

REPLACEMENT EXPLANATORY STATEMENT

Sport Integrity Australia Act 2020

Sport Integrity Australia Amendment (Enhancing Australia's Anti-Doping Capability) Regulations 2020

The *Sport Integrity Australia Amendment (Enhancing Australia's Anti-Doping Capability) Regulations 2020* (Regulations) make consequential amendments as a result of the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020* (Act), which passed Parliament on 12 June 2020, and received Royal Assent on 16 June 2020.

The *Sport Integrity Australia Act 2020* (Act) provides for the operation of Australia's sports anti-doping arrangements. Australia's anti-doping framework comprises the Act, the *Sport Integrity Australia Regulations 2020* (the principal Regulations) and the National Anti-Doping (NAD) Scheme.

Section 79 of the Act provides for the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In August 2017, the then Minister for Sport requested a Review of Australia's Sports Integrity Arrangements (Wood Review), as part of the work being done by the Australian Government to develop a National Sport Plan. The report of the Wood Review was delivered to the then Minister in March 2018 and published on 1 August 2018. The Government announced its response to the Wood Review on 12 February 2019 and agreed to a number of recommendations.

The Wood Review found doping is more prevalent and widespread than ever among athletes at all levels and is facilitated by the increasing availability of highly sophisticated techniques that make it harder to detect. The Wood Review also found serious and organised crime is involved in the supply of performance and image enhancing drugs and the current suite of statutory protections and powers under, what was, the *Australian Sports Anti-Doping Authority Act 2006* is not sufficient to facilitate ASADA's (now, Sport Integrity Australia) increasing emphasis on intelligence-based investigations. The Government addressed these findings and implemented a number of reforms through passage of the Act.

The Regulations would implement consequential amendments from the Act which:

- streamline the administrative phase of the statutory anti-doping rule violation process through the abolition of the Anti-Doping Rule Violation Panel;
- extend statutory protection against civil actions to cover other persons in their exercise of Anti-Doping Rule Violation functions;
- facilitate better information sharing between Sport Integrity Australia and National Sporting Organisations (NSOs) through enhancing statutory protections for information provided to an NSO by Sport Integrity Australia; and
- strengthen Sport Integrity Australia's disclosure notice regime.

Details of the Regulations are set out in the [Attachment](#).

The Act specifies no conditions needing to be met before the power to make the proposed Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence at the same time as Part 1 of Schedule 1 to the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020* commences.

Authority: Section 79 of the *Sport Integrity Australia Act 2020*

Details of the *Sport Integrity Australia Amendment (Enhancing Australia's Anti-Doping Capability) Regulations 2020*

Section 1 - Name of Regulations

This section provides that the title of the Regulations is the *Sport Integrity Australia Amendment (Enhancing Australia's Anti-Doping Capability) Regulations 2020*.

Section 2 - Commencement

This section provides for the Regulations to commence at the same time as Part 1 of Schedule 1 to the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020* commences.

Section 3 - Authority

This section provides that the Regulations are made under the *Sport Integrity Australia Act 2020*.

Section 4 - Schedule(s)

This section provides each instrument specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Items 1 – 9

Items 1 – 9 make consequential amendments throughout the Regulations based on the abolition of the Anti-Doping Rule Violation Panel. These include removing references to the ADRVP, clauses that relate to the function of the ADRVP under the National Anti-Doping Scheme and amending references to clauses within the Regulations to the revised Clauses that outline the streamlined anti-doping rule violation process.

Items 10 – 12, 17, and 24

These items make consequential amendments to Clause 3.26B and 3.26D to remove the requirement that at least three members of the Anti-Doping Rule Violation Panel must agree that the threshold of reasonable belief is met before issuing a disclosure notice.

Items 13 – 16 and 18 – 23

These items make consequential amendments to Clause 3.26B to reflect revised arrangements under the Act that remove the privilege against self-incrimination. Importantly, the information may only be used in connection with proceedings under the Act or regulations, or section 137.1 or 137.2 of the *Criminal Code*.

