



Australian Sports Anti-Doping Authority Bill 2005

Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005

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Law and Bills Digest Section

Contents

Purpose.....	1
Background.....	2
International developments in relation to combating drugs in sport.....	2
The Council of Europe’s Anti-Doping Convention.....	2
The World Anti-Doping Code	2
The Copenhagen Declaration on Doping in Sport.....	3
The UNESCO International Convention against Doping in Sport.....	4
Australian Compliance with the Code	4
The ASDA and Sporting Organisations.....	4
Investigation of allegations of anti-doping violations by the Australian cycling team.....	5
Introduction.....	5
The Anderson Inquiry	6
Discussion Paper and Responses	7
Main Provisions	8
The ASADA Bill.....	8
Part 1 - Introduction.....	8
Part 2 – National Anti-Doping Scheme	8

Part 3 – ASADA’s establishment, functions, powers and liabilities	10
Part 4 – ASADA’s constitution and membership	11
Part 5 – Decision-making and delegation by ASADA	12
Part 7- Australian Sports Drug Medical Advisory Committee (ASDMAC)	13
Part 8 – Information Management	13
Part 9 – Other matters	15
Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005 (the Transitional Bill)	16
Schedule 1 – Consequential Amendments.....	16
Schedule 2 – Transitional Provisions.....	16
Concluding Comments.....	17
Application of the ASADA Bill to athletes and support persons	17
Athletes’ rights.....	18
Constitutional Issues	19
The corporations power	19
For purposes related to money appropriated for the purposes of the Commonwealth	20
Timing of the establishment of the ASADA – Melbourne Commonwealth Games	20
Endnotes.....	21

Australian Sports Anti-Doping Authority Bill 2005

Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005

Date Introduced: 7 December 2005

House: House of Representatives

Portfolio: Arts and Sport

Commencement: Sections 3-79 of the Australian Sports Anti-Doping Authority Bill 2005 (the ASADA Bill) commence on a day to be fixed by Proclamation or, if this does not occur within six months of Royal Assent, on the first day after that period.

Schedules 1 and 2 of the Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005 (the Transitional Bill) commence at the same time section 20 of the ASADA Bill (which establishes the Australian Sports Anti-Doping Authority) commences.

Purpose

The purpose of the Australian Sports Anti-Doping Authority Bill 2005 (the ASADA Bill) is to establish a new organisation, the Australian Sports Anti-Doping Authority (the ASADA), to lead the Government's policy measures against drugs in sport. The creation of the ASADA was a key recommendation of the 2004 Anderson inquiry into the use of drugs by Australia's track cycling team (see below).

The ASADA will take over the functions currently performed by the Australian Sports Drug Agency (the ASDA). The ASADA will also carry out functions in relation to the investigation of doping allegations and the presentation of anti-doping violation cases at hearings before either the [Court of Arbitration for Sport](#) or other sports tribunals.¹

The ASADA will carry out these functions within the context of the 'National Anti-Doping Scheme' (or NAD Scheme), which is also established by the ASADA Bill.

The NAD Scheme implements Australia's international obligations in relation to anti-doping violations in sport, by setting out the anti-doping rules applicable to athletes and support persons and authorising the ASADA to perform sample collection, sample testing, investigation of anti-doping violations and to present the findings of those investigations to sporting tribunals.

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Background

International developments in relation to combating drugs in sport

The [Bills Digest](#) for the *Australian Sports Drug Agency Amendment Bill 1998* provides a background to the issue of drugs in sport and the establishment of ASDA by the *Australian Sports Drug Agency Act 1990* (ASDA Act).²

The Council of Europe's Anti-Doping Convention³

The [Council of Europe Anti-Doping Convention](#) was signed on the 16 November 1989 in Strasbourg, in the wake of increasing public awareness of sports doping as a result of incidents at the 1988 Seoul Olympics and in the 1988 *Tour de France*.

Recognising that sports organisations were developing an internationally coordinated approach to the issue of drugs in sport, the Council of Europe's Anti-Doping Convention was the first international instrument aimed at international harmonisation of the approach to anti-doping violations by governments and public authorities. The Convention was open to signature by non-member States of the Council of Europe. The Convention entered into force in Australia on 1 December 1994.

The World Anti-Doping Code

The [World Anti-Doping Agency](#) (WADA) was established in 1999 to coordinate and harmonise anti-doping efforts across sport at an international level.⁴

In March 2003, WADA released the [World Anti-Doping Code](#) (the Code). The Code provides a framework for sporting organisations and public authorities to establish anti-doping policies, rules and regulations.⁵

The first part of the Code sets out specific anti-doping rules and policies which signatories to the Code are responsible for adopting, implementing and enforcing within their authority. The Code sets out eight anti-doping violations (Article 2):

- the presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen
- use or attempted use of a prohibited substance or a prohibited method
- refusing or failing without compelling justification to submit to sample collection after notification as authorised in applicable anti-doping rule or otherwise evading sample collection
- violation of applicable requirements regarding athlete availability for out-of-competition testing including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules

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- tampering or attempting to tamper with any part of doping control
- possession of prohibited substance and methods
- trafficking in any prohibited substance or prohibited method, and
- administration or attempted administration of a prohibited substance or prohibited method to any athlete or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.

Prohibited substances and methods are set out in a 'Prohibited List', which is devised by WADA (see Article 4 of the Code). The Prohibited List is revised annually.

Article 8 of the Code provides athletes with a right to a fair hearing, with a hearing process that gives a timely hearing, by a fair and impartial body, with the athlete represented by Counsel (at the athlete's expense). The athlete is also to be notified in a timely manner of the alleged anti-doping violation, and to be accorded a right to respond to the allegation and the consequences.

Sanctions for anti-doping violations are set out in Article 10 of the Code.

