The Victorian Bar
Commbar – (Sports Law Section)

Legal Responses to Sports Doping

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Legal Responses to Sports Doping

Whilst that for which all virtue now is sold
And almost every vice, almighty gold;

Ben Jonson (1616)

I got caught in Seoul and lost my gold medal. I’m here to try to tell people…
it’s wrong to cheat, not to take drugs, they’re bad for your health.

Ben Johnson (1989)

1. INTRODUCTION

Sport in Australia has long played a significant role in shaping the culture of our nation and its inhabitants.\(^1\)

Implicit to the notion of sport and the manner in which it is played in Australia, is another of those quintessential Australian values, that of a “fair go”.\(^3\)

Through sport, our heroes and heroines are created and celebrated. Lost battles are usually forgotten. Cheats are universally despised.

At the core of what comprises the essence of sport, is a fair contest conducted on a level playing field and an opportunity for the individual or the team to go as far as ability permits.\(^4\)

Cheating is the very antithesis of these meritocratic ideals which society admires about sport.

The New Oxford Dictionary defines “cheating” as:

“act dishonestly or unfairly in order to gain an advantage, especially in a game or an examination”.\(^5\)

Most modern sport is regulated through rules which address the participation in sport of athletes or players, both on and off the field, in order to uphold the fair contest.\(^6\) These rules form part of the private law (derived from a series of ratcheting agreements) which bind the participants and the various international, national federations and clubs in organised sporting competition.

\(^3\) Cashman, Ibid at page 111, where the author underscores the importance of fair play in sport by reference to the ACB’s famous telegram to the MCC during the 1932-1933 Ashes Test series, also known as the Bodyline series, where the touring English team were accused of engaging in unsportsmanlike conduct. The incident was ultimately resolved with the banning of bodyline bowling and then only after high level political intervention, including that of the Australian Prime Minister at the time, Joe Lyons.
\(^6\) Cashmore, Ibid at page 87. Note also the German sociologist, Norbert Elias’s observation of “sportization” said to have taken place in Europe at about the time of the English Industrial Revolution, which is “the process in which precise and explicit rules governing sporting contests came into being, with a strict application to ensure equal chances for competitors and supervision to observe fairness”, (referred to by Cashmore), which highlights the philosophical foundation upon which the current rules applicable to sport has been built.
At the heart of this sporting regulation is a complex web of private and public law which prohibits the use of specified drugs in sport and by sportspeople, which is globally referred to as sports doping.

The reason for anti-doping laws is simple. Sports doping is cheating. It creates an uneven playing field and therefore an unfair contest for those who do not use performance enhancing drugs. Doping in sport also poses a significant risk to the health of those who choose to cheat.

The short term physical advantages derived by those who engage in sports doping at the elite level are substantial, where the difference between an Olympic gold medal and the accompanying trappings of fame and fortune, and say, fourth place and obscurity, sometimes comes down to milliseconds. Needless to say, with so much at stake in the modern era of professional sport, the temptation for some individuals to choose to cheat by doping, is real and irresistible.

Accordingly, given the importance of the place accorded to sport in contemporary culture, both globally and also locally here in Australia, in order to ensure that the playing field in sport remains level, society has demanded that the law respond to the biggest current threat to the continuity of fair sporting contests, that being doping in sport.

It is impossible to embark upon a definitive treatise on such a broad and complex subject in the context of a one hour seminar. Accordingly, this paper will address the more important and common issues encountered by Counsel briefed in sports doping cases.

2. SPORTS DOPING – SOURCES OF LAW

2.1 The Contractual Nature of Obligations in Sport – International Private Law

By joining a sporting club, team, or entering a sporting competition, participants enter into a contract agreeing to be bound by all of the rules and regulations applicable to the playing and administration of the sport concerned and/or the constitution of the organisation, which also incorporates the subject rules and regulations.

This agreement is usually in writing and in the form of a membership application form/agreement, signed by the participant and often accompanied by the payment of a membership subscription.

Virtually all Australian sport and the respective club, state or national membership/affiliation agreements, incorporate anti-doping regulations.

