

EXPLANATORY STATEMENT

Issued by the Minister for Youth and Sport

National Sports Tribunal Act 2019

National Sports Tribunal Rule 2020

Authority

Subsection 75(1) of the *National Sports Tribunal Act 2019* (the Act) provides that the Minister may make rules prescribing matters required or permitted by the Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

A number of provisions of the Act provide for the making of rules – the relevant provisions of the Act are discussed in greater detail in the description of the relevant provisions of this instrument.

Purpose

The Act establishes the National Sports Tribunal (NST). The substantive provisions of the Act will commence on 19 March 2019, 6 months after the date on which the Act received Royal Assent.

The purpose of the *National Sports Tribunal Rule 2020* (the Rule) is to prescribe matters to support the operation of the NST on its commencement, namely:

- conferring the CEO of the NST with additional functions in relation to applications to the NST, and the procedural management of matters
- the process by which an NST member is required to declare an interest, the types of interests that must be declared, and the consequences of declaring that interest
- the kinds of dispute in respect of which an application can be made to the General Division of the NST for arbitration, mediation, conciliation or case appraisal, or to the Appeals Division of the NST
- the kinds of dispute that the CEO must not approve as being the subject of an application to the General Division of the NST, or to the Appeals Division of the NST
- the circumstances in which the NST can suspend or terminate an arbitration or appeal
- the fees for the various types of applications to the NST
- enabling the CEO to determine the costs of an arbitration, appeal or dispute resolution process, to apportion those costs between the parties, and to refund or waive those costs
- prescribing additional circumstances in which the prohibition in s 72(1) of the Act on the disclosure or use of protected information will not apply.

Details

Details of the Rule are set out in the **Attachment**.

Consultation

The Department consulted extensively with the National Sports Tribunal Advisory Group (NST Advisory Group) on the development of administrative and procedural arrangements for the NST, including the contents of the Rule.

The NST Advisory Group comprises representatives of national sporting organisations, as well as Sport Australia, the Australian Sports Anti-Doping Authority and the Anti-Doping Rule Violation Panel, the Australian and New Zealand Sports Law Association, the legal profession, and academia.

The Department meets regularly with the NST Advisory Group to ensure that key stakeholders are consulted and briefed fully on the NST implementation process.

This Instrument commences on 19 March 2020.

This Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the *National Sports Tribunal Rule 2020*

Part 1 Preliminary

Section 1 – Name of instrument

Section 1 provides that the name of the instrument is the *National Sports Tribunal Rule 2020*.

Section 2 - Commencement

Section 2 of the instrument provides that it commences on 19 March 2020.

Section 3 – Authority

Section 3 provides that the instrument is made under subsection 75(1) of the Act.

Section 4 – Definitions

Section 4 defines terms in the instrument. A number of terms used in the instrument are defined in the Act (such as athlete, CEO, dispute, member, protected information, sporting body and support person).

Relevantly, this section also defines the term ‘member protection policy’. A member protection policy is a policy adopted by a sporting body that aims to protect the members of the sporting body from discrimination, harassment, abuse, bullying and other forms of inappropriate behavior. Most, if not all, sporting bodies to which the Act applies will have a member protection policy in the form contemplated by the definition.

Part 2 Additional functions of the CEO

Section 5 – Additional functions

Paragraph 52(1)(c) of the Act provides that the CEO’s functions include ‘such other functions as are conferred on the CEO under this Act, the rules or any other law of the Commonwealth’. Section 5 confers two functions on the CEO for the purposes of s 52(1)(c) of the Act.

Subsection (1) confers the function of assessing whether an application for arbitration made under Division 2 or 3 of Part 3 of the Act, or an appeal under Division 6 of Part 3, meets the requirements specified in the Act and in the rules. Subsection (2) makes clear that if an application does not meet the requirements specified in the Act and in the rules, the CEO is not required to accept the application.

Subsection (3) would confer the CEO of the NST with a procedural management function. Being able to exercise this function will enable the CEO to implement measures to promote the more efficient case management of individual disputes, to promote consistency in the management of disputes before an NST member is

appointed to deal with the dispute, and to enable the CEO to manage the NST's overall workload.

