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Dr Ian Holland
Secretary
Legislation Committee
Environment, Communications, Information Technology and the Arts,
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Dr Holland

AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY BILL 2005
AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2005

I acknowledge receipt of your letter of 12 December 2005 and thank you for the opportunity to make this submission in respect of the above Bills. Because the AOC believes this matter is of crucial importance to Australian sport, this letter will be published to all AOC member sports, member State Olympic Councils and recognised Olympic Training Centres. It will be posted on the AOC website for public consumption.

At the outset, I reiterate the support of the Australian Olympic Committee for the creation and operation of the Australian Sports Anti-Doping Agency ('ASADA') as the sole national anti-doping organisation for Australia in lieu of the current undesirable division of roles and responsibilities between the Department of Communication, Information Technology and the Arts, the Australian Sports Commission and the Australian Sports Drug Agency ('ASDA').

However, the AOC's support for ASADA is, and always has been, subject to the adoption and implementation of appropriate powers and checks and balances to enable ASADA to properly perform its functions whilst ensuring the proper protection of the rights and roles of Australian sports organisations athletes and athlete support personnel.[i]

I note that the Australian Sports Anti-Doping Authority Bill appears to have been sourced from the Australian Sports Drug Agency Act 1990. Whilst this is understandable, I believe this approach:

1 does not provide for the separation of the proposed ASADA functions and powers concerning:

(1) policy making;

(2) administration;

(3) investigation; and

(4) prosecution;

2 has failed to address the significant issue of the reasons for and status the Register to be maintained under section 13(1)(i) of the Bill;

3 has failed to provide ASADA with necessary and appropriate investigative powers; and

4 has resulted in the adoption of definitions different from, and therefore potentially conflicting with, the definitions in key documents such as the World Anti-Doping Code and the UNESCO Anti-Doping Convention.

I now address each of these points.

(1) Section 21 provides that ASADA's functions include those conferred under Part 2 and the NAD Scheme. Whilst this appears repetitious, sections 9 and 10 provide that the NAD Scheme must concern the implementation of the two Anti-Doping Conventions[ii] and "ancillary or incidental matters". ASADA will have the power to amend the NAD Scheme by legislative instrument.

Whilst the initial NAD Scheme is by way of regulations, when regard is had to section 10(1) and the Legislative Instruments Act 2003, it is apparent that ASADA will have the power to itself amend the NAD Scheme. Consequently, ASADA will have the power and ability to itself determine its own functions with the only limitation being a legal challenge that its interpretation of these functions is outside the parameters described above.

The AOC is concerned at any body having such a power.

(2) When Senator R Kemp, the Minister for Sport, announced the creation of ASADA on 23 June 2005, he stated that ASADA would have the current ASDA functions, the policy development, approval and monitoring roles of the ASC and "will deal with all allegations of anti-doping rules violations outlined in the World Anti-Doping Code." As part of this latter aspect, the Minister stated that, where appropriate, ASADA "will also prepare and present cases to the Court of Arbitration for Sport and other sports' tribunals."

This is a substantial expansion of the current functions of ASDA and it is submitted that there has been an approach in the Bill of simply following past ASDA practice and rules without proper consideration of the appropriateness thereof to ASADA, potential legal consequences and the impact on persons alleged to have committed anti-doping rule violations ('ADRVs').

This is particularly the case with the Register and the separation of the investigation and prosecutorial functions.

(3) ASDA does not presently prosecute alleged ADRVs. Rather, and in simplistic terms, it is responsible for sample collection, arranging sample analysis and advising relevant sports organisations of the results. The sports organisations are then responsible for prosecuting the offence against their anti-doping rules.

In this environment the Register of Notifiable Events serves a useful function recording the results of ASDA's activities. Entry on the Register though is irrelevant to the

prosecution of an athlete for an ADRV by a sports organisation.[iii] Because ASDA does not prosecute, the Register is not designed to take into account the outcome of any prosecution.

