Misconduct Off the Field – When Players Play Up

By John Sneddon

Partner, Shand Taylor Lawyers, Brisbane

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1. Introduction

In its 2016 Annual Report[1], the National Rugby League (**NRL**) valued its media rights for 2018-2022 at $1.9 billion. In 2016, the Australian Rugby Union (**ARU**) announced a turnover of $128 million[2]. During the same period, Cricket Australia reported a turnover of $340 million[3]. With figures such as these, it is no longer controversial to observe that sport in Australia is big business.

There can perhaps be no greater indication of the size and scale of the business of sport in Australia than in the annual player "payroll" for the Australian Football League (**AFL**). In its 2016 Annual Report, the AFL announced that it had distributed more than $225 million to AFL players in 2016[4]. Clearly, if you are a high profile athlete in a prominent sport in Australia, you can earn phenomenal wages and enjoy all of the trappings of success.

However unfortunately, in spite of the largesse often bestowed upon high profile athletes in this country, many of those athletes engage in private behaviour which has the potential to greatly damage their sport. Many sports administrators find themselves presented with the need to curtail the off-field behaviour of the athletes who bring so much success to their sport, due to concerns that their private behaviour may de-value the sport's "*business*" and discourage lucrative sponsor investment.

Consider the plight of the NRL which was recently confronted by the following three drug-related off-field misconduct issues over the course of a single weekend:

(a) on Friday 5 May 2017 Sydney City Roosters star Shaun Kenny-Dowall was charged with cocaine possession. The charges were levelled against Kenny-Dowall less than 12 months after he was acquitted of domestic violence charges against his former girlfriend, Jessica Peris;

(b) the following day, the media reported that a Canberra man faced Court after allegedly supplying two members of the New Zealand Rugby League team with cocaine in the city centre, hours after those players were defeated by the Kangaroos in the Anzac Test. The players who are the subject of the allegations are captains of NRL teams;

[1] NRL Annual Report 2016
[2] ARU Annual Report 2016
[3] Cricket Australia Annual Report 2016
[4] AFL Annual Report 2016

(c) on Sunday 7 May 2017, Mr Damien Keogh, Chair of the board of the 2016 Premiership-winning Cronulla Sharks stood down after he was arrested at a Sydney hotel in possession of a re-sealable plastic bag containing a white substance, alleged to be cocaine.

The combination of lucrative player contracts, risk taking athlete behaviour and increased media scrutiny both on social media and in the traditional press has the potential to inflict enormous damage on sporting codes.

Sports administrators must therefore accept that it is essential that they take steps to protect their sport, club, league or association through clearly defined contractual obligations addressing player off-field misconduct.

2. Scope of paper

This paper will demonstrate that through the fair implementation of well drafted contractual terms, sports administrators are able to control and address player off-field misconduct which has the potential to damage their sport.

Athletes participating in sport in Australia do so as either amateurs or professionals. This paper will demonstrate that irrespective of the status of the athlete, the same legal principles will apply.

The paper will focus primarily upon employee competitors but will have equal application to volunteer amateurs and independent contractors. The distinctions between independent contractors and employees will be dealt with by another speaker at this conference and will not be addressed, other than in a cursory sense, in this paper. The focus of this paper will be primarily upon executive action able to be taken by an employer, sports governing body or principal in relation to off-field misconduct rather than the use of a formal domestic disciplinary tribunal process. Again, another speaker at this conference will be addressing the issue of domestic disciplinary tribunals.

This paper will demonstrate that a well drafted misconduct clause, implemented fairly and reasonably will be of equivalent utility irrespective of whether it is inserted in a member protection policy (in the case of volunteer/amateur competitors), an employment contract, independent contractor's agreement or any associated constitution or code of conduct.

3. Should off-field misconduct be regulated?

On Australia Day in 2016, prominent NRL player Mitchell Pearce participated in a boat cruise on Sydney Harbour with his team mates from the Sydney Roosters. Alcohol was consumed throughout the day.

After the boat returned to port, a club official put Pearce in a cab and gave him a Cabcharge card. Instead of going home, Pearce took the taxi around the corner, collected two new recruits to the Roosters, Dale Copley and Jayden Nikorima and headed to The Hotel Bondi. Further alcohol was consumed.

Later that evening Pearce and his two team mates ended up at an apartment in Redfern with a group of women they had met that evening. Pearce was clearly extremely intoxicated. He attempted to kiss one woman and then briefly simulated sexual intercourse with a small dog. The three rugby league players eventually left the premises.

According to a report in Fairfax Media[5], within 24 hours, a video of the incidents which took place in the Redfern unit was being shopped around by "*Global Online Digital Media Exchange*" Diimex. Throughout the video, the man recording it, apparently on a smartphone, repeatedly asks Pearce for his name. It has been reported that the video was purchased by the Sydney *Daily Telegraph* for in the vicinity of $40,000.00 (this was denied by the paper). In any event, footage of Pearce swamped the media and the internet within hours and dominated the Sydney media for a week.

