

2019

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL SPORTS TRIBUNAL BILL 2019

**NATIONAL SPORTS TRIBUNAL (CONSEQUENTIAL AMENDMENTS AND
TRANSITIONAL PROVISIONS) BILL 2019**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Aged Care and Senior Australians,
Minister for Youth and Sport, Senator the Hon Richard Colbeck)

NATIONAL SPORTS TRIBUNAL BILL 2019
NATIONAL SPORTS TRIBUNAL (CONSEQUENTIAL AMENDMENTS AND
TRANSITIONAL PROVISIONS) BILL 2019

OUTLINE

This package of two Bills will establish the National Sports Tribunal (Tribunal) to ensure the Australian sporting community has access to an effective, efficient, transparent and independent specialist tribunal for the fair hearing and resolution of sporting disputes.

The National Sports Tribunal Bill 2019 provides for the establishment and operation of the Tribunal. The National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019 deals with the consequential and transitional matters arising from the enactment of the *National Sports Tribunal Act 2019*.

Establishing the Tribunal will implement the Government's Response to the *Review of Australia's Sports Integrity Arrangements* (the Wood Review), in so far as the Government agreed (in-principle) with recommendations 26-37 of the Review, which deal with the establishment and operation of such a tribunal.

The Wood Review, the report of which was published on 1 August 2018, is the most comprehensive examination of sports integrity arrangements ever undertaken in Australia.¹

The Wood Review Panel, in reaching its conclusions regarding the resolution of sporting disputes in Australia, examined similar models overseas, including in the United Kingdom, New Zealand, Canada and Japan, and determined that establishing an entity such as the proposed Tribunal would significantly enhance the credibility of sport in Australia. The Tribunal as recommended by the Wood Review and established through these Bills, will deliver a service sorely needed in Australia – an independent, timely, transparent, cost-effective and reliable system of sports dispute resolution.

The Tribunal will provide a forum for the determination of disputes through private arbitration, or through mediation, conciliation or case appraisal, and will not involve the exercise of judicial power. The jurisdiction of the Tribunal will be enlivened and shaped by agreement between parties to a dispute. Agreements enlivening the jurisdiction of the Tribunal will be effected *either* through the policies, rules, by-laws and other constituent documents of a sport (and a person's acceptance of membership, consenting to be bound by those constituent documents), *or* by specific agreement between relevant parties to a dispute otherwise arising under the policies, rules, by-laws and other constituent documents of a sport.

Establishing the Tribunal with a statutory underpinning means that the Tribunal can be vested with powers to properly inform itself, including by requiring the attendance of witnesses and the provision of documents. This was also a key recommendation of

¹ The Report provides helpful background information and can be found at <http://www.health.gov.au/internet/main/publishing.nsf/Content/the-review-of-australias-sports-integrity-arrangements>.

the Wood Review, and will set the Australian National Sports Tribunal apart from foreign and international analogues.

In summary, the National Sports Tribunal Bill 2019:

- establishes the National Sports Tribunal, with an Anti-Doping Division, a General Division and an Appeals Division
- provides for the appointment of suitably qualified members to the Tribunal
- sets out the process by which persons may apply to the Tribunal for arbitration of an anti-doping dispute or another sport-related dispute in the Anti-Doping and General Divisions of the Tribunal
- sets out the process for parties to make an application to the Appeals Division of the Tribunal
- provides for parties to apply for mediation, conciliation or case appraisal to be conducted in the General Division of the Tribunal
- provides for the appointment of the CEO of the Tribunal, sets out the CEO's functions, and provides for the staffing arrangements to support the Tribunal
- provides for the CEO to make (as a notifiable instrument) a determination governing the practice and procedure of the Tribunal
- provides for the Minister to make rules by way of legislative instrument
- generally provides for a two year time limit on the making of applications, unless that two year period is extended by way of legislative instrument.

The National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019 will make consequential amendments to:

- paragraph 13(1)(k) of the *Australian Sports Anti-Doping Authority Act 2006*, so as to ensure that the National Anti-Doping Scheme is required to authorise the ASADA CEO, in certain circumstances, to present certain assertions and information at hearings of the Tribunal
- subsection 13D(3) of the *Australian Sports Anti-Doping Authority Act 2006*, so as to ensure that material obtained under a disclosure notice under that Act can be presented as evidence in the Tribunal
- Schedule 3 to the *Freedom of Information Act 1982*, so as to ensure that material is exempted from release under that Act where its disclosure is prohibited by the secrecy provision at section 72 of the *National Sports Tribunal Act 2019*.

The Bill also provides for the application of the provisions of *the National Sports Tribunal Act 2019* to disputes and decisions made before, on or after commencement.

Given that the establishment of a statutory tribunal to resolve sport-related disputes is new in the Australian context, the Government has decided to implement the Tribunal as a 2 year pilot, in the first instance. The Bill reflects this by containing a provision that imposes a 2 year time limit on the making of applications, or a longer time limit as specified in the rules.

Financial Impact Statement

There is no net cost to Government.

Statement of Compatibility with Human Rights

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

NATIONAL SPORTS TRIBUNAL BILL 2019

This Bill 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*.

Overview of the Bill

The National Sports Tribunal Bill 2019 will establish an independent national sports tribunal to ensure the Australian sporting community has access to effective, efficient, transparent and independent specialist sports dispute resolution services.

In August 2017, the Minister for Sport requested a Review of Australia's Sports Integrity Arrangements (the Wood Review), as part of the work being done by the Australian Government to develop a National Sport Plan.

The Wood Review recommended, as one of its key measures, the establishment of an independent National Sports Tribunal (Tribunal) to address the shortcomings of the current dispute resolution system, to provide an expert, central hearing body that can supplement the work of sports' current internal dispute resolution arrangements and provide a dispute resolution forum for smaller sports.

This legislation is part of a comprehensive response to the evolving nature of global sports integrity threats that challenge the safety and fairness of Australian sport, as well as its broader social and economic value.

Establishing the Tribunal will provide the Australian sporting community access to a dispute resolution mechanism that provides:

- cost-effective processes for sports and participants
- timely, reliable and efficient procedures
- transparency (through release of decisions)
- preservation of actual and perceived independence.

Human rights implications

This Bill may engage the following rights:

- the right to privacy and reputation in Article 17 of the *International Covenant on Civil and Political Rights*
- the right to the presumption of innocence in Article 14(2) of the *International Covenant on Civil and Political Rights*
- the right to a fair trial and fair hearing rights in Article 14 of the *International Covenant on Civil and Political Rights*.

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

Clause 72 of the Bill 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 clause 66 or 67, or a person engaged as a consultant, or an expert witness, under clause 68. The maximum penalty for breach of this provision is imprisonment for 2 years. The Bill provides exceptions to this prohibition in defined circumstances, including where the disclosure or use is for the purposes of the Act or the rules, for the purposes of, or in connection with, the performance or exercise of the person’s functions, duties or powers in the person’s capacity as an entrusted person, is in accordance with the rules prescribed for the purposes of paragraph 72(2)(d), is consented to by the relevant person, or occurs after the relevant information has been lawfully made public.

By preventing the disclosure of protected information, clause 72 positively engages the right to privacy and reputation in Article 17 of the *International Covenant on Civil and Political Rights*. Clause 72 provides for exceptions to this prohibition on disclosure, but does not positively authorise or require disclosure in the specified circumstances, and 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’.

Publication in accordance with practice and procedure determination

Clause 41(2) of the Bill permits the CEO to make a determination (by notifiable instrument) in relation to the practice and procedure of the Tribunal, with which Tribunal members are required to comply in the arbitration context (clause 41(1)). Clause 41(3) provides that the determination may deal with particular matters, which include the circumstances in which determinations of the Tribunal, and reasons for the determinations, are to be published or not published (including the circumstances in which information is to be de-identified). In some circumstances, the CEO’s determination may require Tribunal members to publish personal information about a person, such as an athlete or support person (and such publication will not be prohibited by clause 72, as it will be for the purposes of the performance or exercise of the members’ functions, duties or powers).

Clause 41(2) may engage and limit the right to privacy and reputation because a determination made under that provision may require Tribunal members to publish a person’s personal information. In the anti-doping context, the publication of certain information by the Tribunal may be necessary for compliance with Australia’s international obligations under Article 3 of the *UNESCO International Convention against Doping in Sport* to implement the purposes of the Convention in a manner consistent with the principles of the World Anti-Doping Code, eg, to provide a hearing consistent with the requirements of the World Anti-Doping Code. (It is

expected that, to the extent they deal with anti-doping matters, determinations made under clause 41(2) will be made consistent with that Code.) In the context of disputes in the General Division, and in relation to matters other than anti-doping matters in the Appeals Division, it may be appropriate to publish personal information to inform parties of the outcome of the dispute. Because it will be in accordance with a direction made by the CEO (which is by way of notifiable instrument), any publication of personal information by the Tribunal will not be arbitrary.

Clauses 42(1) and 42(2) of the Bill permit a Tribunal member conducting an arbitration to require a person to appear before the Tribunal to give evidence, or to give the Tribunal particular information, or produce particular documents or things, and to require a witness before the Tribunal to answer a question. It is an offence for a person to fail to comply with any of these requirements. These provisions engage the right to privacy, as they may require persons to divulge personal information.

One of the key findings of the Wood Review was that the inability of sport-run tribunals or the Court of Arbitration for Sport to compel third party witnesses (witnesses beyond contracts with the relevant sports) to give evidence or provide documents or things for the purposes of arbitration represents a significant weakness in the integrity response, which is likely to worsen with an increase in non-analytical Anti-Doping Rule Violations. On this basis, the Wood Review recommended that the Tribunal have available these powers to gather information.

It is important to note that a member can only require a person to appear before the Tribunal to give evidence if the member reasonably believes that the person is capable of giving evidence relevant to the dispute being arbitrated, and can only require a person to give particular information, or produce particular documents or things if the member reasonably believes that the person has information, documents or things relevant to that dispute.

Taking these factors into account, the Tribunal's proposed information gathering powers are a necessary, reasonable and proportionate imposition on the individual's right to privacy.

Right to the presumption of innocence

Clause 72 of the Bill makes it an offence for an entrusted person to disclose or use certain information that was obtained in their capacity as an entrusted person. Subclause 72(2) provides for exceptions to this prohibition in defined circumstances, including where the making of the record or the disclosure or use is for the purposes of the Act or rules, or for the purposes of, in connection with, the performance or exercise of the person's functions, duties or powers in the person's capacity as an entrusted person, is in accordance with the rules prescribed for the purposes of paragraph 72(2)(d), is consented to by the relevant person, or occurs after the relevant information has been lawfully made public. It creates an evidential burden on a defendant who seeks to show that a disclosure was authorised or required within the terms of subclause 72(2).

The placing of an evidential burden on the defendant in relation to these exceptions engages the right to be presumed innocent in Article 14(2) of the *International Covenant on Civil and Political Rights*. Article 14(2) of the *International Covenant on*

Civil and Political Rights provides that persons charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.

Reverse burden provisions will impose an acceptable limitation on the right to presumption of innocence if they are reasonable in the circumstances and maintain the rights of the accused. Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it.

Preventing the disclosure of protected information is important, both because of the content of the information (much of the information is likely to be information that would be regarded as 'sensitive personal information' under the *Privacy Act 1988*), and because of the potential for the disclosure or use of that information to prejudice the interests of persons involved in disputes before the Tribunal.

The scope of 'entrusted persons' to whom the secrecy provision applies is broad, as are the potential sources of authority for a disclosure. It will not reasonably be possible for a prosecution to disprove every conceivable source of authority in many cases, when that information is within the knowledge of the entrusted person who made the disclosure. In order to protect protected information effectively, it is reasonable, necessary and proportionate to require a defendant to adduce or point to evidence that suggests a reasonable possibility that one of the exceptions listed in subclause 72(2) applies. Consequently, it is reasonable, necessary and proportionate for subclause 72(2) to limit the right to the presumption of innocence.

Right to a fair trial and fair hearing rights

By establishing the Tribunal, the Bill may engage Article 14 of the *International Covenant on Civil and Political Rights*:

All persons shall be equal before the courts and tribunals. everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law

However, the Tribunal will not be a court and it will exercise private arbitral authority, rather than judicial or merits review functions. The arbitral authority of the Tribunal to deal with a dispute will be conferred under the agreement between the parties to that dispute (which in practice may take a variety of forms). Consequently, even if the right to a fair trial and fair hearing rights was engaged by the Bill, it would be reasonable, necessary and proportionate for it not to meet all of the standards that would generally be expected in relation to a court or even in relation to a merits review tribunal.

