

REGULATING THE PRIVATE CONDUCT OF EMPLOYEES

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The Australian Football League is itself a significant brand within the Australian community. Players drafted into the AFL are not drafted simply to kick and handball, but to be ambassadors for the interests of the football industry. This article examines the regulation of employee behaviour in Australia, examining the different regulations placed on AFL players as they ply their trade in a competitive and high profile industry, and compares this to regulations placed on a 'traditional employee' and the workplace regulation of the out-of-hours conduct of employees.

Introduction

The Australian Football League ('AFL') is a very considerable industry in Australia. The AFL's revenue (not including Club revenue) for 2010¹ was over \$335 million and players earned \$136.7 million between them. The AFL was linked to 15 broadcast and media partners and a further 27 corporate partners. An estimated 1 in 36 Australians were a member of an AFL club for that year and at a retail level, over \$165 million of AFL licenced products were purchased with consumers having a choice of more than 20,000 products.² In April 2011, the AFL announced that it had signed a \$1.253 billion broadcasting rights deal with Channel 7, Foxtel and Telstra for five years from 2012 onwards. This was up from \$780 million for the previous broadcasting rights deal.³

The AFL is clearly a significant brand within the Australian community. The interests of the AFL are broad. While their reason for being is essentially to coordinate the playing of football at an elite level in Australia, the AFL's interests extend to corporate boardrooms, the national psyche and the values and morals of 'ordinary Australians' who buy AFL memberships, products and tickets, who attend games, hear and watch games through AFL's broadcast partners and support the AFL's corporate sponsors by buying their products.

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¹ Financial Year ending 31 October 2010.

² Australian Football League, *2009 Annual Report* (2009) <www.afl.com.au>; Australian Football League, *2010 Annual Report* (2010) <www.afl.com.au>.

³ Jennifer Witham, *AFL's \$1.25 Billion Broadcast Deal* (28 April 2011) <<http://www.afl.com.au/news/newsarticle/tabid/208/newsid/112560/default.aspx>>.

These interests are shared by each of the clubs, who seek to capture and retain community support. Providing a contest and thereby providing their supporters with a reason to barrack and to buy, is a common goal held by the 18 AFL clubs.

It is into this world that an AFL player steps when he is drafted into the competition. It is important for players to understand the breadth of the AFL industry. He is not drafted simply to kick and handball, but to be an ambassador for all the interests of the industry. Therefore, conduct that is ‘unbecoming or likely to prejudice the reputation or interests of the AFL’⁴ under the AFL Player Rules could take a number of forms – it is not confined to conduct that takes place on the playing field.

This article examines the regulation of employee behaviour in Australia by virtue of the different regulations placed on AFL players as they ply their trade in a competitive and high profile industry, and compare this to regulations placed on a ‘traditional employee’. In particular, this includes the degree to which an employer may regulate the out-of-hours conduct of employees. This article comments on whether AFL players are treated more or less harshly than the ‘traditional employee’ in terms of the control placed on their out of hours conduct.

What regulates the conduct of an AFL player?

The following policies and agreements regulate AFL player conduct on and off the field:

- Standard Playing Contract (‘SPC’);
- Laws of Australian Football;
- AFL Player Rules;
- AFL/AFLPA Collective Bargaining Agreement (‘CBA’);
- Code of Conduct (‘the Code’);
- Anti-Doping Code;
- Illicit Drugs Policy;
- Racial and Religious Vilification Policy;
- Respect and Responsibility Policy; and
- Alcohol Code of Conduct.

⁴ Australian Football League, *Player Rules* (13 February 2013), rr 1.6 and 2.9 <http://www.aflpa.com.au/images/uploads/AFL_Rules_-_Feb_2013_FINAL.pdf> (‘*AFL Player Rules*’).

An AFL player contract is between the player, his club and the AFL. This structure requires the player to undertake activities for, and be responsible to, two separate entities. The SPC incorporates the listed agreements and policies, binding the players for the course of their employment as a player at a club.

An AFL player is arguably well compensated. In 2011, the minimum wage of an AFL player (excluding rookies and newly drafted players) was \$66,900 with a further \$2,900 for each senior match played.⁵ However, in 2012, it was reported that the average wage of an AFL player would be \$262,000, rising to \$301,000 by 2016.⁶ When compared with the 'traditional employee' the minimum wage of a footballer is slightly below that of the average wage earned by workers in the broader community. The Australian Bureau of Statistics ('ABS') reported in August 2011 that the average weekly wage for full time adults was \$1322.60 per week.⁷ This translates to \$68 775.20 per annum. However, while the average AFL player wage is significantly higher than the average wage of the 'traditional employee', these lofty heights do not last for long – the average AFL player's career lasts only for approximately four seasons,⁸ a lot less than the average working career of a 'traditional employee'.