Article 20 of the Code sets out additional rights and responsibilities for signatories to the Code. Specifically, national anti-doping organisations are required to adopt and implement anti-doping rules and policies which conform with the Code.

As at 20 December 2005 the Code had been accepted by:

- all 202 national Olympic committees
- all 19 national Commonwealth Games associations
- 68 national anti-doping organisations (including the Australian Sports Commission and the ASDA)⁶
- 159 of the 161 national Paralympic committees, and
- 10 major games associations (such as the International Olympics Committee and the Commonwealth Games Federation)

as well as other international sporting organisations.

The Copenhagen Declaration on Doping in Sport

Concurrently with the release of the Code, 80 States (including Australia), and a variety of other organisations such as the International Olympic Committee and the International Paralympic Committee, signed the [Copenhagen Declaration on Doping in Sport](#) (Copenhagen Declaration). The Copenhagen Declaration is a non-binding agreement, which by becoming a signatory to, governments can demonstrate an intention to recognise,

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support and implement the Code. The Copenhagen Declaration also commits signatories to developing a legally binding agreement.⁷

The UNESCO International Convention against Doping in Sport

In October 2005 the United Nations Education, Science and Cultural Organisation (UNESCO) adopted the [International Convention against Doping in Sport](#) (the UNESCO Convention) a binding agreement to implement the Code.⁸ Australia is a signatory to the UNESCO Convention. The [Joint Standing Committee on Treaties](#) has recommended that Australia take binding treaty action in relation to the UNESCO Convention.⁹

Australian Compliance with the Code

The ASDA and Sporting Organisations

The Government's 2004 election policy, [Building Australian Communities through Sport](#), sets out a continued commitment to drug-free sport, through:

- membership on the board, executive and subcommittees of WADA
- contribution to the global harmonisation of anti-doping policies and practices, and
- a requirement on sporting organisations to implement anti doping policies and practices consistent with the Code, as a condition for Federal Government funding.

Pursuant to this last point, in [July 2005](#), the Australian Football League (AFL) was the last major sporting code in Australia to become Code compliant.¹⁰

Following the signing of the Code and the Copenhagen Declaration, the ASDA Act was amended to allow ASDA to carry out particular anti-doping functions in order that Australia would comply with the Code. See the [Explanatory Memorandum](#) and the [Bills Digest](#) for the *Australian Sports Drug Agency Amendment Bill 2004*.¹¹

However, those amendments did not allow ASDA to examine all anti-doping rule violations listed in the Code. Specifically, ASDA has the power to examine anti-doping violations in relation to:

- the presence of an prohibited substance or its metabolites or markers in an athlete's bodily specimen
- refusing or failing without compelling justification to submit to sample collection after notification as authorised in an applicable anti-doping rule or otherwise evading sample collection
- violation of applicable requirements regarding athlete availability for out-of-competition testing including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules, and

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- tampering or attempting to tamper with any part of doping control.

Other anti-doping violations, such as possession of, and trafficking in a prohibited substance or method, are dealt with on a case-by-case basis, and normally involve an investigation by an independent investigator appointed by the sporting organisation concerned.¹² Therefore, the ASDA's functions are focussed on the testing, education and advocacy as opposed to the investigation of violations.

There has been criticism both in [Parliament](#) and the [media](#) over the way in which sports organisations and the Australian Sports Commission (also known as the ASC) have handled investigations into allegations of anti-doping violations.¹³

The investigation which led to the Government considering an independent investigation body (and which received extensive media coverage in the lead up to the 2004 Athens Olympics) was the inquiry into alleged anti-doping violations by the Australian cycling team.

Investigation of allegations of anti-doping violations by the Australian cycling team¹⁴

Introduction

In December 2003 a plastic bucket of syringes, Vitamin B and C vials, Equigen vials and other injecting material and an empty box of 'Testicomp' were found in the room of cyclist Mark French at the Australian Institute of Sport (AIS) facility in Del Monte in South Australia.¹⁵ Mr French did not dispute that he owned most of the material in the plastic bucket and the Testicomp package.

A preliminary internal investigation was conducted by a senior manager within the Australian Institute of Sport. During the course of that investigation Mr French made allegations of a clandestine drug-culture amongst (unnamed) elite cyclists, and Mr French's father made allegations that the AIS turned a 'blind eye' to the drugs culture at the AIS facility at Del Monte.

Following this preliminary investigation, the Australian Sports Commission and Cycling Australia instigated an independent investigation of the incident by Mr Justin Stanwix on 19 December 2003.¹⁶ Again, Mr French made allegations of drug use by other unnamed members of the AIS cycling team, and that there was a culture of 'permissiveness' in respect of doping at the Del Monte facility.

As a result of Mr Stanwix's investigation, the Australian Sports Commission and Cycling Australia sought a determination from the Court of Arbitration for Sport as to whether Mr French had violated the Australian Sports Commission's and Cycling Australia's anti-doping policies. The proceedings were listed as a 'non urgent' matter before the Court.

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In May 2004, in evidence to the Court, Mr French named 5 other cyclists who allegedly participated in 'group' injecting sessions at the Del Monte facility.

The Court found Mr French guilty of anti-doping offences. Mr French was banned from competition for 2 years and fined \$1000.

On 18 June 2004, Senator Faulkner raised the matter in [Parliament](#) criticising the conduct of the investigations and calling for the establishment of an investigation and determination process independent of the Australian Sports Commission. Senator Faulkner also raised concerns that no further investigation had been carried out in relation to the 5 cyclists named by Mr French, particularly in light of the fact that 2 of the cyclists named were considered potential Olympic gold medallists at the upcoming Athens Olympics.¹⁷

The Anderson Inquiry

The Australian Sports Commission and Cycling Australia appointed the Honourable Robert Anderson, QC, to [investigate](#) Mr French's allegations of doping within the AIS track sprint cycling program and to assess the effectiveness of the actions by Cycling Australia and the Australian Sports Commission following the discovery of the injecting material in December 2003.

