

# Standing Down Athletes Facing Criminal Charges: An Examination of the NRL's 'No-Fault Stand Down' Policy

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This article considers the introduction of a policy to the NRL in 2019 that made it mandatory for players charged with certain criminal offences to be stood down from their sport. The article compares and contrasts this policy with the principles that are found in general employment law, examining why athletes may be subject to higher behavioural standards. It examines in detail the test case for this policy heard in 2019, looking at the impacts of that judgment, and how the motivations for the policy were justified in court. The article compares the approach adopted by the NRL to other sports, both domestically and internationally, looking at how those sports deal with the issue of the off-field conduct of athletes. It concludes with recommendations for sporting organisations seeking to write similar policies, and how these can be constructed to best balance a range of competing interests.

## I INTRODUCTION

### *A Context*

In early 2019, the National Rugby League ('NRL'),<sup>1</sup> one of the most popular sporting leagues in Australia, faced public backlash following repeated incidents of criminal behaviour, with many involving allegations of sexual assault or physical violence against women. In response, the NRL amended its rules to include a new 'no-fault stand down' policy.<sup>2</sup> Under the policy, players charged with serious criminal offences are automatically prohibited from playing until their charge is determined by a court.<sup>3</sup> If a player is charged with a crime not classified as a serious criminal offence, the NRL vests discretionary power in the Chief Executive Officer ('CEO') or Chief Operating Officer ('COO') to decide whether they should be permitted to play.<sup>4</sup> Thus far, five players have been stood down under the policy, with three players currently stood down, one ultimately found not guilty of the charges and subsequently reinstated to the game,<sup>5</sup> and one sentenced to community service and subsequently reinstated to the game.<sup>6</sup> While the policy has been held to be legally valid,<sup>7</sup> there has been significant debate as to its fairness on the players.

Balancing interests between employers and employees has long attracted legal debate.<sup>8</sup> The traditional view is that there should be a separation between the 'public sphere' and the 'private sphere', with actions outside the workplace remaining distinct from

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<sup>1</sup> In this article, 'rugby league' refers to the sport, and 'NRL' refers to the governing body.

<sup>2</sup> *NRL Rules*, National Rugby League (at 11 March 2019) r 22A ('*NRL Rules*').

<sup>3</sup> *Ibid* r 22A(3).

<sup>4</sup> *Ibid* r 22A(7).

<sup>5</sup> *R v Walker* (District Court of New South Wales, Magistrate Goodwin, 10 May 2019) ('*Walker*').

<sup>6</sup> *R v May* (Parramatta Local Court; Magistrate Denes, 31 January 2020) ('*May*').

<sup>7</sup> *De Belin v Australian Rugby League Commission Limited* [2019] FCA 688 ('*De Belin*').

<sup>8</sup> See, eg, Kenneth A Kovach et al, 'The Balance Between Employee Privacy and Employer Interests' (2000) 105(2) *Business and Society Review* 289; Karen Wheelwright, 'Monitoring Employees' Email and Internet Use at Work – Balancing the Interests of Employers and Employees' (2002) 13(1) *Journal of Law, Information and Science* 70; Andrea M Kanski, 'Employee drug testing – balancing the employer's right to know with the employee's right to privacy' (1987) 1987(1) *Detroit College of Law Review* 27; Amanda Richman, 'Restoring the Balance: Employer Liability and Employee Privacy' (2001) 88(4) *Iowa Law Review* 1; Victorian Law Reform Commission, *Workplace Privacy* (Issues Paper, July 2002) 45.

actions inside the workplace.<sup>9</sup> While this view is still seen as ideal to some, the existence of these spheres has slowly dissipated over time as society becomes increasingly interconnected. The advent of social media and similar online tools have reduced the ability for an employee to have a ‘private life’ without consequences on their employment.<sup>10</sup> For athletes, the distinction between public life and private life is even smaller. In countries including Australia, athletes are thrust into the public spotlight, attracting a plethora of media attention. This has led to the lives of athletes being considered in the public interest,<sup>11</sup> resulting in a requirement to act as role models in both their professional and personal lives.<sup>12</sup> Although there are arguments against this,<sup>13</sup> courts have been willing to accept that the lives of athletes and other celebrities are in the public interest,<sup>14</sup> as there is social utility in discussing celebrity morality.<sup>15</sup>

Central to this article is the principle of a reasonable investigation. It is commonly accepted that, in an employment relationship, a criminal charge against an employee will entitle their employer to take disciplinary action. However, before such action can be taken, there is generally an obligation to conduct a reasonable investigation.<sup>16</sup> This obligation does not apply to sporting organisations, who often construct their rules to exempt themselves from the requirement to conduct investigations.<sup>17</sup> The NRL policy expressly excludes the possibility of an investigation, restricting the rights of players to natural justice.<sup>18</sup>

Ultimately, any discussion concerning the merits of the NRL policy is more nuanced than a simple statement about a perceived curtailment of individual rights. The issue is complex, involving an intersection between employment law, privacy concerns, individual legal rights, and sociocultural factors. This article argues that sporting organisations should be able to stand down athletes facing criminal charges due to

<sup>9</sup> See, eg, John Locke, *A Letter Concerning Toleration* (Awnsham Churchill, 1690) 13; Christoph Beat Graber and Gunther Teubner, ‘Art and Money: Constitutional Rights in the Private Sphere?’ (1998) 18(1) *Oxford Journal of Legal Studies* 61; Hilary Charlesworth, ‘The Public/Private Distinction and the Right to Development in International Law (1989) 12 *Australian Year Book of International Law* 190.

<sup>10</sup> See, eg, Louise Thornthwaite, ‘Social Media, Unfair Dismissal and the Regulation of Employees’ Conduct Outside Work’ (2013) 26 *Australian Journal of Labour Law* 1; Murray Brown and Chris Dent, ‘Privacy Concerns Over Employer Access to Employee Social Media’ (2017) 43(3) *Monash University Law Review* 796; Justin Pen, ‘Never tweet?: Social media and unfair dismissal’ (2016) 41(4) *Alternative Law Journal* 271. See also *Rose v Telstra Corporation Ltd* [1998] AIRC 1592 (‘Rose’).

<sup>11</sup> Daniel Goldsworthy, ‘Athletes’ rights under the World Anti-Doping Code: A legitimate public interest?’ (2018) 43(3) *Alternative Law Journal* 197, 199. But see Roger Clarke, ‘Privacy and the Media – A Platform for Change?’ (Research Paper, No 2012-29, University of Western Australia, 20 July 2012) 14, where it is discussed that the ‘likelihood of a public interest factor justifying media attention ... varies depending on such factors as the nature of the behavior or the event’.

<sup>12</sup> Daryl Adair, ‘Athletes of influence? The role model refrain in sport’, *The Conversation* (online, 19 December 2015) <<https://theconversation.com/athletes-of-influence-the-role-model-refrain-in-sport-52569>>.

<sup>13</sup> See, eg, Australian Athletes Alliance, Submission No 7 to Senate Standing Committees on Environment, Communication and the Arts, *Inquiry into the reporting of sports news and the emergence of digital media* (14 May 2009) 1; *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 167 (Hunt J) (‘Chappell’).

<sup>14</sup> *Terry (previously LNS) v Persons Unknown* [2010] EWHC 119 (QB) (‘Terry’); *Dwyer v Esmonde* (1877) 11 Ir R (CL) 542; *Goldsborough v Fairfax & Sons Pty Ltd* (1934) 34 SR (NSW) 524. Cf *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB); *Chappell* (n 13).

<sup>15</sup> *Terry* (n 14) [104] (Tugendhat J).

<sup>16</sup> See, eg, *Pinawin T/A Rose Vi.Hair.Face.Body v Domingo* [2012] FWA FB 1359 (‘Pinawin’); *Deeth v Milly Hill Pty Ltd* [2015] FWC 6422 (‘Deeth’).

<sup>17</sup> See especially *FFA Code of Conduct*, Football Federation Australia (at 1 January 2007) cl 2.2(j) (‘FFA Code of Conduct’).

<sup>18</sup> *NRL Rules* (n 2) r 22A(16).

social and financial factors. However, the rights and liberties of players should not be made sacrificial to the reputation of the sport. Sporting organisations should seek to draft policies that optimally manage the competing interests between the league and the player, ensuring that both employer and employee obligations best resemble general employment law principles.

### **B Question, Aims and Methodology**

The overarching question of this article is whether sporting organisations should be able to stand down athletes facing criminal charges. In answering this question, this article focuses on the NRL policy, as it is the most recent, controversial, and relevant iteration of a sporting policy enabling disciplinary action arising from criminal charges. However, the question requires a deeper understanding of a myriad of factors. The sub-questions in this article include the difference in obligations between athletes and general employees, as well as the difference in obligations between sporting organisations and general employers. This article seeks to explain why these differences exist, as well as discuss the competing interests that are most relevant when implementing disciplinary action.

This article has two distinct aims. The first aim is to provide the first comprehensive discussion of the benefits and disadvantages of the NRL policy. As the policy was implemented recently, the analysis of it has been limited. From a media perspective, there has been brief opinion pieces before and after the policy's implementation,<sup>19</sup> while from a legal perspective, there has only been the decision handed down in *De Belin v Australian Rugby League Commission Limited* ('*De Belin*').<sup>20</sup> The second aim of this article is to use the research to make recommendations to sporting organisations writing similar policies. This article will use both the doctrinal research paradigm and the reform-oriented research paradigm, looking to provide a 'systematic exposition of the rules governing a particular legal category',<sup>21</sup> before recommending changes to 'any rules found wanting'.<sup>22</sup> These approaches are more appropriate than broad theoretical

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<sup>19</sup> See, eg, Darren Kane, 'The NRL's system is broken and it's time to take charge', *The Sydney Morning Herald* (online, 15 February 2019) <<https://www.smh.com.au/sport/nrl/the-nrl-s-system-is-broken-and-it-s-time-to-take-charge-20190215-p50y3y.html>>; Tim Gore, 'When sport attacks civil liberties: The NRL's no-fault stand down', *The Roar* (online, 6 March 2019) <<https://www.theroar.com.au/2019/03/07/when-sport-attacks-civil-liberties-the-nrls-no-fault-stand-down/>>; Peter Fitzsimons, 'Standing down de Belin is the least rugby league needs to do', *The Sydney Morning Herald* (online, 27 February 2019) <<https://www.smh.com.au/sport/nrl/standing-down-de-belin-is-the-least-rugby-league-needs-to-do-20190227-p510ob.html>>; Matt Rhodes, 'Dealing with misconduct: the NRL no-fault stand down policy', *Mondaq* (Web Page, 25 March 2019) <<http://www.mondaq.com/NewZealand/x/792846/Sport/Dealing+with+misconduct+The+NRLs+nofault+stand+down+policy>>; Sam Phillips, 'Key points from the NRL's new policy on players and criminal charges', *The Sydney Morning Herald* (online, 28 February 2019) <<https://www.smh.com.au/sport/nrl/key-points-from-the-nrl-s-new-policy-on-players-and-criminal-charges-20190228-p510zh.html>>; Roy Masters, 'The case against: Let courts decide, but if De Belin guilty, ban him', *The Sydney Morning Herald* (online, 22 February 2019) <<https://www.smh.com.au/sport/nrl/the-case-against-let-courts-decide-but-if-de-belin-guilty-ban-him-20190222-p50zmm.html>>; 'The Ticket: 1 March 2019', *The Ticket* (ABC Radio, 1 March 2019) <https://www.abc.net.au/radio/newsradio/podcasts/the-ticket/the-ticket-1-march-2019/11065786>; Darren Kane, 'A year on, is the NRL's no-fault stand down rule working as intended?', *The Sydney Morning Herald* (online, 28 February 2020) <<https://www.smh.com.au/sport/a-year-on-is-the-nrl-s-no-fault-stand-down-rule-working-as-intended-20200228-p545bk.html>>.

<sup>20</sup> *De Belin* (n 7).

<sup>21</sup> Terry Hutchinson, 'Developing legal research skills: expanding the paradigm' (2008) 32(3) *Melbourne University Law Review* 1065, 1068.

<sup>22</sup> *Ibid.*

research, as this article is aimed at assessing practicalities in law.<sup>23</sup> The a priori approach will be relied upon, through the evaluation of a range of sources to reach a general conclusion., before identifying any problems that should be resolved.<sup>24</sup>

### **C Structure**

This article is comprised of six Parts. Part One has provided a background of the topic and set out the questions that are to be answered. Part Two examines employment law, looking at the rights of employers to take disciplinary action against an employee's out of work conduct. This Part provides an explanation of the process employers are obligated to undertake before standing an employee down pending a criminal charge. Part Three identifies the reasons athletes are held to higher behavioural standards than other employees, detailing how and why sporting organisations discipline athletes. Part Four provides an in-depth look at the NRL policy, including the motivations behind the policy, the challenges to the policy, and the decision in *De Belin*. Part Five reviews and evaluates the policy by providing alternative approaches used by other sporting organisations. The Part provides recommendations as to what adjustments could be made. Part Six concludes with a summary of the findings and recommendations made in the previous Partss.

## **II THE PUBLIC AND THE PRIVATE**

The power imbalance between employers and employees underpins the uneasiness expressed on this issue. Dissatisfaction concerning athlete discipline is fuelled by fears employers' powers to discipline employees for conduct outside the workplace are too broad. When the conduct is yet to be proven, these feelings of angst are further exacerbated. Legislatively, employer control for out of work, or off-field conduct, is largely unregulated.<sup>25</sup> The *Fair Work Act 2009* (Cth) that regulates unfair dismissal is silent on out of work conduct,<sup>26</sup> while the *Privacy Act 1988* (Cth)<sup>27</sup> is more concerned with information privacy.<sup>28</sup> Therefore, the current status of the law in Australia is governed by cases, particularly those heard before the Fair Work Commission ('FWC'). This Part seeks to determine the law concerning discipline for pending criminal charges as it applies to the general population. It looks at principles of employer control relating to out of work conduct, before examining what happens if the conduct is yet to be proven in court. The distinction between suspensions and terminations is then reviewed. This Part looks beyond the sporting landscape as it seeks to provide a broad framework for athletes to be compared in future Parts.

### **A Out of Work Conduct**

#### **1 Evolution of Cases**

First, it is necessary to examine the evolution of employer control in Australian law. The clearest explanation of the duties employees have to comply with regarding out of work conduct is found in *Rose v Telstra Corporation Ltd* ('*Rose*').<sup>29</sup> In *Rose*, it was held there are three scenarios in which employee behaviour can impact employment.<sup>30</sup> The three scenarios are: (i) if the behaviour is likely to cause serious damage to the

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<sup>23</sup> *Ibid.*

<sup>24</sup> Zina O'Leary, *The Social Science Jargon Buster* (SAGE Publications Ltd, 2007) 13-14.

<sup>25</sup> In this article, out of work conduct and off-field conduct refers to conduct that occurs outside the workplace and would not usually be considered relevant to one's employment duties.

<sup>26</sup> *Fair Work Act 2009* (Cth) ('*Fair Work Act*').

<sup>27</sup> *Privacy Act 1988* (Cth).

<sup>28</sup> Thornthwaite (n 10) 8.

<sup>29</sup> *Rose* (n 10).

<sup>30</sup> *Ibid* [30] (Ross V-P).

employment relationship, (ii) if the behaviour interferes with the interests of the employer, or (iii) if the behaviour is incompatible with an employee's duties or roles.<sup>31</sup> Although the Australian Industrial Relations Commission ('AIRC') stressed in *Rose* that employees are 'entitled to a private life',<sup>32</sup> these parameters concerning employer control have been largely adopted and continually refined. A simpler test applied in *Hussein v Westpac Banking Corporation* ('*Hussein*')<sup>33</sup> of employee behaviour having a 'relevant connection' to their employment has also been widely used.<sup>34</sup> Behaviours held to have a relevant connection include accessing pornography through a work computer,<sup>35</sup> and non-compliance with lawful directions concerning sexual harassment outside of work.<sup>36</sup>

While the tests from *Rose* and *Hussein* are still referenced in employment cases,<sup>37</sup> their validity has been called into doubt after the AIRC found that out of work behaviour only needs to cause 'difficulties at work' for dismissal to be justified.<sup>38</sup> Additionally, there has been an increased focus on protecting the reputation of the employer.<sup>39</sup> This principle is particularly relevant when disciplining athletes as they are in the public eye, however has been held to apply generally if there is significant media coverage of the proceedings.<sup>40</sup>

## 2 Social Media Influence

Although there is still uncertainty surrounding appropriate levels of employer control due to the lack of legislative authority, undoubtedly a driving force of change has been the emergence of social media.<sup>41</sup> Social media has led to increased interconnectedness, further blurring the lines between public and private conduct.<sup>42</sup> Over the past decade, Australian courts and tribunals have gradually accepted that employers have a 'legitimate interest' in their employees' social media postings.<sup>43</sup> Termination has been held to be justified following negative comments on social media about their employer,<sup>44</sup> although complicating this is that employees do still have the 'right to

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Hussein v Westpac Banking Corporation* (1995) 59 IR 103 ('*Hussein*').

<sup>34</sup> *Ibid* 107 (Staindl JR). See also *HEF of Australia v Western Hospital* (1991) 4 VIR 310, 324; *Smith v The Christchurch Press Co Ltd* [2001] 1 NZLR 407, 413; *Wickham v Commissioner of Police* (Unreported, Supreme Court of South Australia Full Court, Matheson, Prior and Debele JJ, 6 and 11 May 1998) 18-19; EI Sykes and HJ Glasbeek, *Labour Law in Australia* (Butterworths, 1972) 71; RC McCallum, Marilyn Pittard and Graham Smith, *Australian labour law: cases and materials* (Butterworths, 2<sup>nd</sup> ed, 1990) 140.

<sup>35</sup> *Griffiths v Rose* (2011) 192 FCR 130.

<sup>36</sup> *McManus v Scott-Charlton* (1996) 70 FCR 16 ('*McManus*'). See also *Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174, where an employee was terminated for messaging explicit material to colleagues outside of work.

<sup>37</sup> See, eg, *Deeth* (n 16); *Keenan v Leighton Boral Amey Joint Venture* (2015) 250 IR 27; *Corrective Services NSW v Danwer* (2013) 235 IR 215; *Tokoda v Westpac Banking Corp* (2012) 221 IR 153.

<sup>38</sup> *Telstra Corporation Limited v Streeter* [2008] AIRCFB 15 [15] (Senior Deputy Presidents Acton and Cartwright). Here, the difficulties at work were that other colleagues were crying, hysterical, distressed, and disgusted: at [11].

