



AUSTRALIAN ATHLETES' ALLIANCE

**Submission of the Australian Athletes Alliance
to the Senate Rural and Regional Affairs Transport Legislation Committee**

Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013

The Australian Athletes' Alliance Inc. ("**AAA**") is the peak body of associations representing Australian athletes. Its members currently include the:

- Australian Cricketers' Association;
- AFL Players' Association;
- Australian Netballers' Association;
- Australian Swimmers' Association;
- NBL Players Association;
- Professional Footballers Australia;
- Rugby League Players' Association; and
- Rugby Union Players' Association.

As the peak body, we provide a unified voice on issues affecting Australian athletes. Together, the member associations of the AAA represent over 3,000 of Australia's elite professional athletes.

General Comments

Our athletes want to compete in a clean sport, enforced through a fair and effective system that recognises human and employment rights.

We do not consider the National Anti-Doping Scheme (or "**NAD scheme**"), which is prescribed under the *Australian Sports Anti-Doping Authority Act 2006* ("**ASADA Act**") (and reflects the World Anti-Doping Authority Code ("**WADA Code**")) to be a fair and effective governing model to prevent doping.

We however propose at this time to limit our detailed submissions to the proposed amendments to grant ASADA additional investigative/coercive powers.

While there may be a case for ASADA to be granted additional investigative powers, we believe that the current proposed legislative response is premature, given that:

1. the Bill would grant powers to ASADA which would be insufficiently defined under the amended legislation and would infringe human rights and principles of best legislative practice in the area of Commonwealth coercive powers (as set out in two valuable documents produced by Commonwealth agencies, explained further below);
2. there has been insufficient public discussion about the need for ASADA's additional powers and, in particular, the appropriate scope of any such powers (more specifically, any particular areas in which the case might be made that the

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infringement on individual rights resulting from the additional powers is justified by the potential benefits which could be secured by ASADA's exercise of those powers);

3. the WADA Code is currently subject to an extensive two year world-wide review (due to be completed in November 2013) and it would be appropriate to await the outcome of that review before granting additional powers to ASADA; and
4. athletes are currently subject to doping regulation through WADA Code-compliant anti-doping codes having effect in their individual sports through their playing contracts. If there is a need for athletes to be subject to additional regulatory powers in the field of anti-doping, consideration should be given to effecting these additional powers through amendments to existing anti-doping codes (governed by individual sports tribunals and/or the Court of Arbitration for Sport), rather than effectively "splitting the jurisdiction" by making athletes subject to legislative powers, separate to the WADA-compliant anti-doping codes to which they are already subject (and with any disputes to be adjudicated in a separate forum).

The two Commonwealth Government documents which we reference further in this submission (for the purpose of benchmarking best practice in the area of Commonwealth coercive power) are:

1. Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* (Report No. 48, May 2008) ("**ARC Report**"); and
2. Attorney General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, (September 2011 edition ("**AG Department Guide**").

Specific Comments on the Bill

The six aspects of the proposed legislation that we find the most troubling are:

1. the proposed new section 13A of the ASADA Act, which would grant the CEO of ASADA unreasonably wide coercive powers (contrary to principles set out in the ARC Report and the AG Department Guide);
2. the proposed new section 13D, which would abrogate the privilege against self-incrimination;
3. proposed new sections 13C and 73R, which would place on a person the onus of proving that he or she does not have the information, knowledge or thing demanded of him/her in a disclosure notice;
4. proposed new section 73N, which would provide that each day of non-compliance in complying with a single request pursuant to a single notice would constitute a new contravention (subject to the prescribed maximum penalty);
5. the failure to provide for protection for the privileged relationships between individuals and their doctors and lawyers; and
6. the failure to include mechanisms and services for athletes who need advice and/or incur costs as a result of the exercise of the proposed coercive powers.

The Power to Require Information, Documents and/or Things

Clause 13A of the proposed legislation grants the CEO the unfettered right to require athletes to provide information and/or items and/or attend an interview where he or she "*reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme*".

We consider that the reference to “*information, documents or things that may be relevant to the administration of the NAD scheme*” constitutes an inappropriate basis on which to empower the ASADA CEO to issue coercive powers against organisations and individuals.

