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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY BILL 2005**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of Senator the Hon. Rod Kemp, Minister for the Arts and Sport)

## AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY BILL 2005

### OUTLINE

The Australian Sports Anti-Doping Authority Bill ('the Bill') provides for the establishment of the Australian Sports Anti-Doping Authority ('ASADA'). The ASADA would carry out the functions of the Australian Sports Drug Agency ('ASDA'), and would also carry out additional functions in relation to the investigation of potential additional sports doping violations, the presentation of cases against alleged offenders at hearings conducted by the international Court of Arbitration for Sport and other sports tribunals, determining mandatory anti-doping rules to be included in Australian Sports Commission (ASC) funding agreements with sports, and advising the ASC of the performance of sports in observing these requirements.

The Bill establishes the ASADA as a body corporate consisting of a Chair, a Deputy Chair and between one and five other members. The ASADA's staff would comprise persons engaged under the *Public Service Act 1999* and the ASADA would be able to be assisted in its functions by persons on loan from other Commonwealth Departments or authorities.

In the interests of sound financial accountability, the members and staff of the ASADA and any persons whose services would be made available to the ASADA from Commonwealth agencies or authorities, would be a prescribed agency for the purposes of the *Financial Management and Accountability Act 1997* (the FMA Act). The Chair of the ASADA would be Chief Executive of the agency for the purposes of the FMA Act. The persons constituting the prescribed agency of ASADA would be able to enter into contracts on behalf of the Commonwealth in accordance with arrangements determined by the Chief Executive in accordance with the FMA Act and the *Financial Management and Accountability Regulations 1997*. For example, the Chair of the ASADA, and members and staff acting under delegations from the Chair, would be able to engage consultants to assist the ASADA in the performance of its functions.

A member of the ASADA could be appointed for a period of up to five years and would be paid such remuneration as determined by the Remuneration Tribunal. The Chair, who is also to be the Chief Executive for the purposes of the FMA Act, would hold office on a full-time basis. Other ASADA members would hold office on a part-time basis.

### FINANCIAL IMPACT STATEMENT

The Australian Government has committed an additional \$5.87m for the four years from 2005-06 for the establishment and operation of ASADA. This will supplement ASDA's existing appropriation of \$33.22m over four years and the \$0.55 million per annum already included in the Forward Estimates for 2005-06 to 2007-08 for enhanced

investigation and hearing of doping allegations. In addition, all of the assets and liabilities of the ASDA will vest in the Commonwealth with effect from the date on which the ASADA is established.

**ABBREVIATIONS**

The following abbreviations are used in this explanatory memorandum:

ASADA	Australian Sports Anti-Doping Authority
ASC	Australian Sports Commission
ASC Act	<i>Australian Sports Commission Act 1989</i>
ASDA	Australian Sports Drug Agency
ASDA Act	<i>Australian Sports Drug Agency Act 1990</i>
ASDA Orders	<i>Australian Sports Drug Agency Drug Testing (Scheme A) Orders 1999 and the Australian Sports Drug Agency Drug Testing (Scheme B) Orders 2000</i>
ASDA Regulations	<i>Australian Sports Drug Agency Regulations 1999</i>
ASDMAC	Australian Sports Drug Medical Advisory Committee
Bill	Australian Sports Anti-Doping Authority Bill 2005
FMA Act	<i>Financial Management and Accountability Act 1997</i>
Minister	Minister for the Arts and Sport
NAD scheme	National Anti-Doping Scheme

## NOTES ON CLAUSES

### Part 1 - Introduction

#### Clause 1 – Short title

Clause 1 provides for the citation of the Bill, when enacted, as the *Australian Sports Anti-Doping Authority Act 2005*.

#### Clause 2 – Commencement

Clause 2 provides that each provision of the Bill (specified in column 1 of the table in clause 2) will commence, or will be taken to have commenced, on the day or at the time specified in column 2 of the table in clause 2.

Item 1 of the table in clause 2 provides that clauses 1 and 2 and anything in the Bill that is not covered in the table will commence on the day on which the Bill receives the Royal Assent.

Item 2 of the table provides that clauses 3 to 55 of the Bill will commence on proclamation, but if any of the provisions do not commence within the period of 6 months from the day on which the Bill receives the Royal Assent, they will commence on the first day after the end of that period.

Delayed commencement of the Bill will enable transitional issues to be finalised prior to the establishment of the ASADA.

#### Clause 3 - Simplified outline

This clause sets out some of the main features of the Bill.

#### Clause 4 - Definitions

Clause 4 sets out definitions of key terms used in the Bill. Some of the more significant definitions include:

- “doping method”, which includes the manipulation or substitution of human biological fluid, human biological tissue (whether alive or otherwise) or human breath in a manner that is capable of concealing the use of a drug. This part of the definition is intended to potentially cover practices such as blood doping via homologous, autologous or heterologous blood transfusions, use of plasma expanders or perflourocarbons, and gene-doping. The definition of “doping method” also includes the use of a substance in a manner that is capable of concealing the use of a drug, a prohibited method within the meaning of the World Anti-Doping Code and a prohibited method

within the meaning of the UNESCO Anti-Doping Convention (if that Convention has entered into force for Australia).

- “drug”, which means any substance (whether naturally occurring or otherwise), a prohibited substance within the meaning of the World Anti-Doping Code and/or a prohibited substance within the meaning of the UNESCO Anti-Doping Convention (if that Convention has entered into force for Australia);
- “sports drug and safety matter”, which means a matter relating to drugs and/or doping methods, or to the safety of athletes. This definition is intended to include such matters as the anti-doping rule violations currently listed in the World Anti-Doping Code, which include use of a substance or method on the World Anti-Doping Agency’s Prohibited List, possession or trafficking of a prohibited substance or method, and administration of a prohibited substance or method to an athlete. It is also intended to include matters related to the safety of athletes, such as the use of non-prohibited substances that may be harmful to the health of an athlete or lead them to endanger others by taking a substance and then participating in a sporting activity.
- “support person”, which means an individual who works with or treats one or more athletes participating in, or preparing for sporting activities, in the capacity of: coach, trainer, manager, agent, team staff member, official, medical practitioner or para-medical practitioner. Examples of para-medical practitioners would include dietitians, nutritionists and chiropractors.
- “UNESCO Anti-Doping Convention”, which means the International Convention Against Doping in Sport, adopted by the UNESCO General Conference at Paris on 19 October 2005 or, if the convention has been amended by any amendment that has entered into force for Australia, the Convention as so amended. At time of writing, the text of the UNESCO Anti-Doping Convention is available through URL [www.unesco.org](http://www.unesco.org), by following the “education”, then “physical education and sport” and finally “anti-doping” hyperlinks.

### **Clause 5 – When is there a vacancy?**

Clause 5 has several purposes. First, it provides that for the purposes of a reference in the ASADA Bill to a vacancy in the office of an ASADA member, there are taken to be five offices of ASADA members in addition to the ASADA Chair and the ASADA Deputy Chair. This would enable the number of offices which are vacant to be determined at any one time, despite fluctuations in the number of members who have been appointed in addition to the Chair and the Deputy Chair (see clause 26 which provides for the membership of the ASADA to be comprised by a Chair, a Deputy Chair and at least one and up to five members). For example, if there were three persons, other than the Chair

and Deputy Chair, appointed as members, the effect of clause 5 would be that there would be two offices of members vacant. The Minister would therefore be able to appoint two members in this circumstance under subclause 27(1).

Second, paragraph 5(1)(b) provides that, for the purposes of a reference in the *Acts Interpretation Act 1901* to a vacancy in the membership of a body, there are taken to be five offices of members in addition to the Chair and the Deputy Chair. For example, subsection 33(2B) of the *Acts Interpretation Act 1901* provides that where an Act confers a power or function, or imposes a duty, on a body (whether incorporated or unincorporated), the exercise of the power or the performance of the function or duty is not be affected merely because of a vacancy or vacancies in the membership of the body (i.e. the performance of a function by the ASADA in circumstances where it is comprised of a Chair, a Deputy Chair and three other members would not be affected because there would be a vacancy in two offices of members).

Subclause 5(2) deals with the same matters set out above, but in the context of the ASDMAC rather than the ASADA. It provides that, for the purposes of a reference in the Bill to a vacancy in the office of an ASDMAC member, or a reference in the *Acts Interpretation Act 1901* to a vacancy in the membership of a body, there are taken to be six offices of the ASDMAC in addition to the ASDMAC Chair.

#### **Clause 6 – Crown to be bound**

This clause provides for the Act to bind the Crown in all its capacities and states that the Act does not make the Crown liable to be prosecuted for an offence.

#### **Clause 7 – Extension to external Territories**

This clause provides for the Act to extend to every external territory.

#### **Clause 8 – Extra-territorial application**

This clause provides for the Act to extend to acts, omissions, matters and things outside Australia, absent a contrary intention. It is intended to ensure that the Act and regulations (including the NAD scheme) made under the Act would apply to enable ASADA to carry out its functions overseas, for example at overseas sporting events.