Subsection (4) sets out the actions that the CEO may take when undertaking the procedural management function in relation to a dispute. The actions include:

- convening a preliminary conference and requiring parties to the dispute to attend;
- requiring parties to take reasonable steps to confine the issues in dispute;
- determining a provisional timetable for the conduct of the proceedings;
- consulting with the parties on matters such as the identity and number of members to be appointed to deal with the dispute, the estimated cost of proceedings and the proposed apportionment of those costs;
- requiring the parties to identify proposed witnesses and evidence to be brought forward in an arbitration;
- where a party wants the tribunal to issue a notice under s 42 of the Act, requiring the party to specify the type of notice, and the identity of the intended recipient.

Part 3 Disclosure of interests

Section 6 – Disclosure of interests to the CEO

Subsection 16(2) of the Act provides that the rules may prescribe how and when a member of the NST must disclose an interest that could conflict with the proper performance of the member's duties, and the consequences of disclosing such an interest.

Subsection 6(1) of the instrument requires a member to notify the NST CEO of any interest, pecuniary or otherwise, that the member has or acquires and that conflicts, or could conflict, with the proper performance of the member's duties.

The disclosure of the interest must be made in writing to the CEO (subsection (2)).

Without limiting the effect of subsection (1), subsection (3) sets out circumstances in which a member of the NST will be taken to have an interest that conflicts, or could conflict, with the proper performance of the member's duties. These circumstances concern:

- participation or involvement in the administration of a sport
- membership of a sporting body, or a constituent part of a sporting body, or an affiliate to a sporting body
- involvement in any way in the administration of a sporting event or sporting venue
- being related to a party to a dispute that is the subject of an application to the NST, or having current or previous involvement in the affairs of, a party to a dispute that is the subject of an application to the NST

- membership of a sporting tribunal administered by a sporting body
- where the member has been retained by a sporting body for the purposes of providing it with legal advice.

Subsection (4) applies if a member declares an interest, or where the CEO is, or becomes aware, that a member has an interest in relation to a particular dispute. In this circumstance, the CEO is not to appoint the member to deal with that dispute unless the parties to the dispute are notified of the nature of the interest and agree to the appointment. This provision operates subject to subsection (5), which provides that the CEO may notify the parties to the dispute of the nature of the interest. If the parties to the dispute agree, the CEO may approve the member dealing with the dispute.

Part 4 Kinds of disputes

Section 7 – Kinds of disputes for which an application to the National Sports Tribunal may be made

Because of the wide range of matters that could potentially be the subject of a dispute between a person and a sporting body, or between 2 or more persons connected to a sporting body, the Act does not specify the kinds of disputes for which an application may be made to the General Division of the NST for arbitration, as well as mediation, conciliation and case appraisal.

Instead, subparagraphs 23(1)(c)(i) and 24(1)(c)(i) of the Act permit the rules to prescribe the kinds of dispute in respect of which an application may be made for arbitration by the General Division of the NST.

Similarly, subparagraphs 25(1)(c)(i) and 26(1)(c)(i) of the Act permit the rules to prescribe the kinds of dispute in respect of which an application may be made to the NST for mediation, conciliation or case appraisal. Access to mediation, conciliation or case appraisal is available only in the General Division of the NST.

Subsection 7(1) of the instrument prescribes the following kinds of dispute as disputes that can be the subject of an application to the NST for arbitration:

- disputes about athlete eligibility or selection, however described or defined in the constituent documents of the sporting body (paragraph 7(1)(a)). Because of the potential for there to be overlap between an eligibility dispute and a selection dispute, and because disputes about these matters are not uniformly described or defined by sporting bodies, it is necessary for paragraph 7(1)(a) to make an allowance for this;
- disciplinary disputes, including but not limited to disputes relating to disciplinary action taken, or proposed to be taken, under a member protection policy of the sporting body (paragraph 7(1)(b)). This will mean, for example, that an application can be made to the NST before the sporting body has taken disciplinary action. For example, a sporting body gives a notice to a

person asserting a breach of the sporting body's member protection policy: or for example, the breach notice also offers the person the choice of accepting the sanction set out in the notice, or alternatively, disputing the allegation and the proposed sanction in the NST;

- disputes relating to disciplinary action taken, or proposed to be taken, by a sporting body against a constituent part of the sport (paragraph 7(1)(c)). For a dispute of this nature to be capable of being a dispute before the NST, the constituent part of the sport must be a body corporate.