In his [Second Stage Report](#), Justice Anderson made the following observations:¹⁸

- 'I must say that I believe the preliminary [internal] investigation tried to do too much, having regard for its objective, which was only to see if there was sufficient credible evidence to suspend Mr French's AIS scholarship and to warrant a formal independent investigation'
- 'Mr Stanwick conducted his investigation with reasonable expedition especially bearing in mind that [the Stanwick] investigation straddled the Christmas New Year period'
- 'I do not think it was appropriate to classify the matter [before the Court of Arbitration for Sport] as not urgent ... This was a serious doping case and the suspension of his AIS scholarship entitlements signified that Mr French had a case to answer; furthermore there was at least some reason to believe that Mr French's allegations involving other cyclists might eventually impact on Olympic selection which was only a few months away' and
- 'On balance and with the benefit of hindsight I think Cycling Australia and the Australian Sports Commission should have instructed their solicitors to proceed with the case more quickly or urgently and the solicitors should have done so. Whether the Court of Arbitration for Sport could have given the case more urgent treatment I do not know, but the attempt should have been made'.

One of Justice Anderson's key recommendations with respect to the investigation of doping offences in Australian sport was:

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that there should be a body which is quite independent of the AIS and of the Australian Sports Commission and of the sporting bodies themselves with the power and duty to investigate suspected infractions such as substance abuse and to carry the prosecution of persons against whom evidence is obtained.¹⁹

Discussion Paper and Responses

At the time of tabling of the Second Stage Inquiry of the Anderson Report the Minister for Sport and the Arts announced that the Government was releasing a [discussion paper](#) for public comment on a new Sports Doping Investigation Board.²⁰

That discussion paper noted that ‘recent cases ...had highlighted a need for an independent and transparent process to investigate doping in sport’.

The paper noted the following problems with the current ‘sport runs sport’ model of investigating allegations of anti-doping violations, and reasons why the Australian Government should be involved in investigations of anti-doping violations:

- some sporting organisations may not be in a position to obtain legal expertise to assist them investigating and preparing a case for hearing
- there is a risk that individuals or organisations may be sued by people being investigated
- there is the potential for real or perceived conflicts of interest where sports organisations investigate possible breaches of codes and allegations of wrongdoing, and²¹
- because of the turnover of office holders in sporting organisations, it may be difficult for a particular sport to build up expertise in handling anti-doping violation matters.

The discussion paper proposed a model where a ‘Sport Doping Investigation Board’ would investigate those anti-doping violations which are not covered by the ASDA and also take the cases to hearing (whether in the Court of Arbitration in Sport, or other sporting tribunal). The Board would not be responsible for issuing anti-doping infraction notices or imposing penalties, but would notify the relevant sporting organisations of the outcome of its investigations.

The model for the Sport Doping Investigation Board presented in the discussion paper is in part reflected in the model for the ASADA proposed by the current Bill. However, it appears that at the time of the release of the discussion paper, the Government intended that ASDA would remain in existence performing its current functions in relation to four of the anti-doping violations listed in the Code.

The discussion paper posed a series of questions, seeking responses from sporting organisations and individuals on certain aspects of the proposed model.

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The responses to the discussion paper, while generally in favour of establishing an independent body to investigate and prosecute anti-doping violations, also raised the following concerns:

- whether the role should be carried out by a body such as the Board, or whether an individual acting as an Ombudsman was a more appropriate means of carrying out the role²²
- the involvement of the investigative body in prosecution of anti-doping violations²³
- the need for an equivalently funded support/ defence organisation for athletes facing investigation and prosecution for anti-doping violations²⁴
- the potential overlap in roles between ASDA and the Board,²⁵ and
- the level of complexity involved in having a Board cover Olympic and non-Olympic sports, which have different tribunal systems.²⁶

Main Provisions

The ASADA Bill

Part 1 - Introduction

Clause 4 sets out the definitions to be used in interpreting the ASADA Bill. In addition to the new definitions of ‘athlete’ and ‘support person’ discussed above, there are other changes in definitions for words which are currently used in the ASDA Act. These changes include expanded definitions of *doping method* and *drug* to include methods and substances prohibited by the Code and the UNESCO Convention (if ratified by Australia).

Part 2 – National Anti-Doping Scheme

Clause 9 provides that regulations must be made for a National Anti-Doping Scheme (or NAD Scheme – defined in **clause 4**). The NAD Scheme must be about the following:

- the Anti-Doping Convention done at Strasbourg on 16 November 1989
- the UNESCO Convention (if ratified)
- matters ancillary or incidental to those Conventions.

The NAD Scheme can be amended by legislative instrument, subject to the limitations set out in **clause 10**. The limitations require that the amended NAD Scheme is about any of the following matters:

- the implementation of the Anti-Doping Convention done at Strasbourg on 16 November 1989, or
- the UNESCO Convention (once ratified).

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Proposed amendments to the NAD Scheme are subject to public consultation (**clause 11**).

Clause 12 makes provision for the NAD Scheme to apply or incorporate relevant international anti-doping instruments.

Clause 13 sets out an extensive list of mandatory content for the NAD Scheme. The NAD Scheme must set out the classes of athletes and support people subject to the NAD Scheme and the anti-doping rules applicable to those athletes and their support persons.

In addition, the NAD Scheme must authorise the ASADA to perform the following functions:

- requesting that an athlete keep the ASADA informed of where the athlete can be found
- requesting athletes to provide samples to ASADA
- testing, or arranging testing, of athlete's samples
- investigating potential violations of the anti-doping rules
- making findings in relation to investigations
- establishing and maintaining a register of findings in relation to investigations (Register)
- notifying athletes of findings of investigations and the ASADA's recommendations of consequences of those findings
- presenting the findings of investigations and the ASADA's recommendations of consequences of those findings to the Court of Arbitration for Sport and other sporting tribunals
- publishing information on the register of findings in relation to investigations.