## **Part 2 – National Anti-Doping Scheme**

### **Division 1 – Making and amending the NAD Scheme**

#### **Clause 9 – Making the National Anti-Doping Scheme**

This clause provides that the regulations must prescribe a scheme about any or all of the following matters:

- implementation of the General Anti-Doping Convention (defined in clause 4 as the Anti-Doping Convention done at Strasbourg on 16 November 1989 [1994] ATS 33);
- if the UNESCO Anti-Doping Convention (defined in clause 4 as the International Convention Against Doping in Sport done at Paris on 19 October 2005) has entered into force for Australia, the implementation of that convention; and
- ancillary or incidental matters.

The scheme will be known as the National Anti-Doping scheme, or NAD scheme.

Clauses 13 to 16 set out the mandatory matters that must be in the NAD scheme, including what the NAD scheme must authorise or require the ASADA to do. It is intended that the NAD scheme will encompass other matters including those currently set out in section 11 and Parts 3A and 3B of the ASDA Act, the ASDA Regulations and the ASDA Orders and further matters in relation to disclosure of information. Part 3A of the ASDA Act deals with testing on behalf of a foreign sporting organisation or under an anti-doping arrangement and Part 3B deals with testing by other sporting administration bodies.

#### **Clause 10 – Amending the National Anti-Doping Scheme**

Subclause 10(1) provides that the ASADA may, by legislative instrument, amend the NAD scheme, provided that the amended NAD scheme is about any or all of certain matters (which replicate the matters set out in clause 9). Without limiting subclause 10(1), subclause 10(2) provides that under subclause (1) the ASADA may amend the NAD scheme to implement:

- the UNESCO Anti-Doping Convention; or
- amendments of the UNESCO Anti-Doping Convention; or
- amendments of the General Anti-Doping Convention;

if the UNESCO Anti-Doping Convention, or amendments of that convention or the General Anti-Doping Convention enters into force for Australia after the commencement of clause 10.

It is intended that, before making a legislative instrument to amend the NAD scheme, the ASADA would consult with the Commonwealth Attorney General's Department to ensure that the proposed amendment accurately reflect the matters set out at clause 10.

#### **Clause 11 – Public Consultation**

This clause sets out certain requirements relating to public consultation that must be satisfied by the ASADA before it makes an instrument under clause 10 that amends the NAD scheme.

Before making such an instrument the ASADA must publish a draft of the instrument, invite people to make submissions on the draft and consider any submissions that are



received within the time limit specified by the ASADA when it published the draft. The specified time limit must be at least 28 days after the day of publication. “Publish” is defined in clause 4 to mean publish on the Internet or otherwise.

Clause 11 is intended to provide for public consultation on amendments to the NAD scheme, in particular to allow for athletes and sports to consider how they would be affected by the proposed amendments, and to make submissions to ASADA.

### **Clause 12 – Use of relevant international anti-doping instruments**

Subclause 12(1) provides that the NAD scheme may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in a relevant international anti-doping instrument (as defined) as in force or existing at a particular time, or from time to time.

Because relevant international anti-doping instruments will be amended from time to time, it is important that those instruments are incorporated by reference rather than setting the Code or the instruments out in the Bill.

Being required to amend the Act each time the Code or instruments are changed or new instruments added would not provide the ASADA or ASDMAC with the ability to act and respond quickly to such changes or the requirements of new instruments. Technical amendments may be made, for example, to the World Anti-Doping Agency’s International Standards, and it is appropriate that ASADA and ASDMAC be able to apply these as soon as is practical. The proposed approach is consistent with the current approach, in relation to drug testing schemes, under subsection 11(5) of the ASDA Act.

A “relevant international anti-doping instrument” is defined in clause 4 to mean:

- the World Anti-Doping Code; or
- an International Standard (further defined in clause 4 as “an International Standard that has been adopted by WADA in support of the World Anti-Doping Code); or
- an international agreement to which Australia is a party, if the agreement is prescribed by the regulations for the purposes of this definition.

Subclause 12(3) provides that subclause 12(1) has effect subject to clauses 9 and 10. Clauses 9 and 10 set out what the NAD scheme must be about, both when it is initially made and if it is subsequently amended. The purpose of subclause 12(3) is to make clear that, in the event that there was a conflict between relevant international anti-doping instrument and the General Anti-Doping Convention (or UNESCO Anti-Doping Convention if in force) then the conventions would have primacy and the NAD scheme would give effect to the convention(s) rather than the Code.

## **Division 2 – What must be in the NAD scheme**

### **Clause 13 – Anti-doping rules etc relating to certain athletes and support persons**

Subclause 13(1) sets out the bare bones of what must be in the NAD scheme, and is not intended to be an exhaustive list of what might be contained in the scheme (see clause 17). It is intended that the NAD scheme will encompass other matters including those currently set out in section 11 and Parts 3A and 3B of the ASDA Act, the ASDA Regulations and the ASDA Orders and further matters in relation to disclosure of information. Part 3A of the ASDA Act deals with testing on behalf of a foreign sporting organisation or under an anti-doping arrangement and Part 3B deals with testing by other sporting administration bodies.

Broadly, the scheme must set out the specified class or classes of athletes and support persons to which the scheme applies, must contain rules (known as the ‘anti-doping rules’) applicable to athletes and support persons and must authorise the ASADA to do certain things in order to assist it to carry out its functions.

It is not intended that the anti-doping rules would be limited to drug testing. They will also cover such matters as are currently covered by the anti-doping rule violations set out in the World Anti-Doping Code, which include matters such as possession of, and trafficking in, prohibited substances or methods, and administration of a prohibited substance or method to an athlete.

The things which the NAD scheme must authorise the ASADA to do include:

- request an athlete to keep the ASADA informed of where the athlete can be found;
- request an athlete to provide a sample;
- test, or arrange the testing of, samples so provided;
- investigate possible violations of the anti-doping rules;
- disclose information obtained during such investigations for the purposes of, and in connection with, such investigations;
- make findings related to such investigations;
- notify athletes, support persons and sporting administration bodies of such findings and ASADA’s recommendations as to the consequences of such findings; and
- present such findings at hearings of the Court of Arbitration for Sport and other sporting tribunals (either at the request of a sporting administration body or on the ASADA’s own initiative);

Paragraph 13(1)(i) provides that the NAD scheme must require (as opposed to authorise) the ASADA to establish and maintain a register of findings relating to investigations of possible violations of the anti-doping rules. The NAD scheme must authorise the ASADA to make or remove entries from the register.

It must also authorise the ASADA to publish information on and relating to the register if the ASADA considers the publication to be in the public interest, or the athlete or support person to whom the information relates has consented to the publication and any

conditions specified in the NAD scheme for the purposes of paragraph 13(1)(m) are satisfied. These conditions are intended to balance athletes' and support persons' rights against the need to ensure a level of transparency for ASADA's operations and the importance of publicly naming athletes and support persons who ASADA finds have committed doping violations. Examples of situations where publication might be considered by the ASADA to be in the public interest include: findings of doping violations, negative test results and circumstances in which a finding of "no case to answer" could be publicised to clear an athlete's name if that athlete had been the subject of public allegations that were subsequently found to be baseless.

Subclause 13(2) provides that the anti-doping rules may deal with matters arising before or after the commencement of clause 13. The intended effect is that the ASADA would be able to fully investigate, under the new arrangements, any allegations that might arise or have arisen prior to the transition from ASDA to ASADA. This would not be prejudicial to athletes or support persons as the anti-doping rules against which the possible violation would be assessed would be the rules that existed at the time of the alleged breach (ie not the potentially different rules that might exist at the time of the investigation). It would be the new procedures, which the ASADA would manage under the NAD scheme and which it is intended would largely be based on the existing procedures under the ASDA Regulations but with the addition of a more comprehensive investigative function, which might differ.

Clause 13 should be read in conjunction with clause 16, which provides for the regulations to provide that the NAD scheme must deal with specified matters.

#### **Clause 14 – Rights of athletes and support persons**

This clause provides that the NAD scheme must comply with the rights of athletes and support persons that are set out in subsections (2) to (4). This clause is intended to ensure, by setting out a minimum set of basic rights, that athletes and support persons are treated fairly and in accordance with principles of natural justice. The terms "athlete" and "support person" are both defined in clause 4.

Subclause 14(2) provides that an athlete has a right to be notified orally or in writing of the possible consequences of a failure to comply with a request by the ASADA to provide a sample or to keep ASADA informed of where the athlete can be found.

Subclause 14(3) provides that if the ASADA proposes to enter the name and particulars of an athlete, or support person, on the register mentioned in paragraph 13(1)(i), then the athlete or support person has a right to be notified in writing about the proposal, to make written submissions to the ASADA about the proposal and to be notified in writing of a decision of the ASADA to make such an entry.

