ANTI-DOPING AND HUMAN RIGHTS IN SPORT: THE CASE OF THE AFL AND THE *WADA CODE*

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In 2005, after considerable pressure from the Federal Government, the Australian Football League (AFL) agreed to adopt the World Anti-Doping Agency Code 2003 *('*WADA Code*'). This came into effect for the 2006 AFL season. There was substantial opposition to the new* WADA Code *from both the AFL and the AFL Players' Association. One reason was that the AFL already had an effective anti-doping code of its own in place. A second was that the AFL had implemented at the beginning of 2005 its own* Illicit Drugs Policy *('*IDP*'). Given that the AFL already had its own framework for dealing with drug infringements, a framework based on long and careful research, the need for the* WADA Code *was questionable. In some respects, the AFL's own* IDP *was tougher than the* WADA Code*: it operated 44 weeks per year. The* WADA Code *is designed only for 'in-competition' infringements. Ultimately, as the* WADA Code *will be applied to AFL football, the question is its legality in certain circumstances. This paper questions whether any suspension of an AFL player for taking recreational drugs in circumstances where there will be no performance benefit can be defended as lawful. There are good reasons to think that any such suspension will be an unlawful restraint of a player's trade as an AFL footballer.*

I INTRODUCTION

The Australian Football League ('AFL'), amongst other sporting bodies, was called upon in 2005 to have their anti-doping policies and rules comply with the *World Anti-Doping Agency Code 2003* ('*WADA Code*'). Significant pressure was placed on the AFL by the government to fall into line with the *WADA Code*. The AFL stood to lose close to two million dollars in government funding of AFL programs if they refused.[1] There was also extensive criticism of the AFL's

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1 Samantha Lane, 'Canberra and AFL in a Clash of the Codes', *Sunday Age* (Melbourne), 12 June 2005, 8; Len Johnson, 'Drugs Impasse Costs AFL $1.5m', *The Age* (Melbourne), 1 July 2005, 3.

resistance to the changes in the media.[2] The AFL has stated that it is completely supportive of the *WADA Code* in respect of performance enhancing drugs.[3] Where the AFL differs from the World Anti-Doping Agency ('WADA') is on how non-performance enhancing drugs, or illicit drugs, ought to be dealt with. The *WADA Code* essentially treats illicit drugs in the same way as performance enhancing drugs.

After detailed research and consultation, the AFL in 2005 announced its *Illicit Drugs Policy 2005* ('*AFL IDP*').[4] The approach under this policy is essentially one of rehabilitation and counseling, with the anonymity of the player respected.[5] In contrast, the approach taken under the *WADA Code* is punishment and public shaming.

This paper will provide an overview of the relevant *WADA Code* provisions and the relevant provisions of the *AFL Anti-Doping Code 2006* ('*AFL Code*') and *AFL IDP*. It will then explore a number of the policy and legal issues in the debate between WADA and the AFL. It will explore how illicit or recreational drug offences ought to be dealt with from the point of view of the general community and other sports.

The strict liability provisions of the *WADA Code* will be considered with reference to performance enhancing drugs on the one hand, and recreational drugs on the other. Finally, legal remedies for a ban that arises out of the application of the *WADA Code* to an athlete who tests positive to recreational drugs will be discussed.

Many issues relating to the *WADA Code* and how it deals with recreational drugs will be common to many sports. However, the focus of this paper is the AFL, and specifically, its *IDP*. This policy is a codified way of dealing with a specific health issue, and it is therefore a good tool for comparing how the *WADA Code* fails to appropriately deal with what is largely a health issue.

II THE WADA CODE AND THE AFL ILLICIT DRUGS POLICY

A *An Introduction to the WADA Code*

The WADA was established primarily by the International Olympic Committee in 1999 to independently promote and co-ordinate the fight against doping in sport internationally.

2 See, eg, Dwayne Russell, 'The Screed of Pound', *Sunday Age* (Melbourne), 17 July 2005, 28, where the President of the World Anti Doping Agency, Dick Pound, is quoted being critical of the AFL's resistance to adopting WADA compliant Anti Doping policies; Jim Wilson, 'AFL Cops Pounding', *The Herald-Sun* (Melbourne), 14 July 2005, 102.

3 See, eg, Andrew Demitriou, 'The AFL and WADA: Room for Compromise' (8-10 July 2005) *AFL Record* 6, 7.

4 Ibid 8, see comments of Brendon Gale, CEO of the AFL Players Association; see also, ibid 6-8, Andrew Demitriou's comments regarding the *AFL Illicit Drugs Policy 2005* ('*AFL IDP*').

5 *AFL IDP* art 1.7, 9.

> All major sports federations and nearly 80 governments gave their approval on March 5th 2003 at the World Conference on Doping in Sport held in Copenhagen, Denmark, to the World Anti-Doping Code version 3.0 by backing a Resolution that accepts the Code as the basis for the fight against doping in sport.[6]

The *WADA Code* applies to the Olympics and Olympic sports, and by virtue of governments' (including Australia's) endorsement of the *WADA Code*, compliance is sought from national sports bodies. Unless sporting bodies are prepared to sign an agreement to comply with the *WADA Code*, the athletes from that sport in that country cannot participate in international competition,[7] or alternatively, the government may withdraw financial support for the sport. In Australia the Australian Sports Commission and the Australian Sports Anti-Doping Authority ('ASADA') are responsible for implementing the *WADA Code*.

The *WADA Code* sets out its purpose as being 'to protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes world wide'.[8] The primary purpose of the *WADA Code* is to ensure equality at elite level sporting competition, and to achieve this by detecting and severely punishing any athlete who seeks to gain an advantage by using performance enhancing drugs and methods.

This condemnation of drug 'cheats' appears almost universally accepted by all sports and governments, and the AFL is in strong agreement with WADA on this point.[9] Further, the market for performance enhancing drugs is significant, generating annual profits in the United States alone of over $US 800 000 000.[10] Therefore concerns about its prevalence are warranted, with evidence to suggest that governments have authorised doping programs in recent decades.[11] Despite the publicity and stringent testing regimes, and the evidence of adverse side effects,[12] athletes continue to violate the anti-doping rules.[13]

The secondary purpose of the *WADA Code* is to promote health. This is apparent in the *WADA Code*'s prohibition of what have been described as 'recreational' or

6 WADA, *What is the Code, Introduction* <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=239> at 24 September 2006.

7 As has occurred with baseball. Baseball (and consequently softball) have been excluded from the 2012 Olympics by the International Olympic Committee at its 117th session in Singapore on 9th July, 2005, primarily because of a failure to adopt WADA compliant anti-doping policies as required by the Olympic charter: see <http://www.olympic.org/uk/news/olympic_news/full_story_uk.asp?id=1426>; see also, Russell, above n 2.

8 *WADA Code*, Introduction.

9 See, eg, Demitriou, above n 3, 8.

10 Michael Kennedy, 'Drugs in Sport: Testing at the 2000 Olympics' (2002) 34 *Australian Journal of Forensic Sciences* 25, 25.

11 For example, the German Democratic Republic: ibid.

12 The International Olympic Committee have written that 'anabolic steroids can have long term effects by causing many health problems', quoted in Antonio Buti and Saul Fridman, *Drugs Sport and the Law* (2001) 59.

13 For example, over 60 doping cases arose during the two weeks of competition at the Sydney 2000 Olympics: ibid 45.

'illicit' drugs.[14] These drugs include cannabis, amphetamines and cocaine. Take the example of cannabis. It is broadly accepted that cannabis does not and cannot enhance athletic performance for most athletic activities, but on the contrary, is likely to impair performance.[15] Conversely, amphetamines or cocaine may enhance performance if taken immediately before competition,[16] although the focus of this paper is the taking of such drugs well before and unrelated to competitive performance.

A further aspect of the application of the *WADA Code* also needs to be noted. There are tests conducted both in-competition, or immediately after the athletic performance, and out-of-competition tests, which occur when an athlete may be training, resting or holidaying, for example. Penalties for test results may differ according to whether the substance was detected in or out of competition.

The *WADA Code* seeks to regulate recreational drug use in competition. There are a number of difficulties with this imposition to the athlete's life which will be explored below. First, it is not appropriate to regulate the private conduct of the athlete. Second, out-of-competition behaviour should be treated differently to in-competition behaviour. Third, and perhaps most significantly, are the penalties that the *WADA Code* directs sporting bodies to impose. The penalties imposed for the use of some illicit drugs should be far more lenient than penalties for the use of performance enhancing drugs.

B *Provisions of the WADA Code*

WADA publishes a list of prohibited substances and methods ('Prohibited List'). That list is divided into the following categories:

(i) Substances and methods prohibited both in and out of competition;
(ii) Substances and methods prohibited in competition;
(iii) Substances prohibited in particular sports; and
(iv) Specified substances.

An anti-doping rule violation occurs where a prohibited substance (or its metabolites or markers) is detected in the athlete's bodily specimen.[17] Further, 'it is not necessary that intent, fault, negligence or knowing use on the athlete's part

14 The terms 'recreational' or 'illicit' drugs are used interchangeably in this article.

15 Peter Brukner and Karim Khan, *Clinical Sports Medicine* (1st ed, 1993) 672; Bill Stronach in Demitriou, above n 3, 8. There are some commentators who believe that the relaxing effect of cannabis is a psychological performance enhancement and therefore should be banned: see eg, Hap Davis, Canadian sports psychologist: Buti and Fridman, above n 12, 49. The International Olympic Committee at the 1998 Nagano winter Olympic Games initially disqualified snowboard gold medalist, Ross Rebagliati, for testing positive to marijuana. Following a Court of Arbitration for Sport ('CAS') hearing, Rebagliati's medal was reinstated, in essence because there was no agreement between the International Ski Federation and the IOC that marijuana should be treated as a banned substance. The WADA Prohibited List now includes cannabinoids, including marijuana.

