

# Chapter 2

## Background

### Use of performance enhancing drugs

2.1 The Australian Crime Commission's recent report *Organised Crime and Drugs in Sport* identified widespread use of performance enhancing and image enhancing drugs among professional athletes.<sup>1</sup> The use of performance enhancing drugs appears to be increasing. The Australian Customs and Border Protection Service informed the committee that:

Since 2009 Australia has seen a significant increase in the number of attempted illegal importations of [performance and image enhancing drugs], including steroids and human growth hormones. In 2011-12 Customs and Border Protection made a record 6,126 steroid detections and 2,595 hormones detections. The majority of these detections were made in the international mail stream. These trends reflect an increasing domestic demand and an increasing ability for individuals to obtain [performance and image enhancing drugs] via online forums from low cost source countries.<sup>2</sup>

2.2 The Australian Crime Commission submitted that its recent *Organised Crime and Drugs in Sport* report demonstrated that the threat posed by the performance enhancing drugs market and related criminal activities to the integrity of sport in Australia, and organised crime attempts to infiltrate the professional sports sector in Australia, is current, crosses sporting codes and is evolving.<sup>3</sup>

### The Australian Sports Anti-Doping Authority

2.3 The Australian Sports Anti-Doping Authority (ASADA) was established by the *Australian Sports Anti-Doping Authority Act 2006*. ASADA combined the anti-doping functions then carried out by the Australian Sports Drug Agency and the educative and other functions undertaken by the Australian Sports Commission (ASC). The Authority was also given limited investigative and prosecutorial powers in relation to anti-doping rule violations.

### Background to the Government's role in sports anti-doping activities

2.4 The Department of Regional Australia, Local Government, Arts and Sport (the department) informed the committee that the Australian Government has had a

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1 Australian Crime Commission, *Submission 11*, p. [1]. The term "performance enhancing drugs" will be used throughout this report to cover both performance enhancing and image enhancing drugs.

2 Australian Customs and Border Protection Service, *Submission 16*, p. 1.

3 Australian Crime Commission, *Submission 11*, p. 1.

role in sports drug testing since 1985 when the Anti-Drugs Campaign of the ASC was established. Since that time, successive Australian Governments have enhanced Australia's anti-doping arrangements. The department and the Australian Olympic Committee submitted that Australia is considered to have one of the most advanced anti-doping arrangements in the world.<sup>4</sup>

2.5 Ms Catherine Ordway, a lecturer in Sports Governance at the University of Canberra, provided the following information concerning the recent history of the Government's anti-doping activities:

In 2004, a new statutory authority was proposed to replace the Australian Sports Drug Agency (ASDA), to be called the Australian Sports Anti-Doping Authority (ASADA). ASDA was the original National Anti-Doping Organisation for Australia. ASDA was established by the *Australian Sports Drug Agency Act 1990*, and became a statutory authority in 1991. ASADA replaced ASDA on 14 March 2006. The creation of ASADA was a key recommendation of the 2004 Anderson inquiry into the use of drugs by Australia's track cycling team.<sup>5</sup>

2.6 Ms Ordway informed the committee that the report of the Anderson inquiry had recommended, with respect to the investigation of doping offences in Australian sport, that 'there should be a body which is quite independent of the AIS and of the Australian Sports Commission and of the sporting bodies themselves with the power and duty to investigate suspected infractions such as substance abuse and to carry the prosecution of persons against whom evidence is obtained'.<sup>6</sup>

2.7 Significantly, when it was originally established, ASADA was given the power to investigate doping allegations and present anti-doping cases at hearings of tribunals established under the World Anti-Doping Code (the Code). As Ms Ordway observed, the establishment of ASADA helped the then Government fulfil its international treaty obligations under the UNESCO International Anti-Doping Convention.<sup>7</sup> The UNESCO convention requires state parties to implement arrangements that are consistent with the principles of the Code.<sup>8</sup> Mr Schwab of the Australian Athletes Association (AAA), remarked that 'ASADA is a creature of

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4 Department of Regional Australia, Local Government, Arts and Sport, *Submission 12*, p. 1; Mr John Coates, President, Australian Olympic Committee, *Committee Hansard*, 1 March 2013, p. 25.

