Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019

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Law and Bills Digest Section

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Date introduced: 17 October 2019

House: House of Representatives

Portfolio: Youth and Sport

Commencement: The formal provisions of the Bill commence on Royal Assent. Parts 1 to 4 of Schedule 1 will commence on proclamation or six months after Royal Assent, whichever is the earlier. The commencement of Part 5 of Schedule 1 is contingent on the passage and commencement of the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

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Glossary

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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AAA</td>
<td>Australian Athletes Alliance</td>
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<tr>
<td>AAF</td>
<td>Adverse analytical finding</td>
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<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
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<tr>
<td>ADRV</td>
<td>Anti-doping rule violation</td>
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<tr>
<td>ADRVP</td>
<td>Anti-Doping Rule Violation Panel—a review body created by the ASADA Act</td>
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<tr>
<td>AFL</td>
<td>Australian Football League</td>
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<tr>
<td>AGD</td>
<td>Attorney-General’s Department</td>
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<td>AOC</td>
<td>Australian Olympic Committee</td>
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<td>ASADA</td>
<td>Australian Sports Anti-Doping Authority</td>
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<td>ASADA Act</td>
<td>Australian Sports Anti-Doping Authority Act 2006</td>
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<td>ASADA Regs</td>
<td>Australian Sports Anti-Doping Authority Regulations 2006</td>
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<tr>
<td>ASC</td>
<td>Australian Sports Commission—now known by the brand name Sport Australia</td>
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<tr>
<td>ASDMAC</td>
<td>Australian Sports Drug Medical Advisory Committee—a body created by the ASADA Act</td>
</tr>
<tr>
<td>ASWS</td>
<td>Australian Sports Wagering Scheme</td>
</tr>
<tr>
<td>CAS</td>
<td>Court of Arbitration for Sport</td>
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<tr>
<td>Code</td>
<td>World Anti-Doping Code 2015 with 2019 amendments. All NSOs must have anti-doping rules and policies that comply with the Code.</td>
</tr>
<tr>
<td>COMPPPS</td>
<td>Coalition of Major Professional and Participation Sports</td>
</tr>
<tr>
<td>ESSA</td>
<td>Exercise and Sports Science Australia—an accrediting body</td>
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<tr>
<td>Government Response</td>
<td>Department of Health, Safeguarding the Integrity of Sport—the Government Response to the Wood Review, Canberra, 11 September 2018</td>
</tr>
<tr>
<td>ICAS</td>
<td>International Council of Arbitration for Sport</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights. Australia ratified the ICCPR in 1980 and it is in force, but not fully implemented domestically1</td>
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</tbody>
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<table>
<thead>
<tr>
<th><strong>Macolin Convention</strong></th>
<th>Council of Europe Convention on the Manipulation of Sports Competitions. Australia signed the convention on 1 February 2019 but has not yet ratified it.</th>
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</thead>
<tbody>
<tr>
<td><strong>NADO</strong></td>
<td>National Anti-Doping Organisation</td>
</tr>
<tr>
<td><strong>NAD scheme</strong></td>
<td>National anti-doping scheme. Authorised by the ASADA Act, the scheme is contained in Part 2 of the Australian Sports Anti-Doping Authority Regulations 2006</td>
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<tr>
<td><strong>NRL</strong></td>
<td>National Rugby League</td>
</tr>
<tr>
<td><strong>NSIC</strong></td>
<td>National Sports Integrity Commission—a generic name for body proposed in the Wood Review. The Government has said the body will be called Sport Integrity Australia</td>
</tr>
<tr>
<td><strong>NSO</strong></td>
<td>National Sporting Organisation—a generic name for a peak governing body for a sport</td>
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<td><strong>NST</strong></td>
<td>National Sports Tribunal—a tribunal proposed by the Wood Review</td>
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<tr>
<td><strong>SCB</strong></td>
<td>Sports Controlling Body</td>
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<tr>
<td><strong>SIA</strong></td>
<td>Sport Integrity Australia</td>
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<tr>
<td><strong>Sport Australia</strong></td>
<td>The operating brand name of the Australian Sport Commission—uses the logo ‘SportAUS’</td>
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<td><strong>WADA</strong></td>
<td>World Anti-Doping Authority</td>
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The Bills Digest at a glance

Purpose

The Bill will amend the Australian Sports Anti-Doping Authority Act 2006 (ASADA Act) to:

• streamline the administrative phase of the statutory anti-doping rule violation process by abolishing the Anti-Doping Rule Violation Panel (ADRVP) and the right to appeal to the Administrative Appeals Tribunal (AAT)
• remove the privilege against self-incrimination in relation to disclosure notices
• lower the burden of proof threshold for the chief executive officer of the Australian Sports Anti-Doping Authority (ASADA CEO) to issue a disclosure notice
• extend statutory protection against civil actions to National Sporting Organisations (NSOs) in their exercise of anti-doping rule violation (ADVR) functions and
• facilitate better information sharing between the Australian Sports Anti-Doping Authority (ASADA) and NSOs through enhanced statutory protections for information provided to an NSO by ASADA.

Committee consideration

The Senate Standing Committee for the Scrutiny of Bills asked the Minister to provide further detail about why lowering the current ‘reasonable belief’ standard is necessary and any safeguards that will be in place to guard against the unauthorised use or disclosure of personal information obtained under a disclosure notice.

Key issues

The Report of the Review of Australia’s Sports Integrity Arrangements (Wood Review) found that the ADRV process is generally convoluted and confusing, too bureaucratic, and involves an inordinate number of procedural steps. The Bill streamlines the process for the issue of an ADRV by abolishing the ADRVP and the right to appeal to the AAT. It appears that the athlete’s right to a fair hearing and an effective remedy are preserved under the proposed process.

ASADA has power to issue a disclosure notice to compel certain persons to attend for questioning and to produce documents and things. Failure to comply carries a civil penalty. The Bill proposes amendments to the penalty provisions that do not appear to comply with the Attorney-General’s Department Guide to Framing Offences. The Bill proposes lowering the threshold for the issue of a disclosure notice from ‘the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme’ to ‘the CEO reasonably suspects, etc.’

The ASADA Act currently provides a person does not have to answer a question or give information if that might incriminate the person or expose them to a penalty. The Bill proposes removing the privilege against self-incrimination and replacing it with a protection against use of the incriminating material in court proceedings. The need to remove the privilege against incrimination is contested.
History of the Bill

The Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019 (the first Bill) was introduced into the Senate on 14 February 2019. Debate on the second reading was adjourned and the Bill lapsed at the end of Parliament on 1 July 2019.  

The Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019 (the Bill) was introduced into the House of Representatives on 17 October 2019.

The Bill is in substantially the same terms as the first Bill. The only changes are of a technical nature to improve the drafting. However, since items 22, 23 and 25 of Part 1 in the first Bill have been moved to Part 5 in the Bill, the item numbers throughout the Bill have changed. The Explanatory Memorandum to the Bill has been extensively revised.

Structure of the Bill

The Bill has one schedule with five parts which amend the Australian Sports Anti-Doping Authority Act 2006 (ASADA Act).

Part 1—Anti-Doping Rule Violation Panel

• abolishes the Anti-Doping Rule Violation Panel (ADRVP), streamlines the anti-doping rule violation (ADRV) process and makes minor consequential amendments to the Australian Sports Commission Act 1989 (the ASC Act)

Part 2—Protection from civil actions

• extends protection to National Sporting Organisations (NSOs) and personnel to encourage cooperation with the Australian Sports Anti-Doping Authority (ASADA)

Part 3—Disclosure to courts or tribunals

• protects information shared with key stakeholders from disclosure in open court or tribunal proceedings

Part 4—Disclosure notices

• alters the statutory threshold for issuing disclosure notices
• alters the times and places a person is entitled to inspect things produced under a disclosure notice
• increases the penalty for non-compliance with a disclosure notice
• removes the remaining elements of the privilege against self-incrimination when responding to a disclosure notice


Part 5—Contingent amendments

• provides for different scenarios contingent on when the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Act 2019 (if it passes Parliament) commences.6

Purpose of the Bill

The purpose of the Bill is to amend the Australian Sports Anti-Doping Authority Act 2006 (the ASADA Act) to implement the recommendations of the Report of the Review of Australia’s Sports Integrity Arrangements (Wood Review)7 to allow ASADA’s existing regulatory functions to be carried out more effectively. The amendments include:

• streamlining the administrative phase of the statutory anti-doping rule violation process by abolishing the ADRVVP and the right to appeal to the Administrative Appeals Tribunal (AAT)
• extending statutory protection against civil actions to NSOs in their exercise of ADRV functions
• facilitating better information sharing between ASADA and NSOs through enhancing statutory protections for information provided to an NSO by ASADA
• lowering the burden of proof threshold for the chief executive officer of the Australian Sports Anti-Doping Authority (ASADA CEO) to issue a disclosure notice and
• removing the privilege against self-incrimination in relation to disclosure notices.

This Bill is one of four pieces of legislation that were prepared to implement Stage One of the Safeguarding the Integrity of Sport—the Government Response to the Wood Review (Government Response).8 The other three are:

• the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019, which proposes that ASADA becomes Sport Integrity Australia
• the National Sports Tribunal Act 2019 (received Royal Assent on 19 September 2019) and
• the National Sports Tribunal (Consequential Amendments and Transitional Provisions) Act 2019 (received Royal Assent on 19 September 2019).

Background

Sport is now a major industry, estimated to account for between three per cent and six per cent of world trade. The commercialisation of the sporting environment together with the increasing product value and the social and cultural importance of high-profile sport has led to a growing need to protect the integrity of sporting competitions. ADRVs can have profound consequences for the athlete, support person, club and sport. It is, therefore, important that there are mechanisms for swift and fair resolution of ADRV disputes.

The World Anti-Doping Code

The World Anti-Doping Agency (WADA) was established in late 1999 to promote and coordinate the fight against doping in sport internationally. WADA developed the World Anti-Doping Code 2015 with 2019 amendments (the Code) which first came into force in 2004.

