

The Future of Alternative Dispute Resolution in Sport: The National Sports Tribunal

Anthony Lo Surdo SC¹

Abstract

Sport's governing bodies are leading exponents of alternative dispute resolution ('ADR') in the resolution of disputes in organised sports. However, given the breadth of sporting interests which range from amateur, to semi-professional and professional, not all sports are well-equipped to determine the types of disputes that frequently arise between participants. The National Sports Tribunal was established to level the playing field in the area of sports dispute resolution by providing for an effective, efficient, independent, transparent and specialist tribunal for the fair hearing and resolution of sporting disputes. It does so by employing a full suite of ADR processes and encouraging the use of processes which optimise the prospects of a successful resolution of a dispute. It will likely make a lasting and significant contribution to the dispute resolution landscape in Australia.

Introduction

Sport's governing bodies ('SGB') the world over prescribe the rules of the games which they administer, organise competitions and establish anti-doping, disciplinary, and grievance resolution machinery that applies to participants. Sport's governing bodies are leading exponents of the use of ADR in the resolution of disputes in organised sports. The sole source of ADR in sport is the contract between SGB and the participant. For participants in amateur sport, the contract relies on the participant agreeing upon registration to be bound by the rules, regulations, and policies of the sport. In the case of semi-professional and professional athletes, individual contracts provide a further layer of obligations including as to the manner in which disputes arising from the performance of the contract are to be determined.

The rules of SGB typically include disciplinary or grievance regulations whose objectives are to provide for an independent, fair, and effective system governing the administration and determination of all

¹ Anthony Lo Surdo SC, (FRIArb1Adv.Med;FCIArb;FACICA) is a barrister, independent arbitrator, and advanced mediator at 12 Selborne Wentworth Chambers, Sydney, Lonsdale Chambers, Melbourne and Outer Temple Chambers, London. He is a sports law expert, an arbitrator and mediator at the Court of Arbitration for Sport and an inaugural member of the National Sports Tribunal.

grievances, incidents, disciplinary disputes and conduct matters involving participants.

The constitution, rules and regulations of the larger, well-funded professional sporting codes such as the members of the Australian Coalition of Major Professional and Participation Sports ('COMPPS'), often provide for the establishment of in-house committees and tribunals (sometimes referred to as 'judicial bodies') which arbitrate disputes between participants, prescribe the jurisdiction of those judicial bodies including any avenues of appeal from them and in the case of 'grievances' or non-disciplinary matters, will usually contain a definition in broad terms with the intention of casting the net as far as possible so that all disputes are determined confidentially and without resort to courts or other public forums. Some SGBs will also offer means of dispute resolution such as mediation or conciliation.

On 19 March 2020, the National Sports Tribunal ('NST') was established pursuant to the *National Sports Tribunal Act 2019*. It was created with the aim of providing for '... an effective, efficient, independent, transparent and specialist tribunal for the fair hearing and resolution of sporting disputes' for the Australian sporting community, especially across the smaller sports which, unlike the COMPPS, do not have the resources or the capacity to establish in-house dispute resolution tribunals. It provides an opt-in system for the resolution of certain sports and sports-related disputes by arbitration, mediation, conciliation, and case appraisal.

The CEO of the NST is Mr John Boulton AM, an experienced sports administrator.

In this article, Anthony Lo Surdo SC (a Fellow of Resolution Institute, Grade 1 Arbitrator and inaugural Member of the NST) ('ALS'), interviews John Boulton (**JB**) about the NST, his vision for the organisation and the contribution that it will make to the sports dispute resolution landscape in Australia and for the promotion of ADR more broadly.

Structure and Jurisdiction of the National Sports Tribunal

ALS: The NST is a one-stop centre for the resolution of sports-related disputes by means of arbitration, mediation, conciliation, and case-appraisal but there are some limits to disputes that it can resolve. What is the structure of the NST?

