



Australian Sports Anti-Doping Authority Amendment Bill 2013

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The Bills Digest at a glance

Purpose of the Bill

This Bill proposes to amend the Australian Sports Anti-Doping Authority (ASADA) Act to provide the Authority with powers to compel persons of interest to cooperate with ASADA investigations.

Background

The Bill is partly in response to recent high profile international scandals, the Australian Government Review into Cycling Australia and the investigation of criminal activity in Australian sport. It was also introduced in conjunction with the release of a report by the Australian Crime Commission (the ACC) which concluded that there is extensive use of drugs in sport in Australia.

The various reports and reviews all conclude that drug testing alone is insufficient to uncover all cases of drug use in sport. Investigative powers are needed to complement drug testing regimes. These powers are intended to deliver a more a comprehensive, co-ordinated and consistent response to doping in sport.

Key elements

The Bill provides the CEO of ASADA, or his or her delegate, with powers to issue a disclosure notice compelling persons of interest to attend an interview to answer questions or produce documents or other material if the CEO is satisfied that those persons have information relevant to the administration of the National Anti-Doping (NAD) Scheme.

The Bill does not give ASADA powers to enter and search premises (under warrant or by consent) or seize evidential material (under warrant).

Stakeholder concerns

Some stakeholders have raised concerns about the nature and extent of powers to be given to ASADA under this Bill. These concerns primarily relate to matters such as the abrogation of an individual's right not to self-incriminate in certain circumstances, and the imposition of an evidential burden on defendants in relation to the proposed coercive powers. The inclusion of these powers is justified as being necessary, proportionate and reasonable for the legitimate aim of catching drug cheats. Similar powers have been granted to other regulatory agencies.

Australian Sports Anti-Doping Authority Amendment Bill 2013

Date introduced: 6 February 2013

House: Senate

Portfolio: Sport

Commencement: Sections 1–3 commence on Royal Assent. Schedules 1–3 commence on a day to be fixed by Proclamation or six months after Royal Assent, whichever is the earlier date.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose of the Bill

The primary purpose of the Australian Sports Anti-Doping Authority Amendment Bill 2013 (the Bill) is to amend the *Australian Sports Anti-Doping Authority Act 2006* (the Act) to allow the Chief Executive officer (CEO) of the Australian Sports Anti-Doping Authority (ASADA), or a delegate of the CEO, to issue a 'disclosure notice' compelling a person of interest to co-operate with ASADA investigators if the CEO reasonably believes it is in the interests of the investigation to compel that person to assist. A disclosure notice will require the person to attend an interview to answer questions, give information or provide documents or other material. A civil penalty will apply for failure to comply with a disclosure notice.

Other amendments to the Act arising from the Bill include proposals to:

- extend ASADA's existing information-sharing capabilities with government agencies to include information-sharing with Australia Post (this also requires an amendment to the *Australian Postal Corporation Act 1989*)
- clarify that ASADA's Anti-Doping Rule Violation Panel is not a 'hearing body' within the meaning of Article 8 of the World Anti-Doping Code (the WADC)
- limit the activities of members of the Anti-Doping Rule Violation Panel and the Australian Sports Drug Medical Advisory Committee to prevent any conflict of interest and
- confirm that the WADC statute of limitations of eight years applies to any action, including civil proceedings, commenced under the Act.

Background

World Anti-Doping Agency

Various substances have been used to enhance athletic performance for centuries.¹ Most sports introduced some form of drug testing during the 1970s, but testing regimes to identify drugs seemed consistently to lag behind the development and introduction of new substances, such as anabolic steroids.

During the 1990s, governments and international authorities considered various policies and actions to combat the increasing use of drugs in sport, but a major problem appeared to be that these efforts were uncoordinated. In an effort to rectify this situation, in 1999 the International Olympic Committee (IOC) convened a world conference on sports doping. As a result of this conference the World Anti-Doping Agency (WADA) was established in late 1999.²

WADA developed the WADC, which applies to all athletes, and to all those who assist athletes in their preparation for international sporting participation. All National Olympic Committees and International Sports Federations are required to sign the WADC. As governments were not bound by the WADC, in October 2005 the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the *International Convention against Doping in Sport*.³ Parties to this Convention (of which Australia is one), are required to implement the WADC. As a result, the WADC applies to anyone who participates in sport at the international or national levels or at lower levels of competition, as well as to athlete support persons, including coaches, agents, managers and medical personnel.⁴

Australian Sports Drug Agency

In 1990 the Australian Government was pro-active in the fight against drugs in sport, establishing an independent statutory agency, the Australian Sports Drug Agency (ASDA), to deal with drug testing and drug education.⁵ However, ASDA was responsible for, but not empowered to deal with, issues relating to possession of, and trafficking in, prohibited substances or methods. These matters were investigated by particular sporting organisations, and at times by the Australian Sports Commission (ASC).

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1. The information in this section is derived from a previous Bills Digest: R Jolly, *Australian Sports Anti-Doping Authority Amendment Bill 2009*, Bills Digest, no. 41, 2009–10, Parliamentary Library, Canberra, 2009, viewed 14 February 2013, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F1EZU6%22>
 2. World Anti-Doping Agency (WADA), 'A brief history of anti-doping', WADA website, viewed 14 February 2013, <http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/>
 3. The text of the *International Convention against Doping in Sport*, 2005 can be found on the United Nations Educational, Scientific and Cultural Organization (UNESCO) website, viewed 14 February 2013, http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html
 4. UNESCO Convention, op. cit.
 5. Senate Standing Committee on Environment, Recreation and the Arts, *Drugs in sport*, Interim report, Australian Government Publishing Service, Canberra, May 1989; ASDA was established under the *Australian Sports Drug Agency Act 1990*, which commenced on 18 February 1991, see: ASDA, *Annual report 1990–91*, p. 1.

In 2004, following an investigation by Cycling Australia and the ASC into doping allegations against a member of the Australian Cycling Team, there were calls for the establishment of an independent anti-doping investigative Board.⁶ In response, the Howard Government created the Australian Sports Anti-Doping Authority (ASADA).

Australian Sports Anti-Doping Authority

ASADA assumed the drug testing, education and advocacy functions of ASDA, took over the ASC's drugs policy development, approval and monitoring roles and was given the power to investigate all allegations of breaches of the WADC. It was also empowered to prepare and present cases to the Court of Arbitration for Sport and other sport tribunals.⁷

ASADA's role and powers have been contentious from the beginning, with the Australian Olympic Committee (AOC) raising concerns that there are contradictions in their extent and content.⁸ As the AOC noted in its submission on the Bills to establish ASADA, on one hand the authority appeared to have excessive powers in that it was not required to put allegations of doping to an independent hearing before declaring an athlete guilty. Similarly, once an investigation was complete, ASADA alone had the power to determine whether an athlete should be sanctioned.⁹ On the other hand, the body had been given no powers of compulsion; athletes and others could not be compelled to give evidence before its inquiries.¹⁰

A number of instances during the next three years suggested that the AOC's concerns may have been justified, but the Howard Government did not attempt to resolve what appeared to be an inherent conflict between the rights of athletes and the need for ASADA to have adequate powers of investigation and compulsion in dealing with doping matters.

In 2009, the Rudd Labor Government introduced legislative changes to improve the organisational structure of ASADA, but these did not specifically address the issue of balance between athletes' rights and investigative powers.

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6. Department of Communications, Information Technology and the Arts (DCITA), *Discussion paper about proposed legislation affecting Australian arrangements for the investigation and hearing of sports doping allegations*, DCITA, 2004, viewed 14 February 2013, http://fulltext.ausport.gov.au/fulltext/2004/feddep/SDIB_discussion_paper/SDIB_Discussion_paper.pdf
 7. R Kemp (Minister for the Arts and Sport), *Path clear for new anti-doping body*, media release, 2 March 2006, viewed 14 February 2013, http://www.minister.dcita.gov.au/kemp/media/media_releases/path_clear_for_new_anti_doping_body
 8. Australian Olympic Committee, Submission to the Department of Environment, Communications, Information Technology and the Arts, *Inquiry into the Australian Sports Anti-Doping Authority Bill 2005* [and] *Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005*, 12 January 2006, viewed 14 February 2013, http://corporate.olympics.com.au/files/61/Holland_Drian_AOC_Submission12Jan05.pdf
 9. Ibid.
 10. M McDonald, 'Thorpe blasts Elke as Coates joins drugs row', *The Australian*, 24 October 2007, viewed 14 February 2013, http://parlinfo.parlinfo/download/media/pressclp/QWOO6/upload_binary/qwoo63.pdf;fileType=application/pdf#search=%22ian%20thorpe%20%20drugs%22

ASADA's National Anti-Doping Scheme

The National Anti-Doping Scheme (NAD scheme), established in accordance with section 9 of the *Australian Sports Anti-Doping Authority Act 2006*, is contained in Schedule 1 of the Australian Sports Anti-Doping Authority Regulations 2006.¹¹ The NAD scheme authorises ASADA to:

- plan, implement, evaluate and monitor education and information programs for doping-free sport for all participants
- encourage and promote research relevant to sports drug and safety matters, including sociological, behavioural, juridical and ethical studies
- undertake the role and responsibility of a National Anti-Doping Organisation for Australia under the UNESCO *International Convention against Doping in Sport* and the WADC
- provide services relating to sports drug and safety matters to a sporting administration body in accordance with contractual arrangements with the body on behalf of the Commonwealth
- undertake results management for a sporting administration body regardless of whether ASADA has conducted the sample collection
- delegate results management responsibilities to International Federations in accordance with the WADC and
- undertake activities relating to sports drug and safety matters referred to it by a sporting administration body.