<sup>39</sup> See *Wakim v Bluestar Global Logistics* [2016] FWC 6692 ('*Wakim*'); *Kolodjashnij v Lion Nathan T/A J Boag and Son Brewing Pty Ltd* [2009] AIRC 893.

<sup>40</sup> *Wakim* (n 39).

<sup>41</sup> *Thornthwaite* (n 10). The tests in *Rose* (n 10) and *Hussein* (n 33) were formulated prior to the advent of social media.

<sup>42</sup> *Ibid.*

<sup>43</sup> Glen Bartlett and Regan Sterry, 'Regulating the private conduct of employees' (2012) 7(1) *Australian and New Zealand Sports Law Journal* 91, 94.

<sup>44</sup> *Little v Credit Corp Group Limited* [2016] FWC 6186; *Fitzgerald v Smith T/A Escape Hair Design* [2010] FWA 7358; *O'Keefe v Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311.

complain about their employment rights and their treatment at work'.<sup>45</sup> Courts have also considered the public interest to be an appropriate rationale for taking disciplinary action against an employee for social media activity.<sup>46</sup>

This was recently confirmed in *Comcare v Banerji*, where a public servant's termination for negative social media comments was justified, notwithstanding the use of an anonymous moniker.<sup>47</sup> This case confirmed the relevance of the public interest in disciplinary determinations, as well as the importance of compliance with employment policies.<sup>48</sup> However, the decision was criticised for 'significantly degrading public discourse' and blurring the lines between acceptable and unacceptable expression of opinions.<sup>49</sup> Regarding athletes, the rising influence of social media is best demonstrated by the furore and subsequent termination of rugby union player Israel Folau in 2019.<sup>50</sup> Folau was criticised following a series of social media postings that included homophobic views.<sup>51</sup> Despite the postings being personal views with no connection to his duties as an athlete,<sup>52</sup> his contract was terminated.<sup>53</sup> These matters demonstrate the effect that social media has on the employment relationship despite being out of work, or off-field. Furthermore, they show the permissible levels of employer control are constantly evolving, in part reflecting the rise of social media.

### **B Undetermined Criminal Charges – The Reasonable Investigation**

The diminishing boundaries between the public and the private are evident in situations where the relevant conduct is proven, or indisputable. The concerns surrounding the NRL policy, however, relate to situations where the conduct is alleged and yet to be proven in a court of law.<sup>54</sup> When this occurs in general employment law,

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<sup>45</sup> *Vosper v Solibrooke Pty Ltd T/A Angie's Cake Emporium* [2016] FWC 1168, [20] (Commissioner Roe). See also *Stutsel v Linfox Australia* [2011] FWA 8444.

<sup>46</sup> Louise Thornthwaite, 'Social media and dismissal: Towards a reasonable expectation of privacy?' (2017) 60(1) *Journal of Industrial Relations* 119; *McManus* (n 36).

<sup>47</sup> [2019] HCA 23.

<sup>48</sup> *Ibid*. See also Australian Public Service Commission, *APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads* (Code of Conduct, 29 March 2018) 26, which states 'APS employees have the same right to freedom of expression as other members of the community, subject to legitimate public interests, such as the maintenance of an impartial and effective public service in which the community can have confidence'. The code also establishes that 'ministers and governments as the elected representatives of the Australian people determine and define the public interest': at 8.

<sup>49</sup> Kieran Pender, 'High Court's *Comcare v Banerji* ruling blurs the line of acceptable political expression', *The Canberra Times* (online, 7 August 2019) <<https://www.canberratimes.com.au/story/6316471/high-courts-powerful-chill-blurs-the-line-of-acceptable-political-expression/>>.

<sup>50</sup> See, eg, Greg Baum, 'Role call', *The Sydney Morning Herald* (online, 3 May 2019) <<https://www.smh.com.au/sport/afl/role-call-20190503-p51jx9.html>>; Gareth Kidd, 'The three reasons RA must come down hard on Folau', *The Roar* (online, 10 April 2019) <<https://www.theroar.com.au/2019/04/11/the-three-reasons-ra-must-come-down-hard-on-folau/>>.

<sup>51</sup> *Ibid*, see the second respondent's defence at para 45(c). Complicating this is that it was recently held in the United Kingdom that 'the mere expression of religious views about sin does not necessarily connote discrimination': *Ngole v the University of Sheffield* [2019] EWCA Civ 1127, [115] (Lord Justice Irwin, Lord Justice Haddon-Cave and Sir Jack Beatson).

<sup>52</sup> The postings had no connection with his on-field capabilities.

<sup>53</sup> Ultimately, Folau and Rugby Australia reached a settlement over the termination: Georgina Robinson, 'Rugby Australia and Israel Folau reach settlement, both apologise 'for any hurt or harm caused'', *The Sydney Morning Herald* (online, 4 December 2019) <<https://www.smh.com.au/sport/rugby-union/rugby-australia-reaches-settlement-with-folau-20191204-p53gr6.html>>.

<sup>54</sup> *NRL Rules* (n 2).

the common law position is that the employee is entitled to procedural fairness, as demonstrated by a number of cases.<sup>55</sup>

In *Pinawin T/A Rose Vi.Hair.Face.Body v Domingo* ('*Pinawin*'), a two-limbed test was developed for assessing whether an employer could summarily dismiss an employee.<sup>56</sup> First, the employer must hold a belief that the employee's conduct was sufficiently serious to justify immediate dismissal. Second, the belief must be based on reasonable grounds with the assistance of a reasonable investigation. The *Pinawin* test follows earlier cases holding that employers can dismiss an employee for alleged misconduct, providing there was a full and proper investigation conducted, including an opportunity for the employee to respond to the allegations.<sup>57</sup> If this procedure is followed, employers are protected against an unfair dismissal claim if it eventuates that the employee did not commit the offence they were charged with.<sup>58</sup>

The principles from *Pinawin* and other cases were tested recently in the FWC case of *Deeth v Milly Hill Pty Ltd* ('*Deeth*').<sup>59</sup> *Deeth* concerned an apprentice butcher who was charged with being an accessory after the fact to murder.<sup>60</sup> Following this charge, the butcher was terminated, as his employer believed it would drive away customers and cause friction amongst staff.<sup>61</sup> Applying the *Pinawin* test, it was concluded that the employer had a 'knee-jerk reaction to the news that Mr Deeth had been charged ... and proceeded to terminate his employment on that basis'.<sup>62</sup> Although customers and other employees had expressed their concern, this did not constitute a reasonable investigation, and the employer had not satisfied the second limb of the *Pinawin* test.<sup>63</sup> The deputy president of the FWC encapsulated the state of the law, stating that 'there is no presumption that a criminal conviction alone is a valid reason for termination of employment'.<sup>64</sup>

### C Suspension vs Termination

While *Deeth* provides a reasonably clear explanation of the general law of employment where undetermined criminal charges are involved, there is a distinction with the NRL policy in that the athlete is suspended, as opposed to terminated. Regarding suspensions, it is accepted that employees are required to comply with lawful and reasonable directions,<sup>65</sup> which includes the direction to skip work for a day or two while an investigation occurs.<sup>66</sup> However, if the suspension is indefinite, courts have held that employers are contravening their duties.<sup>67</sup> In *Downe v Sydney West Area Health Service (No 2)* ('*Downe*'), an employee was indefinitely suspended while her employer investigated allegations of bullying.<sup>68</sup> The NSW Supreme Court held the suspension was improper, as it breached an implied contractual term of mutual trust and

<sup>55</sup> See, eg, *Bi-Lo Pty Ltd v Hooper* (1994) 53 IR 224 ('*Bi-Lo*'); *Howell v John Bennell's Discount Fuel* (2001) 167 QGIG 202 ('*Howell*').

<sup>56</sup> *Pinawin* (n 16) [29] (Watson V-P, Senior Deputy President Richards and Commissioner Cloghan). Summary dismissal refers to conduct justifying immediate dismissal without notice: *Fair Work Act* (n 26) s 388(1). The employee must be 'guilty of gross misconduct': Simon Gardiner et al, *Sports Law* (Routledge, 4<sup>th</sup> ed, 2012) 418.

<sup>57</sup> *Bi-Lo* (n 55).

<sup>58</sup> *Howell* (n 55).

<sup>59</sup> *Deeth* (n 16).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid* [25] (Senior Deputy President Hamberger).

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid* [29] (Senior Deputy President Hamberger).

<sup>65</sup> *R v Darling Island Stevedoring and Lighterage Company Limited* (1938) 60 CLR 601.

<sup>66</sup> *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633 ('*Downe*').

<sup>67</sup> *Ibid*; *Moshirian v University of New South Wales* [2002] FCA 179 [64] (Moore J); *Director-General of Education v Suttling* (1987) 162 CLR 427, 445 (Brennan J).

<sup>68</sup> *Downe* (n 66).

confidence.<sup>69</sup> While this appears to provide clarity, the mutual trust and confidence term was rejected six years after *Downe*, in the case of *Commonwealth Bank v Barker* ('*Barker*').<sup>70</sup> In *Barker*, the High Court of Australia ('HCA') held that 'the implied term of mutual trust and confidence ... imposes mutual obligations wider than those which are necessary'.<sup>71</sup> This has led to uncertainty as to whether the decision in *Downe* remains relevant and correct.

Attempting to resolve the uncertainty, commentators have suggested that an indefinite suspension may still breach the implied duty of good faith that exists in the employment relationship.<sup>72</sup> The 2019 case of *Milam v University of Melbourne* ('*Milam*') indicates this suggestion is accurate.<sup>73</sup> In *Milam*, a university professor was indefinitely suspended while allegations of academic misconduct were pursued.<sup>74</sup> The Federal Court of Australia ('FCA') held that the ongoing suspension would cause the professor harm, and thus the suspension was overturned.<sup>75</sup> Although both *Downe* and *Milam* concern conduct at work, they provide authority for the proposition that an indefinite suspension is improper. While the NRL policy results in suspension until a court verdict, there is an argument that the suspension could be regarded as indefinite due to the length and variability of criminal proceedings.

### D Conclusion

With a lack of legislative authority, a thorough examination of cases is required. When employers sanction an employee for out of work conduct, the test in *Rose* appears to be the most accepted authority despite recent perplexity. Above all, there is an emphasis on due process and a reasonable investigation. This includes matters involving social media,<sup>76</sup> and importantly matters where there has been a criminal charge yet to be adjudicated on.<sup>77</sup> Indefinite suspensions while matters are investigated are likely to be overturned by courts, despite the confusion arising from the *Barker* decision.

## III SPORTING HEROES AND THE COST OF STARDOM

This Part examines the ways in which athletes are subject to higher standards, following on from the previous Part which examined principles as they apply to most employees. It looks at the disrepute clauses that are incorporated into the contracts of professional athletes to protect the reputation of the game. This Part examines two key reasons that athletes are held to a higher standard. First, the belief that athletes are role models for younger generations is used as a justification for the imposition of higher behavioural standards. This is despite inconsistent literature as to what a role model's obligations are, and whether athletes fit the definition of a role model. Second, the money invested by corporate sponsors controls how athletes are disciplined.

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<sup>69</sup> Ibid 682 [411] (Rothman J).

<sup>70</sup> [2014] HCA 32.

<sup>71</sup> Ibid [37] (French CJ, Bell and Keane JJ).

<sup>72</sup> Mark Gibian, 'Trust, confidence and good faith: where to now for employment lawyers' (2016) 135 *Precedent (Australian Lawyers Alliance)* 30.

<sup>73</sup> *Milam v University of Melbourne* [2019] FCA 171 ('*Milam*').

<sup>74</sup> Ibid.

<sup>75</sup> Ibid [19]-[20] (Anastassiou J).

<sup>76</sup> See, eg, *Somogyi v LED Technologies Pty Ltd* [2017] FWC 1966; *Remmert v Broken Hill Operations Pty Ltd T/A Rasp Mine* [2016] FWC 6026.

<sup>77</sup> See, eg, *Pinawin* (n 16); *Deeth* (n 16); *Bi-Lo* (n 55); *Howell* (n 55).



Considering sports and athletes are matters of public interest, sponsors have a vested interest in ensuring they are not seen to endorse misbehaviour.

### ***A Sport in Disrepute***

Incorporated into the majority of sporting rules and regulations are clauses that one must not 'bring the game into disrepute'.<sup>78</sup> These clauses operate to prioritise the 'good of the game', and in doing so, extend the duties and responsibilities of athletes beyond the duties of the average employee.<sup>79</sup> The clauses are deliberately vague so as to be broad as possible, thus encapsulating a breadth of activity far wider than general employment contracts, including a focus on off-field conduct.<sup>80</sup> For example, the NRL rules state:

Should the Chief Operating Officer or the Chief Executive Officer form the opinion, in their absolute discretion, that a person registered under this Part ...<sup>81</sup> has engaged in conduct, whether before or after that person was registered, which, in the opinion of the Chief Operating Officer or the Chief Executive Officer, brought into disrepute, or was detrimental to, the interests, welfare or image of the NRL, a Club, the NRL Competition the Related Competitions, the Representative Competitions or the Game, or might have such an effect if the registration of the person is not cancelled or suspended ...<sup>82</sup> [then they have the power to cancel or suspend the player's registration].<sup>83</sup>

To increase the difficulty for athletes, courts are reluctant to interfere with the decision making of sporting organisations,<sup>84</sup> resulting in athletes having fewer opportunities to appeal disciplinary decisions than the general public.<sup>85</sup>

#### ***1 Defining Disrepute***

The main issue with disrepute clauses is the lack of clarity of the extent of a professional athlete's obligations. Generally, it is accepted that the meaning of disrepute relates to a loss of trust or respect,<sup>86</sup> however it is not always apparent whose trust or respect must

<sup>78</sup> See, eg, Paul T Jonson, Sandra Lynch and Daryl Adair, 'The Contractual and Ethical Duty for a Professional Athlete to be an exemplary role model: bringing the sport and sportsperson into unreasonable and unfair disrepute' (2013) 8(1) *Australian and New Zealand Sports Law Journal* 55, 75; Patrick George, 'Sport in Disrepute' (2009) 4(1) *Australian and New Zealand Sports Law Journal* 24, 36; Peter Kelly and Christopher Hickey, 'Bringing the game into disrepute: the Ben Cousins saga, sports entertainment, player welfare and surveillance in the Australian Football League' (2012) 3(1) *Asia-Pacific Journal of Health* 35, 39.

<sup>79</sup> Jonson, Lynch and Adair (n 78) 60.

<sup>80</sup> Andrew Podbury, 'AFL players as role models: the off-field expectations placed on AFL players as role-models and how this has affected the traditional employment contract' (Honours Thesis, La Trobe University, 2011).

<sup>81</sup> *NRL Rules* (n 2) r 22(1).

<sup>82</sup> *Ibid* r 22(1)(b).

<sup>83</sup> *Ibid* r 22(2).

<sup>84</sup> See, eg, Alan Sullivan, 'The Role of Contract in Sports Law' (2010) 5(1) *Australian and New Zealand Sports Law Journal* 3, 8; *McInnes v Onslow-Fane* [1978] 1 WLR 1521, 1535; *De Pasquale v The Australian Chess Federation* [2000] ACTSC 94; *Baker v British Boxing Board of Control* [2014] EWHC 2074 (QB); *White v Kuzych* [1951] AC 585; *Webb v Confederation of Australian Motor Sport Limited* (2002) NSWSC 1075; *Avellino v All Australia Netball Association Ltd*; *Team Dynamik v Confederation of Australian Motor Sports Ltd & Ors* [2004] VSC 363; *R v Barnes* [2004] EWCA Crim 3246; *Wayde v New South Wales Rugby League Ltd* (1985) 59 ALJR 798.

<sup>85</sup> Martin Kosla, 'Disciplined for 'Bringing a Sport into Disrepute' – A Framework for Judicial Review' (2001) 25(3) *Melbourne University Law Review* 654; *Shepherd v South Australian Amateur Football League Inc* (1987) 44 SASR, 579, 583 (Cox J) ('*Shepherd*'); AS Sievers, *Associations and Clubs Law in Australia and New Zealand* (Federation Press, 2<sup>nd</sup> ed, 1996) 13.

<sup>86</sup> See *Cambridge Dictionary* (online at 21 October 2020), 'disrepute'.

be lost. Professional sport involves many stakeholders, with a wide range of voices and opinions, that may have varying attitudes towards a given behaviour.<sup>87</sup> The decision handed down by the Court of Arbitration for Sport ('CAS') in *D'Arcy v Australian Olympic Committee* ('*D'Arcy*')<sup>88</sup> attempts to provide some guidance. Although this matter concerned selection on a team as opposed to an employment contract,<sup>89</sup> the discussion surrounding disrepute has been relied on by authors since.<sup>90</sup> In *D'Arcy*, it was said that 'disrepute is to lower the reputation of the person in the eyes of the ... public to a significant extent'.<sup>91</sup> While this provides some clarity, the definition is still vague and unquantifiable.<sup>92</sup> Additionally, the definition in *D'Arcy* is concerned with the individual being in disrepute, as opposed to the sport.<sup>93</sup> An alternative definition is that the behaviour must cause reputational injury to the game. This definition emphasises brand and corporate protection,<sup>94</sup> with a sport's reputation intrinsically linked to its ability to generate funding.<sup>95</sup> Under this definition, sporting organisations have a duty to impose strict disrepute clauses due to the high financial stakes.<sup>96</sup> However, this definition is arguably just as unquantifiable, as the wide array of stakeholders in sport may have contrasting views.<sup>97</sup>

Although the disrepute clauses are vague, one thing that is certain is that they take the responsibilities of professional athletes beyond what is expected of the general public. The tests in *Rose* and *Hussein* discussed above dictate that out of work conduct must have a sufficient connection to the workplace to permit disciplinary action.<sup>98</sup> Through the operation of the disrepute clauses, athletes have been disciplined for a wide range

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<sup>87</sup> George (n 78) 24.

<sup>88</sup> *D'Arcy v Australian Olympic Committee* (Court of Arbitration for Sport, Case No 2008/A/1574, 7 July 2008) ('*D'Arcy*').

<sup>89</sup> For further discussion on off-field conduct impacting Olympic selection, see Michael Burke, 'Character and behaviour off the field should not be selection criteria for the Olympics', *The Conversation* (online, 9 June 2016) <<https://theconversation.com/character-and-behaviour-off-the-field-should-not-be-selection-criteria-for-the-olympics-60520>>.