Subsection 7(2) prescribes kinds of disputes that can be the subject of an application to the NST for alternative dispute resolution (ie mediation, conciliation and case appraisal). As with applications for arbitration, parties will be able to make applications for alternative dispute resolution of disputes about athlete eligibility or selection (paragraph 7(2)(a)) and disciplinary disputes (paragraph 7(2)(b)), or (paragraph 7(2)(d)).

Parties will also be able to apply for alternative dispute resolution of disputes about bullying, harassment or discrimination (paragraph 7(2)(c)). This will enable parties to seek less formal alternative dispute resolution of bullying, harassment or discrimination disputes before the point at which disciplinary measures are taken or imposed.

Section 8 – Kinds of disputes that may be appealed to the National Sports Tribunal

Section 35 of the Act enables appeals to the Appeals Division of the NST from a decision (that is not a decision in relation to an anti-doping dispute) made by a sporting tribunal administered by the sporting body.

Subsection 35(1) of the Act provides that where one or more of the constituent documents (eg relevant rules or policies of the sporting body) that bind the person and the sporting body provide for an appeal to be made to the Appeals Division of the NST, the person, the sporting body, or any other person or body permitted by a constituent document to do so may appeal to the NST from a sporting tribunal decision. It is not uncommon for the rules or policies of sporting bodies to provide for entities other than the parties to the dispute to appeal decisions of a sporting tribunal; for example, the anti-doping policies of sporting bodies enable the World Anti-Doping Agency (WADA) to appeal a decision of a sporting tribunal to an intermediate appellate tribunal or to the Court of Arbitration for Sport.

Subsection 35(2) of the Act provides that where no constituent document permits an appeal to the Appeals Division of the NST, but the parties have agreed in writing that an appeal is able to be made to the Appeals Division of the NST, the person or sporting body, or any other person or body specified in the agreement as being able to appeal, can appeal to the NST.

Subparagraphs 35(1)(c)(i) and 35(2)(c)(i) of the Act permit the rules to prescribe the kinds of dispute in respect of which an appeal may be made to the NST from a decision of a sporting tribunal administered by the sporting body.

Section 8 of the instrument has the effect that an appeal can be made to the Appeals Division of the NST from a decision of a sporting tribunal about the following kinds of disputes:

- disputes about eligibility or selection, however described in the constituent documents of the sporting body (paragraph 8(a));
- disciplinary disputes, including but not limited to disputes relating to disciplinary action taken, or proposed to be taken, under a member protection policy of the sporting body (paragraph 8(b));
- disputes relating to disciplinary action taken, or proposed to be taken, by a sporting body against a constituent part of its sport, where the constituent part is a body corporate (paragraph 8(c)).

Section 9 – Kinds of disputes that must not be approved by the CEO

The CEO of the NST may also approve applications to be made in respect of other kinds of dispute, except in respect of kinds of disputes specified in the rules.

Subsections 23(4) and 24(4) of the Act permit the rules to specify the kinds of dispute that the CEO must not approve as being the subject of an application to the General Division of the NST. Subsection 35(6) of the Act permits the rules to specify the kinds of dispute that the CEO must not approve as being the subject of an appeal.

Subsection 9(1) of the instrument sets out the kinds of dispute that the CEO is not permitted to approve as being the subject of an application to the General Division of the NST for arbitration, or to the Appeals Division.

Except where a dispute arises in connection with an alleged breach of a disciplinary rule of the sporting body, it is not intended that the NST will become an alternative forum to other forums that currently exist for the determination of employment disputes, or disputes about entitlements payable to, or the termination of, contracts with independent contractors.

To that end, paragraph 9(1)(a) provides that the CEO is not permitted to approve disputes relating to remuneration or other benefits payable to an individual under a contract for services, or relating to the termination of a contract for services with an individual, except where those disputes arise in connection with an alleged breach of a disciplinary rule of the sporting body.

Similarly, paragraph 9(1)(b) prevents the CEO approving ‘employment disputes’, except where those disputes arise in connection with an alleged breach of a disciplinary rule of the sporting body. Subsection 9(2) of the instrument defines

‘employment dispute’ as a matter in respect of which a remedy is available under the *Fair Work Act 2009* or a general State industrial law within the meaning of subsection 26(3) of that Act, or at general law for breach of a contract of employment.

