Why ASADA's removal of Australian athletes' right to silence is arguably unlawful

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The Australian Sports Anti-Doping Authority (ASADA) was created by an Act of Parliament in 2006. It operates under the Australian Anti-Doping Authority Act 2006 and the Australian Anti-Doping Authority Regulations. Its purpose is to "develop a sporting culture in Australia that is free from doping, and where an athlete's performance is purely dependent on talent, determination, courage and honesty."[1]

This article examines the current controversy[2] surrounding Australian athletes' right to silence, which has recently been undermined by ASADA and the Australian Olympic Committee (AOC) as part of their efforts to further tackle doping in Austrailian sports.

Background: The response to doping scandals and the removal of athletes' right to silence

The ASADA Amendment Bill 2013

In February 2013, the Australian Crime Commission (ACC) released a report entitled 'Organised Crime and Drugs in Sport,'[3] which established links between sport, doping and organized crime. The report did not name specific cases, however several Australian Football League clubs, including Essendon, where implicated after the report was released.

Despite the report being criticised by the Australian Rule of Law Institute,[4] it resulted in a push by the Australian public, including sportspeople and lawmakers, to expand ASADA's legislative powers to investigate doping. The push gained traction and, in February 2013, The ASADA Amendment Bill was drawn up. Among other provisions, the draft bill initially included a clause removing athletes'

right to silence and privilege against self-incrimination.

This proved highly controversial. During debate, several Australian legal organizations voiced their concerns over the issue, including the Institute for Public Affairs, which noted:

> "*The Bill does not even allow athletes to refuse to answer questions on the basis their answers could be self-incriminatory. The privilege against self-incrimination is a basic legal right. There is no justification for removing it in these circumstances...the power to compel athletes to answer questions and produce documents that may assist ASADA in its investigations...are exercised without the need for warrants to be issued by the courts.*"[5]

As a result, Australian Parliament passed the Bill without the clause, reaffirming the right to silence for Australia's athletes.

Circumvention by contractual waiver: The new ASADA template for National Sports Organisations

In late 2015, however, an ASADA spokesperson explained in an ABC news story that:

> "*The Senate Committee that considered the ASADA Amendment Bill 2013 took into account evidence from witnesses that sports could abrogate the privilege against self-incrimination through their contractual arrangements with their athletes, and there is nothing in the ASADA Act that prevents this occurring.*"[6] (emphasis added by author)

This is exactly what happened. By January 1, 2015, most of Australia's national sporting organizations (NSOs) had updated their Anti-Doping Policies (ADPs) using a template provided by ASADA[7] that removed these rights, this time by contract.

By providing such a template for NSO's, ASADA could remove these rights, notwithstanding the lack of legislative authority, by implementing a "*contractual arrangement between the sport and members of the sport.*"[8]

The new Australian Olympic Committee (AOC) By-Law requiring self incrimination

In addition to the contractual wavier introduced by ASADA's ADP template, the AOC has also updated a By-Law in its Anti-Doping Code obliging Australian athletes to cooperate and assist ASADA even if to do so would incriminate them, or risk losing their spot on the Australian Olympic team:

> "*All Athletes must...co-operate with and assist ASADA, including by attending an interview to fully and truthfully answer questions; giving information; and producing documents, in an investigation being conducted by ASADA, even if to do so might tend to incriminate them or expose them to a penalty, sanction or other disciplinary measure.*"[9] (emphasis added).

The By-Law applies to all Australian Athletes, Athlete Support Personnel, and all National Federations. In particular, section 3.5 of the By-Law states that:

> "*Each National Federation must comply with the Code, International Standards, and this By-Law...[and] adopt and implement an anti-doping policy that conforms to the Code and this By-Law.*"

Sanction for non-compliance

Further, the By-Law creates an additional anti-doping sanction, stating those who do not comply:

> "*may be ineligible for selection to, or membership or continued membership of, any [Australian Olympic] Team...*".[10]

Several sports, including Australian Football and Rowing, that had not previously followed the ASADA ADP template on this issue, have now had to remove these common rights rather than risk disqualification from the Olympic Games.[11]

The Right to Silence and Privilege Against Self-Incrimination

An individual's right to silence and privilege against self-incrimination are protected in law at a number of levels.

