State Academies of Sport shall have the right to attend hearings as an observer or an interested or affected party. It shall be the duty of ASADA to inform those relevant parties of such right to attend as an observer or interested/affected party as applicable. If those parties fail to respond to such notification within 14 days, they shall be taken to have waived their right to so participate.

Procedure during the arbitration

The arbitration must be conducted with as little formality and technicality, as much expedition and as little cost as a proper consideration permits (paragraph 40(1)(b)). To help achieve that goal, clause 40 provides:

- the NST is not bound by the rules of evidence but may inform itself in any way it thinks appropriate and
- the NST may determine its procedure.

The CEO may also make determinations about the practice and procedure of the NST.

Specific civil penalties and criminal offences are available to encourage cooperation with the NST, however the NST cannot determine whether those provisions are breached or impose penalties. For civil penalties, the CEO may issue infringement notices. The relevant offences and civil penalties are:

- refusal to take an oath or make an affirmation is an offence under clause 44(1) punishable by a maximum sentence of 12 months imprisonment and a civil penalty provision under clause 44(2), with a maximum penalty of 60 penalty units (currently $12,600)
- refusal to answer questions is an offence under clause 44(3) punishable by a maximum sentence of 12 months imprisonment and a civil penalty provision under clause 44(4), with a maximum penalty of 60 penalty units (currently $12,600)
- knowingly giving false or misleading evidence to the NST is an offence under clause 45 punishable by a maximum sentence of 12 months imprisonment. There is no alternative civil penalty provided
- obstruction of the NST is an offence under clause 70 punishable by a maximum sentence of 12 months imprisonment. There is no alternative civil penalty provided
- intimidation or coercion of witnesses or other persons involved in NST proceedings is an offence under clause 71 punishable by a maximum sentence of 12 months imprisonment. There is no alternative civil penalty provided.

There is no specific defence against the offence of refusing to answer a question on the basis that the answer would tend to incriminate the person. However, the person could rely on the common law privilege against self-incrimination as an answer to the offence. In addition, the ordinary defences in Part 2.3 of the Criminal Code Act 1995 apply to the offence and clause 48 of the Bill applies Part 4 of the Regulatory Powers (Standard Provisions) Act 2014 in relation to the civil penalty provision.

The Bill does not provide ‘use’ or ‘derivative use’ protection against evidence of things said or acts done during an arbitration being admissible in a court. This means that evidence obtained under compulsion during the investigation may be tendered during the arbitration and then later used in a court. So, for example, a person who tests positive to an illicit drug, whether or not it is performance enhancing, could be exposed to later civil or criminal prosecution. Even if they exercise the privilege against self-incrimination to refuse to answer questions during the NST
proceedings, the evidence obtained under compulsion during the investigative stage can still be presented to the NST and then can be used in later proceedings.

The Explanatory Memorandum states that the common law privilege against self-incrimination is not abrogated in the Bill:

Under the common law privilege against self-incrimination, a natural person cannot be required to give information, or produce a document or thing, where the giving of that information or the production of that document or thing might tend to incriminate that person. This common law privilege will not be affected by the Act. ... Because the privilege against self-incrimination can only be abrogated by express provision, it is not legally necessary for the Act to specifically state that the privilege is not affected. This position reflects modern Commonwealth drafting practice.

Consequently, a natural person to whom a notice has been issued may refuse to provide information or a document or a thing to the Tribunal, on the basis that by doing so the person may incriminate themselves.\(^96\)

The Explanatory Memorandum offers the reassurance that the common law privilege against self-incrimination is not abrogated in the Bill; however, it does not explain how the privilege is affected by exercise of coercive powers at the investigative stage.

By the time a person is contesting an ADRV at the Tribunal, ASADA may have already exercised its statutory coercive powers to require the person to attend an interview; and then used the terms of a sporting body’s anti-doping policy, approved by ASADA, to compel the person to answer incriminating questions at that interview.

The issue of self-incrimination is discussed further below under the heading ‘Inquisitorial procedure and self-incrimination’.

Subclause 40(2) requires the parties to act in good faith in the conduct of the arbitration, though there is no obvious remedy available to the NST if a party fails to do so.

The determination the member must make

The finding the Anti-Doping Division member needs to make, and the burden and standard of proof for that finding, are not set out in the Bill; they are contained in the anti-doping policy of the relevant sporting body and the need for approval by ASADA ensures they reflect the Code. For example, the Code provisions are mirrored in the ASC Anti-Doping Policy.

