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Submission of the Commercial Bar Association of Victoria

The Senate Standing Committee on Community Affairs

**Inquiry into the Australian Sports Anti-Doping Authority
Amendment Bill 2014**

**To: The Committee Secretary
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia**

**From: The Commercial Bar Association of Victoria
Owen Dixon Chambers**

**Melbourne
Contact : Philip Crutchfield QC
Anthony Nolan QC**

These Submissions are NOT confidential.

Introduction

1. The Commercial Bar Association of Victoria (“**CommBar**”) and its Sports Section support the objects of the World Anti-Doping Code and in particular its aim to encourage and promote competition free from prohibited substances and methods and to prevent doping practices in sport.
2. CommBar acknowledges that Australia is required to adopt legislation giving effect to its international obligations under the UNESCO International Convention Against Doping in Sport.

3. The World Anti-Doping Code 2015 (**the 2015 WADA Code**) must not take precedence over the laws of the Parliament in relation to the rights of athletes and persons with whom they associate.

Summary

4. CommBar:
 - (a) generally supports the amendments set out in the Australian Sports Anti-Doping Authority Amendment Bill 2014 (**the Bill**);
 - (b) does not support the amendment concerning Prohibited Association Anti-Doping Rule Violation, the provisions which prevent the freedom of association between an athlete and a person described as an athlete support person and the definition of “athlete support person” as this broad definition has unintended consequences; and
 - (c) suggests that the Bill be amended to remove the right to appeal to the Administrative Appeals Tribunal a decision by the Anti-Doping Rule Violation Panel to make an assertion relating to an investigation of a possible violation of the anti-doping rules by an athlete or support person.
5. These submissions are divided into two Sections:
 - (a) General submissions concerning:
 - i. the amendments associated with the Prohibited Association Anti-Doping Rule Violation ; and
 - ii. the removal of the right of an appeal to the Administrative Appeals Tribunal.
 - (b) Schedules which make comment and submissions on the individual amendments in the Bill. For the purposes of simplicity these submissions will adopt the Schedule Headings in the Bill.

SECTION ONE

General submissions

A. Prohibited Association Anti-Doping Rule Violation

6. The 2015 WADA Code introduces a new form of anti-doping rule violation called “Prohibited Association”.¹ Included in the Prohibited Association is a class of persons defined as “Athlete Support Personnel” as defined in the Code.

Any Coach, Trainer, Manager, Agent, Team Staff, Official, Medical, Paramedical Personnel **Parent** or any other Person working with, treating **or assisting** an Athlete participating **in or preparing** for sports Competition” (emphasis added).

7. The purpose of the Prohibited Association provisions are correctly summarised in the Explanatory Memorandum:²

“This ADRV is designed to curtail the influence of people with a proven history of doping and with the skills to facilitate systematic doping programs”.

8. CommBar supports the amendments to the 2015 WADA Code to ensure that coaches, trainers and professional personnel with medical expertise adhere to the highest standards. Those who have convictions for criminal offences for matters which would constitute an anti-doping violation or anti-doping rule violations should be subject to possible exclusions from dealing with athletes for a **period of 6 years**.
9. CommBar does not support the extension of the definition of “Athlete Support Personnel” to include classes of persons other than coaches, trainers and professional personnel with medical expertise. The scope of the provisions set out in the 2015 WADA Code exceed the stated aim.
10. Most athletes have support staff who are volunteers, parents, friends or untrained persons who just want to lend a hand. It would be surprising to these

¹ See 2.10 of the WADA Code 2015 page 23.

² See page 2 Explanatory Memorandum as referred to in paragraph 8 above..

people to learn that they are now subject to the 2015 WADA Code because of the definition of “Athlete Support Personnel”.³

11. CommBar is concerned with the wide application of rule 2.10 of the 2015 WADA Code. In particular rule 2.10 refers to:

“Association by and *Athlete* or other *Person* subject to the authority of the *Anti-Doping Organisation* in a professional or sport-related capacity with any *Athlete Support Person*”.