Subclause 14(4) provides that an athlete or support person has a right to apply to the Administrative Appeals Tribunal for review of a decision of the ASADA to enter his or her name and particulars on the register mentioned in paragraph 13(1)(i).

Subsection 14(5) provides for the NAD scheme to allow an athlete or support person to waive a right under the NAD scheme. However, it also provides that the NAD scheme must not allow waiver of a right to apply to a court, tribunal or other body or person for review of a decision under the NAD scheme. Examples of such rights (that could not be waived) would be the right to apply to the Commonwealth Ombudsman pursuant to the *Ombudsman Act 1976*, or to apply for judicial review of a decision pursuant to the *Administrative Decisions (Judicial Review) Act 1977*.

### **Clause 15 – Sporting administration body rules**

This clause sets out further things that the NAD scheme must do. The NAD scheme must contain rules (known as the sporting administration body rules) applicable to one or more specified sporting administration bodies and relating to the anti-doping rules.

The NAD scheme must also authorise the ASADA to monitor compliance by sporting administration bodies with the sporting administration body rules, publish reports about the extent of such compliance by sporting administration bodies and to notify the ASC about the extent of such compliance by sporting administration bodies (excluding the ASC).

Subclause 15(2) sets out examples of the types of things the sporting administration body rules might deal with. They might deal with rules about promoting athletes' and support persons' compliance with the anti-doping rules, referring possible violations of the anti-doping rules to the ASADA, assisting and giving information to the ASADA in relation to investigations, taking action in response to the ASADA's findings relating to investigations and dealing with hearing and appeal processes arising from such findings. It is not intended that the sporting administration body rules would impose obligations on overseas sporting administration bodies.

This clause goes to the structure of the anti-doping framework created by the Bill. It is not intended that the scheme would set out offences which would be enforceable in the ordinary sense. Instead, the rules contained in the scheme relating to sporting administration bodies would be mirrored in voluntary arrangements entered into between sporting organisations and the ASC and contained in funding agreements. A breach of a rule in the NAD scheme by a sporting administration body would have no direct consequences under the Bill, but would constitute a breach of that sporting administration body's funding agreement with the ASC. Such a breach might have consequences for the provision or amount of funding provided under the agreement.

Similarly, breach of an anti-doping rule by an individual athlete or support person would not constitute an offence under the Bill. The consequences of such a breach might extend to investigation by the ASADA, the making of findings in relation to such investigations, entry of the athlete or support person's details on the register of such findings, the notification of those findings to the relevant athlete, support person and sporting administration body and the presentation by the ASADA of those registered findings at a

tribunal hearing. Any sanction in relation to a breach of an anti-doping rule by an athlete or support person would be imposed by the relevant sporting organisation in accordance with its anti-doping policy, not by the ASADA.

### **Clause 16 – Matters required by the regulations**

This clause provides that the regulations may provide that the NAD scheme must deal with specified matters. As it would be the function of the ASADA to amend the NAD scheme as it sees fit subject only to the requirements of clauses 10, 11, 13, 14 and 15, the purpose of clause 16 is ensure oversight of the scheme by Parliament. If any relevant matter were not included in the NAD scheme, the Regulations could right the omission.

## **Division 3– Miscellaneous**

### **Clause 17 – NAD scheme may deal with other matters**

Division 2, which sets out minimum requirements as to what must be in the NAD scheme, does not limit the matters in relation to which the NAD scheme may make provision.

### **Clause 18 – Decisions under the NAD scheme**

This clause provides that the NAD scheme may make provision in relation to a matter by conferring a power to make a decision of an administrative character on the ASADA or the ASDMAC or a body specified in regulations made for the purpose of paragraph 18(c) (for information on the scheme generally see Divisions 1 and 2 of Part 2). The purpose of this clause, which is based on the existing section 17C of the ASDA Act, is to make clear that administrative powers can be conferred on those bodies.

### **Clause 19 – Fees**

This clause provides for the NAD scheme to authorise the ASADA or the ASDMAC to charge fees for performing their functions under the scheme. A fee would be payable to the Commonwealth (this recognises that the members and staff of the ASADA, and persons whose services have been made available to the ASADA under clause 50, would be a prescribed agency for the purposes of the FMA Act). A fee must not be such as to amount to taxation.

## **Part 3 – ASADA’s establishment, functions, powers and liabilities**

### **Clause 20 – Establishment**

Clause 20, which applies to the body corporate established by section 6 of the ASDA Act (ie the ASADA), provides for that body corporate to continue in existence under and subject to the provisions of the Bill, under the name the Australian Sports Anti-Doping Authority.

## **Clause 21 - ASADA's functions**

This clause sets out the ASADA's functions and imposes limits on the purposes for which the ASADA may perform its functions.

Subclause 21(1) provides that the ASADA's functions are:

- those conferred on the ASADA by Part 2 of the Bill (which relates to the NAD scheme);
- those conferred on the ASADA by the NAD scheme;
- to advise the ASC about sports drug and safety matters that should be included in any agreement under which the ASC gives money to a sporting organisation. It is intended that such funding agreements will be the mechanism by which the ASADA would, through the ASC, encourage compliance by sporting organisations with the sporting administration body rules (see clause 15);
- to advise the ASC about recognising a sporting organisation as being responsible for administering the affairs of a sport, or of a substantial part or section of a sport, in Australia;
- to support, encourage, develop and implement initiatives that increase the skills and knowledge of people involved in sporting activities about sports drug and safety matters (the term "sports drug and safety matter" is defined in clause 4);
- to support and encourage the sporting community to develop and implement comprehensive programs, and education initiatives, about sports drug and safety matters;
- to support, encourage and conduct research about sports drug and safety matters;
- to collect, analyse, interpret and disseminate information about sports drug and safety matters;
- to encourage the development of ways for the States and Territories, and sporting organisations, to carry out initiatives about sports drug and safety matters;
- to cooperate with the States and Territories, and with sporting organisations, to carry out initiatives about sports drug and safety matters;
- to provide anti-doping testing services, safety checking services and/or other services (including information technology services) relating to sports drug and safety matters, under contract on behalf of the Commonwealth. Although this is a function of the ASADA and hence it will be the ASADA that will provide the services under such contracts, because the ASADA itself cannot contract it will be the Commonwealth that enters into the contracts for these purposes. It is intended that the Commonwealth may charge fees for the provision of these services by the ASADA;
- to make resources and facilities (including secretariat services and clerical assistance) available to the ASDMAC for the purposes of enabling the ASDMAC to perform its functions;
- such other functions as are conferred on the ASADA by the Bill or by any other law of the Commonwealth;
- to advise the Minister about matters relating to any of the above functions; and

- to do anything incidental to or conducive to the performance of any of the above functions.

Many of the functions set out in subclause 21(1) are based on the functions set out in section 9 of the ASDA Act.

Subclause 21(2) limits the purposes for which the ASADA may perform its functions, by invoking certain heads of Commonwealth constitutional power.

### **Clause 22 – ASADA’s powers**

Subclause 22(1) provides that the ASADA will have the power to do all things necessary or convenient to be done for or in connection with the performance of its functions, subject to the limitation that the ASADA would not have the power to acquire, hold or dispose of real or personal property, enter into contracts or to lease the whole or any part of any land or building for its purposes. Subclause 22(2) provides that a right to sue is not taken to be personal property for the purposes of paragraph 22(1)(a). The purpose of subclause 22(2) is to make clear that the ASADA would be able to exercise rights to sue in connection with its statutory functions.

Item 8 of Schedule 1 to the Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005 would amend the FMA Regulations to provide that the members and staff of the ASADA, and any persons whose services are made available to the ASADA under clause 50, are a prescribed agency for the purposes of the FMA Act. The Chair of the ASADA will be the Chief Executive of that prescribed agency for the purposes of the FMA Act. The Chair, acting under section 44 of the FMA Act, and members and staff acting under delegations from the Chair under section 53 of the FMA Act, would be able to enter into contracts on behalf of the Commonwealth (for example, a consultancy contract). ASADA would perform the services under those contracts.

### **Clause 23 – ASADA’s financial liabilities are Commonwealth liabilities**

Subclause 23(1) provides that any financial liabilities of the ASADA will be taken to be liabilities of the Commonwealth. ‘Financial liability’ is defined in subclause 23(2) to mean a liability to pay to a person an amount, where the amount, or the method for working out the amount, has been determined.

### **Clause 24 – Minister may give directions to ASADA**

Under subclause 24(1), the Minister will have the power to give the ASADA directions, by legislative instrument, in relation to the performance of its functions and the exercise of its powers. The ASADA will be required to comply with such a direction (subclause 24(3)).

However, the Minister will not be able to give a direction relating to a particular athlete or support person who is subject to the NAD scheme, or the testing of a particular athlete

under an anti-doping testing service, or safety checking service, being provided by the ASADA. This is intended to safeguard the independence of ASADA's functions under the NAD scheme, including its testing, investigations and presentation of cases at hearing functions. To allow the Minister to give such a direction would unduly interfere with ASADA's independence.

