THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY AMENDMENT BILL 2013

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Sport, Senator the Hon. Kate Lundy)
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OUTLINE

The purpose of the Bill is to amend the Australian Sports Anti-Doping Authority Act 2006 (ASADA Act) to strengthen the Australian Sports Anti-Doping Authority’s (ASADA) investigation functions and to enhance information sharing arrangements with other government agencies. In addition, the Bill re-aligns the operation of the Anti-Doping Rule Violation Panel, clarifies conflict of interest provisions for members of anti-doping bodies established under the ASADA Act and confirms the statutory period for commencing action against an athlete in relation to possible anti-doping rule violations.

ASADA is the Australian Government agency responsible for protecting Australia’s sporting integrity through the elimination of doping and the implementation of the World Anti-Doping Code in Australia. ASADA’s powers and functions are specified under the ASADA Act and Australian Sports Anti-Doping Authority Regulations 2006 (regulations), including the National Anti-Doping (NAD) Scheme, which comprises Schedule 1 to the regulations.

The changes introduced by the Bill will provide additional capabilities to ensure ASADA can meet the contemporary challenges faced in a changing anti-doping environment where the analytical testing of urine and blood samples is not exclusive in detecting the most sophisticated doping cases. Only through the application of investigative techniques and intelligence gathering, combined with an effective drug testing program, can an anti-doping agency hope to identify those athletes and athlete support personnel who choose to use prohibited performance enhancing substances and methods.

Enhancing ASADA’s Investigation Function

The primary focus of the Bill is Schedule 1 which enhances ASADA’s investigation function by providing the ASADA Chief Executive Officer (CEO) or the CEO’s delegate, with the power to issue a notice (referred to as a disclosure notice) compelling persons of interest to assist in ASADA’s investigations.

A disclosure notice issued by the CEO will require a specified person to attend interviews with ASADA investigators, provide specific documents, materials (including electronic materials and products) and things (such as video cameras, medications, training bags). The Bill will also enable ASADA to retain those documents, materials or things for use in proceedings for an anti-doping rule violation, or to make copies of those documents or materials for use in such proceedings.

Civil penalty provisions will apply for failing to comply with a disclosure notice (that is, for a failure to provide information, documents or things requested, failure to attend an interview, or failure to answer questions at interview). The civil penalty will be 30 penalty units.

The Bill will also enable the regulations to be amended to establish an infringement notice scheme whereby the CEO can issue an infringement notice to a person who contravenes the requirements of a disclosure notice. The CEO will have the power to issue an infringement notice requiring the person to pay a penalty to the Commonwealth as an alternative to civil proceedings against the person. In this case, the civil penalty will be 6 penalty units.
The Bill also confirms that information collected through the issuing of a disclosure notice may be presented to a hearing of a sporting administration body, the Court of Arbitration for Sport or any other tribunals that relate to sports doping and safety matters.

In addition to the protections afforded by the ASADA Act, ASADA regulations and NAD scheme, the Bill contains a number of additional provisions that protects the rights of a person receiving a disclosure notice. Of note, the CEO must, prior to issuing a disclosure notice, seek the written agreement of three members of the Anti-Doping Rule Violation Panel that the CEO’s belief is reasonable belief. Other provisions are outlined in the Statement of Compatibility with Human Rights.

**Extension of Existing Information Sharing Arrangements**

Schedule 2 of the Bill will extend ASADA’s existing information sharing arrangements with government agencies to also include Australia Post. ASADA’s existing information sharing arrangements with other Government agencies and law enforcement bodies have proven successful in assisting ASADA to identify and pursue anti-doping rule violations committed by athletes and athlete support personnel.

Arrangements with Australia Post will assist ASADA’s intelligence and investigations through the provision of up-to-date information regarding persons residing at addresses which could be helpful in identifying athletes who are receiving prohibited substances through the post. Australia Post is also the only agency able to provide information relating to post office box registrations. ASADA will not be able to intercept or examine the contents of any mail items.

**Disclosure of Protected Customs Information**

The proposed bill inserts a provision which allows the Chief Executive Officer (CEO) to decide not to disclose to an athlete that protected customs information relating to the athlete has been passed to relevant sporting administration bodies where that disclosure is likely to prejudice a current investigation into a possible anti-doping rule violation. To ensure transparency in regard to this power, the CEO would be obliged to report in ASADA’s Annual Report how many times this discretion has been exercised.

**Definitions relating to the Anti-Doping Rule Violation Panel**

The Bill also makes clear that the Anti-Doping Rule Violation Panel (the Panel) is not a hearing body within the meaning of Article 8 of the World Anti-Doping Code; rather, the Panel’s role is to make a finding that an athlete or support person has possibly committed an anti-doping rule violation.

**Conflict of Interest Provisions**

The Bill will broaden the current conflict of interest provisions in the Act to apply to matters relating to the Panel’s or Australian Sports Drug Medical Advisory Committee’s (ASDMAC) activities rather than just the performance of its functions. In particular, the Bill will clarify that a member of the Panel is prohibited from providing information, advice, evidence or support to a person who has a matter before ASDMAC or in proceedings before other bodies (e.g. a sporting tribunal). Similarly, an ASDMAC member is prohibited from providing information, advice, evidence or support to a person who has a matter before the Panel or in proceedings before other bodies (e.g. a sporting tribunal).
Statute of Limitations
The limitation period currently prescribed in the NAD scheme for commencing an action against an athlete or athlete support person for a possible anti-doping rule violation is eight years. This reflects Article 17 of the World Anti-Doping Code.

