

What does Sports Integrity Australia and enhanced anti-doping capabilities mean for athletes and the privilege of self-incrimination?

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This article is drawn from Ms Szkiela's University of Canberra LLB dissertation. It explores what Sports Integrity Australia and enhanced anti-doping capabilities mean for athletes and the privilege of self-incrimination. It is understandable, even admirable, that Australia does not want to merely meet its obligations under the WADC but wants to go above and beyond to eliminate doping from sport. The investigation and prosecution of criminal offences by SIA, however, is not granted by the *Sports Integrity Act*. The focus of Australia's NADO should be directed to protecting the rights of clean athletes in accordance with the WADC. Although catching doping cheats may fall within the wide ambit of prevention, respect of human rights must come first.

I Introduction

Context

On 12 June 2020, the Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019 (Cth) ('ASADA Amendment Bill')¹ passed both Houses of Parliament. The amendment extends protection for national sporting organisations ('NSOs') and their staff while removing yet another human right from athletes. Section 13D of the *Sport Integrity Australia Act 2020* (Cth) ('SIA Act')² now abrogates an individual's privilege against self-incrimination, which means that all questions asked during an investigation must be answered, even if the answer might tend to incriminate the individual or expose them to a penalty.

Australia's tough stance against drugs in sport became evident in 1987 when the Australian Olympic Federation ('AOF'), now the Australian Olympic Committee, introduced a life ban for athletes failing their second doping test.³ Following alleged drug use at the Australian Institute of Sport in 1987,⁴ a Senate standing committee inquiry was launched into the use of performance enhancing drugs by Australian athletes and involvement of Commonwealth agencies.⁵ The findings and recommendations of the inquiry were delivered over two reports, an interim report of May 1989⁶ and a second report in May 1990.⁷ The establishment of the Australian Sports Drug Agency ('ASDA') was recommended⁸ and had begun operating in 1989 as an independent drug testing commission.⁹ The inquiry also recommended that ASDA and

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¹ Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019 ('ASADA Amendment Bill').

² *Sport Integrity Australia Act 2020* (Cth) s 13D ('SIA Act').

³ Senate Standing Committee on Environment, Recreation and the Arts, Parliament of the Commonwealth of Australia, *Drugs in Sport* (Interim Report, May 1989) [3.42] ('Interim Report').

⁴ *Ibid* xvii-iii.

⁵ *Ibid* xvii.

⁶ *Ibid*

⁷ Senate Standing Committee on Environment, Recreation and the Arts, Parliament of the Commonwealth of Australia, *Drugs in Sport* (Second Report, May 1990) ('Second Report').

⁸ Interim Report (n 3) [3.167].

⁹ Second Report (n 7) 14-7.

the AOF adopt a strong international role to promote world-wide testing as not to disadvantage Australian athletes.¹⁰ Fifteen years later, on 1 January 2004, the World Anti-Doping Code ('WADC') came into force, providing the framework for a unified world-wide anti-doping approach.¹¹

In 2006, ASDA was replaced by the Australian Sport Anti-Doping Authority ('ASADA') to become Australia's National Anti-Doping Organisation ('NADO') as required by the WADC. The *United Nations Educational, Scientific and Cultural Organisation's International Convention Against Doping in Sport 2005* ('UNESCO Convention')¹² provides a method to ensure a harmonised global approach, by binding governments to implement the World Anti-Doping Code ('WADC'),¹³ a non-governmental document.

The National Anti-Doping Scheme ('NAD Scheme'),¹⁴ as required by s 9 of the *SIA Act*, is found in sch 1 of the *Sport Integrity Australia Regulations 2020* (Cth) ('*SIA Regulations*').¹⁵ The NAD Scheme effects Australia's obligations under the *General Anti-Doping Convention*¹⁶ and the *UNESCO Convention*.¹⁷

The NAD Scheme allows the Chief Executive Officer of Sport Integrity Australia ('SIA CEO') to issue a disclosure notice¹⁸ to anyone they reasonably believe to have information relevant to the administration of the NAD Scheme.¹⁹ The disclosure notice may require a person to attend an interview and answer questions, to give information, or to provide documents or things as specified by the SIA CEO.²⁰ The penalty for non-compliance with a disclosure notice has been doubled by the amendment from 30, to 60 penalty units.²¹

When registering to participate in organised sport in Australia as an athlete, an official, a team manager, a coach, or even an administrator, each person either knowingly or unknowingly agrees to be bound to an Anti-Doping Policy ('ADP'). The ADP may be referenced in an organisation's code of conduct, member rules, or a registration form and can generally be found online.

For local, state, and national sport organisations to receive funding from the Government, they must enforce an ADP as approved by Sport Integrity Australia ('SIA').²² The template previously provided by ASADA incorporated provisions of the WADC as administered by the World Anti-Doping Agency ('WADA'), with the aim of eradicating doping from sport worldwide. The anti-doping policies apply to all participants of sport which captures athletes,

¹⁰ Interim Report (n 3) 142.

¹¹ World Anti-Doping Agency, *World Anti-Doping Code* (at 1 January 2004) 1 ('2003 WADC').

¹² *International Convention Against Doping in Sport*, opened for signature 19 October 2005, 2419 UNTS 201 (entered into force 1 February 2007) ('UNESCO Convention').

¹³ The World Anti-Doping Code ('WADC') was designed to be a living document, the current WADC came into effect 1 January 2015 ('2015 WADC') and will be updated by the 2021 WADC on 1 January 2021 ('2021 WADC'): 'The Code' (Web Page) <<https://www.wada-ama.org/en/what-we-do/the-code>>.

¹⁴ *Sport Integrity Australia Regulations 2020* (Cth) sch 1 ('NAD Scheme').

¹⁵ *Sport Integrity Australia Regulations 2020* (Cth) ('SIA Regulations').

¹⁶ *Anti-Doping Convention*, open for signature 16 November 1989, ETS No 135 (entered into force 1 March 1990), as amended by *Additional Protocol to the Anti-Doping Convention*, open for signature 12 September 2002, ETS No 188 (entered into force 1 April 2004).

¹⁷ *SIA Act* (n 2) s 8A.

¹⁸ *Ibid* s 13A; *NAD Scheme* (n 14) s 3.26B.

¹⁹ *SIA Regulations* (n 15).

²⁰ *SIA Act* (n 2) s 13A.

²¹ *Ibid* s 13C.

²² *UNESCO Convention* (n 12) art 11(c).

athlete support personnel, members, and officials of sporting administration bodies. This includes minors and non-residents of Australia.²³

The article by Anthony Crocker: ‘The Integrity of Sport and the Privilege against Self-Incrimination - Is ASADA Playing by the Rules?’²⁴ provided a starting point for this thesis as it details ASADA’s implementation of coercive information-gathering powers prior to the recent parliamentary approval in 2020. Crocker also explains the judicial treatment and scope of the common law right not to self-incriminate in Australia and how ASADA was previously denied this coercive power in 2013.

Following several doping scandals that hit the headlines in 2012,²⁵ a review into Cycling Australia was commissioned by the Federal Government and completed in 2013 by John HWood QC AO.²⁶ It was in this report that the abrogation of the privilege against self-incrimination was first recommended to Parliament.

Section 13D currently reads as follows:

- (1) A person is not excused from answering a question, giving information or producing a document or thing as required by a disclosure notice given to the person on the ground that the answer to the question, the information or the production of the document or thing might tend to incriminate the person or expose the person to a penalty.
- (2) However, in the case of an individual:
 - (a) the answer given, the information given or the document or thing produced; and
 - (b) answering the question, giving the information or producing the document or thing; and
 - (c) any information, document or thing obtained as a direct or indirect consequence of the answering of the question, giving the information or producing the document or thing;are not admissible in evidence against the individual in any proceedings, other than:
 - (d) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Act; or
 - (e) proceedings in connection with this Act or the regulations.

²³ *NAD Scheme* (n 14) 1.06.

²⁴ Anthony Crocker, ‘The Integrity of Sport and the Privilege against Self-Incrimination - Is ASADA Playing by the Rules?’ (2014) 9(1) *Australian and New Zealand Sports Law Journal* 27.

²⁵ See Tom Nightingale, ‘Anti-doping Expert Takes Aim at Cycling Australia’ (Web Page, 16 October 2012) < <https://www.abc.net.au/news/2012-10-16/anti-doping-expert-takes-aim-at-cycling-australia/4315930?nw=0>>; Daniel Benson, ‘Matt White Steps Down From Orica GreenEdge After Doping Confession’ (Web Page, 13 October 2012) < <https://www.cyclingnews.com/news/matt-white-steps-down-from-orica-greenedge-after-doping-confession/>>; ‘I Doped For Six Years – Hodge’ (Web Page, 19 October 2012) < <https://www.abc.net.au/news/2012-10-19/cycling-australia-vice-president-resigns/4322804>>.

²⁶ James Wood, *Review of Cycling Australia – Final Report* (Report, January 2013) < [https://www1.health.gov.au/internet/main/publishing.nsf/Content/cycling-australia-review-index/\\$file/cycling-australia-review-20130111.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/cycling-australia-review-index/$file/cycling-australia-review-20130111.pdf)> (‘CA Report’).

Question, Aim and Methodology

The question to be answered by this thesis is:

What does Sports Integrity Australia and enhanced anti-doping capabilities mean for athletes and the privilege of self-incrimination?

To understand how SIA and its coercive information-gathering powers will affect athletes, some auxiliary questions arise. This thesis seeks to distinguish the intentions and motivations of SIA to ascertain, or envisage, how they will exercise the power and if it will be in accordance with human rights principles. As Australia appears to be the first country to adopt such a provision,²⁷ the ramification of these amendments on Australia's various international obligations require identification and assessment. As these questions involve finding, reading and analysing Australian statute in conjunction with international treaties and other multinational agreements²⁸ a doctrinal research approach has been employed.

This thesis focuses on the privilege of self-incrimination and its application in anti-doping matters both in Australia, and internationally, as conferred by the WADC. The WADC does not explicitly address the privilege against self-incrimination and discussion of this precise topic has been minimal. However, due to the previous attempt in 2013 to introduce the provision, and the two preceding Wood reports, there was sufficient material to synthesise and examine.

A reform-oriented research approach has not been applied as this thesis does not aim to recommend changes, instead to provide a thorough analysis of the effects of the amendments.

Structure

Chapter One has introduced the topic and subsequently, the focus of this thesis. It has briefly highlighted the issues that have, and may arise, as a result of the amendment to Australian anti-doping legislation. This chapter has also established some issues which require further investigation.

Chapter Two provides a brief history and background on athletes' privilege against self-incrimination and why it is now abrogated by legislation. Chapter Two discusses two reviews of Australian sport conducted by John Wood QC AO and the influence they have had on Government actions. This chapter is founded on Crocker's 2015 article.²⁹

Chapter Three details the government's desired outcomes of the abrogation of the right not to self-incriminate contained in the *SIA Act*. The practical effects are then discussed highlighting how non-athlete third parties are heavily impacted by this provision.

Chapter Four assesses how the abrogation of the right provided by the *SIA Act* intersects with international law instruments and perspectives. The WADC is examined only to find that it does not provide a clear position on self-incrimination nor does it give detail as to the protection of human rights.

Chapter Five explores the implementation and operation of the new coercive power which removes the right not to self-incriminate. It becomes evident that several sources must be considered to ensure best practice and to remain in line with global values.

²⁷ Email from Emiliano Simonelli Chief Compliance Manager, World Anti-Doping Agency to Dr Catherine Ordway Assistant Professor, University of Canberra, 8 May 2020.

²⁸ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 12(1) *Deakin Law Review* 83, 113.

²⁹ Crocker (n 24).

Chapter Six concludes this thesis and highlights the main arguments made throughout.

II The Current Climate

Since August 2013,³⁰ the Australian Government has come full circle with the ASADA Amendment Bill being passed by the Senate. This time, ASADA was successful in its bid to obtain coercive investigative powers that abrogate an individual's privilege against self-incrimination.

Like the Bill presented in 2013,³¹ the 2019 ASADA Amendment Bill was a result of a review conducted by James Wood QC AO.^{32,33} Both reviews contain recommendations to limit the human right against self-incrimination in favour of the effective enforcement of Australian anti-doping regulations. Another outcome of Wood's most recent review (which is covered in the next chapter), is that ASADA was subsumed by the recommended national sport integrity commission. On 1 July 2020, the *Australian Sports Anti-Doping Authority Act 2006* (Cth) was renamed the *Sport Integrity Australia Act 2020* (Cth) and Sport Integrity Australia was established.³⁴ Sport Integrity Australia now manages all matters relating to sport integrity in Australia including match-fixing, anti-doping, and abuse in a sporting environment.³⁵

The judicial treatment of the privilege against self-incrimination remains unchanged from the time of Crocker's article.³⁶ The privilege continues to be described by the courts as a 'deep-rooted',³⁷ 'cardinal principle' of the common law,³⁸ which is not only applicable to criminal proceedings.³⁹ The twelve National Sport Organisations (NSOs) ADPs that were listed in Crocker's article are also unaltered.⁴⁰

³⁰ Australian Sports Anti-Doping Authority Amendment Bill 2013 (Cth).

³¹ *Ibid.*

³² CA Report (n 26).

³³ James Wood et. al, *Report of the Review of Australia's Sports Integrity Arrangements*, (Report, March 2018)

>[https://www1.health.gov.au/internet/main/publishing.nsf/Content/63FOA5D7BDA5A0B5CA2582CF0005E6F9/\\$File/HEALTH-RASIA-Report-Acc.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/63FOA5D7BDA5A0B5CA2582CF0005E6F9/$File/HEALTH-RASIA-Report-Acc.pdf) ('Wood Review').

³⁴ *Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Act 2020* (Cth) s 2 ('ASADA (SIA) Act').

³⁵ *SIA Act* (n 2) s 4 (definition of 'Threats').

³⁶ Crocker (n 24).

³⁷ *Sorby v Commonwealth* (1983) 152 CLR 281, 294.

³⁸ *Ibid.*, 309.

³⁹ *Pyneboard Pty. Ltd. v. Trade Practices Commission* [1983] HCA 9, 341.