<sup>90</sup> See, eg, Jonson, Lynch and Adair (n 78) 68; Helen Lenskyj, 'Sport exceptionalism and the Court of Arbitration for Sport' (2018) 4(1) *Journal of Criminological Research, Policy and Practice* 5, 13; Chris Davies, 'The International World of Sport and the Liability for Off-Field Indiscretions' (2011) 23(1) *Bond Law Review* 41, 46-8; James Skelton, 'Who really brings the game into disrepute?', *Mondaq* (Web Page, 21 January 2015) <<http://www.mondaq.com/australia/x/367810/Sport/Who+really+brings+the+game+into+disrepute>>.

<sup>91</sup> *D'Arcy* (n 88) [46] (Panel Members Holmes, Grace and Sullivan). See also *Zubkov v Federation Internationale de Natation (FINA)* (Court of Arbitration for Sport, Case No 2007/A/1291, 21 December 2007).

<sup>92</sup> George (n 78) 35.

<sup>93</sup> *Ibid.*

<sup>94</sup> See, eg, Daniel Auerbach, 'Morals Clauses as Corporate Protection in Athlete Endorsement Contracts' (2005) 3(1) *DePaul Journal of Sports Law* 1, 2; Suzanne Dyson and Julienne Corboz, 'Prevention of Violence Against Women in the Australian sports entertainment industry: disentangling tensions between culture change and brand protection in the AFL' in Murray Drummond and Shane Pill (eds), *Advances in Australian Football: a sociological and applied science exploration of the game* (Australian Council for Health, Physical Education and Recreation Inc, 2016) 67, 68.

<sup>95</sup> *Ibid.*; George (n 78) 26.

<sup>96</sup> Thai Huu Phat et al, 'Sporting clubs and scandals – Lessons in governance' (2016) 19 *Sport Management Review* 69, 70.

<sup>97</sup> *Chappell* (n 13) 166 (Hunt J).

<sup>98</sup> *Rose* (n 10); *Hussein* (n 33).

of behaviours, including intoxication,<sup>99</sup> extramarital affairs,<sup>100</sup> and stealing an Olympic flag.<sup>101</sup> While behaviours such as these may be considered unethical and can reflect character flaws,<sup>102</sup> it is unlikely they would pass the aforementioned tests enabling employers to take disciplinary action.<sup>103</sup>

This may seem unfair prima facie, however the vast media coverage that sport attracts is a major factor for determining disreputable conduct. Considering significant media coverage of out of work conduct may justify dismissal,<sup>104</sup> it is evident the sporting media play a large role in determining the scope and severity of an athlete's punishment. In *D'Arcy*, it was held that 'the voluminous media reports that have accompanied his misconduct' justified the removal of an athlete from a team.<sup>105</sup> Therefore, professional athletes have the unfortunate problem of their private lives being public interest.<sup>106</sup> This was demonstrated in England, when association footballer John Terry failed to get an injunction against media outlets reporting on his extramarital affairs, as it was considered to be in the public interest.<sup>107</sup> While those examples involve significant coverage, athletes may nevertheless find themselves in trouble even where the reporting is not extensive.<sup>108</sup>

## 2 Returning to the Reasonable Investigation

The reasonable investigation requirements discussed above are not as rigorous due to the disrepute clauses. For most employers, any form of discipline including those based on social media posts or criminal allegations requires a thorough investigation to obtain a reasonable belief that there was misconduct.<sup>109</sup> If employers fail to conduct a reasonable investigation, it is likely that a decision to terminate an employee will not be upheld.<sup>110</sup> However, in the context of professional sport, the disrepute clauses may forgo any need for an investigation. This is demonstrated by organisations such as the

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<sup>99</sup> Chris Davies, 'Standard playing contracts: the Brett Stewart case' (Speech, Legal Studies Student Conference, 23 April 2009); Glenn Jackson, 'NRL star suspended to face his 'issues'', *The Sydney Morning Herald* (online, 25 February 2013) <<https://www.smh.com.au/sport/nrl/nrl-star-suspended-to-face-his-issues-20130225-2fiub.html>>.

<sup>100</sup> *Chappell* (n 13). This has also resulted in the dismissal of senior executives. See, eg, Konrad Marshall, 'AFL boss Gillon McLachlan: 'Cultural leadership is one of the most difficult parts of the job'', *The Age* (online, 21 September 2019) <<https://www.theage.com.au/sport/afl/afl-boss-gillon-mclachlan-cultural-leadership-is-one-of-the-most-difficult-parts-of-the-job-20190916-p52rp6.html>>. Cf Shane Warne, who was 'never penalised for the widely publicised infidelity to his wife': *George* (n 78) 33.

<sup>101</sup> Amy Corderoy, 'From Olympic bans to One Nation: Dawn Fraser no stranger to controversy', *The Sydney Morning Herald* (online, 7 July 2015) <<https://www.smh.com.au/national/nsw/from-olympic-bans-to-one-nation-dawn-fraser-no-stranger-to-controversy-20150707-gi6sgw.html>>.

<sup>102</sup> Carwyn Jones, 'Drunken Role Models: Rescuing Our Sporting Exemplars' (2011) 5(4) *Sport, Ethics and Philosophy* 414, 424-6.

<sup>103</sup> *Rose* (n 10); *Hussein* (n 33).

<sup>104</sup> *Wakim* (n 39).

<sup>105</sup> *D'Arcy* (n 88) [51] (Panel Members Holmes, Grace and Sullivan).

<sup>106</sup> Some authors have justified this based on the salaries of athletes, as well as the cultural benefits of exposing athlete misbehavior. See Bill Birnbauer, 'Umpire, Where's the line? Reporting the Private Lives of Footballers' in Andrew Dodd and Helen Sykes (eds), *Media Innovation & Disruption* (Future Leaders, 2016) 114, 115.

<sup>107</sup> *Davies* (n 90) 56; *Terry* (n 14). Cf *Australian Football League v The Age Company* [2006] VSC 308, where an injunction was granted against releasing players names who had taken illicit drugs, after it was held that the names had not yet entered the public domain. In this article, 'association football' refers to the sport sometimes commonly known as soccer/football.

<sup>108</sup> *Kosla* (n 85) 667.

<sup>109</sup> *Pinawin* (n 16); *Deeth* (n 16).

<sup>110</sup> *Ibid.*

Football Federation of Australia ('FFA').<sup>111</sup> The FFA's code of conduct states that the charge of a criminal offence against an athlete is enough to bring the sport into disrepute,<sup>112</sup> creating an avenue for the athlete to be disciplined without any of the requirements for a reasonable investigation that are usually applicable.<sup>113</sup> The NRL policy operates similarly, with a criminal charge either resulting in an automatic suspension, or a discretionary decision with no formal process or rights of reply.

If a Player is charged with a Serious Criminal Offence, he will be automatically subject to a No-Fault Stand Down Condition ...<sup>114</sup> where a Player has been charged with a criminal offence (other than a Serious Criminal Offence) and the Chief Executive Officer or the Chief Operating Officer forms the opinion, in their absolute discretion [that the player is bringing the game into disrepute, then they shall be stood down] ...<sup>115</sup> to remove any doubt, the Player has no entitlement to make submissions or lead evidence in respect of the exercise of the discretion ...<sup>116</sup> nothing in this Rule requires the Chief Executive Officer or the Chief Operating Officer to provide reasons for their opinion.<sup>117</sup>

There may be a requirement for a more diligent investigation if inconsistent or disputed facts emerge,<sup>118</sup> however it is apparent that sporting organisations are not subject to the same standards as most employers.

### **B Role Model Status**

The above section demonstrates that athletes are held to a higher behavioural standard than most employees, but the question remains as to why. The primary rationale is the idea that athletes are role models to the broader community.<sup>119</sup> This sentiment appears to be largely accepted, however there are valid queries regarding what a role model is, and whether it is fair that athletes have the responsibility thrust upon them. A commonly accepted definition of a role model is one who is 'perceived as exemplary, or worthy of imitation',<sup>120</sup> or more simply, one who 'can be emulated by others'.<sup>121</sup> Athletes being seen to encompass this definition reflects a social shift towards athletes recognised as entertainers and celebrities, as opposed to simply players of sport.<sup>122</sup> While some athletes are comfortable to accept and promote this view, it is largely perpetuated by the media, and can be burdensome.<sup>123</sup>

#### **1 Athletes as Role Models – Fact or Fiction?**

It is often presumed that athletes automatically have a role model status attached to them, however there is haphazard evidence as to whether this is the case. In the opinions of athletes themselves, it is generally believed they have high expectations thrust upon them. Research conducted with Australian Football League ('AFL') players

<sup>111</sup> The FFA governs association football in Australia.

<sup>112</sup> *FFA Code of Conduct* (n 17) cl 2.2(j).

<sup>113</sup> See Jonson, Lynch and Adair (n 78).

<sup>114</sup> *NRL Rules* (n 2) r 22A(3).

<sup>115</sup> *Ibid* r 22A(7).

<sup>116</sup> *Ibid* r 22A(11)(a).

<sup>117</sup> *Ibid* r 22A(11)(b).

<sup>118</sup> Jonson, Lynch and Adair (n 78) 72.

<sup>119</sup> Kosla (n 85).

<sup>120</sup> Antronette K Yancey, 'Building Positive Self Image in Adolescents in Foster Care: The Use of Role Models in an Interactive Group Approach' (1998) 33 *Adolescence* 253, 256.

<sup>121</sup> Bartlett and Sterry (n 43) 105.

<sup>122</sup> Peter Kelly and Christopher Hickey, 'Professional Identity in the Global Sports Entertainment Industry: Regulating the Body, Mind and Soul of Australian Football League Footballers' (2010) 46 *Journal of Sociology* 27.

<sup>123</sup> Podbury (n 80).

found they felt higher expectations than the average person.<sup>124</sup> Former track and field athlete, Jackie Joyner-Kersey, echoed these beliefs, stating that ‘for professional athletes, whether we like it or not ... we have a way of impacting lives’.<sup>125</sup> She stated that athletes must take these responsibilities seriously, particularly with increased levels of media coverage exposing athlete behaviour to the general public.<sup>126</sup> This reflects research finding that media projections of athletes can influence the behaviour of those viewing them, particularly when the viewers are young and impressionable.<sup>127</sup> Therefore, athletes can be highly influential without any direct interactions,<sup>128</sup> especially given the rise of social media.<sup>129</sup>

Despite this, there is a range of research suggesting the influence of athletes is overstated, with young people less likely to see them as role models than most assume.<sup>130</sup> A California study found most young people named parents as role models, with only 15% naming athletes.<sup>131</sup> A similar study in Europe found that participants valued the qualities of family members and friends more than athletes,<sup>132</sup> while another study found similar results.<sup>133</sup> While there is a strong admiration felt by young people to athletes and other celebrities, they are significantly less likely to be influenced by them than family and friends.<sup>134</sup> These studies were conducted prior to the introduction of social media, however the limited empirical research since has indicated that athletes are still not considered role models to the level expressed in the media.<sup>135</sup> One exception is the role models of youth athletes, although a study examining this cohort found parents and other family members were still held as role models almost as commonly as professional athletes.<sup>136</sup> In any case, it has been suggested that athletes are ‘idols’ and ‘centres of interest’, as opposed to individuals who are actually emulated.<sup>137</sup>

Although there is inconsistent literature as to the actual influence that athletes have, it is still commonly presumed they are role models, which leads to higher behavioural expectations than the general public. Therefore, it is necessary to evaluate the benefits and disadvantages of this presumption when looking at sporting policies such as the NRL’s.

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<sup>124</sup> Ibid. In this article, ‘Australian football’ refers to the sport, while ‘AFL’ refers to the professional league and governing body.

<sup>125</sup> Jackie Joyner-Kersey, ‘Entertainers Be Role Models? Yes. They are whether they want to be or not’ (2007) 63(2) *Ebony* 164, 165.

<sup>126</sup> Ibid.

<sup>127</sup> Podbury (n 80) 62.

<sup>128</sup> Felix Mutter and Tim Pawlowski, ‘Role Models in Sports – Can Success in Professional Sports Increase the Demand for Amateur Sport Participation’ (2014) 17 *Sport Management Review* 324.

<sup>129</sup> David Sutura, *Sports Fans 2.0: How Fans Are Using Social Media to Get Closer to the Game* (Scarecrow Press, 2013) 104.

<sup>130</sup> Earl Spurgin, ‘Hey, How did I become a Role Model? Privacy and the Extent of Role-Model Obligations’ (2012) 29(2) *Journal of Applied Philosophy* 118.

<sup>131</sup> Antronette K Yancey et al, ‘Role modelling, risk, and resilience in California adolescents’ (2001) 48 *Journal of Adolescent Health* 36.

<sup>132</sup> Karl Teigen et al, ‘Who would you most like to be like? Adolescents’ ideals at the beginning and the end of the century’ (2000) 44 *Scandinavian Journal of Educational Research* 5.

<sup>133</sup> Anton Bucher, ‘The influence of models in forming moral identity’ (1997) 27 *International Journal of Educational Research* 619.

<sup>134</sup> Jonson, Lynch and Adair (n 78).

<sup>135</sup> See, eg, Kaytlin LeMier, ‘Relationship between Athletes and Role Models’ (2008) 8(7) *Journal of Undergraduate Research at Minnesota State University, Mankato* 2, 6; Adair (n 12); Professional Footballers Australia, *Culture Amplifies Talent: Building a Framework for Golden Generations* (Report, 22 October 2019) 6.

<sup>136</sup> Noora J Ronkainen, Tatiana V Ryba and Harri Selanne, ‘She is where I’d want to be in my career: Youth athletes’ role models and their implications for career and identity construction’ (2019) 45 *Psychology of Sport & Exercise* 1, 4-7.

<sup>137</sup> Bartlett and Sterry (n 43) 105.

## 2 The Social Benefits

There are benefits to athletes being held out as role models. In regards to on-field behaviour, athletes are associated with positive traits such as determination, strength and ability.<sup>138</sup> A study of young males supported this, finding that sporting heroes were identified as role models because of traits such as aggression and strength that are considered masculine.<sup>139</sup> This can lead to young men feeling more connected and comfortable within themselves.<sup>140</sup> Recently, there has been a significant increase in the visibility of women's sport, which has similar positive impacts for women.<sup>141</sup> When targeting athletes to promote their brands, corporations target those with positive traits as well as personal attractiveness.<sup>142</sup>

This process of identification and connection with role models has clear social benefits for young people. A cross-sectional survey found the majority of participants that identified a specific role model had higher self-esteem and school results, as well as a stronger personal or ethnic identity.<sup>143</sup> A recent Australian study looked at the impact that athletic role models can have on amateur sport participation.<sup>144</sup> The study found clear benefits on participation, as well as on other prosocial behaviours such as safety and quitting smoking.<sup>145</sup> There can also be benefits for athletes that embrace their role model status. The aforementioned research of AFL players discovered that the majority embrace and accept the role model status, taking the opportunity to become involved in community work and improve the lives of others.<sup>146</sup> Many athletes take part in activities including charity work, mentorships, and motivational speaking.<sup>147</sup>

## 3 Unfair Expectations

Despite these social benefits, the expectations on athletes based on their role model status are overbearing and unnecessary.<sup>148</sup> While the traits associated with on-field performance are beneficial, the increased media coverage of off-field behaviour has led to these traits being expected at all times. The notion of a role model is also quite vague and it is argued it has become an easy way for sporting organisations to discipline

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<sup>138</sup> Joyner-Kersee (n 125).

<sup>139</sup> Claudia Biskup and Gertrud Pfister, 'I would like to be her/him: Are athletes role models for boys and girls?' (1999) 5 *European Physical Education Review* 199. See also Ruschelle Leone and Dominic Parrott, 'Hegemonic masculinity and aggression' in Jane Ireland, Philip Birch and Carol Ireland (eds), *The Routledge International Handbook of Human Aggression: Current Issues and Perspectives* (Routledge, 2018) 31, 35.

<sup>140</sup> Gary Fine, *With the boys: Little league baseball and preadolescent culture* (University of Chicago Press, 1987).

<sup>141</sup> See, eg, Seema Patel, 'Women's sport is on the rise but old-fashioned regulators need to catch up' *The Conversation* (online, 22 July 2015) <<https://theconversation.com/womens-sport-is-on-the-rise-but-old-fashioned-regulators-need-to-catch-up-45010>>; New South Wales Government, 'Shaping the future of women's sport in NSW 2019-2023' (Strategy Document, 2018); Carrie Dunn, 'Elite footballers as role models: promoting young women's football participation' (2016) 17(6) *Soccer & Society* 843, 849; Repucom, *Women and Sport* (Report, 2015) 8-12.

<sup>142</sup> William Shanklin and Alan Miciak, 'Selecting sports personalities as celebrity endorsers' (1996) 4(1) *Journal of Promotion Management* 1.

<sup>143</sup> Antronette K Yancey, Judith Siegel and Kimberly McDaniel, 'Role models, ethnic identity, and health-risk behaviours in urban adolescents' (2002) 156 *Archives of Pediatric Adolescent Medicine* 55.

<sup>144</sup> Warren Payne et al, 'Sports Role Models and their impact on participation in physical activity: A Literature Review' (Literature Review, University of Ballarat, 9 July 2014).

<sup>145</sup> *Ibid* 23.

<sup>146</sup> Podbury (n 80) 180.

<sup>147</sup> Sheila Globus, 'Athletes as role models' (1998) 24(6) *Current Health* 25.

