

ACC report: why ASADA needs teeth

The Australian Crime Commission released a February report alleging that 'widespread' doping is occurring in Australia and that organised crime is involved. This has led to the ASADA Amendment Bill 2013, which suggests greater investigative powers for the Australian Sports Anti-Doping Authority (ASADA). Catherine Ordway, a Sport & Anti-Doping Consultant who was formerly a Director at ASADA, explains why these and other powers are needed to help ASADA do its job.

The international performance enhancing drug trade is reportedly worth billions¹. The Australian Crime Commission (ACC) dropped a bomb on Australian sport in the form of its: 'Organised Crime and Drugs in Sport' report on 7 February 2013². The report claimed that 'widespread' doping is occurring in Australia:

'The ACC has found, on the basis of a limited and focused examination of one component of the PIEDs³ market, that the market has evolved significantly in recent years to include peptides and hormones. These substances, which are WADA-prohibited, are being used by professional athletes in a number of professional sporting codes. Organised crime has been found to have a tangible and expanding footprint in this market, and their activity is being facilitated by some coaches and support staff of elite athletes, who have orchestrated and/or condoned the use of prohibited substances and/or methods of administration.⁴

It is clear that doping cannot be detected by testing alone. The World Anti-Doping Agency (WADA) promotes Australia as having developed a revolutionary anti-doping model that solidifies cooperation between the anti-doping authority and other government agencies. WADA lauds the 'Australian Model' on its website and in its publications⁵. WADA is also of the view that a key component in the investigative and intelligence capabilities is the establishment and maintenance of relationships between investigative agencies across Government. This position is reflected in WADA's 'Guidelines for Coordinating Investigations'⁶. So, how can Australian sport respond to the allegations from one of the most powerful law enforcement agencies in the country?

The Australian Sports Anti-Doping Authority (ASADA) is the Australian National Anti-Doping Organisation under the World Anti-Doping Code (the 'Code'), and is a Commonwealth government statutory authority. ASADA's vision is: 'to be the driving force for pure performance in sport'. ASADA's purpose is to: 'protect Australia's sporting integrity through the elimination of doping'⁷. Outspoken scientist and anti-doping campaigner, Dr. Mike Ashenden, was quoted last month as expressing his disappointment in ASADA as: "a prodigy that has not yet delivered on its exciting potential...for some reason, things just haven't clicked, and the results they've produced so far have been pretty modest"⁸.

ASADA is established under the ASADA Act 2006 (amended 2011) and Regulations (including the National Anti-Doping Scheme)⁹. The challenges for anti-doping organisations (ADOs), including ASADA, are to disrupt and detect doping (anti-doping rule violations in the Code terminology) through information and intelligence obtained from the following:

- Athletes and Athlete Support Personnel as defined by the Code, thereby within the ADO jurisdiction.
- Government organisations, including Law Enforcement Agencies [LEAs].
- Non-governmental organisations and professional associations.
- Individuals not within the jurisdiction of the ADO.

ASADA currently has no power to compel any of the classes of person above to provide it with information which ASADA may be able to use to carry out its functions. Australian Olympic Committee (AOC) President, John Coates, has been calling for enhanced investigative powers to

Headline

be granted to ASADA (and its predecessor) from as early as 2000¹⁰.

There is currently a proposal before the Commonwealth parliament that the ASADA Act be amended to allow for, amongst other things, the ASADA CEO to compel witnesses to give evidence¹¹. In accordance with Australian parliamentary process¹², the ASADA Amendment Bill 2013 was introduced into the Senate (upper house) and, following the first reading of the Bill, was immediately referred to the Senate Rural and Regional Affairs and Transport References Committee for consideration. Interested parties were invited to make submissions to the Senate Committee in relation to the Bill, and a public hearing was held on 1 March 2013¹³.