JB: The NST consists of its Registry, and its Members – the 40 individuals appointed by the Minister to arbitrate, mediate, and conciliate sporting disputes. They are mostly lawyers, but others are medical professionals, mainly for their expertise in doping matters, sports administrators, and former elite athletes. The Tribunal has three Divisions – the Anti-Doping Division, the General Division, and the Appeals Division, although all Members are available to sit in all divisions. Some of

the Members are listed in the Alternative Dispute Resolution List, being lawyers who are specialists in mediation and conciliation, and who can conduct case appraisals where appropriate.

ALS: What is the jurisdiction of the NST?

JB: It's a consensual jurisdiction – the parties have to agree to bring a dispute to the Tribunal. That agreement is normally affected by the constitution and rules of the SGB which the members have 'agreed to' by the fact of their membership. The jurisdiction also requires that disputes have a national element, rather than dealing with disputes at lower levels of sport; although if a lower level dispute has been elevated to the national body on account of its seriousness or the inability to resolve it at the lower level, it can thereby attract the jurisdiction of the NST. Under our legislation, the NST can hear disputes consisting of anti-doping infractions, selection and eligibility appeals, disciplinary breaches, and disputes around bullying, discrimination, or harassment. The CEO also has the power to approve other disputes for resolution by the NST.

ALS: Are there some disputes that the NST will not be able to determine?

JB: The NST is precluded from hearing 'on the field' matters – they are best left to SGB themselves to resolve, with specialist expertise in each sport. Also, employment disputes, disputes relating to remuneration or payment for contracts for services (other than where they involve a breach of a disciplinary rule), and claims for damages, are left to the civil courts to resolve.

ALS: What do you perceive to be the main types of disputes that will make their way to the Tribunal?

JB: In the early days, we are seeing quite a lot of disciplinary matters coming before us, and also 'member protection' matters where members have been subject to bullying, discrimination or the like, but I expect that there will be anti-doping and selection cases taking up a lot of our time in the future.

ALS: The Tribunal has the power to make arbitral determinations that are binding on parties, but it also has jurisdiction to assist parties in achieving a consensus-based resolution of their disputes by mediation, conciliation and case appraisal. Have there been early indications of any preference being shown by disputants between these various forms of dispute resolution?

JB: Again, the early cases have shown a clear preference for mediation or conciliation, and conciliation in particular. This is a welcome recognition that those methods are best able to retain a workable relationship between the individuals and the bodies involved, whilst getting through the disagreement that has arisen, and a resolution they can live with. Several parties have proposed mediation or conciliation, rather than having it proposed to them as an alternative to arbitration, which is an interesting development.

ALS: Unlike most sporting tribunals, the NST has a wide-range of legislative-backed coercive powers enabling it to require parties by written notice to, eg appear and give evidence and provide information or produce documents and things. A failure to comply may expose a person to a term of imprisonment or the imposition of a civil penalty. The power to issue those notices lies with the CEO. Do you anticipate that those powers will only be exercised where parties and or witnesses are not sufficiently engaging in or co-operating with the Tribunal?

JB: I do think these powers will be exercised sparingly. The most likely usage of the coercive powers will be in the anti-doping area, where many of the cases will involve the identification of anti-doping rule violations by means other than standard drug testing, so that extracting information from parties or other persons may be necessary to prove the violation – and especially cases where a third party is alleged to have been involved in such a violation eg trafficking cases, complicity cases and the like. In the more private disputes, these quite powerful tools will be less likely to be appropriate.

ALS: The Tribunal has only been operational since March 2020; what have been the largest challenges that it has faced in its first few months and how has it responded to them? Has COVID-19 added to those challenges? If so, how has the Tribunal responded?

