



Australian Government

**Department of Regional Australia,
Local Government, Arts and Sport**

Senate Rural and Regional Affairs and Transport Committee Inquiry Australian Sports Anti-Doping Authority Amendment Bill 2013

In a sports-loving country like Australia, rigorous and effective anti-doping arrangements are important for protecting the values which sport can so powerfully convey to the broader community.

There is no place in sport for those who seek an unfair competitive advantage through doping. The harmful health effects of using prohibited substances and methods is well known, along with the potential for doping to undermine the important values that sport promotes within the community (such as the spirit of competition, honesty, fair play and dedication). Australian athletes and support personnel must also be able to prepare for their chosen sport safe in the knowledge that they are participating on a level playing field where all athletes are subject to the same doping rules and sanctions.

The Commonwealth Government has had a role in sports drug testing since 1985 when the Anti-Drugs Campaign of the Australian Sports Commission (ASC) was established.¹ Since that time, successive Australian Governments have enhanced Australia's anti-doping arrangements. Australia is considered to have one of the most advanced anti-doping arrangements in the world.

These arrangements have operated in an environment where Australian sport is managed on a "sport runs sport" basis and government involvement occurs largely through the specification of conditions on the provision of sports funding.

Background to Anti-Doping in Australia

On 1 July 1990, the Australian Sports Drug Agency (ASDA) was established to provide an independent, accountable, high-standard drug testing regime in Australia. ASDA was responsible for examining possible anti-doping rule violations that relate to the testing process, including failure to comply with a request to provide a sample, tampering in relation to a sample, evading the testing process and failure to meet whereabouts notification requirements.

In recognising the need to protect the rights of athletes, ASDA was also responsible for the development of and implementation of an athlete education plan. In addition to the provision of an independent testing regime ASDA was tasked with integrating drug education into sports programs, increasing the level of knowledge of relevant target groups on the issues associated with drug use in sport and increasing the understanding of drugs in sport through the use of research projects.

While the detection of doping was largely based on testing, there were still four possible doping violations specified in the Code that ASDA was unable to pursue because it could not undertake investigations into these matters. These were usually dealt with on a case by case basis, through an independent person appointed by the sport in question, leading to some inconsistencies in outcomes.

¹ Australian Government Response to the Recommendation of the Senate Standing Committee on Environment, Recreation and the Arts Inquiry into Drugs in Sport (November 1990).

In 2006, the Australian Government established the Australian Sports Anti-Doping Authority (ASADA) to perform the functions of ASDA (including a continuation of ASDA's testing activities) but also set up with the ability to investigate possible breaches of anti-doping rules. This meant that there was a single dedicated body for the independent, robust and transparent investigation and hearing of doping allegations. For the first time the same body was responsible for pursuing all eight possible violations within the Code.

The Government supported the establishment of a body with an independent investigations function because:

- it provides the Australian public with confidence that proper processes are undertaken to investigate and hear doping allegations; and that correct decisions are made. This includes any decision not to proceed with a case;
- the investigation of a doping allegation and taking a case to a hearing can be difficult. Some sports may not be in a position to obtain the expertise to assist them;
- a real or perceived conflict of interest can arise in respect of athletes at all levels but may present particular issues in relation to high profile athletes, whose presence is important to a sport's ability to attract sponsorship, spectator support and other participants; and
- ASADA's involvement in the investigation of potential anti-doping rule violations helps sports to manage conflicts of interest and ensure that the tribunal hearing a case had all the relevant information to enable it to make a fair decision. This process ensures that an independent, fair and impartial service is provided to all sports.

Current Practice

Australia's current anti-doping arrangements give effect to our international obligations under the UNESCO International Convention Against Doping in Sport (the UNESCO Convention). Chiefly, the UNESCO Convention requires States Parties to implement arrangements that are consistent with the principles of the World Anti-Doping Code (the Code).

The Code is an international agreement, which provides the framework for harmonised anti-doping policies, rules and regulations within sport organisations and among governments. The Code is administered by the World Anti-Doping Agency. The Code is accepted by Signatories, which include the International Olympic Committee, the International Paralympic Committee and their respective national committees, international sporting federations, major event organisations and national anti-doping organisations.

National Sporting Organisations become bound by the Code either through their membership of Signatories to the Code, or through specific agreements with Signatories. Athletes and athlete support personnel become bound by the Code through their membership of their sport (normally through their signing of a membership form or event entry form which states that they agree to be bound by the anti-doping policy of the sport).

