30 April 2010

John Coates AC  
President  
Australian Olympic Committee  
PO Box 312  
ST LEONARDS NSW  1590  

Cc: Fiona De Jong  
Director of Sport  
Australian Olympic Committee

Dear Mr Coates

**Law Institute of Victoria (LIV) and Victorian Bar Sports Law Committees - Elite Athlete Legal Assistance Scheme Proposal**

This letter is written on behalf of the Law Institute of Victoria (LIV) and the Victorian Bar Sports Law Committees.

The commercial opportunities available to athletes competing in Olympic events are inextricably tied to their National and Olympic team selection. With an athlete’s livelihood riding on selection it is no surprise that there has also been a marked increase in the media scrutiny on recent selection disputes. These disputes will often lead to long-term friction between athletes and governing bodies to the detriment of the sport. It is therefore critical that the selection appeal process is both transparent and fair and that an athlete involved in a selection dispute is given the opportunity to properly present his or her case. It is also important that selection disputes cause minimal disruption to both the athlete and the sporting body in the lead up to the main event.

Attached to this letter is a proposal developed by the LIV and Victorian Bar Sports Law Committees for athletes involved in selection disputes to be represented by members of an approved panel of sports lawyers. While the Scheme is directed at assisting the athletes, it is also envisaged that it will be of benefit to all Olympic sports and their administration as it will provide good counsel that will ultimately make the selection dispute process fairer, more efficient and at the same time aim to minimise the distraction of selection disputes.

Good counsel and advocacy from experienced lawyers is likely to reduce the frequency and intensity of selection disputes which will in turn reduce the emotional and financial cost of the appeal process. Most importantly it will give both athletes and the sporting organisations confidence in the system by alleviating any actual or perceived bias in the selection process.

We understand that the Australian Olympic Committee already provides a similar service through the ‘Olympic Appeals Consultant’. It is our submission however that this type of valuable resource should be made available to athletes during the selection process to the national team (which is often an intermediate step to Olympic selection) and it should also be extended to legal advice.
The LIV and Victorian Bar Sports Law Committees would be interested in meeting with you to discuss our proposal. We are aware that the proposal will require a proper process of analysis, consultation and policy consideration and we would be happy to assist with this in any capacity.

Please do not hesitate to contact Michael Hayes, Lawyer, Commercial In-House Counsel from the LIV on (03) 9607 9382 or mhayes@liv.asn.au or Anthony Nolan, Deputy Chair Victorian Bar Sports Law Committee to discuss any aspect of the proposal and to organise a meeting with members of the LIV and Victorian Bar Sports Law Committees.

We look forward to hearing from you.

Yours sincerely

Tony Nolan SC
Deputy Chair
The Victorian Bar Sports Law Committee

Caroline Counsel
Acting President
Law Institute of Victoria
Elite Athlete Legal Assistance Program

Law Institute of Victoria Sports Law Committee and the Victorian Bar Sports Law Committee have prepared this proposal with a view to assisting athletes involved in selection disputes.

Currently, athletes who are involved with selection disputes are not provided with any legal support during a selection appeal. This proposal sets out some of the difficulties currently faced by athletes and then explains the proposal to provide legal support to athletes during an appeal process.

This proposal, if implemented, should reduce the number, duration and intensity of selection disputes. In turn, this will reduce the financial and emotional cost that is inherent in the process.

Current difficulties with the selection appeal process

The selection process is a vitally important event for Athletes. First, it affects their rights and interests in terms of their right to represent their country and to access funding. These entitlements arise by virtue of the contractual relationship of the athletes with their sporting federation, the constitution of the federation itself and the imprimatur of the AOC.

An Olympic selection policy is a legal document, usually drafted by lawyers with the assistance of specialists, and its interpretation requires legal analysis. As a result, the appeal process requires specialist legal assistance beyond the capacity of almost all athletes.

An athlete who feels that a mistake was made in the selection process will have a right of appeal. Often, the athlete will not know what those rights are or how to get assistance with challenging a decision. Some athletes will choose to represent themselves and others will engage lawyers with no previous experience in dealing with sports law. If this occurs, it is often difficult for the athlete and the sport’s administrator to resolve the dispute amicably or efficiently.