For all intents and purposes, it would appear that Pearce was aware that he was being filmed, but due to the state of his intoxication, probably unaware of the consequences. It has been suggested that those filming the incident, did so with the express purpose of selling the footage for commercial gain. It is arguable that had Pearce appreciated this could occur, he would have significantly modified his behaviour.

The principal question arising from the unfortunate incident is whether Pearce, who is a highly paid athlete employed by one of the NRL's most high profile and successful sporting clubs, should be disciplined for drunken behaviour in a private apartment in the off-season, several months before the NRL season had even commenced?

It is now commonplace for sports clubs and governing bodies to include clauses in athletes' employment contracts which enable them to discipline the athletes for off-field indiscretions. These clauses are invariably based upon the obligation imposed upon player-athletes to not bring the game into "disrepute". Such clauses are just as common in employment agreements for people who don't participate in sport, but it is rare that such clauses are invoked to discipline or terminate the employment of a tradesman or tradeswoman, shop assistant or professional person. Regrettably for high-profile athletes, when they engage in behaviour off the field, by virtue of their profile, there is potential for that behaviour to end up in the public domain, particularly given the meteoric rise in use of smartphones and social media.

In their paper "*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*"[6] the authors argue that the use of misconduct clauses by sport associations as justification for the right to safeguard their brand and their commercial and reputational interests is unreasonable and improper. The authors argue that the imposition of such terms infringes the human rights of the athletes in question and expects the athletes to meet standards not imposed upon ordinary members of the community. It is a challenging and thought-provoking paper and I encourage you to read it.

[5] "*Mitchell Pearce must be sacked by Sydney Roosters – for his benefit as much as theirs*" Sydney Morning Herald 28 January 2016
[6] Jonson, Lynch and Adair ANZSLA Journal 2013 Vol 8, page 55

The issue of whether athletes should be disciplined for off-field misconduct taps into the argument as to whether athletes are role models and whether the athletes are entitled to a right to privacy.

In Pearce's case, to the extent that he had a right to privacy and irrespective of whether he was a role model, those rights were largely regarded as secondary to the damage the media reports of the incident caused to the NRL and his employer club. Pearce's club negotiated an agreed penalty with the NRL which saw him suspended for eight weeks and fined $125,000.00 (with $50,000.00 of that penalty suspended). He also lost the co-captaincy of his club. Pearce left the country shortly thereafter to undergo alcohol rehabilitation and has since returned to the NRL and Roosters. He remains playing the game today.

Ultimately, the philosophical basis for the regulation of athlete misconduct off the field will be viewed through the prism of money. This will be considered in regard to a range of factors which will include the extent of publication of the misconduct and the potential that publication may have upon the sport's ability to recruit members, attract sponsorship and gain greater credibility.

In the prominent case of Ziems v. Prothonotary of the Supreme Court of New South Wales[7] a barrister was struck off the role of legal practitioners after being convicted of manslaughter and sentenced to two years imprisonment for killing another person in a car accident whilst intoxicated. Mr Ziems appealed his disbarment to the High Court of Australia which held that his manslaughter conviction had "*neither connexion with nor significance for any professional functions as a barrister and therefore did not involve conduct that made the barrister unfit to be a member of his profession*".

This definitive judgment can be contrasted with the situation confronting the Richmond Football Club in 2005 when it lost its sponsorship from the Transport Accident Commission (**TAC**) following a drink driving incident involving one of its players. In recent days another high profile footballer, Josh Papalii from the Canberra Raiders was suspended from playing in the Anzac Test and for a further NRL game after he was convicted of drink driving (bizarrely, after he rang the police anonymously to report his own erratic driving behaviour).

A football player may believe there is no real connection between a drink driving offence and their professional occupation running around on a football field. However, given the potential damage which the athlete's employer may sustain simply as a consequence of the prominent role he or she plays in society, the employer may feel the need to discipline the athlete in reliance upon an off-field misconduct contractual term.

Until these issues are reconciled by our society, philosophical arguments aside, employers of athletes and sports administrators of governing bodies would be well advised to include misconduct clauses in their contractual suite of documents and implement those clauses rigorously if they believe the athlete's conduct has the potential to damage the reputation of their sport.

4. Drafting the contract

[7] (1957) 97 CLR 279

Provisions governing off-field player misconduct need to be incorporated into documents which the sporting participant agrees to be bound by.

In the case of professional athletes, this will invariably be the employment agreement and associated codes of conduct and policies. For amateur athletes, this may take the form of the athlete's agreement when registering or renewing their annual membership to be bound by the terms of the sport's member protection policy and their club rules. In any event, the amateur participant must agree to abide by the standards imposed by the relevant documents.

Contractual provisions which address player off-field misconduct should ideally:

(a) Impose a positive obligation on participants to behave appropriately and to use their best endeavours to pursue the aims of the contract;

(b) Prohibit participants from engaging in misconduct (by both listing the specific misconduct which must be avoided and in a general sense, by requiring athletes to not engage in behaviour likely to bring their employer, club, sport etc. into disrepute); and

(c) Clearly define the consequences of failing to do so (including penalties available to the employer or governing body up to and including termination).