History

The Australian Sports Drug Agency (ASDA) was the original National Anti-Doping Organisation for Australia established by the ASDA Act 1990. In 2004, a new statutory authority was proposed to replace ASDA. The creation of ASADA was a key recommendation of the 2004 Anderson inquiry into the use of drugs by Australia's track cycling team¹⁴. Justice Anderson recommended, with respect to the investigation of doping offences in Australian sport, that:

'There should be a body which is quite independent of the AIS¹⁵ and of the Australian Sports Commission and of the sporting bodies themselves with the power and duty to investigate suspected infractions such as substance abuse and to carry the prosecution of persons against whom evidence is obtained.'¹⁶

ASADA replaced ASDA on 14 March 2006 and took over the functions performed by ASDA.



Catherine Ordway

ASDA's functions were focused on advocacy and the testing and education of athletes and athlete support personnel. Significantly, ASADA was also given the power to investigate doping allegations and present Anti-Doping Rule Violation (ADRV) cases at hearings either before the Court of Arbitration for Sport (CAS) or other sports tribunals under the Code. This new Authority assisted the Howard Government to fulfil its election¹⁷ and treaty¹⁸ obligations. This development was also in keeping with the growth in non-policing public sector agencies performing investigative functions¹⁹.

ASADA's limitations

ASADA does not possess powers of compulsion, or of search and seizure. ASADA must therefore rely on information derived from sport anti-doping rules and cross-government agreements. ASADA's current limitations became more obvious through the release of the ACC 'Organised Crime and Drugs in Sport' report in February 2013²⁰. The ACC has coercive powers to investigate criminal matters at the national level, particularly focused on organised crime. The ACC has referred the matters outlined in its report to the State and Federal police forces, and to ASADA (in relation to anti-doping). Unfortunately, ASADA cannot compel the Athletes or Athlete Support Personnel featured in the ACC report to provide any further information, so unless they voluntarily come forward, there is no guarantee that any of the matters identified can be progressed.

Information sharing with sports organisations

In order to investigate those matters within its jurisdiction, referred to it by the ACC or

otherwise, ASADA must rely on the agreements in place with the major National Sports Organisations (NSOs) requiring the NSOs to: 'immediately advise ASADA of any alleged anti-doping rule violations and [to] provide assistance to ASADA in any investigation that ASADA might reasonably request'²¹. If an NSO fails to comply with this agreement, ASADA only has limited legal (e.g. breach of contract) and political avenues to pursue (e.g. embarrassment in the media, with the Minister for Sport or the Australian Sports Commission). The NSO in turn has jurisdiction over the Athletes and Athlete Support Personnel via their membership contracts (club, state and then national) or employment arrangements.

Information sharing with external organisations (including LEAs)

ASADA's legislation includes expanded information disclosure provisions and specific references to allow ASADA to share information with sports and law enforcement bodies, e.g. Australian Customs, the State and Federal Police, Therapeutic Goods Administration, National Anti-Doping Organisations and International sports Federations²². This is a one directional power, which needs to be replicated in the each of the agencies ASADA wishes to receive information from (including through Memorandums of Understanding). It was intended that this information would enable ASADA to identify athletes or support personnel suspected of doping, and then concentrate its resources on them, whether via further investigation or targeted drug testing. Sharing information between government agencies is consistent with the 'Whole of Government' approach²³.

Barriers to information sharing with government agencies (including LEAs)

An expansion to ASADA's powers as anticipated by the 2013 Bill will assist to overcome one of its current challenges: reliance on LEAs. In order to have matters thoroughly investigated, ASADA must attract the attention of organisations which have scarce resources and higher priorities for community safety (e.g. murders, child pornography, and the trafficking of non-performance enhancing drugs, including ice²⁴ and heroin). Even if the LEAs are keen to provide information to ASADA, there are additional barriers to sharing information, both internally and externally.

