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JOINT STANDING COMMITTEE ON TREATIES

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JOINT STANDING COMMITTEE ON
TREATIES
Monday, 28 November 2005

Members: Mrs May (*Acting Chair*), Mr Wilkie (*Deputy Chair*), Senators Bartlett, Carol Brown, Mason, Santoro, Sterle, Trood and Wortley and Mr Adams, Mr Johnson, Mr Keenan, Ms Panopoulos, Mr Ripoll, Mr Bruce Scott and Dr Southcott (*Chair*)

Members in attendance: Senators Carol Brown, Trood and Wortley and Mr Adams, Mr Johnson, Mr Keenan, Mrs May and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

Treaty tabled on 9 November 2005.

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Committee met at 10.07 am

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United Nations Educational, Scientific and Cultural Organisation International Convention against Doping in Sport

ACTING CHAIR (Mrs May)—Welcome. I declare open this meeting of the Joint Standing Committee on Treaties. As part of the committee's ongoing review of Australia's international treaty obligations, the committee will today review the United Nations Educational, Scientific and Cultural Organisation International Convention Against Doping in Sport, tabled in parliament on 9 November 2005. I thank witnesses for being available for this hearing. I remind witnesses that these proceedings are being televised and broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses, it would be helpful if any issues could be raised at this time. I ask witnesses: do you have any comments to make on the capacity in which you appear?

Mr Zanker—I am Assistant Secretary in the Office of International Law of the Attorney-General's Department.

Ms Cohen—I am General Manager, Planning and Reporting, Sports Performance and Development, at the Australian Sports Commission.

ACTING CHAIR—Thank you. We will now take evidence on the UNESCO International Convention Against Doping in Sport done at Paris on 19 October 2005. I would like to acknowledge that the committee received a letter from Senator the Hon. Rod Kemp, Minister for the Arts and Sport, on 4 November 2005 advising that UNESCO member states, including Australia, are formally moving to accede to the convention with the aim of having it in place by the 2006 Winter Olympics commencing in February in Turin. The Australian government has

indicated that, as a member of the World Anti-Doping Agency executive committee and foundation board, Australia should be one of the first states to accede to the convention and submit an instrument of ratification to the UNESCO Director-General before 31 December 2005. This time frame would also allow Australia to have acceded to the convention before the 2006 Commonwealth Games.

Minister Kemp further advised that he has written to the Hon. Alexander Downer MP, the Minister for Foreign Affairs, seeking a national interest exemption to meet the earliest session time frame. However, the committee is aiming to table its report by the end of the year, even though under the 20-sitting-day inquiry period provision the committee would not be required to table its report until May 2006.

Although the committee does not require witnesses to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Lyons—As committee members will be aware, there has been a concerted effort to harmonise antidoping policies and practices internationally to ensure that all athletes are subject to a comprehensive and fair drug-testing and compliance regime. The World Anti-Doping Agency was established to coordinate antidoping efforts worldwide. The World Anti-Doping code first became operational on 1 January 2004. All national, Olympic and Paralympic committees and many other sporting organisations implemented the code before the 2004 Athens Olympics. In Australia all Australian Sports Commission recognised sports have implemented code compliant antidoping policies.

Governments around the world have been developing a legally binding international instrument that would require state parties to commit themselves to the principles of the WADA code. The International Convention Against Doping in Sport was developed under the aegis of UNESCO by member states and was adopted unanimously on 19 October 2005. Australia has made a significant and active contribution to the drafting of the convention. We have been at the forefront of international efforts to combat doping in sport. Australia is in full compliance with the WADA code, and we do not require any legislative amendments to implement the convention.

The convention will come into force on the first day of the month 30 days after 30 countries submit their documentations for ratification to the Director-General of UNESCO. That is, in order for the convention to be enforced by the Turin Winter Olympics, 30 countries must ratify the convention before 31 December 2005. Given Australia's leadership role on antidoping issues, Australia would like to be one of the first 30 countries to submit its instruments to the UNESCO Director-General.

