

AUSTRALIA AND THE WORLD ANTI-DOPING CODE, 1999–2008

*A STUDY OF THE ROLE OF THE AUSTRALIAN GOVERNMENT AND
AUSTRALIAN PUBLIC SERVICE IN DRAFTING AND IMPLEMENTING THE
WORLD ANTI-DOPING CODE*



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For their generous cooperation, particular thanks must also go to Robert Crick, Alan Stretton, Kevin Thompson, Richard Ings, Bill Rowe and the Hon Jackie Kelly.

Any errors or omissions are my own.

About the Author

This study was drafted while I was a researcher in Senator Kemp's office and completing a Law and Economics combined degree at the Australian National University. Although on beginning the project I could see no apparent link to my studies, I have since learned that the common ground is extensive reading!

The study has given me an awareness that policy development and implementation is an ongoing process, a slow process, and that policy cannot be book-ended. There is much more to be done in the international anti-doping arena, but the achievements already sustained and outlined in this study evidence an important step forward in the fight against drugs in sport.

Introduction

The last decade has seen dramatic reforms to the way sports bodies and Governments have tackled the problem of doping in sport. After it became apparent that the issue would present a challenge to the credibility of ‘clean’ national and international competition, sports organisations and governments realised that a solution required their combined efforts, and an internationally harmonised approach.

This reassessment of anti-doping arrangements prompted sports bodies, led by the International Olympic Committee (IOC) and World Anti-Doping Agency (WADA)¹ under President Dick Pound and Chief Executive David Howman, to create the World Anti-Doping Code (2003) (‘Code’).² This new international framework harmonised anti-doping policies and promoted cooperation in research, drug testing, education, sanctions and adjudication.

National and international sports organisations agreed to be bound by the terms of the Code at an international anti-doping conference held in Copenhagen, in 2003. Legal and other issues prevented many governments from signing directly to the Code – a non-government document – but governments showed their support through the adoption of a UNESCO treaty; the *UNESCO International Convention on Anti-Doping in Sport* (‘UNESCO Convention’). Governments and sports bodies worked together to establish national framework by which the Code could be implemented, and supported WADA in its work.

This study serves two purposes: Part I identifies the stages in the development of the Code and UNESCO Convention, with particular focus on Australia’s role; and Part II outlines the way in which Australia implemented the Code domestically. In these two Parts, the study identifies some of the tensions that arose amongst governments and between sports groups and governments. Up until the establishment of the Code,

¹ The structure of WADA is shown in Appendix 2.

² A current version of the Code is available from the WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=250> (at 25 June 2008). See also Appendix 3. A revised Code was released in 2008, but the focus of this study is on the development of the 2003 Code, which was the initiation of this new international framework to inhibit doping in sport.

much of the work done around the world was severely limited by the fact that governments and sporting bodies (international federations and national bodies) were unable to agree on approaches and standards, and anti-doping suffered as a result. The developments discussed in this study evidenced a fundamental turnaround: the international community was working in cooperation to address the issue of doping in sport.

Scope of the Study: Australia's Role

The focus is on recording Australia's role, but it should be noted that other governments and national and international sports groups played a crucial role in these developments. In particular, Canada was always a strong supporter of the move to the new international standard provided by the Code, and proposed the creation of the International Intergovernmental Consultative Group on Anti-Doping in Sport (IICGADS), which moved forward that agenda. Malaysia, South Africa, Russia, Denmark and Norway hosted meetings essential to the development of the reforms, and provided significant negotiation groundwork to ensure that the Code could be moved forward at those meetings.

Japan headed the Asian region on WADA's Executive Committee, and worked tirelessly to generate support for the Code amongst some of the large Olympic nations in that region, who were otherwise disinterested in the new program. Tokyo was chosen as the location for WADA's Asia-Oceania Regional Office in 2004.³ Similarly, New Zealand worked with Australia to develop and promote the position of the Oceania region, including on the executive of WADA.

The Council of Europe played a vital role in formulating an early international agreement on anti-doping policy, the *Council of Europe Anti-Doping Convention*, agreed to in 1989. And the United Kingdom furthered this approach by playing a significant role in the establishment of a 1992 international agreement, the *International Anti-Doping Arrangement* (IADA), which many European and non-

³ Invitation to the Asian Region Intergovernmental Meeting on Anti-Doping and the Opening Ceremony of WADA's Asia/Oceania Regional Office, 26 March 2004.

European countries adopted. Particular credit for its wide adoption must go to Michele Verroken, then heading the United Kingdom anti-doping program. ASDA was also one of the driving forces behind IADA.⁴

In domestic developments, the United States developed an anti-doping body after a series of consultations with the Australian body – the Australian Sports Drug Agency (ASDA) – which had the expertise to guide the development of the new US body – the United States Anti-Doping Agency (USADA). As the Australian Government considered passing to ASDA the function of investigating potential doping violations, Australia turned back to USADA to share its experience of that kind of model, which had been adopted in the United States.

Research Method

The study has relied on many of the records of meetings and events that led to the cooperative approach now seen in Australia and around the world, both oral and written.

There is, of course, an array of primary and secondary resources publicly available on this topic, and these were also a source of the information contained in this paper. In particular, publications from ASADA and the ASC provided some of the important detail on the anti-doping program as it developed in the early 21st century and as the Code was put into practice in Australia.

Senator Kemp kindly made available a range of his briefing notes used in his time as Sports Minister. They provided interesting insights into the negotiations that paved the way for the new approach to anti-doping presented in the Code, and government agreement to it in the UNESCO Convention.

A number of interviews were also conducted with people who were intimately involved in the process. These were invaluable windows into the working of organisations and groups and their relationship to the Code as it developed.

⁴ ASDA Incoming Ministerial Briefing, 26 November 2001, 7.

With a change of Government in late 2007, the retirement of some of the key players in the anti-doping movement and the inevitable push of time it will be difficult to again review these documents and oral histories. It is hoped that this study will preserve these memories sufficiently to mark in our memory the efforts of many Australian politicians and public servants in the international development of a policy to prevent doping in sport.

PART ONE

DEVELOPMENT OF THE WORLD ANTI- DOPING CODE AND THE UNESCO INTERNATIONAL CONVENTION AGAINST DOPING IN SPORT

Early Stages

The Problem

It was clear in the late twentieth and early twenty-first centuries that doping in sport was a serious issue that had to be addressed.

Steroids were a clear problem. Of particular note was the positive test result recorded against Canadian sprinter Ben Johnson, which resulted in the revocation of his 1988 Olympic gold medal. He tested positive to the anabolic steroid Stanozolol, one of a number of popular doping methods at the time. Past Armenian weightlifter Sergo Chakhoyan, who became an Australian citizen in 1999, tested positive to the same steroid in 2001, and was stripped of almost \$63 000 in prize money and three Goodwill Games gold medals.⁵ Australian Institute of Sport (AIS) swim coach Gennadi Touretski was found to have possession of six Stanozolol tablets by ‘happenstance’, when a teenager stole his safe and it was recovered by police. Touretski was stood down from his position at the AIS on full pay pending a court hearing and, although his case was dismissed on the basis that his wife could not be compelled to give evidence,⁶ the case fuelled concerns about doping in Australia.⁷

And there were other concerns about doping, raised by a series of further doping scares at prominent international sporting events. Drug scandals tarnished the Olympic Games in 1984, 1988 and 1996, including the Johnson scandal mentioned above. There were also a number of positive doping test results at the World Swimming Championships in 1994 and again in 1998. Doping was evident at the 1998 Tour de France, where French police uncovered a large number of prohibited medical substances in the possession of riders. In 1998, Australian Customs also discovered a range of substances in the possession of travelling athletes.

⁵ ‘Drug shame costs world mark and \$60 000 prize’ (Sydney Morning Herald, Sydney) 27 September 2001.

⁶ Roderick Campbell, ‘Touretski charge dropped’ (Canberra Times, Canberra) 15 September 2001.

⁷ Although no swimmers tested positive to banned substances in 2001: Mark Ludlow, ‘Sports stars use banned substances: Tests find 19 cases’ (Sunday Telegraph, Sydney) 11 November 2001.

Blood doping was becoming popular, yet was very difficult to detect through testing. By it, athletes would remove then reinfuse their own blood in order to increase oxygen flow to the muscles during competition, thus enhancing performance. Erythropoietin, commonly known as EPO, was being used for the same purpose. Although a hormone naturally occurring in the body, it was being artificially produced then injected into the body to stimulate red blood cell production. A breakthrough EPO detection test, based on a combination of blood and urine analysis, was discovered by AIS and ADTL researchers just in time for implementation at the Sydney 2000 Olympic Games, and ASDA became the first agency in the world to conduct EPO testing.⁸ But there was more to be done, if anti-doping efforts were to keep up with doping schemes.

The history of institutionalised doping in the former East Germany and Soviet Union caused a stir amongst other governments. Suspicions of state-sponsored doping were raised in the 1970s and 1980s, and confirmed in the case of the former German Democratic Republic. These instances reinforced the realisation that governments could make or break anti-doping policy. Something had to be done, and governments realised that they had to be a part of the solution.

The increased prevalence of doping in sport was well publicised, and the negative publicity was undermining public confidence in existing anti-doping arrangements.

Existing Anti-Doping Agreements

Some important anti-doping agreements were already in place. The Council of Europe had created a multilateral agreement in 1989, the *Council of Europe Anti-Doping Convention*. Australia became the first non-European signatory to the Convention in 1994, and has since been followed by New Zealand and Canada. The Convention includes measures to restrict trafficking in doping substances, increase drug testing and improve doping control procedures, support education and information programs and ensure the effectiveness of penalties regimes.⁹

⁸ ASDA Incoming Ministerial Briefing, above n 4, 18.

⁹ ASDA 2004-05 Annual Report, 38.

The United Kingdom pushed to further this approach by playing a significant role in the establishment of the 1992 *International Anti-Doping Arrangement (IADA)*, an agreement designed in pursuit of ‘international harmonisation through the development and implementation of best practice national anti-doping programs.’¹⁰ Many European and non-European governments and national anti-doping organisations are party to the agreement, including Australia, Canada, Denmark, Finland, the Netherlands, New Zealand, Norway, Sweden, the United Kingdom and South Africa.

These agreements are important pillars in the anti-doping fight. But, it was clear at the end of the twentieth century there was more to be done, both amongst sports organisations and in moving forward an approach amongst governments.

World Conference at Lausanne and the Sydney Summit

A comprehensive and international approach applicable to sports bodies was needed. The IOC decided to convene a World Conference on Doping in Sport, which was held in Lausanne in February 1999, to address this serious issue. Participants – including representatives of Governments, inter-governmental and non-governmental organizations, the International Olympic Committee, International Federations, the National Olympic Committees, and athletes would attend.

At the same time, Australia was well aware that the threat of sports doping presented a serious problem for the Sydney Olympic Games to be held in 2000. The Australian Government was determined that the Sydney Olympics would not be known as ‘the dirty Games’.¹¹ With the Games as a catalyst for action, and a leveraging tool, the Australian Government was well-positioned to move forward the anti-doping program internationally. This was reinforced by the particular credibility of Australia’s anti-

¹⁰ ASDA 2004-05 Annual Report, 38.

