

**KEYNOTE ADDRESS BY THE HON JOHN FAHEY AC  
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TO THE LAW SOCIETY OF NEW SOUTH WALES' SPORTS LAW SEMINAR  
'A LAW UNTO ITSELF'**

TUESDAY, 9 NOVEMBER, 2010  
STATE LIBRARY OF NEW SOUTH WALES

In early 2008 the Spanish government decided that all National Sporting Federations connected with Olympic Sports should hold their annual meetings and election of office bearers prior to the Olympic Games in Beijing in August. It seems the Government believed that decisions such as Olympic attendance should be made by people recently elected in the knowledge that they were entrusted with that specific responsibility.

Football, that is, the code we in Australia call Soccer, had scheduled their annual meeting and election of office bearers for the latter part of 2008 and indicated they would not support the government's decision. A stalemate developed.

The President of FIFA, Sepp Blatter, entered the debate and made a public statement supporting the Spanish Football Federation and his words were unambiguous.

He stated that football would decide when its elections were to be held and if football's autonomy in Spain was taken away, Spain would be suspended from FIFA. Such a suspension could have destroyed their 2010 World Cup campaign which, of course, they subsequently won and derailed their bid to host the 2018 World cup and Madrid's bid to gain the 2016 Olympics which were awarded last year to Rio de Janeiro. When questioned on FIFA's right to interfere with the sovereignty of any nation the FIFA President pointed out that FIFA was a very powerful organisation and had more member countries than the United Nations and it was also far more effective than the United Nations. Not surprisingly,

there were no elections for the Spanish Football Federation prior to the 2008 Olympics.

So, after that story you have probably reached the conclusion that sport is a law unto itself which is the theme of this seminar. I believe it is a law unto itself and for sport's sake I hope it remains that way.

But I would hasten to add that sport should never be above the law and nor should it have the right to ignore or deny a concept that we all support and value, the principles of natural justice.

All sports have rules or laws. Those laws of the game are the agreement that participants have with each other and there is a clear choice. Play by the rules, or don't play.

Many of those rules are technical such as for equipment, size of playing fields, the number of players and the 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 and safety nets and some are extremely puzzling to us mere sports fans such as the full body suits swimming allowed and then banned. Perhaps Grant Hackett might shed some light on this strange set of rules that has thrown the entire swimming record book into chaos for probably all time.

In essence, the laws or rules of sport ensure that all participants start with a level playing field.

In order for sport to maintain its integrity, its rules are the laws that everyone agrees to adhere to and they must be respected. Those who circumvent the rules must be removed from competition.

Whilst each sport has its own laws or rules, sport generally surely must have the right to determine and implement common laws or rules.

It is these common laws that lead into the World Anti-Doping Agency (WADA) and its harmonised Code. Looking back to just over a decade ago there is absolutely no doubt that there was an undeniable and urgent need to develop a protocol or set of rules that would apply in all countries of the world and in all sports to tackle the issue described at that time and still described by many as the single biggest threat to world sport – doping.

So what was this undeniable need and urgency?

When the first International Conference was convened in 1999, the need arose from a sequence of disastrous outcomes in the world's most famous cycle race, the Tour de France. No-one could argue that at that time doping was other than rampant in the sport of cycling.

In addition, sports administrators from around the world had observed with disdain at the performances of athletes from the eastern European countries over the preceding decades. As an Australian sports fan, I will never forget the photograph of the Chinese female swimmer who was sent home from the World Championships in Perth in 1998 for possession of a vast quantity of steroids. I doubt that I've ever seen larger shoulders on any man.

As my predecessor, Dick Pound, once said about another female athlete convicted of doping and it certainly applies to that Chinese swimmer also - "she had muscles in places where most people don't have places".

Individual attempts to deal with the problem of doping in various sports had marginal success at best.

The 1999 Lausanne Conference issued a Declaration which called for the creation of a global, independent anti-doping agency, composed and funded equally by the IOC and governments.

Its primary mandate was to compile a set of rules that would harmonise the various disjointed processes that were then in existence across all sports and in all countries.

The World Anti-Doping Code, following many drafts and many months of consultation, was presented to the second World Conference on Doping in Sport held in Copenhagen in March 2003 and it was unanimously adopted. The sports movement agreed to incorporate the Code in its rules, throughout the many federations, by the commencement of the Athens Olympics in 2004 and the 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 included ensuring the treaty was in effect by the commencement of the Winter Olympics in Turin in 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 International Treaty was accepted as an International Convention by UNESCO in 2003 and there are now 149 countries that have ratified this Convention making it the most successful of all Conventions under the auspices of UNESCO.

So what has this meant in terms of requirements of governments and requirements of sport?

First, it has ensured that harmonious code compliant rules and laws in anti-doping regulations have 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 and with a branch in Sydney.

