DOPING IN SPORT: WHAT ROLE FOR ADMINISTRATIVE LAW?

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Administrative law is the legal field which is concerned with challenges to both the merits and legality of decisions made by governments and other administrative decision-makers. It includes institutions such as courts and tribunals, which this chapter will discuss in detail. It also includes bodies and mechanisms such as ombudsmen, human rights commissions and the freedom of information regime,[1] which may have a peripheral impact in doping-related matters and decisions made by administrators. However, these will not be considered in this chapter. Administrative law is relevant to those accused of doping infringements. These people might seek to use general administrative law principles, such as the right to a fair hearing and an unbiased decision-maker, to challenge decisions by official bodies. This may be possible even where a person cannot obtain administrative law's remedies, available only where the decision-maker is a government entity, because the body at issue is a private association.

As a matter of domestic Australian law, it is possible to challenge certain doping-related determinations either through merits review in the Administrative Appeals Tribunal (AAT) or by way of an application for judicial review made to a court. Judicial review determines the highly technical point of whether a decision was made within jurisdiction, which is to say the limits of the decision-maker's lawful authority. By contrast, merits review is conducted by a tribunal and assesses the merits of the case afresh to determine whether a challenged decision is the 'correct or preferable' decision.[2] It is available only where provided for by statute because it authorises the tribunal to 'stand in the shoes' of the original decision-maker and perform his or her statutory task. The separation of judicial power doctrine prevents federal courts from reviewing decisions on this basis.

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[1] See, eg, *Re Clews and Australian Sports Commission* [2006] AATA 373.
[2] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 70 (Bowen CJ and Deane J).

At an international level, doping sanctions are generally challenged in the Court of Arbitration for Sport (CAS).[3] Consideration will be given to the nature of CAS, its governing rules and the possible development of a global principle concerning fair process.

Challenging Doping Decisions in Australia

In Australia, the body responsible for policing anti-doping violations and sanctions is the Australian Sports Anti-Doping Authority (ASADA). ASADA is governed under the ASADA Act and the Australian Sports Anti-Doping Authority Regulations 2006 (Cth) (hereinafter the ASADA Regulations). An athlete who wishes to challenge a decision of ASADA may apply to the AAT for review of the merits of the decision and, thereafter, to a court for judicial review.

First Option: Merits Review by a Tribunal

The benefits of merits review compared to review by a court are that it is designed to be 'accessible', 'fair, just, economical, informal and quick' and 'proportionate to the importance and complexity of the matter'.[4] It can be beneficial to have the facts of a case reconsidered in circumstances where the decision to impose sanctions is discretionary, as it can be possible to persuade the tribunal to adopt a different factual conclusion. Additionally, merits review tribunals are generally able to consider new evidence that was not available at the time of the original decision.[5] Thus, if an athlete is able to provide new evidence, either scientific or from witnesses, merits review can be an effective and fast mechanism to have this material taken into consideration. Finally, Australian tribunals offer a considerable advantage over courts in that they are able to substitute their decision for the original. This means that if the tribunal is persuaded to a different outcome, either by factual reconsideration or new evidence, the decision will be changed and the athlete will benefit from the new decision immediately. Such a result can be immensely important for an athlete prevented from competing or training for a period by a doping sanction. By contrast, courts can do no more than require that a

[3] This is despite s 8 of the Australian Sports Anti-Doping Authority Act 2006 (Cth) stating that the Act has extra-territorial application.
[4] Administrative Appeals Tribunal Act 1975 (Cth) s 2A.
[5] *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286, 299–300 [40]–[41] (Kirby J), 315 [99]–[100] (Hayne and Heydon JJ).

decision be remade according to law. They have no constitutional power to do the job assigned by statute to the decision-maker.

Under the ASADA Regulations, the National Anti-Doping Scheme (hereinafter the NAD Scheme) implements Australia's obligations under the relevant international conventions.[6] The NAD Scheme authorises the Chief Executive Officer (CEO) of ASADA 'to investigate possible violations of the anti-doping rules' and the Anti-Doping Rule Violation Panel (ADRVP) 'to make assertions relating to' such investigations.[7] ASADA must establish and maintain a register of the findings made in the course of such investigations,[8] which the CEO may then present 'at hearings of the Court of Arbitration for Sport and other sporting tribunals' and otherwise publish.[9] In the course of investigations and prior to hearings by the ADRVP, the CEO of ASADA has broad powers to gather information and compel disclosure.[10]

An athlete who is the subject of an investigation has limited rights under the ASADA Act. In accordance with the principles of natural justice, the athlete must be notified of the possible consequences of failing to cooperate with the investigation and is entitled, prior to the ADRVP entering the athlete's name on its register of findings, to:

- be notified of the ADRVP's proposed course of action;
- have his or her submissions on the matter heard; and
- be notified of the ADRVP's final decision.[11]

If the ADRVP decides to enter the athlete's name and particulars on the register, the athlete has a right to apply to the AAT for merits review of that decision.[12] This is a desirable course of action for athletes facing the possibility of sanctions in a private tribunal run by their sporting association. For example, Sandor Earl, a rugby league player, was alleged to have committed over 30 anti-doping violations between 2011 and 2013, including the use of peptide CJC-1295 while recovering from shoulder surgery. In June 2014, he obtained an

[6] ASADA Regulations sch 1. Specifically, the Anti-Doping Convention 1994, opened for signature 16 November 1989, CETS No 135 (entered into force 1 March 1990); and the International Convention against Doping in Sport 2005, opened for signature 19 October 2015, 2419 UNTS 43649 (entered into force 1 February 2007): ASADA Act s 9. See *Anti-Doping Rule Violation Panel v XZTT* (2013) 214 FCR 40, 42 [2] (the Court).
[7] ASADA Act s 13(1)(f), (h).
[8] ASADA Act s 13(1)(i); ASADA Regulations cl 4.08.
[9] ASADA Act s 13(1)(k), (m).
[10] ASADA Act ss 13A, 13B, 13C, 13D.
[11] ASADA Act s 14(2)–(3); ASADA Regulations cl 4.09.
[12] ASADA Act s 14(4). Alone amongst the rights stipulated in s 14, the right to seek review in a tribunal or court cannot be waived: s 14(5).

interlocutory injunction to prevent his name being added to the ADRVP register unless and until his case was heard in full by the AAT. This had the effect of preventing the National Rugby League (NRL) Tribunal from hearing his case, based upon his alleged doping offences constituting a contractual breach of his player registration, until after the AAT had determined his case on the merits.[13] This was a significant outcome for Earl,[14] since some sporting bodies and particularly the NRL have for many years exercised 'police-style functions' over their registered athletes, notably with regard to the athletes' use of prohibited drugs.[15] Police-style functions include the power to require compulsory tests for prohibited drugs, and the ability to investigate possible infringements and to prosecute and/or sanction contraventions.