⁴⁰ Badminton Australia, *Australian Badminton Association Inc (BA) Anti-Doping Policy*, (1 January 2015) <<https://www.badminton.org.au/wp-content/uploads/2019/09/BA-Anti-Doping-Policy-Final-2015.pdf>>; Basketball Australia, *BA Anti-Doping Policy* (1 January 2015) <<https://australia.basketball/wp-content/uploads/2014/12/BA-Anti-Doping-Policy-effective-1-January-2015.pdf>>; Boxing Australia, *Boxing Australia Limited Anti-Doping Regulations* (1 January 2015) <<https://cdn.revolutionise.com.au/site/wekbppt6z9qsyqzs.pdf>>; Cycling Australia, *Cycling Australia Anti-Doping Policy*, (1 January 2015) <<https://data.cycling.org.au/sites/default/files/Cycling%20Australia%20anti-doping%20policy%20141019.pdf>>; Australian Fencing Federation, *Anti-Doping Policy*, (1 January 2015) <<http://www.ausfencing.org/wp-content/uploads/PDFs/Anti-Doping-Policy-January-2015-2.pdf>>; Netball Australia, *Netball Australia Anti-Doping Policy*, (1 January 2015) <<https://netball.com.au/sites/default/files/2019-06/Netball%20Australia%20-%20Anti-Doping%20Policy%20-%20effective%201%20Jan%202015%20FINAL.pdf>>; Rowing Australia, *Rowing Australia Ltd Anti-Doping Policy*, (1 January 2015) <<https://rowingaustralia.com.au/wp-content/uploads/2015/02/Rowing-ADP-approved-301115.pdf>>; Swimming Australia, *Swimming Australia Limited Anti-Doping Policy*, (1 January 2015) <<https://prod.swimming.org.au/sites/default/files/assets/documents/Anti-Doping->

In 2018, the matter of *Strickland v Commonwealth DPP*⁴¹ came before the High Court. It was a case where the Australian Crime Commission ('ACC') had supplied its coercive investigative powers, provided by statute,⁴² to the Australian Federal Police ('AFP'). The Court examined an individual's privilege against self-incrimination and defined how the power can be exercised under the legislation. It held that investigative powers can only be used for a 'specific, identified purpose' and must be exercised in 'strict accordance' with the legislation.⁴³ The Court also highlighted the severity of any departure from statute as a 'disregard of the will of Parliament' and an 'unlawful infraction of a common-law right'. The result of the illegal and improper use of the ACC's coercive powers meant the administration of justice had been prejudiced and those charged with serious Commonwealth offences could not be tried.

In 2016, the Australian Law Reform Commission ('ALRC') published its report, *Traditional Rights and Freedoms-Encroachment by Commonwealth Law*.⁴⁴ The report reviewed a list of Commonwealth laws limiting common law rights and freedoms. It stated the privilege against self-incrimination did not apply to non-testimonial evidence such as fingerprints and DNA, as explained in *Sorby*⁴⁵ and that the exclusion of the right must be clearly stated in the applicable legislation as it will not be implied by the courts.⁴⁶

The ALRC report also reiterated the requirement of proportionality.⁴⁷ The level of public benefit must be measured when considering legislation that abrogates an individual's right. Terms such as 'serious offence',⁴⁸ 'major criminal activity',⁴⁹ 'danger to human life',⁵⁰ and 'serious personal injury'⁵¹ were submitted as justifications to exclude the privilege through statute. The Human Rights Committee advised that if the abrogation is accompanied by both a use and derivative use immunity, it is more likely to be acceptable.⁵² This is because the protection afforded by a use immunity means that any information obtained under the exercise of coercive information-gathering power cannot be used against the individual who

Policy_0.pdf>; Tennis Australia, *Tennis Australia Anti-Doping Policy*, (1 January 2015) <<https://www.tennis.com.au/wp-content/uploads/2016/03/Tennis-Australia-anti-doping-policy-v10-ASADA-approved-FINAL-MN231214.pdf>>; Volleyball Australia, *Volleyball Australia Ltd Anti-Doping Policy*, (1 January 2015) <http://www.volleyballaustralia.org.au/_literature_152768/Anti-Doping_Policy_-_Effective_from_January_1_2015>; Water Polo Australia, *Water Polo Australia Anti-Doping Policy*, (1 January 2015) <<https://s3-ap-southeast-2.amazonaws.com/piano.revolutionise.com.au/cups/wpal/files/cile3vepom5cazcb.pdf>>; Australian Sailing, *Australian Sailing Anti-Doping Policy*, (1 January 2015) <<https://s3-ap-southeast-2.amazonaws.com/piano.revolutionise.com.au/site/fdczpqf76izsncji.pdf>>; Presumably to be updated in accordance with the 2021 World Anti-Doping Code ('2021 WADC') to commence 1 January 2021.

⁴¹ *Tony Strickland (A Pseudonym) V Commonwealth Director Of Public Prosecutions & Ors; Donald Galloway (A Pseudonym) V Commonwealth Director Of Public Prosecutions & Ors; Edmund Hodges (A Pseudonym) V Commonwealth Director Of Public Prosecutions & Ors; Rick Tucker (A Pseudonym) V Commonwealth Director Of Public Prosecutions & Ors* [2018] HCA 53 ('*Strickland*').

⁴² *Australian Crime Commission Act 2002* (Cth), s 30.

⁴³ *Strickland* (n 41) 101.

⁴⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* (Report No 129, December 2015) ('*ALRC Traditional Rights and Freedoms*').

⁴⁵ *Ibid*, 312 [11.16].

⁴⁶ *Ibid*, 316 [11.35].

⁴⁷ *Ibid*, 320 [11.53-57].

⁴⁸ *Ibid*, 320 [11.51].

⁴⁹ *Ibid*, 319 [11.49].

⁵⁰ *Ibid*.

⁵¹ *Ibid*.

⁵² *Ibid*, 322 [11.62].

provided it. Derivative use refers to information or evidence procured as a result of the initial information obtained, that otherwise would not have been identified.⁵³

The First Wood Review – Cycling Australia Review

As a result of the 2012 Lance Armstrong lifetime ban and associated doping admissions by Australian cyclists Matt White and Stephen Hodge, the then Minister for Sport Kate Lundy, commissioned a review of Cycling Australia.⁵⁴ James Wood QC AO, a former judge and chairman of the New South Wales Law Reform Commission, was appointed to investigate and report on Cycling Australia's approach to anti-doping. Wood was tasked, amongst other things, to provide advice on the effectiveness of the implementation of Cycling Australia's anti-doping policies and practices and to advise on any improvement that should be made.⁵⁵

After a two-month enquiry, Wood's 2013 Cycling Australia report ('CA Report') emphasised the importance of investigations to the discovery of Anti-Doping Rule Violations ('ADRVs')⁵⁶, as contained in the WADC,⁵⁷ and the ability of relevant agencies to carry these out. ASADA's lack of power to compel individuals to attend interviews and cooperate with ASADA investigators was identified as a major obstacle for the investigation of non-analytical ADRV investigations. Wood recommended ASADA be given 'a power, subject to appropriate protections, to compel persons to attend an interview with an investigator nominated by the Chief Executive Officer and to produce information and documents relevant to any inquiry that it is conducting under the NAD scheme.'⁵⁸ There was also a recommendation to sanction any athlete, coach, or support person who refused to cooperate with an ASADA investigation.⁵⁹ The Federal Government supported all 13 recommendations of Wood's CA Report⁶⁰ and presented the Australian Sports Anti-Doping Authority Amendment Bill 2013 (Cth) to implement the changes advised. The Bill introduced disclosure notices, compelling persons to adhere to a request of the ASADA chief executive officer, coupled with a provision abrogating the privilege against self-incrimination.

After significant opposition to the abrogation of such a fundamental human right,⁶¹ the government agreed to protect the privilege against self-incrimination in two out of three

⁵³ *X7 v Australian Crime Commission* [2013] HCA 29 [124]; *Strickland v Commonwealth Director of Public Prosecutions* [2018] HCA 53 [77]-[80].

⁵⁴ CA Report (n 26) i; See also *United States Anti-Doping Agency v Armstrong*, USADA Reasoned Decision on Disqualification and Ineligibility, (Report on Proceedings under the World Anti-Doping Code and the USADA Protocol, 10 October 2012)

<<http://cyclinginvestigation.usada.org/>>; Cycling News, 'Federal Government Announces Review into Cycling Australia' (Web Page, 7 November 2012) <

<https://www.cyclingnews.com/news/federal-government-announces-review-into-cycling-australia/>>.

⁵⁵ CA Report (n 26) app 1, Terms of Reference.

⁵⁶ *Ibid* [4.66].

⁵⁷ WADC (n 13) art 2.

⁵⁸ CA Report (n 26) 4.10(1).

⁵⁹ *Ibid* recommendation 4.5(3).

⁶⁰ Senator Kate Lundy, 'Government Endorses Blueprint to Protect the Future of Australian Cycling' (Media Release, 1 February 2013)

<<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2207922%22;src1=sm1>>; Department of Regional Australia, Local Government, Arts and Sport *Australian Government Response to the Review of Cycling Australia* (25 January 2013) <[https://www1.health.gov.au/internet/main/publishing.nsf/Content/australian-government-reponse-to-review-cycling-australia/\\$file/australian-government-response-to-review-cycling-australia-20130129.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/australian-government-reponse-to-review-cycling-australia/$file/australian-government-response-to-review-cycling-australia-20130129.pdf)>.

⁶¹ Law Institute Victoria, Submission No 3 to Senate Standing Committee on Rural and Regional Affairs and Transport, *Inquiry into the Australian Sports Anti-Doping Authority Amendment*

instances. The right would still apply when an individual was required to either answer a question or to provide information. However, claiming the privilege would not excuse an individual from complying with a request to provide a document or thing.

Not to be dismissed is the submission of the Australian Olympic Committee (AOC) to the Senate Inquiry which conveyed how highly supportive of the proposed amendments it was. The AOC's submission included a chronological history from July 2000 of instances where the AOC had advocated for a properly empowered anti-doping authority in Australia.⁶² Specifically, the AOC sought authority with the power to require and compel persons to give information, produce documents, and answer questions, unless the person had grounds for privilege.⁶³ Attached to the AOC submission were a number of letters between John Coates, President of the AOC, and Senator Rod Kemp, Minister for the Arts and Sport. Coates and Kemp went back and forth debating whether ASADA should be provided with the power to compel evidence from athletes and third parties relating to ADRVs. The last letter from Kemp, dated 20 December 2005, states that WADA supports the Government's decision not to provide ASADA with powers of compulsion.⁶⁴

Report On The Review Of Integrity In Australian Sport

In May 2017, the development of a National Sports Plan by the Australian Government was announced by the then-Minister for Sport, Greg Hunt.⁶⁵ Sport 2030 was published in 2018, a 12-year plan covering all sports across all levels, in all states and territories.⁶⁶ Four key pillars were identified for the plan, each one a recognition of 'the fundamental contribution sport makes to society'.⁶⁷ Integrity was one of the four pillars and the review into the integrity of Australian Sport was announced by Minister Hunt, on 5 August 2017.⁶⁸ The independent review panel was led by Wood and supported by David Howman CNZM, former Director-General WADA, and Ray Murrphy, former Racing New South Wales Chief Steward. Adjunct panel members Jo Setright, and the Honourable Dr Annabelle Bennett AO SC also assisted the panel.⁶⁹ The *Report On The Review Of Integrity In Australian Sport* ('Wood Review')⁷⁰ was

Bill 2013 (21 February 2013); Commercial Bar Association of Victoria, Submission No 9 to Senate Standing Committee on Rural and Regional Affairs and Transport, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*; Australian Athletes Alliance, Submission No 6 to Senate Standing Committee on Rural and Regional Affairs and Transport, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*; Commonwealth, *Parliamentary Debates*, Senate, 24 June 2013, 3830 (Richard Di Natale).

⁶² Australian Olympic Committee, Submission No 7 to Senate Standing Committee on Rural and Regional Affairs and Transport, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013* [7]-[16].

⁶³ *Ibid* attachment 1, 4.

⁶⁴ *Ibid* attachment 7.

⁶⁵ Greg Hunt, 'Minister for Sport announces national plan for elite sport and participation' (Media release, 22 May 2017) <<https://www.greghunt.com.au/national-plan-for-elite-sport-and-participation/>>.

⁶⁶ 'Sport 2030' (National Sport Plan, 2018) <https://www.sportaus.gov.au/__data/assets/pdf_file/0005/677894/Sport_2030_-_National_Sport_Plan_-_2018.pdf>.

⁶⁷ Urbis, *Consultation Phase for the Development of the National Sport Plan*, (Report, 28 February 2018) <https://www.sportaus.gov.au/__data/assets/pdf_file/0011/668351/D18-130623_Consultation_Phase_of_the_Development_of_the_NSP_Final_Report....pdf>.

⁶⁸ Greg Hunt MP, 'Review into Integrity of Australian Sport' (Media Release, 5 August 2017) <<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/review-into-integrity-of-australian-sport>>.

⁶⁹ Wood Review (n 33) 32.

⁷⁰ *Ibid*.

presented to Parliament just seven months later and contained a total of 52 recommendations.⁷¹

The first topic addressed in the report was the current threat environment and foreseeable future challenges. With a strong focus on match-fixing, anti-doping was also covered and referred to data extracted from the 2013 Australian Crime Commission report, *Organised Crime and Drugs in Sport* ('ACC Report').⁷² It concluded that the integrity threat environment is evolving quickly across the globe and Australia needed to act quickly and intelligently to protect Australian sport.

The report went on to detail Australia's anti-doping framework functions and capability to manage contemporary doping threats. Australia is known as a world leader in the fight against doping in sport⁷³ and concern was expressed that this status will be hard to maintain if ASADA's operations continue to be constrained. Policy, resources, and funding, or lack thereof, are all major obstructions in ASADA's road to drug-free sport.

In line with WADA values, summarised as the 'spirit of sport',⁷⁴ the panel confirmed the importance of preventative measures including engagement, deterrence, and education.⁷⁵ Specifically, the need for increased investment in education was highlighted, with the panel recommending overseas resources to be accessed and utilised.⁷⁶

The recommendation that ASADA's investigative authority be enhanced⁷⁷ was supported by the statement that the coercive investigative power 'would also bring ASADA's powers to compel evidence from a witness into line with the powers of investigators acting on behalf of many NSOs (as a result of clauses in player contracts)'. No reference or acknowledgement was made in the Wood Review as to the prevalence or origin of such clauses.⁷⁸ Also recommended in the report was the establishment of a National Sports Integrity Commission. It was proposed that a national platform is the best method to protect, uphold, and advance the integrity of Australian sport. One central agency will ensure the consolidation of expertise and intelligence, while also providing a clear and unified identity to athletes, State Sporting Organisations, and NSOs.

