

Australian Sports Anti-Doping Authority

Senate Community Affairs Legislation Committee

**Inquiry into the Australian Sports Anti-Doping Authority
Amendment Bill 2014**

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Table of Contents

Introduction	1
Anti-Doping Framework in Australia.....	1
Management of Anti-Doping Rule Violations	2
Context of the ASADA Amendment Bill 2014	2
Measures proposed by the Bill	3
Schedule 1 - Prohibited Association violation (Code related)	3
Schedule 2 - Amendments relating to the Australian Sports Drug Medical Advisory Committee (Code related)	3
Schedule 3 – Violations List (Code related)	4
Schedule 4 - Amendments relating to Information Management	4
Powers conferred by the <i>Australian Sports Anti-Doping Authority Amendment Act 2013</i>	5
Context – ASADA Amendment Bill 2013.....	5
Coercive Powers.....	6
Burden of Proof / Evidential Burden.....	6
Contract Limitations.....	7
Disclosure Notices	7
Protection of Athletes.....	7
Direct protections:	7
Controls around the issuing of disclosure notices	7
Decisions of the CEO are scrutinised by others:	8
Conclusion.....	8
Attachment A: Australia's anti-doping framework.....	9
Attachment B: Anti-Doping Rule Violation Process	10

Introduction

The Australian Sports Anti-Doping Authority (ASADA) welcomes the opportunity to make a written submission to the Senate Community Affairs Legislation Committee (*Committee*) inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2014 (*Bill*).

Doping poses one of the greatest threats to sport today. It harms athletes, destroys fair play and equitable competition and does irreparable damage to the credibility of sport.

ASADA's priority is to ensure that Australian sport is clean and the health of athletes is protected.

The purpose of this submission is to outline why the measures proposed by the Bill are necessary for ASADA to effectively perform its functions.

Taking account of the reasons given by the Selection of Bills Committee for the referral of the Bill to the Committee, the submission also discusses ASADA's use of the powers that were conferred on it by the *Australian Sports Anti-Doping Authority Amendment Act 2013*.

Anti-Doping Framework in Australia

ASADA is a statutory agency that works to deter athletes from using prohibited substances and methods through a comprehensive anti-doping program, encompassing deterrence, detection and enforcement activities. ASADA works proactively with Australian athletes, athlete support persons, sports and all other stakeholders to build partnerships based on principles of respect, openness, responsiveness and integrity.

As a signatory to the UNESCO International Convention against Doping in Sport, Australia is required to implement anti-doping arrangements in accordance with the principles of the World Anti-Doping Code (the Code). ASADA is Australia's National Anti-Doping Organisation (*NADO*) and plays an influential role on the international anti-doping scene, aiming to create equality in sport so Australian athletes can participate on a level playing field at home and overseas.

Australia's anti-doping framework includes athletes, athlete support persons, Sporting Administration Bodies (SABs), the Australian Sports Commission, World Anti-Doping Agency (WADA) accredited laboratories, ASADA, as well as three statutory bodies established under the ASADA Act:

- the ASADA Advisory Group;
- the Australian Sports Drug Medical Advisory Committee (ASDMAC); and,
- the Anti-Doping Rule Violation Panel (ADRVP).

Australia's anti-doping framework and its mechanisms for implementing the principles of the Code are included at **Attachment A**.

The Code is the document that applies consistent rules regarding anti-doping across all sports and countries of the world. The Code provides a framework for anti-doping policies, rules, and regulations for sport organisations and public authorities. One of ASADA's key roles is to implement the Code in Australia.

ASADA is established under the ASADA Act and the *Australian Sports Anti-Doping Authority Regulations 2006* (which include the National Anti-Doping (NAD) scheme) and all ASADA investigations are undertaken in accordance with the Australian Government Investigations Standards (2011). As a Commonwealth agency ASADA is subject to the *Privacy Act 1988* and to external scrutiny through judicial decisions, the Commonwealth Auditor-General, Parliamentary Committees and the Commonwealth Ombudsman. ASADA's internal procedures and policies must meet international standards as established by the International Organisation for Standardisation and WADA.

Noting that WADA is consulted throughout contentious anti-doping rule violations processes, WADA and other relevant parties may appeal specified decisions made under the Code or related rules. This means if WADA or for example, the International Federation, disagrees with any anti-doping decision made by ASADA or an individual sport with regard to an infraction notice or sanction, they can appeal that decision to the Court of Arbitration for Sport.

Management of Anti-Doping Rule Violations

While the Code envisages that anti-doping rule violations would be managed by the relevant NADO from start to finish, the Australian Anti-Doping framework provides that ASADA and the SAB share the responsibilities in this process.