JB: The initial challenge is making it known that for the first time, Australia possesses a full-time sports resolution body. So the first few months (being months where sport was in COVID shut down) have been an opportunity to ensure that all the national sports bodies are aware that this facility is open to them, rather than attempting to set up tribunals themselves, and even more important, to let athletes, and other participants in sport know that they can bring matters to the NST and have them dealt with relatively quickly and cost-effectively, as well as fairly and independently. It has been hard for athletes to raise these matters where the sport complained about was often the body that would manage the process to have the dispute resolved. The COVID situation has forced us to do all or our hearings by virtual means, and this has proved quite successful, and is likely to be an important part of how we will work in the future.

Arbitration

ALS: One of the criticisms made of arbitration generally and, occasionally of international sports arbitration, is that it is costly, procedurally complex, and too slow. What measures, if any, has the NST adopted to address these concerns?

JB: I feel those criticisms could have a certain amount of validity in complicated matters. But the same can be said of adversarial court proceedings. Sporting disputes tend often to be less multi-dimensional than other matters (I think) and therefore are amenable to fairly simple procedures, which are what is applied in our legislative framework. The availability of mediation, conciliation and case appraisal is an important means of dealing with not too complex disputes relatively quickly and

efficiently. Other than that, the process of holding a ‘Preliminary Conference’ with the parties in every NST matter where procedural steps are dealt with, and often the issues are defined and contained, has in the early days of the NST been very effective. The legislative admonition to members to conduct arbitrations ‘with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit’ should also lead to efficiency and timeliness.

ALS: Does the NST have procedures in place to ‘fast-track’ the determination of disputes and, if required, to order interim measures? If so, what are they?

JB: In sport, a speedy resolution of matters is very often a major concern. For example, in a selection appeal relating to an event which is due to happen very shortly after selection, there is an absolute necessity to resolve the dispute quickly. To that end our procedures include a provision for expedition, which is expressed very broadly ‘the CEO and the Tribunal member or members are to take all steps necessary to deal with the dispute as expeditiously as the case requires’. It also provides for an early Preliminary Conference, early appointment of the member(s) to hear the dispute, and waiving compliance with procedural requirements.

In any case, there is a requirement that the determination is issued as soon as practicable but, in any case, within three months after final submissions and evidence have been lodged.

There are no specifications about taking interim measures beyond the general principle that the procedure of the Tribunal is within the discretion of the Tribunal.

ALS: What do you perceive to be the barriers, if any, for an increase in the use of the NST’s arbitration facilities in the resolution of sports disputes in Australia?

JB: Cost and accessibility will not be limiting factors for the NST. On the contrary, the advent of the NST is seen as a significant improvement in the options open to SGB and athletes alike. There are no practical barriers to its successfully carrying out its tasks. The only concern is that some SGB may prefer to maintain their in-house tribunals, which they can appoint and to at least a limited extent, control. Most of them, however, see the need for independence of the dispute resolution body and the transparency of that independence as being of greater importance.

Mediation

ALS: The international sports community has a number of limitations on the adoption and use of mediation. Perhaps foremost is cultural; mediation is not fully understood nor is there any systemic encouragement of mediation by sports organisations. Further, it is not viewed the same way as arbitration in international sport and in many civil jurisdictions. Domestically in Australia, mediation

has formed part of the fabric of civil dispute resolution but is not embraced uniformly by SGB. Mediation is, of course, one of the tools available in the NST.

First, would you like to comment on my observations and secondly, do you consider that there is room for SGB in Australia to make greater use of mediation?

JB: I thought I would encounter the same reluctance to embrace mediation, but the experience to date has been to the contrary. Our preliminary discussions with SGB also showed a great deal of interest on their parts, even if their experience with mediation was limited. The fact that the model Member Protection Policy published by Sport Australia (formerly the Australian Sports Commission) placed mediation as a step that sports were encouraged to undertake in dealing with grievances and complaints may have led to a level of comfort with this medium in dealing with many of the disputes that came their way. In any case, the first few cases which the NST has dealt with have all been either mediation or conciliation, with conciliation being marginally preferred over mediation. I do think this is a practice that will continue, as the efficiency and effectiveness of mediation in many disputes becomes realised.