In particular, even if the Bill engages the right to a fair trial and fair hearing rights, it is reasonable, necessary and proportionate for the Bill not to require that Tribunal hearings are public. The practice and procedure of the Tribunal will be determined primarily by a determination made by the CEO of the Tribunal (which will be a notifiable instrument), and this determination will deal with the conduct of hearings, including whether they are to be held in private. Consistent with the World Anti-

Doping Code, the hearing of anti-doping matters will be held in private. In the context of the General Division, and matters other than anti-doping matters in the Appeals Division, matters that may be heard between two disputing parties may be of a personal nature and not appropriate to be held in public.

The Bill may promote the right to a fair trial and fair hearing rights as it contains various measures to ensure that Tribunal members and the CEO are, and are seen to be, impartial and independent, including strict requirements to disclose conflicts of interest, limitations on paid work outside the Tribunal, and limitations on the Minister's power to issue directions to the CEO in relation to specific persons or matters.

Conclusion

The Bill is compatible with human rights because it promotes the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Senator the Hon Richard Colbeck, Minister for Aged Care and Senior
Australians, Minister for Youth and Sport**

Statement of Compatibility with Human Rights

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Overview of the Bill

The National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019 will make consequential amendments to:

- paragraph 13(1)(k) of the *Australian Sports Anti-Doping Authority Act 2006*, so as to ensure that the National Anti-Doping Scheme is required to authorise the ASADA CEO, in certain circumstances, to present certain assertions and information at hearings of the Tribunal
- subsection 13D(3) of the *Australian Sports Anti-Doping Authority Act 2006*, so as to ensure that material obtained under a disclosure notice under that Act can be presented as evidence in the Tribunal
- Schedule 3 to the *Freedom of Information Act 1982*, so as to ensure that material is exempted from release under that Act where its disclosure is prohibited by the secrecy provision at section 72 of the *National Sports Tribunal Act 2019*.

The Bill also provides for the application of the provisions of *the National Sports Tribunal Act 2019* to disputes and decisions made before, on or after commencement.

Human rights implications

This Bill engages the following right:

- the right to privacy and reputation in Article 17 of the *International Covenant on Civil and Political Rights*.

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.’

The secrecy protections of clause 72 of the National Sports Tribunal Bill 2019 will be extended by the inclusion of a reference to that provision in Schedule 3 to the *Freedom of Information Act 1982*. This will ensure that, in circumstances in which section 72 of the *National Sports Tribunal Act 2019* prohibits a person from disclosing or otherwise using protected information, the *Freedom of Information Act 1982* will not require the release of that information.

By ensuring that appropriate protections are available to prevent the disclosure of protected information, the recognition of the Bill’s secrecy provision in the *Freedom*

of Information Act 1982 positively engages the right to privacy and reputation in Article 17 of the *International Covenant on Civil and Political Rights*.

Conclusion

The Bill is compatible with human rights because it promotes the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Senator the Hon Richard Colbeck, Minister for Aged Care and Senior
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NATIONAL SPORTS TRIBUNAL BILL 2019

NOTES ON CLAUSES

Current Sports Dispute Resolution Arrangements

Currently, most professional sporting codes in Australia employ in-house dispute resolution tribunals to adjudicate Anti-Doping Rule Violations (ADRV) and other integrity/code breaches. Some also have internal appeal mechanisms. These tribunals are constituted by experienced lawyers and others with sports medicine expertise or significant sporting backgrounds, and are well respected.

Many smaller sports do not have the same resources or capacity to establish and / or maintain in-house integrity units or dispute resolution bodies; as such their rules may permit or require referral to the Court of Arbitration for Sport (CAS) or to an ad hoc tribunal.

The Wood Review found deficiencies in Australia's current sports dispute resolution arrangements, particularly with respect to procedural powers, independence, transparency, accessibility and timeliness.

It recommended, as one of its key measures, establishing an independent National Sports Tribunal (Tribunal) to address the shortcomings of the current dispute resolution system - to provide an expert, central hearing body that can supplement the work of sports' current internal dispute resolution arrangements where they may exist and provide a dispute resolution forum for the smaller sports.

The National Sports Tribunal

The Tribunal will be an independent arbitral tribunal for sports matters. It will be established by statute, exercising powers of private arbitration underpinned by legislation that will also enable it to engage in mediation, conciliation and other dispute resolution strategies for the prompt and cost-effective resolution of cases brought to it.

Further, the Tribunal will have available appropriate powers to facilitate the effective resolution of cases, including the power to order a witness to appear before it to give evidence, and/or to produce documents or things; and the power to inform itself independently of submissions made by parties.

The Tribunal will have two first-instance divisions – the Anti-Doping Division, and the General Division, and will also offer an Appeals Division.

It is important to note that while the Tribunal is to be established by statute, it will be resolving disputes through exercising powers of private arbitration. As the Wood Review observed at p 205 (footnotes from the Report included in the text):

It is possible, in general, to confer arbitral authority on a Commonwealth agency. Under such arrangements, the courts have explained, the Commonwealth agency is exercising a 'power of private arbitration ... [where] the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract.' (*Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645,

658). Acting as a private arbitrator, a Commonwealth agency such as the proposed body is understood not to be exercising ‘government power’ (*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* (2015) 235 FCR 305, 338) or ‘public law functions’ (*Linfox Australia Pty Ltd v Transport Workers Union of Australia* (2013) 213 FCR 479, 490).

Because the Tribunal will be resolving disputes in accordance with contractual arrangements agreed between the parties for the resolution of their dispute, the scope for judicial review of an arbitration will be limited.

Anti-Doping Division

In Australia, sporting bodies’ anti-doping policies must be approved by the ASADA CEO under the ASADA legislative framework. It is through this approval process that the Tribunal will become the default dispute resolution body responsible for arbitrating anti-doping matters in Australia, other than in circumstances where the ASADA CEO approves a sporting body having an internally-run tribunal for anti-doping matters.

Immediately following commencement however, it is unlikely that many, if any sporting bodies will have recognised the Tribunal in their rules. It is, in part, for this reason that an ‘ad-hoc’ mode of access to the Tribunal will be available, by agreement between the sport, the athlete or support person and the ASADA CEO.

In circumstances where the anti-doping policy of a sport provides that the Tribunal is the hearing body for first-instance anti-doping matters, or the sport, the athlete or support person and the ASADA CEO otherwise agree for the Tribunal to conduct first instance arbitration, a party to that first instance arbitration (or certain other persons as provided for in the anti-doping policy or agreement) will be able to appeal to the Appeals Division. The World Anti-Doping Code (Code) requires that certain bodies, for example, the World Anti-Doping Agency (WADA), and relevant international sporting federations, have a direct right of appeal to CAS. The Bill will not prevent those bodies exercising that appeal right, should they so choose.

General Division

The General Division will be able to arbitrate disputes between a person and a sporting body, and disputes between 2 or more persons in a sport (where the sporting body agrees), where the constituent documents of the sport permit the dispute to be heard in the General Division, or where the sport and the person, or the sport and the 2 or more persons in dispute, otherwise agree to refer their dispute to the General Division of the Tribunal for arbitration.

The rules will prescribe the kinds of disputes that will be able to be referred, and the CEO will also have the ability to approve the referral of additional kinds of dispute, in exceptional circumstances.

The reason for these provisions is to place appropriate limits around the matters that the General Division is to deal with. For example, it is not intended that the General Division of the Tribunal would extend to dealing with on-field incidents that would not amount to breaches of sports’ integrity policies or minor behavioural issues that

are capable of being dealt with at sport level. Nor is it intended that the General Division of the Tribunal would deal with commercial contract disputes, or disputes about employment entitlements, both of which are more appropriately dealt with in the civil courts.

Appeals Division

The Tribunal will have an Appeals Division for both anti-doping and general matters. Given the powers that will be available to the Tribunal to obtain evidence and otherwise inform itself of relevant matters, the CEO will be able to determine, as part of the practice and procedure of the Tribunal, circumstances in which hearings will not need to be held in order to deal with an appeal. This will allow for an expedited appeal process, where appropriate.

Type of dispute	Applicable criteria	Who may apply for arbitration	Parties to the arbitration
<i>Anti-Doping Division (Anti-doping Policy recognises the Anti-Doping Division)</i>			
<ul style="list-style-type: none"> • Anti-doping dispute • Relates to an athlete or support person • s22(1) 	<p>Sporting body has an ADP that is approved by the ASADA CEO</p> <p>Athlete or support person is bound by the ADP</p> <p>ADP permits dispute to be heard in the Anti-Doping Division</p>	The athlete or support person	<p>The athlete or support person</p> <p>The sporting body</p> <p>The ASADA CEO</p> <p>Any other person or body that is permitted by the ADP to participate in a hearing of a dispute of the relevant kind, and advises the Tribunal in writing of their wish to be a party</p>
<i>Anti-Doping Division (Anti-doping Policy does not recognise the Anti-Doping Division)</i>			
<ul style="list-style-type: none"> • Anti-doping dispute • Relates to an athlete or support person • s22(2) 	<p>Sporting body has an ADP that is approved by the ASADA CEO</p> <p>Athlete or support person is bound by the ADP</p> <p>ADP does not provide for dispute to be heard in the Anti-Doping Division</p> <p>World Anti-Doping Code provides for a form of hearing in relation to disputes of this kind</p> <p>Athlete or support person, sporting body and ASADA CEO have agreed in writing to refer the dispute to the Anti-Doping Division</p>	The athlete or support person	<p>The athlete or support person</p> <p>The sporting body</p> <p>The ASADA CEO</p> <p>Any other person or body that is specified in the agreement as being permitted to participate in a hearing of a dispute of the relevant kind, and that advises the Tribunal in writing of their wish to be a party</p>

Type of dispute	Applicable criteria	Who may apply for arbitration	Parties to the arbitration
<i>General Division (constituent documents recognise the General Division)</i>			
<ul style="list-style-type: none"> • Dispute other than an anti-doping dispute • Between a person and a sporting body • s23(1)(b)(i) 	<p>Person is bound by one or more constituent documents of the sporting body</p> <p>Constituent document/s permit the dispute to be heard in the General Division</p> <p>Either the kind of dispute is prescribed by the rules, or the CEO has approved the dispute, in writing, due to exceptional circumstances</p>	<p>The person</p> <p>The sporting body</p>	<p>The person</p> <p>The sporting body</p> <p>Any other person or body that is permitted by a constituent document to participate in a hearing of a dispute of the relevant kind, and that advises the Tribunal in writing of their wish to be a party</p>
<ul style="list-style-type: none"> • Dispute other than anti-doping dispute • Between 2 or more persons • s24(1)(b)(i) 	<p>All of the persons are bound by one or more constituent documents of the sporting body</p> <p>Constituent document/s permit the dispute to be heard in the General Division</p> <p>Either the kind of dispute is prescribed by the rules, or the CEO has approved the dispute, in writing, due to exceptional circumstances</p>	<p>The sporting body</p>	<p>The 2 or more persons</p> <p>The sporting body</p> <p>Any other person or body that is permitted by a constituent document to participate in a hearing of a dispute of the relevant kind, and advises the Tribunal in writing of their wish to be a party.</p>

Type of dispute	Applicable criteria	Who may apply for arbitration	Parties to the arbitration
<i>General Division (constituent documents do not recognise the General Division)</i>			
<ul style="list-style-type: none"> • Dispute other than an anti-doping dispute • Between a person and a sporting body • s23(1)(b)(ii) 	<p>Person is bound by one or more constituent documents of the sporting body</p> <p>Constituent document/s do not provide for the dispute to be heard in the General Division</p> <p>The person and the sporting body have agreed in writing to refer the dispute to the General Division</p> <p>Either the kind of dispute is prescribed by the rules, or the CEO has approved the dispute, in writing, due to exceptional circumstances</p>	<p>The person</p> <p>The sporting body</p>	<p>The person</p> <p>The sporting body</p> <p>Any other person or body that is permitted by a constituent document to participate in a hearing of a dispute of the relevant kind, and that advises the Tribunal in writing of their wish to be a party</p>
<ul style="list-style-type: none"> • Dispute other than anti-doping dispute • Between 2 or more persons • s24(1)(b)(ii) 	<p>All of the persons are bound by one or more constituent documents of the sporting body</p> <p>Constituent document/s do not provide for the dispute to be heard in the General Division</p> <p>The persons and the sporting body have agreed in writing to refer the dispute to the General Division</p> <p>Either the kind of dispute is prescribed by the rules, or the CEO has approved the dispute, in writing, due to exceptional circumstances</p>	<p>The sporting body</p>	<p>The 2 or more persons</p> <p>The sporting body</p> <p>Any other person or body that is permitted by a constituent document to participate in a hearing of a dispute of the relevant kind, and advises the Tribunal in writing of their wish to be a party.</p>

