

The Impact of the World Anti-Doping Code on Australasian and International Law

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At the Olympic Games in Seoul in 1988, there were a number of breaches of the International Olympic Committee's rules on anti-doping. Everyone will recall the case of Ben Johnson and the ensuing response by the IOC, and then subsequently by the Federal Government of Canada in conducting a full-blown inquiry (the Dubin Inquiry) into doping in sport. I do not intend to address the details of that case within this paper.

However, a less known, and less publicized case was that of a modern pentathlon athlete from Australia, Alex Watson. He failed a urine test which showed that he had excessive levels of caffeine in his system. At the hearing before the IOC Disciplinary Committee he gave evidence that he had drunk between 12 and 15 cups of coffee, and 2 or 3 cans of Coca-Cola at the pentathlon venue over the 12 hours of competition. He was disqualified from the Games. The Australian Olympic Federation (now the Australian Olympic Committee) through its Chef de Mission, John Coates, gave Alex Watson an hour to leave the village and he returned home to Australia a disgraced athlete. In addition, in line with the contract that the AOF had with the athlete, Watson was banned for life from any future Australian Olympic team, consistent with section 2 of the AOF doping policy which had been introduced in November 1987. The doping policy was subsequently revised, and a 1989 appeal by Watson saw this ban reduced to 2 years.

Watson was subsequently banned by the International Federation for two years. In Australia, a Senate inquiry was convened and commenced in 1990. At its conclusion, it made several findings in respect of the treatment meted

out to Watson, and the processes it suggested ought to be taken in terms of the continued inclusion of caffeine on the IOC prohibited list. There were other recommendations including how the AOC should operate in terms of its briefing of athletes, prior to major events, and its support to athletes at those events in respect of the doping rules. Many steps have been taken since then.

It is intriguing to muse now that caffeine was not taken off the list until WADA assumed jurisdiction over its compilation in 2004. Just recently, there has been a minor controversy in Australia relating to the ingestion of caffeine tablets by AFL players prior to games (potentially extending to other team sports) because medical officials associated with teams have been prescribing sleeping pills to players to ingest post-match in order to provide “downers” and counteract the stimulant “upper” effect of caffeine tablets. One player required urgent hospitalization and medical treatment as a result of a reaction to this combination which led to a semi-coma. This is a matter for the medical profession, and those who regulate their practice.

With that introduction blending history with today, it is interesting to look at the history of anti-doping in Australasia. The Australian Sports Drug Agency was established in 1990 and the New Zealand Sports Drug Agency, which modeled itself on its Trans-Tasman counterpart, came into effect a few years later.

Both countries introduced legislation to deal with the issue of drugs in sport, primarily to establish a body responsible for undertaking the testing. Both established and operated reputable national anti-doping agencies, and both were to the forefront when the international controversy led to the first world conference on doping in sport in Lausanne in 1999. Prior to that, Australia and New Zealand had both signed, through its governmental officials, a document which bound several of the more developed countries of the world

to an agreement of reciprocity in relation to this issue. Called the International Anti-Doping Agreement (IADA), this arrangement between governments still exists. So does the legislation, although both have had several amendments.

In 1998, on the Tour de France, the French police arrested members of the Festina Team and the subsequent furor turned the cycling world upside down, and forced the sport movement to look at how it was actually combating the issue of doping in sport. For the first time, the IOC invited members of governments to attend a conference in February 1999 and discuss this issue. The result was the Lausanne Declaration, which called for the creation of a global, independent anti-doping agency, composed and funded equally by the IOC and governments. In November 1999, the World Anti-Doping Agency (WADA) was established as a private Swiss foundation to fill this role, with its temporary headquarters located in Lausanne, Switzerland. Later, following an extensive bid process, WADA shifted to Montreal where it is hosted by the Federal Government of Canada in partnership with the Provincial (National) Assembly of Quebec.

