

# BLOG – DOPING IN SPORT

## The Prohibited List of Substances; – Prohibited by Whom?

*The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways.*<sup>1</sup>

How do I find out what is a prohibited substance? Well, you go to the WADA website and look it up in the List of Prohibited Substances at <http://www.wada-ama.org>. What is WADA? It's an acronym for the World Anti-Doping Agency. It was founded on 10 November 1989 and is headquartered in Lausanne, Switzerland. What jurisdiction does it have in Australia? It has no direct jurisdiction, but it may have an indirect one.

If so, then what is ASADA? It is the acronym for the Australian Sports Anti-Doping Authority which was established by the Commonwealth under the *Australian Sports Anti-Doping Authority Act 2006* (Cth) (the Act). There is no direct head of power dealing with sport under the Constitution. So where did the Parliament get its authority to pass this Act?

Parliament has sought to use the external affairs power under the Constitution to make laws on a subject referable to a topic covered by an international treaty which the Australian Government had ratified. The position is helpfully explained by Mason C.J. and Deane J. in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273 at para 25 .

*It is well established that the provisions of an international treaty to which Australia is a party do not form part of the Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive.*

So what treaty was used here? Well, on 19 October 2005 at a meeting in Paris of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) the delegates entered into a treaty known as the *International Convention Against Doping in Sport (the Convention)* [2007] ATS 10. Having ratified the *Convention* on 17 January 2006, it came into force for Australia on 1 February 2007. Annex I of the *Convention* purports to pick up the current WADA Prohibited List of Substances.

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<sup>1</sup> *USA Shooting and Quigley v International Shooting Union (UIT)*, Reeb, M., Digest of CAS Awards 1986-1998 (1998), 187, 197-198. CAS 94/129, Award of 23 May 1995, [34] as cited in Paul J Hayes, 'The Rule of Law and Sporting Justice', (2007) Vol 2(1) *Australian and New Zealand Sports Law Journal* at p.8.

Here the *Convention* was putatively incorporated into domestic law by being prescribed in the Regulations. Whether the Act can be impugned either wholly or partly because the Parliament has overreached its power under the external affairs power is a question which for present purposes I will leave for further consideration.

In the meantime, the Act had been passed and generally came into force on 13 March 2006. The Act works by providing for a National Anti-Doping Scheme (s.9) to be established under the Regulations and which provided for the incorporation of the *Convention* when it came into force (S. 9(b)).

When the Regulations picked up the *Convention* upon entering into force for Australia it was incorporated by reference as against being published as part of the legislative instrument F2012C00886.<sup>2</sup> As such Annex I was effectively incorporated but not published. By dint of s.12(2) of the Act, the provisions of s.14(2) of the *Legislative Instruments Act 2003* (Cth)(the LIA) were to be disregarded, so that incorporation by reference to the *Convention* and the Prohibited List of Substances in Annex I were allowed.

The flaw in negating s.14(2) of the LIA is that it ignores what was said by Stephen J. in *Watson v Lee* (1979) 144 CLR 374 at p.393, *that notification is a critical step in the process of delegated law-making and without it that process is incomplete*. By following this procedure neither the *Convention* nor Annex I are readily accessible. Here it seems that the Parliament has abdicated its legislative power to the Executive.

The athlete is simply kept in the dark as to whether a drug is on the prohibited list. Importantly neither under the Act nor the Regulations is the prohibited list directly picked up and **published**. At best it is only indirectly picked up because it is an integral part of the *Convention* as Annex I which records the 2005 Prohibited List. For further amended prohibited lists, e.g. the 2012 Prohibited List, a Conference of the Parties was required to approve the amendment as required by Article 34 of the Convention. In essence any amendments seem to have been approved by a default procedure.

Let us look at a specific substance like ‘Anti-Obesity Drug 9604’ otherwise known as AOD 9604. On reading the 2010 list of prohibited substances, it was not prohibited. But there was a new category ‘S0 – Non Approved Substances’ inserted for 2011 and later years. It is this category which supposedly makes AOD 9604 a prohibited substance.

So what’s the position in the Australian Football League (AFL) and in particular AOD 9604? The AFL has picked up the WADA Code which it has modified to produce the AFL Anti-Doping Rules.<sup>3</sup> The 2010 Prohibited List of Substances is set out in Appendix B of the AFL Anti-Doping Rules. Rule 5.2 also purports to include amendments or additions to the WADA Prohibited List and under Rule 5.3(b) purports to include amendments or additions. Other

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<sup>2</sup> <<http://www.comlaw.gov.au/Details/F2012C00886/Download>> accessed 19 September 2013.

<sup>3</sup> <<http://www.afl.com.au/staticfile/AFL%20Tenant/AFL/Files/Schedule%206%20-%20National%20Anti-Doping%20Code.pdf>> accessed 19 September 2013

than for 2010, when AOD 9604 was not a prohibited substance, Appendix B is of no effect in its unamended state, notwithstanding that the WADA Code itself has been amended in later years.

Further under Rule 5.3(c) *it is the obligation of each person to whom this Code applies to inform himself of all substances and methods prohibited under this Code.*

The player is supposedly required to find out for himself whether a drug is prohibited under the WADA Code. He would also seem to need the expert help of a pharmacologist or endocrinologist to be adequately informed. No link or reference is given as to where the current authorised prohibited list of substances is readily accessible.

In short, the present state of the AFL Anti-Doping Rules are unsatisfactory, if not confusing.

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