Generally, the statute of limitations with regard to civil proceedings varies in each state and territory, with the limit set usually between three and six years. For the avoidance of doubt, the Bill confirms that the eight year limitation period that is required to be prescribed in the NAD scheme will prevail over a law of a state or territory to the extent of any inconsistency.

The Bill will commence on a date to be fixed by Proclamation.

Statement of Compatibility with Human Rights
A Statement of Compatibility with Human Rights has been prepared and is attached.

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Financial Impact Statement
There is no financial impact associated with this Bill.
NOTES ON CLAUSES

Clause 1: Short title

1. Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

2. Sections 1 to 3 of the Bill will commence on the date that the Bill receives the Royal Assent. Schedules 1 to 3 of the Bill will commence on a day to be fixed by Proclamation. If the provisions have not commenced within six months of receiving royal assent, they will commence on the day after the end of the six month period.

Clause 3: Schedule(s)

3. This clause gives effect to the Schedules to the Bill by providing that each Act specified in the Schedules is amended or repealed as set out in the items of the Schedules. Any other item in the Schedules has effect according to its terms.
Schedule 1 - Disclosure notices

Australian Sports Anti-Doping Authority Act 2006

Item 1: Section 4
4. This item inserts a signpost to the definition of ‘civil penalty order’ in new subsection 73B(4). A civil penalty order is an order for a person to pay the Commonwealth a pecuniary penalty for contravening a civil penalty provision under the Bill.

Item 2: Section 4
5. This item inserts a signpost to the definition of ‘civil penalty provision’ in new section 73A. A ‘civil penalty provision’ is a provision within the ASADA Act which contains a pecuniary penalty amount, indicated by the words ‘Civil Penalty’ and followed by the number of penalty units.

Item 3: Section 4
6. This definition confirms that an ‘act’ or ‘failure to act’ constitutes conduct for the purposes of the Act.

Item 4: Section 4
7. This item inserts a signpost to the definition of ‘disclosure notice’ in new subsection 13A(1). A disclosure notice is the notice that can be issued by the CEO, or the CEO’s delegate, requiring a person to provide information which will assist in an investigation into possible anti-doping rule violations by an athlete or athlete support person.

Item 5: Section 4
8. This item amends section 4 of the Act to insert the definition of ‘evidential burden’. The definition provides that an ‘evidential burden’ in relation to a matter means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. Under the provisions of this Bill, a person may be asked to provide information, documents, materials or things which will assist ASADA in its investigations.

Item 6: Section 4
9. This definition confirms that a ‘relevant court’ is the Federal Court of Australia, the Federal Circuit Court of Australia or a State or Territory Court with the appropriate jurisdiction to hear matters arising under this Act.

Item 7: After paragraph 13(1)(e)
10. Section 13 of the Act specifies what the NAD scheme must contain. New paragraph 13(1)(ea) provides the authority for the NAD scheme to authorise the CEO to request a specified person to attend an interview, give information and/or produce documents or things. However, the CEO must have a reasonable belief that the person has information, documents or things that may be relevant to the administration of the
NAD scheme (for example, material that is relevant to pursuing an anti-doping rule violation against an athlete).

11. A specified person can be any person, not just an athlete or athlete support person, who has information that can assist in an anti-doping investigation. This amendment recognises that people outside the jurisdiction of Australia’s anti-doping regime may have information that would assist in establishing an anti-doping rule violation by an athlete or athlete support person.

**Item 8: Paragraph 13(1)(g)**

12. New paragraph 13(1)(g) removes any doubt that the CEO is permitted to disseminate any material obtained as a result of the issuing of a disclosure notice to other organisations, in accordance with the Act and the regulations.

**Item 9: After section 13**

*New section 13A – Power to require information or documents to be given*

13. This new section provides the authority for the NAD scheme to establish a disclosure notice scheme. This is consistent with the legislative structure of the ASADA Act, whereby the Act provides the authority for the NAD scheme to specify the detail of particular matters.

14. New subsection 13A(1) requires the NAD scheme to authorise the CEO to issue a disclosure notice to a person of interest requiring that person to attend an interview, give information or provide information, documents or things.

15. New subsection 13A(1A) requires that, before issuing a disclosure notice, the CEO must have a reasonable belief that the person has information relevant to the administration of the NAD scheme. To ensure the CEO does not have unfettered power to issue a disclosure note, the CEO must obtain the written agreement of three members of the Anti-Doping Rule Violation Panel (the Panel) that this belief is reasonable before a disclosure notice can be issued.

16. New subsection 13A(1A) also sets out the circumstances in which a registered medical practitioner may be issued with a disclosure notice. The new powers only enable ASADA to seek information documents or things from medical professionals where the CEO has a reasonable belief that the medical professional is involved in the commission or attempted commission of an anti-doping rule violation. Again, the CEO’s reasonable belief must be tested with the Panel.

17. New subsection 13A(2) authorises the NAD scheme to make provision in relation to matters such as how interviews are to be conducted and how information, documents, materials and things may be provided by a person to whom a disclosure notice has been issued.

18. Given that the NAD scheme is specified in the regulations, the other requirements on the ASADA CEO when issuing a disclosure notice are to be specified in the regulations. This includes requirements around the manner in which a disclosure notice is to be issued, the form and content of the disclosure notice, the conduct of
interviews and allowing up to a 14 day response period by recipients to a disclosure notice.

19. This new section also provides that a person who is issued with a disclosure notice has the right to be informed of the possible consequences should they fail to meet the requirements of a Disclosure Notice.