Type of dispute	Applicable criteria	Who may apply for arbitration	Parties to the arbitration
<i>Appeals Division (Anti-doping policy/constituent documents recognise the Appeals Division)</i>			
<ul style="list-style-type: none"> Appealing an anti-doping determination <i>made by the Anti-Doping Division</i> s31(1) 	ADP permits an appeal to the Appeals Division from the determination	<p>A party to the arbitration</p> <p>Any other person or body permitted by the ADP to make such an appeal</p>	<p>The parties to the arbitration</p> <p>The applicant (where the applicant was not a party to the arbitration)</p> <p>Any other person or body that is permitted by the ADP to make an appeal to the Appeals Division from the determination, and advises the Tribunal in writing of their wish to be a party</p>
<ul style="list-style-type: none"> Appealing an anti-doping decision <i>made by a sporting body</i> s32(1) 	<p>Sporting body has an ADP that is approved by the ASADA CEO</p> <p>Athlete or support person is bound by the ADP</p> <p>Sporting body's decision is of a kind that the World Anti-Doping Code provides may be made without a hearing</p> <p>ADP permits an appeal to the Appeals Division from the decision</p>	<p>The athlete or support person</p> <p>The ASADA CEO</p> <p>Any other person or body permitted by the ADP to make such an appeal</p>	<p>The athlete or support person</p> <p>The sporting body</p> <p>The ASADA CEO</p> <p>The applicant (if not covered by the above)</p> <p>Any other person or body that is permitted by the ADP to make an appeal to the Appeals Division from the decision, and advises the Tribunal in writing of their wish to be a party</p>

Type of dispute	Applicable criteria	Who may apply for arbitration	Parties to the arbitration
<i>Appeals Division (Anti-doping policy/constituent documents recognise the Appeals Division) (continued)</i>			
<ul style="list-style-type: none"> • Appealing an anti-doping decision <i>made by a sporting tribunal</i> • s33(1) 	<p>Sporting body has an ADP that is approved by the ASADA CEO</p> <p>Athlete or support person is bound by the ADP</p> <p>ADP permits an appeal to the Appeals Division from the decision</p>	<p>The athlete or support person</p> <p>The ASADA CEO</p> <p>The sporting body</p> <p>Any other person or body permitted by the ADP to make such an appeal</p>	<p>The athlete or support person</p> <p>The sporting body</p> <p>The ASADA CEO</p> <p>The applicant (if not covered by the above)</p> <p>Any other person or body that is permitted by the ADP to make an appeal to the Appeals Division from the decision, and advises the Tribunal in writing of their wish to be a party</p>
<ul style="list-style-type: none"> • Appealing a general determination <i>made by the General Division</i> • Between: <ul style="list-style-type: none"> - a person and a sporting body, or - 2 or more persons • s34(1) 	<p>Constituent document/s permit an appeal to the Appeals Division from the determination</p>	<p>A party to the arbitration</p> <p>Any other person or body permitted by a constituent document to make such an appeal</p>	<p>The parties to the arbitration</p> <p>The applicant (if they were not a party to the arbitration)</p> <p>Any other person or body that is permitted by a constituent document to make an appeal to the Appeals Division from the determination, and advises the Tribunal in writing of their wish to be a party</p>

Type of dispute	Applicable criteria	Who may apply for arbitration	Parties to the arbitration
<i>Appeals Division (Anti-doping policy/constituent documents recognise the Appeals Division) (continued)</i>			
<ul style="list-style-type: none"> • Appealing a general decision <i>made by a sporting tribunal</i> • Between a person and a sporting body • s35(1) 	<p>The person is bound by one or more constituent documents of the sporting body</p> <p>Constituent document/s permit an appeal to the Appeals Division from the decision</p> <p>Either the kind of dispute is prescribed by the rules, or the CEO has approved the dispute, in writing, due to exceptional circumstances</p>	<p>The person</p> <p>The sporting body</p> <p>Any other person or body permitted by a constituent document to make such an appeal</p>	<p>The person</p> <p>The sporting body</p> <p>The applicant (if not covered by the above)</p> <p>Any other person or body that is permitted by a constituent document to make an appeal to the Appeals Division from the decision, and advises the Tribunal in writing of their wish to be a party</p>
<i>Appeals Division (Anti-doping policy/constituent documents do not recognise the Appeals Division)</i>			
<ul style="list-style-type: none"> • Appealing an anti-doping determination <i>made by the Anti-Doping Division</i> • s31(2) 	<p>ADP does not provide for an appeal to the Appeals Division from the determination</p> <p>Athlete or support person, sporting body and ASADA CEO have agreed in writing that an appeal may be made to the Appeals Division</p>	<p>A party to the arbitration</p> <p>Any other person or body specified in that agreement as being able to make such an appeal</p>	<p>The parties to the arbitration</p> <p>The applicant (where the applicant was not a party to the arbitration)</p> <p>Any other person or body that is specified in the agreement as being able to make an appeal to the Appeals Division from the determination, and advises the Tribunal in writing of their wish to be a party</p>

Type of dispute	Applicable criteria	Who may apply for arbitration	Parties to the arbitration
<ul style="list-style-type: none"> • Appealing an anti-doping decision <i>made by a sporting body</i> • s32(2) 	<p>Sporting body has an ADP that is approved by the ASADA CEO</p> <p>Athlete or support person is bound by the ADP</p> <p>The sporting body's decision is of a kind that the World Anti-Doping Code provides may be made without a hearing</p> <p>Sporting body's decision is of a kind that the World Anti-Doping Code permits an appeal from</p> <p>ADP does not provide for an appeal to the Appeals Division</p> <p>Athlete or support person, sporting body and ASADA CEO have agreed in writing that an appeal may be made to the Appeals Division from the decision</p>	<p>The athlete or support person</p> <p>The ASADA CEO</p> <p>Any other person or body specified in the agreement as being able to make such an appeal</p>	<p>The athlete or support person</p> <p>The sporting body</p> <p>The ASADA CEO</p> <p>The applicant (if not covered by the above)</p> <p>Any other person or body that is specified in the agreement as being able to make an appeal to the Appeals Division from the decision, and advises the Tribunal in writing of their wish to be a party</p>

Type of dispute	Applicable criteria	Who may apply for arbitration	Parties to the arbitration
<i>Appeals Division (Anti-doping policy/constituent documents do not recognise the Appeals Division) (continued)</i>			
<ul style="list-style-type: none"> • Appealing an anti-doping decision <i>made by a sporting tribunal</i> • s33(2) 	<p>Sporting body has an ADP that is approved by the ASADA CEO</p> <p>Athlete or support person is bound by the ADP</p> <p>Sporting body's decision is of a kind that the World Anti-Doping Code permits an appeal from</p> <p>ADP does not provide for an appeal to the Appeals Division from the decision</p> <p>Athlete or support person, sporting body and ASADA CEO have agreed in writing that an appeal may be made to the Appeals Division from the decision</p>	<p>The athlete or support person</p> <p>The ASADA CEO</p> <p>The sporting body</p> <p>Any other person or body specified in the agreement as being able to make such an appeal</p>	<p>The athlete or support person</p> <p>The sporting body</p> <p>The ASADA CEO</p> <p>The applicant (if not covered by the above)</p> <p>Any other person or body that is specified in the agreement as being able to make an appeal to the Appeals Division from the decision, and advises the Tribunal in writing of their wish to be a party</p>
<ul style="list-style-type: none"> • Appealing a general determination <i>made by the General Division</i> • Between <ul style="list-style-type: none"> - a person and a sporting body, or - 2 or more persons • s34(2) 	<p>Constituent document/s do not provide for an appeal to the Appeals Division from the determination</p> <p>The parties to the arbitration have agreed in writing that an appeal may be made to the Appeals Division from the determination</p>	<p>A party to the arbitration</p> <p>Any other person or body specified in the agreement as being able to make such an appeal</p>	<p>The parties to the arbitration</p> <p>The applicant (if they were not a party to the arbitration)</p> <p>Any other person or body that is specified in the agreement as being able to make an appeal to the Appeals Division from the determination, and advises the Tribunal in writing of their wish to be a party</p>

Type of dispute	Applicable criteria	Who may apply for arbitration	Parties to the arbitration
<i>Appeals Division (Anti-doping policy/constituent documents do not recognise the Appeals Division) (continued)</i>			
<ul style="list-style-type: none"> • Appealing a general decision <i>made by a sporting tribunal</i> • s35(2) 	<p>The person is bound by one or more constituent documents of the sporting body</p> <p>Constituent document/s do not provide for appeal to the Appeals Division from the decision</p> <p>The person and the sporting body have agreed in writing that an appeal may be made to the Appeals Division from the decision</p> <p>Either the kind of dispute is prescribed by the rules, or the CEO has approved the dispute, in writing, due to exceptional circumstances</p>	<p>The person</p> <p>The sporting body</p> <p>Any other person or body specified in the agreement as being able to make such an appeal</p>	<p>The person</p> <p>The sporting body</p> <p>The applicant (if not covered by the above)</p> <p>Any other person or body that is specified in the agreement as being able to make an appeal to the Appeals Division from the decision, and advises the Tribunal in writing of their wish to be a party</p>

Part 1—Preliminary

Clause 1: Short title

The effect of this clause is that the Bill, when enacted, may be cited as the *National Sports Tribunal Act 2019* (the Act).

Clause 2: Commencement

This clause provides for the commencement of the entire Bill on a date to be fixed by proclamation. In the absence of proclamation within a period of 6 months beginning on the day of Royal Assent, the Bill will commence on the day after that period ends.

Once the Bill receives Royal Assent, the Minister will be able to make appointments and rules, which will come into effect when the substantive clauses of the Bill commence (see section 4 of the *Acts Interpretation Act 1901*).

Clause 3: Object of this Act

This clause sets out the object of the Act, which is to establish the Tribunal to provide an effective, efficient, independent, transparent and specialist tribunal for the fair hearing and resolution of sporting disputes.

Subclause (2) highlights that the Bill gives effect to the *UNESCO International Convention Against Doping in Sport*: of particular relevance in this respect are the provisions of the Bill dealing with the Anti-Doping Division and anti-doping related disputes that are appealed to the Appeals Division. The Bill also gives effect to other international agreements prescribed by the rules.

Clause 4: Simplified outline of this Act

This clause provides an overview of the Bill. It should be noted that, while this outline is included to assist readers to understand the legislation, readers should rely on the substantive provisions of the Bill.

Clause 5: Definitions

Subclause (1) sets out definitions for certain terms used in the Bill.

In this context, a key definition for the Bill is the definition of ‘sporting body’. A sporting body is defined as (a) a national sporting organisation for a particular sport, or (b) a body or organisation specified in an instrument under subclause (3).

Subclause (3) will provide that the CEO may, by notifiable instrument, specify a body or organisation for the purposes of paragraph (b) of the definition of ‘sporting body’. A body or organisation will be able to be specified by name, or by class. This facility will provide greater access to the Tribunal for those sporting bodies that wish to use the Tribunal.

The notifiable instrument is not legislative in character pursuant to the *Legislation Act 2003* as it does not determine or alter the content of the law, but rather, simply determines to whom the law applies.

Subclause (2) clarifies that the word ‘dispute’, when used in the Act, includes a dispute in connection with a decision made by a person or body. For example, a dispute would include circumstances in which an athlete disagreed with a decision of

a national sporting organisation not to select them for a particular event, or not to impose a sanction on a person in relation to whom the athlete had made a bullying complaint.

Clause 6: Application of this Act

This clause sets out the constitutional coverage for the Act. Subclause (1) makes clear that the provisions of the Act governing the process for arbitration of anti-doping disputes and appeals, and related provisions of the Act, rely on the Commonwealth's legislative power in respect of external affairs (s 51(xxix) of the Constitution) to give effect to the *UNESCO International Convention Against Doping in Sport*. Relevantly, the Convention requires States Parties to adopt anti-doping measures that are consistent with the principles of the Code. In this context, the Code sets out requirements for the results management of asserted breaches of the anti-doping rules, including requirements for anti-doping hearings and appeals.

Subclause (2) concerns disputes other than anti-doping disputes. It provides that the provisions governing the process for the resolution of such disputes (whether by arbitration or alternative dispute resolution mechanisms), and related provisions of the Act, apply in relation to disputes of a kind that are listed in the subclauses.

The first category of disputes (paragraph (2)(a)) concern those where the relevant sporting body is a trading or financial corporation within the meaning of s 51(xx) of the Constitution, or is a body corporate incorporated in a Territory, or is a body corporate taken to be registered in a Territory under s 119A of the *Corporations Act 2001*.

The second category of disputes (paragraph 2(b)) are those involving matters relating to a sporting event at which Australia is to be, is, or was, represented as a nation. Assuming the relevant sporting bodies and their members were to agree to submit disputes of this nature for resolution by the Tribunal, disputes of this kind would include: disputes concerning selection in an Australian team for an Olympic Games or Commonwealth Games (whether those Games are to be held in Australia or overseas), or for an event held between Australia or another nation (for example, the Ashes).