Many said that harmony would be impossible, and that there would be legal challenges and political difficulties. From time to time there have been legal challenges and from time to time the politics of both sport and nation have surfaced but to date no tribunal has found against the Code. Of the 193 nations that have committed to the Copenhagen Declaration, 149 Governments have

made the Code part of their nation's laws by ratification of the UNESCO Convention.

Most of the remaining nations are in the process of ratification. There are now more than 670 signatories to the Code emanating from National Olympic Committees (NOCs), International Sport Federations (IFs), National Sport Federations, professional leagues and sports as diverse as Bridge and Dog Sledding.

There is no doubt in my mind that the strength of the WADA Code or law is the unique nature of the equal partnership between Sport and Government. This is certainly not a case of sport being above the law but the law and sport working together under a jointly developed law to produce an agreed common goal. In fact, some countries such as Australia have felt the need to pass separate legislation to support the application of the Code.

The Australian Sports Anti-doping Authority (ASADA) has its own legislation chiefly to do with the establishment, governance, management and funding (with its allied accountability to government) and this legislation allows ASADA to share information with law enforcement agencies such as Customs and the Australian Federal Police. Such progressive legislative initiative has made ASADA and Australia very effective in the fight against doping in sport.

Not all countries have specific anti-doping legislation but specific purpose anti-doping agencies exist in more than 80 countries of the world and a further 120 countries, namely the smaller and economically disadvantaged countries, are covered by regional anti-doping organisations (RADOs).

For example there is a Pacific RADO based in Suva which manages the program in the Pacific Island countries including Papua New Guinea.

I turn now to some of the concerns and criticisms expressed against the WADA laws and process. We are not without our challenges and nor should we be. In fact it is my view that scrutiny is essential to re-assure our constituency that WADA is independent, transparent and accountable.

There are presently several cases going through tribunals and courts within Belgium. Some athletes are challenging the jurisdiction of the Court of Arbitration for Sport as having the exclusive jurisdiction to deal with matters pertaining to the WADA Code. It is worth reminding ourselves that the Court of Arbitration for Sport was set up to dispense justice to sport and sports people in an accessible, affordable and expeditious manner and leaving aside the Belgium challenges against the jurisdiction of CAS for the moment there are some unhelpful examples that the accessible, affordable and expeditious objectives are slipping somewhat.

For example, CAS has determined that a national sport federation should pay a commercial filing fee and not the standard 500 Swiss francs in all cases except when the national federation was appearing on behalf of the International Federation under delegation. In a recent appeal case involving WADA and Spanish footballers the filing fee that ultimately fell to WADA to pay if the case was to proceed was 28,000SF. Last year, a New Zealand Paralympian in the sport of archery was required to pay 7000SF to prosecute an appeal before a three person tribunal. I can't imagine this athlete was earning much if any money in his chosen sport.

I am also aware that appeals lodged against decisions pursuant to the IOC anti-doping program at the Beijing Olympics were still to be heard by CAS fifteen months later. With a new President soon to be elected to the Court of Arbitration for Sport, I am hoping a renewed focus on the objectives will occur. I also hope that CAS might look closely at its rules requiring all evidence on appeal to be on de nova basis.

Surely in the interests of reducing costs and saving time, uncontested evidence, particularly from specialists, can be admitted through the transcript from the initial hearing.

Still on the issue of affordability of justice, it is relevant to visit the extraordinary challenge by Tour de France winner Floyd Landis, who was given a two year sanction after returning a positive EPO sample during that event.

His case alleged the Paris Laboratory had a number of failings in dealing with his sample and spread over two 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 Australia, one may have anticipated some form of complaint to the Law Society about such inappropriate behaviour from litigating lawyers. In any event, WADA's legal costs were well in excess of US\$1million and subsequently the athlete has publicly admitted he doped during that race and on many other occasions. No one could describe this case as affordable and nor was it dealt with in a timely manner.

There is ongoing debate, particularly in Europe, as to whether 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 and it raises its head in the WADA Code in the International Standard for Testing which requires certain elite athletes to be in a registered testing pool and provide their whereabouts for one hour a day for months in advance. Many of those politicians who raise the proportionality argument are not aware of the limited class of elite athletes to whom some of the rules apply. I believe proportionality prevails.

There is a growing move for sportsmen and women to join players associations, particularly in Europe. These player associations - with

a level of encouragement from a number of Governments- seem to be endeavouring to enshrine sportsmen and women into the employer/employee relationship. Whilst I fully support the notion that sport should fairly and properly reward its participants, I dread the thought that certain labour laws might become applicable to sport. For example, that drug testing should be suspended during a player or athletes annual holidays. Sportsmen and women cannot be brought into the working concept of nine to five.

To reach the top they have to make sacrifices and commitments that defy normal rules and to be sure they are not cheating, they must be able to be tested any day, anytime and anywhere.