New section 13B – CEO may retain and copy documents etc

20. This new section provides the authority for the CEO to take and retain possession of a document or thing for as long as is necessary and copy documents that are provided in response to a disclosure notice. Where the CEO has taken possession of a document or thing, the person who provides the document or thing will still be able to inspect or view the document or thing if they need to.

New section 13C – Failure to comply with disclosure notice

21. New subsection 13C(1) specifies that a person contravenes the subsection if the person fails to provide the information, documents or things requested in a disclosure notice within the period specified in the notice. The subsection provides that the civil penalty for the contravention is 30 penalty units. A penalty unit has the meaning in section 4AA of the Crimes Act 1914.

22. New subsection 13C(2) provides that, if a person can demonstrate that they do not possess the information or have not been able to obtain the information requested in the disclosure notice, the person will be deemed not to have contravened the Act. New section 73R has the effect that the person who was the subject of the disclosure notice is required to establish that he or she does not in fact possess the information, document or thing specified in the notice, or that the person has been unable to obtain the information, document or thing.

23. This requirement would be satisfied if the individual provides the CEO with a signed statutory declaration. Penalties exist under the Criminal Code if someone lies to ASADA.

24. New subsection 13C(3) provides that a person contravenes the subsection where the person is required by a disclosure notice to attend an interview to answer questions and fails to comply with the notice. The civil penalty for the contravention is 30 penalty units.

25. New subsection 13C(4) provides that a person contravenes the subsection where the person is required by a disclosure notice to attend an interview to answer questions and the person refuses or fails to answer the question. The civil penalty for the contravention is 30 penalty units.

New section 13D – Self-incrimination

26. The primary intent of this Bill is to assist ASADA in its investigations into possible anti-doping rule violations but not to expose individuals to other civil or criminal proceedings.
27. New subsection 13D(1) protects privilege against self-incrimination by asserting that an individual can elect not to comply with a requirement to answer a question or to give information if the answer to the question might incriminate the individual or expose them to a penalty.

28. New subsection 13D(1A) makes it clear that the right not to self-incriminate does not apply to the individual producing a document or thing, as required by a disclosure notice given to the person.

29. However, new subsection 13D(2) ensures that a document or things obtained by ASADA, the producing of the document or thing; or any information, document or thing obtained as a direct or indirect consequence of producing the document or thing is inadmissible as evidence against the person in criminal proceedings (except an offence against section 137.1 (false or misleading information) or 137.2 (false or misleading documents) of the Criminal Code.

30. Documents or things provided in response to a disclosure notice will also be inadmissible as evidence against the person in civil proceedings unless the proceedings are under, or arising out of, the ASADA Act or regulations.

**Item 10:** After paragraph 14(2)(a)

31. Section 14 of the ASADA Act sets out the rights of athletes and athlete support persons. New paragraphs 14(2)(aa), 14(2)(ab) and 14(2)(ac) ensure that the rights of athletes and athlete support persons in relation to the amendments proposed in the Bill are maintained. The new provisions will ensure that the NAD scheme must specify that athletes and athlete support persons who have been issued with a disclosure notice have the right to be notified, orally or in writing, of the possible consequences of failing to comply with a request by the CEO to attend an interview to answer questions or to provide information, documents or things.

**Item 11:** Subsection 24(N)(1)

**Item 12:** After subsection 24N(3)

32. Section 24N of the Act enables the CEO to delegate all of their functions and powers to other persons including ASADA staff and other Commonwealth employees who may be engaged to assist the CEO from time to time. The amendment proposed by item 11 provides that this general power of delegation does not apply to the power to give a disclosure notice. The amendment proposed by item 12 ensures that the power to issue a disclosure notice can only be delegated by the CEO to an ASADA staff member who is an SES or acting SES employee. This recognises the significance of the decision to give a disclosure notice.

**Item 13:** After Part 8

**Part 8A – Civil penalty orders**

33. As the Bill introduces civil penalties for the contravention of the requirements of disclosure notices, this new section of the Act sets out the mechanisms for enforcing
the civil penalty provisions. These provisions substantially reflect the provisions of Part 4 of the Regulatory Powers (Standard Provisions) Bill 2012.

New section 73A – Civil penalty provisions

34. New section 73A describes which provisions are civil penalty provisions. These provisions are enforceable by civil penalty orders.

New section 73B – Civil penalty orders

35. New subsection 73B(1) provides that the CEO may apply to a relevant court for an order seeking a monetary penalty where a person is alleged to have contravened a civil penalty provision. An application for an order must be made within four years of the alleged contravention (new subsection 73B(2)).

36. If the relevant court is satisfied that the person has contravened the civil penalty provision, the court can order that person to pay a monetary penalty as the court considers appropriate (new subsection 73B(3)). This order is called a civil penalty order (new subsection 73B(4)).

37. New subsection 73B(5) provides for the maximum monetary penalty that a court can order a person (or body corporate) to pay. In the case of a body corporate, this amount is five times the penalty specified in the civil penalty provision. Otherwise, the maximum penalty is the amount specified in the civil penalty provision.

38. New subsection 73B(6) sets out the matters that the court must take into account in determining this amount. This allows the court to consider the nature and extent of the contraventions, any damage or loss suffered as a result of the contravention and circumstances in which the contravention took place.

New section 73C – Civil enforcement of penalty

39. New section 73C provides that a monetary penalty is a debt payable to the Commonwealth and can be recovered by the Commonwealth as if it is a judgement debt against that person. A judgement debt is the amount that is awarded to be paid under a court order and can be enforced against the person who owes the money. The debt is enforceable through civil debt proceedings and payable into consolidated revenue.

40. This clause is necessary to ensure that the Commonwealth can take action to recover the amount of monetary penalty ordered by the court under a civil penalty order.