Sometimes the documents which regulate the conduct of players can be extensive. For example, AFL players may be regulated by the following policies and agreements:

- The Standard AFL Player Contract;
- Laws of Australian Football;
- AFL Player Rules;
- The AFL Player's Association Collective Bargaining Agreement;
- The AFL Code of Conduct;
- The Anti-Doping Code;
- The Respect and Responsibility Policy;
- The Illicit Drugs Policy;
- The Alcohol Code of Conduct; and
- The Racial and Religious Vilification Policy.

It is not necessary for all sports to incorporate such a range of policies within their suite of contractual documents. This is particularly the case for amateur sports.

For example, Sports Taekwondo Australia Limited (**STAL**) is the national organisation overseeing the sport of Taekwondo in this country. Anyone wishing to participate in the sport of Taekwondo, when joining a local club, agrees to be bound by the STAL Member Protection Policy. That policy states on page 1:

> "*This National Member Protection Policy ("Policy") aims to assist Sports Taekwondo Australia Limited (STAL) to uphold its core values and create a safe, fair and inclusive environment for everyone associated with our sport. It sets out our commitment to ensure that every person involved in our sport is treated with respect and dignity and protected from discrimination, harassment and abuse. It also ensures that everyone involved in our sport is aware of their legal and ethical rights and responsibilities, as well as the standards of behaviour expected of them*." (Underlining added).

In clause 8, the Member Protection Policy defines a breach of the policy as "*to do anything contrary to*" the policy. This is defined as including, but is not limited to:

(i) Breaching the codes of behaviour; and

(ii) Bringing the sport of Taekwondo and/or STAL into disrepute, or acting in a manner likely to bring the sport of Taekwando and/or STAL into disrepute.

Clause 9 of the policy indicates that STAL "*may impose disciplinary measures on an individual or organisation for breach of this policy*". The clause goes on to assert that disciplinary measures imposed will be:

- Fair and reasonable;
- Applied consistent with any contractual and employment rules and requirements;
- Be based on the evidence and information presented and the seriousness of the breach; and
- Be determined in accordance with our constitution, by-laws, this policy and/or the rules of the sport.

The range of penalties which may be imposed upon an athlete is broad and varied. The penalties are clearly defined and include:

(i) A direction that the individual make a verbal and/or written apology;

(ii) A written warning;

(iii) A direction that the individual attend counselling;

(iv) Withdrawal of awards, scholarships etc.;

(v) A demotion or transfer of the individual to another location, role or activity;

(vi) A suspension of the individual's membership;

(vii) A termination of the individual's membership;

(viii) A recommendation that the individual's membership be terminated;

(ix) In the case of a coach or official, a direction that a relevant organisation de-register the coach or official;

(x) A fine; and

(xi) Any other form of discipline that a Disciplinary Tribunal considers appropriate.

Although the policy does not specifically define the standards of behaviour which participants are required to meet (other than in a general sense), the nature and extent of the prohibited behaviour meets the requirements of a well-drafted misconduct clause. The best clauses specifically define behaviour which must be outlawed but also contain a general clause which acts as something of a "*catch all*". These tend to be the "*disrepute*" clauses which prohibit acting in a manner likely to bring the relevant sport into disrepute.

As is demonstrated from the STAL member protection policy, the fact that the athletes in question may not be employed by STAL in a professional sense, does not prevent the administrators of that sport from drafting documents which govern their private misconduct. When the STAL documents are compared to those used by high profile professional sports, the same objective is achieved.

The business model utilised by most of the major sporting codes in this country involves professional athletes being employed by a club and agreeing pursuant to their employment contracts to meet the on-field and off-field conduct standards of the professional association their club is affiliated with. These standards will invariably be recorded in the suite of legal documents imposed by the professional association on the clubs and players alike, such as codes of conduct and specific policies relating to drug use, gambling and the making of public comments etc.

In the case of The Football Federation of Australia (**FFA**), competitors will be contracted with their clubs pursuant to a prescribed Professional Player Contract. That document indicates (among others) that the competitors are casual employees of their club. The contract sets out the usual terms and conditions of employment and is not remarkably dissimilar to an employment contract used for any other class of skilled employee.

Clause 7.4(b) of the FFA prescribed Professional Player Contract provides that the club may terminate the athlete's employment by giving written notice if the athlete is "*found to be guilty of proven serious misconduct or otherwise in accordance with the FFA Statutes (including the Code of Conduct)*".

The FFA Code of Conduct is a clearly drafted document which effectively applies to everyone associated with the sport of football pursuant to the FFA Statutes. Clause 1.2(a) of the Code of Conduct states that the Code "*...applies to the conduct and behaviour of FFA, Member Federations, Competition Administrators, Clubs, Players, Officials, Match Agents and Intermediaries (Members)*".

