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Submission of the International Council for Arbitration for Sport dated 29 October 2008

I make this brief submission to the Independent Sports Panel ("ISP") broadly in support of the submission of the International Council for Arbitration for Sport ("ICAS") to the ISP dated 29 October 2008, and further to my remarks concerning the current cost of sporting disputes, published in the Editorial of the 2007 edition of the *Australian and New Zealand Sports Law Journal*, which accompanied the ICAS's submission to the ISP.

My submission addresses a discrete but important aspect of sports administration, that being the modern challenges which now confront athletes, officials and sporting organisations in the determination and resolution of sporting disputes, which appears to fall within the ISP's remit to '*look for better ways to run, promote and manage sport in Australia*'.

With the rapid growth in the internationalisation and professionalisation of modern sport over the past 25 years and with more at stake nowadays in the participation in sport for athletes and sporting organisations (at all levels from grass-roots right through to the elite categories), there has been a corresponding increase in the number of sporting disputes and their complexity. A consequence of this legal trend is a greater number of cases being heard in both the Ordinary Division (ie. hearings at first

instance) and the Appeal Division of the Court of Arbitration for Sport (“CAS”), involving Australian athletes and sports organisations, which address issues ranging from selection disputes to the more legally and factually difficult cases involving doping and off-field conduct. The resolution and/or determination of such sporting disputes is important, not only because of the broad and influential role sport plays in Australian society, but also because the outcome of these disputes ultimately impacts upon an individual's participation in their chosen sport, and/or an organisation's administration of a particular sport.

Because of the more legalised structure of modern sport in Australia, which has emerged as a consequence of the Constitutions, Rules, or Charters of the Australian Olympic Committee and our national sporting federations (“NFs”) being required to conform with the governing legal provisions of their international parent organisations (ie. the International Olympic Committee and the international sporting federations), in areas such as anti-doping under the *World Anti-Doping Code* and dispute resolution, where the CAS is required to be the ultimate and final arbiter of all sporting disputes, sporting disputes have become more intrinsically complicated.

It is with this internationally-driven trend towards legalisation in sport and the consequential complication of sporting disputes that the monetary cost of the determination of these disputes has also increased.

It is a trite proposition that many of Australia's elite athletes and NFs (especially those involved in Olympic sports) have little in the way of financial means and could not otherwise afford to be properly legally represented, if they were to be engaged in a sporting dispute. While there will always be plenty of well-meaning lawyers who will represent athletes and smaller NFs, sports organisations or clubs when they are engaged in sporting disputes on an honorary or pro-bono basis (often because of their involvement in, or love of, a particular sport), such persons or entities (or their lawyers) are unable to bear the considerable financial costs in the form of hearing fees or advances, now being imposed upon them by the CAS, which hears and determines many of these disputes at first instance and which ultimately decides all appeals.

Central to my submission is that any fee or cost (other than a small nominal fee), imposed upon the parties to a sporting dispute, by any tribunal charged with its determination, (whether it be the CAS or any other tribunal, at either first instance or on appeal), should not be borne by any athlete or sports organisation.

The provision of fair and affordable access to justice for all Australians is a core responsibility of government and the Australian Government should not be relieved of this responsibility when it comes

to the determination of sporting disputes, especially when one considers the central role which sport plays in most Australian's daily lives and the shaping of our national identity.


I do not suggest that the government fund the direct legal costs of the lawyers representing those parties engaged in sporting disputes. There will always be a surfeit of generous and well-meaning members of the legal profession available to assist and represent athletes and sports organisations involved in sporting disputes on an honorary or pro-bono basis. Rather, I submit that the Australian Government fund those costs of any tribunal charged with the determination of sporting disputes at first instance (NF domestic tribunals or the CAS) and on appeal (the CAS).

While it has been suggested that the Australian Government should consider the establishment of a Australian National Sports Disputes Tribunal ("ANSDT") akin to the those national sports tribunals which exist in Canada (<http://www.adrsportred.ca/>) and New Zealand (<http://www.sportstribunal.org.nz/>), such tribunals would only be able to operate at a first instance basis, because ultimately any appeal involving an Olympic sport, the Olympic movement, or the *World Anti-Doping Code*, for the reasons already outlined above, would be required to be ultimately heard by the CAS. Under the prevailing international regime for the determination of sporting disputes as it presently stands, an ANSDT could ever only operate subordinate to the CAS. Also, an ANSDT, if it were established, would be duplicating the existing resources and expertise of the CAS in Australia, which have been well developed over the past decade.

Notwithstanding concerns amongst some practitioners and academics in the Australian sports community regarding some aspects of the structure and operation of the CAS, I submit that for the time being, despite the considerable hearing/composition costs now being imposed by the CAS upon the parties appearing before it, (at both first instance and on appeal), the payment of those case by case costs of the CAS by the Australian Government to hear and determine 'national' sporting disputes at first instance, would be a financially and more logistically efficient means of meeting the hearing/tribunal costs incurred by those parties engaged in sporting disputes, than those costs it would incur in the establishment from scratch of an ANSDT to serve an identical role to that already served by the CAS. Instinctively, I am of the opinion that the funding of the CAS (an established specialist sports tribunal with a well-respected and experienced panel of sports law arbitrators) by the Australian Government to hear and determine 'national' sporting disputes at first instance, on a case by case basis, would prove to be a much less expensive and more efficient use of government resources, than funding the establishment of a separate ANSDT.

Finally, where the CAS is the final arbiter of any 'national' sporting dispute, the Australian Government should meet the hearing/tribunal costs of the CAS, where the CAS is charged to hear and determine cases in its Appellate Division.

I trust my submission will be of assistance to the ISP and remain available to meet with the ISP at a mutually convenient time, should the ISP wish to discuss with me any of the matters I have raised above.

Yours sincerely,


Paul J. Hayes

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