

## SHOULD ATHLETES BE TESTED FOR RECREATIONAL DRUGS? THREE SPORTING FEDERATIONS KICK AROUND THE PROVERBIAL FOOTBALL

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*The question of illicit drugs in sport has been one that has recently dominated the media's coverage of sport. Players in rugby union, rugby league and Australian football have tested positive for recreational drugs, or have admitted using such drugs. Also an issue are the policies adopted by the various codes in regard to the testing of such drugs out of competition. At present the AFL has a three-strike policy, which means that players will only suffer consequences after a third positive test. The NRL will be adopting a two-strike policy, while rugby union has yet to adopt any out-of-competition testing or policy. It is suggested that with the AFL's policy being based on the education, rehabilitation and health of the players, a three-strike policy is an appropriate one for that particular organisation.*

### Introduction

The modern sporting landscape is one that involves national and international bodies which exist for the sole purpose of combating the use of performance-enhancing drugs. More recently, political pressure has been placed on sporting federations and anti-doping agencies to extend testing for "recreational drugs"<sup>2</sup> outside of competition as well as on match or competition day.

The governing bodies of three of Australia's major sporting codes, the Australian Rugby Union (ARU), the Australian Football League (AFL), and the National Rugby Football League (NRL), were all confronted with players testing positive to the use of illicit drugs during the 2006 season. All three cases raised a number of issues relating to the testing of athletes for the use of

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<sup>2</sup> It is also accepted that some drugs commonly referred to as recreational may also have some performance-enhancing effects in certain sports. By "recreational drugs" we mean drugs that are used for non-therapeutic purposes and which are commonly used outside of any sport or employment context for purposes of personal enjoyment. This therefore does distinguish them from drugs such as steroids which are only used in a medical context or to enhance performance in sport. Another feature of the recreational drugs is that their use is controlled by the criminal law, which is why the term "illicit drugs" is also used. This, however, is not intended to be an authoritative definition. It should also be noted that, for the purposes of this article, the terms "recreational" and "illicit" have been treated as being interchangeable. To some extent we share the same approach articulated by US Supreme Court Justice Potter Stewart when he said, in relation to an attempt to define what is "obscene": "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it...*": *Jacobellis v Ohio* 378 U.S. 184 (1964).

prohibited recreational drugs. In the AFL the league had to seek an injunction in the Supreme Court of Victoria to prevent the publication of the names of players who had twice tested positive for the use of illicit drugs on non-match days. This was sought to preserve the players' confidentiality which is required under the AFL Illicit Drug Policy. The league has also had to manage the adverse publicity resulting from the revelation of persistent recreational drug use by one of its stars, Ben Cousins. In rugby league, the North Queensland Cowboys terminated the contract of Mitchell Sargent after he tested positive to cocaine in a test taken during a recovery session the morning following a match. The rugby union player concerned, Wendell Sailor, returned a positive match day test to cocaine which resulted in a two-year ban from sport and the termination of his employment contract.

In this paper these incidents will be used as a means of examining the broader question of whether players should be submitted to tests for illicit drugs both in and outside of competition. Any discussion of drug policy in sport also requires a consideration of the World Anti-Doping Code (WADA Code) as well as the role of the World Anti-Doping Agency (WADA) and the Australian Sports Anti-Doping Agency (ASADA). The article will first look at the historical aspects of drug testing in sport with a focus on the role of recreational drugs in anti-doping policy. It will then give a brief overview of the physiological effects of some of the illicit drugs and how this may, or may not, impact on the on-field performance of a player. Finally it will examine the details of the incidents outlined above in the context as to the appropriateness of recreational drug testing in sports.

### **Anti-doping policy: a historical overview**

There has, in recent years, been some debate regarding the appropriateness of including recreational drugs in anti-doping policies.<sup>3</sup> However, when modern anti-doping efforts are viewed in light of their historical context, it is clear that such drugs have always been a part of anti-doping policy.

Although most commentators recognise the 1960s as when anti-doping policy began in earnest,<sup>4</sup> it is clear that some efforts at adopting anti-doping rules had begun much earlier. In 1928 the first of such rules developed when the then International Amateur Athletic Federation (IAAF) adopted an anti-doping rule

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<sup>3</sup> See Antoni Buti and Saul Fridman (2001) *Drugs, Sport and the Law*, Mudgeeraba: Scribblers Publishing, 47ff who recount some of the debate which has arisen about which drugs should be included on the Prohibited List.

<sup>4</sup> See Barrie Houlihan (1999) *Dying to Win: Doping in Sport and the Development of Anti-Doping Policy*, Strasbourg: Council of Europe Publishing, 130. Jan Todd and Terry Todd (2001) "Significant Events in the History of Drug Testing and the Olympic Movement" in Wayne Wilson and Edward Derse (Eds) *Doping in Elite Sport: The Politics of Drugs in the Olympic Movement*, Champaign: Human Kinetics, and Pound, D. (2004) *Inside the Olympics*, Mississauga, John Wiley & Sons Canada Ltd, 55 for example.



the drugs targeted by anti-doping policy were also being used outside of sport in what we would now call a recreational setting.

Notwithstanding the historic place of recreational drugs in anti-doping policy and the present inclusion of many such drugs on the WADA Prohibited List, it is clear from the public response to recent events, such as those detailed below, that there is no consensus, even among sporting administrators, on the question of how to respond to this problem.