On the very first page of the Code of Conduct, in clause 2, the intent of the Code is spelled out as follows:

"*2.1 A Member must not bring FFA or the game of football into Disrepute.*

2.2 Without limiting the generality of clause 2.1, a Member will be taken as having brought football into Disrepute if any of the following occurs:

(a) discriminatory behaviour, including public disparagement of, discrimination against, or vilification of, a person on account of an Attribute;

(b) harassment, including sexual harassment or any unwelcome sexual conduct which makes a person feel offended, humiliated and/or intimidated where that reaction is reasonable in the circumstances;

(c) offensive behaviour, including offensive, obscene, provocative or insulting gestures, language or changing;

(d) provocation or incitement of hatred or violence;

(e) spectator or crowd violence;

(f) intimidation of Match Officials, which may take the form of (but is not restricted to) derogatory or abusive words or gestures toward a Match Official or the use of violence or threats to pressure a Match Official to take or omit to take certain action regardless of where such action is taken;

(g) forgery and falsification, including creation of a false document, forgery of a document or signature, the making of a false claim or providing inaccurate or false information on a prescribed form;

(h) corruption, including offering a Benefit or an advantage to a Player or an Official in an attempt to incite him or her to violate FIFA Statutes or FFA Statutes;

(i) abuse of position to obtain personal benefit;

(j) commission or charge of a criminal offence; or

(i) any other conduct, behaviour or statement that materially injures the reputation and goodwill of FFA or football generally.

2.3 A Club is deemed to have committed an offence under this section where its crowd or its spectators have engaged in any of the conduct outlined in clause 2.2

2.4 Players and Officials are entitled to have their privacy respected and this Code is not intended to apply to private activities engaged in by a Player or an Official that are not in the public domain."

The Code therefore specifically targets certain behaviour offensive to the sport but then incorporates a general "catch all" misconduct clause which links the conduct to the reputation and goodwill of the FFA and football generally.

Clause 2.4 acknowledges that private behaviour is not covered by the code however this should not extend to appalling misconduct which will always be carried out in private such as corruption, bribery and criminal behaviour.

The exception relating to activities "not in the public domain" will be of no comfort to athletes if their private misconduct engaged in behind closed doors makes it into the public domain as a result of the use of smartphone by an unrelated third party (as happened to Mitchell Pearce).

Clause 6 of the Code of Conduct outlines the consequences for breach of the Code in the following terms:

"6.1 Professional Players, Representative Players and Officials are the public face of football in Australia and so their behaviour is subject to greater scrutiny. Accordingly, a Professional Player, a Representative Player and an Official must:

(a) it all times behave in a manner that promotes and upholds the highest standards of integrity, dignity and professionalism;

(b) comply with any team protocol and procedures, including in relation to alcohol, curfews and inappropriate relationships; and

(c) not act in a manner contrary to the best interests of the team.

6.2 A Club may discipline its Professional Players, Representative Players or Officials in relation to behaviour that relates only to that Player's employment or engagement by that Club, including:

(a) unexplained absence from a Match or official training session or team meeting;

(b) failure to wear designated clothing to a team promotion or activity;

(c) conflicting sponsor brand visible during a team promotion or activity; and

(d) behaviour that brings the Club into Disrepute, including inappropriate behaviour in public (such as a nightclub brawl).

6.3 A Club may impose disciplinary sanctions on a Professional Player in accordance with article 21.4 of the FFA Constitution subject to the following maximum sanctions:

(a) imposition of a fine not exceeding 50% of 1 week's remuneration (being the Annual Salary paid for the most recent week and Match Payments for the Players most recent Match);

(b) suspension up to a maximum of 2 Matches; or

(c) termination of a Standard Player Contract (provided that the Club has already enforced sanctions against the Player on at least 3 separate occasions).

6.4 A Club may impose disciplinary sanctions on a Representative Player and an Official in accordance with article 21.4 of the FFA Constitution subject to the following maximum sanctions:

(a) the imposition of a fine;

(b) suspension up to a maximum of 2 Matches; or

(c) expulsion from the representative team (provided that the Club has already enforced sanctions against the Player on at least 3 separate occasions)."

Athletes are therefore left in no doubt as to the standards the FFA expects them to meet and the consequences of failing to do so. Similar clauses can be found in the relevant contractual documents and associated codes of conduct for all of the main football codes in this country.

5. Can employers control the private conduct of employees?

Employers traditionally do not have the right to exert influence over the private behaviour of their employees outside working hours. For example, in the case of *Graincorp Operations Limited v. Markham*[8] it was held that " . . . *only in exceptional circumstances will an employer be given an extended right of supervision over the private activities of employees*".

However a line of authority has developed which enables employers to exercise control over the private behaviour of their employees if that behaviour has ". . . *a relevant connection to the employment.*"[9]

In the case of *Rose v Telstra Corporation Limited*[10] an employee was found to have been unfairly dismissed after he was involved in an altercation with another Telstra employee and sustained significant injuries outside work hours.