ASC Anti-doping policy 2015\(^97\)

ARTICLE 8 RIGHT TO A FAIR HEARING

8.6 CAS determination

8.6.1 CAS will determine:

a) if the Person has committed a violation of this Anti-Doping Policy;

b) if so, what Consequences will apply (including the start date for any period of Ineligibility); and

c) any other issues such as, but not limited to, reimbursement of funding provided to the Athlete or other Person by the ASC or other sport organisation.

8.6.2 Consequences will be in accordance with Article 10.

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\(^96\) Explanatory Memorandum, National Sport Tribunal Bill 2019, p. 40.

\(^97\) ASC, Australian Sports Commission anti-doping policy, op. cit.
Current ASADA approved anti-doping policies specify that the hearing will be conducted by CAS (or an in-house tribunal); in the future it is intended the NST Anti-Doping Division will be the default arbitration tribunal. A first instance hearing tribunal will make a finding of fact about whether the relevant anti-doping policy has been breached. The tribunal will be required by the anti-doping policy to apply the sanctions prescribed in Article 10 of the Code. The standard and burden of proof are prescribed by Article 3 of the Code and mirrored in approved anti-doping policies.

ASC Anti-doping policy 2015

ARTICLE 3 PROOF OF DOING

3.1 Burdens and standards of proof

An Anti-Doping Organisation shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether an 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 a reasonable doubt.

Where this Anti-Doping Policy places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

For some ADRVs, the sanction provides some latitude as to period of ineligibility and the tribunal will have to apply discretion. Some sanctions are mandatory. In addition to the sanctions listed in Table 1 above, Article 9 of the Code provides that an in-competition ADVR will automatically result in a disqualification from results in that competition including forfeiture of any medals, points and prizes.

The personal consequences of an ADRV determination for a professional athlete, coach or medical support person can be very grave. The reputational damage alone can be career ending. A multi-year period of ineligibility to participate can also result in the loss of substantial sponsorship income or effectively end an athletic career.

Subclause 27(2) of the Bill provides ‘The determination takes effect on the day specified in the determination.’ No further legal or administrative step is necessary for the sanction to be applied.

Statutory tribunals must not exercise the ‘judicial power of the Commonwealth’

The Constitution requires a strict separation of powers between the judiciary on one hand and the executive and legislature on the other. It is settled law that the ‘judicial power of the Commonwealth’ can only be exercised by a court created in accordance with Chapter III of the Constitution.

Professors Sarah Joseph and Melissa Castan, relying on the majority judgment in Brandy v Human Rights and Equal Opportunity Commission, note that ‘The strongest indicator of judicial power is that judicial findings are binding and enforceable’.

There is one aspect of judicial power which may serve to characterise a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power. ...in Federal Commissioner of Taxation v Munro ((1926) 38 CLR 153 at 176) Isaacs J pointed out that

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98. Ibid. [emphasis added].
99. R v Kirby; Ex parte Boilermakers’ Society of Australia (‘Boilermakers’ case’) [1956] HCA 10; (1956) 94 CLR 254. For example, per Kitto J at p. 267.
concept of judicial power includes enforcement: the capacity to give a decision enforceable by execution ... However, ... it is not essential to the exercise of judicial power that the tribunal should be called upon to execute its own decision. As Dixon CJ and McTiernan J observed in *R v Davison* ((1954) 90 CLR at 368), an order of a court of petty sessions for the payment of money is made in the exercise of judicial power, but the execution of such an order is by means of a warrant granted by a justice of the peace as an independent administrative act. 103

The High Court in *Brandy*, considered section 25Z(2) of the *Racial Discrimination Act 1975*, which provided:

‘(2) A determination of the Commission under subsection (1) is not binding or conclusive between any of the parties to the determination.’ 102

However, the *Racial Discrimination Act* also made registration of a determination compulsory under section 25ZAA. The automatic effect of registration was, subject to review, to make the determination binding upon the parties and enforceable as an order of the Federal Court.

The High Court decided that the registration and enforcement provisions made a determination of the Human Rights and Equal Opportunity Commission (HREOC) binding, authoritative and enforceable by HREOC itself. The legislation therefore invalidly purported to invest judicial power in a non-judicial body.