Item 25

This item amends Note 1 of Clause 3.26E to clarify that should someone wish to inspect a document or view something in relation to the Clause, it may only be done so at a time the CEO thinks appropriate.

Items 26 and 27

Items 26 and 27 make consequential amendments to Subclause 4.06(2) to replace references to the ADRVP with the CEO.

Items 28 and 29

Items 28 and 29 make consequential amendments to Subclause 4.07A(3) to replace references to the ADRVP with the CEO.

Item 30 – Clauses 4.08 to 4.12 of Schedule 1

Item 30 repeals Clauses 4.08 to 4.12, and substitutes new 4.08 and 4.09 to outline the revised anti-doping rule violation process. The revised process provides that the CEO assesses information and engages with a participant to determine if the CEO is satisfied the participant committed a possible anti-doping rule violation.

The revised process still affords participants the opportunity to provide additional information to assist the CEO in their assessment of whether the participant has committed a possible anti-doping rule violation.

Item 31 – Subclause 4.17(1) of Schedule 1

Item 31 removes reference to the ADRVP in relation to providing notice to a participant, and replaces it with a requirement that the CEO must give notice.

Item 32 – Paragraph 4.17(3)(c) of Schedule 1

Item 32 implements a consequential amendment from the *Australian Sports Anti-Doing Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020* which removed subsection 14(4) from the Act, which was the relevant clause which provided recourse to the AAT.

This Item removes the requirement for the CEO to include, in a notice issued under subclause 4.17(1) or (2), information that the participant has the right to appeal the decision to assert an anti-doping rule violation in a notice.

Item 33 – Subclause 4.22(1A) of Schedule 1

Item 35 removes provisions that outline the public disclosure requirements for matters before the Administrative Appeals Tribunal.

Item 34 – At the end of Part 7 of Schedule 1

Item 36 includes transitional provisions that account for the abolition of the Anti-Doping Rule Violation Panel. This includes, as a general overview, that:

- decisions and notifications issued by the ADRVP prior to the commencement of this item are taken to have been issued by the CEO;
- notices which contain references to specific clauses within the Regulations prior to commencement are taken to refer to the revised clauses under the amended regulations; and
- where the ADRVP are yet to make a decision in relation to notices issued prior to commencement, new Clause 4.08 would apply.

In addition, for notices issued under Clause 4.11 prior to commencement there is still opportunity to appeal the notice to the Administrative Appeals Tribunal.

Where a participant has commenced a proceeding in the Administrative Appeals Tribunal and the ADRVP are named as a party, the CEO of Sport Integrity Australia is substituted as the relevant party.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

SPORT INTEGRITY AUSTRALIA AMENDMENT (ENHANCING AUSTRALIA'S ANTI-DOPING CAPABILITY) REGULATIONS 2020

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Sport Integrity Australia Amendment (Enhancing Australia's Anti-Doping Capability) Regulations 2020* (Regulations) implement consequential amendments from the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020* (Act). The Parliament passed the Act on 12 June 2020, and it received Royal Assent on 16 June 2020.

The Regulations engage a number of the same human rights as the Act, which amends the *Sport Integrity Australia Act 2020* to implement the following reforms included as part of the Government's response to the Review of Australia's Sport Integrity Arrangements (Wood Review):

- streamline the administrative phase of the statutory anti-doping rule violation process;
- extend statutory protection against civil actions to cover other persons in their exercise of Anti-Doping Rule Violation functions;
- strengthen Sport Integrity Australia's disclosure notice regime.

Human rights implications

The Regulations engage the following rights:

- Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR) – right to an effective remedy.
- Article 14(2) of the ICCPR – right to presumption of innocence.
- Article 17 of the ICCPR – privacy and reputation.