The incident occurred in a hotel room and in order to justify the termination, Telstra relied on the fact that the employees had received a travel allowance and were provided with the company's code of conduct which provided that employees must not engage in conduct that discredits Telstra's image. The employees had a fight after a lengthy night of drinking which resulted in Mr Rose being stabbed in the chest by a co-worker with a shard of glass and requiring stitches.

Mr Rose successfully argued that the conduct in question was remote from his employment because neither employee was wearing a Telstra uniform and they were not on duty at the time of the altercation.

Vice President Ross was influenced by the fact that the incident occurred in a private hotel room rather than a public place. It is interesting to note that the incident pre-dated the advent of social media.

In any event, Vice President Ross articulated principles in relation to out of hours conduct which have informed subsequent case authorities for almost 2 decades.

[8] (2002) 120 IR 253
[9] Hussein v Westpac Banking Corporation (1995) 59 IR 103, 107
[10] [1998] IRCommA 1592

In the judgment Ross VP stated:

> "*It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:*
>
> - *The conduct must be such that, viewed objectively it is likely to cause serious damage to the relationship between the employer and employee; or*
> - *The conduct damages the employer's interests; or*
> - *The conduct is incompatible with the employee's duty as an employee.*
>
> *In essence the conduct complained of must be of such gravity and importance as to indicate a rejection or repudiation of the employment contract by the employee.*
>
> *Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct.*"

The legal commentator, Emma Bicknell Goodwin has analysed Australian legal decisions relating to out of hours behaviour in a traditional employment relationship to inappropriate sporting conduct and argued that "*conduct unbecoming*" may arise in relation to off-field incidents if they:

- harm the employer's interests, reputation and standing;
- demonstrate a lack of trustworthiness or competence on the part of the employee;
- are incompatible with the employee's duties as an employee;
- cause serious damage to the relationship between employer and employee;
- demonstrate unfitness of the employee for a particular office;
- render the employee unable to perform their obligations.[11]

The difficulty for high profile athletes in particular is that as a result of their profile, any conduct they engage in, once it enters the public domain will often automatically be linked to, or in some way be connected with, their employer.

In the case of Mitchell Pearce mentioned above, no sooner had the video of him behaving drunkenly in the Redfern apartment been made public than the media was asking questions of the Sydney Roosters and the NRL.

6. The extent of publication

When most sporting codes provide sports administrators with the ability to terminate the employment or retainer of athletes who bring their sport into disrepute, it is inevitable that tension will arise between the extent of publication (and the propriety of that publication) and the athletes' right to privacy.

[11] See Emma Bicknell Goodwin "*Rules, Referees and Retribution: Disciplining employee athletes in professional team sports*" (2005) 18 Australian Journal of Labour Law 240

If the athlete has engaged in potential misconduct but no-one is aware of it, how can it be possible for them to bring their sport or employer into disrepute? This question may particularly arise in circumstances in which a contractual misconduct clause prohibits behaviour which not only brings the sport into disrepute but *is likely to*.

Prior to the advent of social media, if misconduct occurred in a public setting, this was sufficient to justify the definition of "*public knowledge*". In the case of *Woodward v Hutchins*[12] the entertainer Tom Jones was alleged to have become intoxicated and to have behaved inappropriately on an aircraft with a woman "*not his wife*". Lord Denning MR found that the fact that the incident took place in public (on an aircraft) was sufficient to describe the conduct as being "in the public domain".

Comparing behaviour on an aircraft to behaviour at a public dance he stated:

> "*…any incident which took place at the dance would be known to all present. The information would be in the public domain. There can be no objection to the incidents being made known generally. It would not be confidential information. So in this case the incident on this jumbo jet was in the public domain. It was known to all passengers on the flight*."

The difficulty for high profile athletes is that incidents which take place in private can end up in the public domain if a person at the private event has a smartphone and wishes to post photographs of the behaviour on the internet. This was the experience of NRL player Todd Carney who was summarily sacked by Cronulla after a photo taken by an associate of him engaging in a vulgar act in a public toilet circulated on social media.

Athletes therefore need to appreciate that if evidence of potential misconduct enters the public domain, particularly via social media, the potential for an employer to believe the conduct is likely to bring the sport into disrepute is greatly increased, as is the likelihood of sanctions.

7. Specific examples of misconduct

7.1 Misconduct via social media

Although the advent of social media means the likelihood of out of hours behaviour being linked to a person's place of employment has increased, the legal principles remain the same. Postings on social media can provide the basis for termination of employment if there is sufficient connection between the postings (or the individual making them) and the employer.

In the case of *Fitzgerald v Dianna Smith t/as Escape Hair Design*[13] a hairdresser posted a status update on her Facebook page which offended her employer. The status update read:

> "*Xmas 'bonus'' alongside a job warning, followed by no holiday pay!!! Whooooooo! The Hairdressing Industry Rocks! AWESOME!!*"

[12] [1977] 2 ALL ER 751
[13] [2010] FWA 7358

The employee was dismissed and Fair Work Australia found the social media posting was insufficient to justify dismissal. However when doing so, Commissioner Bissett confirmed that it is possible for social media postings to form the basis of a dismissal:

> "*A Facebook posting, while initially undertaken outside working hours, does not stop once work recommences. It remains on Facebook until removed, for anyone with permission to access the site to see. A Facebook posting comes within the scope of Rose v Telstra consideration but may go further. It would be foolish of employees to think that they may say as they wish on their Facebook page with total immunity from any consequences*."

