

Doping Issues in Sport and the ACC Report

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Six Months in Anti-doping: October 2012 to March 2013



- *USADA v Armstrong* investigation/report (October, 2012).
- UCI investigation into drugs in cycling (December, 2012). Report due mid-year 2013.
- Wood Cycling Australia Review: Investigation into anti-doping practices in Australian cycling (January 2013).
- *ACC and ASADA investigation into organised crime and drugs in sport (February, 2013).
- NRL: ASADA investigation into the Cronulla Sutherland Rugby League Club (March 2013 – ongoing).
- AFL: ASADA investigation into the Essendon Football Club (March 2013 – ongoing).
- Australian Sport Anti-Doping Authority Amendment Bill 2013 (March – ongoing).

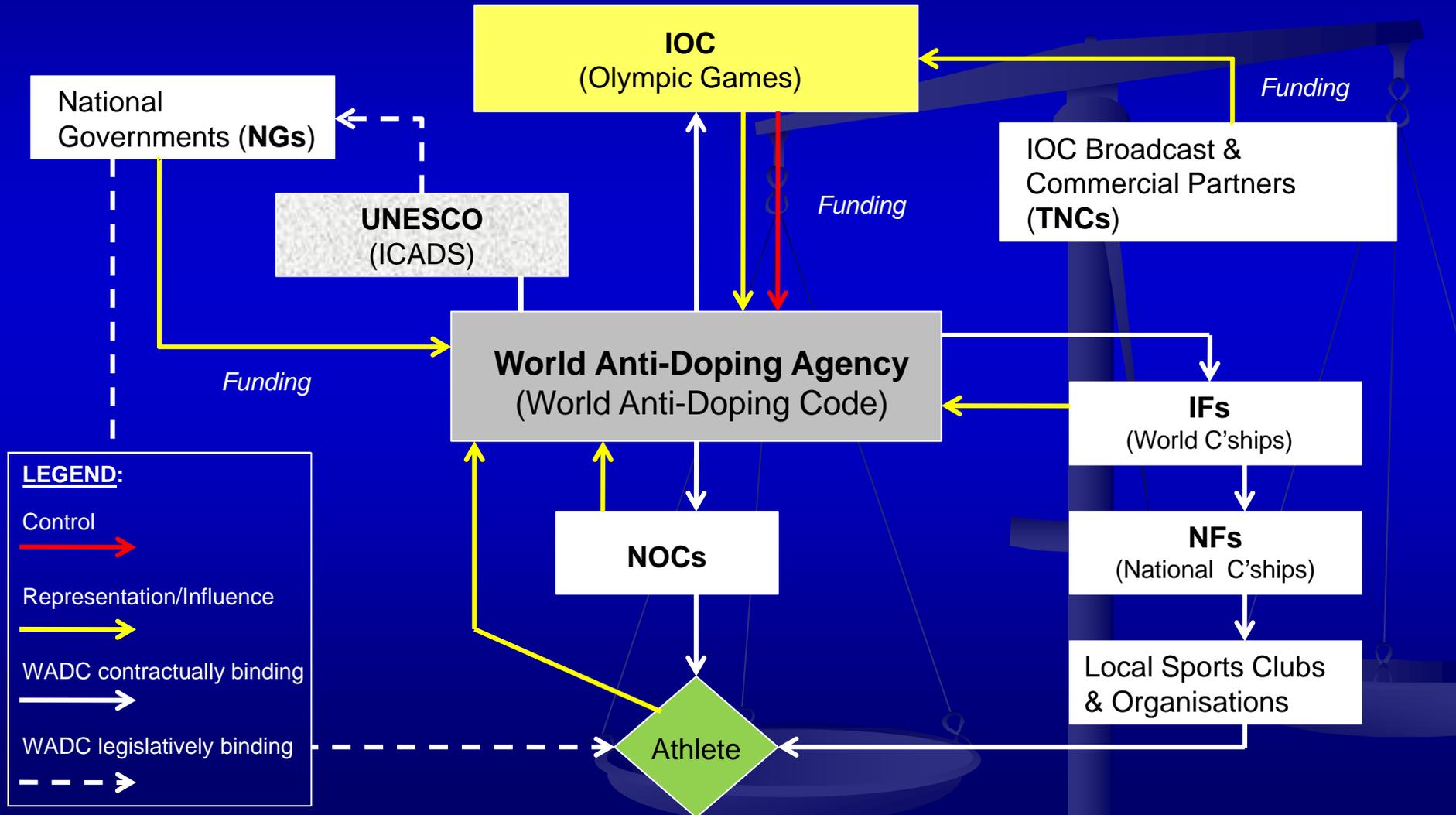
The current challenge: How best to address 'non-analytical positive' ADRVs?