The exception for disputes arising in connection with a breach of a disciplinary rule of a sporting body has been included to enable a party to choose to have their dispute dealt with in one forum (the NST) rather than in separate forums.

For example, in professional sports, the playing contracts under which players are engaged (usually as employees) generally include the breach of specified disciplinary rules as grounds for the termination of the playing contract. If paragraph 9(1)(b) prohibited the CEO approving applications about ‘employment disputes’ generally, the player would potentially have to make applications in two forums – to the NST to arbitrate the dispute about the disciplinary issue, and to a court, claiming wrongful dismissal.

Other kinds of disputes that are not permitted to be approved by the CEO for the purposes of an application for arbitration or appeals are:

- anti-doping disputes (paragraph 9(1)(c)) – this prohibition reflects the fact that Division 2 of Part 3 of the Act governs the process for applications for arbitration of anti-doping disputes, and Subdivision A of Division 6 of Part 3 of the Act governs the process for appeals in relation to such disputes, and no approval by the CEO is necessary or appropriate;
- disputes occurring in the field of play, however the ‘field of play’ is described or occurring. This prohibition reflects the fact that sporting tribunals will generally not arbitrate disputes about decisions occurring in the field of play (paragraph 9(1)(d)) simply because a person disagrees with the decision that was made. This reflects an acceptance that, given the conditions under which on-field decisions are made, there may well be mistakes, whether by referees or umpires, but also by athletes;
- disputes of any kind in which damages as a remedy are being sought from another party to the dispute (paragraph 9(1)(e)). This exclusion reflects an intention that the NST should not be arbitrating claims for damages (even though the parties to the dispute might have agreed to the NST doing so).

Subparagraphs 25(1)(c)(ii) and 26(1)(c)(ii) of the Act permit the CEO to approve a dispute for the purposes of an application for mediation, conciliation or case appraisal, where the CEO is satisfied that there are exceptional circumstances justifying the grant of the approval (subsections 25(5) and 25(6) of the Act).

Subsections 25(4) and 26(4) of the Act permit the rules to specify the kinds of dispute that the CEO must not approve as being the subject of an application for mediation, conciliation or case appraisal.

To that end, subsection 9(3) of the instrument prevents the CEO of the NST approving anti-doping disputes, and disputes occurring in the field of play (paragraph 9(3)(a)), however described or occurring (paragraph 9(3)(b)) as matters that could be the subject of mediation, conciliation or arbitration in the General Division.

This narrower set of prohibitions reflects the intention that the CEO of the NST should have greater discretion to approve a wider range of disputes for referral to mediation, conciliation or case appraisal.

Part 5 Suspension or termination of an arbitration

Section 10 – Circumstances in which the National Sports Tribunal may suspend or terminate an arbitration or appeal

Paragraph 27(4)(d) and paragraph 36(4)(b) of the Act permit the rules to prescribe circumstances in which the NST may terminate an arbitration or appeal.

Subsections 27(5) and 36(5) of the Act permit the rules to prescribe circumstances in which the NST may suspend an arbitration or appeal.

Subsection 10(1) of the instrument provides that the NST may direct that an arbitration or an appeal be suspended or terminated where:

- criminal proceedings have been, or are, commenced in respect of conduct that is substantially the same conduct that is the subject of the dispute before the NST (paragraph 10(1)(a));
- if the arbitration is in the General Division or the Appeals Division – where separate proceedings arising out of the same subject matter have been instituted in any other court or tribunal (paragraph 10(1)(b));
- if the arbitration is in the Anti-Doping Division – where a party has exercised a right to appeal to the Court of Arbitration for Sport (paragraph 10(1)(c));
- where there is undue delay, without reasonable excuse, by the applicant in pursuing their application (paragraph 10(1)(d));
- where costs, however determined under section 13 of this instrument, have not been paid (paragraph 10(1)(e)).