Nothing that the Federal Court does gives a determination the effect of an order. That is done by the legislation operating upon registration. The result is that a determination of the Commission is enforceable by execution under s 53 of the Federal Court Act. It is the determination of the Commission which is enforceable and it is not significant that the mechanism for enforcement is provided by the Federal Court. 103

An administrative body could not validly be empowered to make final and enforceable determinations by statute. However, private arbitration is treated differently. A court will decide whether a body is exercising arbitral or judicial power by examining the powers it exercises. The name of a body and the description of its process as arbitration is irrelevant. 104

The High Court decided in the *TCL Air Conditioner case* that a private arbitrator is not exercising the judicial power of the Commonwealth. 105 The majority of the Court was clear that the ‘distinction between the power exercised by an arbitrator and the impermissible delegation of the judicial power of the Commonwealth considered in *Brandy v Human Rights and Equal Opportunity Commission*’ is the consensual foundation of the arbitration.

If the NST is genuinely exercising arbitral power, it will not be exercising judicial power even if it makes a final, conclusive and binding determination of all matters of fact and law between the parties. 106

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106. Ibid., at [106]–[110].
Consent of all parties is critical to private arbitration

The Wood Review recommended that the NST be established using the Fair Work Commission, which resolves disputes by arbitration, as a model. The question of whether a dispute resolution in the Fair Work Commission is an ‘arbitration’ if it is legislatively compelled is currently before the Federal Court in One Tree Community Service Inc v United Voice.

One Tree is alleging that it has not voluntarily agreed to arbitration by the Fair Work Commission, but, in its particular factual circumstances, is instead being compelled by legislation to submit to arbitration in the FWC. The case has not yet been argued, but in the course of considering whether to grant interlocutory relief, McKerracher J said:

The passages referred to in the Private Arbitration case make clear that the essential characteristic grounding the arbitrator’s power is the agreement between the parties to submit disputes to a third party for determination. French CJ and Gageler J repeat this requirement in TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia [2013] HCA 5; (2013) 251 CLR 533 (at [29]) in these terms:

... Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. ... The reference to ‘private arbitration’ was not to a private function, as distinct from a public function, but rather to a function the existence and scope of which is founded on agreement as distinct from coercion.

One Tree argues, with some force, that while s 186(6) of the FW Act mandates a dispute resolution clause in enterprise agreements, it does not mandate arbitration per se for that very reason. It is not within parliamentary power to mandate arbitration in circumstances where no agreement has been reached to arbitrate ...

There may be some limited scope for athletes, support persons and sporting organisations to argue that they have not voluntarily agreed to arbitration in the Anti-Doping Division of the NST on the basis that their participation in arbitration is mandatory under the NAD Scheme. Athletes clearly have little choice in whether to accept anti-doping policies containing arbitration clauses if they wish to participate in sport. Contract law contains a number of protections to prevent abuse of power when there are clear imbalances of power between parties. However, Professor Andrew Byrnes observes that an argument that an express contractual agreement to arbitration should be vitiates due to abuse of power is unlikely to succeed:

The problematic assumption of the truly voluntary nature of the consent of athletes has frequently been highlighted. Indeed it has been argued and recognised (including by courts) that a simple acceptance of such ‘consent’ as genuine and valid fails to recognise the power imbalances that exist in most relations between athletes and governing organisations. However, in those legal systems in which a finding of legally valid consent is necessary to produce the requisite legal obligations, it is rare that courts displace an express contractual agreement to refer disputes to arbitration.

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109. Ibid., at [30] [Emphasis added and citations omitted by McKerracher J].
110. Ibid., at [56].
If such an argument were to succeed, it would mean the NST was not using arbitral power to determine sporting disputes referred to the NST through anti-doping policies made under the NAD Scheme. At that point the constitutional validity of the NST would be in doubt, since an argument is available that the NST will make final, binding and enforceable determinations (see below).

**Enforcement of sanctions determined by the NST**

The NST member’s determination takes effect on the day specified in the determination (subclause 27(2)). No court order or any other additional step is necessary to enforce the determination.

The NST must give the parties written notice of the determination, and the reasons to all parties to the arbitration (subclause 27(3)).

The Code provides:

<table>
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<tr>
<th>WADA Code</th>
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<tr>
<td><strong>3.2 Methods of Establishing Facts and Presumptions</strong></td>
</tr>
<tr>
<td><strong>3.2.4</strong> The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the Athlete or other Person to whom the decision pertained of those facts unless the Athlete or other Person establishes that the decision violated principles of natural justice.113</td>
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In combination, these provisions suggest that the NST determination can be applied by a sporting body, including WADA, or an event manager, without any further legal or administrative step, to exclude the athlete or support person from events. There is, therefore, some risk that decisions of the NST could be said to be conclusive and enforceable.