## **Part 4 – ASADA's constitution and membership**

### **Division 1 – ASADA's constitution**

#### **Clause 25 - ASADA's Constitution**

The ASADA will be a body corporate, with perpetual succession. It will also have a seal and be able to sue and be sued in its corporate name (subclause 25(1)).

The ASADA's seal is to be kept in safe custody and must not be used except as authorised by the ASADA (subclause 25(2)).

All courts, judges and other persons acting in a judicial capacity will be required to take judicial notice of the imprint of the ASADA's seal on a document and presume that the imprint was duly affixed (subclause 25(3)).

### **Division 2 – ASADA's membership**

#### **Clause 26 – ASADA's membership**

The ASADA will consist of a Chair, a Deputy Chair and between one and five other members.

#### **Clause 27 – Appointment of ASADA Members**

Each ASADA member will be appointed by the Minister, who must not appoint a member unless he/she is satisfied that the proposed appointee has qualifications relevant to, or special experience or interest in, a field related to ASADA's functions. Fields related to ASADA's functions might include ex-athletes, experts in law or sports law, sports medicine and sports drug experts, and persons with experience in sports administration.

The Chair is to hold office on a full time basis, while other ASADA members are to hold office on a part time basis.

#### **Clause 28 – Period of appointment for ASADA members**

This clause provides that a member will hold office for the period, not exceeding 5 years, specified in his or her instrument of appointment.



### **Clause 29 – Acting ASADA Members**

The Minister will be empowered to appoint a member to act as the ASADA Chair during a vacancy in the office of Chair or during any period (or all periods) when the Chair is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office (subclause 29(1)).

Subclause 29(2) provides for the same regime for the appointment by the Minister of a person to act as an ASADA member, other than as Chair.

Subclause 29(3) restricts eligibility to act to people who are eligible for appointment as an ASADA member (the matters of which the Minister must be satisfied are set out in subclause 27(2)).

A defect or irregularity in connection with a person's appointment to act under clause 29 will not invalidate anything done by the person when purporting to act under this clause. Nor will certain other technicalities viz. the occasion for the appointment not having arisen, the appointment ceasing to have effect and the occasion for the person to act not having arisen or having ceased.

### **Division 3 – Terms and Conditions for ASADA members**

#### **Clause 30 – Remuneration**

An ASADA member is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the member is to be paid such remuneration as is prescribed in the regulations. An ASADA member is to be paid such allowances as are prescribed in the regulations.

Clause 30 would have effect subject to the *Remuneration Tribunal Act 1973* which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders.

#### **Clause 31 – Standing obligation to disclose interests**

This clause requires an ASADA member to disclose to the Minister, and to each ASADA member, any interest he or she has if the interest could conflict with the proper performance of the functions of the member's office. This disclosure must be in writing and must be given as soon as practicable after the member becomes aware of the potential for conflict of interest.

Subclause 31(3) sets out a non exclusive list of circumstances in which an ASADA member would be deemed to have a potential conflict of interest that would require disclosure. Broadly, these circumstances relate to involvement in a sport, sporting administration body, sporting event or sporting venue. They extend to involvement in the affairs of athletes or support persons subject to the scheme, or an individual tested under

an anti-doping testing service (or safety checking service) previously provided by the ASADA or who could be tested under such a service being provided by the ASADA. It is intended that the reference to a testing or safety checking service previously provided by the ASADA include the situation where those services were previously provided by ASDA.

The obligation to disclose would apply irrespective of whether the interest would directly or indirectly conflict with the performance of the member's functions of office, or whether the interest is pecuniary or otherwise, and whether the interest was acquired before or after the member was appointed.

**Clause 32 – Obligation to disclose interests before deliberating on or deciding a particular matter**

This clause requires an ASADA member who has an interest that could conflict with the proper performance of the functions of his or her office, as they confer a role in deliberations or decisions of the ASADA in relation to a particular matter, not to perform that role in relation to that matter unless certain conditions are met.

The member with the potential conflict of interest must not perform the role unless he or she has disclosed the interest to each of the other ASADA members, and has obtained each of the other members' consent to the performance of the role in relation to the matter despite the possible conflict of interest.

Subclause 32(4) sets out a non exclusive list of circumstances in which an ASADA member would be deemed to have an interest that could conflict with the proper performance of the functions of his or her office as they give him or her a role in the deliberations or decisions of the ASADA in relation to a particular matter.

Consistent with clause 31, above, the obligation to disclose conflicts would apply irrespective of whether the interest would directly or indirectly conflict with the performance of the member's functions in relation to the particular matter, whether the interest was pecuniary or otherwise, and whether the interest was acquired before or after the member was appointed.

Apart from the ASADA Chair, each member notified of the conflict and who consented to the member performing the relevant role despite the possible conflict of interest would need to notify his or her consent to the Chair. The Chair, in turn, would need to give the Minister a written notice that described the interest and the particular matter in question, and advised the Minister whether all of the members had consented to the disclosing member performing the role.

It is intended that if a member's role in the deliberations or decisions of the ASADA in relation to a particular matter would extend over a period of time, the disclosure of the potential conflict of interest and the consent from all other members to the performance of the role in relation to that matter would cover the entire period during which the

member performed the role. For example, a member would not need to disclose the interest at each meeting of the ASADA at which the particular matter was to be discussed and decided (and the consent procedure and notification of the Minister would not need to be repeated) provided that the member had initially disclosed, the other members had consented and had notified the Chair, and the Chair had notified the Minister as required by subclause 32(3).

**Clause 33 – ASADA Member to remain at arm’s length from deliberations and decisions of sporting administration bodies**

An ASADA member will not be able to take part in any deliberations or decisions of a sporting administration body in relation to a particular matter if the member has participated in any deliberations or decision of the ASADA in relation to the matter.

This clause is intended to ensure that ASADA members will be suitably removed from decisions of sporting administration bodies in which an ASADA member’s participation might raise the perception of a conflict of interest. It is not intended that merely presenting evidence at a proceeding of a sporting administration body would constitute taking part in the deliberation or decision of such a body.

**Clause 34 – Outside employment**

The ASADA Chair will not be able to engage in paid employment outside the duties of the ASADA Chair’s office without the Minister’s approval.

**Clause 35 – Leave of absence**

The ASADA Chair will have such recreation leave entitlements as are determined by the Remuneration Tribunal (subclause 35(1)).

The Minister may grant the Chair leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Minister determines (subclause 35(2)).

The Chair may grant another ASADA member leave of absence on such terms and conditions as the Chair determines (subclause 35(3)).

**Clause 36 - Resignation**

An ASADA Member may resign by giving the Minister a written notice. Subclause 36(2) provides that the resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

### **Clause 37 - Termination of appointment**

This clause sets out the grounds upon which the Minister may terminate the appointment of an ASADA member, or terminate the appointment of all of the ASADA members. The Minister may terminate the appointment of all of the ASADA members if the Minister is of the opinion that the ASADA's performance has been unsatisfactory.

The Minister may terminate the appointment of an individual ASADA member for misbehaviour, physical or mental incapacity, or under subclause 37(3) if:

- the member becomes bankrupt, applies for relief from bankruptcy, enters into an arrangement with creditors regarding the payment of his or her debts, or assigns all or part of his or her remuneration for the benefit of creditors;
- the member fails, without reasonable excuse to comply with clause 31, 32 or 33. Clause 31 imposes a standing obligation on members of the ASADA to disclose interests which may potentially conflict with the proper performance of their functions of office. Clause 32 prevents a member from performing a role in deliberating or deciding a particular matter if he or she has an interest that may conflict with the performance of that role, unless the member discloses the interest and all members consent to the member performing that role. Clause 33 requires an ASADA member to remain at arm's length from deliberations and decisions of sporting administration bodies;
- the Minister is satisfied that the performance of the member has been unsatisfactory;
- the Chair fails to comply with clause 34 (which prevents the Chair from engaging in paid employment outside the duties of his/her office without the Minister's approval) or is absent for 14 consecutive days or for 28 days in any 12 consecutive months, except on leave of absence;
- the member (excluding the Chair) is absent from 3 consecutive meeting of the ASADA except on leave of absence; or
- the member commits an offence against clause 71 or 72. Clause 71 sets out a regime for the protection of NAD scheme personal information (as defined in clause 4). Clause 72 sets out a similar regime for the protection of contract services personal information (as defined in clause 4).

### **Clause 38 – Other terms and conditions**

This clause provides that an ASADA member holds office on the terms and conditions (if any) in relation to matters not covered by the ASADA Bill as are determined by the Minister.

## **Part 5 – Decision making and delegation by ASADA**

### **Division 1 - Meetings**

#### **Clause 39 - Holding of meetings**

This clause provides for the ASADA to hold such meetings as are necessary for the performance of its functions. Subclause 39(2) provides that the ASADA Chair may convene a meeting at any time, but must do so within 30 days after receiving a written request from the Minister or from two or more ASADA members.