Clause 14 deals with the rights of athletes and support persons in relation to the NAD Scheme.

An athlete has the right to be notified of the consequences of failing to comply with the ASADA's request either for the athlete to provide a sample or to keep the ASADA informed of the athlete's whereabouts.

Where the ASADA proposes to enter an athlete or support person's name on the Register, the person has the right:

- to be notified of that proposal and
- to make submissions on the proposal.

Athletes and support persons have a right of appeal to the Administrative Appeals Tribunal for a review of a decision by the ASADA to enter the person's name onto the Register.

Clause 14(5) allows for the NAD Scheme to provide that athletes and support persons may waive rights granted to them under the NAD Scheme. However, athletes and support

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persons cannot waive the right to have a decision made under the NAD Scheme reviewed by a court, tribunal or other body.

Clause 15 sets out further mandatory content in relation to the NAD Scheme, namely that the scheme must contain rules (known as the ‘sporting administration body rules’) that are:

- applicable to sports administration bodies, and
- relate to the anti-doping rules.

Examples of sporting administration body rules include:

- rules about promoting the compliance of athletes and support persons with anti-doping rules
- rules about referring potential anti-doping violations to the ASADA, and
- rules about providing information and assistance to the ASADA in relation to investigations of potential anti-doping violations.

The ASADA is authorised to monitor compliance of sporting administration bodies with the sporting administration body rules and to report to the Australian Sports Commission (often referred to as the ASC) on the extent of compliance with those rules.

The content of the NAD Scheme is not limited to the mandatory content specified in clauses 13 and 15 (see **clause 17**).

Part 3 – ASADA’s establishment, functions, powers and liabilities

Clause 20 provides that ASDA will be renamed the Australian Sports Anti-Doping Authority.

The ASADA’s functions are set out in **clause 21(1)**. Many of those functions relate to advising or promoting education, research or information about ‘sports drug and safety matters’. Sports drug and safety matters are defined in **clause 4** as:

- a) a matter relating to drugs and/or doping methods in one or more sporting activities; or
- b) matter relating to the safety of athletes.

ASDA’s functions in relation to sports drug and safety matters include:

- advising the Australian Sports Commission on sports drug and safety matters to be included in funding agreements between the Australian Sports Commission and sporting organisations
- promoting initiatives to educate people involved in sporting activities about sports drug and safety matters
- supporting, encouraging and conducting research on sports drug and safety matters

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- collecting, analysing, interpreting and disseminating information on sports drug and safety matters
- providing assistance to States, Territories and sporting organisations to develop and carry out initiatives about sports drug and safety matters, and
- providing services relating to sports drug and safety matters under contract on behalf of the Commonwealth.

The ASADA's other functions, include:

- functions conferred by the NAD Scheme
- advising the Australian Sports Commission about recognising a sporting organisation as being responsible for administering the affairs of a sport (or of a substantial part or section of the sport)
- providing anti-doping testing services and safety checking services under contract on behalf of the Commonwealth and
- making resources and facilities available for the Australian Sports Drug Medical Advisory Committee (ASDMAC). ASDMAC is discussed further below.

Clause 21(2) sets out the Constitutional limitations on the ASADA's performance of its functions. These are discussed further below in the Concluding Comments section.

Clause 22 sets out the ASADA's powers which are the power to do all things necessary or convenient to be done for or in connection with the performance of its functions. The limitations to these powers are that the ASADA cannot:

- acquire, hold or dispose of real property
- enter into contracts, or
- lease land or buildings for the purposes of the ASADA.

The Minister may give directions to the ASADA in relation to the performance of its functions or exercise of its power (**clause 24**). However, the Minister cannot make directions with respect to:

- a particular athlete or support person who is subject to the NAD Scheme, or
- the testing of a particular athlete under an anti-doping testing service or safety checking service by the ASADA.

Part 4 – ASADA's constitution and membership

The ASADA is to have a Chair, a Deputy Chair and between 1 and 5 other members (**clause 26**).

Members are appointed to the ASADA by the Minister (**clause 27(1)**). The Minister must be satisfied that appointees to the ASADA have qualifications, experience or an interest related to the ASADA's functions (**clause 27(2)**).

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The Chair holds his/her position on a full time basis and all other members hold their positions on a part time basis (**clause 27(3)** and **(4)**).

Members are appointed to the ASADA for a period of not more than 5 years (**clause 28**).

Clause 29 sets out the procedures and requirements for appointing acting members to the ASADA.

Clauses 30 – 38 set out the terms and conditions of appointment for ASADA members. Importantly, in order to maintain the ASADA's independence, the ASADA members must disclose:

- any interest that may conflict with the duties the member performs for the ASADA
- any participation or involvement in sports administration, or
- involvement in the affairs of an athlete or support person subject to the NAD scheme.

The ASADA members are also prohibited from participating in decisions or deliberations of a sporting organisation in relation to a matter, where the member has previously been involved with a decision or deliberation by the ASADA in relation to the same matter.

Part 5 – Decision-making and delegation by ASADA

Clauses 39– 44 set out the procedures for the ASADA meetings.

Clause 45 makes provision for a decision to be made by the ASADA without holding a meeting where the majority of the ASADA members agree with the proposed decision.

Clause 47(1) provides that the ASADA may delegate its functions and powers to:

- an ASADA member
- a committee consisting of 2 or more ASADA members
- a member of the ASADA staff
- a person assisting the ASADA (discussed further in relation to **clause 50**), or
- a chaperone or drug testing official appointed under the NAD Scheme.

Subclauses 47(2), (3) and (4) limit the delegation of the ASADA's functions and powers under the NAD Scheme.