Cycling review

In August 2012 the United States Anti-Doping Agency (USADA) imposed a lifetime disqualification on cyclist Lance Armstrong. USADA found overwhelming evidence that the seven times Tour de France champion had engaged in serial cheating through the use, administration and trafficking in performance enhancing drugs throughout the majority of his cycling career. USADA also found that Armstrong had been involved in running his professional cycling team as 'a drug conspiracy'.¹² The drug agency concluded its investigations had exposed 'one of the most sordid chapters in sports history'.¹³

The Armstrong scandal prompted the Australian Government to review cycling in Australia. The review, undertaken by James Woods QC during late 2012, concluded that while drugs testing, education and monitoring are clearly indispensable elements of any anti-doping regime, equally

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11. Section 9 of the *Australian Sports Anti-Doping Authority Act 2006*, viewed 18 February 2013, http://www.comlaw.gov.au/Details/C2011C00690/Html/Text#_Toc302391501 and National Anti-Doping Scheme, viewed 18 February 2013, http://www.asada.gov.au/publications/about/asada_national_antidoping_scheme_0609.pdf
 12. United States Anti-Doping Agency (USADA), *Reasoned decision of the United States Anti-Doping Agency on disqualification and ineligibility* [in the matter of USADA versus Lance Armstrong], 10 October 2012, viewed 15 February 2013, <http://d3epuodzu3wuis.cloudfront.net/ReasonedDecision.pdf>
 13. Ibid.

essential to doping detection 'is the ability of relevant authorities to investigate alleged incidents of doping involving athletes, support personnel or team staff'.¹⁴ The value of such investigative powers in Woods' opinion was patently demonstrated by the USADA investigation into Lance Armstrong and his cycling team.

Woods QC acknowledged that review of ASADA's capacity to perform investigative work was outside the scope of his review, but at the same time, he pointed out that ASADA's lack of power to compel persons to attend an interview, to provide information or to produce documents, severely limited ASADA's potential investigative capacity. Woods saw this as a deficiency that needed to be addressed and this Bill seeks to do this by providing in **proposed paragraph 13(1)(ea)** of the Act, inserted by **item 7** of Schedule 1 to the Bill, that the Chief Executive Officer (CEO) of ASADA may request specific persons to attend an interview and answer questions, provide information and produce documents if the CEO 'reasonably believes' that this may be relevant to the administration of the NAD scheme.

Woods QC's recommendations also included the proviso that ASADA's powers of investigation should be:

... subject to the inclusion of suitable safeguards including, as a precondition for any such requirement, the existence of a reasonable belief that the person has knowledge, documents or other materials that will assist the effective administration of the NAD Scheme. It would appear to be appropriate for an exemption to apply in relation to the provision of information or documents where that might involve the incrimination of a person for an offence; or alternatively for a provision to be included that would prevent the use or derivative use of that information in criminal proceedings (but not in relation to the proof of possible breaches of anti-doping rules).¹⁵

The Bill also addresses the potential for self-incrimination by accepting Woods QC's second recommendation that while self-incrimination should not be an excuse for refusing to provide information to ASADA, that information should not be admissible in criminal proceedings (**proposed paragraph 13(D)(2)(e)** of the Act or in civil proceedings other than proceedings arising out of the Bill once enacted, or relevant regulations (**proposed paragraph 13(D)(2)(f)**).

Furthermore, Woods QC noted how ASADA's investigative capacity is enhanced when information sharing occurs with law enforcement agencies in relation to prohibited substances, and where this can be linked to relevant athletes. He recommended removing limitations on the powers of federal statutory bodies to provide information to ASADA. In pre-empting the Australian Crime Commission's announcement in February, he noted such powers are of particular importance in relation to cycling given that:

... there are concerns that criminal organisations have become engaged in the supply of prohibited substances as an adjunct to their involvement in the wider illicit trade in drugs, as well as concerns that

14. J Woods, *Cycling Australia review*, Department of Regional Australia, Local Government, Arts and Sport, Canberra, January 2013, viewed 15 February 2013, <http://www.regional.gov.au/sport/resources/reports/files/cycling-australia-review-20130111.pdf>

15. Ibid.

some supplement outlets may be supplying, in addition to their regular products, substances that are included in the WADA prohibited list.¹⁶

Two sections of the Bill deal with this recommendation from Woods QC. **Item 8** in Schedule 1 inserts a new **paragraph 13(1)(g)** into the Act, to authorise ASADA 'to disclose information, documents or things obtained in relation to the administration of the NAD scheme' ... 'for the purposes of, or in connection with,' the administration of the NAD scheme. **Item 1** of Schedule 2 of the Bill proposes to allow Australia Post to share relevant, drug-related information or documents with ASADA by amending section 90J of the *Australian Postal Corporation Act 1989*.

Essendon scandal

In early February 2013 the Australian Football League (AFL) and ASADA began to investigate claims that during the 2012 football season, Essendon players were injected with performance-enhancing drugs.¹⁷

The club suspended its fitness coach, Dean Robinson, pending the investigation. It was later revealed that sports scientist Stephen Dank may have also been involved. Dank had previously caused controversy over the administration of certain substances to players, including an anti-inflammatory product which was initially used on racehorses, and the use of calves' blood extract to heal muscular injuries.¹⁸

Because of Robinson's and Dank's earlier associations with other AFL and Australian Rugby League (ARL) clubs, there were fears that the scandal would have far-reaching consequences across football codes.¹⁹ It appears ASADA intends to investigate several clubs as well as players and officials, and may take several months to reach any conclusion.

At the end of February 2013, Essendon's administrators announced that an independent review of the club's governance and processes would be undertaken in addition to ASADA's review and that the findings of the review would be delivered to the ASC and ASADA.²⁰

16. Ibid.

17. Editorial, 'Tilting the playing field to a precarious angle', *The Age*, 7 February 2013, p. 12, viewed 18 February 2013, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F2212039%22>

18. M Warner, 'The pharmacist to the stars', *The Herald Sun*, 6 February 2013, p. 7, viewed 18 February 2013, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F2210709%22>

19. Australian Football League clubs, Geelong and the Gold Coast and Rugby League clubs, Manly, Cronulla and Penrith and S Gullan, 'A step towards great unknown: doping expert's scrutiny warning', *The Herald Sun*, 6 February 2013, p. 76, viewed 18 February 2013, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F2210845%22>

20. G Denham, 'Dons call in help to cure drug problems', *The Australian*, 28 February 2013, p. 32, viewed 28 February 2013, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F2262206%22>

Australian Crime Commission findings

The report released in February 2013 was not the first time the Australian Crime Commission (ACC) had noted that there were vulnerabilities in professional sport in Australia. In 2011 it claimed that these vulnerabilities had the potential to be exploited by criminal elements in terms of match fixing in particular.²¹ The ACC noted also Australian law enforcement agencies had identified associations between professional athletes and criminals, including those who import and distribute illicit drugs.²²

In 2012, with the support of ASADA and the Therapeutic Goods Administration (TGA), the ACC embarked on a year-long investigation to follow up on the earlier findings. The investigation undertook a broad consideration of:

- Performance and Image Enhancing Drugs (PIEDs)
- involvement of organised crime in the distribution of PIEDs
- use of WADA prohibited substances by professional athletes in Australia and
- current threats to the integrity of professional sport in Australia.²³

The major conclusion of the investigation was that peptides and hormones are being used by professional athletes in Australia, facilitated by sports scientists, high performance coaches and sports staff. This is thought to take place in a number of professional sporting codes in Australia.

Findings from the ACC's investigation were released hours after the Essendon scandal surfaced and the day after the Minister for Sport, Kate Lundy, introduced this Bill into the Senate. In a joint press conference, the Minister for Sport and the Minister for Justice, Jason Clare, declared on 7 February 2013 that they suspected wide substance abuse in sport.