ALS: There is a perception that mediation may not be suitable for the resolution of anti-doping, disciplinary and governance disputes. Do you have a view?

JB: The World Anti-Doping Code which governs the policies which all sports in Australia (and elsewhere) have adopted, does not allow for any formal mediation process, but disciplinary disputes are very often open to being resolved by mediation – where there is a range of sanctions open in the case of possible breaches. Likewise, where there is a dispute between different governing bodies (eg a state and a national body) an independent mediator has a good chance of successfully steering these two custodians of their sport to a good place.

ALS: I understand that at a preliminary conference held shortly after an application is filed with the NST, parties can expect a discussion with registry staff as to whether mediation or other forms of ADR may best complement arbitration as a means of resolving their dispute. Is that correct?

JB: Yes, that is correct. The NST Practice and Procedure Determination specifically empowers the CEO upon receiving an application for arbitration to consider and provide advice to the parties as to the availability of ADR and this is certainly discussed at the Preliminary Conference as well as highlighted on the NST's website, where the different forms of ADR are explained.

ALS: To what extent have parties shown an interest in mediation at those preliminary meetings?

JB: To date it has been considerable, and often the interest has even been expressed at the time of application, then confirmed at the Preliminary Conference.

ALS: Of the alternatives to arbitration, which have proved more popular than others? Are you able to proffer an opinion as to why?

JB: Early signs are that conciliation is the preferred process. I expect this is because parties welcome the slightly more directive approach the conciliator takes towards a conclusion, whereas mediation may be seen more as facilitating a discussion with the parties which may lead to resolution.

ALS: At the Sport Dispute Resolution Centre of Canada, the increased use of mediation and facilitation processes has more than tripled settlement rates from 14% to almost 50%, often within days or weeks of claims being filed. In light of these kinds of statistics, do you see a greater role for mediation in the resolution of disputes in the NST?

JB: I would expect to achieve similar numbers or better from the indications so far.

ALS: What do you perceive to be the hurdles, if any, for an increase in the use of mediation more generally in the resolution of sports disputes in Australia?

JB: I think that the NST's clear embracing of mediation in appropriate cases will lead to its more general use, and the hurdle would be, in my view, a reluctance of SGB to refer matters to the NST. In-house tribunals are traditionally bodies which expect to hear evidence and make a decision, without the same emphasis at looking at other methods of resolution of disputes. In particular, sport disciplinary tribunals do not generally have an ADR function.

The Future

ALS: If you were granted three wishes for the NST, what would they be and why?

JB: The government has set us up on a two-year trial basis. My wish would be that it becomes so obvious that we are filling a significant need well that the government will need little time or effort to decide that the trial has been successful. I would also wish that within the space of a year our caseload will justify the appointment of additional members. Lastly, I would wish that the NST be recognised and celebrated as the predominant forum if not the only forum in the country for sports disputes, and that the limits of our jurisdiction be expanded to take in a number of areas which to date are not specified in our rules.

ALS: What should SGB do if they want to avail themselves of the benefits of the NST?

JB: The NST, Sport Australia and Sport Integrity Australia (formerly the Australians Sports Anti-Doping Agency) are all ready to assist SGB in adjusting their current policies (Disciplinary, Anti-Doping, Selection, Member Protection etc) to legislate for matters arising under them to come to the NST. In the meantime, they are able to bring their matters to the NST if all parties to the matter agree

– and generally there seems to be a strong willingness amongst athletes and SGB, as well as Sport Integrity Australia, to agree to such matters coming to the NST for speedy and effective resolution.

ALS: Is the NST able to provide SGB with assistance? If so, what assistance can it offer and how?

JB: As mentioned, we can provide some assistance in the adjustment of policies. Also, we can assist SGB (and athletes) in situations of financial hardship with the waiver of fees in appropriate circumstances, as well as referral to our panel of legal practitioners who are available to provide pro bono assistance.