This is done either by the insertion of a specific clause addressing the issue of doping, or, as is more common nowadays, a clause where the participant agrees to be bound by the current anti-doping policy in force for the particular sport concerned.

By way of illustration, the relevant anti-doping clause in force for participants at the 2005 Australian Inter-Varsity Games, provides:

“At the time of signing this form:

(a) I acknowledge that I have read and understood the Australian University Sport Inc (“AUS”) Code of Behavior [copy is available on the AUS web

Nafziger, Ibid at pages 147 to 148.

8 Applicable Anti-Doping Policies for most sports are found on the websites of the particular club or association, or the National Federation for such sport.

9 2005 Australian University Sport Participation Agreement.
(b) I acknowledge that I have read and understood the AUS Anti-Doping Policy [copy is available on the AUS web site: http://www.unisport.com.au and displayed in the Event accreditation centre];

(c) I agree I am bound by the provisions contained within the AUS Code of Behavior and AUS Anti-Doping Policy and will abide by any penalties or sanctions imposed by the Disciplinary Committee convened to determine breaches of the Code of Behavior and Anti-Doping Policy;

(d) I declare that I have not engaged in doping and that I am not currently subject to any sanctions for being in breach of my sports anti-doping rules;

(e) …

(f) I acknowledge that I understand and that I am bound by the rules/laws that govern the sport[s] I am entered into for this event as well as the AUS rule variations for the same sports [copy is available on the AUS web site: http://www.unisport.com.au and displayed in the Event accreditation centre];"

In addition to those they enter into with their local sporting club, participants at the elite level of sport, are contractually bound by anti-doping regulations which are incorporated into agreements they enter into with the National Federation of their Sport (usually specified for the appropriate High Performance Program), the Australian Sports Commission (or more commonly, the Australian Institute of Sport (“AIS”), if the participant is the holder of an AIS scholarship) and the Australian Olympic Team (usually incorporated into the Shadow Team Agreement when an athlete is first nominated by his or her National Federation as a potential member of the Australian Olympic Team and later confirmed in the Team Agreement upon selection by the Australian Olympic Committee (“AOC”)).

The applicable Anti-Doping Policies incorporated into such agreements are prescribed by the peak organisations for sport, are World Anti-Doping Code (“WADC”) compliant and are then passed down through the chain of national and regional associations, and then clubs, and finally to the participant, in a series of binding affiliation and membership agreements. Such a series of related cascading contracts is also referred to as an “umbrella agreement”.  

For most sports, especially the Olympic suite of sports, the structure of the umbrella agreement incorporating the anti-doping policy applicable to the particular sport follows the structure in place for the organisation of International Sport, as set out in the diagram below:

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Diagram 1: Organisation of International Sport

The result of the umbrella agreement structure which regulates the participation in sport, in accordance with prevailing anti-doping regulations, again, especially in Olympic sports, is the following series of agreements, which binds athletes and players:

- The Olympic Charter (which regulates the conduct of the International Olympic Committee (“IOC”) and the operation of the Olympic Games);
- Contract: IOC and the various National Olympic Committees, (“NOC’s”), including the AOC;
- Contract: IOC and the various International Sports Federations (“IF’s”);
- Contract: NOC (AOC) and National Sports Federations (“NF’s”) and Athlete (ie. Olympic Shadow Team and Team Agreements);
- Contract: IF and NF;
- Contract: NF and Club/Association and/or Athlete; and
- Contract: Club / Association and Athlete (Membership Agreement).

Not only is the practice or prevention of sports doping regulated through the prism of private law, via the law of contract, but so too are the resolution of doping disputes between the parties to the respective contracts.

2.2 Public International Law

2.2.1 2003 Copenhagen Declaration and the WADA Code

Due to the international character of sports participation at the elite level and the increase in doping amongst athletes, the various international stakeholders in sport (which included the Olympic Movement, all National Sports Federations,
Participants and Governments) which comprised the World Anti-Doping Agency ("WADA")\(^{11}\), at a watershed conference held in Copenhagen during March 2003, decided that a united and consistent approach in the application of anti-doping policy was needed to succeed in the fight against doping in sport and hence the WADC was born.