ACTING CHAIR—Thank you. Would anyone else like to make some remarks? We will now proceed to questions. I might open the questioning. Is it likely that those 30 member states that we are hoping will become signatories to the convention will sign?

Mr Lyons—I am not in a position to give you conclusive testament that that will happen, but I think there is a strong expectation that it will and a strong likelihood that it will.

ACTING CHAIR—Have countries already signed?

Mr Lyons—I have just been passed a media release saying that Sweden was the first state to ratify the convention, on 25 November 2005. That has been welcomed and announced by the UNESCO Director-General.

ACTING CHAIR—So we have a very short time frame in which to have those 30 countries signed?

Mr Lyons—Yes. For some countries it is a very easy thing to do in an administrative or a legal sense. In other countries it is a quite cumbersome thing involving legislation. Some countries which will not be able to do it by 31 December might very well have very strong antidoping policy regimes in place and be fully WADA code compliant. But I think it is going to take Japan, for example, a number of years—12 months or something—to be able to ratify the convention for its own constitutional reasons.

ACTING CHAIR—I guess I could say that Australia has a very special interest, with the Commonwealth Games being held here next year. Would we actively work with countries who may not be as willing to sign? Would we work with them to ensure that they fully understood why we are moving forward on this and why it is important for international games?

Mr Lyons—Yes. I think our minister has already written to particular colleagues indicating the importance of this, although my understanding from attending WADA meetings recently is that all countries are doing whatever they can within their legal and constitutional constraints to ratify before 31 December. I do not think there are any examples that we are aware of where countries are dragging the chain in terms of not doing what they could do.

Mr ADAMS—With regard to imposing the code on all sports in Australia, I remember there were some issues with the AFL, the Australian Football League. What was that about?

Mr Lyons—Those issues have been resolved but I might refer to my colleague from the Australian Sports Commission, who can probably provide you with more detail in relation to the AFL.

Mr Espeland—The AFL became code compliant on 31 October. There was an extended period of discussion. The main issue was about the adoption of the prohibited list, which is released each year by WADA. It is a mandatory provision, to be code compliant, to adopt the list in its entirety.

Mr ADAMS—Is that where we come into conflict—because of some drugs being used to relieve pain or for other issues other than enhancing the athlete's or sportsperson's performance?

Mr Espeland—The legitimate legal application of drugs in terms of treatment of ailments is dealt with under the therapeutic exemption arrangement. From a practical point of view in terms

of the application of those arrangements, there are some difficulties. That really lies with ASDA, and they might like to comment on that.

Ms Gripper—Yes, I will. There are three criteria which enable a substance or a class of substances to be incorporated into the prohibited list. Performance enhancement is only one of those criteria. The others are that it could be harmful to health or contrary to the spirit of sport. So, each year when the prohibited list is revised, those three criteria are applied. In this case the AFL had some issues about some of the substances that were included on the list, and they preferred, for the purposes of their sport, that they were not included.

Mr ADAMS—What were they and why was that?

Ms Gripper—I think their main issue was with cannabis being included on the prohibited list. Their belief was that they could deal with that particular substance in a different way outside of an antidoping framework. For instance, they would prefer to deal with that through a code of conduct arrangement.

Mr ADAMS—Cannabis does not enhance somebody's performance?

Ms Gripper—That is debatable. There are some sports where it is believed that it does enhance performance—sports where you are required to get into the zone or have a fairly slow heart rate.

Mr ADAMS—In the information we received, there was a reference to what the code says and what the convention says. They are two different things. The code lays down requirements to be met. What is the convention?

Mr Lyons—One way to look at it is that the convention is an agreement between the member states to implement the principles of the code in each of their own jurisdictions, and there are some specific obligations relating to those commitments but they are broadly about implementing the WADA code, whereas the WADA code is a code that has been produced jointly by governments and sport. WADA is an organisation that consists of representation from the Olympic movement, sports and government—almost like world's best practice determining what are the appropriate antidoping law violations and what is the appropriate prohibited list, and that world's best practice applying in each country. Australia already complies with the WADA code, but the convention itself is an international legal instrument obliging us and other member countries to implement the code in their own jurisdictions.