However, ASADA will now conduct the prosecutions of ADRVs.[iv] Surely what will be relevant to ASADA and the athlete concerned is not the entry on the Register, but rather the outcome of the prosecution of the ADRV and the imposition of any sanction.

A Register that simply records the possibility of an ADRV serves no useful purpose. Rather, the Register should record proven ADRVs – i.e. those ADRVs successfully prosecuted by ASADA before the Court of Arbitration for Sport or other sports tribunal.

As proposed, the Register can only be a record of possible ADRVs, not proven or established ADRVs. The expanded number of ADRVs that are proposed to be included in the Register under the Bill alone makes this proposal unworkable. This Register and the associated right of appeal to the Administrative Appeals Tribunal ('AAT') has the potential to make the AAT the de facto anti-doping tribunal for Australian sport and the proposal fails to address:

- how sanctions are to be imposed on athletes who are found to have committed ADRVs;
- the right for persons, other than ASDA and the athlete concerned, to be heard; and
- the obligations on sporting organisations under the World Anti-Doping Code to provide for appeals to the Court of Arbitration for Sport at both international and national levels under Article 13 of the Code;

amongst other things.

The AOC does not support the AAT becoming the de facto anti-doping tribunal as may well be the case under the provisions of the Bill.

(4) The AOC is concerned that the proposed entry on the Register of possible ADRVS could lead to a diversion of resources of both ASADA and the athlete through the appeal process to the AAT. The AAT process essentially gives an athlete "two bites of the cherry" to challenge allegations of a possible ADRV. As is the current situation with sports organisations and ASDA, entry on the Register will be irrelevant in the prosecution of ADRVs by ASADA as it will be bound to prove all the elements of the alleged ADRVs. Even if an athlete has challenged an entry in the Register before the AAT, there is nothing to prevent the athlete making the same challenges to the Court of Arbitration for Sport or other sports tribunal, depending which body is hearing the allegation. The body hearing the allegation is not bound by any determination of the AAT.

The AOC has raised this concern of duplication of hearings and waste of resources with ASDA. ASDA's response has been to refer to rules 68 - 70 of the Leagues Anti-Doping Rules adopted by the National Rugby League and the Australian Rugby League where it is provided that a player:

- may not challenge an entry on the Register except before the AAT; and

- may not dispute any findings or decisions made by the AAT, or the Federal Court on appeal from the AAT.

The AOC accepts that this resolves the current situation for that sport. It is submitted that if such a provision is appropriate, then it should be part of the legislative and regulatory framework and therefore apply to all sports and not be dependent on sports organisations including it in their individual anti-doping policies.

(5) When the AOC raised its concerns regarding the right of appeal to the AAT, ASDA responded as follows:

DCITA have spoken to Sue Bromley in AGs who was involved with providing AGs comments on the Discussion Paper in 2004. In brief, her key points were:

- *AAT appeal right is an existing right and there would need to be a convincing policy reason to remove;*
- *AAT appeal right is a domestic right (as opposed to the CAS appeal process through an international body). Sue asked whether we had consulted DFAT and indicated that they may have a view on the removal of an existing domestic appeal right. Sue was concerned that decisions made by ASADA be subject to some form of review by an appropriate Australian body;*
- *Following on from the above point, it is standard practice for government decisions which may adversely affect an individual to be subject to merits review. Again, we would need to have a very clear and strong justification for removing.*

Sue also indicated that the Scrutiny of Bills Committee would pick up on any amendment to/removal of the AAT clause and would need to be convinced that it would not negatively impact on the rights of individuals.

In response to these points, I comment:

(a) As discussed above, the right of appeal to the AAT currently arises out of the ASDA entry on the Register independent of any prosecution of an ADRV. This will not be the case under the ASADA regime.

(b) With the possible exception of New Zealand, the AOC is not aware of any similar Register of possible ADRVs anywhere else in the world. The AOC understands that the New Zealand Sport Drug Agency operates in the same manner as does ASDA, so the New Zealand regime is irrelevant for future ASADA purposes.

