



Australian Government
Department of Health

Senate Community Affairs Legislation Committee

Australian Sports Anti-Doping Authority Amendment Bill 2014

The Department of Health has portfolio responsibility for policy oversight of the Australian Sports Anti-Doping Authority Act 2006 (ASADA Act).

The objective of the Australian Sports Anti-Doping Authority Amendment Bill 2014 is to align Australia's anti-doping arrangements with the revised World Anti-Doping Code (Code), which is due to come into force on 1 January 2015. By aligning with the Code the Government seeks to ensure our athletes compete under the same set of anti-doping arrangements as the rest of the world.

Introduction

It is widely acknowledged sport plays an important role in Australian society, improving the lives of individuals and building communities.

The most effective way to ensure Australian sport is played in an environment free from doping is to ensure rigorous and effective anti-doping arrangements are in place. Such arrangements seek to protect the health and wellbeing of individual participants and preserve the important values sport encompasses such as honesty, fair play and dedication. As Australians compete internationally in a wide range of sports, and Australia hosts numerous major sporting events in which international athletes compete, it is essential our national arrangements fully align with international anti-doping framework.

Australia's International Anti-Doping Obligations

Australia's current anti-doping arrangements give effect to our international obligations under the UNESCO International Convention against Doping in Sport (UNESCO Convention). Chiefly, the UNESCO Convention requires States Parties to implement arrangements that are consistent with the principles of the Code.

The Code is an international agreement, administered by the World Anti-Doping Agency (WADA), which provides the framework for harmonised anti-doping policies, rules and regulations within sport organisations and among governments. A fundamental purpose of the Code is to protect the rights of the clean athlete. The Code specifies:

- acts that constitute an anti-doping rule violation (ADRV);
- the framework for listing substances and methods prohibited from sport;
- sanctions that apply to individuals for committing ADRVs;

- procedures for managing a positive result from testing; and
- an individual's right to procedural fairness, including a fair hearing.

The Code is adopted by Signatories including the International Olympic Committee, International Paralympic Committee, national Olympic committees, international sporting federations, major event organisers, and national anti-doping organisations.

National Sporting Organisations (NSOs) submit to the Code either by being a signatory to the Code, or membership of an international sporting federation which itself is a signatory to the Code. Athletes and athlete support personnel become bound by the Code through their membership of their sport, normally through signing a membership form or event entry form by which they agree to be bound by the anti-doping policy of the sport.

The Australian Sports Anti-Doping Authority (ASADA) is the Australian Government agency responsible for implementing Code-compliant policies and activities in Australia. ASADA's powers and functions are specified under the ASADA Act and the Australian Sports Anti-Doping Authority Regulations 2006, including the National Anti-Doping (NAD) Scheme. The NAD Scheme underpins ASADA's implementation of a co-ordinated Code-compliant anti-doping programme encompassing:

- a) **deterrence** – programmes that increase awareness and educate athletes and support persons (e.g. coach; trainer; manager, official) on doping and the operation of Australia's anti-doping rules;
- b) **detection** – the coordinated implementation of a programme to catch doping cheats, incorporating testing, non-analytical investigations and intelligence gathering; and
- c) **enforcement** – management of cases involving possible breaches of ADRVs and the presentation of these cases at hearings before the tribunal of the relevant sport or the Court of Arbitration for Sport (CAS).

As a condition of receiving Australian Government funding, Australia's NSOs are required to have and operate an anti-doping policy that complies with the Code, and acknowledges ASADA's powers and functions under the ASADA Act and NAD Scheme. All NSO anti-doping policies replicate essential parts of the Code (for example, Article 2 of the Code, which sets out ADRVs), such that when ASADA is exercising its legislative functions in relation to ADRVs, it is also enforcing the anti-doping policy of the relevant NSO.

The commission of a doping violation is not a criminal offence. Penalties (sanctions) for an ADRV may involve bans from all sport, disqualification of results and the loss of prizemoney. Depending on terms, sanctioned athletes or support persons may also have to pay back money obtained through contractual arrangements.

Review of the Code – Development of Revisions

The Code is intended to be a living document, and is expected to be reviewed and updated from time to time to properly equip anti-doping authorities to meet emerging challenges. Accordingly, in late-2011, WADA initiated a comprehensive review of the Code.

This review included an extensive three-stage consultation process allowing all members of the international anti-doping community to contribute views on changes required to ensure the Code remains an effective mechanism for countering modern doping practices. WADA received over 300 submissions and 4,000 individual comments across the consultation process.