A diagrammatic representation of the process is included at **Attachment B**.

Context of the ASADA Amendment Bill 2014

Following a two-year international review, revisions to the Code and associated International Standards were adopted at the World Conference on Doping in Sport in Johannesburg, South Africa on 15 November 2013. The main purpose of the Bill is to align Australia's anti-doping arrangements with the revised Code and International Standards to ensure that Australia is Code compliant by 1 January 2015.

It is also proposed that the Bill be used to make a number of amendments, some related to the Code revisions, which seek to simplify the operation of Australia's anti-doping arrangements.

All of the proposed amendments aim to safeguard Australian athletes from the threat that doping poses to sport.

Importantly, the amendments acknowledge that the methods required to identify and progress cases involving anti-doping rule violations are moving away from the traditional use of testing and education towards the adoption of a strengthened intelligence based testing approach.

Doping offences have traditionally been detected by testing blood and urine samples to identify the presence of a banned substance. However, well organised and systematic doping programs have been able to evade detection by testing regimes. With doping becoming increasingly sophisticated, it is less likely that anti-doping rule violations will be established through testing alone.

The current Code contains eight ADRVs, six of which are non-presence (that is doping offences that require detection through intelligence based investigations). ASADA currently employs a number of methods to identify the non-analytical anti-doping rule violations related to an athlete's

whereabouts, tampering and evasion, as well as use, possession and the trafficking of substances or methods on the List.

While testing remains an integral component of ASADA's anti-doping programme, there is a broad consensus and acceptance among NADOs and WADA that an additional focus will need to be put on intelligence driven methods for detecting anti-doping rule violations, testing of itself is not designed to establish six of the eight anti-doping rule violations in the current Code (noting that the anti-doping rule violation of Use or Attempted Use may be established by other reliable evidence).

The 2015 Code contains two additional anti-doping rule violations, both of which must be established through non-analytical means.

Measures proposed by the Bill

Schedule 1 - Prohibited Association violation (Code related)

The 2015 Code recognises that doping can be facilitated by coaches, trainers, people with medical expertise and other athlete support persons. The Code contains a new violation called 'Prohibited Association' which is designed to protect athletes from associating in a professional or sports-related capacity with a person who has been banned from sport, has been convicted of a crime that otherwise would constitute a doping violation, or has been sanctioned for professional misconduct.

The prohibition only applies for a defined time and an athlete who is associating with a prohibited person must first be notified in writing by the ASADA CEO before a violation can be committed. An athlete has the opportunity to provide reasons why the association should not be prohibited; for example, a family relationship. A person will also have an opportunity to provide reasons why they should not be classified as a 'prohibited person' under the Code.

This anti-doping rule violation is designed to curtail the influence of people with a proven history of doping and with the skills to facilitate systematic doping programmes.

The sanction for an athlete who commits such a violation ranges from a reprimand to a 12 month ban from sport.

Schedule 2 - Amendments relating to the Australian Sports Drug Medical Advisory Committee (Code related)

The Bill proposes to increase the membership of ASDMAC to enable the Minister to appoint three members who will have the function of reviewing ASDMAC decisions in relation to a Therapeutic Use Exemption¹ made by the athlete or athlete support person.

These amendments will implement the requirement in the revised Code and the World Anti-Doping Agency's International Standard for Therapeutic Use Exemptions for anti-doping organisations to provide a mechanism to review TUE decisions and provides athletes with a domestic appeal avenue if they wish to seek a review on a TUE decision. At present, a person who wishes to seek review of an ASDMAC decision must go directly to WADA.

¹ A Therapeutic Use Exemption (TUE) is an exemption that allows an athlete to use, for therapeutic purposes only, an otherwise prohibited substance or method (of administering a substance) which may be present during competition.

Schedule 3 – Violations List (Code related)

The Bill removes the requirement for the Anti-Doping Rule Violation Panel (the Panel) to maintain a Register of Findings.

An entry on the Register of Findings by the Panel is not a finding that an anti-doping rule violation **has** been committed. Rather, it indicates that, based on the evidence the Panel has reviewed, it is **possible** that an anti-doping rule violation has occurred.

The Register of Findings is not publicly available; however, when a finding is placed on the Register of Findings, it provides a trigger for notifications to be made under the NAD scheme (it is noted that the athlete or support person and the relevant sport are involved earlier in the process). The details of possible anti-doping rule violations recorded on the Register of Findings are referred to the relevant SAB so that an Infraction Notice can be issued and a hearing arranged (if the athlete elects to have a hearing). The hearing body will determine whether or not a violation has been committed, and, if so, will determine the applicable sanction (see **Attachment B**).