Removal of the Anti-Doping Rule Violation Panel and right to appeal to the Administrative Appeals Tribunal

The Regulations streamline the anti-doping rule violation (ADRV) process by removing the Anti-Doping Rule Violation Panel (ADRVP) and, by consequence, removing the right for an athlete or athlete support person to merits review in the Administrative Appeals Tribunal (AAT) *prior* to the matter proceeding to a formal hearing.

The Wood Review noted 'the current ADRV process is overly bureaucratic, inefficient, and cumbersome. Australia's implementation of Code-compliant ADRV procedures is one of the most complicated of any countries in the world and, as a result, it is confusing for those subject to an ADRV allegation and to their representatives.'

The ADRV process currently includes duplicative steps in the consideration of a matter that can lead to delays in its final determination. This involves approaching an athlete or support person twice to respond to what are, essentially, the same ADRV allegations. In the first instance, the Sport Integrity Australia Chief Executive Officer (CEO) writes to the athlete or support person giving notice of a possible ADRV and inviting the recipient to make a submission to the ADRV (the 'show cause notice'). Sport Integrity Australia then prepares material for consideration by the ADRV, which, if satisfied that a possible ADRV has occurred, will notify the CEO and request the person be invited to provide a further submission to the ADRV. Following receipt of a further submission (or expiry of the relevant submission period), the ADRV will consider the matter a final time, and if the ADRV remains satisfied that a possible ADRV has occurred, the ADRV will make an assertion to that effect and notify the CEO, who will in turn notify the participant and the relevant sporting body of the assertion.

The Wood Review found this process to be convoluted and unnecessarily time intensive, often taking a minimum of eight weeks from the issue of a 'show cause' letter for a matter to pass through the ADRV. The intent and effect of the proposed amendments is to expedite the participant's opportunity to have a fair hearing.

The amendments, based on the Wood Review's recommendations, remove ADRV consideration from the ADRV process and give full responsibility to the CEO to manage a simplified process up to the point where the assertion of a possible anti-doping rule has been made. The amendments also remove a participant's right to appeal to the AAT. As with the decisions of the ADRV, any decision of the AAT will not determine the rights and obligations of participants in relation to their sport. At most it will determine a step in the process, being the decision to advise the Sport Integrity Australia CEO of the possible violations. Individuals will still have recourse against a decision handed down by Sport Integrity Australia with an ability to seek judicial review. The actions of the CEO would rightly be scrutinised by a sport's anti-doping tribunal or the National Sports Tribunal.

The proposed simplified ADRV process will be as follows:

1. The Sport Integrity Australia CEO will review evidence and determine if there has been a possible ADRV. If the CEO determines there has been a possible ADRV, the person is notified and invited to provide a submission within 10 days.
2. The Sport Integrity Australia CEO will review the submission provided and if they remain satisfied a possible ADRV has occurred, will make an assertion to that effect, notify the person against whom assertion has been made as well as the relevant sporting body, and make a recommendation to the sporting body as to consequences of the assertion.
3. The person may then accept or contest the infraction in a tribunal.

Article 2 (3) (a) of the ICCPR is engaged by this amendment:

To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

The ADRV was intended to provide independent oversight of ADRV allegations and act as a check on the administrative aspect of the ADRV process. Likewise, recourse to the AAT for any person unsatisfied with the ADRV's determination provided a possible additional layer of scrutiny to ensure a robust and independent process. However, submissions to the Wood Review from both National Sporting Organisations (NSOs) and the Australian Sports

Anti-Doping Authority (ASADA) stated that, in practice, the ADRV's involvement in the process was time-consuming, overly complicated and duplicated procedures in circumstances where stakeholders felt that any value of ADRV oversight did not provide for an adequate counterbalance to the inefficiencies it created.

Nonetheless, while these amendments remove some checks and balances, the process for a person alleged to have committed an ADRV will remain an effective remedy. By removing unnecessary delays to the pre-hearing process, the person is likely to have their allegation heard in a more timely fashion. In addition, the person retains their right to have their allegation heard by a tribunal, which will act as the arbiter as to whether an ADRV has been committed.

