



Australian Government

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

Committee Secretary
Senate Standing Committee on Rural and
Regional Affairs and Transport
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Thank you for providing the opportunity to provide supplementary information to the Committee's inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013.

This attached document seeks to clarify a number of issues that were discussed during the hearings on 1 March 2013. It aims to ensure a common understanding of the key elements of the Bill and of Australia's anti-doping arrangements. The Department would be pleased to provide separate briefing to Committee members on specific matters as required.

A response to the Question on Notice that arose during the hearings will be provided separately.

Should you have any queries on the Bill, please contact Ms Natasha Cole, Assistant Secretary, National Integrity in Sport Unit. Ms Cole can be contacted on 6210 2705 or at Natasha.cole@pmc.gov.au.

Yours sincerely

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Deputy Secretary
Office for Sport, Corporate Services, Local Government,
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Supplementary Submission to the Rural and Regional Affairs Legislation Committee relating to the Australian Sports Anti-Doping Authority Amendment Bill 2013

The purpose of this supplementary submission is to address a number of issues that arose during the public hearing on the Australian Sports Anti-Doping Authority Amendment Bill 2013 (the Bill), held on 1 March 2013. The submission attempts to clarify a number of matters that were raised by committee members during the public hearing.

Evidence of the Problem

Issue

During the hearing, the Committee questioned why the proposed powers were needed if there was no evidence that athletes were not cooperating with ASADA investigators.

In the previous 12 months, when trying 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.

ASADA will only seek an interview with a person where other evidence indicates an anti-doping rule violation may have occurred. Experience in investigations indicates that interviewing is a major tool towards proving a violation. ASADA's experience in this field suggests that its inability to require people to attend interviews and cooperate is likely to result in more athletes evading detection.

Burden of Proof / Evidential Burden

Issue

At the hearing, a view was expressed that the proposed amendments would shift the evidential burden for an anti-doping rule violation from the Australian Sports Anti-Doping Authority (ASADA) to the athlete.

Response

Under the Bill, and in accordance with the World Anti-Doping Code (the Code), the burden of proof for establishing an anti-doping rule violation still rests with ASADA. The Code states that:

“The Anti-Doping Organisation shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all

cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.”

The Code also operates under the principle of strict liability. Under the strict liability 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 eight possible violations under the Code. For the other seven violations, which are established by non-analytical means (i.e. other than a drug test), ASADA is required to establish intent on the behalf of the athlete or support person in order to demonstrate that an anti-doping rule violation has occurred.

Under the Bill, 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.

In practical terms, 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 (e.g. statutory declaration).

There are no other areas of the Bill or the Australian Sports Anti-Doping Authority Act 2006 (ASADA Act) which seek to shift the burden of proof.

Review of the World Anti-Doping Code

Issue

There were suggestions during the hearing that changes should not be made to the ASADA legislation until the completion of the current review of the World Anti-Doping Code which is being conducted by the World Anti-Doping Agency.

Response

While the review of the World Anti-Doping Code (the Code) is scheduled to finish in November 2013, the new revised Code will not take effect until 1 January 2015. This means that changes to Australia’s anti-doping arrangements arising from the Code Review will also not take effect until 1 January 2015. ASADA needs these additional powers as soon as possible to enhance the effectiveness and efficiency of its investigative activities. A failure to address this issue now may result in more athletes evading detection.

Presumption of Innocence

Issue

There were suggestions during the hearing that the Bill will erode a person's right to be presumed innocent until proven otherwise.

Response

It is factually incorrect that an athlete's presumption of innocence has been removed by this Bill. As previously outlined, the Bill places an evidential burden on a person who is issued a disclosure notice in relation to the information that is requested in the notice. If sufficient evidence is gathered via a disclosure notice that indicates a possible anti-doping rule violation has been committed by an athlete, ASADA will still need to follow the same processes for confirming the violation as that which currently exist under the legislation and the Code.

ASADA will need to compile the evidence it has, present the evidence to the Anti-Doping Rule Violation Panel for consideration and, subject to the Panel determining whether a possible violation has occurred and the athlete or support person requesting a formal hearing, providing the evidence to the sport's tribunal (or the Court of Arbitration for Sport (CAS) for deliberation. As discussed above, the Code requires that the case must be proven to the comfortable satisfaction of CAS or other sport tribunal.

The World Anti-Doping Code provides considerable protection for athletes. Under the World Anti-Doping Code, the relevant provisions provide that disclosure of a person's identity may be made public at any time from a positive test result until the final processes have been completed. Australia has chosen to ensure that an individual's identity is maintained until all due processes, including review, are completed. This shows the strong emphasis placed on the protection of an athlete's rights and reputation in Australia's anti-doping system.