Enabling the NST to suspend or terminate proceedings in the circumstances set out in paragraphs 10(1)(a) and (b) will minimise the potential for NST proceedings to conflict with, or undermine, other civil or criminal proceedings. In relation to paragraph 10(1)(c), the World Anti-Doping Code requires certain bodies (eg WADA and the relevant International Federation for the sporting body) to be able to exercise a right of appeal directly to the Court of Arbitration for Sport. Paragraph 10(1)(c) is intended to promote compliance with Australia's international obligations in this area.

Subsection 10(3) makes clear that a direction to terminate an arbitration or appeal in the circumstances set out in paragraphs 10(1)(a), (b) and (c) can be made on the

condition that the termination has effect only once the proceedings have been resolved by the other court or tribunal, or by the Court of Arbitration for Sport.

Paragraph 10(1)(d) of the instrument enables the NST to suspend or terminate an arbitration in a cases where the application is not progressing due to the conduct of the applicant.

Paragraph 10(1)(e) of the instrument enables the NST to suspend or terminate an arbitration in cases where costs determined under section 12 of this Rule have not been paid.

Subsection 10(2) of the instrument enables the NST to direct that an arbitration or appeal be suspended where the parties have decided to make an application for conciliation, mediation or case appraisal in relation to the dispute.

Part 6 Making applications

Section 11 – Application fee

Paragraph 37(b) of the Act provides that the rules can prescribe fees for the various types of applications to the NST.

Section 11 of the instrument sets out the application fees for the various proceedings. The level of the application fees has been set having regard to the need to strike an appropriate balance between access by parties to the NST while also deterring spurious applications, as well as cost recovery principles.

Broadly, the application fee model adopted for the NST is that parties with the ability to pay more should be able to do so, and conversely, parties without the ability to pay should still be able to seek access to a remedy from the NST.

Paragraph 11(1)(a) sets the application fee for a mediation, conciliation or case appraisal at \$750. As it is envisaged that these applications will often be made jointly by parties, the parties will be able to apportion the payment of the application fee, as they consider appropriate (subsection 11(2)).

Paragraph 11(1)(b) sets the fee for an application to commence an arbitration in the General Division at \$500.

There will be no fee for an application to commence an arbitration in the Anti-Doping Division (paragraph 11(1)(c)). This reflects a decision by government that such applications should be free of charge, in order to reduce the costs to applicants of applications for the arbitration of anti-doping disputes.

Paragraph 11(1)(d) sets the fee for an application to commence an arbitration in the Appeals Division at \$1,500.

Paragraph 11(1)(e) sets the fee to join an existing arbitration before the NST at \$250.

Subsection 11(3) of the instrument provides for the CEO to waive an application fee where the CEO is satisfied that requiring the applicant to pay the fee would cause hardship to the applicant.

Section 12 – Time limit on certain applications

Paragraphs 38(2)(b), 38(3)(b) and 38(4)(b) of the Act permit rules to be made prescribing time limits for the making of certain applications for arbitration in the Anti-Doping Division or the General Division of the NST, and for applications to the Appeals Division of the NST.

Normally, the time limit for making an application will be set out in the anti-doping policy of the sporting body, or, for another sport-related dispute, in a constituent document of the sporting body. In those instances, paragraphs 38(2)(a), 38(3)(a) and 38(4)(a) of the Act provide that the application must be made within that specified time limit.

Section 12 of the instrument addresses instances where the anti-doping policy or other constituent document of the sporting body does not set out a time limit.

Subsection 12(1) of the instrument applies where an anti-doping policy does not set out a time limit for the making of an application for arbitration in the Anti-Doping Division of the NST. In this instance, the application must be made within 21 days after the day the applicant receives the notice from the sporting body that establishes the dispute, that being a notice that asserts that the applicant contravened the sporting body's anti-doping policy and which contains a proposed sanction. This timeframe reflects the time limit that is generally prescribed in the anti-doping policies of sporting bodies.

Subsections 12(2) and (3) of the instrument set out a time limit for the making of an application in the General Division of the NST for arbitration of a dispute, where there is no timeframe specified in the sporting body's constituent documents for the dispute.

Subsection 12(2) provides that the application must be made within a reasonable period after the event, or the more recent of the events, that gave rise to the dispute. This provision envisages that there may be a dispute in relation to a series of events or a course of conduct, where the point at which a 'dispute' could be said to have arisen might be a matter of contention in itself.