While the ACC's John Lawler hoped that criminal charges would be laid against those identified as a result of the investigation, he refused to identify individuals, clubs or codes under investigation. As such, it appeared that all sports and all athletes were tainted by the findings. Indeed, some sectors

21. Australian Crime Commission (ACC), *Threats to the integrity of professional sport in Australia*, Crime Profile Series, April 2011 [series dated April, this publication post August 2011 according to online document access information], viewed 15 February 2013,

http://www.crimecommission.gov.au/sites/default/files/files/Professional_sports_Factsheet_251111.pdf

22. Ibid.

23. ACC, *Organised crime and drugs in sport*, ACC, Canberra, February 2013, viewed 18 February 2013,

<http://www.crimecommission.gov.au/publications/other/organised-crime-drugs-sport>

of the media considered it the blackest day in Australian sport.²⁴ Others acknowledged that it was a bleak and depressing situation, but that it was better to confront it now than in the future.²⁵

Committee consideration

Senate Standing Committee on Rural and Regional Affairs and Transport

The Bill was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee for inquiry and the Committee reported on 12 March 2013. A public hearing took place on 1 March 2013 in Canberra. A copy of the Committee's report can be found at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/report/index.htm.²⁶

The Government members of the Committee (Senators Sterle (Chair), Gallacher and Thorp) made the following three recommendations:

In light of the serious possible consequences for athletes and others, the committee recommends that the Government consider additional transparency options in the issuing of disclosure notices.²⁷

and

The committee recommends that the Government consider amendments which would require ASADA to report annually to the Parliament on its use of disclosure notices.²⁸

and

The committee recommends that... [subject to the above recommendations]... the Senate pass the Australian Sports Anti-Doping Authority Amendment Bill.²⁹

In relation to the 'evidential burden' and failure to comply issues, the Committee did not make a final decision, as it noted that the Scrutiny Committee had sought the Minister's advice as to

24. M Gordon, 'Blackest day in Australian sport', *The Sydney Morning Herald*, 8 February 2013, p. 1, viewed 15 February 2013,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F2214785%22>

25. Editorial, 'Dark day we had to have', *The Herald Sun*, 8 February 2013, p. 32, viewed 18 February 2013,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F2214556%22>

26. Senate Rural and Regional Affairs and Transport Committee, *Australian Sports Anti-Doping Authority Amendment Bill 2013*, The Senate, March 2013, viewed 18 March 2013,

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/report/index.htm

27. *Ibid.*, p. 17.

28. *Ibid.*

29. *Ibid.*, p. 25.

whether a statutory declaration would be sufficient to discharge the evidential burden (see below), and no response had been received at the time of the report.³⁰

The Committee considered that the civil penalties included in the Bill are a suitable starting point as a deterrent, but noted that further consideration may be required once the legislation has operated for several years.³¹

While noting the concerns of some submitters regarding the potential issues around medical and legal privilege, the Committee was satisfied that there is no limitation in respect of client legal privilege. In the case of medical privilege, the Committee has suggested that the Government may wish to provide further clarification.³²

In addition to the report by the Government members of the Committee, both the Australian Greens and the Coalition Senators provided dissenting reports.

The Australian Greens member of the Committee (Senator di Natale) expressed concern that the Bill represents 'an unprecedented expansion of ASADA's powers and overturns some fundamental legal principles. As such it would significantly reduce the freedom of Australian sportspeople.'³³ Therefore he recommended in his dissenting report that the Bill not be passed.

The Coalition Senators (both Committee members and participants)(Senators Heffernan, Brandis, Bernardi and Edwards) noted that Australia's existing legislation is already acknowledged as world's best practice, and that Australia complies with all its WADA obligations, and that therefore 'it is difficult to conclude that the new, invasive powers of ASADA are necessary.'³⁴ Given that there is a comprehensive review of the WADA Code underway which is expected to be completed by the end of the year, the Senators have recommended that consideration of the Bill be deferred until that review is available.³⁵

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has also examined this Bill.³⁶ The Committee identified a number of provisions in the Bill which it fears may trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

30. Ibid., p. 22.

31. Ibid., p. 23.

32. Ibid., p. 25.

33. Ibid., pp. 27–28.

34. Ibid., p. 31.

35. Ibid., p. 32.

36. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2013*, 27 February 2013, viewed 13 March 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2013/index.htm

The Scrutiny of Bills Committee has sought comments from the Minister for Sport on a number of provisions in the Bill. A summary of these is shown below:

- **Disclosure of personal information**

The Committee considered **proposed section 13A** may limit a person's right to privacy. The Committee noted the statement of compatibility with human rights (which is included in the Explanatory Memorandum to the Bill and discussed below) argues that the proposed amendments are 'reasonable, necessary and proportionate to the legitimate aim of catching doping cheats'.³⁷ It acknowledged the further argument that section 71 of the Act 'already provides for the protection of NAD scheme personal information while section 73 preserves the operation of the *Privacy Act 1988*'.³⁸ In light of these justifications for the power, the Committee was prepared to leave the overall question of whether the powers are appropriate to the Senate as a whole.

However, as it was not clear why further privacy protections cannot be included in the primary legislation, the Committee sought an explanation:

... why the requirements dealing with what information must be included in a disclosure notice and the provision of a minimum time for compliance (14 days is the accepted norm) cannot be included in the bill itself, especially as the bill already includes a requirement for the NAD scheme to provide that a person who receives a disclosure notice has the right to be notified in writing of the possible consequences of a failure to comply with a disclosure notice.³⁹

- **ASADA CEO's power to retain documents or things**

The Committee questioned **proposed subsection 13B(2)**, which would empower the ASADA CEO to take and retain 'for as long as necessary' documents or items produced in response to a disclosure notice. It noted:

Where items are seized under search and seizure powers, the power to retain such items is usually subject to a maximum time limit, with the possibility of this limit being extended if necessary. It is also common for legislation to require that seized material be regularly reviewed to ensure its retention remains necessary. These powers provide additional accountability for decisions to retain documents and things disclosed under the NAD scheme.⁴⁰

The Committee asked whether consideration had been given to including in the Bill a maximum time limit and a requirement to review the need to retain disclosed documents and other items at regular intervals.

37. Statement of Compatibility with Human Rights attachment to Explanatory Memorandum, Australian Sports Anti-doping Authority Amendment Bill 2013, p. iii.

38. Ibid.

39. Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2013*, op. cit.

40. Ibid.

- **Coercive powers**

The Committee was concerned that **proposed paragraph 13C(1)(c)** provides that a person fails to comply with a disclosure notice if he or she does not comply within a period specified in the notice. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that a person should be allowed at least 14 days to comply with such a notice.⁴¹ While the Committee acknowledged that the recommended timeframe may be included in regulations, it considered that such an important matter should be dealt with in the primary legislation if possible, so again it sought the Minister's advice about whether this could be included in the Bill.

- **Self-incrimination**

The Committee noted a detailed justification of the necessity for **proposed section 13D**, which abrogates the right against self-incrimination for persons in receipt of disclosure notices; however it asked for further justification of the proposed approach in relation to civil proceedings.

- **Evidential burden—reversal of onus**

Proposed subsection 13C(2) imposes an evidential burden on persons responding to a disclosure notice if they do not possess the information, document or item required by ASADA or that they have taken all reasonable steps available to obtain the information, document or thing and have been unsuccessful.

The statement of compatibility considers it appropriate for the burden of proof to be placed on 'a defendant' as imposing the burden of proof on ASADA would be 'extremely difficult or expensive'.⁴² The Committee is of the view, however, that 'it is often not easy to establish what is not in one's knowledge or possession and it appears that this has been recognised in the explanatory memorandum by the statement that a statutory declaration would be sufficient for these purposes'. Further information has been sought.⁴³

- **Infringement notice scheme**

Proposed section 80 authorises the regulations to provide for an infringement notice scheme as an alternative to civil proceedings in relation to failure to comply with a disclosure notice. The Committee notes that in general, infringement notice schemes are considered more appropriate for minor offences where a high volume of contraventions is expected and where assessments of liability are straightforward.

41. Attorney General's Department (AGD), *A guide to framing Commonwealth offences, infringement notices and enforcement powers*, AGD, September 2011, viewed 8 March 2013, <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

42. Statement of Compatibility, op. cit.

43. Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2013*, op. cit.

The Committee therefore sought advice on why an infringement notice scheme was necessary in this instance and why, if it were, it could not be provided for in the primary legislation.

- **Privacy in relation to information sharing**

Current subsections 68(2) to 68(5) of the Act require the ASADA CEO to give written notice to a person to whom information relates if it is proposed to share the information with a sporting administration body. **Proposed subsection 68(5A)**, inserted by **item 3 of Schedule 2** to the Bill, provides that these notification requirements do not apply if the 'CEO is satisfied that complying with those requirements is likely to prejudice a current investigation into a possible violation of the anti-doping rules'.

The Committee was concerned that this power given to the CEO is broad, despite there being certain protections in the legislation. It was convinced that additional safeguards could apply without undermining the effectiveness of the provision.

- **Fair trial**

Proposed section 73G provides that the rules of evidence and procedure for civil matters apply during proceedings for a civil penalty. **Proposed section 73K** provides that criminal proceedings may be commenced after civil proceedings. Given that the relationship between civil penalty orders and criminal offences may not be clear cut, the Committee was concerned that this provision may raise questions about punishment being twice imposed for the same offence. At the same time, the Committee was prepared to leave this matter to the consideration of the full Senate.

Parliamentary Joint Committee on Human Rights

Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government is required to assess a Bill's compatibility with human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.