### **Recreational drugs and the WADA Code**

So far as the WADA Code is concerned there is no theoretical distinction between recreational drugs and non-recreational drugs. The treatment of recreational drugs in the WADA Code is substantially similar to that of non-recreational, performance-enhancing substances in that there is no separate policy or even section of the policy devoted to these substances. Both types of substances are included on the Prohibited List and are subject to testing and the same system of sanctions. The fact that recreational drugs are not dealt with as a separate category suggests that little or no attention has been given to the very different policy issues presented by athletes' use of these substances. It is rational therefore to conclude that, at least in the minds of the framers of anti-doping policies, "drug use is drug use", whatever the nature of the substance, regardless of any difference in the physiological effects that it may have on performance.<sup>10</sup>

There are, however, some practical differences in the treatment of recreational drugs according to where on the Prohibited List they are placed. For example, under the WADA Code the 2007 Prohibited List<sup>11</sup> sets out substances in a number of different categories, and the use of substances and methods classified as "S1 to S5" and "M1 to M3" are prohibited at any time, that is, in and out of competition. Those classified as "S6 to S9" are prohibited "in competition" only. There is also a category for Specified Substances where there is a greater risk of "inadvertent doping". Testing positive to these substances attracts a reduced sanction if the athlete can show that their use was not intended to enhance sport performance.<sup>12</sup> Recreational drugs including amphetamines,

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<sup>10</sup> The failed attempt to disqualify Canadian freestyle skier, Ross Rebagliatti, at the Nagano Winter Olympic Games in 1998 is consistent with this thesis. Rebagliatti was initially stripped of his gold medal on account of testing positive to cannabis, despite the fact that cannabis was not then included on the relevant prohibited list. Rebagliatti was ultimately allowed to keep his medal. See Antoni Buti and Saul Fridman, *Drugs, Sport and the Law*, Scribblers Press, Mudgereeba, 2001, 35. This "problem" was subsequently rectified by including cannabis on the prohibited list in the World Anti-Doping Code.

<sup>11</sup> *The World Anti-Doping Code, The 2007 Prohibited List International Standard*, <[http://www.wada-ama.org/rtecontent/document/2007\\_List\\_En.pdf](http://www.wada-ama.org/rtecontent/document/2007_List_En.pdf)> visited 28 May 2007.

<sup>12</sup> WADA Code, Article 10.3.

cocaine, marijuana and heroin all appear in the S6 (Stimulants), S7 (Narcotics) and S8 (Cannabinoids) categories. Cannabinoids (marijuana and hashish) also appear on the Specified Substances list. The practical effect of these categorisations is that recreational drugs are only prohibited at the time of actual competition.

As outlined in the previous section, doping policies have not always treated recreational drugs in this manner. The original list of prohibited substances included many substances which were used both as performance enhancers and as recreational drugs. At some point in history the distinction between which drugs were considered performance enhancers and which were considered recreational drugs became clearer. The treatment of marijuana is a case in point. Cannabis (hashish) appeared on the first IOC Prohibited List in 1967 but by 1998 the IOC Medical Code did not treat marijuana as a banned substance and testing of Olympic athletes for marijuana was, in the words of Prince Alexandre De Merode (then the head of the IOC Medical Commission), “an educative measure, not more. It is not doping.”<sup>13</sup> It was not until the USA pushed for marijuana to be included on the Prohibited List that this situation changed.

Article 4.3 of the WADA Code sets out the criteria for inclusion of a substance or method on the Prohibited List, and therefore helps to identify a definitive justification for the prohibition of recreational drug use in competition. This Article states that:

*“WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List.*

*4.3.1. A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:*

*4.3.1.1. Medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to enhance or enhances sport performance;*

*4.3.1.2. Medical or other scientific evidence, pharmacological effect, or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;*

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<sup>13</sup> Arbitration CAS ad hoc Division (O.G. Nagano 1998) 002, *R v International Olympic Committee (IOC)*, award of February 12, 1998.

4.3.1.3. *WADA's determination that the Use of the substance or method violates the spirit of sport described in the Introduction to the Code.*"

The Introduction to the WADA Code states that what the anti-doping programs seek to preserve is "the spirit of sport", that is, what is intrinsically valuable about sport. This spirit of sport is stated to be "the celebration of the human spirit, body and mind", and includes concepts such as ethics; fair play and honesty; health; excellence in performance; character and education; dedication and commitment; respect for rules, laws, self and other participants. Presumably, it is the view of WADA that the use of recreational drug is contrary to the "spirit of sport" as well as an actual or potential health risk to the athlete. While there have been various attempts to justify prohibition of recreation drug use on grounds of alleged performance enhancement, as will be discussed in the next section, it is questionable whether there is direct evidence that drugs, such as stimulants, do actually enhance performance.

### **The physiological effect of recreational drugs on sporting performance**

The most basic question is whether illicit drugs have a positive effect on "on-field" performance and therefore should be considered to be performance enhancing. Cocaine, for example, is classified by WADA as a stimulant, and therefore a positive test for cocaine on the day of competition will attract an automatic two-year ban.<sup>14</sup> Avois et al<sup>15</sup> note, however, that while cocaine is a strong central nervous system stimulant,<sup>16</sup> it does not really enhance performance in sport.<sup>17</sup> Rhonda Orr, Lecturer in Exercise and Sports Science at the University of Sydney, is also of the opinion that in the context of football cocaine may hinder, rather than help, a player's performance if taken shortly before a game.<sup>18</sup> Andrew McLachlan, Professor of Pharmacy at the University of Sydney, on the other hand has stated that cocaine has the potential to deliver improved oxygen supply, enhanced mental awareness and a feeling of invincibility. Amphetamines produce a similar effect. Ice, as a methamphetamine, has the additional benefit of improving anaerobic performance. In McLachlan's opinion, when a player is tired, such drugs could potentially help the player "to refocus, remain stimulated and keep fighting on in a match".<sup>19</sup> John Mendoza, former Chief Executive of ASADA, has also

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<sup>14</sup> WADA Code Article 10.2

<sup>15</sup> L.Avois, N. Robinson, C. Sauden, N. Baume, P. Mangin and M. Saugy, "Central nervous system stimulants and sport practice", (2006) 40 (Supplement 1) *British Journal of Sports Medicine* i16-i20; doi:10.1136/bjism.2006.027557: [http://bjism.bmj.com/cgi/content/full/40/suppl\\_1/i16](http://bjism.bmj.com/cgi/content/full/40/suppl_1/i16).