The first meeting of the Foundation Board, a body comprised equally of representatives from the sport movement (presidents of international federations, members of the IOC, members of the IOC Athletes Commission) and representatives from governments (ministers of sport) occurred in March 2000.

The immediate work of this new agency was to address issues that would obviously be confronted at the Olympic Games in Sydney, Australia. WADA ensured that contracts were in place for all the international federations so that out of competition testing could be done. At this time it was realized that many sports had no rules in place at all, so there was a lot of immediate drafting. For the event, WADA formed an Independent Observer Team to

observe and report on the IOC anti-doping program at the Games. The anti-doping program was carried out by the Organizing Committee with the significant tasks conducted by ASDA. Subsequently WADA published its report which led to many recommendations to the IOC on how the program could be enhanced and improved. The IOC changed its rules.

WADA then embarked on its primary mandate, to compile a set of rules that would harmonize the very disjointed processes that were then in existence across all sports and in all countries. The World Anti-Doping Code, following many drafts, weeks and months of consultation, was presented to the second world conference on doping in sport held in Copenhagen, Denmark in March 2003. The Code was unanimously adopted. The sports movement agreed to incorporate it in its rules, throughout the many federations, by the day of the opening ceremony for the Olympic Games in Athens. Governments undertook, through the signing of the Copenhagen Declaration, to commit to drafting an international treaty whereby they would be bound to the Code. That commitment was to ensure the treaty was in effect by the day of the opening ceremony of the winter Olympic Games in Turin in February 2006.

WADA's task was to ensure these milestones were kept.

Not only was the Code required to be incorporated in the rules and laws of those engaged, but also the international standards which included the International Standard on Testing, the International Standard on Laboratories, the International Standard on the Prohibited List and the International Standard on Therapeutic Use Exemptions, were all required to be part of the rules and processes related to anti-doping programs.

This was achieved.

The governments were responsible, with the help of WADA, in writing an international treaty in world record time. In less than 12 months, the International Convention against Doping in Sport was drafted and accepted. In less than a further 12 months, it received the first 30 ratifications from countries, therefore bringing it into effect. There are now 144 countries that have ratified this Convention making it the most successful of those under the auspices of UNESCO.

The sports movement successfully ensured that each of the federations altered its rules by August 2004, spurred undoubtedly by a change to the IOC charter which indicated that if any sport was not in compliance with the Code, then it was subject to possible Olympic sanctions, including removal from the Olympic Games program, and/or loss of IOC recognition. Both would have dramatic financial consequences for any federation.

Following some years of practice, the Code was fully reviewed to ensure the experiences of such practice were incorporated in a revision. That revision was completed with the revised Code being approved at the third world conference on doping in sport in Madrid in November 2007 and the subsequent revised Code coming into effect on 1 January 2009.

It is projected that the Code will once again be reviewed in 2012 with a world conference to be convened at the end of 2013 and any amendments coming into effect on 1 January 2015.

So what has all this meant in terms of requirements of governments and requirements of sport? First, it has ensured with Code compliant laws and rules that harmony in anti-doping regulations has prevailed globally. Second, it accordingly means that athletes from all countries and in all sports are subject to the same rules and processes, and as time goes on, to the same form of practice of sample collection and analysis, no matter in which country

they may be living or competing. Third, all have accepted as the ultimate appeal body the Court of Arbitration for Sport, headquartered in Lausanne, but with a branch office in Sydney (a convenient legacy of the Sydney Games). Many said that harmony would be impossible, and that there would be legal challenges and political difficulties. Not so. Not only has the compliance process been undertaken with commitment, but WADA has also succeeded where no other international organization has; it has collected all of its dues from government members.

What has happened in Australia and New Zealand since the advent of the Code?

Obviously, the laws have been amended. Not just once, but several times. The legislation however is chiefly to do with the establishment, governance, management and funding (with its allied accountability to government) of the national anti-doping agencies (now ASDA and Drug Free Sport New Zealand). Both countries have introduced regulations to deal with operational issues.