Abrogation of the Privilege against Self-Incrimination

Issue

During the hearing there were suggestions that the abrogation of the right not to self-incriminate is unusual in legislation which provides only for civil penalties.

Response

It is not uncommon in Commonwealth legislation for the privilege against self-incrimination to be abrogated in legislation which provides only for civil penalties. Similar provisions exist in the *Aged Care Act 1997* and the *Carbon Credits (Carbon Farming Initiative) Act 2011*.

Criminal vs Civil Penalties

Issue

During the hearing, a number of comments referred to the proposed penalty provisions in the Bill as criminal penalties.

Response

The proposed penalty provisions in the Bill are not criminal penalties, rather civil penalties. The following comments are offered for clarity:

- A pecuniary penalty issued for failure to comply with a disclosure notice becomes a debt payable to the Commonwealth, not a criminal matter.
- A pecuniary penalty under the Bill does not result in a criminal conviction and the person will not have a criminal conviction recorded against them in the event that a Court determines to impose a fine for a breach of the relevant provision.
- The relevant court decides on the amount of the penalty to be imposed.
- The Bill sets out a number of factors that a court must take into account when determining a pecuniary penalty (nature and extent of contravention, loss or damage suffered, the circumstance, history of the person)
- The Bill does provide, under subsection 13D(2)(e), that if a person provides false or misleading evidence in response to a disclosure notice, the information may be used against a person in a criminal matter in accordance with section 137.1 or 137.2 of the Criminal Code. This is a standard requirement/provision in Commonwealth law.

Drugs Covered by the ASADA Act

Issue

During the hearing, there were inferences that the scope of ASADA's activities extended to any substance.

Response

ASADA's role is to administer the Code in Australia. An anti-doping rule violation under the Code relates only to substances and methods that are listed on the WADA List of Prohibited Substances and Methods. A copy of the current list (effective 1 January 2013) is at [Attachment A](#) for the Committee's information. As such ASADA only pursues anti-doping rule violations against athletes in relation to substances specified on the WADA List.

Contract Limitations

Issue

During the hearing, there were claims that the measures outlined in the Bill could be implemented through Codes of Conduct or through the contracts that players have with their respective sports and therefore this legislation is not required.

Response

There are times at the formative stages of an investigations process where, to protect the identity of the individual under investigation, ASADA needs to operate independently of the sporting organisation to ensure a thorough investigation.

ASADA's experience is that there are occasions where it needs to gather information from people who are not captured by a Sport's Code of Conduct. This could include for example, lower level athletes, medical practitioners and sports scientists. In these cases the Bill's procedures provide an essential capacity for ASADA to request such people to attend interviews and/or provide information.

It is important to have both Codes of Conduct and the ASADA legislation. Providing these additional investigatory powers through amendments in the ASADA legislation ensures consistency across all sports that have a Code-compliant policy in place.

Protections for athletes/person of interest

Issue

There were concerns that the ASADA Chief Executive Officer (CEO) would have unfettered powers to issue disclosure notices and that the Bill offered limited protections to athletes.

The Bill seeks only to assist ASADA in being better able to undertake investigations into possible violations of the anti-doping rules as set out in the Code and the National Anti-Doping (NAD) Scheme. The confidentiality of the athlete or support person is maintained until all due processes, including review, are completed.

Athletes are protected in a number of ways:

Direct protections:

- the ASADA Act protects the privacy and confidentiality of persons who are issued a disclosure notice. Under Sections 71 and 72 of the ASADA Act, there are significant penalties for officers of ASADA who reveal NAD Scheme personal information. These provisions will also apply in relation to the issuing of disclosure notices.
- the Bill 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, i.e. 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 will stem from intelligence obtained by ASADA under the NAD Scheme.
- As a matter of administrative practice, the reasons which 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.
- The Bill makes clear that the power to issue a disclosure notice cannot be delegated beyond the Senior Executive Service level within ASADA.

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 (ADJR Act).
- We understand that decisions made by the CEO are also reviewable by the Commonwealth Ombudsman.
- Under the Act, the evidence collected by ASADA relating to a possible anti-doping rule violation, including information collected from a disclosure notice, will need to be assessed by the Anti-Doping Rule Violation Panel before it is passed onto a sport.
- A final decision on whether an anti-doping rule violation has occurred ultimately rests with the relevant sport tribunal.