Merits review is exclusively a creature of statute: there is no general right to seek review of a decision on its merits unless such a right is provided by legislation.[16] Here, the right of an athlete to seek review in the AAT is provided only in respect of decisions made by the ADRVP to enter that athlete's details on the register and does not extend, for example, to challenges to the manner in which the CEO exercises the power to conduct investigations.

The Register of Findings and the AAT

The AAT has developed a small body of jurisprudence on the merits review of decisions related to the register of findings. Most recently, in 2012, the AAT affirmed the decision of the ADRVP to enter the name of an athlete on the Register in *Re Toskas and Anti-Doping Rule Violation Panel*.[17] Mr Toskas was registered with the Victorian Athletic League and was found by the ADRVP to have refused to comply with a valid request made by a person authorised by ASADA to submit a blood and urine sample, and to have evaded sample collection in breach of the ASADA Act. The Tribunal rejected submissions in which Mr Toskas denied he was present on the collection day and preferred the evidence of two

[13] See Chris Barrett, 'Sandor Earl Wins Injunction against ASADA' *Sydney Morning Herald* (20 June 2014) www.smh.com.au/rugby-league/league-news/sandor-earl-wins-injunction-against-asada-20140620-zsg9g.html.
[14] Although he was ultimately banned in 2015 for four years by an Anti-Doping Tribunal chaired by former High Court judge Ian Callinan for using performance-enhancing drugs, including eight violations relating to the use of peptide CJC-1295; see Michael Carrayannis, 'Former NRL winger Sandor Earl given four-year ban for drug use' *Sydney Morning Herald* (15 October 2015) www.smh.com.au/rugby-league/league-news/former-nrl-winger-sandor-earl-given-four-year-ban-for-drug-use-20151014-gk8xdd.html.
[15] JRS Forbes, *Justice in Tribunals* 4th edn (Sydney, Federation Press, 2014) 48.
[16] Administrative Appeals Tribunal Act 1975 (Cth) s 25.
[17] *Re Toskas and Anti-Doping Rule Violation Panel* [2012] AATA 662.

ASADA officials, as well as a coach and another athlete who confirmed the applicant was present.

In 2011, *Re Peters and Anti-Doping Rule Violation Panel*[18] affirmed the decision of the ADRVP to make two entries relating to the applicant on the Register – the first that a banned substance had been detected and the second that the applicant had used the banned substance. The applicant was a player in the Queensland Rugby League (QRL) and tested positive to a banned substance, a stimulant called 1,3-dimethylpentylamine, which he consumed in a product known as 'Jack3d'. The banned substance was not included on Jack3d's ingredient list, but 'geranium root' was included. The banned substance is extracted from geranium root. The AAT held that 'if the applicant had made more searching inquiries, he would have realised that [the banned substance] is extracted from geranium plants. That substance is on the list of banned substances for the purpose of [the NAD Scheme] because it is a stimulant'.[19]

The AAT rejected the applicant's arguments that he was not subject to the drug testing rules. He had contended that his contractual arrangements with his club did not effectively incorporate the anti-doping rules to which the Australian Rugby League (ARL) and the NRL were parties.[20] The AAT held that the applicant's contract with his club expressly required him to observe the QRL's rules and the QRL rules expressly referred to and incorporated the ARL's anti-doping policy, and that policy in turn conformed to and incorporated the NAD Scheme arrangements.[21]

The AAT also noted the applicant's claim that he was denied procedural fairness, which was based on alleged process failures centred on the applicant's assertion that the testing process was required to comply strictly with the provisions regarding the presence of an independent witness. The independent witness was present for the opening of the B sample, but not for the entirety of the testing process. The AAT dealt with the substance of this claim without using the expression 'procedural fairness', which is a ground of judicial review and is therefore irrelevant to the merits of a case. It noted that the NAD Scheme in clause 3.24 contained the express words that the testing process 'comply or substantially

[18] *Re Peters and Anti-Doping Rule Violation Panel* [2011] AATA 333.
[19] ibid [7] (Deputy President Hack and Senior Member McCabe).
[20] ibid [29] (Deputy President Hack and Senior Member McCabe).
[21] ibid [30] (Deputy President Hack and Senior Member McCabe).

comply'[22] with the World Anti-Doping Agency Code (hereinafter the WADA Code) and the relevant international standards. The AAT was satisfied that there had been substantial compliance.

A distinction must be drawn between according procedural fairness by providing fairness to the accused and complying with procedures mandated by the WADA Code. The athlete's characterisation of this issue as one of 'procedural fairness' was ill-founded, since a party owing procedural fairness is generally required to comply completely with the requirements of procedural fairness unless failure to do so would cause no 'practical injustice'.[23] The law on purely 'technical' or 'inconsequential' breaches of procedural fairness is heavily fact-based and revolves around the question of whether there is a reason why the court ought not to issue relief.[24]

There have been two examples where ASADA appealed to the Federal Court after an athlete was successful in having a decision overturned by the tribunal.[25] The potential for ASADA to exercise appeal rights should therefore always be taken into account and athletes should be advised that success in the tribunal does not automatically mean the end of the matter. Athletes should also be aware that the AAT has powers to dismiss applications for review should any requirements not be complied with or deadlines not met.[26]

There are many sections of the ASADA Act that contain the possibility of decisions being made against athletes that may not be reviewed on the merits. An example is if a person is given a notice which requires him or her to attend an interview to answer questions and he or she fails to comply with the notice, he or she has contravened the Act and may be fined 30 penalty units.[27] No circumstances are provided for in which a failure to attend an interview might not require or deserve the penalty stipulated. The AAT has warned about the risk of injustice where decision-makers apply inflexible, blanket policies which fail to recognise, for

[22] ibid [25] (Deputy President Hack and Senior Member McCabe).
[23] *Re Minister for Immigration and Multicultural Affairs ex p Lam* (2003) 214 CLR 1, 14 [37] (Gleeson CJ).
[24] Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* 5th edn (Sydney, Thomson Reuters, 2013) 477–81.
[25] *Re MTYG and Australian Sports Anti-Doping Authority* [2008] AATA 448, subsequently appealed to the Federal Court of Australia as *Australian Sports Anti-Doping Authority v Muhlhan* (2009) 174 FCR 330; *Re XZTT and Australian Sports Anti-Doping Authority* [2012] AATA 728, subsequently appealed to the Federal Court as *Anti-Doping Rule Violation Panel v XZTT* (n 6). Appeals from decisions of the AAT lie on 'a question of law' to the Federal Court: Administrative Appeals Tribunal Act 1975 (Cth) s 44.
[26] See Administrative Appeals Tribunal Act 1975 (Cth) s 42A(5)(b); *Re Al Shaick and ASADA* [2007] AATA 1076.
[27] ASADA Act s 13C(3). Thirty penalty units currently amounts to $5,400: Crimes Act 1914 (Cth) s 4AA(1).