In this context, it is important to note the ADRV does not determine rights and obligations as far as it may be considered a suit at law. In the anti-doping context, rights and obligations as between the athlete or support person and their sport are determined through the processes set out in the anti-doping policy of the sport by which they have agreed to abide. The role of the ADRV is to be satisfied that, on the material provided to it by the Sport Integrity Australia CEO and by the athlete or support person (should they so choose), that there is a possible anti-doping rule violation, and to make such an assertion.

Pursuant to Article 8 of the World Anti-Doping Code (Code), the rights and obligations of athletes or support persons are determined by hearing bodies established in accordance with that article. Subsection 41(3) of the *Sport Integrity Australia Act 2020* explicitly provides that the ADRV is not a hearing body within the meaning Article 8 of the Code.

The National Sports Tribunal (NST), established under the *National Sports Tribunal Act 2019*, will ensure members of the Australian sporting community have access to an effective, efficient, transparent and independent specialist tribunal for the fair hearing and resolution of sporting disputes. The NST has powers to inform itself, including by requiring the attendance of witnesses and the provision of documents. The NST will also not be subject to direction from any party, so that any person appearing before it can be assured of an impartial and independent hearing.

Importantly, the amendments maintain Australia's ongoing commitment under Article 3(a) of the United Nations Educational, Scientific and Cultural Organization *International Convention against Doping in Sport* to adopt appropriate measures at the national and international levels that are consistent with the principles of the Code.

Amendments to the disclosure notice regime

Under the Sport Integrity Australia Act, the ASADA CEO may issue a disclosure notice to require a person to do one or more of the following things:

- attend an interview;
- answer questions;
- give information; and/or
- produce documents or things.

The disclosure notice regime has proven critical to Sport Integrity Australia's ability to detect doping cheats given the increasing reliance on effective non-analytical investigations rather than the traditional testing of urine and blood samples.

The Wood Review identifies elements of the disclosure notice regime should be enhanced, and the Act implements a number of reforms to the Sport Integrity Australia Act, including:

- preventing the recipient of a disclosure notice claiming the privilege against self-incrimination or the privilege against self-exposure to a penalty in order not to answer a question, give information or produce a document or thing; and
- increasing the penalty for non-compliance with a disclosure notice from 30 to 60 penalty units.

These clauses are reasonable, necessary and proportionate to the legitimate aim of catching doping cheats and the persons who facilitate doping. Doping is potentially injurious to a person's health, may distort the outcome of sporting contests, and over time undermines the overall integrity of sport. Australian Governments make significant investments in sport, and that investment suffers when the integrity of a sport is compromised in this way.

Privilege against self-incrimination in relation to disclosure notice

The disclosure notice provisions were first inserted into the Sport Integrity Australia Act by the *Australian Sports Anti-Doping Authority Amendment Act 2013*. While ASADA (as Australia's National Anti-Doping Organisation (NADO)) was established in 2006 with a statutory investigations function, it had no ability to compel cooperation by persons of interest. ASADA investigators could only request persons of interest to attend an interview; persons would either decline the request, or agree to attend an interview and then not show up. In addition, it was becoming increasingly evident doping violations were being facilitated by persons who were not subject to the anti-doping policies of any sports – accordingly, a sport could not use its contractual powers to require such persons to cooperate with anti-doping investigations. The 2013 amendments were intended to address these problems.

The current Sport Integrity Australia Act places limits on Sport Integrity Australia's coercive powers once a disclosure notice has been issued. At present, a recipient of a disclosure notice:

- is excused from answering questions, or providing information, on the ground that the answer to the question or the information might tend to incriminate the person or expose them to a penalty (Sport Integrity Australia Act, ss 13D(1))
- is not excused from providing a document or thing on the ground that the provision of the document or thing might tend to incriminate the person or expose them to a penalty (Sport Integrity Australia Act, s 13D(1A)).