¹¹ Jackie Kelly in a private interview with the author, 13 September 2007.

doping program domestically. The Australian Government had adopted a general ‘Tough on Drugs’ policy on 2 November 1997.¹²

The policy underlined the work of the Australian Sports Drug Agency (ASDA), which was created in 1990 and had primary responsibility for matters of doping in sport, including policy and program-implementation. ASDA was one of the first national anti-doping agencies (NADOs) established worldwide, and its expertise, as this paper elucidates, was instrumental in the development of effective NADOs and related bodies worldwide. Largely through ASDA, Australia was a leader in sport-government and interagency cooperation in anti-doping policy development.¹³

From this position, the idea of an intergovernmental forum on the issue was born. Natalie Howson, Chief Executive of ASDA, and her team initially formulated the idea of a strategy to better coordinate agencies involved in existing doping efforts, and to work to achieve similar cooperation internationally. Jackie Kelly, then Minister for Sport, took the idea to the Prime Minister, persuading the Australian Government to fund an intergovernmental conference to be held before the Sydney Games – the Sydney Summit.¹⁴ There were two particularly important outcomes of the Lausanne World Conference. First, participants agreed to the establishment of an ‘independent International Anti-Doping Agency’ to be fully operational for the Sydney Games in 2000.¹⁵ It was a body designed to improve the cohesion between sports organisations in dealing with the issue of doping in sport, and generally to deal with the issue decisively. As explained below, that body would become WADA. And secondly, it was at Lausanne that the plan to host the Sydney Summit was announced by Howson. A significant period of drafting and negotiation of the terms of an agreement for Sydney ensued.

¹² Prime Minister John Howard MP, ‘Tough on Drugs’ (Media Release, 2 November 1997).

¹³ Letters from Peter Bartels, Chairman of the Australian Sports Commission, to Minister Kemp, 11 July 2002 and 5 August 2002.

¹⁴ Officially titled the *International Drugs in Sport Summit*, it was held from 14–17 November 1999. The Summit was hosted by the Hon Jackie Kelly (as Minister for Sport) and chaired by the Hon Amanda Vanstone (as Minister for Justice and Customs). Of the 25 Governments present, most were represented by their sports minister, although several sent a senior department bureaucrat.

¹⁵ *Lausanne Declaration on Doping in Sport* (February 1999), art 4.

In the context of this centralisation of the drugs issue in Australian policy and the fast-approaching Sydney Olympics, Minister Kelly was working on a sports-specific drugs policy. On the basis of Howson's strategy, the Government announced their 'Tough on Drugs in Sport' policy in May 1999. It was initially coordinated by ASDA. After the first inter-agency meeting, the Department of Prime Minister and Cabinet suggested the involvement of DISR. The policy development role went to the Sport and Tourism Division, headed by Robert Crick. Although DISR had more extensive policy experience and resources than ASDA, ASDA retained all of the specific expertise in sports doping policy. Crick's Division had only a small sport advising unit, with no drugs in sport role. The sports policy advising role had gone to the Australian Sports Commission some years before. To ensure the transition from ASDA to the Department was smooth, and the policy development effective, Crick has said:

With Natalie's complete support, we seconded one of her senior officers to come to my Division to provide support. This was Stephen Richards. He got a few others around him, who, together, formed an effective nucleus to drive the policy exercise. I brought in others to organise the Summit – and together we all produced the strategic policy with the Summit as a key element.¹⁶

Once the Tough on Drugs in Sport policy was in place, Crick and Richards in conjunction with an interagency taskforce worked to draft the document that would be discussed and negotiated at the Sydney Summit. After negotiation, the final document became known as the *Sydney Communique* ('Communique'). There was, of course, a significant amount of negotiation needed to reach agreement as to the terms of the Communique. Some European Governments were particularly hesitant to adopt a new approach to anti-doping, concerned that there would be insurmountable jurisdictional issues where Governments tried to force sporting bodies to make particular commitments. Europe also questioned the need to alter the existing anti-doping arrangements from the 1989 Convention and IADA. Senator Amanda Vanstone, then Minister for Justice and Customs, was instrumental in negotiations. She led extensive private discussions with the European Union, Asia and the United States. The instrumental work from Senator Vanstone alongside

¹⁶ Robert Crick in a private email discussion with the author, 17 March 2008.

increasingly global support for the Communique assisted all Governments to come to agreement on its terms, including the European Governments.

One of the most significant outcomes of agreement to the Communique would be the meeting of governments over a period following the Summit. The Canadian Government had proposed a series of intergovernmental meetings to progress an anti-doping solution, known as the International Intergovernmental Consultative Group on Anti-Doping in Sport (IICGADS). The group would meet over the years following the Sydney Summit to reinforce international governmental agreement, and the continued momentum of anti-doping policy.¹⁷ At this stage the main drivers for this new approach were Canada and Australia, who had made recommendations at Lausanne, and had convened the Sydney Summit.

All 26 participants¹⁸ at the Summit agreed to the Communique on 17 November 1999. The consensus evidenced the credibility of Australia in the anti-doping program.

World Anti-Doping Agency (WADA)

The galvanisation of the government community at the Sydney Summit also prompted sports groups to act on their promise, made at Lausanne in February 1999, to establish an international anti-doping agency. There was little evidence of attempts to realise that promise over the proceeding eight months – until it became clear that governments were collaborating on an approach to the issue.

The Sydney Summit was a catalyst for action by sports groups on two fronts. First, it was in light of government action that the IOC voted to establish WADA. The vote was cast on 10 November 1999, less than a week before the Summit, although at this stage only as a paper organisation, with no official location or membership. The

¹⁷ The outcomes of the ensuing IICGADS meetings are discussed below. IICGADS met on 5 occasions from 2000 to 2002.

¹⁸ Argentina, Australia, Canada, Peoples' Republic of China, European Commission, Finland, France, Federal Republic of Germany, Greece, India, Italy, Japan, Republic of Korea, Malaysia, Netherlands, New Zealand, Norway, Pakistan, Republic of Poland, Portugal, Republic of South Africa, Spain, Sweden, Thailand, United Kingdom, United States of America.

establishment of WADA was an important turnaround for the IOC, which had previously refused to allow an external body to take full responsibility for anti-doping. Second, the IOC accepted its invitation to attend the Sydney Summit as an observer.¹⁹ In that capacity, the IOC proposed that governments agree to take a role in the development and operation of WADA. The proposal eventually became the *Summit Declaration on the World Anti-Doping Agency* ('Declaration'), and was appended to the Communique, thus adopted along with the main body of the Communique.

The Declaration had been negotiated between the IOC and governments. It was drafted under the coordination of Crick and Kevan Gosper (the Australian representative to the IOC), and drafts considered by delegates to the Sydney Summit. It was decided at this stage that governments would not contribute financially to WADA, since they were contributing significantly to national anti-doping policies. It was also agreed that WADA would be supported by government representation from all regions of the globe, resolving that the remaining seats²⁰ on the WADA Board would be distributed to ensure 'equitable geographic representation ... from regions other than Europe'. As to the choice of permanent location, the Declaration agreed that WADA would take note of the 'very strong preference expressed for a city other than Lausanne.'

The Sydney Summit provided the impetus for the development of a coherent anti-doping program, and thus leveraged the IOC to act to create the body that it had promised at Lausanne.

Conclusion

Using the 1989 Council of Europe Convention and IADA as a starting point, the Lausanne World Conference, Sydney Summit and the establishment of WADA were pivotal moments in the movement against doping in sport. Australia played a key role in convening the Sydney Summit, and in focussing attention on the need for a universal 'Tough on Drugs' approach to the doping issue. It marked a fresh attempt

¹⁹ Formal decision-making at the conference was to be restricted to Governments.

²⁰ One representative from each of the European Union, the Council of Europe and the Supreme Council of Sport in Africa had already been granted a seat on the WADA Board.

by the international community of governments to address the issue of doping in sport. The experience of the Australians, through ASDA and its Tough on Drugs policy (with the later addition of the Tough on Drugs in Sport policy), provided the credibility to bring governments to the table. It would be through the united efforts of governments and sports groups that an effective anti-doping code would be established.

This movement was an essential revitalisation to counter the negative publicity surrounding doping in sport at the time. It has been said that the policy of Tough on Drugs in Sport, evidenced in the *Communique*, subjected Olympic athletes to the most stringent anti-doping program yet, and did much to restore the image of international sporting competition in the context of a flood of negative publicity.²¹

²¹ DCITA Policy Statement, *Backing Australia's Sporting Ability – a more active Australia*, http://archive.dcita.gov.au/2005/12/backing_australias_sporting_ability_-_a_more_active_australia_-_policy_statement/backing_australias_sporting_ability_a_more_active_australia#4.0 (18 March 2008).

IICGADS

Having shown a commitment to a unified approach to doping, governments, WADA and the sports community now had to show exactly how it would tackle the sports doping issue. As had been agreed at the Sydney Summit, the International Intergovernmental Consultative Group on Anti-Doping in Sport (IICGADS) would meet over the years following the Sydney Summit. The meetings were co-chaired by the Australians, Canadians and usually also the hosting nation. They were intended to provide a forum in which government parties could agree to the governing framework of WADA, and to ensure that countries that did not participate in the Summit would have their views fully reflected in the activities of WADA. Once WADA became fully operational, the IICGADS ceased.

February 2000: Montreal

At the Montreal IICGADS Meeting in February 2000, the 33 participating Governments agreed to the *Montreal Declaration on Anti-Doping in Sport* (February 2000) ('Montreal Declaration'). Participants discussed the appointment of government representatives to WADA,²² the changes to the WADA Statute necessary to enshrine principles of independence, transparency and accountability, agreed to a review of the proposed financial contributions of Governments to WADA,²³ and considered the future action plan for IICGADS. Participants were 'mindful that Governments have a major role to play in developing a worldwide doping control program'.²⁴

²² Australia and New Zealand became the representatives for the Oceania region on the WADA Foundation Board, and Australia became the region's representative on the Executive Committee. New Zealand replaced Australia as the Oceania region representative to the Executive Committee in 2007, in accordance with the decision to rotate representation within each region: Montreal Declaration, art 1.7. For a current list of the Executive Committee members, see WADA website, *Governance* at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=290> (at 25 June 2008).

²³ As required by the *Sydney Communique* (November 1999). Over the following two IICGADS meetings they would determine to contribute a full half of WADA's funding.

²⁴ Montreal Declaration, preamble.

The Meeting also suggested a policy direction for WADA. The IICGADS recommended the IOC require sports bodies to actively support and promote WADA programs as a prerequisite to participation in the Olympic Games.²⁵ They recommended that organisers of major sports competitions adopt the same as a prerequisite for participation.²⁶ And they recommended that the IOC and all International Federations require their athletes to agree to unannounced out of competition drug testing as a prerequisite to competition in major international events.²⁷ Participants also agreed to encourage all Governments to accede to the existing *Council of Europe Anti-Doping Convention*, which would ‘act as a reference point for the development of a worldwide instrument.’²⁸

November 2000: Oslo

The Oslo IICGADS Meeting was held in November 2000 and was co-chaired by Senator Vanstone on behalf of the Australian Government, the Norwegian Minister of Cultural Affairs, the Hon Ellen Horn, and Assistant Deputy Minister for the Department of Canadian Heritage, Mr Norman Moyer, on behalf of the Canadian Minister for Sport, the Hon Denis Coderre.

At Oslo, governments agreed to the *Oslo Declaration on Anti-Doping in Sport* (November 2000) (‘Oslo Declaration’). They decided to contribute 50 percent of WADA’s funds from 1 January 2002, to pick up after the cessation of full IOC funding, and they reinforced their commitment to working in cooperation with WADA. Participating Governments agreed to ‘facilitate intergovernmental discussion on anti-doping issues’ and to exchange information and expertise relating to anti-doping programs and policies.²⁹ They agreed to promote a coordinated policy framework, with legislative backing where appropriate, through the establishment of a Working Group.³⁰ They agreed to allocate funding to anti-doping research,³¹ and to

²⁵ Montreal Declaration, art 4.6.1.