It is important to note that players do not earn money from their football club for their footballing abilities alone:

The contemporary job description has widened beyond the physical and character attributes necessary to the tasks of running, jumping, tackling and kicking ... Character traits indicating capacities to handle celebrity, relative wealth, free time, demands from sponsors, clubs and the industry, assume more prominence in deciding who to recruit, who to keep on the list, who to spend time, energy and resources on developing.⁹

The high number of regulations imposed on an AFL player demonstrates that players are expected to engage in conduct that will not put at risk the interests of the AFL or the player's club.

⁵ Australian Football League and Australian Football League Players' Association Incorporated, *Collective Bargaining Agreement 2007–2011*, Sch B, cl 1 <http://www.aflpa.com.au/images/uploads/AFLPA_AFL_CBA_2007_2011_FINAL_2.pdf> ('AFL/AFLPA Collective Bargaining Agreement').

⁶ Michael Warner, 'Push and Shove Ends in Massive AFL Pay Deal', *Herald Sun* (online), 16 December 2011, <<http://www.heraldsun.com.au/sport/afl/push-and-shove-ends-in-massive-afl-pay-deal/story-e6frf9jf-1226223448870>>.

⁷ Australian Bureau of Statistics, *6302.0 – Average Weekly Earnings, Australia, Aug 2011* (22 February 2012), Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/CD8B821AF434F448CA2579AC000D5D46?opendocument>>.

⁸ Jason Murnane, *Restricted Free Agency: Evolution Not Revolution* (22 October 2008) AFL.

⁹ Christopher Hickey and Peter Kelly, 'Education or Regulation: Managing Behaviour Change in the AFL' (Paper presented at Australian Association for Research in Education Conference, Fremantle, Western Australia, 25–29 November 2007) 9 <<http://dro.deakin.edu.au/eserv/DU:30022618/hickey-educationorregulation-2007.pdf>>.

Therefore, although an AFL player is required to uphold high standards of behaviour and is beholden to many interests, are the behavioural expectations vastly different from those of a 'traditional employee', especially one who is compensated at a similar level? What are the behavioural expectations placed on a traditional employee?

Control of private activities of traditional employees

Employers do not have a broad right to exercise control over the out-of-hours behaviour of their employees. Indeed 'only in exceptional circumstances will an employer be given an extended right of supervision over the private activities of employees'.¹⁰

As discussed by Emma Bicknell Goodwin in her article 'Rules, Referees and Retribution: Disciplining Employee Athletes in Professional Team Sports':

The power to discipline for poor performance or misconduct has its roots in the high level of control exercised by masters over their servants prior to the shift to the conceptualisation of the employment relationship as one of contract. When this shift took place during the industrial revolution, there came a wider recognition of the separation between the employee's work and personal lives, and of a now restricted scope for the employer to exercise control over the employee's conduct, particularly out of hours.¹¹

The courts have been determined to ensure the employees are not beholden to their employers for their out of hours activities. However, increasingly there have been cases in Australia where employers have been found to have a legitimate interest in their employees' non-work behaviours.

In *Hussein v Westpac Banking Corporation*,¹² Staindl JR saw the critical element in whether or not an employer could exercise control over an employee's behaviour as being whether or not that behaviour 'has a relevant connection to the employment'.¹³ Judicial Registrar Staindl noted that:

a conviction on a drink-driving charge which occurred outside work hours would not be relevant to the employment of many people. However, it would be of critical relevance to a truck or taxi driver.¹⁴

¹⁰ *Graincorp Operations Ltd v Markham* (2002) 120 IR 253; (2003) EOC 93-250; [2002] AIRC 1318, [39].

¹¹ Emma Bicknell Goodwin, 'Rules, Referees and Retribution: Disciplining Employee Athletes in Professional Team Sports' (2005) 18 *Australian Journal of Labour Law* 240, 242 (footnotes omitted).

¹² *Hussein v Westpac Banking Corporation* (1995) 59 IR 103 ('Hussein'), cited in *Appellant v Respondent* (1999) 89 IR 407 (MacBean SDP, Duncan DP, Commissioner Deegan).

¹³ *Hussein v Westpac Banking Corporation* (1995) 59 IR 103, 107.