In October 2005 the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the International Convention Against Doping in Sport. The Convention has been signed by 188 countries, including Australia. Parties to this Convention are required to implement the Code:

[The Code] is the core document that harmonizes anti-doping policies, rules and regulations within sport organizations and among public authorities around the world.

Australia’s National Anti-Doping Scheme

ASADA was established by the ASADA Act to assist the CEO of ASADA perform functions including making, amending and administering a national anti-doping scheme (NAD scheme) and other sports doping and safety matters. The NAD scheme is made and administered by the ASADA CEO under authority of the ASADA Act. The NAD scheme is contained in Schedule 1 of the Australian Sports Anti-Doping Authority Regulations 2006 (ASADA Regs).

The ASADA Act also creates the ADRV Scheme and the Australian Sports Drug Medical Advisory Committee (ASDMAC). The ADRV Scheme has various functions, including those conferred by the NAD scheme. Currently the NAD scheme provides that the ADRV’s functions include satisfying

11. World Anti-Doping Code 2015 with 2019 amendments. Some 2017 amendments to the Code took effect on 1 April 2018 and are included.
17. The ADRV is established by section 40 of the ASADA Act. Members are appointed by the Minister (section 43). Current composition of the ADRV can be found at ‘Anti-Doping Rule Violation Panel’ on the ASADA website.
18. Part 7 of the ASADA Act. Current composition of the ASDMAC can be found at ‘About ASDMAC’ on the ASADA website.
19. Ibid., section 41.
themselves that there has been an ADRV and requesting the ASADA CEO to issue an infraction notice.\textsuperscript{20}

The provisions of the Code, the NAD scheme and the ASADA approved anti-doping policies of sporting bodies, have a substantive effect on how ADRVs are investigated, asserted, contested and punished. It is important to consider the entire scheme to properly understand how a suspected ADRV will be dealt with.

The scope and effect of both the NAD scheme and the ASADA-approved NSO anti-doping policies, which contractually bind athletes and support persons, should be taken into account when considering the effect of the Bill.

The ASADA Act requires that the NAD scheme implement Australia’s international anti-doping obligations.\textsuperscript{21} Division 2 of Part 2 of the ASADA Act requires prescribed matters to be included in the NAD scheme. The proposed amendments in Part 1 make changes to the requirements for the NAD scheme, rather than to the NAD scheme itself. Therefore the Bill will require consequential amendments be made to the ASADA Regs.

Division 2.1 of the NAD Scheme sets out the anti-doping rules, which are the same as the ten ADRVs listed in Article 2 of the Code. (Set out in Table 1 below).

Table 1: ADRVs and prescribed sanctions

<table>
<thead>
<tr>
<th>NAD Scheme anti-doping rule</th>
<th>Sanction in Code for violation of rule</th>
</tr>
</thead>
</table>
| 2.01A Presence in athlete’s sample of prohibited substance, or metabolites or markers. (Code article 2.1) Offence is absolute liability—clause 2.01A(3).\textsuperscript{22} | (Code article 10.2.1) Ineligibility\textsuperscript{23} for 4 years if:  
- ADRV did not involve a specified substance—article 10.2.1.1 or  
- ADRV involved a specified substance and was intentional—article 10.2.1.2 |
| 2.01B Use or attempted use by an athlete of a prohibited substance or a prohibited method. (Code article 2.2) Offence is absolute liability—clause 2.01B(2). | (Code article 10.2.2) Ineligibility for 2 years if:  
- ADRV did not involve a specified substance and person can prove was not intentional or  
- ADRV involved a specified substance but there is no proof violation was intentional |
| 2.01C Evading, refusing or failing to submit to sample collection (Code article 2.3) | Ineligibility for 4 years OR 2 years if person can prove ADRV was not intentional—article 10.3.1. |

\textsuperscript{20} Australian Sports Anti-Doping Authority Regulations 2006, clauses 1.03A, 4.08 and 4.09 of Schedule 1.

\textsuperscript{21} ASADA Act, section 9.

\textsuperscript{22} In this context ‘absolute liability’ is shorthand for the fact that it is not necessary that intent, fault, negligence or knowing use on the athlete’s part be demonstrated in order to establish that ADRV. There is no defence of mistake of fact. Once the defined act or omission is proved, the ADRV is established. See for example subclause 2.01A(2), NAD scheme.

\textsuperscript{23} ‘Ineligibility’ is defined in Appendix 1 to the Code under the definition of ‘Consequences of Anti-Doping Rule Violations’ as ‘Ineligibility means the Athlete or other Person is barred on account of an anti-doping rule violation for a specified period of time from participating in any Competition or other activity or funding as provided in Article 10.12.1’.
<table>
<thead>
<tr>
<th>NAD Scheme anti-doping rule</th>
<th>Sanction in Code for violation of rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.01D Whereabouts failures (Code article 2.4)</td>
<td>Ineligibility for a usual period of 2 years reducible to a minimum of 1 year depending on athlete’s degree of fault—article 10.3.2.</td>
</tr>
<tr>
<td>2.01E Tampering or attempted tampering with any part of doping control (Code article 2.5)</td>
<td>Ineligibility for 4 years OR 2 years if person can prove ADRV was not intentional—article 10.3.1.</td>
</tr>
</tbody>
</table>
| 2.01F Possession of prohibited substances and prohibited methods (Code article 2.6) | *(Code article 10.2.1)* Ineligibility for 4 years if:  
- ADRV did not involve a specified substance—article 10.2.1.1 or  
- ADRV involved a specified substance and was intentional—article 10.2.1.2  
*(Code article 10.2.2)* Ineligibility for 2 years if:  
- ADRV did not involve a specified substance and person can prove was not intentional or  
- ADRV involved a specified substance but there is no proof violation was intentional |
| 2.01G Trafficking or attempted trafficking in a prohibited substance or prohibited method (Code article 2.7) | Ineligibility for a minimum of 4 years up to lifetime depending on seriousness of violation. If substance trafficked to a minor by a support person, lifetime ineligibility. Conduct reported to judicial bodies—article 10.3.3. |
| 2.01H Administration or attempted administration of a prohibited substance or prohibited method (Code article 2.8) | Ineligibility for a minimum of 4 years up to lifetime depending on seriousness of violation. If substance administered to a minor by a support person, lifetime ineligibility. Conduct reported to judicial bodies—article 10.3.3. |
| 2.01J Complicity (Code article 2.9) | Ineligibility for a minimum of 2 years up to 4 years depending on seriousness of violation—article 10.3.4. |
| 2.01K Prohibited association (Code article 2.10) | Ineligibility for a usual period of 2 years reducible to a minimum of 1 year depending on person’s degree of fault—article 10.3.5. |

Source: Parliamentary Library

For some ADRVs, the sanction provides some latitude as to period of ineligibility and the tribunal will have to apply discretion. Some sanctions are mandatory. In addition to the sanctions listed in Table 1 above, Article 9 of the *Code* provides that an in-competition ADRV will automatically

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24. ‘Ineligibility’ is defined in Appendix 1 to the *Code* under the definition of ‘Consequences of Anti-Doping Rule Violations’ as ‘*Ineligibility* means the Athlete or other Person is barred on account of an anti-doping rule violation for a specified period of time from participating in any Competition or other activity or funding as provided in Article 10.12.1.’
result in a disqualification from results in that competition including forfeiture of any medals, points and prizes. Individual prizes in some sports competitions exceed one million dollars.

The personal consequences of an ADRV determination for a professional athlete, coach or medical support person can be very grave. The reputational damage alone can be career ending. A multi-year period of ineligibility to participate can also result in the loss of substantial sponsorship income or effectively end an athletic career.

**Contractual binding of athletes and support persons to the Code**

Australian sport bodies are subject to what has been called ‘soft’ coercion to adopt key national policies for sports integrity.\(^{25}\) The *Wood Review* noted:

> The anti-doping framework, both domestically and internationally, is highly complex; it involves national and international governance, private corporations and NGOs in a complicated web of contractual agreements, private arbitration and government regulation which operates both coercively and by way of moral imperative and reputational protectionism.\(^{26}\)

The coercion operates in a variety of non-statutory ways:

- in order for athletes to compete at international level, the NSO must join or affiliate with the international sporting organisation and implement its sports integrity policies (which in practice means implementing the Code)\(^{27}\)
- to be eligible for Commonwealth government funding, a sporting organisation must be recognised as an NSO by Sport Australia\(^{28}\)
- to be recognised as an NSO, the organisation must meet certain criteria including:
  > The organisation is accountable at the national level for establishing and enforcing the key policies that underpin integrity in their sport, including
  > a. A current policy for harassment, discrimination, bullying, abuse, child safe and complaints that at a minimum are consistent with Sport Australia policy templates; and
  > b. A current anti-doping policy compliant with the World Anti-Doping Code and approved by the Australian Sports Anti-Doping Authority (ASADA) ...

Sport law academics have observed:

> One of the intriguing effects of the [Code] and the NAD scheme is the inclusion of Australian sports that are neither Olympic nor international into an international anti-doping regimen. The same observation can be made in respect to athletes who are ‘merely club-players’.\(^{30}\)

The funding requirements of Sport Australia are underpinned by clause 2.04 of the NAD scheme which requires a ‘sporting administration body’—which is defined as a NSO for Australia NSO—to

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have in place an anti-doping policy that complies with the mandatory provisions of the Code. The NAD scheme requires that the anti-doping policy is approved by the ASADA CEO.

Further influence is exerted when NSOs organise national competition. For example, the NSO may prescribe that athletes must be members of the NSO or of affiliated state or local bodies to be eligible to compete at national level. The state or local bodies must comply with the NSO anti-doping policy in order to affiliate or join.

To assist the NSOs to draft compliant anti-doping policies, ASADA distributes a template anti-doping policy. Self-incrimination provisions that have been included in that template, and the lawfulness of their inclusion, are discussed further below.

The Wood Review noted:

Anti-doping arrangements operate fundamentally on a ‘sport runs sport’ basis, with the adoption of Code-compliant anti-doping policies being a precondition for continued international recognition and government support.