The third category of disputes (paragraph 2(c)) are those involving matters that occur beyond the limits of the States and Territories – in other words, involving matters geographically external to Australia. An example of a dispute of this kind would be where an athlete who is member of a sporting body travels overseas to train, and commits a breach of the sporting body's disciplinary code while overseas. Provided that the constituent documents of the sporting body enable the Tribunal to deal with the dispute, or the sporting body and the athlete otherwise agree to the Tribunal dealing with the dispute.

Clause 7: Crown to be bound

Subclause (1) provides that the Act will bind the Crown in each of its capacities. This means that the Commonwealth and State and Territory executive governments will be bound to comply with the provisions of the Act. However, subclause (2) will operate so that the Crown is not liable to be prosecuted for an offence under the Act.

Clause 8: Extraterritorial application

This clause provides that the Act will extend to acts, omissions, matters and things outside Australia. This means, for example, that a dispute will be able to be heard by the Tribunal, even if the dispute is in relation to something that occurred overseas (provided the relevant threshold requirements for an application to the Tribunal specified in the Act are complied with).

Part 2—Establishment of the National Sports Tribunal

Division 1—Simplified outline of this Part

Clause 9: Simplified outline of this Part

This clause provides an overview of Part 2 of the Bill. It should be noted that, while this outline is included to assist readers to understand the legislation, readers should rely on the substantive provisions of the Part following the simplified outline.

Division 2—Establishment of the National Sports Tribunal

Clause 10: Establishment of the National Sports Tribunal

This clause establishes the National Sports Tribunal (Tribunal).

Clause 11: Divisions of the National Sports Tribunal

This clause specifies the three Divisions of the Tribunal – the Anti-Doping Division, the General Division and the Appeals Division.

Division 3—Members of the National Sports Tribunal

Clause 12: Number of members

This clause provides that the Tribunal will consist of the members that are appointed in accordance with the Act. There is no minimum or maximum number of members that may be appointed: this means that the Minister will be able to appoint as many members as he or she considers necessary to provide the range of expertise and capacity required.

Clause 13: Appointment of members

Subclause (1) provides that a member is to be appointed by the Minister by written instrument, on a part-time basis. A person's appointment as a member does not guarantee them a minimum volume of work, or even that they will be allocated by the CEO of the Tribunal to an arbitration panel, or otherwise requested to provide services at all.

Subclause (2) provides that members hold office for the period specified in their instruments of appointment, which may be up to 5 years. Because the Tribunal will initially be established as a 2 year pilot, the initial member appointments will be for 2 years or less.

Subclause (3) prohibits the Minister from appointing a person as a member of the Tribunal unless the Minister is satisfied that they have experience or knowledge in one of the listed fields. It is important for the pool of members to have experience in a range of relevant fields, so that the CEO is able to appoint to each arbitration panel a

member or group of members with expertise that will enable an efficient and effective arbitration of the dispute in question.

Subclause (4) makes clear that the CEO of the Tribunal is not eligible for appointment as a member.

Clause 14: Remuneration

This clause provides for the remuneration and allowances of members to be determined by the CEO. The CEO will determine the remuneration of members having regard to factors such as the expertise of the member, the complexity of the matter arbitrated by the member and the financial capacity of the parties to the matter. It is anticipated that, in some circumstances, members may agree to receiving minimal or no remuneration in relation to a matter.

Clause 15: Other terms and conditions

This clause allows the CEO to set terms and conditions on which a member holds office, in addition (but not contrary) to those set out in the Act.

Clause 16: Disclosure of interests to the CEO

This clause provides an important mechanism for ensuring the actual and perceived impartiality of the Tribunal. It requires each member to notify the CEO of all interests of that member that conflict, or could conflict, with the proper performance of the member's functions. This obligation applies regardless of the type of interest (ie, whether the interest in question relates to money or anything else), and regardless of whether the member has the interest at the time of their appointment or they acquire it after their appointment.

One reason this clause is particularly important is that, because members will be appointed on a part-time basis, and have no guarantee of being allocated to an arbitration panel, it is expected that many members will engage in paid work outside the Tribunal. Further, it is anticipated that persons with the requisite skills and expertise required for appointment as a panel member are likely to have roles (paid or unpaid) within the sports sector.

Subclause (2) permits the rules to prescribe how and when interests must be disclosed and the consequences of disclosing an interest.

Clause 17: Resignation of appointment

This clause sets out the process for, and time of effect of, member resignations.

Clause 18: Termination of appointment

This clause sets out the circumstances in which the Minister may terminate the appointment of a member. These include circumstances in which the member fails, without reasonable excuse, to disclose interests to the CEO in accordance with clause 16.

Subclause (1) provides that the Minister may terminate the appointment of a member for misbehaviour. In *Vanstone v Clark* (2006) 224 ALR 666, the Full Court of the Federal Court concluded that for conduct to be regarded as 'misbehaviour' in the general sense it must bear on the person's capacity to hold office and the question

must be considered with reference to the particular office (at 673, 721)). The reference to ‘misbehaviour’ can apply to misbehaviour in the course of performing duties of the office, as well as misbehaviour out of office (eg the commission of a serious criminal offence) which affects the perceptions of others in relation to the office so that any purported performance of the office will be perceived as corrupt, improper or inimical to the interests of the persons, or the organisation for whose benefits the functions are performed (at 708); see also *Clark v Vanstone* (2004) 211 ALR 412 at 440-441).

Clause 19: Application of the *Public Governance, Performance and Accountability Act 2013*

This clause provides that a member is not an official for the purposes of the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act), which imposes a range of obligations on ‘officials’ of Commonwealth entities.

Clause 20: General duties of members

This clause imposes on members duties that are broadly equivalent to those imposed on an official of a Commonwealth entity by sections 26-28 of the PGPA Act, namely the duty to act honestly, in good faith and for a proper purpose, and duties in relation to use of position and use of information.

Part 3—Resolution of disputes by the National Sports Tribunal

Division 1—Simplified outline of this Part

Clause 21: Simplified outline of this Part

This clause provides an overview of Part 3 of the Bill. It should be noted that, while this outline is included to assist readers to understand the legislation, readers should rely on the substantive provisions of the Part following the simplified outline.

Division 2—Anti-Doping Division

Clause 22: Applications for arbitration of disputes relating to anti-doping policies

This clause sets out the criteria that must be satisfied before a person may apply to the Tribunal for arbitration of a dispute relating to an anti-doping policy of a sport, and specifies who may make such an application. There are different sets of criteria that apply to different circumstances. These different circumstances are intended to take account of the different arrangements provided for in the anti-doping policies of sports.

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

Importantly, Art 2 of the Code specifies circumstances and conduct that constitute ADRVs, and Art 10 provides for sanctions to be imposed on individuals should they commit an ADRV.

To be recognised as a national sporting organisation in Australia, and consequently be eligible for government funding, a sporting organisation is required to have an anti-doping policy for its sport that is approved by the ASADA CEO as being compliant

with the Code (including approval of substantive amendments to that policy). The ASADA CEO's approval of an anti-doping policy (or amendments to it) may occur before commencement of the Act, or afterwards.

In becoming members of a sport, athletes and support personnel agree to abide by the policies of the sport, including the anti-doping policy.

If an athlete or support person is asserted to have breached the terms of an anti-doping policy (ie, an ADRV is asserted against them) they will receive a notice from their sport (which may be referred to as an infraction notice) asserting a breach of the relevant provisions of the anti-doping policy of the sport.

Under the terms of the anti-doping policy, the athlete or support person can either choose to accept the violation and sanction, or apply for a hearing before a sport tribunal to dispute the assertion that they committed an ADRV, or dispute the sanction that the sport proposes to impose.

ASADA, as the national anti-doping organisation for Australia for the purposes of the Code, or WADA, may also wish to dispute a sanction imposed by a sporting body, or dispute the failure of a sporting body to impose a sanction.

Art 8 of the Code provides that an athlete or support person who is asserted to have committed an ADRV is entitled, at a minimum, to a fair hearing within a reasonable time by a fair and impartial hearing panel.

As discussed above, in Australia, some anti-doping disputes are arbitrated at first instance by tribunals run internally by individual sports. However, most sports do not have internal tribunals. Currently, their only available forum for ADRV disputes is CAS, a body based in Switzerland established to provide sport-related dispute resolution services (primarily arbitration) to parties who have agreed to its jurisdiction. The CAS Oceania Registry is based in Sydney.

Subclause (1) enables an athlete or support person to apply to the Tribunal for arbitration of an anti-doping dispute where the terms of the anti-doping policy by which they are bound permits such disputes to be heard in the Anti-Doping Division of the Tribunal.

Subclause (2) deals with the case where the terms of the anti-doping policy do not provide for the referral of an anti-doping dispute for hearing by the Anti-Doping Division of the Tribunal, but the dispute is of a kind in respect of which the Code provides for a hearing. Where the athlete or support person, the sporting body and the ASADA CEO agree in writing to refer the dispute to the Anti-Doping Division of the Tribunal, the athlete or support person will be able to apply to the Tribunal for arbitration of the dispute.

Immediately following commencement, it is unlikely that many, if any sporting bodies will have recognised the Tribunal in their rules. It is, in part, for this reason that an 'ad-hoc' mode of access to the Tribunal will be available, by agreement between the sport, the athlete or support person and the ASADA CEO.

It is through the ASADA legislative framework and requirement for anti-doping policies to be approved by the ASADA CEO that the Tribunal will become the default dispute resolution body responsible for arbitrating anti-doping matters in Australia

(other than in circumstances where the ASADA CEO approves a sporting body having an internally-run tribunal for anti-doping matters).

Subclause (3), paras (a)-(c) provide that the parties to the arbitration will be the athlete or support person, the sporting body, and the ASADA CEO. This generally reflects the current position, in which the sport delegates to the ASADA CEO its function of presenting cases against athletes or support personnel, but the sport is also a party to the proceedings.

Consistent with the Code, anti-doping policies also provide other relevant bodies (eg, a relevant international sporting federation, WADA, the Australian Olympic Committee, the Australian Sports Commission) the right to participate in a hearing, should they wish to do so. Paragraph (3)(d) provides a mechanism by which those bodies are able to become a party to an arbitration. In the case where the arbitration is as a result of an agreement under paragraph (2)(f), paragraph (3)(e) will provide a mechanism for other persons or bodies specified in that agreement to become a party to that arbitration.

Subclause (4) provides that the arbitration is to be conducted in the Anti-Doping Division of the Tribunal.

Division 3—General Division

Subdivision A – Applications for arbitration of disputes

It is proposed that sporting bodies will be able to use the General Division of the Tribunal for the arbitration of disputes that are not anti-doping disputes (other sport-related disputes).

That is, sporting bodies and certain persons associated with them will be permitted to utilise the Tribunal for the arbitration of other sport-related disputes, provided relevant threshold criteria are met. However, sporting bodies and certain persons associated with them may also choose to resolve disputes that are not anti-doping disputes by other alternative dispute resolution mechanisms.

Clause 23: Disputes between a person and a sporting body

This clause sets out the criteria that must be satisfied before a person may apply to the Tribunal for arbitration of a dispute, where the dispute is between a person and a sporting body.

This clause refers to ‘a person bound by one or more constituent documents by which a sporting body is constituted or according to which a sporting body operates’. Broadly stated, this expression is intended to encompass any person who has agreed to be bound by the rules of the sporting body. A person may enter into such an agreement in various ways, eg, by signing a membership form, or by signing an entry form when entering a race organised by the sporting body, and in doing so agreeing to be bound by the rules of the sport.

When a dispute arises between such a person and the relevant sporting body, the person or sporting body may apply to the Tribunal for arbitration of the dispute, provided those parties have agreed that the dispute can be arbitrated by the General Division of the Tribunal. This agreement may arise in 2 different ways:

- one or more of the constituent documents that bind the person and the sporting body permit disputes of the relevant kind to be arbitrated by the Tribunal
- none of the constituent documents permits disputes of the relevant kind to be arbitrated by the Tribunal, but the person and the sporting body agree separately, in writing, for the dispute to be arbitrated by the General Division of the Tribunal.

Subclause (2) provides that the parties to the arbitration are the person, the sporting body, and any other person or body that is permitted under any of the sporting body's constituent documents to participate in a hearing of a dispute of that kind, and that advises the Tribunal in writing that the person or body wishes to be a party to the arbitration. Subclause (3) provides that the arbitration is to be conducted in the General Division of the Tribunal.

However, a final criterion that must be met before a person or sporting body may apply to the Tribunal for arbitration of the dispute is that the dispute must either be of a kind prescribed by the rules for the purposes of this clause(subclause (1)(c)(i)), or be a dispute that is approved by the CEO in writing (subclause (1)(c)(ii)).