The introduction to the WADC provides:\(^{12}\)

“The purposes of the World Anti-Doping Program and the Code are:

- To protect the Athletes’ fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide; and

- To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping”.

Further the fundamental rationale for the WADC is stated to be:

“Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as “the spirit of sport; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterized by the following values:

- Ethics, fair play and honesty;
- Health;
- Excellence in performance;
- Character and education;
- Fun and joy;
- Teamwork;
- Dedication and commitment;
- Respect for rules and laws;
- Respect for self and other participants;
- Courage; and
- Community and solidarity.

Doping is fundamentally contrary to the spirit of sport”.

The WADC has been accepted by the Olympic movement, all of the Olympic Sports and most of the major IF’s and many national government anti-doping agencies.

In Australia, the WADC has been adopted by the AOC, the Australian Sports Commission ("ASC") and the Australian Sports Anti-Doping Authority ("ASADA").

As a consequence of the adoption of the WADA Code by the above bodies, the WADC is incorporated into the participation agreements for virtually all sport played in Australia.\(^{13}\)

\(^{11}\) WADA was founded in November 1999, prior to the Sydney Olympics, in light of the 1999 Lausanne Declaration, following a meeting amongst the key stakeholders in international sport which was held in light of the collective concern of the prevalence of doping in sport, as a consequence of the Festina doping scandal which occurred during the 1998 Tour de France.

\(^{12}\) WADC 2003, Introduction.
2.2.2 2005 UNESCO International Convention Against Doping in Sport

In October 2005, at the 33rd session of the General Conference of UNESCO in Paris, the International Convention Against Doping in Sport (“UNESCO Convention”) was unanimously adopted by member nations.

Although 186 national governments signed the Copenhagen Declaration in 2003 supporting the creation of the WADC, these governments could not be legally bound under public international law by the ratification of what really is a private agreement.

Accordingly, the UNESCO Convention provides the legal machinery for governments, upon ratification of the Convention, to adopt the WADC through the enactment of domestic legislation consistent with the WADC.

Australia is one of the founding signatories to the Convention and as a consequence of its accession, Australia has ensured that all of its domestic law relating to sports doping and also those government agencies engaged in sports issues, are WADC compliant. 14

2.3 Domestic Law

2.3.1 Commonwealth

In 2005, following the doping controversy which surrounding the Australian Track Sprint Cycling Team, prior to the 2004 Athens Olympics, the Federal Minister for Sport, The Hon Senator Rod Kemp, established ASADA to replace the former Australian Sports Drug Agency (“ASDA”).

Following the establishment of ASADA, the Commonwealth earlier this year enacted the WADC compliant, Australian Sports Anti-Doping Authority Act 2006 (“ASADA Act”) and the Australian Sports Anti-Doping Authority Regulations 2006 (“ASADA Regulations”).

The ASADA Act empowers ASADA to engage in the following activity:

- to conduct drug testing (in and out of competition, including without notice), education and advisory functions formerly undertaken by ASDA (and the Australian Sports Drug Medical Advisory Committee);
- to assume the role of anti-doping policy development, approval and monitoring, together with compliance and reporting, formerly undertaken by the ASC;
- to investigate anti-doping rule violations (“ADRVs”) under the WADC;
- to report the findings of its investigations of ADRVs to the relevant sporting associations; and

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• presenting ADRV cases before sports tribunals (including the Court of Arbitration for Sport ("CAS"));\textsuperscript{15}

The ASADA Act also prescribes that the ASADA Regulations must also establish a National Anti-Doping Scheme ("NAD Scheme"), which implements the UNESCO Convention (and accordingly the WADO).

In practical terms the NAD scheme contained in the ASADA Regulations has been adopted by virtually all Australian NF’s in their relevant participation agreements. Failure to adopt the NAD Scheme by any NF would almost certainly ensure that Commonwealth funding for the sport concerned would cease and accordingly such a condition (ie. requiring the NF to implement and maintain a NAD Scheme) is “not negotiable” in any funding agreement entered into between the ASC and the relevant NF.