(c) With an entry on the Register being merely a record of a possible ADRV, it will essentially record a decision that there exists a prima facie case to prosecute. Precedent exists that "*decisions to prosecute persons for any offence against a law of the Commonwealth, a State or a Territory*" are excluded from the operation of the Administrative Decisions (Judicial Review) Act 1977[v]. Whilst accepting that an ADRV is not a criminal offence, many cases before the Court of Arbitration for Sport have recognised the seriousness of a doping allegation with the application of a consequent standard of proof.[vi]. It is submitted that the same considerations would apply concerning decisions to prosecute ADRVs as to the prosecution of criminal offences.

(d) If the Register as a record of possible ADRVs is discarded together with the associated right of appeal to the AAT, there is no detriment to the athlete, for ASADA will still have to prove the occurrence of the ADRV before the Court of Arbitration for Sport or the appropriate sports tribunal. The athlete must be accorded natural justice in that hearing.

(e) If the purpose of the proposed Register and associated right of appeal to the AAT is simply because "that is the way it has been done to date", then it is submitted that this is inadequate. The AAT only has jurisdiction where this is so provided in an enactment.[vii]. If there is to be such an enactment, there should be a better and more cogent analysis and reasoning than that advised to the AOC and reported above.

(6) The regime proposed under the Bill authorises ASADA to investigate all anti-doping rule violations ('ADRVs'). These ADRVS are not limited to adverse analytical findings[viii], but include the seven other ADRVs provided for under the World Anti-Doping Code and also listed in the UNESCO Anti-Doping Convention.[ix] Once an investigation is complete, ASADA will then alone determine whether to enter the name of the athlete or athlete support personnel on the register for the offence in question. This initial determination is prior to any notification to the athlete or opportunity to be heard. The Bill does not describe the standard of satisfaction or belief that ASADA must reach before arriving at this initial determination. It is only after this decision making process that ASADA is bound to notify the athlete concerned and give that athlete an opportunity to make written submissions about the proposed entry on the register.[x] Based on the written response and without the need for any hearing and adjudication independent of the investigation, ASADA then determines to enter the athlete's name on the register. It is only at that stage that the athlete has the right to compel a hearing before the Administrative Appeals Tribunal.

This regime reflects the current ASDA process in respect of adverse analytical findings and refusals to provide samples. It ought not be adopted by ASADA for the investigative process is considerably greater for the non analytical ADRVs and the potential for loss and damage to an 'innocent' athlete is much greater. Under the proposed regime, ASADA will be the investigator, prosecutor, judge and jury unless and until challenged before the AAT. The AOC submits that this would be a potentially serious breach of the rules of natural justice – the cornerstone of which is that *"justice should not only be done, but should manifestly and undoubtedly be seen to be done."*[xi]

In **Rush v WA Amateur Football League (Inc)**[xii], His Honour, Hasluck J stated:

When charges of misconduct are advanced there is generally an assumption that the party preferring the charges holds a bona fide belief that there is substance in the allegations and that a verdict of infringement is appropriate. It is therefore clearly undesirable that a person charged with the responsibility of resolving the dispute by an impartial consideration of evidence bearing upon the charges should play any part in the formulation and advancement of the charges in question. This could give rise to a reasonable apprehension of bias which is inconsistent with a proper application of the rules of natural justice. Further, if the adjudicator has played a part in formulating the charges then it might be thought that if any procedural issue arose as to duplicity or some other flaw in the charges then the adjudicator could not bring an unbiased mind to the resolution of such a controversy. He would appear to have an interest in defending the sufficiency of his own handiwork in formulating the charges.

The proposed regime infringes the separation that Hasluck J clearly believed to be necessary if allegations of a breach of natural justice are to be avoided.