example, that letters do 'go astray in the post'.[28] The principle is no different where legislation treats every failure to attend an interview as being qualitatively the same. There might be many reasons why a person does not attend an interview, which range from a simple refusal to having been involved in an accident en route to the interview. It is unlikely that the legislation's drafters intended to treat each circumstance in the same way, but the subsection leaves little scope for inquiry into *why* a person has failed to attend an interview. This is compounded by the fact that a person with a perfectly good reason for not attending is subject to a $5,400 fine and is not entitled to challenge the imposition of that fine before the AAT.[29]

Second Option: Judicial Review by a Court

In Australia, there are two mechanisms under which an athlete may make an application for judicial review. The first is under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (hereinafter the ADJR Act) to the Federal Court of Australia,[30] while the second involves an application for judicial review made under section 75(v) of the Constitution to the High Court of Australia or, using the identical jurisdiction provided by section 39B of the Judiciary Act 1903 (Cth), to make an application to the Federal Court of Australia. The latter is often termed common law judicial review, as it has developed through cases.

Judicial Review Using the ADJR Act

The ADJR Act was enacted to codify the state of common law judicial review,[31] but the course of time has left it significantly different from the common law, since the ADJR Act has rarely been amended, while the common law has done as its nature demands and has marched on. The ADJR Act has threshold requirements that: (1) there must be a decision, or conduct related to a decision,[32] (2) which is of administrative character,[33] (3) made under an enactment.[34] The third element, requiring the decision to have been made under an enactment, has in practice been the most restrictive aspect of the legislative threshold for

[28] *Re Goodson and Secretary, Department of Employment, Education, Training and Youth Affairs* (1996) 42 ALD 651, 654–55 (Deputy President Barnett).
[29] A person in these circumstances could seek judicial review of the decision made under the ASADA Act, although where the statutory scheme is so clear, it can be difficult to find an appropriate ground of review to attack its application.
[30] ADJR Act s 8(1).
[31] Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012) 57 [3.47].
[32] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337 (Mason CJ).
[33] *cf* Legislative Instruments Act 2003 (Cth) s 5(2). See also *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582.
[34] *Griffith University v Tang* (2005) 221 CLR 99, 130–31 (Gummow, Callinan and Heydon JJ).

jurisdiction under the ADJR Act and the one furthest removed from the common law, which allows judicial review of decisions that do not have a statutory basis.[35] Notably, ADJR Act jurisprudence has excluded judicial review of decisions made in consensual relationships,[36] which are reviewable using common law judicial review.[37]

In relation to the ASADA Act, an applicant for judicial review under the ADJR Act needs to demonstrate that the relevant decision was either required or authorised by the ASADA Act or the ASADA Regulations, and that the decision derives, either expressly or impliedly, from the ASADA Act on the basis that it conferred, altered or otherwise affected legal rights or obligations. In other words, the relevant legislation must be the driving force behind the decision, which is not the case where the decision is made under a contract or another mutual, voluntary agreement. It is doubtful whether an athlete would succeed in establishing that the Federal Court has jurisdiction under the ADJR Act where the dispute is essentially for breaching the terms of a contract that requires compliance with the ASADA Act and related instruments.

Judicial Review at Common Law

In order to apply for judicial review at common law in Commonwealth jurisdiction, it is necessary to establish that the decision to be reviewed has been made by an 'officer of the Commonwealth'.[38] The High Court has been reluctant to explore the possible scope of that term,[39] and significant uncertainty remains about whether and when it might extend to people or bodies not in an employment relationship with the Commonwealth.[40] Both ASADA and the ADRVP are established under Commonwealth legislation, but there are many examples

[35] See, eg, in the UK: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; and in Australia: *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.
[36] As distinct from contractual relationships, which neither the common law nor the ADJR Act will review: *R v Disciplinary Committee of the Jockey Club ex p Aga Khan* [1993] 1 WLR 909; *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164.
[37] *Griffith University v Tang* (n 33) 128–29 [81]–[82] (Gummow, Callinan and Heydon JJ). *cf* Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1.
[38] With regard to seeking review in the original jurisdiction of the High Court of Australia, this phrase can be found in s 75(v) of the Constitution. The phrase also appears in the Judiciary Act 1903 (Cth) s 39B with reference to seeking review in the Federal Court of Australia.
[39] See *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 345 [51] (the Court).
[40] See *R v Murray and Cormie ex p the Commonwealth* (1916) 22 CLR 437, 452 (Isaacs J); Janina Boughey and Greg Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316, 325–26.

of institutions created under Commonwealth legislation which were nonetheless found not to be 'officers of the Commonwealth'.[41]

Regardless of whether ASADA or the ADRVP may be characterised as an officer of the Commonwealth, which remains unsettled, the CEO of ASADA, at least, is an officer of the Commonwealth. As a result, in *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority*,[42] Middleton J of the Federal Court was prepared to hear and decide judicial review proceedings brought against the CEO by the Essendon Football Club and James Hird under section 39B of the Judiciary Act 1903 (Cth). Essendon and its coach, Mr Hird, had come to the notice of ASADA as a result of its systematic injection of its players with supplements, a practice with a long history.[43] Both the club and Mr Hird sought judicial review of the joint investigation into possible anti-doping rule violations conducted by ASADA and the Australian Football League (AFL), arguing that such a joint investigation was beyond the scope of the investigatory powers under the ASADA Act, the ASADA Regulations and the NAD Scheme. Justice Middleton rejected this argument. Essendon and Mr Hird also argued that ASADA had breached the confidentiality obligations imposed on it under the ASADA Act and the NAD Scheme. Justice Middleton noted that:

> [W]hatever label is given to the investigation is of little relevance. The important enquiry is to consider the nature, purpose and conduct of the investigation itself. The investigation, from ASADA's point of view, was part of a wider investigation by ASADA under the [ASADA Act] and [the NAD Scheme] of the [ASADA Regulations].[44]

Justice Middleton concluded that the investigation was in accord with the ASADA Act and dismissed the judicial review application. Following the conclusion of the matter, the World Anti-Doping Agency (WADA) issued a statement welcoming the decision of Middleton J and noting that 'Collaborations between different organizations are an important aspect of any anti-doping investigation, provided rules and laws permit such sharing', but declined to comment any further.[45]

It is significant that neither Essendon nor Mr Hird sought judicial review remedies against the AFL itself, although this is also unsurprising inasmuch as the AFL is a private body and is not an 'officer of the Commonwealth' under the existing case law.[46] While judicial review's *principles* have long been able to extend beyond strictly public bodies,[47] its *remedies* do not. The remedies available under section 75(v), in particular, were intended to have an accountability purpose that is properly directed to public bodies or, at the highest that one could argue the point, to bodies performing public functions.[48] Other countries have adopted a different approach on this complex modern issue of privatisation/contracting-out. In particular, in *R v Panel on Takeovers and Mergers ex p Datafin plc*, the UK focused on the nature of the power being exercised and not the identity or source of power of the decision-maker.[49] The Australian High Court has so far seemed unconvinced by this reasoning, although the issues considered in *Datafin* have never arisen squarely for argument before it.[50] Indeed, they have seldom arisen in the UK since *Datafin*.