²⁶ Ibid art 4.6.2.

²⁷ Ibid art 4.6.3.

²⁸ Ibid art 4.4.

²⁹ Oslo Declaration, art 2.

³⁰ Ibid art 1.1.

³¹ Ibid art 1.2.

regulate the availability and supply of banned performance enhancing drugs.³² Governments agreed that drug testing programs should comprise both event testing and unannounced out of competition testing of elite and developing athletes across all sports.³³

May 2001: Cape Town

The Cape Town IICGADS Meeting held in May 2001 was again co-chaired by Australia, this time represented by Robert Crick, Head of Division, Sport and Tourism, and the Governments of Canada and South Africa. At Cape Town, Governments adopted a formula for government contributions to WADA, intended to be 'fair and equitable and encourage as many Governments/public authorities as are able to make contributions'.³⁴ The formula was based on capacity to pay and levels of involvement in international sport. The Oceania Region was to contribute 2.54 percent of the government share of WADA's funding.

April 2002: Kuala Lumpur

A key issue raised at the Kuala Lumpur IICGADS Meeting, held in late April 2002, was whether so-called 'recreational drugs' should be covered by the Code, and whether professional non-Olympic sports should be subject to it. Senator Rod Kemp, Australia's Minister for Sport from November 2001, took a leading role at this Meeting, as co-chair with Canada and Malaysia. Minister Kemp strongly advocated that the WADA anti-doping standard bring all athletes and so-called 'recreational' drugs' under the anti-doping regime. His view was that these substances met the criteria for inclusion in the list of prohibited substances, set a clear standard for aspiring athletes and young sportsmen and sportswomen that doping in sport would not be tolerated, and were illicit in the domestic context. In negotiating his position, he conducted numerous bilateral and trilateral meetings while at the Conference, including meetings with sports representatives from the United States, Finland,

³² Ibid art 1.5.

³³ Ibid art 1.4.

³⁴ *Cape Town Declaration on Anti-Doping in Sport* (May 2001), art 1.1.

Norway, Japan, France, Canada, South Africa and Malaysia. All governments ultimately endorsed the plan to ban the use of ‘recreational drugs’ across sports.

Participating governments also endorsed the development of a short term non-binding instrument to indicate government support for the Code,³⁵ and agreed to the need for a legally binding instrument, to be developed over the longer term, which would ensure all ratifying governments complied with the Code.³⁶ It was expected that the short-term agreement would be drafted and ready for presentation for negotiation and agreement at the upcoming Moscow IICGADS Meeting. For the purpose of drafting the shorter term instrument, Governments agreed to establish an International Instrument Working Group (as an extension of the Working Group established at Oslo). The Group included members nominated by the five regional Executive Committee member Governments and the IICGADS Coordination Group, which included Australian Stephen Richards as well as Canadian Ole Sorensen. Michelle Gallen, from ASDA, was appointed as a subject matter expert.

Under the coordination of Alan Stretton, Australia was again the primary drafter of the instrument, which ultimately became the *Moscow Memorandum of Common Principles on Anti-Doping in Sport*. Stretton and Thompson coordinated international and domestic input, produced successive drafts and drove international negotiations that led to its successful conclusion.³⁷

December 2002: Moscow

In December 2002, the 51 participating governments at the Moscow IICGADS Meeting (the largest number at an IICGADS yet)³⁸ unanimously endorsed the *Moscow Memorandum*. The Meeting had been primarily instigated by the Australian Government, through DCITA. It was to be co-chaired by Australia, Canada and the Russian Federation, usually represented by their Sports Minister.

³⁵ *Kuala Lumpur Declaration on Anti-Doping in Sport* (April 2002), art 2.2.

³⁶ *Ibid* art 2.2.

³⁷ DCITA 2002–03 Annual Report, 25.

³⁸ Participation at Moscow was used to predict the possible attendance at Copenhagen: Minister’s briefing note (Copenhagen World Conference).

It was at Moscow that governments agreed to a method for creating the longer term binding instrument, suggested at Kuala Lumpur. Governments participating at Moscow made the significant decision to involve the United Nations Educational, Scientific and Cultural Organisation (UNESCO). The Council of Europe was still concerned about the direction of the anti-doping arrangements, and Governments agreed that the proposal to involve UNESCO should be further developed at the Round Table of Ministers Responsible for Sport, to be held in Paris in January 2003. There, 103 countries requested UNESCO to conference relevant bodies and formulate an international convention against doping in sport, based on the 1989 Council of Europe Convention.

Conclusion

Through this series of meetings, held over the two years following the Sydney Summit, governments interested in the anti-doping issue were able to move forward their concern to find a clear policy approach. The IICGADS meetings achieved agreement as to the financial support and representation that governments and their delegates would provide to WADA. They also set the groundwork for an instrument binding on governments, by which governments could agree to the terms of a new international standard for anti-doping to be set by the newly established WADA (the *World Anti-Doping Code*), in an international treaty under the auspices of UNESCO.

World Anti-Doping Code (2003)

With these promises of support from governments, WADA faced its first task – to create an international anti-doping standard to bind all sporting bodies. After a significant period of drafting and consultation, this would become the *World Anti-Doping Code (2003)* ('Code').

At this stage, tensions arose amongst governments about the extent to which the new anti-doping arrangements should differ from those already established in the 1989 Council of Europe Convention and IADA. The Council of Europe were hesitant to accept that significant change was necessary. The Europeans wanted to retain a central role for the Council of Europe, whereas the Australians and a number of other non-European countries were unconvinced that the Council of Europe machinery would be able to move sufficiently quickly to implement the new anti-doping Code. And there was also tension over appropriate sanctions.

Australia played a crucial role at this point. WADA had requested that Government WADA Foundation Board representatives, including the Australian Government, should establish an initial point of contact for the development of the Code.³⁹ Minister Kemp instructed that senior Australian public servants, led by Alan Stretton and Kevin Thompson from DCITA, should provide any assistance to WADA necessary to move forward the Code. Minister Kemp also ensured that Australia provide useful and extensive feedback on draft versions of the Code, which were provided to the Minister in his position as a member of the WADA Foundation Board.⁴⁰ The Australian Government provided a submission on the draft list of prohibited substances and methods ('Prohibited List')⁴¹ in August 2003,

³⁹ Letter from Dick Pound to Minister Kemp, 11 April 2002.

⁴⁰ Minister Kemp continued to provide feedback to WADA for the continual revisions of the Code, for example in relation to the risk that the Prohibited List would capture unintended substances or that the approval process contained legal loopholes, as well as suggesting a truncated form of consultation involving a wider circle of interested parties for any subsequent changes to the List: letter from David Howman to Minister Kemp, 7 April 2004.

⁴¹ Unlike the list of prohibited substances previously provided by the IOC, the new WADA Prohibited List for the first time provided sports with the opportunity to directly participate in the development of the List

Stretton and Thompson coordinated the responses, consulting with a number of overseas Governments,⁴² Australian Departments,⁴³ State and Territory Sports Ministers,⁴⁴ and regional Governments.⁴⁵ They also incorporated technical advice from ASDA, the ASC, the Australian Olympic Committee (AOC), various other national sporting organisations and the Department of Foreign Affairs and Trade. The ASDTL also sent WADA independent comments on WADA's proposed Laboratory Accreditation Requirements and Operating Standards.⁴⁶

ASDA, under the leadership of John Mendoza, provided much of the technical expertise necessary to respond to drafts of the Code, and indeed helped to draft parts of it. This expertise was recognised not only in Australia, but also by WADA and the rest of the international community. Mendoza worked closely with stakeholders, managing relations with them, using his significant technical expertise. He had a strong team supporting him, including Anne Gripper, Kerry Knowler, Teri Jenkins and Jo Saies, all of whom were recognised internationally for their expertise and the work their involvement with various international bodies and committees.

This expertise, in Alan Stretton's view, enabled Australia to 'punch above its weight' in the international development of the Code. ASDA was able to provide very detailed comments on the contents of the Prohibited List and the concomitant therapeutic use exemptions standards and protocols, as well as model rules for national anti-doping organisations, guidelines for blood and urine collection, guidelines for out of competition testing, and a guideline for a proposed 'athlete whereabouts' scheme, used to monitor athletes and from which athletes could monitor their test results,⁴⁷ and launched by ASDA in February 2002.⁴⁸ This group from

⁴² Including the Canadian, Danish and United States governments.

⁴³ Including the Department of Foreign Affairs and Trade and the Department of Health and Ageing.

⁴⁴ In June 2002, Minister Kemp wrote to each of the State and Territory Sports Ministers, advising them of the progress of the Code and of the IICGADS meetings. He sought their comments on the draft Code, particularly in relation to the rules and sanctions to be imposed for violation.

⁴⁵ In July 2002, as regional representatives to WADA, Minister Kemp and the Hon Trevor Mallard – New Zealand Sports and Recreation Minister – wrote to regional Governments to encourage them to provide feedback on the Code.

⁴⁶ A list of substances and methods prohibited in-competition, out-of-competition and in particular sports. The use of these substances for medical reasons is possible under the Therapeutic Use Exemption.

⁴⁷ ASDA 2003-04 Annual Report, 34.

⁴⁸ ASDA, "'Athlete Passport' Program Launched' (Media Release, 7 February 2002).

ASDA also drafted large segments of the technical standards supporting the Code, thereby providing WADA with expertise that it, as a new sports body, did not have.

The ASC, under Chief Executive Mark Peters, also provided significant assistance to the Australian Government in coordinating consultations between the Government and Australian sporting organisations. The ASC provided submissions to the Department summarising the position of Australian sport, and provided input on the proposed content of the Prohibited List.

With this significant input from Australia, the credibility of the new scheme to tackle doping in sport was enhanced. Thompson has said:

Australian input to the Code was comprehensive and decisive – not only were problems identified but solutions proposed. The final Code owes much to the contribution of the Australian Government and sporting sector, both of which were fully committed to achieving a global approach to fight doping.⁴⁹

It was an important boost to the new scheme, vital in the debate over the necessity of a movement away from the existing Council of Europe Convention and IADA. The final version of the *World Anti-Doping Code* was ready for release in early 2003, with all government and sporting groups in support. WADA noted in May 2003 that its major challenge would be implementation of the Code.⁵⁰

⁴⁹ Kevin Thompson in a private email discussion with the author, 25 February 2008.

⁵⁰ Letter from WADA to Minister Kemp, 26 May 2003.

Copenhagen World Conference on Anti-Doping in Sport

The World Code was to be presented at the World Conference on Anti-Doping in Sport, held in Copenhagen in March 2003, for the agreement of sports organisations from around the world. In the lead up to the Conference, the IOC indicated that it expected that all Olympic sports would be willing to sign up to the Code. The Australian Olympic Committee (AOC) became the first national Olympic committee to formally adopt the Code.

But there were still tensions between governments and sports bodies. While the IOC could ensure the agreement of Olympic sports, governments could not sign directly onto the Code, since it was officially a non-government document created by WADA. A number of Governments indicated that they would have difficulties directly signing it. After sports signed up to the Code, however, they were concerned that governments were failing to simultaneously show their commitment.