The AOC instead suggests that ASADA should prosecute all alleged ADRVs before an independent tribunal and only make entries in the register should the tribunal find the allegations proved or the athlete earlier admit the ADRV. This would further accord with the obligations of sports organisations under Article 3.1 of the World Anti-Doping Code[xiii] to prove the occurrence of an ADRV to a standard equivalent to the well known Brigginshaw Test".[xiv]

The UNESCO Anti-Doping Convention requires the States Parties to *commit themselves to the principles of the [World Anti-Doping] Code.* The principles of natural justice are one of the key principles in the Code.[xv]

(7) Whilst noting Senator Kemp's above statements concerning ASADA prosecuting ADRVs, I note that section 13(1)(k) of the Bill states that the NAD Scheme must:

> "*authorise the ASADA to present:*
>
> *(i) findings on the register mentioned in paragraph (i); and*
>
> *(ii) the ASADA's recommendations as to the consequences of such findings;*
>
> *at hearings of the Court of Arbitration for Sport and other sporting tribunals, either:*
>
> *(iii) at the request of a sporting administration body; or*
>
> (iv) *on the ASADA's own initiative: ...*"

This wording does not appear to accord with a commitment for ASADA to prosecute ADRVs. Rather, it appears to reflect a lesser commitment related solely to the Register.

(8) Whilst ASADA will be empowered to investigate allegations of ADRVs, the Bill is silent on the nature and extent of any powers in this regard.

The AOC's views in regard to the need for proper investigation of alleged doping offences and practices are not new. Since 2000, the AOC has submitted to the Minister that there has been a need for a independent person to be known as the '*Sports Doping Ombudsman*' "with "*powers to investigate allegations of doping practices, including the power to compel witnesses to attend and give evidence and to produce documents.*"

Clearly the creation of ASADA as a body independent of Australian sports organisations with investigative powers has removed the need for such a person. However, the extent of the investigative powers are a different matter.

Attached to this letter are copies of:

- my e-mail of 23 June 2005 to Senator R Kemp;
- the Minister's response dated 28 July 2005;

- my letter to Senator Kemp of 10 August 2005; and
- the Minster's response thereto dated 20 December 2005.

Sports organisations have the power to compel their member or employee athletes to co-operate with investigations as a matter of contract. Outside this contractual relationship, they have no power to compel the giving of any evidence.

The AOC is committed to opposing and, if possible, eliminating, the scourge of cheating in sport through the use of drugs and prohibited methods. AOC experience is that without the power to compel the giving of oral and documentary evidence, many allegations of ADRVs cannot be properly investigated and prosecuted.

In support of this view I cite merely two examples:

(a) Werner Reiterer.

Reiterer was an Australian Olympic athlete who retired from competitive athletics in late 1999 or early 2000. In July 2000, he published his book entitled "Positive" which contained admissions of doping by him as well as allegations of doping by many Australian athletes and collusion by sports officials.

The AOC and Athletics Australia initially appointed Justice Trish Kavanagh to investigate these allegations, although she was unable to make any headway due to Reiterer's refusal to appear before her or provide any evidence. Based on the admissions and allegations of doping made in the book, the AOC then commenced proceedings against Reiterer in the Court of Arbitration for Sport ("CAS"). To compel his attendance, the AOC issued a Subpoena to Produce Documents and Give Evidence out of the Supreme Court by virtue of section 17 of the Commercial Arbitration Act (NSW) 1984.

Reiterer applied to have the Subpoena set aside on the grounds that CAS did not have any jurisdiction over him as he was no longer a competitor in the sport of athletics. Following advice from H Nicholas QC,[xvi] the matter was settled on confidential terms.

(b) BALCO

As I stated in my letter of 10 August 2005, following the initial "whistleblower" advice, the Bay Area Laboratory Organisation matter was only progressed through the IRS and a grand jury investigation. Documents were obtained through a raid of the BALCO premises by the FBI and "the use of subpoenas and other law enforcement mechanisms" and the US Senate.[xvii]

In its subsequent prosecutions of Tim Montgomery and Chryste Gaines, the Court of Arbitration for Sport found both these athletes had committed ADRVs based on the evidence of another athlete, Kelli White. Ms White gave evidence after having herself been earlier found to have committed an ADRV as a result of the BALCO investigations.

In other words, the successful outcome of the BALCO case concerning athletes was almost entirely built on the foundation of coercively acquired evidence.