Government Response

Safeguarding the Integrity of Sport – the Government Response to the Wood Review⁷⁹ was released by Bridget McKenzie, the then Minister for Sport on 12 February 2019. The Government welcomed the report and agreed with the majority of the recommendations.⁸⁰ The government recognised the increasingly sophisticated and transnational nature of threats to the integrity of sport worldwide and accordingly pledged its commitment to protect

⁷¹ Ibid.

⁷² Australian Crime Commission, *Organised Crime and Drugs in Sport* (Report, February 2013) ('ACC *Organised Crime and Drugs in Sport*').

⁷³ Elise Parham, 'Australia and the World Anti-Doping Code, 1999-2008: A Study of the Role of the Australian Government and Australian Public Service in Drafting and Implementing the World Anti-Doping Code' (June 2008) 54; 'ASADA "a World Leader" in Anti-Doping – Report' (Media Statement, 5 December 2018) < <https://www.asada.gov.au/news/asada-world-leader-anti-doping-report> >.

⁷⁴ 2015 WADC (n 13) 14; 2021 WADC (n 13) 13.

⁷⁵ Wood Review (n 33) 116.

⁷⁶ Wood Review (n 33) 119.

⁷⁷ Wood Review (n 33) 172.

⁷⁸ See Crocker (n 24).

⁷⁹ Australian Government, *Safeguarding the Integrity of Sport – The Government Response to the Wood Review* ('*Safeguarding the Integrity of Sport*').

⁸⁰ Ibid 3.

Australian sport. The response stated that any loss of confidence in the integrity of Australian sport could not only destroy the social glue that binds the Australian community together⁸¹ but also has the potential to affect an industry that accounts for 2-3% of Australia's Gross Domestic Product.⁸²

The government announced the recommendations from the Wood Review would be implemented in two stages. Stage one includes the establishment of SIA as the national sports integrity commission recommended in the Wood Review. The enactment of national match-fixing legislation with criminal offences and the creation of the National Sports Tribunal would also be part of stage one. It is then planned for SIA to expand in stage two, contingent on funding and further consideration by the government.

Sport Integrity Australia

The Wood Review recommended that the ASADA remain as Australia's National Anti-Doping Organisation⁸³ and for ASADA work in collaboration with the NSIC⁸⁴ instead of being subsumed by it. The reason for the separation was stated to be for operational independence as required by the WADC.⁸⁵ The Government instead determined that 'the current functions of ASADA should be incorporated into a NSIC to provide for a single, effective national body responsible for all sports integrity matters and providing a single point of consultation and outreach for all stakeholders on sports integrity matters.'⁸⁶

SIA commenced on 1 July 2020 and incorporates the sports integrity functions of Sports Australia, the National Integrity in Sport Unit ('NISU'), and ASADA, to create a central agency to deal with matters relating to sport integrity. Sport integrity is defined as 'the manifestation of the ethics and values that promote community confidence in sport.'⁸⁷ Threats to sport integrity include the manipulation of sporting competitions, doping in sport, abuse of children and other persons in a sporting environment, and the failure to protect persons in a sporting environment from bullying, intimidation, discrimination, or harassment.⁸⁸

SIA is now listed as an enforcement body under the *Privacy Act 1988*⁸⁹ to assist with information sharing between other enforcement bodies,⁹⁰ both domestically and internationally.⁹¹ The identification as an enforcement body also ensures SIA will be able to act as a National Platform,⁹² a requirement under the Council of Europe Convention on the Manipulation of Sports Competitions (Macolin Convention), of which Australia is a party.⁹³ In line with the expanded jurisdiction of the Act, the SIA CEO's functions are also expanded which include the remit of 'sports doping and safety matters' to 'matters relating to sports

⁸¹ Ibid 2.

⁸² The Boston Consulting Group, 'Intergenerational Review of Australian Sport 2017' (Report, 2017) 43.

⁸³ *Safeguarding the Integrity of Sport* (n 79), 12.

⁸⁴ Ibid.

⁸⁵ Wood Review (n 33) 175; 2015 WADC (n 13) art 20.5; 2021 WADC (n 13) art 20.5.

⁸⁶ *Safeguarding the Integrity of Sport* (n 79) 12.

⁸⁷ *SIA Act* (n 2) s 4 (definition of 'Sports Integrity').

⁸⁸ Ibid (definition of 'Threats').

⁸⁹ *Privacy Act 1988* (Cth) s 6(1) (definition of 'Enforcement Body') (*Privacy Act*).

⁹⁰ Ibid s 6(1).

⁹¹ *Safeguarding the Integrity of Sport* (n 72) 19.

⁹² *Council of Europe Convention on the Manipulation of Sports Competitions*, opened for signature 18 September 2014 CETS 215 (entered into force 1 September 2019) art 13.

⁹³ Ratified 1 February 2019: Search on Treaties <
https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/country/AUT?p_auth=It2KTIp7>.

integrity',⁹⁴ working with domestic and overseas stakeholders to confront match-fixing and fraud.⁹⁵

III Enhancing Australia's Anti-Doping Capability Bill

Aims

The following is found in the Wood Review:

Recommendation 23

That the Australian Sports Anti-Doping Authority's (ASADA) investigative capability be enhanced by:

- Strengthening ASADA's disclosure notice regime by:
 - excluding the right to claim privilege against self-incrimination when answering a question or providing information to ASADA, while providing, where an objection or privilege is raised, appropriate protections against non-direct or derivative use in any criminal prosecution.⁹⁶

SIA is now Australia's NADO responsible for fighting doping in sport as required under the *UNESCO Convention* and subsequently the WADC. Each NADO around the world works towards promoting the prevention of doping in sport while ensuring the delivery of a harmonised World Anti-Doping Program.⁹⁷

Not only is doping against the rules of sport, but it poses serious risks to an athlete's health. The health risks, however, extend to 'recreational exercisers'⁹⁸ and any other type of performance or image enhancing drugs ('PIED') user. The reported use of PIEDs in professional sport can also result in long term problems for the government and public, due to reduced participation in sport and exercise as Australian's become disengaged and lose faith in the integrity of Australian sport. Thus, the government is focused on combatting 'present, emerging, and future threats' to sport within Australia.⁹⁹

The illegal PIED market unsurprisingly contains counterfeit, mislabelled, and cross-contaminated substances.¹⁰⁰ Due to the reportedly high demand¹⁰¹ and exorbitant profits¹⁰² associated with the illicit sale of PIEDs, the production and supply of these drugs attracts medical professionals through to career criminals. The unsupervised use of unregulated

⁹⁴ *SIA Act* (n 2) s 20CA.

⁹⁵ *Ibid* s 21(1)(f).

⁹⁶ Wood Review (n 33) 130.

⁹⁷ 2015 WADC (n 13) 11; 2021 WADC (n 13) 9.

⁹⁸ Gen Kanayama, Harrison G. Pope Jr., 'History and epidemiology of anabolic androgens in athletes and non-athletes' (2018) *Molecular and Cellular Endocrinology* 464 4-13; Eric J. Ip et al, 'The Anabolic 500 Survey: Characteristics of Male Users versus Nonusers of Anabolic-Androgenic Steroids for Strength Training' (2011) 31(8) *Pharmacotherapy* 8.

⁹⁹ Victoria Jamieson and Catherine Ordway, 'Exercising Discretion for Social/Recreational Athletes: Case Study Athlete XYZ' in Catherine Ordway (ed), *Restoring Trust in Sport: Corruption Cases and Solutions* (Routledge, forthcoming).

¹⁰⁰ Sara Odoardi, et al, 'An overview on performance and image enhancing drugs (PIEDs) confiscated in Italy in the period 2017–2019' (2020) *Clinical Toxicology*; Ross Coomber et al, 'The Supply Of Steroids And Other Performance And Image Enhancing Drugs (PIEDs) In One English City: Fakes, Counterfeits, Supplier Trust, Common Beliefs And Access', (2014) 3 *Journal of Performance Enhancement & Health* 135-144.

¹⁰¹ Alexandra Hall, Rosa Koenraadt and Georgios A Antonopoulos, 'Illicit Pharmaceutical Networks In Europe: Organising The Illicit Medicine Market In The United Kingdom And The Netherlands' (2017) 20 *Trends in Organised Crime* 296-315.

¹⁰² *ACC Organised Crime and Drugs in Sport* (n 72) 30.

substances is a concern to public health for more reasons than one. To protect public health, along with the government's investment in a physically active nation, eradicating doping in sport is imperative.

By gathering intelligence on why athletes are doping, how they are doping, and who is doping, a NADO can work towards eliminating the associated threats. Intelligence can be used by the NADO to identify athletes in sports with a high risk of doping while also enabling them to develop and deliver tailored education programs. As contained in the ASADA Annual Report 2018/19: 'Intelligence shapes decisions around which athletes to test, and when, which sports are most at risk of doping, and what emerging substances pose a threat to athlete health and sport integrity.'¹⁰³

As reported by the Wood Review, the importance of intelligence-based investigations continues to rise contiguous to the increasing sophistication of doping.¹⁰⁴ Blood and urine analysis has been deemed ineffective,¹⁰⁵ and most ADRVs can be established without a biological sample.¹⁰⁶ Coercive information gathering power could prove to be useful in identifying ADRVs. The effective execution of investigations and intelligence gathering by NADOs has proved to be vital to the identification, prosecution, and prevention of doping in sport. Information sharing between NADOs and law enforcement agencies has produced some excellent results, including some of the headline doping scandals.¹⁰⁷

While the Australian Criminal Intelligence Commission ('ACIC') and police may investigate serious and organised crime within the sporting sector, their powers and resources do not extend to enforcing rules of sports participation. Specifically, breaching anti-doping rules is not illegal and as such, the enforcement of the WADC is left to the NADO. Where the NADO obtains information relevant to the enforcement of other Australian laws, it can share it with the associated government agency e.g. the AFP or the Australian Border Force ('ABF'). With SIA listed as an enforcement body under the *Privacy Act*,¹⁰⁸ in addition to being covered by the secrecy provision of the *Freedom of Information Act 1982* (Cth), the sharing of intelligence from other enforcement agencies with the NADO should increase.

As stated in the Explanatory Memorandum, the amendment 'further aligns ASADA's powers with pre-existing contractual powers utilised by many national sporting organisations.'¹⁰⁹ However, what the Wood Review failed to report on, were the details of that pre-existing

¹⁰³ Australian Sports Anti-Doping Authority, *Annual Report 2018-19* (Report, October 2019) 48.

¹⁰⁴ Wood Review (n 33) 105.

¹⁰⁵ Working Group, 'Report to WADA Executive Committee on Lack of Effectiveness of Testing Programs' (Report, 5 December 2013) < <https://www.wada-ama.org/en/resources/world-anti-doping-program/lack-of-effectiveness-of-testing-programs>>; Gerhard P Baumann, 'Growth Hormone Doping in Sports: A Critical Review of Use and Detection Strategies' (2012) 33(2) *Endocrine Reviews* 155; Perikles Simon and Ulrich Dettweiler, 'Current Anti-Doping Crisis: The Limits of Medical Evidence Employing Inductive Statistical Inference' (2019) 49 *Sports Medicine* 497; Carsten Kraushaar Martensen and Verner Mølle, 'More Money – Better Anti-Doping?' (2017) 24(3) *Drugs: Education, Prevention and Policy* 286.

¹⁰⁶ 2015 WADC (n 13) 2.1-10; 2021 WADC (n 13) art 2.1-11.

¹⁰⁷ Bryan T Ikegami, 'From Dumpster to Dicta: How the BALCO Investigation Created Incurable Violations of Players' Rights and How to Prevail Them' (2011) 34(3) *Columbia Journal of Law & the Arts* 491-544; Jeremy Whittle, 'Twenty Years on the Festina Affair Casts Shadow Over the Tour de France', *The Guardian* (online, 4 July 2018) < <https://www.theguardian.com/sport/2018/jul/03/tour-de-france-festina-affair>>; *United States Anti-Doping Agency v Armstrong*, USADA Reasoned Decision on Disqualification and Ineligibility, (Report on Proceedings under the World Anti-Doping Code and the USADA Protocol, 10 October 2012) < <http://cyclinginvestigation.usada.org/>>.

¹⁰⁸ *Privacy Act* (n 89) s 6(1) (definition of 'Enforcement Body').

¹⁰⁹ Explanatory Memorandum, ASADA Amendment Bill (n 1).

contractual power. Found in each NSO's (ASADA approved) ADP is a clause which explicitly abrogates the common law privileges against self-incrimination and self-exposure to a penalty. Crocker's article details the insertion of this contractual provision following the events of the 2013 Bill.¹¹⁰

While ASADA promoted its clear vision and purpose, the new SIA entity is yet to announce or publish any detailed information. Any information to be gathered, at this point, is found by searching through parliamentary documents. A new section was, however, inserted into the SIA Act to provide its object, which is to 'prevent and address threats to sports integrity and to coordinate a national approach to matters relating to sports integrity in Australia.'¹¹¹ Though, it must be remembered, the coercive powers being provided are only to be used for matters relating to the administration of the NAD scheme.¹¹²

Effect

The SIA CEO has many functions and responsibilities under the *SIA Act*. The investigation of ADRVs is one of those functions which includes gathering information from athletes. Section 13A of the *SIA Act* provides the SIA CEO with the authority to issue a disclosure notice requiring the recipient to answer questions, to give information, or to produce documents. The disclosure notice, however, may only be given if the SIA CEO has a reasonable belief that its recipient has information relevant to the administration of the NAD Scheme.

Prior to the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020* (Cth) ('*ASADA Amendment Act 2020*'), s 13D(1)¹¹³ excused an individual from answering a question or providing information if to do so might tend to incriminate or expose the individual to a penalty. This privilege against self-incrimination was congruent with Australia's system of justice where the prosecution is required to prove the guilt of the accused without compelling a confession from the individual.¹¹⁴ The penalty for failure to comply with a disclosure notice, as provided in s 13C of the *Australian Sports Anti-Doping Authority Act 2006* (Cth) ('*ASADA Act 2006*'), was 30 penalty units.¹¹⁵

The *ASADA Amendment Act 2020* doubled the penalty for failing to comply with a disclosure notice to 60 penalty units.¹¹⁶ The *ASADA Amendment Act 2020* also removed the ADRV panel and the requirement that three ADRV Panel members agreed the CEO's belief that the recipient had relevant information was reasonable.