Mr ADAMS—And we do that by requiring that any sport which gains money from the Commonwealth government must comply with that code?

Mr Lyons—That is the heart of it. The convention leaves it up to each member country to decide what mix of policy, administration and legislation mechanisms it thinks is most appropriate to implement the code. As you say, the centrepiece of the Australian government's approach is its funding agreements through the Australian Sports Commission with sporting bodies—both the Olympic sporting bodies and the professional bodies such as the AFL—to require them to comply with the code. Our compliance with the code is backed up by the fact that the parliament has created a sports drug agency, ASDA, which is a national drug-testing

agency. That fulfils requirements under the code. It uses a WADA-accredited laboratory, the Australian Sports Drug Testing Laboratory. Again, that fulfils their obligations under the code. That laboratory conducts research programs which improve analytical techniques and investigate new forms of doping. The department runs grant programs, inviting applications for antidoping research. There is supplementary legislation in relation to Customs et cetera that complements the sport-specific antidoping policy framework of the government.

Mr ADAMS—Once they sign the code, they accept the code. Can somebody then turn up and ask for a test to be taken?

Mr Lyons—Yes, I might defer to my ASDA colleagues to outline the testing process.

Mr ADAMS—Can you tell me how it works in practical terms. Once this is in place for all sports that come under this regime, how does it operate?

Ms Gripper—The Australian Sports Drug Agency Act gives us the authorisation to test athletes who meet the definition of a competitor. A competitor is quite clearly defined in that legislation. We have a public interest testing program for most of our Olympic sports and quite a few other sports, but we also enter into contractual arrangements with the professional sports such as AFL. The majority of testing done on AFL players is through a contractual arrangement between the AFL and ASDA, but that is not to say that we could not also conduct a public interest test on one of their players, because they quite clearly meet the definition of competitor.

Mr ADAMS—Australia shows some leadership in this field by assisting other countries. I think that is mentioned in the text. Does that refer to some of our Pacific neighbours? Will we assist them to reach this level?

Mr Lyons—Ms Gripper might want to refer briefly to the cooperative efforts from ASDA in the Pacific area, where they do not necessarily have a national antidoping body in each of the Pacific countries, to help them have more of an umbrella approach to meet those obligations.

Ms Gripper—We are currently collaborating with WADA and Drug Free Sport New Zealand to establish what we are calling a RADO, a Regional Anti-Doping Organisation, that will be based in Fiji and will attempt to provide coverage to the other 11 Oceania countries that are not Australia or New Zealand. It will provide them with an antidoping organisation that can service their needs. We are currently in a pilot project, which is being sponsored and funded by the World Anti-Doping Agency with practical and logistical support from Australia and New Zealand, to make that happen.

Mr WILKIE—I notice in the letter from the minister to the committee that he talks about problems that might arise if the committee objects to certain sections in article 34. What likely objections would we have with regard to that prohibited list? Was there ever any likelihood that we would object to any of those items on that list?

Mr Lyons—I would not think so. I think the issue that is being raised there is the fact that WADA produces a prohibited list of substances each year. It makes a decision at a September meeting of its executive committee as to what should be on the prohibited list each year. It makes that list public on 1 October and it gives advance notice to athletes that, come 1 January

of that next year, that will be the new prohibited list that will apply. The difficulty is that the prohibited list is an annexure to the convention and there needs to be a process undertaken through the committee in relation to that annexure to the convention. I do not think there is necessarily any particular reason why the committee would have a problem with items on the prohibited list. It is just that if the Australian government was not in a position to accept those changes to the prohibited list in terms of its obligations under the convention, there would in fact be a discrepancy because there would be the list that the Australian government had agreed to at the international level and there would be the new list that was about to come into force on 1 January which would apply to athletes. The problem that the minister might have been alluding to is the problem of confusion as to which was the list that Australia was requiring its athletes to comply with.

Mr WILKIE—I suppose we are a little annoyed that this is the reason being given as to why this has to be rammed through under the national interest exemption, because this committee might object to certain provisions within that list. I would have thought that, if that is not the case, the grounds for asking for a national interest exemption are pretty thin, and it is an abuse of the process. How many Commonwealth nations have agreed to ratify the treaty?