5 Ms Catherine Ordway, *Submission 14*, p. 2.

6 The Honourable R Anderson QC, 'Second Stage Report to the Australian Sports Commission and to Cycling Australia', (Anderson Report), Canberra, 27 October 2004, Department of Communications, Information Technology and the Arts, 2004, [http://fulltext.ausport.gov.au/fulltext/2004/feddep/Anderson\\_report.asp](http://fulltext.ausport.gov.au/fulltext/2004/feddep/Anderson_report.asp). Referred to in Ms Catherine Ordway, *Submission 14*, p. 2.

7 Ms Catherine Ordway, *Submission 14*, p. 2.

8 Department of Regional Australia, Local Government, Arts and Sports, *Submission 12*, p. 2.

WADA [World Anti-Doping Agency]'.<sup>9</sup> The establishment of ASDA 'was also in keeping with the growth in non-policing public sector agencies performing investigative functions'.<sup>10</sup>

## **The bill**

2.8 The Government has indicated in the explanatory memorandum to the bill that the current methods for detecting doping in athletes, namely blood and urine tests, are no longer adequate to detect sophisticated doping cases. It is therefore proposed that ASADA be provided with investigative techniques and intelligence gathering powers to identify athletes and support personnel who may be using prohibited performance enhancing substances and methods.<sup>11</sup>

2.9 The additional powers would give the Chief Executive Officer of ASADA the power to issue disclosure notices that would compel persons to cooperate in ASADA's investigations. Persons served with a disclosure notice would be required to cooperate by answering questions, giving information or providing materials, documents or things. ASADA would be able to retain this material which might be used in proceedings that arise under or in relation to the ASADA Act or Regulations. Civil penalties apply for failure to comply with disclosure notices.<sup>12</sup> This subject, along with the associated topics of the limitation of the right against self-incrimination and the reversal of the onus of proof, are discussed in the following chapter.

2.10 The Government also intends that the current information sharing arrangements between ASADA and other Government agencies be extended to allow the Agency to obtain information from Australia Post about individuals' current addresses and about post office box registrations. The proposed changes would not allow ASADA to intercept or examine the contents of any mail item.<sup>13</sup>

2.11 Other changes proposed include: clarifying that the role of the Anti-Doping Rule Violation Panel is to make findings that an athlete or supporting person has possibly committed an anti-doping rule violation; additional provisions to address possible conflicts of interest for members of the Panel and the Australian Sports Drug

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9 Mr Brendan Schwab, General Secretary, Australian Athletes' Alliance, *Committee Hansard*, 1 March 2013, p. 22.

10 Ms Ordway, *Submission 14*, p. 3.

11 See Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment Bill 2013, p. 2.

12 Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment Bill 2013, p. 2.

13 Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment Bill 2013, p. 3.

Medical Advisory Committee; and providing for a statute of limitations of eight years.<sup>14</sup>

### **Parliamentary scrutiny committees' reports**

2.12 Two scrutiny committees of the Parliament, which have a specific role to examine bills to ensure their compatibility with human rights or personal rights and liberties, have examined the bill. A summary of their examinations may be found in the following paragraphs.

#### ***Parliamentary Joint Committee on Human Rights***

2.13 The Parliamentary Joint Committee on Human Rights (PJCHR) expedited its report on the bill so that this committee might be assisted in its inquiry.<sup>15</sup> The PJCHR's report identified the following matters in relation to the bill.