Sections 13 to 16 of the ASADA Act set out the mandatory requirements as to what must be included in a NAD Scheme which includes the persons to whom the NAD Scheme applies (athletes and support persons, ie. coaches and agents) and an authorisation to ASADA carry our its functions with respect to such person to whom the NAD Scheme applies.

Important matters now addressed by the ASADA Act include:

• the obligation of an athlete to keep ASADA informed of his or her whereabouts, if requested by ASADA (so that the athlete is reasonably available for testing and is aware of the consequences if he or she fails to do so);

• the procedure to be followed when requesting and obtaining a sample from an athlete;

• the rights of athletes which include:\textsuperscript{16}

  - to be informed of the consequences applicable should they fail to comply with an ASADA request for notification of whereabouts or testing;

  - the opportunity to have a chaperone or representative present while providing a sample; and

  - the opportunity to have the “B” sample tested (and to be present while the sample is opened), where there has been a positive test to the “A” sample.

• the Register of Notifiable Events, kept by ASADA, which contains a listing of any person who has committed an ADRV under a NAD Scheme and under the ASADA Act.

As stated above, the NAD Scheme which has been implemented in most of the Anti-Doping policies applicable to Australian sport is contained in the ASADA Regulations.

Also contained in the ASADA Regulations are the four WADA International Standards which sets out all of the elements needed to ensure optimal

\textsuperscript{15} S.21(1) ASADA Act.
\textsuperscript{16} S.14 ASADA Act.
harmonization and best practice in international and national anti-doping programs.\textsuperscript{17}

These standards address the following:

- The Current WADA Prohibited List of Substances;\textsuperscript{18}
- The International Standard for Testing;
- The International Standard for Laboratories; and
- The International Standard for Therapeutic Use Exceptions (“TUEs”).

It has taken ASADA approximately one year to gear up and be fully functional which it shall be by the end of this year.

2007 will no doubt prove interesting in examining who the new ASADA Act and ASADA Regulations operate when it comes to the future investigation and prosecution of ADRVs.

2.3.2 Victoria


The object of the SAD Act is to ensure that the underlying objectives of the WADC are clearly supported and promoted at a State level in manner similar to that promoted by the ASADA Act.

The SAD Act does not have the same breadth of power or operation as the Commonwealth legislation and is more policy orientated than enforcement driven.

2.4 Other Sources – Non Olympic Sports

As for Olympic sports, most non-Olympic sports have their own WADC compliant anti-doping policies in place, including the AFL which became WADC compliant in June 2005, to which their participants become contractually bound.

Again, these policies are available from the websites of the NF’s for each particular sport.\textsuperscript{19}

3. DOPING OFFENCES

3.1 Persons Liable

WADC compliant Anti-Doping Policies now apply to athletes and ‘support persons’ which include coaches, agents and medical practitioners (including physiotherapists).\textsuperscript{20}

\textsuperscript{17} The four International Standards can be found at: \url{http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=268} (viewed 24 October 2006).

\textsuperscript{18} The 2007 Prohibited List was approved by the WADA Executive Committee on 16 September 2006 and is available at: \url{http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=370} (viewed 24 October 2006).

\textsuperscript{19} By way of example, the AFL Anti-Doping Code is available at \url{http://afl.com.au/cp2/c2/webi/article/240712ac.pdf} (viewed 24 October 2006).

\textsuperscript{20} S.4 ASADA Act.
3.2 Banned Substances

The List of current banned or prohibited substances are set out in the 2006 WADC Prohibited List and primarily include (amongst other banned substances ad methods):

*In and Out of Competition*

- Anabolic Androgenic Steroids;
- Hormones and Related Substances (ie. Growth Hormone and Insulin Growth Factor);
- Beta 2 – Agonists (ie. inhalers such as salbutamol, unless permitted by Therapeutic Use Exemption);
- Agents with Anti-Estrogenic Activity;
- Diuretics and Masking Agents;
- Blood Doping;
- Sample Tampering; and
- Gene Doping.

*In Competition*

- Stimulants;
- Narcotics;
- Cannabinoids;
- Glucocorticosteroids (ie. cortisone, unless accompanied by a medical certificate in accordance with a TUE).