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Structure of International Sports Anti-Doping Regulation



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The World Anti-Doping Code

- World Anti-Doping Agency (**WADA**) established in 1999; WADC implemented in 2003; Current revised version of WADC implemented in 2009. WADCv4, Jan 2015.
- WADA states that it is *'an international independent agency composed and funded equally by the sport movement and the governments of the world'*. (<http://www.wada-ama.org/en/About-WADA/>).
- WADA's stated mission is: *'to promote and coordinate at international level the fight against doping in sport in all its forms including in and out of competition .. it will seek and obtain from all of [IGOs, NGs, IOC, IFs, NOCs and public and private bodies fighting against doping in sport] the moral and political commitment to follow its recommendations'*. (WADA Constitution, Art 4(1))
- The stated purpose of the WADC is: *'to protect the Athletes' fundamental right to participate in doping-free sport and thus promote health and equality for Athletes worldwide'* and *'to ensure harmonized, coordinated and effective anti-doping programs at the international level with regard to detection, deterrence and prevention of doping'*. (WADC, Introduction, 11)
- WADC is incorporated by reference into all sporting contracts directly, or indirectly (via IF, NF or organisation/club anti-doping policy (**ADP**), conforming with WADC).

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AFL: The Bombers – Relevant Contractual Provisions

- **AFL Player Contract**: Requirement to submit to drug-testing; be bound by AFL ADC; and, *'comply with all directions of .. ASADA given in accordance with the AFL ADC'* (Clause 4.11); AFL PRs & CoC binding (Clause 8.1).
- **AFL ADC**: Broadly imports the WADA Code; ASADA authorised to investigate possible ADRVs u/AFL ADC (Clause 4.1); Applicability of WADA Prohibited List: *Prohibited Substances and Prohibited Methods* (Clause 6.1); All Players, Officers & Officials bound by AFL ADC (Clause 7.1); ADRVs (Clause 11); *'Players, Officers & Officials must notify the AFL GM – Football Ops of all facts and circumstances where the P, O & O believes there is or may be an ADRV or other breach of the AFL ADC'* (Clause 12.2); AFL and ASADA *'shall investigate'* possible ADRVs (Clause 12.6); Each P, O & O must *'fully co-operate'* with investigation and *'truthfully answer'* questions + produce relevant documents (Clause 12.7); Infraction Notices (Clause 13); "Sanctions/Defences", incl. *'substantial assistance'*, etc (Clause 14); Confidentiality – no public comment on case pending (Clause 18).
- **AFL CoC & Player Rules**: Players prevented from: bringing the game, the AFL, their Club and other AFL Players [Cf. AOC position: not, *'self'*] into *'disrepute'* (CoC, Clause 2.1(iv). Cf. PRs, Clauses 1.6 to 1.8).
- Consequences of non co-operation? Fines (ADC, Clauses 12.7 & 14.11), Termination of Player Contract (Clause 15). Note: s138 *Criminal Code* (Cth), False or misleading information.