This provision would provide a basis for the use of coercive powers in circumstances which go well beyond the types of specific investigations which would be envisaged by most people with an interest in this Bill.

The NAD scheme (which is set out in Schedule 1 to the *Australian Sports Anti-Doping Authority Regulations 2006*) concerns a broad range of issues surrounding anti-doping.

Clause 1.02(1) of the NAD scheme provides for ASADA to undertake the following functions under the NAD scheme:

- (a) planning, implementing, evaluating and monitoring education and information programs for doping-free sport for all participants;
- (b) encouraging and promoting research relevant to sports drug and safety matters, including sociological, behavioural, juridical and ethical studies;
- (c) having the role and responsibility of a National Anti-Doping Organisation for Australia under the UNESCO Anti-Doping Convention and the World Anti-Doping Code, including performance of functions internationally that relate to that role and responsibility;
- (d) providing services relating to sports drug and safety matters to a sporting administration body in accordance with contractual arrangements with the body on behalf of the Commonwealth;
- (e) undertaking results management for a sporting administration body regardless of whether or not ASADA has conducted the sample collection;
- (f) delegating results management responsibilities to International Federations in accordance with the World Anti-Doping Code; and
- (g) functions about performance of activities relating to sports drug and safety matters referred to ASADA by a sporting administration body.

Accordingly, the ASADA CEO would be empowered to exercise his or her coercive power where he or she reasonably believed that a person had information, documents or things that are relevant to matters such as education, planning and research as part of ASADA's functions under the NAD Scheme.

In our view, if coercive investigatory powers are to be granted to ASADA for the purposes of investigating and detecting the use and/or trafficking of performance enhancing drugs, the legislation should confine the powers to that purpose. For example, Section 8P of the *Medicare Australia Act 1973* requires that the agency have reasonable grounds for believing that an offence has been committed and that the information or document is relevant to the offence.

We propose that the grant of coercive power to ASADA should be limited to instances in which there is probable cause to believe that the anti-doping regulations have been violated and that the information, documents, or things requested are necessary to the investigation of the violation.

Under the proposed legislation, once the ASADA CEO has met the required test to authorise him or her to issue a coercive notice (which, as we noted above, would be too easily satisfied), a recipient of the notice would then be compelled to comply with the requirements specified in the notice. Importantly, once this trigger is met, it would then be up to the ASADA CEO to determine the requirements set out in the notice (which a recipient of a notice would be required to meet). The Bill provides very little protection for individual rights with respect to the coercive requirements which the ASADA CEO may prescribe in the notice.

Paragraph 9.3.3 of the AG Department Guide, consistent with Principle 14 in the ARC Report, states, as a principle, that:

“A notice to produce information or documents must state:

- *the nature of the information or documents required to be produced*
- *to whom the information or documents are to be provided*
- *how the information or documents are to be provided, and*
- *the deadline for compliance.*

A notice to attend must state the time and place of the hearing, and should also state that the person may be accompanied by a lawyer, and whether other third parties may also attend the hearing.”

If this coercive power is to be granted to ASADA, it should be made subject to suitable protections for individual rights, including that the person compelled to provide information, documents and/or things should:

1. have the right to be represented by a lawyer or support person;
2. be provided reasonable time within which to respond (allowing him or her to obtain appropriate advice, etc.);
3. be informed of the basis upon which the request is being made;
4. receive a notice that meets the requirements under paragraph 9.3.3 of the AG Department Guide (set out above).

We also note that Principle 2 in the ARC Report provides that before using coercive information gathering powers, Commonwealth agencies should first consider:

1. alternative means that could be used to obtain the information sought; and
2. whether the probable importance of information obtained through using coercive information-gathering powers is justified, having regard to the cost of compliance for the notice recipient.

We are not aware of any considered analysis having been undertaken with respect to the above principle in the design of the Bill.

In accordance with this principle, we propose that, should the CEO be granted coercive powers, before using such powers in an individual case, he/she should be required to:

1. state what information or thing he/she seeks; and
2. provide evidence that he/she considered whether:
 - a. there are other means through which to obtain the information or thing and;
 - b. the information or thing is of sufficient importance to justify the use of coercive power.

