

RULE OF LAW

INSTITUTE OF AUSTRALIA

Sport and the Rule of Law in Australia

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The Rule of Law Institute of Australia is an independent not-for-profit organisation which promotes discussion of rule of law issues in Australia. It seeks to uphold transparency and accountability in government and strongly supports the presumption of innocence, independence of the judiciary and procedural fairness in the Australian legal system.

Have a question about this resource or a rule of law issue?

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What is Sport?

The Australian Sports Commission defines sport as a human activity which requires physical exertion and/or physical skill which, by its nature and organisation, is competitive and is generally accepted as being a sport.

In 2012 60% of Australian children played some type of sport¹. Australians play sport at local, state, national and international levels. Sportsmen and women are divided into amateur and professional competitions.

Sporting fans also have a large interest in how sports operate in terms of the success of individual teams, the rules which are used, etc... Most often this interest is recreational and social and involves friends watching or attending a sporting match together.

Sponsorship of sporting codes, sports people and advertising in sport is big business in Australia. Funding from sponsors is an essential form of revenue for sporting organisations, and allows competition

Gambling on sports is another aspect of participation in sport. Strict regulations exist to control betting on sport, this is to prevent issues such as match fixing, and other fraudulent activity.

1 Australian Bureau of Statistics, 'Sports and Physical Recreation: A Statistical Overview, Australia', 2012

60% of Australians under the age of 18 participate in some kind of sporting activity!

Take a survey of the sports played by people in your class. What percentage of your class plays sport?

Trivia:

Which of the following is not considered a sport by the Australian Sports Commission?

- a) Twirling
- b) Trolling
- c) Underwater Hockey

See p. 14 for the answer.

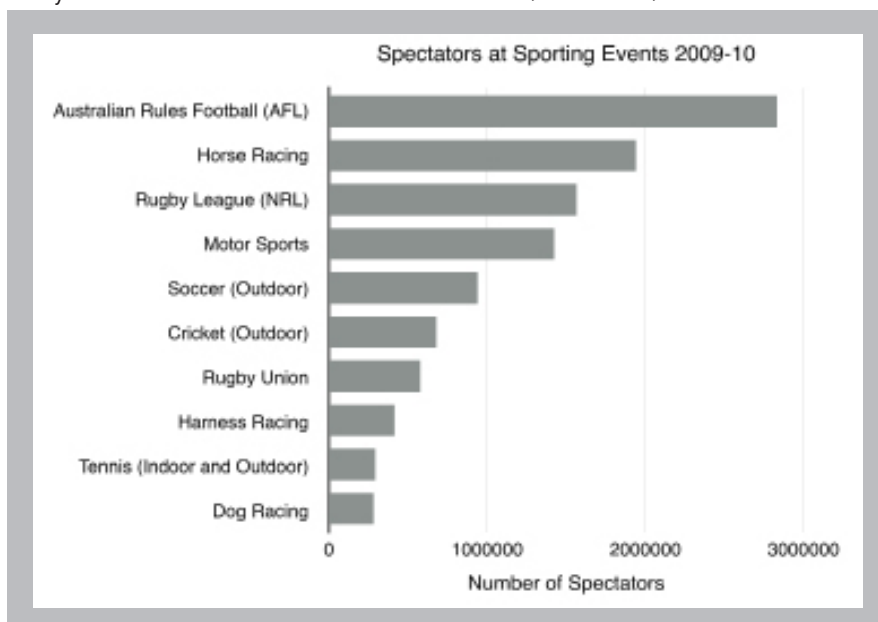
Why do people watch sport even if they do not play or participate?

Thinking Questions

1. What issues in sport do you think would concern the law?
2. If there is a dispute over the decision of a referee in a sporting match, should teams/players be able to appeal to the courts of law? Why/why not?