<sup>148</sup> George (n 78) 26; Paul Horvath, 'Anti-Doping and Human Rights in Sport: The Case of the AFL and the WADA Code' (2006) 32 *Monash University Law Review* 357, 375.

athletes and manage their private conduct.<sup>149</sup> Although some athletes do embrace being a role model, many have expressed concern that the behavioural requirements are not part of their defined job,<sup>150</sup> and that the title of role model does not sit well with them.<sup>151</sup> However, as there is often a lack of alternative employment options, athletes are forced to try and meet these high behavioural standards.<sup>152</sup>

In *Chappell v TCN Channel Nine Pty Ltd* ('*Chappell*'),<sup>153</sup> it was stated that 'you cannot set up a person as having a reputation for possessing a character which he does not himself publicly claim to possess, then show that he does not in fact possess that character'.<sup>154</sup> In *Chappell*, the court made clear it was necessary a person professes they are of a high moral character before they can be held to that standard.<sup>155</sup> This is a preferable interpretation of role models, in that one should accept a role such as a brand ambassador or a leadership position before the expectations of a role model are cast upon them.<sup>156</sup> This would suit the scope of their employment better, as currently the expectations on athletes are unreasonable, although they may simply be unavoidable.<sup>157</sup>

#### 4 Sport vs the Law

Interestingly, athletes are often treated harsher than other professions requiring high moral character. The case of *Ziems v Prothonotary of the Supreme Court of New South Wales* concerned a barrister who was disbarred after being involved in a car accident while intoxicated which resulted in a conviction of manslaughter.<sup>158</sup> The disbarment was appealed and overturned in the HCA, with the court finding the incident had no connection with his professional duties,<sup>159</sup> reminiscent of the tests currently used in employment law.<sup>160</sup> This is despite the fact that lawyers are entrusted with special 'privileges, duties and responsibilities',<sup>161</sup> including that confidence and trust must be maintained in them by the court and the public.<sup>162</sup> Similarly, there has been instances involving members of the judiciary holding their positions following drink-driving offences.<sup>163</sup> Despite the fact that these professions are considered to be of high moral character and would thus require exemplary behavioural standards, there has been a

<sup>149</sup> Jonson, Lynch and Adair (n 78) 58.

<sup>150</sup> Podbury (n 80) 24.

<sup>151</sup> Bartlett and Sterry (n 43) 105.

<sup>152</sup> James Paterson, 'Disciplining Athletes for Off-Field Indiscretions: A Comparative Review of the Australian Football League and the National Football League's Personal Conduct Policies' (2009) 4(1) *Australian and New Zealand Sports Law Journal* 105, 141.

<sup>153</sup> *Chappell* (n 13).

<sup>154</sup> *Ibid* 167-8 (Hunt J).

<sup>155</sup> *Ibid* 168.

<sup>156</sup> Kosla (n 85) 669. A non-sporting example are politicians, whose lives are open to public scrutiny due to professing to be of high moral character. See, eg, Daniel Sutter, 'Media scrutiny and the quality of public officials' (2006) 129 *Public Choice* 25, 38; Caroline Overington, 'Barnaby Joyce's affair with a staffer needed to be made public', *The Australian* (online, 10 February 2018) <<https://www.theaustralian.com.au/nation/inquirer/barnaby-joyces-affair-with-a-staffer-needed-to-be-made-public/news-story/0e4d92f52f1a552caf704bc85a57ab88>>.

<sup>157</sup> Jonson, Lynch and Adair (n 78) 79.

<sup>158</sup> *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 ('*Ziems*').

<sup>159</sup> *Ibid*.

<sup>160</sup> *Rose* (n 10); *Hussein* (n 33).

<sup>161</sup> *Ziems* (n 158) 286 (Dixon CJ).

<sup>162</sup> *Ibid* 285 (Dixon CJ). See also *Legal Profession Act 2006* (ACT) ss 11, 22-5.

<sup>163</sup> Paul T Jonson, 'Why are athletes alone held to higher standards?', *ABC News* (online, 24 February 2015) <<https://www.abc.net.au/news/2015-02-24/jonson-rugby-drug-scandal-highlights-flaw-in-our-standards/6221874>>.

willingness by courts to separate their actions from their professions, a luxury that is rarely afforded to professional athletes.

### **C Sponsor Pressure**

Another factor distinguishing the responsibilities and pressures of athletes from the general public is the amount of money invested into sporting individuals, teams, and leagues by corporate sponsors.<sup>164</sup> Sponsors are attracted to the public nature of sport, seeking to increase brand recognition or spread a message to the community. However, investment by sponsors can manifest both favourable and unfavourable outcomes, by which 'unsavoury off-field incidents ... threaten such a positive association for the commercial partners, potentially clouding their message to the community'.<sup>165</sup> Sponsors expect return on financial investments, so must act diligently to ensure they are not seen to 'take on any negative connotations' of their associations,<sup>166</sup> as the reputational risk is too great.<sup>167</sup> In doing so, they create pressure on sporting organisations to act against misbehaviour by threatening to remove financial support.<sup>168</sup> Considering sponsors are critical to the financial growth of any sport, it is clear that this pressure may force disciplinary action in a hasty manner that would not occur in other professions.<sup>169</sup> In implementing the NRL policy, the interests of corporate sponsors were heavily considered.<sup>170</sup>

The public can also exert pressure on sponsors to persuade sporting organisations to act on social issues.<sup>171</sup> While distinct from the issue of athlete misbehaviour, community campaigns have called for sponsors to take more action preventing corruption in sporting organisations such as the Federation Internationale de Football Association ('FIFA'),<sup>172</sup> which was criticised after its decision to award Russia and Qatar the rights to host the association football World Cups in 2018 and 2022.<sup>173</sup> FIFA's sponsors have been criticised for not doing 'much more than issue statements in favour

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<sup>164</sup> Paterson (n 152) 106.

<sup>165</sup> Ibid.

<sup>166</sup> Bartlett and Sterry (n 43) 104.

<sup>167</sup> Margaret A Johnston, 'The sum of all fears: Stakeholder responses to sponsorship alliance risk' (2015) 15 *Tourism Management Perspectives* 91, 93; Ellen Bloxsome, 'Studies of the off-field behaviours of sportspeople: Are sponsors' objectives at risk?' (Honours Thesis, Murdoch University, June 2012).

<sup>168</sup> Davies (n 90).

<sup>169</sup> Paterson (n 152). See also Australian Associated Press, 'Qantas boss Alan Joyce backs Rugby Australia's handling of Israel Folau dispute', *The Guardian* (online, 17 June 2019) <<https://www.theguardian.com/sport/2019/jun/17/israel-folau-targets-support-for-transgender-children-in-church-sermon>>.

<sup>170</sup> Dan Walsh, 'Warriors' new policy will stand down players facing serious charges', *NRL* (online, 28 February 2019) <<https://www.nrl.com/news/2019/02/28/warriors-new-policy-will-stand-down-players-facing-serious-charges/>>.

<sup>171</sup> Catherine Ordway and Hayden Opie, 'Integrity and Corruption in Sport' in Niko Schulenkorf and Stephen Frawley (eds), *Critical Issues in Global Sport Management* (Routledge, 2016) 60.

<sup>172</sup> See especially #NewFIFANow, 'Charter For FIFA Reform', #NewFIFANow (Web Page, June 2016) <<http://www.newfifanow.org/charter-for-fifa-reform.html>>. FIFA governs association football at an international level.

<sup>173</sup> See, eg, Sarah Joseph, 'Sport & the Law: The fiasco of FIFA' (2014) 39(3) *Alternative Law Journal* 191; Samuel Morris, 'FIFA World Cup 2022: Why the United States cannot successfully challenge FIFA awarding the cup to Qatar and how the Qatar controversy shows FIFA needs large-scale changes' (2011) 42 *California Western International Law Journal* 542, 548-50; Ryan J Becker, 'World Cup 2026 now accepting bribes: a fundamental transformation of FIFA's world cup bid process' (2013) 13(1) *International Sports Law Journal* 132; Kate Youd, 'The Winter's Tale of Corruption: The 2022 FIFA World Cup in Qatar, the Impending Shift to Winter, and Potential Legal Actions against FIFA' (2014) 35(1) *Northwestern Journal of International Law & Business* 167, 171-4.



of ethical behaviour',<sup>174</sup> with members of the community feeling they should show more leadership and accountability.<sup>175</sup> This adds an extra layer to the pressure that sporting organisations face. Even if sponsors are at first willing to forgive actions bringing the sport into disrepute, they may be forced into action by other stakeholders such as fans,<sup>176</sup> who can easily spread their opinions via social media channels.<sup>177</sup> Additionally, governments may be determined to ensure that action by sporting organisations positively shapes social values.<sup>178</sup> These external forces driving sporting organisations are unlike those relevant to most industries. As long as sport continues to rely on financial support for growth, athletes and administrators will be held to exemplary moral standards.

## **D Conclusion**

Despite the fact that athletes might only be competing for a few hours a week, the extent of their responsibilities has led to a widespread view that being an athlete is a '24-hour job'.<sup>179</sup> This is a direct result of the media attention that professional sport receives in countries such as Australia. Although this is somewhat unfair, the reality is there is a widespread perception that athletes are role models in the community. Despite haphazard literature as to whether this is actually the case, athletes are ultimately considered to be influential people, and naturally assume extra social responsibility. Furthermore, the financial investment into sport by sponsors and broadcasters creates greater obligations upon athletes.

## **IV NO-FAULT STAND DOWN**

The previous two Parts looked at the rights of employees facing criminal charges, as well as the differences in obligations between general employees and professional athletes. Importantly, the rules of sporting organisations commonly include a clause stating that anyone within their jurisdiction must not bring their sport into disrepute. This Part looks in-depth at the NRL policy, under which players are automatically stood down following a criminal charge, examining the motivations for the policy's introduction. This Part also explores challenges to the policy, before a discussion on *De Belin*, the first occasion of an NRL player challenging the policy in court.

### ***A Details of the Policy***

The NRL policy came into effect on 11 March 2019, after the rules were amended to insert the policy as r 22A.<sup>180</sup> The 'no-fault' element in the title refers to the debated

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<sup>174</sup> Lisa Baertlein, 'FIFA sponsors talk tough, action another thing', *Reuters* (Web Page, 1 June 2011) <<https://www.reuters.com/article/soccer-fifa-sponsors/rpt-fifa-sponsors-talk-tough-action-another-thing-idUSN3110911520110601>>.

<sup>175</sup> Roger Pielke, 'How can FIFA be held accountable?' (2013) 16 *Sport Management Review* 255, 256.

<sup>176</sup> *Ibid* 263.

<sup>177</sup> Martin Holzen and Henk Erik Meier, 'Do Football Consumers Care About Sport Governance? An Analysis of Social Media Responses to the Recent FIFA Scandal' (2019) 4(1) *Journal of Global Sport Management* 97, 112-13. Fans can also criticise sponsors through this medium, demonstrated recently after fencing company TFH withdrew sponsorship from the NRL club Gold Coast Titans, citing that a player delivered an 'embarrassing performance' in reciting the Welcome to Country speech before the 2019 NRL Grand Final. The decision was condemned by fans, and TFH backflipped on their decision and re-committed to the club: See Elise Kinsella, 'Gold Coast Titans get sponsor TFH back after they apologise to captain Ryan James', *ABC News* (online, 19 October 2019) <<https://www.abc.net.au/news/2019-10-18/sponsor-backflips-to-support-titans-ryan-james-again/11618958>>.

<sup>178</sup> Jamie Fuller, 'Promoting integrity in sport: A sponsor's perspective' in Transparency International (ed), *Global Corruption Report: Sport* (Routledge, 2016) 327, 327.

<sup>179</sup> Bartlett and Sterry (n 43) 105.

<sup>180</sup> *NRL Rules* (n 2) r 22A.

contention by the NRL that the policy attributes no blame to individuals, and thus does not prejudice any future proceedings.<sup>181</sup> The key section of the rule states: 'if a player is charged with a serious criminal offence, he will be automatically subject to a no-fault stand down condition'.<sup>182</sup> There is no right for the player to appeal this or to have it reviewed.<sup>183</sup>

Under the rule, a 'serious criminal offence' is one attracting a maximum punishment of 11 years imprisonment or more under the *Crimes Act 1900* (NSW) ('*Crimes Act*').<sup>184</sup> There is no explained rationale for the threshold of 11 years, although an examination of the *Crimes Act* reveals the offences the policy encompasses.<sup>185</sup> By setting the threshold at 11 years, the policy includes aggravated dangerous driving occasioning grievous bodily harm,<sup>186</sup> as well as aggravated dangerous navigation.<sup>187</sup> The more likely explanation is that the threshold excludes certain offences which incur a maximum penalty of 10 years. These offences include sending threatening documents,<sup>188</sup> aiding suicide,<sup>189</sup> affray,<sup>190</sup> possession of an unregistered firearm,<sup>191</sup> as well as some trespass and sexual offences.<sup>192</sup> In any case, the threshold covers most of the sexual assault offences that the policy was primarily enacted to respond to.<sup>193</sup> Preventing sexual assault and domestic violence were some of the key reasons the policy was introduced, and will be discussed further in the next section.

If the maximum punishment for the criminal charge falls below the threshold of 11 years, the CEO or COO of the NRL have discretion to impose a stand down condition if the game has been brought into disrepute.<sup>194</sup> If the criminal offence involves an allegation that the player has acted violently towards a female or a child, the CEO or COO operate on a presumption that the player should be stood down.<sup>195</sup> Under this discretionary provision, the player has no right to make submissions or lead evidence,<sup>196</sup> while the CEO or COO has no obligation to provide a reason for their decision.<sup>197</sup> The player does have the right to request for the decision to be reviewed,<sup>198</sup> unlike those charged with serious criminal offences.<sup>199</sup>

The stand down condition is imposed 'until such time as the relevant criminal offence has been determined by the court or withdrawn'.<sup>200</sup> In some instances, this can take years; a significant portion of a playing career. During the period the player is stood

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<sup>181</sup> Interview with Peter Beattie, Commissioner of the ARLC (Leigh Sales, The 7.30 Report, 6 March 2019) ('*Beattie Interview*').

<sup>182</sup> *NRL Rules* (n 2) r 22A(3).

<sup>183</sup> *Ibid* r 22A(16).

<sup>184</sup> *Ibid* r 3 (definition of 'serious criminal offence').

<sup>185</sup> *Crimes Act 1900* (NSW) ('*Crimes Act*').

<sup>186</sup> *Ibid* s 52A(4).

<sup>187</sup> *Ibid* s 52B(4).

<sup>188</sup> *Ibid* s 31.

<sup>189</sup> *Ibid* s 31C.

<sup>190</sup> *Ibid* s 93C.

<sup>191</sup> *Ibid* s 93I.

<sup>192</sup> *Ibid* ss 66C(3), 113.

<sup>193</sup> *Ibid* ss 61I-61K.

<sup>194</sup> *NRL Rules* (n 2) r 22A(7). The policy has also been used to not stand down some players including Josh Reynolds and Curtis Scott: Adrian Proszenko, 'Greenberg hails 'no-fault' rule for delivering \$30m windfall to NRL', *The Sydney Morning Herald* (online, 27 February 2020) <<https://www.smh.com.au/sport/nrl/greenberg-hails-no-fault-rule-for-delivering-30m-windfall-to-nrl-20200227-p5450c.html>>.

<sup>195</sup> *NRL Rules* (n 2) r 22A(8).

<sup>196</sup> *Ibid* r 22A(11)(a).

<sup>197</sup> *Ibid* r 22A(11)(b).

<sup>198</sup> *Ibid* r 22A(17).

<sup>199</sup> *Ibid* r 22A(16).

<sup>200</sup> *Ibid* r 22A(12).

down, they are ineligible to play in any competition,<sup>201</sup> to be considered for representative selection,<sup>202</sup> and to participate in promotional or community activities.<sup>203</sup> They are however permitted to train,<sup>204</sup> and to be paid.<sup>205</sup>

## **B Motivations Behind the Policy**

### **1 Reputation of the Game**

As discussed in Part Three, athletes are held to a higher behavioural standard than most employees due to contractual clauses stating they must not bring the game into disrepute. The NRL policy includes this, along with the statement that playing while a charge remains unresolved would be detrimental to the NRL,<sup>206</sup> and bring the game into disrepute.<sup>207</sup> The rules also include a separate provision for cancelling a player's registration if they bring the game into disrepute.<sup>208</sup> When designing the policy, upholding the reputation of the game was a key motivation. The off-season from 2018-19 contained a disproportionately high number of incidents of misbehaviour, becoming known in the media as the 'summer from hell'.<sup>209</sup> The majority of these included physical or sexual violence against women, and were heavily reported in the media, tarnishing the image of the NRL. Journalist Peter Fitzsimons echoed the thoughts of many in writing that players needed to be held accountable for demonstrably damaging the reputation of the NRL, and claiming it was becoming a toxic brand for sponsors to attach to.<sup>210</sup>

The NRL were concerned with the opinions of various stakeholders about the rampant misbehaviour. The success of the NRL depends greatly upon the competition being attractive to sponsors, broadcasters, spectators and television viewers.<sup>211</sup> Sponsors of individual clubs were tiring of the constant incidents and negative associations,<sup>212</sup> and

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<sup>201</sup> Ibid r 22A(13)(a).

<sup>202</sup> Ibid r 22A(13)(c).

<sup>203</sup> Ibid r 22A(13)(d).

<sup>204</sup> Ibid r 22A(13)(e).

<sup>205</sup> Ibid r 22A(13)(f).

<sup>206</sup> Ibid r 22A(2)(b)(i).

<sup>207</sup> Ibid r 22A(2)(b)(ii).

<sup>208</sup> Ibid r 22(1)(b).

<sup>209</sup> *De Belin* (n 7) 39 [131] (Perry J). The phrase 'summer from hell' was first used in Sam Phillips, 'Summer from hell has cost NRL millions', *The Sydney Morning Herald* (online, 17 February 2019), <<https://www.smh.com.au/sport/nrl/summer-from-hell-has-cost-the-nrl-millions-peter-beattie-20190217-p50ye4.html>>. See also Christian Nicolussi, 'No fears 'summer from hell' becomes 'weekend from hell' in Brisbane', *The Sydney Morning Herald* (online, 4 May 2019) <<https://www.smh.com.au/sport/nrl/no-fears-summer-from-hell-becomes-weekend-from-hell-in-brisbane-20190504-p51k28.html>>; Australian Associated Press, 'The 17 incidents in NRL's summer of hell', *SBS News* (online, 27 February 2019) <<https://www.sbs.com.au/news/the-17-incidents-in-nrl-s-summer-of-hell>>; Madeline Crittenden, 'Telstra brand 'ruined' by NRL's summer from hell, court told', *The West Australian* (online, 30 July 2019) <<https://thewest.com.au/news/nsw/telstra-brand-ruined-by-nrls-summer-from-hell-court-told-ng-89b20c0acfc3600911cfc90a6f1f469>>.

<sup>210</sup> Fitzsimons (n 19).

<sup>211</sup> *De Belin* (n 7) 32 [109] (Perry J).