*Substances Prohibited in Particular Sports*

- Alcohol
- Beta-Blockers

(For instance in shooting and modern pentathlon)

*Specified Substances*

- Includes ‘minor’ substances which are generally available and can result in unintentional doping by an athlete (ie. ingestion through supplements, or by administration while under anesthetic during surgery). A doping violation for such substances may result in a reduced penalty if the athlete can establish the ingestion of the substance was not intended to enhance performance.

3.3 Offences – Performance Enhancing Drugs

The most commonly encountered doping offences are set out below:

3.3.1 Positive Test Result

The most common ADRV is where an athlete returns a positive result from a doping test.

There is an obligation on the participant to present for sporting competition, “drug-free”.

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If the presence of a prohibited substance is detected in the system of an athlete, then strict liability applies in proving the commission of an ADRV.\(^\text{22}\)

The onus then shifts to the participant to prove that he or she had not in fact committed an ADRV.

### 3.3.2 Failure to provide sample or comply with test

Failure to provide a sample for testing is also deemed to be an anti-doping offence under the current regime.\(^\text{23}\)

In the case of a failure to provide a sample, the same penalty applies to that of a positive test result which for a first offence is a two year ban from participation in sport.

### 3.3.3 Tampering

Tampering with a sample while in the process of providing it, or following the provision of a sample is also deemed to be an ADRV.\(^\text{24}\)

### 3.3.4 Non-analytical positives

The new frontier in the prosecution of doping offences is what are referred to as “non-analytical positives”.

This is commonly where an athlete is found in possession of a prohibited substance.

In order to establish that, the prosecutor must establish knowledge on the part of the person deemed to be in possession of the prohibited substance.

The concept of possession is disarmingly simple.

To possess something, one needs to have it and to know that one has it.

It is a question of fact.

In what still stands as the seminal authority in Australia on what is required to establish “possession”, the High Court in *He Kaw Teh v The Queen* (1985) 157 CLR 523, stated that where a statue makes it an offence to have possession of goods, knowledge on the part of the person concerned that those goods are in his or her custody, in the absence of a sufficient indication of a contrary intention, will be a necessary ingredient of the offence, because the word “possession” itself necessarily imports a mental element, where its meaning will depend on the context of the prevailing applicable statutory provision.\(^\text{25}\)

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\(^\text{25}\) *He Kaw Teh* per Gibbs CJ and Mason J at 545 & 546, Brennan J at 585, Dawson J at 598-599 and 602.
“As with importation, possession is a concept which contains within it a mental element. As Aicken J. observed in Williams v The Queen (1978) 140 CLR 591 at 610:

'It is necessary to bear in mind that in possession there is a necessary sufficient mental element of intention, involving a sufficient knowledge of the presence of the drug by the accused. No doubt in many cases custody of an object may supply sufficient evidence of possession, including the necessary mental element, but that is because knowledge may often be properly drawn from surrounding circumstances”.

and

“Possession may be an intricate concept for some purposes, but the intricacies belong to the civil rather than the criminal law. As was observed in Director of Public Prosecutions v Brooks [1974] AC 862 at 867, the technical doctrines of the civil law which separate proprietary and possessory rights in chattels are generally irrelevant for the purposes of the criminal law. There the concept is a basic one involving the intentional exercise of physical custody or control over something. Knowledge is the basis of the necessary intent. There may be a sense in which physical custody or control can be exercised over something in ignorance of its presence or existence, but this has never been sufficient to amount as possession in law. This is what Griffith CJ meant in Irving v Nishimura (1907) 5 CLR 233 at 237:

‘If a man has something put into his pocket without his knowledge, he cannot be charged with having it unlawfully in his possession, if the fact appears’.

Although intent must be based upon knowledge, it is the degree of knowledge which poses the difficult question. When, as in the present instance, the exercise is one of statutory interpretation, the answer to the question will depend upon the nature and the form of the legislation.”

This proposition was applied by the Court of Arbitration for Sport (“CAS”) Appeals Panel (Professor Richard McLaren, The Hon Alan McDonald QC and Henry Jolson QC) in the sports law context of anti-doping regulations in the case of French v Australian Sports Commission and Cycling Australia and as a consequence of this decision, a greater responsibility is now placed on sporting organisations in the investigation and prosecution of “non-analytical positive” doping cases.