This phrase is ambiguous and not consistent with the definition – “*Athlete Support Personnel*” and it does not seek to identify is meant by a “sport related capacity”. It is too wide and too onerous.

12. CommBar submits that the inclusion of a “parent” is unnecessary and ill advised. Many athletes live with their parents who prepare food for them. This likely is assisting an athlete to participate or prepare for sports competition. The Bill does not afford any express protection to the parents to ensure their role as parents in providing traditional family support for a young athlete is affected by an overzealous interpretation of the WADA Code. The ASADA Act should be amended to enshrine such protection.

13. The statements in the Explanatory Memorandum⁴ misstate the provisions of the Code:

“WADA has drafted this ADRV to ensure that an athlete can maintain personal relationships with other family members”.

This provision does not appear in the 2015 WADA Code or the commentary. There is no explanation as to how the protection can occur or that the 2015 WADA Code should be interpreted in this manner.

“An ADRV would only be established if the association is one that the athlete or other person can reasonably avoid”.

It may be available to an athlete to live away from home to reasonably avoid that situation. But that in itself is totally unreasonable and unnecessary.

³ World Anti-Doping Code 2015 Appendix 1 Definitions at page 132.

⁴ Circulated with the authority of Minister of Sport the Hon. Peter Dutton.

“The limitation on family members is that they will not be able to assist the athlete in their preparation, involvement or participation in sport should they fit the criteria for prohibited association.”

It is difficult to see how this statement can be reconciled with a domestic situation where a family will be required to provide the strict dietary requirements of an elite athlete.

14. The Bill should include provisions which expressly protect the family relationship.
15. A simple example highlights the issue. An athlete resides with her parents. The athlete is subject to a NAD Scheme. The parents provide general assistance to the athlete by providing shelter and transport to and from training. The parents are convicted of possession of cannabis which is a prohibited substance in competition and on the prohibited list. The court finds that the drugs were for personal consumption. The parents would fall into a class of persons who could be considered as “persons with a “disqualifying status” if they are considered an “athlete support personnel”.⁵ The conviction is disclosed to the CEO of ASADA. She or he may determine to issue a disqualifying notice on the athlete and the parents. The athlete may not have the resources to shift out of home and would be required to rely upon the term “reasonable” to continue the relationship. What is reasonable for the child of an upper class member of society may be unreasonable for a family whose parents are in a compromised financial position.
16. The potential sanctions faced by the athlete are clearly disproportionate.
17. The provision in the Code is clearly ill-conceived and should not be adopted as part of the law in Australia.

⁵ See the 2015 WADA Code section 2.10.2 page 23.

Disciplinary or professional proceedings?

18. The above example dealt with criminal convictions of parents. However the 2015 WADA Code seeks to extend its operation to persons who have been the subject of disciplinary or professional proceedings. Clause 2.10.2 refers to:

“disciplinary or professional proceeding to have engaged in conduct which would have constituted violation of the anti-doping rules if Code-compliant rules had been applicable to such a person.”⁶

19. No attempt has been made to define the meaning of “disciplinary or professional proceeding”.

Does the definition extend to a proceeding taken against a person who voluntarily joins a coach’s association with the object of enhancing the profession of coaches?

Does it extend to professionals such as accountants or lawyers who may be defined as “support staff”?

Both occupations may be classified in the category of agents and player managers. But these people will have little day to day contact with the athletes. If the lawyer or accountant is charged by his professional association for consuming a prohibited stimulant such as cocaine and that person is found guilty of the charge but given a warning is that “convicted or found in a criminal disciplinary or professional proceeding”?

Does this mean that person may be classified as holding a “disqualifying status” and may be required to cease dealing with the athlete for a period of 6 years from the date of the so-called “disciplinary or professional proceeding”?