One of the additional challenges to inter-agency cooperation is Australia's privacy legislation. This has not been addressed in the current draft Bill. For example, in 2008, ASADA attempted to data-match records with Medicare²⁵ to determine whether doctors were prescribing performance enhancing drugs to athletes for non-therapeutic purposes, particularly where those substances may be subsidised by the Pharmaceutical Benefits Scheme (PBS). Other Australian Government agencies data-match on a regular basis, and far in excess of the number of records referred by ASADA, and yet ASADA's efforts in that instance were blocked²⁶. Before a response was received from Medicare, concerns relating to the privacy of medical records were raised in the media²⁷. Following an investigation initiated by the then Sports Minister, Kate Ellis²⁸, questions were asked of ASADA by the Commonwealth Parliament Senate Estimates Committee²⁹. This led to the Privacy Commissioner conducting an investigation and handing down recommendations for ASADA to

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implement in its future information handling practices³⁰. It would be of assistance to ASADA if this Bill was amended to allow for data-matching exercises to be conducted to investigate anti-doping rule violations (ADRVs), including - for example - to examine whether public funds are being diverted from the PBS inappropriately.

Summary

I am supportive of ASADA being provided with powers to compel witnesses to provide information relating to potential anti-doping rule violations. Many of the human rights, privacy and philosophical concerns raised with me by some of my legal and sporting colleagues have been fully addressed in the parliamentary report into human rights³¹. In my submission to the Senate Committee, I have also suggested that it may also be of benefit for ASADA to be granted powers of 'search and seizure', and for the recently introduced information-sharing facilitation mechanism - the National Collaboration Framework - be used more effectively in relation to ASADA³², including extending the Privacy Commissioner's data-matching in accordance with information handling guidelines. I have also suggested that we have another look at whether ADRV's should be made criminal offences under the Crimes Act, and thereby whether other benefits may flow from that, including applying the relevant provisions of the Proceeds of Crime Act to ASADA. The latter suggestion is a bigger discussion for another day!

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2. www.crimecommission.gov.au/publications/other/organised-crime-drugs-sport
3. Performance and Image Enhancing Drugs.
4. www.crimecommission.gov.au/publications/other/organised-crime-drugs-sport at p36.
5. www.wada-ama.org/en/dynamic.ch2?pageCategoryId=694. See also the joint WADA & Interpol press release: 'WADA Applauds Actions Targeting the Illegal Manufacture and Distribution of Doping Substances New Era in Anti-Doping Must Involve Coordination with Law Enforcement' and Ings R, (2007), Play True, WADA Issue 1, p10-11 www.wada-ama.org/rtecontent/document/PlayTrue2007_BeyondtheAthlete_En.pdf
6. www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Investigation--Trafficking/Investigations/Guidelines/. See also Senator George Mitchell in his findings into the illegal use of steroids in Major League Baseball (USA): Mitchell G.J. (2007) 'Report To The Commissioner Of Baseball Of An Independent Investigation Into The Illegal Use Of Steroids And Other Performance Enhancing Substances By Players In Major League Baseball', www.primerahora.com/XStatic/primerahora/docs/espanol/informemitchell4.pdf
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8. S Lane, 'ASADA: Is it Working', Sydney Morning Herald, 23 February 2103, www.smh.com.au/sport/asada-is-it-working-20130222-2ex1r.html#ixzz2MC344dup
9. www.comlaw.gov.au/Details/C2011C00690
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12. www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/briefs/brief08