Accordingly, in light of the resources (or lack thereof) of many NF’s, it is suggested that the function of investigation and prosecution of “non-analytical positive” doping cases will now be undertaken by ASADA.

### 3.3.5 Trafficking

Likewise, the trafficking of prohibited substances is considered to be an ADRV.

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26 He Kaw Teh at 598.
27 He Kaw Teh at 599.
28 CAS 2004/A/651 at paragraph 86.
To establish the offence of *Trafficking* as opposed to the offence of mere “possession” or “use” of a prohibited substance, knowledge of possession of the substance must be linked to a purpose (or intent) on the part of the offender, (as proven by the evidence), to supply or provoke others to use the actual substance of which the offender is in possession.\(^{29}\)

It should be noted that in the fight against doping in sport, ASADA now has the power to liaise with and obtain information from other government agencies, such as the Department of Customs in its investigation of suspected ADRVs.

### 3.3.6 Aiding & Abetting

Likewise, a person who knowingly provides a venue for a person to take performance enhancing drugs or otherwise knowingly assists a person take performance enhancing drugs or engage in performance enhancing methods is guilty of an ADRV.

### 3.3.7 Admission of Doping

Finally, where an athlete admits to having taken a prohibited substance at some earlier stage of their career, they too will be deemed to have committed an ADRV.\(^{30}\)

### 3.4 Offences – Non-performance Enhancing Drugs

Perhaps the most relevant example to Victorian Counsel in considering the issue of non-performance enhancing drugs, (or as referred to by some in the media as “recreational drugs”) is the recent case of *Australian Football League v The Age Company Limited*\(^{31}\).

The AFL Anti-Doping Code only addresses the issue of “performance enhancing drugs”.\(^{32}\)

Non-performance enhancing drugs are covered by the AFL’s Illicit Drugs Policy, which is geared towards the rehabilitation of the offender and hence for a first offence, the confidentiality of the offender is maintained under the contractual arrangements existing between player, club and the AFL.

For the first and second offence the penalties essentially involve counselling and treatment, in a confidential environment.

Third and subsequent positive tests to illicit drugs will result in a ‘public’ notification, an appearance before the AFL Tribunal and the possible suspension of the player for up to 12 matches. In the consideration of illicit drugs, marijuana is treated more benignly that other illicit substances, such as ecstasy or speed.


\(^{30}\) *Tori Edwards v IAAF & USTAF* OG 2004/003, where the athlete admitted to taking two glucose tablets which were proven to be the source of the prohibited substance, unbeknown to her and her trainer and by doing so admitted she committed a doping offence by “mistake”. She also failed on this ground in seeking to rely on an “exceptional circumstances” defence. See also: *Dajka v Australian Olympic Committee* CAS, Sydney, 12 August 2004.

\(^{31}\) [2006] VSC 308.

4. DEFENCES

The following are the most commonly raised defences in sports doping cases:

4.1 Incorrect taking of sample

The “Berlina” test is the current internationally accepted test which anti-doping agencies require athletes to submit to, during in and out-of-competition testing.

It is a reasonably fool-safe test, notwithstanding its invasive nature.

The procedure must be fully explained to the athlete and in the past ASADA have provided the athlete concerned with a brochure setting out the nature of the process to be followed and informing the athlete of his or her rights and responsibilities. ASADA also follows a similar procedure.

Any departure from the procedure on the part of the collector of the sample will allow the athlete to challenge the test result, if the athlete can demonstrate that the departure from the established procedure may have resulted in a result other than a positive test.  

An illustration of where testing procedures have been successfully is where the participant, has not been informed of the opportunity to be present for the opening of the “B” sample, when challenging the validity of the positive test result to the “A” sample and the “B” sample has been opened in the participant’s absence.

4.2 Challenges to International Standards

Other grounds of challenge available to a Defendant to an allegation of an ADRV include:

• A challenge to the accreditation to the laboratory concerned;
• A challenge to the accuracy or reliability of the test;
• A challenge to the scientific means or method by which the test was conducted; and
• A challenge to whether or not a product actually contains a prohibited substance, notwithstanding the labeling of the product.