16 Brukner and Khan, ibid, 672, 674. Heroin may also enable an injured athlete to compete because of its ability to remove the pain usually experienced by the athlete. This leads to exacerbated injuries to the athlete.

17 *WADA Code* art 2.1.

be demonstrated in order to establish an anti-doping violation'.[18] 'The success or failure of the use of a prohibited substance or prohibited method is not material. It is sufficient that the prohibited substance or prohibited method was used or attempted to be used for an anti-doping rule violation to be committed'.[19]

In order for a substance or method to be included on the prohibited list, it must meet two of the following three criteria:

1. 'The substance or method has the potential to enhance or enhances sport performance';

2. 'The use of the substance or method represents an actual or potential health risk to the athlete'; or

3. WADA believes that 'the use of the substance or method violates the spirit of sport described in the introduction to the Code'.[20]

The most serious offences will occur under category (1), where performance enhancement is sought. Therefore offences that do not involve the enhancement or an attempt to enhance performance, but rather are a health risk (category (2)) and are against the spirit of sport (category (3)) should be dealt with less severely.

The most commonly referred to drug in performance enhancement, steroids, is listed as prohibited both in and out of competition. As far as recreational drugs are concerned, these are primarily prohibited in competition (under category (ii) above). This group includes drugs such as ecstasy, amphetamines (eg, speed), cocaine, heroin and cannabinoids (including hashish). However, cannabis is treated differently regarding penalty as it appears in the Prohibited List under category (iv) above.

The organization responsible for conducting the doping tests has 'the burden of establishing that an anti-doping rule violation has occurred'.[21] The standard of proof is 'to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt'.[22]

If an athlete were charged with an offence against the *WADA Code*, he or she is entitled to raise certain defences. The athlete may show, which burden is on him or her, that his or her blood or urine sample has not been analysed in accordance with specified standards, or the chain of custody of the sample has not followed procedures.[23] The organization responsible for the testing then must establish that

18 *WADA Code* art 2.1.1.
19 *WADA Code* art 2.2.1.
20 *WADA Code* art 4.3.1.
21 *WADA Code* art 3.1.
22 *WADA Code* art 3.1.

the departure from the standard did not cause the test to be positive.[24]

The *WADA Code* enshrines the right to a fair hearing, which is stated to include:

- An unbiased, fair and impartial hearing body;
- The right to legal representation (at the athlete's own expense);
- The right to be heard, to present evidence and to question witnesses in response to the alleged anti-doping code violation and its consequences;
- Swift advice of the alleged code violation, a timely hearing, and timely advice of the decision in writing.[25]

If an athlete were to be found guilty of a breach of the *WADA Code*, a range of prescribed penalties may apply. The first issue may be whether any 'exceptional circumstances' exist which would lead to the elimination or reduction of the suspension period otherwise applicable. This includes where the athlete 'bears *no fault or negligence* for the violation',[26] which onus of proof is on the athlete. If the athlete has been found to have a prohibited substance in his or her sample[27] he or she must also 'establish how the prohibited substance entered his or her system in order to have the period of ineligibility eliminated'. Where the alleged offence is one of use or attempted use of a prohibited substance or method,[28] then the additional proof of how the substance entered his or her system need not be proven in order to satisfy the 'exceptional circumstances' test.

A further 'exceptional circumstances' defence may lead to any period of suspension being reduced by up to one half of the period otherwise applicable. This is where the athlete can show that he or she bears *no significant fault or negligence*.[29] It would appear that this is an easier test to satisfy than the *no fault or negligence* test outlined above. Again, where the doping offence involves being found with a prohibited substance in one's sample, the athlete must establish how the prohibited substance entered his or her system in order to have the period of suspension reduced.

The penalties that apply for prohibited recreational drugs in competition vary depending on the type of drug found in the athlete's sample. For a first offence relating to ecstasy, amphetamines ('speed'), cocaine or heroin, the period of suspension is two (2) years. For a second offence, a lifetime ban applies.[30] In the

23 See, eg, *Vinnicombe v Australian Sports Drug Agency* [1992] FCA 65 (Unreported, Ellicott J, Federal Court of Australia, No G0065 of 1992); and the case involving Australian Olympic sprinter Dean Capobianco, in which Athletics Australia's Anti Doping Control Tribunal (chaired by Robert Ellicott QC) initially cleared the athlete of a positive finding to the steroid stanozolol, because of problems in proving the proper chain of custody of the sample. This finding was overturned after the IAAF referred the matter to its own Arbitration Panel.

24 *WADA Code* 3.2.1.

25 *WADA Code* art 8.

26 *WADA Code* art 10.5.1.

27 In accordance with *WADA Code* art 2.1.

28 See *WADA Code* art 2.2.

29 *WADA Code* art 10.5.2.

case of cannabis, if the athlete can establish that the use was not intended to enhance sport performance, then a first offence will attract a minimum penalty of a warning, up to a one year period of suspension; for a second offence two years' suspension; and for a third offence, life suspension.[31]

The Code provides for automatic disqualification of the individual result obtained in the event during which the sample was taken.[32]

Under the AFL's new WADA compliant Anti-Doping Code, the AFL Tribunal will deal with any Code violations.[33] Given the close attention WADA, the Australian government, and national and international media have given to the 'WADA and the AFL' debate, it is anticipated that the AFL would be challenged if it were to apply its Anti-Doping Code leniently.

Aside from criticism it would be likely to attract, the ASADA has a right to appear at any AFL Tribunal hearing and to appeal against any AFL Tribunal decision made under the *AFL Code*.[34] The AFL Tribunal, therefore, is obliged to apply Court of Arbitration for Sport ('CAS') Anti-Doping decisions, to *AFL Code* and therefore apply penalties rigorously and consistently with the strict liability intention of those who wrote the *WADA Code*.

If a player is dissatisfied with his Tribunal hearing or any penalty imposed, he may appeal to the AFL Appeal Board [35] or take legal action such as judicial review.[36]

C *The AFL Anti-Doping Code ('AFL Code')*

The AFL has had its own Anti-Doping Code ('the *AFL Code*') in force for about sixteen years. The *AFL Code* deals with a range of prohibited drugs and methods, and now strictly applies the WADA Prohibited List. However, prior to January, 2006, the *AFL Code* amended such that it departed from the *WADA Code* in relation to the treatment of cannabinoids, insulin, certain asthma treatments and glucocorticosteriods.[37]

The *AFL Code* 'ensures that the AFL competition is conducted upon the basis of

30 That ban covers participation in any capacity in a competition or activity authorized or organized by any signatory to the *WADA Code* or a signatory's member.
31 *WADA Code* art 10.3.
32 *WADA Code* art 9.
33 *AFL Code* arts 10.4, 10.5, 12 & 14; and *AFL Player Rules* (2006) ('*AFL Player Rules*') r 23.3.7.
34 *Australian Sports Anti Doping Authority Act 2006* (Cth) s 13(1)(k); see also s 15(2), especially s 15(2)(e) regarding ASADA's right to monitor the AFL's compliance with the *WADA Code*.
35 *AFL Player Rules* r 24. Note r 24.31, which states that players are required to exhaust their appeal under r 24 before engaging in any relevant legal proceedings in a court of law.
36 See *R v Panel on Take-Overs and Mergers, ex parte Datafin PLC* [1987] 1 QB 815. Judicial review following this case would be possible if the AFL were found to be exercising power in the performance of a public duty or in a matter of public importance: *State of Victoria v Master Builders Association of Victoria* [1995] 2 VR 121. For the view that a private body such as the AFL may not be subject to judicial review, see *R v Disciplinary Committee of Jockey Club; Ex parte Aga Khan* [1993] 2 All ER 853.
37 *AFL Code 2005* art 4.1(1).

athletic prowess and natural levels of fitness and development and not on any pharmacologically enhanced performance'.[38] Its other objectives include player health and education, and setting an example which condemns the use of performance enhancing substances.[39] The previous version of the *AFL Code* was unapologetically severe on penalty and directed the Tribunal to 'demonstrate [by its sanctions] to all participants in the sport of Australian Football that the use of performance enhancing substances will not be tolerated'.[40]

Players are required to provide a urine sample at certain random times without prior notification. These times will be either 'in competition' which includes matches in the pre-season competition, the AFL home and away season and the AFL finals series.[41] Alternatively, tests are conducted 'out of competition', which is at any time other than on a match day. Testing may occur during 52 weeks of the year, and at all times includes testing for illicit drugs. This testing contrasts with *WADA Code* testing which in 'out of competition' testing does not test for most illicit drugs, including amphetamines, cocaine, ecstasy and cannabis.

The procedure for providing a sample is that after the player has been advised that he has been randomly selected to give a sample, he will then be accompanied by an ASADA chaperone from that time until the sample has been collected. He will be required to complete certain documentation, is then given drinks and a sealed sample collection container. The player, in the presence of a qualified anti doping official must provide a urine sample in a manner which enables the official to 'witness the sample leaving the Athlete's body'.[42]

D AFL's Illicit Drugs Policy ('AFL IDP')

The AFL has taken a different approach to dealing with illicit drugs to those which are performance enhancing.