<sup>16</sup> Ibid, 5.

<sup>17</sup> Ibid, 6.

<sup>18</sup> Amy Lawson, "Cocaine no help, says expert," *The Sun-Herald*, 21 May, 2006, 114.

<sup>19</sup> Chip Le Grand, "Ben on thin ice as WADA threat looms," *The Australian*, 29 March, 2007, 31.

stated that amphetamines could well help enhance the performance of “an AFL midfielder who is all over the paddock”,<sup>20</sup> though he questioned the benefit of cocaine, stating that it, like other recreational drugs, should be excluded from the anti-doping campaign.<sup>21</sup> Avois et al note that the use of amphetamines has positive effects, including an increase in physical energy and mental aptitude, as well as a feeling of confidence. Its use, however, also has negative effects, including anxiety and slowness in reasoning.<sup>22</sup> Avois et al also note that the use of amphetamines in sport to promote aggression and lower fatigue “has led to misjudgements and major fouls on the pitch”.<sup>23</sup> Therefore, while amphetamines may be considered to be performance enhancing in sports such as the sprints in athletics and road racing, it is more questionable as to whether they will enhance performance in a football match. Hardy et al,<sup>24</sup> who specifically studied drug doping in Australian football, also points that the sport “requires speed, stamina, judgment, physical skills and courage in about equal proportions” and drugs that will enhance some of these characteristics will decrease others.<sup>25</sup>

As far as the other commonly used illicit drug, cannabis, is concerned, there is even less opinion that it provides any performance-enhancing effects at all. There are two alleged performance-enhancing effects of cannabis. One is that it lowers the standing pulse rate and acts in a manner similar to a beta blocker,<sup>26</sup> and can therefore potentially aid performance in sports such as shooting. The other is that it can also lower inhibitions and therefore may produce superior effort in some other sports.

Thus, there is divided opinion on the performance-enhancing effects of drugs such as stimulants, even when taken on the day of a match. The scientific evidence, from a legal perspective, can be best described as circumstantial evidence. This is because while there are clear physiological changes that occur from the use of such drugs, it requires an inference to then say that these lead to an enhancement of performance. One reason for the lack of direct evidence are the ethical and practical reasons for direct testing of athletes, which is why most of the knowledge of pharmacology of drugs such as cocaine comes from animal studies and addict reports.<sup>27</sup>

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<sup>20</sup> Ibid.

<sup>21</sup> Nicole Jeffrey, “Forget cannabis, just focus on cheats,” *The Weekend Australian*, 14 October, 2006, 54.

<sup>22</sup> Avois et al, above n 15, 4.

<sup>23</sup> Ibid, 5.

<sup>24</sup> Kenneth J. Hardy, John J McNeil, Anthony G Gapes, “Drug doping in senior Australian Rules football: a survey for frequency”, (1997) 31 *British Journal of Sports Medicine* 126–128.

<sup>25</sup> Ibid, 127.

<sup>26</sup> Beta blockers are a specific category of banned substance on the WADA List

<sup>27</sup> Avois et al, above n 15, 5.

It should also be noted that, in practice, the use of such substances is often dealt with in the employment contract of a professional athlete. For example, a soccer player with Leyton Orient in the English lower divisions had his contract terminated after a positive test to cocaine on match day. This was because he was in breach of a condition of his contract that obliged him to ensure that he was fully fit and ready to perform on the day of a match. Other employment contracts may contain specific provisions directed at use of illicit drugs or other immoral or unlawful behaviour.<sup>28</sup> Note that the rationale for an employer insisting on such terms is fairly easy to ascertain: the employer has invested in the athlete and will want to ensure maximum return. That means that the athlete must be ready to perform at his or her best, and that the athlete, particularly those with a high profile, must remain relatively blemish-free as a vehicle for endorsement and publicity. The team, therefore, is rightly concerned about the moral standing of the athlete and usually protects its interest through private means. The impact of a player's behaviour on team morale and performance is another important consideration, and was ultimately one of the reasons why Cousins was sacked by the West Coast Eagles. Another reason why the club had to take a hard stand after Cousins' arrest for drug possession was potential sanctions from the AFL.

### **The AFL and illicit drugs**

#### *The AFL policy*

The AFL Anti-Doping Code was introduced in 1990 and now complies with the requirements of the WADA Code, at least in regard to the contents of the Prohibited List.<sup>29</sup> The AFL Anti-Doping Code now extends to illicit, recreational drugs as well as performance-enhancing substances and involves in-competition testing.