<sup>212</sup> See, eg, Roy Masters, 'Canterbury Bulldogs lose key sponsor over Mad Monday scandal', *The Sydney Morning Herald* (online, 7 September 2018) <<https://www.smh.com.au/sport/nrl/canterbury-bulldogs-lose-key-sponsor-over-mad-monday-scandal-20180907-p502bw.html>>; Australian Associated Press, 'Sharks and Roosters lose \$1 million sponsorship: report', *The Sydney Morning Herald* (online, 10 May 2017) <<https://www.smh.com.au/sport/nrl/sharks-and-roosters-lose-1-million-sponsorship-report-20170510-gw1fmt.html>>; Phil Lutton, Christian Nicolussi and Adrian Prosenko, 'Game may have lost 'north of 10 million' as sponsors go cold on NRL', *The Sydney Morning Herald* (online, 16 February 2019) <<https://www.smh.com.au/sport/nrl/game-may-have-lost-north-of-10-million-as-sponsors-go-cold-on-nrl-20190216-p50ya3.html>>.

contacted the NRL to request they took stronger action against misbehaviour.<sup>213</sup> They were concerned their brands were being damaged, and encouraged the stand down policy.<sup>214</sup> The NRL also received a plethora of negative e-mails and complaints from fans, who were angered with the lack of action being taken.<sup>215</sup> Almost all fan correspondence supported standing down the players, with many suggesting they would not continue to support the NRL if the players were allowed to continue playing.<sup>216</sup> Individual NRL clubs also expressed struggles to attract major sponsors,<sup>217</sup> generate revenue from merchandise,<sup>218</sup> and attract directors and staff.<sup>219</sup> The NRL faced the likelihood of serious financial and social damage, and thus implemented the policy to protect the reputation of the game.

## 2 Detering Misbehaviour

A more philosophical motivation behind the introduction of the policy was the principle of deterrence. The policy was partly enacted to ensure others would not engage in similar behaviour, with commentary prior to the drafting of the policy stating that any action by the NRL must have a deterrent measure.<sup>220</sup> The CEO of the NRL echoed this, stating that the purposes of the policy were both to curb player misbehaviour, as well as the effect it was having on the game.<sup>221</sup> While the NRL policy is too new to assess its effectiveness as a deterrent, parallels can be drawn between the policy and one-punch legislative reform designed to reduce street violence. One-punch violence, also referred to as 'king hits' or 'coward punches', refer generally to single punch assaults, where 'a single blow to the head causes a victim to fall to the ground unconscious'.<sup>222</sup> Generally, these assaults follow heavy amounts of alcohol consumption.<sup>223</sup> While there are stark differences, both regimes have mandatory

<sup>213</sup> *De Belin* (n 7) 49 [157] (Perry J).

<sup>214</sup> *Ibid* 50 [157]. See also Madeline Crittenden, 'Sponsors demanded De Belin NRL crackdown', *The Australian* (online, 31 July 2019) <<https://www.theaustralian.com.au/sport/nrl/sponsors-demanded-de-belin-nrl-crackdown/news-story/70d9cf6596ada2d05bf055b0515fd64a>>.

<sup>215</sup> *De Belin* (n 7) 46 [148]. See also Benjamin J, 'NRL: The Most Toxic Sport in Australia', *The Commentariat* (online, 8 February 2019) <<https://thecommentariat.org/2019/02/08/nrl-the-most-toxic-sport-in-australia/>>; Steve Zemek, 'Greenberg: women inspired stand down rule', *The Sydney Morning Herald* (online, 17 April 2019) <<https://www.canberratimes.com.au/story/6065265/greenberg-women-inspired-stand-down-rule/?cs=14326>>; David Mark, 'I'm no longer proud to say I love rugby league: The NRL's women problem is deep-seated', *ABC News* (online, 15 March 2019) <<https://www.abc.net.au/news/2019-03-14/women-rugby-league-sex-tapes-female-fans-dwindling/10898160?pfmredir=sm>>.

<sup>216</sup> *De Belin* (n 7) 46 [150] (Perry J).

<sup>217</sup> *Ibid* 53 [167]. See also Lutton, Nicolussi and Proszenko (n 212)

<sup>218</sup> *De Belin* (n 7) 53 [167] (Perry J).

<sup>219</sup> Adrian Proszenko, 'Time to Go: Wests Tigers chair ends tenure at club', *The Sydney Morning Herald* (online, 4 March 2019) <<https://www.smh.com.au/sport/nrl/time-to-go-wests-tigers-chair-ends-tenure-at-club-20190303-p511fv.html>>.

<sup>220</sup> Mal Meninga, 'No-fault stand down policy' doesn't mean it's open season on players', *NRL* (online, 2 March 2019) <<https://www.nrl.com/news/2019/03/02/mal-meninga-no-fault-stand-down-policy-doesnt-mean-its-open-season-on-players/>>.

<sup>221</sup> *De Belin* (n 7) 101 [304.1] (Perry J).

<sup>222</sup> Jason Schrieber, Angela Williams and David Ranson, 'Kings to Cowards: One-Punch Assaults' (2016) 44(2) *The Journal of Law, Medicine and Ethics* 332, 332. One-punch assaults can also occur on the sporting field, increasing the link between the NRL policy and the legislative reform: See Annette Greenhow and Matthew Raj, 'Regulating unsanctioned violence in Australian sport: time for Vamplew 2.0?' (2019) 22 *Sport in Society* 1.

<sup>223</sup> Julia Quilter, 'One-punch laws, mandatory minimums and 'alcohol-fuelled' as an aggravating factor: Implications for NSW Criminal Law' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81.

punishments and are targeting the similar audience of young adult males,<sup>224</sup> who are historically prone to physical aggression,<sup>225</sup> particularly when intoxicated.<sup>226</sup>

Similar to the NRL's 'summer from hell', frequent incidents of one-punch violence led to stakeholders demanding reform.<sup>227</sup> In particular, courts demanded that the violence was 'all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence'.<sup>228</sup> In *R v Loveridge*, a lenient sentence was successfully appealed by the Crown, on the basis that the first instance judge had not taken into account deterrence as a sentencing factor.<sup>229</sup> The need for stronger deterrence led to changes in public policy and legislation,<sup>230</sup> with the *Crimes Act* being amended to include a mandatory minimum sentence of eight years imprisonment for individuals convicted of assault causing death when intoxicated.<sup>231</sup> Despite the constructive motivations, these amendments were heavily criticised by civil liberty groups for ignoring subjective factors.<sup>232</sup> This view is supported by research suggesting that mandatory imprisonment is an ineffective deterrent that can lead to disproportionate sentences.<sup>233</sup>

While the NRL is not imposing a mandatory sentence, and there is no prospect of imprisonment,<sup>234</sup> there are similarities to an indefinite suspension without a right of reply. Therefore, assessing the effectiveness of one-punch reform is the best method to examine the likelihood of the policy being effective as a deterrent. Eight months after the reform, the Attorney General of NSW stated there had been a 'massive reduction in violence'.<sup>235</sup> More recently, a statutory review into amendments to the *Crimes Act* found there had been limited cases requiring the use of the mandatory sentencing

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<sup>224</sup> Catherine Ferguson and Rachel Robson, 'A Legal and Social Analysis of 'One Punch' Cases in Western Australia' (2014/15) 18(1) *University of Western Sydney Law Review* 19, 19.

<sup>225</sup> Stephen Tomsen and Thomas Crofts, 'Social and Cultural Meanings of Legal Responses to Homicide Among Men: Masculine Honour, Sexual Advances and Accidents' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 423.

<sup>226</sup> Jane Cullen, 'WA's 'One Punch' Law: Solution to a Complex Social Problem or Easy Way Out for Perpetrators of Domestic Violence' (2014) 2(1) *Griffith Journal of Law & Human Dignity* 53, 54.

<sup>227</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 30 January 2014, 2 (Barry O'Farrell). See also Cullen (n 226) 56.

<sup>228</sup> *R v Loveridge* [2014] NSWCCA 120 [103]-[105] (Bathurst, Johnson and Hulme JJ) ('*Loveridge*'). See also *R v Mitchell*; *R v Gallagher* (2007) 177 A Crim R 94, 101 [29] (Howie J).

<sup>229</sup> Schrieber, Williams and Ranson (n 222) 332; *Loveridge* (n 228).

<sup>230</sup> Schrieber, Williams and Ranson (n 222).

<sup>231</sup> *Crimes Act* (n 185) ss 25A-25B.

<sup>232</sup> Ugur Nedim, 'Is the NSW One Punch Law Working to Reduce Violence?', *Sydney Criminal Lawyers* (Web Page, 8 October 2014) <<https://www.sydneycriminallawyers.com.au/blog/is-the-nsw-one-punch-law-working-to-reduce-violence/>>.

<sup>233</sup> See, eg, Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 273-8; Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, November 1997); *Chester v the Queen* (1988) 165 CLR 611, 618 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ); Frank A Sloan et al, 'Deterring domestic violence: Do criminal sanctions reduce repeat offenses?' (2013) 46(1) *Journal of Risk and Uncertainty* 51, 74-7; Robert Davis, Barbara Smith and Laura Nickles, 'The deterrent effect of prosecuting domestic violence misdemeanours' (1998) 44(3) *Crime & Delinquency* 434.

<sup>234</sup> There is no imprisonment under the NRL policy – there is the prospect of imprisonment when the charges are eventually heard in court.

<sup>235</sup> Justin Huntsdale, 'One-Punch laws working, AG tells Wollongong lawyers', *ABC Illawarra* (online, 27 August 2014) <<http://www.abc.net.au/local/stories/2014/08/27/4075379.htm>>.

provisions,<sup>236</sup> with the first conviction occurring nearly four years after the amendments.<sup>237</sup> Although almost all submissions to the statutory review supported repealing the provisions, they were retained due to a decrease in street violence.<sup>238</sup> The laws, while they were introduced as part of a broader package, have therefore been beneficial in reducing one-punch violence, thus supporting the proposition that deterrence can be effective, justifying one of the NRL's motivations.

### 3 The Domestic Violence Issue

Financial concerns aside, the NRL also felt compelled to take a stand against the issue of domestic violence. The policy identifies this by implementing the presumption that a player will be stood down if charged with an offence involving violence towards a female or child.<sup>239</sup> In 2019, the Australian Institute of Health and Welfare reported that one in six Australian women over the age of 15 had been a victim of domestic violence,<sup>240</sup> while research shows that one woman every nine days is killed by an intimate partner.<sup>241</sup> These rates have remained stable over time despite declining rates in overall violence.<sup>242</sup> Furthermore, more women are being hospitalised due to domestic violence than ever before.<sup>243</sup> The issue is one of national importance, and has become a priority for federal and state governments.<sup>244</sup> The NRL has a wide range of viewers, hence having the power to influence others and make a meaningful statement. In both Australia and overseas, athletes have had a troubled history with domestic violence.<sup>245</sup> Considering athletes naturally assume a role model status, it is essential that sporting organisations consistently strive to manage the culture and attitudes surrounding domestic violence.<sup>246</sup> Attitudes and beliefs are pivotal to domestic violence,<sup>247</sup> and as such if negative attitudes are held by influential people, these can be

<sup>236</sup> Director of Public Prosecutions, Parliament of New South Wales, *Statutory Review of Sections 25A and 25B of the Crimes Act 1900* (Statutory Review, May 2017) 7 ('Crimes Act Statutory Review').

<sup>237</sup> *Garth v R* [2016] NSWCCA 203.

<sup>238</sup> *Crimes Act Statutory Review* (n 236).

<sup>239</sup> *NRL Rules* (n 2) r 22A(8).

<sup>240</sup> Australian Institute of Health and Welfare, *Family, domestic violence and sexual violence in Australia: continuing the national story* (Report, 5 June 2019) vii.

<sup>241</sup> *Ibid* x.

<sup>242</sup> Australian Institute of Criminology, *Homicide in Australia 2012-13 to 2013-14: National Homicide Monitoring Program Report* (Statistical Report, 18 June 2017) ix.

<sup>243</sup> *Ibid*.

<sup>244</sup> Department of Social Services, *National Plan to Reduce Violence against Women and their Children – 2010-2022* (National Plan, 9 August 2019). This has become particularly important during the COVID-19 pandemic: Jennifer Duke, 'States urged to focus domestic violence funds on emergency accommodation', *The Sydney Morning Herald* (online, 4 April 2020) <<https://www.smh.com.au/politics/federal/states-urged-to-focus-domestic-violence-funds-on-emergency-accommodation-20200403-p54gwq.html>>.

<sup>245</sup> Suzanne Dyson, 'Violence against women and sports: ethical responsibility or brand control?' *The Conversation* (online, 23 October 2014) <<https://theconversation.com/violence-against-women-and-sports-ethical-responsibility-or-brand-control-32270>>; Helen Lenskyj, 'Attitudes to violence against women in sports haven't improved in 30 years' *The Conversation* (online, 22 October 2014) <<https://theconversation.com/attitudes-to-violence-against-women-in-sports-havent-improved-in-30-years-32013>>.

<sup>246</sup> Dyson and Corboz (n 94) 68.

<sup>247</sup> See, eg, Liesl Mitchell, *Domestic violence in Australia – an overview of the issues* (Research Paper, 22 November 2011); Janet Phillips and Penny Vandebroek, *Domestic, family and sexual violence in Australia: an overview of the issues* (Research Paper, 14 October 2014); Michael Flood and Bob Pease, 'Factors Influencing Attitudes to Violence Against Women' (2009) 10(2) *Trauma Violence Abuse* 125, 126; James O'Neil and Michelle Harway, 'A multivariate model explaining men's violence toward women: Predisposing and triggering hypotheses' (1997) 3(2) *Violence Against Women* 182; Lori Heise, 'Violence against women: An integrated, ecological framework' (1998) 4(3) *Violence Against Women* 262.

adopted by others, especially fanatical supporters.<sup>248</sup> Studies have discovered that male athletes often hold particularly problematic views regarding violence against women.<sup>249</sup> These results have been attributed to the fact that being trained to use violence and intimidation on the field may lead to the same attributes being applied in personal relationships.<sup>250</sup> Sporting organisations have a social duty to resolve this discrepancy, as norms of gender inequality and the acceptance of violence can be easily transferred.<sup>251</sup>

Sport itself can also impact negatively on rates of domestic violence. An American study demonstrated that days where American football games were nationally televised had a significantly higher amount of arrests for domestic violence.<sup>252</sup> The study found this true of other sports including basketball, hockey and baseball, but American football was clearly the most significant.<sup>253</sup> Additionally, research has shown that the FIFA World Cup is associated with an increase in domestic abuse.<sup>254</sup> Similar research has been done in Australia, with a 40.7% increase in domestic assaults documented when State of Origin (an NRL showcase event) is on.<sup>255</sup> This indicates that witnessing violence on field may impact the attitudes of viewers. Research has also discovered that avid fans experience hormonal surges when supporting their teams.<sup>256</sup> Other factors attributed to this rise in domestic violence include alcohol consumption and advertising, toxic masculinity, and competition.<sup>257</sup> Sporting organisations, particularly

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<sup>248</sup> Robert Hilliard and Carra Johnson, 'Sport fan attitudes and willingness to commit aggressive acts' (2018) 41(3) *Journal of Sport Behavior* 305.

<sup>249</sup> See, eg, Scot Boeringer, 'Associations of rape-supportive attitudes with fraternal and athletic participation' (1999) 5(1) *Violence Against Women* 81; Robin Sawyer, Estina Thompson and Anne Chicorelli, 'Rape myth acceptance among intercollegiate student athletes: A preliminary examination' (2002) 18(1) *American Journal of Health Studies* 19.

<sup>250</sup> Article, 'Out of Bounds: Professional Sports Leagues and Domestic Violence' (1996) 109 *Harvard Law Review* 1048, 1050; Brant Webb, 'Unsportsmanlike Conduct: Curbing the Trend of Domestic Violence in the National Football League and Major League Baseball' (2012) 20(3) *American University Journal of Gender, Social Policy & the Law* 741, 759.

<sup>251</sup> See, eg, Flood and Pease (n 247) 14; Leora Rosen et al, 'The effects of peer group climate on intimate partner violence among married male US Army soldiers' (2003) 9(9) *Violence Against Women* 1045; Martin Schwartz and Walter DeKesedery, *Sexual assault on the college campus: The role of male peer support* (Thousand Oaks, 1997).

<sup>252</sup> Beth Adubato, 'The Promise of Violence: Televised, Professional Football Games and Domestic Violence' (2015) 40(1) *Journal of Sport and Social Issues* 22. In this article, 'American football' refers to the sport also known as gridiron.

<sup>253</sup> *Ibid* 31.

<sup>254</sup> Stuart Kirby, Brian Francis and Rosalie O'Flaherty, 'Can the FIFA World Cup Football (Soccer) Tournament Be Associated with an Increase in Domestic Abuse?' (2014) 51(3) *Journal of Research in Crime and Delinquency* 259, 270. See also Suzanne Martin, 'World Cup shines a light on persistent domestic violence', *The Conversation* (online, 24 June 2014) <<https://theconversation.com/world-cup-shines-a-light-on-persistent-domestic-violence-28132>>.

<sup>255</sup> Michael Livingston, *The association between State of Origin and assaults in two Australian states* (Research Report, June 2018) 5.

<sup>256</sup> James C McKinley, 'Sports Psychology; It Isn't Just a Game: Clues to Avid Rooting', *The New York Times* (online, 11 August 2000) <<https://www.nytimes.com/2000/08/11/sports/sports-psychology-it-isn-t-just-a-game-clues-to-avid-rooting.html>>.