3. Think of an example of a rule in a particular sport that ensures it is:

- a) fair
- b) safe
- c) challenging



Sport and the Rule of Law

The law impacts on the way sporting organisations operate in a number of ways:

- legal standards are set for playing the sport in a way which is safe for participants and spectators
- the actions of sports people on the field and off the field can be subject to the criminal law
- the use of performance enhancing drugs in sport
- deciding contractual disputes between sports people and sporting organisations

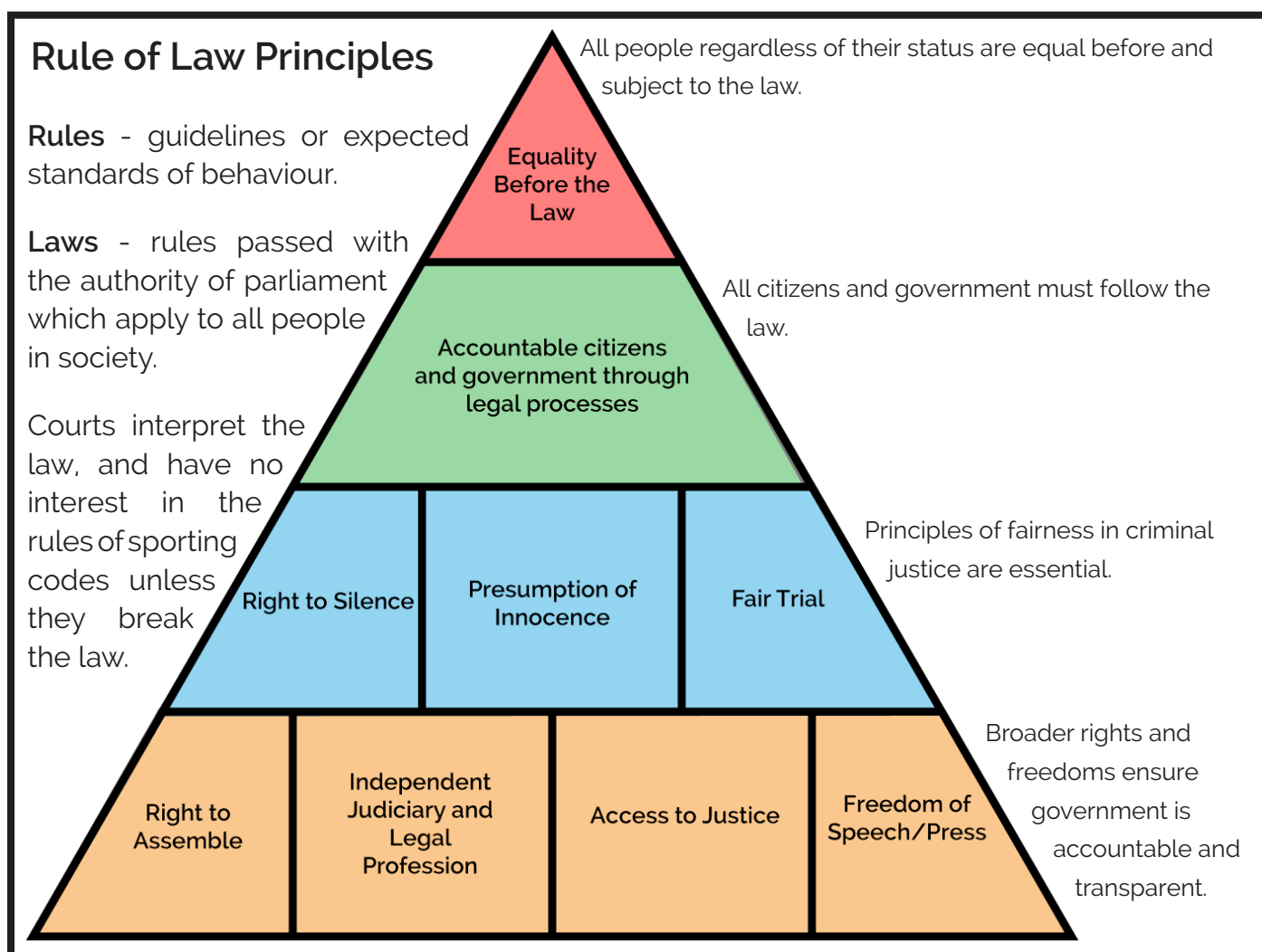
These issues involve many different stakeholders within sport other than sports people such as coaches, medical staff, and sports administrators.