Many sports in Australia currently discourage the involvement of lawyers in selection appeals, and some expressly forbid the representation by barristers or solicitors. Consequently, athletes must either represent themselves or have a lay person represent them.

The very nature of an appeal is that it is a legal process. Principles of natural justice, actual bias, the burden of proof and the construction of the selection policy are matters which are inherent to the appeal process. Presenting these arguments in the short space of time allowed in selection disputes is difficult without legal experience.

Requiring an athlete or their lay representative to address these issues during an appeal will often result in frustration for the athlete and a high chance that the issues are not properly presented to the appeal board. If the athlete is unsuccessful, there is therefore a high likelihood of further appeals.
Effect of appeals on athletes

Once a selection dispute is formalised, its disruptive effects can affect the performance of many athletes. This applies to both non-selected athletes and those athletes whose position on the team would be affected by the appeal. It can also have a long term effect on the relationship between the athlete and his or her coaches and administrative support staff. This strain will often spell the end of an athlete’s career.

In the experience of the LIV and Victorian Bar Sports Law Committees, discouraging athletes from obtaining legal representation is likely to result in a perception by the athlete that they have not been dealt with fairly. If legal submissions from the athlete are not formulated properly, they are likely to be given insufficient consideration by the appeal board, leading to further appeals and the associated costs and delays.

The need for this type of service has been addressed by the Australian Olympic Committee in the provision of Olympic Appeals Consultants, but this assistance is limited to a liaison and explanatory role for Olympic non-selection. It is not available to athletes considering an appeal for non-selection to the national team.

Proposal for athlete representation

It is our submission that all Olympic sports that allow selection appeals should be required by the AOC to allow athletes legal representation during all stages of the appeal process.

In the experience of the LIV and Victorian Bar Sports Law Committees, having experienced legal practitioners on both sides of any dispute will result in a better outcome for all parties. This principle applies equally to appeals of an administrative nature, such as selection disputes.

The LIV and Victorian Sports Law Committees suggest that a panel of solicitors be made available to athletes involved in selection disputes. The athlete can then be properly advised by specialist legal practitioners on the grounds for appeal and the prospects of success. This will reduce the feeling of alienation athletes often feel when adverse decisions are made by immediately providing an avenue of support.

By having experienced members of the legal profession representing athletes, the appeal process can operate more effectively by the lawyers filtering and narrowing the terms of the dispute. It may also serve to discourage appeals with little prospect of success, reducing the number of appeals. Any appeals are also more likely to resolve quickly.

Cost of representation

Athletes are often young and without access to financial support. The primary source of income for most full time athletes is from funding from the Australian Government, but this support is not sufficient to cover legal fees. If this proposal is accepted, it is submitted that the cost of panel of lawyers representing athletes should be externally funded with no obligations for athletes to pay.
It is submitted that a selection dispute should be made on a ‘no cost’ basis: that is, neither side will be required to pay the other’s legal costs if it loses. The prospect of costs order against an athlete will often discourage athletes from appealing a decision, further alienating that athlete.

If this submission is adopted, it would seem likely that the overall cost of selection disputes would not increase, but remain the same or be reduced for the reasons given above. This proposal should also reduce the time spent by administrators preparing for the appeal process.

Summary

All Olympic sports that allow selection appeals should be required by the AOC to allow athletes legal representation during all stages of the appeal process. This approach will:

(a) Reduce the frequency of selection appeals through impartial advice to athletes on their prospects of success, discouraging appeals with no likelihood of success and reducing the rate of appeals to the CAS.

(b) Assist with the early resolution of disputes. If an athlete has faith in the decision making process and feels that the matter has been properly heard, improving the perception of justice, the chance of further appeals to the Court of Arbitration for Sport will be reduced.

(c) Reduce the conflict and tension associated with the decision. By having an impartial advocate acting for the athlete the process is more dispassionate, reducing the likelihood of subsequent friction between the athlete and the coaches or administrators of the sport, reducing the effects of selection disputes on the performance of athletes.

Contact details

For any enquiries in relation to this proposal, please contact Ben Patrick on 9321 9899.