4.3 Knowledge

In the case of a “non-analytical positive” ADRV, the defence of lack of knowledge may also be raised successfully by a Defendant, where the person concerned was not aware that they were in possession of the prohibited substance.

4.4 Exceptional Circumstances

The defence of “exceptional circumstances” available to all participants under WADC compliant anti-doping policies, is perhaps the most commonly used, yet commonly misunderstood legal propositions in sports doping law.

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33 Ss. 13 to 16 ASADA Act and ASADA Regulations.
34 Beaton and Scholes v Equestrian Federation of Australia CAS 2003/A/477.
35 See paragraph 3.3.4 above.
The defence is not available to overcome a positive test result and hence an ADRV, such is the nature of strict liability in sports doping. The defence only goes to the issue of mitigation on penalty, and is only available to the athlete where there was no significant fault or negligence on the part of the athlete in the ingestion of the substance.\textsuperscript{36}

Commonly, the defence is put in the terms: “I did not know that the substance I consumed contained a ‘prohibited substance’”. The athlete raising the defence carries the onus of proving the defence on the balance of probabilities.

In short, a successful mounting of the defence will not keep a gold medal, but will lessen or even eliminate the prospect of any suspension of the athlete from competition.\textsuperscript{37}

4.5 Therapeutic use Exemption

Where an athlete tests positive to a prohibited substance, that is included in the WADA prohibited list of substances that are exempt on the grounds of therapeutic use, and the use of that substance is accompanied by an appropriate medical certificate, there will be no commission of an ADRV by the athlete concerned.

4.6 Endogenous/Exogenous Production

This is one of the more ‘desperate’ defences raised by Defendants.

Generally speaking it is used in the case of positive test results for testosterone.

A positive testosterone test is determined by the testosterone:epitestosterone ration of the sample, exceeding the average testosterone:epitestosterone ratio taken from a random comparable athlete sample.

This is the defence that is likely to be used by 2006 Tour de France winner Floyd Landis, after testing positive to testosterone during the 2006 Tour de France.

The nature of the defence is that the level of the substance detected was produced naturally by the athlete, which was the cause of the positive result and not the wrongful ingestion of a prohibited substance.

Reasons advanced by athletes for high testosterone levels in the past (all of which have failed), include the ingestion of large amounts of beef and/or chicken with high hormone levels and the participation in excessive amounts of sex by the athlete the night before the event.

4.7 Non-analytical positives – chain of custody

Finally, in the case of a “non-analytical positive” case, or even in a positive sample case, where there has been interference with the sample after it has left the custody of the athlete, it is open to the defence to raise the possibility that the evidence has been

\textsuperscript{36} Except though in sports where the rules do not provide for the specific relegation of results in the circumstance of a positive drug test to a team member. See for example: United States Olympic Committee v International Olympic Committee and International Amateur Athletic Federation CAS 2004/A/725.

contaminated, where there has been a break in the integrity and/or the chain of custody of the sample.\textsuperscript{38}

5. **PENALTIES**

Penalties differ in the details from sport to sport so it is therefore appropriate to consult the prevailing anti-doping policy for each sport.

Under WADC complaint anti-doping policies, the standard penalty for a doping offence is 2 years suspension for a first offence and a life ban for a second offence.

If the substance concerned is a “specified substance” (ie. minor substance), the athlete concerned can seek a shorter period of suspension of between 3 months and 2 years.

Of course, as referred to above, if the athlete can establish that “exceptional circumstances” existed in the ingestion of the substance, then the penalty may be waived.

Finally, it should be noted that under the Australian Olympic Committee’s Anti-Doping Policy, if an athlete is found guilty of “trafficking” prohibited drugs, then such person is subject to a lifetime ban from participation in the Olympic Games.

6. **DETERMINATION OF DOPING PROCEEDINGS**

6.1 **Bodies entitled to bring proceedings**

ADRV proceedings may be brought by any party to the relevant agreement which incorporates the ADRV or ASADA.