<sup>257</sup> See, eg, Melanie Pescud, 'Whether teams win or lose, sporting events lead to spikes in violence against women and children' *The Conversation* (online, 13 July 2018) <<https://theconversation.com/whether-teams-win-or-lose-sporting-events-lead-to-spikes-in-violence-against-women-and-children-99686>>; Nicole Repetto, 'Domestic Violence, Sexual Assault, and Elite Athletes: Analyzing Arrest and Conviction Rates' (Honours Thesis, Eastern Michigan University, 2016) 17; Theresa Brown, Kenneth Sumner and Romy Nocera, 'Understanding Sexual Aggression Against Women: An Examination of the Role of Men's Athletic Participation and Related Variables' (2002) 17(9) *Journal of Interpersonal Violence* 937.

those governing sports with excessive physical contact such as the NRL, have the power to mitigate this through statements, partnerships and action such as the policy change.<sup>258</sup>

Regarding the NRL specifically, there are further reasons to take a stand against domestic violence. Throughout the past 20 years, many players have been involved in incidents concerning violence against women.<sup>259</sup> In 2004, a large number of incidents led to an investigation into the NRL's culture. The investigation resulted in the implementation of educational programs, but no concrete policy change.<sup>260</sup> In 2009, major sponsors threatened to terminate their contracts if tougher action was not taken in regards to off-field indiscretions.<sup>261</sup> In 2015, following more incidents, the NSW Premier criticised the NRL for failing to act, and his statements were supported by organisations including Domestic Violence NSW.<sup>262</sup> The NRL was criticised for 'not acting when such serious charges have been laid', and not taking its opportunity to condemn domestic violence.<sup>263</sup> Following the 'summer from hell', key stakeholders in the NRL met to discuss the cultural problems, which ultimately resulted in the policy change.<sup>264</sup>

## **C Challenges to the Policy**

### **1 Restraint of Trade**

The imposition of a suspension restraining players from performing under their contract constitutes a restraint of trade under the *Restraints of Trade Act 1976* (NSW).<sup>265</sup> The preclusion of playing alone satisfies the definition, and it is irrelevant that the players still receive payment and are permitted to continue training.<sup>266</sup> Furthermore, the restraint of trade is indefinite and a player's career may be significantly hampered prior to a court determination. Criminal trials, particularly those of a serious nature, can take up to 18 months to be heard, constituting a large amount of a playing career.<sup>267</sup> Considering the competitive nature of sports such as the NRL, clubs may not be willing to hold a suspended player for this long, meaning that for some it may be the end of their career.<sup>268</sup>

### **2 Restriction of Rights**

Although the NRL has been emphatic in its assertion that the policy infers no judgment as to the player's guilt or innocence, commentators have alleged that it interferes with

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<sup>258</sup> Ruth Liston et al, *A team effort: Preventing violence against women through sport* (Research Report, 27 August 2018).

<sup>259</sup> Dyson (n 245).

<sup>260</sup> Ibid.

<sup>261</sup> Davies (n 90) 53. It was reported in the media that these sponsors included Telstra and Harvey Norman: Brad Walter, 'Sponsors have had a gutful of drunks', *The Sydney Morning Herald* (online, 20 March 2009) <<https://www.smh.com.au/sport/nrl/sponsors-have-had-a-gutful-of-drunks-20090320-gdtfh2.html>>.

<sup>262</sup> NSW Council of Social Service, 'NRL has failed to act responsibly on domestic violence' (Media Release, 22 July 2015).

<sup>263</sup> Ibid.

<sup>264</sup> *De Belin* (n 7) 55 [176] (Perry J).

<sup>265</sup> *Restraints of Trade Act 1976* (NSW) s 4(1).

<sup>266</sup> *De Belin* (n 7) 68 [214] (Perry J).

<sup>267</sup> Gore (n 19).

<sup>268</sup> Ian Prendergast, 'RLPA Statement' (Media Release, Rugby League Players Association, 28 February 2019) ('*RLPA Statement*'). Penalties that can end an athlete's career have traditionally been viewed negatively by courts. See, eg, *Greig v Insole* [1978] 1 WLR 302 ('*Greig*'); Stephen Owen-Conway and Linda Owen-Conway, 'Sports and Restraint of Trade' (1989) 5 *Australian Bar Review* 208, 223; David Thorpe et al, *Sports Law* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 411.



a player's right to the presumption of innocence.<sup>269</sup> The presumption of innocence is not protected in the *Australian Constitution* ('*Constitution*'), however it is entrenched in the common law as part of the right to a fair trial.<sup>270</sup> The right to a fair trial is 'fundamental and absolute',<sup>271</sup> operating as an essential characteristic of the rule of law.<sup>272</sup> Although it is not constitutionally protected specifically, sections of the *Constitution* including the right to a jury trial,<sup>273</sup> and the concept of judicial power,<sup>274</sup> have been taken to indicate the right to a fair trial.<sup>275</sup> On the presumption of innocence, courts have held that 'the accused does not need to prove his or her innocence',<sup>276</sup> and 'the presumption of innocence in criminal proceedings is an important incident of the liberty of the subject'.<sup>277</sup> At an international level, the presumption of innocence is protected.<sup>278</sup>

The protection of an individual's civil liberties has traditionally been an argument against sporting organisations exercising discretion to suspend or terminate an athlete's contract. Commentators have argued that legal standards of proof should be utilised when a determination is made as to whether a disrepute clause should be exercised.<sup>279</sup> These arguments emphasise that an athlete's civil rights should not be made sacrificial to the reputation of sporting organisations.<sup>280</sup> When an AFL player was suspended in 2013 following a criminal charge, the president of the AFL Players Association stated that 'we remind the industry and wider community that in our society all members have the right to the presumption of innocence'.<sup>281</sup> It is important for sporting organisations to recognise this principle, and ensure the rights of athletes are considered when drafting policies or making disciplinary determinations.<sup>282</sup>

The NRL policy has been criticised by some for prejudicing the right to a fair trial. Despite the vehement assertions that it is a 'no-fault rule',<sup>283</sup> it has been argued there is a presumption of guilt before the player has the opportunity to provide evidence.<sup>284</sup> By standing the player down, it may interfere with future proceedings by projecting to the public that the player is guilty. Following the announcement of the policy, the Rugby League Players Association ('RLPA') stated that despite the title of the policy, 'the reality is that standing down a player indefinitely can impact on the fundamental principle of the presumption of innocence and may prejudice the legal process'.<sup>285</sup> The RLPA stated that the policy was not the fairest approach to what is understandably a

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<sup>269</sup> Gore (n 19); Rhodes (n 19).

<sup>270</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Report No 129, December 2015) 220 ('*Traditional Rights and Freedoms*').

<sup>271</sup> *Brown v Stott* [2003] 1 AC 681, 719 (Lord Bingham).

<sup>272</sup> Tom Bingham, *The Rule of Law* (Penguin UK, 2011) ch 9.

<sup>273</sup> *Australian Constitution* s 80.

<sup>274</sup> *Ibid* ch III.

<sup>275</sup> *Traditional Rights and Freedoms* (n 270) 220; *Dietrich v the Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J); *Carr v Western Australia* (2007) 232 CLR 138 ('*Carr*').

<sup>276</sup> *Carr* (n 275) [103] (Kirby J).

<sup>277</sup> *Momcilovic v the Queen* (2011) 245 CLR 1, [44] (French CJ).

<sup>278</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>279</sup> Jonson, Lynch and Adair (n 78) 75.

<sup>280</sup> Jonson (n 163).

<sup>281</sup> Staff Reporter, 'AFLPA "Deeply Concerned" by St Kilda's Decision to Suspend Milne' *The Age* (online, 19 June 2013) <<https://www.theage.com.au/sport/afl/aflpa-deeply-concerned-by-st-kildas-decision-to-suspend-milne-20130619-2oj6k.html>>.

<sup>282</sup> Tara Magdalinski and Ian Warren, 'Sport: civil liberties and athletes' (2004) 29(2) *Alternative Law Journal* 95.

<sup>283</sup> *Beattie Interview* (n 181).

<sup>284</sup> Rhodes (n 19).

<sup>285</sup> *RLPA Statement* (n 268).

complex issue, and that the policy should better respect the presumption of innocence.<sup>286</sup>

### **3 Back to the Reasonable Investigation**

As discussed earlier, employers are generally required to conduct a reasonable investigation before suspending or terminating an employee based on alleged criminal conduct.<sup>287</sup> One of the criticisms of the NRL policy is that there is no right of reply for the players,<sup>288</sup> and no requirement for the CEO or COO to explain their reasons for making a decision.<sup>289</sup> For offences falling below the 11-year threshold, this grants the decision makers near unfettered power to decide the immediate future of the player. While the NRL cannot conduct a pseudo-trial as this could prejudice future proceedings, there is an argument that the NRL could be 'less draconian' and conduct a deeper investigation or allow submissions on certain matters.<sup>290</sup> This would dispel criticisms that subjective circumstances are not being considered.

## **D Testing the Policy**

### **1 Dylan Walker**

Dylan Walker, a player for the NRL club Manly Sea Eagles, was one of the players initially stood down under the policy. Walker was charged with assault occasioning actual bodily harm, which carries a maximum penalty of five years,<sup>291</sup> as well as common assault, which carries a maximum penalty of two years.<sup>292</sup> Although the charge did not warrant an automatic stand down, he was stood down under the discretionary provision of the policy.<sup>293</sup> As the alleged assault was against a woman (Walker's fiancée), the CEO acted on the presumption that the player should be stood down.<sup>294</sup> Walker was found not guilty of the charges on 10 May 2019,<sup>295</sup> and accordingly the stand down was lifted. This occurred after his fiancée adjusted her testimony, instead supporting Walker's version of events.<sup>296</sup> Nine days later, Walker resumed playing duties and played every match for the rest of the 2019 season. The result of his situation was nine missed matches, despite ultimately being found not guilty of the criminal charges.<sup>297</sup>

### **2 Jack De Belin**

Jack De Belin, a player for the NRL club St George Illawarra Dragons, led to the most extensive discussion of the policy when he was stood down after being charged with aggravated sexual assault.<sup>298</sup> The alleged offence carries a maximum penalty of 20 years,<sup>299</sup> and accordingly he was stood down automatically. Subsequently, he appealed

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<sup>286</sup> *Ibid.*

<sup>287</sup> *Deeth* (n 16).

<sup>288</sup> *NRL Rules* (n 2) r 22A(11)(a).

<sup>289</sup> *Ibid* r 22A(11)(b).

<sup>290</sup> *De Belin* (n 7) 100 [302] (Perry J).

<sup>291</sup> *Crimes Act* (n 185) s 59(1).

<sup>292</sup> *Ibid* s 61.

<sup>293</sup> *NRL Rules* (n 2) r 22A(7).

<sup>294</sup> *Ibid* r 22A(8). Cf the cases of Josh Reynolds and Curtis Scott: *Proszenko* (n 194).

<sup>295</sup> *Walker* (n 5).

<sup>296</sup> Chloe Hart, 'NRL player Dylan Walker's fiancée backflips on testimony in alleged domestic violence case', *ABC News* (online, 26 February 2019) <<https://www.abc.net.au/news/2019-02-26/nrl-player-dylan-walkers-fiancee-backflips-on-testimony/10850004>>.

<sup>297</sup> Players can also be reinstated following a guilty verdict, presuming there is no jail time: *May* (n 6).

<sup>298</sup> *Crimes Act* (n 185) s 61J.

<sup>299</sup> *Ibid* s 61J(1).

the validity of the policy to the FCA. The decision was handed down on 17 May 2019.<sup>300</sup> In *De Belin*, it was ultimately held the policy was legitimate and valid, and the application was dismissed. The judgment included a lengthy discussion of the policy, including justifying the motivations and a response to the array of challenges previously discussed.

### **(a) Justification of the Motivations**

The decision in *De Belin* ultimately rested on the protection of the interests and reputation of the NRL. The success of the NRL in the long term was said to rely on high levels of participation at junior and amateur levels of rugby league,<sup>301</sup> and this was only tenable if players maintained high behavioural standards.<sup>302</sup> The ‘summer from hell’ had caused sponsors, broadcasters and fans to distance themselves from the game, and the NRL was left with no option but to take action.<sup>303</sup> Furthermore, the criminal charge leading to the applicant’s stand down was very much in the public domain.<sup>304</sup> There was no challenge to the motives of the NRL, with the judge accepting they were ‘genuinely concerned with promoting the best interests of the NRL Competition and the game at all levels’.<sup>305</sup> Regarding the motivation of deterrence, a claim by the applicant that the policy should be invalid as there was no evidence it would curb poor player behaviour was dismissed.<sup>306</sup> Furthermore, the judge was satisfied that society had high expectations of the league’s response to domestic violence, and thus the third motivation outlined was justified.<sup>307</sup>

### **(b) Response to the Challenges**

#### **(i) Restraint of Trade**

Although the policy is a restraint of trade, this is permissible depending on the circumstances of a case.<sup>308</sup> In *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd*, it was held that a restraint of trade is justified if it is reasonable to protect the interests of the parties or the public.<sup>309</sup> Subsequent cases in Australia have upheld this definition.<sup>310</sup> The relevant test in *De Belin* was whether or not the policy was objectively reasonable to protect the interests of the NRL, without being ‘more than adequate protection to [its] interests’.<sup>311</sup> In making the decision, careful consideration was paid to the extent of the restraint. In *Adamson v New South Wales Rugby League Limited*, it was held that in a sporting context, there was no greater restraint of trade

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<sup>300</sup> *De Belin* (n 7).

<sup>301</sup> *Ibid* 32 [110] (Perry J).

<sup>302</sup> *Ibid* 34 [115].

<sup>303</sup> *Ibid* 35 [119].

<sup>304</sup> *Ibid* 42 [138]. The NRL provided evidence of a media analysis prepared by market intelligence firm Isentia identifying 10,155 mentions online (including social media), 8,522 mentions on television, and 7,213 mentions on radio.

<sup>305</sup> *Ibid* 72 [225].

<sup>306</sup> *Ibid* 101 [304.1].

<sup>307</sup> *Ibid* 60 [193.3].

<sup>308</sup> *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd* [1894] AC 535.

<sup>309</sup> *Ibid* 565 (Lord MacNaghten).

<sup>310</sup> See, eg, *Buckley v Tutty* (1971) 125 CLR 353 (‘Buckley’); *Queensland Co-operative Milling Association v Pamag Pty Limited* (1973) 133 CLR 260 (‘Pamag’); *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Ltd* (1973) 133 CLR 288; *Maggbury Pty Limited v Hafele Australia Pty Limited* (2001) 210 CLR 181; *Peters (WA) Limited v Petersville Limited* (2001) 205 CLR 126; *McHugh v Australian Jockey Club Ltd* (2014) 214 ALR 20; *Adamson v New South Wales Rugby League Limited* (1991) 103 ALR 319 (‘Adamson’).

<sup>311</sup> *Adamson* (n 310) 265 (Wilcox J).

than restraining a player from playing altogether.<sup>312</sup> Therefore, the onus was on the NRL to demonstrate that the policy was reasonably necessary to protect its interests.<sup>313</sup> The judge in *De Belin* relied on a series of cases identifying valid restraints of trade. In *Queensland Co-operative Milling Association v Pamag Pty Limited*, a case involving an agreement restricting a baker from purchasing flour from other millers, certain interests of corporations were said to be legitimate validations for imposing a restraint of trade.<sup>314</sup> These included the protection of their trade,<sup>315</sup> their business,<sup>316</sup> and their goodwill.<sup>317</sup> In the case of a rugby league organisation, interests such as competitiveness and membership stability have been held to be legitimate,<sup>318</sup> as well as maintaining the financial viability of the clubs and league.<sup>319</sup> As discussed, the judge was sympathetic to the motivations and interests of the NRL. The evidence provided of potential sponsors withdrawing from negotiations due to the ‘summer from hell’ was said to be a legitimate danger to the interests of the league,<sup>320</sup> as well as the potential decline in female participation and interest.<sup>321</sup>

While the policy was objectively reasonable to protect the interests of the NRL, it still had to be demonstrated that it was not ‘more than adequate protection’ at the expense of the players.<sup>322</sup> Here, the fact that players are permitted to train with their clubs and receive their full salary was a relevant consideration.<sup>323</sup> While the applicant suffered financial loss due to personal sponsor withdrawals as well as removal from an NRL marketing fund, these losses were said to result purely from the association with the criminal charge, as opposed to the imposition of the policy.<sup>324</sup> Also, players are not restricted from negotiating their contracts, which was said to mitigate concerns that the policy could substantially impair the career of players.<sup>325</sup>

The applicant used the indefinite nature of the stand down as an argument that the policy went beyond protection of the legitimate interests of the NRL.<sup>326</sup> Employers are generally not permitted to hand down indefinite suspensions, as they breach an implied duty to act in good faith.<sup>327</sup> He sought to rely on *Hughes v Western Australian Cricket Association (Inc)* (*‘Hughes’*), in which a cricketer’s disqualification was held to be an unlawful restraint of trade, partly because the disqualification was ‘indefinite in its operation’.<sup>328</sup> An indefinite suspension was said to be beyond adequate protection to

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<sup>312</sup> Ibid 267.

<sup>313</sup> Ibid 266.

<sup>314</sup> *Pamag* (n 310) 277-8 (Stephen J).

<sup>315</sup> *Peters American Delicacy Co Ltd v Patricia’s Chocolates and Candies Pty Ltd* (1947) 77 CLR 574, 581 (Latham CJ).

<sup>316</sup> Ibid 582 (Rich J).

<sup>317</sup> Ibid 599 (Williams J).

<sup>318</sup> *Buckley* (n 310).

<sup>319</sup> *Adamson* (n 310) 295 (Gummow J).

<sup>320</sup> *De Belin* (n 7) 82 [255.3] (Perry J).

<sup>321</sup> This was another motivation behind the policy. See, eg, Zemek (n 215); Mark (n 215); Jeremy Nicholas, ‘Extending our NRL partnership into Women’s Rugby League’, *Telstra* (Web Page, 13 June 2019) <<https://exchange.telstra.com.au/extending-our-nrl-partnership-into-womens-rugby-league/>>.

<sup>322</sup> *Adamson* (n 310) 265 (Wilcox J).

<sup>323</sup> *De Belin* (n 7) 74 [231] (Perry J).

<sup>324</sup> Ibid 75 [235].

<sup>325</sup> Ibid 75 [234]. Note that Jack De Belin successfully received a new contract while awaiting trial in late 2020: Simon Brunson, ‘Dragons reveal Jack de Belin’s NRL future as rape trial awaits’, *Fox Sports* (online, 2 September 2020) <<https://www.foxsports.com.au/nrl/nrl-premiership/teams/dragons/nrl-2020-jack-de-belin-dragons-contract-rape-court-case/news-story/343b5beef6fdcf538e5c5daa047f6b35>>.

<sup>326</sup> Ibid 89 [269].

<sup>327</sup> *Downe* (n 66); *Milam* (n 73).