¹⁴ *Ibid.*

Further, in the first instance of *Appellant v Respondent*,¹⁵ Drake DP held that an employer could also exercise control over an employee where the activity of the employee:

might reflect on the [employer] in the conduct of its business or where the act of engaging in such activities might indicate unfitness for work or is intrinsically improper conduct ... This would vary according to the circumstances of the applicant and the business undertaking of the respondent.¹⁶

In the case of *Rose v Telstra Corporation Ltd*¹⁷ 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 or 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.

This view was also expressed in the New Zealand case of *Smith v The Christchurch Press Co Ltd*,¹⁸ where the Court of Appeal held that in order for an employee to be dismissed for conduct that occurred outside the workplace:

there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper

¹⁵ *Appellant v Respondent* (Unreported, Australian Industrial Relations Commission, Deputy President Drake, Print P9973, 20 May 1998).

¹⁶ Note that whilst this statement by Drake DP has been utilised by industrial relations lawyers, the facts of the case were such that if the matter was heard before the Tribunal today, a different outcome may result.

¹⁷ *Rose v Telstra Corporation Ltd* [1998] IRCommA 1592; [1998] AIRC 1592.

¹⁸ *Smith v The Christchurch Press Co Ltd* [2001] 1 NZLR 407, 413.

discharge of the employees' duties; because it impacts upon the employer's obligations to other employees; or for any other reason it undermines the trust and confidence necessary between employer and employee.

In relating private conduct to the public work of police officers, the Supreme Court of South Australia held that it was the views of fair minded members of the public that was a determining factor in the ability of the employer to judge the private behaviour of an employee.

If conduct of a private nature is to be relied upon as a warrant for dismissal from the force then, as a matter of logic, it must be of such a heinous type as, manifestly, to render it untenable that the perpetrator of it be retained in the force. Normally that will involve conduct amounting to serious immorality, dishonesty or irresponsibility patently inconsistent with the desirable character of a police officer – which would be perceived as such by a fair minded member of the public aware of the relevant facts.¹⁹

Social media and the regulation of traditional employment

In recent times, the use of social media by employees has become a hot topic. In 2010 and 2011, a number of cases were heard by Fair Work Australia ('FWA') which confirmed that similar principles apply to the postings by employees on Facebook and on their personal blogs (and presumably therefore Twitter) as to their conduct outside work. That is, if there is a sufficient connection to the workplace and the workplace may be damaged as a result of the posting, then there may be cause for termination of employment.

In *Fitzgerald v Dianna Smith t/as Escape Hair Design*²⁰ an employee posted a status update on her Facebook page which was 'Xmas "bonus" alongside a job warning, followed by no holiday pay!!! Whoooooo! The Hairdressing Industry rocks man! AWESOME!!'. The employee's contract was terminated due to the disparaging nature of the remarks and the employee made a claim for unfair dismissal. Although the posting was found to be insufficient to justify dismissal, Commissioner Bisset clearly found that social media postings have the capacity to be grounds for dismissal. Commissioner Bisset found that:

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

¹⁹ *Wickham v Commissioner of Police* (Unreported, Supreme Court of South Australia Full Court, Matheson, Prior and Debelle JJ, 6 and 11 May 1998), 18–9.

²⁰ *Fitzgerald v Dianna Smith t/as Escape Hair Design* [2010] FWA 7358 <<http://www.fwc.gov.au/decisionssigned/html/2010fwa7358.htm>>.

site to see. A Facebook posting comes within the scope of a *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.²¹

The Tribunal found that the posting was insufficient to justify dismissal because:

- the employee didn't name the employer;
- the Facebook page was only available to the employee's friends;
- the comments were only on the Facebook page for 2 weeks;
- the name of the employer was not readily accessible on the employee's Facebook page;
- the comments would not adversely affect either the hair dressing industry or the specific salon; and
- the employer did not take immediate action to raise concerns about the comments with the employee.

In *Dover Ray v Real Insurance Pty Ltd*²² an employee brought a claim of unfair dismissal. Ms Dover Ray made an allegation of sexual harassment which, when investigated was not substantiated. Ms Dover Ray then wrote about the matter on her blog. The company asked her to remove the posting and cease publishing the blog. This did not occur and she was summarily dismissed for misconduct. In finding that the termination of Ms Dover Ray's employment was not harsh, unjust or unreasonable, Commissioner Thatcher stated that:

... The blog identified Ms Dover Ray by photograph and name. It contained a date of 24 April 2009 and referred to the investigation she had just been through. For reasons to which I have already alluded it was about her workplace experience. Therefore it would have been clear to anyone who knew her that she was referring to her employment with Real. The blog may not have named Real, but it cannot be described as non identifying to anyone who knew Ms Dover Ray.

