



Submission of the Commercial Bar Association of Victoria

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

**To: The Committee Secretary
Senate Standing Committees on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
Canberra ACT 2600
Australia**

**From: The Commercial Bar Association of Victoria
Owen Dixon Chambers
205 William Street
Melbourne**

These Submissions are NOT confidential.

Introduction

1. The Sports Section of the Commercial Bar Association of Victoria ("CommBar") supports the objects of the World Anti-Doping Code and in particular to encourage and promote competition free from prohibited substances and methods and to prevent doping practices in sport.
2. CommBar supports the provisions of the Australian Sports Anti-Doping Authority Amendment Bill 2013 ("the ASADA Amendment Bill") which:
 - (a) extend the existing information sharing arrangements with government agencies including Australia Post;
 - (b) clarify the conflict of interest provisions in the *Australian Sports Anti-Doping Authority Act (2006) (the ASADA Act)*.

3. CommBar does not support the provisions of the ASADA Amendment Bill which grant the ASADA Chief Executive Officer (“CEO”) of the Australian Sports Anti-Doping Authority (“ASADA”) (or the CEO’s delegate) coercive powers.
4. In summary CommBar believes that the extension of these powers is:
 - (a) unwarranted;
 - (b) an unjustified infringement of the athletes’ human rights; and
 - (c) an unacceptable grant of unfettered powers to the CEO of ASADA.

The Amendment is Unwarranted

5. In special circumstances coercive powers are needed to ensure compliance with the laws of Australia. These coercive powers are only granted in exceptional circumstances where the ordinary investigating powers given to police and other enforcement bodies or other investigatory commissions are insufficient. For example the Australian Crime Commission (“ACC”) is able to conduct investigations involving breaches of the criminal law using coercive powers.¹ Similar powers are granted to a Royal Commission². Whilst a Royal Commission generally does not investigate criminal matters, the government’s right to know warrants the granting of coercive powers in appropriate cases.
6. Parliament tightly regulates the areas where basic human rights are curtailed. Coercive powers including curtailing the right to privacy of a citizen, requiring the writer of a document to produce a document against that person’s free will and abandoning the right to avoid self-incrimination should only be granted in exceptional circumstances.

¹ Section 7A(c) Australian Crime Commission Act 2002 authorizes the ACC to investigate, when authorised by the Board, matters relating to federally relevant criminal activity. The coercive powers are set out in Division 2 of the ACC Act.

² Section 1A Royal Commissions Act 1902 authorizes an enquiry into a matter which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth

7. There is no information to suggest that the specialist criminal investigators, such as the Federal Police or the ACC have been unable to conduct criminal investigations involved in sport using their existing powers. Indeed the recent investigation by the ACC highlights that the ACC is well resourced and competent to conduct investigations of criminality which involves sport.³
8. ASADA does not investigate criminal matters. The objects of the ASADA Act are to prevent doping practices in sport and to encourage and promote competition free from prohibited substances and methods. The ASADA Act imposes no criminal sanctions upon athletes or support staff. The primary sanction for those who violate the anti-doping rules or traffic in prohibited substances under the WADA code is the exclusion of that athlete or coach from sport. Appropriately this is a matter of contract between the athlete and the sport.
9. The Explanatory Memorandum ("the Memorandum") cites the findings of Justice Wood as justification for the introduction of coercive powers. In January 2013 Justice Wood prepared a detailed report entitled "Cycling Australia Review"⁴. Whilst Justice Wood made a recommendation that coercive powers be given to ASADA, he cited no evidence to support an assertion that athletes had not co-operated with ASADA investigators. Indeed Justice Wood highlighted that most sports had already inserted contractual obligations on the athletes and coaches to cooperate with investigations conducted by that sport and ASADA. Justice Wood was qualified in his comments :
- "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." (Emphasis added).⁵

³ See National Crime Commission Report: "Organised Crime and Drugs in Sport".
<http://www.crimecommission.gov.au/publications/other/organised-crime-drugs-sport>

⁴ A copy of the report is available at:
<http://www.regional.gov.au/sport/resources/reports/files/cycling-australia-review-20130111.pdf>

⁵ At paragraph 4.94

If any evidence existed of a pattern of athletes or coaches failing to attend interviews, CommBar expects that Justice Wood would have referred to this in his report.