2.14 The PJCHR noted that a statement of compatibility with human rights that was provided with the bill concluded that the bill is compatible with human rights. The statement of compatibility states that 'the bill promotes the right to enjoy culture as it seeks to protect the integrity of sport in Australia by enforcing anti-doping rules' and argues that the enjoyment of the right to culture would be significantly eroded '[s]hould Australians lose the belief that sporting contests in this country take place on a level playing field'.<sup>16</sup>

2.15 The PJCHR examined the civil penalty provisions of the Bill and sought clarification from the minister as to whether the civil penalty provisions are 'considered to involve "criminal charges" under article 14 of the ICCPR [International Convention on Civil and Political Rights] and are required to be dealt with in proceedings which observe the guarantees applicable to criminal proceedings'. In addition, it noted the provisions of proposed sections 73H and 73K and the potential for double trial or double punishment for the same conduct. The PJCHR therefore sought clarification from the minister as to whether the provisions are consistent with the ICCPR.<sup>17</sup>

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14 Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment Bill 2013, p. 3.

15 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Australian Sports Anti-Doping Authority Amendment Bill 2013*, Second Report of 2013, February 2013, Executive Summary, p. ix.

16 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Australian Sports Anti-Doping Authority Amendment Bill 2013*, Second Report of 2013, February 2013, p. 2.

17 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Australian Sports Anti-Doping Authority Amendment Bill 2013*, Second Report of 2013, February 2013, pp 3–4.

2.16 The limitation of the right not to incriminate oneself was examined by the PJCHR which found that proposed section 13D is 'generally consistent with the right not to incriminate oneself'. However, the PJCHR indicated that it intended to write to the minister to ask whether proposed paragraph 13D(2)(f) – which provides that answers, information or documents given may be used against the person in civil proceedings under the Act – is consistent with the ICCPR in relation to:

- the right not to incriminate oneself, if such proceedings are 'criminal' under international human rights law; or
- with the right to a fair hearing, if such proceedings are 'civil' under international human rights law.<sup>18</sup>

2.17 The PJCHR also commented that the statement of compatibility states that the bill may operate to limit the right to be presumed innocent as it imposes an evidential burden on the defendant in relation to a range of matters. It noted the explanation made in relation to proposed provisions regarding failure to comply with disclosure notice<sup>19</sup> and mistakes of fact<sup>20</sup> and concluded that 'in light of this explanation that these matters are peculiarly within the defendant's knowledge, and as the burden is limited to an evidential burden only and not a legal burden, the limitation on the presumption of innocence is reasonable and proportionate'.<sup>21</sup>

2.18 The PJCHR also examined the bill in relation to the right not to be subject to arbitrary or unlawful interference with privacy. It reported that in light of the explanation provided in the statement of compatibility, the bill does not appear to give rise to any human rights privacy concerns.<sup>22</sup>

2.19 The PJCHR sought further information from the minister in relation to the provisions imposing a civil penalty on any person for failing to comply with a disclosure notice and the right not to be subject to arbitrary or unlawful interference with family life. The PJCHR sought information from the minister regarding the right to freedom of association and freedom of expression in relation to restrictions on

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18 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Australian Sports Anti-Doping Authority Amendment Bill 2013*, Second Report of 2013, February 2013, p. 5.

19 Proposed section 13C, Australian Sports Anti-Doping Authority Amendment Bill 2013.

20 Proposed section 73Q, Australian Sports Anti-Doping Authority Amendment Bill 2013.

21 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Australian Sports Anti-Doping Authority Amendment Bill 2013*, Second Report of 2013, February 2013, p. 6.

22 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Australian Sports Anti-Doping Authority Amendment Bill 2013*, Second Report of 2013, February 2013, p. 7.

members of the Australian Sports Drug Medical Advisory Committee liaising with others and contributing to deliberations or discussions.<sup>23</sup>

2.20 Shortly before finalising its report, the committee received from the PJCHR, the minister's responses to the matters raised and associated commentary by the PJCHR. Due to timing constraints, the committee was not able to fully consider this material as part of this inquiry. The minister's responses and the PJCHR commentary can be found at Appendix 3.