New section 73D – Conduct contravening more than one civil penalty provision

41. New section 73D provides that where conduct constitutes a contravention of more than one civil penalty provision, proceedings may be instituted against a person for any one or more of those provisions. This clause also provides that a person is not liable to more than one monetary penalty for the same conduct.
New section 73E – Multiple contraventions

42. New section 73E allows a relevant court to make a single civil penalty order against a person for multiple contraventions of a civil penalty provision if proceedings are founded on the same facts; or if the contraventions form, or are part of, a series of contraventions of the same or a similar character. The ability to make a single civil penalty order in respect of multiple contraventions is intended to minimise court administration and consolidate legal proceedings.

43. The maximum penalty that the court can order in this case cannot exceed the amount that could be ordered if each penalty was ordered separately for each contravention.

New section 73F – Proceedings may be heard together

44. New section 73F allows the relevant court to direct that two or more proceedings for civil penalty orders are heard together.

45. These clauses allow multiple contraventions to be dealt with in an appropriate way by the relevant court by hearing several matters together, without disadvantaging the person who is accused of contravening the provisions.

New section 73G – Civil evidence and procedure rules for civil penalty orders

46. New section 73G provides that during proceedings for a civil penalty order, the relevant court must apply the rules of evidence and procedure for civil matters. This ensures that criminal rules of evidence and procedure are not applied to proceedings for civil penalty orders.

New section 73H – Civil proceedings after criminal proceedings

47. New section 73H provides that a relevant court may not make a civil penalty order for a contravention under this Act if the person has been convicted of an offence or is found to have contravened a civil penalty provision under the law of the Commonwealth, a State or a Territory for conduct that is the same or substantially the same as the conduct constituting the contravention.

New section 73J – Criminal proceedings during civil proceedings

48. New section 73J stays civil proceedings if criminal proceedings exist and relate to the same conduct, to prevent information that arises during the criminal proceedings prejudicing the civil proceedings. If the criminal proceedings result in a conviction, new subsection 73J(2) will ensure that civil proceedings related to the same conduct are dismissed and costs for the civil proceedings are not awarded.

New section 73K – Criminal proceedings after civil proceedings

49. New section 73K clarifies that criminal proceedings may commence after civil proceedings, regardless of whether civil proceedings result in a civil penalty order. This recognises the importance of criminal proceedings and criminal penalties in dissuading and sanctioning contraventions of the Act and ensures that criminal remedies are not precluded by earlier civil action.
50. For example, if a law enforcement agency is able to collect evidence through means other than that collected by ASADA through the issuing of a disclosure notice, then a criminal matter can proceed.

New section 73L – Evidence given in civil proceedings not admissible in criminal proceedings

51. New section 73L prevents the use of evidence of information given, or evidence of production of documents, by a person in criminal proceedings under a law of the Commonwealth if:

- the person previously gave the evidence in proceedings for a civil penalty order (whether or not the order was actually made), or
- the conduct is the same or substantially the same as the conduct alleged to constitute the contravention.

52. The clause does not apply to criminal proceedings which arise in relation to false evidence given by the person in the proceedings for the civil penalty order. This ensures that the evidence elicited during civil proceedings cannot be used to build a criminal prosecution against a person for the same or similar conduct.

New section 73M – Ancillary contravention of civil penalty provisions

53. New section 73M sets out circumstances where a person is taken to have contravened a civil penalty provision. The circumstances are:

- attempting to contravene a provision
- aiding, abetting, counselling or procuring the contravention of a provision
- inducing the contravention of a provision (for example, by threatening or promising to another person)
- in any way being directly or indirectly, knowingly or party to the contravention of a provision, and
- conspiring with others to contravene a provision.

54. This ensures that these types of conduct can also give rise to a civil penalty order.

New section 73N – Continuing contraventions of civil penalty provisions

55. New section 73N provides that where the failure to do an act or thing constitutes a contravention of a civil penalty provision, then the person commits a separate contravention for each day that the person fails to do the act or thing. This is the case even on the day of and any day after a civil penalty order is made. For example, if a person is given a direction to comply with a disclosure notice by a particular date, and fails to do so, then this person may be contravening a civil penalty provision. The person would continue to contravene this civil penalty provision until the person complied with the disclosure notice, and would be liable for a contravention for each day until the person complied was taken.
New section 73P - State of mind

56. New section 73P provides that it is not necessary to prove the state of mind of a person during proceedings for a civil penalty order against a person for a contravention of a civil penalty provision (that is, the person’s intention or knowledge or other fault elements). This principle applies only to contraventions of civil penalty provisions, not for ancillary contravention of civil penalty provisions.

New section 73Q – Mistake of fact

57. New section 73Q provides that an exception of mistake of fact may be available for contravention of a civil penalty provision if the items in this provision are made out. This is significant because of new section 73M stating that, in civil penalty proceedings, it is unnecessary to prove intention, knowledge or other fault elements. This has an effect on civil proceedings similar to the effect strict liability has on criminal proceedings. To ensure that new section 73M does not result in liability for simple errors of fact, new section 73Q provides a ‘defence’ to civil penalty proceedings on the grounds that a person’s conduct was the result of a considered but reasonable error of fact.

58. The person who asserts that a particular course of action resulted from a mistake of fact has the burden of proving the matter. This is appropriate in the circumstances as this type of knowledge (that is, that a person considered particular facts) is within the knowledge of the person and forms an exception to a contravention that would otherwise result in a civil penalty order being made.