#### **Clause 40 – Presiding at meetings**

The Chair is to preside at all meetings at which he or she is present. In the absence of the Chair, the Deputy Chair is to preside. In the absence of both the Chair and the Deputy Chair, the members present are to appoint one of their number to preside.

#### **Clause 41 – Quorum**

Three ASADA members will constitute a quorum as an ASADA meeting. Subclause 41(2) deals with the situation where a member is required by clause 32 not to participate in the deliberations or decisions of the ASADA in relation to a particular matter, and as a result of the member leaving there would no longer be a quorum present. In such a circumstance, the remaining ASADA members present would constitute a quorum for the purpose of any deliberation or decision at that meeting in relation to that matter.

#### **Clause 42 – Voting at meetings etc.**

Questions at meetings will be decided by a majority of the votes of the members present and voting. The person presiding at a meeting will have a deliberative vote and, in the event of an equality of votes, also have a casting vote (i.e. the deciding vote).

#### **Clause 43 – Conduct of meetings**

Subject to Division 1 of Part 5 of the Bill, the ASADA may regulate proceedings at its meetings as it considers appropriate.

#### **Clause 44 – Minutes**

Clause 44 requires the ASADA to keep minutes of its meetings.

## **Division 2 – Decisions without meetings**

### **Clause 45 – Decisions without meetings**

This clause allows the ASADA to determine that decisions can be made without a meeting and the method by which ASADA members are to indicate agreement with proposed decisions.

If the ASADA determines that subclause 45(1) applies in relation to a particular matter or particular matters and the method by which members are to indicate agreement to a proposed decision, a resolution in relation to the matter or matters will be taken to have been passed at a meeting of the ASADA if:

- without meeting, a majority of members indicate their agreement in accordance with the method determined by the ASADA; and
- all members were informed of the proposed resolution, or reasonable efforts had been made to inform them of it.

Paragraph 45(1)(a) will not apply to a member who, if the proposed decision were a matter to be considered at a meeting of the ASADA, would be prevented by clause 32 from deliberating on the proposed decision of the ASADA (subcl. 45(3)).

### **Clause 46 – Record of decisions**

The ASADA will be required to keep a record of decisions made in accordance with clause 45 (i.e without a meeting).

## **Division 3 – Delegation**

### **Clause 47 – Delegation by ASADA**

Clause 47 allows the ASADA to delegate, subject to certain limitations discussed below, any or all of its functions to an ASADA member, a committee consisting of 2 or more ASADA members, a member of the ASADA staff, an individual whose services are made available to the ASADA under clause 50 or an individual appointed as a chaperone or as a drug testing official under the NAD scheme (subclause 47(1)). A delegate must comply with any written directions of the ASADA (subclause 47(5)).

The ASADA's power to delegate does not apply to the ASADA's power to make an instrument amending the NAD scheme (subclause 47(2)). The power to delegate to an ASADA member, a member of the ASADA staff, an individual whose services were made available to the ASADA under clause 50 or an individual appointed as a chaperone or as a drug testing official under the NAD scheme does not apply to a function or power conferred by the NAD scheme if the function or power is declared by the NAD scheme to be a function or power that can only be delegated to a committee consisting of 2 or more

ASADA members (subclause 47(3)). Further, the ASADA's ability to delegate to an individual appointed as a chaperone or as a drug testing official under the NAD scheme is limited to the delegation of a function or power conferred by the NAD scheme.

If the ASADA delegates a function or power to a committee and the committee makes a decision relating to the delegated function or power, then the ASADA will be required to cause written records of the decision to be kept (subclause 47(6)). Such a record will be prima facie evidence that the decision was duly made as recorded, provided that the record is signed by an ASADA member who was a member of the committee at the time the decision was made. Subclause 47(8) provides that a record kept under subclause 47(6) is not a legislative instrument. This subclause is intended to clarify to the reader that such a record is not a legislative instrument. It is not an exemption to the *Legislative Instruments Act 2003*.

While it is acknowledged that it is current practice for delegation provisions to impose limitations on delegations so that they be restricted to senior executive employees, it is not appropriate to apply such limits in respect of the ASADA's delegations as most of the powers and functions are highly administrative and would require the involvement of junior staff on a daily basis. It would not be possible for just the senior executive level employees to carry out such powers and functions. For example, one of ASADA's powers under the NAD scheme will be to request athletes to provide samples, a function which must necessarily be carried out by more junior level drug testing officials.

## **Division 4 – Advisory committees**

### **Clause 48 – Advisory committees**

This clause provides for the ASADA to establish advisory committees to assist it to perform any of its functions. Such an advisory committee would consist of such individuals as the ASADA from time to time appointed to the committee (subcl. 48(2)). The ASADA will be able to give an advisory committee written directions as to the way in which the committee is to carry out its functions and procedures to be followed in relation to meetings (subcl. 48(3)). The ASADA will be obliged, on behalf of the Commonwealth, to reimburse reasonable expenses incurred by a committee member in performing his or her duties as a committee member, provided that the committee member is neither an ASADA member nor a member of the ASADA staff, and that the ASADA Chair approves the reimbursement.

An appointment to an advisory committee will not be a public office within the meaning of the *Remuneration Tribunal Act 1973* (subcl. 48(5)). The Remuneration Tribunal will not therefore have a role in determining the remuneration (if any) that is to be paid to an appointee to such a committee.

Subclause 48(6) and (7) provide that an instrument under subclause 1 (establishing an advisory committee) or 3 (giving an advisory committee written directions), respectively, is not a legislative instrument.

## **Part 6 – ASADA’s staff etc**

### **Clause 49 – Staff**

The ASADA’s staff will consist of persons engaged under the *Public Service Act 1999* (subclause 49(1)).

For the purposes of the *Public Service Act 1999*, the Chair and the ASADA staff will together constitute a Statutory Agency and the Chair will be the Head of that Statutory Agency (subclause 49(2)).

### **Clause 50 – Persons assisting ASADA**

This clause provides that the ASADA may be assisted by officers and employees of Agencies (within the meaning of the *Public Service Act 1999*) and of authorities of the Commonwealth.

It is intended that the ASADA Chair or anyone authorised by the Chair will be able, on behalf of the Commonwealth, to engage consultants to perform services for the ASADA or for the ASDMAC. For avoidance of doubt, the ASC is an authority of the Commonwealth.

## **Part 7 – Australian Sports Drug medical Advisory Committee**

### **Division 1 – ASDMAC’s establishment and functions**

#### **Clause 51 – Establishment of ASDMAC**

This clause provides for the ASDMAC, established under section 65B of the *Australian Sports Drug Agency Act 1990*, to continue in existence under and subject to the provisions of the Bill.

#### **Clause 52 – ASDMAC’s functions**

This clause sets out the ASDMAC’s functions. In addition to any functions conferred on the ASDMAC by the NAD scheme, ASDMAC’s functions are to:

- give advice to the ASADA and to the ASC the performance of ASDMAC’s functions and about sports drug and safety matters;
- give advice and information to sporting administration bodies about individual cases involving a sports drug and safety matter or any other matter arising out of the provision of anti-doping testing or safety checking services;
- perform services relating to sports drug and safety matters under contract on behalf of the Commonwealth (it is intended that the Commonwealth may charge for the



provision of services by the ASDMAC under such contracts), for example information and advisory services;

- perform such other functions as are conferred on the ASDMAC by the Bill or by any other law of the Commonwealth; and
- do anything incidental or conducive to the performance of any of the above functions.

Subclause 52(2) provides that subclause 21(2) of the Bill applies to the functions of the ASDMAC in a corresponding way to which it applies to the functions of the ASADA. Subclause 21(2) sets out the purposes for which ASADA may perform its functions, by invoking certain Commonwealth constitutional heads of power.

## **Division 2 – ASDMAC’s membership**

### **Clause 53 – ASDMAC’s membership**

The ASDMAC consists of a Chair and between three and six other members.

### **Clause 54 – Appointment of ASDMAC members**

Each ASDMAC member will hold office on a part time basis and will be appointed by the Minister, who must not appoint a member unless the candidate is a registered medical practitioner. The Minister must also be satisfied that the person has knowledge of or experience in at least one of: sports medicine, clinical pharmacology, endocrinology or any other field specified in the Regulations.

### **Clause 55 – Period of appointment for ASDMAC Members**

An ASDMAC member will hold office for the period specified in his or her instrument of appointment. The period must not exceed 5 years.

### **Clause 56 – Acting ASDMAC members**

The Minister will be empowered to appoint a person to act as the ASDMAC Chair during a vacancy in the office of Chair or during any period (or all periods) when the Chair is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office (subcl. 56(1)).

Subclause 56(2) provides for the same regime for the appointment by the Minister of a person to act as an ASDMAC member (other than as Chair).

Subclause 56(3) restricts eligibility to act to people who are eligible for appointment as an ASDMAC member. Matters relating to eligibility for appointment are set out in clause 54.