In Australia, this manifests in NSOs developing and implementing Code-compliant, ASADA-approved policies; committing their athletes and support persons, through contractual arrangements, to abide by these policies; working with ASADA as the Australian NADO [National Anti-Doping Organisation] to implement effective anti-doping activities; and, through referral of ADRVP assertions from ASADA, being responsible for making the final decision on possible ADRVs.

Acceptance of the often onerous terms of anti-doping policies compliant with the Code is characterised as a voluntary contractual choice. However, sporting bodies, athletes and support persons are, in practice, compelled by a succession of WADA, Commonwealth, ASADA and NSO policies to comply with these anti-doping policies in order to participate in sports.

Current process for investigation and determination of an ADRV

There are four stages an ADRV goes through to final determination. The first stage is an investigation by the ASADA CEO. The second stage is the process for the ASADA CEO to issue notice of an ADRV. During this process the person suspected of an ADRV can make submissions to the ASADA CEO and the ADRV. Once the ADRV notice is issued, the person may make an application for arbitration. The fourth stage is the arbitration hearing. Flowchart 1 below shows the process visually.

Stage 1: ASADA CEO conducts an investigation

ASADA CEO’s coercive investigatory powers

It is the NAD scheme which authorises the ASADA CEO to conduct investigations into suspected ADRVs and to issue ADRV notices. When a doping incident is suspected, ASADA investigates and provides a brief of evidence to the ASADA CEO.

31. ‘Sporting administration body’ is defined in section 4 of the ASADA Act.
32. Clause 2.04 of the NAD scheme.
Section 13A of the *ASADA Act* and clause 3.26B of the NAD scheme authorise the ASADA CEO to give a person a **disclosure notice** requiring the person to:

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

At the moment, the CEO can only give the notice **if the CEO reasonably believes** that the person has information, documents or things that may be relevant to the administration of the NAD scheme and **three members of the ADRVP agree** that the CEO’s belief is reasonable.

Any person can be compelled to attend an interview—they do not have to be suspected of wrongdoing. The only requirement is that they may have relevant information. Potential witnesses and third parties can be compelled to attend interviews or provide documents.
Flowchart 1: current ADRV process

Source: Wood et al., Wood Review, op. cit., p. 136
**Privilege against self-incrimination during investigation**

The common law privilege against self-incrimination is an absolute right that can only be abrogated by statute or waived by consent. Prior to August 2013, the ASADA Act contained no provisions authorising compulsory questioning or abrogating the privilege. In 2013, Senator Kate Lundy, stated in her second reading speech introducing the *Australian Sports Anti-Doping Authority Amendment Bill 2013* (2013 ASADA Bill):

I have also asked ASADA and the National Integrity in Sport Unit within the Office for Sport to work with our national sporting organisations to amend their Codes of Conduct and/or anti-doping policies so that all athletes and their support personnel are required to cooperate with an ASADA investigation. National sporting organisations will be required to apply an appropriately strong sanction (such as significant periods of ineligibility) for those who fail to do so. 38

The 2013 ASADA Bill contained proposed provisions supporting that Ministerial policy; however, the Bill was amended in the Senate to insert subsection 13D(1) into the *ASADA Act*. Subsection 13D(1) provides that, during an investigation, a natural person (not a corporation) does not have to answer a question or give information if that might incriminate the person or expose them to a penalty. 39

That statutory protection is currently undermined, however, by the terms of the ASADA approved anti-doping policies incorporated into the membership rules of sporting bodies and into athlete contracts. 40 For example, the *Anti-Doping Policy* of the Australian Sports Commission (ASC), 41 which covers athletes and support persons at the Australian Institute of Sport, states:

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**ASC Anti-doping policy 2015**

**ARTICLE 6A NON-ANALYTICAL INVESTIGATION PROCESS**

6A.2.3 *All Persons* bound by this Anti-Doping Policy and the ASC must assist, cooperate, and liaise with ASADA in relation to any investigation into a potential anti-doping rule violation (or the ASC where it has approval by ASADA to conduct its own investigation or be involved in an ASADA investigation). Specifically, all *Persons* must cooperate with and assist ASADA or the ASC (where relevant), including by:

a. attending an interview to fully and truthfully answer questions;

b. giving information; and

c. producing documents or things,

in an investigation being conducted by ASADA or the ASC (where relevant), even if to do so might tend to incriminate them or expose them to a penalty, sanction or other disciplinary measure.

**For the avoidance of doubt, the common law privileges against self-incrimination and self-exposure to a penalty are abrogated by this Article.** [emphasis added]

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39. Note that item 47 of Schedule 1 proposes to repeal and replace subsections 13D(1) and (2) of the ASADA Act, abolishing the protection against answering questions or producing information and substituting an amended protection against use of that information against the person in proceedings other than proceedings under the ASADA Act or ASADA Regulations, or proceedings related to providing false or misleading information or documents.


The clause in the anti-doping policy abrogating the privilege against self-incrimination and self-exposure to a penalty is not required by the Code or the NAD scheme and is in direct conflict with the protection provided by Parliament in subsection 13D(1) of the ASADA Act.

Anti-doping policies such as these are incorporated in conditions of membership or athlete and support person contracts, so joining a sporting organisation or accepting an employment contract may involve a waiver of the privilege against self-incrimination that the person may not be aware has occurred.

By the time a person is contesting an ADRV at a tribunal, ASADA may have already exercised its statutory coercive powers to issue a disclosure notice to require the person to attend an interview; and then used the terms of a sporting body’s anti-doping policy, approved by ASADA, to compel the person to answer incriminating questions at that interview.

**Legal constraints on Commonwealth agencies and public officers**

Parties to a contract are free to decide the terms of their contract; however, Commonwealth officers and agencies have additional obligations imposed by the duties of their office. It is a fundamental principle of constitutional law that powers and discretions granted by statute are restrained by the terms of the statute. The rule of law, supported by section 75(v) of the Australian Constitution, requires respect by Commonwealth officials for the limits of power and official compliance with their legal duties.42

It would be a straightforward breach of the ultra vires doctrine for a Minister, other public officer, or Commonwealth agency to take deliberate action which had the purpose or effect of avoiding a statutory requirement or otherwise breaching the duties and obligations of the office or agency. Such action would be beyond the lawful authority of the officer or agency and would expose them to civil and, in some circumstances, criminal liability.43

The question whether ASADA acted lawfully in obtaining evidence as a result of the contractual waiver of the privilege against self-incrimination was specifically considered and extensively examined in *Essendon Football Club v CEO ASADA* (the *Essendon FC case*).44 In that case, the Essendon FC coach and players had contractually waived their privilege against self-incrimination if questioned by officers of the Australian Football League (AFL). The AFL chose to interview the coach and players in the presence of ASADA personnel. Critically, no claim to the privilege against self-incrimination was made by the coach or players at the interviews.

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42. ‘The great common law remedies against unlawful official action came to Australia from the courts of England. The prerogative writs — certiorari to quash jurisdictional error, mandamus to require the performance of official duty and prohibition to restrain excess of official power together with habeas corpus against unlawful restraints on liberty — form an historical foundation for administrative justice in Australia. The principles underpinning their application have a constitutional character which does not depend upon the existence of a written constitution. The rule of law, insofar as it requires respect by Commonwealth officials for the limits of power and official compliance with their legal duties, is supported by s 75(v) of the Constitution which directly confers upon the High Court original jurisdiction in all matters: “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”.’ High Court Chief Justice R French *The rule of law as a many coloured dream coat*, 20th annual lecture, Singapore Academy of Law, 18 September 2013 [emphasis added]; citing the reference by Gleeson CJ to section 75(v) as providing in the Constitution ‘a basic guarantee of the rule of law’ in M Gleeson, *The Rule of Law and the Constitution*, Boyer Lectures, ABC Books, 2000, p. 67.

43. A public officer who knowingly abuses or exceeds his or her statutory powers and by his or her actions causes damage to a person may be liable in tort for misfeasance in public office: *Northern Territory v Mengel* (1995) 129 ALR 1, [1995] HCA 65.

Conduct which willfully breaches the duties and obligations of that public office, and which is so serious it merits criminal punishment, may amount to the common law offence of misconduct in public office: *Obeid v R* (2017) 350 ALR 103, [2017] NSWCCA 271.

44. *Essendon FC case*, op. cit., at para. [442].
The provisions of the *ASADA Act* at that time did not allow ASADA to issue disclosure notices, so any conflict with the requirements of subsection 13D(1) did not arise. Middleton J found:

The use of the compulsory powers by the AFL (and not by ASADA) did not thwart or frustrate the purpose of the Act or the NAD Scheme. **ASADA did not use any compulsory power of its own, and Mr Hird and the 34 Players did not answer questions or provide any information arising from any requirement to do so under or pursuant to the Act or NAD Scheme.** No power of the State has been utilised by ASADA to compel Mr Hird or the 34 Players to act in the way they did during the investigation.

I should indicate that even after the introduction of the 2013 Amendment Act, the position did not change in respect of Mr Hird and the 34 Players, who remained subject to the contractual regime. ASADA may need to rely upon the Act as amended to facilitate obtaining information from persons outside that contractual regime. However, **nothing in the amended Act added to or removed the ability of ASADA to request the voluntary provision of information** from the AFL, or from those who voluntarily contracted to provide information to the AFL (and to ASADA).

I have already considered the nature of privilege against self-incrimination, and how it was effectively curtailed under the contractual regime entered into by Mr Hird and the 34 Players. At the interviews, no claim to invoke the privilege against self-incrimination was made. **Mr Hird and Essendon had the opportunity to refuse to answer questions and provide information, albeit with the consequence of possible contractual sanctions by the AFL. No power of the State would have been involved in the imposition of this sanction—ASADA could take no action to enforce the refusal of any player or of Mr Hird to answer questions or provide information.** This would be entirely a matter for the AFL. In essence, there was thus no “compulsion” by ASADA at all, nor any resultant abrogation of privilege against self-incrimination. 45

Middleton J left open the question of whether, if ASADA had used its own power to compel the players to give answers which would incriminate them, that would have thwarted or frustrated the Act. The question of whether the use of a disclosure notice by ASADA to compulsorily access evidence would conflict with the current provisions of the *ASADA Act* or the NAD scheme was not considered by Middleton J because:

- ASADA did not issue a disclosure notice and
- the disclosure of evidence to ASADA by the players and coach was ruled voluntary since no claim to invoke the privilege of self-incrimination was made.