In this instance:

- The comments were posted for a mere two weeks;
- The Facebook page was able to accessed by the employee's friends and was otherwise not publicly accessible;
- The employee did not name the employer;
- The comments would not adversely reflect upon the specific salon; and
- The name of the employer was not readily accessible on the employee's Facebook page.

Consider however a posting by a prominent AFL footballer who, as a result of his occupation is immediately recognisable as an employee of a particular club. It is suggested that a similar posting in those circumstances would have the potential to reflect poorly upon the employer club and AFL generally and may be sufficient to justify disciplinary measures being taken against the footballer.

Indeed, this occurred in 2011 when two Melbourne football club players posted tweets complaining about a suspension imposed upon a fellow player by a disciplinary Tribunal. The AFL considered their tweets to constitute umpire criticism and fined them $2,500.00. Notwithstanding the fact that the tweets were from their private accounts, the AFL also fined their club $5,000.00 for good measure[14].

All employers, including sporting clubs, governing bodies and sporting associations should have a written social media policy which clearly defines the standards expected of employees and the consequences for breaching those standards.

7.2 Sexual misconduct

The same principles will apply in relation to sexual misconduct as social media (indeed, the two issues are regrettably often inextricably intertwined). If the misconduct in question reflects poorly upon or has the potential to bring the sport or club into disrepute, it may form the basis for disciplinary action being taken against the participants. Obviously sexual misconduct which contravenes the law will fall into a different category particularly in the event of criminal charges or convictions. This issue will be dealt with below. However, in the case of conduct between two consenting adults, it is respectfully suggested that the mere fact that the conduct has occurred and

[14] "*AFL Fines Melbourne Demons Players for Twitter Reaction to Teammate Jack Trengove's Tribunal Ban*" www.foxsports.com.au

entered the public domain should not justify discipline unless the publication of the information is as a result of the athlete's stupidity or other misbehaviour.

If the misconduct constitutes sexual harassment this would justify grounds for disciplinary action including termination of employment. The same principles should apply in a sporting environment as any other workplace. Sexual harassment is prohibited according to Federal and State legislation. Each case must be determined on its own facts. Sometimes, the media will publish salacious articles about sports men and women simply because they are high profile and highly paid individuals.

In early 2016, the Collingwood Football Club was briefly rocked by controversy after nude photographs of players Dane Swan and Travis Cloke were leaked to the media. It quickly became apparent that the explicit images of the players (both of whom were in relationships with other women) were sent by the men to women via social media. It is understood that none of the recipients of the images complained about receiving them but the images were quickly forwarded to other people before eventually being published by Woman's Day magazine. Neither player was the subject of penalties by their club or the AFL in spite of the fact that the images and videos appeared to directly contravene the AFL's social media policy which clearly banned players from accessing, downloading or transmitting any sexually explicit material.

7.3 Unsuitable associations

As a general principle, being associated with a person classified as "*unsuitable*" will only constitute misconduct if the publication of that association reaches a point whereby it brings the employer into disrepute. Most sporting codes of conduct do not contain an express prohibition against being seen in the company of people convicted of a criminal offence and sporting administrators therefore rely upon "disrepute" clauses to justify the imposition of a penalty.

This occurred in two high profile instances in the NRL in 2016. The first involved the footballer Corey Norman who was fined $20,000.00 and suspended for eight weeks after achieving the holy trinity of:

(a) being in possession of the drug MDMA at a casino;

(b) consorting with known criminals at the same casino; and

(c) distributing a video of himself engaged in sexual intercourse via social media.

In a more bizarre disciplinary matter, the Cronulla Sharks forward Andrew Fifita was fined $20,000.00 after it was revealed that he was playing with the initials FKL on his wrist strapping for much of the 2016 season. It was subsequently revealed by Fifita that FKL stook for "*For Kieran Loveridge*" a friend of Fifita who was convicted of manslaughter following a high profile killing in Kings Cross in 2012. Fifita was fined $20,000.00 and warned by the NRL that further misconduct of that nature may result in his de-registration.

7.4 Gambling

Almost all codes of conduct for major sporting codes in Australia will contain an express prohibition on gambling on sporting events in which the athlete participates. Not only would this meet the definition of misconduct but would also constitute criminal conduct as well. This is entirely appropriate and athletes who engage in this behaviour should be subject to disciplinary action up to and including the immediate termination of their employment.

In March 2018, footballer Tim Simona received an open-ended ban after it was found he had placed bets on opposition players and teams in matches he was playing in. This was widely regarded as meaning he will never play the game of rugby league again.

