AUSTRALIAN ATHLETES' ALLIANCE

Executive Summary

The Australian Athletes' Alliance Inc. ("**AAA**") is the peak body of associations representing Australian athletes. Its members include:

- Australian Cricketers' Association (ACA)
- Australian Football League Players' Association (AFL Players)
- Australian Jockeys' Association (AJA)
- Australian Netball Players' Association (ANPA)
- National Basketball League Players' Association (NBLPA)
- Professional Footballers Australia (PFA)
- Rugby League Players Association (RLPA)
- Rugby Union Players' Association (RUPA)

As the peak body, the AAA provides a unified voice on issues affecting Australian athletes. Together, the member associations of the AAA represent over 3,000 of Australia's elite professional athletes.

Athletes want to compete in clean sports, governed by a fair and effective system of enforcement that recognises human and employment rights. For this to occur, any anti-doping scheme must be fair and effective and enjoy the trust and confidence of all key stakeholders in the industry, including the athletes.

General Comments on ASADA & the WADA Code

The AAA does not consider the National Anti-Doping Scheme ("**NAD Scheme**"), which is prescribed under the *Australian Sports Anti-Doping Authority Act 2006* ("**ASADA Act**") (and reflects the World Anti-Doping Authority Code ("**WADA Code**")), to be a fair and effective governing model to prevent doping.

The amendments to the ASADA Act contained within the *Australian Sports Anti-Doping Authority Amendment Bill 2014* ("**ASADA Bill**"), in large part, further impinge on human and employment rights. Moreover, they do so without verifiable advancement of anti-doping purposes.

In the Australian legal system, human rights and fundamental legal protections may not be limited absent a compelling justification: the limitation must be reasonable, necessary and proportionate to achieving a legitimate objective. No such justification exists for the impingement of athletes' rights in the proposed legislation or generally under the statute it amends.

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First, the limitation is not reasonable or proportionate because it basically addresses a breach of contract. A person only becomes bound to the WADA Code when he or she enters into a sporting contract which, in respect to almost all athletes represented by the AAA, is an employment contract subject to Australian employment law. Accordingly, a breach of the WADA Code is merely a breach of a private contract between the athlete (or other person) and his or her employer or sport.

Second, the regime set out in the WADA Code does not achieve its purposes, thus it is not necessary for the purpose.

Former NBA basketballer Walter Palmer, who now heads UNI Sport Pro, the world athletes' association comprising more than 80,000 athletes through players' associations in football, cricket, rugby, rugby league, European and major US sports, has conducted extensive research into the effectiveness of the WADA Code.

UNI Sport Pro, on behalf of its members including the AAA, submitted extensively into the review process that led to the adoption of the new WADA Code to take effect from 1 January 2015. The AAA is able to make the submission of UNI Sport Pro available to the Committee.[1]

According to Mr Palmer[2]:

- WADA does not adequately monitor the global testing program. It does not publish the number of anti-doping violations ("**ADRVs**") that occur globally. WADA's Annual Testing Report analyses only positive tests, the vast majority of which are TUEs (legitimate and permitted medical uses of prohibited substances). Without ADRV information, it is extremely difficult, if not impossible, for WADA to evaluate the impact of its policies on the prevalence of doping
- At the national level, there are no consistent reporting standards of ADRVs by national anti-doping organisations ("**NADOs**"). Many NADOs do not report at all
- Of 277,928 tests conducted in 2009 based on the incomplete available data, 758 were violations (0.27%)
- Of 258,267 tests conducted in 2010, 1,393 were violations (0.54%)
- Only nine out of 49 European NADOs reported out of competition testing results in 2010. Of the 17,166 tests, there were only 28 violations (0.16%)
- Available data from WADA Code compliant NADOs indicates that the vast majority of violations are not the result of testing or for intentional cheating.

Mr Palmer also analysed the published results of the United States Anti-Doping Agency ("**USADA**") in 2013. USADA recorded 29 ADRVs from 9,197 tests (0.003%). Of

[1] [1] *WADA Code Review*, UNI Sport PRO, 15 March 2012.

[2] B Schwab, 'Why Australian sports must cut ties with WADA', *The Sydney Morning Herald,* (online edition), 15 June 2014, accessed 29 September 2014, and interviews with Walter Palmer, 2 and 6 October 2014.

the 29, at least 23 were unrelated to cheating. Instead they were for reasons such as inadvertent use or contaminated food or supplements.

For example, in 2012 (the year Lance Armstrong was caught), USADA conducted 8,490 tests; 5,714 out of competition, 2,776 in competition. It recorded a total of 37 violations, only 4 of which were for high level athletes as the result of the testing program. The breakdown of the ADRVs for that year is set out in the following table:

Breakdown of ADRVs	
Whereabouts failures	4
Public warnings	4
THC (Cannabis)	4
(Contaminated) Supplements	6
Amateurs (Masters athletes)	5
Intentional Doping Cheats (not caught with testing)	1
Lance Armstrong investigation (not caught with testing)	9
Intentional Doping Cheats (caught with testing):	
- In competition	1
- Out of competition	3
Total violations (ADRVs)	**37**

The statistics do not justify added restrictions on the human and employment rights of the thousands of athletes covered by this regime. Instead, they call for a fundamental review of the effectiveness of the WADA Code.