Subsequently, Mr Hird, but not Essendon, appealed to the Full Court of the Federal Court.[51] A unanimous Full Court dismissed the appeal and agreed with the reasoning of Middleton J that the investigation was authorised by the ASADA Act; there was no improper purpose, no unlawful disclosure and no practical unfairness.

What Do You Need to Show a Court to Succeed in a Judicial Review Application?

Judicial review actions require the applicant to identify a 'ground' of review, which is an established basis on which an error might be identified in the original decision. This requirement applies regardless of whether the action is commenced in the Federal Court under the ADJR Act, in the Federal Court under section 39B of the Judiciary Act 1903 (Cth) or in the High Court under section 75(v) of the Constitution.[52]

[41] Aronson and Groves (n 23)[2.160].
[42] *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1.
[43] In the 1930s, Wolverhampton Wanderers and other English football clubs injected their players with 'monkey glands', extracts from monkey testicles, to improve player performance. The practice had mixed results and, while decreed permissible by the FA, was also seen as 'immoral' by some players: see Neil Carter, 'Monkey Glands and the Major: Frank Buckley and Modern Football Management' in Dave Day (ed), *Sporting Lives* (Manchester, Manchester Metropolitan University Institute for Performance Research, 2011) 179.
[44] *Essendon* (n 41) 6.
[45] WADA, 'WADA Statement on Joint ASADA/AFL Investigation' (19 September 2014) https://www.wada-ama.org/en/media/news/2014-09/wada-statement-on-joint-asadaafl-investigation.
[46] *R v Murray and Cormie ex p the Commonwealth* (n 39) 452 (Isaacs J).
[47] Aronson and Groves (n 23) [7.410].
[48] Boughey and Weeks (n 39) 320–23.
[49] *R v Panel on Takeovers and Mergers ex p Datafin plc* [1987] 1 QB 815, 847 (Lloyd LJ).
[50] *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.
[51] *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95.
[52] The ASADA Act additionally provides some avenues of review that go beyond common law judicial review principles, such as the capacity to challenge a civil penalty order on the basis of a mistaken but reasonable belief

Breach of procedural fairness is the ground of judicial review, which will be most commonly pleaded in doping-related challenges, either under legislation or at common law.

Procedural Fairness

Procedural fairness is a core concept of administrative law, which encapsulates the right to a fair hearing and the right to an unbiased decision.[53] The principles of procedural fairness, which have a long history,[54] are widely applied across all common law jurisdictions,[55] and continue to evolve and attract regular judicial consideration.

The threshold question which must be first asked in any case is whether the decision-making body owes a duty to accord procedural fairness to the applicant. In Australia, the rule that procedural fairness requires a fair hearing has, since *Kioa v West*,[56] been applied so broadly to decisions by public authorities that the true issue becomes not whether it applies, but what it requires in any given set of circumstances.[57] As explained above, the AAT has held that ASADA must 'substantially comply' with the statutory procedures in the ASADA Act, but this is not truly a procedural fairness obligation, nor is it the full extent of what is required of ASADA with regard to procedural fairness. There has been a sequence of cases at the state level which have confirmed that 'statutory tribunals, being creatures of parliament (and therefore not founded on private consensus or contract) are required as a matter of public law to apply the principles of natural justice to any disciplinary hearing'.[58]

ASADA owes a general duty to accord the *principles* of procedural fairness and, as a 'creature of Parliament', is also likely to be subject to judicial review's *remedies* for any failure to do so. By contrast, private disciplinary bodies which impose sanctions as a matter of contract, such as the NRL Judiciary and comparable bodies, owe a duty to accord procedural fairness largely as part of an obligation not to unduly harm livelihoods or

about certain facts: s 73Q. At common law, there is almost no scope for an error of fact to form the basis of a successful claim for judicial review.

[53] See Aronson and Groves (n 23) [7.20].

[54] See, eg, *Bonaker v Evans* (1850) 16 QB 162; *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180; *Ridge v Baldwin* [1964] AC 40.

[55] See, eg, *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817; *Khalon v Attorney General* [1996] 1 NZLR 458.

[56] *Kioa v West* (1985) 159 CLR 550.

[57] ibid 585 (Mason J); Aronson and Groves (n 23) [8.10].

[58] David Thorpe et al, *Sports Law* 2nd edn (Oxford, Oxford University Press, 2013) 49. See *Freedman v Petty and Greyhound Racing Authority* [1981] VR 1001; *Gleeson v New South Wales Harness Racing Authority* [1990] 21 ALD 515; *Carter v NSW Netball Association* [2004] NSWSC 737.

reputations,[59] but are not subject to judicial review's remedies for breach of that duty. In these contexts, the application of the administrative law principle of procedural fairness is by analogy rather than as an application of administrative law per se, since any failure to apply procedural fairness is a breach of a private law obligation and is not remediable by administrative law.

Information Obtained by Informants

Doping sanctions may conceivably take into account circumstantial evidence, including information provided by persons other than those against whom the doping allegations have been made. It has become more common for sanctions to be based on non-analytical findings, which is to say other than by a positive drug test result.[60] It has been noted that 'while analytical evidence will usually be the most significant evidence in a sport drug test, testimonial evidence given either orally, by written statement, or by a phone link up, can also be highly significant in some cases'.[61]

For example, in three CAS cases from 2008,[62] testimonial evidence was relied on to determine whether or not a doping infringement had occurred in the circumstances. The importance of evidence from informants, and also non-analytical sources, was also central in the high-profile instances involving Lance Armstrong and Marion Jones.[63]

Information prejudicial to the accused may sometimes be provided on an anonymous basis. In Australia, the hearing rule of procedural fairness requires that a person be given the opportunity to know and respond to the case against him or her, and in particular to any material adverse to his or her interests.[64] The High Court of Australia considered the issue of sensitive, anonymous information in *Applicant VEAL of 2002 v Minister for Immigration and*

[59] See Aronson and Groves (n 23) [7.410].