Subsection 12(3) of the instrument sets out the factors that the CEO is to take into account in determining whether a period is reasonable for the purposes of subsection 12(2). These are: the period since the event or events that gave rise to the dispute, and any other matter the CEO considers relevant.

Subsection 12(4) sets out the time limits for applications to the Appeals Division in the circumstances where time limits are not otherwise contained in an anti-doping

policy or constituent document. For a dispute in relation to an anti-doping matter, the application to the Appeals Division must be made within 21 days of the date of the decision or determination appealed from. For General Division disputes, the application to the Appeals Division must be made within 30 days of the date of the decision or determination appealed from.

Subsection 12(5) of the instrument deals with the case where the applicant to the Appeals Division is the World Anti-Doping Agency. In this circumstance, the time limit is the later of:

- the last day on which any other party to the decision or determination could have appealed; or
- the day on which the World Anti-Doping Agency received the complete file relating to the decision or determination appealed from.

The time limits in this subsection reflect the relevant requirements of Art 13.2.3 of the World Anti-Doping Code. At the time of the making of this instrument, the current text of the World Anti-Doping Code was available at: <https://www.wada-ama.org/en/resources/the-code/world-anti-doping-code> .

Part 7 Charging costs of an arbitration or an alternative dispute resolution process

Section 13 – Charging costs of an arbitration or an alternative dispute resolution process

Section 46 of the Act permits the rules to provide for and in relation to the CEO of the NST charging parties to an arbitration the costs in conducting the arbitration, apportioning the charges between the parties, or waiving the whole or part of a charge.

Subsection 13(1) of the instrument provides that the CEO may determine a charge to be paid by a party or parties to an arbitration in the Anti-Doping Division or in the General Division of the NST. Subsection 13(2) provides for that determination to apportion the charges between the parties, to provide for the parties to be charged a portion of the actual or estimated fees of the arbitration, and to require that a party or parties pay the charge, or a portion of it, before the dispute is set down for hearing.

Subsection 13(3) of the instrument provides that in making a determination under subsection (1), the CEO is to have regard to the nature of the persons or entities that are the parties to the dispute.

Subsection 13(4) of the instrument provides that the CEO may determine a charge to be paid by a party or parties to an appeal. Subsection 13(5) provides for that determination to apportion the charges between the parties, to provide for the parties to be charged a portion of the actual or estimated fees of the appeal, and to require that a party or parties pay the charge, or a portion of it, before the appeal itself is set down for determination (noting that appeals may be determined without a hearing).

Subsection 13(6) requires the CEO to have regard to the nature of the person or entity instituting the appeal in making a determination under subsection (4).

Section 47 of the Act permits the rules to provide for and in relation to the CEO of the NST charging parties to a mediation, conciliation or case appraisal the costs in conducting the process, apportioning the charges between the parties, or waiving the whole or part of a charge.

To this end, subsection 13(7) provides that the CEO may determine a charge to be paid by a party or parties to a mediation, conciliation or case appraisal.

Subsection 13(8) provides for that determination: to apportion the charges between the parties, to provide for the parties to be charged a portion of the actual or estimated fees of the alternative dispute resolution process, and to require that a party or parties pay the charge, or a portion of it, before the dispute is listed for alternative dispute resolution.

Subsection 13(9) provides for the refund of charges to parties in the event that the final costs of an arbitration, appeal or alternative dispute resolution process are less than the charges paid.

Subsection 13(10) provides that, where it is appropriate to do so, the CEO may consult with the member or members before making a determination of charges under subsection 13(1), 13(4) or 13(7).

Subsection 13(11) is an avoidance of doubt provision, which makes clear that the CEO may make more than one determination of charges in respect of the same proceedings. In complex disputes in particular, the total likely costs of a matter may not become apparent until the proceedings are in progress. This may necessitate the CEO making a further determination of charges so that the cost of the proceedings is covered.

Section 14 – Waiver of charges

Paragraph 46(c) of the Act permits the rules to make provision for, or in relation to, the CEO of the NST waiving the whole or a part of the costs of an arbitration.

Paragraph 47(c) of the Act permits the rules to provide for the waiver of the whole or part of the costs of a mediation, conciliation or case appraisal.

