



AUSTRALIAN OLYMPIC COMMITTEE INC
ABN 33 052 258 241
Registered Number A0004778J

SUBMISSION

concerning

AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY AMENDMENT BILL 2013

Executive Summary

- 1 The Australian Olympic Committee (AOC) welcomes the introduction of the Australian Sports Anti-Doping Authority Amendment Bill 2013 (the Bill).
- 2 It is paramount to the fight against doping in Australia that anti-doping authorities have the proper powers to investigate allegations of doping practices, in an increasingly sophisticated sporting environment.
- 3 The AOC is therefore highly supportive of the proposed amendments to the Australian Sports Anti-Doping Authority Act 2006 (the Act) and in particular the expansion of the Australian Sports Anti-Doping Authority's (ASADA's) investigative powers to enable it to compel persons to produce information and documents relevant to the investigation of possible Anti-Doping Rule Violations (ADRVs).
- 4 Without these powers, ASADA's ability to vigorously pursue potential ADRVs is potentially limited.
- 5 However, to be effective these powers must be backed by appropriate penalties for those who refuse or fail to comply with a disclosure notice. To this end, the AOC questions whether the proposed civil penalty for a failure to comply with a disclosure notice is sufficient or whether additional or more compelling consequences are required.

History

- 6 The AOC has a long and significant history of involvement in the fight against doping in sport, both as a National Olympic Committee responsible for its Australian Olympic Teams, and as a supporter of anti-doping reforms more broadly within Australia and internationally.
- 7 In particular, since as far back as 2000 the AOC has called for Australia's national anti-doping authority (in whatever form) to be properly empowered to receive and fully investigate allegations of doping practices.
- 8 In its July 2000 *Proposal for a Sports Doping Ombudsman* (Attachment 1) to the then Office of the Minister for Sports and Tourism, Senator the Hon. Jackie Kelly, the AOC called for the creation of the position of a Sports Doping Ombudsman who was to be empowered to require and compel persons to give information, produce documents and answer questions, unless the person had grounds for privilege.
- 9 The AOC again advocated for these powers in its November 2004 *Submission concerning the Discussion Paper about Proposed Legislation Affecting Australian Arrangements for the Investigation and Hearing of Sports Doping Allegations* (Attachment 2).
- 10 In particular, the AOC submitted that any Sports Doping Investigation Board (or alternatively, a Sports Doping Ombudsman) must have the power to compel the giving of evidence and the production of documents. "Absent such powers, it would be too easy for investigations into the majority of alleged anti-doping rule violations to result in findings of 'not proven' rather than 'proven' or 'dismissed'".
- 11 Again, such provisions ought to have regard to the preservation of privilege and the inadmissibility of admissions and evidence generally in subsequent civil and criminal proceedings and sporting tribunals concerning the individual.
- 12 The AOC continued to press the importance of these powers following the announcement in 2005 that the Government of the day would create a national anti-doping organisation, now ASADA. In particular, the AOC was vocal on this issue its correspondence with then Minister for the Arts and Sports, Senator the Hon. Rod Kemp, in 2005 and 2006, and in a related Media Release (Attachments 3 to 7, inclusive).
- 13 The AOC also addressed the issue in its January 2006 submission concerning the *Australian Sports Anti-Doping Authority Bill 2005 and Australian Sports Anti-Doping Authority (Consequential and Transitional Provisions) Bill 2005*, (Attachment 8) noting that "without the power to compel the giving of oral and documentary evidence, many allegations of ADRVs cannot be properly investigated and prosecuted".

- 14 The creation of ASADA in 2006 ultimately eliminated the need for an Ombudsman. However, despite the AOC's persistent calls, regrettably the power to compel information was absent from its legislative powers.
- 15 More recently, the AOC renewed its calls for ASADA to be given stronger investigative powers, in an open letter to Senator the Hon. Kate Lundy MP, Minister for Sport, in October 2012 (Attachment 9) and in a related Media Release (Attachment 10).
- 16 The AOC was pleased to note that *The Independent Review into Cycling Australia*, recently conducted by the Hon. James Wood AO QC, included a recommendation to extend ASADA's powers to investigate doping practices to compel persons to attend interviews and provide documents.