> Illicit Drugs Policy differs in some important respects from the AFL Anti-Doping Code by addressing the problem of Illicit Drug taking by focusing primarily on education and rehabilitation of Players and others in the AFL system who are found to have been involved with Illicit Drugs.[43]

The *AFL IDP* commenced operation on 14th February, 2005. After consultation with stakeholders and a range of internationally renowned experts in sports medicine, the AFL articulated its *IDP*. The AFL were 'consistently advised that the best way to deal with any illicit drug problem was confidential counseling and

38 *AFL Code* art 1(1).
39 *AFL Code* art 1(2)-(4).
40 *AFL Code 2005* (which ceased operation on 31st December, 2005) art 12.8. For example, where the offence involved anabolic agents such as steroids, a first offence was punished by a two year minimum suspension, a lifetime ban for a second: *AFL Code 2005* art 12.2 (1).
41 *AFL Code* art 7.
42 *AFL Code* art 7.1, which requires that WADA's *International Standards for Testing* be followed; see Annexure C, and *WADA's International Standards for Testing* art C.4.8.
43 *AFL IDP* art 1.7.

education'.[44]

The drugs tested for under this policy are broken down into three categories: stimulants (such as amphetamines and cocaine), narcotics (such as heroin) and cannabinoids.[45] 'Samples for testing may only be taken when a player is performing duties in the course of his employment with his club.'[46]

Where a player records a first positive test[47] to an illicit drug, the AFL medical officer shall advise him that he is required to attend before the AFL medical officer for the purpose of education, counseling and treatment for illicit drugs.[48] For a second positive test, the player is again referred for education, counseling and treatment. However, that player's AFL Club doctor shall also be informed of the second positive test, to involve them in the rehabilitative process.[49]

Where a player records a third positive test, the player is deemed to have engaged in conduct which is 'unbecoming or likely to prejudice the reputation or interests of the AFL or to bring the game of football into disrepute'.[50] The player is then referred to the AFL Tribunal to be dealt with in relation to sanction. Up to twelve weeks' suspension may be imposed, depending on the drug.[51]

The AFL, through its *IDP*, shows a positive and ongoing interest in the welfare of the player by taking steps to address the problem in a confidential manner which is most likely to lead to the problem being resolved. Andrew Demitriou has observed that 'WADA was created, essentially, to counter drug-taking in Olympic sports'.[52] This highlights the *WADA Code*'s suitability to sports other than the AFL. The AFL *IDP* complies both with the spirit and intention of the *WADA Code*, is more rigorous than the *WADA Code* in some areas, 'but is a more appropriate policy for a football code'.[53]

III POLICY REASONS AGAINST ADOPTING THE WADA CODE IN RELATION TO 'RECREATIONAL' DRUGS

This part of the paper will explore the competing reasons for adopting an inflexible strict liability approach to illicit drug use by athletes. It will be argued that the justification of promoting athlete health is contradicted by a number of factors, and is not sustainable. The approach of the courts and the criminal justice

44 Demitriou, above n 3, 8.
45 *AFL IDP*, schd 1.
46 *AFL IDP*, art 6.2.
47 A 'positive test' includes a 'deemed positive test', for example because the player refused to provide a sample.
48 *AFL IDP* art 9.2.
49 *AFL IDP* art 9.6.
50 *AFL IDP* art 11; *AFL Player Rules* r 1.6.
51 If the drug involved is cannabis, up to six weeks suspension may be imposed; in all other cases, between six (6) and twelve (12) weeks suspension for a first offence: *AFL IDP* art 12.1.3.
52 Demitriou, above n 3, 6.
53 Ibid.

system to minor drug offences will also be considered. That analysis demonstrates a general trend in the community towards the rehabilitation and counseling approach, together with minimizing any long term stigma of the offending for the offender.

Some anti-doping case examples from Australian sport will be considered, which highlight the appropriateness of a more flexible approach both in the rules and the available penalties. The response of other sports and countries to the *WADA Code* and its inflexibility will then be considered. It will be apparent from this analysis that there is international support for a more flexible approach to illicit drug use by athletes. Critics of the AFL's stance in this debate, it will be seen, are ill informed.

A *Athlete Health*

The most obvious reason for banning 'recreational' drugs that do not enhance performance is to protect the health of athletes. One medical observer of the Sydney 2000 Olympics has stated that athlete health was more important than detecting performance enhancing drugs. The aim of testing 'was to prevent athletes being doped with drugs such as amphetamines that could seriously impair their health and even place their lives at risk'.[54]

However, with cannabis, the research is inconclusive regarding harmful side effects.[55] In contrast, 'there is a significant body of opinion that marijuana consumption is less harmful than either tobacco or alcohol usage'.[56]

The role of sports' governing bodies is not to be too paternalistic in relation to the athlete. It is not appropriate that the rules effectively control the private lives of athletes, and in that regard, their use of 'recreational' drugs where that has no potential to be performance enhancing. If the need for a 'clean' image and being above moral reproach is what is sought, there should be consistency in censuring other immoral behaviour, such as where athletes engage in extra-marital affairs, or where they engage in unprotected sex.

The 1986 version of the International Amateur Athletics Federation ('IAAF') anti-doping policy defines doping as 'the use by ... an athlete of certain substances which could have the effect of improving artificially the athlete's physical and / or mental condition and so augmenting his athletic performance'.[57]

The Sydney Organising Committee for the Olympic Games ('SOCOG') Chief

54 Michael Kennedy, 'Drugs in Sport: Testing at the 2000 Olympics', (2002) 34 *Australian Journal of Forensic Sciences* 25, 25.

55 Buti and Fridman, above n 12, 59.

56 Ibid. The authors there rely on a detailed 1991 inquiry by the Australian Capital Territory Legislative Assembly entitled Marijuana and Other Illegal Drugs, 'Third Interim Report of the Select Committee on HIV, Illegal Drugs and Prostitution'. It is noted that tobacco is not banned under the *WADA Code*, and alcohol only in certain limited sporting competitions (see *WADA Prohibited List 2006*, P1, Substances Prohibited in Particular Sports).

57 *IAAF Doping Control Regulations 1986* r 144, cited in Opie, Hayden, 'Legal Regimes for the Control of Performance-Enhancing Drugs in Sport', (1990) 12 *Adelaide Law Review* 332, 343.

medical Officer issued an introductory statement in the SOCOG Doping Control Guide which emphasized the need for 'fair play and true competition for the vast majority of athletes who do not cheat'.[58] The Guide also gives 'top priority' to the 'health of the athlete'.[59]

It is suggested that the concern of the Olympic movement and the IAAF in the above examples is health risk brought about by the use of performance enhancing drugs, not by the use of recreational drugs. It is not sustainable for the Olympic movement or the IAAF to assert that it is so concerned about the athlete using cannabis or ecstasy that it must impose a ban of one or two years suspension for the athlete's own good. That also can not be the concern of WADA as testing for recreational drugs does not occur outside of competition. For the Olympic athlete, testing may only occur two weeks in every 208. It follows therefore that WADA puts its concerns for the athlete's health on hold outside competition. This is nonsensical.

If athlete health were truly the issue, then a ban on alcohol might also have to be imposed more universally.[60] Under the current *WADA Code*, alcohol is listed as a prohibited substance under the Prohibited List for certain sports, and in-competition only. One can understand that for the safety of the individual competitor and his or her co-competitors, in sports like automobile racing, motorcycling and pentathlon (which involves shooting), athletes need to have zero or very low blood alcohol levels.

Like illicit substance use, alcohol consumption out of competition has nothing to do with the athlete's ability to conduct him or herself within the sport. It has no bearing on how the individual carries out his or her duties as an athlete, save for instances of attending official or sponsor's functions. In that case, an AFL player would be liable to be dealt with under the *Player Code of Conduct* as well as the general rule of bringing the sport into disrepute.[61] Generally, players have attracted fines for such conduct, but not AFL suspensions.

Given this inconsistent dealing with substances likely to affect health, it seems that there may be other reasons for the unforgiving approach to illicit drugs. The first reason might be a concern about liability if an athlete were to be injured during competition or training whilst under the influence of a drug. However, given that the *WADA Code* was developed under the auspices of the International Olympic Committee ('IOC'), the likelihood of sustaining a case against the IOC

58 Cited in Peter Dwyer, 'Drugs in Sport: Trials of the 2000 Olympics', (2002) 34 *Australian Journal of forensic Sciences*, 29, 33.

59 Ibid, 32, citing International Olympic Committee ('IOC') President, Juan Antonio Samaranch's introduction in the Guide.

60 Yet alcohol appears as a major sponsor of a number of sports, despite the well known consequences of its abuse, such as violence, sexual assault and indirectly, driving offences, and sponsors will withdraw their financial support in cases where they believe the athlete has damaged its image. An example is the TAC withdrawing its support of Richmond Football Club in early 2005 as a result of a drink driving infringement by one of the players. Sponsors would be equally as likely to withdraw from sponsorships as a result of drug offences by players.

61 *AFL Player Rules* r 1.6

must be small.[62] By extension, it is unlikely that national and international sporting federations provided the impetus to include recreational drugs in the Prohibited List out of fear of exposure to litigation.