A defect or irregularity in connection with a person’s appointment to act under clause 56 will not invalidate anything done by the person when purporting to act under this clause.

Nor will certain other technicalities viz. the occasion for the appointment not having arisen, the appointment ceasing to have effect and the occasion for the person to act not having arisen or having ceased.

### **Division 3 – Terms and Conditions for ASDMAC members**

#### **Clause 57 – Remuneration**

An ASDMAC member is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the member is to be paid such remuneration as is prescribed in the regulations. An ASDMAC member is to be paid such allowances as are prescribed in the regulations.

Clause 57 has effect subject to the *Remuneration Tribunal Act 1973* which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders.

Clause 57 is consistent with the provisions relating to the remuneration of a member of the ASADA (see clause 30).

#### **Clause 58 – Standing obligation to disclose interests**

This clause replicates, for ASDMAC members, the standing obligation to disclose interests that is imposed on ASADA members under clause 31.

Clause 58 requires an ASDMAC member to disclose to the Minister, and to each ASDMAC member, any interest he or she has if the interest could conflict with the proper performance of the functions of the member's office. This disclosure must be in writing and must be given as soon as practicable after the member becomes aware of the potential for conflict of interest.

Subclause 58(3) sets out a non exclusive list of circumstances in which an ASDMAC member would be deemed to have a potential conflict of interest that would require disclosure. Broadly, these circumstances relate to involvement in a sport, sporting administration body, sporting event, sporting venue or in the affairs of certain athletes and/or support persons.

The obligation to disclose would apply irrespective of whether the interest would directly or indirectly conflict with the performance of the member's functions of office, or whether the interest is pecuniary or otherwise, and whether the interest was acquired before or after the member was appointed.

**Clause 59 – Obligation to disclose interests before deliberating on or deciding a particular matter**

This clause replicates, for ASDMAC members, the obligation to disclose interests before deliberating on or deciding a particular matter that is imposed on ASADA members under clause 32.

Clause 59 requires an ASDMAC member who has an interest that could conflict with the proper performance of the functions of his or her office, as they confer a role in the deliberations or decisions of the ASDMAC in relation to a particular matter, not to perform that role in deciding the matter unless certain conditions are met.

The member with the potential conflict of interest must not perform the role unless he or she has disclosed the interest to each of the other ASDMAC members, and has obtained each of the other members' consent to the performance of the role in relation to the matter despite the possible conflict of interest.

Subclause 59(4) sets out a non exclusive list of circumstances in which an ASDMAC member would be deemed to have an interest that could conflict with the proper performance of the functions of his or her office as they give him or her a role in the deliberations or decisions of the ASDMAC in relation to a particular matter.

The obligation to disclose conflicts would apply irrespective of whether the interest would directly or indirectly conflict with the performance of the member's functions in relation to the particular matter, whether the interest was pecuniary or otherwise, and whether the interest was acquired before or after the member was appointed.

Apart from the ASDMAC Chair, each member notified of the conflict and who consented to the member performing the relevant role despite the possible conflict of interest would need to notify his or her consent to the Chair. The Chair, in turn, would need to give the Minister a written notice that described the interest and the particular matter in question, and advised the Minister whether all of the members had consented to the disclosing member performing the role.

It is intended that if a member's role in deciding a particular matter would extend over a period of time, the disclosure of the potential conflict of interest and the consent from all other members to the performance of the role in relation to that matter would cover the entire period during which the member performed the role. For example, a member would not need to disclose the interest at each meeting of the ASDMAC at which the particular matter was to be discussed and decided (and the consent procedure and notification of the Minister would not need to be repeated) provided that the member had initially disclosed, the other members had consented and had notified the Chair, and the Chair had notified the Minister as required by subclause 59(3).

### **Clause 60 – ASDMAC member to remain at arm’s length from deliberations and decisions of sporting administration bodies**

This clause replicates, for ASDMAC members, the obligation to remain at arm’s length from certain deliberations or decisions that is imposed on ASADA members by clause 33.

Clause 60 provides that an ASDMAC member will not be able to take part in deliberations or decisions of a sporting administration body relating to a matter if the member has participated in any deliberations or decisions of the ASDMAC in relation to that matter. This clause is intended to ensure that ASDMAC members will be suitably removed from decisions of sporting administration bodies in which an ASDMAC member’s participation might raise the perception of a conflict of interest. It is not intended that merely presenting evidence at a proceeding of a sporting administration body would constitute taking part in a deliberations or decision of that body.

### **Clause 61 – Leave of absence**

The Minister may grant the ASDMAC Chair leave of absence on such terms and conditions as the Minister determines. The Chair may grant any other ASDMAC member leave of absence on such terms and conditions as the Chair determines.

### **Clause 62 – Resignation**

An ASDMAC Member may resign by giving the Minister a written notice. The resignation takes effect if it is received by the Minister or, if a later day is specified in the resignation, on that later day.

### **Clause 63 – Termination of appointment**

This clause sets out the grounds upon which the Minister may terminate the appointment of an ASDMAC member, or terminate the appointment of all of the ASDMAC members. It is largely consistent with the provision relating to ASADA members set out at clause 37.

The Minister may terminate the appointment of all of the ASDMAC members if the Minister is of the opinion that the ASDMAC’s performance has been unsatisfactory.

The Minister may terminate the appointment of an individual ASDMAC member for misbehaviour, physical or mental incapacity, or under subclause 63(3) if:

- the member ceases to be a registered medical practitioner;
- the member becomes bankrupt, applies for relief from bankruptcy, enters into an arrangement with creditors regarding the payment of his or her debts, or assigns all or part of his or her remuneration for the benefit of creditors;

- the member fails, without reasonable excuse to comply with clause 58, 59 and 60. Clause 58 imposes a standing obligation on members of the ASDMAC to disclose interests which may potentially conflict with the proper performance of their functions of office. Clause 59 prevents a member from performing a role in deciding a particular matter if he or she has an interest that may conflict with the performance of that role unless the member discloses the interest and all members consent to the member performing that role. Clause 60 requires an ASDMAC member to remain at arm's length from decisions of sporting administration bodies;
- the Minister is satisfied that the performance of the member has been unsatisfactory;
- the member is absent from 3 consecutive meeting of the ASDMAC except on leave of absence; or
- the member commits an offence against clause 71 or 72. Clause 71 sets out a scheme for the protection of NAD scheme personal information, and clause 72 sets out a scheme for the protection of contract services personal information.

#### **Clause 64 – Other terms and conditions**

This clause provides that an ASDMAC member holds office on the terms and conditions (if any) in relation to matters not covered by the ASADA Bill as are determined by the Minister.

### **Division 4 – Decision-making and delegation by ASDMAC**

#### **Clause 65 – Decision-making by ASDMAC**

The regulations may specify the manner in which the ASDMAC is to perform its functions and the procedure to be followed at or in relation to meetings of the ASDMAC.

This clause also provides for the ASDMAC to determine that resolutions can be passed without a meeting, and to determine the method by which ASDMAC members are to indicate agreement with such resolutions.

If the ASDMAC does in fact determine that subclause 65(2) has effect in relation to a particular resolution(s), and the method by which members are to indicate agreement, then the resolution will be taken to have been passed at a meeting of the ASDMAC if:

- without meeting, a majority of members indicate their agreement in accordance with the method determined by the ASDMAC; and
- all members were informed of the proposed resolution, or reasonable efforts had been made to inform them of it.

Paragraph 65(2)(a) would not apply to a member who, if the proposed resolution was a matter to be considered at a meeting of the ASDMAC, would be prevented by clause 59 from deliberating on the proposed decision of the ASDMAC.

#### **Clause 66 – Delegation by ASDMAC**

This clause provides for the ASDMAC to delegate any or all of its functions and powers to an ASDMAC member. Such a delegation will continue in force despite a change in membership of the ASDMAC, and a delegate must comply with any directions given, by resolution, by the ASDMAC.

A certificate signed by the ASDMAC Chair stating any matter with respect to a delegation is prima facie evidence of the matter.

### **Part 8 – Information Management**

#### **Division 1 – Access to, and use of, customs information**

##### **Clause 67 – ASADA’s access to, and use of, customs information**

This clause, which is similar to the existing section 67AA of the ASDA Act, provides for the ASADA to receive information from the Australian Customs Service relating to the importation or attempted importation of prohibited substances (within the meaning of the NAD scheme), and to use and disclose that information for the purposes of the NAD scheme. It is particularly important that the ASADA be able to receive such information so that it can pursue possible violations of anti-doping rules by athletes or support persons subject to the NAD scheme, for example, the trafficking or possession of prohibited substances.

Clause 67 interacts with the provisions of section 16 of the *Customs Administration Act 1985*, which prohibits the unauthorised recording and disclosure of certain information held by the Australian Customs Service, provides for exceptions in relation to the prohibition and makes particular provision in relation to the authorised disclosure of personal information.

