



**Australian Government**

**Australian Sports  
Anti-Doping Authority**

# EXPLANATORY STATEMENT

NAD Scheme Review 2008

This Explanatory Statement has been drafted for the purpose of fulfilling the Australian Sports Anti-Doping Authority's (ASADA's) obligations under section 26(1) of the *Legislative Instruments Act 2003*.

## **1. Purpose**

Section 9 of the *Australian Sports Anti-Doping Authority Act 2006* (the Act) provides that the regulations must prescribe a scheme about:

- (a) the implementation of the Council of Europe Anti-Doping Convention;
- (b) if the UNESCO Anti-Doping Convention has entered into force for Australia – the implementation of that Convention;
- (c) ancillary or incidental matters.

Section 4 of the Act provides that the scheme prescribed for the purposes of section 9 is to be known as the National Anti-Doping (NAD) scheme. The NAD scheme provides a detailed framework for the performance of the powers and functions of ASADA. In particular, it:

- sets out anti-doping rules applicable to athletes and support persons;
- sets out rules applicable to sporting administration bodies;
- authorises and requires ASADA to do certain things;
- sets out procedures governing the exercise of ASADA's powers; and
- sets out certain rights of athletes.

Schedule 1 of the *Australian Sports Anti-Doping Authority Regulations 2006* (the Regulations) prescribed the NAD scheme in accordance with section 9 of the Act.

A review of the NAD scheme is necessary to ensure Australia's continued compliance with the World Anti-Doping Code and the UNESCO Anti-Doping Convention, given changes to the Code that were adopted on 17 November 2007 for implementation on 1 January 2009. It is also timely, two years after ASADA's establishment, for the review to encompass amendments to the NAD scheme to address operational issues with that have been identified in those two years.



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## **2. Authority for making this instrument**

Section 10 of the Act provides that ASADA may, by legislative instrument, amend the NAD scheme so long as the amended NAD scheme is about any or all of the following matters:

- (a) the implementation of the Council of Europe Anti-Doping Convention;
- (b) if the UNESCO Anti-Doping Convention has entered into force for Australia – the implementation of that Convention;
- (c) ancillary or incidental matters.

## **3. Background to instrument**

The World Anti-Doping Code (the Code) is the core document of a uniform set of anti-doping rules, developed by the World Anti-Doping Agency, to harmonise anti-doping policies, rules, and regulations. It works in conjunction with four International Standards aimed at bringing harmonisation among anti-doping organisations in various technical and operational areas. Because governments can not be legally bound by a non-governmental document such as the Code, the UNESCO Anti-Doping Convention was drafted to enable the alignment of domestic legislation with the Code, thereby harmonising the sport and public legislation in the fight against doping in sport. The Convention was ratified by Australia on 17 January 2006 and entered into force on 1 February 2007.

Due to changes to the Code, adopted on 17 November 2007 for implementation on 1 January 2009, significant changes need to be made to the NAD scheme to ensure Australia's continued compliance with the Code and the UNESCO Anti-Doping Convention. Through the continued implementation of the NAD scheme, a number of further operational issues have been identified requiring amendments to be made. ASADA has therefore undertaken a major review of the NAD scheme. Details of the major issues addressed in this review and amendments made by ASADA to the NAD scheme by this Legislative Instrument appear at Item 5 below.



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## **4. Public Consultation**

Section 11 of the Act provides that, before making an instrument that amends the NAD scheme, ASADA must:

- (a) publish a draft of the instrument and invite people to make submissions on the draft; and
- (b) consider any submissions that are received within the time limit specified by ASADA when it published the draft. The time limit must be at least 28 days after publication.

ASADA released an exposure draft of the revisions to the NAD scheme on 21 July 2008, with public notification of the draft amendments provided in the sports sections of the *Weekend Australian*, *Canberra Times*, *Sydney Morning Herald* and *Age* newspapers on Saturday 26 July 2008. The draft amendments were also posted on ASADA's website. All national sporting organisations and other relevant stakeholders were advised of the proposal by direct e-mail. The time limit for submissions was set at close of business on Monday 18 August 2008.

Submissions were received from five national sporting organisations, a peak body representing athletes, a state government and the Office of the Privacy Commissioner. These submissions were considered by ASADA and drawn upon in preparing the final legislative instrument.

## **5. Details of the instrument**

Provision 3 of the instruments sets out that Schedule 1 to the instrument amends the NAD scheme.

The first provision of Schedule 1 to the NAD scheme substitutes a new document for the NAD scheme in its entirety, except for clause 96 which deals with fees. The new document has been drafted in order to address the major issues set out below. Amendments to clause 96 have been made in a separate instrument.