The adoption of the WADA Code by the AFL was not unproblematic. While the AFL initially wanted to retain its own code, especially the approach they had adopted to recreational drugs within that code, pressure from the Australian government forced it into complying with WADA, at the risk of losing around \$3m dollars in government funding.<sup>30</sup> The AFL Illicit Drugs Policy was introduced in February 2005, with there now being a four-year agreement in place, dating from 14 February, 2007. This policy complies with the WADA Code as far as tests carried out on match days. The Illicit Drugs Policy therefore

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<sup>28</sup> A good example is the AOC Athlete Participation Agreement: see Toni Buti, "The AOC Athletes' Agreement for Sydney 2000", (1999) 23 *UNSWLJ* 746.

<sup>29</sup> *The Australian Football League v The Age Company Ltd* [2006] VSC 308, [3].

<sup>30</sup> Greg Denham, "AFL bows to federal anti-dope pressure", *The Australian*, 20 July, 2006, 3.



treats a positive test of stimulants, narcotics or cannabinoids on match day to be a breach of the AFL Anti-Doping Code and subject to WADA Code penalties.<sup>31</sup>

The AFL Illicit Drugs Policy provides for out-of-competition testing, but does not apply the standard penalty regime set out in the WADA Code, that is, a standard two-year ban for a first offence. It should also be noted that the WADA Code does not prohibit the use of recreational drugs out of competition,<sup>32</sup> which therefore makes the AFL policy more invasive than that of the WADA Code. The result is that, at present, a positive test for drugs such as cocaine and methamphetamines on match day will mean the player is subject to an automatic two-year ban for a first offence whereas a positive test for the same drugs on a non-match day will attract a lesser penalty.<sup>33</sup> This policy was introduced after negotiations between the AFL and Australian Football League Players' Association (AFLPA), with its primary focus being education and rehabilitation of the players. AFLPA therefore insisted that the results of the first two positive tests remain confidential.<sup>34</sup> With the first positive test, the player is informed by the AFL medical officer and is then required to receive education, counselling and treatment, with the club doctor now also being informed. A similar situation also occurs after the second positive test. It is only after a third positive that the player's name is made public with the matter being referred to the AFL Tribunal which then conducts a hearing to determine what the penalty should be. The sanctions set out in the Policy are mandatory suspensions of six to 12 matches if there has been a positive test for stimulants or narcotics, and up to six matches for a positive test for cannabinoids.<sup>35</sup> In 2006, however, the AFL was forced to defend its policy of confidentiality in court proceedings to restrain publication of identities of three players who tested positive to illicit drugs.

### *AFL v The Age*

In *Australian Football League v The Age* the AFL and the AFLPA sought an injunction to prevent *The Age* newspaper and *Nationwide News* from publishing material that would identify any AFL player who had tested positive under the AFL Illicit Drugs Policy.<sup>36</sup>

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<sup>31</sup> *The Australian Football League v The Age Company Ltd* [2006] VSC 308, [4].

<sup>32</sup> These substances are included in category S6–S9 on the Prohibited List described above and are prohibited in competition only.

<sup>33</sup> Chip Le Grand and Jenny McAsey, "Cousins takes off for secret drug rehab", *The Australian*, 30 March, 2007, 31.

<sup>34</sup> *Ibid*, [5].

<sup>35</sup> *Ibid*, [10].

<sup>36</sup> *Ibid*, [1]. Note that a similar situation later arose when the Seven Network obtained the names of players who were receiving treatment at a drug rehabilitation clinic, with the AFL again being successful in preserving the confidentiality of the players.

In March 2006, *The Age* had received information that identified three AFL players who had allegedly been the subject of positive drug tests.<sup>37</sup> Discussion also commenced on various internet websites “whereby speculation, rumour and general discussion as to the possible identity of players took place”. On 16 March 2006, *The Sydney Morning Herald* named the players in an electronic version of an article, and although this was removed before publication, an electronic copy was sent to Media Monitors which then made the article available to various government organisations, such as the Australian Institute of Sport. All those who received a copy of the article, however, later agreed to destroy the document.<sup>38</sup> On 6 April a telephone call was made to a program on Foxtel’s Fox Footy station in which a player’s name was mentioned as one of those who had been named.<sup>39</sup> There was also evidence that at least some people within the AFL knew the names.<sup>40</sup>

When the AFL went to the Victorian Supreme Court seeking the injunction to prevent further publication of the players’ names, *The Age* claimed that information was no longer confidential as it had passed into the public domain so that an injunction would not serve any purpose. *The Age* also claimed that the information disclosed iniquitous behaviour and therefore there could not be a breach of confidence, while the public interest argument of the identity of the three AFL players being disclosed to the public at large was also raised.<sup>41</sup>

Regarding the issue as to whether the information had entered into the public domain, Kellam J noted that “information would not have the necessary quality of confidence about it if it is “public knowledge, commonly known, publicly known, well-known, public property ... or common knowledge”.<sup>42</sup> It was therefore a question as to whether the purpose of confidentiality had effectively been destroyed by the publicity that made restraining further publication pointless since the confidential information had entered into the public domain.<sup>43</sup> Justice Kellam noted that one important factor in determining whether the information should be considered confidential was the degree of accessibility.<sup>44</sup> His Honour also stated that as a general rule, the publication of confidential information in widely circulated print media would place such information in the public domain, though he also noted that there were few authorities in regard to publication on the internet.<sup>45</sup> Justice Kellam then held

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<sup>37</sup> Ibid, [15].

<sup>38</sup> Ibid, [31].

<sup>39</sup> Ibid, [32].

<sup>40</sup> Ibid, [34].

<sup>41</sup> Ibid, [16].

<sup>42</sup> Ibid, [35]. Justice Kellam was referring to *The Law of Trade Secrets and Personal Secrets*, Dean, 2<sup>nd</sup> Edition, 2002, Thomson Law Book Co.