7.5 Performance enhancing and illicit drugs

Like the prohibition on gambling, most codes of conduct or employment contracts for major sporting codes in Australia contain an express prohibition on the use or consumption of illegal drugs or performance enhancing narcotics. The use of these substances will invariably either meet the definition of misconduct as a result of a direct breach of an express term in the contract or inevitably result in sufficient adverse publicity as to bring the sport or employer, club or association into disrepute. In many instances it may constitute criminal conduct as well.

7.6 Criminal conduct

There are few issues more convoluted than the manner in which a sports' governing body or employer should deal with criminal conduct by an athlete. Tension arises between the inevitable publicity which a criminal investigation, the levelling of charges or criminal trial may provide, and the athlete's right to privacy and the presumption of innocence upon which our criminal justice system is based.

If an athlete is accused of a serious criminal offence, employers can be seen to be subverting the presumption of innocence if as a result of concern about the public relations fall out caused by the fact of the charges themselves, they move to discipline or even terminate the employment of an athlete before the trial has run its course.

It is important for employers in such circumstances to remember that their rights under a contract of employment are not dependent or contingent upon the outcome of the criminal justice process. It is possible for employers to make a decision regarding the discipline of an employee before the matter has been determined by a Court (and indeed even before the matter has been referred to the police).

In the case of *Howell v John Bennell's Discount Fuel*[15], the Queensland Industrial Relations Commission determined:

> "*Provided the employer has fair and reasonable grounds for believing that the offence occurred, that there was full and proper investigation and provided the manner or process of dismissal was just, the employer will escape liability, even if it be later established that the employee had not committed the offence*."

[15] (2001) 167 QGIG 202

Similarly, in the case of *Bi-Lo Pty Ltd v Hooper*[16], the Commission held that:

> "*The employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.*"

The criminal standard of proof is "beyond reasonable doubt". The standard a sporting club must satisfy itself of is whether the athlete has breached their contract. The two standards are largely unrelated and not inter-dependent.

The NRL Code of Conduct addresses the issue of Criminal Proceedings as follows:

> *"Where the breach of a provision of this Code involving a Player or a Club Official has occurred, and the conduct constituting that breach is the subject of a police investigation or criminal proceeding, the Chief Executive Officer shall not proceed against the Player or Club Official pursuant to Part 2 of the NRL Rules until the conclusion of that investigation or proceeding, as the case may be, <u>unless the Chief Executive Officer forms the view, in his absolute discretion, that it is appropriate to do so</u>."* (underling added)

Clearly the underlined text enables the sport to move against a player or official before the criminal proceedings have run their course if the reputation of the sport is suffering.

In the high profile case of swimmer Nick D'Arcy, a decision was made to exclude him from the 2008 Australian Olympic Team after he was charged with criminal offences, well in advance of his criminal trial. D'Arcy had been selected on the Australian Olympic Team for the Beijing Olympics and when celebrating on the night of his selection struck another swimmer, Simon Crowley to the face. Crowley sustained severe facial injuries and Darcy was charged with inflicting grievous bodily harm.

Membership of the Australian Olympic Team depended upon athletes maintaining good behaviour and avoiding misconduct, irrespective of whether the misconduct was in the public domain or not. The relevant policy provided that punishment was at the absolute discretion of the President of the Australian Olympic Committee.

AOC President John Coates terminated D'Arcy's membership of the 2008 Australian Olympic Team before the criminal justice system had run its course on the basis of D'Arcy engaging in

[16] 919920 53 IR 224

behaviour which could bring his sport into disrepute. When announcing the termination of Darcy's membership of the team, Coates stated:

> "*It is clear that being charged with criminal offences of such a serious nature is sufficient to bring Nicholas and the sport of swimming into disrepute and is likely to bring the team and the AOC into disrepute if he continues to be a member of the Team*."

D'Arcy appealed the decision to the Court of Arbitration for Sport (**CAS**). The CAS held that "*bringing a person into disrepute is to lower the reputation of the person in the eyes of the…public to a significant extent*.[17]" The significant media coverage of the incident and the serious nature of the misconduct D'Arcy was accused of resulted in his appeal being dismissed.

Similarly in *Jongewaard v The Australian Olympic Committee*[18], Mr Jongewaard was a cyclist who was charged with leaving the scene of a motor vehicle accident while drink driving. A fellow cyclist received severe head injuries in the accident. Although he was nominated by Cycling Australia for selection to the Australian Olympic Team, the AOC refused to select him due to the criminal charges levelled against him. His appeal to the CAS was dismissed.

It is impossible to consider the issue of off-field misconduct without considering the circumstances relating to the AFL footballer Ben Cousins.

Cousins was a star mid-fielder with the West Coast Eagles who was involved in repeated private incidents including allegations of assault, abandonment of a motor vehicle ahead of a Police breath test, refusal to co-operate with the authorities, association with organised crime identities and an incident in which he ran away from Police and swam across the Swan River. He received several criminal convictions and in 2006 was arrested at the Crown Casino in Melbourne in an agitated and disoriented state.