<sup>328</sup> *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, 51 (Toohey J) (*‘Hughes’*).

his employer's interests.<sup>329</sup> Ultimately, *De Belin* was distinguished from *Hughes*, as the operation of the policy is finite, even if the date that the criminal charge will be adjudicated on is unknown.<sup>330</sup> By having a 'rational connection' between the reason for the stand down and the period of the stand down, the NRL protected itself against the concerns outlined in *Hughes*.<sup>331</sup>

Responding to this, the applicant raised concerns about the length of time that criminal trials often take.<sup>332</sup> This is of particular concern for athletes, as their careers are limited due to the physical demands of professional sport. The applicant was 29 years old at the time he was stood down, which was relevant as few rugby league players are actively playing beyond their mid-30's.<sup>333</sup> In response, the judge referred to recent legislative amendments enacted to shorten delays in finalising criminal charges.<sup>334</sup> The amendments relieve the burden on magistrates to determine the sufficiency of evidence before trial.<sup>335</sup> NSW District Courts also expressed that ideally, all sexual assault trials would be commenced within eight months of charges being laid.<sup>336</sup> These factors were used to ameliorate concerns about the potential indefinite length of the restraint of trade.<sup>337</sup>

### **(ii) Restriction of Rights**

It was also argued the policy neglects the right to the presumption of innocence. The judge was mindful of the presumption of innocence, however her belief was that an 'ordinary reasonable member of the public is likely to conclude ... that the police have reasonable cause for laying the charge against him'.<sup>338</sup> This decision was made with reference to *Mirror Newspapers Limited v Harrison*, in which a defamation claim against a newspaper that reported the defendant had been charged with a crime was dismissed, as members of the public would presume that any charge would have been reasonably made.<sup>339</sup> It was held that any inference as to the players' guilt arises from the criminal charge, as opposed to the imposition of the policy, which was said to still respect the presumption of innocence.<sup>340</sup> Furthermore, authority was relied upon stating that 'preventative action taken by an employer in good faith to protect its reputation ... does not jeopardize the presumption of innocence in favour of an employee against whom criminal charges have been laid'.<sup>341</sup> As it was established that

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<sup>329</sup> *Ibid* 52.

<sup>330</sup> *De Belin* (n 7) 91 [279] (Perry J).

<sup>331</sup> *Ibid*.

<sup>332</sup> *Ibid* 73 [229].

<sup>333</sup> *Ibid*.

<sup>334</sup> *Ibid* 94 [286].

<sup>335</sup> *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW); *Criminal Procedure Act 1986* (NSW) s 66(2).

<sup>336</sup> The District Court of New South Wales, *Annual Review 2017* (Annual Review, 31 December 2017) 15.

<sup>337</sup> Despite this, as at 28 October 2020, *De Belin's* case is still yet to be heard.

<sup>338</sup> *De Belin* (n 7) 83 [258] (Perry J).

<sup>339</sup> *Mirror Newspapers Limited v Harrison* (1982) 149 CLR 293, 301-2 (Mason J) ('*Mirror Newspapers*').

<sup>340</sup> *De Belin* (n 7) 84 [260] (Perry J).

<sup>341</sup> *Industrial Alliance Life Insurance Company v Cabiakman* [2004] 3 SCR 195, [68] (LeBel and Fish JJ) ('*Cabiakman*').

the policy was enacted to prevent further reputational or financial damage to the NRL,<sup>342</sup> this argument was dismissed.

*(iv) Reasonable Investigation*

The applicant made numerous submissions relating to the fact the policy does not allow for affected players to make submissions, while the CEO or COO can make a discretionary decision without providing any reasons for the decision. First, the applicant referred to *Hughes*, in which the lack of a right to be heard was a feature of a rule held to be an unlawful restraint of trade.<sup>343</sup> Second, the judge discussed the Canadian Supreme Court case of *Industrial Alliance Life Insurance Company v Cabiakman* ('*Cabiakman*'),<sup>344</sup> in which the court held that an employee was entitled to make submissions or explain a situation with their version of facts.<sup>345</sup> This is similar to the Australian cases imposing obligations on employers to conduct a reasonable investigation.<sup>346</sup> Third, the applicant submitted that players should be entitled to a hearing, based on HCA authority that their contract,<sup>347</sup> and their reputation, are affected.<sup>348</sup> Here, De Belin heavily relied on the decision in *Ainsworth v Criminal Justice Commission* ('*Ainsworth*'), in which a report damaging the reputation of a group of gaming companies was subject to a declaration that their rights to natural justice had not been observed.<sup>349</sup> Finally, it was submitted that the NRL should not have 'carte blanche to amend the rules at whim in whatever way it felt appropriate to do', referencing the lack of a requirement to provide reasons for a discretionary decision.<sup>350</sup>

In *De Belin*, these concerns were ultimately mitigated by the fact that the highly publicised nature of the policy meant there was a risk of hindering the future criminal proceedings,<sup>351</sup> even if there was a finding of innocence.<sup>352</sup> It was believed that a determination by the NRL based on evidence would ultimately prejudice a fair trial.<sup>353</sup> It creates a risk of interference and prejudice if one is questioned on matters directly relevant to the criminal charge.<sup>354</sup> This is especially true where the matter is in the public interest, as 'there is a danger ... that prospective jurors may be prejudiced, or a party will come under pressure to make admissions'.<sup>355</sup> Additionally, any investigation based on evidence would be incomplete, unreliable, and more prone to error.<sup>356</sup> While this appears contradictory to cases such as *Cabiakman* and *Deeth*, it creates the impression that any reasonable investigation requires specific limits, especially in situations where the case has been reported on publicly. The judge in *De Belin* did not comment extensively on whether any investigation would have been possible, instead flatly stating that 'the applicant's submission that a player should be entitled to a hearing before being stood down ... must be rejected'.<sup>357</sup> The decision in *Ainsworth* was

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<sup>342</sup> *De Belin* (n 7) 84 [263] (Perry J).

<sup>343</sup> *Hughes* (n 328). See also *Greig* (n 265).

<sup>344</sup> *De Belin* (n 7) 96 [293] (Perry J).

<sup>345</sup> *Cabiakman* (n 341) [68] (LeBel and Fish JJ).

<sup>346</sup> See *Pinawin* (n 16); *Deeth* (n 16).

<sup>347</sup> *Jarratt v Commissioner of Police* (2005) 224 CLR 44; *Annetts v McCann* (1990) 170 CLR 596.

<sup>348</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

<sup>349</sup> *Ibid.*

<sup>350</sup> *De Belin* (n 7) 106 [321] (Perry J).

<sup>351</sup> *Ibid* 96 [293].

<sup>352</sup> *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616, 626-7. See also *R v Castro, Onslow's & Whalley's Case* (1873) LR 9 QB 219.

<sup>353</sup> *De Belin* (n 7) 96 [291] (Perry J).

<sup>354</sup> *Hammond v Commonwealth* (1982) 152 CLR 188, 198 (Gibbs CJ).

<sup>355</sup> JRS Forbes, *Justice in Tribunals* (Federation Press, 4<sup>th</sup> ed, 2014) ch 12.

<sup>356</sup> *De Belin* (n 7) 95 [290] (Perry J).

<sup>357</sup> *Ibid* 96 [292].

distinguished, as the judge held that the laying of criminal charges is the event damaging the player's reputation, as opposed to the application of the policy.<sup>358</sup> In regards to the CEO and COO's broad discretion, it was held that the policy did not subvert any rational limitations,<sup>359</sup> as this discretion was more or less agreed to when registering as an NRL player.<sup>360</sup>

### **E Conclusion**

Although the decision in *De Belin* confirmed the validity of the NRL policy, there are still clearly concerns.<sup>361</sup> The next Part looks at alternatives to the NRL policy found in other sports both domestically and internationally, before providing recommendations for sporting organisations moving forward.

## **V ALTERNATIVES AND RECOMMENDATIONS**

### **A Other Sporting Codes**

#### **1 AFL**

The AFL confers discretion to senior members similar to the NRL, with the Commission and the General Counsel granted power to investigate rule breaches,<sup>362</sup> and take subsequent disciplinary action.<sup>363</sup> This includes if a player has engaged in conduct likely to 'bring the game of [Australian] football into disrepute'.<sup>364</sup> However, the rules stipulate that being charged with a crime does not bring the game into disrepute,<sup>365</sup> instead stating that the AFL will wait until either a plea of guilty or a guilty verdict by a court or tribunal.<sup>366</sup> This is consistent with the AFL's historic emphasis on protecting the presumption of innocence.<sup>367</sup> The AFL's disciplinary process is also more thorough than the NRL's. Generally, they will appoint people to conduct an investigation into the matter,<sup>368</sup> as well as appointing a disciplinary tribunal to make a final determination.<sup>369</sup> This tribunal is composed of three people, as opposed to vesting discretion in one individual.<sup>370</sup> The players are given the right to be heard,<sup>371</sup> and the right to appeal an unfavourable decision to a board composed of at least three people.<sup>372</sup> This process is far more generous to the player involved, although this could be a result

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<sup>358</sup> Ibid 100 [301].

<sup>359</sup> Ibid 109 [327].

<sup>360</sup> Ibid. See also JW Carter, *Contract Law in Australia* (Lexis Nexis Butterworths, 7<sup>th</sup> ed, 2018) 2-17. However, the judge did not consider the inequality in bargaining power when agreeing to these contracts/registrations. See, eg, Nick De Marco, 'Compelled Consent – *Pechstein* & the Dichotomy and Future of Sports Arbitration' (Discussion Paper, Blackstone Chambers, 4 July 2016); Tilman Niedermaier, 'Arbitration Agreements between Parties of Unequal Bargaining Power – Balancing Exercises on Either Side of the Atlantic' (2014) 39 *ZDAR* 12, 13.

<sup>361</sup> The decision in *De Belin* was set to be appealed, but was called off via settlement the day before the hearing. This was partly because the date of the criminal trial was scheduled before the commencement of the 2020 NRL season, making any success on appeal redundant: Adrian Prosenko, 'De Belin withdraws appeal over NRL's no-fault stand down policy', *The Sydney Morning Herald* (online, 22 August 2019) <<https://www.smh.com.au/sport/nrl/de-belin-withdraws-appeal-over-nrl-s-no-fault-stand-down-policy-20190822-p52jlp.html>>. Despite this, De Belin's case is still yet to be heard as at 28 October 2020.

<sup>362</sup> *AFL Rules*, Australian Football League (at 9 May 2019) r 2.1(a) ('*AFL Rules*').

<sup>363</sup> Ibid r 2.1(a)(iv).

<sup>364</sup> Ibid r 2.2(a)(iii).

<sup>365</sup> Ibid r 2.3(g).

<sup>366</sup> Ibid r 2.3(c)(i).

<sup>367</sup> Staff Reporter (n 281); Paterson (n 152) 140.

<sup>368</sup> *AFL Rules* (n 362) r 3.1.

<sup>369</sup> Ibid r 41.1(a)(i).

<sup>370</sup> Ibid r 41.2.

<sup>371</sup> Ibid r 41.4(a).

<sup>372</sup> Ibid r 43.2.

of AFL players being involved in far less scandals than NRL players, particularly in recent years.<sup>373</sup>

Despite comparatively better behaviour historically, the AFL's lack of a similar policy to the NRL's has been criticised in 2020, following an incident involving Sydney Swans player Elijah Taylor.<sup>374</sup> Taylor was stood down by his club after he was arrested and charged with aggravated assault occasioning bodily harm.<sup>375</sup> Additionally, Collingwood Magpies player Jordan De Goey was charged with sexual assault in 2020, however was permitted to play the rest of the season as the club and league awaited outcomes of a potential trial.<sup>376</sup> It has been suggested the AFL may consider implementing a similar policy to the NRL's prior to the commencement of the 2021 season, however this remains to be seen.<sup>377</sup>

## 2 National Football League ('NFL')

The NFL<sup>378</sup> is perhaps the most comparable to the NRL considering its personal conduct policy was designed to deter against incidents of domestic violence, following an incident involving NFL player Ray Rice where footage of an assault on his then fiancée was made public.<sup>379</sup> However, as with the AFL, the NFL policy allows for a more thorough investigation. When a player is charged with a crime, the NFL undertakes an investigation to determine the appropriate sanction.<sup>380</sup> The investigation is undertaken concurrently with the police investigation,<sup>381</sup> and is conducted by a 'highly-qualified individual with a criminal justice background'.<sup>382</sup> This appointment is sensible and diminishes concerns expressed by the NRL that an investigation would prejudice the future criminal proceedings. The investigator can engage with experts and independent

<sup>373</sup> *De Belin* (n 7) 57 [180] (Perry J). The lack of scandals could be a result of the AFL enacting a policy in 2004 as a response to allegations of sexual violence: Julianne Corboz, 'Commercial Sport and Culture Change: Lessons From 'Respect and Responsibility': A Primary Prevention of Violence against Women Policy Implemented in the Australian Football League' in Susan Dun, Mo'tasem Kalaji and Marion Stell (eds), *It's How You Play the Game: International Perspectives on the Study of Sport* (Inter-Disciplinary Press, 2013) 25.

<sup>374</sup> See, eg, Jessica Halloran, 'Toxic silence on sexual assault claims shows AFL has work to do', *The Australian* (online, 8 September 2020)

<<https://www.theaustralian.com.au/sport/afl/toxic-silence-on-sexual-assault-claims-shows-afl-has-work-to-do/news-story/39ec5f7926dco8ad627bbf76ebc3d92b>>.

<sup>375</sup> Australian Associated Press, 'Sydney Swans stand down AFL player Elijah Taylor after assault charge', *The Guardian* (online, 15 September 2020)

<<https://www.theguardian.com/sport/2020/sep/15/sydney-swans-stand-down-afl-player-elijah-taylor-after-assault-charge>>.

<sup>376</sup> Anthony Colangelo and Michael Gleeson, 'De Goey charged with indecent assault', *The Age* (online, 4 July 2020) <<https://www.theage.com.au/sport/afl/de-goey-charged-with-indecent-assault-20200704-p55909.html>>. Note that his case will not be heard until April 2021 at the earliest following a recent adjournment: Adam Cooper, 'Pies star won't face court on indecent assault charge until April', *The Age* (online, 30 October 2020)

<<https://www.theage.com.au/national/victoria/pies-star-won-t-face-court-on-indecent-assault-charge-until-april-20201030-p56a3h.html>>.

<sup>377</sup> David Zita, 'No-fault stand down rule 'high on the agenda' for AFL after Taylor, De Goey charges', *Fox Sports* (online, 15 September 2020) <<https://www.foxsports.com.au/afl/afl-2020-elijah-taylor-jordan-de-goey-no-fault-stand-down-rule-police-charges-indecent-assault/news-story/699976d4a478ae7fb9128e5471b95049>>.

<sup>378</sup> The NFL governs the sport of American football.

<sup>379</sup> See eg, Maleaha L Brown, 'When Pros Become Cons: Ending the NFL's History of Domestic Violence Leniency' (2016) 50(1) *Family Law Quarterly* 193; Othello Richards Jr et al, 'A knockout to the NFL's reputation?: A case study of the NFL's crisis communications strategies in response to the Ray Rice scandal' (2017) 43 *Public Relations Review* 615.

<sup>380</sup> *NFL Personal Conduct Policy*, National Football League (at 11 August 2017) 3 ('NFL Personal Conduct Policy').

<sup>381</sup> *Ibid.*

<sup>382</sup> *Ibid* 5.



advisors with specialised skills including law enforcement and mental health.<sup>383</sup> Throughout the investigation, players are permitted to make submissions or meet with the investigator.<sup>384</sup> They are obviously unable to challenge the criminal charge,<sup>385</sup> but are free to offer facts about the charge in order to mitigate any punishment.<sup>386</sup> The investigator is then obligated to report their findings, before the NFL Commissioner makes a determination.<sup>387</sup> The player has the right to appeal the decision before a board composed of multiple 'hearing officers'.<sup>388</sup>

As the NFL is targeting domestic violence, there are specific provisions regarding these incidents, that are similar to the NRL policy. If a violation of the policy involves domestic violence, there is a baseline suspension of six games without pay.<sup>389</sup> Although there is a financial impact, the penalty is less onerous than the presumption of a stand down that is in the NRL policy.<sup>390</sup> There has been some concern regarding this baseline suspension, as most players have been given a suspension of less than six games, indicating the policy allows for more discretion than is indicated.<sup>391</sup> The NFL also implements education, counselling and treatment to both offenders and victims.<sup>392</sup> While the NRL policy does not preclude someone from seeking education and welfare,<sup>393</sup> the policy is silent on any immediate assistance following the imposition of a stand down.

### **3 National Basketball Association ('NBA')**

In contrast to the NRL, the NBA in the United States places huge importance on subjective considerations in its policy on domestic violence, sexual assault and child abuse.<sup>394</sup> Once a player is charged, they are subject to a treatment and accountability plan, with a focus on education and welfare.<sup>395</sup> If a player does not comply with this plan, they are then subject to disciplinary action.<sup>396</sup> The NBA Commissioner has the power to stand players down with pay for a 'reasonable period of time',<sup>397</sup> however each case is treated differently, with a range of factors considered.<sup>398</sup> These factors include the nature and severity of the allegations,<sup>399</sup> the evidence of the allegations,<sup>400</sup> the relationship between the player and the accuser,<sup>401</sup> prior history,<sup>402</sup> the player's reputation within the NBA community,<sup>403</sup> and the risk of reputational damage to the

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<sup>383</sup> Ibid 5-6.

<sup>384</sup> Ibid 6.

<sup>385</sup> Ibid.

<sup>386</sup> Ibid.

<sup>387</sup> Ibid.

<sup>388</sup> *NFL Collective Bargaining Agreement*, National Football League (at 4 August 2011) art 46(2)(a).

<sup>389</sup> *NFL Personal Conduct Policy* (n 380) 7.

<sup>390</sup> *NRL Rules* (n 2) r 22A(3).

<sup>391</sup> John T Holden and Joanna Wall Tweedie, 'The National Football League: Action Versus Activism' (2018) 97 *Oregon Law Review* 397, 419-20.

<sup>392</sup> *NFL Personal Conduct Policy* (n 380) 3.

<sup>393</sup> *De Belin* (n 7) 74 [231] (Perry J).

<sup>394</sup> *NBA Collective Bargaining Agreement*, National Basketball Association (at 30 June 2017) app F (*NBA Domestic Violence Policy*).

<sup>395</sup> Ibid 333.

<sup>396</sup> Ibid.

<sup>397</sup> Ibid 334.

<sup>398</sup> Ibid.

<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

<sup>401</sup> Ibid.

<sup>402</sup> Ibid.

<sup>403</sup> Ibid.