The question has therefore not been determined.

The proposal in the Bill to legislatively abrogate the privilege against self-incrimination is discussed further below in ‘Key issues and provisions’ under the heading ‘Removing self-incrimination as a defence to answering questions’.

**Stage 2: Issue of the ADRV notice**

If the ASADA CEO believes there is a possible ADRV, the ASADA CEO notifies the athlete or support person and gives them ten days to make a submission. The ASADA CEO collates the material and passes it to the ADRVVP. 46

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45. *Essendon FC case*, op. cit., at paras. [440–442].
46. Rules 4.04, 4.06 and 4.07A of the NAD scheme at Schedule 1 to the *Australia Sports Anti-Doping Authority Regulations 2006* (ASADA Regs).
If the ADRVP is satisfied that there has been a possible ADRV, the ASADA CEO notifies the athlete or support person and gives them ten days to make a submission to the ADRVP.  If, after considering the submission, the ADRVP is still satisfied there has been a rule violation, it asserts the ADRV and authorises the ASADA CEO to give notice of the ADRVP’s decision to the athlete or support person.

The athlete or support person then either accepts the ADRV notice or contests it in a tribunal. If they take no action, they are deemed to accept the ADRV notice.

Stage 3: The person issued the notice applies for arbitration

Private arbitration, the resolution of sporting disputes by and through the rules of the sport, is ‘now firmly established as the dispute resolution method of choice throughout the sports industry’. One reason for the choice of arbitration is that, as the Wood Review put it:

... maintaining organisational autonomy is a high priority for national and international sporting organisations ...

... sport runs sport, setting the rules for administration, competition and governance, including rules regarding integrity issues at international and national levels.

Current ASADA approved anti-doping policies specify that the hearing will be conducted by the Court of Arbitration for Sport (CAS) (or an in-house tribunal); the National Sport Tribunal (NST) Anti-Doping Division is intended to be the default arbitration tribunal in the future.

Stage 4: The arbitration hearing

The determination the tribunal must make

The finding the arbitration tribunal needs to make, and the burden and standard of proof for that finding, are contained in the anti-doping policy of the relevant sporting body. The need for approval by ASADA should ensure they reflect the Code. For example, the Code provisions are mirrored in the ASC Anti-Doping Policy:

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47. Rule 4.08 of the NAD scheme at Schedule 1 to ASADA Regs.
50. Ibid., p. 56.
51. The National Sports Tribunal Act 2019 will commence on a date fixed by proclamation, or if there is no proclamation, 19 March 2020. The Act has an ‘opt-in’ jurisdiction. An ADRV matter may be heard by the NST if either: the anti-doping policy of a sporting body specifically permits arbitration of a dispute by the Anti-Doping Division; or, all relevant parties agree in writing to refer the dispute to the Anti-Doping Division (see section 22 of that Act). See K Elphick, National Sports Tribunal Bill 2019 [and] National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019, Bills digest, 27, 2019–20, Parliamentary Library, Canberra, 2019.
52. Wood et al., Wood Review, op. cit., p. 146.
**ASC Anti-doping policy 2015**

**ARTICLE 8 RIGHT TO A FAIR HEARING**

**8.6 CAS determination**

8.6.1 CAS will determine:

a) if the Person has committed a violation of this Anti-Doping Policy;

b) if so, what Consequences will apply (including the start date for any period of Ineligibility); and

c) any other issues such as, but not limited to, reimbursement of funding provided to the Athlete or other Person by the ASC or other sport organisation.

8.6.2 Consequences will be in accordance with Article 10.

The standard and burden of proof are prescribed by Article 3 of the *Code* and mirrored in approved anti-doping policies:

**ASC Anti-doping policy 2015**

**ARTICLE 3 PROOF OF DOPING**

3.1 Burdens and standards of proof

An Anti-Doping Organisation shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether an Anti-Doping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

Where this Anti-Doping Policy places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

The NAD scheme in rules 1.02A(3) and 4.13, and the approved anti-doping policies, make clear the function of the ASADA CEO in the hearing is analogous to a prosecutor:

**ASC Anti-doping policy 2015**

**ARTICLE 8 RIGHT TO A FAIR HEARING**

8.4 Establishment of hearings

8.4.3 ASADA and the ASC are both entitled to present evidence, file submissions, cross-examine witnesses and do any other thing necessary for the enforcement of this Anti-Doping Policy at any hearing under this Article. Unless otherwise agreed in writing between ASADA and the ASC, ASADA will take the lead in presenting the matter in any hearing.

8.5 Right to attend hearings

The international federation, the National Federation, WADA and, where applicable, the Australian Olympic Committee, Australian Paralympic Committee, Australian Commonwealth Games Association, and relevant State Institutes of Sport/State Academies of Sport shall have the right to attend hearings as an observer or an interested or affected party. It shall be the duty of ASADA to inform those relevant parties of such right to attend as an observer or interested/affected party as applicable. If those parties fail to respond to such notification within 14 days, they shall be taken to have waived their right to so participate.

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54. Ibid. [emphasis added].
55. Ibid., pp. 37–39 [emphasis added].
If the first instance hearing tribunal finds that the person has committed an ADRV, the tribunal will be required by the anti-doping policy to apply the sanctions prescribed in Article 10 of the Code (set out in Table 1 above).

**The Wood Review**

The *Wood Review* was a comprehensive examination of sports integrity arrangements, set up by the Government ‘in response to the growing global threat to the integrity of sport’.

It considered issues around prevention, investigation, and administrative responses to match fixing and doping. The *Wood Review* consulted widely and made 52 recommendations.

The centrepiece of the *Wood Review* recommendations is the formation of a National Sports Integrity Commission (NSIC) to manage sports integrity matters at a national level. The *Wood Review* recommended:

> That the Australian Sports Anti-Doping Authority (ASADA) be retained as Australia’s National Anti-Doping Organisation and that the current requirement for all National Sporting Organisations (NSO) (including sports with competitions only up to the national level) to have anti-doping rules and policies that comply with the *World Anti-Doping Code* also be retained.

The Government did not support ASADA remaining an independent organisation and Australia’s National Anti-Doping Organisation (NADO). Instead, the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019 proposes replacing ASADA with Sport Integrity Australia (SIA).

Stakeholders appear to support this approach (see discussion below).

This Bill is focused on the parts of the *Wood Review* dealing with improving anti–doping measures. The most relevant portion of the *Wood Review* to this Bill is Chapter 4: *The Capability of the Sports Anti-doping Authority and Australia’s Sports Sector to Address Contemporary Doping Threats*.

**Government response**

The Government agreed with 22 of the *Wood Review* recommendations, agreed in-principle with 12 and a further 15 were agreed in-principle for further consideration. Two recommendations were agreed in part and one was noted. The Government Response indicated that it would take a phased approach: some of the important recommendations will be implemented immediately while more complex recommendations will be further considered and implemented at a later stage. This Bill is part of the first stage and implements *Wood Review* recommendations 17, 19, 23 and 24 in part or in full.

A *Wood Review* recommendation that all NSOs continue to comply with the Code was not supported by all sports and that opposition is discussed below under the heading ‘Positions of...’

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59. Wood et al., *Wood Review*, op. cit., pp. 102–139. The key findings and a summary of recommendations can be found in the introduction to Chapter 4, pp. 104–107.
major interest groups’. However, the Government agreed with the Wood Review that all NSOs should continue to have Code-compliant anti-doping policies.62

62. Ibid.
Committee consideration

*Senate Standing Committee for the Scrutiny of Bills*

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) reported two scrutiny concerns on the first Bill in *Scrutiny Digest 2 of 2019.*

**Removal of merits review**

The Committee noted its scrutiny concerns regarding the proposal to remove review by the Administrative Appeals Tribunal of assertions by the Anti-Doping Rule Violation Panel in relation to potential anti-doping rule violations (consequential on the abolition of the Panel). This issue is discussed further below under the heading ‘Part 1—Abolishing the ADRVP and appeal to the AAT’.

**Privacy**

The Committee noted its scrutiny concerns regarding the expansion of the basis on which persons may be required to disclose certain information and the impact this may have on the right to privacy. The Committee considered that the explanatory materials did not adequately address these concerns, and drew this matter to the attention of the Senate.

In *Scrutiny Digest 8 of 2019*, the Scrutiny of Bills Committee considered the Bill and reiterated its concern about privacy. The Committee asked the Minister to provide further detail about:

- why lowering the current ‘reasonable belief’ standard is necessary given that a ‘reasonable belief’ may be formed on the basis of intelligence gathered while investigating a potential anti-doping rule violation and
- any safeguards that will be in place to guard against the unauthorised use or disclosure of personal information obtained under a disclosure notice.

These points are discussed below under the heading ‘Part 4—Lowering the burden of proof for issue of a disclosure notice’.

**Policy position of non-government parties/independents**

On 1 August 2018, Senator Don Farrell, Shadow Minister for Sport, issued a media release stating that the Australian Labor Party (Labor) welcomed the release of the *Wood Review* and urged the Government to consult with national sporting organisations and other key stakeholders. In addition the Labor Party National Platform states:

> Labor will ensure Australia is at the forefront of efforts against doping and match fixing in sport and, in partnership with sports, will provide leadership in the international effort to protect the integrity of sport.

The policy of The Australian Greens on Sport and Physical Recreation includes support for:

- a drug free sporting environment

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65. D Farrell (Shadow Minister for Sport), *Sports game plan a start but proof is in performance*, media release, 1 August 2018, p. 2.
• governance structures and financial structures in sporting organisations and associations to ensure integrity in all sporting codes
• reduced influence of gambling on sport through:
  – more tightly regulated sports betting
  – education about the risks and harms of gambling on sport and
  – restricted advertising of gambling on sports.  

As at the date of writing this Bills Digest, it appears that no non-government parties or independents have indicated a position on the Bill.