But what about the lawyers? I would suggest that extra work has resulted for those lawyers involved in sport.

First, let's look at a snapshot of some of the issues or cases that have been litigated or argued in Australasia:

- a) Shane Warne
- b) Wendell Sailor
- c) Trent Bray
- d) Nathan Baggeley
- e) Lisa Cropp
- f) Mark French
- g) NZ Sports Tribunal decisions

- h) TUE appeal
- i) Sydney CAS cases
- j) Nick Willis from bronze to silver

There have been books and articles published, and the burgeoning sport law bar has had interesting work to undertake. There are a number of lawyers from Australia and New Zealand who serve on the panel of arbitrators to CAS. It is not my intention to provide a critique of the cases, nor of any trend, rather to point it out and look then at the international perspective.

Some of the current legal challenges include:

1. A challenge by athletes in Belgium against the jurisdiction of the Court of Arbitration for Sport. This has exhibited itself in several cases presently going through tribunals and courts within Belgium.
2. The extraordinary challenge by Floyd Landis against the laboratory in Paris. This spread over 2 long hearings, with the appeal determining that there was no case properly advanced by Landis' lawyers. In fact the decision of the arbitrators went further, suggesting that many of the arguments were spurious and had no relationship to the actual facts of the case. In this part of the world, one may have anticipated some form of complaint to the Law Society about such inappropriate behavior from litigating lawyers.
3. The debate about data protection and the right of privacy.
4. The continuous battle to ensure there is a proper balance between the rights of the individual and the need to eliminate doping from sport. Proportionality is often used as the catch cry. Many of those politicians

who use it, however, are not aware of the very limited class of elite athletes to whom some of the rules apply. Proportionality prevails.

5. The continuing issue of selection criteria in some countries. The BOA for example still has a lifetime ban on selection for Games teams for athletes who test positive. An appeal process has seen all but Dwayne Chambers successfully overcoming it. Any double jeopardy?
6. The IOC has introduced a rule forbidding entry to the Games to any athlete who has been sanctioned for an anti-doping rule violation and received a suspension of more than 6 months if that sanction was imposed in the 4 years prior to the Games.

These latter two issues might both be subjected to legal scrutiny before London. WADA is aware of Jessica Hardy, a U.S. swimmer, who would currently be stopped from going to London as a result of a sanction imposed shortly after Beijing. She is seeking redress and tried to include it in her appeal hearing.

Why do we have anti-doping rules or laws?

Sport is supposed to be a celebration of what can be achieved by natural talent, training and self-discipline, not for athletes to be test-tubes for some pharmacist or genetic engineer.

As soon as competitors lose confidence in the fairness of the competition, the risk is that they will seek to “level the playing field” themselves. Clean athletes then will become burdened with the pressure to dope and assume the related health consequences, or risk becoming outmoded.

Inevitably, doping imperils public health. I must say that I am alarmed when I hear it suggested that the problem of doping is confined to the few hundred

elite-level athletes at the very top of every sport, and therefore, why be so concerned with combating it?

The answer to this question can be very simple. Once there is the perception that some elite athletes are using these drugs in order to succeed in their sport, the message is that, if you want to play at that level, you will have to do the same. That message trickles down and out, from the elite-level to junior players and youth athletes. Subsequently, you are not dealing with a few hundred, but instead thousands of young people who believe that not only is it OK to dope, but that it is necessary in order to succeed.

Not only now is this a perception, it is a fact, further enhanced by many young people who turn to steroids to “look good”. When the Internet readily makes the purchase of unregulated and hence unsanitary doping substances available to our youth, you have an instant social problem, which has already led to suicides and bad health problems for many young folk. Addressing it requires governmental work in education and health.

Society as a whole must address this issue. It is not simply a matter for sport, although sport gets the headlines and the attention.

Certainly, these are harsh realities that cannot, must not, be ignored.