[60] See, eg, *French v Australian Sports Commission and Cycling Australia* (Award, Court of Arbitration for Sport, Case No CAS 2004/A/651, 11 July 2005); *Marinov v Australian Sports Anti-Doping Authority* (Award, Court of Arbitration for Sport, Case No CAS 2007/A/1311, 9 June 2007).

[61] Chris Davies, 'The "Comfortable Satisfaction" Standard of Proof: Applied by the Court of Arbitration for Sport in Drug-Related Cases' (2012) 14 *University of Notre Dame Australia Law Review* 1, 21.

[62] *World Anti-Doping Agency v International Ice Hockey Federation* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1564, 23 June 2009); *Fedrazione Italiana Giuoco Calcio v World Anti-Doping Agency* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1557, 27 July 2009); *World Anti-Doping Agency v Comitato Olimpico Nazionale Italiano* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1551, 18 March 2009).

[63] See generally Richard H McLaren, 'Is Sport Losing its Integrity?' (2011) 21 *Marquette Sports Law Review* 551.

[64] *Kioa v West* (n 55) 582 (Mason J).

Multicultural and Indigenous Affairs.[65] The context of *VEAL* was different: it concerned an applicant for a protection visa who was anonymously accused of assassinating a prominent political figure in his country of origin. Nonetheless, *VEAL*'s reasoning can be applied by analogy to the situation of adverse material provided by an anonymous informant in a doping matter. In a unanimous judgment, the High Court held that:

> [B]ecause principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do *in the course* of deciding how the particular power given to the decision-maker is to be exercised. They are applied to the process by which a decision will be reached.[66]

The test which governs when information must be disclosed is that the information must be 'credible, relevant and significant',[67] such that the decision-maker could not dismiss it from further consideration. The High Court said that whether the information is credible, relevant and significant 'must be determined by [the] decision-maker before the final decision is reached'.[68] In *VEAL*, procedural fairness required that the information be drawn to the attention of the party, but the High Court balanced this against public interest immunity considerations that required the identity of the informant not to be disclosed to the affected party in circumstances where the informant had asked for anonymity. The Court said:

> That public interest, and the need to accord procedural fairness to the appellant, could be accommodated. They were to be accommodated, in this case, by the Tribunal telling the appellant what was the substance of the allegations made … and asking him to respond to those allegations.[69]

Thus, were a doping sanction or related decision to be made on the basis of information or material provided by an informant, anonymous or otherwise, the affected party would need to be apprised of the substance of the allegations, without necessarily revealing the identity of the informant if he or she had requested anonymity, and be provided with an opportunity to comment in response, assuming that the information provided met the standard of being 'credible, relevant and significant'. Failure to do so could place the ultimate decision at risk of challenge by way of judicial review on the ground that the decision-maker had failed to provide a fair hearing.

[65] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.
[66] ibid 96 [16] (the Court) (emphasis in original).
[67] *Kioa v West* (n 55) 629 (Brennan J).
[68] *VEAL* (2005) 225 CLR 88, 96 [17] (the Court).
[69] ibid [29] 100 (the Court).

Breach of Statutory Limits on Power

An exercise of a statutory power may be invalidated if the decision-maker acts in breach of the statute.[70] This is not automatic; ultimately it is a question of statutory interpretation which is determined by giving 'the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.[71] Sometimes, it is irresistibly clear that the legislature intends a decision to be valid regardless of breach. For example, section 11 of the ASADA Act requires that:

> (1) Before making an instrument … amending the NAD scheme, the CEO must:
>
> (a) publish a draft of the instrument and invite people to make submissions to the ASADA on the draft; and
> (b) consider any submissions that are received within the time limit specified by the CEO when he or she published the draft.

However, section 11(3) then says expressly that a 'failure to comply with this section does not affect the validity of the instrument'.[72]

Other sections of the ASADA Act include requirements of which a breach is more likely to result in invalidity. The requirement in section 13A that 'the NAD scheme must authorise the CEO to give a person a written notice (a *disclosure notice*)' before that person can be required to attend an interview or produce documents is one example. Australian courts have shown a tendency to view such language as indicating a 'mandatory' requirement.[73] Statutory requirements to provide written notice have in particular been strictly construed by the High Court.[74]

Unreasonableness

The *Wednesbury* unreasonableness ground of review, where a decision is so unreasonable that no reasonable person could have made it, was for many years seen in Australia as the last refuge of desperate counsel when it appeared that other grounds for judicial review would not

[70] See, eg, *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454.
[71] *Project Blue Sky v Australian Broadcast Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).
[72] See the comparable provisions to the ASADA Act in the Legislative Instruments Act 2003 (Cth) ss 17, 19.
[73] DC Pearce and RS Geddes, *Statutory Interpretation in Australia* 8th edn (Sydney, LexisNexis, 2014) 451–52.
[74] *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 319–22 [72]–[77] (McHugh), 345–46 [173] (Kirby), 353–55 [204]–[208] (Hayne J). This is so even where the requirements of common law procedural fairness would not have been breached. See *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190; Greg Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *Australian Journal of Administrative Law* 100, 104–05.

succeed.[75] Australian courts had not generally applied the *Wednesbury* ground with the abandon of the UK judiciary. Instead, they have stuck closer to the reasoning behind the now much-maligned speech of Lord Greene MR in *Wednesbury* that courts only have jurisdiction to interfere in the most extreme circumstances, which is widely held to amount to little short of lunacy. Brennan J was disquieted even by this modest scope for judicial intervention, reminding his judicial colleagues that courts have no power simply to cure administrative injustice.[76]

This state of affairs had seemed utterly fixed in Australian law. It was therefore a surprise when the High Court handed down its decision in *Minister for Immigration and Citizenship v Li*,[77] the finer points of which are still a matter of debate.[78] What seems clear, however, is that in unanimously holding that the Migration Review Tribunal (MRT) acted unreasonably in refusing to grant Ms Li a further adjournment, the High Court primarily took issue with the manner of the MRT's refusal rather than the fact of it. The MRT's failure to articulate its reasons for refusing the requested adjournment was the basis on which the High Court held that it had made a jurisdictional error; nothing in the High Court's judgments indicates that the MRT might not validly have refused the adjournment had it given adequate reasons. However, the High Court relied on a series of authorities which hold, in essence, that if a decision-maker fails to provide reasons for a decision, and a good reason is not obvious to a reviewing court, then that court is entitled to conclude that no good reason exists and may therefore hold that the decision is invalid on the *Wednesbury* ground.[79] This reasoning makes it imperative that people making decisions under the ASADA Act and related legislation provide appropriate reasons. This is not generally a demanding standard, so it is critical that some effort is made to explain the reasoning behind any doping sanction.