20. None of these matters are explained by the Explanatory Memorandum or the 2015 WADA Code. It was open to WADA to draft the 2015 WADA Code to a more acceptable standard. It has chosen not to do so.
21. CommBar submits that clause 2.10 of the 2015 WADA Code is oppressive and unfair and not a proportionate response to the spread of doping. As drafted the

⁶ See 2.10.2 of the Rules Anti-Doping Code 2015 page 23.

provisions will not limit the influence of “doping facilitators”, they clearly affect the human rights of individuals. CommBar does not accept that the human rights implications as set out in the Explanatory Memorandum have adequately considered the issue of the person who may have been professionally disciplined for misconduct. The statement that “Mr Costa provided a favourable opinion” is an unacceptable delegation of the assessment of human rights implications and does not absolve the Australian Government from undertaking an independent assessment of the human rights implications.

SECTION ONE

General Submissions

B. Removal of right to appeal to the Administrative Appeals Tribunal

22. The Anti-Doping Rule Violation Panel (**ADRVP**) is established under Part 5 of the ASADA Act. It is not a hearing body within the meaning of article 8 of the WADA Code.⁷
23. Under section 13 of the Act the ADRVP is required to make findings relating to investigations of possible violations of the anti-doping rules⁸ and required to establish and maintain a register of findings.⁹
24. The role and functions of the ADRVP was recently considered in *Anti-Doping Rule Violation Panel v XZTT*¹⁰. The Full Federal Court highlighted:
- (a) that the register of findings was an assertion of a violation, not a finding;¹¹
 - (b) there was no power which would enable the ADRVP to reach a concluded finding;¹²
 - (c) the rights of the athlete will not be affected by the decision of the ADRVP as these rights will be determined at a hearing before the Tribunal or CAS:
- “[98] The Panel conducts no final determination process and no hearing. It administrative process to record an entry onto the Register is quite separate from the contractual steps that lead to a hearing in the CAS. The Panel is not involved in that hearing. It is the result of that hearing alone (unless the athlete accepts the sanction) which considers the case against and for an athlete.

⁷ See section 41(3) ASADA Act 2006.

⁸ See section 13(1)(h) of the Act.

⁹ See section 13(1)(i) of the Act.

¹⁰ [2013] FCAFC 95 (19 August 2013).

¹¹ See paragraphs [62], [98].

¹² See paragraphs [84], [92].

[99] The Panel contends, and we accept, that, with respect, the error in the approach taken by the AAT is that it treated the Panel as if it was to make actual findings of violations and it records such actual breaches on the Register”.

25. It can be seen that the role of the ADRVP under the Act is confined.
26. The Bill proposes to substantially amend the functions which are currently undertaken by the ADRVP.
27. CommBar strongly supports the fundamental change by the deletion of the Register of Findings and the establishment of a Violations List.¹³ The details of an athlete are only entered onto the Violations List after a sanction has been imposed.
28. If the Bill is passed the role of the ADRVP will be substantially reduced. Under section 14(3) of the Bill its role will now be to “make an assertion relating to the investigation of a possible violation of anti-doping rules by an athlete or support person”.
29. CommBar does not support the proposed amendment to section 14(3) of the Act as it is unnecessary. Any athlete will be aware of the investigation and has the right to present material to the investigators. If an infraction notice is served that athlete will have the right to present any evidence at a Tribunal or at CAS.
30. If, contrary to these submissions the Parliament proposes to amend subsection 14(3) and 14(4) of the Act as set out in the Bill then it should include a provision whereby there is no right for an athlete to seek a review of decision to make an assertion relating to an investigation of a possible violation of anti-doping rules by an athlete or a support person.
31. The processes of Administrative Appeals Tribunal (**AAT**) appeal can delay hearings before a Tribunal. In *XZTT* the athlete was tested in China in 2010.

¹³ See paragraph 19A of the Bill.