<sup>43</sup> Ibid, [36].

<sup>44</sup> Ibid, [40].

<sup>45</sup> Ibid, [46].

that the publication of *The Sydney Morning Herald* material was not sufficient to bring the material into the public domain,<sup>46</sup> nor was the phone call made to the Fox Footy Channel<sup>47</sup> and what was known within the AFL family,<sup>48</sup> as in each case the disseminated information was to a limited audience, and there had been “no dissemination to the public at large”.<sup>49</sup>

Justice Kellam then considered the information that appeared on various internet sites, and held that “the fact that such speculative gossip, innuendo and assertion by unknown persons has been placed on the web sites of various discussion fora does not make confidential material lose its confidential nature”.<sup>50</sup> *The Age* also argued that the information the AFL sought to protect was information which revealed whether or not the players had committed a criminal offence since the use and possession of these drugs was a criminal offence in all the states and territories of Australia.<sup>51</sup> Kellam J held that:

*“...the disclosure of the names of the players who have tested positive to illicit drugs will not disclose any iniquity of a serious criminal nature. At the highest, such disclosure may establish that the players at some stage had traces of illicit drugs in their urine and thus information may be relevant to the possibility of, or the suggestion of, a crime having been committed by one of them. However, no crime, be it possession of, or use of such illicit substance, could possibly be proved by such information alone.”*<sup>52</sup>

Within Australia it has been a matter of police practice that athletes who have tested positive to illicit drugs will not be arrested after such results. The above statement by Justice Kellam indicates that the results of such tests, on their own, would not provide evidence of the required probative value to sustain a court conviction. In regard to the public interest issue, Kellam J noted that such “disclosure must amount to more than public ‘curiosity’ or public ‘prurience’” as “there was a wide difference between what is interesting to the public and what is in the public interest to make known”.<sup>53</sup> Justice Kellam then held that:

*“In the end result it appears to me that there is nothing other than the satisfaction of public curiosity in having confidentiality of the names*

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<sup>46</sup> Ibid, [49].

<sup>47</sup> Ibid, [50].

<sup>48</sup> Ibid, [51].

<sup>49</sup> Ibid, [52].

<sup>50</sup> Ibid, [56]. For a further discussion of the confidentiality aspect of the case see *Australian Football League v The Age Company Ltd (No 2)* [2006] VSC 326.

<sup>51</sup> Ibid, [57].

<sup>52</sup> Ibid, [70].

<sup>53</sup> Ibid, [84] with his Honour quoting from *British Fuel Corporation v Granada Television Limited* [1981] AC 1096, 1168.

*of those who have tested positive breached by being released. It may well make a wonderful front page story for the newspapers and a scoop for other sections of the media... However I can see nothing that is in the public welfare or in the interests of the community at large which can be served by the identification, and perhaps to a degree the vilification and shaming of those who agreed to be tested.”*<sup>54</sup>

This comment by Justice Kellam reflects the concern about the possible “vilification and shaming” of the players who have tested positive and highlights the potential excessive consequences on those who have consented to being tested. It must be emphasised that this out-of-competition testing for recreational drugs does depend on the consent of the players, and not surprisingly, the AFL players threatened to withdraw their consent because of this leaked information that was intended to remain confidential.<sup>55</sup> An injunction was therefore granted to the AFL preventing the publication of the names of the three players who had tested positive, and the three players from Port Adelaide, Fremantle and the West Coast Eagles were submitted to further testing, treatment, education and counselling.<sup>56</sup> The AFL did however make it clear that one of the three names was not that of the West Coast Eagles star, Ben Cousins,<sup>57</sup> who has been subjected to extensive media attention since it was revealed that he had a problem with illicit drugs.<sup>58</sup>

### *The Ben Cousins case*

While Cousins has revealed that he has been a user of illicit drugs, it should be noted that he has never tested positive to such drugs in any test, either on match day or out of competition, although there has been speculation that he was taking drugs that on match day are considered by WADA to be performance enhancing. In Cousins’ case it was suggested that the specific substances involved were cocaine and methamphetamines (ice).<sup>59</sup> In March 2007 he was suspended indefinitely by the West Coast Eagles and travelled to the United States for drug rehabilitation. It was also revealed that the club had been aware of the problem since as early as July 2006, but allowed Cousins to continue playing, despite the fact that he was regularly missing training sessions. On his return to Australia there were calls from some involved in the AFL, such as Brisbane Lions coach Leigh Matthews, that he receive a 12-week suspension,

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<sup>54</sup> Ibid, [94].

<sup>55</sup> Greg Denham, “No confidence in flawed system,” *The Australian*, 16 March, 2006, 44.

<sup>56</sup> Greg Denham, “Identities to remain restricted,” *The Australian*, 23 March, 2006, 22.

<sup>57</sup> Peter Lalor, “Test case for doping policy,” *The Weekend Australian*, 24 March, 2007, 53.

<sup>58</sup> Greg Denham and Elizabeth Gosch, “Ben ban ends great Eagles era,” *The Australian*, 21 March, 2007, 21.