The other reason may be a genuine concern for the health of the athlete. Whilst this may appear logical, it does not withstand closer scrutiny. The athlete found with a recreational drug in his or her sample may only receive a limited number of sanctions. These include a suspension from competition in most cases other than where the drug is cannabis, in which case a warning is an option for a first offence. Prizes are stripped from the athlete. This may require the athlete to refund any scholarship paid to them up to that time, and render him or her ineligible for any payments during the period of suspension.[63] The name of the athlete is placed on a public register.

The *WADA Code* is bereft of any steps to rehabilitate or assist an athlete with a drug problem.[64] It does not consider counseling, nor take into account that the use may belie a personal problem that needs delicate handling. It publicly humiliates them, whilst at the same time imposing severe punishments. As Opie observed that '[t]he level of self sacrifice and risk of crippling injury that many athletes endure in the hope of some form of international success should not be treated as for nothing, without very good reason.'[65]

Athlete health is such a 'good reason', but it is not advanced by the way the *WADA Code* deals with recreational drug violations. Concern for an athlete's health does not seem to be the reason recreational drugs are banned. If the aim is to paternalistically save an athlete from causing irreversible injury to him or herself, providing *some* assistance at least to address the problem is far more likely to prevent 'actual or potential health risk to the athlete'.[66] Perhaps putting the athlete back on the path of a successful sporting career, rather than taking everything they have worked hard for, including their career, is far less likely to harm the athlete's mental and physical health.

If athlete health is a major reason to justify testing for illicit drugs, then 'it may be necessary to require that such drugs also have demonstrated adverse health consequences before adding them to the banned list'.[67]

B How Victorian Criminal Laws Deal with Minor Drug

62 The Olympic athlete's contract with his or her National Olympic Committee ('NOC') contains numerous exclusions of liability of the NOC and IOC. Further, any litigation would be likely to be defended with substantial resources. Defences such as that of voluntary assumption of the risk, contributory negligence and illegality may also be argued by the IOC.

63 See *WADA Code* art 10.9, which appears to require the AFL to 'withhold some or all financial support or other sport-related benefits'. This may require Clubs to withhold contractual payments from players suspended under the *WADA Code*.

64 In contrast, the *AFL Code 2006* (the AFL's new, WADA compliant anti-doping code) art 12.6, provides for 'a drug rehabilitation programme in addition to any other sanction imposed' for an anti doping violation.

65 Hayden Opie, 'Drugs in Sport and the Law – Moral Authority, Diversity and the Pursuit of Excellence', (2004) 14 *Marquette Sports Law Review* 267, 277.

66 *WADA Code* art 4.3.1.2.

67 Buti and Fridman, above n 12, 61.

Offences

It is useful to compare how the criminal law deals with members of the community charged with minor drug offences. Under the *Drugs Poisons and Controlled Substances Act 1981* (Vic), a person who is found guilty of using a drug of dependence is subject to a maximum penalty of a $500 fine if the drug is cannabis, or $3,000 or one years' imprisonment (or both) in the case of any other drug.[68]

However, there is a further presumption in relation to how the courts should sentence a person charged with this type of offence. It is presumed that a person charged with using a small quantity of a drug of dependence who has never been before a court for the same or a similar offence, shall be released without conviction, and be placed on a 'good behavior bond' for a period of up to two years.[69] It is a condition of a bond granted under this section in relation to any offence other than a cannabis offence that the person complete an approved drug education and information program.[70]

In 1997, a pilot program was developed through the Victorian Magistrates' Court for dealing with persons who had committed minor offences, including minor drug offences. The program was successful and received legislative status in 2002.[71] The program is called 'Diversion', as its intention is to divert away from the criminal justice system persons who have no previous convictions, are prepared to acknowledge having committed the offence, and are prepared to accept certain conditions, including counseling. If all these conditions are met, a person can be cautioned by a Magistrate, and the charge or charges are effectively withdrawn, avoiding a formal finding of guilt by a court.

A number of the reasons for introducing the Diversion scheme are similar to the rationale behind the AFL's *IDP*. Both seek to:

- Deal with first time offenders and give them an opportunity to avoid having the stigma of a finding of guilt against their names;
- Place emphasis on counseling, with a view to addressing the possible problem, or preventing drug use from developing into a problem;
- Deal with the matter in a relatively confidential manner, as opposed to employing the method of public shaming;
- Accept that a person is entitled to make one mistake, provided that they are prepared to take steps to ensure that the conduct will not recur.

It can be seen that the AFL's *IDP* follows community trends for the treatment of minor drug offences. The *WADA Code* does not.

C *Australia's Sporting Experience with Anti Doping Offences*

68 *Drugs Poisons and Controlled Substances Act 1981* (Vic) s 75.
69 *Drugs Poisons and Controlled Substances Act 1981* (Vic) s 76.
70 *Drugs Poisons and Controlled Substances Act 1981* (Vic) s 76(1A).
71 Section 128A of the *Magistrates Court Act 1989* was introduced by *Criminal Justice Legislation (Miscellaneous Amendments) Act 2002* (Vic).

In Australia, there has been considerable public debate about and condemnation of the use by athletes of performance enhancing drugs. Despite this condemnation, Australian public opinion has found room for compromising the strict application of the rules in worthy cases. The examples cited below demonstrate that in appropriate cases, flexibility is required to arrive at a fair penalty in all the circumstances. It is suggested that this flexible approach is needed in applying the *WADA Code* to instances of illicit drug use.

One commentator has linked a lean period of Olympic medals for Australia, coupled with the sudden rise of the East German athletes in the 1970s and the Chinese in the 1990s, with Australia's strident criticism of 'drug cheats'.[72] For a nation that prides itself on its international sporting achievements, it is right that any threat to the level playing field by the use of performance enhancing substances should be strongly condemned.

However, Australians would also argue for a 'fair go'. In an appropriate case, the penalty must be tailored to fit the crime. In the 1995 case of Australian and world champion swimmer, Samantha Riley, FINA – international swimming's peak body – was prepared to listen to an innocent explanation for a positive drug test. Riley's coach had given her a single tablet to treat a migraine headache which contained the banned painkiller, 'Digesic'.

A 'strong warning' instead of a two year ban was imposed. 'The case also attracted attention because of doubts expressed in medical and scientific circles over whether Digesic should have been among the list of prohibited substances. It was subsequently removed'.[73] It may be that the subsequent banning of the coach for seven months from involvement in swimming satisfied the public perception that FINA were being consistently tough on drugs. Riley had argued that she had made an honest and reasonable mistake and relied on the decision in *Maynard*.[74]

Another Australian case which captured local and international attention was that of cricketer Shane Warne. His sample tested positive to a diuretic, a substance banned because of its ability to mask performance enhancing drugs. He gave evidence that he believed he was taking a fluid tablet. It was the 'vanity' defence: I took it to look better for a media conference.

However, so broad was international interest in the case that even WADA chairman Dick Pound was quoted in Australian newspapers on the case. The case posed the dilemma of the competing interests of showing athletes that the anti-doping rules would be applied without favour, as against the fact that there was little doubt that Warne had not sought or gained any performance advantage from the drug.

Ultimately, it appears that the more specific concerns with Warne's defence and his evidence led to a tougher penalty than may otherwise have been the case.[75] He

72 Opie, above n 65, 270.
73 Ibid, 272.
74 Discussed below, pt IV (The Problems with a Strict Liability Approach to Recreational Drug Use). See Buti and Fridman, *Drugs Sport and the Law* (2001) 122.

stood to lose a substantial amount of remuneration during any period of suspension, a significant penalty. Warne's one year ban 'was accepted by the majority of Australian public opinion that, if anything, may have considered his treatment a little harsh'.[76]

It is suggested that Australian sporting tribunals applying anti-doping rules are not likely to deal lightly with any rule violation. The anti-doping rules adopted by the Australian Cricket Board at the time Warne was charged in early 2003 displayed appropriate flexibility to deal with a wide variety of breaches, yet were stern enough to deter anti-doping offences.

The AFL's new WADA compliant Anti-Doping Code does not have that same degree of flexibility. There is no report that can be obtained from the AFL Anti-Doping medical advisor to reduce the penalty.[77] The fact that there may have been no attempt to seek to enhance sporting performance has little or no bearing on penalty.

D *The Stance Taken by Other Sports and Agencies on the WADA Code*

Although the National Rugby League ('NRL') has agreed to comply with the *WADA Code* by the deadline set by the Australian government, there was at least some resistance to compliance, and how the Code applied to recreational drugs. Tony Butterfield, president of the Rugby League Professionals Association, 'said the players felt the issue of social drugs was outside WADA's parameters ... We're saying that's [not] part of an employment contract. That's not their area'.[78]

FIFA, the peak international body for soccer, was also opposed to the *WADA Code* for a considerable period of time.[79] FIFA wanted concessions made which would allow for individual case management and a flexibility of sanctions. It called for certain appeal rights, and strict medical confidentiality with test results.[80] A recent CAS opinion found that current FIFA anti-doping rules are not *WADA Code* compliant.[81]

75 The offence under art 4.1(b) of the *Australian Cricket Board Anti-Doping Policy* attracted a minimum two year suspension for a first offence. However, that period may be varied on the basis of a report, statement or evidence of the Australian Cricket Board anti-doping medical adviser (art 8.3). The medical adviser, Dr Harcourt, reported that there had been no performance advantage; there was no direct evidence of anabolic steroid use; Warne's recovery from a shoulder dislocation was not unusual, nor apparently assisted in his rehabilitation by steroids; steroids would not have assisted spin bowling which is almost exclusively a skill sporting activity (see decision of Williams J, Dr S White and Mr P Taylor, 23 February, 2003, 9).