Abrogation of the Right Against Self-Incrimination

As recognised in the AG Department Guide, the right against self-incrimination is “*enshrined*” in Australia common law and the removal of the privilege represents a “*serious loss of personal liberty*”. Accordingly, provisions for removing the privilege should be enacted only for “*serious offences and to situations where they are absolutely necessary*”. Similarly Principle 17 in the ARC Report also highlights the importance of the right against self-incrimination, stating “*[a]brogation of the privileges should occur only rarely, in circumstances that are clearly defined, compelling and limited in scope.*”

There is no evidence that the removal of the right of self-incrimination is necessary for the investigation of doping offences. The *Statement of Compatibility with Human Rights* accompanying the Explanatory Memorandum for the Bill states, without proof, that denying this basic human right “... *is necessary to ensure that possible doping offences under the NAD scheme are able to be properly investigated.*”

There has been no evidence provided to demonstrate that the investigations under the NAD scheme are any more difficult, or that the offence of doping is more serious than other matters (including serious criminal offences) which are routinely investigated without undermining the right against self-incrimination.

We recognise that the person at issue would receive immunities against the use of his/her testimony in any proceeding other than in connection with the ASADA Code (or for perjury). These immunities are insufficient because the impact of any proceeding based on evidence adduced in the denial of this privilege could have substantial and devastating effects on the person at issue, such as the loss of his or her livelihood. The inflexible and harsh mandatory penalties applicable under the WADA Code are highly relevant in this regard.

The proposed legislation would provide ASADA with new power to compel information, documents and things. The efficacy of this new power in investigations should be tested before an important civil right is abrogated.

Onus of Proof that Information, Documents or Items Exist

Under the proposed legislation, someone who is compelled to produce, information, documents, or things that he/she does not possess, bears the unreasonable onus of proving a negative — that he/she is not in possession of such, knowledge or said document/thing. If the person cannot perform the potentially impossible task of proving that he/she does not know something and/or does not possess something, he/she is subject to a sanction of 30 penalty units (more than \$5,000) per day that he/she does not produce what he/she does not possess.

The appropriate procedure would be to place the onus of proof on ASADA.

Once a person has stated under oath that, he or she has exercised reasonable inquiries and to the best of his/her information, knowledge and belief, he/she is not in possession of the information or item requested, ASADA should bear the onus of proving otherwise. Given that ASADA should have had a reasonable belief that the person possessed the information, documents, or thing requested, it should have the ability to provide evidence in support of this position.

Separate Contravention for Each Day

The proposed new section 73N of the ASADA Act would provide for a separate contravention of a civil penalty provision to occur in relation to a failure to comply with a single notice, in respect of each day during which the contravention occurs.

Multiplying the sanction by each day that the information is not provided is excessive and is a way in which to increase penalties beyond those appropriate for failing to provide information/documents.

Doctor-Patient and Lawyer-Client Privileges

Section 13A should explicitly recognise the doctor-client and lawyer-client privileges.

An athlete's physician should not be required to provide information even if that information may assist in establishing an anti-doping violation against the athlete. If physicians can be compelled to divulge what they are told by athletes, athletes would be loath to speak frankly and freely with physicians, putting their health at risk. For instance, it would be important for a surgeon to be aware of EPO use because it increases the possibility of life-threatening blood clots in surgery. Clearly, the public interest in protecting athletes' health outweighs the public interest in establishing doping violations.

Similarly, an athlete should be able to be able to obtain legal advice regarding his/her rights without the fear that his/her lawyer will be required to reveal what was said.

Compliance Cost and Services

Before instituting a scheme that will increase the obligations on athletes and potentially deny athletes rights ordinarily enjoyed by others, the legislature must ensure that it provides mechanisms and services for athletes to allow them to receive the necessary specialist advice and support. The current legislation should be reconsidered to include a mechanism to cover athletes' costs of compliance.

Conclusion

If the Senate concludes that ASADA should have legislative coercive power over persons covered by existing sports anti-doping codes, then we believe that it should re-consider the proposed legislation and amend it as described above.

As currently drafted, the legislation is overly broad, grants ASADA virtually unfettered coercive power, fails to adequately protect human rights, and does not comply with principles of good practice with respect to Commonwealth coercive powers (as set out in the ARC Report and the AG Department Guide).

Further Assistance and Public Hearing

We would welcome the opportunity for a representative of the AAA to appear before the Committee at a public hearing.