**Position of major interest groups**

While there have been no statements from major interest groups on the Bill as drafted, there was extensive consultation during the *Wood Review* and some groups have issued statements about the Government Response.

**ASADA**

ASADA fully endorses the *Government Response*, including the formation of SIA.  

**Australian Olympic Committee**

The Australian Olympic Committee (AOC) supports all the recommendations of the *Wood Review*, ‘[a]s for Anti-Doping Rule Violation matters, the AOC fully supports the establishment of a National Sports Tribunal and generally on the basis proposed’. It also commends the *Government Response*, while saying it would continue to study it and questioning whether the Government had committed sufficient funding.

**Paralympics Australia**

Paralympics Australia welcomes the Government Response. CEO Lynne Anderson said:

Paralympics Australia also supports the concept of a new National Sports Tribunal, which is proposed to hear anti-doping rule violations and other sports disputes, and resolve them in a consistent, cost-effective and transparent manner.

**Coalition of Major Professional and Participation Sports**

The Coalition of Major Professional and Participation Sports (COMPPS) represents the major participation sports in Australia including Australian football, rugby, football, cricket, rugby league, netball and tennis. COMPPS submission to the *Wood Review* on funding levels for ASADA to combat anti-doping states, ‘[c]urrently, ASADA is insufficiently funded and resourced to provide the type, and level, of support being sought by the Sports. Previously, ASADA had a strong

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69. Australian Olympic Committee (AOC), *AOC welcomes integrity review and national sports plan*, media release, 1 August 2018.
detection and investigation arm’. It notes that each sport it represents has ‘now established its own integrity unit with responsibility for managing [anti-doping rule violation] ADRV processes’. Despite this ongoing allocation of resources, we submit that current arrangements are not capable of adequately addressing the doping threat. Specifically, we contend that the Sports are not being given the support that they require by ASADA to effectively combat the current doping threat … Accordingly, ASADA has been unable to satisfactorily perform a number of its vital functions that support the Sports’ ADRV processes.

Exercise and Sports Science Australia
Exercise and Sports Science Australia (ESSA) is an accrediting body for professional support personnel and sports scientists. It supports the findings in chapter 4 of the Wood Review.

Australian Athletes Alliance
The Australian Athletes Alliance (AAA) is the peak body for Australia’s elite professional athletes, through eight major player and athlete associations that cover professionals in cricket, AFL, netball, basketball, football, rugby league, rugby union and horse-racing (jockeys). AAA asked the Wood Review to endorse sport-specific, differentiated, anti-doping and sanction regimes – an approach which would result in those regimes not being Code-compliant.

The Wood Review saw no merit in that approach:

In our view, there is no overall benefit from changing the present policy and thereby creating a dual system in Australia for national-level athletes. No evidence has been submitted to the Review which would warrant such an amendment to current anti-doping arrangements.

The independence and objectivity inherent in applying the Code to all Australian sports makes for a simpler, clearer and consistent anti-doping system, beyond the reach of internal sport politics and collective bargaining.

Accordingly, we do not agree with AAA’s argument regarding the reach of the Code in relation to sanctions or the ‘fit’ of the world anti-doping system overseen by WADA. Our view is that penalties under the Code are sufficiently flexible to allow for effective application in a professional team-sports environment.

The approach of the Wood Review is consistent with the aims of WADA:

An aim of the 2015 Code is to unify doping regulations throughout the world, such that the Code might be considered similar to a body of international law ... In respect to the [Code’s] reach into sports of national, rather than international operation the Code describes a purpose, ‘To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.’

73. Speed, Submission to Review Panel, op. cit., p. 8.
74. Ibid., pp. 8–9.
76. Australian Athletes Alliance (AAA), ‘Who we are’, AAA website.
77. Wood et al., Wood Review, op. cit., p. 110, citing Submission 25.
78. Ibid., p. 110.
Commonwealth Games Australia

Commonwealth Games Australia (CGA) supports the consolidation of existing Federal Government functions in sports integrity under a new agency – Sport Integrity Australia – and the conduct of a two-year pilot of a new National Sports Tribunal. CGA also supports the signing of the Council of Europe Convention on the Manipulation of Sports Competitions (Macolin Convention). CGA President Ben Houston said the National Sports Tribunal will benefit Commonwealth Games member sports, many of whom struggle with the resourcing in this area. 80

Financial implications

According to the Explanatory Memorandum, the Bill will have no financial impact on the Commonwealth. 81 The AOC and COMPPS both argued that a further commitment of Commonwealth funding is necessary to ensure the NAD scheme is effective. 82 Some smaller sports NSOs see financial benefit in having access to a nationally resourced sports tribunal. 83

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible. 84

Human rights engaged

The Government acknowledges at page 2 of the Explanatory Memorandum that the Bill engages the following rights:

- Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) – right to an effective remedy
- Article 14(2) of the ICCPR – right to presumption of innocence (which includes the right not to be compelled to self-incriminate 85)
- Article 17 of the ICCPR – privacy and reputation.

The Explanatory Memorandum discusses the human rights issues in detail in the Statement of Compatibility with Human Rights at pages 2–10. The Bill removes two opportunities for an athlete or support person to contest the evidence and process involved in the imposition of an infraction notice for an ADRV. However, the recipient is still given:

- an opportunity to be heard before the infraction notice is issued and
- the opportunity to contest the notice in an independent tribunal.

80. Commonwealth Games Australia (CGA), Integrity initiatives welcomed by Commonwealth Games Australia, media release, 12 February 2019.
82. Speed, Submission to review panel, op. cit., pp. 6, 8–9; AOC, AOC commends Government Response to the Wood Review, op. cit.
83. CGA, Integrity initiatives welcomed by Commonwealth Games Australia, op. cit.
84. The Statement of Compatibility with Human Rights can be found at pages 2–10 of the Explanatory Memorandum to the Bill.
The Government considers that the rights to a fair hearing and a presumption of innocence are, therefore, largely preserved.

However, since the Bill will lower the standard of proof for the issuing of a disclosure notice and abolish the privilege against self-incrimination when answering questions, it would appear that the Bill engages the right not to be compelled to self-incriminate under the ICCPR and also the common law privilege against self-incrimination. 86

The proposed disclosure notice provisions and their justification are discussed further under the ‘Key issues and provisions’ heading below.

**Parliamentary Joint Committee on Human Rights**

At the time of writing this Bills Digest, the Parliamentary Joint Committee on Human Rights had not yet reported on this Bill.

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Key issues and provisions

Constitutional basis for legislation

While there is no express Commonwealth legislative power for regulating sport or athlete drug use, section 3 of the ASADA Act identifies implementing Australia’s international anti-doping obligations as the foundation for the Act. Australia is a party to several international conventions which provide a basis in the external affairs power for Parliament to legislate. The ASADA Act and ASADA Regs implement the Council of Europe Anti-Doping Convention 1989,87 the UNESCO International Convention against Doping in Sport,88 and the Code. The Commonwealth is therefore able to rely on the external affairs power as the primary source of its power to legislate in this area.89

The voluntary submission to the Code and NAD scheme by organisations, athletes and other personnel through contracts extends the effective reach of the NAD scheme. Voluntary contractual submission to an anti-doping code means that a constitutional challenge will probably never be effective on its own to overturn an ADRV infraction.

Abolishing the ADRVP and appeal to the AAT

The ADRVP was created by amendments inserted in the ASADA Act in 2009.90 ASADA was set up in 2006 and assumed the functions of a variety of existing agencies. It took over roles in drug testing, education and advocacy from the Australian Sports Drug Agency; it took over the Australian Sports Commission’s (ASC) policy development, approval and monitoring roles; it incorporated the ASDMAC and was given the power to investigate all allegations of ADRV in the Code. The CEO of the Australian Sports Drug Agency was appointed ASADA CEO and a Board headed by the ASADA Chair was appointed.91

The AOC extensively criticised the intertwined nature of the ASADA governance arrangements at the time it was set up. AOC President John Coates said ASADA would become investigator, prosecutor, judge and jury.92

The AOC considered there was insufficient provision for the separation of ASADA’s policy making, administrative, investigative and prosecution functions. It particularly noted that there needed to be proper protection of the rights and roles of Australian sports organisations, athletes and athlete support personnel. The investigative regime to be put in place did not require ASADA to put its case to an independent hearing before declaring an athlete guilty, the AOC noted. And once an investigation was complete, ASADA alone had the power to determine whether an athlete should be sanctioned.93

In response to a number of controversial doping investigations, the governance arrangements were changed in 2009 to create a marked distinction between the administrative and investigative

89. Constitution, section 51(xxiv).
93. Ibid.
functions and the adjudication functions of ASADA. The ASADA Chair position was abolished and financial and administrative functions concentrated in a new ASADA CEO position. Instead of the Board, a specialist Advisory Group was formed solely to give advice to the CEO in relation to the CEO’s functions. The group had no adjudicatory or administrative functions. The ADRVP was established to take on the quasi-judicial role of deliberating on rule violations. Day to day anti-doping policy issues were confined to the administrative sector.

In some respects, the Wood Review proposes undoing those 2009 changes. However, the AOC does not oppose the proposed amendments. The duplicated process was designed to provide an independent check on the power of the ASADA CEO to issue infraction notices. Stakeholders agreed, however, that this had not been the practical outcome of the system. Instead it had resulted in a cumbersome, time wasting process that was of little assistance to the sports tribunal.

**Wood Review consideration of ADRV process**

The Wood Review examined the current ADRV process and found it was overly bureaucratic, inefficient and cumbersome. COMPPS told the Wood Review:

> The ADRV process is generally convoluted and confusing, and difficult for athletes and other stakeholders to understand. It is too bureaucratic, involving an inordinate number of procedural steps.

Before an infraction notice is issued, the current ADRV process requires:

- consideration of evidence by the ASADA CEO and
- a second consideration by the ADRVP.