Mr Lyons—Could you repeat the question?

Mr WILKIE—You have talked about Switzerland and Japan. How many Commonwealth nations will have acceded to and ratified it before the Commonwealth Games?

Mr Lyons—We have a list of countries which have adopted the convention.

Mr WILKIE—The reason I ask that is that it is another critical part of the minister's letter, in that he says that we need to lead the way because we have to have this in place before the Commonwealth Games are held, to make ourselves look good. That is all well and good, but how many Commonwealth countries will have ratified?

Mr Lyons—The countries that have adopted the convention and are moving now to ratify it that are Commonwealth countries, from my limited knowledge of Commonwealth countries, are New Zealand and Canada. The list I have in front of me is a list of the countries that are most likely to ratify quickly. I do not have in front of me a full list of the Commonwealth countries that have adopted and are moving to ratify.

Mr WILKIE—Could you take that on notice and let us know when they are likely to ratify it?

Mr Lyons—Yes.

Mr WILKIE—Because the second-last paragraph of the minister's letter talks about how Australia would be embarrassed media-wise and publicly if we have not ratified. I do not really see an issue to do it urgently under the national interest exemption if no-one else has been moving down that path. I think the convention is important and I do not have any problem with it, but what I do have a problem with is where departments, through ministers, write to the foreign minister asking for national interest exemptions when it is not necessarily needed. I think this committee needs to follow the proper due processes. Had we been asked, in the natural course of things, to progress this treaty through quickly, assess it and make a recommendation,

that would have been sufficient, without asking us to not even be involved, which is what happens with a national interest exemption.

Mr JOHNSON—I have two questions. One is in relation to consultation with the states. I note that all the states have been consulted. I understand that two states, Queensland and Victoria, have raised specific issues. I would be interested to know what those issues were.

Mr Lyons—I will have to take that question on notice. I am advised that the issues did not relate to our obligations under the convention; they were questions in relation to the application of the WADA code itself.

Mr JOHNSON—Was it more of an operational point?

Mr Lyons—For example, one of the issues that has been raised in the past is the extent to which the WADA code applies to state-level athletes rather than to national athletes. I would need to confirm this, but I think the questions would have been more related to that than to whether or not Australia should adopt or ratify the convention.

Mr JOHNSON—So the issues would be about distinctions between, for example, Queensland athletes who come under the Queensland Academy of Sport and those who come under the AIS. Would that be correct?

Mr Lyons—I think that was one of the issues that was raised. I am not sure whether anyone from the Sports Commission has any comments about the application of the code to state-level athletes.

Ms Cohen—The state institutes and academies of sports, which would include Queensland and Victoria, do have code-compliant antidoping policies, so any elite or emerging elite athlete is covered under both the sports antidoping policy and the policy of the state institutes and academies of sport.

Mr JOHNSON—I assume that, if they are an elite athlete within a state organisation, they may or may not be under an Australian Commonwealth funded organisation as well. Is that a relevant point for the purposes of this convention?

Ms Cohen—The state institutes and academies of sport do receive Commonwealth funding, either through partnerships the Australian Institute of Sport may have or through funding that we provide to national sporting organisations, which in turn provide that funding to institutes and academies of sport. We also have a number of athletes who get direct athlete support, and it is a requirement that they fall under the framework of a code-compliant antidoping policy.

Mr JOHNSON—Perhaps you could take that on notice.

Mr Lyons—The WADA code obligations may apply only to national athletes, but we will take that on notice and get back to you.

Mr JOHNSON—I am just wondering whether an athlete can be under both a federally funded and a state funded elite sporting association or academy.

Mr Lyons—We will take that on notice.

Mr JOHNSON—My second question is in relation to the funding of article 17. It seems to me that it is somewhat ad hoc. There are no specific funding criteria in terms of the number of dollars that nations would give or be expected to give. Can you comment on that? Are there any annexures that might refer to it? If it is voluntary, some countries will be in a position to contribute more. We may decide, for whatever reason, not to contribute.