**Inquisitorial procedure and self-incrimination**

The common law privilege against self-incrimination, defined below by the Australian Law Reform Commission (ALRC), is not confined to criminal proceedings:

The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person. Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges: a privilege against self-incrimination in criminal matters; a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).114

Barrister Anthony Crocker explains:

The privilege against self-incrimination is a fundamental right. It is available to all natural persons but is not available to corporations. It is not simply a rule of evidence. It is not limited in its application to only judicial proceedings. The privilege has been held to be available in disciplinary proceedings unless the privilege has been abrogated.115

113. Code, op. cit., p. 27 [emphasis added].
Any removal of the common law privilege against self-incrimination will require express words or be a matter of necessary intendment. This ‘principle of legality’ is paramount when construing legislative provisions said to abrogate such basic common law privileges. ... the privilege may also be waived. This could be a waiver made by a person on an ad hoc basis, question by question or investigation by investigation, or it could be a waiver given by the person at the commencement of a particular relationship. In the context of a sporting relationship, the athlete will have usually waived this privilege when agreeing to participate in the sport and to be bound by its rules and regulations.\textsuperscript{116}

The Bill does not abrogate the common law privilege against self-incrimination during hearings before the NST.

Parliament has previously expressly acted to ensure that a natural person retained a privilege against self-incrimination when an ADRV is being investigated. In February 2013, the \textit{Australian Sports Anti-Doping Authority Amendment Bill 2013} was introduced to Parliament. The Bill, as introduced, proposed a complete abrogation of the privilege against self-incrimination in ASADA investigations. There is a useful discussion of the point in the \textit{Bills Digest} for the 2013 Bill:

\begin{quote}
The Law Institute of Victoria, in opposing the section in its submission to the Senate Rural and Regional Affairs and Transport References Committee, declared that the right not to self-incriminate is a basic human right. As such, it should not be abrogated. In the Society’s view: ‘if ASADA has proof that a breach of the Code has occurred, the burden of proving such should rest with ASADA, not with a person to provide evidence establishing their guilt’.

The Australian Athletes’ Association cited the Administrative Review Council and Attorney-General’s Department reports in making the argument that there is no evidence to justify removing the right not to self-incriminate when investigating doping offences. Doping offences are no more major than serious criminal matters, which are regularly investigated without undermining the right. The Athlete’s Association is not convinced by the Bill’s Statement of Compatibility with Human Rights, which claims that the abrogation of the right against self-incrimination is necessary ‘to ensure that possible doping offences under the NAD scheme are able to be properly investigated’.\textsuperscript{117}
\end{quote}

In 2013, Brendan Schwab, the General Secretary of the Australian Athletes’ alliance said of the proposed abrogation of the privilege:

\begin{quote}
the whole concept that athletes would face a criminal penalty for breach of contract is ridiculous and absurd ... the threat of jail terms for those who refuse to be interviewed by Australia’s anti-doping agency infringes the basic civil rights of sportspeople ... everyone should be under no illusion that the powers ... under the existing anti-doping codes which have been agreed to by athletes are extreme.\textsuperscript{118}
\end{quote}

Parliament did not agree to the extensive powers requested; amendments introduced in the Senate to preserve a privilege against self-incrimination for natural persons were passed. However, according to Crocker, sports organisations have since found a way around Parliament:

\begin{quote}
Nonetheless, since 1 January 2015, ASADA has been able to overcome this restriction. It has prepared a template anti-doping policy (‘ADP’) for sporting administration bodies to use. This policy reflects a full abrogation of the privileges.
\end{quote}

\textsuperscript{116}. Crocker, op. cit., p. 38 [citations removed].
\textsuperscript{117}. R Jolly, \textit{Australian Sports Anti-Doping Authority Amendment Bill 2013}, Bills digest, 92, Parliamentary Library, Canberra, 19 March 2013, p. 28.
This is a most unsatisfactory development. ASADA is the national body charged with the task of investigating anti-doping matters so as to maintain the integrity of sport. It sought a range of additional powers from the Commonwealth Parliament. Not all of those powers were granted. What ASADA could not obtain through the ‘front door’, it has given to itself through the ‘back door’, by drafting a template that is not consistent with the ASADA Act.

