# EXPLANATORY STATEMENT

**Select Legislative Instrument No. 125, 2015**

*Australian Sports Anti-Doping Authority Act 2006*

*Australian Sports Anti‑Doping Authority Amendment (Prohibited Association) Regulation 2015*

The *Australian Sports Anti-Doping Authority Act 2006* (the Act) provides for the operation of Australia’s sports anti-doping arrangements. Section 79 of the Act provides that the Governor-General may 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.

Australia’s anti-doping framework comprises the Act, the *Australian Sports Anti‑Doping Authority Regulations 2006* (the Principal Regulations) and the National Anti‑Doping (NAD) Scheme, which comprises Schedule 1 to the Principal Regulations. The Australian Sports Anti‑Doping Authority (ASADA) is the focal point for the Australian Government’s efforts against doping in sport.

Australia is a signatory to the UNESCO International Convention against Doping in Sport. This obliges us to implement anti-doping arrangements consistent with the principles of the World Anti-Doping Code (Code). Following a two year review, in late 2013 the international anti-doping movement agreed to revisions to the Code. In turn, Australia’s anti-doping legislation was amended in 2014 to bring it into line with the revised Code which took effect from 1 January 2015.

The Code identifies those activities which are to be considered anti-doping rule violations. A new ‘prohibited association’ anti-doping rule violation was introduced in the revised Code to prevent an athlete from associating in a professional or   
sports-related capacity with an athlete support person who has been identified as a doping facilitator (known as a ‘disqualified support person’). A person may be classified as a disqualified support person if they are serving a period of ineligibility from sport; convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a doping violation if that person had been subject to anti-doping rules; or serving as a front or intermediary for an individual in either of the two preceding categories.

From 1 January 2015 the Principal Regulations gave effect to the revised Code with one exception – the Code provides for the prohibited association violation to apply when the disqualifying conduct of the athlete support person occurred prior to 1 January 2015, whereas the existing Principal Regulations stipulated the conduct by which an athlete support person may be considered a disqualified person must have been engaged in on or after 1 January 2015.

It has since been established that Australia is alone in adopting this interpretation. By not amending the Regulations to bring our arrangements in line with international anti‑doping standards, Australia is at risk of being targeted by support persons disqualified in overseas jurisdictions for conduct prior to 1 January 2015, and ASADA is prevented from exercising the violation for continued association in a professional or sports-related capacity with a support person whose disqualifying conduct occurred prior to 1 January 2015.

The *Australian Sports Anti-Doping Amendment (Prohibited Association) Regulation 2015* (Amendment Regulation) provides for the specification of the prohibited association violation to fully align with the Code.

The amendment allows ASADA, like other national anti-doping organisations globally, to consider the conduct of a disqualified support person prior to 1 January 2015 in establishing a prohibited association violation against an athlete.

Details of the Amendment Regulationare set out in the Attachment.

Consultation

The Australian Government Solicitor, Australian Olympic Committee, ASADA and the Office of International Law within the Attorney-Generals Department were consulted in the development of the amendments.

The Act specifies no conditions which need to be met before the power to make the proposed Amendment Regulation may be exercised.

The Amendment Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation will commence the day after it is registered.

Authority: Section 79, *Australian Sports Anti-Doping Authority Act 2006*

**ATTACHMENT**

**Details of the *Australian Sports Anti-Doping Authority Amendment (Prohibited Association) Regulation 2015***

Section 1 – Name

# This section provides for the Amending Regulation to be referred to as the *Australian Sports Anti-Doping Authority (Prohibited Association) Amendment Regulation 2015*.

Section 2 – Commencement

This section provides for the Amendment Regulation to commence the day after this instrument is registered.

Section 3 – Authority

The *Australian Sports Anti‑Doping Authority Act 2006* provides for the amendment of the Regulations.

Section 4 – Schedules

This section provides for the operation of this Regulation.

**Schedule 1 – Amendments - Australian Sports Anti‑Doping Authority Regulations 2006**

Item [1] – Clause 7.03 of Schedule 1

This item repeals Clause 7.03 and substitutes a new Clause 7.03 to specify the operation of the prohibited association anti-doping rule violation.

A support person referred to in Clause 2.01K of the Principal Regulations may be classified as a disqualified support person for the purposes of the prohibited association anti-doping rule violation for conduct that occurred before, on or after 1 January 2015.

**Statement of Compatibility with Human Rights**

**Australian Sports Anti-Doping Authority Amendment (Prohibited Association) Regulation 2015 (Amendment Regulation)**

The Amending Regulation is assessed to be 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 Amendment Regulation**

This Amending Regulation aligns the new prohibited association anti-doping rule violation provisions specified in the *Australian Sports Anti‑Doping Authority (ASADA) Regulations 2006* (Principal Regulations) with the revised World Anti-Doping Code (Code).

