

# Sports and ADR

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***This paper was prepared and settled jointly by the members of ADRAC.***

One area of increased use of ADR is in Australian sport. Sportspersons usually have a limited sporting lifespan and sporting teams are built on the maintenance of team cohesion/morale. The reputation of sporting clubs can significantly impact their success both on and off the field. Accordingly, the use of ADR can provide for timely and cost-effective resolution of disputes which could otherwise damage individual and team performance, and even the very success of a sport in an ever more competitive market.

There are a number of approaches to dispute resolution among sports governing bodies. While some have developed detailed rules to deal with disputes and complaints, others have committed to the 'Play By the Rules' approach.

Over time, sports governing bodies have developed detailed rules to deal with every aspect of a game, from the rules of the game to disciplinary and grievance processes. For example, the Football Federation Australia (FFA) has [extensive regulations and by-laws](#) covering most aspects of soccer organized under its auspices, both professional and amateur. Indeed, sporting dispute resolution is well established at a national and supranational level, as bodies such as the Court of Arbitration for Sport attest.

Under most sports contracts, professional players will agree to have disputes resolved under the regime of regulation developed by the sport. In the case of professional soccer, players will normally agree to resolution of a termination of a player's contract to be dealt with under the grievance resolution regulations that are in place at the relevant time by the relevant sport's governing body. In the case of the FFA, an arbitrator, usually a barrister or solicitor, is normally appointed to hear a

dispute under its grievance resolution regulations, and to make a determination of the dispute in writing. These types of arbitral hearings will resolve a dispute within a short time period, usually behind closed doors, with no or very limited recourse to the courts. The parties are encouraged whenever possible to settle their differences without the need for a determination.

ADRAC acknowledges that sports governing bodies have quite successfully set up their own regulatory systems to manage their respective sports, with disputes in a large part resolved quickly and efficiently.

Equally, ADRAC believes that sports governing bodies could benefit by adding additional ADR options into their regulations, building on (for example) the approach by *Play by the Rules*, to enable disputes to be resolved through more facilitative or advisory processes. ADRAC believes that there is still a lot of room for greater use of flexible ADR options in sports and would welcome comment as to how they might be usefully employed in resolving some sporting disputes. It should also be noted that sports stakeholders are not limited to just players and clubs - fans are equally important.

Australia's premiere football codes—Australian rules football and rugby league—have well-established dispute resolution systems in place to address incidents of potential on-field misconduct by players. Charges are formulated by the Australian Football League (AFL) or National Rugby League (NRL) match review body, as the case may be, which grades conduct (such as dangerous tackles or 'off-the-ball' incidents) according to its severity and formulates charges. Players may then elect to challenge those charges before the AFL Tribunal or NRL Judiciary—bodies chaired by senior legal professionals or former judges, and constituted by ex-players, officials, and referees—which adjudicate factual and legal disputes before players and their legal representatives, with further provision for appeals as necessary. Efforts to extend these structures to off-field conduct have faltered, however. Although the NRL has a mandatory no-fault suspension policy for players charged with serious criminal offences off the field, which survived Federal Court challenge in *de Belin v Australian Rugby League Commission Ltd* [2019] FCA 688, neither the AFL nor NRL have extended their dispute resolution apparatuses to cover the wider disputes landscape (such as in contract or in relation to off-field issues).

One example of where ADR might have accelerated a satisfactory outcome was the

soccer fan dispute in late 2015 which significantly affected the A-League, with a number of games being boycotted by fans. This dispute arose from the objection by fans to the way the FFA had banned some football fans for alleged misconduct, and the appeals process in relation to those bans, which fans contended was procedurally unfair. As the dispute with fans escalated, the FFA determined that the appeals process surrounding the banning of fans was to be reviewed following a summit meeting between the FFA and active supporter groups. It is possible that this dispute, which affected the A-League significantly at the time, might have been resolved earlier through the use of a more facilitative ADR process.

Finally, ADRAC notes that governing bodies overseas have in some areas developed hybrid ADR processes to resolve appropriate disputes. ADRAC queries

Whether Australian sport might benefit from such hybrid processes which are briefly outlined below, and seeks any comments on whether sporting bodies or the wider Australian community might benefit from their use in certain situations, or whether they are in fact utilised at present.

Hybrid process, also known as combined resolution or blended process, is a combination of a number of traditional ADR processes. The benefit of this approach is that it allows for a more tailored approach to be used depending on the situation. Some hybrid processes popular in sports are described below:

***Mediated-Arbitration (Med-Arb)***: The parties agree ahead of time that if there is an impasse, the mediator concludes the mediation and begins arbitration either immediately or at a pre-determined future date. The mediator will act as an arbitrator and gives a binding award or judgment.

***Arbitration-Mediation (Arb-Med)***: Similar to Med-Arb, the process combines arbitration and mediation, but changes the order. In Arb-Med, the matter commences with a pre-arbitration hearing, where the arbitrator makes a determination and provides reasons. However, this decision is not disclosed to the parties at this stage. The matter will then go to mediation for resolution between parties. If mediation is unsuccessful, the initial decision from the hearing is revealed and parties are bound by it.