The CEO can only give an approval to a dispute being referred to the Tribunal if the CEO is satisfied that there are exceptional circumstances justifying the giving of the approval. Subclause (6) sets out circumstances that are exceptional for these purposes, but does not limit what can be considered exceptional circumstances for the purposes of subclause (5).

The CEO is not permitted to approve a particular dispute which is of a kind prescribed by the rules for the purpose of subclause (4).

Requiring the disputes that may be arbitrated in the General Division to be prescribed by type in the rules, or otherwise approved on a case by case basis by the CEO is intended to ensure that the Tribunal is not used to arbitrate disputes that are inappropriate for arbitration by the Tribunal, such as matters more appropriate for resolution in courts of law (eg, enforcement of employment entitlements), and matters that are more appropriately dealt with at a sport level (eg, on-field incidents).

Subclause (7) makes clear that the CEO's approval is not a legislative instrument. This provision has been included to assist readers, as the instrument is not a legislative instrument within the meaning of s 8(1) of the *Legislation Act 2003*.

Clause 24: Disputes between 2 or more persons

Sometimes sporting disputes arise under the rules of a sport between 2 or more persons involved in the sport, rather than between a person and a sporting body. This clause sets out the criteria that must be satisfied before a person may apply to the Tribunal for arbitration of such a dispute.

This clause refers to 'a person bound by one or more constituent documents by which a sporting body is constituted or according to which a sporting body operates'. Again, broadly stated, this expression is intended to encompass persons who have agreed to be bound by the rules of the sporting body. A person may enter into such an agreement in various ways, eg, by signing a membership form, or by signing an entry form when entering a race organised by the sporting body, and in doing so agreeing to be bound by the rules of the sport.

When a dispute arises between 2 or more such persons, the sporting body may apply to the Tribunal for arbitration of the dispute, provided those parties have agreed that the dispute can be arbitrated by the General Division of the Tribunal. This agreement may arise in 2 different ways:

- each of the persons are bound by one or more constituent documents that permit disputes of the relevant kind to be arbitrated by the Tribunal
- none of the constituent documents permit disputes of the relevant kind to be arbitrated by the Tribunal, but all of the persons agree separately, in writing, for the dispute to be arbitrated by the General Division of the Tribunal.

The persons in dispute may not themselves apply to the Tribunal for arbitration: the application can only be made by the sporting body under whose rules the dispute has arisen. This limitation is to ensure that the Tribunal only arbitrates disputes that the relevant sporting body considers appropriate for resolution by the Tribunal.

Subclause (2) provides that the parties to the arbitration are the persons involved in the dispute, the relevant sporting body, and any other person or body that is permitted under any of the sporting body's constituent documents to participate in a hearing of a dispute of that kind, and that advises the Tribunal in writing that the person or body wishes to be a party to the arbitration.

Again, a final criterion that must be met before a person or sporting body may apply to the Tribunal for arbitration of the dispute is that the dispute must either be of a kind prescribed by the rules for the purposes of this clause, or be approved by the CEO in writing.

The CEO is not permitted to approve a particular dispute which is of a kind prescribed by the rules for the purpose of subclause (4). The CEO can only give an approval if the CEO is satisfied that there are exceptional circumstances justifying the giving of the approval. Subclause (6) sets out circumstances that are exceptional for these purposes, but does not limit what can be considered exceptional circumstances.

As discussed above, requiring the disputes that may be arbitrated in the General Division to be prescribed by type in the rules, or otherwise approved on a case by case basis by the CEO is intended to ensure that the Tribunal is not used to arbitrate disputes that are inappropriate for arbitration by the Tribunal, such as matters more appropriate for resolution in courts of law, and matters that are more appropriately dealt with at a sport level.

Subclause (7) makes clear that the CEO's approval is not a legislative instrument. This provision has been included to assist readers, as the instrument is not a legislative instrument within the meaning of s 8(1) of the *Legislation Act 2003*.

Subdivision B—Applications for alternative dispute resolution processes

Clause 25: Disputes between a person and a sporting body

This clause sets out the criteria that must be satisfied before a person may apply to the Tribunal for mediation, conciliation or case appraisal of a dispute, where the dispute is between a person and a sporting body. Mediation, conciliation or case appraisal will only be available for disputes in the General Division.

This clause refers to ‘a person bound by one or more constituent documents by which a sporting body is constituted or according to which a sporting body operates’. Broadly stated, this expression is intended to encompass any person who has agreed to be bound by the rules of the sporting body. A person may enter into such an agreement in various ways, eg, by signing a membership form, or by signing an entry form when entering a race organised by the sporting body, and in doing so agreeing to be bound by the rules of the sport.

When a dispute arises between such a person and the relevant sporting body, the person or the sporting body may apply to the Tribunal for mediation, conciliation or case appraisal of the dispute, provided those parties have agreed in writing that the dispute can be referred to the Tribunal for mediation, conciliation or case appraisal by the General Division of the Tribunal.

Subclause (2) provides that the participants in the mediation, conciliation or case appraisal are the person and the sporting body, and subclause (3) provides that the mediation, conciliation or case appraisal is to be conducted in the General Division of the Tribunal.

The dispute must either be of a kind prescribed by the rules for the purposes of this clause, or be approved by the CEO in writing. The CEO is not permitted to approve a particular dispute which is of a kind prescribed by the rules for the purpose of subclause (4).

Requiring the disputes that may be the subject of mediation, conciliation or case appraisal in the General Division to be prescribed by type in the rules, or otherwise approved on a case by case basis by the CEO is intended to ensure that the Tribunal is not used to deal with disputes that are inappropriate for mediation, conciliation or case appraisal by the Tribunal, such as matters more appropriately dealt with at a sport level (although a wider range of matters will be appropriate for the purposes of this clause, as compared to the clauses relating to arbitration).

Subclause (5) makes clear that the CEO’s approval is not a legislative instrument. This provision has been included to assist readers, as the instrument is not a legislative instrument within the meaning of s 8(1) of the *Legislation Act 2003*.

Clause 26: Disputes between 2 or more persons

This clause sets out the criteria that must be satisfied before an application may be made to the Tribunal for mediation, conciliation or case appraisal of a dispute, where the dispute arises under the rules of a sport between 2 or more persons, rather than between a person and a sporting body. Mediation, conciliation or case appraisal will only be available for disputes in the General Division.

This clause refers to ‘a person bound by one or more constituent documents by which a sporting body is constituted or according to which a sporting body operates’. Again, broadly stated, this expression is intended to encompass persons who have agreed to be bound by the rules of the sporting body. A person may enter into such an agreement in various ways, eg, by signing a membership form, or by signing an entrance form when entering a race organised by the sporting body, and in doing so agreeing to be bound by the rules of the sport.

When a dispute arises between 2 or more such persons, the sporting body may apply to the Tribunal for mediation, conciliation or case appraisal of the dispute, provided

each of the persons has agreed in writing that the dispute can be referred to the Tribunal for mediation, conciliation or case appraisal by the General Division of the Tribunal.

The persons in dispute may not themselves apply to the Tribunal for mediation, conciliation or case appraisal: application can only be made by the sporting body under whose rules the dispute has arisen. This limitation is to ensure that the Tribunal only provides mediation, conciliation or case appraisal in relation to disputes for which the relevant sporting body considers Tribunal involvement appropriate. Each of the persons involved in the dispute, and also the relevant sporting body, are participants in the mediation, conciliation or case appraisal.

The dispute must either be of a kind prescribed by the rules for the purposes of this clause, or be approved by the CEO in writing. The CEO is not permitted to approve a particular dispute which is of a kind prescribed by the rules for the purpose of subclause (4).

Requiring the disputes that may be the subject of mediation, conciliation or case appraisal in the General Division to be prescribed by type in the rules, or otherwise approved on a case by case basis by the CEO is intended to ensure that the Tribunal is not used to deal with disputes that are inappropriate for mediation, conciliation or case appraisal by the Tribunal, such as matters more appropriately dealt with at a sport level (although a wider range of matters will be appropriate for the purposes of this clause, as compared to the clauses relating to arbitration).

Subclause (5) makes clear that the CEO's approval is not a legislative instrument. This provision has been included to assist readers, as the instrument is not a legislative instrument within the meaning of s 8(1) of the *Legislation Act 2003*.

The participants in the mediation, conciliation or case appraisal are each of the 2 or more persons and the sporting body, and the mediation, conciliation or case appraisal is to be conducted in the General Division of the Tribunal.

Division 4—Arbitration of disputes in Anti-Doping Division or General Division

Clause 27: Arbitration of disputes in Anti-Doping Division or General Division

Subclause (1) requires the Tribunal to conduct an arbitration of a dispute and make a written determination in relation to the dispute if an application is made for that arbitration in the circumstances permitted by Division 2, or Subdivision A of Division 3, and the application is made in accordance with Division 7 of Part 3.

Under subclause (2), the Tribunal's determination takes effect on the day specified in the determination and, under subclause (3), the Tribunal is required to give the parties to the arbitration written notice of the determination and its reasons for making that determination.

Subclause (4), paragraphs (a)-(c) set out certain circumstances in which the Tribunal may terminate an arbitration. Paragraph (4)(d) permits the rules to set out additional circumstances in which the Tribunal may terminate an arbitration.

Subclause (5) provides that the Tribunal will be able to suspend an arbitration in circumstances prescribed by the rules. An example of a circumstance that is to be

prescribed by the rules is where the Tribunal considers that it is appropriate to refer a General Division dispute to mediation or conciliation, before it is arbitrated.

Division 5—Alternative dispute resolution processes

Clause 28: Mediation, conciliation or case appraisal of disputes

Subclause (1) requires the Tribunal to conduct a mediation, conciliation, or case appraisal of a dispute if an application is made for that mediation, conciliation or case appraisal in the circumstances permitted by Subdivision B of Division 3 of Part 3, and the application is made in accordance with Division 7 of Part 3.

Subclause (2) requires the participants in the mediation, conciliation or case appraisal to act in good faith in relation to the conduct of the mediation, conciliation or case appraisal.

Clause 29: Practice and procedure of National Sports Tribunal in mediation, conciliation or case appraisal

This clause allows the CEO to make a determination in relation to the practice and procedure of the Tribunal in conducting a mediation, conciliation or case appraisal of a dispute, and requires the members of the Tribunal to comply with such a determination. The CEO's determination is a notifiable instrument.

Clause 30: Evidence not admissible

For mediation, conciliation and case appraisal to be successful it is important that participants feel that they are able to speak freely and put forward relevant information. The intention of this clause is to promote candour. It provides that anything said, or any act done in mediation, conciliation or case appraisal of a dispute before the Tribunal is not admissible in any court, or in any arbitration of the dispute by the Tribunal. However, it does not cause things said or done in a mediation, conciliation or case appraisal to be inadmissible in later arbitration before the Tribunal if the parties to the arbitration agree to those matters being admissible.

Division 6— Appeals Division

Subdivision A—Appealing decisions about anti-doping matters

The Bill will provide a pathway for appeals from the Tribunal's Anti-Doping Division to generally be able to be heard by the Appeals Division of the Tribunal.

However, it should be noted that the Code permits WADA and relevant international sporting federations to appeal directly to CAS, thereby bypassing the Tribunal. The Bill will not prevent this from occurring.

Where parties agree, the Bill will also provide a pathway for certain anti-doping decisions of sporting bodies and internal tribunals of sporting bodies to be appealed to the Appeals Division of the Tribunal.

Clause 31: Appealing decisions made in Anti-Doping Division

Subclause (1) deals with the circumstance where the Tribunal has made a determination at first instance in relation to an anti-doping dispute, and the anti-doping policy of the sport permits an appeal to the Appeals Division of the Tribunal.

In this case, a party to the arbitration, or another person or body permitted to do so by the anti-doping policy, can appeal the determination. The reference to ‘other person or body’ is a reference to persons or bodies that Art 13 of the Code specifies may also appeal decisions – for example, ASADA, an international sporting federation, or WADA.

Subclause (2) deals with the circumstance where the Tribunal has made a determination at first instance, and the anti-doping policy of the sport does not permit an appeal to the Appeals Division of the Tribunal. Where the athlete or support person, the sporting body and the ASADA CEO have agreed in writing that an appeal is able to be made to the Appeals Division of the Tribunal, a party to the original arbitration, or any other person or body specified in that agreement as being able to make such an appeal, may appeal to the Appeals Division.

Subclause (4) provides that if the appeal is under subclause (1), the parties to the appeal are the parties to the original arbitration, the applicant (if they were not a party to the arbitration), and any other person or body that is permitted under the anti-doping policy to participate in an appeal of that kind, that advises the Tribunal in writing that they wish to be a party to the appeal.

Where the appeal is under subclause (2), the parties to the appeal are the parties to the original arbitration, the applicant (if they were not a party to the arbitration), and any other person or body specified in the agreement as being able to make an appeal, that advises the Tribunal in writing that they wish to be a party to the appeal.