<sup>59</sup> Chip Le Grand, “Double life of champion going off rails,” *The Australian*, 22 March, 2007, 31.

the prescribed penalty under the AFL's Illicit Drug Policy. The AFL, however, indicated that it did not intend to impose additional punishment,<sup>60</sup> though the AFL made it clear that Cousins had to comply with a number of requirements before he would be allowed to return to play in the league.<sup>61</sup> These requirements included entering into an out-patient rehabilitation program, and agreeing to regular drug testing.<sup>62</sup>

The AFL also took a hard line with the West Coast Eagles, threatening the club with the possible loss of premiership points, draft selections, suspensions and fines. This was in response to a number of off-field drug-related misdemeanours involving its players, including Cousins, dating back to 2001.<sup>63</sup> The Cousins situation also saw the AFL fast track its crackdown on illicit drugs, with it being announced that it will increase its non-match testing to 10 times that of match days and that an estimated 1400 to 1500 tests would be carried out each year.<sup>64</sup>

Cousins resumed playing for the West Coast Eagles in July 2007, and after an impressive best on-ground performance in his return match, further problems arose later in the year. First, he tore his hamstring in the semi-final against Port Adelaide, which caused him to miss the following week's semi-final loss to Collingwood. A short time later it was revealed that his close friend, former West Coast Eagles premiership player, Chris Mainwaring, had suffered a drug-related death at the age of 41. The final incident which has, temporarily if not permanently, ended Cousins' career was his arrest for possession of a prescription drug without a prescription. He had his contract immediately terminated by the West Coast Eagles and, at the time of writing, it is uncertain whether he will be allowed to resume his AFL career. One reason for the termination of the contract was that the West Coast Eagles had obviously lost patience with him and the effect his behaviour was having on the team. However, the club must have also been concerned about potential AFL sanctions if the club did not act promptly. The AFL, in turn, was concerned about the adverse publicity the Cousins affair was having on the corporate image of the AFL. However, the fact that the drug charge was later dropped by the police has raised other potential legal issues regarding the termination of his contract and the present situation of him being denied the opportunity to continue his AFL career. At the time of writing, Cousins is reportedly seeking legal advice regarding his situation,<sup>65</sup> though he is also facing a claim from the

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<sup>60</sup> Chip Le Grand and Courtney Walsh, "Cousins questions to remain," *The Australian*, 3 May, 2007, 31.

<sup>61</sup> Courtney Walsh, "Cousins tells AFL boss: I'll be back," *The Australian*, 15 May, 2007, 18.

<sup>62</sup> Greg Denham, "Last-chance warning for Eagles," *The Australian*, 30 April, 2007, 19.

<sup>63</sup> *Ibid.*, 18. Presumably this statement was made to support the club's laissez-faire attitude towards recreational drug use, seeing this as a problem best dealt with through private counselling rather than public disciplining.

<sup>64</sup> Greg Denham, "Number of drug tests set to triple," *The Australian*, 3 May, 2007, 33.

<sup>65</sup> Elizabeth Gosch, "Cousins explores legality of dismissal," *The Australian*, 1 November, 2007, 16.

AFL that he has brought the game into disrepute. One other issue that the authors would like to raise is whether the West Coast Eagles would have been as tolerant of Cousins when his behaviour became apparent if he had been a fringe player rather than a star player?

### **Rugby league and illicit drugs**

As with the AFL, the NRL is WADA compliant. Nonetheless, recent events have brought the question of out-of-competition recreational drug use by players into public focus. Rugby league has seen a number of players test positive for illicit drugs over the past several years. Indeed, one of the league's recently retired star players, Andrew Johns, has admitted to regular and persistent use of illegal substances including ecstasy to relieve depression throughout his playing career.<sup>66</sup>

In 2001 two West Tiger players, Craig Field and Kevin McGuinness, tested positive to cocaine and ecstasy respectively in non-match day testing and both were suspended by the club.<sup>67</sup> Manly's Andrew Walker tested positive to cocaine in 2004, but because it was in a match day test, he received an automatic two-year ban rather than the more lenient suspensions McGuinness and Field received.<sup>68</sup> Finally, North Queensland Cowboy's Mitchell Sargent tested positive for cocaine use during a recovery session the morning after a match in August 2006. Although it was his first offence, Sargent had his contract with the club terminated, the Cowboys having adopted a strict, no-tolerance attitude to the use of illicit drugs by its players.<sup>69</sup> After a negative reaction to this termination of employment, the Cowboys acknowledged that they would reconsider their policy of terminating contracts for a first positive test on non-match days.<sup>70</sup> As with the Cousins situation, the authors also raise the question as to whether the club would have terminated the contracts of its star players such as Matt Bowan or Jonathon Thurstans.

The events surrounding Sargent's sacking did, however, lead to a debate about the question of the appropriate punishment for positive out-of-competition tests for recreational drugs. One problem was that the consequences varied from club

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<sup>66</sup> See Brad Walter, "Johns confesses: I use drugs", *The Sydney Morning Herald*, 31 August, 2007, 1.

<sup>67</sup> "Drug suspensions in the NRL", *The Australian*, 25 August, 2006, 31. In Craig Field's case, Field commenced legal action claiming that terms of his contract exposing him to substantial penalties for use of non-performance-enhancing drugs, detected by means of mandatory drug tests, were unconscionable and subject to review in the Industrial Court: see Antoni Buti and Saul Fridman, *Drugs, Sport and the Law*, Scribblers Press, Mudgereeba, 2001, 40. The action was ultimately abandoned after Field's employment with his club was terminated for other conduct-related reasons. McGuinness was initially suspended for the rest of the season, though this was later reduced to 16 weeks.

<sup>68</sup> *Ibid*, 31.

<sup>69</sup> Brent Read and Stuart Honeysett, "Sargent axed for cocaine positive," *The Australian*, 25 August, 2006, 31.