The Government has declared that in its view this Bill is compatible with those rights and freedoms.⁴⁴

Joint Committee report on compatibility with Human Rights

In its second report of 2013, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) identified a number of human rights matters about which it sought clarification from the Minister for Sport.⁴⁵ The Human Rights Committee sought clarification from the Minister on

44. Statement of Compatibility, op. cit.

45. Parliamentary Joint Committee on Human Rights, *Second report of 2013, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011*, 13 February 2013, viewed 14 March 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/ind

several matters (see details below). The Minister responded on 27 February, to which the Committee replied on 12 March.⁴⁶

- **Civil penalty enforcement provisions**

In relation to the civil penalty enforcement provisions introduced in **new Part 8A** of the Act, the Human Rights Committee was concerned that the imposition of a civil penalty under this Bill may constitute the determination of a 'criminal charge' within the meaning of Article 14 of the International Covenant on Civil and Political Rights (the ICCPR).⁴⁷ The Committee also noted that the statement of compatibility makes no reference to whether the guarantees relating specifically to criminal proceedings contained in Article 14 apply to the imposition of the new civil penalty provisions.⁴⁸

The Australian Law Reform Commission's Statement of Principle in relation to the distinction between criminal and civil penalty law and procedure notes that it:

... is significant and adds to the subtlety of regulatory law. This distinction should be maintained and, where necessary, reinforced. Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.⁴⁹

In her response to the Committee, the Minister noted that under the proposed penalty provisions are classified as civil penalties under Australian domestic law. A failure to comply with a disclosure notice will not result in a criminal conviction.⁵⁰

[ex.htm](#). Note: the Committee's *First report of 2013* raised similar concerns about civil penalty regimes included in the Biosecurity Bill 2012 and the Agriculture and Veterinary Chemicals Legislation Amendment Bill 2012.

46. The Minister's response and Committee's reply can be found at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/index.htm

47. Parliamentary Joint Committee on Human Rights, *Second report of 2013*, op. cit. At paragraph 1.10 the Human Rights Committee outlines the factors identified by international jurisprudence that are taken into account when determining whether the imposition of a penalty for particular conduct involves the determination of a 'criminal charge'. One of these factors is the severity of the penalty and whether it is punitive and intended to deter, rather than compensate for loss. The Human Rights Committee at paragraph 1.11 outlines how the enforcement of a civil penalty order under **proposed section 73N** of the Act could result in a significant and escalating fine for failing to comply with a disclosure notice under **proposed section 13C** of the Act.

48. Ibid. Paragraph 1.8 notes that **new Part 8A** of the Act replicates the provisions proposed in the Regulatory Powers (Standard Provisions) Bill 2012, which is currently before the House of Representatives. The Human Rights Committee has previously commented on the human rights issues arising from these provisions and its comments are relevant to, and expanded upon in relation to this Part of this Bill.

49. Australian Law Reform Commission (ALRC), *Principled regulation: federal civil and administrative penalties in Australia*, ALRC, report 95, as modified 19 July 2012, viewed 8 March 2013, <http://www.alrc.gov.au/report-95>

50. K Lundy, Letter to the Chair, Parliamentary Joint Committee on Human Rights, 27 February 2013, viewed 12 March 2013,

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/index.htm

- **‘Double jeopardy’**

The Human Rights Committee noted that **proposed section 73K** of the Act provides that criminal proceedings can be commenced regardless of whether a civil penalty order has been made against a person ‘for conduct that is the same, or substantially the same’.⁵¹ So it may be that if ‘some or all’ civil penalty proceedings are deemed to be criminal penalty proceedings, it is possible that contrary to Article 14(7) of the ICCPR, a situation of double jeopardy may arise.⁵² Further to the response above, the Minister’s view is that as the civil penalty provisions are not characterised as ‘criminal’ there is no potential for double trial or double punishment.

- **Right not to self-incriminate**

Proposed section 13D of the Act abrogates the right against self-incrimination. However, **proposed subsection 13D(2)** provides a ‘use’ and ‘derivative use’ immunity in relation to criminal proceedings, other than proceedings for an offence against sections 137.1 or 137.2 of the Criminal Code (**proposed paragraph 13D(2)(e)**) and civil proceedings, other than proceedings arising out of, or under the Act or Regulations (**proposed paragraph 13D(2)(f)**). While the Committee considered that **proposed section 13D** was generally consistent with the right not to incriminate oneself, it was unsure if the **proposed new paragraph 13D(2)(f)** was also consistent.⁵³

Again, as the Minister considers the penalties civil charges, the issue of self-incrimination does not apply. The Committee had deferred finalising its views on the fair trial implications of these provisions to enable a closer examination of the issues.

- **Right to the presumption of innocence**

Proposed subsection 13C(2) and **proposed section 73Q** of the Bill place an evidential burden on the person who may be subject to a civil penalty order and as such, may operate to limit the right to be presumed innocent.⁵⁴ The Committee considered, however:

...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.⁵⁵

- **Right not to be subject to arbitrary or unlawful interference with family life**

[ex.htm](#); **Proposed paragraph 13D(2)(e)** in Schedule 1 does contemplate that criminal proceedings under section 137.1 (false or misleading information) and section 137.2 (false or misleading documents) of the *Criminal Code* might arise.

51. Parliamentary Joint Committee on Human Rights, op. cit., p. 4.

52. Ibid., p. 4., paragraph 1.14.

53. Ibid., paragraph 1.22.

54. Article 14(2) of the ICCPR states that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty at law.

55. Parliamentary Joint Committee on Human Rights, op. cit., paragraph 1.25.

The Human Rights Committee considered that the right not to be subject to arbitrary or unlawful interference with family life under Article 17 of the ICCPR may be infringed by the provisions which require a person other than an athlete to comply with a disclosure notice. There is nothing to enable a person issued with a notice to object on the basis that he or she is being asked to provide information in respect of a family member.⁵⁶

The Minister has argued that in order to issue a disclosure notice the CEO of ASADA must reasonably believe that the person has information or things that may be relevant to the administration of the NAD scheme. Minister Lundy also notes that evidence collected under a disclosure notice will not be used in any criminal prosecutions.

The Committee has responded that it 'remains concerned that subjecting a person to a penalty for failing to comply with a disclosure notice, without allowing for any exceptions, may interfere with the right to respect for family life.' The Committee therefore suggests that consideration be given to allowing family members to raise an objection to compliance if to do so may cause harm to the person or their family relationships.⁵⁷

- **Freedom of association and freedom of expression**

The Committee noted that the restrictions imposed on members of the Australian Sports Drug Medical Advisory Committee from liaising with others outside the Committee on matters relating to the NAD scheme without the prior written consent of the CEO of ASADA may infringe Articles 19 and 22 of the ICCPR, which deal with freedom of expression and freedom of association.⁵⁸

The Minister noted that the purpose of this amendment is not to limit an individual's freedom of association or expression, but rather to avoid possible conflicts of interest. The Committee considered this response adequately addressed its concerns.

Policy position of non-government parties/independents

While there has been considerable commentary on the ACC report by politicians, there has been limited discussion about the specific aspects covered by this Bill. The Opposition Leader, Tony Abbott, was asked immediately following the release of the ACC report if he intended to support the Government's intention to strengthen ASADA's powers. Mr Abbott declared his support in principle; he was happy to work with the Government, but wanted to wait until he saw specific proposals.⁵⁹

56. Ibid., paragraphs 1.30-31.

57. Parliamentary Joint Committee on Human Rights, Reply to K Lundy letter, 12 March 2013, viewed 12 March 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/index.htm

58. Parliamentary Joint Committee on Human Rights, *Second report of 2013*, op. cit., p. 8.

59. T Abbott (Leader of the Opposition), B Bilson (Shadow Minister for Small Business, Competition Policy and Consumer Affairs) and P Hendry (Liberal Candidate for Eden-Monaro), Joint press conference, Queanbeyan, 7 February 2013, transcript, viewed 20 February 2013,

The Greens spokesperson on sport, Senator Di Natale, has made no public comment on this Bill but has engaged in the general debate following from the ACC report. The Senator does not question that doping in sport is a serious issue. He has expressed concern, however, that a 'witch hunt' has emerged against individual players who have in fact been let down by the institutions that are supposed to be protecting their interests.⁶⁰

Financial implications

The Explanatory Memorandum states that there will be no financial impact associated with this Bill. However, following the release of the ACC report and the introduction of this Bill, Minister Lundy stated that the legislation would not only increase ASADA's investigative powers, it would also 'double the funding for investigations'.⁶¹

Key issues and related provisions

Greater investigative powers and the role of the CEO

Proposed provision

The Bill proposes to authorise the CEO of ASADA under **paragraph 13(1)(ea)** to issue a disclosure notice to a person of interest requiring that person to attend an interview, give information or provide information, documents or other items. This Bill proposes to require the NAD Scheme to make provision for how interviews are to be conducted and how information, documents, materials and other items may be provided by a person to whom a disclosure notice has been issued.