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NRL: The Sharks – Relevant Contractual Provisions

- **NRL Player Contract**: incorporates NRL ADP & NRL CoC into Players Contract, as does the CoC (NRL CoC, Clause 22).
- **NRL ADP**: Broadly imports the WADA Code; ADRVs (Part 2); Applicability of WADA Prohibited List: *Prohibited Substances* and *Prohibited Methods* (Part 4); “Sanctions/Defences”, incl. ‘substantial assistance’, etc (Part 9); ‘ASADA .. May carry out investigations in relation to whether “Participants” have committed an ADRV’) (Clause 102); ‘Participants are required to cooperate with an investigation by [NRL], or .. ASADA’ (Clause 102).
- **NRL CoC**: *Players shall .. so far as practicable .. do all things necessary to ensure .. the proper working of the NRL ADP* (Clause 15); *If a .. person bound by the NRL ADP knows that there is a breach of the NRL ADP, it is the duty of that person to report the breach to the NRL* (Clause 16); *Persons are prohibited from publicly commenting on any matter likely to go before NRL ADP* (Clause 31).
- Consequences of non-co-operation? Termination of Player Contract... Note: s138 *Criminal Code* (Cth), False or misleading information.

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Interpretation of 'sports contracts'

At Common Law (In General)

- When considering the 'sports contract' as a whole, if a provision is ambiguous on its face, then the parties' intentions and the circumstances surrounding their entry into the agreement, must be objectively ascertained. (See: *Toll v Alphapharm Pty Ltd* (2004) 219 CLR 164 and *Codelfa Constructions Pty Ltd v State Rail Authority* (1982) 149 CLR 337). If the provision is devoid of meaning, then it may be declared uncertain.
- Note the 'contra proferentem principle'. Clauses (or even permissive clauses in favour of one party), where ambiguous, should be interpreted as any other clause, and if capable of one or more meanings, be construed against the interest of the party benefitting from that clause (ie. anti-doping policies, conduct codes, etc) (See: *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500).

CAS Jurisprudence

- Sports rules must be clear and predictable, properly made and be capable of understanding by athletes (*Quigley v UIT*, CAS 1994), 'so that the entire sport community are informed of the normative system in which they live, work and compete and the circumstances in which these rules apply' (*USOC v IOC & IAAF*, CAS 2004. Cf *Anderson & Ors v IOC*, CAS 2010 and *USOC v IOC*, CAS 2011).