The Australian Government made a submission in each stage of the consultation process, identifying several areas in which the Code might be enhanced to better address evolving doping threats. In developing the Australian Government submission, consultation fora were held to allow Australia's national sporting organisations, athlete bodies and relevant government agencies to offer views on the operation of the Code and desired changes. WADA Director-General, David Howman, also travelled to Australia on two occasions to meet with Australian stakeholders.

While the Government provided submissions during the three consultation phases, Australian stakeholders could also lodge own submissions directly with WADA.

The revisions to the Code arising from the review were adopted by the international anti-doping community at the World Conference on Doping in Sport in Johannesburg, South Africa on 15 November 2013. The key principles that underpinned the major revisions included:

- the imposition of longer bans from sport for people involved in intentional or more serious doping
 - for example, the sanction for a first violation involving non-specified substances such as steroids may be a period of ineligibility of up to four years. An individual who commits a serious doping violation would therefore miss at least one Olympics Games;
- emphasising the principles of proportionality and procedural fairness in the administration of anti-doping arrangements
 - one of the key themes throughout the Code Review was the need to protect the rights of athletes and ensure procedural fairness. Accordingly, WADA engaged Jean-Paul Costa, a former President of the European Court of Human Rights, to provide advice on the international human rights aspects of the proposed revisions to the Code throughout the review process;
- more flexibility in sanctioning under some circumstances
 - for example, there may be flexibility in sanctioning a person who inadvertently commits a violation due to use of a contaminated or mislabelled a nutritional supplement;

- increased focus on addressing doping that is facilitated by an athlete's support team, including the introduction of a new ADRV of 'prohibited association'
 - in its Report on Organised Crime and Drugs in Sport¹, the Australian Crime Commission (ACC) highlighted the involvement of sports scientists, doctors, pharmacists, criminal gangs and anti-ageing clinics in the supply of performance and image enhancing drugs;
- elevating the importance of investigations and intelligence gathering in the detection of a doping violation
 - with doping becoming increasingly sophisticated, anti-doping authorities need better tools for detecting ADRVs. The Code has been revised to recognise the role investigations and intelligence gathering can play in the detection of doping. It encourages the adoption of an integrated strategy of intelligence gathering, investigations and analytical testing; and
- placing more emphasis on 'smart test' distribution planning and menus for sample analysis (testing)
 - this will calibrate the test planning with the drugs more likely to be prevalent in a particular sport or discipline – for example, Erythropoietin (EPO) for endurance sports.

A number of revisions to the Code refine certain rules, improve the wording of provisions, and clarify the meaning of individual clauses in the Code.

Stakeholders are required to align their anti-doping policies to reflect the revised Code by 1 January 2015. Under Article 4 of the UNESCO Convention, the Australian Government is obliged to implement arrangements that are consistent with the principles of the Code. Given that the ASADA Act and associated Regulations already gives effect to the operation of Code-compliant anti-doping arrangements, it is appropriate to amend the Act and Regulations to reflect the revised Code.

While most of the changes to give effect to the revised Code will need to be made to the ASADA Regulations and to anti-doping policies of NSOs, some amendments to the ASADA Act are required to ensure the Regulations can give effect to the changes in the Code.

Implications if Australia's Arrangements are not updated

If the amendments contained in the Bill are not enacted, Australia's anti-doping arrangements will not reflect the revised Code and will be deemed by WADA as non-compliant. As a consequence, Australia's anti-doping provisions would, to varying degrees, fall out of step with global anti-doping arrangements. Practical difficulties that may result include:

¹ Australian Crime Commission (2013), *'Organised Crime and Drugs in Sport: New Generation Performance and Image Enhancing Drugs and Organised Criminal Involvement in their use in Professional Sport'*, Report released on 7 February 2013, Commonwealth of Australia.

- NSOs would be faced with differing obligations between their International Federation and Australian anti-doping legislation, including different anti-doping violations, sanctions, and athlete reporting requirements;
- the ASADA Chief Executive Officer (CEO) would be required to consider and approve a sport's anti-doping policy, but would be denied jurisdiction to enforce aspects of those policies;
- the independent Anti-Doping Rule Violation Panel (Panel) would be required to consider possible violations against a different framework to that operated by NSOs; and
- it would disadvantage Australia's competitiveness, or even call into question Australia's eligibility, to host major international sporting events.

Key Amendments Contained in the Bill

Prohibited Association

The Bill introduces the new 'prohibited association' ADRV. This violation addresses past experience whereby athlete support personnel, of whom some may operate outside the umbrella of a national sporting organisation's anti-doping policy, may facilitate systematic doping regimes.