In 2007 it was revealed that Cousins had a drug problem and he travelled overseas to receive treatment. His club, the West Coast Eagles suspended him from play.

Later that year, in October his vehicle was stopped by Police and various illegal narcotics were found in the vehicle. He was charged with a number of drug offences (these were later dropped). He subsequently again travelled overseas but was plagued by reports of a lengthy cocaine binge and his subsequent admission to hospital.

The AFL Commission found Cousins guilty of breaching player rule 2.9 which (at that time) read:

> "*The Commission may at any time and on such conditions as it thinks fit, cancel or suspend the registration of a player where it is of the opinion that such player has conducted himself in a manner unbecoming of an AFL player or likely to prejudice the reputation or interests of the AFL or to bring the game of football into disrepute*."

[17] D'Arcy (Award, Court of Arbitration for Sport, Case No. CAS 2008/A/1574, 7 July 2008
[18] Jongewaard (Award, Court of Arbitration for Sport, Case No. CAS 2008/A/1605

The case is interesting in that at the time Cousins was found guilty of breaching that rule (and had his AFL registration revoked) the criminal charges against Cousins had been dropped. Less than a week later, the AFL sanctioned Cousins on the basis that notwithstanding the fact the charges were dropped, his lengthy history of misconduct had brought the game into disrepute.

Sports governing bodies have a tendency to administer these issues haphazardly, but this is not necessarily inappropriate. Each matter will turn on its own individual facts and the decision as to whether the player will be disciplined will invariably turn on a number of disparate issues. Regrettably, the most compelling issue will relate to the media prominence of the criminal allegations and the effect that publication is having upon the reputation of the sport.

8. Penalties

Penalties imposed on athletes for breaching off-field misconduct provisions will be imposed either by an executive officer of the club or sporting association or a domestic tribunal appointed to determine whether a breach has occurred.

As another paper at this conference will address the issue of domestic disciplinary tribunals, this paper will focus upon the contractual right to penalise for misconduct by the executive officers of employers, clubs and sports governing bodies. That is the right most comparable to other, non-sporting workplaces.

It goes without saying that if the contractual documents impose an obligation to follow a disciplinary tribunal process for allegations of off-field misconduct, that process should be complied with.

The most significant penalty able to be imposed upon an aberrant athlete for misconduct will be termination. It is therefore important that contracts clearly stipulate this right. Where a contract does not expressly stipulate a right to terminate, the employer or sports' governing body will need to prove that the misconduct complained of was sufficiently serious to justify immediate termination on the basis that it is a breach of a condition of a contract[19].

Other common penalties include the imposition of a fine (which usually takes the form of a forfeiture of future earnings under the contract) and a suspension from playing in future sporting events for a defined period of time.

In the absence of an express contractual term permitting the employer to "*fine*" an employee, it is not possible for employers to impose a financial penalty for misconduct. They can commence legal proceedings for breach of contract or for negligence, but this would be self-defeating in the absence of a loss occasioned by the conduct sufficient to justify the litigation.

Although it is arguably unnecessary for an athlete to be given natural justice (or procedural fairness) for breach of an express condition of the contract, any penalty wrongfully imposed by an executive officer of the employer or sporting association may be subject to review by a Court. It is therefore advisable for athletes to be provided with natural justice to the greatest extent possible under the circumstances.

[19] *Associated Newspapers Limited v Bancks* (1951) 83 CLR 322

Athletes should be informed of the conduct which it is alleged constitutes a breach of the relevant contract or code of conduct. They should be invited to provide a response and informed that disciplinary action may be taken against them up to and including termination of employment. The response should be considered and if it is determined that the response does not adequately address the allegations raised against the athlete, the athlete may be penalised.

It is respectfully suggested that the athlete should be informed of the final decision in writing.

Decisions to penalise athletes should not be made capriciously. There should be proof of the misconduct sufficient to justify the decision made to impose a penalty.

The consequences of imposing a penalty unjustifiably may be significant. An athlete could sue for breach of contract (reports have indicated that Todd Carney has sued the Cronulla Sharks for $3 million for the summary termination of his employment after photographs of him simulating urinating in his mouth appeared on social media) or, in the case of more junior, lower paid athletes who fall within the scope of the unfair dismissal regime, an unfair dismissal application could be filed in the Fair Work Commission.

9. Conclusion

Australians tend to idolise successful athletes and as a consequence, set high standards for them. Conduct which would result in a proverbial "*slap on the wrist*" in ordinary workplaces may, as a result of publication driven by the athlete's profile result in serious penalties being imposed in a sporting workplace.

It is in the interests of all parties, both athlete and administrator, for the rights and wrongs of the relationship to be recorded clearly, in writing and with each party's legal obligations clearly defined.

Inevitably, athletes will engage in misconduct. Some of that misconduct will be foolhardy and some of it will be private behaviour which is published through no fault of the athlete concerned.

A well-drafted misconduct policy and associated documents will ensure that the parties to the sports contractual relationship know what is expected of them and what will occur when breaches arise.