<sup>70</sup> Stuart Honeysett, "Cowboys rethink hard line on drugs," *The Weekend Australian*, 26 August, 2006, 53.

to club. The NRL also had to consider whether it should adopt an AFL-style three-strikes policy in relation to these drugs, or continue to allow clubs to decide how to deal with such matters themselves. During preliminary discussions one third of the clubs rejected the proposed three-strikes policy. This was because these clubs considered it too lenient as players would only receive a suspended fine for a first offence and a fine of 15 per cent of their salary for a second offence, although a third offence would incur an automatic 12-match suspension with the club also having the right to terminate the player's contract.<sup>71</sup> What was accepted as a uniform policy was a two-strikes policy whereby a player would receive a formal warning and a suspended fine of five per cent of their salary for a first offence. Results of a first positive test would remain confidential with the player also receiving rehabilitation and subjected to further testing. A second positive test would result in an automatic 12-match suspension with the club also having the right to terminate the player's contract,<sup>72</sup> though the player can still be employed by another club.

### **Rugby union and illicit drugs**

The present ARU policy is that players must submit to random match day testing and also out-of-competition tests for performance-enhancing drugs. It is therefore in compliance with the WADA Code, as since 2006, the ARU has adopted a WADA compliant code.

Wendell Sailor, who since his signing from rugby league in 2002 had played 40 rugby union tests for Australia, including the 2003 World Cup Final, tested positive to cocaine after a match between the NSW Waratahs and the ACT Brumbies in April 2006. Under the WADA Code this meant that Sailor received an automatic two-year suspension, not only from rugby union in Australia, but also from playing rugby union overseas, thus preventing him from plying his trade in lucrative markets such as Japan or Europe. Since rugby league was also WADA compliant, it prevented a return to rugby league before the completion of the two-year ban,<sup>73</sup> although he intends to return in 2008.

Sailor's two-year ban for what was recreational use of a prohibited drug can be viewed as a harsh penalty, and it should be noted that the new WADA Code,<sup>74</sup> due to be operational on 1 January 2009, will provide some relief to athletes in a similar situation to Sailor's. Article 10.4 of the new WADA Code will allow for penalties much lower than Sailor's two-year ban, if the athlete involved can establish how a Specified Substance had entered his or her body. The onus,

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<sup>71</sup> Brent Read, "NRL clubs strike out soft drug rule," *The Australian*, 23 January, 2007, 1.

<sup>72</sup> Brent Read, "Clubs to accept two-strikes drug policy," *The Australian*, 4 April, 2007, 20.

<sup>73</sup> Wayne Smith and Stuart Honeysett, "No way out," *The Australian*, 15 May, 2006, 17.

<sup>74</sup> [http://www.wada-ama.org/rtecontent/document/WADA\\_Code\\_Redline\\_3.0\\_to\\_2003.pdf](http://www.wada-ama.org/rtecontent/document/WADA_Code_Redline_3.0_to_2003.pdf).

therefore, will be on the athlete to prove that he or she did not intend to enhance their performance, and in Sailor's situation, for instance, that the drug had been taken purely for recreational purposes. Marshall suggests that this amendment could have resulted in Sailor receiving a ban shorter than the two years he received, perhaps in the vicinity of six to 12 months.<sup>75</sup>

It should also be noted that, unlike the AFL and the NRL, the ARU at present does not have a policy to test for recreational drugs on non-match days, though since Sailor's positive test, there have been suggestions that testing should also be carried out on non-match days.<sup>76</sup> This also raises the question as to whether a positive test in a confidential, out-of-competition test would have been enough to "warn" Sailor about the possible consequences of cocaine use, and therefore prevented the positive match day test that resulted in the two-year ban.

## Discussion

Drug testing in sport can be divided into four categories: performance-enhancing drugs during competition; performance-enhancing drugs out of competition; recreational drugs during competition; and recreational drugs out of competition. There is an acceptance that the testing of clearly performance-enhancing drugs, such as steroids, has to be done both during competition and out of competition to eliminate such drugs from sport. It is the testing of the recreational drugs, such as cocaine, that is more problematic. Drugs such as cocaine may or may not be performance enhancing, although they are so classified for any test carried out on competition or match day. Even if they are not performance enhancing, their use during competition can at least be seen as being against the "spirit of sport". It is also suggested that there is an element of occupational health and safety involved when a player of large size and speed is engaged in physical contact with others while under the influence of drugs such as cocaine and amphetamines. Although it has been established that players who take the field for a football game give implied consent to the level of physical contact allowed by the rules of that particular sport, the question arises as to whether they consent to physical contact from a player whose ability to make rational decisions is affected by a psychoactive drug such as cocaine. Therefore, there may be valid reasons, other than alleged performance enhancement, for banning the use of some recreational drugs on the day of a match. However, none of these justifications would appear to justify the out-of-

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<sup>75</sup> John Marshall, "Will the new WADA Code plug all the gaps? Will it make new ones?" Paper presented to the 17<sup>th</sup> Annual Australian and New Zealand Sports Law Conference, Gold Coast, Australia, 1–2 November, 2007, 4.

<sup>76</sup> James MacSmith, "Sailor affair prompts ARU to get tougher on drugs use," *The Sun-Herald*, 21 May, 2006, 114.



competition testing that is presently carried out by the AFL and is to be introduced by the NRL.