Clause 48 provides for the ASADA to establish advisory committees to assist the ASADA in the performance of its functions. **Clause 50** provides that the ASADA may also be assisted by officers and employees of Commonwealth Agencies and Authorities.

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Part 7- Australian Sports Drug Medical Advisory Committee (ASDMAC)

The ASDMAC is a specialist medical advisory body consisting of experienced medical professionals established by the ASDA Act to:

- consider, and approve where appropriate, therapeutic use exemption applications by athletes for the legitimate therapeutic use of prohibited substances
- provide expert medical advice to drug testing laboratories
- provide expert medical advice to anti-doping tribunals
- provide advice to national federations regarding drugs in sport issues e.g. athletes use of asthma medications
- advise the ASDA and the Australian Sports Commission on matters relating to drugs in sport, including the safety of athletes, and
- advise ASDA's clients relating to sports medicine issues.²⁷

Under the ASADA Bill (**clauses 51-66**), the ASDMAC will continue in existence largely in the same way it currently works.

Clause 52 amends the functions of the ASDMAC to:

- reflect that it will perform functions conferred on it by the NAD Scheme, and
- provide for ASDMAC to give advice in relation to 'sports drug and safety matters' (see discussion above in relation to **clause 21**).

Similar obligations of disclosure apply to the ASDMAC members as for the ASADA members (see **clauses 58, 59 and 60**).

Part 8 – Information Management

Clauses 67 and 68 deal with the ASADA's access to, and use of, information held by the Australian Customs Service. These clauses further develop the measures put in place in section 67AA of the ASDA Act for the ASDA to receive and use information held by the Australian Customs Service.

Section 16 of the *Customs Administration Act 1985*:

- (a) prohibits the unauthorised recording and disclosure of certain information held by the Australian Customs Service; and
- (b) provides for exceptions in relation to the prohibition; and
- (c) makes particular provision in relation to the authorised disclosure of personal information.

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Clause 67 puts in place the necessary legislative regime so that the exemptions in relation to the prohibition disclosure apply to the ASADA, including:

- designating the ASADA as a Commonwealth agency for the purposes of section 16 of the Customs Administration Act
- setting out the types of protected information which may be held by the Australian Customs Service which would be used by the ASADA to perform its functions
- expressly providing that the use and further disclosure of certain information is authorised by law, and
- expressly providing that the disclosure by the ASADA to sporting administration bodies of personal information provided to the ASADA by the Australian Customs Service is permitted by section 16 of the Customs Administration Act.

Clause 68 sets out the conditions under which the ASADA may disclose ‘protected customs information’, that is information provided to the ASADA under section 16 of the Customs Administration Act, to sporting administration bodies. Those conditions are that:

- ASADA is satisfied that the information should be disclosed for ‘permitted anti-doping purposes’
- the sporting administration body has given an undertaking to only use the information for ‘permitted anti-doping purposes’ and has taken reasonable steps to ensure that the information will not be disclosed in a way to unfairly prejudice the person to whom the information relates, and
- ASADA is satisfied that the disclosure of information will not contravene the authorisation under which the Australian Customs Service provided the information.

A ‘permitted anti-doping purpose’ is:

- investigating possible breaches of a current policy of the sporting administration body about drugs and/or doping methods
- determining whether to take action, and what action to take, under such a policy
- taking action under a policy, and
- taking, or participating in, proceedings relating to action taken under the policy.

Prior to any disclosure of protected customs information to a sporting administration body, the ASADA must inform the person to whom the information relates and give them the opportunity to respond to the ASADA about the proposed disclosure.

Clauses 71 and 72 create two offences in relation to the disclosure of personal information.

Clause 71(1) makes it an offence for an ‘entrusted person’ (defined in **clause 69**) who has obtained personal information in relation to the NAD Scheme to disclose that personal

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information to someone else. The maximum penalty for the offence is 2 years imprisonment.

Exceptions to the offence in clause 71(1) are set out in clause 71(2) and include when the disclosure is:

- for the purposes of the ASADA Act
- for the purposes of the NAD Scheme
- made with the consent of the person to whom the information relates, and
- to the Australian Federal Police or the Australian Customs Service.

Clause 72(1) makes it an offence for an entrusted person who has obtained ‘contract services personal information’ (defined in **clause 4**) to disclose that information to any other person. The maximum penalty for the offence is 2 years imprisonment.

The exceptions to the offence in clause 72(1) are set out in clause 72(2) and are similar to those listed in clause 71(2).

Clause 73 provides that both the ASADA Act and the NAD Scheme are to operate within the limits imposed by the *Privacy Act 1988* in relation to the handling of personal information.

Part 9 – Other matters

Part 9 deals with a range of miscellaneous matters related to the operation of the ASADA, including the preparation of an annual report and the provision of reports or information by the ASADA to the Minister.

Clause 78(1) provides for protection from civil actions for a range of people and organisations associated with the ASADA for acts or omission done in the course of performing the ASADA’s functions or exercising the ASADA’s powers.

Specifically, the following individuals and organisations are protected from civil actions under clause 78(1):

- the ASADA members and staff
- officers and employees of Commonwealth agencies and authorities which are assisting the ASADA, and
- chaperones and drug testing officials under the NAD Scheme.

Clause 78(2) protects ASDMAC members from liability for acts or omission done in the course of performing the ASDMAC’s functions or exercising the ASDMAC’s powers.

Clause 78(3) provides that the Commonwealth and the ASADA are exempt from civil actions arising from a loss, damage or injury to a person caused by a good faith

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publication or disclosure in the course of performing the ASADA's functions or exercising the ASADA's powers.