Clause 32: Appealing decisions made by sporting bodies

In the context of anti-doping, there are certain decisions that are able to be made by a sporting body, without the need for a hearing. These include, for example, a decision to impose consequences (ie, a sanction) for an anti-doping rule violation, a decision not to impose consequences for an anti-doping rule violation, or a decision not to take forward a matter as an anti-doping rule violation. Article 13.2.2 of the Code (as replicated in the anti-doping policies of sports) relevantly provides that appeals from decisions made by a sporting body in relation to national level athletes are able to be appealed to a national level appeal body.

Subclause (1) deals with the case where the anti-doping policy permits an appeal from a decision of a sporting body to the Appeals Division of the Tribunal. An appeal may be made by any person or body permitted by the anti-doping policy to do so.

Subclause (2) deals with the case where the anti-doping policy does not permit an appeal to the Appeals Division of the Tribunal. (For example, the anti-doping policy might provide a right of appeal to CAS.) Where the athlete or support person, the sporting body and the ASADA CEO have agreed in writing that the appeal is able to be made to the Appeals Division of the Tribunal from the decision, and the decision is of a kind that the World Anti-Doping Code permits an appeal from, the athlete, support person or ASADA CEO, or any other person specified in the agreement, can appeal the decision.

Subclause (4) provides that the parties to such an appeal are the athlete or support person, the sporting body, the ASADA CEO and the applicant (where the applicant is none of the preceding persons or bodies).

Where the appeal is under subclause (1), the parties also include any other person or body that is permitted under the anti-doping policy to participate in an appeal of that kind, and that advises the Tribunal in writing that they wish to be a party to the appeal.

Where the appeal is under subclause (2), the parties also include any other person or body specified in the agreement in paragraph (2)(h) as being able to make an appeal to the Appeals Division, and that advises the Tribunal in writing that they wish to be a party to the appeal.

Subclause (5) provides that the appeal is to be heard in the Appeals Division.

Clause 33: Appealing decisions made by sporting tribunals

Subclause (1) deals with the circumstance where an anti-doping tribunal of a sporting body has made a determination at first instance, and the anti-doping policy of the sport permits an appeal from that determination to the Appeals Division of the Tribunal. In this case, a party to the arbitration (ie, the athlete or support person, or the ASADA CEO), or another person or body permitted to do so by the anti-doping policy, can appeal the determination. The reference to ‘other person or body’ is a reference to persons or bodies that Art 13 of the Code specifies may also appeal decisions – for example, ASADA, an International Sporting Federation, or WADA.

Subclause (2) deals with the circumstance where an anti-doping tribunal of a sporting body has made a determination at first instance, and the anti-doping policy of the sport does not permit an appeal to the Appeals Division of the Tribunal. Where the athlete or support person, the sporting body and the ASADA CEO have agreed in writing that an appeal is able to be made to the Appeals Division of the Tribunal, and the decision is of a kind that the World Anti-Doping Code permits an appeal from, the athlete or support person, the sporting body, the ASADA CEO, or any other person or body specified in that agreement as being able to make such an appeal, may appeal to the Appeals Division.

Subclause (4) provides that the parties to such an appeal are the athlete or support person, the sporting body, the ASADA CEO, and the applicant (where the applicant is none of the preceding persons or bodies).

Where the appeal is under subclause (1), paragraph (4)(e) provides that the parties also include any other person or body that is permitted under the anti-doping policy to participate in an appeal of that kind, and that advises the Tribunal in writing that they wish to be a party to the appeal.

Where the appeal is under subclause (2), paragraph (4)(f) provides that the parties also include any other person or body specified in the agreement in paragraph (2)(h) as being able to make an appeal to the Appeals Division, and that advises the Tribunal in writing that they wish to be a party to the appeal.

Subclause (5) provides that the appeal is to be heard in the Appeals Division.

Subdivision B—Appealing decisions about other matters

Clause 34: Appealing decisions made in General Division

This clause applies either where the first instance arbitration was of a dispute between a person and a sporting body, or where the first instance arbitration was of a dispute

between 2 or more persons. Subclause (1) provides that where one or more of the constituent documents provides for appeal to the Appeals Division, or the person and the sporting body otherwise agree, in writing, a party to the arbitration can appeal to the Appeals Division.

Subclause (2) deals with the case where none of the constituent documents of the sport provide for an appeal to the Appeals Division. If the parties to the arbitration agree in writing that an appeal is able to be made to the Appeals Division of the Tribunal, a party to the original arbitration, or any other person or body specified in the agreement as being able to make such an appeal, can appeal to the Tribunal.

Subclause (4) provides that the parties to the appeal are the parties to the first instance arbitration, and the applicant (where the applicant was not a party to that arbitration). Subclause (5) makes clear that the appeal is to be heard in the Appeals Division of the Tribunal.

Where the appeal is made under subclause (1), paragraph (4)(c) provides that the parties to the appeal also include any other person or body that is permitted under a relevant constituent document to make an appeal to the Appeals Division, and advises the Tribunal in writing that they wish to be a party to the appeal.

Where the appeal is made under subclause (2), paragraph (4)(d) provides that the parties to the appeal also include persons or bodies specified in the agreement as being able to make an appeal, if they notify the Tribunal in writing that they wish to be a party to the appeal.

Clause 35: Appealing decisions made by sporting tribunals

This clause deals with the circumstance where a sporting tribunal administered by a sporting body has arbitrated a dispute between a person and a sporting body.

Subclause (1) provides that where one or more of the constituent documents that bind the person and the sporting body provide for an appeal to be made to the Appeals Division of the Tribunal, the person, the sporting body, or any other person permitted by a constituent document to do so may appeal to the Tribunal from a sporting tribunal decision.

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

Subclause (4) provides that the parties to the appeal are the person, sporting body and the applicant (where the applicant is not a person or sporting body). Subclause (5) makes clear that the appeal is to be heard in the Appeals Division of the Tribunal.

Where the appeal is made under subclause (1), paragraph (4)(d) provides that the parties to the appeal also include any other person or body that is permitted under a relevant constituent document to make an appeal to the Appeals Division, and advises the Tribunal in writing that they wish to be a party to the appeal.

Where the appeal is made under subclause (2), paragraph (4)(e) provides that the parties to the appeal also include persons or bodies specified in the agreement as

being able to make an appeal, if they notify the Tribunal in writing that they wish to be a party to the appeal.

The dispute must either be of a kind prescribed by the rules for the purposes of this clause, or be approved by the CEO in writing. The CEO is not permitted to approve a particular dispute which is of a kind prescribed by the rules for the purpose of subclause (6). Subclause (7) provides that the CEO can only approve a dispute if satisfied that there are exceptional circumstances justifying the giving of approval.

Requiring the disputes that may be appealed to be prescribed by type in the rules, or otherwise approved on a case by case basis by the CEO, is intended to ensure that the Tribunal is not used to arbitrate disputes that are inappropriate for arbitration by the Tribunal, such as matters more appropriate for resolution in courts of law, and matters that are more appropriately dealt with at a sport level.

Subclause (8) makes clear that the CEO's approval is not a legislative instrument. This provision has been included to assist readers, as the instrument is not a legislative instrument within the meaning of s 8(1) of the *Legislation Act 2003*.

Subdivision C – Arbitration of disputes in Appeals Division

Clause 36: Arbitration of disputes in Appeals Division

Subclause (1) provides that, where an application for appeal is made to the Tribunal in accordance with the requirements set out in the Bill, the Tribunal must conduct an arbitration of the dispute and make a written determination in relation to the dispute. Subclause (2) provides that the determination takes effect on the day specified in it, while subclause (3) requires the Tribunal to give the parties to the appeal written notice of the determination.

Subclause (4) provides for the Tribunal to terminate an arbitration where the parties to the appeal agree to the termination, or in circumstances prescribed by the rules.

Subclause (5) provides that the Tribunal will be able to suspend an arbitration in circumstances prescribed by the rules. An example of a circumstance that is to be prescribed by the rules is where the Tribunal considers that it is appropriate to refer an appeal in respect of a General Division dispute to mediation or conciliation, before it is arbitrated.

Division 7—Making applications

Clause 37: Form of applications

This clause sets out requirements in relation to which applications to the Tribunal for arbitration in the Anti-Doping, General or Appeals Divisions, or for mediation, conciliation or case appraisal in the General Division, must comply. In addition to the requirements specified in paragraphs (a)-(d), an application must comply with any other requirements prescribed by the rules for the purposes of this clause. The Tribunal is not required to arbitrate or provide mediation, conciliation or case appraisal in relation to a dispute if the requirements set out in this clause are not met.

Clause 38: Time limit on applications

This clause sets out time limits pertaining to applications to the Tribunal.

Subclauses (2) and (3) provide that applications for arbitration of disputes are to be made to the Anti-Doping Division or the General Division within the timeframe set out in the anti-doping policy or relevant constituent document, or in any other case, within the timeframe set out for this purpose in the rules. These provisions are expressed to operate subject to subclause (5) – in other words, if the deadline for making an application worked out under subclause (2) or (3) would occur after the end of the period of the operation of the tribunal (ie, 2 years from commencement), the application is required to be made before the end of the 2 year period.

Subclause (4) provides that an application to the Appeals Division must be made within the timeframe set out in the anti-doping policy or relevant constituent document, or in any other case, within the timeframe set out in the rules.

Subclause (5) prevents applications from being made to the Tribunal for arbitration by the Anti-Doping Division or General Division, or for mediation, conciliation or case appraisal in the General Division, from 2 years after the commencement of this clause, unless a rule is made prescribing a larger number of years (in which case applications cannot be made once the larger number of years has passed). This provision provides for the orderly termination of Tribunal operations, including the finalisation of matters currently on foot, unless a rule is made to extend the operation of the Tribunal.

Provided that an application was made within the 2 year period, the Tribunal will be required to arbitrate the application, even if the arbitral process extends beyond the 2 year period.

Division 8— Manner of conducting arbitration

Clause 39: Scope of Division

This clause makes clear that the Division applies in relation to an arbitration of a dispute before the Tribunal.

Clause 40: General principles relating to arbitration

This clause allows the Tribunal to determine its own procedure for arbitrations (other than where the Act imposes procedural requirements, eg, through a practice and procedure determination made under the following clause).

However, this clause also imposes an overarching requirement that Tribunal arbitration proceedings be conducted with minimum formality and technically, maximum expedition, and at minimum cost to the parties as possible, while still ensuring proper consideration of the matters before the Tribunal. This obligation is imposed because one of the primary purposes of establishing the Tribunal is to ensure that the Australian sporting community has access to arbitration that is timely, reliable, efficient and cost-effective.

This clause provides that the Tribunal is not bound by the rules of evidence and that it may inform itself on any matter in such manner as it thinks appropriate. This may include, for example, asking parties to make written or oral submissions, conducting non-coercive inquiries or commissioning research. The Tribunal also has coercive information-gathering powers conferred elsewhere in the Act.

Subclause (2) imposes a requirement on the parties to an arbitration to act in good faith in relation to the conduct of the arbitration.

Clause 41: CEO's determination about practice and procedure of National Sports Tribunal in arbitration

This clause provides for the CEO to make a determination in relation to the practice and procedure of the Tribunal in an arbitration of a dispute. The determination is a notifiable instrument, and Tribunal members are required to comply with it. Subclause (3) sets out certain matters that may be dealt with by a CEO's practice and procedure determination, but is not exhaustive. That is, the CEO may make a determination under this clause in relation to the practice and procedure of the Tribunal even if it does not deal with one of the matters listed at subclause (3).

It is expected that, to the extent it deals with anti-doping matters, a determination dealing with the practice and procedure of the Tribunal will be made consistent with the Code.

Subclause (4) displaces subsection 14(2) of the *Legislation Act 2003*, in its application to a determination under subclause (2). Subsection 14(2) of the *Legislation Act 2003* relevantly provides that, unless the contrary intention appears, a notifiable instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

While its final content will be determined by the CEO, it is envisaged that the kinds of documents that are to be incorporated by reference in a determination will be documents that are publicly available, for no cost. An example of a document that may be incorporated by reference into a determination is the World Anti-Doping Code, which is varied from time to time, and can be found at www.wada-ama.org.

Clause 42: Members may give notices

This clause gives a Tribunal member who is carrying out an arbitration the power to issue a written notice to a person, requiring that person to appear before the Tribunal at a specified time and place and give evidence. The Tribunal member must reasonably believe that the person is capable of giving evidence relevant to the dispute.

The clause also permits a Tribunal member who is carrying out an arbitration to issue a written notice to a person, requiring that person to give to the Tribunal information, or produce to the Tribunal documents or things, in accordance with the notice. The member may only issue such a notice if the member reasonably believes that the person has information, documents or things relevant to the dispute.