76 Opie, above n 65, 274.

77 See above n 75.

78 Brent Read and Greg Denham, 'Players' body seeks drugs unity', *The Australian* (All-round Country), 30 June 2005, 36 (Sport).

79 FIFA ratified WADA compliant Anti-Doping rules prior to the commencement of the 2006 World Cup, Germany which commenced on 9th June, 2006: Goodbye, John, 'World Cup on Side Over Drugs', *Times Online* (London), 13 May 2006, available <http://www.timesonline.co.uk/article/0,,4-2179026.html> at 13 May 2006. The ICC adopted a WADA compliant Anti Doping Policy in July 2006: <http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=2006102709402000.htm&date=2006/10/27/&prd=th&> at 4 January 2007.

The concept of individual case management is a recurring theme in relation to FIFA concerns. As Professor Jiri Dvorak, Chief Medical Officer of the 2002 FIFA World Cup, has stated: 'If every offence was judged in the same way and automatically punished with a two year ban, such decisions would not be upheld in an ordinary court of law. Athletes know this and so the code has lost much of its deterrent effect'.[82]

FIFPro, international soccer's player representative body, supports the stance taken by FIFA.[83] FIFPro believes that the Code needs to be able to take into account situations where the positive test came about by a lack of awareness, a mistake or the fault of doctors, trainers or coaches.[84] 'FIFPro feels that treating different cases equally, is discrimination'.[85]

The New Zealand Sports Drug Agency's executive director Graeme Steel also believes that drug testing should be directed at 'cheats' who seek to enhance their performances using steroids, human growth hormones and EPO, not cannabis users.[86] Mr Steel believes his agency should not get 'sidetracked' on social drugs and focus 'on key doping issues'. He expressed concerns that 'testing for cannabis inflated costs and increased staff workloads'.[87] Mr Steel believes that it is more important to try to find ways to encourage athletes to move away from recreational drugs and address the issue, rather than penalizing them.[88]

In the sport of cricket, there has been resistance to the adoption of the *WADA Code* also.[89] The International Cricket Council ('ICC') has 'wanted more flexibility than the mandatory penalties applied in accordance with the *WADA Code*'.[90] Therefore it held ongoing negotiations with WADA which appear likely to lead to the adoption of a WADA compliant Anti Doping Code in the near future.[91] There have also been objections to the *WADA Code* raised by

80 FIFA Activities Report 2002-2004, [8.1].

81 *FIFA v WADA* (*Advisory Opinion*) (2006) CAS 2005/C/976 & 986.

82 FIFA, *Medical Matters* (2003) FIFA <http://www.fifa.com/en/print/article/0,4039,53143,00.html> at 31 March 2003.

83 FIFPro, 'FIFPro supports FIFA in doping conflict with WADA' (Press Release, 25 May 2005).

84 FIFPro, 'FIFPro's perspective on doping and the *WADA Code*, (Press Release, 13 April 2004).

85 Hayden Opie expresses a similar view: see Opie, below n 138.

86 Gary Birkett, 'Cannabis testing slammed', *Stuff* (New Zealand), 17 July 2005, available at <http://www.stuff.co.nz/stuff/0,2106,3347967a1823,00.html> at 17 July 2005.

87 Ibid.

88 Ibid. In agreement is John Mendoza, former head of the then Australian Sports Drug Agency, who has criticised the two year ban imposed on rugby union player Wendell Sailor for using cocaine four days before a game: see Nicole Jefferey 'Forget cannabis, just focus on cheats', *The Australian* (Australia), 14 October 2006, [PINPOINT].

89 The International Cycling Union (UCI) objected to parts of the *WADA Code* but adopted a WADA compliant anti-doping policy in time for the 2004 Olympic Games, Athens: 'Cycling Union adopts new Anti Doping Rules based on *WADA Code*', The Associated Press (Aigle, Switzerland), 23 July 2004.

90 Memorandum from Urvasi Naidoo (ICC In House Lawyer), 18 August 2005, 4.

91 On 20 March 2006, the ICC Executive Board approved an ICC Anti-Doping policy for all major ICC events: memorandum from Urvasi Naidoo (ICC In House lawyer) to Paul Horvath, 17 May 2006. It is expected that a resolution that this policy will be approved at the ICC Annual Conference which will be held on 7 July 2006. If approved, the policy would commence operation at October's ICC Champion's Trophy in India: Long, Jon 'ICC Board to tackle Future Tours Program, Zimbabwe, anti-doping, anti-racism, pitch monitoring, playing conditions and ICC Champions Trophy venues', ICC News, 19th March, 2006, <http://www.icc-cricket.com/icc-news/content/story/241291.html> at 19 March 2006.

international cricket's player representative body, FICA,[92] and whilst Cricket Australia initially objected, it has now adopted a WADA compliant policy.

One specific area of difference between recent ICC policies for its international events has been in relation to cannabis. In some recent competitions,[93] the ICC anti-doping policy has removed cannabis from the prohibited substances list, whilst at another recent competition, the WADA Prohibited List was adopted wholesale, which bans cannabinoids.[94]

The ICC Chief Executive, Malcolm Speed contends that cricket is a 'low-risk sport for drug abuse', pointing to cricket's good track record on drug problems.[95] To date, 'there have been no positive tests at any ICC events'.[96] The ICC have held concerns about recreational drug use such as cannabis for welfare and public image reasons. They therefore propose putting it back on its banned list, but will be seeking 'greater discretion ... when considering what penalty to impose on the player'.[97] These are very similar concerns to those held by the AFL and the AFL Players Association ('AFLPA').

E *Privacy and the Right to Test for Illicit Drugs in the Workplace*

Drug testing occurs in relatively few workplaces. There are certain occupations where having drugs in the blood could impair a person's ability to carry out their employment. This includes airline pilots, ship's captains, forklift drivers and machine operators, and soon perhaps police officers.[98] This type of testing seems to be acceptable when safety, particularly of others, is an issue. An employee may have consumed a recreational drug outside work, yet may test positive for that drug days later when tested in the workplace. The employee may nonetheless not be impaired in their ability to carry out their job, and may not therefore be a threat to the safety of others.

The AFL Collective Bargaining Agreement effectively provides consent for the AFL to test players for both performance enhancing and illicit drugs. This agreement is negotiated between the AFL and the AFLPA. However, there are limits to what 'private' conduct an employer is entitled to consider in unfair dismissal cases in the Australian Industrial Relations Commission ('AIRC'). The tests laid down in these cases[99] may provide guidance on where the courts will

92 Federation of International Cricketers' Associations.
93 ICC Cricket World Cup 2003, ICC Champions Trophy 2004 and the ICC Super Series 2005.
94 ICC Trophy Ireland 2005. However, the maximum penalty for cannabis detection under the ICC policy was a reprimand.
95 Mark Harrison, 'ICC Media release: 2004 ICC Champions Trophy' (Press Release, 23 August 2004).
96 Naidoo, above n 90.
97 Ibid 5.
98 Laws requiring random drug and alcohol testing of police officers in Victoria are currently in a draft bill: 'Cops strike over drug tests' *News.com.au*, 12 May 2005 <http://www.news.com.au/story/print/0,10119,15902757,00.html> at 12 May 2005.
99 See, eg, *Matthew Roach v Qantas Airways Ltd* AIRC PR 912545 (Unreported, Cartwright SDP, 13 December 2001). In that case, the applicant flight attended had purchased some hashish whilst on a stopover in Frankfurt. This conduct was found to be exceptional and warranted termination.

draw a line between the private conduct of an AFL player and conduct within the scope of employment, and therefore open to scrutiny.

Generally, an employer may only review the conduct of an employee which occurs in the employee's personal time in 'exceptional circumstances'.[100] Examples of exceptional circumstances include drug dealing, paedophilia or indecent exposure in a public place. This private conduct of the employee may include the consumption of recreational drugs.

The business undertaking of the employer is relevant to determining what conduct is reviewable. If the conduct of the employee adversely affects the employer's reputation, is incompatible with the employee's duties as an employee, the conduct demonstrates an unfitness to work or is intrinsically improper, then the employer may be able to argue that the conduct 'out of hours' has a *relevant connection* to the employment and is therefore reviewable. Any conduct engaged in by an employee is reviewable if it goes to the heart of the employment contract.[101]

In the decision of Vice President Ross in *Rose v Telstra Corporation Ltd*[102] a useful review of cases involving 'out of hours' conduct was conducted. The Commission drew upon the general obligation of mutual trust and confidence between the parties, and concluded that 'if conduct objectively considered is likely to cause serious damage to the relationship between the employer and employee then a breach of the implied obligation may arise'.[103] The conduct must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract, or must be incompatible with the employee's duty as an employee.

Applying the above tests to an AFL player who tests positive to a recreational drug other than cannabis, it is difficult to see how the fact of recreational drug use outside the course of employment is of such gravity as to warrant a long period of suspension. However, being found under the influence of a drug at an official function may well have a relevant connection to employment, sufficient to warrant a lengthy suspension or termination.

However, each case will turn on its own facts, and the seriousness of the transgression will depend on a number of variables. What, if any, media attention was given to the incident? Was the allegation one of 'one off' drug experimentation, or an instance of use and sale of drugs? If any sponsor is

100 *Applicant v Respondent* AIRC PR 9973 (Unreported, Drake DP, 20 May 1998) 3; this decision was upheld on appeal to the Full Bench of the Australian Industrial Relations Commission: *Respondent v Applicant* AIRC PR 1221 (Unreported, MacBean SDP, Duncan DP and Deegan C, 1 February 1999). The applicant and respondents were flight attendants. On a stopover overseas was alleged to have sexually assaulted hi female colleague. His dismissal was found to be harsh unjust and unreasonable as the facts alleged were unclear and both parties were intoxicated to varying degrees.