The Act, and the Regulations, will remove the privilege with respect to answering a question or providing information, in effect, harmonising Sport Integrity Australia's current powers across the provision of information. However, protections on use of the information remain as it may not be used against the person for any proceeding other than in connection with the Sport Integrity Australia Act, or an offence against 137.1 (false or misleading information) or 137.2 (false or misleading documents) of the *Criminal Code Act 1995* (the Criminal Code).

Article 14(2)(g) of the ICCPR is engaged by this amendment:

Not to be compelled to testify against himself or to confess guilt.

The Wood Review found that for ASADA (now Sport Integrity Australia) to effectively execute its intelligence and investigative functions, the right to claim privilege against self-incrimination in certain circumstances, as currently prescribed in the Sport Integrity Australia Act, should be excluded.

Sport Integrity Australia is the entity designated by the Australian Government to be Australia's NADO. However, because of the ability for a recipient of a disclosure notice to claim the privileges against self-incrimination or self-exposure to a penalty, Sport Integrity Australia is in the position where, the NSO to which the person belongs has greater

(contractual) powers to compel that person to answer questions truthfully and to provide information, than Sport Integrity Australia does as the regulator. In the past, ASADA relied on the cooperation of NSOs in exercising this contractual right to require athletes and other persons to answer questions. The amendment will mean that Sport Integrity Australia will not be entirely reliant on cooperation through private contracts, allowing the function to operate via statutory powers where cooperation may not be possible or appropriate.

Further, it is not uncommon for the doping conduct of an athlete or a support person to have been facilitated by a third party who was never, or who was not at the time, bound by the terms of a sport's anti-doping policy. Again, while Sport Integrity Australia can issue such a person with a disclosure notice requiring them to attend an interview to answer questions, Sport Integrity Australia has no ability to require them to answer questions, or to answer them truthfully.

There continue to be safeguards on the exercise of the Sport Integrity Australia CEO's power to issue disclosure notices. The Act and Regulations makes it clear that, in the case of an individual, answers or information given, or documents or things produced, under a disclosure notice will not be admissible in any proceedings other than proceedings in connection with the Sport Integrity Australia Act or the *Sport Integrity Australia Regulations 2020* (including proceedings before CAS, the NST or a sporting tribunal relating to sports doping or safety matters). This provision represents a reasonable and proportionate safeguard on the use of the information obtained.

In addition, s 13A(1) of the Sport Integrity Australia Act and clause 3.26B of the Sport Integrity Australia Regulations set out the requirements for disclosure notices. Relevantly, in relation to information, documents or things, the notice is required to specify:

- the kind of information that the recipient is required to provide; or
- the documents or things of the kind the recipient is required to produce.

This specificity is necessary in order to enable the recipient of the notice to understand what they are required to do to comply with the notice.

Further, s 67 of the Sport Integrity Australia Act contains strong protections over information obtained through the disclosure notice process. Relevantly, ss 67(1) creates an offence punishable by 2 years' imprisonment, for an 'entrusted person' to disclose 'protected information' other than in the circumstances permitted by Part 8 of the Sport Integrity Australia Act.

An 'entrusted person' includes the Sport Integrity Australia CEO, the staff of Sport Integrity Australia, and persons made available, or engaged, to assist the CEO. 'Protected information' is information obtained under, or for the purposes of, the Sport Integrity Australia legislative framework, that relates to a person (other than an entrusted person), and identifies, or is reasonably capable of identifying, the person. This clearly includes information about a person obtained using a disclosure notice.

It will also continue to be the case that a disclosure notice cannot be issued to a medical practitioner unless the Sport Integrity Australia CEO reasonably believes that the medical practitioner is involved, in that capacity, in the commission, or attempted commission, of a possible violation of the anti-doping rules. This limitation recognises the confidential nature of the doctor-patient relationship, and the need to prevent arbitrary interferences with that relationship.

This, in effect, is a reasonable and proportional response as it brings current practice into an appropriately regulated channel with sufficient safeguards in place. Further, in an

environment where organised, concerted doping has become an elevated risk, the ongoing reliance on contractual obligations in order to gather critical information and intelligence cannot be supported – particularly when the reputational risks that stem from a doping scandal are so high for sport.