Sporting organisations have their own rules/codes which regulate the way the sport is played and set expectations for the behaviour of sports people and others involved in the sport.

It is important to understand that these rule and regulations are not legally enforceable.

For example, a sports person/team in a sport that involves scoring points cannot challenge a referee's decision in a court of law for not awarding them a point.

Pages 4 and 8 discusses legal responses to the use of drugs and doping in sport. Pages 10-13 go through the non-legal responses and discusses the international and Australian frameworks for dealing with misconduct and disputes in sport.



Rule of Law Institute's Concerns with the use of ACC's powers

Primary concern: the use of the ACC's examination powers and release of the report has diminished the presumption of innocence of sports people, and other members of sporting organisations.

- ACC has extensive powers and can compel people to attend secret examinations where they are not entitled to the right to silence or the privilege against self-incrimination
- Information from these examinations can be provided to the police and sporting organisations.
- Although the ACC cannot bring criminal charges against a person its investigations can lead to criminal charges. It can also cause significant harm to people's reputations. Mud sticks even if the person is never charged or convicted with a criminal offence.
- No criminal charges with regard to the issues identified in the report have been laid as of December 2013.
- Information provided in the report made accusations without providing evidence and were assumed to be true. This diminished the presumption of innocence for those involved and unnecessarily damaged the reputation of Australian sport.
- The report led to law reform which gave ASADA greater powers to investigate doping in sport. *See the following page about the passing of the bill to amend the ASADA Act.*

Case study: The Essendon Football Club

Following the release of the report, the presumption of innocence of the players and club officials of the NRL and AFL was effectively ignored. They were regarded as guilty until they could show otherwise.

The release of the ACC's report led the AFL to take action against various officials. According to the media certain officials of the Essendon Football Club were encouraged to take the blame for the use of performance enhancing drugs, even though evidence of their involvement remains unclear.

After a 10 month joint AFL and ASADA investigation no formal legal charges have been brought against Essendon officials.

Effectively the reputation of sporting clubs and officials was called into question before a proper investigation had been undertaken.

It is a key feature of criminal justice and the presumption of innocence that an proper investigation takes place, that evidence forms the basis of a charge, and that the accused is able to answer that charge in a court of law. None of this has yet occurred.

While the ACC report addresses links between organised crime and the use of steroids, the performance enhancing substances in question involving Essendon are not illegal drugs in Australia, even though they may be prohibited by the rules of the AFL or the WADA Code (see glossary).

ASADA Powers: How a Bill is amended by Parliament

The Australian Sports Anti-Doping Authority (ASADA) is an intelligence focused anti-doping agency. Its key priorities are deterrence, detection, and enforcement. It conducts testing of sports people for banned substances, investigates suspected cases of doping, as well as handling the prosecution of drugs and doping offences in sport.

ASADA has powers to conduct investigations into suspected cases of doping, even in the absence of a positive drug test. As a response to the ACC's report the Act which gives ASADA its powers was amended to give it greater coercive powers.

ASADA can now issue a disclosure notice to a sports person or anyone who has contact with

a sports person and require them to answer questions or surrender documents that relate to doping.

The Bill to change the ASADA Act initially proposed that athletes interviewed by ASADA during a doping investigation should not have the right to silence or the privilege against self-incrimination.

The Bill was referred to a Senate Committee which considered the changes and delivered a report with a number of recommendations.

The Senate then debated the Bill further and agreed on amendments to the first version of the Bill, see the difference between the first version and the Bill as passed on the next page.

Should these rights be taken away?

The right to silence and privilege against self-incrimination are very important parts of the justice system in Australia. Laws which remove or diminish these rights endanger equality before the law, and the presumption of innocence in criminal cases.