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WADC General Provisions



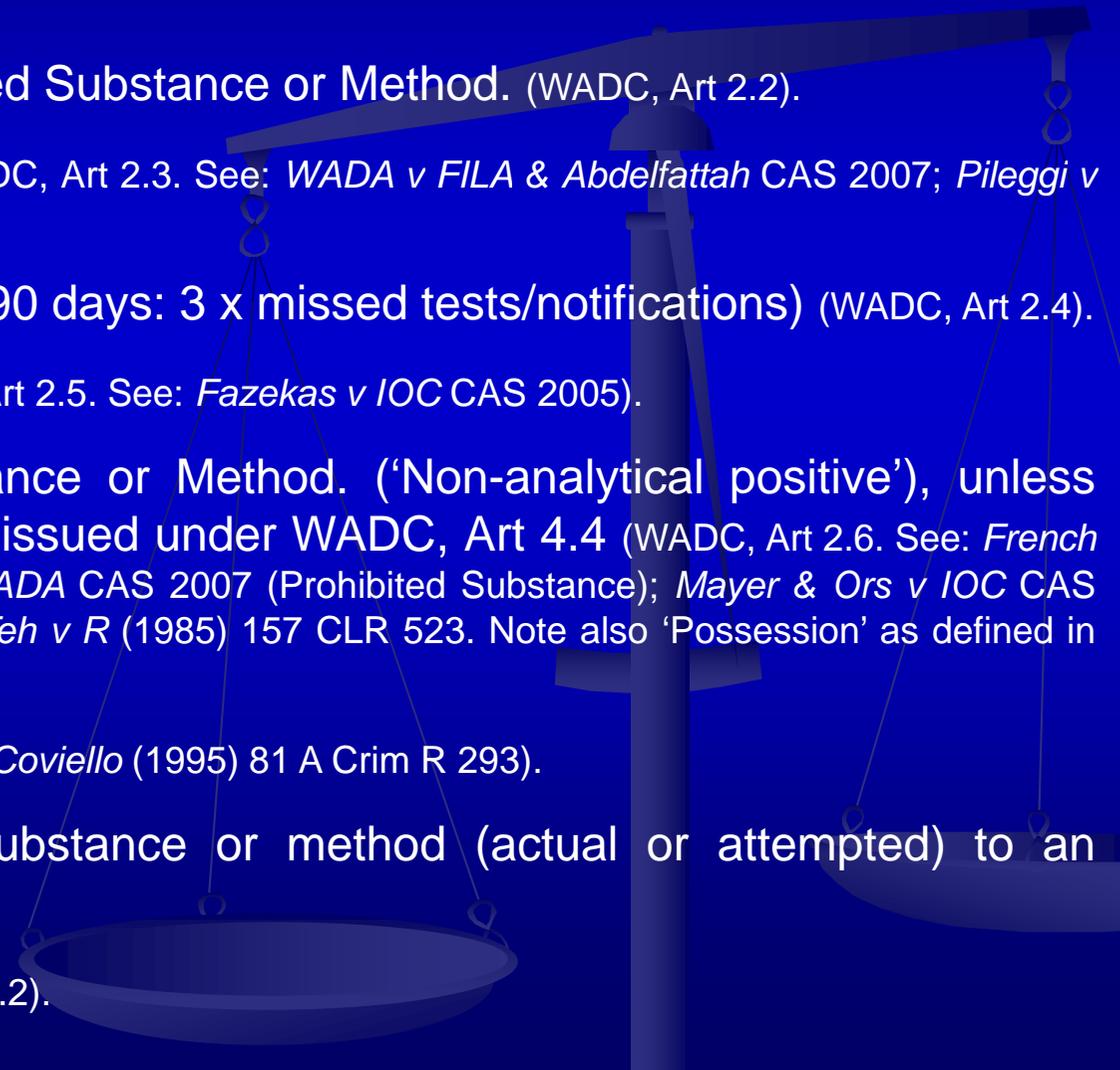
- WADA Prohibited List 2013. Includes substances which:
 - ‘[have] the potential to enhance or enhances sport performance’ OR
 - ‘represent[s] an actual or potential health risk to the Athlete’ OR
 - ‘violate[s] the spirit of sport’ as described in the introduction to the WADC (WADC, Art 4.3.1).
- Definition of Doping
 - ‘Doping is defined as one or more of the [ADRVs] set forth in Article 2.1 through Article 2.8 of the [WADC]’ (WADC, Art 1).
- Athlete Responsibility: Strict Liability (Applicable with respect to ADRVs relating to Positive Sample, Use, Attempted Use – Prohibited Substances and Prohibited Methods).
 - ‘It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping violation under Article 2.1’ (WADC, Art 2.1.1. See also Art 2.2).

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Anti-Doping Rule Violations

- Positive sample (WADC, Art 2.1).
 - Use or attempted use: Prohibited Substance or Method. (WADC, Art 2.2).
 - Refusal to provide sample (WADC, Art 2.3. See: *WADA v FILA & Abdelfattah CAS 2007*; *Pileggi v ASDA [2004] FCA 955*).
 - Athlete whereabouts violation (90 days: 3 x missed tests/notifications) (WADC, Art 2.4).
 - Tampering with sample (WADC, Art 2.5. See: *Fazekas v IOC CAS 2005*).
 - Possession: Prohibited Substance or Method. ('Non-analytical positive'), unless possession is pursuant to TUE issued under WADC, Art 4.4 (WADC, Art 2.6. See: *French v ASC & CA CAS 2005*, *Marinov v ASADA CAS 2007* (Prohibited Substance); *Mayer & Ors v IOC CAS 2003* (Prohibited Method). Cf *He Kaw Teh v R* (1985) 157 CLR 523. Note also 'Possession' as defined in WADC).
 - Trafficking (WADC, Art 2.7. See: *R v Coviello* (1995) 81 A Crim R 293).
 - Administration of prohibited substance or method (actual or attempted) to an Athlete (WADC, Art 2.8).
 - Admission of doping (WADC, Art 3.2).
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ADRV Defences