Australian Olympic Committee

- 17 On 5 March 2003, the AOC became a signatory to the World Anti-Doping Authority Code (WADA Code) and is responsible for assisting ASADA in initiating, implementing and enforcing the doping control process.
- 18 The AOC's roles and responsibilities as the National Olympic Committee for Australia are set out in its Anti-Doping By-Law.
- 19 Inter alia, the AOC undertakes to fully co-operate with and assist ASADA to vigorously pursue all potential anti-doping rule violations within its jurisdiction, including fully co-operating with any investigation ASADA is conducting into whether athletes or other persons may have been involved in each case of doping.
- 20 The commission of an anti-doping rule violation is a breach of the AOC's Anti-Doping By-Law.
- 21 The WADA Code applies to determine whether any Anti-Doping Rule Violation has been committed. The sanctions imposed by the AOC as a result of the finding of the commission of an ADRV are consistent with the WADA Code. The period or periods applicable will determine the length of time a person is ineligible for selection to or membership of any Australian Olympic Team, or to receive funding from or to hold any position within the AOC.

Australian Sports Anti-Doping Authority Investigations

- 22 Under the existing legislation, ASADA has the power to investigate possible violations of anti-doping rules to determine whether there is evidence of an ADRV as defined by the National Anti-Doping Scheme (NAD Scheme) and the WADA Code.

- 23 ASADA's investigative powers are not limited to testing for a prohibited substance. It has in place information sharing relationships with government agencies, law enforcement bodies and sporting administration bodies, including the AOC and National Federations.
- 24 ASADA also receives intelligence from a variety of sources and the scope of this intelligence gathering exercise has seen the collection of intelligence in accordance with the Australian Government Investigation Standards.
- 25 Information gathered from these sources assists ASADA not only in investigating the use of prohibited substances (in addition to testing), but to investigate the use of prohibited methods as well.
- 26 Once an investigation commences, the process which ASADA undertakes includes interviewing relevant persons and gathering evidence of a possible ADRV.
- 27 To date, there not been any power to compel a person to respond to ASADA's requests for information in the course of an investigation. This has been a significant weakness in the process. Persons interviewed may refuse to answer questions or to provide evidence.

Limits on Investigations

- 28 The increasing sophistication of sports doping practices and the inadequacy of a traditional reliance on athlete urine and blood testing, demands stronger powers of investigation.
- 29 In 2010 the Association of Summer Olympic International Federations (ASOIF) commissioned a survey of its member International Federations (IFs) (Attachment 11). The stated "objectives of this study were to establish the total expenditure on anti-doping, determine the distribution of that expenditure across the various aspects of anti-doping programmes, and relate this expenditure to the outcome of those programmes."
- 30 The study indicated that the stakeholders were spending approximately USD1.2 billion every Olympic quadrennial on testing alone and of the thousands of tests done annually only about 0.89% of these tests result in a meaningful ADRV. ASADA will be able to inform of the percentage of tests it carries out which result in an ADRV and the cost.
- 31 The Federal Government's representative on WADA will also be able to confirm the AOC's understanding that WADA itself recognises the failure of testing alone. WADA has set up an internal working group to review the problem, which it calls the "WADA Working Group on Ineffectiveness of Testing" chaired by Foundation WADA President, Richard Pound. The AOC has not seen any report of the Working Group.

- 32 The limitations of testing and the importance of witness testimony are most compellingly illustrated in the recent *Reasoned Decision of the United States Anti-Doping Agency (USADA) on Disqualification and Ineligibility*, in the Lance Armstrong case.
- 33 Acknowledging that Armstrong had employed a wide variety of measures to avoid testing, and despite Armstrong's own claims to have never had a positive drug test, USADA found overwhelming evidence that Armstrong had doped throughout much of his professional career. Of critical importance to the case were the sworn statements of more than twenty four witnesses, including members of Armstrong's cycling teams and other professional cyclists.
- 34 An earlier yet equally compelling example is the Bay Area Laboratory Co-operative (BALCO) cases. Documents obtained through a raid of the BALCO premises, the evidence of other athletes, and the use of subpoenas and other law enforcement mechanisms ultimately enabled the prosecution of Marion Jones and Tim Montgomery, among others, for ADVRs. Coercively acquired evidence provided the foundation for the successful outcome in these cases.
- 35 While these cases concern international athletes, it would be naive not to expect that the same underlying principles might apply equally to Australian athletes and officials.
- 36 In its own experience, an inability to compel the giving of evidence prevented the AOC from properly investigating allegations made by Australian Olympian Werner Reiterer in his 2000 book, *Poison*, of doping by many Australian athletes and collusion by sporting officials.