New section 73R – Exceptions etc. to civil penalty provisions—burden of proof

59. New section 73R provides that in proceedings against a person for a contravention of a civil penalty provision, the defendant bears an evidential burden in relation to any exception, exemption, excuse, qualification or justification provided by the Act. That is, the person must adduce evidence which points to the fact that he or she was authorised to perform the actions which would otherwise constitute a contravention of the civil penalty provision. It will then be up to the Commonwealth to establish that this exception does not apply. This is appropriate because a defendant will have the requisite knowledge for these exceptions.

New section 73S – Civil penalty provisions contravened by employees, agents or officers

60. This section provides that a body corporate is responsible for the actions of an employee acting within the actual or apparent scope of their employment, or the actions of an agent or officer acting within the actual or apparent scope of their authority.

Item 14: After subsection 74(1)

61. Under the Act, as soon as practicable after the end of each financial year, the CEO is required to prepare a report of the CEO’s operations during the financial year (the Annual Report). The CEO will be required to include in the Annual Report:

- the number of disclosure notices given in the financial year; and
• the number of proceedings for contraventions of section 13C (failure to comply with disclosure notice) that were commenced or concluded in the financial year; and

• the number of proceedings concluded in the financial year in which a person was ordered to pay a civil penalty for contravening section 13C.

**Item 15: At the end of Part 9**

*New section 80 – Infringement notices for civil penalty provisions*

62. The Guide to Framing Commonwealth Offences recognises that an infringement notice scheme can be included in Regulations so long as the primary legislation includes the appropriate regulation-making power providing for this.

63. New section 80 provides that the regulations may provide for a person who is alleged to have contravened a civil penalty provision to pay a penalty to the Commonwealth as an alternative to civil proceedings, with the penalty not to exceed one-fifth of the maximum penalty that a court could impose on a person for a contravention of a provision.

64. An infringement notice is a notice of a pecuniary penalty imposed on a person by statute setting out particulars of an alleged contravention. It gives the person to whom the notice is issued the option of either paying the penalty set out in the notice or electing to have the matter dealt with by a court. The operation of an infringement notice scheme provides the CEO with some flexibility to promptly manage matters that involve non-compliance.
SCHEDULE 2 – INFORMATION SHARING

Australian Postal Corporation Act 1989

Item 1: At the end of section 90J

65. Section 90J of the Australian Postal Corporation Act 1989 sets out the permitted uses or disclosures of information and documents regardless of whether the information or documents are protected. This amendment will enable Australia Post to provide information or documents to the CEO as long as the information or document is for the purposes of the administration of the NAD scheme.

66. Despite this amendment, ASADA will not be able to intercept or examine the contents of any mail items.

Australian Sports Anti-Doping Authority Act 2006

Item 2: Paragraph 68(1)(d)

Item 3: After subsection 68(5)

67. Under section 68 of the Act, ASADA may share protected Customs information with sporting administration bodies (including sporting organisations, other anti-doping organisations) for permitted anti-doping purposes, namely building the case to issue a sanction against an athlete or athlete support person for breaching anti-doping rules. Subsections 68(2) and 68(5) require the CEO to give written notice to the person to whom the information relates if in fact ASADA decides to provide information to the sporting administration body.

68. However, there are circumstances where notifying the person of interest in accordance with these requirements could prejudice a current investigation into an anti-doping rule violation. These items provide an exception to the rules in subsection 68(2) to (5) where the CEO is satisfied that compliance with these requirements is likely to prejudice a current investigation into a possible violation of the anti-doping rules.

Item 3A: Before subsection 74(2)

69. The new subsection 74(1B) compels the CEO to report in ASADA’s Annual Report the number of times the CEO has exercised their discretion not to disclose to a person that protected customs information relating to that person has been passed to relevant sporting administration bodies.

Item 4: Application of amendments

70. Sub-item 4(1) ensures that information obtained by Australia Post before the commencement of the amendment proposed by item 1 can be disclosed to the CEO after that commencement.

71. Sub-item 4(2) provides that the amendments proposed by items 2 and 3 apply to disclosures of information made after the commencement, irrespective of when the investigation to which the information relates commenced.
SCHEDULE 3 – OTHER AMENDMENTS

Australian Sports Anti-Doping Authority Act 2006

Item 1: Section 4 (definition of anti-doping rules)

72. This definition provides that anti-doping rules have the meaning given by the NAD Scheme (the regulations). Clause 2.01 of the NAD scheme specifies the circumstances and conduct that constitute breaches of the anti-doping rules, or anti-doping rule violations.

Item 2: Section 4

73. This definition provides that finding has the meaning given by the NAD scheme, that is, a finding is a finding by the Anti-Doping Rule Violation Panel (the Panel) that:

(a) there is an adverse analytical finding; or
(b) it is possible that an athlete or support person has committed a non-presence anti-doping rule violation.

Item 2A: Section 5(1A)

74. There is a consequential change to the definition of vacancy in subsection 5(1A) of the ASADA Act as a result of increasing the membership of the Panel from seven to nine. The increase in membership will assist to alleviate the additional workload that will be placed on members as a result of requiring that three members of the Panel agree in writing prior to the CEO issuing a disclosure notice to a person.

Item 3: Paragraph 13(1)(b)

75. This is a technical amendment to reflect the fact that the anti-doping rules can only apply to athletes and support persons.

Item 4: Paragraph 13(1)(h)

76. This clause clarifies that the NAD scheme may authorise the Panel to make findings relating to investigations by the CEO of possible anti-doping rule violations.