Education, rehabilitation and the health of the players have been highlighted by the AFLPA as the underlining reasons for the AFL three-strikes policy. There is certainly an argument that the AFL and the clubs have a duty to look after the health of their players, particularly as AFL players often commence a relationship with a team while still in their teen years and are often required to move interstate, away from their families. From the players' perspective, confidentiality for the first two positive tests has been of paramount importance with court action being taken in order to maintain it. Given the intrusive nature of the out-of-competition testing, the vilification and shaming that will accompany the naming of such players, the players' requirement of confidentiality for the first two positive tests is justified. From a practical perspective, what does a three-strike policy provide? It is suggested that, from such a perspective, the three-strike policy provides for one positive test to identify a "problem", and then one more test for what could be described as a "relapse", before the player's name becomes public and the player will be suspended by the AFL. This, it is suggested, would seem an appropriate outcome for a policy that is based on the education and rehabilitation of the players involved, particularly as addictive substances are involved. At the same time this should not be seen as a criticism of rugby league's proposed two-strike policy as being too harsh on the players, or on rugby union for presently not having any illicit drug policy. Ultimately it is for the individual sports to decide what best suits them. This is a very new area for sport, and it is impossible to judge at this stage what is the best policy. Maybe in five years or so it will be clear that the three strikes is clearly the best, or it is the two-strikes policy that is the more beneficial. Alternatively, time may prove that the AFL, rugby league and rugby union have all got it right with their present policies in regard to the needs of their particular sport.

While the AFL's three-strikes policy was attacked as being too lenient on drugs by the former Minister for Sport, Senator Brandis, particularly after Cousins' arrest on a drug charge, it seems to have escaped the minister's attention that even a one-strike policy would not have worked in Cousins' case as he had never tested positive. This does suggest that more testing, rather than the actual policy, may be more important in stamping out illicit drug use in sport, and perhaps Senator Brandis should have focused on the fact that the AFL was being tougher on drugs by increasing the number tests that will be carried out, rather than on the number of strikes in their policy.

Another area of law that may well be relevant to the suspension and termination of contracts for illicit drugs use by players is restraint of trade. While the legal

basis for the testing for illicit drugs on non-match days and the penalties that follow, is a contractual one, the law requires that terms restraining the players' ability to carry out their trade be a reasonable one. In Sailor's case a two-year suspension may well be seen by a court to be unreasonable, which is why the potential lightening of a sentence under the proposed 2009 WADA Code could well be in the interests of sport as it would make it easier to argue that the restraint is reasonable. Cousins' situation may provide an even stronger restraint of trade argument in that he never tested positive to illicit drugs and his contract was terminated after a drug charge that was soon dropped by the police,<sup>77</sup> yet the AFL is presently indicating that he will not be allowed to resume his playing career.

It is also suggested that, in a sport such as the AFL which implements a draft system, the recent happenings involving the West Coast Eagles could create another potential restraint of trade situation. The AFL draft can force 18-year-olds to move interstate to carry out their trade as AFL footballers. Given the drug-related issues that have been highlighted at the West Coast Eagles,<sup>78</sup> it is understandable that the parents of an east coast-based player may not wish to see their son drafted by the West Coast Eagles. There is then the potential that, if such a player has no choice but to go to the West Coast Eagles in order to play AFL football, such a player will take legal action on the grounds that the draft system is an unreasonable restraint of trade and should not apply to him. Although the AFLPA does accept the AFL draft, and there is presently no threat of the collective action that saw the demise of the rugby league draft,<sup>79</sup> that does not mean that an individual would not be successful. It should be noted that while there was no collective action against the Victorian Football League's (VFL)<sup>80</sup> old zone and transfer system, two players were successful in having the rules declared an unreasonable restraint of trade and that the rules did not apply to them.<sup>81</sup>

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<sup>77</sup> It should be noted that the charges were laid because Cousins was found to be in possession of a banned sedative, diazepam. However, Cousins had it in tablet form and the drug is only illegal in an injectable form, that is, liquid form. See Robert Lusetich and Greg Denham, "Cousins skips rehab and goes missing on streets of LA", *The Australian*, 1 November, 2007, 1.

<sup>78</sup> Note that the AFL has recently announced that Justice Gillard, a former Victorian Supreme Court judge, has been appointed to conduct an investigation into the West Coast Eagles: see Greg Denham and Robert Lusetich, "Judge hired for probe as Eagle flies in", *The Australian*, 8 November, 2007, 3; Greg Denham, "Probe into Eagles' conduct", *The Australian*, 8 November, 2007, 20.

<sup>79</sup> See *Adamson v NSWRL* (1991) 31 FCR 242.

<sup>80</sup> The VFL was formed in 1897 and was the premier Australian football competition in Victoria from that time. In 1982 the South Melbourne club played all its home matches in Sydney and the following year moved to Sydney and became known as the Sydney Swans. Five years later the West Coast Eagles and the Brisbane Bears (now Lions) were admitted to the competition. To reflect the increasing national identity of the competition it was renamed the AFL in 1990.

<sup>81</sup> See *Hall v Victorian Football League* [1982] VR 64, and *Foschini v Victorian Football League* (Unreported, Victorian Supreme Court, 15 April, 1983).

## **Conclusion**

While the topic of drugs in sport is a wide one, the emphasis of this article has been the specific question of the testing of illicit drugs on non-match days in situations where their use is clearly unrelated to any effect on performance that the drugs may have. The introduction of such policies has involved political pressure, although it is market forces that have had a major impact, because the AFL, NRL and rugby union all have to be conscious of the fact that situations and incidents involving illicit drugs can, and will, affect their corporate image, and therefore the money that they will be able to generate through sponsorship. At present, the AFL is committed to a three-strike policy and the NRL a two-strike policy, while rugby union has no such policy. Time will tell what proves to be the most effective policy. It is also almost certain that this article is merely a preliminary discussion of a topic that will remain in the news for many years to come.

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