Publication of certain details of anti-doping rule violation assertions

Under the Regulations, the Sport Integrity Australia CEO may publish certain details of anti-doping rule violation assertions. The Amending Regulations do not substantially amend the existing publication arrangements, rather, implement consequential amendments as a result of the Act. Nonetheless, the amendments engage Article 17 of the ICCPR.

The objective of publication is to ensure the integrity of sporting competitions by enabling the global sporting community, and in particular sporting organisations, to accurately ascertain individuals who are ineligible to compete or perform any other official function (such as coach, or work in an administrative capacity) within sport.

The measure ensures Australia meets publication requirements under 14.3.1 of the Code, with the additional publication requirements to accommodate scenarios where athletes or support persons fail to recognise the jurisdiction of the sporting tribunal, or no sporting tribunal has jurisdiction.

Sanctioned athletes who continue to compete in sport despite their ineligibility (generally because organisers may not be aware they are sanctioned) can prevent legitimate competitors from winning awards, accolades or prize money, creates an uneven playing field, and encroaches on the rights of clean athletes to compete in sport free from doping. In most cases, athletes have little recourse to retrieve lost earnings or accolades when such rewards are improperly awarded to sanctioned athletes who should not have competed. In addition, if athlete support persons who have committed an anti-doping rule violation are not publicised, they may continue to improperly influence athletes and others within the sporting community.

Publication of an assertion where the person does not recognise the jurisdiction, or there is no jurisdiction, is primarily a matter of public safety. For example, there may be a situation where a person meets the definition of ‘support person’ under the SIA Act, but has not signed a membership agreement with a sporting organisation to fall within a sporting tribunal’s jurisdiction. If a criminal court were to convict that support person of trafficking an illegal substance, for example steroids, the Sport Integrity Australia CEO should have the ability to alert sporting organisations that this particular support person has an assertion of an anti-doping rule violation for trafficking.

Likewise it is imperative to publish an assertion of an anti-doping rule violation where a person who has contractually agreed to anti-doping rules, including arbitration through appropriate hearing bodies, tries to avoid sanction or publication by refusing to engage in an arbitration hearing process. In both examples, the ability to publish the assertion is directly linked and proportional to protect the safety of other participants and the integrity of sporting events in Australia and potentially internationally.

The clauses currently included within the Principal Regulations allow the Sport Integrity Australia CEO to meet the objective to protect sport and its participants through the publication of timely, clear and accurate information which is published and easy for relevant members of the sporting community to access.

An individual against whom a violation is asserted may challenge the assertion through judicial review under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*. In

addition to judicial review, a person may make a complaint to the Commonwealth Ombudsman.

In the case where an athlete or support person does not recognise the jurisdiction of a sporting tribunal it is important to understand that international anti-doping arrangements are structured to ensure athletes and support personnel agree to the jurisdiction of the relevant tribunal when they enter into a contractual arrangement with the sport (usually a membership agreement) and agree to abide by the anti-doping rules of the sport. The ability for the CEO to publicly disclose details of the assertions if an athlete or athlete support person simply refuses to cooperate with the established process they have contractually agreed to is required to ensure Australia remains compliant with its obligations to the Code.

The measure is a proportionate response when seeking to ensure other members of the sporting community are not adversely affected by the actions of a person who is asserted to have committed an anti-doping rule violation, but has avoided the proper hearing process. To ensure the proportionality of the measure, the long-standing practice of Sport Integrity Australia, and the former Australian Sports Anti-Doping Authority, is to remove the publication once the athlete or athlete support person's period of ineligibility has, or would have, expired. This ensures the publication does not last beyond the intended objective.

Conclusion

This Regulation is compatible with human rights as it promotes rights and to the extent that it limits rights, these limitations are reasonable, necessary and proportionate to achieving a legitimate objective.