Section 14 of the instrument provides that the CEO may waive or reduce any charge payable by a party in respect of an arbitration, appeal or dispute resolution procedure if the CEO is satisfied that requiring the party to pay the charge would cause the party to suffer financial hardship.

Part 8 Secrecy

Section 15 – Disclosure or use of protected information

Subsection 72(1) of the Act makes it an offence for an entrusted person to disclose or otherwise use protected information, unless certain exceptions apply.

Section 5 of the Act defines ‘protected information’ to mean information that:

- was obtained by the person in their capacity as an entrusted person; and
- relates to the affairs of another person (except that person in their capacity as an entrusted person); and
- identifies, or is reasonably capable of being used to identify, the other person.

An ‘entrusted person’ (also defined in section 5 of the Act) means the CEO of the NST, a member of the NST, or a person made available to assist the CEO of the NST under section 66 or 67 of the Act.

The exceptions to the prohibition on the use or disclosure of protected information are set out at subsections 72(2) and 72(3) of the Act. Paragraph 72(2)(d) of the Act enables rules to be made setting out additional circumstances in which the prohibition in subsection 72(1) of the Act on the disclosure or use of protected information will not apply.

Subsection 15(1) of the instrument sets out two circumstances in which disclosure or use of protected information will be exempt from the prohibition in subsection 72(1) of the Act. These are where:

- the disclosure is made by the CEO in circumstances where the CEO considers it necessary to prevent or lessen a serious risk to the safety, health or well-being of a person (paragraph 15(1)(a)); or
- the disclosure or use is of information about a determination of the NST that a person has breached a disciplinary rule of the sporting body, where the disciplinary rule relates to the protection of children participating in that sport, or the safety of participants in that sport (paragraph 15(1)(b)).

Paragraph 15(1)(a) would enable the CEO (or delegate) to disclose or use protected information where necessary to protect persons. For example, where a party to a dispute before the NST threatens to harm themselves or others, the CEO will be able to contact the relevant authorities without contravening subsection 72(1) of the Act.

Determinations of the General Division of the NST in many cases will not be published. Where a person who has been found by the NST to have engaged in relevant conduct, the prohibition that would otherwise exist on the disclosure or use of that information means that, if that person applies for a role in a different sporting body, and the person does not disclose the previous finding, that sporting body may not have any other means of finding out about that conduct. Paragraph 15(1)(b) attempts to ameliorate this risk by enabling the CEO to disclose information about NST determinations about breaches of disciplinary rules of a sporting body relating to the protection of children, or the safety of participants.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

NATIONAL SPORTS TRIBUNAL RULE 2019

This legislative instrument is compatible with the rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Legislative Instrument

This legislative instrument is made under subsection 75(1) of the *National Sports Tribunal Act 2019* (the Act).

This legislative instrument prescribes matters to support the operation of the National Sports Tribunal (NST) on its commencement, namely:

- conferring the CEO of the NST with additional functions in relation to applications to the NST, and the procedural management of matters
- the process by which a member of the NST is required to declare an interest, and the consequences of declaring that interest
- the kinds of dispute in respect of which an application can be made to the General Division of the NST for arbitration, mediation, conciliation or case appraisal, or to the Appeals Division of the NST
- the kinds of dispute that the CEO must not approve as being the subject of an application to the General Division of the NST, or to the Appeals Division of the NST
- the circumstances in which the NST can suspend or terminate an arbitration or appeal
- the fees for the various types of applications to the NST
- enabling the CEO to determine the costs of an arbitration, appeal or dispute resolution process, and to apportion those costs between the parties, and to refund or waive those costs
- prescribing additional circumstances in which the prohibition in s 72(1) of the Act on the disclosure or use of protected information will not apply.

Human rights implications

This legislative instrument may engage the following rights:

- the right to an effective remedy in Article 2(3) of the *International Covenant on Civil and Political Rights*
- the right to privacy and reputation in Article 17 of the *International Covenant on Civil and Political Rights*.

Right to an effective remedy

This legislative instrument engages the right to access to justice, which is implied in the right to an effective remedy under Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 2(3) of the ICCPR protects the right to an effective remedy for violation of rights and freedoms recognised by the ICCPR, and provides for a person's right to be determined by competent judicial authorities, by administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State party.