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| <p>13. www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/sports_anti_doping/submissions.htm</p> <p>14. Australian Sports Anti-Doping Authority Bill 2005, Bills Digest no. 79 2005-06, www.aph.gov.au/library/Pubs/BD/2005-06/06bd079.htm</p> <p>15. Australian Institute of Sport.</p> <p>16. The Honourable R Anderson QC, 'Second Stage Report to the Australian Sports Commission and to Cycling Australia', (Anderson Report), Canberra, 27 October 2004, Department of Communications, Information Technology and the Arts, 2004, http://fulltext.ausport.gov.au/fulltext/2004/feddep/Anderson_report.asp (originally located at www.dcita.gov.au/sport/publications/anderson_report).</p> <p>17. The Howard Government's 2004 election policy, Building Australian Communities through Sport, included a requirement on sporting organisations to implement anti doping policies and practices consistent with the World Anti-Doping Code as a condition for Federal Government funding. Australian Sports Anti-Doping Authority Bill 2005, Bills Digest no. 79 2005-06, www.aph.gov.au/library/Pubs/BD/2005-06/06bd079.htm. See also the 7 December 2005 reference to: 'the 2004 election policy Building Australian Communities Through Sport', http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2537041&table=HANSARDR</p> <p>18. See www.wada-ama.org/rtecontent/document/copenhagen_en.pdf and www.wada-ama.org/rtecontent/document/UNESCO_Convention.pdf</p> <p>19. Examples of public agencies having investigative functions include: the Australian Taxation Office, Centrelink, Medicare Australia, the Office of National Assessments, the Australian Securities and Investment Commission, the Australian Commission for Law Enforcement Integrity, the Australian Competition and Consumer Commission, Customs Australia, Comcare, Auscheck, and the Department of Families, Housing, Community Services and Indigenous Affairs. See P Fairchild, 'The emerging police complex: Hoogenboom and Australian Inter Agency Cooperation',</p> | <p>Australian and New Zealand Journal of Criminology, 27 (1994), p111-132.</p> <p>20. www.crimecommission.gov.au/publications/other/organised-crime-drugs-sport</p> <p>21. An example of this type of agreement is found at Appendix D of the 'Cycling Australia Review' conducted by the Hon James Wood AO QC, released on 14 January 2013, at www.regional.gov.au/sport/resources/reports/review-of-cycling-australia.aspx</p> <p>22. ASADA Act, 2006, www.comlaw.gov.au</p> <p>23. See also the National Collaboration Framework cited. W G Carson, 'Whole of Government and Crime Prevention for Victoria', August 2003, Department of Criminology, University of Melbourne, p1-40, www.criminology.unimelb.edu.au/staff/kit_carson/whole-government-crime-prevention.pdf. H Goldstein, 'Problem-oriented policing: the basic elements' in 'Problem-Oriented Policing' (1990), McGraw-Hill, New York, p32-49 at p47.</p> <p>24. Methamphetamine, or 'crystal meth'.</p> <p>25. Medicare is Australia's universal health insurance scheme.</p> <p>26. J Magnay, 'Minister orders review', and 'Medicare enlisted for fight against "loophole seekers"', Sydney Morning Herald, 15 March 2008, www.smh.com.au</p> <p>27. S Parnell, 'Investigators scouring athletes' medical records for drug cheats', The Australian, 14 March 2008, www.theaustralian.com.au/news/secret-anti-doping-probe/story-e6frg7mo-111115793892</p> <p>28. S Parnell, 'Doping Checks May End', The Australian, 15 March 2008, www.theaustralian.com.au/news/doping-checks-may-end/story-e6frg7mo-111115803868</p> <p>29. See Senate Estimates Committee hearing transcript, 5 June 2008, www.aph.gov.au. See also S Parnell, 'Secret List of Athletes Led to Drugs Inquiry', The Australian, 24 July 2008, www.theaustralian.com.au/news/secret-athletes-list-led-to-inquiry/story-e6frg7mo-111117000573</p> <p>30. News 22 July 2008, ASADA website, 'On 30 June 2008 the Australian Privacy Commissioner (OPC), contacted ASADA outlining three recommendations...', www.asada.gov.au</p> <p>31. 'Examination of legislation in accordance with the Human Rights</p> | <p>(Parliamentary Scrutiny) Act 2011 ASADA Amendment Bill 2013 Second Report of 2013' dated February 2013, available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/index.htm</p> <p>32. http://agimo.gov.au/collaboration-services-skills/national-collaboration-framework/</p> |
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