- Correct Sample Procedure/Integrity of Evidence (Continuity)? (See: *French v ASC & CA CAS 2005*; *FINA v Azevedo CAS 2004*).
- Is the laboratory properly accredited and have the correct scientific procedures been followed? (WADC, Articles 5 and 6; Cf Arts 3.2.1 and 3.2.2).
- Proper management of test/sample? Athlete opportunity to be present for the opening of the 'B' Sample? (WADC, Art 7; *Beaton & Scholes v EFA CAS 2003*).
- TUE? Must be medically documented and exemption obtained in advance of test (WADC, Article 4.4. See: *WADA & USADA v Lund & FIBT CAS 2006*).
- Elimination or reduction of Period of Ineligibility (**Pol**) for specified substances in specific circumstances (Athlete required to prove to 'comfortable satisfaction' standard, how substance entered his/her body and that he/she did not intend to enhance 'sport performance') (WADC, Art 10.4. See: *Foggo v NRL CAS 2011*).
- No fault or negligence [Pol: Nil] (WADC, Art 10.5.1. See: *WADA & ITF v Gasquet CAS 2009*).
- No significant fault or negligence (Onus on athlete) [Pol: Discretionary – half to full sanction] (WADC, Art 10.5.2. See: *Knauss v FIS CAS 2005*; *Puerta v ITF CAS 2006*. Cf *UCI v Contador CAS 2012*).
- Double Jeopardy? (See: *British Olympic Association v WADA (Re Chambers) CAS 2012*).

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Sanctions generally

- First offence for standard ADRV: 2 years Pol (WADC, Arts 10.2 & 10.3.1).
- Aggravating Circumstances (Trafficking, Administration): Pol can range from 'life' to 8 years (WADC, Art 10.6). Multiple violations: Increased Pols for subsequent ADRVs (WADC, Art 10.7).
- Discretionary reduction of Pol where 'substantial assistance' given to regulator ('discount' of up to 75% or 8 years, where life) (WADC, Art 10.5.3).
- Disqualification of results where ADRV occurs 'in competition', unless 'no fault' established under WADC, Art 10.5.1 (WADC, Arts 9, 10.1 & 10.8).
- Team disqualified where 2 or more members during an 'Event Period' commit ADRVs (WADC, Art 11.2. See: *ASADA v Clark & Ors* CAS 2010).
- Imposition of fines are permissible under any ADO ADP (WADC, Art 10.12).
- Commencement of Pol: Date of decision, or upon date Pol voluntarily accepted. Note the possibility of provisional Pol in seasonal sports – flexibility (WADC, Art 10.9).
- No sports participation during Pol (WADC, Art 10.10).

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Anti-Doping Enforcement – Usual Procedure (Overview)