There are also appeal mechanisms available to a person whose name is placed on the Register of Findings. For example, under the ASADA legislation, if the Panel determines to make an entry onto the Register of Findings, an athlete to whom the entry relates is entitled to appeal the Panel's decision to the Administrative Appeals Tribunal (AAT).

The current requirement to enter details onto a Register of Findings in the middle of the anti-doping rule violation process creates significant confusion.

The Bill seeks to simplify this process while still ensuring that the rights and privacy of the athlete are protected until the anti-doping rule violation has been determined and may be publicly disclosed.

To achieve this aim, the Register of Findings will be removed and (consistent with the provisions of the Code) the Panel will make an 'assertion' that it is possible an anti-doping rule violation has been committed. Under the Bill, athletes and athlete support persons continue to have the option to seek review by the Administrative Appeals Tribunal of an assertion made by the Panel².

Further, it is proposed that a Violations List be established by ASADA, where the names and other details of athletes or athlete support persons who have committed an anti-doping rule violation will be placed for the duration of their sanction (or one month – whichever is longer)³. This is a key deterrent against doping for athletes and is a public reporting requirement established by the Code.

Schedule 4 - Amendments relating to Information Management

Information Management is the cornerstone of Australia's anti-doping framework. Information flows mark every stage of the anti-doping process from initial anti-doping education to the athlete, through to the provision of advice to an athlete's international federation and WADA following an appeal process.

² Of the 7 appeals made to the AAT since 2006, only 1 was upheld, however, this case was overruled by the Federal Court.

³ ASADA currently reports the details of a finalised ADRV on its website as required by the public reporting requirements of the Code..

With greater prominence given to the role of investigations and intelligence gathering in the Code, there is a increased emphasis on the need for effective information flows. The amendments proposed by the Bill would:

- bring together the provisions relating to information management (currently captured across the ASADA Act, ASADA Regulations and NAD scheme), and enable ASADA to more effectively and more appropriately disclose information to other public authorities and to other bodies or persons prescribed by regulation;
- enable disclosures to be made by the ASADA CEO and employees where such disclosures are necessary for the proper performance of functions under the ASADA Act (including disclosures that are required or permitted by the Code);
- ensure that where necessary, the ASADA CEO can disclose information that is already lawfully in the public domain;
- ensure (consistent with the Code) that the ASADA CEO can respond to comments attributable to athletes, athlete support persons or their representatives about anti-doping matters; and
- streamline the current provisions that govern the disclosure of Customs and Border Protection information to ASADA.

Currently, the management and exchange of information is complex, difficult to understand, and is prescribed under various different provisions of the Act and Regulations. Although this has occurred inadvertently as a result of amendments made over time (in response to emerging issues) ASADA's capacity to operate effectively is constrained.

In addition, the current provisions in the ASADA Act overly restrict the ability of ASADA to share information with other relevant bodies. The existing provisions limit the organisations that information can be passed to and only allow the transfer of information that is related to the administration of the NAD scheme. This means that in some cases it is not possible to share information that may be useful to other regulatory or law enforcement bodies. This might include, for example, identifying unethical practices by health professionals.

Information possessed by ASADA is treated differently depending on how it has been obtained. The proposed amendments treat all the different sources of information as 'protected information'. The current restrictions imposed by other agencies will continue to apply. In addition, under the proposed amendments, the ASADA CEO will also be able to impose conditions upon a body or person in relation to the disclosure of protected information.

Powers conferred by the Australian Sports Anti-Doping Authority Amendment Act 2013

Context – ASADA Amendment Bill 2013

In January 2013, the Hon James Wood QC AO handed the Australian Government his findings and recommendations following a review of Cycling Australia. The review was conducted following revelations of widespread and systematic doping violations in professional road cycling.

In the review Mr Wood recommended the need to strengthen ASADA's capabilities. In particular, he recommended that the ASADA Act and other relevant legislation be amended to give ASADA a

power, subject to appropriate protections, to compel persons to attend an interview and to produce information and documents relevant to any inquiry that it is undertaking.

In response to Mr Wood's review, amendments to the ASADA Act were passed by Parliament and received the royal assent on 29 June 2013 and came into force on 1 August 2013.

These changes have enhanced ASADA's investigations and intelligence gathering capacity. Upon the establishment of reasonable belief, the ASADA CEO can require someone to assist with an investigation by issuing a disclosure notice. Since the Bill's passage, the ASADA CEO has used these powers carefully and appropriately, where there is a reasonable belief that a person has information, documents or things that may be relevant to the administration of the NAD scheme. ASADA has only issued a disclosure notice when it has been necessary to compel a person to assist with an investigation. Use of these powers has enabled ASADA to pursue many instances of possible anti-doping rule violations and has contributed to multiple infraction notices being issued to athletes.