The ASADA Amendment Bill contained a proposal to reduce the threshold for issuing a disclosure notice from a reasonable belief to a reasonable suspicion of the SIA CEO. This provision was opposed and removed just before the third reading. Although the removal of the threshold provision aids in protecting athlete rights, in this situation, close enough is not good enough.

An individual will continue to be afforded an element of protection by the use and derivative use immunity.¹¹⁷ Although any information given is not admissible as evidence against the

¹¹⁰ Crocker (n 24).

¹¹¹ *SIA Act* (n 2) s 3.

¹¹² *SIA Act* (n 2), s 13A(1A).

¹¹³ *Australian Sports Anti-Doping Authority Act 2006* (Cth) ('*ASADA Act 2006*').

¹¹⁴ *Sorby* (1983) 152 CLR 281, 294.

¹¹⁵ *ASADA Act 2006* (n 113) (at 11 June 2020).

¹¹⁶ *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020* (Cth) s 46 ('*ASADA Amendment Act 2020*').

¹¹⁷ Other than in proceedings for an offence against section 137.1 or 137.2 of the applicable *Criminal Code* or in proceedings in connection with the ASADA Act or the regulations: *SIA Act* (n 2) s 13D(2)(d).

individual who gave it, the provision does not exclude the use of protected information to be used against others. The collected information may also be shared with numerous bodies and persons such as the AFP, the Department of Home Affairs, and even a law enforcement body in a foreign country.¹¹⁸

The removal of the ADRV panel means the SIA CEO can give a disclosure notice without first obtaining review or approval. This brings the SIA CEO's authority in line with the Fair Work Commissioner,¹¹⁹ Australian Security and Investments Commissioner,¹²⁰ and the Australian Taxation Commissioner¹²¹ who also have coercive information-gathering powers. While the delegation of the CEO's power to issue a disclosure notice is prohibited under s 24N(2)(b) of the *SIA Act*, the interview may be conducted by an 'interviewer', which is simply defined as the person conducting the interview.¹²² Both the Attorney General's Department's 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers'¹²³ and the Administrative Review Council's report *The Coercive Information-gathering powers of Government Agencies* recommend limiting the use of the coercive power to specific, suitably qualified persons.¹²⁴ There should at least be procedures or guidelines ensuring that officers exercise the power appropriately and responsibly to ensure a fair process and to avoid abuse of power.

The safeguards of the CEO's power to issue a disclosure notice were discussed at the public hearing of the Senate Community Affairs Legislation Committee. Andrew Godkin, then First Assistant Secretary of the National Integrity in Sport Unit, assured the Committee that 'significant oversight is retained through internal ASADA procedures as well as through judicial review, through the Federal Court and complaints Ombudsman.'¹²⁵ Godkin also informed the committee that anti-doping related disputes may now be taken to the newly established National Sports Tribunal ('NST'), which has a specific anti-doping division. Both of Godkin's suggestions are reactive instead of proactive and place an onus on the athletes to monitor the CEO's appropriate exercise of powers. Not only will athletes need to understand how the CEO may exercise the power, but athletes will also need the resources to initiate a review of the CEO's actions.

An application for judicial review may be submitted to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)¹²⁶ where an injunction may be granted to prohibit the SIA CEO from acting beyond their power. This can be a lengthy and costly process. Alternatively, a complaint to the Commonwealth Ombudsman may be registered which is free and can be a relatively quick service. Though the NST has an anti-doping division, a dispute relating to the SIA CEO's exercise of power under the *SIA Act* may

¹¹⁸ *SIA Act* (n 2) s 68B, s 13(1)(g); *NAD Scheme* (n 14) 4.21.

¹¹⁹ *Fair Work (Registered Organisation) Act 2009* (Cth) s 335.

¹²⁰ *Australian Securities and Investments Commission Act 2001* (Cth) s 19.

¹²¹ *Australian Taxation Administration Act 1952* (Cth) sch 1 ch 5 pt 5-1 div 353-10.

¹²² *SIA Regulations* (n 15) 3.26C.

¹²³ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, (Guide, September 2011) <<https://www.ag.gov.au/sites/default/files/2020-03/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>>.

¹²⁴ Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* (Report No 48, May 2008) 7.4.1, 25 ('ARC Report').

¹²⁵ Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 14 February 2020, 18 (Andrew Godkin, First Assistant Secretary, National Integrity of Sport Unit).

¹²⁶ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 6; *Judiciary Act 1903* (Cth) s 39B.

not be a dispute provided for by the NST,¹²⁷ as SIA is not defined as a sporting body¹²⁸ as required by the *National Sports Tribunal Act 2019* (Cth).

Effect On Athletes And Athlete Support Personnel

These legislative changes affect all athletes and athlete support persons in Australia. Anybody¹²⁹ who competes in a sport under an anti-doping policy is considered an athlete for the purposes of the *SIA Act*.¹³⁰ The *SIA Act* captures athlete support personnel by incorporating the definition found in the WADC which includes any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other person working with, treating or assisting an athlete participating in or preparing for sports competition.

Previously, there were two methods ASADA may have used to interview an athlete or support person believed to have information regarding a possible ADRV. First, was a request for the individual to attend an interview to answer questions. Second, was a requirement to attend an interview by issuing a disclosure notice. If an interview between ASADA and an athlete or support person was the result of a disclosure notice issued in accordance with the NAD scheme,¹³¹ the individual could be excused from answering questions or providing information and claim privilege against self-incrimination under s 13D(1) of the *ASADA Act 2006*.¹³²

Under NSO ADPs that commenced 1 January 2015, and remain current, athletes and support persons are contractually bound to comply with any ASADA investigations.¹³³ Under the *SIA Regulations*, an NSO is required to refer all instances of possible ADRVs to the SIA CEO for investigation. This means that most, if not all, anti-doping investigations will be conducted by SIA and athletes are contractually obligated to fully cooperate as their ADP¹³⁴ explicitly abrogates the privilege against self-incrimination and self-exposure to a penalty. Therefore, the failure to answer questions, give information, or provide documents would not result in a fine, but would instead be considered a breach of contract which may lead to a much harsher consequence for the athlete or support person. Either a suspension or termination of an athlete's contract and the resulting inability to participate in sport can mean the end of their sporting career, loss of income, and loss of identity.¹³⁵ Athletes who are unprepared for retirement are also at a higher risk for mental ill-health and an inability to adapt to life post sport.¹³⁶

A clear imbalance of power emerges here as athletes are required to exchange a fundamental right, for the ability to participate in sport. It remains to be seen if a new SIA ADP template will contain a contractual abrogation of the right, to encourage an informal and efficient investigation, or if SIA will rely on disclosure notices which may not put an athlete at risk of breaching any contracts with their NSO.

¹²⁷ *National Sports Tribunal Rule 2020* (Cth) Pt 4 s 7(1).

¹²⁸ *Ibid* s 5(1) (definition of 'sporting body'); *National Sports Tribunal Act 2019* (Cth) s 21.

¹²⁹ *NAD Scheme* (n 14) 1.06.

¹³⁰ *SIA Act* (n 2) s 4 (definition of 'Athlete').

¹³¹ *NAD Scheme* (n 14) div 3.4B

¹³² *ASADA Act 2006* (n 113).

¹³³ *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019, 51.

¹³⁴ See Crocker (n 24) and *Swimming Australia Limited Anti-Doping Policy* (1 January 2015) art 6A.2.3 'All persons must cooperate with and assist ASADA. . . in an investigation. . . even if to do so might tend to incriminate them or expose them to a penalty, sanction or other disciplinary measure. For the avoidance of doubt, the common law privileges against self-incrimination and self-exposure to a penalty are abrogated by this Article.'

¹³⁵ Gayelene Clews, *Wired to Play* (Paragon Printers) 254.

¹³⁶ *Ibid* 270-1; see also <<https://crossingthelinesport.com/>>.

In 2013, ASADA worked in partnership with the Australian Football League ('AFL') to investigate the use of drugs in the AFL. As all AFL players, at that time, were bound by the AFL's anti-doping policy, they were required to fully cooperate with any AFL investigation.¹³⁷ During the investigation, the AFL shared the benefits of their coercive information-gathering power with ASADA by granting ASADA investigators access to attend interviews it conducted. Without biological samples to establish players had been doping, ASADA's investigation relied completely on intelligence gathered. The use of forensic intelligence and analysis by the investigation team¹³⁸ proved successful in identifying doping which ASADA could not have done alone.¹³⁹

While the abrogation of this human right was contained in contracts, athletes and support persons still had a chance to negotiate the removal of the provision in future contracts.¹⁴⁰ Although, it has been acknowledged that athletes are in an inferior position to that of the NSOs and the likelihood of negotiating beneficial terms for athletes is not high.

However, just as the *Australian Sport Anti-Doping Authority Amendment (Sport Integrity Australia) Act 2019* has been used to make significant changes to the *ASADA Act 2006*, including its renaming, another amendment can be enacted to make further changes. It is therefore possible the *SIA Act* may be amended to remove the abrogation of privilege against self-incrimination, or, to allow the SIA CEO to exercise the coercive information-gathering power for other matters captured by the *SIA Act*. Thus, expanding a power that arguably shouldn't have been provided in the first place.

Effects on Third Parties

Individuals who do not participate in organised sport are not obliged to adhere to anti-doping rules, nor are they restricted by contract from supplying athletes with WADA prohibited substances. These third-party suppliers can range from a local supplement store to a faceless username on the dark web guaranteeing untraceable anonymity.¹⁴¹ International organised criminal groups have been linked to the importation, trafficking, and supply of PIEDs since the 1970s¹⁴² with the Australian Crime Commission delivering the report *Organised Crime and Drugs in Sport* in 2013.¹⁴³

¹³⁷ *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019 [51]-[2].

¹³⁸ Peter Rex Harcourt, Francois Marclay, Brett Clothier, 'A Forensic Perspective of the AFL Investigation into Peptides: an Antidoping Investigation Case Study' (2014) 48 *British Journal of Sports Medicine* 810.

¹³⁹ See 'Media Statement: ASADA Issues Amended "Show Cause" notices to AFL Players' News (Web Page, 17 October 2013) <<https://www.asada.gov.au/news/media-statement-asada-issues-amended-show-cause-notices-afl-players>>; See also 'Essendon Doping Investigation: Timeline' 11 January 2016 (Web Page) <<https://www.abc.net.au/news/2013-03-08/essendon-doping-saga:-timeline/4708474>>, for a detailed timeline of the investigation.

¹⁴⁰ Although extremely slight, due to the unequal power balance between athletes and NSOs; 'Athletes are in the best position to ensure proportionality through contractual negotiations' *Essendon v ASADA* (n 137) 337.

¹⁴¹ Illegal black market on internet: Gabrielle Knowles, 'Police Put Users of Dark Web on Notice' *The West Australian* (online, 12 July 2017) <<https://thewest.com.au/news/wa/police-put-users-of-dark-web-on-notice-ng-b88533434z>>.

¹⁴² Alessandro Donati, *World Traffic in Doping Substances* (Report, February 2007) 29 <<https://www.wada-ama.org/en/resources/world-anti-doping-program/donati-report-on-trafficking>>.

¹⁴³ *ACC Organised Crime and Drugs in Sport* (n 72).

As third-parties are not bound by contract to cooperate or assist with anti-doping investigations, it is the *SIA Act* which authorises the SIA CEO to issue third-parties a disclosure notice.¹⁴⁴ Now, with the abrogation of the privilege against self-incrimination third-parties face a substantial fine for not complying, or risk a criminal conviction should they decide to lie. Any information provided may then be shared with other government bodies listed in s 68B of the *SIA Act* which includes the AFP. While the information conceded may not be used as evidence against the individual, it is not excluded from being used against others.

The result of the replacement s 13D¹⁴⁵ on third parties is significant. A non-participant of sport can no longer evade answering questions or protect athletes who dope by claiming the privilege against self-incrimination. The abrogation of this human right, in conjunction with the inclusion as an enforcement body under the *Privacy Act 1988* (Cth) means that SIA's scope to obtain and share information has been substantially expanded.

IV Interaction With International Instruments

To ensure Australia's obligations are met, the *SIA Act* allows for the NAD Scheme to be amended as required by a relevant anti-doping instrument which is listed in the *SIA Regulations*.¹⁴⁶ Due to the limited reference to human rights, the Council of Europe Anti-Doping Convention and the International Anti-Doping Arrangement have intentionally not been included below. It is, however, worth noting that the *European Convention on Human Rights*¹⁴⁷ is the first convention of the Council of Europe and remains a source for their actions today.¹⁴⁸

UNESCO Convention Against Doping in Sport

By ratifying the *UNESCO Convention*, Australia agreed to be a part of the harmonised global fight to eradicate doping in sport.¹⁴⁹ As a State Party¹⁵⁰ to the *UNESCO Convention*, Australia is obliged to implement appropriate measures such as legislation, policies, etc., based on the principles of the WADC.¹⁵¹ At the time of discussing acceding to the *UNESCO Convention*, the government had already prepared to establish ASADA along with a national anti-doping scheme as required by the WADC as Australia already agreed with the Code.¹⁵² By ratifying the *UNESCO Convention*, Australia became bound by international law to adhere to the WADC, a transnational, private law contract.

Specifically, Article 12 of the *UNESCO Convention* requires States Parties, where appropriate, to 'encourage and facilitate the implementation by sports organizations and anti-doping

¹⁴⁴ *SIA Act* (n 2) s 13A.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Sport Integrity Australia Regulations 2020* (Cth) sch 2.

¹⁴⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010).

¹⁴⁸ *A Convention to Protect Your Rights and Liberties* (web page) <<https://www.coe.int/en/web/human-rights-convention/home>>.

¹⁴⁹ *UNESCO Convention* (n 12).

¹⁵⁰ A 'State Party' to the International Convention against Doping in Sport is a country that has ratified, accepted, approved or acceded to this international instrument, and is legally bound by its provisions.

¹⁵¹ *UNESCO Convention* (n 12) Article 4, 5.

¹⁵² National Interest Analysis [2005] ATNIF 16, [19] <<https://www.austlii.edu.au/au/other/dfat/nia/2005/16.html>>.

organizations within their jurisdiction of doping controls in a manner consistent with the Code.’ Doping control is the entire process from planning to test, through to the enforcement of consequences (of committing an ADRV).¹⁵³ Article 3 requires State Parties to ‘adopt appropriate measures at the national and international levels which are consistent with the Principles of the Code’ and to encourage and foster international cooperation.