101 Ibid.

102 AIRC PR Q9292 (Unreported, Ross VP, 4 December 1998).

103 Ibid.

affected, what does their specific contract say about any conduct of an AFL club or player which has a tendency to 'bring them into disrepute'? There are a large number of variables in each case of recreational drug use which makes it quite unfair to have uniformly strict penalties of strict liability application.

Incidents of misbehaviour including drunkenness or being charged with criminal offences rarely lead to anything more than a fine under the AFL *Players' Code of Conduct*, or a brief relegation to the reserves.[104] AFL players, it would appear, must be more answerable for their conduct because of their general profiles, and the fact that they are held up as role models. The difficulty with the *WADA Code* is that it seeks to punish disproportionately, private player conduct. An AFL player does not surrender all privacy rights when he signs up with a club: a player still has some right to privacy. No employee is either employed or paid 24 hours per day, as the AIRC decisions cited above show.

IV THE PROBLEMS WITH A STRICT LIABILITY APPROACH IN RELATION TO RECREATIONAL DRUG USE

The AFL has introduced an amended anti-doping code which complies with the requirements of the *WADA Code*. The amended *AFL Code* took effect from 1st January, 2006. It is reasonable to expect that the amended *AFL Code* will need to be applied in accordance with the principle of strict liability. An analysis of how strict liability operates in practice in anti doping cases is therefore useful, with a discussion of alternative forms of strict liability including allowing the defence of honest and reasonable mistake.

As we have seen above, committing an offence under the *WADA Code* is a strict liability, or no fault, offence. This means that athletes are responsible for any prohibited substance in their body, regardless of how it came to be there, and whether or not they knew a prohibited substance had entered their system. In the language of the criminal law, the athlete does not need to have mens rea, or a guilty mind, in order to commit the anti doping violation.

There is certainly a place for sporting authorities to take a strong stand against drugs in sport. Part of that strong stand is to apply the rules in a strict liability manner. Then any breach of the anti-doping rules, any attempt to 'cheat', is punished, and punished severely. However, there is a distinction between more serious code violations, such as steroid use, to which strict liability should apply, and less serious violations, such as cannabis or ecstasy use (particularly when used recreationally, and when that drug can not enhance performance) which should not attract strict liability.

[104] Hawthorn player Luke Hodge was relegated for a week to the reserves early in the 2005 AFL season under Hawthorn's zero alcohol tolerance policy after missing training due to over celebrating at his 21st birthday on a weekend.

Decisions such as *Gasser v Stinson*[105] have reinforced that the absence of any moral innocence argument is justifiable because otherwise 'the floodgates would be opened and [any] attempts to prevent drug taking by athletes would be rendered futile'.[106] Justice Scott appeared to accept that sometimes 'the morally innocent may have to suffer in order to ensure that the guilty do not escape'.[107]

A *The Defence of Honest and Reasonable Mistake*

This defence is generally available for strict liability criminal offences. The essence of the defence is that the alleged offender honestly holds a reasonable belief in a state of facts which if true would exculpate him or her. The defence tempers the severe application of a law or rule. Once the defence is raised, it is a matter for the prosecuting authority to disprove it on the balance of probabilities.

Two Australian decisions have canvassed extensively the arguments as to whether or not this defence can be read into Australian civil law. The first was *Maynard v Racing Penalties Appeal Tribunal of Western Australia*.[108] The appellant claimed that a positive drug result on one of his horses was beyond his control, and he had acted in accord with prescribed medical guidelines for administering substances to his horse, and he could not reasonably have known that his horse would test positive. The majority there held that the defence of honest and reasonable mistake could be a defence to offences under the Rules of [thoroughbred] Racing, unless expressly excluded.[109]

In *Harper v Racing Penalties Appeal Tribunal of Western Australia*[110] the court rejected the applicability of the defence to the Rules of Trotting, which are similar to the Rules of Racing in *Maynard*. It found that the rules of natural justice and the 'elementary rules of justice'[111] were sufficiently met without the need to imply a defence of honest and reasonable mistake into the *Rules of Trotting*. The court also found that the defence of honest and reasonable mistake was available under West Australian law, but that the rules here 'are not bylaws and do not have legislative effect'.[112] The court in *Harper* preferred the imposition of strict liability in doping offences, 'even at the expense of convicting a trainer who might not be at fault',[113] similarly to *Gasser v Stinson* discussed above.

In *Maynard* the seriousness of the offence and the consequences of a breach of the rules[114] was a reason to imply the defence. The rules were seen to be akin to

105 [1988] (Unreported, Scott J, 15 June 1988).
106 Ibid 21.
107 Ibid.
108 (1994) 11 WAR 1.
109 Ibid 18, Ipp J, with whom Wallwork J agreed.
110 (1995) 12 WAR 337.
111 *Abbott v Sullivan* [1952] 1 KB 189, 198 (Denning LJ).
112 (1995) 12 WAR 337.
113 Paul McCutcheon, 'Sports Discipline, Natural Justice and Strict Liability' (1999) 28 *Anglo-American Law Review* 37, 56.
114 Unlimited discretion to suspend or disqualify a trainer (and others) from practice as a trainer and a fine of up to $ 20 000. The effect on the right to work was considered important in *Maynard*.

the criminal law in their strict liability application. It was also a basic principle of justice that 'a person should not be found guilty unless he or she has a guilty mind'[115]. The court also relied on the High Court decision of *He Kaw Teh v The Queen*[116] in which a serious criminal offence attracted the defence.

Both *Maynard* and *Harper* are decisions of the Full Court of Western Australia, although in *Harper* it was a full bench of five Justices. It has been observed that 'there are a significant number of points of agreement between the decisions'.[117] Nevertheless, the competing decisions leave some uncertainty about the availability of the defence of honest and reasonable mistake at common law. The better view, it is suggested, is that *Harper* has overruled *Maynard,* and made the defence difficult to establish in sport.

The benefit of this defence is that it can usually ameliorate the harshness of strict liability rules.

> The consequences of an adverse disciplinary ruling are potentially as onerous as, if not more so than, a criminal conviction. This is particularly the case where an athlete's livelihood and reputation are in jeopardy, circumstances where legal intervention has long been considered to be warranted.[118]

These decisions may be distinguished on the basis that they arise out of horse racing, where statutory regulation of the industry is important. There is significant government revenue generated from this industry, particularly from betting, and the health of the industry depends on the integrity of the sport.[119] The AFL does not have the same dependency on betting. Also, given the very different nature of each sport, it is suggested that these decisions will not necessarily be followed.

It must however be noted that as the *WADA Code* makes it clear that a defence of honest and reasonable mistake does not apply, there is no real scope for their application under the AFL's new anti-doping policy. It is suggested that under the current *WADA Code*, the defence should apply to make the code's application fairer.

B *How the Court of Arbitration for Sport applies Strict Liability provisions*

It is instructive to consider decisions of the Court of Arbitration for Sport ('CAS'), and how they have dealt with anti doping offences generally, and how they have applied the principle of strict liability. These decisions will apply to anti-doping cases dealt with under the new AFL Code.

115 McCutcheon, above n 113, 54.
116 (1985) 157 CLR 523.
117 McCutcheon, above n 113, 61.
118 Ibid 62.
119 (1995) 12 WAR 337, 347.

A good example of how CAS deals with anti-doping code breaches can be found in the case of Andrea Raducan.[120] Ms Raducan was stripped of her gold medal in gymnastics at the Sydney 2000 Olympics for being found to have excessive amounts of pseudo ephedrine in her sample. It was not disputed that Ms Raducan's team Doctor had given her a Nurofen cold and flu tablet on the day of the gymnastics event, to combat a cold she was suffering from.

The CAS Panel presiding over her case relied heavily upon the strict liability nature of the offence. It did not therefore regard intention as an element in establishing the offence. It relied on previous CAS decisions which endorsed the element of strict liability.[121] This was despite expert evidence that was led 'to the effect that the amount of pseudo ephedrine found in her urine sample did not have an enhancing affect on her athletic performance but would rather impair her gymnastic skills'.[122]

The Panel quoted a previous CAS decision[123] with approval where the earlier panel had ruled that 'the system of strict liability of the athlete must prevail when sporting fairness is at stake'. It indicated that it was 'aware of the impact its decision will have on a fine, young, elite athlete', but nevertheless found: 'In balancing the interests of Ms Raducan with the commitment of the Olympic Movement to a drug free sport, the Anti-Doping Code must be enforced without compromise'.[124]

The following observation was made about the way in which the CAS applied the anti-doping rules at the Sydney 2000 Olympics: 'The CAS (and related organisation) Rules certainly appeared as *masters* not *servants*', displaying an absence of discretion. For this Australian barrister,[125] 'the *strict liability* element in these cases [of Raducan, and Romanian hammer throw world record holder, Mihaela Melinte] was difficult to appreciate and accept'.[126]

The rationale behind the strict liability approach to allegations of anti doping breaches is reinforced in a number of CAS decisions.[127] The decisions and the *WADA Code* impose a penalty on an athlete no matter what the reason is that the substance was in his or her system. Otherwise, it has been argued, the athlete has had a banned substance in his or her system in breach of the rules, often in

120 *Raducan* (2000) CAS 2000/011.