Under the Australian Constitution, the Parliament can pass laws which remove these rights. While there is strong support for these rights from many judges, politicians, and in the community, there is also a strong argument to remove the rights and privileges of the individual to fight organised crime. This is a balancing act which Parliament and Courts need to carefully consider.

The ASADA powers above are an example of a law which removes individual rights. The amendment of this Bill shows that the Parliament is uneasy about removing the right to silence, and that while removing that right entirely was proposed, after debate this did not occur.

It is also important to understand that the penalties imposed by ASADA are civil penalties, not criminal ones.

In criminal justice the right to silence and privilege against self-incrimination have a solid grounding. However, over the past 20 years there has been an increasing trend to provide government agencies, like ASADA, with the power to issue civil penalties such as fines. ASADA can fine an athlete \$5220 for not attending an interview.

The distinction between civil and criminal penalties is a grey area. A fine for breaking the criminal law can look just the same as a civil penalty requiring a person to pay money. The only real difference is that a person does not get a criminal record for being ordered to pay a civil penalty. However, the loss of reputation that can follow having a civil penalty imposed can be just as serious as getting a criminal record.

Under human rights law and the International Covenant on Civil and Political Rights a hearing which results in a penalty should maintain the same rights for the accused as if they were standing trial for a crime.

First Version of Bill

*Australian Sports Anti-Doping Authority
Amendment Bill 2013*

Section 13D

(1) A person is not excused from:

- (a) answering a question; or
- (b) giving information; or
- (c) producing a document or thing;

as required by a disclosure notice given to the person on the ground that the answer, information, document or thing might tend to incriminate the person or expose the person to a penalty.

Removes the right to silence

Removes the privilege against self-incrimination

What is the privilege against self-incrimination? That a person should not be required to say anything that would incriminate themselves. Slightly different to the right to silence in that it is accepted in principle that requiring people to confess to a crime is the first step to forcing them to confess whether they are guilty or not!

What is the right to silence? The idea that a person accused of a crime is not required to answer questions or prove their innocence. This is an essential aspect of the presumption of innocence and ensures the prosecution must prove its case beyond a reasonable doubt.

Bill as Passed

**Australian Sports Anti-Doping Authority
Amendment Act 2013**

Section 13D

(1) An individual is excused from complying with a requirement to answer a question or to give information if the answer to the question or the information might tend to incriminate the individual or expose the individual to a penalty.

(1A) A person is not excused from producing a document or thing as required by a disclosure notice given to the person on the ground that the document or thing might tend to incriminate the person or expose the person to a penalty.

The Bill as Passed came into force on 1 August 2013

Privilege against self-incrimination protected when questioned by ASADA

However, privilege against self-incrimination is **NOT** protected when people or organisations are made to submit documents

Legal Response to Doping: WADA and ASADA

The WADA Code is designed to provide a framework for anti-doping systems and regulation for countries and sporting organisations.

The anti-doping system in Australia is managed by ASADA who enforce the WADA Code. The purpose of this is to promote integrity in sport and promote a 'level playing field'.

In Australia ASADA enforces the WADA Code which is a document published yearly listing banned methods and prohibited substances.

ASADA enforces the WADA Code through regular testing of sports people in and out of competition, issuing bans to sports people who test positive to substances on the 'Prohibited List' or the use of 'Prohibited Methods'.

Sports people are required to be available for testing at any time, this is managed through the 'whereabouts' system.

Athletes who do not notify ASADA of their physical location and availability of testing both in and out of competition can be banned from competing. These are requirements which are backed up by the law.

Sports people adhere to the Code as they want to compete in their chosen sport at the Olympics.

Some sports have their own system for anti-doping. An example of this is Professional Surfing. See page 9 on how the Association of Surfing Professionals deals with the use of doping in surfing.

Professional v Amateur

Professional sports people are paid to play sport, this payment can take the form of prize money, sponsorship and /or goods

Example: Professional Cricket Players receive money from the Cricket Australia and money from endorsements of products and services.