Since governments would have difficulty directly signing the Code, it was apparent that they needed to draft a separate instrument. This was the reason for early government agreement through the *Moscow Memorandum*. However, sports bodies noted that governments had failed to take much further action to show their commitment to the Code. After committing to the creation of a binding agreement at Moscow, the Round Table discussions were the only indication that Governments were actually implementing the commitment, and even that agreement was still merely a plan. Governments had taken very little action over the months following Moscow to enlist UNESCO as they had agreed.

Further, Governments had failed to hold to their promise to fund half of WADA's operating budget from 2002. At the time of the Copenhagen Conference, only two countries had made their share of the payment for 2003: Australia and New Zealand. Australia was also the first country to pay its contribution to the WADA budget for

2004.⁵¹ Due to government failures to pay in 2002, WADA suffered a US\$3 million budget shortfall in that year. It was a serious concern for sports bodies, and spurred doubts about governments' commitment to WADA.

Government Commitment: The Copenhagen Declaration

It was imperative that Governments show their genuine commitment to the fight. Australia acted decisively. In conjunction with officials from Canada and in close liaison with WADA, Australia took a leading role. Stretton and Thompson established and led a group of countries, who were at the forefront of the anti-doping field to draft an instrument that would, as Kevin Thompson puts it,

at least morally and publicly, commit Governments to the *Code*, WADA and a range of other initiatives that Governments could take that would complement and enhance the commitments of sporting bodies in the fight against doping, as well as indicating Governments' intention to sign an international binding agreement once it had been formulated.⁵²

The instrument became the *Copenhagen Declaration on Anti-Doping in Sport*. Minister Kemp, with the assistance of Stretton and Thompson, in close collaboration with WADA officials and members of the drafting group, lobbied and negotiated with all governments present at the Copenhagen World Conference in an effort to obtain agreement sufficient to send a strong message to sports that governments were indeed committed and doing their part in the fight against drugs in sport. Minister Kemp, as in Kuala Lumpur, conducted several bilateral meetings in the lead up to the final session of the Conference, at which the *Declaration* was to be presented. In these meetings, Kemp raised questions such as the level of agreement on the current draft of the Code and any particular issues that had arisen for other governments. The Danish Minister of Culture, Brian Mikkelsen, worked hard at negotiations at this point, to bring to Europeans on board. The Australian Government greatly appreciated his support, both in this role and as Vice-Chair of the Foundation Board and Executive Committee of WADA.

⁵¹ Letter from David Howman to Minister Kemp, 17 December 2003.

⁵² Kevin Thompson in a private email discussion with the author, 25 February 2008.

All of this work paid off. The *Declaration* was accepted unanimously at the Copenhagen Conference and signed on the spot by more than 50 countries.⁵³ Over the ensuing months, other Governments continued to sign the *Declaration*; by December 2007, 192 Governments had signed.⁵⁴ It remains the most widely accepted international intergovernmental agreement on anti-doping in history. It committed Governments to the creation of a legally binding document by the Turin Winter Olympics, to be held in February 2006.

The Conference was a significant mark of sport and government support for the Code. Then President of WADA, Dick Pound, said in his message to the Conference delegates:

By your acceptance here, you will signal the political and moral backing that your Governments and your sports organisations give to the Code and its role in the fight against doping in sport.⁵⁵

Australia had an important role in its success, as Minister Kemp recorded in a Press Release after the successful vote:

Australia has played a leading role in the development of the Code and once again we are at the forefront of international efforts to stamp out drugs in sport. We can be very proud of the excellent outcome achieved in Copenhagen.⁵⁶

Indeed, Dick Pound wrote specifically to Minister Kemp to thank him and his staff

for the enormous amount of work and effort which went into our very successful World Conference in Denmark. We were indeed very fortunate to have Australia's leadership setting the tone for the other continents ...

We would be remiss if we did not also mention our appreciation for the fact that Alan [Stretton] and Kevin [Thompson] travelled half-way around the world, on very short notice, to work with other government partners and bring them on board. We are grateful that they were so open and responsive, and of course that you as the Minister supported the decisions that enabled their presence.⁵⁷

⁵³ Minister Kemp, 'International Declaration on Doping in Sport' (Media Release, 6 March 2003).

⁵⁴ Signatories to the later UNESCO Convention are also automatically recorded as signatories to the Copenhagen Declaration. Thus any additional signatory to the UNESCO Convention is an additional signatory to the Copenhagen Declaration, and the number of signatories to both continues to climb. See further WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=391> (at 25 June 2008).

⁵⁵ Dick Pound, 'Message from the WADA President' (letter to all delegates to the Copenhagen World Conference on Anti-Doping in Sport, undated).

⁵⁶ Minister Kemp, 'International Declaration', above n 53.

⁵⁷ Letter from Dick Pound to Minister Kemp, 19 March 2003.

UNESCO International Convention

The next step for governments was to use the momentum of the achievements at Copenhagen to finally establish the international agreement that could be legally binding if adopted according to national rules about international law, because it was backed by an international legal body – the United Nations Economic, Scientific and Cultural Organisation (UNESCO). There was a general conference of UNESCO scheduled for October 2005, at which it was hoped such an instrument could be adopted by governments.

Drafting

As an agency of the United Nations, UNESCO has stringent requirements for the drafting of a treaty. The treaty on anti-doping in sport – the UNESCO Convention – would involve a significant period of consultation, with the release of several draft agreements and the full engagement of all Member States. Yet, while UNESCO had some involvement in sport initiatives, it had no experience and very little expertise in the anti-doping field. This expertise had to be brought in, and one of Australia's senior public servants, Kevin Thompson, who had worked on the Moscow and Copenhagen agreements, was seconded to UNESCO to manage the process.

The UNESCO Convention was drafted in stages at a series of official intergovernmental meetings at UNESCO involving all 192 Member States, with each meeting involving representatives from up to 150 countries. After each session, a new draft was produced and sent to all Member States for comment. Thompson collated the feedback and developed solutions with UNESCO legal experts, workshopping them between meetings with the key stakeholders in preparation for the next session.

The first was the legal problem of binding governments to a Code developed by a non-government body (WADA). This issue was resolved by goodwill and artful drafting. Yet two other issues emerged: the involvement of the Council of Europe and its 1989 Convention, and the question of financial backing.

Support from UNESCO and Financial Backing

The Director General of UNESCO, Mr Koïchiro Matsuura, was a strong supporter of the development of the UNESCO Convention. UNESCO has a broad mandate and does much work globally, but often in areas where success is elusive and positive publicity hard to come by. In contrast, doping in sport was a highly publicised issue at the time, and its goals were already clear since the Code had been written and agreed to by sports bodies at Copenhagen. Not only was this an opportunity for UNESCO to contribute positively to the fight against doping but also to enhance its profile and image.

As agreed at Copenhagen, the Convention had to be in place before the Winter Olympics at Turin in February 2006. Work had to begin immediately, however UNESCO did not have any budget for the development of the UNESCO Convention. While all Member States agreed that the fight against doping was desirable and necessary, many were reluctant to see UNESCO resources diverted from what they considered to be greater priorities. Australia stepped up, providing a voluntary financial contribution to UNESCO to enable work to commence. Encouraged by Australia's commitment, other countries followed with smaller donations. In order to provide ongoing financial support for the monitoring and administration of the UNESCO Convention, it was also agreed that the Convention would establish a voluntary fund.

In response to critics of the government role in anti-doping, Minister Kemp also urged his counterparts to consider supporting the general fund approach, then being used to gather finance for WADA. Although Australia had made vital voluntary contributions, Kemp was concerned that reliance on voluntary funding would 'create uncertainty and hinder the implementation process.'⁵⁸ It was an argument that at the least encouraged governments to make regular contributions to the UNESCO Convention fund, but also reiterated the need for governments to financially support the international anti-doping movement.

⁵⁸ Minister Kemp and the Hon Trevor Mallard, Letter to Regional Colleagues (12 August 2005).

Hesitation from the Council of Europe

The prospect of a truly global UNESCO Convention threatened the existence of their 1989 Convention, which had played an important role in achieving some global consensus prior to the development of the World Code. Signatories to the Council of Europe Convention represented a bloc of countries amongst the world's leaders in the field.⁵⁹ While supportive of a global instrument, signatories in Europe were reluctant to support something that was significantly different to what they already had in place. None intended to withdraw from the Council of Europe Convention in favour of the UNESCO Convention.

As a bloc, European countries lobbied for the UNESCO Convention to very closely resemble the Council of Europe Convention, which would make it simpler for them to accede to the former while retaining their involvement in the latter. But many other countries were reluctant to tread this path. They saw the Council of Europe direction as a softer approach, and an old approach from which the field had now substantially moved on. At the very least, the establishment of WADA and the introduction of the new World Code required a fresh response. Moreover, many countries were nervous about a European bloc dominating the field, particularly considering that the majority of International Sports Federations were based in Europe. Global politics was now an issue.

To the credit of Council of Europe officials and representatives of the States Party to that Convention, they realised that while the Council of Europe Convention could be used as a starting point, the UNESCO Convention would necessarily be different. These officials became positive and influential contributors to the process.

Negotiations for Support

Mr Jean-Pierre Blais, a senior public servant from Canada, was appointed Chairperson of the meetings which would develop the UNESCO Convention. Mr Blais and his

⁵⁹ Most signatories were European Governments, but the Australian and Canadian Governments were also signatories. Australia had been the first non-European party to ratify the treaty, ratifying in 1994.

staff worked closely with Thompson at UNESCO on drafting and the politics of meetings. Thompson also conducted a number of presentations on anti-doping and the UNESCO Convention to a number of sub-groups from around the world, bringing them up to speed on the issues and engaging them in the process. He also worked on an ongoing basis with representatives from countries that emerged as key players, with WADA and with Council of Europe officials. It was imperative that the stakeholders who would vote for or against the UNESCO Convention at the General Conference of all Member States fully understood its terms and were engaged in the process surrounding its creation.

In Australia, Minister Kemp undertook additional negotiations to encourage Governments to support the Convention. Kemp, with the Hon Trevor Mallard (New Zealand Minister for Sport and Recreation) wrote to his regional colleagues encouraging them to agree to adopt the Convention. DCITA also convened three Interdepartmental Committee meetings in January, April and October 2004, intended to contribute to the preparation of an independent submission to UNESCO on the draft terms of its Convention. These meetings brought together the Department of Foreign Affairs and Trade (DFAT), the Attorney-General's Department, the Department of Prime Minister and Cabinet, the Department of Health and Ageing, Customs, the Australian Sports Commission (ASC), the Department of Agriculture, Fisheries and Forestry, the National Measurement Institute, the Australian Federal Police, the Department of Education, Science and Training and ASDA. States and Territories were consulted through the Joint Standing Committee on Treaties in October 2004. Through these meetings, DCITA drafted a series of independent submissions to UNESCO, which suggested solutions to some of the drafting issues raised.

Finalisation of the UNESCO Convention

The terms of the UNESCO Convention were announced in 2005, ready for adoption at the UNESCO General Conference in October. This in itself represented a remarkable achievement. From start to finish, the drafting of the Convention was completed in one of the fastest times in history. Australia played a key role through

financial contributions, submissions and the technical expertise of Kevin Thompson at UNESCO.