There is a brief reference to existing international instruments relating to human rights in the preamble to the *UNESCO Convention*, however, it does not go on to explicitly list or detail specific rights or instruments.

WADA and WADC

While the Australian Government is not a Signatory to the WADC (as national governments cannot be),¹⁵⁴ Australia’s NADO (currently listed as ASADA),¹⁵⁵ the AOC, the Australian Commonwealth Games Association, the Australian Paralympic Committee and the Australian Football League¹⁵⁶ are. Signatories are organisations with significant relevance to sport who have accepted the WADC and agree to implement the WADC as provided by the WADC.¹⁵⁷ The Government’s obligations are created under the *UNESCO Convention* with Article 22 of the WADC setting out ‘expectations’ of governments.¹⁵⁸ Should a government fail to comply with the *UNESCO Convention* by failing to adhere to the WADC, it will be up to WADA and UNESCO to decide on meaningful consequences.¹⁵⁹

The WADC explicitly states that ‘the Code has been drafted giving consideration to the principles of proportionality and human rights.’¹⁶⁰ It also goes on to direct that the sport-specific rules and procedures contained in the WADC are intended to be applied in a manner that respects the principles of proportionality and human rights.¹⁶¹ Article 8 of the WADC includes the legal principles of a fair hearing as found in Article 6.1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.¹⁶²

¹⁵³ *UNESCO Convention* (n 12) art 2(8) “‘Doping control’ means the process including test distribution planning, sample collection and handling, laboratory analysis, results management, hearings and appeals.’

¹⁵⁴ Elise Parham, ‘Australia and the World Anti-Doping Code, 1999-2008’, (Legal Article, 6 January 2008) <<https://www.wada-ama.org/en/resources/world-anti-doping-program/australia-and-the-world-anti-doping-code-1999-2008>> 7.

¹⁵⁵ ‘Code Signatories’ (Web Page, at 13 July 2020) < <https://www.wada-ama.org/en/code-signatories#GovernmentFundedOrganizations>>.

¹⁵⁶ As there is no International Federation for the Australian Football League (‘AFL’), the AFL must be a Signatory to be bound by the WADC (n 13); See also Samantha Lane, ‘Australian Codes Warned on WADA Breakaway’ (Online Newspaper, 19 June 2014) <<https://www.smh.com.au/sport/australian-codes-warned-on-wada-breakaway-20140619-zsfd7.html>>.

¹⁵⁷ ‘Signatories: Those entities accepting the Code and agreeing to implement the Code, as provided in Article 23’: WADC (n 13) app 1 (definition of ‘Signatories’).

¹⁵⁸ WADC (n 13) Comment to art 22.

¹⁵⁹ 2021 WADC (n 13) art 22.10.

¹⁶⁰ 2015 WADC (n 13) 11; 2021 WADC (n 13) 9.

¹⁶¹ 2015 WADC (n 13) 17; 2021 WADC (n 13) 14.

¹⁶² *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS (entered into force 3 September 1953), as amended by *Protocol No. 14 to the Convention for the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010). Australia is not a Signatory.

The issue of proportionality and the WADC is discussed by Olivier Niggli¹⁶³ and Julien Sieveking¹⁶⁴ in their article addressing issues from anti-doping case law.¹⁶⁵ The article explains that the uniform application of sanctions under the WADC must be enforced, even in the most exceptional circumstances.¹⁶⁶ It is confirmed that, although sometimes harsh and inflexible on some athletes, the rules have been accepted by all signatories with the overarching aim of eradicating doping in sport.

Though the protection of Athletes' human rights is promoted by the Code, an Athlete's right to privacy¹⁶⁷ is severely impeded by sample collection requirements. Sample collection is a part of the doping control process which includes the collection of blood or urine for testing.¹⁶⁸ A comment has been included on art 21.1 which is the provision that requires athletes to be available for sample collection at all times. The comment confirms Athletes' human rights and privacy were considered during drafting, however, the aim of catching drug cheats at optimal times justified such an infringement.

While the right to a fair hearing is explicitly provided for in the WADC,¹⁶⁹ any reference to a right against self-incrimination is hard to find. An acknowledgement of the right against self-incrimination, and the decision not to abrogate or limit it may be inferred by the fact it hasn't been explicitly removed. Particularly, the use of rewards¹⁷⁰ to entice athletes to 'cooperate' with Anti-Doping Organisation's investigations confirms an awareness that the athlete's cooperation is not obligatory.

The use of the terms 'cooperate' and 'fully cooperate' throughout the Code also indicates different levels of obligations created by the Code. While the Code specifically states that an Athlete's admission may be used to establish an ADRV,¹⁷¹ it is also made clear that non-cooperation with an Anti-Doping Organisation's investigation is not itself an ADRV.¹⁷² In relation to substantial assistance,¹⁷³ a person must fully cooperate, and continue to cooperate so that any suspended consequences¹⁷⁴ are not reinstated.

As a result of providing substantial assistance,¹⁷⁵ an athlete or other person who has been charged with an ADRV may receive a reduction or suspension of consequences. Substantial assistance requires full disclosure and cooperation with investigations and adjudication while ensuring any information provided is credible and valuable.¹⁷⁶ Substantial assistance may be given at any time of the Results Management process prior to appealing the decision of the Results Management Authority to the CAS.

¹⁶³ Lawyer, Director of Legal Affairs with WADA.

¹⁶⁴ Manager of Legal Affairs with the WADA.

¹⁶⁵ Olivier Niggli and Julien Sieveking, 'Selected Case Law Rendered Under the World Anti-Doping Code' (2006) February 20 *Jusletter* <<https://www.wada-ama.org/en/resources/legal/selected-case-law-rendered-under-the-world-anti-doping-code>>.

¹⁶⁶ *Ibid* 9-11; *Squizzato v FINA* (Court of Arbitration for Sport, Case No CAS 2005/A/830) 15 July 2005.

¹⁶⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) art 17.

¹⁶⁸ WADC (n 13) art 21.1.

¹⁶⁹ *Ibid* art 8.1.

¹⁷⁰ 2015 WADC (n 13) art 10.6; 2021 WADC (n 13) arts 10.7-8.

¹⁷¹ WADC (n 13) art 3.2.

¹⁷² 2015 WADC (n 13) Comment to Article 21.1.6, 113; 2021 WADC (n 13) Comment to Article 21.1.6, 136.

¹⁷³ See appendix

¹⁷⁴ See 'Consequences of Anti-Doping Rule Violations ("Consequences")' WADC (n 13) app 1.

¹⁷⁵ WADC (n 13) app 1 (definition of 'Substantial Assistance').

¹⁷⁶ *Ibid*.

The creation of a Case Resolution Agreement is provided for in the 2021 WADC, Article 10.8.2,¹⁷⁷ which allows for the reduction in the period of ineligibility of an athlete, as decided by the ADO and WADA. The agreement is available to athletes and other persons who admit to an ADRV after being confronted with the ADRV by an ADO, and agrees to acceptable consequences.¹⁷⁸ Factors such as the asserted ADRV, the seriousness of the violation, the degree of fault, and how promptly the athlete admitted the violation can be considered when deciding the period of ineligibility.

To achieve the purpose of the WADC and ensure universal acceptance and implementation, the WADC has been drafted to be ‘specific enough to achieve complete harmonisation on issues where uniformity is required, yet general enough in other areas to permit flexibility.’¹⁷⁹ Article 23.2¹⁸⁰ provides specific requirements of implementation, including a list of Articles that must be implemented by Signatories in their rules, without substantive change. Additional provisions are allowed, including disciplinary measures,¹⁸¹ however, should any additional provisions result in a substantive change to any of the articles listed, a Signatory may be deemed as non-compliant.¹⁸² Non-compliant Signatories could face serious consequences if the issue is not rectified accordingly.¹⁸³ Though not a provision of the WADC, WADA has publicly stated that the agency does not believe that doping should be made a criminal offence for athletes.¹⁸⁴ As the purpose of the WADC is to harmonise anti-doping programs throughout the world, the sanctions agreed upon should remain uniform. As all governments have agreed to the process provided by the Code, such action disrupts the unified and agreed approach.¹⁸⁵

While ‘substantive change’ is not defined in the Code, two cases have come before the Court of Arbitration of Sport (‘CAS’) which may assist in understanding this issue further. In both *United States Olympic Committee (USOC) v. International Olympic Committee (IOC)*¹⁸⁶ and *British Olympic Association (BOA) v. World Anti-Doping Agency (WADA)*,¹⁸⁷ the CAS panel was required to determine if additional rules added by the Signatories (IOC and BOA) caused a substantive change to a mandatory article of the Code. In both cases, the CAS panel established the effect of the additional provision and then how that provision changed the effect of a mandatory article of the WADC.¹⁸⁸ Specifically, each provision in question was found to create additional sanctions for Athletes. Both additional provisions were determined as a ‘substantive change’ and therefore inconsistent with the WADC. The Panel then issued a reminder that the Code serves to harmonise the worldwide fight against doping in sport and that Signatories agreed to limit their autonomy concerning activities covered by the WADC.¹⁸⁹

¹⁷⁷ 2021 WADC (n 13) art 10.8.2.

¹⁷⁸ Ibid.

¹⁷⁹ 2015 WADC (n 13) 11; 2021 WADC (n 13) 9.

¹⁸⁰ WADC (n 13).

¹⁸¹ WADC (n 13) arts 23.2.2, 13.

¹⁸² WADC (n 13) art 24.1.4.

¹⁸³ WADC (n 13) arts 24.1.4, 24.1.12.

¹⁸⁴ ‘WADA Statement on the Criminalization of Doping in Sport’ (25 October 2015)

<<https://www.wada-ama.org/en/media/news/2015-10/wada-statement-on-the-criminalization-of-doping-in-sport>>.

¹⁸⁵ See ‘WADA calls on US Senate to consider widely held concerns about Rodchenkov Act’ (12 March 2020) <<https://www.wada-ama.org/en/media/news/2020-03/wada-calls-on-us-senate-to-consider-widely-held-concerns-about-rodchenkov-act>>.

¹⁸⁶ *United States Olympic Committee (USOC) v. International Olympic Committee (IOC) (Award)* (Court of Arbitration for Sport, Case No 2011/O/2422, 4 October 2011) (‘*USOC v IOC*’).

¹⁸⁷ *British Olympic Association (BOA) v. World Anti-Doping Agency (WADA) (Award)* (Court of Arbitration for Sport, Case No CAS 2011/A/2658, 30 April 2012) (‘*BOA v WADA*’).

¹⁸⁸ Ibid [8.39]; *USOC v IOC* (n 187) [48].

¹⁸⁹ *BOA v WADA* (n 188) [8.12]; See also 2015 WADC (n 13) 11; 2021 WADC (n 13) 9.

It is therefore unclear where an Athlete who has been statutorily coerced to provide information or answer questions sits within the results management process. Will the athlete still be eligible to enter a Case Resolution Agreement (art 10.8.2)? If an Athlete is legally obliged to fully cooperate with their NADO can they still be considered as providing Substantial Assistance? Are benefits for cooperation still available to Athletes participating in Australia?

World Anti-Doping Code International Standard Testing and Investigations 2021

The WADA International Standard for Testing and Investigations (ISTI)¹⁹⁰ creates mandatory standards for efficient and effective ADRV investigations for ADOs. The document highlights the importance of anti-doping intelligence gathering and the processes required to maintain the integrity of any intelligence gathered. Like the WADC, the ISTI states that the principles of proportionality, human rights, and other applicable legal principles were given consideration during drafting and it shall be interpreted and applied in that light.¹⁹¹

Part Three of the ISTI covers standards for intelligence gathering and investigations with a strong push for ADOs to use all resources possible to gather anti-doping intelligence. The ISTI also recommends the instigation of disciplinary action against Athletes or other Persons not cooperating with ADO investigations, as required by Article 21 of the WADC.¹⁹² Such a policy could be described as incompatible with an Athlete's right to silence as addressed in a 2007 *Legal Opinion* on a draft WADC.¹⁹³ That discussion, however, did not consider a threat of disciplinary action for non-cooperation as it instead assessed if the loss of a possible discount of sanction constituted an additional penalty.¹⁹⁴ The opinion cited the relevant case law as *USADA v Collins*¹⁹⁵ as decided by the American Arbitration Association. The arbitration panel found that the *Fifth Amendment* to the U.S. Constitution¹⁹⁶ does not proscribe the drawing of an adverse inference from a witness who asserts the Fifth, according to American case law.¹⁹⁷

Court of Arbitration of Sport

The Court of Arbitration of Sport ('CAS') was established by the International Olympic Committee in 1984 to deal with an increasing number of international sports-related

¹⁹⁰ *World Anti-Doping Code International Standard, Testing and Investigations 2021* ('WADA ISTI').

¹⁹¹ *Ibid* art 3.6.2

¹⁹² *Ibid* art 12.2.4.

¹⁹³ Gabrielle Kaufmann-Kohler, Antonio Rigozzi, 'Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes' (13 November 2007) < https://www.wada-ama.org/sites/default/files/resources/files/Legal_Opinion_Conformity_10_6_complete_document.pdf >.

¹⁹⁴ *Ibid* 37-8.

¹⁹⁵ *USADA v. Collins (Award)* (American Arbitration Association, AAA No 30 190 00658 04, 9 December 2004).

¹⁹⁶ *United States Constitution* amend V.

¹⁹⁷ Gabrielle Kaufmann-Kohler, Antonio Rigozzi, 'Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes' (13 November 2007) < https://www.wada-ama.org/sites/default/files/resources/files/Legal_Opinion_Conformity_10_6_complete_document.pdf > [99];

See *USADA v. Collins (Award)* (American Arbitration Association, AAA No 30 190 00658 04, 9 December 2004) [37]-[39].

disputes.¹⁹⁸ Its main task is to settle disputes specific to sport by means of arbitration or mediation.¹⁹⁹ The CAS is a private institution with its seat in Switzerland and its Code of Sports-related Arbitration²⁰⁰ in accordance with relevant Swiss law.²⁰¹ Prior to arbitration, parties may agree on the law to apply to the resolution of their dispute.²⁰²

Although CAS is not bound to follow precedent of previous arbitral decisions, to achieve a fair and consistent framework, panel members have tended to do so.²⁰³ Due to the autonomy of sport organisations worldwide and the establishment of the CAS, a specific area of transnational sports law²⁰⁴ has evolved. Also known as *lex sportiva*,²⁰⁵ this distinct area of law has developed its own principles, such as ‘fair play’ and strict liability in all doping cases.²⁰⁶ It appears the Australian National Sports Tribunal (‘NST’) will look to previous CAS decisions and to other tribunals to understand relevant case law, as stated in the NST Bench book.²⁰⁷ The privilege against self-incrimination has been discussed by the CAS in only one reported decision (Makudi v FIFA).²⁰⁸ Unfortunately, in that case, the privilege did not apply to Mr Makudi’s sanction and the Panel members did not opine any further on the right.²⁰⁹

The adoption of a utilitarian approach by WADA as found in the WADC and then subsequently by the CAS has been observed by academics.²¹⁰ The strict liability principle found in the WADC places an absolute burden on athletes to ensure ‘that no *Prohibited Substance* enters their bodies.’²¹¹ Should a *Prohibited Substance*²¹² be found in an Athlete’s sample (without a

¹⁹⁸ CAS, History of the CAS (Web Page) < <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> >.