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## **5.1 Compliance with the World Anti-Doping Code**

The major reason for this review of the NAD scheme is to ensure ASADA's continued compliance with the Code when the revised Code comes into effect on 1 January 2009. To this end, a number of key changes have been made to the NAD scheme as follows:

### Definitions

The definitions contained in the Code are mandatory provisions of the Code in accordance with Article 23.2.2 of the Code. The definitions within the NAD scheme have therefore been amended to reflect those definitions, with minor, non-substantive changes to some language to reflect the fact that the NAD scheme is an Australian legislative document. Terminology has been changed throughout the NAD scheme to reflect these definitions and to provide greater harmony between the language in the scheme and that used by sporting organisations in their anti-doping policies. (For example, the terms 'drug' and 'doping method' have been largely replaced with 'prohibited substance' and 'prohibited method'). Some words and phrases are defined within the ASADA Act (which is not being amended at this time) and are therefore not repeated in the NAD scheme.

### Meaning of athlete

Section 13(1)(a) of the ASADA Act requires the NAD scheme to provide that one or more specified classes of athlete are subject to the NAD scheme. This is given effect to in clause 4 of the previous NAD scheme. Clause 1.06 of the revised scheme has amended the classes of athlete subject to the NAD scheme in light of the new definition of 'athlete' within the Code, and to better reflect ASADA's practice and procedures.

The Code definition of 'athlete' has not been directly copied into the NAD scheme as it fundamentally leaves much of this definition in the hands of each national anti-doping organisation, such as ASADA. Clause 1.06 has been drafted, however, to meet the Code definition of 'athlete'. It subjects different classes of athletes to different parts of the NAD scheme including application of the anti-doping rules, testing, collection of whereabouts information, requirement for therapeutic use exemptions and provision of education. The Code definition of athlete specifically allows national anti-doping organisations such as ASADA to do this.



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## Meaning of support person

Section 13(1)(a) of the ASADA Act also requires the NAD scheme to provide that one or more specified classes of support person are subject to the NAD scheme. The term 'support person' is used rather than the Code language of 'athlete support personnel' because 'support person' is provided within the ASADA Act.

Clause 1.07 of the revised NAD scheme provides for this requirement and has again been worded to reflect the revised Code definition of 'athlete support personnel' as closely as possible.

## Anti-doping rules

Section 13(1)(b) of the ASADA Act requires that the NAD scheme contains anti-doping rules applicable to athletes and support persons. The anti-doping rules contained in clause 1 of the previous NAD scheme paraphrased the anti-doping rule violations found in article 2 of the Code. As this is another mandatory clause of the Code under article 23.2.2, the revised NAD scheme adopts them verbatim (again with minor, non-substantive changes to some language to reflect the fact that the NAD scheme is an Australian legislative document).

This direct adoption of the anti-doping rule violations of the Code as the anti-doping rules within the NAD scheme will ensure complete uniformity between Australian legislation and the anti-doping rules of sporting organisations.

## Athlete Whereabouts

Division 2.3 of the previous NAD scheme addressed ASADA's powers in relation to locating athletes. However, it did not reflect the new detail contained in the International Standard for Testing that will come into effect on 1 January 2009. These provisions, now contained in Division 3.2 of the revised scheme, have therefore been redrafted to more closely reflect ASADA's obligations under the International Standard for Testing and current procedures relating to athlete whereabouts.



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## Comments annotating the Code

ASADA recognises that, for mandatory provisions of the Code, the comments annotating those provisions in the Code are considered similarly mandatory by WADA. However, the phrasing of these comments is unsuitable for direct inclusion in a legislative document such as the NAD scheme. Therefore, where mandatory Code provisions have been included in the revised NAD scheme, the comments annotating those clauses have been omitted. Instead, subclause 1.03(3) makes it clear that ASADA must have regard to these comments as well as the Code as a whole in exercising its powers under the NAD scheme.

## **5.2 Format of the NAD Scheme**

The NAD scheme as adopted in March 2006 had been adapted from the *Australian Sports Drug Agency Orders 2000*. As such, the structure of the document was no longer an ideal reflection of ASADA's functions, powers and operations. Parts of the previous NAD scheme were unnecessarily repetitive, leading to a cumbersome document that was difficult to follow and ambiguous in parts.

For this reason, the revised NAD scheme has been completely reformatted with a new structure and numbering system. While some of the clauses from the previous NAD scheme do remain, repetition has been removed wherever possible and the document follows a more logical, sequential order.