6.2 **Forums**

6.2.1 **Court of Arbitration for Sport**

For Olympic sports, the main forum where doping disputes are determined is CAS.

CAS is an international arbitral tribunal, with its permanent seat being located in Lausanne, although an active division of CAS sits here in Oceania, with the registry being located in Sydney.

Based upon the standard \textit{Scott v Avery} clauses which apply to the resolution of sporting disputes for Olympic sports, CAS is the final tribunal of determination for sports doping disputes (or indeed any other dispute under the participation agreements), from which there is no appeal to the Australian Commonwealth/State Court system.\textsuperscript{39}

6.2.2 **Domestic Tribunals**

Sometimes at first instance for Olympic Sports, an ADRV will be first returnable before a domestic tribunal for that sport, from which an appeal will lie to CAS.

\textsuperscript{38} \textit{French v ASC and CA} ibid.

\textsuperscript{39} \textit{Raguz v Sullivan} (2000) 50 NSWLR 236.
Of course in other non-Olympic sports, such matters are determined by the domestic tribunals for these sports, such as the AFL Tribunal and the AFL Appeals Panel.

6.2.3 Racing Appeals Tribunal

Doping matters in racing (thoroughbreds, harness racing and greyhounds) are determined by the Racing Appeals Tribunal which is a statutory tribunal established under the Racing Act 1958.

6.2.4 Administrative Appeals Tribunal

One avenue available to an athlete wishing to challenge a test conducted by ASADA would be to appeal the test or manner in which the investigation or prosecution of the case was handled, which resulted in an entry on the Register, kept by ASADA, on administrative grounds.\(^{40}\)

Such an appeal at first instance would lie to the Administrative Appeals Tribunal and thereafter to the Federal Court.\(^{41}\)

6.3 Right to Legal Representation

Under WADC compliant anti-doping policies, parties are entitled to legal representation when ADRVs are prosecuted before either the appropriate domestic tribunal or CAS.

6.4 Rules of Procedure

Again the rules of procedure governing the hearing of ADRVs are prescribed by the contractually applicable rules for the relevant domestic tribunal, which are either contained in the participation agreement, or provided for separately by the sport concerned.

In the case of matters which are heard by CAS, the CAS Rules of Procedure apply.\(^{42}\)

6.5 Standard of Proof

The standard of proof applicable to the proof of the commission of an ADRV is the Briginshaw test,\(^{43}\) that being *proof to the comfortable satisfaction of the tribunal bearing in mind the seriousness of the matters being considered*. In doping cases, it is suggested that the Tribunal ought apply a “high Briginshaw”.\(^{44}\)

In CAS jurisprudence, the tribunal has consistently stated that the onus of proof lies somewhere between the *balance of probabilities and beyond reasonable doubt*.\(^{45}\)

6.6 Costs

The matter of costs again is usually addressed by the relevant participation agreement.

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\(^{40}\) Paragraph 2.3.1 above.
\(^{41}\) Pileggi, Ibid.
\(^{43}\) Briginshaw v Briginshaw Ibid.
\(^{44}\) French v ASC and CA Ibid.
\(^{45}\) Kabaeva v FIG Ibid.
Further, the matter of costs in CAS proceedings, subject to any agreement of the parties is preserved to the discretion of the tribunal, although CAS awarded by CAS historically have not been significant.\footnote{Rules 64 and 65 CAS Rules and Redman, R., A Closer Look at Costs Awards in the Court of Arbitration for Sport (2005) 60 The Commentator (1). See also French v ASC and CA Ibid (Costs Award 7 September 2005).}

7. CONCLUSION

The fight against doping has expanded significantly in recent years in terms of size and complexity.

Much of this is due the considerable body of emerging rules and regulations necessary to address such evils.

For as long as sports doping occurs, the community will continue to demand a legal response to this problem, so as to uphold the ideals of sport and sporting endeavour to which it holds dear.

With greater vigilance and the effective management of ADRVs under the WADC, not only has the first step in the battle against sports doping been taken by the genuine stakeholders in sport, but perhaps it may also be the decisive strike in ultimately winning the war.

Paul J. Hayes

24 October 2006.