Mr Lyons—As I understand it, the minimum costs of the secretariat function of monitoring compliance with the convention will be met from the UNESCO general fund. However, you are right: if there were a need for additional funding for that purpose, it would need to come from the voluntary fund. I do not have a figure in mind regarding what other countries are likely to contribute to a voluntary fund—it may vary—and each year Australia would need to make a choice. If there were a call for a voluntary fund and the Australian government were called on to choose whether to commit to the voluntary fund, my understanding is that that contribution would be unlikely to exceed \$US250,000 in any financial year.

Mr JOHNSON—How has that figure been determined? Has it been plucked from the air?

Dr Salmond—It is in line with the current WADA contribution that Australia makes.

Mr Lyons—The contribution Australia currently makes to WADA just happens to mirror that amount. But it would really depend upon what the call and the advice from UNESCO were as to what resources were required on an ongoing basis and what other countries were likely to contribute. With these sorts of things, it is usually only certain countries that deliver if there is a call for a voluntary fund; others will not. It will depend on who else is contributing and how much is required.

Mr JOHNSON—They depend on goodwill and capacity. Were there any discussions about expectations or the like?

Mr Lyons—I would have to take that on notice. I am not sure whether there was any particular discussion about the amount of additional contributions that might be required via the voluntary fund for UNESCO to monitor compliance with the convention.

Mr JOHNSON—Right. It is all very well to have nice conventions and words but, at the end of the day, they become somewhat meaningless if the funding and resources are not there.

Mr Lyons—A lot of the resources for monitoring compliance with the convention will be provided indirectly via WADA. WADA will independently monitor compliance with the code. Whilst compliance with the WADA code and compliance with the convention are not identical, there is a substantial degree of overlap. WADA will report to the UN secretariat on a yearly basis on compliance with the WADA code by countries that have ratified the convention. The WADA secretariat will use that information as a very substantial input into the question of compliance with the convention itself. So the amount of additional funds it will need from the funding that will be allocated from the general fund is something which is a bit unknown at this stage.

Mr JOHNSON—Right. Thank you.

Senator TROOD—Negotiation of these treaties conventions is often a matter of compromise between the parties. Can you tell us whether or not this treaty or convention is as robust as we would like it to be? Did we have to give away too much to get the agreement we have got?

Mr Lyons—To my knowledge, it is as robust as Australia would like it to be. It was a convention which was developed and came into force in a very short space of time which shows there was an overwhelming consensus amongst governments. The fact that it was unanimously adopted also sends a similar signal. I think there were the usual debates about the particular wording and the achievement of particular objectives and related issues, for example, about the general fund and the voluntary fund rather than the core provisions of implementing the code. The only other issues that were of concern to particular member countries were about making sure that there was nothing in the convention which was inconsistent with their own constitutional and legal systems; sometimes it was the wording of the document and whether that was consistent with their own legal and constitutional systems, rather than the principles.

Senator TROOD—That is gratifying. This is directed primarily at elite athletes participating in international sporting activity. What are your expectations about the convention and the code in relation to subelite athletes, and to what extent might it trickle down to people in sports at lower levels?

Mr Lyons—The WADA code, which is what this convention is implementing, is world best practice and sends a strong signal to the subelite athletes. There is no current intention for it to be automatically applied down to that level. I am not sure whether anyone from the ASC or ASDA has any comment to make.

Ms Gripper—I think both the code and the convention foresee much more broadening of the antidoping effort internationally. Certainly, both those documents make reference to athletes who are not at the elite level yet, particularly with respect to education and making sure that information and education gets out to a much wider and much younger group of athletes, rather than the elements of the code that refer more to testing and compliance issues.

Senator TROOD—Are we taking specific action in relation to that here in Australia? Is that a particular focus of our antidrug policy?

Mr Lyons—Both ASDA and the ASC play an important role in education. I will let each of them talk to that.

Ms Gripper—At the moment ASDA's education and information program is geared primarily to what we consider our target audience, which are those athletes who fall under our legislation and the code. Our intentions and aspirations are to increase the scope of that education. As with everything, it is a case of funding. At the moment, we are funded primarily to ensure that elite athletes are deterred from taking performance enhancing substances and that they do not do it inadvertently. Over the next few years we will be attempting to broaden that education base.