The Bill provides for the making of regulations that enable the ASADA CEO to implement this new ADRV. It will become an ADRV for an athlete to associate in a professional or sports-related capacity with an athlete support person who is serving a period of ineligibility, or a person who has been convicted of a crime that otherwise would constitute a doping violation or sanctioned for professional misconduct.

Several protections are offered to athletes and athlete support persons in the specification of this ADRV. Any association subject to sanction must be of a professional or sports-related nature, and an individual must be warned about a particular association and potential consequences should the association continue before an ADRV can be asserted.

The prohibited person is also afforded an opportunity to state their case as to why they should not be considered to be 'prohibited'. Decisions made by the ASADA CEO on these matters will always be reviewed and scrutinised by the Panel should a possible ADRV come forward.

The Australian Government abides by the International Covenant on Civil and Political Rights (ICCPR). Article 22 of the ICCPR relates to the freedom of association. To ensure this ADRV does not impinge on international human rights obligations under the ICCPR, it is proposed a clause acknowledging the operation of Article 22 will be included in the ASADA Regulations.

Extending the Limitations Period

The Code has extended the period within which an ADRV process must commence from the time of commission from eight to ten years. The Bill simply amends the Act to reflect the revision to the Code. As recent cases have shown, it can take a significant amount of time to uncover sophisticated doping programmes. This change improves the scope for anti-doping agencies to uncover such programmes and greater scope for the

retrospective analysis of stored samples as new technologies to identify prohibited substances are developed.

Australian Sports Drug Medical Advisory Committee

Under the revised Code anti-doping organisations are explicitly required to provide for reviews of decisions on Therapeutic Use Exemption (TUE) applications. While there is a clear authority for the Australian Sports Drug Medical Advisory Committee (ASDMAC) to approve TUE applications in Australia, the only mechanism available to athletes to dispute ASDMAC decisions is through appeal to WADA.

The Bill provides for an expansion of the ASDMAC membership so the responsible Minister may appoint three people with the sole function of reviewing ASDMAC decisions.

The Bill also seeks to enshrine the new requirement that at least one member of ASDMAC should have experience in the care and treatment of athletes with an impairment. While the current ASDMAC membership meets this requirement, it is appropriate to legislate to make this a mandatory consideration.

Information Sharing

The revised Code emphasises the need for effective information flows between government agencies, sporting bodies and anti-doping organisations. The Bill enhances and simplifies the information sharing provisions in the ASADA Act to improve the exchange of information between relevant stakeholders to assist in identifying and substantiating doping violations.

Violations List

Consistent with public reporting requirements in the Code, the introduction of a 'Violation List' will enable ASADA to publicly record those found to have committed an ADRV. It aims to provide clarity and transparency to the ADRV process. However, the ASADA CEO will have the discretion to exclude from the Violation List an athlete or athlete support person found to have committed an ADRV in certain circumstances, for example, a first violation by a minor.

Public Disclosure of Information

Article 14.3.5 of the Code provides that no anti-doping organisation shall publicly comment on the specific facts of a pending case, except in response to public comments attributed to an athlete, other person or their representatives. The Act does not currently recognise this exception. The proposed amendment will allow ASADA to correct or clarify the facts as appropriate, if an athlete or support person publicly discloses information about their case.

Removing the Register of Findings and Replacing the Word 'Findings' with 'Assertions'

The removal of the Register of Findings (Register) from the Act will amend the existing process whereby the Panel makes an entry onto the Register whenever it finds that it is possible that an ADRV has been committed. The operation of the Register midway through the ADRV process creates unnecessary complexity and confusion about the

Panel and status of Panel outcomes, including misapprehension the Panel is a final hearing body or tribunal. Rather than making a finding, the Panel will make an assertion of an ADRV to the CEO.

Removing the Register does not remove a person's right to appeals to the Administrative Appeals Tribunal. This right will be preserved by linking it to the assertion.

Other

Other amendments in the Bill update definitions to align with the revised Code. The definition for 'recognised laboratory' has been added to reflect the accreditation process specified in the International Standard for Laboratories, and the definition of 'international standard' and 'registered medical practitioner' have been updated. The reference to 'safety checking service' is removed to better reflect current practice. The definition of 'athlete' is amended to reflect the definition in the revised Code.

Conclusion

The fight against doping in sport continues to get tougher. The key factor in addressing doping across the world is a strong commitment by the international sporting movement and governments to work together to implement harmonised anti-doping programmes that are robust, effective and fair. This Bill ensures Australia meets its international obligations to work with sports to operate a consistent set of anti-doping arrangements that contribute to a safe and fair sporting environment, safeguard athlete health and continue to protect the fundamental values of sport.

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