10. It is notable that Justice Wood did not recommend a civil penalty be introduced. He suggested the appropriate remedy would be “a sanction by the relevant sport”.⁶
11. There has been no material submitted to establish that the coercive powers will assist ASADA in catching more drug cheats. The mere assertion by ASADA that increasing its powers will make it more effective is not supported by any evidence.
12. There is no justification to extend the coercive powers to contractual investigations which may be not applicable in criminal investigations.

THE INFRINGEMENT OF HUMAN RIGHTS

13. The Memorandum relating to the ASADA Amendment Bill attaches a “**Statement of Compatibility with Human Rights**”. Articles 14(2), 14(3), 15 and 17 of the International Covenant on Economic, Social and Cultural Rights are cited. These rights are basic rights and should not be lightly disregarded by any government. The proposed amendments to the ASADA Act seek to infringe upon those rights.
14. The Memorandum incorrectly argues that the infringement of article 17 (the arbitrary or unlawful interference with an individual's privacy) should be read down for the purposes of protecting a contractual right. The Memorandum claims that “*these clauses are reasonable, necessary and proportionate to the legitimate aim of catching doping cheats*”. Yet the Memorandum does not cite any facts in support of these propositions. It should be noted that human right statutes require a much higher threshold from any limitation on a human right to be justifiable. Limitations are only recognised as being permissible if they are reasonable limits that can be justified in a free and democratic society based upon human dignity, equality and freedom.

⁶ At paragraph 4.97

15. By way of example ASADA has not provided any information which establishes a pattern by persons who have been interviewed to decline to answer questions or produce documents. The experience of barristers who are engaged in doping violation hearings is that the vast majority of athletes voluntarily co-operate with ASADA by providing interviews and statements without any compulsion. There is every reason to believe this will continue.
16. It is incumbent upon the government and ASADA to explain when and how the coercive powers are likely to be used. Only then can the Parliament consider whether the infringement of basic human rights is necessary to achieve the goal. It is a legitimate aim to catch doping cheats. However the proportionality of that aim must be considered. Given the undue haste surrounding these amendments they appear to be ill-considered. Commbar believes that ill-considered decisions should not be made.
17. The Memorandum does not explain why the right of self-incrimination should be negated by effectively reversing the onus of proof in a civil anti-doping case.
18. There is no justification for the waiver of these fundamental principles of common law and human rights. The Memorandum concentrates on the adversarial role of the process. It must be remembered that this is a civil proceeding for a civil penalty, usually the exclusion from the sport. This highlights that the authors of the Memorandum have misconceived the reason for the infringement of basic human rights.
19. The creation of cumulative civil penalty orders⁷ of 30 penalty points is not justified⁸. There is no rational basis for the imposition of such a heavy penalty. In any event the ASADA Amendment Bill simply assumes that the threat of a civil penalty order will be sufficient to ensure truthful answers at an interview.

⁷ See item 13 of Schedule 1 of the ASADA Amendment Bill which seeks to introduce a new section 73N in the *ASADA Act*.

⁸ These sanctions were not recommended by Justice Wood in the *Cycling Australia Review*- See paragraph 4.97 of the Report.