Item 5: Paragraph 13(1)(ha)

Item 6: Paragraph 13(1)(j)

Item 7: Subparagraph 13(1)(k)(ii)

77. Repealing paragraph 13(1)(ha) confines the operation of the Panel to only making findings into whether a possible anti-doping rule violation has been committed. The Panel will no longer be expected to make recommendations to the relevant sport tribunal as to the consequences of its findings.

78. It has been found in the past that, in making recommendations to the relevant sport tribunal regarding consequences, the Panel did not always have access to important information that may have affected its recommendation. Athletes and athlete support
persons have preferred to withhold such evidence until the hearing arranged by the sporting body.

79. The management of possible anti-doping rule violations will consist of two stages. The Panel will consider evidence of a possible anti-doping rule violation provided to it and determine whether a possible anti-doping rule violation has been committed. The Panel’s findings are then passed to the sporting body that will confirm or not confirm the violation and issue the appropriate sanction, in accordance with its anti-doping policies.

80. To still provide the sporting organisation with assistance when considering possible anti-doping rule violations, Paragraphs 13(1)(j) and (1)(k)(ii) will provide for the NAD scheme to authorise the CEO to engage with the sports directly, based on providing information relevant to the particular case.

Item 8: At the end of section 13

81. Consistent with the World Anti-Doping Code, the limitation period prescribed in the NAD scheme for commencing an action against an athlete or athlete support person for a possible breach of anti-doping rules is eight years.

82. The new sub-section 13(4) removes doubt that the limitation provision prescribed in the regulations prevails over a law of a State or Territory to the extent of any inconsistency.

Item 9: At the end of section 41

83. Article 8 of the World Anti-Doping Code states that each anti-doping organisation with results management responsibility shall provide a hearing process for persons alleged to have committed an anti-doping rule violation.

84. This clause clarifies that the Panel is not a hearing body, as is described under Article 8 of the World Anti-Doping Code. Under the NAD scheme, each national sporting body is the decision maker on possible anti-doping rule violations.

Item 9A: At the end of section 42

85. The maximum number of members on the Panel is increased from seven to nine. This will assist to alleviate the additional workload that will be placed on members as a result of requiring that three members of the Panel agree in writing prior to the CEO issuing a disclosure notice to a person.

Item 10: Subsection 43(3)

86. Subsection 43(3) is amended to confirm that a member of the Australian Sports Drug Medical Advisory Committee (ASDMAC) cannot, at the same time, be a member of the Panel.

Item 11: Section 50

87. Section 50 is updated to restrict members of the Panel from liaising with others outside of the Panel on matters under the NAD scheme.
88. A Panel member cannot take part in any deliberations or decisions of a sporting administration body in relation to a matter relating to, or arising under, the NAD scheme without first receiving written consent from the CEO.

89. A Panel member, without the prior written consent of the CEO, cannot provide information, advice or support to a person nor can they provide evidence or information on behalf of a person in relation to a matter under the NAD scheme.

**Item 12: Subsection 54(2)**

90. Subsection 54(2) is amended to confirm that a member of the Panel cannot at the same time be a member of the ASDMAC.

**Item 13: Section 60**

91. Section 60 is updated to restrict members of the ASDMAC from liaising with others outside of the Committee on matters under the NAD scheme.

92. A Committee member cannot take part in any deliberations or decisions of a sporting administration body in relation to a matter relating to, or arising under, the NAD scheme without first receiving written consent from the CEO.

93. A Committee member, written the prior written consent of the CEO, cannot provide information, advice or support to a person nor can they provide evidence or information on behalf of a person in relation to a matter under the NAD scheme.

**Item 14: Application of amendments**

94. With respect to the amendment to sub-section 43(3), after the date of commencement, a person appointed to the Panel cannot be a member of the ASDMAC as well. Similarly, under sub-section 54(2), after the date of commencement, appointees to ASDMAC cannot also be a member of the Panel.

95. The amendment to Section 50 applies to all members of Panel after the commencement date, regardless of when the member was appointed.

96. The amendment to Section 60 applies to all members of the ASDMAC after the commencement date, regardless of when the member was appointed.

**Item 15: Validation of ADRVP’s findings**

97. Any findings or recommendations made by Panel remain valid after the Bill commences.

**Item 16: Transitional regulations**

98. The Governor General is able to make regulations to deal with matters arising from the amendments. Regulations are able to take effect before the regulations are registered under the Legislative Instruments Act 2003.
Statement of Compatibility with Human Rights

Australian Sports Anti-Doping Authority Amendment Bill 2013

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

The Australian Government’s anti-doping arrangements give effect to Australia’s international obligations under the UNESCO International Convention Against Doping in Sport (the UNESCO Convention). Chiefly, the UNESCO Convention requires States Parties to implement arrangements that are consistent with the principles of the World Anti-Doping Code (the Code).

The Australian Sports Anti-Doping Authority (ASADA) is the Australian Government agency responsible for protecting Australia’s sporting integrity through the elimination of doping and the implementation of the Code in Australia. ASADA’s powers and functions are specified under the Australian Sports Anti-Doping Authority Act 2006 (ASADA Act) and the Australian Sports Anti-Doping Authority Regulations 2006 (ASADA regulations), including the National Anti-Doping (NAD) Scheme. The NAD scheme underpins ASADA’s implementation of a co-ordinated Code-compliant anti-doping program encompassing deterrence, detection and the management of cases involving possible breaches of anti-doping rules.

As a condition of receiving Australian Government funding, Australia’s national sporting organisations (NSOs) are required to have in place an anti-doping policy that complies with the Code as well as acknowledging ASADA’s powers and functions under the ASADA Act and NAD scheme. All NSO anti-doping policies replicate the essential parts of the Code, such as the eight actions that constitute an anti-doping rule violation.