NBA.<sup>404</sup> While the NRL relies on little subjectivity in making determinations,<sup>405</sup> the NBA seeks to consider the circumstances of the charge as much as reasonably possible. As with most North American sports, the NBA relies heavily on the authority of a Commissioner, an approach emulated by the NRL policy. The NBA Commissioner has always had extremely broad authority to take disciplinary action.<sup>406</sup> Courts have seldom intervened with this power, stating that their power can generally only be limited by express constitutional terms.<sup>407</sup> It has been suggested that the Commissioner's discretion to impose discipline should be limited, with proper sentencing guidelines.<sup>408</sup> This would lead to internal consistency and a clearer understanding of obligations.<sup>409</sup> One set of suggested guidelines has been a 'three strikes, you're out' approach, where a minimum one game suspension is imposed following a third violent transgression.<sup>410</sup> This demonstrates that concerns about one individual holding too much disciplinary power is not limited to the NRL policy.

#### 4 Australian Olympic Committee ('AOC')

The AOC team member agreement stipulates that athletes must not bring the sport or themselves into disrepute,<sup>411</sup> and that being charged with a crime satisfies the definition of disrepute.<sup>412</sup> The agreement does not operate in exactly the same context as the other policies, concerning team selection as opposed to employment relationships.<sup>413</sup> However, cases involving the agreement have helped to provide some clarity as to the meaning of disrepute. Prior to the Beijing Olympics in 2008, two athletes were stood down following criminal charges, and both appealed these decisions to the CAS, who made determinations confirming the validity of the AOC's policy.<sup>414</sup> In *D'Arcy*, a swimmer charged with assaulting a fellow member of the swim team appealed the decision on the grounds that it was 'so unreasonable or perverse that it could be said to be irrational'.<sup>415</sup> In holding that the stand down was valid, the CAS relied on the overwhelming number of media reports, which 'could not help but be likely to bring him into disrepute'.<sup>416</sup> In *Jongewaard v Australian Olympic Committee*, a cyclist was charged with a hit and run incident. In holding that the decision was

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<sup>404</sup> Ibid.

<sup>405</sup> *NRL Rules* (n 2) rr 22A(3), 22A(7).

<sup>406</sup> Robert I Lockwood, 'The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA' (2008) 15 *Sports Law Journal* 137, 149.

<sup>407</sup> See, eg, *Riko Enters., Inc. v Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y., 1973).

<sup>408</sup> Bethany Withers, 'The Integrity of the Game: Professional Athletes and Domestic Violence' (2010) 1(1) *Harvard Journal of Sports and Entertainment Law* 146, 176.

<sup>409</sup> Ibid.

<sup>410</sup> Ibid 177. Under this approach, a criminal charge (even if later dropped) would be considered a transgression. See also Joel Ugolini, 'Even a Violent Game Has Its Limits: A Look at the NFL's Responsibility for the Behaviour of its Players' (2007) 39(1) *University of Toledo Law Review* 41, 56-7.

<sup>411</sup> *Team Membership Agreement – Athletes*, Australian Olympic Committee (at 21 August 2015) cl 4.1(4).

<sup>412</sup> Ibid cl 4.1(5).

<sup>413</sup> The team selections are for the Summer or Winter Olympics, which occur every four years, meaning that the period of influence the AOC has over athletes is limited.

<sup>414</sup> *D'Arcy* (n 88); *Jongewaard v Australian Olympic Committee* (Court of Arbitration for Sport, Case No 2008/A/1605, 19 September 2008) (*'Jongewaard'*). Cf the case of Peter Wakefield in 2004, who was charged with a crime prior to the Olympics and permitted to compete due to the presumption of innocence. He was ultimately convicted following the Olympics: George (n 78) 46.

<sup>415</sup> *D'Arcy* (n 88) 4 [1] (Panel Members Holmes, Grace and Sullivan). See also *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (Lord Greene) (*'Wednesbury'*); *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1986) 162 CLR 24, 40-2 (Mason J).

<sup>416</sup> *D'Arcy* (n 88) 15 [46] (Panel Members Holmes, Grace and Sullivan).

rational, the AOC stated that the fact there was alcohol in his system automatically invoked the disrepute clause.<sup>417</sup> Furthermore, the CAS, similar to the judge in *De Belin*, relied on the fact that the charge itself would lead to members of the public reasonably believing that he was ‘guilty of criminal charges arising out of the incident’,<sup>418</sup> especially considering the volume of media attention.<sup>419</sup> In justifying this, it was held there is a significant process before charges are officially laid, citing that the Director of Public Prosecutions (‘DPP’) and a magistrate both have to form the view that there are reasonable prospects of conviction.<sup>420</sup> These cases upheld the validity of the policy, while also confirming that athletes are held to a higher behavioural standard due to the significant media coverage.

### **B Alternative Approach: Educating the Players**

To align with the NFL and the NBA, the NRL could opt to rely on a more educational and therapeutic approach to implement cultural change. While the NRL spend approximately \$3.5 million annually on player education and welfare,<sup>421</sup> the policy does not mention any immediate educational support. A study in the United States looked at how sporting culture often perpetuates negative attitudes regarding domestic violence,<sup>422</sup> and sought to examine the best methods of education to change attitudes.<sup>423</sup> Domestic violence advocates, as well as sporting coaches, delivered effective results in changing the athletes’ attitudes to recognising abusive behaviours.<sup>424</sup> However, the results were most effective when the advocate cultivated relationships with the participants by joining workouts and training.<sup>425</sup> Furthermore, if the advocate had shared experiences such as being an ex-player, players were more likely to be receptive.<sup>426</sup> In implementing educational programs, selecting advocates who can integrate into the athletic culture will be most effective.<sup>427</sup> Other necessary factors for educational programs include that they are comprehensive, intensive, relevant, and offer positive messages.<sup>428</sup>

While educating players on anti-social behaviours may be the most desirable approach,<sup>429</sup> this is not always possible. The NRL’s gender advisor, who has invested time into promoting and implementing player education, recently said that some players were simply ‘education-proof’.<sup>430</sup> Therefore, an alternative approach focusing on education may not be a viable response to concerned sponsors and fans. However, lessons can be learned from international studies at how best to implement player

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<sup>417</sup> *Jongewaard* (n 414) 3 (Panel Members Kavanagh, Ellicott and Sullivan). Cf *Ziems* (n 158), where a distinction was drawn between a barrister’s personal and professional life following a drink-driving accident.

<sup>418</sup> *Ibid* 2.

<sup>419</sup> *Mirror Newspapers* (n 339) 299 (Mason J).

<sup>420</sup> *Jongewaard* (n 414) 6 [14] (Panel Members Kavanagh, Ellicott and Sullivan).

<sup>421</sup> *De Belin* (n 7) 38 [130] (Perry J); *Beattie Interview* (n 181).

<sup>422</sup> Maria Jaime et al, ‘Using a domestic and sexual violence prevention advocate to implement a dating violence prevention advocate to implement a dating violence prevention program with athletes’ (2016) 31(6) *Health Education Research* 679.

<sup>423</sup> *Ibid* 680.

<sup>424</sup> *Ibid*.

<sup>425</sup> *Ibid* 691.

<sup>426</sup> *Ibid*.

<sup>427</sup> *Ibid* 692.

<sup>428</sup> Michael Flood and Suzanne Dyson, ‘Sport, athletes, and violence against women’ (2007) 4(3) *NTV Journal* 37, 43.

<sup>429</sup> Kate Fitzgibbon, *Legal Responses to One-Punch Homicide in Victoria: Understanding the Impact of Law Reform* (Report, December 2018) 48-50.

<sup>430</sup> Belinda Kontominas and Andrea Jonson, ‘NRL gender adviser Catharine Lumby says some rugby league players are ‘education-proof’, *ABC News* (online, 8 March 2019) <<https://www.abc.net.au/news/2019-03-08/nrl-gender-adviser-says-some-players-are-education-proof/10881190>>.

education, and an educational approach should be used concurrently with disciplinary procedures.

### **C Recommendations**

The decision in *De Belin* confirms the NRL policy is legally valid. While it is not always fair on athletes, the pressure arising from media attention, their role model status, and sponsor influence means they are held to a higher behavioural standard when it comes to off-field conduct. However, in the interests of balancing the abundance of competing interests, including between the reputation of the sport and the individual rights of the players, sporting policies such as the NRL's should implement changes to achieve greater fairness.

#### **1 Time for Clarity**

The first recommendation is that policies should clarify the obligations of athletes. In particular, terms such as disrepute should be properly defined.<sup>431</sup> Previous authors have suggested it should amount to actions which are 'so outrageous that the sport is subjected to public ridicule',<sup>432</sup> or that demonstrate a lack of trustworthiness or competence.<sup>433</sup> The most preferable interpretation is one that mirrors general employment law principles.<sup>434</sup> As per the *Rose* test, the behaviour should either cause serious damage to the employment relationship, interfere with the interests of the employer, or be incompatible with their duties or role.<sup>435</sup> Creating a clear framework in which the disrepute clauses operate would make it fairer for athletes, while also ensuring consistency in disciplinary action.<sup>436</sup>

An alternative option is presented in the FFA policy. The FFA policy creates a non-exhaustive list of conduct that brings the sport into disrepute.<sup>437</sup> These include actions such as discriminatory behaviour,<sup>438</sup> harassment,<sup>439</sup> offensive behaviour,<sup>440</sup> as well as being charged with a criminal offence.<sup>441</sup> Although this policy is inconsistent with other sporting policies,<sup>442</sup> it does help to clarify the expected behavioural standards, and is another option for sporting organisations.

The scope of obligations as a role model should also be clearly identified. It is illogical that all players are subject to the same standards as a role model, when some players are more idolised, generally due to accessibility via the media or marketing campaigns. A more reasonable approach is one where athletes must subscribe to a particular standard.<sup>443</sup> This would include accepting a certain role such as being in a leadership position,<sup>444</sup> or choosing to be involved in a marketing or advertising campaign.<sup>445</sup> In *De Belin*, this was discussed, however was dismissed as the NRL own all rights to the individual's 'player property', consisting of their name, photograph, likeness, image,

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<sup>431</sup> Paterson (n 152); Kosla (n 85).

<sup>432</sup> Kosla (n 85) 670.

<sup>433</sup> Emma Bicknell-Goodwin, 'Rules, Referees and Retribution: Disciplining Employee Athletes in Professional Team Sports' (2005) 18 *Australian Journal of Labour Law* 240, 242.

<sup>434</sup> Paterson (n 152).

<sup>435</sup> *Rose* (n 10).

<sup>436</sup> Jonson, Lynch and Adair (n 78) 70; *Mitchell v Australian Football League* (Unreported, Supreme Court of Victoria, Tadgell J, 12 June 1992).

<sup>437</sup> *FFA Code of Conduct* (n 17) cl 2.2.

<sup>438</sup> *Ibid* cl 2.2(a).

<sup>439</sup> *Ibid* cl 2.2(b).

<sup>440</sup> *Ibid* cl 2.2(c).

<sup>441</sup> *Ibid* cl 2.2(j).

<sup>442</sup> *AFL Rules* (n 362) r 2.3(g).

<sup>443</sup> Kosla (n 85) 673-8.

<sup>444</sup> *Ibid* 676.

<sup>445</sup> Jonson, Lynch and Adair (n 78) 84.

reputation and identity.<sup>446</sup> With players being 'live advertising space',<sup>447</sup> there limits the opportunities for players to subscribe to a certain standard. The intricacies of this agreement are beyond the scope of this article; however, it would be preferable if players could opt to be included in publicity and promotions, thus subscribing to a particular standard.

## **2 Implementing the Reasonable Investigation**

The main issue with the NRL policy is the absence of a reasonable investigation. While the policies of other sporting organisations discussed include provisions for an investigation, the NRL imposes an automatic stand down for offences above the 11-year threshold,<sup>448</sup> and a very limited investigation for offences below the threshold.<sup>449</sup> This is a denial of procedural fairness which should be rectified.<sup>450</sup> Sporting organisations should be subject to the same obligations as general employers, with a reasonable investigation required before taking disciplinary action.<sup>451</sup>

The concerns in *De Belin* that an investigation may prejudice a fair trial are well founded, however there are steps that can be taken to ensure the investigation does not interfere with the police process. The NFL model of limiting the scope to an individual with a criminal justice background is optimal, as is engaging with experts possessing specialised skills. Direct questions regarding the criminal charge should be forbidden,<sup>452</sup> however there a range of other considerations that could be included in an investigation. In *De Belin*, the suggestion of including an investigation was rejected as the only factors raised by the applicant were regarding the financial and emotional impact upon the player.<sup>453</sup> This was an inadequate argument as the players still have access to their salary and welfare support.<sup>454</sup> Factors that were not raised by the applicant, but could be considered, include the impact on the wellbeing of the player's family, the impact on the club and representative matches, the impact of feelings of isolation, as well as the fact the NRL has no evidence by which to base its claim.

The suggestion that the charge itself means that there is a high likelihood of guilt could be disputed by Commonwealth DPP statistics. According to their website, there were 65 defendants convicted after a plea of not guilty in 2017-18, while there were 46 defendants acquitted.<sup>455</sup> These statistics could be relied upon to counter the argument that the charge itself brings the game into disrepute, obliging the NRL to conduct a reasonable investigation.

The other reform should be to reduce the power vested in one individual. Commissioners in the United States have been described as 'more powerful than a chairperson of a board',<sup>456</sup> and possessing 'all the disciplinary powers of the proverbial

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<sup>446</sup> *De Belin* (n 7) 18 [53] (Perry J).

<sup>447</sup> *Ibid* 30 [100].

<sup>448</sup> *NRL Rules* (n 2) r 22A(3).

<sup>449</sup> *Ibid* r 22A(7).

<sup>450</sup> Davies (n 90) 68; Deborah Healey, *Sport and the Law* (UNSW Press, 4<sup>th</sup> ed, 2009) 114.

<sup>451</sup> *Pinawin* (n 16); *Deeth* (n 16).

<sup>452</sup> It would also be inappropriate for sporting organisations to involve the victim in these investigations, as there is the risk of re-traumatising them: See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) xx.

<sup>453</sup> *De Belin* (n 7) 101 [303] (Perry J).

<sup>454</sup> *Ibid*.

<sup>455</sup> Commonwealth Director of Public Prosecutions, 'Prosecution Statistics' *CDPP: Australia's Federal Prosecution Service* (Web Page) <<https://www.cdpp.gov.au/statistics/prosecution-statistics>>.

<sup>456</sup> Matthew Mitten et al, *Sports Law and Regulation: Cases Materials and Problems* (Aspen Publishers, 1<sup>st</sup> ed, 2005) 437.

paterfamilias'.<sup>457</sup> Although their powers have occasionally been limited,<sup>458</sup> there is little doubt that they have 'historically been the most powerful tool' for controlling player discipline,<sup>459</sup> and are essentially only subject to federal law restrictions.<sup>460</sup> This model of disciplinary power is emulated by the NRL policy, however a more preferable approach would be a tribunal composed of multiple individuals with specialised skills, with clarity in the constitution, tribunal rules and procedures.<sup>461</sup> This would lead to decisions that are reasonable, consistent, and in the best interests of the game.<sup>462</sup> It is essential that sporting organisations make reasonable disciplinary decisions, as courts are reluctant to involve themselves.<sup>463</sup> Decisions are generally only reviewable in a court if 'no reasonable man could come to the conclusion that the facts proved amounted to the offence charged under the rules'.<sup>464</sup> Given this responsibility, tribunals are optimal as they encompass a broader range of knowledge and opinions. Additionally, the reasons for the decision should be made clear to the players, which is not the case in the current iteration of the NRL policy.<sup>465</sup>

## VI CONCLUSION AND LIMITATIONS

In the modern social landscape, sporting organisations have a difficult task of balancing a significant number of competing interests when a player is charged with a criminal offence. These interests include the sport's reputation amongst the public, pressure from sponsors and broadcasters, laws surrounding restraints of trade, a player's right to the presumption of innocence, managing internal investigations, and affording players natural justice. While these factors create a complex intersection, the mass of media coverage and money invested into sport ultimately mean it is unavoidable that athletes may need to be stood down following a charge of a serious criminal offence. However, sporting organisations still have a duty to properly respect the players when drafting rules and policies.

While the NRL was forced to act due to a myriad of social and financial factors, its policy is overbearing on players and should be amended to closer resemble other sporting organisations. The automatic stand down for offences over 11 years is too rigid, while the discretion for the CEO or COO to make a determination for other offences grants too much power to one individual. The best approach is to conduct a careful investigation, with a disciplinary determination ultimately decided by a tribunal composed of members with specialised skills or knowledge. This approach aligns sporting organisations closer with other industries. This is a fairer method, as currently the obligations imposed on athletes as a result of disrepute clauses and role model factors are unclear. As many other commentators have noted,<sup>466</sup> all employees deserve to have a clear understanding of their obligations, both when at work, and for out of work conduct.

It is hoped the recommendations of this article can be used as guidance for sporting organisations when introducing policies that involve standing down players charged with a criminal offence. However, it must be acknowledged there were limitations in writing this article. First, the recency of the NRL policy meant there was limited

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<sup>457</sup> *Atlanta Baseball Club, Inc. v Kuhn*, 432 F Supp 1213, 1220 (N.D. Ga, 1977).

<sup>458</sup> See, eg, *Mackey v National Football League*, 435 F.2d 606 (8<sup>th</sup> Cir., 1976).

<sup>459</sup> Holden and Tweedie (n 391) 402-3.

<sup>460</sup> Sean McCarthy, 'Bending the Rules to Change the Rule? Was the National Football League's Domestic Violence Policy Collectively Bargained For?' (2015) 26(1) *Marquette Sports Law Review* 245, 257; *Finley & Co. v Kuhn*, 569 F.2d 527 (7<sup>th</sup> Cir., 1978).

<sup>461</sup> Healey (n 450) 125.

<sup>462</sup> Paterson (n 152) 139.

<sup>463</sup> Kosla (n 85) 654; *Shepherd* (n 85).

<sup>464</sup> *Dickason v Edwards* (1910) 10 CLR 243, 254 (O'Connor J). See also *Wednesbury* (n 415).

<sup>465</sup> *NRL Rules* (n 2) r 22A(11)(b).

<sup>466</sup> See, eg, Paterson (n 152); Kosla (n 85); Jonson, Lynch and Adair (n 78); Davies (n 90).

literature on it, while the policy itself has only been implemented on five occasions.<sup>467</sup> These concerns were somewhat ameliorated due to the *De Belin* decision being handed down, which substantively covered some issues relating to the policy. Second, the scope of this article meant there is little discussion about other jurisdictions. While international policies including those of the NBA and the NFL were mentioned, it would be beneficial for organisations such as the NRL to examine individual cases arising from international jurisdictions.

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<sup>467</sup> Additionally, there has been discretion used to not suspend a player in at least two instances: *Proszenko* (n 194).