¹⁹⁹ Court of Arbitration for Sport, *Code of Sports-related Arbitration* (adopted 1 January 2019) S12 (‘CAS Rules’); Lorenzo Casini, ‘The Making of a Lex Sportiva, The Court of Arbitration for Sport “The Provider”’ (ILLJ Working Paper 2010/5, Global Administrative Law Series, Institute for International Law and Justice, New York University School of Law) 9.

²⁰⁰ Meinard Vetter, ‘The CAS An Arbitral Institution with its Seat in Switzerland’ (2008) *eLaw Journal: Bond University Sports Law eJournal*, 1; History of the CAS (above n 199).

²⁰¹ *Swiss International Private Law Act of 18 December 1987*, art 190, ann 2.

²⁰² CAS Rules (n 200) R45 Law Applicable to the Merits.

²⁰³ Ryan Connolly, ‘Balancing the Justices in Anti-Doping Law’ (2006) 5(2) *Virginia Sports and Entertainment Law Journal* 161, 197; *A.C. / Federation Internationale de Natation Amateurt (FINA), (Award)* (Court of Arbitration for Sport, Case No CAS 96/149, 13 March 1997) [19].

²⁰⁴ Franck Latty, ‘Transnational Sports Law’ (2011) 1-2 *The International Sports Law Journal* < https://www.academia.edu/20389292/Transnational_Sports_Law > 37; Antoine Duval, ‘Lex Sportiva: A Playground for Transnational Law’ (2013) 19(6) *European Law Journal* 822, 827.

²⁰⁵ Brendan Schwab, ‘Embedding the Human Rights of Players in World Sports’ (2018) 71 *The International Sports Law Journal* 214, 214.

²⁰⁶ Cassini (n 200) 14; Richard H. McLaren, ‘The Court of Arbitration for Sport: An Independent Arena for the World’s Sports Disputes’ [2001] 35(2) *Valparaiso University Law Review* 379, 396.

²⁰⁷ National Sports Tribunal Bench Book -2020, [6] < <https://www.nationalsportstribunal.gov.au/sites/default/files/files/2020-05/bench-book-2020.pdf> >.

²⁰⁸ *Worawi Makudi v Federation Internationale De Football Association (FIFA) (Award)* (Court of Arbitration for Sport, Case No CAS 2018/A/5769, 11 February 2019).

²⁰⁹ *Ibid* [136]

²¹⁰ Kaisa Kirikal, ‘Critical Analysis of the World Anti-Doping Code: Timely Issues Related to Andrus Veerpalu v FIS and other Relevant Case Law’ (2013) 21(1) *British Association for Sport and Law Journal*, 35; Mark Smith, ‘A Critical Analysis Of The Divided Court Of Arbitration For Sport Jurisprudence On The World Anti-Doping Code Article 10.4’ (2013) 8(1) *Australian and New Zealand Sports Law Journal*, 108; Annette Greenhow & Kim Weinert, ‘Diversity and Inclusion (or Exclusion) in Sport: A Review of the Caster Semenya Case’ (2019) 7(2) *Griffith Journal of Law & Human Dignity*.

²¹¹ WADC (n 13) arts 2.1-2.

²¹² WADC (n 13) app 1 (definition of ‘Prohibited Substance’).

Therapeutic Use Exemption)²¹³, an ADRV will be established. The responsibility then falls upon the Athlete to prove they bear *No Fault, No Significant Fault* or *Negligence* on a balance of probability to receive a reduction or elimination of the appropriate sanction.²¹⁴

It is somewhat concerning that the CAS, WADA and other ADOs allow individual injustices and justify them as ‘practical necessities of the fight against doping.’²¹⁵ In their universal, harmonised battle, ADOs must be held accountable in their protection of fundamental human rights. With this understanding, and as directed by Jean-Paul Costa in his legal opinion for WADA: ‘the fight against the scourge of doping and respect for human rights can be reconciled. The two can and must be reconciled.’²¹⁶

MINEPS

The International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (‘MINEPS’) was created in 1976 by UNESCO as part of their commitment to physical education and sport. MINEPS is a global platform that fosters the identification and implementation of policy actions to ensure the field of physical education and sport continues to grow. The formation of the 1978 *International Charter of Physical Education and Sport*²¹⁷ and the *UNESCO Convention* were both facilitated by MINEPS.²¹⁸

In 2017 the Sixth International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (‘MINEPS VI’) was held in Kazan. It was here that the Kazan Action Plan (‘KAP’) was adopted which provides a framework to implement global policy in alignment to the *United Nations 2030 Agenda for Sustainable Development*.²¹⁹

One of three main policy areas identified in the KAP is ‘Protecting the Integrity of Sport’.²²⁰ Within this area is the objective of safeguarding athletes’ health, safety, and well-being to provide a safe environment, where human rights are fully respected.²²¹ Also of importance and attracting a strategy for improvement is good governance of sports organisations. As stated in the KAP: ‘Good governance is increasingly recognized as a critical feature of effective, equitable and ethical sports organizations.’²²²

The respect and promotion of human rights is not limited to just Athletes but extends to all those involved in the delivery of physical education, physical activity and sport, including

²¹³ WADC (n 13) app 1 (definition of ‘Therapeutic Use Exemption (TUE)’).

²¹⁴ 2015 WADC (n 13) arts 10.4-5; 2021 WADC (n 13) arts 10.5-6.

²¹⁵ *Liam Cameron v. UK Anti-Doping Limited (UKAD) (Award)* (Court of Arbitration for Sport, Case No CAS 2019/A/6110, 30 December 2019) [110]; Ryan Connolly, ‘Balancing the Justices in Anti-Doping Law’ (2006) 5(2) *Virginia Sports and Entertainment Law Journal* 161, 184 quoting *USA Shooting & Quigley v. International Shooting Union (UIT) (Award)* (Court of Arbitration for Sport, Case No CAS 94/129, 23 May 1995) CAS Digest I, at 187, 193-194.

²¹⁶ Jean-Paul Costa, ‘Legal Opinion 2019 (expert opinion) on the World Anti-Doping Code’ (26 September 2019) <<https://www.wada-ama.org/en/resources/the-code/legal-opinion-on-the-2021-code-by-judge-jean-paul-costa>>, 38.

²¹⁷ *UNESCO International Charter of Physical Education and Sport*, UN Doc SHS/2012/P1/H/1 REV.2 (21 November 1978) revised by *Revision of the International Charter of Physical Education and Sport*, UN Doc 38 C/47 (November 2015).

²¹⁸ *International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (MINEPS)* (web Page) <<https://en.unesco.org/themes/sport-and-anti-doping/mineps>>.

²¹⁹ *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1 UN Doc A/RES/70/1 (21 October 2015 adopted 25 September 2015); *MINEPS* (Web Page) <http://en.mineps2017.com/conference/about_mineps/>.

²²⁰ *Kazan Action Plan*, UN Doc SHS/2017/PI/H/14 REV, (2017) (‘KAP’).

²²¹ *Ibid* Annex I C.8.III.1.

²²² *Ibid* III.3.

those engaged for major sports events.²²³ As such, the KAP recognises the United Nations Guiding Principles on Business and Human Rights ('UNGPs') must be followed to safeguard the fundamental rights of all.²²⁴

The UNGPs contain directions to employees to enable understanding of internationally recognised human rights as found in the International Bill of Human Rights and the International Labour Organisation's ('ILO') Declaration on Fundamental Principles and Rights at Work.²²⁵

In 2015, the UNESCO Charter on Physical Education, Physical Activity and Sport was amended to include that any employer in the sports area must respect international labour conventions and basic human rights. Since its adoption in 1978, the Charter continues to guarantee the right of access to sport and physical education while recurrently being reviewed and developed to maintain its efficacy.²²⁶

In January 2020, the ILO Global Dialogue Forum on Decent Work in the World of Sport adopted 31 points of consensus to promote and protect decent work in the world of sport.²²⁷ The document identifies opportunities, recognises current practices, and provides recommendations for future action. Point 28²²⁸ recommends that governments, employers' and workers' organisations promote the principles set out in the UNGPs in conjunction with the Sporting Chance Principles.²²⁹

The Human Rights Council has also confirmed the application of human rights to the sport field to be compatible and essential.²³⁰

With such global momentum towards protecting the fundamental rights of Athletes, including the right to participate in doping-free sport, it is hard to understand how the Bill has passed through Australian Parliament. It is also alarming that the Wood Review did not report on current practice or any opinions obtained from key stakeholders in the human rights in sport sector. There is however the argument that such measures as abrogating the privilege against self-incrimination are imperative in the fight against cheating. This appears to be incongruent with the direction of the world and will be discussed further in the following chapter.

²²³ Ibid III.1.

²²⁴ Ibid III.

²²⁵ United Nations Human Rights: Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> 12 ('UNGP').

²²⁶ *Follow up to the Fifth International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (MINEPS V)*, UN Doc 37/ C/INF.16 (5 September 2013) [11].

²²⁷ International Labour Organization: Global Dialogue Forum on Decent Work in the World of Sport, *Points of consensus*, ILO Doc GDFWS/2020/7 (22 January 2020).

²²⁸ Ibid.

²²⁹ See Centre for Sport and Human Rights, *Sporting Chance Principles* (web page) <<https://www.sporhumanrights.org/en/principles>>.

²³⁰ *Final report of the Human Rights Council Advisory Committee on the possibilities of using sport and the Olympic ideal to promote human rights for all and to strengthen universal respect for them*, UN Doc (A/HRC/30/50) (3 August 2015) [6].

V. Future Issues

Reason for The Bill – The Wood Review

The *ASADA Amendment (Enhancing Australia's Anti-Doping Capabilities) Act 2020* (Cth), is the result of the government's commitment to implement agreed recommendations of the Wood Review.²³¹ Between 5 August 2017, the date the review was announced,²³² and 12 June 2020, the day the *Amendment Bill* successfully passed parliament, a number of relevant events occurred. It is unclear if these events have been considered throughout the process.

World Events

The *Final Report*²³³ from MINEPS VI was delivered in September 2017. The report included a focus on integrity in sport as a main policy area for development. Human rights were highlighted as needing to be protected and respected to continue improvement in the physical education, physical activity and sport domain.

Later in 2017, WADA announced and began the two-year revision process for the 2021 WADC.²³⁴ Australia submitted comments on three versions of the draft and was notably the only stakeholder, out of 23, not to provide a supportive comment regarding new whistleblower protections. Australia instead chose to warn of the onerous obligations to affect such a program. A proposed amendment to reduce the age limit for minors under the WADC had the Council of Europe pointing out a violation of the UN Convention on the Rights of the Child. In response to the same provision, Australia advocated to subject all athletes at open international events to the same anti-doping arrangements regardless of age, in the interest of fairness.²³⁵

In December of 2018, the General Council of the UN welcomed 'the growing attention by the international community to exploring and leveraging the role of sport and physical activity in the attainment of development objectives and the enjoyment of human rights.'²³⁶ The Council went on to encourage the application of the UN Guiding Principles on Business and Human Rights²³⁷ by those delivering major sports events.

The 2021 WADC was unanimously approved on 7 November 2019 at the World Conference on Doping in Sport,²³⁸ at the same event, the WADA Executive Committee approved another pivotal document, the *Athletes' Anti-Doping Rights Act*.²³⁹ While not a legal document, the *Athletes' Anti-Doping Rights Act* ('AADR Act') represents a large body of athletes who are

²³¹ Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 14 February 2020, 18 (Andrew Godkin, First Assistant Secretary, National Integrity of Sport Unit).

²³² Hunt (n 68).

²³³ *United Nations Educational, Scientific and Cultural Organization: Sixth International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (MINEPS VI)*, UN Doc SHS/2017/5 REV (September 2017).

²³⁴ 'The Code' (Web Page) <<https://www.wada-ama.org/en/what-we-do/the-code>>; Wood Review (n 33) 210.

²³⁵ '2021 Code Review' (Collation of Comments, 17 June 2019) 121 <<https://www.wada-ama.org/en/resources/the-code/2021-world-anti-doping-code>>.

²³⁶ UN General Assembly, 73rd sess, Agenda item 12, Resolution adopted by the General Assembly on 3 December 2018, A/RES/73/24 (6 December 2018) 4.

²³⁷ UNGP (n 226) 6.

²³⁸ '2021 Code Review', WADA (web page) <<https://www.wada-ama.org/en/what-we-do/the-code/2021-code-review>>.

²³⁹ *WADA Athletes' Anti-Doping Rights Act*, (18 June 2020) <https://www.wada-ama.org/sites/default/files/resources/files/athlete_act_en.pdf>.

aware of, and are striving to promote and protect fundamental rights for all athletes. The *AADR Act*, and its acceptance, contribute to the growing movement towards ensuring athlete human rights are respected and protected.

The Sporting Chance Forum held by the Centre for Sport and Human Rights in November 2019 reported that athlete activism on specific issues is on the rise, along with an increasing number of major sporting event organisers implementing the UN Guiding Principles.²⁴⁰ The Centre for Sport and Human Rights was established in 2018 for the defined purpose of working towards a ‘world of sport that fully respects human rights.’²⁴¹

As discussed in the previous chapter, the International Labour Organisation held its global dialogue forum on decent work in the world of sport in January 2020. It produced 31 points of consensus recognising the importance of sport and the need for workers’ rights to be protected in this area.²⁴²

Both domestic and international lawyers have expressed their concerns with the abrogation of the privilege against self-incrimination which effects already over-burdened athletes.²⁴³ Brendan Schwab, Head of the World Players Association, when discussing the issue with journalist Tracy Holmes, said it would be ‘ironical should Australia be lagging behind the rest of the world on fundamental athlete rights.’²⁴⁴ Schwab went on to recommend Australian sport organisations be proactive and undertake player human rights due diligence so that remedies could be made available for any identified risks.