Further, the efforts of Kemp, Mallard and Thompson in generating support for the agreement paid off. Conference delegates unanimously accepted the Convention at the Sport session of the UNESCO Conference, held on 19 October 2005. It was a credit to the strong leadership and financial support of Australia, evidenced by the presence of Minister Kemp during the final negotiations on the UNESCO Convention.⁶⁰

Governments were finally bound by the Code, in the sense that the Convention was enforceable against its government parties.⁶¹ It committed those Governments to backing the new Code, and also allowed them to act on the terms of the UNESCO Convention to create legally enforceable measures. The Code was appended to the UNESCO Convention in order to retain the currency of domestic law when changes to the Code were made – particularly to the contents of the list of prohibited substances.⁶² Yet there was one further obstacle to the application of the Convention as enforceable. The Convention had to be ratified (not just signed) by 30 Member States for the Convention to come into force, which presented a problem for the February 2006 deadline set at Copenhagen, in contrast to the length of most domestic ratification processes.

⁶⁰ UNESCO: 33rd General Conference: Final Report (particular contents confidential).

⁶¹ In some countries, like Australia, a treaty is not strictly enforceable until domestic legislation is passed in terms similar to the treaty, or appending the treaty (but it is possible for ratification of a treaty to give rise to a 'legitimate expectation' that the executive will act in a particular way). In other countries, a treaty becomes domestically enforceable as soon as it is ratified. Further, for the UNESCO Convention to be able to come into force in any country, thirty member states had to ratify – not just sign – the UNESCO Convention. That threshold was achieved in January 2007, and the UNESCO Convention achieved the full force of an international treaty on 1 February 2007.

⁶² Provision was made in the UNESCO Convention for simple accession to changes in its appendices, which included the Code, Prohibited List and Therapeutic Use Exemptions. Because these lists are continually updated to reflect new methods of doping, the ability to rapidly incorporate any changes to these annexes gives the UNESCO Convention the status of a 'living document': see Paul Marriott-Lloyd, *Drugs in Sport: UNESCO Provides an International Legal Framework*, available at: http://portal.unesco.org/shs/en/ev.php-URL_ID=9682&URL_DO=DO_TOPIC&URL_SECTION=-465.html (21 April 2008).

PART TWO

AUSTRALIAN IMPLEMENTATION OF THE WORLD ANTI-DOPING CODE

Australia Ratifies UNESCO Convention

Minister Kemp sought to ensure that the UNESCO Convention was ratified in Australia as soon as possible after its acceptance, and contributed to a series of discussions within Australia about the best way to achieve swift ratification and negotiated with stakeholders to achieve the necessary support.

In July 2005, before the UNESCO Convention was adopted, Kemp wrote to the Departments of Prime Minister and Cabinet, Foreign Affairs and Trade and the Attorney-General's Department asking them to advise on the best method to achieve swift ratification. They advised that the official process of ratification would be likely to take at least 6 months, and could not begin until the UNESCO Convention was in its final form.

Minister Kemp then wrote to the relevant Federal Ministers seeking their support for ratification. Once they had expressed their support, he wrote to the Prime Minister to seek his approval for Australian acceptance of the confirmed text of the Convention. After the UNESCO Convention was formally agreed, Minister Kemp wrote to the Joint Standing Committee on Treaties (JSCOT), expressing the importance of ratifying the Convention ahead of the Melbourne Commonwealth Games, scheduled for March 2006. However, Kemp also realised that the process of examination by a Parliamentary Committee

will take some time, but the openness and accountability required under the Australian system is entirely appropriate and will underline the seriousness of Australia's commitment to the *Code*.⁶³

JSCOT was expeditious in considering the UNESCO Convention, tabling a report on 6 December recommending Australia accede. The Executive Council approved that accession on 15 December. The UNESCO Convention was tabled less than a month after the UNESCO Conference, on 9 November 2005. Australia became the fourth country to ratify it on 17 January 2006.

⁶³ Minister Kemp, 'Australia welcomes agreement on UNESCO anti-doping convention' (Media Release, 7 October 2005). Kemp was, throughout this process, careful to adhere to the set procedures for bringing a treaty into effect in Australia. He had, indeed, led the debate which resulted in those processes being established.

The thirty ratifications threshold was reached in January 2007, and the UNESCO Convention came into force for all ratifying countries on 1 February 2007. The swift ratification of the Convention around the world marks it as a significant international law development. David Howman has claimed that the Convention was drafted and ratified in record time for UNESCO.⁶⁴ In his speech at the UNESCO Conference, Minister Kemp said:

As the Australian Minister for Sport, I was keen to ensure Australia played a leading role in the drafting of this Convention. The International Convention Against Doping in Sport will provide the framework for a comprehensive and consistent international anti-doping regime. It also provides a foundation for best practice anti-doping programmes to be employed throughout the world. Accordingly, Australia supports the adoption of the Convention at this Conference and will immediately commence its ratification process once the Convention is adopted.

The importance of this Convention in protecting the value of sport requires that it have the resources it needs to be effective. Many will see this Convention as a means of creating a level playing field for elite athletes. That is true – but this Convention is about much more. It is about imparting values to our athletes and children that cheating is unacceptable and that sporting success must come from dedication and hard work.⁶⁵

Governments and sports had agreed to be bound by the terms of the new World Code. All that remained was to ensure that sports and Governments were fulfilling their obligations.

⁶⁴ David Howman Regional Anti-Doping Organization website:
http://www.sportingpulse.com/assoc_page.cgi?client=2-3612-0-0-0&sID=34488&news_task=DETAIL&articleID=2306592§ionID=34488 (at 25 June 2008).

⁶⁵ Minister Kemp, 'Address to the 33rd Session of the UNESCO General Conference' (5 October 2005):
http://www.minister.dcita.gov.au/kemp/media/speeches_for_2005/address_to_the_33_rd_session_of_the_unesco_general_conference (at 25 June 2008).

Code-Compliance by Australian Sports

Following the establishment of the Code as an international anti-doping framework for sports, responsibility for anti-doping was divided between the ASC and ASDA. The ASC and ASDA were designated as Australia's national anti-doping organisations (NADOs). The task of assessing whether sports were in compliance with the Code was a joint initiative between ASDA and the ASC.

It fell to the ASC to develop a template for national sporting organisations (NSOs) and State and Territory Institutes and Academies of Sport to become Code-compliant, and the ASC worked closely with them to ensure their policies and practices complied with the Code. The ASC template was not mandatory, however included all of the mandatory articles of the Code, as well as additional principles. The ASC also reviewed and approved NSO policies, and monitored the implementation and enforcement of the policies including, when appropriate, the enforcement of sanctions.

ASDA, and later ASADA, played a significant role in maintaining the effectiveness of the Code's provisions by conducting testing and implementing sanctions regimes, as well as through education and research. ASDA had, as noted earlier, existed since 1990. From April 2001, it had operated under the 'Backing Australia's Sporting Ability – Tough on Drugs in Sport' policy. It required a universal commitment from all Australians to be tough on drugs in sport, and sought to create a sporting environment free from drug cheats, in which athletes could compete fairly.⁶⁶ ASDA had a key role in the operations and activities of WADA, with involvement in various committees and a leader in the development of policy, represented by the Hon Senator Amanda Vanstone during 2000 and Robert Crick (on behalf of Minister Kelly) during 2001.⁶⁷

⁶⁶ ASDA Incoming Ministerial Briefing, above n 4, 2.

⁶⁷ Ibid, 7.

The ASC and ASDA had to deal with a variety of issues in ensuring all Australian sports became Code-compliant. Mark Peters, Chief Executive of the ASC, and his team along with John Mendoza, Chief Executive of ASDA, continued to negotiate with concerned sports groups over appropriate compliance deadlines, the contents of the Prohibited List, the rigidity of Code sanctions and particularly the status of players during a period of ineligibility under the Code, namely their ineligibility for training. Legal concerns were also raised that the Code would be a restraint of trade. This issue was handled by DCITA. Peters summarises:

From the finalisation of the Code in March 2003 until later 2005, the ASC put significant effort and resources into assisting all NSOs to become Code compliant and approving the anti-doping policies of all ASC funded and recognised NSOs. This was a comprehensive process involving considerable legal and administrative resources.⁶⁸

Some particular issues also arose for the professional sports. The Australian Rugby League (ARL), Cricket Australia and the Australian Football League (AFL) were concerned about aspects to the changes, particularly how the anti-doping framework that existed for them would be disrupted. However, the Australian Rugby Union and Football Federation Australia (soccer) were willing to make the changes to become Code-compliant.

ASC funding agreements provided a deadline of 30 June 2005 for sports to become Code-compliant, since the 2004-05 ASC terms and conditions of funding required that sports bring their policies and procedures in line with the Code or face the suspension of their funding. If Cricket Australia failed to sign up, it would lose around \$1.2 million in ASC funding. The ARL and AFL would lose about \$500 000 in government funding, plus additional grants and ASC programs, including the AIS programs. Minister Kemp was also concerned that Australian sports be seen to be Code-compliant in the lead up to the Melbourne Commonwealth Games, scheduled for March 2006. Australians had worked hard to develop the terms of the Code, and to generate support for it, and to now turn away from using it at one of the first major international competitions would have been hypocritical.

⁶⁸ Mark Peters in a private correspondence with the author, 20 September 2007.

With credit to the work of the ASC and ASDA, by the deadline all but one of the ASC funded sports had adopted Code-compliant policies, including the ARL and Cricket Australia. Although the ASC did not expect that the withholding of funding would be necessary,⁶⁹ one sport remained non-compliant: AFL.

The AFL

The AFL wanted to retain its existing anti-doping policy. Andrew Demetriou, Chief Executive of the AFL, stated that the AFL was completely supportive of the WADA Code in respect of performance enhancing drugs, but wanted to retain its own anti-doping policy. The AFL was concerned with the WADA Code's strict liability and limited exceptional circumstances provisions, especially the mandatory sanctioning, restraint of trade, Prohibited List and transparency provisions.

There was concern within Government and the ASC that the AFL Code failed to meet the sanctions and transparency provisions requirements of the WADA Code.⁷⁰ The penalties for the use of so-called recreational drugs under the AFL Code were lighter than those under the World Code. The penalties for cannabis use, for example, were counselling and treatment for the first two offences and a ban of up to six months for a third offence, with a 6 to 12 month ban for later offences. Under the World Code, cannabis use could result in a reprimand and maximum one-year ban for a first offence, a maximum two-year ban for a second offence, and a life ban for a third offence.⁷¹

Further, the AFL Code very narrowly defined 'in competition' for the purposes of testing. It restricted 'in competition' testing to match day, which would only catch athletes using drugs on or very near the matches in question. In contrast, the World Code standard operated on Olympic athletes to allow testing at any time during their stay at the Athletes Village. In a similarly broad definition, the Australian Tennis

⁶⁹ ASC brief to Minister Kemp, 20 May 2003.

⁷⁰ The AFL is unusual in Australian sport in that it has no International Federation, and thus no influence on WADA or the IOC.

⁷¹ Code, art 10.3.

standard allowed testing at any time from the opening of the tournament until the particular player exited.

Kemp and the ASC had issued their ultimatum, threatening to withdraw nearly \$2 million in Australian Government funding of AFL programs if they refused to become WADA Code-compliant. Minister Kemp met with Demetriou on two occasions, to attempt to resolve the stalemate.

The first meeting was held on 28 June 2005. Present at the meeting were Ron Evans (Chairman of the AFL) and Demetriou. On the Government side of the table were Kemp, Bill Rowe (Minister Kemp's Sports Adviser), Peter Bartels (Chairman of the ASC) and Mark Peters (Chief Executive of the ASC). The AFL lauded the AFL Code as 'probably the most vigilant of any sport in the world,' and complained that the World Code had the potential to inhibit the League's ability to test players for illicit drugs outside of competition, and might contradict the League's collective bargaining agreement.⁷² Demetriou indicated at the meeting that the AFL was not able to sign up to the Code to meet Kemp's deadline, arguing that the Players' Association would not meet until March the following year.