Subclause 67(1) of the Bill sets out a number of matters that inform the operation of *Customs Administration Act 1985*. It provides that, for the purposes of that section, the ASADA is taken to be a Commonwealth agency and the ASADA Chair is taken to be the principal officer of the Commonwealth Agency.

Paragraph 67(1)(c) further provides that, if protected information (within the meaning of that section) relates to the importation or attempted importation into Australia of a prohibited substance, then the information will be taken to be information that will be used by the ASADA for the purposes of the ASADA’s functions, provided that certain conditions are met.

The conditions are that:

- the importation or attempted importation contravenes a law of the Commonwealth;
- there are reasonable grounds to suspect that an athlete subject to the NAD scheme, or a support person subject to the NAD scheme, is responsible for the importation or attempted importation; or
- there are reasonable grounds to suspect that the prohibited substance is for use by one or more athletes subject to the NAD scheme.

Paragraph 67(1)(d) deems the use or further disclosure of the information for the purpose of the ASADA's administration of the NAD scheme, or the performance by the ASADA of its functions under clause 68, to be authorised by law. It is intended that the reference to "use or further disclosure" of the information mean use or further disclosure by the ASADA or by its staff or members. It is not intended that this refer to use or further disclosure by sporting administration bodies, which is regulated by clause 68.

Paragraph 67(1)(e) deems the purpose of the ASADA's administration of the NAD scheme to be a permissible purpose referred to in a paragraph of subsection 16(9) of the *Customs Administration Act 1985*. This provision would ensure that in relation to all its functions under the NAD scheme, the ASADA could receive protected information from the Australian Customs Service.

Paragraph 67(1)(f) deems the purpose of the performance by the ASADA of its functions under clause 68 is taken to be a permissible purpose referred to in a paragraph of subsection 16(9) of the *Customs Administration Act 1985*

Paragraph 67(1)(g) deems the disclosure of the information to the ASADA Chair or to a person acting on the ASADA's behalf to be necessary for a permissible purpose mentioned in paragraph (e) or (f) and is taken to comply with subsection 16(10) of the *Customs Administration Act 1985*.

For the purposes of the Bill, "protected customs information" is protected information (within the meaning of the *Customs Administration Act 1985*) given to the ASADA Chair, or to a person acting on the Chair's behalf, under section 16 of the *Customs Administration Act 1985* (subclause 67(2)). Subclause 67(3) provides that the ASADA, in administering the NAD scheme, may have regard to protected customs information. This does not limit the matters to which the ASADA may have regard (subclause 67(4)).

The disclosure of protected information under this clause would be in relation to NAD scheme matters only. Disclosure of protected information in relation to non-NAD scheme matters, such as the provision of drug testing services under contract, would be regulated by clause 68.

### **Clause 68 – Disclosing protected customs information to sporting administration bodies**

This clause provides for the ASADA to disclose protected customs information (as defined) to sporting administration bodies, for the anti-doping purposes of those bodies, if certain conditions are met. Those conditions are that:

- the ASADA is satisfied that the information should be disclosed to the body for permitted anti-doping purposes of the body; and
- the body has given a written undertaking that the body will use or disclose the information only for permitted anti-doping purposes (defined in subclause 68(7)) of the body and will take reasonable steps to satisfy itself that the information will not be used or disclosed, by a person to whom the body has disclosed the information, in a way that would be unfairly prejudicial to the interests of the person to whom the information relates; and
- the ASADA is satisfied that the disclosure of the information would not contravene any terms of the authorisation under which the information was disclosed to the ASADA Chair, or to a person acting on the ASADA's behalf under section 16 of the *Customs Administration Act 1985*; and
- the requirements of subsections (2) to (5) are satisfied (these subsections deal with the giving of notice to a person to whom the information relates, and are discussed below).

The disclosure of protected information under this clause would be in relation to non-NAD scheme matters only. Disclosure of protected information in relation to the NAD scheme would be regulated by clause 67.

If the protected customs information that is proposed to be disclosed by the ASADA to a sporting administration body relates to more than one person, then the information cannot be disclosed unless the notice requirements (subsections (2) to (5)), as they relate to *each* of those persons, are satisfied.

Subclause 68(2) provides that, before disclosing the protected customs information to the sporting administration body, the ASADA must give written notice of the proposed disclosure to the person to whom the information relates and invite that person to make a written submission, within the submission period, to the ASADA about the proposed disclosure. The notice must also advise the person of the effect of subsection 68(5), which relates to the end of the submission period and is discussed below.

Subclause 68(3) sets out the length of the submission period. It provides a default submission period of 14 days after the day on which the person receives the notice, or if the ASADA considers it appropriate in the circumstance to specify a lesser number of days, that lesser number of days. A shorter period may be appropriate where, for



example, an important sports period was imminent and it was necessary to deal with a matter prior to that event.

Subclause 68(4) provides that the protected customs information must not be disclosed under clause 68 unless the submission period has ended and the ASADA has considered any submission made within the submission period.

Subclause 68(5) would allow the ASADA, if it received a submission from the person before the end of the submission period, to take the submission period to have ended immediately after receipt of the submission. This would allow the ASADA to potentially take action as soon as a submission had been received rather than waiting to the end of the submission period.

Subclause 68(6) would allow the ASADA to specify the manner in which, and the conditions under which, the disclosure is to be made (including the form in which the information is to be presented and the mode of transmitting the information).

Subclause 68(7) sets out a range of purposes that are “permitted anti-doping purposes” for the purposes of the Bill. They are investigating possible breaches of a current policy of the body about drugs and/or doping methods, determining whether to take action under such a policy or what action to take, actually taking action under such a policy or taking or participating in any proceedings relating to action taken. Subclause 68(8) makes clear that clause 68 does not by implication limit the disclosures that may be made for the purposes of the administration of the NAD scheme.

It is noted that, in allowing for the disclosure of protected information, any protected information that becomes embedded in the findings of the ASADA in relation to an investigation it conducts, including in any report on such findings, would no longer be considered to be protected information.

## **Division 2 – Protection of personal information**

### **Clause 69 – Entrusted persons**

This clause sets out a definition of “entrusted persons” for the purposes of the Bill, which means:

- an ASADA member; or
- a member of the ASADA staff; or
- a person engaged by the Commonwealth to perform services for the ASADA or the ASDMAC; or
- a designated associate of a person or a partnership engaged by the Commonwealth to perform services for the ASADA or the ASDMAC (for the meaning of designated associate, see clause 70); or
- an individual whose services are made available to the ASADA under clause 50; or

- an individual appointed as a chaperone, or as a drug testing official, under the NAD scheme; or
- an ASDMAC member; or
- a member of a committee established under clause 48; or
- an individual attending a meeting of the ASADA, or a committee established under clause 48.

This definition sets out the categories of persons who would be regulated by clauses 71 and 72, which relate to the protection of NAD scheme personal information and contract services personal information, respectively.

### **Clause 70 – Designated associates**

Subclause 70(1) sets out the “designated associates” of a person for the purposes of the Bill, which are:

- if the person is a body corporate, a director, officer or employee of the body corporate;
- if the person is not a body corporate, an employee of the person.

Subclause 70(1) sets out the “designated associates” of a partnership for the purposes of the Bill, which are:

- if a partner is an individual, the individual;
- if a partner is a body corporate, the body corporate, a director or officer of the body corporate;
- an employee of the partnership.

This clause is intended to ensure that if an entrusted person (being a body corporate or otherwise) or a partnership is engaged by the Commonwealth to perform services for the ASADA or the ASDMAC, and that an entrusted person commits an offence under clause 71 or 72, they will not be able to use the legal structure of partnership or incorporation, or an employment relationship, as a shield against personal liability.

### **Clause 71 – Protection of NAD scheme personal information**

This clause creates an offence regarding the improper use of NAD scheme personal information, and sets out certain exceptions to that offence. As the ASADA would have access to and hold personal information, for example in relation to athletes, it is important that such personal information be adequately protected against unnecessary or unlawful disclosure. However, it would also be necessary for the ASADA to disclose information in the course of carrying out its functions. For example, advising sporting administration bodies about findings in relation to a particular athlete, disclosing allegations against a particular athlete to a contracted investigator or informing the Australian Federal Police if a matter revealed criminal activity.

“NAD scheme personal information” is defined in clause 4 to mean personal information that is obtained in relation to the administration of the NAD scheme or relates to the administration of the NAD scheme. Personal information has the same meaning as in the *Privacy Act 1988*.

The offence created by clause 71(1) has three elements, which are that

- the person is or was an entrusted person; and
- when the person was an entrusted person, the person obtained NAD scheme personal information; and
- the person discloses the information to someone else.

A person who commits the offence is liable for imprisonment for 2 years.

Subsection 71(2) sets out a range of discrete exceptions to the prohibition created by subsection (1). A disclosing person will not commit an offence if the disclosure is:

- for the purposes of the Act;
- for the purposes of the NAD scheme;
- with the consent of the individual to whom the NAD scheme personal information relates;
- to the individual to whom the NAD scheme personal information relates;
- to the Australian Federal Police;
- to the Australian Customs Service; or
- prescribed by the regulations.