The High Court is very firm as to the rules concerning the privilege against self-incrimination. When amending the ASADA Act in August 2013, the Parliament was equally clear. Unless and until ASADA corrects the current situation, it will continue to play outside those rules.\(^{119}\)

In late 2015 ASADA was criticised by a journalist for ‘compelling athletes to give up their common law right to silence’.\(^{120}\) ASADA responded in a media release on 29 November 2015:

> ASADA does not mandate any sport to abrogate athletes of their privilege against self-incrimination in anti-doping investigations. Under ASADA’s legislation, sports determine their own anti-doping policies, which are contractual arrangements with their members.\(^ {121}\)

The media release did not address the ASADA anti-doping policy template. It noted that the AOC had amended its anti-doping by-law to include a provision abrogating the privilege of self-incrimination and continued:

> ASADA CEO Ben McDevitt said: ‘The AOC is a fantastic partner and ASADA supports them for going above and beyond in its fight against doping. Many other sports have also chosen to include the provision in their own anti-doping policies and they too have ASADA’s full support in their commitment to protecting their clean athletes.’\(^ {122}\)

The previous effort by Parliament in 2015 to ensure that athletes and support persons would retain a personal privilege against self-incrimination when being investigated by ASADA was not effective. A waiver of the privilege, which allows ASADA to compel athletes to incriminate themselves during a compulsory interview, is now routinely incorporated into the anti-doping policies of sports bodies.

If Parliament wishes to ensure athletes and support persons have a privilege against self-incrimination, one option would be to include an express provision in the Bill preventing the presentation to the NST of any material which has been obtained by compelling a person to give evidence which tends to incriminate them.

### Human Rights

The Government acknowledges in the Explanatory Memorandum that the Bill engages Article 14(2) of the *International Covenant on Civil and Political Rights (ICCPR)*—the right to presumption of innocence (which includes the right not to be compelled to self-incriminate\(^ {123}\),\(^ {124}\)).

Human rights in the context of the international anti-doping regime and the Code requirement for a ‘fair hearing’ are discussed extensively by Professor Andrew Byrnes in Chapter 5 of *Doping in Sports and the Law*.\(^ {125}\) Byrnes identifies that, in terms of international human rights law, there is a

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119. Crocker, op. cit., p. 28.
120. T Holmes, ‘ASADA stripping athletes’ legal right to silence by inserting provision in policy, sports lawyers says’, ABC news, 29 November 2015; cited by Hickie, op. cit., at p.49.
122. Ibid.
125. A Byrnes, op. cit.
developing body of opinion that the obligation of the state is expanding beyond the state merely avoiding encroaching on a person’s human rights to protecting persons against encroachment on their rights by non-state actors.\textsuperscript{126} Byrnes offers the opinion:

The hybrid nature of the anti-doping regime and its potential application in national systems \textbf{where the investigation and disciplinary proceedings are conducted as the exercise of or with the support of state power} are likely to engage the \textbf{human rights obligations of the state} under national and international law.\textsuperscript{127}

Since the abrogation of the privilege against self-incrimination is not required by the Code, sport lawyer Nikki Dryden also suggests that coercive measures to abrogate the privilege against self-incrimination may not be valid, on the basis:

\begin{itemize}
  \item that the CAS rules do not permit national organisations making substantive changes to the [Code];
  \item that the required ‘consultative process’ for changing rules has not been followed;
  \item that the abrogation of the privilege against self-incrimination may breach international agreements on which the [Code] is founded; and finally,
  \item that the rule of law may have been violated.\textsuperscript{128}
\end{itemize}

In the process of developing the Code, WADA has commissioned a number of legal opinions from Swiss and French lawyers on various drafts of the Code. In one of those opinions, the authors, Kaufmann-Kohler and Riggozzi, stated:

\begin{quote}
\ldots for the purpose of the present opinion, we will assume that the current approach of the courts might evolve in the future towards enforcement of human rights in sports matters. Indeed, mainly because sports governing bodies hold a monopolistic ‘quasi-public’ position in their relation with athletes, there is a growing understanding among legal commentators that sports governing bodies can no longer ignore fundamental rights in their activities, at least if they intend to avoid government intervention. After all, the UNESCO Convention itself was adopted with a specific ‘refer[ence] to existing international instruments relating to human rights’ (see Preamble, first ground).
\end{quote}

Byrnes reports the reliance by the Government and the AOC in 2015 on a different opinion, by human rights expert Jean Paul Costa, supporting various aspects of WADA revisions to the Code in 2015 as aligning with international human rights.\textsuperscript{130}

\section*{Appointment of NST members}

Members of the NST will conduct arbitration, mediation and conciliation as required by the Bill and the rules made under the Bill. The number of NST members is not limited by the Act (clause 12) and all members are appointed on a part-time basis (subclause 13(1)).