The AFL was harshly criticised for its recalcitrance. Dual Olympic swimming champion and Australian Sports Commission member Kieren Perkins slammed the AFL as being 'small-minded and irresponsible'. He said: 'For a sport that has built up a great reputation, this is so counterproductive and it's a shame for Australian sport.'⁷³ WADA's David Howman reiterated the message: 'Australians have been at the forefront of the fight against drugs and to have AFL stand alone and reject the Code is bitterly disappointing.'⁷⁴ He made clear the threat the AFL posed to Australia's reputation as a nation tough on drugs:

the Australian Government is a very important friend and stakeholder of the World Anti-Doping Agency and a supporter of the Code... So for them to be in a position where the AFL have turned them down so to speak, yes that's disappointing and it's

⁷² 'AFL refuses to sign WADA anti-doping Code' (ABC, Melbourne) 30 June 2005.

⁷³ Jim Wilson and Damian Barrett, 'Swimming great slams AFL drug stance' (Herald Sun, Melbourne) 1 July 2005.

⁷⁴ Ibid.

unusual because it hasn't really occurred in many parts of the world or in many sports.⁷⁵

Pound also criticised the AFL decision, saying, '[t]he AFL has had their head in the sand over this and part of the deal in sport is you don't take drugs'.⁷⁶ He went on to slam their existing policy: 'By the time you get to the third or fourth offence, it is more like an intelligence test, not a drug test'.⁷⁷

Howman felt the powerful AFL Players' Association was the driving force against the Code. They did not want to see the introduction of testing for social drugs, and were concerned at the lack of flexibility in penalties under the new Code. Indeed, support for Code-compliance emerged from other areas of the AFL. Collingwood coach Mick Malthouse agreed that 'what we can't do is be archaic in our ruling in regard to the drug Code'.⁷⁸ Eddie McGuire, Collingwood President, felt that the AFL should sign up to the Code:

The agreement that was put in place by the AFL and the AFL Players' Association has been superseded by community standards already. If the AFL don't want to have any more egg on their face on this drug issue, they need to move quickly on this.

Kemp proceeded to withhold all Australian Government funding. Nonetheless he maintained that 'my door is always open if [the AFL] wish to reconsider their position.'⁷⁹

Within three weeks, the AFL requested a second meeting with Kemp. This time the AFL's lawyer, Geoff Brown accompanied Demetriou. Kemp was joined by Bartels and Rowe. Kim Terrell was also present as the acting Chief Executive Officer of ASDA. The meeting was held on 19 July, and the AFL simply indicated that they were willing to sign up to the Code, and would ensure compliance by 1 November 2005.⁸⁰ A week previous Demetriou had, after meeting with WADA Director General David Howman, already indicated a softening in the AFL position. He said

⁷⁵ David Howman in an interview with ABC Radio, 'WADA disappointed that the AFL refused to sign its drug Code' (1 July 2005). Transcript at <http://www.abc.net.au/pm/content/2005/s1405334.htm> (at 25 June 2008).

⁷⁶ Jim Wilson, 'AFL cops Pounding' (Herald Sun, Melbourne) 14 July 2005.

⁷⁷ Ibid.

⁷⁸ Wilson and Barrett, 'Swimming great', above n 73.

⁷⁹ Minister Kemp, 'Cricket, Rugby League sign up to WADA Code' (Media Release, 30 June 2005).

⁸⁰ Minister Kemp, 'AFL to become WADA Code compliant' (Media Release, 19 July 2005).

that the AFL 'want[s] to be WADA-compliant, we believe in the principle, and we want to work with the Federal Government'.⁸¹

A Fresh Look at the AFL Code

The AFL's drugs policy continued to come under attack during 2006. A number of high profile drug cases kept the AFL's approach to illicit drugs on the agenda. While recognising that the AFL had gone further than the Code in conducting out of competition tests for illicit drugs, Kemp argued that the policy was flawed. Clubs would not be notified until the third breach and the sanctions involved were simply not sufficiently stringent. He felt the three strike policy gave 'get out of jail free cards' to players.

Kemp stepped down from the ministry in February 2007, and the new Sports Minister George Brandis continued to vigorously pursue this issue. In March 2007, Brandis in parliamentary Question Time said that the AFL's three strike policy undermines the integrity of sport and sends the wrong message to young people. Brandis and Christopher Pyne (the Minister responsible for the Government's illicit drug policy) met with Andrew Demetriou at the end of May 2007. The meeting did not resolve the dispute, although the AFL indicated that it would review the three strikes policy. However, Brandis indicated that he and Pyne had been successful in building a coalition among leading National Sporting Organisations, excepting the AFL, in support of the Howard Government's 'zero tolerance' policy towards drugs in sport.

In October, Brandis and Pyne announced a series of new measures which 'will take to a new level the Government's fight against illicit drugs in sport.'⁸² The Ministers obtained the agreement of the Government to provide up to \$21 million to fund these new measures. The new measures would, as a condition of Government funding, require sports to adopt a minimum standard of sanctions. Those standards would ensure:

⁸¹ Quoted in Jim Wilson, 'AFL cops Pounding', above n 76.

⁸² Minister George Brandis, 'Illicit Drugs in Sport Policy' (Speech delivered at Melbourne Aquatic Centre, 6 October 2007).

there are sanctions for the first illicit drugs breach, more serious consequences for a second breach, including a compulsory period of disqualification, and, in the case of a third breach, potential lifetime disqualification.⁸³

Apart from sanctions, the new measures also required sports to adopt ‘minimum standards for testing, management of results and education.’⁸⁴ Sports could choose to subscribe to the new scheme.

With the election called on 14 October 2007, implementation of the new policy had to wait on the incoming Government.

Conclusion

The AFL example is evidence of the need for the Australian Government, the ASC, ASDA, and other NADOs to continue to monitor the way in which sports implement the WADA Code, and changes to the Code, to ensure that sports remain in Code-compliant.

Nonetheless, it was a remarkable achievement by the Australian Government to have all non-Olympic sports WADA Code-compliant within a year of agreeing to be bound by the Code in the UNESCO Convention.

⁸³ Ibid.

⁸⁴ Ibid.

Establishment of Australian Sports Anti-Doping Authority (ASADA)

Although all ASC-funded sports were Code-compliant, Minister Kemp was aware that doping remained a serious threat to the integrity of Australian sport. The Coalition took a policy of 'Building Australian Communities through Sport' to the 2004 federal election, which set out a continued commitment to drug-free sport through membership of WADA, contribution to global anti-doping policies and practices, and the continuing requirement that sporting organisations implement Code-consistent anti-doping policies and practices as a condition of Federal Government funding.⁸⁵ Kemp was aware that efforts were needed to ensure the anti-doping framework remained current and effective.

An Investigatory Model

Despite the momentum behind the new Code, Patrick Smith notes the truism that 'the chemists continue to run faster than the drug police.'⁸⁶ In part to deal with this problem, the Code provided for a movement from emphasis on pure drug testing to investigation of possible violations of the Code. One year after agreement to the UNESCO Convention, and in the lead up to the Melbourne Commonwealth Games, Minister Kemp instigated the groundwork to establish a new anti-doping body, which would 'provide relevant functions and powers to ASDA and the Australian Sports Drug Medical Advisory Committee to meet Code requirements.'⁸⁷ The Chief Executive of the new body, Richard Ings, said at its inception:

Bodies that have their main focus on testing need to change. They need to bring in new methodologies and new tactics to deal with the reality of sophisticated doping today.⁸⁸

⁸⁵ See Bills Digest for the Australian Sports Anti-Doping Authority Bill 2005:

<http://www.aph.gov.au/library/Pubs/BD/2005-06/06bd079.htm> (at 25 June 2008).

⁸⁶ 'Demetriou misses the target in waster battle' (The Australian, Sydney) 31 August 2006.

⁸⁷ Minister Kemp, 'ASDA to comply with the World Anti-Doping Code' (Media Release, 12 March 2004).

⁸⁸ Quoted in Patrick Smith, 'Beware knock on door as Big Brother opens new front to war on drugs' (The Australian, Sydney) 1 August 2006.

The Chief Executive of ASDA at the time, John Mendoza, and his deputy, Kim Terrell, were strongly supportive of a wider role for ASADA. They proposed a model in which key anti-doping responsibilities were incorporated into one anti-doping program, run by a single anti-doping agency. During a visit to Australia, Mendoza and Terrell arranged for the then head of the United States Anti-Doping Agency (USADA), Terry Madden, to meet with the Minister Kemp. The Minister's sports adviser, Bill Rowe, and Kerry Knowler (ASDA's legal adviser) also attended the meeting.

At this stage, ASDA had established itself as a world leading national anti-doping body through its work on the Code and its support for the 2000 Olympics. It had operated as a statutory body for over a decade and had provided significant support for the establishment of USADA, through shared skills and expertise. The United States, however, adopted a different anti-doping model to Australia. Unlike ASDA, USADA was given responsibility for investigating allegations of doping, as it ably demonstrated in its investigation of the BALCO⁸⁹ case. In Australia, the ASC and national sporting bodies had responsibility for investigating doping offences, while ASDA had responsibility for testing and education, as explained above. The dispersal of these responsibilities in Australia contributed to what Ian Thorpe called 'poor cooperation' in anti-doping arrangements, which he complained 'left athletes confused and lacking confidence in the testing procedures.'⁹⁰

At the meeting with USADA, held on 10 December 2004, Mendoza and Terrell were eager that the Minister nut out some of the technical and practical aspects by discussing the operation of an investigatory model in practice. The meeting was very successful, and the indications to all present were that the limitations of the current ASDA model that were being debated in Australia could be dealt with effectively by assimilation as Mendoza and Terrell had suggested. All agreed that a plan should be implemented to move forward this proposal.

⁸⁹ Bay Area Laboratory Co-Operative.

⁹⁰ Nicole Jeffery, 'Thorpe Demands Drug-Testing Agencies Clean up their Act' (The Australian, Sydney) 30 May 2002.

The Anderson Inquiry

The limit of an anti-doping agency model that does not contain this investigatory role was shown up by a major doping scandal involving a leading cyclist in 2003. Just prior to the Games, in December 2003, drug paraphernalia was discovered at an Australian Institute of Sport (AIS) cycling facility at Del Monte in Adelaide. A preliminary investigation by ASC was completed on 18 December 2003, recommending that an independent investigation into the matter be commissioned. The Independent Investigator reported the findings of his investigation to the ASC on 29 January 2004. Based on the Report's finding, the cyclist was charged with breaching the ASC and Cycling Australia's Anti-Doping Policies.⁹¹ The ASC, in conjunction with Cycling Australia, brought the charges and at the initial hearing before the Court of Arbitration for Sport (CAS) the cyclist received a two year suspension. As part of the hearing process, the cyclist made allegations against five other cyclists.

But the issue exploded on 17 June 2004, when Senator John Faulkner launched an attack on the AIS and Sports Minister Kemp for the handling of the case. He demanded in the Parliament that Government provide more information on the case and alleged that there was a shooting gallery at the AIS. In the event, a retired Justice of the West Australian Supreme Court, Robert Anderson QC, was appointed on 21 June 2004 to review the case. The accusations of Faulkner were proven to be groundless. The main body and first addendum of the Anderson Report, tabled in Parliament on 29 July 2004, clearly showed that there was no cover up of information by the ASC or Cycling Australia (CA), and that the case had been handled appropriately.