ASADA estimates that the minimum time to pass from the ASADA CEO ‘show cause notice’ through to the end of the ADRVP process is eight weeks. ASADA noted that the ADRVP has never once overruled the ASADA CEO. The ADRVP Chair explained:

> The threshold that the Panel applies is that there is a possibility that an ADRV has occurred. In practice this has meant that the Panel hasn’t ever disagreed with the CEO, as the threshold that the CEO applies is higher in the first instance.[emphasis added]

The decision by the ADRV to assert an ADRV (marked ‘5’ in Flowchart 1 above) can then be challenged in the Administrative Appeals Tribunal (AAT). The WADA Code provides that anti-doping decisions can be appealed to CAS. Appeals can be made to the CAS Appeals Arbitration Division and the Swiss Federal Tribunal.

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96. AOC, AOC welcomes integrity review and national sports plan, op. cit.; AOC, AOC commends Government Response to the Wood Review, op. cit.
98. Ibid., Chapter 4, Key finding 8, p. 105.
99. Ibid., p. 131.
100. Ibid., p. 132.
101. Ibid., p. 134.
102. Ibid., p. 145.
103. Ibid., pp. 110, 144, 146.
COMPPS recommended that the ADRVP be abolished.\textsuperscript{104} ASADA suggested that the opportunity for an athlete to respond to an ADRV allegation be deferred until the infraction notice is received.\textsuperscript{105}

However, the \textit{Wood Review} considered that issuing the ‘show cause notice’ had the merit of allowing the athlete the opportunity to engage with the allegations prior to hearing and potentially avoid delays at the hearing or avoid a hearing altogether if the athlete acknowledges the infraction.\textsuperscript{106} It therefore proposed removing the ADRVP but allowing the athlete an opportunity to be heard before the ASADA CEO issues an infraction notice.\textsuperscript{107}

The \textit{Wood Review} also recommended abolition of appeals to the AAT.\textsuperscript{108}

For the purposes of procedural fairness, there is no need for any aspect of the pre-hearing phase of the ADRV process to be subject to AAT review.

In our view, so long as participants have the opportunity to respond to allegations before the issue of an infraction notice – and have access to an affordable, efficient, and effective tribunal to have their matter heard should they elect – recourse to the AAT for a merits review of any aspect of the pre-hearing ADRV process is unnecessary and potentially dilatory.\textsuperscript{109}

Under the \textit{Wood Review} proposals, the athlete would then contest the notice in the NST. Appeal to CAS Appeals Arbitration Division would also still be available.\textsuperscript{110}

It appears that the athlete’s right to a fair hearing and an effective remedy are preserved under the proposed process. The amendments proposed in \textit{Part 1 of Schedule 1} to the Bill appear to maintain compliance with Australia’s international obligations under the \textit{ICCPR}, Council of Europe \textit{Anti-Doping Convention 1989} and the UNESCO \textit{International Convention against Doping in Sport}.

All major interest groups supported the recommendation. The Government agreed with the recommendation and the recommended process (see \textit{Flowchart 2} below) is reflected in the Bill.

\textbf{Item 16 of Part 1 of Schedule 1} to the Bill repeals existing subsection 14(4) of the \textit{ASADA Act} which requires the NAD scheme to establish a right of appeal to the AAT. A consequential amendment to the NAD scheme will be necessary to abolish the right to appeal to the AAT for review of a decision of the ADRVP.\textsuperscript{111}
Flowchart 2: proposed ADRV process\textsuperscript{112}

\begin{figure}
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\includegraphics[width=\textwidth]{flowchart.png}
\caption{Proposed ADRV process}
\end{figure}

Source: Wood et al., \textit{Wood Review}, op. cit., p. 137

\textsuperscript{112} Wood et al., \textit{Wood Review}, op. cit., p. 137.
Lowering the threshold for issue of a disclosure notice

The ASADA CEO may issue a disclosure notice requiring a person to, within a specified period:

- attend an interview to answer questions
- give information of the kind specified in the notice and/or
- produce documents or things of the kind specified in the notice.\(^{113}\)

At present, three ADRVP members must agree that the ASADA CEO reasonably believes that a person has ‘information, documents or things that may be relevant to the administration of the NAD scheme’ before the CEO can issue a disclosure notice.\(^{114}\)

The Wood Review found that the present threshold of \textit{reasonably believes} resulted in disclosure notices generally only being granted by the ADRVP in circumstances where ASADA already had evidence to suggest that an ADRV has taken place—for instance, a returned positive sample or adverse analytical finding (AAF).\(^{115}\) The Review therefore recommended that the threshold be changed to \textit{reasonably suspects}.

The \textit{proposed amendments to paragraphs 13(1)(ea) and paragraphs 13A(1A)(a) and (b)} change the threshold for the issue of a disclosure notice from \textit{reasonably believes} to \textit{reasonably suspects}.\(^{116}\) This change in threshold, as well as the repeal in \textit{item 13} of Schedule 1 to the Bill of the need for three ADRVP members to agree with the notice,\(^{117}\) will result in a significantly reduced threshold for the issue of a coercive disclosure notice.

Neither the Wood Review nor the Explanatory Memorandum gives a clear reason why the ASADA CEO only issues a disclosure notice under the present legislation where evidence of an ADRV is already available. That is not the effect of the \textit{ASADA Act} on its face. Paragraph 13(1)(f) of the \textit{ASADA Act} makes it clear that investigation of possible violations of the anti-doping rules is a responsibility of the ASADA CEO.

The \textit{ASADA Act} and the NAD scheme do not require, except in the case of medical practitioners, that the CEO hold a reasonable belief that any person has been involved in the commission or attempted commission of an ADRV.\(^{118}\) The threshold of reasonable belief instead applies to whether ‘the person has information, documents or things that may be relevant to the administration of the NAD scheme’. As Middleton J observed in the \textit{Essendon FC case}, the responsibilities of the ASADA CEO in administering the NAD scheme are very wide and include all the matters in clause 1.02 of the scheme.\(^{119}\)

Note that the \textit{proposed amendment to paragraph 13(1)(ea) of the ASADA Act} (at \textit{item 43} of Schedule 1 to the Bill) will not change this position, as the threshold of reasonable suspicion does not apply to whether an ADRV has occurred, but to whether ‘the person has information, documents or things that may be relevant to the administration of the NAD scheme’.

\(^{113}\) \textit{ASADA Act}, subsection 13A(1); NAD scheme, subrule 3.26B(1).
\(^{114}\) \textit{ASADA Act}, subsection 13A(1A); NAD scheme, subrule 3.26B(2).
\(^{115}\) Wood et al., \textit{Wood Review}, op. cit., p. 129.
\(^{116}\) \textit{Items 43 and 44} of Schedule 1 to the Bill.
\(^{117}\) Existing paragraph 13A(1A)(c) of the \textit{ASADA Act}.
\(^{118}\) \textit{ASADA Act}, subsection 13A(1A). The \textit{ASADA Act} provisions are repeated in the NAD Scheme at clauses 3.26A and 3.26B in Schedule 1 to the ASADA Regs.
\(^{119}\) \textit{Essendon FC case}, op. cit., at para. [377].
However, in **proposed amendments to paragraphs 13A(1A)(a) and (b)** (at **item 44** of Schedule 1 to the Bill) the threshold is then linked to an additional requirement, for **medical practitioners only**, that the ASADA CEO reasonably suspects that the person has been involved, in their capacity as a medical practitioner, in the commission, or attempted commission, of a possible ADRV.

**Departure from Attorney-General’s Department Guide to Framing Offences**

The Attorney-General’s Department (AGD) **Guide to Framing Offences** (the **Guide**) says that a document disclosure provision should normally:

- impose a threshold of ‘reasonable grounds to believe’ that a person has custody or control of documents, information or knowledge which would assist the administration of the legislative scheme
- give a person 14 days to comply with the notice and
- impose a maximum penalty for non-compliance of six months imprisonment or a 30 penalty unit fine.  

In contrast to the above, the amendments in **Part 4** propose:

- a threshold of ‘reasonable suspicion’ the person has information, documents or things that may be relevant to the administration of the NAD scheme
- no limit to the period that the ASADA CEO may specify in the notice and
- a penalty for non-compliance of 60 penalty units but no penalty of imprisonment is applied.

Where draft provisions depart from the **Guide**, the AGD website instructs Departments to consult with the Criminal Law Division in AGD before proceeding.  

The **Wood Review** said the reasonable suspicion ‘threshold for the exercise of similar powers is relatively commonplace in comparable statutory schemes and would be appropriate in these circumstances’ – but did not provide any examples.

The Explanatory Memorandum argues that some jurisdictions allow search warrants to be issued at a threshold of “suspicion” and that the nature of a disclosure notice is quite different and less intrusive than a search warrant because it does not permit entry into premises.

The **Regulatory Powers (Standard Provisions) Act 2014** provides that a search warrant may be issued if there are ‘reasonable grounds for suspecting’ that evidential material may be on the premises within a specified time.  

Although the threshold in that provision is lower, the material sought is much more tightly defined, requiring particular material, an association with an offence and a time limit. The privilege against self-incrimination is also not abrogated by the use of those powers.

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121. **Item 46** of Schedule 1 to the Bill increases the maximum penalty available to 60 penalty units.
123. **Wood et al., Wood Review**, op. cit., p. 129.
125. **Section 70** of the **Regulatory Powers (Standard Provisions) Act 2014**.
126. **Section 47** of the **Regulatory Powers (Standard Provisions) Act 2014**.
The analogy with search warrants is not complete since disclosure notices can also compel a person to attend for questioning. A person can generally only be compelled to attend for questioning if a court issues a warrant for their arrest or a person, usually a police officer, arrests them without a warrant. The general requirement for issue of a warrant, or for arrest without a warrant, is that the person issuing the warrant or making the arrest believes on reasonable grounds that the person has committed or is committing an offence.\(^\text{127}\) Even then, although a person arrested for a criminal offence may be questioned, they have a right to remain silent.\(^\text{128}\)

In light of the broad responsibilities of the ASADA CEO and the width of the phrase ‘relevant to the administration of the NAD scheme’, there is some doubt whether a change to the threshold for issue of a disclosure notice is necessary. It may be sufficient for the ASADA CEO to fully utilise the current legislation.