Comments

The Explanatory Memorandum argues that the proposed increase in ASADA's power, (and therefore the increase in the power of its CEO), is:

... reasonable, necessary and proportionate to the legitimate aim of catching doping cheats, particularly given the safeguards that already exist in the *Australian Sports Anti-Doping Authority Act 2006*. Section 71 of the Act already provides for the protection of NAD scheme personal information while Section 73 preserves the operation of the *Privacy Act 1988*.⁶²

<http://www.tonyabbott.com.au/LatestNews/InterviewTranscripts/tabid/85/articleType/ArticleView/articleId/9060/Join-Doorstop-Interview-Queanbeyan.aspx>

60. R Di Natale, *Don't scapegoat players: Greens*, media release, 11 February 2013, viewed 20 February 2013,

<http://richard-di-natale.greensmps.org.au/content/media-releases/dont-scapegoat-players-greens>

61. K Lundy, 'The frustrations of facts with drugs in sport', *The Roar*, 8 February 2013, viewed 8 March 2013,

<http://www.theroar.com.au/2013/02/08/the-frustrations-of-facts-with-drugs-in-sport/>

62. Statement of Compatibility, op. cit., p. iii.

Support for proposed change

The Australian Olympic Committee (AOC) was enthusiastic in its support for this power to be given to ASADA. The Olympic body considered that in an increasingly sophisticated sporting environment, it was paramount in the fight against doping in Australia for the authorities to have proper investigative powers.

The AOC submission called for stronger powers to be granted to ASADA given the ‘increasing sophistication of sports doping practices and the inadequacy of a traditional reliance on athlete urine and blood testing’.⁶³

The ACC agreed. It considered ASADA was at a disadvantage when dealing with persons who wish to conceal information and that proposed amendments would help to ensure the body was better equipped to pursue issues of concern to Australian sporting codes.⁶⁴

The Office of Sport in the Department of Regional Australia, Local Government, Arts and Sport was convinced that only the application of investigative techniques and intelligence gathering combined with an effective drug testing program could give an anti-doping agency hope in identifying those who choose to use prohibited substances and methods.⁶⁵

Aurora Andruska, the CEO of ASADA, told the Senate Committee public hearing that 45 per cent of its investigations were abandoned because ASADA was not able to compel suspects to fully cooperate with an investigation. Andruska estimated that a quarter of anti-doping violations were not uncovered for this reason. In her estimate there would have been an additional ten anti-doping violations over the past twelve months if ASADA had been able to compel the provision of information.⁶⁶

63. AOC submission, op. cit.

64. Australian Crime Commission (ACC), Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 22 February 2013, viewed 26 February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm

65. Department of Regional Australia, Local Government, Arts and Sport, Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, viewed 4 March 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm

66. Australian Sports Anti-Doping Authority (ASADA), evidence to public hearing, Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 1 March 2013, viewed 8 March 2013, http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/toc_pdf/Rural%20and%20Regional%20Affairs%20and%20Transport%20Legislation%20Committee_2013_03_01_1751.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/0000%22

Lawyer and academic Catherine Ordway argued in her submission that the ACC's report has illustrated the limitations in ASADA's powers and made the need for change clear.⁶⁷ In Ordway's view, while the ACC has coercive powers to investigate criminal matters at the national level, the fact that ASADA currently has no coercive powers in relation to the anti-doping matters referred to it by the ACC means that unless athletes or athlete support personnel volunteer information, 'there is no guarantee that any of the matters identified can be progressed'.⁶⁸

Ordway continued that for ASADA to be able to investigate matters within its jurisdiction, whether those matters are referred to it or not, it must rely on agreements in place with major National Sports Organisations (NSOs). These agreements require the NSOs to advise ASADA of alleged anti-doping rule violations and to assist in its investigations. However, if an NSO fails to comply, ASADA has limited legal and political avenues to pursue.⁶⁹

Ordway suggested that ASADA's 'one directional' power to share information needs 'to be replicated in each of the agencies ASADA wishes to receive information from'. She supported the expansion of ASADA's powers proposed in this Bill.⁷⁰

Concerns

Exercise and Sports Science Australia appeared to be satisfied with the proposal to increase ASADA's investigative powers, suggesting only that there could be authorised communication channels between ASADA and self-regulatory bodies to foster sharing of information.⁷¹ Sports Medicine Australia also supported enhancing ASADA's investigative powers, as did the Coalition of Major Professional and Participation Sports, albeit with reservations about the self-incrimination provision for which it sought clarification about the extent to which this complied with international conventions.⁷² Malcolm Speed, appearing as a witness for the Coalition at the public hearing,

67. C Ordway, Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 26 February 2013, viewed 4 March 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm

68. Ibid.

69. Ibid.

70. Ibid.

71. Exercise and Sports Science Australia, Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 21 February 2013, viewed 26 February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm

72. Sports Medicine Australia, Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, viewed 26 February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm and Coalition of Major Professional and Participation Sports, Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 21 February 2013, viewed 26 February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm. The Coalition represents the Australian Football League (AFL),

suggested revision of the CEO's power to issue a notice 'so that there is greater transparency and protection around the process'.⁷³ This was also a recommendation of the Government members of the Senate Rural and Regional Affairs and Transport Legislation Committee, as noted above.

The Australian Paralympic Committee thought it important in relation to ASADA's powers that the distinction between ASADA and law enforcement bodies was defined in clear terms.⁷⁴ The Law Institute of Victoria considered the ACC's existing investigative powers made it a more appropriate body to investigate matters involving potential criminality than ASADA. The Law Institute saw this option as 'eliminating the need to provide such powers to additional government bodies, whose powers would remain largely unchecked'.⁷⁵

The Australian Psychological Society (APS) saw the increase in ASADA's powers as resulting in an exceptionally onerous burden being placed on athletes and others as a result of the interview process. Consequently, it recommended that legal or other representation should be mandated to ensure due process. Further, it believed that some provision should be made in the Bill to ensure that ASADA is required to inform athletes and others about their rights and responsibilities. Such a safeguard 'would strengthen the proposed amendment to the Bill'.⁷⁶

Australian Rugby Union (ARU), Cricket Australia (CA), Football Federation Australia (FFA), National Rugby League (NRL), Netball Australia and Tennis Australia.

73. M Speed, on behalf of Coalition of Major Professional and Participation Sports, evidence to public hearing, Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 1 March 2013, viewed 8 March 2013, http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/toc_pdf/Rural%20and%20Regional%20Affairs%20and%20Transport%20Legislation%20Committee_2013_03_01_1751.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/0000%22
74. Australian Paralympic Committee, Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 19 February 2013, viewed 26 February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm
75. Law Institute of Victoria, Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 21 February 2013, viewed 26 February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm
76. Australian Psychological Society (APS), Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 26 February 2013, viewed 26 February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm

The issue of unchecked power was of concern to the Australian Athletes Alliance (AAA), which questioned what it saw as ‘unreasonably wide coercive powers’ to be given to ASADA’s CEO under **proposed section 13A**.⁷⁷

The AAA called for more protections for the rights of individuals to be included in the legislation to counter the CEO’s power to request persons to attend interviews and produce documents. It wanted these protections to include the rights to be represented by a lawyer or support person, to be given a reasonable time in which to respond, and to be informed about the basis upon which a request may be made. In addition, the AAA called for restrictions to be imposed on the ASADA CEO requiring him or her to state what information or thing was sought and to consider alternative means to obtain that information or thing.⁷⁸

The Commercial Bar Association of Victoria added:

There are no checks and balances in this Bill to guarantee basic human rights. 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 [sic] decision. It is amazing to see that the ASADA CEO is granted greater powers than a police officer without any of these checks and balances.

In short, too much arbitrary power would be dependent on the integrity of the CEO. It is no answer to say these powers would 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 [sic] delegate) where are the checks and balances to ensure proportionality?⁷⁹

In contrast, the Department of Regional Australia, Local Government, Arts and Sport (DRALGAS) argued that while there is an investigative function in the *Australian Sports Anti-Doping Act 2006*, because it does not contain powers of compulsion, ASADA is unable to control the location or timing of interviews, and athletes and others have little incentive to respond to ASADA’s requests for interviews. In turn, ASADA needs to expend significant resources in attempting to arrange interviews and gather information; sometimes this effort is without success.⁸⁰

77. Australian Athletes Alliance, Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, viewed 26 February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm. The Australian Athletes Alliance represents Australian Cricketers’ Association, Australian Football League Players’ Association, Australian Netballers’ Association, Australian Swimmers’ Association, National Basketball League Players’ Association, Professional Footballers’ Australia, Rugby League Players’ Association and Rugby Union Players’ Association.

78. Ibid.

79. Commercial Bar Association of Victoria, Submission to Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, viewed 26 February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/sports_anti_doping/submissions.htm

80. Department of Regional Australia, Local Government, Arts and Sport submission, op. cit.

In its evidence to the Committee inquiry DRALGAS argued there are in fact checks and balances in place with ASADA and that its CEOs would in general be expected to comply with Australian Government Investigative Guidelines. Deputy Secretary Richard Eccles was adamant that a person cannot 'just be grabbed off the street and brought into a Star Chamber'.⁸¹

Additional comment

In addition to the comments made in submissions to the Senate Inquiry, in two articles written for the online publication *Crikey*, Dr James Conner from the University of New South Wales has argued that the ACC investigation had been used as a catalyst to give ASADA even 'further powers of compulsion and observation' over a group of people who are already subject to what Conner believed was an extreme regime of surveillance⁸²:

Elite athletes subject to ASADA testing already have to provide the organisation with their location, at all times, three months in advance. An hour every day between 6am and 10pm must be nominated where the athlete will be available for drug testing. Failure to comply with this, or heaven forbid, failure to be where you had stated you are, means you can be sanctioned for an anti-doping rule violation and subsequently banned from sport.