121 See Peter Dwyer, 'Drugs in Sport: Trials of the 2000 Olympics' (2002) 34 *Australian Journal of Forensic Sciences* 29, 35.

122 Ibid.

123 *C v FINA* (1996) CAS 95/141.

124 Quote from CAS Panel decision, as quoted in Dwyer, above n 121, 36.

125 Peter Dwyer is also Adjunct Professor (Law and Ethics) Post Graduate Studies in Drug Development, Faculty of Medicine, University of New South Wales.

126 Dwyer, above n 121, 39.

127 See eg, *USA Shooting & and Quigley v International Shooting Union (UIT)* (1995) CAS 94/129, as reported in *CAS Digest I* 187, 196-7. This decision is relied on by Professor Gabrielle Kauffman-Kohler and Professor Giorgio Malinverni as the 'best rationale for strict liability doping offences' in their *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law* (2003) WADA <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf> at 26 February 2003, 30.

competition, which is unfair to 'clean' athletes. If it were required to show guilty intent, 'cheats' may escape punishment, and sporting federations would be financially crippled by costly litigation.

A very recent decision of the Oceania Division of CAS shows a number of interesting signs regarding rule interpretation and application, although the case does not deal with questions relating to an appropriate penalty. The decision in *Mark French v Australian Sports Commission ('ASC') & Cycling Australia ('CA')*[128] is significant because of the way it treats the standard of proof required to be met in order to establish the anti-doping offence. The case centred around allegations of group drug injecting amongst elite cyclists at the Australian Institute of Sport in Adelaide.

It is suggested that in applying the test set down in *Brigginshaw v Brigginshaw*,[129] the panel accepted French's submission that 'given the serious allegations with respect to trafficking and aiding and abetting, and the consequences thereof, a very high standard almost approaching beyond a reasonable doubt is required for the Panel to accept that the offences have been proven'.[130]

It is submitted that this is the correct approach to take where a strict liability regime with severe consequences applies. The difficulty is that the tribunal has very limited penalty options upon a finding of guilt, which adds to the need for it to be satisfied to a very high standard indeed before finding the alleged 'doper' guilty. This system may encourage athletes to contest charges.

The findings of the *French* case were not made applying the *WADA Code*. However, the policies that applied[131] were subject to strict liability,[132] and carried severe penalties, as is the case with the *WADA Code*. Further, CAS is generally the tribunal that considers violations of the *WADA Code*, and how it interprets other anti-doping codes is instructive of how it will deal with the *WADA Code*, if called upon to do so.

It can be seen that the above decisions relate primarily to drugs other than illicit drugs. As stated from the outset, there is no dispute that athletes who seek to use performance enhancing drugs ought to be dealt with harshly, and if that includes applying the principle of strict liability, there appear to be valid reasons for this. However, illicit drugs used in circumstances where no performance benefit is sought, should be dealt with differently. Strict liability is neither necessary nor beneficial to any party, and the defence of honest and reasonable belief should be available. Further, as will be argued below, applying strict liability to illicit drug

128 (2005) CAS 2004/A/651 (The Panel comprised Prof Richard McLaren P, Allan McDonald QC, and Henry Jolson QC).
129 (1938) 60 CLR 336.
130 Dwyer, above n 126, 10 [42]. In *N, J, Y, W v FINA* (1998) CAS 98/208, the Panel confirmed that 'The presumption of innocence operates in the athlete's favour until [the sporting body] has discharged that burden. The standard of proof is high: less than criminal standard but more than the ordinary civil standard'.
131 *Australian Sports Commission Anti-Doping Policy*; *Cycling Australia Anti-Doping Policy*.
132 Dwyer, above n 126, 11-12 [47].

use which does not enhance performance probably leaves the body imposing the sanction open to legal challenge on the grounds of restraint of trade.

Unfortunately, even on a best case scenario, where the AFL player has had his or her drink spiked with 'speed', for example, and tests positive at the next day match drug test, he will still be penalized even if he can prove spiking by establishing the defence of no fault. He would, for example, be disqualified from Brownlow Medal contention. This further illustrates the inflexibility of the strict liability nature of the *WADA Code*.

C *Flexible Penalty Options: The Discretion to Apply Fairness in Penalties*

A strict liability regime may achieve a level of fairness if there is a broad range of penalties available to properly distinguish serious violations from minor breaches which warrant only a warning. However, again the *WADA Code* fails on this score. For offences relating to illicit drugs other than cannabis, a mandatory two year ban applies for a first offence.

Take an example where an athlete has been detected in competition with traces of a stimulant such as ecstasy[133], the residue of social over-exuberance. This can not properly be seen as an attempt to enhance sporting performance. Nevertheless, a two year ban applies to its detection for a first offence, the same penalty that would apply to the detection of steroids. The significant difference is that one drug is taken clearly to gain an unfair advantage over co-competitors, the other is not. This highlights the inflexibility of the *WADA Code*.

The only way the penalty may be reduced is to argue that the athlete bears no fault or negligence for the violation, or no significant fault or negligence. If the athlete knew he was taking ecstasy, the two year ban applies. This appears to be a severe penalty, disproportionate to the mischief the *WADA Code* seeks to address.

It also does not allow for varying degrees of culpability:

> The mandatory sanction prescribed by the disciplinary code deprives the tribunal of the flexibility that criminal courts enjoy and employ to dilute the harshness of strict liability – unlike criminal law it is not possible to reflect the athlete's fault in an appropriately framed sanction.[134]

WADA has created inflexible rules which do not withstand close scrutiny for fairness or suitability of the punishment for a given anti-doping rule violation. The rules were not intended to punish the athlete who is found to have taken a recreational drug once, in the same way as a 'cheating' steroid user is

[133] Or methylenedioxymethamphetamine, listed in the *WADA Prohibited List* (2005) and (2006), under Prohibited Substances as a stimulant.
[134] McCutcheon, above n 113, 44.

punished.[135] WADA, however, is not prepared to relent on the, at times, inadvertently draconian aspects of its Code and the manner in which it applies, by creating exceptions. A number of recent CAS decisions illustrate the unfairness of the Code in relation to the use of a cream to fight a skin infection (12 month ban)[136] and the ingestion of nutritional supplements not knowing that they contained a prohibited substance (18 month ban[137] in one case and two year bans[138] in other cases).

As Opie has observed, 'fixed or mandatory penalties, although exhibiting a formal equality, may finish up imposing unequal punishments'.[139] Rather, 'it is difficult to justify the imposition of strict liability in serious disciplinary offences, even when the interests of promoting fair and healthy competition in sport are considered. Those interests might be adequately protected by a less strict regime and all that is sought is that an athlete be given a reasonable opportunity of exculpation'.[140]

V WADA CODE PENALTIES FOR ILLICIT DRUG OFFENCES: A RESTRAINT OF TRADE

Claims challenging a period of suspension for non performance enhancing illicit drug use potentially include unfair dismissal claims in the AIRC and breach of contract claims at common law. The legal claim with most merit that may be brought against the AFL under the new WADA compliant *AFL Code* is that of restraint of trade.

The general rule is that it is unlawful to deprive the player of the ability to play football, to earn income, to be considered for the Brownlow medal, or to earn match payments in finals games. It is an unlawful interference with individual liberty to prevent the player from plying his trade and earning his income in any lawful way he chooses. This is generally true. However, the restraint (brought about by the suspension) must be shown to be reasonable having regard to:

1. The protection of the legitimate interests of the AFL;
2. It must not be unreasonable in relation to the player suspended; and
3. It must not be unreasonably injurious to the public.[141]

135 Recently, a two year ban was imposed on the 2002 one hundred metre sprint world record holder, Tim Montgomery, for steroid use: *USADA v Tim Montgomery* (2005) CAS 2004/O/645; *US BALCO* (2005) CAS 2004/05; for investigation involving other high profile athletes, see, eg, *USADA v Michelle Collins*, AAA No 30, 190, 00658 04 (10 December 2004).

136 In *Squizzato v FINA* (2005) CAS 2005/A/830, the athlete was a 17 year old swimmer.

137 In *Knauss v International Ski Federation* (2005) CAS 2005/A/847, the Austrian athlete had been a professional skier for 18 years with no history of anti-doping or other drug violations.

138 *Australian Weightlifting Federation Inc v Fogagnolo & Myers* (2006) CAS A4/2006 & A2/2006; *Edwards v International Association of Athletics Federations* (2004) CAS OG 04/003; *Triathlon Australia Ltd v Rebekah Keat* (2005) CAS 18 May 2005; *Vencill v United States Anti-Doping Agency* (2003) CAS 2003/A484.

139 Opie, 'Drugs in Sport and the Law – Moral Authority, Diversity and the Pursuit of Excellence' above n 65, 274.

140 McCutcheon, above n 113, 67.

141 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 565.

It is suggested that the longer the suspension, the more excessive the penalty, the higher the likelihood that a court will strike down the suspension as a restraint of trade. As was noted by Buti and Fridman: 'The imposition of sanctions that will effectively end an athlete's career will receive close scrutiny by the courts'.[142] Any suspension for use of recreational drugs must not 'go beyond what is reasonably necessary to protect the interest of promoting drug-free sport',[143] and, in the case of the AFL, the legitimate commercial and other interests of the league. The AFL constrains its Tribunal by its *Player Rules* which state that it 'shall not impose a sanction which amounts to an unreasonable restraint of a person's trade'.[144]

The public has an interest in seeing the best players displaying their skills, and it should not be unreasonably deprived of such entertainment.[145]

The case of Ben Johnson, the Olympic sprinter, who was banned for life, bears comparison. Johnson brought an action arguing that the ban restrained his trade as an athlete. However, at the time of receiving the lifetime ban, he did not challenge the testing that led to the ban, which he sought to question in the courts. Nor did he attempt to argue restraint of trade until four years after the ban was imposed.