## **5.3 Results Management**

ASADA's results management processes, including the establishment of the Register of Findings as required by the ASADA Act, were contained in Divisions 2.6, 2.7 and 2.8 of the previous NAD scheme. Those provisions, particularly those within Division 2.6, were the most repetitive within the previous scheme and no longer reflected best practice results management as expressed in the Code, International Standards and World Anti-Doping Agency (WADA) Guidelines.



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The provisions relating to results management in the NAD scheme are contained in Part 4 of the revised scheme. Whilst this Part now more closely reflects WADA Guidelines, none of the rights afforded to athletes or support persons under the previous NAD scheme have been removed. In particular, athletes and support persons retain the right to make submissions to ASADA prior to an entry being made on the Register of Findings, and the right to review of a decision of ASADA to place an entry on the Register of Findings, over and above their rights contained under the Code and International Standards.

The revision of this Part of the NAD scheme will enable greater clarity relating to ASADA's results management processes for ASADA staff, sporting organisations, athletes and support persons alike.

## **5.4 Sporting Administration Body Rules**

The sporting administration body rules contained in clause 93 of the previous NAD scheme have been reproduced largely unchanged in clause 2.05 of the revised scheme. Amendments to these rules:

- clarify the types of information that ASADA requires national sporting organisations to provide to ASADA;
- include ASADA's right to appeal the outcome of an Australian anti-doping case (contained in article 13.2.3 of the revised Code); and
- include an obligation to promote anti-doping education which reflects the greater emphasis this is given in the revised Code.

## **5.5 Disclosure Provisions**

ASADA's ability to disclose information is strictly controlled through the *Privacy Act 1988*, the ASADA Act and the NAD scheme. The previous NAD scheme contained several provisions relating to the disclosure of information by ASADA within Divisions 2.8 and 2.9. The revised NAD scheme brings these provisions together in new Division 4.4, allowing for some simplification and clarification of the situations in which ASADA may or must disclose personal information relating to its functions. These clauses, in particular, have been scrutinised by and discussed with the Office of the Privacy Commissioner, to the satisfaction of that Office.



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## 5.6 Transitional Provisions

The revised NAD scheme contains transitional provisions that allow all operational aspects of the NAD scheme to take effect immediately upon registration of the legislative instrument, but enable those aspects of the revised scheme that are dependent on the implementation of the amended World Anti-Doping Code (namely, the precise anti-doping rules and associated results management procedures) to come into effect on 1 January 2009. This enables ASADA's rules and regulations to harmonise with those of national sporting organisations and recognise the Effective Date for the revised Code.

## 5.7 Incorporation by Reference

The revised NAD scheme incorporates the following documents, in part or whole, by reference:

- The World Anti-Doping Code (the Code). Clause 1.03(2) of the revised NAD scheme obliges ASADA to have reference to the Code in exercising its powers for the NAD scheme, as did clause 2(5) of the old NAD scheme. Article 8 of the Code, which provides mandatory standards for hearings relating to anti-doping rule violations, is referenced in clause 4.22(1)(b)(i) of the revised NAD scheme. The Code may be found on the website of the World Anti-Doping Agency, at <http://www.wada-ama.org>.
- The International Standards adopted by the World Anti-Doping Agency in support of the Code. These Standards comprise of:
  - the International Standard for Testing (IST);
  - the International Standard for Laboratories (ISL);
  - the International Standard for Therapeutic Use Exemptions (ISTUE); and
  - the Prohibited List.

The International Standards are referenced in

- clause 1.03(2) as a **relevant international anti-doping instruments** to which ASADA must have regard in exercising its powers for the NAD scheme;
- clause 3.13 (a request for a sample and sample collection must substantially comply with IST procedures);
- clause 3.24 (analyses of samples must substantially comply with procedures in the Code and International Standards);
- clause 3.27(2) (investigations must be conducted in accordance with the Code and International Standards);



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- clause 4.02 (ASADA must determine if a therapeutic use exemption has been granted in accordance with the ISTUE as part of results management);
- clause 4.05(2) (analysis of B samples must be in accordance with the ISL); and
- clause 5.01(1) (ASDMAC may give athletes approvals for therapeutic use in accordance with the Code and the ISTUE).

The International Standards may all be found on the website of the World Anti-Doping Agency, at <http://www.wada-ama.org>.

- The Australian Governments Investigations Standard. Clause 3.27 obliges ASADA to conduct investigations in accordance with the Standard as well as the Code and International Standards above. Provision of the Australian Governments Investigations Standard is restricted to Australian Government agencies and private organisations with a demonstrated need for it, and it may be obtained by contacting the Client Service Team of the Australian Federal Police.