ASADA's powers and functions are specified under the *Australian Sports Anti-Doping Authority Act 2006* (the Act) and the Australian Sports Anti-Doping Authority Regulations 2006, including the National Anti-Doping (NAD) Scheme. The NAD scheme underpins ASADA's implementation of a co-ordinated Code-compliant anti-doping program encompassing:

- a) **deterrence** – programs that seek to increase awareness and educate athletes and their support persons (eg coach; trainer; manager, official) on doping and the operation of Australia’s anti-doping rules;
- b) **detection** – the coordinated implementation of a program to catch doping cheats, incorporating testing, non-analytical investigations and intelligence gathering; and
- c) **enforcement** – management of cases involving possible breaches of anti-doping rules (known as anti-doping rule violations or ADRVs) and the presentation of these cases at hearings before the tribunal of the relevant sport or the Court of Arbitration for Sport (CAS).

As a condition of receiving Australian Government funding, Australia’s NSOs are required to have in place an anti-doping policy that complies with the Code and acknowledges ASADA’s powers and functions under the Act and NAD Scheme. All NSO anti-doping policies replicate the essential parts of the Code (for example, Article 2 of the Code, which sets out the ADRVs). The effect of this is that when ASADA is exercising its legislative functions in relation to ADRVs, it is also enforcing the anti-doping policy of the relevant NSO.

Penalties (sanctions) for doping offences usually involve bans from sport but are not criminal penalties.

Rationale for the Proposed Amendments

The primary purpose of the Bill is to amend the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) to strengthen the ASADA’s investigation functions and to enhance information sharing arrangements with other government agencies.

With doping becoming increasingly sophisticated, it is less likely that anti-doping rule violations will be detected through analytical testing means alone. It is also the case that a number of the behaviours which constitute an anti-doping rule violation in the World Anti-Doping Code can only be detected and substantiated through non analytical means, that is through investigations and the collection of evidence.

The value of investigations was demonstrated by the United States Anti-Doping Agency’s (USADA) investigation into Lance Armstrong and the United States Postal Service Cycling Team. USADA uncovered evidence of widespread systemic doping practices that was only discovered through intelligence, investigations and witness testimony. It also demonstrated the sophistication in these doping technologies and practices is reducing the capacity of testing alone to detect doping .

While testing athletes to detect the use of prohibited substances will remain a valuable and fundamental means of identifying doping in sport, increasingly anti-doping organisations will need to have the capacity to undertake effective investigations and intelligence gathering activities. Testing will of course continue to be an important tool in the conduct of these investigations and intelligence gathering activities.

The Act currently contains an investigations function. However, this does not give ASADA’s investigators the ability to require an athlete or support person to attend an interview. To the extent that an athlete or support person agrees to attend an interview, it is usually because investigators have usually presented them with other evidence pointing to the strong likelihood of an ADRV.

The consequences of this are that:

- 1) ASADA has very little ability to control the location or timing of an interview with an athlete or support person;
- 2) athletes and support personnel currently have little incentive to respond to a letter from ASADA requesting an interview. Accordingly, ASADA expends significant resources in following up contacts to arrange an interview;
- 3) ASADA has had a number of instances where athletes or support personnel have failed to attend pre-arranged interviews there are cases where investigators have travelled a considerable distance to interview an athlete).

Investigators face the same difficulties in arranging follow-up interviews.

The recent Review of Cycling Australia conducted by the Hon James Wood QC AO reaffirmed these consequences. In the review Mr Wood writes:

Neither the ASADA Act or Regulations make provision for ASADA's investigators to exercise powers of compulsion, that would allow them to require persons (as defined under and subject to the provisions of the NAD scheme) to attend an interview and to provide information or produce documents. The absence of such a power potentially limits the capacity of ASADA to investigate allegations or suspicions of ADRVs, and to determine the time and place of any interview. Additionally, unless a contractual requirement for cooperation exists then there is little incentive for an athlete to respond to a request for an interview.²

Proposed amendments to the Bill

The changes introduced by the Bill will provide additional capabilities to ensure ASADA can meet the challenges faced in a changing anti-doping environment where analytical testing of athlete urine and blood samples is not exclusive in detecting the most sophisticated doping cases. Only through the application of investigative techniques and intelligence gathering, combined with an effective drug testing program, can an anti-doping agency hope to identify those athletes and athlete support personnel who choose to use prohibited performance enhancing substances and methods.

The Bill proposes several amendments to the ASADA Act. Many of the amendments to the ASADA Act provide the authority to make Regulations and therefore the NAD Scheme and how it operates.