Proposed Amendments

- 37 The proposed amendments make provision for ASADA to require persons to whom a written notice (a disclosure notice) has been given to:
- (a) attend an interview to answer questions;
 - (b) give information of the kind specified in the notice;
 - (c) produce documents or things of the kind specified in the notice,
- if the CEO of ASADA reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD Scheme.
- 38 The proposed amendments make it a contravention of the Act if a person fails to comply with the notice.
- 39 A person is not excused from complying with the notice on the basis that to do so, might tend to incriminate the person or expose the person to a penalty. However, in

the case of an individual, the information or documents sought will not be admissible in evidence against the individual in criminal proceedings or civil proceedings, other than proceedings under or arising out of the Act or the Regulations. The AOC supports this.

Submissions

- 40 The AOC is largely supportive of the proposed amendments and, in particular, ASADA's powers to compel the giving of information and documents.
- 41 These powers are critical to enabling ASADA to properly investigate and prosecute ADRVs, particularly in cases concerning the use of prohibited substances and/or methods where urine and blood tests have not returned a positive result.
- 42 The proposed amendments include the power to impose a civil penalty for failure to comply with the notice, which is enforceable through the Federal Court or other court having jurisdiction in relation to matters arising under the Act.
- 43 The AOC questions whether a civil penalty will be sufficient to compel compliance when non-compliance will simply amount to a debt payable.
- 44 Athletes are being increasingly well rewarded financially for their successes in sport at the highest levels through funding, prize money, and from sponsorships and endorsements.
- 45 While membership of an Australian Olympic Team does not create an employment relationship, the AOC provides significant medal incentive funding to a large number of athletes. The AOC's budget for direct funding to medallists, known as the adidas Medal Incentive Funding, in respect of the 2014 Australian Olympic Winter Team and the 2016 Australian Olympic Team, is AUD4,763,000.
- 46 In this respect, the AOC queries whether the penalty for a failure to comply with a disclosure notice, currently equating to AUD5,100, is inconsequential.
- 47 The AOC submits that the legislation should also provide expressly that the failure to comply will give rise to an adverse inference against the person, on which the ADRVP may make its decision or otherwise act.
- 48 The AOC has recently resolved to introduce the requirement for athletes and others involved with the AOC to make statutory declarations in relation to any ADRV.
- 49 Any person who does not make a statutory declaration, or who in the AOC's opinion makes a false one, will be ineligible for membership of any Australian Olympic Team or Shadow Team. Likewise, any funding will be withheld and the person will be prevented from holding any position within the AOC.

- 50 Any person who wilfully and corruptly makes a false statutory declaration knowing it to be untrue will be guilty of a criminal offence and could face up to 5 years imprisonment.
- 51 The AOC has taken this strong stand in view of the implications of doping in sport, with the presence of cheating and dishonesty, the deception of the sports involved and the public who follow the sports, and the tendency for such conduct to feed corruption and criminality elsewhere.
- 52 In the light of these implications, the AOC calls for even stronger measures to be implemented in relation to the compulsion for persons responding to ASADA's disclosure notice in the course of an investigation.
- 53 The AOC submits the sanctions for a failure to comply with a disclosure notice should involve a criminal penalty to demonstrate the seriousness with which compliance should be considered by the Government and by the community. Criminal penalties should also apply to the truthfulness of the information provided.
- 54 Such penalties are known under the *Australian Securities and Investments Commission Act 2001* (Cth) in respect of the compulsive powers and penalties available for non-compliance.
- 55 Given the high esteem and reputation that individuals and sporting bodies can achieve through sport and the increasingly vast amounts of money invested in its development, promotion and operation, such measures are necessary, in the AOC's submission, to ensure integrity and honesty in the administration of sport in this country.

Public Hearing

- 56 The AOC would seek to appear as a witness should the Senate Rural and Regional Affairs and Transport References Committee hold a public hearing on 1 March 2013.

John D Coates AC
President, Australian Olympic Committee

21 February 2013