Clause 78(4) provides protection from civil actions for people who provide documents or information to the ASADA or the ASDMAC:

- alleging an anti-doping violation
- in connection with investigations under the NAD Scheme
- supporting an allegation of an anti-doping violation
- in connection with the ASADA's or the ASDMAC's functions under the NAD Scheme

Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005 (the Transitional Bill)

Schedule 1 – Consequential Amendments

Schedule 1 amends the following legislation to reflect the establishment of the ASADA, the creation of the NAD Scheme and the abolition of the ASDA:

- *Administrative Decisions (Judicial Review) Act 1977*
- *Age Discrimination Act 2004*
- *Australian Sports Commission Act 1989*
- *Australian Sports Drug Agency Act 1990*
- *Financial Management and Accountability Regulations 1997*
- *Olympic Insignia Protection Act 1987*

The key provision is **clause 7** which repeals the ASDA Act.

Schedule 2 – Transitional Provisions

Part 1 sets out the definitions used in the Transitions Bill. One of the key definitions is 'transition time' which means the commencement of Schedule 2.

Part 2 provides for the administrative issues such as how the ASDA's assets, liabilities and legal proceedings are to be dealt with following the abolition of the ASDA.

Part 3 sets out how references to the ASDA are to be read in instruments and contracts for services.

Part 4 deals with the appointments for the officeholders for the ASDA and the ASDMAC under the ASDA Act. The ASDA officeholders cease to hold their appointments at the

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transition time. The Chair of the ASDMAC and other officeholders cease to hold those appointments at the transition time, but are automatically reappointed to ASDMAC by way of a ‘notional instrument’ of appointment under the ASADA Act.

Part 5 provides for the continued operation of ‘core operating provisions’ of the ASDA Act, despite the repeal of the Act.

Part 6 provides for the continued operation of the non-disclosure provisions in Part VIIA of the Australian Sports Commission Act in relation to protected information disclosed to the Australian Sports Commission prior to the transition time. Part 6 also deals with the disclosure by the Australian Sports Commission to the ASADA of certain information received prior to the transition time.

Part 7 sets out the ASADA’s reporting obligations for the transition time.

Concluding Comments

While some aspects of the ASADA’s proposed functions have raised concerns by those involved in anti-doping investigations and tribunal hearings, the establishment of the ASADA goes some way to addressing concerns raised in relation to current ‘sport runs sport’ model of investigation.

Application of the ASADA Bill to athletes and support persons

The ASDA Act sets out an extensive definition for ‘competitor’ in section 2A. That definition makes it clear that the ASDA’s drug-testing and anti-doping functions are aimed at international or national level athletes, or younger athletes who may become international or national level athletes.

The ASADA Bill replaces the definition of ‘competitor’ with ‘athlete’. An athlete is defined as a ‘participant in sporting activity’. Therefore, potentially the ASADA Bill will apply more broadly across all levels of sport than the ASDA Act currently does.

The ASDA Act recognises that persons other than competitors may be involved in anti-doping violations, such as coaches, trainers and managers. For example section 4A relates to ‘people’, and not only ‘competitors’ tampering with sports drug matters. However, the ASADA Bill sets out an express definition of ‘support person’ as being a coach, trainer, manager, agent, team staff member, official, medical practitioner or para-medical practitioner who works with or treats athletes participating in or preparing for sporting activities.

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Support persons may be subject to the NAD Scheme and are accorded the same rights as athletes in relation to making submissions in relation to proposed decisions by the ASADA and seeking administrative review of decisions by the ASADA.

Therefore the ASADA Bill creates a larger pool of people who are potentially subject to the operations of the NAD Scheme and the ASADA.

Athletes' rights

The second reading speech for the ASADA Bill describes the creation of the ASADA as 'a tough response to doping in sport and a response that treats all athletes fairly'.²⁸ In contrast, on the announcement of the ASADA in July 2005, one sports commentator stated that Mark French's allegations of group drug taking had led the AIS to create a 'Big Brother-style regime' for AIS scholarship holders, and expressed concerns that the ASADA may continue in the same vein, leaving athletes with very few personal rights.²⁹

The ASADA Bill accords the following rights to athletes:

- oral or written notification of the possible consequences of failing to comply with a request by the ASADA to provide a sample or keep the ASADA informed of the athlete's whereabouts
- the right to make submissions on a proposal by the ASADA to enter the athlete's name onto the register of investigation findings (this right is also extended to support persons where the ASADA proposes to enter the support person's name onto the register)
- a right of appeal to the Administrative Appeals Tribunal in respect of any decision by the ASADA to enter an athlete's (or a support person's) name onto the register.

Provision is also made for athletes and support persons to waive rights that they may have under the NAD Scheme. However, any right to apply to a court or tribunal for review of a decision cannot be waived.

It is noted that Article 8 of the Code provides that athletes have the right to be represented by Counsel at any hearing by a tribunal into anti-doping violations and that this representation is at the athlete's expense.

It may be appropriate, given the potentially serious consequences on an athlete's (or support person's) career of an anti-doping violation, or even the allegation of an anti-doping violation, to consider whether an advocate (or other supporter) to advise and counsel athletes and support persons should be made available in the investigative stages of the process. This type of safeguard would be particularly important for younger athletes who may feel overwhelmed by an investigation.

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Constitutional Issues

Clause 21(2) of the ASADA Bill sets out in detail the constitutional underpinnings (and hence limitations) to the performance of the ASADA's functions. The ASADA Bill is supported by a diverse range of constitutional heads of power, including:

- the external affairs power (section 51(29) of the Constitution)
- the appropriations powers (sections 81 and 83 of the Constitution)
- the corporations power (section 51(20) of the Constitution)
- the trade and commerce power (section 51(1) of the Constitution) and
- the postal, telegraphic and telephonic power (section 51(5) of the Constitution).

The corporations power

A constitutional corporation is defined in **clause 4** as a corporation to which section 51(20) of the Constitution applies. Section 51(20) of the Constitution gives Parliament the power to make laws with respect to foreign corporations, and trading or financial corporations.