Amateur sports people do not receive payment for playing their sport. They are sometimes supported by the government through the Institute of Sport, particularly if they are Olympians.

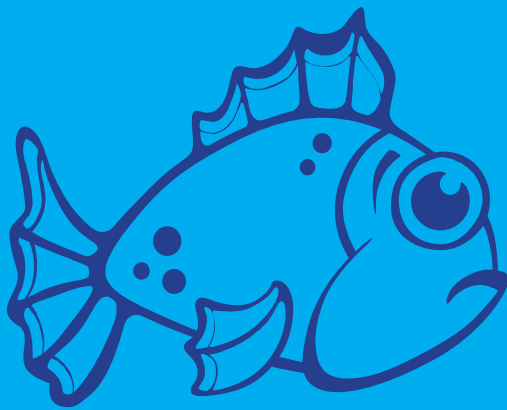
Example: Swimmers who represent Australia at the Olympics. Some amateur athletes receive money for TV ads if they are well known and successful in the Olympics.



There are around **2.5** million recreational surfers in Australia...

20 national surfing events

The Association for Surfing Professionals (ASP) runs worldwide professional surfing competitions



212 surf clubs

Recreational surfers abide by an unwritten 'Surfing Code' that determines how surfers behave when in the water

For professional surfers the ASP has formal rules for competition and only follows part of the WADA code

Use of Recreational Substances such as Cannabis are treated differently due to the lack of evidence they improve performance. Testing for doping is only performed in competition

The ASP can do this because they run their own competitions and are not affiliated with the Olympic Movement

Resolving Disputes in Sport

Sporting organisations enforce their own rules through bodies called tribunals, or judiciaries. A judiciary or tribunal is designed to resolve disputes and rule violations within a sporting code. Its main function is to decide on penalties for players who break the rules of the organisation. This is particularly important in sports where physical contact is part of playing the game. Many of the rules are designed to protect players from significant injury, particularly to the head.

They can issue sanctions such as fines or suspensions to players who do not follow the rules. However, ultimately its power comes from the ability to ban sports people from playing the sport if they do not follow the rules, or if they do not comply with instructions or sanctions given.

Although the judiciary/tribunal can have many features of a court of law, including having lawyers and/or judges sitting on the panel, it is not a court of law and its decisions only apply to members of the club. Their decisions are not legally enforceable but players must accept their decisions to continue playing.

If a player disagrees with a decision there is often an appeals process involving alternative dispute resolution (ADR) and international sports bodies such as the Court of Arbitration for Sport. However, the courts of law generally are not involved in these disputes unless there is a legal issue such as a dispute over an employment contract or a criminal act during a sporting event.

What is Arbitration?

Arbitration is when the 2 parties agree to have an independent person/s (the arbiter) make a decision about their dispute and to stand by the outcome of that decision.

Appeals Process in Sport

1

National Sporting Organisation

makes the initial decision about a case of misconduct or a dispute. Examples include: the NRL Judiciary, Australian Underwater Federation Tribunal

2

International Sporting Organisation

can hear appeals from national sporting organisations. Examples include the International Olympic Committee for Olympic Sports, FIFA for Soccer, and the ICC for Cricket.

3

Court of Arbitration for Sport

The Court of Arbitration for Sport is based in Switzerland and is the main international organisation which hears appeals relating to disputes in court. It is not a court of law, however, cases can be appealed to the Supreme Court of Switzerland.

Bringing Sport into Disrepute

Sport is always a popular topic in the media and the treatment of players by their clubs and sporting organisations is frequently discussed in public. Many fans feel that players are treated unfairly when they 'misbehave', or 'bring the sport into disrepute' others feel that the penalties are not severe enough due to the role that players have as 'role models' for young people playing sport.

Players have recourse to ADR when they feel they have been treated unfairly either through sporting code tribunals or in the case study below the Court of Arbitration for Sport.