Subclause (3) provides for the notice and content requirements of such notices.

Clause 43: Failure to comply with notice

Subclause (1) makes it an offence for a person to fail to comply with a notice given to them under the preceding clause. The offence carries a maximum penalty of imprisonment for 12 months.

Subclause (2) is a civil penalty provision that is contravened if a person fails to comply with a notice given to them under the preceding clause. Due to the operation

of subclause 48(1), subclause (2) is enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (RP Act). Under Part 4 of the RP Act, an authorised applicant (the CEO – see subclause 48(2)) may apply to a relevant court (the Federal Court of Australia or the Federal Circuit Court of Australia – see subclause 48(5)) for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty. In this case, the relevant penalty will be up to 60 penalty units for an individual and up to 300 penalty units for a body corporate – see section 82 of the RP Act.

Equipping the Tribunal with powers to compel evidence from third parties provides for superior dispute resolution capacity. This is particularly important in cases that are reliant on intelligence-based evidence. Penalties are important in deterring third parties who may be reluctant to provide information or produce documents or things, from failing to comply with a notice.

In this context, regard has been had to similar provisions in the *Administrative Appeals Tribunal Act 1975* (AAT Act) – for example, subsection 61(1) sets out a similar offence for failing to comply with a summons, with a (criminal) pecuniary penalty of 60 penalty units, 12 months’ imprisonment, or both.

The level of the civil penalty has been set at a level intended to achieve the objective of deterrence, and taking into account the need for court proceedings to enforce the penalty.

In establishing both an offence and a civil penalty provision for a contravention of clause 43, the Bill will enable the CEO to choose, in any particular case, the enforcement mechanism that would be most conducive to securing compliance with the provision.

Common law privilege against self-incrimination not abrogated

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.

The privilege against self-incrimination can only be abrogated by using express words in legislation. 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.

However, the privilege against self-incrimination does not apply where it is alleged that a person has given false or misleading information, where a person voluntarily provides information or documents, or to bodies corporate.

Clause 44: Refusal to be sworn or answer questions

Subclauses (1) and (3) make it an offence for a person appearing as a witness before the Tribunal to fail to take an oath, make an affirmation or answer a question if

required to do so by the Tribunal. The offences set out in these subclauses both carry a maximum penalty of imprisonment for 12 months.

Subclauses (2) and (4) are civil penalty provisions, which are contravened if a person appearing as a witness before the Tribunal fails to take an oath, make an affirmation or answer a question after being required to do so by the Tribunal. Due to the operation of subclause 48(1), subclause (2) is enforceable under Part 4 of the RP Act. Under Part 4 of the RP Act, an authorised applicant (the CEO – see subclause 48(2)) may apply to a relevant court (the Federal Court of Australia or the Federal Circuit Court of Australia – see subclause 48(5)) for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty. In this case, the relevant penalty will be up to 60 penalty units for an individual and up to 300 penalty units for a body corporate – see section 82 of the RP Act.

It is important for the integrity of Tribunal proceedings that persons who appear before it in the context of disputes are prepared to give truthful evidence, and answer questions that the Tribunal requires them to answer. The level of penalty has been set with the aim of deterring non-compliance with the requirement to take an oath or affirmation, and the requirement (if imposed by the Tribunal) to answer questions. In this context, regard has been had to similar provisions in the AAT Act – for example, subsections 62(1) and 62(3) set out similar offences, each with a (criminal) pecuniary penalty of 60 penalty units, 12 months' imprisonment, or both. The level of the civil penalty has also been set having regard to the potential cost of court proceedings, in the event that the provisions are contravened.

However, unlike the AAT Act, the Bill establishes both an offence and a civil penalty provision for contravention of clause 44. In so doing, the Bill will enable the CEO to choose, in any particular case, the enforcement mechanism that would be most conducive to securing compliance with the provision. For example, in a case where a person refuses to be sworn or refuses to make an affirmation, the deterrent effect of a civil penalty may not be sufficient, and the retributive effect of a prison sentence may be more conducive to securing compliance with this requirement.

As discussed above, under the common law privilege against self-incrimination, a natural person cannot be required to give information that would tend to incriminate that person. This common law privilege will not be affected by the Act. Consequently, a natural person who has been required to answer a question may refuse to answer that question on the basis that by doing so the person may incriminate themselves.

Clause 45: False or misleading evidence

This clause makes it an offence for a witness appearing before the Tribunal to give evidence that the witness knows is false or misleading. The offence carries a maximum penalty of imprisonment for 12 months.

Division 9—Costs

Clause 46: Charging costs of an arbitration

It is intended that the CEO have the capacity to charge parties to an arbitration for some or all of the costs incurred in conducting the arbitration. This clause permits the rules to provide for the CEO to impose such charges, for how charges are to be

apportioned between one or more of the parties, and for waiver of the charge (eg, in circumstances of financial hardship). These charges must not amount to taxation.

Clause 47: Charging costs of alternative dispute resolution processes

It is intended that the CEO have the capacity to charge participants to a mediation, conciliation or case appraisal for some or all of the costs incurred in conducting the relevant process. This clause permits the rules to provide for the CEO to impose such charges, for how charges are to be apportioned between participants, and for waiver of the charge (eg, in circumstances of financial hardship). These charges must not amount to taxation.

Division 10—Civil penalty provisions

Clause 48: Civil penalty provisions

Subclause (1) provides that each civil penalty provision of the Act (ie, subclauses 43(2), 44(2) and 44(4)) is enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (RP Act). Under Part 4 of the RP Act, an authorised applicant may apply to a relevant court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.

Subclauses (2) and (5) provide, for the purposes of Part 4 of the RP Act that the CEO, on behalf of the Commonwealth, is an authorised applicant, and that the Federal Court of Australia and the Federal Circuit Court of Australia are each a relevant court.

Subclause (3) permits the CEO to delegate the CEO's powers and functions as an authorised applicant to an SES employee, or an acting SES employee in the Department. Subclause (4) requires a delegate to comply with any written directions of the CEO.

Division 11—Infringement notices

Clause 49: Infringement notices

Under subclause (1), each civil penalty provision of the Act (ie, subclauses 43(2), 44(2) and 44(4)) is subject to an infringement notice under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014*. Part 5 of the Regulatory Powers Act sets out a standard framework under which infringement notices can be issued. Amongst other things, Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* provides the following:

- if an infringement officer believes on reasonable grounds that a person has contravened a provision subject to an infringement notice under this Part, the infringement officer may give to the person an infringement notice for the alleged contravention
- if the person to whom an infringement notice for an alleged contravention of a provision is given pays the amount stated in the notice before the end of the specified period, proceedings seeking a civil penalty order may not be brought in relation to the alleged contravention

- a person to whom an infringement notice has been given may apply to the relevant chief executive for an extension of the time within which the relevant amount can be paid
- a person to whom an infringement notice has been given may make written representations to the relevant chief executive seeking the withdrawal of the notice.

Subclauses (2)-(5) provide that, for the provisions of the Act subject to an infringement notice, the CEO is an infringement officer, the CEO is the relevant chief executive, and the CEO may delegate the CEO's powers and functions of either role to an SES employee, or an acting SES employee in the Department. A delegate is required to comply with any written directions of the CEO.

Permitting the facility for the issuing of infringement notices will enable the CEO of the Tribunal to deal with contraventions of the civil penalty provisions of the Act without the need to go to court.

Part 4—Administration of the National Sports Tribunal

Division 1—Simplified outline of this Part

Clause 50: Simplified outline of this Part

This clause provides an overview of Part 4 of the Bill. It should be noted that, while this outline is included to assist readers to understand the legislation, readers should rely on the substantive provisions of the Part following the simplified outline.

Division 2—Chief Executive Officer

Clause 51: Chief Executive Officer

This clause provides that there is to be a Chief Executive Officer of the Tribunal.

Clause 52: Functions of CEO

Subclause (1) sets out the functions of the CEO. In addition to such other functions conferred on the CEO by the Act, the rules or other provisions of Commonwealth legislation, the CEO has the functions of managing the administration and operation of the Tribunal and assisting the Tribunal in the performance of its functions. The CEO also has the function of doing anything incidental or conducive to the performance of the abovementioned functions.

Subclause (2) sets out certain functions that the CEO is required to perform. These include, at paragraphs (a)-(c), allocating Tribunal members for the purposes of a proceeding, nominating a member to preside at the proceeding and reconstituting the Tribunal for the purposes of a proceeding in certain circumstances. Subclause (4) requires the CEO to determine principles as to how the CEO is to perform the functions set out at paragraphs (a)-(c), and subclause (3) requires the CEO to comply with these principles.

Paragraph (d) of subclause (2) requires the CEO to promote the services of the Tribunal to athletes, support persons, national sporting organisations and any other persons or bodies the CEO considers appropriate.

Paragraph (e) of subclause (2) requires the CEO to establish and maintain a panel of legal practitioners who are willing to provide free legal assistance to the parties in a proceeding before the Tribunal. The intention is that such a panel would allow parties to disputes before the Tribunal to obtain high quality legal representation without incurring significant costs.

Clause 53: Powers of CEO

This clause provides that the CEO has power to do all things necessary or convenient to be done for or in connection with the performance of the CEO's functions.

Clause 54: Appointment of CEO

Subclause (1) provides for the CEO to be appointed by the Minister by written instrument. The CEO must be appointed on a full-time basis.

Subclause (2) provides that the CEO holds office for the period specified in their instrument of appointment, which may be up to 5 years. Because the Tribunal will initially be established as a pilot, and the period of the pilot will be 2 years, the initial CEO appointment will be for 2 years or less.

Clause 55: Acting appointments

This clause provides for the appointment of a person (other than a member) to act as the CEO in certain specified circumstances, such as where there is a vacancy in the office of CEO. This ensures that the Tribunal can continue to operate smoothly in the absence of a CEO.

Clause 56: Remuneration

This clause provides for the CEO to be paid the remuneration that is to be determined by the Remuneration Tribunal. In the absence of such a determination, subclause (4) permits the Minister to prescribe the CEO's remuneration by means of the legislative instrument.

Clause 57: Leave

This clause provides for the CEO to have the recreation leave entitlements that are determined by the Remuneration Tribunal. The Minister will be able to grant the CEO leave of absence (other than for recreation leave) on the terms and conditions determined by the Minister.

Clause 58: Other terms and conditions

This clause allows the Minister to set terms and conditions on which the CEO holds office, other than to the extent those terms and conditions are provided for by the Act.

Clause 59: Other paid work

This clause requires the CEO to obtain the Minister's approval before engaging in paid work outside the duties of the CEO's office. Because the CEO holds their office on a full-time basis, it is expected that the CEO will not generally seek to engage in paid work outside the duties of that office. If the CEO does wish to engage in other paid work, it is important that they seek the Minister's approval, so that the Minister can ensure that the other paid work will not impinge on the CEO's capacity to carry

out their functions, and to ensure that there is no question of that other work being in conflict, or perceived conflict with the proper performance of the CEO's functions.

Clause 60: Disclosure of interests to the Minister

The CEO will be an official of a Commonwealth entity for the purposes of the PGPA Act, and the PGPA Act will therefore impose various obligations on the CEO. However, subclause (2) disapplies section 29 of the PGPA Act. This provision requires an official of a Commonwealth entity to disclose material personal interests that relate to the affairs of the entity. Under section 16 of the *Public Governance, Performance and Accountability Rule 2014*, an official of a Commonwealth entity who is not the accountable authority, or a member of the accountable authority, is required to disclose such an interest in accordance with any instructions given by the accountable authority of the entity. Because the Tribunal will operate independently of the Department, it will not be appropriate for the CEO to disclose relevant interests in accordance with these instructions. Rather, it is appropriate for the CEO to disclose relevant interests to the Minister: subclause (1) provides for this.

Clause 61: Resignation of appointment

This clause sets out the process for, and time of effect of, the CEO's resignation.

Clause 62: Termination of appointment

This clause sets out the circumstances in which the Minister may terminate the appointment of the CEO. These include; misbehaviour, circumstances in which the CEO has engaged in paid work without the Minister's approval in breach of the Act, and circumstances in which the member fails, without reasonable excuse, to disclose interests to the CEO in accordance with the Act.

In *Vanstone v Clark* (2006) 224 ALR 666, the Full Court of the Federal Court concluded that for conduct to be regarded as 'misbehaviour' in the general sense it must bear on the person's capacity to hold office and the question must be considered with reference to the particular office (at 673, 721)). The reference to 'misbehaviour' can apply to misbehaviour in the course of performing duties of the office, as well as misbehaviour out of office (eg the commission of a serious criminal offence) which affects the perceptions of others in relation to the office so that any purported performance of the office will be perceived as corrupt, improper or inimical to the interests of the persons, or the organisation for whose benefits the functions are performed (at 708); see also *Clark v Vanstone* (2004) 211 ALR 412 at 440-441).