A Canadian court found that the ban was reasonable 'for many reasons', one of which was the protection of 'Mr Johnson for the sake of his own health from the effects of consistently using prohibited substances'.[146] It also deferred to the skill and expertise of the IAAF in deciding whether the ban was reasonable:

> It is not this court's function to serve as a court of appeal on the merits of decisions reached by tribunals exercising jurisdiction over specialized fields. The International Amateur Athletics Federation has special expertise not only in regulating amateur athletics but also in regulating, detecting and preventing drug abuse.[147]

The *Johnson* case is not particularly instructive of the legal position in relation to recreational drugs. In any case, it is submitted that for myriad reasons, a strict and punitive stance in relation to performance enhancing drugs can be legally sustained.

The general position in sport in relation to restraint of trade has been stated in *Gasser v Stinson*:

> In a sport which allows competitors to exploit their ability in the sport for financial gain and which allows that gain to be a direct consequence of

142 Buti and Fridman, above n 12, 128.
143 Ibid 129.
144 *AFL Player Rules* r 23.7.4.
145 *Buckley v Tutty* (1971) 125 CLR 353, 380; *Greig v Insole* [1978] 3 All ER 449, 503.
146 *Johnson v Athletics Canada* (1997) 41 OTC 95 [29] (Caswell J).
147 Ibid [32].

> participation in competition, a ban on competition is, in my judgment, a restraint of trade.[148]

In this case from the United Kingdom, the plaintiff's urine sample was found to contain traces of steroids. Like the *Johnson* case, the two major arguments related to a challenge to testing procedures and restraint of trade. Justice Scott held that the two year mandatory penalty that followed a positive sample finding was reasonable. This was because 'if the absolute nature of the offence were removed [or] the length of the sentence became discretionary', the 'floodgates would be opened and the IAAF's attempts to prevent drug taking by athletes would be rendered futile'.[149]

One Australian case[150] held that a two year ban imposed by the Australian Professional Cycling Council (APCC) upon an international cyclist for a positive steroid test did unreasonably restrain his trade as a professional cyclist. The penalty imposed by the International Cycling Union (UCI) for the same infraction was a three month deferred suspension plus points sanction. However, as the defendant, the APCC, did not appear at court to defend the proceedings, it could not discharge its onus of showing the reasonableness of the ban. The plaintiff's challenge was upheld, and the suspension overturned. However, the authoritative weight of the case must be questioned.

The above cases all relate to restraint challenges in cases involving performance enhancing substances. There are no known challenges at common law to bans relating to athletes who have been found to have used illicit drugs, except under the unfair contracts jurisdiction of the New South Wales *Industrial Relations Act 1996* (NSW).[151] It is not disputed that the penalties imposed in cases involving performance enhancing drugs do not generally restrain trade.

It is suggested that the suspension of an AFL player for the use of an illicit drug either out of competition, or in circumstances where it can not be shown to enhance performance, would be open to challenge as a restraint of trade. It would be difficult for the AFL to justify the ban by reference to protecting its legitimate interests. Its interests would largely relate to protecting the image of the AFL, and the game of Australian Rules, and setting a positive role model for the community. Imposing bans of one or two years for a first offence, goes beyond what is necessary. A player may argue that by following the procedure under the *IDP*, without suspension, the AFL is more likely to protect its interests.

As discussed earlier in this paper, there are many reasons why any suspension in

148 [1988] (Unreported, Scott J, 15 June 1988) 20.
149 Ibid 21.
150 *Robertson v Australian Professional Cycling Council Inc* [1992] NSWSC 3357/1992 (Unreported, Waddell CJ, 10 September 1992)
151 *Field v National Rugby League,* NSW Industrial Relations Court, claim filed 27 June 2001. The matter was settled on confidential terms before it reached a hearing. Field was originally suspended for six months for a positive test for cocaine. NRL records appear to confirm that that ban was not altered after the case settled: Personal communication of John Brady (NRL) to Paul Horvath on 26 August 2005.

the above circumstances could not be justified. There are many effective alternatives to suspension, including fines and counseling. Given the dearth of relevant Australian authorities,[152] it is suggested that restraint cases such as *Hall v Victorian Football League*,[153] *Foschini v Victorian Football League*[154] and *Buckly v Tutty*[155] will be instructive. It is suggested that these authorities support the claim that a suspension for non performance enhancing illicit drug use is in restraint of trade.

The restraint of trade position in relation to substances which are 'clearly not related to performance enhancement' is that 'the public policy justification for imposing a sanction on the basis of a mandatory test is weak'.[156]

It may be possible for a (perhaps junior) player who is suspended from playing due to an anti-doping violation for recreational drugs to argue that that suspension has effectively amounted to a termination of his employment contract. The strength of the claim will depend on the length of the suspension. If he is unable to receive any club payment during the period of suspension,[157] the imposition of the suspension may amount to a termination. A long period of suspension may effectively end a player's career, as the player would have real difficulty maintaining his skills without training or playing at a high level.

An unfair dismissal claim under the *Workplace Relations Act 1996* (Cth) may be possible if the player's income falls under the statutory ceiling.[158] This type of claim would not be without its difficulties as the AFL club could argue that the employment has neither been terminated, nor was any 'termination' at the initiative of the employer. It would be the AFL imposing the suspension, which effectively brings the working relationship to an end. It may be argued that the contract has been frustrated.

VI CONCLUSION

Tim Lane summed up the debate between the *WADA Code* and the AFL's *IDP*, when he wrote:

> Far from being soft on drugs, as some have superficially and ignorantly sought to portray it, the AFL has tried to find a balance between the need for

152 Katrina Krabbe, a sprinter, successfully argued in a German court that a suspension in excess of two years unlawfully restrained her trade as an athlete: see McCutcheon, above n 113, 70.

153 [1982] VR 64.

154 *Foschini v Victorian Football League* [1983] VSC 9868/1982 (Unreported, Crockett J, 15 April 1983).

155 (1971) 125 CLR 353.

156 Buti and Fridman, above n 12, 134.

157 Article 10.9 of the WADA Code requires 'Signatories, Signatories member organizations and governments' of the code to withhold 'some or all sport-related financial support or other sport-related benefits received' by the player, except in the case of offences relating to cannabis (and other specified substances under art 10.3).

158 $ 98 200 as at 7 December 2006.

> vigilance on one hand, and recognition of its local realities and the civil liberties of its players on the other.[159]

The WADA is made up primarily of Olympic delegates and government representatives. It is far removed from a regional sporting competition such as the AFL. The Olympic competition occurs once every four years for two weeks. The AFL competition runs for most of the year, when pre-season training is included. The AFL had no input into the *WADA Code*, yet is expected to abide by it wholesale.

We can see from the discussion above, that the *WADA Code* does not contain the sort of provisions that allow it to adapt and evolve as it is applied. Bodies such as CAS who enforce it, are given a straight jacket to apply to the many and varied cases that it is called upon to deal with. A greater range of penalties for violations, particularly in areas such as use of recreational drugs and medication which does not enhance performance, is urgently required. Unlike WADA, the AFL is equipped to deal with alternatives such as counseling and rehabilitation. A compulsory donation to a drug rehabilitation facility could be a penalty option which has a positive community impact.

Unfortunately, the range of penalties is at present not available. That, coupled with the strict liability application of the *WADA Code* leaves little room for discretion in the hands of those charged with applying it. The recent Australian CAS decision in *French* is an encouraging sign of how high the standard of proof ought to be before the serious penalties of anti-doping codes are applied. However, this decision appears to run counter to the majority of CAS decisions, and may be confined to its own facts. It also does not resolve other issues that remain regarding the need for a broader range of penalties.

There is no doubt that sport should be conducted on a level playing field. One reason in support of this is the need for certainty about the physical state of competitors engaged in a sporting competition given the prevalence of betting both today, and traditionally in sports such as thoroughbred racing. There are many other reasons to support the notion of a level playing field – all of them good reasons.

However, there seems to be a double standard that applies to the policing of personal information relating to recreational drug use that has no proven ability to enhance performance, either in the individual case, or generally. If the image of sport needs to be protected scrupulously from the tarnishing effect of a positive cannabis or ecstasy finding, why is it that not only is alcohol a major sponsor of the AFL (and other sports), but incidences of abuse occur with regularity by players, and are dealt with without the need to resort to long term periods of suspension from the sport.

159 Tim Lane, 'AFL's Brave Drug Stand' The Age (Online), 2 July 2005 <http://theage.com.au/articles/2005/07/01/1119724808779.html?oneclick=true> at July 2 2005.

The players have a right to demand some level of privacy which the *WADA Code* denies through its 'name and shame' approach. On the one hand, players are role models who are handsomely paid for what they do. On the other hand, there are many young, unworldly, naïve boys playing AFL who may once make the mistake of taking a recreational drug. Paying the price with their career is too high a price for that sort of error of judgment. The *WADA Code* needs to be *smarter* on dealing fairly with illicit drug violations, not *tougher*.