In tabling the Report, Kemp highlighted Mr Anderson's findings that:

there is no evidence of a pro-drugs mentality, habitual widespread drug use, or of group injecting sessions as alleged ...

It is clear from the contemporaneous records in files of the Australian Sports Commission that, well before those statements and accusations were made in

⁹¹ Private email discussion with the ASC, 13 May 2008.

Parliament, the Australian Sports Commission had commenced the process of appointing an independent investigator specifically to investigate the French allegations against the other cyclists.⁹²

In his Report, Mr Anderson recommended that for the longer term there should be a body which was independent of the AIS, the ASC and NSOs to investigate and prosecute cases.⁹³

In tabling the Anderson Report, Kemp issued a discussion paper for public comment on the creation of a new Sports Doping Investigation Board, and he proposed the creation of the Australian Sports Anti-Doping Authority (ASADA). After receiving comment from interested parties, he proposed the creation of a new anti-doping body of this kind to be set up.

Legislation for the New Body

Kemp was very eager that the legislative framework for the new body be passed and ready for operation in time for the Commonwealth Games in March 2006, but the timetable was very tight. The UNESCO negotiations had concluded less than a year earlier, followed by further processes at home to bring the UNESCO Convention into force. The legislation was introduced to the Parliament on 7 December 2005. With the cooperation of the Labor Party, the Bill had a speedy passage through the Parliament. It was passed by the House on 8 February 2006, introduced to the Senate the next day and passed by the Senate less than a month later, on 2 March, without amendment. The Bill received the royal assent on 7 March and was proclaimed on 14 March 2006. Apart from the Act,⁹⁴ the Government created Regulations⁹⁵ to describe the purview of ASADA's powers, the remuneration of its officers, testing procedures and the NAD (National Anti Doping) Scheme. It would be the primary guide for the new body.

⁹² Minister Kemp, 'The Anderson Report' (Tabling Report, 29 July 2004).

⁹³ Report by the Hon Robert Anderson QC (24 June 2004).

⁹⁴ *Australian Sports Anti-Doping Authority Act 2006* (Cth).

⁹⁵ *Australian Sports Anti-Doping Authority Regulations 2006* (Cth).

The finalised regulations were released on the afternoon of 13 March 2006. The Act was proclaimed the following day, ASADA commenced operation on 14 March 2006, and on the next day the Commonwealth Games were opened. The new body assumed the existing drug testing, education and advocacy functions of ASDA, but also adopted the ASC's policy development, approval and monitoring roles. It was given the power to investigate all allegations of anti-doping rule violations under the Code, and could prepare and present cases to the Court of Arbitration for Sport and other sports' tribunals.⁹⁶

A Model for the Rest of the World

ASADA was the first of its kind. It was given the capacity to investigate possible doping offences, including by working in cooperation with other sports and interested government agencies. ASADA was also an *independent* watchdog, entirely separate from sports bodies. Its new Chief Executive, Ings, said:

The establishment of ASADA balances a tough on drugs approach with upholding and respecting the rights of athletes. Australians can have complete confidence in the fairness and impartiality of the processes.⁹⁷

At the WADA Conference held in Madrid in November 2007, Ings spoke to the delegates about the ASADA model. He said:⁹⁸

Athletes and support personnel doping today are on notice that via ... investigations they are subject to greater and increasing scrutiny than ever before and the sanctions when caught are severe. Complimenting traditional testing with strong investigative and intelligence management capabilities and building working partnerships between anti-doping organisations and agencies of law enforcement and border control is the future of protecting the integrity of sport.

David Howman, Director General of WADA, called the Australian model 'revolutionary'.⁹⁹ He endorsed the role of Governments in adopting the investigative approach:

⁹⁶ See Minister Kemp, 'Path Clear for New Anti-Doping Body' (Media Release, 2 March 2006).

⁹⁷ Minister Kemp, 'New Sports Anti-Doping Body Enhances Australia's Reputation' (Media Release, 14 March 2006).

⁹⁸ Richard Ings (Speech delivered at WADA Madrid Conference, 15 November 2007).

⁹⁹ WADA, *Play True*, Issue 1 2007, 8: http://www.wada-ama.org/rtecontent/document/PlayTrue2007_BeyondtheAthlete_En.pdf (at 25 June 2008).

Sport has got no investigative powers. Sport can't go out and search bags and look at what's going on. Sport can't provide the evidence, but Governments can. That's the tool that we want to specify in what we see as the way forward in the fight against doping.

Just look at what has happened in the last 10 years. All of the major busts were made through governmental agencies. BALCO was uncovered by the inland revenue, Operation Puerto was the justice department in Spain, Festina [1998 Tour de France] was the police in France, the Chinese swimmers who were caught in Australia in 1998 involved the customs department. What's common to all these? Governmental agencies.¹⁰⁰

Of Australia's adoption of this approach he said:

There is great interest in this new approach to the fight against doping, and preliminary reports are promising: on February 9, 2007, ASADA announced that its new investigatory powers, enacted last March, have accounted for 25 percent of doping violations. WADA, for its part, will convene a follow-up symposium on investigations, to be hosted on April 16–17, 2007, by UK Sport, with the aim of further advancing this concept and facilitating coordination among sports and Governments.¹⁰¹

In February 2008, the United Kingdom recommended following the direction of 'other leading anti-doping countries, such as Australia, Canada, New Zealand and the United States, in requiring funded sports to transfer their results management and case presentation functions to a central, properly-resourced NADO [National Anti-Doping Organisation].'¹⁰² In January, the establishment of the Russian Anti-Doping Agency was announced, to have powers similar to ASADA, though closely modelled on the United States Anti-Doping Agency (USADA).¹⁰³

ASADA remains a model for the rest of the world. On 1-2 May 2008, Australia hosted the third WADA symposium on information sharing between law enforcement

¹⁰⁰ Quoted in Simon Hart, 'Sleuths hot on trail of doping cheats' (Sunday Telegraph, UK) 10 February 2007: <http://www.injuryupdate.com.au/forum/showthread.php?t=3435> (at 25 June 2008).

¹⁰¹ WADA, *Play True*, above n 100.

¹⁰² UK World Sport, *Modernisation of the UK's National Anti-Doping Organisation Summary Document: February 2008* (February 2008), 2.

¹⁰³ See 'Newly formed Russian Anti-Doping Agency is learning from US agency' (Associated Press), 23 January 2008.

and investigative agencies.¹⁰⁴ At the meeting, Richard Ings and representatives from USADA, conducted an education session on the investigative model. Twenty-five percent of the doping cases uncovered by ASADA have resulted from investigations rather than positive drug tests.¹⁰⁵ After the Conference, *The Australian* reported:¹⁰⁶

The Australian Sports Anti-Doping Agency has been the trail-blazer in establishing information-sharing agreements with federation agencies including police and customs under federal legislation passed two years ago.

By using its investigative powers, ASADA was tackling the doping issue in ways that had not previously been achieved.

The organisations which congregated on Sydney for the Conference – including WADA’s David Howman, Interpol, UNESCO, USADA and National Anti-Doping Agencies – intended to further the plans for a similar investigative model internationally. The WADA Executive Committee meeting was held on 10–11 May, to which David Howman represented the developments of the Conference. WADA officials had already drafted a memorandum of understanding, which it is hoped will be formally ratified within 2008.

ASADA at Work

The new anti-doping agency was immediately tested. A weightlifting scandal erupted on the eve of the Commonwealth Games, at the time when investigation of Code violations was being transferred from ASC to ASADA. An Australian weightlifter was accused of trafficking banned substances to two weightlifters in Tasmania. ASADA had been created just in time to ensure that a thorough and final examination of the case would be seen by the world to be done, particularly under the scrutiny of its attitude towards an Australian competitor. Ings appointed one of the world’s toughest drug investigators and a key drafter of the Code, Richard Young, to lead the investigation.¹⁰⁷ Further, the involvement of an independent body was welcomed by

¹⁰⁴ The first symposium was held in Colorado Springs in October 2006, the second in London in April 2007.

¹⁰⁵ Ings (WADA Madrid Conference), above n 98.

¹⁰⁶ Nicole Jeffery, ‘Performance drug fight stepped up’ (*The Australian*, Sydney) 3 May 2008.

¹⁰⁷ Cameron Stewart, ‘Probe lifts the bar for heavyweights’ (*The Australian*, Sydney) 25 March 2006.

weightlifters and weightlifting authorities. The investigation was widely considered a fair treatment of the case. The work of ASADA was underway.

The new and improved anti-doping watchdog also had the role of establishing clear and consistent arrangements for the hearing of doping in sport matters. It was charged with presenting cases against alleged offenders of the Code at the Court of Arbitration for Sport, and other sports tribunals. Minister Kemp said:

The creation of ASADA enhances Australia's reputation as a world leader in the fight against doping in sport. It enhances our regime for responding to alleged anti-doping rule violations in Australia through a new, dedicated agency.¹⁰⁸

The Government made it a condition of ASC funding that sporting organisations submit to the operations of ASADA, including its anti-doping investigations and presentation of cases at hearing.¹⁰⁹ ASC-funded sports bodies had to agree to accept any adverse finding of ASADA, and to respond by issuing an infraction notice and enforcing penalties imposed in accordance with that sport's anti-doping Code.¹¹⁰ Sports were also required to refer all instances of possible doping violations to ASADA for investigation.

Under the new Sports Minister, Kate Ellis MP, a rigorous program of investigation will be used with the Australian athletes at the 2008 Beijing Olympic Games. In an historic partnership, the AOC and Australian Government have partnered in a world-leading anti-doping program to combat doping at the Games. It exposes athletes to over 1000 tests, and comprehensive testing, education and control measures.¹¹¹ As Minister Ellis noted at a WADA symposium held in Sydney on 1 May 2008:

The battle is clearly ongoing; and the importance of the task before this symposium can be measured by the high level expertise gathered here today. If the serious issues before you are not addressed satisfactorily, there is potential for the appeal and credibility of international sport to suffer and for drug supply chains to prosper. For

¹⁰⁸ Minister Kemp, 'New Sports Anti-Doping Body Enhances Australia's Reputation', above n 97.

¹⁰⁹ Although sports can independently pursue a hearing, provided ASADA is satisfied that the sport has a robust and transparent process for its own hearing of doping matters.

¹¹⁰ Minister Kemp, 'New Anti-Doping Body Legislation Introduced' (Media Release, 7 December 2005).

¹¹¹ Minister Kate Ellis MP, 'Strongest Ever Doping Protection for Aussie Olympians' (Media Release, 21 February 2008).

all these reasons, I wish you every success with your work and assure you that Australia will continue to do all we can to support international anti-doping efforts.¹¹²

Conclusion

The Australian Government, amongst other Governments, continues to show international policy leadership. Indeed, the commitment of Minister Kemp to the adoption and implementation of the Code was warmly recognised in an Award of the Order of Merit from the Australian Olympic Committee, which citation said:

As a Board member of WADA Senator Kemp has played a key role in the campaign against doping in sport and the development of the WADA Code.

Once WADA was established, he was instrumental in garnering the support of Governments around the world to join the Olympic movement in the fight against doping in sport. Under Senator Kemp the Australian Government has done more to create a global level playing field for athletes than any previous administration.

Domestically Senator Kemp also played an active role in getting all Australian sports across the line to be WADA Code compliant.