Irrationality Grounds

A decision-maker may also commit jurisdictional error by failing to take into account considerations which he or she was bound by statute to consider, or conversely by taking into account matters which he or she was forbidden by statute to take into account. This can

[75] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228 (Lord Greene MR).
[76] *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).
[77] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
[78] See the Hon John Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (Sydney, Federation Press, 2014) 35.
[79] *Minister for Immigration and Citizenship v Li* (n 76) 364 [68], 367 [76] (Hayne, Kiefel and Bell JJ).

include matters that can be inferred from the legislation. Consequently, for example, a Minister who was under no obligation on the face of the statute to consider matters that arose after a formal inquiry, was nonetheless held to be obliged to consider new factual material, since it could be inferred from the statutory scheme that the Minister was required to make his determination based on the most current material.[80] If an athlete submits that the exercise of a statutory power will affect him or her adversely, such a submission will generally be a mandatory consideration.[81]

A related ground is acting for an improper purpose. It is difficult on an evidentiary level to prove that a decision-maker has acted for a purpose not authorised by the statute. An unauthorised purpose will generally not be inferred unless the evidence *cannot* be reconciled with the proper exercise of the power.[82] In practice, it is difficult for an applicant to find evidence to support such a claim. The CEO of ASADA may perform his or her functions only for the purposes set out in section 21(2) of the ASADA Act and is at risk of committing a jurisdictional error if he or she acts for any other purpose. However, the purposes for which the CEO may validly act are broadly drafted and it seems unlikely that an athlete could establish that the CEO had acted for another purpose, given the high evidentiary hurdle.

Third Option: Appeal from Tribunal to a Court

Rather than seeking judicial review, a person may choose to appeal to the Federal Court on the basis that the tribunal found incorrectly on a question of law.[83] In practice, there does not seem to be any distinction or advantage between an appeal from the AAT to the Federal Court compared to a judicial review application to the court. Both of the matters that have been litigated under the ASADA Act following an AAT hearing and determination, *Muhlhan*[84] and *Re XZTT and Anti-Doping Rule Violation Panel*,[85] were brought as appeals against decisions of the AAT, but might also have been run as judicial review matters challenging the decision of the AAT member as an officer of the Commonwealth. One noteworthy aspect of the appeals to the Federal Court in *Muhlhan* and *XZTT* is that ASADA

[80] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 30 (Gibbs CJ). See Aronson and Groves (n 23) 274–75.
[81] Mark Robinson (ed), *Judicial Review: The Laws of Australia* (Sydney, Thomson Reuters, 2014) 155.
[82] *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649, 672 (Gaudron J).
[83] Administrative Appeals Tribunal Act 1975 (Cth) s 44(1).
[84] *Australian Sports Anti-Doping Authority v Muhlhan* (2009) 174 FCR 330 (n 24).
[85] *Re XZTT and Anti-Doping Rule Violation Panel* (2012) 131 ALD 169.

and the ADRVP respectively were active participants in both the merits review and appellate processes.

In *Muhlhan*, Jessup J heard an appeal by ASADA against the decision of the AAT to set aside ASADA's decision to enter Mr Muhlhan's name on the Register of Findings on the ground that 'before requesting [Mr Muhlhan] to provide a [urine] sample, [ASADA] had not complied with clause 4.6.2 of the International Standard for Testing ("the Standard") made by the World Anti-Doping Agency under the World Anti-Doping Code'.[86]

The AAT had held that clause 4.6.2 set out a number of considerations which ASADA 'shall' take into account 'as a minimum' before selecting an athlete for target testing.[87] The AAT found as a fact that ASADA had not considered the items listed (a)–(j) in clause 4.6.2 and that the test was therefore invalid.

Justice Jessup took a different view of the meaning of clause 4.6.2 of the Standard. His Honour reasoned that the Standard noted in several places that certain minimum steps must be taken before ASADA could act in a nominated manner, but that: 'There is no suggestion that the precise format or content of the testing regimes established pursuant to the Standard will be identical in all places.'[88] Justice Jessup did not read clause 4.6.2 restrictively, as permitting target testing only in the circumstances listed, but as setting out the *minimum* matters which should be 'included in a particular target testing regime as justifying tests'.[89] The regime specifies certain circumstances in which non-random testing *must* be considered, but does not prohibit non-random testing in other circumstances, as determined by ASADA in its discretion. His Honour held that the AAT had erred in law by finding otherwise and set aside its decision, effectively meaning that Mr Muhlhan's name remained on the Register.

The second matter litigated under the ASADA Act was *Anti-Doping Rule Violation Panel v XZTT*, which was heard on appeal by a Full Court of the Federal Court in 2013.[90] The matter concerned the ADRVP deciding to place the athlete in question on the Register for having tested positive to a small amount of the principal metabolite of cocaine after competing in an international competition in China. The AAT held that the ADRVP and

[86] *Muhlhan* (n 24) 331 [4].
[87] *Re MTYG and Australian Sports Anti-Doping Authority* [2008] AATA 448 [48] (Deputy President Donald, Member Breen).
[88] *Muhlhan* (n 24) 335 [13].
[89] ibid 335 [14].
[90] *Anti-Doping Rule Violation Panel v XZTT* (n 6).

ASADA had each misconceived their respective responsibilities under the ASADA Act, the ASADA Regulations and the NAD Scheme, and set aside the ADRVP's decisions.[91] In a unanimous judgment, the Full Court allowed the ADRVP's appeal against the AAT's findings.[92]

The meaning of the ADRVP's statutory role to 'establish and maintain a Register of Findings for the purpose of *recording findings*' of the ADRVP was an issue of fundamental dispute between the parties.[93] The AAT had held that 'a "possible" finding is not a finding for the purposes of the NAD Scheme', which required '*evidence* of a violation' in the form of the presence of a prohibited substance having been identified in the athlete's sample by an accredited laboratory.[94] Consequently, the AAT ordered that an entry be made in the Register recording a violation based upon the 'presence' of a prohibited substance in the athlete's system, but held that the entry in the Register recording the athlete's 'use' of that substance could not be supported and ordered that it be removed.

The Full Court came to a different conclusion, based heavily upon its view that references to 'findings' in the NAD Scheme were 'unfortunate',[95] inasmuch as they really recorded what were nothing more than 'assertions'.[96] It summarised the true operation of the statutory scheme in this way:

> The duty of the [ADRVP] is to consider any submissions made by an athlete and to decide whether or not an entry will be made on the Register … There is no question in this case that the Athlete received the requisite notifications, made submissions and the response period had expired. As a consequence, the Panel was empowered to decide whether or not to make an entry.[97]

The AAT's error, therefore, was 'that it treated the [ADRVP] as if it was to make *actual* findings of violations and that it records such *actual* breaches on a Register'.[98] The ADRVP's processes are internal only and contain no provision for hearings.