### ***Senate Standing Committee for the Scrutiny of Bills***

2.21 In its Alert Digest No. 2 of 2013, the Scrutiny of Bills Committee (the Scrutiny Committee) reported that it had sought the minister's advice in relation to a range of provisions in the Bill, as follows:

- *privacy – delegation of legislative power:* it was noted that proposed paragraph 13(1)(ea) provides that the NAD Scheme must provide authority for the CEO to be able to request a specified person to attend an interview, give information and/or produce documents or things. The CEO must have a 'reasonable belief' that the requested things may be relevant to the administration of the NAD Scheme. Proposed section 13A provides the authority for the NAD Scheme to establish a system for the issuing of disclosure notices. The Scrutiny Committee noted the comments in the statement of compatibility that amendments to the regulations will provide further protections around the issuing of disclosure notices.

The Committee sought an explanation from the minister as to whether the protections pertaining to the issuing of disclosure notices can be included in the bill, given the importance of these additional safeguards;

- *privacy and property rights:* it was noted that proposed subsection 13B(2) empowers the CEO to take and retain 'for as long as necessary' documents and things produced in response to a disclosure notice. The Scrutiny Committee sought the minister's advice as to whether consideration has been given to including a maximum time limit and a requirement to review the need to retain disclosed documents and things at regular intervals;
- *coercive powers:* the Scrutiny Committee sought the advice of the minister in relation to the inclusion of a provision in the Act that provides for a stated time to comply with a disclosure notice. This would be in line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and is an important protection;
- *self-incrimination:* it was noted that the use and derivative use immunities in relation to criminal proceedings are common in Commonwealth legislation

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23 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Australian Sports Anti-Doping Authority Amendment Bill 2013*, Second Report of 2013, February 2013, p. 8.

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where the privilege against self-incrimination is abrogated. However, the Scrutiny Committee stated that it is less clear why the exception to the use and derivative use immunities in relation to civil proceedings is appropriate. It sought the minister's advice in this regard;

- *reversal of onus of proof*: in relation to proposed subsection 13C(2), the Scrutiny Committee stated that it is not easy to establish what is not in one's knowledge of possession, but that this appears to have been recognised in the explanatory memorandum in that a statutory declaration would be sufficient. The Scrutiny Committee, however, was concerned to ensure that this option would be effective in practice. It sought the ministers advice 'as to whether the view expressed in the [statement of compliance] that a statutory declaration would be sufficient for these purposes has been accepted by the courts and, if not, whether consideration has been given to making it clear in the bill that such evidence would be sufficient to discharge the evidential burden imposed on a person under proposed subsection 13C(2)';
- *fair trial*: the Scrutiny Committee pointed to the comments of the Human Rights Committee in relation to proposed sections 73G and 73K (see paragraph 2.15 above);
- *infringement notice scheme*: proposed section 80 authorises the regulations to provide for an infringement notice scheme to be made as an alternative to civil proceedings in relation to a failure to comply with a disclosure notice. The Scrutiny Committee commented that, in order to assess whether the proposed scheme is appropriate, it had sought advice from the minister as to why the scheme is necessary and whether it is appropriate to provide for the scheme in regulations rather than being included in primary legislation; and
- *privacy*: in relation to information sharing, subsections 68(2) and 68(5) provide that a written notice must be given to a person to whom information is related if that information is shared with a sporting administration body. Proposed subsection 68(5A) provides that the notification requirements do not apply if the CEO is satisfied that a current investigation into possible violations will be prejudiced by complying with the notification requirement. The Scrutiny Committee noted that broad powers were being provided to the CEO and that additional safeguards could apply without undermining the effectiveness of the provision. The minister's advice was sought on appropriate limitations on this power or whether its use should be subject to reporting requirements.<sup>24</sup>

2.22 At the time of writing, the Scrutiny Committee had not received responses from the minister regarding the matters raised.

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24 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2013*, 27 February 2013, pp 4-11.

2.23 Some of the issues identified in the scrutiny committees' publications were also of concern to witnesses in the current inquiry. These issues are discussed in the following chapter of the report.