> The argument used to be whether Australian media laws would prevent a Watergate exposure in Australia. Will we asking whether Australian sports laws (or more accurately the lack thereof) will prevent a BALCO exposure in Australia?

The AOC accepts that coercive investigative powers involve a balancing of rights. The AOC believes that this balance can be achieved through:

(i) requirements that:

- a person may refuse to give oral or documentary evidence on the grounds of privilege whereby, in proceedings in a court of law, the person might resist a like requirement;
- a statement or disclosure made by any witness in the course of giving evidence before ASADA is not (except in proceedings for an offence against the requirement to provide evidence to ASADA) admissible in evidence against that witness in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory; and
- a person making any statement or publication to ASADA in the course of investigation has absolute privilege against a suit for defamation;

and

(ii) review of these safeguards under either the Administrative Appeals Tribunal Act or the Administrative Decisions (Judicial Review) Act.

(9) The Australian Sports Drug Agency Act 1990 has, as a key concept, the definition of "competitor" dependent on competing in a sporting competition or training to so compete.[xviii] Drug testing schemes apply to competitors.[xix]

In contrast, the Bill focuses on "athletes" – a term that is defined by reference to participation in a sporting activity. This raises the possibility of a lawyers' banquet in that "sporting activity" is not defined and is a term that is not used in the World Anti-Doping Code nor the two Conventions. In the Code, an athlete is defined by reference to participation in sport at different levels.[xx] In the General Anti-Doping Convention, the term 'sportsmen and sportswomen' is defined as "*those persons who participate regularly in organised sports activities.*"[xxi] The UNESCO Anti-Doping Convention follows the Code definition in defining an athlete as "*any person who participates in sport ...*"[xxii]

The use of "sporting activity" rather than "sport" is, I presume, deliberate.[xxiii] Whilst there is debate as to what is meant by "sport", it is clearly narrower in meaning than "sporting activity". I am unsure what exactly is intended by the use of the word "sporting" as an adjective to the noun "activity" as opposed to "sport" as a noun or "sports" as the adjective to "activity".

"Sporting" is relevantly defined in the Australian Concise Oxford Dictionary as an adjective meaning:

> "**1** interested in sport (a *sporting man*) **2** sportsmanlike, generous (a *sporting* offer) **3** concerned in sport (a *sporting dog; sporting news*)"

"Sport" is relevantly defined as a noun meaning:

> "**1 a** a game or competition activity, esp. an outdoor one involving physical exertion, eg cricket, football, racing, hunting. **b** such activities collectively (*the world of sport*) **2** (in pl) **a** a meeting for competing in sports, esp. athletics (*school sports*) **b** athletics"

In my opinion a "sporting activity" does not mean the same thing as a "sports activity" or "sport". This difference is compounded when all that is required is participation in a sporting activity rather than participation in sport.

By way of example, pole dancing is not recognised as a sport, yet participation in pole dancing is participation in a sporting activity.

I submit the AOC's views are supported by the words of the Bill itself, for "sporting competition" is defined as meaning a "sporting event or series of sporting events with "sporting event" being defined in turn as including a "sporting activity".

It must be asked what was intended by the draftsman in using these particular phrases in lieu of the terms used in the World Anti-Doping Code and the two Conventions and the current 'competitor' approach under the Australian Sports Drug Agency Act? What will the consequences be for Australian sport? Will it possibly lead to a challenge to the constitutional basis for the Australian Sports Anti-Doping Authority Act, once the Bill is proclaimed and any NAD Scheme made thereunder?

(10) There are possible scenarios under the Bill that could create issues for Australian National Federations (NFs). Under the international structure of sport, NFs are bound first and foremost by the rules and regulations of their International Federations (IFs). As demonstrated by the Advisory Opinion of the Court of Arbitration for Sport in **CONI v Union Cycliste Internationale**[xxiv], the IF has the primary authority to prescribe the anti-doping rules of its sport and, in the event of a conflict, the anti-doping rules of an IF prevail over the rules enacted by an NOC or another national sports authority. Whilst that decision pre-dates the World Anti-Doping Code, I have no reason to doubt that the IFs would still regard it as valid and applicable.