The AAT handed down its decision in 2012 and the Full Federal Court handed down its decision in August 2013, three years after the athlete was tested. The WADA Code is designed to provide an efficient and expedited hearing process to enable anti-doping violations to be heard by an independent tribunal as soon as is practical. This aim cannot be achieved if the athlete is given the right to appeal procedural findings relating to possible violations.

32. ASADA has been recently criticised by WADA on 1 October 2014. The Australian published an article “Angry WADA trashes tardy ASADA”. The article highlighted that WADA complained about “a number of delays directly as a result of the lack of activity or decision by either ASADA for the Australian Government”. Any review process which would delay a hearing of any infraction notices before an independent tribunal should not be tolerated.
33. CommBar suggests that the ASADA Act be amended to specifically remove the right of an athlete or a support person to appeal a decision of the ADRVP made pursuant to sections 14(3) or 14(4) of the Act.

SECTION 2

Schedule 1 – Prohibited Association

Section 4 (definition of support person)

34. CommBar submits that the proposed definition of “Athlete Support Person” or “Athlete Support Personnel should not be incorporated into the ASADA Act for the reasons set out in the submissions.
35. If contrary to these submissions the Act is to be amended then CommBar makes the following comments.
36. The stated aim of the Amendment Bill is “the continued operation of a globally harmonised anti-doping framework”. Therefore the definitions in the ASADA Act should mirror the definitions in the 2015 WADA Code.
37. The 2015 WADA Code defines “Athlete Support *Personnel*”.¹⁴ However, rule 2.10 refers to “*Athlete Support Person*”.
38. CommBar believes that the Amendment would be better framed if the definitions in the 2015 WADA Code and the ASADA Act are identical.
39. CommBar suggests that Section 4 should repeal the current definition of “support person” and substitute the following words:

“*Athlete support personnel* means any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other person working with, treating or assisting an athlete participating in or preparing for sports competition.”
40. It is acknowledged that the change in definition from “support person” to “athlete support personnel” will cause consequential changes to the Bill and in

¹⁴ See Appendix 1 definitions page 132.

particular the definitions which appear in section 13 of the *Bill*.¹⁵ But these changes are minor

¹⁵ See for example Heading section 13, section 13(1)(j), section 13(3) and the proposed section 13(1)(f).

Schedule 2 – Australian Sports Drug Medical Advisory Committee

1. CommBar supports the amendments relating to the Australian Sports Drug Medical Advisory Committee (ASDMAC).
2. The procedure which entitles an athlete to obtain a Therapeutic Use Exemption (TUE) should be as simple as possible. The proposal to have a review process by ASDMAC members is practical and sensible. However, this process should be reviewed in three years to ensure that the process is working and a genuine (rather than theoretical) review is available to athletes.
3. The provision in relation to at least one member having experience in the care and treatment of athletes with impairments is essential.
4. Subject to the above, CommBar makes no other submissions in relation to the proposed amendments set out in Schedule 2.

Schedule 3 – Violations List

Overview

1. CommBar strongly supports the introduction of a Violations List. CommBar supports the removal of the Register of Findings currently included in the ASADA Act.
2. The maintenance of a Register of Findings that a “possible violation” may have occurred has always been unnecessary and unworkable. It has permitted several challenges to the decisions made by the Anti-Doping Rule Violation Panel.¹⁶ CommBar has always preferred that the matters should be sent to a tribunal to make a determination as to whether a violation of the anti-doping rules has occurred rather than “possible violations”.
3. CommBar does not support any appeal to the Administrative Appeals Tribunal of a decision by the ADRVP of an **assertion** of a violation of the anti-doping rules as contemplated by section 14(4) and 15(2)(d) and (e) of the Bill. Further amendments should be made to the Bill to remove the right to an appeal to the Administrative Appeals Tribunal.
4. In relation to the specific amendments CommBar makes the following comments:
 - (1) **Section 4:** CommBar agrees with the proposed amendment.
 - (2) **Section 4:** CommBar agrees with the proposed amendment.
 - (3) **Section 4:** CommBar agrees with the proposed amendment.
 - (4) **Sub-paragraph 10(1)(a)(vi):** CommBar agrees with the proposed amendment.
 - (5) **Paragraph 13(1)(h) :** CommBar agrees with the proposed amendment.
 - (6) **Paragraph 13 (1) (i):** CommBar agrees with the proposed amendment.
 - (7) **Paragraph 13(1)(j) :** CommBar agrees with the proposed amendment.
 - (8) **Paragraph 13(1)(ja):** CommBar agrees with the proposed amendment.