Under customary international law, the International Covenant on Civil and Political Rights (ICCPR) affirmatively protects an individual's rights against self incrimination, stating that no person shall "*be compelled to testify against himself or to confess guilt.*"[12]

In compliance with international law, the WADA World Anti-Doping Code 2015 (WADA Code) at no point forces athletes to cooperate, nor does it force athletes to give up their right to silence or the privilege against self-incrimination.

The history of the privilege in common law is summarized in a law review article by Angela Roxas,[13] whereby she identifies the right dating back to the thirteenth century. It is interesting and important to know the root of the right, as it allows an appreciation of its foundation that remains relevant today:

> "*The privilege first developed in English common law courts as a response to the inquisitorial modes of procedure used by the ecclesiastical courts...[who] used the 'oath ex officio' (a religious oath made by the accused prior to questioning to answer truthfully all questions that might be asked) in prosecuting heretics who failed to conform their beliefs to the Church of England.*"[14]

"Common law lawyers found the oath 'repugnant to their political values'and sought to prohibit the use of the oath by relying on the Latin maxim meo tentur spisum prodere (no man is bound to accuse himself")."[15]

The Australian Rule of Law Institutes states:

> "*The right to remain silent when being investigated is a fundamental principle of our system of justice, alongside the presumption of innocence until proven guilty. It is the 'golden thread' through our common law system of criminal justice, as well as international human rights law, civil law, and Sharia law.*"[16]

It should be noted, however, in Australia these rights are not constitutionally guaranteed and there are numerous statutory abrogations of the right. For example, it is not available to witnesses testifying before a Royal Commission,[17] like those in regards to sexual molestation and organized crime.

Analysis

Is it lawful for ASADA and NSO's to require athletes to contractually waive their right to silence?

Unlike ASADA, which is a government entity, the AOC and NSOs are non-profit organizations. By implementing the change at the NSO level (and as described below the AOC level) there is an argument that AOC and ASADA have effectively circumvented Australian Parliament by going directly to the entities that control Olympic athletes.

Australian attorney Anthony Crocker spells out the legal issues. In particular, he finds fault with the ASADA ADP Template's introductory language, which is what would normally give an athlete the knowledge of the content in the ADP:

> "*The preamble to the template says that the ADP is in accordance with the ASADA Act and the regulations thereunder, but it is not.*"[18]

More specifically he argues:

> "*[ASADA] should not be preparing agreements whereby athletes contractually waive significant legal rights in circumstances where the Parliament has recently determined those rights should remain...Any contractual waiver must be transparent, particularly if the waiver is said to be necessary in the name of integrity.*"[19]

ASADA denied claims in late 2015 that it was overreaching, issuing a statement that reads in part:

> "*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…….*"[20]

However, Mr. Crocker provides legally reasoned and compelling arguments in his paper that:

> "*This purported contractual abandonment of these privileges may will be unenforceable....because it is contrary to the legislative provision or contrary to public policy, or because it is unconscionable or because ASADA had acted ultra vires (i.e. beyond their powers).*"[21]

Does the AOC's new By-law violate of the WADA Code by introducing a substantive change?

Article 23.2.2 states that the WADA Code:

> "*must be implemented by Signatories without substantive change...No additional provision may be added to a Signatory's rules which changes the effect of the Articles enumerated in this Article.*"[22]

The By-law arguably constitutes a substantive change to the WADA Code as it expressly removes legal rights of the athlete that otherwise subsist in law. It also creates an additional anti-doping penalty (i.e. removal from the Olympic Team), which arguably undermines the purpose and intent of the Code:

> "*These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way...are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights.*" (emphasis added)[23]

A WADA Code Comment includes specific guidance on this issue:

"*Those Articles of the Code which must be incorporated into each Anti-Doping Organization's rules without substantive change are set forth in Article 23.2.2. For example, it is critical for purposes of harmonization that all Signatories base their decisions on the same list of anti-doping rule violations, the same burdens of proof and impose the same Consequences for the same anti-doping rule violations.*" (emphasis added)[24]

CAS precedent regarding substantive changes to the Code

There is precedent from the Court of Arbitration for Sport (CAS) on the rule against national organisations making substantive changes to the Code.