Case Study: Nick D'Arcy and the Australian Olympic Committee

29 March 2008 Nick D'Arcy is chosen to represent Australia at the Beijing Olympics in the sport of Swimming after breaking the Australian record

30 March 2008 at 1.30am, whilst out celebrating his acceptance in the team in a Sydney Bar, Nick D'Arcy punched Simon Cowley, a former swimmer, in the face.

He was charged with assault occasioning grievous bodily harm under the Crimes Act 1900 (NSW) s35

After the event there was considerable media attention and speculation about the drinking habits of Mr D'Arcy and previous violent incidents

18 April 2008 the Australian Olympic Committee (AOC) President Mr John Coates told Mr D'Arcy that he was no longer a member of the Australian Olympic swimming team and would not be going to the Beijing Olympics in August 2008. The reason given for the decision was that Mr D'Arcy had brought himself and the AOC into "disrepute" and therefore his contract with the AOC was terminated.

Later in 2008 Mr D'Arcy appealed the decision in Court of Arbitration for Sport (ICAS). They dismissed his appeal and agreed with the decision of the AOC.

27 March 2009 Mr D'Arcy plead guilty to the criminal charges and was given a 14 month suspended sentence for his assault of Mr Cowley

Mr D'Arcy represented Australia in the 2012 London Olympic Games

'The CAS decision of D'Arcy v Australian Olympic Committee ...established that if a competitor is charged with a criminal offence, then this in itself is enough to bring a sport into disrepute, regardless of whether there the competitor is later found guilty or not guilty.'

Chris Davies*

*Chris Davies, 'Bringing a sport into disrepute: Tiger Woods and other sporting stories' Abstracts from the Annual Staff - Student Law Conference 2010, Gregynog, Wales, Annual Staff - Student Law Conference 2010, 26-28 February, 2010, Aberystwyth University <<http://eprints.jcu.edu.au/15853/>>

Non-Legal Responses: National Sporting Organisation Tribunals and Judiciaries

The following outline the way in which the Australian Football League and the National Rugby League deal with disputes or cases of rule violations under their codes.

National Rugby League Judiciary

- Points system with 5 grades of seriousness for offences
- Each 100 points results in a one match suspension
- If a player pleads guilty to a charge they will receive a reduction of 25 points
- If a player and club want to plead not guilty or request a downgrade for a charge then they can appear before the judiciary
- Once the judiciary has made a decision the player must abide by any suspensions or financial penalty decided by the judiciary
- **Example:** A Grade 5 Dangerous Throw charge could earn a player 925 points, an effective suspension of 9 games.

Australian Football League Disciplinary Tribunal

- Points system based on conduct, impacts and contact. The more severe the offence the greater the penalty
- Range of penalties including match suspensions along with significant financial penalties
- Charges made by Match Review Panel (MRP) after reporting by match umpires
- If a player wants to plead guilty to a charge they will receive a 25% reduction in the points penalty
- If a player want to contest a charge they go to the Tribunal. They (and their club) have to pay \$5000 to have their case considered.
- Players and clubs have to exhaust the appeal process before they can take their case to a court of law

Combat Sports Bill(NSW) 2013

The following is an example of the law being responsive to changes in sport.

The Original Act	Reasons for Change	New Legislation
<ul style="list-style-type: none"> • The originating act created the Combat Sports Authority (CSA) • The CSA regulates Boxing, Kick boxing, Wrestling, Muay Thai, Mixed Martial Arts and Ju-Jitsu • Professional combatants (fighters), promoters, matchmakers, managers, trainers, seconds referees, judges and timekeepers must be registered with the CSA • Amateur combat sports events must apply and be granted a permit 	<ul style="list-style-type: none"> • Lots of new types of combat sports have emerged since 2008. Example: UFC and Cage Fighting • Not a lot of difference between amateur and professional competitions. Sometimes both amateur and professional athletes can appear in the same bout • Increase in the amounts of money involved in Combat Sports and potential involvement of criminals • Need to protect the health and safety of all fighters. Examples: medical officers at all fights and regular blood testing for infection 	<ul style="list-style-type: none"> • Amateur and professional events to be treated the same when there is money involved, either in payment to fighters, spectators paying to watch, held on a premises that are subject to the Liquor Act (NSW) 2007 • All fighters will need to register with the CSA • All fighters will have ONE medical book issued by the CSA • All participants and those involved with organising, managing or refereeing of fights will have to register with the CSA and may be subject to criminal record checks • Promoters will be responsible for the events meeting health, safety and other legal regulations which include having a medical officer present