Compliance with The UNESCO Convention

As contained in art 3(a) of the *UNESCO Convention*, the government is obliged to ‘adopt appropriate measures . . . which are consistent with the principles of the Code.’ Article 23.2.2 of the WADC²⁴⁵ prohibits additional provisions that change the effect of the listed mandatory articles, which includes art 10. Article 10²⁴⁶ covers sanctions on individuals, specifically arts 10.7-8²⁴⁷ which include the elimination or reduction of sanctions in exchange for cooperation from an athlete. The WADC also stipulates that a consultative process lead by WADA must be completed prior to any changes of the WADC.²⁴⁸ It does not appear that the government

²⁴⁰ Centre for Sport and Human Rights, “The 2019 Sporting Chance Forum Meeting Report” (June 2020), available at: <https://www.sporhumanrights.org/en/resources/meeting-report-2019-sporting-chance-forum>

²⁴¹ ‘Overview’ (Web Page) <<https://www.sporhumanrights.org/en/about/overview>>.

²⁴² International Labour Organization: Global Dialogue Forum on Decent Work in the World of Sport, *Points of consensus*, ILO Doc GDFWS/2020/7 (22 January 2020).

²⁴³ Crocker (n 24); Nikki Dryden, Submission 6 to Senate Standing Committees on Community Affairs, Parliament of Australia, *Inquiry into Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability Bill 2019)*; ²⁴³ Law Institute Victoria, Submission No 3 to Senate Standing Committee on Rural and Regional Affairs and Transport, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013* (21 February 2013); Commercial Bar Association of Victoria, Submission No 9 to Senate Standing Committee on Rural and Regional Affairs and Transport, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*; Australian Athletes Alliance, Submission No 6 to Senate Standing Committee on Rural and Regional Affairs and Transport, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*.

²⁴⁴ The Ticket: 9 February 2020, *The Ticket* (ABC NewsRadio, 8 February 2020). <<https://www.abc.net.au/radio/newsradio/podcasts/the-ticket/the-ticket:-9-february-2020/11947282>>.

²⁴⁵ WADC (n 13).

²⁴⁶ WADC (n 13).

²⁴⁷ 2021 WADC (n 13).

²⁴⁸ *Ibid* 25.1.2-3.

sought confirmation or advice as to the effect of the ASADA Amendment Act 2020 on the principles of the WADC.

There is a comment to art 10.7.1 which reads: ‘The cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring anti-doping rule violations to light is important to clean sport.’²⁴⁹ It is unclear if coerced cooperation by an athlete is still valued under the WADC and if it will effect the reduced sanction amount.

Therefore, if the statutory abrogation of the privilege against self-incrimination found in the *SIA Act* is deemed to change the effect of art 10,²⁵⁰ Australia would be in breach of art 3(a) of the UNESCO Convention²⁵¹ as the legislation would not be consistent with the principles of the WADC. The principle of proportionality particularly, as the WADC provides benefits for cooperation with investigations instead of requiring mandatory cooperation by athletes, thus exemplifying the acceptable balance.

On recommendation of the WADA Compliance Review Committee (‘WADA CRC’), the WADA Executive Committee may report any non-compliance of the WADC to the relevant body to impose sanctions. The WADA CRC is described as an independent, non-political body composed of compliance experts from around the world. James Wood QC, author of the Wood Review, is currently appointed as the WADA CRC Chair.²⁵²

Addressing Threats

Sports integrity has been defined in the *SIA Act* as ‘the manifestation of the ethics and values that promote community confidence in sport.’²⁵³ Threats to sports integrity include both the manipulation of sporting competitions and the use of drugs or doping methods in sport.²⁵⁴ The infiltration of organised crime in sport is undisputedly a major concern worldwide, especially into the aforementioned areas. After gaining a foothold into one area of illegality in sport, it is understood criminal enterprises may expand their activities once further opportunities of power or profit are identified.

While the Wood Review relied heavily on the 2013 *ACC Organised Crime and Drugs in Sport report*, it is unclear if any further data was sought to confirm the relevance, or the currency, of the data it contained. In fact, there is information available that suggests otherwise. A six-year review of PIED cases was completed which found only 12% of cases indicated possible links with organised crime groups.²⁵⁵ Workers in the healthcare sector, however, made-up 17% of the cases, which is consistent with the findings in the *ACC Organised Crime and Drugs in Sport report*.²⁵⁶

The investigation identified doctors and other medical practitioners, such as sport scientists, providing PIEDs to athletes. Doctors were found prescribing PIEDs and issuing scripts to patients in false names, without a consultation or without pre-requisite tests. Concern was also raised by the ACC regarding the use of athletes as ‘guinea pigs’ for experimental drugs

²⁴⁹ 2021 WADC (n 13) 72.

²⁵⁰ *Ibid.*

²⁵¹ *UNESCO Convention* (n 12).

²⁵² Compliance Review Committee (Web page, 2020) < <https://www.wada-ama.org/en/who-we-are/governance/compliance-review-committee> >.

²⁵³ *SIA Act* (n 2) s 4 (definition of ‘Sports Integrity’).

²⁵⁴ *SIA Act* (n 2) s 4 (definition of ‘Threats’).

²⁵⁵ Katinka van de Ven, Matthew Dunn, Kyle Mulrooney, ‘Performance and image enhancing drug (PIED) producers and suppliers: a retrospective content analysis of PIED-provider cases in Australia from 2010-2016’ *Trends in Organised Crime* (2020) 23: 143-153. 148

²⁵⁶ *ACC Organised Crime and Drugs in Sport* (n 72).

and ‘off-label’ substance use. Although not all are listed on the WADA Prohibited List, some substances not suitable for human consumption have been injected into players, putting not only their health at risk, but also their careers. Anti-ageing clinics were highlighted in the report as a popular location for the procurement of peptides and hormones, specifically testosterone,²⁵⁷ with supplement suppliers identified as ‘a particular threat to the integrity of sport given their ready access to professional athletes and PIEDs.’²⁵⁸

Even in this post-Dank era,²⁵⁹ exercise & sport science is still a self-regulated profession in Australia. Penalties have however increased for persons claiming to be or acting as a registered health practitioner.²⁶⁰ The maximum penalty for the offence went from \$30,000, to \$60,000 or 3 years imprisonment or both.²⁶¹ Exercise & Sport Science Australia (‘ESSA’) administers the national accreditation scheme for exercise and sport science professionals, with the Australian Sports Commission (ASC) denying funding to any organisation employing non accredited staff.²⁶² A memorandum of understanding between ASADA and the Australian Health Practitioner Regulation Agency (‘AHPRA’) was announced on 14 November 2017. This partnership opens the avenue for information gathering and sharing between SIA and the agency responsible for regulation of the Health Practitioner Regulation National Law.²⁶³

Obtaining Information

Although increased and improved education was recommended by the Wood Review,²⁶⁴ ASADA’s focus remained heavily on their ability to catch doping athletes and facilitators. Now SIA have the power they asked for, will it be everything that was expected?

Australians value ethics, fair play and honesty in sport,²⁶⁵ however, doping in sport is not a criminal offence. Any information that SIA collects may be disclosed to an entity listed in the *SIA Act*,²⁶⁶ if it will assist the entity carry out its functions, duties or powers.²⁶⁷ The AFP are listed under s 68B, which means SIA may share any relevant information it obtains with the AFP. The Australian Criminal Intelligence Commission has stated that the scope of their inquiries is limited to serious and organised crime, as stipulated by statute. This does not

²⁵⁷ Ibid 20.

²⁵⁸ Ibid 29.

²⁵⁹ Carly Crawford, ‘Essendon Drugs Saga: How Stephen Dank Ran the Controversial Supplement Program’, (Online News Article, 27 March 2015)

<<https://www.heraldsun.com.au/sport/afl/teams/essendon/essendon-drugs-saga-how-stephen-dank-ran-the-controversial-supplement-program/news-story/ea77b17df9d7f67d8docac79f4f9aa5>>.

²⁶⁰ *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2019* (Qld) s 10.

²⁶¹ *ASADA Amendment Act* (n 116).

²⁶² ‘Australian Sport Commits to National Standard for Sport Science’ 19 December 2017 (Web page) <

https://www.sportaus.gov.au/media_centre/news/australian_sport_commits_to_national_standard_for_sport_science2>.

²⁶³ ‘Powerful Partnership to Tackle Improper PED prescriptions’ *News* (14 December 2017) (Web page) < <https://www.asada.gov.au/news/powerful-partnership-tackle-improper-ped-prescriptions>>; *Health Practitioner Regulation National Law (NSW)* No 86a.

²⁶⁴ Wood review.

²⁶⁵ Jason Mazanov, Twan Huybers and James Connor, ‘Prioritising Health in Anti-Doping: What Australians Think’ (2012) 15 *Journal of Science and Medicine in Sport* 381, 382.

²⁶⁶ *SIA Act* (n 2).

²⁶⁷ Ibid.

capture alleged breaches of the WADC.²⁶⁸ SIA is also limited by statute to pursue matters relevant only to the administration of the NAD Scheme which does include breaches of the WADC. It was announced on 1 July 2020, that SIA and ACIC have entered a formal agreement where the two organisations will work together to protect the integrity of sport in Australia.²⁶⁹ Once the relevant information is extracted from the individual, what is the plan? If intelligence is obtained about a doctor, not acting illegally but breaching the WADC, will the investigators send that to AHPRA in the hope that some action is taken? If a member of an organised crime gang is interviewed as required by a disclosure notice, and they are unable to recall if they ever sold drugs to a specific athlete, what then? The threshold contained in the *SIA Regulations* for the CEO to provide issue a disclosure notice is ‘if the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD Scheme.’ ‘Relevant to the NAD Scheme’ is a broad scope which, it could be argued, includes removing criminal activity from sport as a prevention measure against doping.

In addition to the possibility of false confessions,²⁷⁰ studies from Britain have reported that removing the right to silence had ‘little or no apparent effect in terms of gaining the conviction of the guilty.’²⁷¹ It must also be remembered that doping cheats seem to always be one step ahead and the use of advanced tactics in interviews, such as counter-interrogation training, cannot be dismissed.²⁷²

How are the powers being implemented?

The Administrative Review Council (‘ARC’) produced a report after reviewing six government agencies and their use of coercive information-gathering powers provided for them by statute.²⁷³ The ARC recommends the application of 20 best-practice principles to encourage fair and efficient exercise of the coercive power. Several guidelines and policies must be considered prior to establishing operation parameters and methods.

A clear scope and threshold for the use of the power is contained in the *SIA Act* being that of a reasonable belief held by SIA CEO relating to the administration of the NAD Scheme.²⁷⁴ In their current form, neither the *SIA Act* nor the *SIA Regulations* stipulate any requirements of the officers conducting an interview. Best practice suggests only officers appropriately trained, qualified and experienced should be eligible to exercise such power, as provided by, and distinguished by legislation.²⁷⁵

²⁶⁸ Australian Crime Commission, Submission No 11 to Senate Rural and Regional Affairs Transport Legislation Committee, *Inquiry into the Australian Sports Anti-Doping Authority Amendment Bill 2013*, (22 February 2013) 2.

²⁶⁹ ‘Powerful Intelligence Partnership “Crucial” to Protect Sport’, *News* (Media Statement, 01 July 2020) <<https://www.sportintegrity.gov.au/news/media-statements/2020-07/powerful-intelligence-partnership-crucial-protect-sport>>.

²⁷⁰ See Kassin et al., ‘Police-Induced Confessions: Risk Factors and Recommendations’ (2009) *American Psychology-Law Society/Division 41 of the American Psychological Association* 2009.

²⁷¹ R Leng, *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate Research*, Bulletin No. 35, HMSO, London (1994); see also J D Jackson, ‘Curtailing the Right to Silence: Lessons from Northern Ireland’ (1991) *Crim L Rev* 404 as cited in Barbara Hocking, Laura Manville, ‘What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?’ (2001) 1(1) *Macquarie Law Journal* 63, 71; ALRC *Traditional Rights and Freedoms*, 11.

²⁷² Stephen Moston, Terry Engelberg, ‘Detecting Doping in Sport’ (2017, Routledge, Oxon), 44.

²⁷³ ARC Report (n 122).

²⁷⁴ *SIA Regulations* (n 15) pt 2 div 2 s 13(1)(ea).

²⁷⁵ ARC Report (n 122) 48, xii-iii; Australian Government, *Australian Government Investigations Standards* (Standards, August 2011).

Protected Persons

The term 'Minor' has been removed from the 2021 WADC and replaced with a more detailed and technical term of 'Protected Persons'.²⁷⁶ This category includes not only athletes under the age of 18 but also any athlete lacking legal capacity as considered by their relevant national legislation. While SIA aim to protect children from abuse and provide them with safe sport, the abrogation of their human right not to self-incrimination seems contradictory. The *Convention of the Rights of the Child*²⁷⁷ prohibits a state party from compelling a child to give testimony or to confess guilt if the child is alleged to have infringed the penal law.

Although the CAS does not consider age when determining if an ADRV has occurred, the child's age and their understanding of the matter will be considered when deciding a sanction.²⁷⁸ Unfortunately, none of the WADC, WADA ISTI, *SIA Act*, *SIA Regulations*, nor the NSO ADP provide additional protection of child rights or any parameters when investigating or interviewing either minors or protected persons.

Strict procedures and training in this area is imperative to not only protect fundamental rights of athletes, but also to be respectful and to build rapport between athletes and the national anti-doping body. As suggested by Senator Richard Di Natale, in stating his objection to the Bill, the subrogation of the right against self-incrimination could damage the relationship between ASADA and athletes, possibly causing a disinclination of athletes to work with SIA and be forthcoming with relevant information.²⁷⁹

Who Is Regulating SIA?