**Comparative coercive questioning powers in Commonwealth legislation**

There are a number of Commonwealth officers and authorities who are given power to conduct coercive questioning of natural persons under threat of penalty. Some examples are summarised below.

**Tax Commissioner**

A person may be required by law to attend before the Commissioner to give information, or produce documents.\(^\text{129}\) The Commissioner may question any person for the purpose of the administration or operation of a taxation law. There is no preliminary threshold.\(^\text{130}\) Refusal or failure to comply is subject to a maximum fine of 20 penalty units for a first offence and 50 penalty units and 12 months imprisonment for a third or subsequent offence.\(^\text{131}\) A person issued a notice to attend and give evidence cannot refuse to answer on the grounds of self-incrimination.\(^\text{132}\)

**Royal Commissions**

A Royal Commission may summon a person to give evidence and produce a document or thing.\(^\text{133}\) There is no apparent threshold to exercise that power, however it is a defence to a prosecution for failing to comply to show that the document or thing required was not relevant to the commission’s inquiry.\(^\text{134}\) It is an offence, subject to a maximum penalty of two years imprisonment, to fail to appear, or fail or refuse to answer a question or produce a document or thing.\(^\text{135}\)

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127. Division 4 of Part IAA of the *Crimes Act 1914*.
128. Section 23F of the *Crimes Act 1914* provides that if a person is arrested, a police officer must ‘caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence’. Section 17 of the *Evidence Act 1995* provides that a defendant cannot be called to give evidence by the prosecution. Section 128 of the *Evidence Act* provides for a witness to object to giving evidence on the basis it may incriminate them.
129. Schedule 1, section 353–10 of the *Taxation Administration Act 1953*.
130. Ibid.
131. Sections 8C and 8D of the *Taxation Administration Act 1953*.
133. Section 2 of the *Royal Commissions Act 1902*.
134. Subsections 3(3) and 3(6) of the *Royal Commissions Act 1902*.
135. Section 3 of the *Royal Commissions Act 1902*. 
A person is not excused from giving evidence on the grounds of self-incrimination; however, evidence given to a Royal Commission is not admissible in evidence against the person in civil or criminal proceedings in any Australian court.\(^\text{136}\)

**Australian Competition and Consumer Commission**

The Australian Competition and Consumer Commission (ACCC) and certain officers may issue a notice requiring a person to attend and give evidence, provide information or produce documents.\(^\text{137}\) The ACCC or officer must have reason to believe that a person is capable of furnishing evidence on a matter the ACCC may investigate.\(^\text{138}\) The High Court in *Daniels Corporation v ACCC* took the view that the “reason to believe” threshold was a relatively low one.\(^\text{139}\)

Non-compliance is an offence subject to a penalty of 100 penalty units or two years imprisonment.\(^\text{140}\) A person is not excused from complying if the evidence, information or documents would tend to incriminate the person; however, the evidence cannot be used against the person in criminal proceedings other than obstruction and providing false evidence offences.\(^\text{141}\)

**Law Enforcement Integrity Commissioner**

The Commissioner may summon a person to give evidence, produce documents or other things, if the Integrity Commissioner has reasonable grounds to suspect that the evidence, documents or things will be relevant to the investigation of a corruption issue or conduct of a public inquiry.\(^\text{142}\) It is an offence with a maximum penalty of two years imprisonment to fail or refuse to answer questions, produce a document or thing or obstruct an officer.\(^\text{143}\)

The privilege against self-incrimination is abrogated; however, a ‘use immunity’ is substituted so that the evidence, information or document produced is not admissible in evidence against the person in a criminal proceeding, a proceeding for the imposition or recovery of a penalty or a confiscation proceeding.\(^\text{144}\)

### Removing self-incrimination as a defence to answering questions

Both the common law and the *ICCPR* recognise a right to not be forced to incriminate oneself – often referred to (in a common law context) as the privilege against self-incrimination. The common law privilege against self-incrimination is not confined to criminal proceedings. Middleton J summarised the common law in the *Essendon FC case*:

> The common law privilege against self-incrimination entitles a person to refuse to answer any question, or to produce any document, if the answer or the document would tend to incriminate that person: see *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; (1983) 152 CLR 328 (‘Pyneboard’). Although broadly referred to as the privilege against self-incrimination, the concept encompasses

\(^\text{136}\) Sections 6A and 6D of the *Royal Commissions Act 1902*.
\(^\text{137}\) Section 155 of the *Competition and Consumer Act 2010*.
\(^\text{138}\) Ibid.
\(^\text{139}\) *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* 213 CLR 543, [2002] HCA 49 at para [130].
\(^\text{140}\) Subsection 155(6A) of the *Competition and Consumer Act 2010*.
\(^\text{141}\) Subsection 155(7) of the *Competition and Consumer Act 2010*.
\(^\text{142}\) Sections 75 and 83 of the *Law Enforcement Integrity Commissioner Act 2006*.
\(^\text{143}\) Sections 78 and 93 of the *Law Enforcement Integrity Commissioner Act 2006*.
\(^\text{144}\) Sections 80 and 96 of the *Law Enforcement Integrity Commissioner Act 2006*.
distinct privileges relating to criminal matters, and self-exposure to a civil or administrative penalty and self-exposure to the forfeiture of an existing right.

In Rich v Australian Securities and Investments Commission (2004) 220 CLR 129; [2004] HCA 42 at [26]–[29] the High Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) discussed the nature of penalties and forfeitures which attract the privileges: “... The penalties and forfeitures which attract the privileges include, but are not confined to, monetary exactions ...”

The privilege has been described by the High Court as a human right which protects personal freedom, privacy and dignity: see Environment Protection Authority v Caltex Refining Co Pty Ltd [1993] HCA 74; (1993) 178 CLR 477 at 498.

Rationales for the privilege include preventing the abuse of power and convictions based on false confessions, protecting the quality of evidence and the requirement that the prosecution prove the offence, and avoiding putting a person in a position where the person will be exposed to punishment whether they tell the truth, lie, or refuse to provide the information.

Some protections, such as the competency of an accused person to give evidence as a witness for the prosecution, cannot be waived: see, eg, Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1 at 565 [51]–[52] and Lee v The Queen (2014) 308 ALR 252; [2014] HCA 20 (‘Lee v The Queen’) at [33].

There seems little doubt that the privilege against self-incrimination, although a “human right”, can be waived. The privilege applies in non-judicial proceedings, such as inquiries, unless it is expressly or impliedly abrogated by a governing statute: Pyneboard, 340-341, 344.

One of the problems with the recognition of the privilege against self-incrimination outside a court exercising judicial power is that there is the practical problem of how the decision maker is to properly consider the claim for privilege, and the consequences that may follow from a refusal to answer...

However, any abrogation of the privilege against self-incrimination must be clear and unmistakable.145

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146. Essendon FC case, op. cit., para. [283].
Existing subsection 13D(2) provides the limited protection that, if a person does produce a document or information, it cannot be used against them in criminal proceedings, or proceedings that might result in a penalty, other than proceedings for an offence against the ASADA Act or ASADA Regs, or an offence of providing false or misleading information under the Criminal Code Act 1995.

**Proposed abrogation of privilege**

Proposed subsections 13D(1) and (2) (at item 47 of Schedule 1 to the Bill) abolish the privilege against answering questions or producing information which might incriminate the person or expose them to a penalty.

The Bill substitutes a ‘use immunity’ which provides that the evidential material cannot be used against the person in criminal proceedings. As currently, information provided can be used in proceedings under the ASADA Act or the ASADA Regs (and therefore the NAD scheme), and for prosecution for providing false or misleading information (sections 137.1 and 137.2 of the Criminal Code). The information cannot be used in a criminal prosecution for any other offence.

Therefore, unlike the current situation, the amendment would allow a person to be compelled to answer questions or give information that could then be used in evidence against them in ADRV proceedings. The Explanatory Memorandum notes:

This amendment ... further aligns ASADA’s powers with pre-existing contractual powers utilised by many national sporting organisations. 147

The point is somewhat disingenuous in a context where ASADA has been encouraging and approving those very ‘pre-existing contractual powers’, apparently since at least January 2015, to empower its own investigations. 148 That context is discussed above under heading ‘Background’ and immediately below.

**Coercive questioning powers were proposed in 2013**

As mentioned above, prior to 1 August 2013, neither ASADA nor the CEO had any power to compel a person to attend an interview or provide information. In February 2013, the Australian Sports Anti-Doping Authority Amendment Bill 2013 was introduced to Parliament. The Bill, as introduced, proposed a complete abrogation of the privilege against self-incrimination in ASADA investigations.

The Bills Digest for the 2013 Bill contains comments from interest groups on the proposal:

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. 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’.

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. Doping offences are no more major than serious criminal matters, which are regularly investigated without undermining the right. The Athlete’s

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147. Explanatory Memorandum, op. cit., p. 18.
148. Crocker, op. cit., p. 28. [quoted below at n. 148]
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’. 149

In 2013, Brendan Schwab, the General Secretary of the Australian Athletes’ Alliance said of the proposed abrogation of the privilege:

... the whole concept that athletes would face a criminal penalty for breach of contract is ridiculous and absurd ... the threat of jail terms for those who refuse to be interviewed by Australia’s anti-doping agency infringes the basic civil rights of sportspeople ... everyone should be under no illusion that the powers ... under the existing anti-doping codes which have been agreed to by athletes are extreme. 150

Parliament did not agree to the extensive powers requested; amendments introduced in the Senate to preserve a privilege against self-incrimination for natural persons were passed. However, according to Barrister Anthony Crocker, sports organisations have since found a way around Parliament:

Nonetheless, since 1 January 2015, ASADA has been able to overcome this restriction. It has prepared a template anti-doping policy (‘ADP’) for sporting administration bodies to use. This policy reflects a full abrogation of the privileges.

This is a most unsatisfactory development. ASADA is the national body charged with the task of investigating anti-doping matters so as to maintain the integrity of sport. It sought a range of additional powers from the Commonwealth Parliament. Not all of those powers were granted. What ASADA could not obtain through the ‘front door’, it has given to itself through the ‘back door’, by drafting a template that is not consistent with the ASADA Act.