One of the reasons for the review was the death of Kick Boxer Mark Fowler after being punched in the head - there has been an inquest in the Coroner's Court into his death

Scan the QR Code for a media article into Mark Fowler's Death



Court of Arbitration for Sport (CAS)

Court established by the International Olympic Committee (IOC). Based in Switzerland. Designed to use mediation and arbitration (ADR) to resolve disputes in sport.

World Anti-Doping Agency (WADA)

An international independent agency. Key activities include scientific research, education, development of anti-doping capacities, and monitoring of the World Anti Doping Code (WADA Code)

Australian Sport Anti-Doping Authority (ASADA)

A statutory authority, with prime responsibility for implementation of the WADA Code in Australia. This mainly involves coordinating the testing of athletes.

Australian Sports Commission (ASC)

A government statutory authority, with responsibility to provide money to sporting organisations and assist in the high performance programs through the AIS. They also register National Sporting Organisations and work with ASADA in the provision of drug testing.

National Sporting Organisations(NSO)

Registered organisations that provide sporting services from community to high performance levels. NSOs are required to meet ASADA testing standards and all anti-doping regulations.

Sporting Tribunal

A forum for dispute resolution set up by a club or organisation to ensure that the Code of Behaviour or Code of Conduct and the Member Protection Policy are properly interpreted and enforced. It is not a court of

law and is not required to follow any legal process.

Sporting Rules

Rules and/or regulations that are a publicly agreed upon sets of policies to ensure that the sport being played is fair, safe and competitive. Rules are not legally enforceable.

Government Regulations

Laws that deal with regulating sport, includes safety, anti discrimination, child protection and anti-doping. Laws can be legally enforced by the court system.

Doping

The giving/taking drugs to (a racehorse, greyhound, or athlete) in order to inhibit or enhance sporting performance.

Prohibited Substances and Methods

Drugs and other substances and medical methods that are prohibited by WADA under it's code. They are published yearly as a list. All National Sporting Organisations in Australia are required to have an Anti-Doping code and with the assistance of ASADA test their sports people in and out of competition.

Legislation

Australian Sports Anti-Doping Authority Amendment Act 2013

Combat Sports Act 2008 (NSW)

Combat Sports Bill 2013 (NSW)

Crimes Act 1900 (NSW)

Reports

Australian Crime Commission, 'Organised Crime and Drugs in sport', Australian Crime Commission, 2013

<<http://www.crimecommission.gov.au/sites/default/files/files/organised-crime-and-drugs-in-sports-feb2013.pdf>>

Cases

DPP v D'Arcy [2009] NSWLC1

CAS 2008/A/1574 Appeal by Mr Nicholas D'Arcy v Australian Olympic Committee

Further Reading

Australian Story. 'Judging Nick D'Arcy', Australian Broadcasting Corporation, 30/03/2009. <<http://www.abc.net.au/austory/specials/darcy/default.htm>>

Chris Wren SC, 'SURF RULES!' and the LAW', Australian Lawyers Surfing Association Conference 2012. <http://www.surfinglawyers.com.au/images/papers/2012/ALSA-CONF-2012_SURF-RULES_THELAW_PAPER.cw.pdf>

Chris Davies, 'Bringing a sport into disrepute: Tiger Woods and other sporting stories' Abstracts from the Annual Staff - Student Law Conference 2010, Gregynog, Wales. Annual Staff - Student Law Conference 2010, 26-28 February, 2010, Aberystwyth University <<http://eprints.jcu.edu.au/15853/>>



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