In *United States Olympic Committee (USOC) v IOC*, the panel outlines the purpose of Art. 23.22 is:

> "*to ensure that Signatories do not introduce provisions that negate, contradict, or otherwise change the WADA Code articles that are mandatory...*" The panel finds that "*through unilateral action by the IOC...*" the rule in question (the Osaka Rule or Rule 45[25]) changed the effect of the WADA Code anti-doping regulations.[26]

CAS ruled against the British Olympic Association (BOA) on a similar issue, finding that the BOA's then By-Law that imposed a permanent eligibility to participate in the Olympics for an athlete with an anti-doping violation:

> "*had the effect of changing the sanctions and their effect under the Code...Therefore the BOA has breached its obligation not to add any provisions to its rules that change the effect of Article 10 WADA Code.*"[27]

The CAS Panels specifically addressed the idea that the autonomy of sporting organizations "*is not absolute.*"[28] In *WADA v BOA*, the CAS Panel explained that:

> "*When the BOA chose to become a Signatory to the WADA Code, it in fact gave up-like any other Signatory-some of its autonomy, including agreeing not to impose a sanction other than those imposed by Article 10 WADA Code.*"[29]

In Australia, the explanatory memorandum circulated by the Minister when introducing the updated ASADA Bill in 2013 to limit athletes' rights stated in part:

> "*This approach is necessary as anti-doping investigations are often significantly hampered or in some cases completely obstructed by a person's refusal to provide information if the person believes that they may implicate themselves in an anti-doping rule violation.*"[30]

However, the CAS panel in *WADA v BOA* specifically stated that NOCs, like the AOC, who have signed the WADA Code, have agreed to limit their autonomy by accepting it:

> "*The WADA Code ensures that in principle, any athlete in any sport will not be exposed to a lesser or greater sanction than any other athlete; rather they will be sanctioned equally...Any disharmony between different parties undermines the success of the fight against doping. For these good reasons NOCs and other Signatories agreed to limit their autonomy to act within their own spheres with respect to activities covered by the WADA Code.*"[31]

The correct procedure for modifying the Code

Article 23.7 indicates that WADA is responsible for modifications to the Code in collaboration with Athletes, stakeholders, and governments through a "*consultative process.*" Further, Article 23.7.3, provides for amendments, which:

> "*shall, after appropriate consultation, be approved by a two-thirds majority of the WADA Foundation Board including a majority of both the public sector and Olympic Movement members casting votes.*"

The CAS Panel, which was the same for both cases above, reiterated that the awards:

> "*both cases simply reflect the fact that the international anti-doping movement has recognized the crucial importance of a worldwide harmonized and consistent fight against doping in sport, and it has agreed (in Article 23.2.2 WADA Code) to comply with such a principle, without any substantial deviation in any direction...the BOA and the IOC are free, as are others, to persuade other stakeholders that an additional sanction of inability to compete in the Olympic Games may be a proportionate, appropriate sanction of an anti-doping offense and may therefore form part of a revised WADA Code.*"[32]

Opinion

There are three important points that the author would like to make.

Violation of the WADA Code

The first is that by abrogating the privilege against self incrimination, changing the procedural rules for Australian athletes and adding as a consequence of non-compliance possible removal from the Olympic Team, there is strong argument that the AOC and ASADA have violated the internationally agreed upon intent, purpose and rules of the WADA Code.

There is a process by which the WADA Code is amended (Section 23.7). It involves consultation with athletes. It involves international consensus. In contrast, the AOC and ASADA have unilaterally implemented changes to the rules specifically for Australian athletes.

In this regard, it is also important to note the pressure being placed on NSO's to introduce ASADA's ADP template.