Consider just for a moment the privacy you have abandoned for the privilege of being in sport. The testing looks for performance enhancing drugs as well as illicit drugs. These same illicit drugs are used by many in Australia, but as an athlete you can be banned, and lose your income and reputation, for having used those drugs. In the interests of not spoiling lunch, I won't describe the process of actual collection -- rest assured, there is no privacy at all.

Another problem with the doping rules is the idea of strict liability. As an athlete, if you have a substance in your body you are liable. No excuses, no leniency -- you are a drug cheat. This has led to absurd outcomes where pharmacists have admitted to making a mistake (oops, wrong bottle) yet the athlete still is a "cheat". Further, the penalties (two years or life -- unless you divulge) are unfair and arbitrary.

A two-year ban for a short-life athletic career (gymnastics) is effectively a life ban, whereas for long-lived sports (eg rowing) it is a training break. No account of the sport, neither age of the competitor nor severity of cheating is taken into account.⁸³

In Conner's view, the changes in this Bill may exacerbate the situation:

ASADA will be able to compel people to tell them about doping and if you don't, you are subject to civil penalties. It is easy to imagine how an athlete might talk about drugs, drug use and what they have seen with a parent or partner. Now ASADA can force those partners and parents to divulge that entire

81. Department of Regional Australia, Local Government, Arts and Sport, evidence to public hearing, Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 1 March 2013, viewed 8 March 2013, http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/toc_pdf/Rural%20and%20Regional%20Affairs%20and%20Transport%20Legislation%20Committee_2013_03_01_1751.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/0000%22

82. J Conner, 'The real sacrifice of athletes--giving up their privacy', *Crikey*, 8 February 2013, viewed 19 March 2013, <http://www.crikey.com.au/2013/02/08/the-real-sacrifice-of-athletes-giving-up-their-privacy/>

83. Ibid.

conversation to their investigators. They can now also follow an athlete's mail—with Australia Post to be authorised to release mailing information.⁸⁴

In light of the proposal to increase ASADA's powers, academics Benjamin Koh and Martin Hardie have called for the establishment of an independent athlete advocacy organisation to help athletes navigate the minefield of banned and permitted substances in sport.⁸⁵ According to Koh and Hardie:

As the lead national authority on what is legal or illegal in sport, ASADA is the ultimate source in Australia to confirm whether a substance is banned. But if ASADA is also the prosecutor of athletes for anti-doping violations—as per the proposals in the new bill—that will make it difficult (and even *less* [emphasis in original] appealing) for athletes to approach the organisation to clarify the status of supplements. An analogy would be a person asking the police how much cannabis he or she is allowed to legally grow/possess.⁸⁶

According to the Attorney-General's Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, 'there must be an appropriate basis for new coercive powers' included in legislation and they 'should only be granted in exceptional circumstances where existing powers do not adequately address an identified law enforcement need'.⁸⁷ This sanctions the use of coercive powers to ensure effective administration of Commonwealth law, but acknowledges that the exercise of these powers infringes upon fundamental rights of individuals, including rights to dignity, privacy and the security of premises.

Intrusion upon these rights therefore should not occur without due process, and is only warranted where the use of the power is in the public interest.⁸⁸ Where the exercise of coercive powers involves a limitation on individual rights and liberties they must be aimed at achieving a legitimate objective and be reasonable, necessary and proportionate. Adequate safeguards must also be in place.⁸⁹

The Scrutiny of Bills Committee appeared to be satisfied that the powers in this Bill are not arbitrary, that there are existing safeguards under the ASADA Act and that 'the objectives being pursued by the legislation are significant, including the protection of integrity of sport and the prevention of harm to an athlete's health.' Hence, as previously noted, the Committee left the question of 'whether the powers are appropriate taking into account both the purposes of the legislation and privacy concerns' to the Senate as a whole.⁹⁰

84. Ibid.

85. B Koh and M Hardie, 'We need an advocate against ASADA's power in doping control', *The Conversation* website, 11 February 2013, viewed 28 February 2013, <http://theconversation.edu.au/we-need-an-advocate-against-asadas-power-in-doping-control-12119>

86. Ibid.

87. Attorney General's Department, *A guide to framing Commonwealth offences, infringement notices and enforcement powers*, op. cit., p. 69.

88. Ibid.

89. Ibid.

90. Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2013*, op. cit.

Alternative view—need for greater powers

It could be argued that while this Bill seeks to extend the investigative capabilities of ASADA, by providing it with a degree of coercive power, it does not propose to include the stronger coercive powers—such as entry, search and seizure powers—which are available to some regulatory agencies. Hence, the Bill seeks to give ASADA the power to require a person to answer questions and provide information, documents or things. It does not give ASADA the power to enter and search premises (under warrant or by consent) or seize evidential material (under warrant) even where there is a reasonable suspicion that an anti-doping rule violation has occurred.

The Explanatory Memorandum notes only that it is important that the ASADA CEO has not been given powers relating to search and seizure or surveillance.⁹¹ A recent example of a regulatory authority being provided with a number of these more serious powers is contained in the *Greenhouse and Energy Minimum Standards (GEMS) Act 2012*.⁹² However it should be noted that agencies are regularly granted coercive powers without having search, seizure and/or surveillance functions included. A notable example of this is the Ombudsman's office.

Comment

One side of this argument would consider it unreasonable and disproportionate to include additional powers, such as search and seizure in association with the investigation of a possible breach of an anti-doping rule violation as this may result in a ban from sport as opposed to the imposition of a more serious criminal sanction.

The other side of the argument is that in the light of scandals like the Armstrong affair and the recent ACC disclosures, particularly relating to allegations about banned substance use in professional sports, there is no alternative, but 'to get tough'. That is, it is indeed necessary, reasonable and proportionate to give ASADA even greater powers where there are reasonable grounds for suspecting a violation of an anti-doping rule. For some, this may be especially relevant in relation to the suspected use of substances and methods which are prohibited, but which are currently undetectable and which may not fall within the scope of a criminal investigation; for example, autologous blood doping.⁹³

It could be argued that some athletes are already subject to a search and seizure program which has been in place at the Australian Institute of Sport (AIS) for a number of years. This program allows for random searches to occur on AIS premises in keeping with the terms of AIS scholarship agreements

91. Statement of Compatibility, op. cit. p. ii.

92. *Greenhouse and Energy Minimum Standards (GEMS) Act 2012* is at: <http://www.comlaw.gov.au/Details/C2012A00132>

93. 'Autologous blood doping' is where the blood (or blood product) originates from the recipient rather than another donor.

made between athletes and the AIS.⁹⁴ The AOC has also given itself search and seizure powers in its draft team agreement for officials and athletes for Sochi.⁹⁵

Indeed, a number of countries (for example Austria, Spain and Italy) have taken the investigation of doping in sport out of the hands of regulatory bodies by establishing special sports investigative units within the police force and by deeming a breach of an anti-doping rule violation to be a criminal offence. This does not appear to be an option which Australia has ever considered desirable.

Right not to self-incriminate

Proposed Provision

Proposed section 13D would compel the giving of oral and documentary evidence and abrogate the privilege against self-incrimination—that is, a person would not be excused from complying with a disclosure notice on the basis that this may incriminate him or her, or expose the person to a penalty.

The Department of Regional Australia, Local Government, Arts and Sport argued that this requirement is necessary:

... as anti-doping investigations are often hampered or in some ways completely obstructed by a person's refusal to provide information if the person believes that they [sic] may implicate themselves in an anti-doping rule violation.⁹⁶

The Department continued that the intent of the Bill is not to expose individuals to civil or criminal proceedings but to assist ASADA in its investigations.⁹⁷ The Bill therefore provides for use and derivative use immunities which will ensure that any information or item provided cannot be used as evidence against the person in criminal proceedings (other than to prove an offence of false and misleading information or document) or in civil proceedings (other than those arising under the ASADA Act) (**proposed subsection 13D(2)**).

Comments

Proposed new section 13D raised serious concerns with a number of stakeholders.