The NSOs are ultimately responsible for imposing penalties for doping. Penalties (sanctions) for doping offences involve bans from sport for a certain period.

Anti-doping authorities have historically focused on the testing of samples (urine and blood) to detect the presence of prohibited substances in an athlete’s body. However, a number of anti-doping rule violations cannot be detected through testing but, rather, require the collection of information/evidence.

Given this, the advances in doping practices and the emergence of sophisticated and systemic doping programs, the approach to detecting doping is changing from one being based solely on the identification of prohibited substances and methods through testing to developing the capacity to undertake non-analytical detection programs (investigations and intelligence gathering).

ASADA has the authority to undertake investigations into possible doping offences. However, ASADA’s powers have been limited. In his review of Australian cycling, the Hon James Wood AO QC identified that ASADA’s inability to compel someone to attend an interview or produce information / documents potentially limits the capacity of ASADA to
investigate allegations or suspicions of doping. This was a deficiency that needed to be addressed.

The main purpose of the Bill is to give the CEO a power, subject to appropriate protections, to compel persons to attend an interview with an investigator nominated by the CEO and to produce information and documents or things relevant to the administration of the NAD scheme. Importantly, under this Bill, the CEO has not been given any powers relating to search and seizure; or surveillance.

The Bill will also amend the Australian Postal Corporation Act 1989 to allow Australia Post to share information with ASADA. ASADA has benefitted from information sharing arrangements with other Government agencies such as the Australian Customs and Border Protection Service. Establishing an information sharing arrangement with Australia Post will further enhance ASADA’s investigative capacity.

The Bill also makes a number of minor amendments aimed improving the operational effectiveness of Australia’s anti-doping arrangements.

**Human Rights Implications**

List of rights engaged:

- Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) – right to enjoy and benefit from culture
- Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) – right to protection from arbitrary interferences with privacy
- Article 14(3) of the ICCPR – right to be free from self-incrimination
- Article 14(2) of the ICCPR – right to the presumption of innocence

**Right to enjoy and benefit from culture**

Article 15 of ICESCR protects the right of all persons to take part in cultural life and to enjoy the benefits of scientific progress and its applications. The United Nations Committee on Economic, Social and Cultural Rights (General Comment 21, 2009) has stated that culture encompasses:

“ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions.”

This Bill promotes the right to enjoy culture under Article 15 of the ICESCR by protecting the integrity of sport in Australia. The Bill aims to protect the rights of the vast majority of Australians who want to participate in sport, both nationally and internationally that is free of doping. It aims to protect those important life values that sport promote such as fair play, teamwork, dedication and friendship.

People make choices as to whether they compete fairly or whether they involve themselves in doping. Gaining a competitive advantage in a sporting contest through unfair means, such as doping, significantly undermines the legitimate enjoyment that many Australians gain from competing in and watching competitive sport. Should Australians lose the belief that sporting contests in this country take place on a level playing field, there is a serious risk that this enjoyment will be significantly eroded.
Right to protection from arbitrary interference with privacy

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual’s privacy, family, home or correspondence, and protects a person’s honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and are non-arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to this purpose.

The introduction of paragraph 13(1)(ea) provides the NAD scheme to give the CEO the power to request a person to attend an interview, give information or produce documents or things if the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme. The new Section 13A provides that the NAD scheme must authorise the CEO to give a person a written notice (disclosure notice) requiring the person to do the above.

The Bill provides for the amendment of paragraph 13(1)(g) to allow the NAD scheme to authorise the CEO to disclose information, documents or things obtained in relation to the administration of the NAD scheme (including information obtained during investigations of possible violations of the anti-doping rules) for the purposes of, or in connection with, that administration.

The Bill also provides that the CEO will be able to issue a disclosure notice to any person (not just athletes and their support persons) where they are satisfied that the person has information relevant to the administration of the NAD scheme. This provision recognises that people outside the jurisdiction of Australia’s anti-doping regime may have information that would assist in establishing anti-doping rule violations by athletes or support personnel.

If the person issued with a disclosure notice is not an athlete or support person, they would only be subject to penalty if they failed to cooperate with ASADA. They could not be found to have breached anti-doping rules.

These clauses are reasonable, necessary and proportionate to the legitimate aim of catching doping cheats. Doping is potentially injurious to the person’s health, may distort the outcome of sporting contests and over time undermine the overall integrity of sport. These measures are necessary as the detection of doping is becoming increasingly reliant on effective non-analytical investigations. Yet, ASADA has found that people with information that may assist in establishing an anti-doping rule violation against an athlete or athlete support person, currently refuse to cooperate with the ASADA investigators. Accordingly, the CEO needs a broad power to require people to produce this information.

The ASADA CEO has previously noted that in the twelve months to March 2013, in 45 per cent of the cases where ASADA asked someone for an interview, the person was either not present, refused an interview or was not prepared to be interviewed after ASADA investigators had arrived.

While the CEO is provided with this authority, the Bill also includes provisions that aim to protect a person’s rights in relation to the issuing of a disclosure notice:

- The CEO may only issue a disclosure notice if the CEO reasonably believes that the person has information that may be relevant to the administration of the NAD scheme. The CEO will not be able to arbitrarily request or compel a person to be interviewed or
produce documents or things based on a hunch or vague suspicion. The CEO’s reasonable belief must stem from and be supported by the intelligence gathered by ASADA in the administration of the NAD scheme.

- This justification must be in writing.
- Furthermore, at least three members of the Anti-Doping Rule Violation Panel (the Panel) must agree in writing that the CEO’s belief is reasonable, prior to the CEO issuing a disclosure notice.