One of the rules in national and international sport is that doping is prohibited. The original anti-doping rules were adopted out of health and safety concerns, and they have evolved into a desire to protect the ethical rule underlying sport, the inherent humanistic values of sport, as well as to protect the health of the athletes.

Sport is, by its very nature, based on rules. The rules of the game are the agreement that participants have with each other. The rules are clearly

defined, and the participants have the right to participate pursuant to those rules, or they can choose not to participate.

There is a clear choice. Play by the rules or don't play.

There are lots of rules. Some of them are technical, such as for equipment, size of playing fields, number of players, and rules on the field of play as determined by a referee or umpire. Some are safety-driven, such as helmets for skiers, hockey players and boxers. Some are to protect health, such as minimum ages, weight categories, medical examinations, safety nets. And, so it goes.

In essence, the rules ensure that all participants start with a level playing field. As soon as a participant seeks an unfair advantage by going outside of the rules, then the competition is ruined for all. In order for sport to maintain its integrity, the rules that everyone agrees to adhere to must be respected, and those who circumvent the rules must be removed from competition.

The athletes who cheat destroy the whole purpose of what they set out to do, which was to see how far their talents could take them in competition with others, playing by agreed-upon rules. Instead of something which should be a triumph of the human spirit, their achievements become soiled, must be hidden from view, in fear of exposure and the disgrace that will follow. Disgrace to their sport, to their country, to their family.

We must also realize that, in most cases, it is not athletes acting alone to defeat everything for which they should stand. They are assisted, counseled, sometimes tricked and occasionally forced into the downward spiral of cheating. Coaches, trainers, medical doctors, scientists, sports administrators – even some misguided parents - all of whom ought to know better and who

have a professional or moral responsibility to the young people under their charge, conspire to destroy the value of what the athletes are trying to do.

Why should the vast majority of athletes – your children, your brother, your sister or your neighbor - be forced to become doped simply because there are some who are themselves willing to do so, in full knowledge that they are cheating, with all of the risks of disgrace and health problems that may follow? There is an easy answer to this question: they should not.

A distinct change that has emerged in the last few years relates to the gathering of evidence that will lead to sanctions for breaches of the anti-doping code by means other than sample collection and analysis. For some time, it has been recognized that science, both research and analysis, finds it difficult to keep pace with the dirty scientists. There are some that currently say the prevalence of doping has in fact increased of recent years because of the ability that many elite athletes have had in manipulating samples or ensuring that their samples would not reveal positive findings. There are many methods of attempting this, from over-hydrating to micro-dosing, to cocktail effect combinations of prohibited substances and others.

Coming from a time where manipulation was initially quite primitive, you probably will recall the Hungarian shot putter who won the gold medal in Athens but was detected manipulating his urine through a device. Now athletes have been detected with substances on their hands, which substances are put into the sample bottles. This degrades the sample or defeats the role of the analyst. So the cheater prevails, one only has to look at the career of Marion Jones. She was tested more than 160 times, yet never returned a positive, and subsequently admitted to cheating for 7 years only when facing a lengthy term of imprisonment for perjury.

There have been significant governmental inquiries over the last 8 years that have led to major “busts” in the world of sport. The most prominent of course is BALCO but there are several others starting with the Festina inquiry that I first mentioned in this address, and including other inquiries relating to the Tour de France and cycling in general, the Senator Mitchell inquiry into baseball, the “Raw Deal” bust just prior to the Olympic games in Beijing and now the current investigation being carried out by federal agencies from the United States and engaging others in Europe.

Some will say that anti-doping ought not to be criminalized, but now the Olympic movement has accepted that there ought to be laws relating to the trafficking and distributing of prohibited substances. That is the result of the outcome of an inquiry undertaken by the Italian police at the winter Olympic Games in Turin. As a prelude to this, the IOC were concerned that the Italian laws would wrongly impact on this event and lead to the police making raids on the Olympic village. There was a suggestion at one stage from the IOC that the Italian government be asked to “waive” the law during the period of the event. WADA was not supportive of that approach and the role that WADA played in the subsequent gathering of information which led to the expulsion of the Austrian cross-country ski team was impactful. The subsequent controversy has led to a total revision of laws in Austria, the establishment of a new and vigorous national anti-doping agency with extra powers, and an alertness within Austria to the scourge of doping in sport. The IOC is now asking bid cities to ensure they have national legislation in place to allow similar enforcement inquiries, before any bid is advanced.