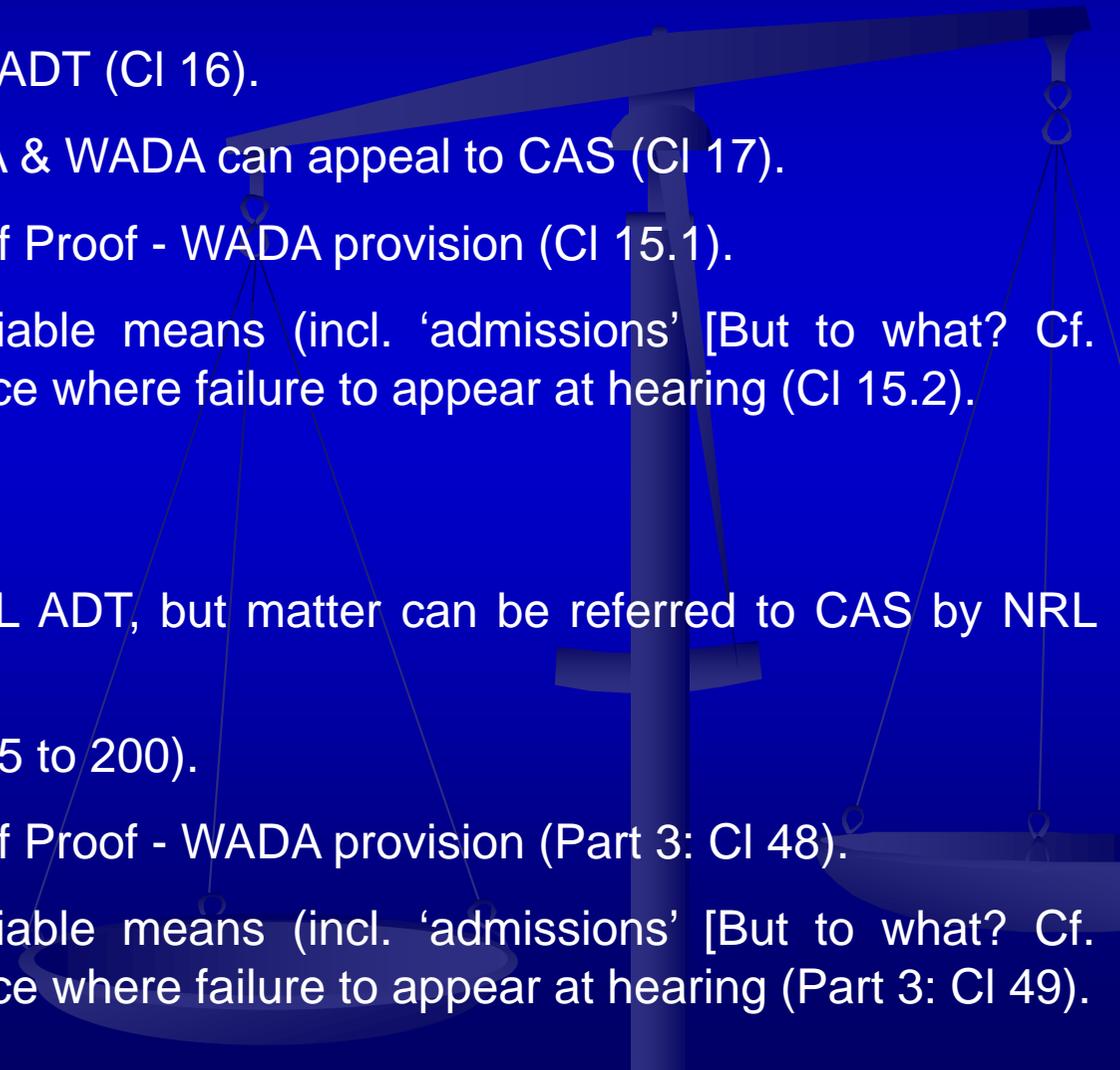
- Athlete is notified of positive sample by ASADA: Date, substance, result. Offered opportunity to test 'B' sample and be present for opening of 'B' sample.
- Athlete invited to show cause as to why his/her name should not be included on ASADA Register. If the athlete does not seek an immediate hearing and seeks to show cause (ie. reduction sought pursuant to WADC, Arts 10.4 and/or 10.5), a submission may be made to the ASADA Anti-Doping Review Panel for consideration. ASADA may then offer a penalty which the athlete can accept, or otherwise contest by electing to proceed to a hearing.
- If the matter proceeds to a hearing, ASADA will issue an 'Infraction Notice' under the relevant NF or ADO ADP (ie. Charge and particulars).
- The hearing will be before the NF or ADO Anti-Doping Tribunal (according to the tribunal rules of the NF or ADO) or CAS (according to the CAS Rules), incorporated into the 'sporting contract' (WADC, Arts 8, 13). Under the WADC, CAS is the final court of appeal, subject only to limited judicial review by the Swiss Federal Tribunal.
- Evidence: NF/ADO carries the burden of proof of any ADRV to a 'comfortable satisfaction' standard. Athlete rebuttal is on 'balance of probabilities', except under WADC Arts 10.4 & 10.6 (WADC, Art 3.1. See also: WADC, Art 3.2 'means of proof' and 'inferences').