Rowing Australia originally adopted an adapted version of the ADP template to keep athletes' rights intact. Their ADP stated:

> "*that the persons who are bound to cooperate with ASADA shall do so 'in accordance with the ASADA Act and the ASADA Regulations.' The effect of this provision was that the privileges were retained.*"[33]

But according to his own admission in an ABC News report, they received a call from the head of AOC, Mr. John Coates, who said:

> "'*Yeah, I rang them. I said do you know you didn't do this, and they got the shock of their life,' he said. 'It was a personal embarrassment to me because I'm a former president of that body and a former honorary secretary.' It was put down to 'administrative error*'".[34]

Under international sports and customary law, Rowing Australian and other Australian NSOs should be free to write their own ADP that complies with the WADA Code and is supported by the intent of Australian Parliament without being threatened with expulsion from the Olympic Games.

If they are not allowed to do this, then in the author's view WADA must now step in to allow Australian athletes and their NSOs to choose how to contract around these rights and not be subject to additional anti-doping penalties that violate the WADA Code.

Subversion of the rule of law

The second point is that, in addition to violating the WADA Code, ASADA and the AOC have also arguably subverted the rule of law by abrogating athletes' rights to silence and privilege against self incrimination.

If key rights are to be abrogated, it must be by way of due legal process – namely legislative backing - rather than by backdoor contractual waiver backed by coercive punishment. An abrogation of fundamental legal and human rights will only weaken the fight against doping, as it risks threatening the legal integrity of the very system it is trying to protect.

The view of the athlete

Finally, to really appreciate the points above, one must consider the perspective of those affected. In this regard, the author speaks with experience as an ex-professional and Olympic athlete.

Australia's athletes have not been given a choice about abrogating their common law rights, and in some cases, are unknowingly contracting them away. They are simply required to sign the ADPs for their sport, and as Mr. Crocker argues, the preambles to the ADPs are "*simply false and misleading.*"

What is worse is that, even if athletes are fully aware of what it is they are signing, now that the AOC has hinged compliance with participation in the Olympics, athletes who might have questioned giving such consent are instead coerced into compliance.

An AOC spokesperson told ABC News that clean athletes should not worry about what is happening:

> "'*We introduced the rule to protect clean athletes,' the spokesperson said. 'Without the power to compel athletes and officials to answer questions relating to doping those who are cheating are less likely to be exposed. The AOC has a zero tolerance approach to doping in sport and we make no apology for our tough stance, a stance that has full support of clean athletes. If you are adhering to the rules, if you are clean, you have nothing to fear by answering questions.*"[35]

In the author's view, this is an overly simplistic way of selling these changes to Australia's athletes. In the lead up to Rio 2016, Olympic athletes are relatively powerless to oppose the changes implemented by ASADA and the AOC. In this author's view, standing up and speaking out on this issue for any athlete or sport wanting to represent Australia this summer is just not a realistic option. As an Olympic athlete who read every page of the athlete agreements I had to sign during my career, I can state that no matter what was in the document there was no way I wouldn't have signed it.

On the other hand, the Australian Athletes' Alliance (AAA), a union representing the top 8 professional (and notably non-Olympic) sports, is led by Ian Prendergast who said that:

> "*while athletes are committed to clean sport, they believe in retaining fundamental legal rights. It is not the case they are prepared to give up all of their fundamental rights others in society take for granted in the purported aim of achieving that objective. The right against self incrimination is an important fundamental right that must be protected for athletes, which Parliament has made clear.*"[36]

As representatives of over 3500 of Australia's elite athletes the AAA arguably speaks not only for its members but those Olympic athletes who cannot do so as the consequence, not competing in Rio, would be unacceptable to any Olympic athlete.

Conclusion

While the author acknowledges that the AOC and ASADA's actions have been implemented in what is undeniably a worthy fight against the scourge of doping; it remains unacceptable that it has come at the expense of violating the Code and subverting the rule of law. Such points must take precedent even over upholding the integrity of sport.

In sum what started as an attempt to fight doping in Australian sport has risen to the level of arguably violating not just common law, but also the World Anti-Doping Code (WADA Code) and international sports law, and undermining the rights of the very same athletes they are trying to protect.

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