The High Court is very firm as to the rules concerning the privilege against self-incrimination. When amending the ASADA Act in August 2013, the Parliament was equally clear. Unless and until ASADA corrects the current situation, it will continue to play outside those rules. 151

In late 2015 ASADA was criticised by a journalist for ‘compelling athletes to give up their common law right to silence’. 152 ASADA responded in a media release on 29 November 2015:

ASADA does not mandate any sport to abrogate athletes of their privilege against self-incrimination in anti-doping investigations. Under ASADA’s legislation, sports determine their own anti-doping policies, which are contractual arrangements with their members. 153

It noted that the AOC had amended its anti-doping by-law to include a provision abrogating the privilege of self-incrimination and continued:

ASADA CEO Ben McDevitt said: ‘The AOC is a fantastic partner and ASADA supports them for going above and beyond in its fight against doping. Many other sports have also chosen to include the

149. R Jolly, Australian Sports Anti-Doping Authority Amendment Bill 2013, Bills digest, 92, Parliamentary Library, Canberra, 19 March 2013, p. 28.
151. Crocker, op. cit., p. 28.
152. T Holmes, ‘ASADA stripping athletes’ legal right to silence by inserting provision in policy, sports lawyers says’, ABC news, 29 November 2015; cited by Hickie, op. cit., at p.49.
153. ASADA, Media correction: ABC report about ASADA’s legislative powers inaccurate, media release, 29 November 2015.
provision in their own anti-doping policies and they too have ASADA’s full support in their commitment to protecting their clean athletes.154

The media release did not address the ASADA anti-doping policy template.

The AOC has long opposed the privilege against self-incrimination in the anti-doping context and its President, John Coates, welcomed Wood Review recommendations that athletes and support people be compelled to give evidence about doping:

I am particularly pleased that the [Wood Review recommends] legislation establishing the Tribunal will include ‘the power to order a witness to appear before it to give evidence, and/or to produce documents or things; and the power to inform itself independent of submission by the parties’.

The AOC has long argued for this legislative support to the fight against doping in sport and, having repeatedly been knocked back, introduced similar requirements in its Anti-Doping Policy - making it a condition for member National Federations nominating athletes for selection in Australian Olympic Teams that they must include these requirements in their Anti-Doping policies...

So very much better that this be by statute rather than relying on contractual arrangements.155

Public policy and coercive questioning

In the coercive questioning schemes compared above, except the taxation regime which is motivated by the national interest in protecting public revenue, the witness is protected from the immediate consequences of giving evidence under compulsion. The witness is not being examined for the primary purpose of obtaining evidence against them; instead, their evidence is intended to serve a higher public policy goal. A ‘use immunity’ is given to encourage truthfulness.

The ‘use immunity’ provided here, however, is not sufficiently wide to protect from the absolute liability ADRV findings which could result from the compelled evidence. Those absolute liability ADRV are then followed by sanctions including mandatory suspensions and automatic loss of results and prizes. The losses may be substantial and affect other team members. All this occurs in a context where the investigator is also the prosecutor and facilitator of the sanction, and all without access to a court.

In the context of the Bill and an ADRV, it is questionable whether removal of the privilege against self-incrimination could be considered proportionate to the public policy goals, particularly when it was strenuously opposed in 2013 by interest groups which represent athletes. It is difficult to reconcile the strong opposition of these groups with the framework of supposedly voluntary contractual submission to coercive questioning.

Human rights obligations

The Government acknowledges in the Explanatory Memorandum that the Bill engages Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR)—the right to presumption of innocence156 (which includes the right not to be compelled to self-incriminate157).

154. Ibid.
155. AOC, media release, 1 August 2018, op. cit.
156. Explanatory Memorandum, National Sport Tribunal Bill 2019, p. 2.
Human rights in the context of the international anti-doping regime and the Code requirement for a ‘fair hearing’ are discussed extensively by Professor Andrew Byrnes in Chapter 5 of Doping in Sports and the Law.\footnote{158} Byrnes identifies that, in terms of international human rights law, there is a developing body of opinion that the obligation of the state is expanding beyond the state merely avoiding encroaching on a person’s human rights to protecting persons against encroachment on their rights by non-state actors.\footnote{159} Byrnes offers the opinion:

> The hybrid nature of the anti-doping regime and its potential application in national systems where the investigation and disciplinary proceedings are conducted as the exercise of or with the support of state power are likely to engage the human rights obligations of the state under national and international law.\footnote{160}

Since the abrogation of the privilege against self-incrimination is not required by the Code, sport lawyer Nikki Dryden also suggests that coercive measures to abrogate the privilege against self-incrimination may not be valid, on the basis:

- that the CAS rules do not permit national organisations making substantive changes to the [Code];
- that the required ‘consultative process’ for changing rules has not been followed;
- that the abrogation of the privilege against self-incrimination may breach international agreements on which the [Code] is founded; and finally,
- that the rule of law may have been violated.\footnote{161}

In the process of developing the Code, WADA has commissioned a number of legal opinions from Swiss and French lawyers on various drafts of the Code. In one of those opinions, the authors, Kaufmann-Kohler and Riggozzi, stated:

> ... for the purpose of the present opinion, we will assume that the current approach of the courts might evolve in the future towards enforcement of human rights in sports matters. Indeed, mainly because sports governing bodies hold a monopolistic ‘quasi-public’ position in their relation with athletes, there is a growing understanding among legal commentators that sports governing bodies can no longer ignore fundamental rights in their activities, at least if they intend to avoid government intervention. After all, the UNESCO Convention itself was adopted with a specific ‘reference’ to existing international instruments relating to human rights’ (see Preamble, first ground).\footnote{162}

Byrnes reports the reliance by the Government and the AOC in 2015 on a different opinion, by human rights expert Jean Paul Costa, supporting various aspects of WADA revisions to the Code in 2015 as aligning with international human rights.\footnote{163}

\footnotesize
\begin{itemize}
  \item \footnote{158} A Byrnes, ‘Human rights and the anti-doping lex sportiva—the relationship of public and private international law, “law beyond the State” and the laws of nation states’, Chapter 5 in U Haas and D Healey, Doping in sport and the law, Bloomsbury, Oxford, 2017, pp. 81–104.
  \item \footnote{159} Ibid., pp. 99–100.
  \item \footnote{160} Ibid., p. 100 [emphasis added].
  \item \footnote{162} Ibid., p. 100.
  \item \footnote{163} Ibid., pp. 101–102.
\end{itemize}
**Protection of NSO personnel from civil actions**

The ASADA Act protects the ASADA CEO and staff against civil action relating to the performance of the powers and functions of the CEO provided they have acted in good faith.\(^\text{164}\) However, the NAD scheme requires NSOs to also perform some functions of the ASADA CEO. The Wood Review recommended that the government extend statutory protection against civil actions to cover NSO’s in their exercise of ADRV functions.\(^\text{165}\)

**Protection may be broader than intended**

Proposed subsection 78(5) of the ASADA Act (at item 40 of Schedule 1 to the Bill) will extend a potentially much broader protection from civil action than currently applies to ASADA:

\[
(5) \text{ A national sporting organisation of Australia, or a person performing work or services for the organisation, is not liable to an action or other proceeding for damages for or in relation to an act done or omitted to be done in good faith in implementing or enforcing the organisation’s anti-doping policy.}
\]

The provision protecting ASADA staff is limited to action pursuant to the CEO’s functions or powers. Proposed subsection 78(5) covers all actions taken in implementing or enforcing the organisation’s anti–doping policy. The actions are not limited to those required or permitted by law generally or by the NAD scheme in particular. The only requirement is that the action be implementing or enforcing the NSO’s own anti–doping policy and be done in good faith.

The clear policy intent is to:

\[
\ldots \text{ ensure that national sporting organisations and their personnel are not disadvantaged by engaging with the legislative anti-doping process through exposure to litigation.}\(^\text{166}\)
\]

However, the provision goes beyond the recommendation of the Wood Review. Neither the Government Response nor the Explanatory Memorandum contain any indication that a broader provision than recommended was thought necessary and it may be unintentional.

Parliament may wish to consider whether:

\* proposed subsection 78(5) has been drafted too broadly and
\* whether protection for NSOs and staff should be limited to acts taken or required under the NAD scheme, rather than under the NSO’s own anti-doping policy.

**Exclusion of negligence and incompetence**

It is common for statutory duties to require that duty be exercised with reasonable care. There is no such requirement here and indeed the protection against civil suit allows a person or organisation who carries out a duty or function under the NAD scheme negligently or incompetently to avoid repercussions provided they have acted in good faith.

The ASADA Act involves a balancing of the rights of athletes, officials and the sport itself. Given the very serious effect an ADVR can have on an athlete’s career and reputation, and conversely, the very serious effect undetected doping can have on the integrity of sport; Parliament might...

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164. Section 78 of the ASADA Act.
166. Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019, p. 16.
consider whether officials acting in good faith is sufficient protection for the athlete and sport or whether grossly negligent action should be excluded from protection.

**Enabling wider sharing of protected information**

Part 8 of the *ASADA Act* provides for the management of information that comes into the possession of ASADA, ASDMAC or the ADRVP. Under existing subsection 67(1), it is an offence for an *entrusted person* to disclose *protected information* except in certain circumstances or to certain bodies specified in the Act.

Existing section 67(3) provides that a court or tribunal may not require an *entrusted person* to disclose *protected information*. In its current form, the Act protects only specified persons from being required to disclose protected information to a court or tribunal. NSO personnel, however, are not specified.

The proposed amendment to subsection 67(3) by *item 42 of Schedule 1* to the Bill will apply to a *person* instead of only to *entrusted persons*. This will allow ASADA to share protected information with NSOs because NSO personnel will have:

- the same secrecy obligations as ASADA personnel and
- the same protection as ASADA personnel against being forced to reveal, for example, a secret source of information to a court or tribunal.

This provision implements part of recommendation 19 of the *Wood Review*. Other elements of recommendation 19 are implemented in *Parts 1 and 2* of the Bill.  

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Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019