The Bill recognises IFs, although they are described as International Sporting Federations.

A potential conflict arises under the definition of "national sporting organisation" in that it is possible for the IF and the ASC to recognise different NFs as being responsible for a particular sport in Australia. This is clearly undesirable and would have grave consequences.

Further, IFs have agreed to be bound by the World Anti-Doping Code. I appreciate the position of Australia as a State differs from a mere sports organisation and that Australia is a signatory to the two Conventions. However, the World Anti-Doping Code and the two Conventions may have different requirements – indeed the Code is expressly stated to not be part of the UNESCO Anti-Doping Convention.[xxv]

Should there be any differences between the requirements of the Code and the Conventions, how is it proposed that ASADA ensure its NAD Scheme permits Australian NFs to observe their obligations to their IFs? In saying this, I note the assurances of Mr Andrews in the Second Reading Speech that the NAD Scheme "*will*

be consistent with the mandatory provisions of the World Anti-Doping Code" although he had earlier stated it will reflect the provisions of the two Conventions.

(11) Much will depend on the provisions of the NAD Scheme. In the Second Reading Speech, Mr Andrews stated this *"will be a legislative instrument developed alongside the ASADA Bill, to be tabled in parliament."* At this point in time, the NAD Scheme (should it exist) has not been released for comment.

Yours sincerely

JOHN D COATES

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i In this letter I will refer simply to "athletes", but ask that this be understood as including "athlete support personnel" where appropriate.

ii i.e. the General Anti-Doping Convention and the UNESCO Anti-Doping Convention

iii For example refer to the matter of Martin Vinnicombe, the Australian Cycling Federation (as it then was) and ASDA.

iv The AOC understands from discussions with ASDA that ASADA will permit some a small number of sports organisations, such as the professional football codes, to continue their prosecutions of ADRVs within their respective sports subject to close ASADA oversight.

v Schedule 1, Section 3(xa) the Act.

vi Eg **AOC v S Eadie** Court of Arbitration for Sport 21 July 2004, **USADA v Tim Montgomery** CAS 2004/0/645

vii Section 25 Administrative Appeals Tribunal Act 1975

viii i.e. positive drug tests revealing the presence of a prohibited substance or method.

ix The ADRVs are:

- the presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen;
- use or attempted use of a prohibited substance or a prohibited method;
- refusing, or failing without compelling justification, to submit to sample collection after notification as authorized in applicable anti-doping rules or otherwise evading sample collection;
- violation of applicable requirements regarding athlete availability for out-of-competition testing, including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules;
- tampering, or attempting to tamper, with any part of doping control;
- possession of prohibited substances or methods;
- trafficking in any prohibited substance or prohibited method;
- administration or attempted administration of a prohibited substance or prohibited method to any athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.

x Section 14(3)

xi Per Lord Hewart CJ **R v Sussex Justices; ex parte McCarthy** [1924] 1 KB 256.

xii [2003] WASC 70

xiii *The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all*

cases is greater than a mere balance of probabilities but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be a preponderance of the evidence.

xiv **Brigginshaw v Brigginshaw** (1938) 60 CLR 336.

xv See Article 8 of the World Anti-Doping Code.

xvi Now Nicholas J of the Supreme Court of NSW

xvii **USADA v Tim Montgomery** CAS 2004/0/645 – paragraphs 5 and 6

xviii See section 2A of the Australian Sports Drug Agency Act 1990

xix See Section 11 of the Australian Sports Drug Agency Act 1990

xx See Appendix 1 to the World Anti-Doping Code.

xxi See Article 2 of the General Anti-Doping Convention.

xxii See Article 2 of the UNESCO Anti-Doping Convention.

xxiii In making this comment, I am aware of the use of the terms "sporting organisation" and "sporting events" in the Australian Sports Commission Act 1989 and the Australian Sports Drug Agency Act 1990.

xxiv TAS 94/128 pronounced 5 January 1995

xxv See Article 4.2 of the UNESCO Anti-Doping Convention.