[91] *Re XZTT and Anti-Doping Rule Violation Panel* (n 84) 172 [3] (Kerr J, Member Nicoletti).
[92] It also dismissed the athlete's cross-appeal, which was based on 'egregious' delays in handling the matter which were the fault neither of the athlete nor of the ADRVP or ASADA: ibid 188 [123] (Kerr J, Member Nicoletti); *Anti-Doping Rule Violation Panel v XZTT* (n 6) 43 [9] (the Court).
[93] ASADA Regulations cl 4.08 (emphasis added); *Anti-Doping Rule Violation Panel v XZTT* (n 6) 42 [6] (the Court).
[94] *Re XZTT and Anti-Doping Rule Violation Panel* (n 84) [66] (emphasis added).
[95] *Anti-Doping Rule Violation Panel v XZTT* (n 6) 62 [88] (the Court).
[96] Ibid. See *NAD Scheme* cl 2.04(m) .
[97] *Anti-Doping Rule Violation Panel v XZTT* (n 6) 65 [94]–[96] (the Court).
[98] ibid 65 [99] (the Court) (emphasis added). The AAT was held not to have understood, as it ought, that such an interpretation would invalidly bypass certain essential matters, such as the contractual operation of the WADA Code, the procedural fairness rights of athletes in relation to possible sanctions, and the proper functions of CAS. Details as to hearings are contained in the WADA Code, and the NAD Scheme ought not to be

Anti-Doping Rule Violation Panel v XZTT was decided essentially on the principle that the NAD Scheme contained sufficient 'contrary intention'[99] for the Court to conclude that a 'finding' should not be given its usual or literal meaning.[100] The statutory definition of 'finding' was later changed in the NAD Scheme to reflect the result in *Anti-Doping Rule Violation Panel v XZTT*, although the 'unfortunate' use of the defined term was retained. Whereas the term 'finding' had been defined as 'a finding by the Panel that an athlete or support person *has committed*'[101] an anti-doping rule violation, it has now been altered to:

> [A] finding by the ADRVP that:
>
> (a) there is an adverse analytical finding; or
> (b) it *is possible* that an athlete or support person has committed a non-presence anti-doping rule violation.[102]

This change is consistent with ASADA's contention in *XZTT* that, following analysis of the athlete's A and B samples, there was then enough evidence for the ADRVP to be '*prima facie satisfied* that [the Athlete] has *possibly* used cocaine in-competition'[103] and that this would suffice for the ADRVP to make a 'finding' under the terms of the NAD Scheme.

Challenging Doping Decisions at an International Level

As the international regulatory body responsible for doping, WADA is a unique body described as 'emblematic of the emergence of new forms of hybrid public-private governance mechanisms in the global sphere'.[104] The power of WADA in respect of decisions and actions taken in individual sports remains strong. In fact, WADA takes an active role in overseeing individual domestic anti-doping authorities. This power was publicly demonstrated in September 2014, when WADA issued a statement on the sanction imposed by ASADA on 12 NRL players from the Cronulla Rugby League Club.[105] The statement is notable for the fact that it is critical of the delays it found to be directly the result of a 'lack of activity or decision

interpreted such that it would deny 'the athlete all the processes set out in the WADA Code for a hearing': at 66 [99] (the Court).
[99] ibid 66 [101]–[102] (the Court).
[100] Pearce and Geddes (n 72) 317–19.
[101] *Anti-Doping Rule Violation Panel v XZTT* (n 6) 43 [10] (the Court) (emphasis in original).
[102] *Australian Sports Anti-Doping Authority Amendment Regulation 2012 (No 1)* (Cth) sch 1 cl 6 (emphasis added).
[103] *Anti-Doping Rule Violation Panel v XZTT* (n 6) [26] (the Court) (emphasis in original).
[104] Lorenzo Casini, 'Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)' (2009) 6 *International Organization Law Review* 421, 424.
[105] WADA, 'WADA Statement on NRL Sanctions' (29 September 2014) https://www.wada-ama.org/en/media/news/2014-09/wada-statement-on-nrl-sanctions.

by either ASADA or the Australian Government'.[106] It concluded by stating that 'WADA is not entirely satisfied with the outcome of this case and the practical period of the 12 month suspensions that will be actually served by the players', but decided against lodging an appeal as it 'would not advance the fight against doping in any meaningful way'.[107]

The WADA Code is the core document that provides the framework for harmonised anti-doping policies, rules and regulations within sport organisations and among public authorities around the globe.[108] The new version of the WADA Code commenced operation on 1 January 2015. Article 8.1 contains some general guidance on procedural fairness principles to be applied by doping decision-makers in the following terms:

> For any *Person* who is asserted to have committed an anti-doping rule violation, each *Anti-Doping Organization* with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of *Ineligibility* shall be *Publicly Disclosed* as provided in Article 14.3.[109]

The commentary to Article 8.1 also explains that the principles of a fair hearing are 'also found in Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and are principles generally accepted in international law'.

This provision must, of course, be read and applied with regard to Australia's common law and statutory provisions regarding the application of the hearing rule of procedural fairness. To the extent that the WADA Code and Australian domestic law differ in this regard, precedence must be given to Australian law, under which initial challenges to decisions by anti-doping bodies will be made. The comment to Article 8.1 in the 2015 WADA Code state that the article is 'not intended to supplant each Anti-Doping Organization's own rules for hearings but rather to ensure that each Anti-Doping Organization at least provides a hearing process consistent with these [underlying] principles'.

Challenges to doping sanctions in the international context are made to CAS. CAS has been referred to as a 'kangaroo court' by Marion Jones and also by contrast as 'an innovative and efficient way to settle the sports world's disputes'.[110] It is governed by its Statutes and

[106] ibid.
[107] ibid.
[108] The first iteration of the WADA Code was adopted on 1 January 2004.
[109] World-Anti-Doping Agency, WADA Code (1 January 2015) art 8.1 (emphasis in original).
[110] Michael Straubel, 'Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do its Job Better' (2005) 36 *Loyola University Chicago Law Journal* 1203, 1203.

Rules, which together are informally referred to as the 'the CAS Code'.[111] The Statutes establish CAS and its governing body, the International Council of Arbitration for Sport (ICAS), whilst the Rules prescribe procedural matters. The CAS operates in a manner similar to the AAT, in that it conducts a de novo review and has 'full powers to review both the facts and law and to either issue a new decision or refer the case back to the original sports body for reconsideration'.[112]

Once an application to CAS has been lodged, the CAS Code directs that a panel be formed to hear and determine the matter. Under rule 40.1, the panel is composed of one or three arbitrators. Parallels exist between the common law procedural fairness rule against bias[113] and rule 33, which provides for the independence and qualifications of arbitrators as follows:

> Every arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect his independence with respect to any of the parties.
>
> Every arbitrator shall appear on the list drawn up by the ICAS in accordance with the Statutes which are part of this Code, shall have a good command of the language of arbitration and shall be available as required to the complete the arbitration expeditiously.