THE UNACCEPTABLE GRANT OF UNFETTERED POWERS

20. Item 9 of Schedule 1 of the ASADA Amendment Bill seeks to introduce a new section 13A (1) in the ASADA Act which empowers a CEO to issue a notice "*if the CEO reasonably believes that the person has information documents or things that may be relevant to the administration of an NAD scheme*".
21. The power given to the CEO is virtually unfettered. This is in stark contrast with S28 (1A) of the ACC Act which requires the Examiner to record written reasons for the issue of any summons. This provision is essential to ensure that the decision of the Examiner is capable of review pursuant to the *Administrative Decisions (Judicial Review) Act 1977*⁹. It is curious that none of the protections enshrined in the ACC Act are granted to an athlete or a person to be examined under the proposed amendments to the legislation. The failure to build in fundamental protection of rights demonstrates that this legislation is ill-conceived.
22. One must consider how the proposed power to issue a summons might be applied by a CEO. Given the impecuniosity of most athletes it is unlikely that those athletes could afford to seek an administrative review of the decision by a CEO. There is no ability to obtain financial assistance from the government to prosecute any judicial review. In practical terms there would be no ability to review a decision. Even if there were financial and/or pro bono resources to do so, there is no ability to obtain documents relating to the reasonable grounds which were considered by the CEO. It is disturbing that the rights of athletes could be affected to a greater extent than if the investigation and summons was issued by the ACC.
23. The power to issue a notice is not only directed to the coaches and athletes but may also be issued to any person whom the CEO believes is relevant.

⁹ The ACC Act also enables a person to be examined to seek costs of the examination and prescribes a right that the person to be examined is entitled to legal representation – see sections 25A, 26 and 27 of the ACC Act.

24. The ASADA Amendment Bill provides no guidance as to what is meant by "administration". Does this entitle the CEO to issue a notice to an athlete's doctor? The doctor may be in possession of information which is relevant to the athlete's consumption of performance enhancing or illicit drugs either in or out of competition. But it is privileged. If the investigation was conducted by the Federal Police it would not be available.
25. There is no provision in the ASADA Amendment Bill to protect doctor/client confidentiality. Similarly there is no provision which protects lawyer/client legal privilege.¹⁰
26. There are no checks and balances in this Bill to guarantee basic human rights.¹¹ If the investigation was undertaken by the police it would be necessary for the relevant officer to swear an affidavit or statutory declaration verifying the basis of the belief to establish to an independent third party that the belief was reasonable. If the investigation was undertaken by the ACC it would be necessary for the officer to record written reasons about his decision. It is amazing to consider that the ASADA CEO is granted greater powers than a police officer without any of these checks and balances.
27. In short, too much arbitrary power would be dependent upon the integrity of the CEO. It is no answer to say that these powers will be used sparingly. If this is true, there is no warrant for granting the powers in the first place. And if the system is corrupted by an overzealous CEO (or his delegate) where are the checks and balances to ensure proportionality?
28. In our submission, the ASADA Amendment Bill is poorly drafted and requires substantial amendment to protect the ordinary rights of individual citizens.

¹⁰ Once again this is in stark contrast to the ACC Act

¹¹ Item 9 Schedule 1 of the ASADA Amendment Bill seeks to introduce a new section 13B in the *ASADA Act* which appears to remove the right of protection from self-incrimination which arise in relation to documents.

PRACTICAL MATTERS

29. The extension of ASADA'S power to conduct investigations will no doubt require an increase of the ASADA budget. If ASADA intends to conduct investigations which are not based upon positive analytical analyses, the administration costs must necessarily increase. At a press conference the Minister stated that additional funds would be allocated for this purpose.
30. Given the tight economic circumstances it is unlikely that the total funding to sports in the budget will increase. If, contrary to expectations, the sports budget remains the same then it is inevitable that the funds which would otherwise be available to the athletes for training, development and coaching purposes will be reduced. The net effect of the legislation will be to promote a bureaucracy at the cost of individual athletes, who are already struggling on Commonwealth grants or living off their parents. The so-called "fight against drugs" will be paid for by the clean athletes.
31. The Commonwealth Government is obliged to ensure that money administered by the Australian Sports Commission to sports for the benefit of athletes is wisely spent. It appears that the cost involved in administering sports, including funding ASADA is dramatically increasing compared to the amounts available for the training and support of elite athletes.
32. This "bureaucratization" of organised sport must stop.

SUMMARY

33. The granting of coercive powers to the CEO of ASADA is not warranted or justified. The proposed Bill should be referred to a Senate Committee for a full investigation.

If the Senate Committee requires any further information or submissions please contact Anthony Nolan SC on anolan@vicbar.com.au.

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