Coercive Powers

Prior to the introduction of the coercive powers to ASADA, when attempting to talk to athletes or athlete support personnel on whom ASADA had evidence of a possible anti-doping rule violation, 45% of those athletes or athlete support personnel did not cooperate with ASADA by either refusing an interview, not providing any comment at interview or refusing to fully cooperate at the interview.

Since the introduction of the coercive powers through the ASADA Amendment Bill 2013, ASADA has only issued disclosure notices to persons of interest where evidence indicates an anti-doping rule violation may have occurred.

Burden of Proof / Evidential Burden

The Code operates under the principle of strict liability. Under this principle, an athlete is responsible, and an anti-doping rule violation occurs, whenever a prohibited substance is found in an athlete's sample.

This relates to the violation of 'presence' of a prohibited substance, which is one of the ten possible violations under the 2015 Code. As mentioned previously, ASADA is required to establish intent on the behalf of the athlete or athlete support person in order to demonstrate that an anti-doping rule violation has occurred.

The only area where the evidential burden is shifted is in relation to the provision of information requested by a disclosure notice. A person who has been asked to provide information, documents or things in a disclosure notice, and claims not to have them, will bear an evidential burden to demonstrate that they don't have the materials requested. This is an accepted approach which is consistent with the 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' developed by the Attorney-General's Department.

In practical terms, the evidential burden in relation to not having documents or things may be satisfied if the person signs a document of legal standing that they do not have the required material (for example, statutory declaration). Statutory declarations have been accepted by ASADA in a

number of investigations that have been undertaken since the 2013 ASADA Amendment Bill was passed.

Contract Limitations

While in some circumstances it may be possible to rely on the provisions of the sport's Codes of Conduct or anti-doping policy to ensure that persons cooperate with an ASADA investigation, there are a number of persons of interest that ASADA would not be able to reach without the coercive powers provided under the ASADA Act. To protect clean athletes it is sometimes necessary to obtain information from non-contracted people such as chemists, banks, and telecommunications companies. In these cases the coercive powers allow ASADA to request such persons to attend interviews and/or provide information or things.

Even in relation to contracted parties, there are times at the formative stages of an investigation process where, to protect the identity of the individual under investigation, ASADA needs to operate independently of the sporting organisation.

As such it is imperative that complementary 'cooperation' clauses are available under both the ASADA legislation and the relevant rules of the sport.

Disclosure Notices -Protection of Athletes

The rights of athletes and athlete support persons underpin the operation of Australia's anti-doping framework. These rights are reflected both in ASADA's legislative framework and through internal processes and apply to disclosure notices issued under the ASADA Act in a number of ways:

Direct protections:

- the ASADA Act protects the privacy and confidentiality of persons to whom a disclosure notice is issued. Under the ASADA Act there are significant penalties for ASADA officers who reveal National Anti-Doping (NAD) scheme personal information. These provisions apply in relation to the issuing of disclosure notices.
- the ASADA Act provides 'use' and 'derivative use' immunities which ensure that information that is provided to ASADA as a result of a disclosure notice, cannot be used against that person in a criminal proceeding (except 137.1 and 137.2 of the Criminal Code) or civil proceeding (except proceedings that arise under or out of the ASADA Act or ASADA Regulations, that is pursuing an anti-doping rule violation).

Controls around the issuing of disclosure notices

- Issuing of disclosure notices can only occur if the CEO has a reasonable belief that the individual concerned has information, documents or things that may be relevant to the administration of the NAD Scheme.
- The CEO's reasonable belief stems from intelligence obtained by ASADA under the NAD Scheme.
- As a matter of administrative practice, the reasons that underpin the application of that discretion are to be properly recorded at the time of the decision.
- The CEO is also bound by other Commonwealth provisions such as the Australian Government Investigations Standards 2011.

Decisions of the CEO are scrutinised by others:

- If a person thinks that a decision to issue a disclosure notice is unreasonable, they can seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.
- Part of the anti-doping rule violation process includes a review by the independent Anti-Doping Rule Violation Panel (the Panel) where a decision is made as to whether the name of the athlete or athlete support person should be placed on the Register of Findings (this decision is reviewable by the Administrative Appeals Tribunal). The ADRVP is also responsible for confirming that the belief of the CEO is reasonable before a disclosure notice may be issued under the Act.
- A final decision on whether an anti-doping rule violation has occurred ultimately rests with the relevant sport tribunal.