Ms Cohen—I will add to that. The application of a sports antidoping policy is dependent on the definition of what a 'member' is. In some sports, a member is an elite level athlete or an international level athlete. In others, it can be a national level athlete and, in other cases, it can go down to developing, or even grassroots, athletes—obviously not in a testing framework but

certainly in an educational framework or their understanding of the fact that doping is contrary to the spirit of sport and detrimental to the health of athletes. The other issue we have with the national sporting organisations that the Australian sports commissions fund is that it is a requirement that not only do they have a code-compliant antidoping policy but they address issues about integrity of sport in their strategic and operational plans. In that area we are obviously looking at antidoping, in particular.

Senator TROOD—That is our policy in Australia, but, presumably, it is not necessarily the policy elsewhere. So would you say that we are ahead of international practice here?

Ms Cohen—Correct.

Senator TROOD—I have a question about the Commonwealth Games. Would the code that applies there be the world code, the international code? Is that the level, the standard we expect? Athletes participating in the Commonwealth Games are required to comply irrespective of what happens with the convention—is that right?

Ms Gripper—The set of antidoping rules that will apply for the Commonwealth Games is a set of rules that have been developed by the Commonwealth Games Federation, and that set of rules is in compliance with the World Anti-Doping Code. Each major event organiser is responsible for developing their own set of antidoping rules and procedures that are suitable for the event on the basis that they must be in compliance with the World Anti-Doping Code.

ACTING CHAIR—How difficult is it for us to stay on top of these performance enhancing drugs? What sort of research or facilities do we have to put in place to ensure that we are on top of any new performance enhancing substances? Is it difficult?

Mr Lyons—One of the things to emphasise—and I would be grateful for contributions from my colleagues—is that that really needs to be done at an international level even more so than, perhaps, at a domestic level. That is why WADA was established. In going through the process of deciding what should be the prohibited list of substances, clearly that is an ongoing battle between whatever chemists can develop and dream up and what athletes might be using or their expectations about what might improve performance. There are specialist scientific committees that go through a process of determining what should and should not be on the list. WADA also funds applied research into exactly those sorts of issues and provides grants for that particular purpose. It is getting together the world experts. They make the recommendations to the WADA executive committee, which is comprised of sports and government, and they make decisions guided by that expert evidence. In Australia, the Australian WADA accredited laboratory does its own research and, as I said before, the Australian government runs an antidoping research program. It is definitely an ongoing battle, and a strong message needs to be sent to athletes.

It is difficult to guarantee that anyone who uses a substance which is either currently prohibited, or perhaps should be prohibited for performance enhancing, cheating purposes will be caught, but stronger and stronger evidence is that there is a significant risk that they will be caught and they will be punished.

Senator WORTLEY—Are there countries that are unlikely to accede to the convention and, if so, what are the reasons for this?

Dr Salmond—I don't think we have information about this. I don't know of any countries that were deliberate hold-outs on acceding to the convention.

Mr Lyons—There is, I suppose, a difference between those countries that might have adopted it in the first place—they are the ones we are looking at ratifying the convention. Of course, there are always some countries that may not have adopted the convention in the first place.

Dr Salmond—There is one in the Oceania region—the government of Kiribati has yet to accede to the convention. The minister intends to write to exhort them to do so.

Senator WORTLEY—So the minister is going to—

Dr Salmond—Write to his neighbouring minister in the Republic of Kiribati to exhort her to accede to the convention if possible.

Senator WORTLEY—Were reasons given why they would not accede?

Dr Salmond—We were not able to establish that, no.

Mr Lyons—Some countries do not have the same developed antidoping schemes that Australia has.

ACTING CHAIR—Thank you very much for attending today.

Resolved (on motion by **Senator Trood**):

That, pursuant to the power conferred by paragraph (o) of sessional order 28B, this committee authorises publication of the evidence given before it at public hearing this day, including publication on the electronic parliamentary database of the proof transcript.

Committee adjourned at 10.46 am