Australia is a signatory to the UNESCO International Convention against Doping in Sport. This obliges us to implement anti-doping arrangements consistent with the principles of the World Anti-Doping Code (Code). Following a two year review, in late 2013, the international anti-doping movement agreed to revisions to the Code. In turn, Australia’s anti-doping legislation was amended in 2014 to bring it into line with the revised Code which took effect from 1 January 2015.

The Code identifies those activities which are to be considered anti-doping rule violations. A new prohibited association anti-doping rule violation was introduced in the revised Code to deter an athlete from associating in a professional or sports-related capacity with an athlete support person who has been identified as a doping facilitator (known as a ‘disqualified support person’).

A person may be classified as a disqualified support person if they are serving a period of ineligibility from sport; have been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a doping violation if that person had been subject to anti-doping rules; or serving as a front or intermediary for an individual in either of the two preceding categories.

From 1 January 2015 the Principal Regulations gave effect to the revised Code with one exception – the Code provides for the prohibited association violation to apply when the disqualifying conduct engaged in by the support person occurred prior to, on or after 1 January 2015, whereas the existing Principal Regulations stipulated the conduct by which a person may be considered a disqualified support person must have been engaged in on or after 1 January 2015.

It has since been established that Australia is the only country to adopt this restrictive interpretation of the prohibited association anti-doping rule violation. Moreover, if this divergence between the Regulations and the Code remains, there is a risk Australia may be targeted by support persons disqualified in overseas jurisdictions for conduct that occurred prior to 1 January 2015. This specification also unduly limits ASADA’s capacity to exercise the violation for continued association in a professional or sports-related capacity with a support person whose disqualifying conduct occurred prior to 1 January 2015.

The Amending Regulation allows a support person to be classified as a ‘disqualified’ person for the purposes of the prohibited association anti-doping rule violation regardless of whether the conduct occurred before, on or after 1 January 2015.

**Human rights implications**

The human rights implications of the prohibited association violation were addressed in detail when Australia’s anti-doping legislation was amended in late 2014. At the time, the construction of the amendment adopted an abundance of caution to ensure the prohibited association violation was consistent with Australia’s international human rights obligations.

Importantly, the robust protections for athletes and athlete support persons originally specified in the ‘Prohibited Association’ violation remain in place despite the proposed amendment to the Principal Regulations. In particular:

* an association is only prohibited if it is of a ‘professional’ or ‘sports-related’ nature. The revised Code provides clear examples of the types of association that could constitute a ‘professional’ or ‘sports related’ nature, including:
  + obtaining training, strategy, technique, nutrition or medical advice;
  + obtaining therapy, treatment or prescriptions;
  + providing any bodily products for analysis; and
  + allowing the banned support person to serve as an agent or representative.
  + an individual will be warned about a particular association and the consequences should the association continue before a violation is asserted;
  + the athlete has opportunity to provide early advice as to why the association should not be considered ‘prohibited’. The ‘disqualified person’ is also afforded an opportunity to state their case as to why they should not be considered to be ‘prohibited’;
  + the normal anti-doping violation process, including avenues of appeal, will be followed;
  + case referred to sporting organisations by the ASADA Chief Executive Officer will be reviewed and scrutinised by a ‘Sports Tribunal’ when considering a violation; and
  + the ASADA Regulations already recognises Australia’s obligations not to contravene Article 22 of the International Covenant on Civil and Political Rights (ICCPR) – ‘freedom of association’.

*Prohibition against the retrospective operation of criminal laws*

The proposed amendment has been assessed to determine if it engages Article 15 of the ICCPR. Article 15 recognises that laws must not impose criminal liability for acts that were not criminal offences at the time they were committed. Specifically, Article 15 (1) of the ICCPR specifies:

*‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.’*

Taking into account the disqualifying conduct of a support person before 1 January 2015 does not amount to a ‘penalty’ for the purpose of Article 15(1) of the ICCPR. This is due to the following reasons:

* + the violation is a preventative rather than a punitive measure aimed at protecting clean athletes by limiting the capacity for negative influence by known doping facilitators;
  + the violations specified in the Code are not criminal offences and the process by which a person is considered to be a disqualified support person is not a criminal process;
  + a violation can only be pursued if the association by the athlete occurs after 1 January 2015;
  + in the first instance, a notice will be issued to both the athlete and disqualified support person, giving each an opportunity to refute that the relationship should be prohibited. The violation is only enforceable against the athlete if the athlete continues to associate with the disqualified support person, and then only after proceedings are brought in a tribunal of the relevant sport. There is no penalty imposed on the support person; and
  + the measure only applies to professional and/or sports-related associations which are reasonably avoidable. This limited type of association is not characterised in any sense as a ‘severe’ penalty.

Importantly, countries which have the same international human rights obligations as Australia have adopted the Code specification for prohibited association in full.

In essence, the Amending Regulation will better protect the clean athlete and the overall integrity of sport.

**Conclusion**

This Amendment Regulation is compatible with human rights.

**The Hon Sussan Ley MP, the Minister for Sport**