The CAS Code also contains a provision allowing a challenge to be made against the chosen arbitrator where 'the circumstances give rise to a legitimate doubt over his independence or over his impartiality'.[114] Two motives for the establishment of CAS have been expounded, the first being dissatisfaction with internal mechanisms, and the second being the avoidance of the courts. On this first motive, it has been explained that 'where the sports body itself convenes the tribunal and appoints its members, there is a potential for perceived, if not actual, lack of independence on the part of the tribunal'.[115]

In respect of the general right to a fair hearing, the CAS Code contains detailed provisions in rule 44 concerning the procedure to be adopted before the Panel. These procedures cover written submissions and hearings and specific provisions relating to appeals, although it is possible for CAS to make a decision on the papers alone. Nonetheless, 'doping allegations, regardless of whether they are quasi-criminal

[111] The Statutes and Rules are contained together in one document: CAS, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 March 2013).
[112] Straubel (n 109) 1217.
[113] Aronson and Groves (n 23) ch 9.
[114] CAS Code r 34.
[115] Andrew Vaitiekunas, *The Court of Arbitration for Sport: Law-Making and the Question of Independence* (Stämpfi Verlag, Bern, 2014).

in nature or breach of contract in nature, are accusatory and therefore require a heightened level of fairness, apparent to all parties'.[116]

Although CAS does not formally apply a doctrine of binding precedent in its own decisions, and the CAS Code is silent on the issue of precedent as it is understood in common law countries, CAS aims to be consistent in its decision-making, and matters previously decided by the CAS are persuasive.[117] It has been explained that: 'This sparse use of precedent could be due to the civil law traditions of the majority of the early and active CAS arbitrators. Nevertheless, panels over the past three to four years have demonstrated and created a willingness to cite and rely on CAS precedent.'[118]

Therefore, the decision by CAS in 2011 in a judgment between the Croatian Golf Federation and the European Golf Association (EGA) is significant, as it explained that:

> The right to be heard is a fundamental and general principle which derives from the elementary rules of natural justice and due process … CAS has always protected the principle *audiatue et altera pars* in connection with any proceedings, measures or disciplinary actions taken by an international federation *vis-à-vis* a national federation, a club or an athlete.[119]

In that case, the CAS ruled in favour of the applicant, the Croatian Golf Federation, and set aside the decision of the EGA to expel the Croatian Golf Federation from its organisation. Whilst not finally determining the issue of whether the EGA decision was set aside on the basis of non-current information being relied upon by the EGA or a breach of the fair hearing rule by the EGA, CAS did indicate that either would form a sufficient basis for the decision to be overturned.

More than 20 years ago, it was contended that it is in the area of procedural concerns that 'most of the recent challenges to drug testing have been made'.[120] We believe that this point remains accurate. Procedural concerns may relate to a failure to follow appropriate testing protocols, as well as a lack of procedural fairness or defects with evidence-handling. As a general rule, 'disciplinary tribunals are not generally required to apply the rules of evidence as strictly as trial courts'.[121]

[116] Straubel (n 109) 1223.
[117] ibid 1255.
[118] ibid 1256.
[119] *Croatian Golf Federation v European Golf Association* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2275, 20 June 2011) 11 [29].
[120] Tony Buti and Saul Fridman, 'Drug Testing in Sport: Legal Challenges and Issues' (1999) 20(2) *University of Queensland Law Journal* 153, 159.
[121] ibid 161.

Other commentators have posited a potential application of international law, such as the European Convention on Human Rights,[122] to international sports arbitration, particularly in respect of protections of a fair trial. However, at this time, these commentators have concluded that it appears questionable.[123] Given the points made in this chapter, we have reached the same conclusion. Similarly, a detailed analysis of the 2015 WADA Code concluded that: 'The application of human rights principles is a debated topic in anti-doping.'[124] While welcoming the alignment to human rights, it was also noted that the references 'remain either purely aspirational or too vague to provide concrete guidance to [anti-doping organisations] to design their disciplinary process'.[125] We need do no more than note that Australia has no human rights protection of either a constitutional or a statutory nature at the Commonwealth level, or in most States,[126] and conclude that, as a result, the application of international human rights principles in Australian domestic proceedings is at present likely to be no more than nugatory.

In a similar vein, initial consideration has been devoted to the emergence of a global administrative law regime[127] and its application, particularly to global hybrid public-private bodies such as WADA.[128] Global administrative law gives recognition to the idea that there are basic requirements in the process of adjudication that exist regardless of the 'economic or social sector in which global administrative activity is being conducted'.[129] The elements of procedural fairness contained in both the WADA Code and the CAS Rules could be considered as fulfilling this basic principle of global administrative law.

Conclusions

[122] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 13 May 2009, CETS No 194 (entered into force 1 June 2010).
[123] See Ulrich Haas, 'The European Convention on Human Rights (ECHR) in the Jurisprudence of the Court of Arbitration for Sport' (Speech delivered at the Staff Seminar Series, University of New South Wales, 27 May 2014).
[124] Antonio Rigozzi, Marjolaine Viret and Emily Wisnosky, 'Does the World Anti-Doping Code Revision Live up to its Promises?' (2013) 11 *Jusletter* 1, 37.
[125] ibid.
[126] Both the Victorian and the Australian Capital Territory Parliaments have passed legislation recognising and protecting human rights: Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic).
[127] Sérvulo Correia, 'Administrative Due or Fair Process: Different Paths in the Evolutionary Formation of a Global Principle and of a Global Right' in Gordon Anthony et al (eds), *Values in Global Administrative Law* (Oxford, Hart Publishing, 2011) 313.
[128] Casini (n 103).
[129] Correia (n 126) 314–15.

The role of administrative law in the context of doping is in its infancy, but this chapter has explored some areas on both the domestic and international stage where it may possibly assist in understanding the obligations that investigatory bodies have to athletes. This assistance has been framed negatively, ie, in terms of those seeking to challenge doping-related sanctions, but it is equally relevant when seen from the perspective of those exercising powers. Such decision-makers must be aware of the potential for administrative law to be used to challenge their decisions and take measures to ensure that procedural fairness is accorded to the athletes at each stage of the doping-related decision-making process. Given the serious nature of doping infringements and the monumental impact this can have on an athlete's career, it is essential for those against whom doping allegations are made to be accorded procedural fairness by those who investigate and determine infringements and the imposition of penalties. Furthermore, each decision must also be accompanied by a full statement of reasons. In Australia, ASADA is subject to administrative law review mechanisms as a government agency. To the extent that this is true of testing authorities in other countries, administrative law should be viewed as central to the legal accountability processes which apply to decision-making about doping allegations.