94. Reference is made to this program in the appendices to the AOC submission, op. cit.

95. Australian Olympic Committee, evidence to public hearing, Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 1 March 2013, p. 24, viewed 8 March 2013, http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/toc_pdf/Rural%20and%20Regional%20Affairs%20and%20Transport%20Legislation%20Committee_2013_03_01_1751.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/0000%22

96. Department of Regional Australia, Local Government, Arts and Sport submission, op. cit.

97. Ibid.

The Law Institute of Victoria, in opposing the section in its submission to the Senate Rural and Regional Affairs and Transport References Committee, declared that the right not to self-incriminate is a basic human right.⁹⁸ As such, it should not be abrogated. In the Society's view: 'if ASADA has proof that a breach of the Code has occurred, the burden of proving such should rest with ASADA, not with a person to provide evidence establishing their guilt'.⁹⁹

The Australian Athletes' Association cited the Administrative Review Council and Attorney-General's Department reports in making the argument that there is no evidence to justify removing the right not to self-incriminate when investigating doping offences.¹⁰⁰ Doping offences are no more major than serious criminal matters, which are regularly investigated without undermining the right. The Athlete's Association is not convinced by the Bill's Statement of Compatibility with Human Rights, which claims that the abrogation of the right against self-incrimination is necessary 'to ensure that possible doping offences under the NAD scheme are able to be properly investigated'.¹⁰¹

While not quoted in the submissions to the Committee, the objections to **proposed section 13D** reflect comments in an American Supreme Court decision. According to the Court's Justice Goldberg:

[The right not to self-incriminate] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that selfincriminating [sic] statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty', is often a protection to the innocent'.¹⁰²

The Commercial Bar Association of Victoria was equally concerned that powers which require a person to produce documents against his or her free will should also 'only be granted in exceptional circumstances'.¹⁰³

The Australian Paralympic Committee was similarly uneasy about the section, which it believed implicitly confers an assumption of guilt in circumstances where it is reasonable for a person to claim non possession of documents or information, but have no means of proving this.¹⁰⁴

98. Law Institute of Victoria submission, op. cit.

99. Ibid.

100. Australian Athletes Alliance submission, op. cit. Documents cited were Administrative Review Council, *The coercive information-gathering powers of government agencies*, report no. 48, May 2008; and Attorney General's Department, *A guide to framing Commonwealth offences, infringement notices and enforcement powers*, op. cit.

101. Ibid.

102. *Murphy v Waterfront Commission* 378 US 52, 55 (1964), quoted in New Zealand Law Commission, *The privilege against self-incrimination: a discussion paper*, Preliminary paper, no. 25, Wellington, September 1996, viewed 25 February 2013, http://www.lawcom.govt.nz/sites/default/files/publications/1996/09/Publication_58_304_PP25.pdf

103. Commercial Bar Association of Victoria submission, op. cit.

The Australian Psychological Society (APS) sought assurances that athletes' rights not to self-incriminate are protected. It added a further dimension to this discussion in stating that it believed responses to substance abuse by athletes should be based on harm minimisation, rather than a punitive approach. The APS considers that zero tolerance, which it sees this Bill promoting, often exacerbates and reinforces problematic behaviour. Additionally, the APS considers that it is important to maintain distinctions between athletes' use of illicit 'recreational' substances and illicit performance-enhancing substances, and to be mindful of health and wellbeing issues relating to the use or misuse of many licit substances, such as alcohol, sports drinks and prescription medication.¹⁰⁵

The ACC was of the view that the Bill had the appropriate balance of rights. It stated that the prohibition of use of answers given under a disclosure notice in civil or criminal proceedings achieves an appropriate balance between compelling the production of information and the protection of an individual's rights and reputation.¹⁰⁶

Evidential burden

Proposed provision

Under **proposed section 13C** a person does not fail to comply with a disclosure notice to give information or produce documents (under **proposed subsection 13C(1)**) if the person is able to establish that he or she did not possess the information, document or thing and had taken all reasonable steps to obtain it, but had been unable to do so (under **proposed subsection 13C(2)**). **Proposed section 73R** provides that a person bears an evidential burden in relation to this exception.

Comments

The Law Institute of Victoria commented that the new definition of 'evidential burden' proposed to be inserted into section 4 of the Act by **item 5** of Schedule 1 to the Bill, introduces the burden of proving a negative.¹⁰⁷ The Bill provides that an evidential burden means 'adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist'. Additionally, the **proposed paragraph 13C(2)(b)** would require a person to have taken all reasonable steps yet not be able to obtain information, documentation or a 'thing'. The Law Institute of Victoria agrees also that a person should not have 'the burden of proving that something does not exist'.¹⁰⁸

Kimberley Crow, Chair of the AOC Athletes Commission, on the other hand stated in her evidence to the Senate public hearing that she believed athletes would not have a problem with this provision of the legislation. Athletes already give up a considerable amount of freedom for sport and they would

104. Australian Paralympic Committee submission, op. cit.

105. APS submission, op. cit.

106. ACC submission, op. cit.

107. Law Institute of Victoria submission, op. cit.

108. Ibid.

be happy to comply with this requirement in order to prove that they are ‘clean’ and free from drugs.¹⁰⁹

Penalties

Proposed provision

Proposed section 13C of the Act prescribes a maximum penalty of 30 penalty units (\$5100) for the contravention of a civil penalty provision, being ‘Failure to comply with disclosure notice’.¹¹⁰

Comments

There was some discussion in submissions and in the public hearing held by the Senate Committee concerning the level of civil penalties proposed under this Bill.

The Commercial Bar Association of Victoria considered there is no rational basis for the imposition of what it saw as a ‘heavy penalty’.¹¹¹ Anthony Nolan, chair of the Sports Section of the Association, added in evidence at the public inquiry that most athletes were not professionals and not able to afford to pay the fines proposed.¹¹²

In contrast, at the public hearing the AOC questioned whether the civil penalties to be imposed ‘will be sufficient to compel compliance when non-compliance will simply amount to a debt payable’. John Coates argued that as athletes are increasingly well rewarded financially, the penalty proposed in the legislation is inconsequential.¹¹³

The AOC went further, suggesting that failure to comply with an ASADA disclosure notice should involve a criminal penalty:

... to demonstrate the seriousness with which compliance should be considered by the Government and by the community. Criminal penalties should also apply to the truthfulness of the information provided.¹¹⁴

109. K Crow, evidence to public hearing, Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 1 March 2013, viewed 13 March 2013, http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/toc_pdf/Rural%20and%20Regional%20Affairs%20and%20Transport%20Legislation%20Committee_2013_03_01_1751.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/0000%22.

110. A penalty unit is defined in section 4AA of the *Crimes Act 1914* as \$170 for an individual.

111. Commercial Bar Association of Victoria submission, op. cit.

112. A Nolan, evidence to public hearing, Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 1 March 2013, viewed 8 March 2013, http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/toc_pdf/Rural%20and%20Regional%20Affairs%20and%20Transport%20Legislation%20Committee_2013_03_01_1751.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/0000%22.

113. AOC submission op. cit.

114. Ibid.

The severity of the penalty as it stands does not appear to be prohibitive for a professional athlete who does not wish to cooperate with an ASADA investigation. However, it appears from the Second Reading Speech to the Bill that the Minister will require national sporting organisations which receive annual funding grants from the federal government to amend their codes of conduct to ensure that athletes cooperate with an ASADA investigation or risk severe penalties.¹¹⁵ The recent suggestion that Cronulla Rugby League players could be suspended for six months if found guilty of drug offences, illustrates that the penalty in these circumstances could therefore be substantial.¹¹⁶

Concern about other aspects of privacy protection

Relationship rights

The APS considered that basic privacy protections must be ensured if ASADA's information-sharing capabilities are extended under this Bill. This would particularly apply for relationships between athletes and health professionals. The APS acknowledges that confidentiality is never absolute, but adds that a statutory reporting requirement to breach this commitment to confidentiality may deter athletes from seeking the services and support they may need.¹¹⁷

The Law Institute of Victoria added that the draft provisions in this Bill 'are silent as to common law privileges between persons and their lawyers and/or doctors'. It therefore sought clarification that the legislation would not infringe on these common law rights.¹¹⁸ The Coalition of Major Professional and Participation Sports was also opposed to what it labelled an 'abrogation of the privilege of doctor-patient confidentiality and lawyer-client confidentiality' in the Bill.¹¹⁹

Sports governance lecturer and Anti-Doping Consultant, Catherine Ordway also took up the issue of confidentiality.¹²⁰ Ordway considered privacy legislation was a challenge to the idea of inter-agency cooperation, and noted that this issue had not been addressed in the current Bill. Ordway cited the example of ASADA's attempt in 2008 to investigate athletes' medical records through a process of cross referencing with prescription records held by Medicare. After this was revealed in the press, the Privacy Commissioner intervened and found that ASADA 'interfered with the privacy of athletes

115. J Collins, 'Second reading speech: Australian Sports Anti-Doping Authority Amendment Bill 2013', Senate, *Debates*, 6 February 2013, pp. 60–62, viewed 8 March 2013, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2Fcd49be4a-f16b-4de0-b0f2-bf0168a14644%2F0158%22>

116. The National Rugby league (NRL) salary cap for example for 2012 was \$4.4 million for the 25 highest paid players at each club. If all players were paid equally amount, they would get \$176 000 each. Each club can exercise its discretion in relation to how much individual players are paid, providing that total payments do not exceed the various salary caps. In addition to the \$4.4 million salary cap for top 25 players, each club may spend up to an additional \$350 000 on players outside the top 25 who play in the NRL competition. See more detail at the NRL website, viewed 8 March 2013, <http://www.nrl.com/nrlhq/referencecentre/salarycap/tabid/10434/default.aspx>

117. APS submission, op. cit.

118. Law Institute of Victoria submission, op. cit.

119. Speed, evidence, op. cit.

120. Catherine Ordway submission, op. cit.

and support personnel by improperly disclosing their personal information to Medicare Australia'.¹²¹ The finding forced cancellation of the ASADA investigation prior to information sharing occurring. While Ordway does not take this issue further, her implication appears to be that in the interests of exposing drug taking that the right to doctor/patient confidentiality should not be absolute.