The issue of double jeopardy is alive and well especially in relation to selection criteria in some countries. The British Olympic Association, for example, still has a lifetime ban on selection for Olympic Games teams for athletes who test positive.

A few weeks ago at the Commonwealth Games a Scotsman by the name of David Millar easily won the cycling gold medal for the 40 kilometre road time trial. Because he was suspended for two years for doping he was ineligible for selection for Great Britain for the Games in Beijing and will not be selected for London.

Track sprinter, Dwayne Chambers, also sanctioned for doping under the Code, sought relief from this BOA rule in the British High Court just prior to the Beijing Games. He unsuccessfully sought narrow injunctive relief but the comments of the Judge relating to the double jeopardy issue were very interesting.

A third case on this principle is also worthy of brief examination. American swimmer Jessica Hardy qualified through the U.S.A. Olympic trials to represent her country in four events in Beijing. Doping controls at the trials subsequently revealed an adverse analytical finding and she was suspended for one year by the American Arbitration Association.

This meant that she breached an IOC rule introduced in July 2008 forbidding entry to the Games to any athlete who has been sanctioned for an anti-doping violation and received a suspension of more than six months if that sanction was imposed in the four years prior to the Games. The Appeal to the Court of Arbitration for Sport confirmed the one year suspension, and now Jessica will be ineligible to compete in London in 2012 even though she has been back swimming for more than a year after her one year ban.

The same rule now applies to US 2008 400 meter Olympic champion LaShawn Merrit, who was suspended for 21 months for testing positive three times for an anabolic steroid contained in an over-the-counter sexual enhancement product, ExtenZe. Merrit's suspension will be over in July 2011 but he is ineligible for the London Games a year later.

Many might wish to argue that the cases I have brought to your attention invoke the double jeopardy principle and confirm sport can be a law unto itself.

Yet, having raised a number of areas of conjecture in the relationship between sport and the law, I would like to see an extension of the law and other rules as they apply in criminal codes and professional codes in most countries, to the WADA Code and the fight generally against doping in sport.

In the area of criminal law, the issue of manufacturing, supply and trafficking across borders of performance enhancing drugs is rarely covered by the criminal

codes. WADA has a formal protocol with INTERPOL to enable INTERPOL to work through its member police forces around the world to uncover source of supply and the chain of distribution of performance enhancing drugs (PEDS). There is growing evidence that illegal drugs and PEDS are manufactured by the same criminals in their underground laboratories.

The street value of PEDS is around the same as illegal drugs such as ice and cocaine. The difference is the supplier of illegal drugs usually holidays in gaol if caught and still holidays on the Riviera if caught supplying PEDS.

Many first world countries have no laws to prevent cross-border trafficking and the fight against doping in sport would benefit significantly if such laws did exist. Some countries such as Italy, Russia and Austria have sports doping in their criminal code and gaol penalties can be imposed on conviction.

Whilst I wonder whether sometimes this type of application of the criminal code is a case of the law unnecessarily interfering with sport, I also respect the sovereign right of any Government to make the laws it believes will benefit its citizens.

I mentioned rules for governing professional behaviour because athletes rarely cheat alone. Invariably it is some or many in the entourage that are as guilty as or guiltier than the cheating athlete.

Lawyers, doctors, agents, managers and physiotherapists cannot be sanctioned by sport but they can and should be sanctioned by their professional bodies for the role they play in putting an athlete's health at risk and damaging sport through doping. Unfortunately, such behaviour frequently escapes the scrutiny of professional bodies as it is not the main work of the professional.

I now wish to draw my thoughts to some conclusion on the issue of this Seminar.

I stated at the beginning that in many instances sport is a law unto itself but never above the law. I have explained and advocated that the WADA Code establishes its own law but it does so with the support and encouragement of the elected law makers in the overwhelming majority of the world's nations, most of whom have made the code their law through the UNESCO Convention ratification.

And I have canvassed the concerns and challenges ahead where sport decides it can apply its own rules that may be in conflict with widely accepted principles of law.

I would not be surprised to see the principle of double jeopardy tested in some superior Court where it impacts in the manner I have shown in some examples today. At the same time as raising such an issue, I do not venture a personal opinion on this matter as sport is a 50 percent shareholder in WADA and my role is to defend the WADA Code, not the code of individual sports.

I strongly support the Court of Arbitration for Sport as the sole tribunal to adjudicate on the Code providing it continues to deliver in an affordable, accessible and expeditious manner but I would never deny any individual the right to expose any aspect of the WADA.

Code to the scrutiny of an appropriate civil Court. Having one designated judicial body however is a significant step in ensuring that world-wide harmonious rules apply to doping in sport.

But sport is different. By its inherent nature, sport requires those who aspire to be the best to have the least number of restrictions placed on them as might be possible.

At the same time both athletes and sports bodies have rights and without the law in whatever form those rights cannot be protected.

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