The Panel is a separate body established under the ASADA Act for the purpose of reviewing the information provided to it by ASADA to determine whether or not it is possible that an anti-doping rule violation has occurred. As part of this process, the Panel assures itself that ASADA has followed procedures established in the relevant regulations in bringing a case forward. Under the Bill, the Panel will be tasked to review information provided by the CEO to assess whether the CEO has a reasonable belief for issuing a disclosure notice.

- Section 14 of the ASADA Act will be amended so that an athlete has a right to be notified orally, or in writing, of the possible consequences of a failure to comply with a request by the CEO.
- Section 71 of the ASADA Act already provides for the protection of NAD scheme personal information while Section 73 preserves the operation of the Privacy Act 1988. More generally, decisions taken by the ASADA CEO, including the decision to issue a disclosure notice, are also captured by the Administrative Decisions Judicial Review Act 1977.

Amendments to the ASADA regulations following passage of these legislative amendments will provide further protections around the issuing of a disclosure notice such as specifying what information must be included in a disclosure note.

The Bill will also amend the Australian Postal Corporation Act 1989 to insert new subsection 90J(12), allowing for the disclosure of information by Australia Post employees to the CEO of ASADA for the purposes of the administration of the NAD scheme. Under this amendment, Australia Post will have discretion on what information may be shared with the CEO; however, it must be for the purposes of the administration of the NAD scheme. ASADA will not be able to intercept or examine the contents of any mail items.

Currently under the ASADA Act, the CEO is required to give written notice of the proposed disclosure of protected information from the Australian Customs and Border Protection Service to a specified sporting body, to the person to whom the information relates and invite the person to make a written submission about the proposed disclosure.

As this provision has impeded the conduct and timing of investigations in the past, the Bill would provide the CEO with the option of not disclosing protected Customs information to the person if they are satisfied that such a disclosure would prejudice a current investigation. To provide transparency, the CEO will be required to report in the ASADA Annual Report on the number of occasions that protected Customs information is disclosed to a sporting administration body without first giving written notice to the person or persons to whom it relates.

Right to be free from self-incrimination

Article 14(3)(g) of the ICCPR protects the right to be free from self-incrimination in that a person may not be compelled to testify against him or herself or confess guilt. The privilege
against self-incrimination may be subject to permissible limits. Any limitations must be for a legitimate objective, and be reasonable, necessary and proportionate to that objective.

Under the Bill, an individual can elect not to comply with a requirement to answer a question at interview or to give information if the answer to the question might incriminate the individual or expose them to a penalty.

The right not to self-incriminate does not extend to an individual producing a document or thing, as required by a disclosure notice given to the person. As it does not have search and seizure powers, this provision is important in enhancing ASADA investigations capacity.

In any case, a document or things obtained by ASADA, the producing of the document or thing; or any information, document or thing obtained as a direct or indirect consequence of producing the document or thing will be inadmissible as evidence against the person in criminal proceedings (except an offence against section 137.1 (false or misleading information) or 137.2 (false or misleading documents) of the Criminal Code).

The information obtained from a document or thing provided in response to a disclosure notice will also be inadmissible as evidence against the person in any other proceedings that would expose the individual to a penalty, other than proceedings under, or arising out of, the ASADA Act or regulations. This includes any proceedings before a sporting administration body, the Court of Arbitration for Sport or other tribunals that relate to sports doping and safety matters.

Right to the presumption of innocence

Article 14(2) of the ICCPR states that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to presumption of innocence is also a fundamental common law principle.

Laws which shift the burden of proof to the defendant can be considered a limitation of the presumption of innocence. This is because a defendant’s failure to discharge a burden of proof or prove an absence of fault may permit their conviction despite reasonable doubt as to their guilt. This includes where an evidential or legal burden of proof is placed on a defendant.

A Bill may operate to limit the right to be presumed innocent through imposing an evidential burden on the defendant in relation to a range of matters. When a defendant bears an evidential burden in relation to an exception, it means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the exception is made out. If this is done, the prosecution must refute the exception beyond reasonable doubt.

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

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

The Code operates under the principle of strict liability. Under the strict liability principle, an athlete is responsible, and an anti-doping rule violation occurs, whenever a prohibited substance is found in an athlete’s sample.
For the other seven violations specified in the Code, which are established by non-analytical means (i.e. other than a drug test), ASADA is required to establish intent on the behalf of the athlete or support person in order to demonstrate that an anti-doping rule violation has occurred.

The only area where the evidential burden would be shifted is in relation to the production of information, document or thing requested through a disclosure notice. A person who has been asked to provide information, documents or things in a disclosure notice, and claims not to have them, will bear an evidential burden to demonstrate that they don’t have the materials requested.

It is appropriate for the burden of proof to be placed on a defendant in this case as it will be within the knowledge of the person as to whether they have what is being requested. Imposing the burden of proof on ASADA would be extremely difficult or expensive whereas it could be readily and cheaply provided by the recipient of the disclosure note.

In any case, new subsection 13C(2) would provide that this evidential burden would be satisfied by the person giving the CEO a statutory declaration stating that they do not possess the information, document or things and has taken all reasonable steps to obtain this information but has not been able to obtain it.

The new Section 73 also provides an exception to the offence of contravening the requirements of a Disclosure Notice through Mistake of Fact. A person who wishes to rely on a Mistake of Fact defence bears an evidential burden to demonstrate the Mistake of Fact. This clause is reasonable and proportionate because the defendant will have the requisite knowledge to adduce evidence of the Mistake of Fact.