This legislative instrument specifies various fees for applications to the NST, namely from \$500 for an application for arbitration, \$750 for an application for mediation, conciliation or case appraisal (the cost of which can be divided between the parties in whatever proportions they agree). For appeals, an application fee of \$1,500 will apply. No fee will be payable for an application to the NST to arbitrate an anti-doping dispute.

The level of the application fees has been set having regard to the need to strike an appropriate balance between access by parties to the NST while also deterring spurious applications, as well as cost recovery principles. Broadly, the application fee model adopted for the NST is that parties with the ability to pay more should be able to do so, and conversely, parties without the ability to pay should still be able to seek access to a remedy from the NST.

To that end, this legislative instrument also makes provision for the CEO of the NST to waive the requirement to pay an application fee, where the imposition of that requirement would cause financial hardship to the applicant. This legislative instrument also makes provision for the CEO of the NST to determine that a party or parties to a dispute be charged only a portion of the actual or estimated fees of an arbitration or appeal.

Right to privacy and reputation

Article 17 of the *International Covenant on Civil and Political Rights* states that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

Secrecy provision

Subsection 72(1) of the Act makes it an offence for an entrusted person to disclose or use information that was obtained in their capacity as an entrusted person, that relates to the affairs of a person (except a person in the person's capacity as an entrusted person), and identifies, or is reasonably capable of being used to identify, the person to whose affairs the information relates. An 'entrusted person' is the CEO, a member, a person assisting the CEO in accordance with section 66 or 67 of the Act,

or a person engaged as a consultant, or an expert witness, under section 68 of the Act. The maximum penalty for breach of this provision is imprisonment for 2 years.

By preventing the disclosure of protected information, section 72 of the Act positively engages the right to privacy and reputation in Article 17 of the *International Covenant on Civil and Political Rights*.

The Act provides exceptions to this prohibition in defined circumstances, including, relevantly, where the disclosure or use is in accordance with the rules prescribed for the purposes of paragraph 72(2)(d) of the Act.

Subsection 15(1) of the legislative instrument sets out two circumstances in which disclosure or use of protected information will be exempt from the prohibition in subsection 72(1) of the Act. These are where:

- the disclosure is made by the CEO in circumstances where the CEO considers it necessary to prevent or lessen a serious risk to the safety, health or well-being of a person (paragraph 15(1)(a)); or
- the disclosure or use is of information about a determination of the NST that a person has breached a disciplinary rule of the sporting body, where the disciplinary rule relates to the protection of children participating in that sport, or the safety of participants in that sport (paragraph 15(1)(b)).

Paragraph 15(1)(a) would enable the CEO (or delegate) to disclose or use protected information where necessary to protect persons. For example, where a party to a dispute before the NST threatens to harm themselves or others, the CEO will be able to contact the relevant authorities without contravening subsection 72(1) of the Act.

Where a person who has been found by the NST to have engaged in relevant conduct, the prohibition that would otherwise exist on the disclosure or use of that information means that, if that person applies for a role in a different sporting body, and the person does not disclose the previous finding, that sporting body may not have any other means of finding out about that conduct. Paragraph 15(1)(b) attempts to ameliorate this risk by enabling the CEO to disclose information about NST determinations about breaches of disciplinary rules relating to the protection of children in that sport, or the safety of participants in that sport.

These exemptions to the prohibition on the use or disclosure of information are reasonable, necessary and proportionate in the circumstances. The exemption in paragraph 15(1)(a) of the legislative instrument is directed to the legitimate objective of promoting the safety, health or well-being of the individual whose protected information it is, or other persons who might have contact with the individual in the context of the NST's processes. The exemption in paragraph 15(1)(b) is directed to the legitimate objective of protecting children, and other participants in sport.

It is relevant to note that paragraphs 15(1)(a) and 15(1)(b) of the legislative instrument do not positively authorise or require disclosure in the specified circumstances; the legislative instrument will therefore not affect the default

limitations on use and disclosure of protected information that are imposed by the *Privacy Act 1988* in relation to ‘personal information’.

Conclusion

This Rule is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* and, to the extent the Rule may limit human rights, those limitations are reasonable, necessary and proportionate.

Senator the Hon Richard Colbeck, Minister for Youth and Sport