¹⁶ See for example *Anti-Doping Rule Violation Panel v XZTT* [2013] FCAFC 95 (19 August 2013)..

- (9) **Sub-paragraph 13(1)(k)(1):** CommBar agrees with the proposed amendment.
- (10) **Paragraph 13(1)(l):** CommBar agrees with the proposed amendment.
- (11) **Paragraph 13(1)(m):** CommBar agrees with the proposed amendment.
- (12) **Sub-paragraph 13(1)(m)(ia):** CommBar agrees with the proposed amendment.
- (13) **Sub-section 14(3):** CommBar agrees with the repeal of sub-paragraph 14(3). There is no need to notify an athlete as the ADRVP is not making a “decision” other than to make an “assertion” to the CEO. All matters can be conveniently heard by the Tribunal.
- (14) **Sub-section 14(4):** Sub-paragraph 14(4) should be repealed. The ADRVP will merely make an “assertion” to the CEO. This is an internal process. The athlete will already been aware of the investigation as she or he will have attended interviews with the ASADA staff. It is an unnecessary step to require the athlete to have notice of the “assertion”. This will be done by the investigators.
- (15) **Paragraphs 15(2)(d) and (e):** These paragraphs are unnecessary and should be repealed.

Part 2A Violations List

- 5. CommBar strongly agrees with the introduction of the Violations List.
- 6. **Sub-paragraph 19(a)(3):** The section should include a requirement to disclose the drug or prohibited substance which constitutes the anti-doping rule violation. This type of information is already available in the ASADA annual reports. It would be convenient if that information was included on the Violations List.
- 7. **Paragraph 19A (5)(a)(i) and (ii).** CommBar strongly supports that the interests of children be protected and that the names of children are not entered onto the Violation List. If a person aged under 18 commits an anti-doping rule violation

and subsequently commits another one after that person is older than 18, both violations should be entered on the Violations List.

8. **Paragraph 19A (vi)(2).** This clause appears to be unnecessary. It appears that paragraph 19A (vi)(b) is sufficient.

Part 2 – Application provisions

9. CommBar supports the application provisions relating to findings and the Violations List.

Schedule 4 – Information Management

1. CommBar supports the amendments proposed in Section 4, Paragraphs 24J(2)(e), Subsections 24N(1), 24N(2), and the addition of Subsection 24N(3)(a).
2. CommBar supports the amendments to Division 1 Part 8 and in particular paragraphs 67, 68 and 68A.
3. Paragraph 68B is generally supported by CommBar. However, CommBar believes that paragraph 68B(3)(g) is inappropriate. It is the disclosure of information relating to athletes which affects the rights of athletes. It is CommBar's view that if such information is to be disclosed then express powers should be given in the ASADA Act and not in the Regulations.
4. CommBar supports the disclosures permitted pursuant to paragraphs 68C, 68D and 68E.

Amendments of the Customs Administration Act 1985

5. CommBar supports the amendment.

Schedule 5 – Other amendments

1. CommBar supports the other amendments set out in Schedule 5.
2. CommBar makes specific reference to the amendment of the limitations period from 8 to 10 years. CommBar agrees that given the advances in medical testing and analytical services it is appropriate to extend the limitations period.

Schedule 6 – Simplified outlines

1. CommBar supports the simplified outlines as set out in Schedule 6.

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