Conclusion

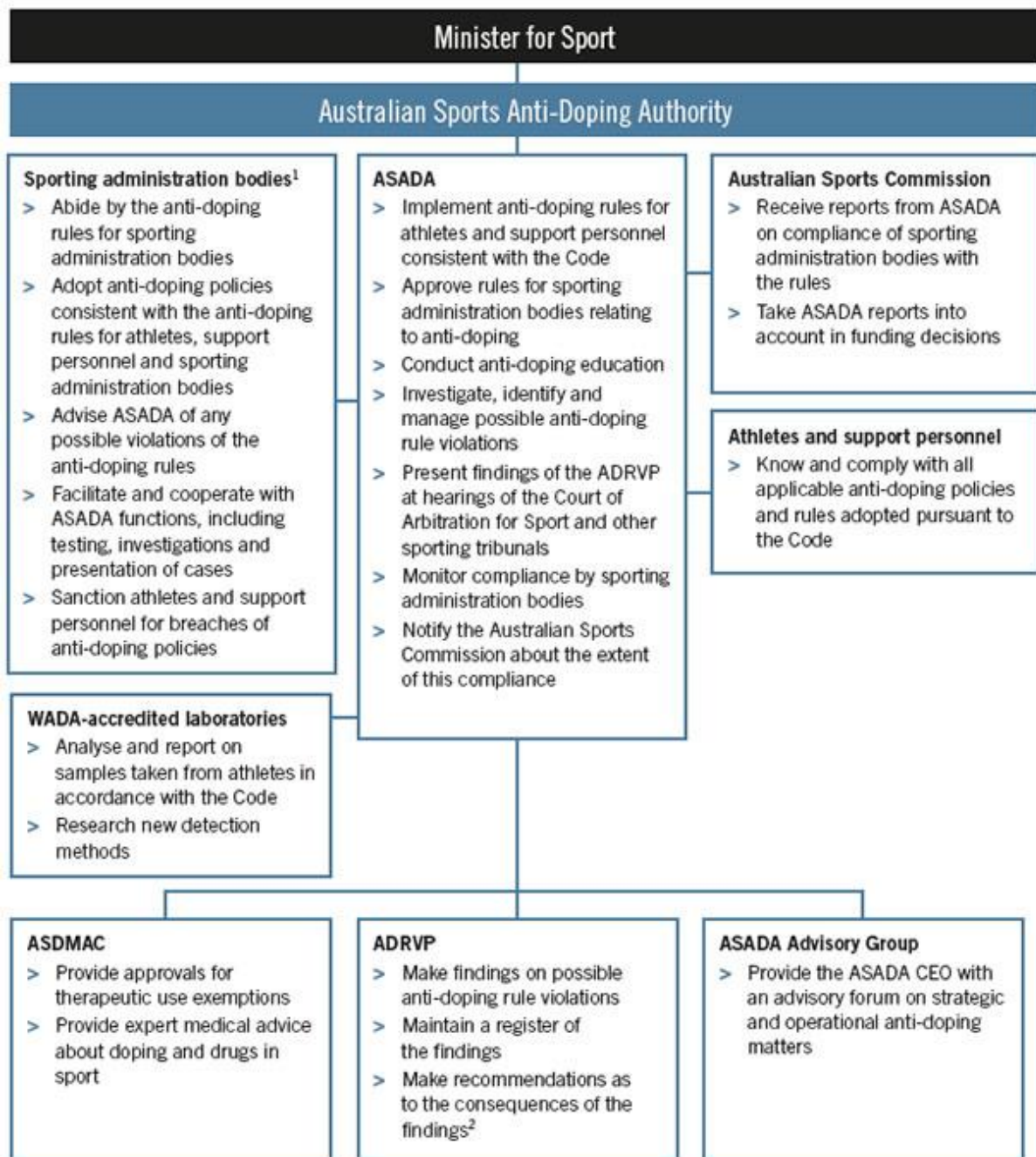
Responding to the ever increasing threat of doping to sport, the 2015 Code reflects the direction that international anti-doping efforts will take over the next five years and was developed after an exhaustive consultation period with the world anti-doping community.

As Australia's NADO, ASADA is required to comply with the Code and must be able to cooperate and effectively and appropriately share information to ensure that Australian athletes are safeguarded from the threat of doping in sport.

Australian Sports Anti-Doping Authority

October 2014

Attachment A: Australia's anti-doping framework



Attachment B: Anti-Doping Rule Violation Process

ANTI-DOPING RULE VIOLATION PROCESS