Australia has been one of the leading countries with its advanced legislation, and increased powers to its national anti-doping agency (ASADA). The investigations or inquiries that can be conducted by enforcement agencies, and the sharing of such gathered evidence, are pivotal in the way that the fight against doping can continue.

WADA has entered into a Memorandum of Understanding with INTERPOL in order to facilitate the appropriate sharing of this evidence between countries, and with sporting bodies. Australia has provided a model with ASADA able to legally receive evidence or information from customs and police. Already many non-analytical cases have been advanced in Australia both against athletes for possession (human growth hormone being prominent) and members of the athlete entourage for supply.

Investigations or inquiries are now central to the arm of anti-doping which is committed to finding those who are cheating their fellow competitors.

One of the forms of cheating is doping. Others include bribery and corruption, each of which might also be linked to doping, but let me confine my remarks to doping.

Doping undermines the integrity of sport. The intrinsic value of sport, often referred to as the "spirit of sport," is the celebration of the human spirit, body and mind, and is characterized by such values as: ethics, honesty, excellence, as well as respect for rules, self-respect and respect for others. When sport is void of these values, it might be argued it is no longer sport.

We sometimes hear or read of athletes' negative comments about anti-doping programs. These comments frequently come from athletes who often have been misinformed or not informed about anti-doping programs. But unfortunately, rarely is the spin on the many who do support anti-doping programs such as in- and out-of-competition testing, including the whereabouts system, and so on. More than 13,000 elite athletes worldwide now provide whereabouts through our ADAMS program.

Many athletes have reiterated their support to the whereabouts requirements and have asked specifically that anti-doping programs be further enhanced. They deplored the fact that some organizations cannot or do not perform enough tests, meaning that, in some sports, athletes might not even be tested at World Championships, and in some countries few athletes are tested out of competition.

Our job at WADA is to make sure that the Code and the same anti-doping rules apply to all athletes, in all sports, wherever they may be competing.

It is a huge achievement to have an international set of rules accepted by all. We must now ensure all are enforcing these rules in the same consistent manner.

Doping in sport by an athlete can be handled within the sport context. An athlete in competitive sport knows that he or she can be subject to testing at all times and without notice and that, if a positive sample is produced, there will be a disciplinary process. There must be transparency in this process. All we have in the Code has been fully studied and tested to ensure the preservation of fundamental rights of athletes including minimizing the impact on private life and the general principles of law globally. These rights, of course, include the right of athletes to fair and clean competitions.

Remember this right because it forms the hub of what we do to protect the integrity of sport. We uphold this right. Those who are alleged to have broken the rules and become subject to any sanction, have the right to proper process and a fair hearing with a right of appeal to Court of Arbitration for Sport.

We must resist attempts to make the whole question of doping banal. You have all heard some of these attempts. "Everybody is doing it." "You will

always be behind the cheaters, so why bother with anti-doping programs?"
"Let's have doped sport." "The Romans watched the Christians fight the lions." Do we want continued entertainment or do we appreciate the values of sport?

The contribution that the World Anti-Doping Agency makes to the leveling of the playing field is that it performs an independent role in making it possible to contemplate an environment for sport that is doping-free. We bring together the sport movement and the governments of the world and put them at the same table, at the same time, with the same objective – that of restoring the integrity of sport, to give every athlete an equal chance of doing their best, without having to cheat.

Clean athletes should be honored, not denied their fair opportunity. The World Anti-Doping Program is designed to create the chance for athletes to compete clean in a leveled playing field.