The Minister appoints a member by a written instrument which specifies the term of appointment, which must not exceed five years, however the member may be reappointed (subclauses 13(1)–(2)). Appointment by the Minister is a departure from the recommendations of the Wood Review, discussed below.

\begin{itemize}
\item \textsuperscript{126} Ibid., pp. 99–100.
\item \textsuperscript{127} Ibid., p. 100 [emphasis added].
\item \textsuperscript{129} Ibid., p. 100.
\item \textsuperscript{130} Ibid., pp. 101–2.
\end{itemize}
Eligibility

Subclause 13(3) requires a person to have experience or knowledge in at least one appropriate field of expertise before they are eligible for appointment. Relevant fields are:

(a) sports law;
(b) sports governance or sports administration;
(c) scientific or medical expertise in relation to sport;
(d) dispute resolution;
(e) ethics;
(f) investigative practices or techniques;
(g) any other appropriate field of expertise.

The Chief Executive Officer of the NST (CEO) is not eligible to be appointed as a member (subclause 13(4)).

Member terms and conditions

Remuneration and allowances for members are determined by the CEO (clause 14). Any other terms and conditions are determined by the CEO (clause 15).

A member must disclose in writing all possible conflicts of interest. The Minister may make rules about when and how that disclosure must occur, and prescribe consequences of a disclosure (clause 16).

A member is not an official for the purposes of the Public Governance, Performance and Accountability Act 2013 (clause 19).

Member duties

Members are prescribed three general duties under clause 20:

• a duty to act honestly, in good faith and for a proper purpose
• a duty not to improperly use their position
• a duty not to improperly use information obtained as a member.

There is nothing unusual about the provisions in the Bill for appointment, terms, and termination of appointment for members. They are ordinary provisions for appointment of statutory officers which have been widely used in Commonwealth legislation. However, the provisions depart from the Wood Review recommendations

Departure from Wood Review recommendations

The Wood Review emphasised the importance of the independence of the NST and of NST members having appropriate specialised expertise. Both ASADA and the Wood Review recommended that the current members of the ADRVP be appointed as the first members of the NST. The Review further recommended that future members be appointed by the SIA in consultation with the Minister, using a similar model of selection as that developed by Sport
Resolutions UK (SRUK).\textsuperscript{131} SRUK ensures that its closed list of arbitrators remains current and contemporary by specifically recruiting for particular skills and expertise.\textsuperscript{132}

Although the Bill requires in clause 13(3) that members have experience or knowledge in particular fields, appointment of members is entirely at the discretion of the Minister. Contrary to the Wood Review recommendations, appointment is not through a selection process overseen by SIA. The Explanatory Memorandum does not provide an explanation for why the Bill diverges from the Wood Review on this point.

**Consequential Amendments**

The amendments proposed in items 1 and 2 of Schedule 1 of the Consequential Amendments Bill ensure certain powers and evidential arrangements currently available under the ASADA Act in relation to hearings before CAS will also be available for hearings before the NST.

**Item 3 of Schedule 1** amends the *Freedom of Information Act 1982* to prohibit disclosure under that Act of material protected by the secrecy provision at clause 72 of the Bill.

**Schedule 2** ensures that a person may make an application to the NST after commencement in relation to a disputes arising before, on or after commencement of the Bill. Relevant timeframes for the application will be found in the applicable anti-doping policy, constituent document or rules.

**Concluding comments**

The Wood Review found cogent reasons for the Commonwealth to expand its regulation of sport to guarantee sports integrity. Sports integrity reform is identified as a matter of public interest that should be underpinned by public funding and statutory power.

It may be that Parliament needs more time, perhaps through scrutiny by a Select Committee, to consider the complex interaction of the NAD Scheme with the NST and Australia’s international human rights obligations and to assess the effect of that interaction on the fundamental rights of participants in sport.

\textsuperscript{131} Recommendation 30, *Wood Review*, op. cit., p. 159.
\textsuperscript{132} Wood Review, op. cit., p. 155.