Disclosure Notice may be given to any person

Under **proposed section 13A** the ASADA CEO may give a person a disclosure notice. **Proposed paragraph 13(1)(ea)** of the Act provides for the NAD scheme to authorise the CEO to give a specified person such a notice.

The Explanatory Memorandum confirms:

A specified person can be any person, not just an athlete or athlete support person, who has information that can assist in an anti-doping investigation. This amendment recognises that people outside the jurisdiction 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.¹²²

During the public hearing on this Bill, Senator Cory Bernardi expressed concern that the Bill would therefore allow 'a person who is not subject to the WADA code [sic] to be brought before ASADA, questioned and effectively put in front of a 'court''.¹²³

Moreover, the Human Rights Committee had previously identified that the right not to be subject to arbitrary or unlawful interference with family life may be breached by this provision as it may subject an athlete's family members to questioning. There is nothing to enable a person issued with a notice to object on the basis that he or she is being asked to provide information in respect of a family member.¹²⁴

Provisions

This section of the Digest addresses technical aspects of the provisions in this Bill.

Schedule 1—Disclosure Notices

Section 13 of the ASADA Act outlines the anti-doping rules and other things relating to certain athletes and support persons that must be included in the NAD scheme.

121. S Parnell, 'Secret list of athletes led to drug inquiry', *The Australian*, 24 July 2008, viewed 4 March 2013, <http://www.theaustralian.com.au/news/secret-athletes-list-led-to-inquiry/story-e6frg7mo-111117000573>

122. Explanatory Memorandum, op. cit., p. 7.

123. C Bernardi questioning A Hobson-Powell giving evidence to public hearing, Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, 1 March 2013, viewed 8 March 2013, http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/toc_pdf/Rural%20and%20Regional%20Affairs%20and%20Transport%20Legislation%20Committee_2013_03_01_1751.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a145cde0-6bb8-45cb-ab51-ff71242cba00/0000%22

124. Parliamentary Joint Committee on Human Rights, op. cit., paragraphs 1.30–31.

Proposed paragraph 13(1)(ea) of the Act is an addition to this list. It sets out the coercive investigative powers granted to the CEO under the Act.¹²⁵

If the CEO reasonably believes that a person has information, documents or things that may be relevant to the administration of the NAD scheme, the CEO is authorised to request a specified person within a specified period to:

- attend an interview to answer questions
- give information of a specified kind or
- produce documents or things of a specified kind.

According to the Explanatory Memorandum to the Bill:

- a specified person may include any person and not just an athlete or athlete support personnel
- materials (including electronic materials and products) are also referred to alongside documents and
- things include video cameras, medications and training bags.¹²⁶

Proposed paragraph 13(1)(g) of the Act expands current paragraph 13(1)(g) to accommodate **proposed paragraph 13(1)(ea)** and ‘remove any doubt that the CEO is permitted to disseminate any material obtained as a result of the issuing of a disclosure notice to other organisations’.¹²⁷

Overview of Disclosure Notices

Proposed sections 13A-13D of the Act set out the new powers of compulsion/coercive powers granted to ASADA and referred to above.

Proposed section 13A of the Act provides the power which allows the CEO to issue a **disclosure notice** to a person if the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme.

Proposed section 13B of the Act allows the CEO to inspect and make copies of documents and also retain documents and things whilst still allowing access to them.

Proposed section 13C of the Act sets out the elements amounting to a failure to comply with a disclosure notice and prescribes a maximum civil penalty of 30 penalty units for a contravention the requirements. **Proposed subsection 13C(2)** provides an exception to a contravention of **proposed subsection 13C(1)**—failure to give information or produce documents in time.

125. Section 2.03 of the NAD scheme confirms that ASADA is authorised to exercise powers prescribed under subsection 13(1) of the Act for the NAD scheme.

126. Explanatory Memorandum, op. cit., p. 2.

127. Ibid., p. 7.

Proposed section 13D of the Act abrogates the principle against self-incrimination (**proposed subsection 13D(1)**) but provides for use and derivative use immunities except in certain circumstances/specified criminal proceedings or in civil proceedings, other than proceedings arising under or out of the ASADA Act (**proposed subsection 13D(2)**).

Comments

There is no provision allowing the CEO to request that information or documents required under a disclosure notice be provided under oath or affirmation. This discretion has been included in other legislation in relation to coercive powers.

It is noted that under **proposed paragraph 13D(2)(e)** of the Bill, information and other items provided in response to a disclosure notice are inadmissible in evidence against a person in criminal proceedings other than proceedings for an offence against section 137.1 (false and misleading information) or section 137.2 (false or misleading documents) of the *Criminal Code*.

Part 8A—Civil penalty orders

The Bill introduces civil penalty provisions (**proposed section 73A**) and provides for a civil penalty order to be made by a court if the court is satisfied that a person has contravened a civil penalty provision (**proposed section 73B**). The maximum amount of the penalty is specified in the civil penalty provision and if the person is a body corporate the maximum penalty is five times this amount (**proposed subsection 73B(5)**).¹²⁸ The CEO must apply to the relevant court for a civil penalty order within four years of an alleged contravention of a civil penalty provision (**proposed subsection 73B(2)**).

Proposed sections 73C-73S of the Act prescribe the operation of civil and criminal penalty proceedings under this new Part. **Proposed section 80** of the Act allows the regulations to provide for the use of Infringement Notices as an alternative to civil proceedings.

Schedule 2 – Information sharing

- Australia Post

The proposed amendment to section 90J of the *Australian Postal Corporation Act 1989* will allow information (including protected information) to be disclosed by Australia Post to the ASADA CEO for the purposes of the administration of the NAD scheme. The Explanatory Memorandum confirms that ASADA will not be able to intercept or examine the contents of any mail items.¹²⁹

- Notification of information disclosures

128. The determination of the pecuniary penalty is consistent with the Attorney-General's *A guide to framing Commonwealth offences, infringement notices and enforcement powers*, op. cit.

129. Explanatory Memorandum, op. cit., p. 14.

Existing subsections 68(2) to (5) of the Act require the ASADA CEO to give written notice to a person if the CEO intends to provide protected Customs information about the person to a sporting administration body.

Under **proposed subsection 68(5A)** of the Act the requirements of subsections 68(2)-(5) do not apply if the CEO is satisfied that compliance with those requirements will prejudice a current investigation into an anti-doping rule violation.

Schedule 3 – Other amendments

Items 1 and 2 of Schedule 3 update the definition of **anti-doping rules** and insert a new definition of **finding**—both definitions to have the meaning given by the NAD scheme.

- Role of Anti-Doping Rule Violation Panel

Proposed subsection 41(3) of the Act confirms that the Anti-Doping Rule Violation Panel is not a hearing body within the meaning of Article 8 of the WADC.

The repeal of **paragraph 13(1)(ha)** removes the requirement for the Anti-Doping Rule Violation Panel to recommend to the relevant sport tribunal as to the consequences of a finding. This will instead occur at the time of the hearing and will be the responsibility of the CEO (**proposed paragraphs 13(1)(ja)**). The new two stage process for managing the result of a possible rule violation is detailed in the Explanatory Memorandum to the Bill at page 15.

- Statute of Limitations

Under **proposed subsection 13(3)** of the Act, the limitation period within which an action against an athlete or support person in relation to a possible anti-doping rule violation may be commenced is eight years. This proposed amendment ensures that this timeframe prevails in the event of any inconsistency with other state or territory laws.

- Conflict of interest

Proposed sections 50 and 60 of the Act seek to limit the activities of members of both the ADRVP and Australian Sports Drug Medical Advisory Committee. These amendments prevent members from liaising with any outside persons in relation to a matter related to, or arising under, the NAD scheme without the written consent of the CEO. The amendments seek to address any potential conflicts of interest.

Concluding comments

The fundamental issue with this Bill is whether a Commonwealth regulatory body—ASADA—should be granted coercive investigative powers to assist it to uncover drug cheats. Some see this as integral to the fight against doping in sport, and would approve of even further extensions of ASADA's powers. Others consider it is possible to achieve anti-doping objectives by other means;

they do not believe the need to reduce doping in sport justifies the infringement of fundamental rights.

The Bill proposes that some coercive powers be given to the CEO of ASADA. These powers are less than the more substantial powers typically granted to law enforcement agencies, and also to other regulatory bodies, such as the powers of search, seizure and surveillance. The Explanatory Memorandum to the Bill acknowledges there is some abrogation of the rights of individuals in the provisions proposed, but this is felt necessary to protect Australia's sporting integrity.

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