The ASADA can provide an anti-doping testing service or safety checking service to a constitutional corporation where (**clause 21(2)(i)**)

- i) the service involves testing one or more employees of the constitutional corporation, and
- ii) the results of the testing are relevant to the relationship between the constitutional corporation and the employee or employees.

In addition, the ASADA may provide a service to the constitutional corporation where the service is provided to protect the corporation's reputation from being damaged by the use of drugs in sports and/or doping methods in sport (**clause 21(2)(j)**).

Situations can be envisaged where the ASADA may provide services to a constitutional corporation under clauses 21(2)(i) or (j), for example commercial football clubs.

However, as currently drafted, clause 21(2)(i) gives rise to the prospect of the ASADA being used to provide an employee drug testing service to private enterprise, without any link between the employee and participation in a sporting activity. Essentially, the ASADA is not limited to testing 'athletes', regardless of the breadth of the definition of that word in the ASADA Bill.

Section 51(20) of the Constitution provides that the Federal Government has the power to make laws for the peace, order and good government of the Commonwealth with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.' Under current High Court case law, in order to be a trading or financial corporation, a *substantial or significant part* of the corporation's activities must be trade or financial activities.³⁰ As noted by (then) Justice Mason, the 'substantial

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activity' test is 'very much a matter of fact and degree' as to whether a body engages in enough trading or financial activity to bring it within federal control under the corporations power.³¹

With the exception of corporations engaged in major sporting codes (for example AFL clubs, NRL clubs and A-league soccer clubs), it might be questioned whether 'trading' would form a *substantial* part of the activities of most Australian sporting bodies. If not, most Australian sporting organisations may be beyond Commonwealth regulation under the corporations power. The constitutional legality of the ASADA drug testing regime in relation to such organisations would then depend on whether the key provisions of the ASADA Bill were supported by another head of power in the Constitution, such as the external affairs power. Parliament may wish to seek further advice on the constitutional coverage of the ASADA regime.³³

For purposes related to money appropriated for the purposes of the Commonwealth

Clause 21(2)(b) provides that the ASADA may perform its functions 'for purposes related to money appropriated for the purposes of the Commonwealth'.

The extent to which Parliament can nominate the purposes for the expenditure of Commonwealth funds as being 'for the purposes of the Commonwealth' has been the subject of debate by the High Court.³⁴ While it may be that Parliament has the power to appropriate money for the Government's sports anti-doping policy, does this allow Parliament to give ASADA any function relating to expenditure of that money? Can the Commonwealth legislate for any purpose 'related to money' appropriated for the purposes of the Commonwealth? The appropriation of Commonwealth money for a particular purpose may not be sufficient to provide the Parliament with the power to legislate for any activity in relation to that purpose – rather the activities must be supported by the legislative, executive or judicial powers in the Constitution.³⁵

Timing of the establishment of the ASADA – Melbourne Commonwealth Games

When the establishment of the ASADA was initially announced in July 2005, the Minister stated that the new body would be established from 1 January 2006.

However, in the November 2005 Senate Estimates hearings, the Minister admitted that the Government's legislative program meant that the ASADA would not be established until early 2006.³⁶

A further delay to this timetable means that the ASADA may not be established in time for the Commonwealth Games in Melbourne, which commence on 15 March 2006.

While the transition from the ASDA to the ASADA will not impact on drug testing for the Commonwealth Games, if the ASADA is not established before the Commonwealth Games the current arrangements in relation to investigations into anti-doping violations (that is by independent investigations appointed by sporting administration bodies) will continue.³⁷ Given that it has been over 12 months since Justice Anderson recommended

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the establishment of an independent investigative body, and the Government's release of its discussion paper on the matter, it would be disappointing if the ASADA were not established in time for the Commonwealth Games.

Endnotes

- 1 The Court of Arbitration for Sport is an international institution independent of sports organisations which provides services to facilitate the settlement of sports-related disputes through arbitration or mediation (see <http://www.tas-cas.org/default.htm>). Generally speaking, a dispute may be submitted to the Court of Arbitration for Sport only if there is an arbitration agreement between the parties which specifies recourse to the Court. Some sports, such as the National Rugby League and the Australian Football League, have established independent tribunal arrangements separate to the Court of Arbitration for Sport.
- 2 Jennifer Norberry, 'Australian Sports Drug Agency Amendment Bill 1998', *Bills Digest*, no. 100, Department of the Parliamentary Library, Canberra 1998-99.
- 3 For more information on the Council of Europe's Anti-Doping Convention see the Explanatory Report to the Convention, available at <http://conventions.coe.int/Treaty/en/Reports/Html/135.htm>. A copy of the text of the Council of Europe's Anti-Doping Convention is available at <http://conventions.coe.int/Treaty/en/Treaties/Html/135.htm>.
- 4 The summary in this and the following paragraphs have been extracted from Joint Standing Committee on Treaties, 'Report 70: Treaty tabled 9 November 2005: United Nations Educational, Scientific and Cultural Organization International Convention Against Doping in Sport', December 2005, Canberra, at pp3-6. Further information on WADA is available on the WADA website at <http://www.wada-ama.org/en/>.
- 5 Information in this and the following paragraphs in relation to the Code has been extracted from the WADA website at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=267>. A copy of the Code is available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf/.
- 6 The Australian Sports Commission (also known by the abbreviation ASC) is the national sports administration and advisory body. More information about the Australian Sports Commission is available at <http://www.ausport.gov.au/asc/index.asp>.
- 7 A copy of the Copenhagen Declaration is available at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=267>. As at 28 October 2005, 182 governments had signed the Copenhagen Declaration (<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=390>).
- 8 For more information on the UNESCO Convention see <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=273>. A copy of the UNESCO Convention is available at http://www.wada-ama.org/rtecontent/document/UNESCO_Convention.pdf.
- 9 See Joint Standing Committee on Treaties, op. cit.