Clause 63: Application of the finance law etc.

Subclause (1) provides that the CEO is taken to be an official of the Department for the purposes of the PGPA Act. This means that, subject to the Act (eg, in relation to the disclosure of interests), the PGPA Act will impose various obligations on the CEO.

Under subclause (2), the Secretary of the Department will be required to include information about the operation of the Tribunal in the Department's annual report under section 46 of the PGPA Act.

Clause 64: Directions to CEO

Subclause (1) provides that the Minister, may, by legislative instrument, give directions to the CEO in relation to the performance of the CEO's functions or powers. Such a direction cannot relate to a particular athlete, support person or sporting body, or to a particular dispute before the Tribunal: subclause (2). The CEO is required to comply with a direction.

Subclause (4) provides that the CEO is not subject to the directions of the Secretary of the Department in relation to the CEO performing the CEO's functions.

Clause 65: Delegation by CEO

This clause permits the CEO to delegate, in writing, any of the CEO's functions or powers under the Act, or the rules made under the Act, to an SES employee, or an acting SES employee, in the Department.

Division 3—Persons assisting the Chief Executive Officer

Clause 66: Arrangements relating to staff of the Department

Subclause (1) provides for the CEO to be assisted in performing their functions by Australian Public Service employees in the Department, whose services the Secretary makes available for that purpose. Subclause (2) makes it clear that, when providing assistance to the CEO, these employees are subject to the directions of the CEO, rather than the Secretary of the Department.

Clause 67: Other persons assisting the CEO

Subclause (1) provides for the CEO to be assisted in performing their functions by employees of Agencies (within the meaning of the *Public Service Act 1999*), officers or employees of a State or Territory and officers or employees of bodies or organisations of the Commonwealth, a State or a Territory, where the services of such officers or employees are made available to the CEO in connection with the performance of any of the CEO's functions.

Subclause (2) makes it clear that, when providing assistance to the CEO, these employees and officers are subject to the directions of the CEO, rather than any other person, such as the Secretary of the Department or the chief executive of the Commonwealth, State or Territory body or organisation.

Clause 68: Consultants and expert witnesses

This clause permits the CEO, on behalf of the Commonwealth, to engage persons as consultants to the CEO, or expert witnesses in relation to a dispute before the Tribunal, provided they have suitable qualifications and experience. The CEO can determine, in writing, the terms and conditions of the engagement of such persons.

Part 5—Other matters

Clause 69: Simplified outline of this Part

This clause provides an overview of Part 5 of the Bill. It should be noted that, while this outline is included to assist readers to understand the legislation, readers should rely on the substantive provisions of the Part following the simplified outline.

Clause 70: Obstruction etc. of National Sports Tribunal

Subclause (1) makes it an offence for a person to obstruct, hinder, intimidate or resist the Tribunal or a member in the performance of the member's duties. The offence carries a maximum penalty of imprisonment for 12 months.

Clause 71: Intimidation etc. of witnesses or other persons

The purpose of this clause is to protect witnesses appearing before the Tribunal from untoward behaviour, and to protect the integrity of Tribunal proceedings. It makes it an offence for a person to take certain actions in relation to another person on account of that other person having appeared, or being about to appear, as a witness in a proceeding before the Tribunal. The offence carries a maximum penalty of imprisonment for 12 months.

Clause 72: Secrecy

The purpose of this clause is to protect the privacy and reputation of the parties. Information relating to claims may be of a highly personal nature (including health and medical records) or may have the potential to impact adversely on the parties (eg, with respect to future selection).

This clause makes it an offence for an entrusted person to make a record of, disclose or otherwise use protected information, unless certain exceptions apply.

Protected information is defined in clause 5 to mean information that:

- was obtained by a person in their capacity as an entrusted person; and
- 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 whom the information relates.

An entrusted person is defined in clause 5 to mean:

- the CEO
- a member of the Tribunal
- a person assisting the CEO in accordance with clause 63 or 64 of the Act
- a person engaged as a consultant, or an expert witness, under clause 65 of the Act.

The maximum penalty for the offence is imprisonment for 2 years.

Subclauses (2), (3) and (4) set out exceptions to the prohibition on disclosure. They also have the effect that the defendant in a proceeding for an offence under this provision has the evidential burden in relation to these matters. The placement of the evidential burden on the defendant can be justified in this instance because it will not reasonably be possible for a prosecution to disprove every conceivable source of authority in many cases, when that information is within the knowledge of the entrusted person who made the disclosure. In the event that the prosecution was required, in such circumstances, to disprove that the disclosure was unlawful, it would be significantly more difficult and costly for the prosecution to disprove the matter.

In order to protect protected information effectively, it is reasonable, necessary and proportionate to require a defendant to adduce or point to evidence that suggests a reasonable possibility that one of the exceptions listed in subclause 72(2) applies.

Subclause (5) provides that, except where it is necessary to do so for the purposes of giving effect to this Act, a person is not to be required to produce a document containing protected information to a court, or to disclose protected information to a court.

Clause 73: Protection and immunity

This clause provides certain protections and immunities to:

- Tribunal members
- barristers, solicitors or other persons appearing before the Tribunal on behalf of a party
- a person appearing before the Tribunal as a witness.

The protections and immunities conferred on High Court Justices include substantial immunity from being sued for their acts within jurisdiction. If Tribunal members were not provided with a similar immunity, this would provide an incentive for persons dissatisfied with the outcome of an arbitration to sue individual members of the Tribunal. This in turn would be likely to substantially hinder the Tribunal's operations, in that it would discourage persons agreeing to sit as Tribunal members (at least in the absence of the Commonwealth agreeing to indemnify those members).

The protections and immunities conferred on a barrister in appearing for a party in proceedings in the High Court include a limited form of advocates' immunity. It is appropriate for equivalent protections to be conferred on persons appearing before the Tribunal, as the work and risks associated with representation before the Tribunal are similar to those of a barrister providing representation before a court. Similarly, witnesses enjoy certain immunities when appearing before the High Court. It is appropriate for witnesses appearing before the Tribunal to be protected in an equivalent manner, to ensure that witnesses are not discouraged from appearing before the Tribunal and providing candid evidence by, for example, threats of being sued for defamation by a party to the dispute.

Other Commonwealth legislation confers equivalent protections and immunities on non-judicial bodies, as well as the barristers, solicitors and witnesses appearing before them. These include:

- section 60 of the *Administrative Appeals Tribunal Act 1975*, which confers the same respective protections and immunities on a member of the Administrative Appeals Tribunal, a barrister, solicitor or other person appearing before the Tribunal on behalf of a party and a person summoned to attend or appearing before the Tribunal as a witness
- section 167 of the *Veterans' Entitlements Act 1986*, which confers the same respective protections and immunities on a member of the Veterans' Review Board, a person representing a party at a hearing of a review before the Board and a person summoned to attend or appearing before the Board as a witness

- section 171 of the *Copyright Act 1968*, which confers the same respective protections and immunities on a member of the Copyright Tribunal of Australia, a barrister, solicitor or other person appearing before the Tribunal on behalf of a party and a person summoned to appear before the Tribunal as a witness
- section 584B of the *Fair Work Act 2009*, which confers the same protections and immunities on persons undertaking the management of complaints against a Member of the Fair Work Commission, as well as witnesses and relevant legal representatives.

Clause 74: Protection from civil actions

This clause ensures that certain persons are not liable to an action or other proceeding for damages for or in relation to certain acts done or omitted to be done in good faith. The relevant acts are those done in the performance or purported performance of any function of the CEO, or in the exercise or purported exercise of any power of the CEO. The persons given protection by this clause are the CEO, persons assisting the CEO in accordance with clause 66 or 67 and persons engaged as consultants, or expert witnesses engaged to assist the Tribunal in relation to a dispute, under clause 68.

The protection afforded by this clause is broad, and appropriately so. For example, in particularly contentious disputes, a person should not be able to take collateral proceedings against the CEO and others, either to delay the Tribunal’s consideration of a dispute, or as an attempt to reopen a dispute that was arbitrated by the Tribunal.

Similar protections can be found in other Commonwealth legislation. Examples include:

- section 110Q of the *Defence Act 1903*, which confers similar protections on the Inspector-General ADF, and a person acting under the authority of the Inspector-General ADF,
- section 74T of the *Broadcasting Services Act 1992*, which confers similar protections on the Commonwealth, the Australian Communications and Media Authority (ACMA) and ACMA officials in respect of the exercise of functions associated with the maintenance of the Register of Foreign Owners of Media Assets.

Clause 75: Rules

This clause permits the Minister to 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. Various provisions in the Bill permit particular rules to be made.

This clause also clarifies that the rules may not do the following things:

- create an offence or civil penalty;
- provide powers of:
 - arrest or detention; or
 - entry, search or seizure;

- impose a tax;
- set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
- directly amend the text of the Act.

The rules are a legislative instrument.

This clause also displaces subsection 14(2) of the *Legislation Act 2003*, in its application to the rules. Subsection 14(2) of the *Legislation Act 2003* relevantly provides that, unless the contrary intention appears, a legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

As a general principle, the rules will make direct provision about relevant matters (eg the kinds of disputes that will be dealt with in the General Division; the circumstances in which the Tribunal may suspend or terminate an arbitration or appeal; application fees and arbitration costs), rather than dealing with these matters by relying on documents incorporated by reference.

However, given that the rules are yet to be finalised, provision has been included to address the possibility that it may be necessary for the rules to incorporate a document, such as the World Anti-Doping Code, by reference.

NATIONAL SPORTS TRIBUNAL (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 2019

NOTES ON CLAUSES

Clause 1: Short title

The effect of this clause is that the Bill, when enacted, may be cited as the *National Sports Tribunal (Consequential Amendments and Transitional Provisions) Act 2019*.

Clause 2: Commencement

This clause sets out when each of the provisions in the Act commence. The whole Act will commence at the same time as the *National Sports Tribunal Act 2019* commences. If the *National Sports Tribunal Act 2019* does not commence the provisions of this Act will not commence.

Clause 3: Schedule(s)

This clause provides that legislation that is specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item has effect according to its terms.

Schedule 1 – Amendments

Australian Sports Anti-Doping Authority Act 2006

Item 1: Paragraph 13(1)(k)

This item will amend paragraph 13(1)(k) of the *Australian Sports Anti-Doping Authority Act 2006*. Under paragraph 13(1)(k), the National Anti-Doping Scheme (in Schedule 1 to the *Australian Sports Anti-Doping Authority Regulations 2006*) is required to authorise the ASADA CEO, in certain circumstances, to present certain assertions and information at hearings of the Court of Arbitration for Sport and other sporting tribunals. The amendment to paragraph 13(1)(k) will put beyond doubt that the National Anti-Doping Scheme is required to authorise the ASADA CEO, in those circumstances, to present those assertions and information at hearings of the Tribunal.

Item 2: Subsection 13D(3)

This item will amend subsection 13D(3) of the *Australian Sports Anti-Doping Authority Act 2006* to ensure that material obtained under a disclosure notice under that Act can be presented as evidence in the Tribunal.

Freedom of Information Act 1982

Item 3: Schedule 3

This item will amend Schedule 3 to the *Freedom of Information Act 1982* (the FOI Act) so as to insert a reference to section 72 of the *National Sports Tribunal Act 2019*.

Under s 38 of the FOI Act, a document will be exempt from disclosure requirements under that Act if the relevant disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment that is specified in Schedule 3 to the FOI Act. Consequently, the effect of item 3 is to exempt material from requirements to release imposed by the FOI Act where disclosure of the material

is prohibited by the secrecy provision at section 72 of the *National Sports Tribunal Act 2019*.

This amendment will serve the dual purposes of ensuring that the secrecy provision cannot be circumvented and providing parties to tribunal proceedings appropriate guarantees about the confidentiality of material provided and obtained during the course of proceedings (noting that this can include sensitive medical and health information about athletes).

Schedule 2 – Application provisions

Item 1: Application provisions

Subitem (1) will have the effect that, subject to the criteria set out in the Bill being met, an application will be able to be made for arbitration in the Anti-Doping Division, or for arbitration or mediation, conciliation or case appraisal, in the General Division, in relation to a dispute that arises before, on or after commencement.

Subitem (2) will have the effect that, subject to the criteria set out in the Bill being met, a person or body will be able to make an appeal (to the Appeals Division) in respect of a decision of a sporting body, whether that decision was made before, on or after commencement.

Subitem (3) will have the effect that, subject to the criteria set out in the Bill being met, a person or body will be able to make an appeal (to the Appeals Division) in respect of a decision of a sporting tribunal, whether that decision was made before, on or after commencement.

The legislative note to this item is intended to draw the reader's attention to the fact that any relevant application or appeal is required to be made within the timeframes specified in the anti-doping policy, constituent document, or rules.