¹¹² Minister Ellis, (Speech to the World Anti-Doping Agency, Symposium, 1 May 2008).

Australian Heads WADA

Brandis was able to lead a successful campaign to elect an Australian as President of WADA, replacing Dick Pound whose term expired at the end of 2007. Past Federal Finance Minister and New South Wales Premier John Fahey was elected the second WADA President in November 2007, with his three-year term beginning on 1 January 2008.

The race for the position was an interesting one. The Europeans had put forward former French Sports Minister and WADA Vice-President Jean-Francois Lamour. They criticised Fahey's nomination, labelling him inexperienced in the sports arena. Lamour claimed that Kemp had promised Australian support for his nomination. After checking with Kemp, Brandis was able to indicate that this was not the case. Lamour withdrew his nomination on 16 October 2007, recognising that he did not have the numbers.

The Europeans rushed to find a replacement, considering former French Olympic hurdles champion Guy Drut. To give them time to confirm a candidate and generate sufficient support, the Council of Europe requested a 6-month postponement of the vote on the basis that more time was needed to find a consensus candidate.¹¹³ Dick Pound, the outgoing President, refused the request, maintaining that nominations had closed more than a month earlier, and could not be reopened. At the election, 4 out of the 35-member WADA board abstained from the vote, denying Fahey a unanimous election.

On his election, Mr Fahey immediately made clear his aims. He stated his support for a unified global approach, in particular his plan to travel to Europe in early 2008 to discover how best to cooperate and collaborate with the region.¹¹⁴ He indicated that one of his priorities is to urge Governments to ratify and implement the UNESCO

¹¹³ 'John Fahey elected World Anti-Doping Agency President' (Associated Press, New York) 19 November 2007.

¹¹⁴ 'Fahey wins first battle in drugs fight' (Canberra Times, Canberra) 19 November 2007.

Convention.¹¹⁵ After 192 Governments had in principle agreed to adopt the Code by signing up to the Copenhagen Declaration,¹¹⁶ only 52 had ratified the UNESCO Convention by the time of Fahey's election. Ultimately, Fahey has said that a unified approach to sports doping is essential, since, in his words, there is 'no more important role in sport than to win this fight'.¹¹⁷

¹¹⁵ Ibid.

¹¹⁶ See above n 54 and accompanying text.

¹¹⁷ 'John Fahey elected', above n 113.

Conclusion

Australian played a critical role in the international fight against doping in sport. Australian politicians and public servants were largely responsible for instigating and pushing to maintain the standard of Tough on Drugs in Sport. Through the IICGADS for which Australia was a co-chair, Australian Government participants assisted in the development of a cooperative government approach. And successive Australian Government Ministers, including Kelly, Vanstone, Kemp, Brandis, Pyne and Ellis, worked to ensure the effective implementation of the provisions of the Code, in order to maintain the momentum for the fight. The international recognition of ASADA is a legacy to that work.

This study is also a contribution to the future of the anti-doping movement. Doping in sport is a continuing threat to the international sporting community, and will continue to present new challenges. By recording history, it is an effort to avoid some of the pitfalls of the past. And it serves as a reminder of the many and varied issues that confront the sporting community, which have required a variety of methods and solutions. This paper credits the work of all those who tirelessly committed to establishing the Code in its first form, in an effort to creatively and definitively challenge those who presumed to cheat in international and national competition. This study is a praise of the ability of individuals, agencies and systems to turn ideas into reality, and challenge this threat to sport.

Appendix 1: Key Australian Participants in the Fight against Sports Doping¹¹⁸

*Politicians*¹¹⁹

The Hon Jackie Kelly: *Minister for Sport, Minister Assisting the Prime Minister for the Sydney 2000 Games*

The Hon Amanda Vanstone: *Minister for Justice and Customs*

Senator the Hon Rod Kemp: *Minister for Sport*

Senator the Hon George Brandis: *Minister for Sport*

Chris Pyne, MP: *Assistant Minister for Health, Minister for Ageing*

The Hon Kate Ellis MP: *Minister for Sport*

*Public Servants*¹²⁰

Peter Bartels: *Chairman, Australian Sports Commission (ASC)*

Nadine Cohen: *General Manager, Planning and Reporting, ASC*

Jason Costigan: *Sports Adviser, Senator the Hon George Brandis*

Robert Crick: *Head, Sport and Tourism Division, Department of Industry, Science and Resources (DISR)*

Brent Espeland: *Director, Sport Performance and Development, ASC*

Anne Gripper: *Australian Sports Doping Agency (ASDA)*

Natalie Howson: *Chief Executive, ASDA*

Richard Ings: *Chairman/Chief Executive Officer, Australian Sports Anti-Doping Authority (ASADA)*

Teri Jenkins: *Member, ASDA*

¹¹⁸ References to job positions and Departments of the Australian Public Service are those held at the time of the developments of the *World Anti-Doping Code* discussed in this Study. This list refers to people and groups mentioned in this study, or specifically mentioned to me during my research. I am aware that there are many others who were involved, including numerous staff at ASDA and the ASC. Credit is of course due to every public servant, politician and others who worked on the Code and its implementation. See also those Australians participating in WADA, in Appendix 2.

¹¹⁹ In order of period with portfolio.

¹²⁰ In alphabetical order.

Kerry Knowler: *Legal Adviser, ASDA*

John Mendoza: *Chief Executive, ASDA*

Renee O’Callaghan: *Senior Sports Consultant, Anti-Doping, ASC*

Mark Peters: *Chief Executive Officer, ASC*

Stephen Richards: *Manager, Sport, Department of Communications, Information Technology and the Arts (DCITA)*

Bill Rowe: *Sports Adviser, the Hon Jackie Kelly and Senator the Hon Rod Kemp*

Jo Saies: *Member, ASDA*

Dr Brian Sando: *Chairperson, ASDA; Member Health, Medical and Research Committee, WADA*

Alan Stretton: *Deputy Secretary, Arts and Sport, DCITA*

Kim Terrell: *Acting Chief Executive, ASDA*

Kevin Thompson: *Assistant Manager, Sport, DCITA*

Helen Williams: *Departmental Secretary, ex officio, ASC*

Public Agencies Assisting in Development of the Anti-Doping Framework

Australian Government Analytical Laboratory (AGAL)¹²¹

Australian Sports Commission (ASC)

Australian Sports Drug Agency/Australian Sports Anti-Doping Agency (ASDA/ASADA)

Australian Sports Drug Testing Laboratory (ASDTL)

Department of Customs (Customs)

Department of Foreign Affairs and Trade (DFAT)

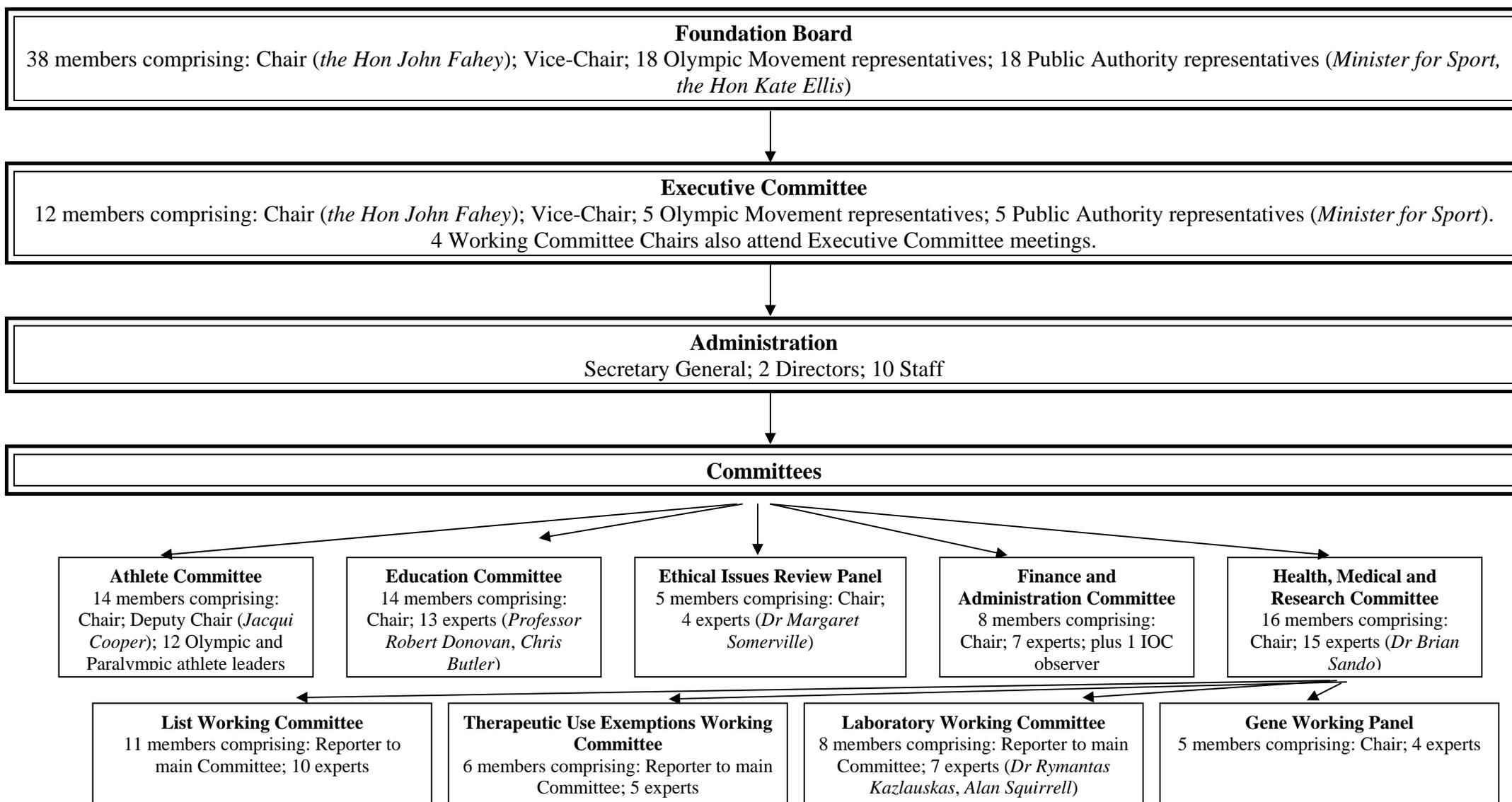
Department of Prime Minister and Cabinet (PM&C)

National Measurement Institute (NMI)

Therapeutic Goods Administration (TGA)

¹²¹ AGAL was later incorporated into the NMI.

Appendix 2: Structure of WADA (Australians in italics)¹²²



¹²² At 25 June 2008.

Appendix 3: Elements of the World Anti-Doping Framework¹²³

Level One: Code

Defines doping; the fundamental rationale underlying the Code; the scope and organisation of the Code; procedures for acceptance, modification and compliance; roles and responsibilities of WADA members and other stakeholders in the Code; anti-doping cooperation, education and research; doping control.

Level Two: International Standards

List of prohibited substances and methods; standard for doping control operations; standards for accreditation of laboratories; standards for analysis of samples; standards for research; standards for therapeutic use exemptions.

Level Three: Models of Best Practice and Guidelines

Detailed model rules and regulations based on the Code sufficient for effective enforcement; other model documents on best practice; guidelines for education, therapeutic use exemptions, results management, out of competition testing, whereabouts information, blood and urine sample collection, breath alcohol collection, sample collection personnel, laboratory test reports.

¹²³ See WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=250> (at 25 June 2008).

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