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- 10 See Senator the Hon Rod Kemp, Minister for the Arts and Sport, *AFL to become WADA Code compliant*, media release, 19 July 2005, available at http://www.minister.dcita.gov.au/kemp/media/media_releases/afl_to_become_wada_code_compliant.
- 11 Kim Jackson, 'Australian Sports Drug Agency Amendment Bill 2004', *Bills Digest*, no. 97, Parliamentary Library, Canberra 2003-04
- 12 See the discussion in 'Discussion Paper about proposed legislation affecting Australian arrangements for the investigation and hearing of sports doping allegations', p. 2.
- 13 See Senator John Faulkner, 'Adjournment: Sport: Drug Testing', Senate, *Debates*, 18 June 2004, p. 24295; and Quentin McDermott, 'Tarnished Gold: Are Australia's sports bosses surrendering to the drug cheats?', *Four Corners*, 22 March 2004, transcript available at <http://www.abc.net.au/4corners/content/2004/s1072143.htm>.
- 14 The material for this section was extracted from the various reports of Robert Anderson SC, available at http://www.dcita.gov.au/sport/publications/anderson_report.
- 15 Equigen is equine growth hormone. It is a prohibited substance for the purposes of the Anti-doping policies of the Australian Sports Commission, Cycling Australia, the Australian Commonwealth Games Association and the Australian Olympic Committee By-law. Testicomp contains corticosteroids, which are prohibited substances for the purposes of the anti-doping policies noted.
- 16 Mr Stanwix is a solicitor with experience in sports doping investigations.
- 17 Senator John Faulkner, 'Adjournment: Sport: Drug Testing', Senate, *Debates*, 18 June 2004, p. 24295.
- 18 See The Honourable Robert Anderson QC, 'Second Stage Report to the Australian Sports Commission and to Cycling Australia', Canberra, 27 October 2004, pp. 38, 40-41, 46 and 49, available at <http://www.dcita.gov.au/?a=16787>.
- 19 *ibid.*, p. 62.
- 20 A copy of the discussion paper, 'Discussion Paper about proposed legislation affecting Australian arrangements for the investigation and hearing of sports doping allegations', is available at http://www.dcita.gov.au/sport/consultation/proposed_arrangements_for_the_investigation_of_sports_doping_allegations_discussion_paper.
- 21 An example of such a conflict is the situation prior to the Athens 2004 Olympics where the Greek sporting organisations were investigating Greek runners who had evaded a drug test. The athletes were the drawcard attractions for the sporting organisation at the Olympics. See R. Masters, 'New 'one-roof' body to fix drug problem', *The Sydney Morning Herald*, 24 June 2005, p. 25.
- 22 See submissions on the discussion paper by the [Australian Olympic Committee](http://www.dcita.gov.au/__data/assets/pdf_file/23601/Australian_Olympic_Committee.pdf) (available at http://www.dcita.gov.au/__data/assets/pdf_file/23601/Australian_Olympic_Committee.pdf) and the [Court of Arbitration for Sport](http://www.dcita.gov.au/__data/assets/pdf_file/23604/Court_of_Arbitration_for_Sport.pdf) (available at http://www.dcita.gov.au/__data/assets/pdf_file/23604/Court_of_Arbitration_for_Sport.pdf).

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- 23 See the submission on the discussion paper by the [Australian and New Zealand Sports Law Association](#) (available at http://www.dcita.gov.au/_data/assets/pdf_file/23597/ANZSLA.pdf).
- 24 *ibid.*, However, while the Code provides for an athlete or support person to be represented at any hearing into anti-doping violations, this representation is to be at the athlete/support person's own expense.
- 25 See the submission on the discussion paper by John Marshall (available at http://www.dcita.gov.au/_data/assets/pdf_file/23608/John_Marshall_Lawyer.pdf).
- 26 See the submission on the discussion paper by National Rugby League Ltd (available at http://www.dcita.gov.au/_data/assets/pdf_file/23611/NRL.pdf).
- 27 This list is taken from the ASDMAC website at <http://www.asdmac.org.au/role.htm>.
- 28 Kevin Andrews, MP, Minister for Employment and Workplace Relations and Minister assisting the Prime Minister for the Public Service, 'Second reading speech: The Australian Sports Anti-Doping Authority Bill 2005', House of Representatives, Debates, 7 December 2005, p. 9.
- 29 J. Magnay, 'Searching examination: new doping body will have skeleton key to AIS rooms', [The Sydney Morning Herald](#), 14 July 2005, p. 30.
- 30 *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian National Football League (Inc) and West Perth Football Club* (1979) 143 CLR 190; *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282.
- 31 *ibid.*, (1979) 143 CLR 190, pp. 233–4.
- 33 For a review of who can be regulated under section 51(20) of the Constitution see Peter Prince and Thomas John, 'The Constitution and industrial relations: is a unitary system achievable?', [Research Brief](#), no. 8, Parliamentary Library, Canberra, 2005-06, pp 3; 20–3.
- 34 See *Attorney-General (Vic); Ex rel Dale v Commonwealth (Pharmaceutical Benefits Case (No. 1))* (1945) 71 CLR 237; and *Victoria v Commonwealth (Australian Assistance Plan Case)* (1975) 134 CLR 338.
- 35 See *Victoria v Commonwealth (Australian Assistance Plan Case)* (1975) 134 CLR 338 at 396 per Mason J.
- 36 See discussion in the Environment, Communications, Information Technology and the Arts Legislation Committee, [Estimates Committee Transcript](#), 1 November 2005, pp. 37–38.
- 37 Mr Richard Ings, Chief Executive of the ASDA, discussed the issues relating to the transition from the ASDA to the ASADA at Senate Estimates Hearings on 1 November 2005 (Environment, Communications, Information Technology and the Arts Legislation Committee, [Estimates Committee Transcript](#), 1 November 2005, pp. 37–38, 41–43.

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