In relation to disclosures for the purposes of the Act, it is not intended that paragraph 71(2)(a) of the Bill substantially broaden the types of disclosures that are currently permitted under section 67 of the ASDA Act, except as necessary for the exercise of ASADA’s new investigative and presentation of cases at hearings functions. Examples of disclosures for the purpose of the Act may be reports on outcomes of particular investigations that are included in ASADA’s reports under clauses 74 and 75.

Subclause 71(3) provides that if a disclosure of NAD scheme personal information is covered by subclause (2), the disclosure is authorised by clause 71. This provision is intended to inform the operation of the *Privacy Act 1988* by making clear that the disclosure is authorised by or under law.

Subclause 71(4) provides that, except where it is necessary for the purposes of giving effect to the Bill, or the NAD scheme, or for the purposes of a criminal proceeding, an entrusted person is not to be required to disclose NAD scheme personal information to a court. The purpose of this provision is to prevent personal information being used for civil litigation purposes, or for similar purposes outside the intent of the NAD scheme, while recognising the primacy of criminal proceedings.

It is intended that an entrusted person who is a designated associate of a person or partnership engaged by the Commonwealth to perform services for the ASADA or the ASDMAC commits an offence under clause 71, they will not be able to use the legal

structure of partnership or incorporation, or an employment relationship, as a shield against personal liability (see clause 70 as it relates to clause 71).

### **Clause 72 – Protection of contract services personal information**

This clause creates an offence regarding the improper use of contract services personal information, and sets out certain exceptions to that offence. “Contract services personal information” is defined in clause 4 to mean personal information that is obtained in relation to the provision of services, or relates to the provision of services, under paragraph 21(1)(k) or 52(1)(d). These paragraphs set out, respectively, the ASADA and the ASDMAC’s functions relating to the provision of services under contract on behalf of the Commonwealth. Consistent with clause 71, above, personal information has the same meaning as in the *Privacy Act 1988*.

Examples of the type of information that might fall within the definition of “contract services personal information” include personal details and results of tests or investigations that have been obtained in the course of ASADA’s provision of testing or investigation services under contractual arrangements with sporting organisations that may fall outside the scope of the NAD Scheme.

The offence created by clause 72(1) has three elements, which are that

- the person is or was an entrusted person; and
- when the person was an entrusted person, the person obtained contract services personal information; and
- the person discloses the information to someone else.

A person who commits the offence is liable for imprisonment for 2 years.

Subsection 72(2) sets out a range of discrete exceptions to the prohibition created by subsection (1). A disclosing person would not commit an offence if the disclosure were:

- for the purposes of the Bill;
- for the purposes of the provision of the services to which the contract services personal information relates (such as a contract for testing services);
- with the consent of the individual to whom the contract services personal information relates;
- to the individual to whom the contract services personal information relates;
- to the Australian Federal Police;
- to the Australian Customs Service;
- a disclosure to the Commonwealth, a State or Territory, the ASC, any sports academy or sports institute or other similar body of a State or Territory, that the ASADA believes provides support to the individual to whom the contract services personal information relates (such support may be direct or indirect or by way of financial assistance or otherwise); or
- a disclosure prescribed by the regulations.

The reference in subclause 72(2) to “support” is intended to include support by way of a person, for the purpose of taking part in sporting activities or training for that purpose, using facilities of the government or a government agency (for example ASC and Australian Institute of Sport facilities), a person being a member of or in any way associated with a sporting administration body that receives funding from the government of a government agency, a person being a member of or in any way associated with a sporting administration body that uses facilities of the government or a government agency or a person being a member of or in any way associated with a sporting administration body that receives advice or other services from the government or a government agency.

Subclause 72(3) provides that if a disclosure of contract services personal information is covered by subclause (2), the disclosure is authorised by clause 72. This provision is intended to inform the operation of the *Privacy Act 1988* by making clear that the disclosure is authorised by or under law.

Subclause 72(4) provides that, except where it is necessary for the purposes of giving effect to the Bill, or the NAD scheme, or for the purposes of a criminal proceeding, an entrusted person is not to be required to disclose NAD scheme personal information to a court. The purpose of this provision is to prevent personal information being used for civil litigation purposes, or for similar purposes outside the intent of the NAD scheme, while recognising the primacy of criminal proceedings.

### **Clause 73 – Operation of *Privacy Act 1988* is not affected**

Nothing in the Bill or in the NAD scheme limits the operation of the *Privacy Act 1988*.

## **Part 9 – Other matters**

### **Clause 74 – Annual report**

Clause 74 requires the ASADA, as soon as practicable after 30 June in each financial year, to prepare and give to the Minister a report on the ASADA’s operations during that financial year. The Minister would be required to cause a copy of each annual report to be tabled in each House of the Parliament within 15 sitting days of that House after the day on which the Minister receives the report.

### **Clause 75 – Minister may require ASADA to prepare reports or give information**

This clause provides for the Minister to require, by notice in writing, the ASADA to prepare and provide the Minister with a report about a specified matter or matters relating to the performance of the ASADA’s functions. Similarly, the Minister may require the ASADA, by notice in writing, to prepare and provide the Minister with a document setting out specified information relating to the performance of the ASADA’s functions. The ASADA must comply with such requirements (subclause 75(3)).

Subclause 75(4) provides that the Minister may cause such a report or document to be published.

A report under subsection (1), document under subsection (2) or notice from the Minister under subsection (1) or (2) is not a legislative instrument. This subclause is intended to clarify to the reader that such a record is not a legislative instrument. It is not an exemption to the *Legislative Instruments Act 2003*.

#### **Clause 76 – Exemption from taxation**

Clause 76 provides, for the avoidance of doubt, that for the purposes of section 50-25 of the *Income Tax Assessment Act 1997*, the ASADA is taken to be a public authority constituted under an Australian law. The effect of this, as explained in the legislative note, is that the ASADA would be exempt from income tax.

Similarly, subclause 76(2) provides that, for the avoidance of doubt, the ASADA is not subject to taxation under a law of a State or Territory where the Commonwealth is not subject to the taxation.

#### **Clause 77 – ASADA Chair not subject to direction by ASADA on certain matters**

Clause 77 makes it clear that the ASADA may not direct the Chair in relation to the Chair's performance of functions, or exercise of powers, as Chief Executive under the FMA Act or as Agency Head under the Public Service Act.

The purpose of clause 77 is to avoid possible conflicts between the Chair's powers and responsibilities under the FMA Act as Chief Executive of the prescribed agency of the ASADA (as prescribed by the FMA Regulations – see item 8 in Schedule 1 to the Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005), and under the Public Service Act as Agency Head, and decisions made by the ASADA, being decisions made by the body corporate established by section 6 of the ASDA Act and continued in existence as the ASADA under clause 20 of the Bill.

#### **Clause 78 – Protection from civil actions**

Consistent with the current position under section 72 of the ASDA Act, this clause provides that an ASADA member, a member of the ASADA staff, an individual whose services are made available to the ASADA under clause 50 or an individual appointed as a chaperone or as a drug testing official under the NAD scheme, is not liable to an action or other proceeding for damages for or in relation to an act done (or omitted to be done) in good faith in the performance or purported performance of any function, or exercise or purported exercise of any power, of the ASADA.

Subclause 78(2) sets out protection from civil actions for an ASDMAC member, and provides that an ASDMAC member is not liable to an action or other proceeding for damages for or in relation to an act done (or omitted to be done) in good faith in the

performance or purported performance of any function, or exercise or purported exercise of any power, of the ASDMAC.

Subclause 78(3) provides that civil proceedings do not lie against the ASADA or the Commonwealth in respect of loss, damage or injury of any kind suffered by another person because of a publication or disclosure in good faith in the performance or purported performance of any function, or in the exercise or purported exercise of any power, of the ASADA.

Subclause 78(4) is a new provision that provides a person with immunity against civil proceedings for loss, damage or injury suffered by another person because of one of a number of specified acts done in good faith. The specified acts are the making of a statement to, or the giving of a document or information to the ASADA or ASDMAC:

- alleging a possible violation of an anti-doping rule;
- in connection with an investigation under the NAD scheme;
- that may be capable of supporting an allegation of a possible violation of an anti-doping rule.

The protection extends to the making of a statement to, or the giving of a document or information to:

- the ASADA in connection with the performance by the ASADA of any of its functions under the NAD scheme; and
- the ASDMAC in connection with the performance by the ASDMAC of any of its functions under the NAD scheme.

Subclause 78(4) is intended to encourage the frank and open provision of information to the ASADA or to the ASDMAC so that the ASADA and ASDMAC are able to effectively carry out their functions. Examples might include information provided to ASADA in the course of its investigation on an alleged anti-doping rule violation, or testimony by a witness (whether the accused or otherwise) at a hearing in which ASADA has participated.

### **Clause 79 – Regulations**

Clause 79 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.