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The Hearing

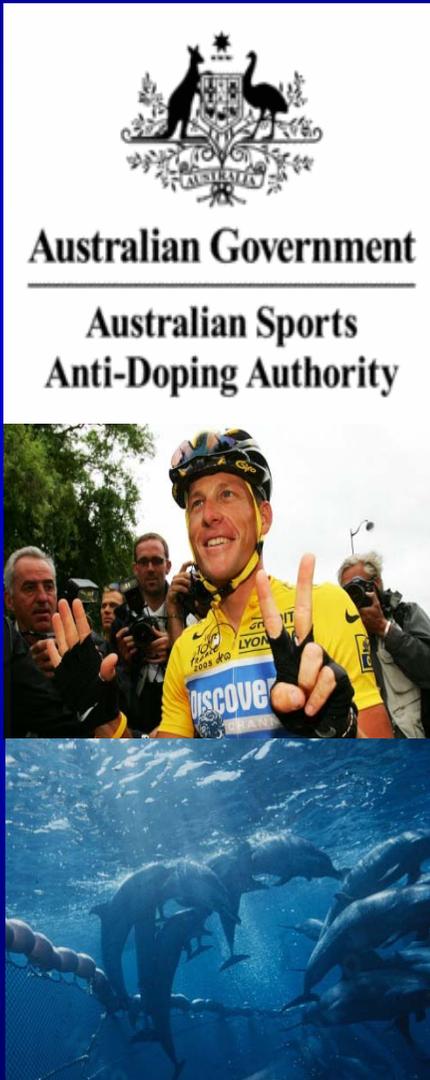
- **AFL** (u/AFL ADC):
 - Hearing at First Instance: AFL ADT (CI 16).
 - Appeals: AFL AB. Only ASADA & WADA can appeal to CAS (CI 17).
 - Evidence: Balance/Standard of Proof - WADA provision (CI 15.1).
 - Evidence: Proof by other reliable means (incl. 'admissions' [But to what? Cf. *Armstrong*]) + adverse inference where failure to appear at hearing (CI 15.2).
 - **NRL** (u/NRL ADP):
 - Hearing at First Instance: NRL ADT, but matter can be referred to CAS by NRL ADT (Part 7: CIs 120-130).
 - Appeals: CAS (Part 10: CIs 195 to 200).
 - Evidence: Balance/Standard of Proof - WADA provision (Part 3: CI 48).
 - Evidence: Proof by other reliable means (incl. 'admissions' [But to what? Cf. *Armstrong*]) + adverse inference where failure to appear at hearing (Part 3: CI 49).
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Conclusion: Integrity in Sport AND the Rule of Law



- The integrity of sport in the modern professional/commercial era is considerably vulnerable: doping; match fixing; etc...
- Whether the so-called “blackest day in Australian sport” will amount to anything, depends very much upon what evidence is collated by ASADA and whether or not such evidence can support proof of ADRVs and/or conduct infractions.
- In light of *USADA v Armstrong* and the current ACC/ASADA investigation into Australian sport, the sports regulatory landscape is about to be significantly tightened both internationally (WADC 2015) and domestically (*Australian Sports Anti-Doping Amendment Bill 2013*), especially with the [alarming] potential introduction of ‘coercive powers’.
- The challenge for lawyers in the new sports regulatory environment will be to ensure that not just the integrity of sport remains intact, but also integrity is maintained in the rule of law and the legal processes by which sport (especially with respect to anti-doping) is governed and regulated.