For the reasons stated above, the AAA disagrees with the unsupported assertion in the Explanatory Memorandum, that '*the 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*.'

The AAA is particularly concerned with:

- The proposed amendments regarding:
  - Prohibited Association
  - Limitation Period
  - Increased sanction despite no significant fault
  - Information sharing
- The absence of a provision respecting collective bargaining agreements.

Proposed Change: Prohibited Association

The changes to prohibited association are overly broad, unworkable and oppressive.

The ASADA Bill prohibits an athlete from associating in a professional or sports related capacity with a person who is either currently serving an anti-doping sanction from sport, or who has been criminally convicted or professionally

disciplined for an action that would constitute an ADRV. However, neither the WADA Code nor the ASADA Bill defines the terms 'professional' or 'sports-related capacity'. Instead, the onus is on the athlete to show that the association does not fall into the above categories.

Moreover, the terms 'professional' and 'sports-related capacity' are overly broad and encompass a range of activities that only have a tenuous link to sports generally and doping specifically. For instance, an athlete in a small town might have little choice but to associate with a pharmacist who has been disciplined where the alternative would be to travel long-distances. Athletes may not have the ability to select their co-workers and thus could have their livelihoods threatened if their employers hire someone with whom they are prohibited from associating.

The burden of proof rests with the athlete to show that the association does not fall into the above categories. This is not satisfactory. It is the position of the AAA and UNI Sport Pro that *'athletes, as the weaker party against the interests of sport organisations and governments, must be protected by procedural guarantees that include the presumption of innocence and levels of burden of proof that put the onus on the prosecuting party to prove liability and/or guilt*'.[3]

The proper onus in these circumstances should be upon ASADA or the relevant anti-doping body to demonstrate that an athlete by reason of a relevant association with a prescribed person is likely to engage in an ADRV. To do otherwise would be to determine guilt by association, which is contrary to the human rights of Australian citizens.

Additional to the AAAs substantial disquiet about the breadth and practicalities of the provisions regarding association are its concerns about the impact that they would have on the rights of athletes. It would be easy to accept this change as a sincere and valiant attempt to curtail the influence of people with a proven history of doping and with the skills to facilitate systematic doping programme. However, the problem is that it has the potential to include within its scope those who are innocent of any wrongdoing.

Section 2.10 of the WADA Code is incompatible with Article 22 of the International Covenant on Civil and Political Rights ("**ICCPR**"), which guarantees 'the right to freedom of association with others'. Infringement is permissible only if necessary for the maintenance of public order and health or for the protection of the rights of others.[4] There is no evidence that this sweeping prohibition is necessary to achieve the anti-doping purpose of the WADA Code, not that it would be effective in doing so. Given the burden imposed on athletes and the absence of a compelling justification, this should not be included in the Act.

[3] *WADA Code Review*, UNI Sport PRO, March 15 2012, accessed 29 September 2014, 6.
[4] *International Covenant on Civil and Political Rights* (ICCPR), ATS [1980] No. 23 (entered into force generally, except Article 41, 23 March 1976), accessed 18 July 2014, s 22 (2).

Proposed Change: Limitation Period

Schedule 5 (item 7, amended subsection 13(3)) of the ASADA Bill increases the period from eight to ten years in which action in relation to a possible ADRV may commence. This limitation period is grossly disproportionate to the limitation periods found in Australian civil law. Limitation periods in civil actions are generally six years or less. Given that a breach of the WADA Code is basically a breach of contract, six years (the limitation period for contract claims in Victoria)[5] is a more proportional limitation. Longer limitation periods exist only for aggravated crimes, such as child sexual abuse and murder.

That the longer limitation period could help uncover doping offenses as new technologies are developed or could improve the detection of sophisticated doping programs are insufficient justification to counteract the purposes of limitation periods, which as stated by Jean-Paul Costa are to 'protect potential defendants against tardy complaints and avoid legal actions being brought a very long time after the alleged facts have taken place in which the provision of evidence would be arbitrary or even impossible'.[6] It is blatantly unfair to defend an action long after the allegation of wrongdoing and unreliable in practice to determine an action based on evidence that is other than fresh in the mind of the witness.

Further, WADA has failed to provide factual or legal support for the increase in the limitation period, such as an action that important to anti-doping that was impeded by the 8-year limitation period.

Finally, implications of extended document retention under Australia's *Privacy Act* have not been explored.

Proposed Change: Increased Penalty Despite No Significant Fault

Currently, under the WADA Code the minimum sanction for an athlete who ingests a non-specified substance through no significant fault of his or her own is a one-year (50% of the otherwise applicable sanction of two years) suspension. We believe that this is disproportionately high, especially for professional athletes.