***MEDALOA (Mediation and Last Offer Arbitration)***: This approach is commonly known as **baseball arbitration** as it is commonly used to resolve baseball salaries. In this approach, if mediation is unsuccessful, a mediator considers each party's 'last offer' and makes a decision for the most reasonable offer. The mediator's discretion only allows him/her to pick either one or the other position, but at no point in between. The mediator's decision takes the form of a binding award or judgment.

***Night time baseball mediation*** is a variation of the baseball arbitration approach often referred to as **golf arbitration**. The mediator writes down what he/she believes to be the fairest, most reasonable and realistic final conclusion, either in monetary or non-monetary terms, on all claims and counterclaims. The mediator keeps this final

position confidential and then asks all sides to write down their final positions. The side whose final position is closest to that of the mediator becomes an award or judgment.

***Pocket golf mediation:*** This approach commences with a mediator carefully reviewing the matter and writing down a recommendation that he/she deems to be the most appropriate solution. The mediator then runs a separate meeting with each party where the offer is pitched to that party in private. If both parties agree to the offer, it is binding. If only one side accepts, that side does not lose face because the party which does not accept does not know the position of the other side.

### **WADA-complaint anti-doping regimes**

The World Anti-Doping Authority (WADA) has promulgated the World Anti-Doping Code (WADC) which obliges signatory sporting bodies to follow particular procedures and rules in cases of suspected doping rule violations. In Australia, the WADA and WADC are formally recognised under the National Anti-Doping Scheme enshrined in the *Sport Integrity Australia Regulations 2020*, made under the *Sport Integrity Australia Act 2020* (Cth) (Sports Integrity Act). Both the Sports Integrity Act and Regulations contain detailed mandatory provisions for handling suspected doping rule violations. These provisions do not recognise any formal role for ADR, noting that regulation of suspected doping rule violations is a complex combination of private and public law, and indeed have been criticised for fostering an overly complex and unduly punitive regulatory culture: see, for example, the discourse surrounding anti-doping violations by high-level tennis players such as Jannik Sinner and Iga Swiatek. WADA-based anti-doping regimes are ultimately predicated upon binding determinations by private sporting tribunals, subject to 'supervisory' arbitrations by the Court of Arbitration for Sport. These regimes do not allow for ADR-mediated resolution of disputes concerning suspected doping rule violations. To that extent, anti-doping regimes may be seen as quite distinct from those mechanisms which apply to resolution of other sports-related disputes.

### **National and Supranational ADR in Sport**

Beyond the ADR mechanisms operated by individual codes and governing bodies, set out above, there is also a national-level dispute resolution body called the National Sports Tribunal (**NST**), established by the *National Sports Tribunal Act 2019* (Cth). The NST is available both to individuals and national-level

organisations in certain circumstances, and is typically engaged by the consent of parties in respect of disputes with some national element. In respect of individuals, this consent is often incorporated into the regulations or contractual arrangements agreed to prior to participation in the sport in question. For organisations with their own ADR mechanisms, and although the NST can be used as a first-instance dispute resolution mechanism in both its General and Anti-Doping Divisions, the NST can be used for its Appeals Division where an issue has previously been agitated at first instance before the organisation's ADR body. The NST also facilitates other processes, including mediations, conciliations, and case appraisals, and is constituted by an extensive and diverse membership.<sup>1</sup>

At the international level, the Court of Arbitration for Sport (**CAS**) is available to natural and legal persons involved in any dispute directly (eg concerning participation in a sporting event) or indirectly (eg concerning broadcast rights for a sporting event) linked to sports. As with the NST, the CAS is available by consent of the parties to a dispute. The CAS arbitrates on a confidential basis in a manner not dissimilar to a tribunal process, and pronounces awards which are binding upon all parties thereto and enforceable under the *New York Convention*.

The CAS has offices in each of Lausanne (its principal seat), New York, and Sydney. Awards are not ordinarily appealable, save on administrative grounds such as lack of jurisdiction or violations of procedural fairness, in which case they can be appealed to the Swiss Judiciary. In exceptional cases, the European Court of Human Rights can hear further appeals.<sup>2</sup>

## **What needs to happen?**

The use of traditional ADR processes has been the preferred ADR methods in sport, namely, the use of an arbitral determination process. However, hybrid processes have had significant success overseas, and ADRAC queries whether they might prove useful in some areas such as Australian sport, and perhaps more broadly.

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<sup>1</sup> See <https://www.nationalsportstribunal.gov.au/about-us/who-we-are>.

<sup>2</sup> See, eg, *Case of Mutu and Pechstein v Switzerland* (applications nos. 40575/10 and 67474/10)

ADRAC welcomes any comments on whether there are significant benefits in the use of hybrid processes, and whether there might be greater use of facilitative and advisory processes in the sporting sector.