- Provision to allow the ASADA Chief Executive Officer (CEO) or Senior Executive Service level delegate to issue a disclosure notice compelling a person to cooperate with an ASADA investigation, by attending an interview, providing information and/or producing documents or things.
 - The CEO must have a reasonable belief that the person has information, documents or things that may be relevant to the administration of the NAD scheme (for example, material that is relevant to pursuing an anti-doping rule violation against an athlete).
 - A disclosure notice can be provided to anyone, not just an athlete or athlete support person. This amendment recognises that people outside the *traditional* jurisdiction

² Review of Cycling Australia—Final Report, p64

of Australia's anti-doping regime may have information that would assist in establishing an anti-doping rule violation by an athlete or athlete support person.

- The new amendments abrogate the privilege against of self-incrimination. This approach is necessary as anti-doping investigations are often hampered or in some cases completely obstructed by a person's refusal to provide information if the person believes that they may implicate themselves in an anti-doping rule violation.
 - The intent of this Bill is to assist ASADA in its investigations into possible anti-doping rule violations and not to expose individuals to other civil or criminal proceedings. As such, the Bill provides use and derivative use immunities which will ensure that any information or answers given, or documents or things gathered as the result of a disclosure notice, will be inadmissible as evidence against the person in criminal proceedings, except in instances of deliberate false or misleading information/documents.
- To ensure compliance with the powers being introduced, the use of civil penalty provisions are intended to apply for failing to comply with a disclosure notice. The civil penalty will be a maximum 30 penalty units (\$5100).
 - The Bill will also enable the establishment of an infringement notice scheme whereby the CEO will have the power to issue an infringement notice requiring the person to pay a penalty to the Commonwealth as an alternative to civil proceedings against the person. In this case, the civil penalty will be six penalty units (\$1020).

These new provisions have been largely based on standard government practice and have precedent in other Commonwealth legislation for facilitating instances where it is necessary to compel people to cooperate with investigations and also the imposition of relevant civil penalties.

Additionally, all of ASADA's investigations are conducted in accordance with relevant Commonwealth guidelines and all of ASADA's investigators are properly qualified and trained on the proper conduct of investigations. Additionally, ASADA investigators do not have the power to undertake surveillance or any similar covert methods of intelligence gathering.

Information Sharing

Schedule 2 of the Bill will extend ASADA's existing information sharing arrangements with government agencies to also include Australia Post. Importantly though, ASADA will not be able to intercept or examine the contents of any mail items.

A key strength of ASADA's investigative and intelligence gathering function has been the information sharing arrangements that exist with Australian law enforcement agencies and other regulatory authorities such as the Australian Customs and Border Protection Service; and the Therapeutic Goods Administration. Co-operation between such agencies has contributed significantly to the identification of many more doping offences than what may otherwise have been the case.

Arrangements with Australia Post will assist ASADA's intelligence and investigations through the provision of up-to-date information regarding persons residing at addresses which could be helpful in identifying athletes who are receiving prohibited substances

through the post. Such information would be provided to ASADA after the CEO (or Senior Executive Service level delegate) has made a request to ASADA for the information.

Other Amendments

Definitions relating to the Anti-Doping Rule Violation Panel

The Bill also makes clear that the Anti-Doping Rule Violation Panel (the Panel) is not a hearing body within the meaning of Article 8 of the World Anti-Doping Code; rather, the Panel's role is to make a finding that an athlete or support person has possibly committed an anti-doping rule violation.

Conflict of Interest Provisions

The Bill will broaden the current conflict of interest provisions in the Act to apply to matters relating to the Panel's or Australian Sports Drug Medical Advisory Committee's (ASDMAC) activities rather than just the performance of its functions. In particular, the Bill will clarify that a member of the Panel is prohibited from providing information, advice, evidence or support to a person who has a matter before ASDMAC or in proceedings before other bodies (e.g. a sporting tribunal). Similarly, an ASDMAC member is prohibited from providing information, advice, evidence or support to a person who has a matter before the Panel or in proceedings before other bodies (e.g. a sporting tribunal).

Statute of Limitations

The limitation period currently prescribed in the NAD scheme for commencing an action against an athlete or athlete support person for a possible anti-doping rule violation is eight years. This reflects Article 17 of the World Anti-Doping Code.

Generally, the statute of limitations with regard to civil proceedings varies in each state and territory, with the limit set usually between three and six years. For the avoidance of doubt, the Bill confirms that the eight year limitation period that is required to be prescribed in the NAD scheme will prevail over a law of a state or territory to the extent of any inconsistency.

Conclusion

The Government expects that with these amendments, athletes and support persons who are involved in doping have a greater chance of being caught. ASADA will be better able to investigate possible doping violations with the knowledge that people will assist ASADA in undertaking these investigations and its intelligence activities.

Ultimately this will help instil those values which sport represents; values such as fair play, determination, teamwork and friendship and help to provide a sporting environment free from doping – an outcome sought by the vast majority of athletes who are clean.