The new WADA Code effectively doubles this penalty with effect from 1 January 2015. The applicable sanction will increase to four years, meaning that a professional athlete will lose two years of employment in his or her industry even if he or she is not at fault for ingestion of the non-specified substance.[7] In reality, this is a career ending penalty. It also highlights the incompatibility of the sanctions regime to professional team sports, as the four year ban is largely based on the Olympic Games cycle.

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[5] *Limitations of Actions Act 1958* (Vic), s 5 (1)(a).
[6] JP Costa, *Legal opinion regarding the draft 3.0 revision of the World Anti-Doping Code*, Strasbourg, 25 June 2013, WADA Website, accessed 29 September 2014.
[7] Article 10.2.1 of the World Anti-Doping Code, 2015 draft, accessed 29 September 2014.

The ASADA Bill aligns the NAD Scheme with the new WADA Code. As a result the new sanctions are incompatible with principles of Australian employment law and basic fairness.

The flexibility that exists for specified substances in the absence of significant fault should extend to non-specified substances. This will allow the finder of fact to determine an appropriate penalty, rather than be forced to apply a disproportionate penalty.

In short, each case should be dealt with on its merits in keeping with the principle of individual case management.

Proposed Change: Information Management

Division 1 of Part 8 of the ASADA Act relates to access to and the use of customs information. Item 8 of Schedule 4 of the ASADA Bill repeals this Division.

The new proposed section 67 will make it an offence to disclose protected information unless it is to an authorised person or is required under federal, state or territory laws. Any contravention of this proposed section would carry a maximum penalty of two years' imprisonment.

The ASADA Bill, under proposed section 68, intends to authorise entrusted persons to disclose protected information for the purposes of the ASADA Act or regulations made under the Act, to comply with the WADA Code or to assist the CEO of ASADA, the Australian Sports Drug Medical Advisory Committee ("**ASDMAC**"), the Anti-Doping Rule Violation Panel ("**ADRVP**") or the ASADA Advisory Group to perform their functions.

The AAA is specifically concerned with the proposed section 68B. Despite there being certain protections in the legislation, the CEO's power to disclose information, including personal information, remains broad. The CEO is given discretionary power to disclose information to legal and intelligence gathering agencies and to authorise entrusted persons who are also able to carry out this task.

These proposed changes appear to accommodate Article 22, new paragraph 2 of the WADA Code, which requires governments to put in place legislation, regulation, policies and administrative practices for cooperation and sharing of information between anti-doping organisations, whilst protecting against unauthorised disclosure.

However, the AAA has serious concerns with the implementation of these powers, particularly in relation to the rights to privacy for the athlete. Article 17 of the ICCPR states that *'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*'.

As stated in the submissions of the Commercial Bar Association of Victoria[8], the integrity of the CEO is paramount to ensure this provision does not work against Article 17. The broad discretionary power does not provide an adequate check against the possibility that the integrity of the CEO is compromised in any way.

The report into 'The Coercive Information-Gathering Powers of Government Agencies'[9] notes that personal information collected for a particular purpose can be used for another purpose only in the circumstances that it is authorised by law. The guideline states that a law authorises an agency to use information for another purpose if it *'clearly and specifically gives [the agency] a discretion to use the personal information for that purpose'*.[10] Therefore the consent of the athlete can be waived, despite the possibility that the information that is shared across government agencies could be extremely sensitive. This puts the athlete in an extremely vulnerable position.

Absence of Recognition of Collective Bargaining Agreements

As anti-doping regulation is a material issue in professional sports that affects the terms and conditions of employment of professional athletes, it is most effectively and appropriately dealt with through employment law. The governing bodies, employers, employees and athlete representatives should retain the right to collectively bargain tailored anti-doping codes to govern anti-doping matters at the level of each sport that take into account that sport's particular requirements. The Bill should provide for this.[11]

Conclusion

As currently drafted, the ASADA Bill is overly broad, grants ASADA virtually unfettered power, fails to adequately protect human rights and does not comply with principles of best practice with respect to Commonwealth coercive powers. More needs to be done to protect the rights of the athletes, who are the most important participants in the sporting landscape. Their real human interests must be protected, and the ASADA Bill does not provide an effective means to combat doping.

Instead, the AAA supports the notion of a collectively bargained regime for athletes and their sports. It would provide sport-specific measures that would not put a limit on the basic fundamental rights that are afforded to other members of society, but which are not recognised by the current or proposed anti-doping regime.

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[8] Commercial Bar Association of Victoria, Submission to Senate Rural and Regional Affairs and Transport Legislation Committee, *Inquiry into the Australian Sports Anti-Doping Authority Bill 2005* [and] *Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005*, 12 January 2006, accessed 29 September 2014.
[9] The Coercive Information-Gathering Powers of Government Agencies, *Administrative Review Council*, May 2008, accessed 29 September 2014.
[10] Ibid 64.
[11] B Schwab, 'Why Australian sports must cut ties with WADA', *The Sydney Morning Herald,* (online edition), 15 June 2014, accessed 29 September 2014.

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