As SIA is now listed as an enforcement body in the *Privacy Act 1988* (Cth) sub 6(1), and s 67 of the *SIA Act* has been added to sch 3 of the *Freedom of Information Act 1982* (Cth) ('*FOI Act*'), information sharing with other enforcement bodies should increase. This provides comfort to other agencies that confidential information shared between SIA and other listed enforcement agencies, will remain highly protected by statute and vice versa.²⁸⁰ The Office of the Australian Information Commissioner regulates adherence to both acts to ensure privacy and information access rights are upheld.²⁸¹

Although SIA is defined as an enforcement body under the *Privacy Act*, it must however be noted that SIA does not fall within the remit of the *Law Enforcement Integrity Commissioner Act 2006* (Cth).²⁸² The Australian Commission for Law Enforcement Integrity ('ACLEI'), as a law enforcement commission, handles complaints of corruption and other wrong-doing within Australian law enforcement agencies. Those wishing to make a complaint against SIA then must turn to the Commonwealth Ombudsman. The Ombudsman is equipped to receive

²⁷⁶ 2021 WADC (n 13) app 1 (definition of 'protected person'); *Protected Person*: An Athlete or other natural Person who at the time of the anti-doping rule violation: (i) has not reached the age of sixteen years; (ii) has not reached the age of eighteen years and is not included in any Registered Testing Pool and has never competed in any International Event in an open category; or (iii) for reasons other than age has been determined to lack legal capacity under applicable national legislation.

²⁷⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, (entered into force 2 September 1990) art 40(b)(iv).

²⁷⁸ *Sesil Karatancheva v International Tennis Federation*, 3 July 2006 (Court of Arbitration for Sport Case No CAS 2006/A/1032, [141]-[5]; *S v FINA* 15 July 2005 (Court of Arbitration for Sport, Case No CAS 2005/A/830) [35].

²⁷⁹ Commonwealth, *Parliamentary Debates*, Senate, 24 June 2013, (Richard Di Natale) 3832.

²⁸⁰ *Privacy Act* (n 88) s 38; *SIA Act* (n 2) s 67.

²⁸¹ *Australian Information Commissioner Act 2010* (Cth) pt 2 div 3.

²⁸² *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 5 (definition of 'law enforcement agency').

complaints about the actions and decisions of Australian Government agencies and to help those effected to find a solution.²⁸³

The Australian Government Investigations Standards ('AGIS'),²⁸⁴ contain the minimum standards for investigations conducted by Australian Government agencies. The document includes both requirements and suggestions, such as cl 4.4 where it is stated that agencies must have a written procedure for using any coercive powers during investigations. The contents of the procedure are then suggested. While relevant training and qualifications are required of investigations staff, it is merely a request that obtaining information from witnesses be done in accordance with the associated principles.²⁸⁵

It has been argued that ASADA has previously acted beyond its power by enforcing the inclusion of the clause abrogating the privilege against self-incrimination in NSO ADPs.²⁸⁶ The *Australian Constitution* requires all Commonwealth agencies and public officers to respect the limits of power imposed by statute. It is unclear how ASADA was allowed to circumvent its own limit of power, as determined by parliament, without any comment from the Attorney-General's department. The fact that a government agency was able to behave in such a way for over five years, is a major cause of concern for the future.

Will there be an effective mechanism of accountability for SIA when exercising its coercive power?

Effect Of Anti-Doping Investigations On Athletes

Athletes are humans first and competitors second.²⁸⁷ Many elite athletes are employees,²⁸⁸ some are underpaid employees,²⁸⁹ but being an athlete is their full time job. Professional athletes are, however, in a special category of employees. They don't work nine-to-five, they don't get weekends off, travel is required, and their private life is barely private at all. They provide entertainment to sometimes millions of spectators at a time, and consequentially become household names and familiar faces. Some accept the duties of being a public figure willingly, others prefer partying, and some just can't bear it all.²⁹⁰ The reality is, to keep their

²⁸³ 'How we can help' *Australian Government Agencies and Services* (Web Page) < <https://www.ombudsman.gov.au/How-we-can-help/australian-government-agencies-and-services>>.

²⁸⁴ Australian Government, *Australian Government Investigations Standards* (Standards, August 2011).

²⁸⁵ *Ibid* cl 4.1.1.

²⁸⁶ Nikki Dryden, Submission 6 to Senate Standing Committees on Community Affairs, Parliament of Australia, *Inquiry into Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability Bill 2019)*; Crocker (n 24).

²⁸⁷ See: Scott Fujita, 'Acceptance by Example, on the Field and at Home' (Essay, 23 March 2013) < <https://www.nytimes.com/2013/03/24/sports/football/scott-fujita-acceptance-by-example-in-locker-room-and-at-home.html>>; Liam Flint 'I'm a human being first and then an athlete second' (Interview, 9 July 2018) < <https://www.passionforsport.com/blog/keenan-horne>>; *About* (Web Page) < <https://www.uninterrupted.com/about>>; *Mental Health in Professional Sport* (Web Page) < <https://www.beyondblue.org.au/personal-best/pillar/in-focus/sport-and-mental-health>>.

²⁸⁸ *Buckley v Tutty* (1971) 125 CLR 353; *Commissioner of Taxation v Stone* (2005) 222 CLR 289; *McCracken v Melbourne Storm Rugby League Football Club* [2005] NSWSC 107, [1], [43].

²⁸⁹ Global Athlete, '2020 Survey Results' (Report, 24 February 2020) 8.

²⁹⁰ See Carrie Battan, 'Lebron James's "The Shop" Reinvigorates the Celebrity Interview', (Web Page, 22 December 2018) < <https://www.newyorker.com/culture/culture-desk/lebron-james-the-shop-reinvigorates-the-celebrity-interview>> cf J R Moehring, 'Kevin Durant's New Headspace; The Nets New Star Is Focused On His Recovery And Elated To Be Coming To Brooklyn—So Can Everyone Stop Worrying About Whether Or Not He's Happy? "We Talk About

job, athletes must comply with strict codes of conduct, anti-doping policies and other rules stipulated by their club, NSO and International Federations.

Athletes in a registered testing pool,²⁹¹ generally national-level athletes, have additional provisions to adhere to. Reporting their whereabouts, up to three months in advance, is required including the nomination of one 60 minute window per day where the athlete will be available at a specified location for testing.²⁹² Once the athlete is notified of being selected for testing, they are then obliged to submit to the doping control process as conducted by a doping control officer or chaperone. The doping control process involves giving a blood sample and/or providing a urine sample while witnessed by a doping control officer or chaperone, to ensure the integrity and gravity of the specimen.

Should an athlete be advised of a possible ADRV, they can accept the consequences, or they may dispute the assertion. Once the anti-doping organisation has proven the athlete has committed the ADRV to a comfortable satisfaction, the burden then shifts to the athlete to prove, on a balance of probability, that the ADRV has not occurred.²⁹³ However, for violation of anti-doping rule 2.1 presence of a prohibited substance, 2.2 use or attempted use of a prohibited substance, or 2.6 possession of a prohibited substance, strict liability will apply and an athlete will record an ADRV.²⁹⁴ If it can be established that there was no fault, no significant fault or negligence of the athlete, sanctions may be eliminated or reduced in certain circumstances.²⁹⁵

The dispute of an ADRV by an athlete can be a long, emotional and arduous journey that usually plays out in the public domain. One athlete has questioned if it's all worth it. Paul Gallen, former NRL player of the Cronulla Sharks, shared the devastating effect an ASADA investigation had on him in his autobiography, *Heart and Soul*:

Indeed, had I known – way back when I signed my first contract with Cronulla as a teenager-of the mental and physical anguish that would begin in 2011 and culminate in 2014 with our ASADA ban, I doubt I would have ever committed to chasing an NRL career. The pain would not have been worth the pursuit. I have come a long way since 2011. But I will never overcome the mental and emotional torment I endured during the eighteen-month period of the ASADA investigation and its consequences. Sixteen members of the Cronulla Sharks playing group were breached by ASADA after they determined-according to their official records-that we ‘may have used a prohibited substance between around March and April 2011.’²⁹⁶

Shayna Jack, Australian Commonwealth Games gold medal winner, announced her failed doping test on 27 July 2019.²⁹⁷ Jack is currently serving a four-year ban²⁹⁸ but has an appeal

Mental Health A Lot. We Only Talk About It When It Comes To Players. We Need To Talk About It When It Comes To Executives, Media, Fans.” (2019) 10 Sep *Wall Street Journal (Online)*.

²⁹¹ WADC (n 13) app 1 (definition of ‘Registered Testing Pool’).

²⁹² World Anti-Doping Agency, ‘World Anti-Doping Code International Standard Testing and Investigations’ (March 2019) annex I.1.1; World Anti-Doping Agency, ‘World Anti-Doping Code International Standard Testing and Investigations (January 2021) art 4.8.6.2 (‘2021 ISTI’).

²⁹³ WADC (n 13) art. 3.1.

²⁹⁴ *Ibid.*

²⁹⁵ 2015 WADC (n 13) arts 10.4-5; 2021 WADC (n 13) arts 10.5-6.

²⁹⁶ Paul Gallen and David Riccio, *Heart and Soul* (Allen & Unwin, 2019) 167.

²⁹⁷ ‘Australian swimmer Shayna Jack failed doping test before world championships’, (Web Page, 27 July 2019) <<https://www.abc.net.au/news/2019-07-27/australian-swimmer-shayna-jack-failed-doping-test/11353638>>.

²⁹⁸ 2015 WADC (n 13) 10.2.1.

hearing at the CAS²⁹⁹ where, it appears, a case of contamination may be argued.³⁰⁰ Since the news of her failed drug test broke, Jack has been the target of online bullying,³⁰¹ intense media scrutiny and most recently, an attempted extortion.³⁰² This experience has impacted Jack greatly as she has shared her struggles online,³⁰³ where she also commented: ‘there are many aspects of the anti-doping system that are seriously flawed but possibly the worst element is the presumption of guilt that one has to bear.’³⁰⁴

It could be disputed that catching doping athletes is currently the top priority of Australia’s NADO. It shouldn’t be. The WADC, to which the NADO must abide, specifically states its purpose is ‘to protect the *Athletes*’ fundamental right to participate in doping-free sport and thus promote health, fairness and equality for *Athletes* worldwide.’³⁰⁵ Jack Anderson, Professor of Law at The University of Melbourne and Member of the CAS,³⁰⁶ has confirmed the protection of the rights of clean athletes must come before catching cheats.³⁰⁷

As pointed out by human rights lawyer and two-time Olympian, Nikki Dryden,³⁰⁸ an athlete will incur substantial legal fees to dispute an ADRV whether they are clean or dirty.³⁰⁹ The process is extensive and specific to sport. Therefore, not only will athletes lose most, if not all their income, but at the same time, they will also be amassing costs to prove their innocence.

Where is the line drawn? Where exactly is the correct balance between protecting clean athletes and catching the dirty ones? These athletes are devoting their lives to sport only to be let down by the very institution that should be protecting them.

VI Conclusion

Starting with the submissions to the 2013 Bill, then Crocker’s paper addressing the ADPs in 2015, the abrogation of the privilege against self-incrimination has been frequently and strongly objected to. It may be the case that the abrogation continues to be objected to, by athletes and third parties alike. Due to the lack of information or assistance provided by SIA,³¹⁰ it is hard to predict how the agency will exercise the coercive powers and if it will be in accordance with the appropriate parameters.

²⁹⁹ @shayna_jack, (Instagram, 15 May 2020) <<https://www.instagram.com/p/CAM-WsBAeXC/>>.

³⁰⁰ The Project, ‘Shayna Jack Speaks Out | The Project’ (YouTube, 15 December 2019) <https://www.youtube.com/watch?v=YqM6_ySDf8k> 4:00.

³⁰¹ The Project, ‘Shayna Jack Speaks Out | The Project’ (YouTube, 15 December 2019) <https://www.youtube.com/watch?v=YqM6_ySDf8k> 5:13.

³⁰² @shayna_jack, (Instagram, 24 June 2020) <https://www.instagram.com/p/CBz_Z6LgpQr/>.

³⁰³ @shayna_jack, (Instagram, 24 September 2019) <<https://www.instagram.com/p/B2yUhHfAa9S/>>.

³⁰⁴ @shayna_jack, (Instagram, 15 May 2020) <<https://www.instagram.com/p/CAM-WsBAeXC/>>.

³⁰⁵ 2015 WADC (n 13) 11; 2021 WADC (n 13) 9.

³⁰⁶ Find an Expert, Jack Anderson, (Web Page) <<https://findanexpert.unimelb.edu.au/profile/790818-jack-anderson>>.

³⁰⁷ ‘Legal experts say Swimming Australia was right to hide Shayna Jack drug result’, *AM* (ABC Radio National, 29 July 2019) <<https://www.abc.net.au/radio/programs/am/was-swimming-australia-right-to-hide-shayna-jack-drug-result/11355144>> 2:30.

³⁰⁸ Dryden (n 288).

³⁰⁹ ‘Australian Swimmer Shayna Jack Failed Doping Test Before World Championships’, 27 July 2019 (Web Page) <<https://www.abc.net.au/news/2019-07-27/australian-swimmer-shayna-jack-failed-doping-test/11353638>>.

³¹⁰ Via online resources and by direct request.

While the Wood Review was imperative to the Government's National Sports Plan, it failed to recommend an approach consistent with current global values supporting athlete rights. The Wood Review relied on what could be described as outdated data to support the removal of fundamental human rights. The biggest concern was the omission of the origin of the clause contained in each NSO's ASADA approved ADP, which requires each athlete to fully cooperate with any ASADA investigation. Instead, the Wood Review recommended the enactment of the clause originally refused by Parliament.

It is understandable, even admirable, that Australia does not want to merely meet its obligations under the WADC but wants to go above and beyond to eliminate doping from sport. The investigation and prosecution of criminal offences by SIA, however, is not granted by the *SIA Act*. The focus of Australia's NADO should be directed on protecting the rights of clean athletes in accordance with the WADC. While catching doping cheats may fall within the wide ambit of prevention, respect of human rights must come first.

Whether by choice, or oversight, Australia is now straying away from collective global values. Numerous events regarding the promotion and protection of human rights in sports are detailed in chapter 5 and includes the 2021 WADC drafting, MINEPS VI Final Report, meeting of the General Council of the UN, the Sporting Chance Forum and the ILO Global dialogue forum on decent work in the world of sport. After review and understanding of the content, it is almost unfathomable as to how the amendment has been justified.

It remains to be seen whether athletes will be impacted by the statutory abrogation of the privilege against self-incrimination and whether SIA will live up to its mandate. In order to maintain Australia's perceived position as the leading NADO and 'sport integrity' body in the world, it is hoped that this power will be reserved for only the most egregious cases, and not used against athlete and athlete support persons whose power in this equation is already extremely low.