The blog is, in effect, an attack on the integrity and management of Real. The criticism of corruption is of such a nature and degree that it cannot be brushed aside ...²³

Therefore, in the traditional workforce, for a worker to be disciplined for private activities, there must be a clear connection between their work and the activity

²¹ Ibid [52].

²² [2010] FWA 8544 <<http://www.fwc.gov.au/decisionssigned/html/2010fwa8544.htm>>.

²³ Ibid [53]–[54].

under investigation. If the employer may be adversely impacted by the behaviour of the employee (including any posting on social media) the employer may have the right to discipline the employee, including by terminating employment.

How does this compare to the employment of an AFL footballer?

Controlling the private activities of an AFL Footballer

As an AFL footballer has a broader job description than merely ‘running, jumping, tackling and kicking’; the elements required by a court to allow the control of an employee are significant and also awkward. ‘The elevation of the sport star to the status of celebrity and Club or League to iconic brand, means that the idea that an elite performer has a *private life* and a *public life* that are separate ... is one that is increasingly problematic.’²⁴

Players are expected to be role models and behaviour that falls outside expectations results in disciplinary action against the player. It is clear that if there is a connection between the employment activities performed by the employee and their actions in their non-work hours, then employers, namely the AFL and the club, may be able to discipline the employee – the player.

Conduct outside football

The SPC states that a player will:

not engage in any dangerous or hazardous activity, including but not limited to, trail bike riding, professional boxing or wrestling, soccer, grid iron, karate, judo, hang gliding, parachuting, or bungee jumping, which, in the reasonable opinion of the AFL Club, may affect the Player’s ability to perform his obligations under this Contract, without first obtaining the consent of the AFL Club, which consent shall not be unreasonably withheld.²⁵

This clause provides a list of activities which are prima facie deemed to be dangerous to a player. The risk of injury, and therefore the risk to the club is deemed to be high in the specifically listed activities. In late 2008, Western Bulldogs player Jason Akermanis was involved in an accident when he rolled his Mini Race car on the warm up lap of a competition. Although uninjured,²⁶ it would have been a test of the SPC as to whether or not Akermanis should have sought the consent of the Western Bulldogs prior to driving in such a competition. Although the list of activities under the SPC is an unlimited one, to protect

²⁴ Hicky and Kelly, above n 9, 3 (original emphasis).

²⁵ Australian Football League, *Standard Playing Contract* (April 2008), cl 4.10.

²⁶ *Jason Akermanis Rolls Mini on Warm-up Lap* (24 November 2008) Press Portal <<http://www.pressportal.com.au/news/315/ARTICLE/3855/2008-11-24.html>>.

itself, the AFL should review the list, make it more extensive and include more current recreational activities. The CBA makes it clear²⁷ that where an injury is not received during an official duty (for example, playing, training, attending promotions or club functions) or is caused by the player's own negligence then the player has no right to receive injury payments from the club. As such, should Akermanis have been injured in the car accident, it would be open for his club to not pay him for the length of time he took to return to fitness to play football. This is very similar to the position of a 'traditional employee' who cannot claim any form of workers compensation payments should his or her injury occur outside the workplace without connection to the employment.

What are the working hours of a professional footballer?

The CBA sets out the leave entitlements of players. Players are entitled to one day off per week (Monday to Friday) and eight weeks leave at the end of the season. An additional one week of leave is provided over Christmas and players are also entitled to leave in accordance with the provisions of the relevant club's AFL Players Long Service Leave Certified Agreement. This provides a mechanism for 'a fair and equitable process by which any such accrued long service leave entitlement of an AFL Player can be addressed and extinguished'.²⁸ In effect, it means that players utilise their long service leave entitlement as it accrues rather than having this amount paid out at the end of their career, or taking three months leave, which would not be practical given the nature of the sport. Neither the SPC nor the CBA make mention of nominal working hours each day for the player, or average working hours over the length of the season.

Day off

As noted, players are entitled to one day off per week.²⁹ This day off is provided to players at the discretion of the club. The day off can also be utilised for travel to and from interstate matches – an activity that has a clear link between the player and the club. However, even if the player is not involved in travel, as will be shown in the following sections, there are very few behaviours which would not link a footballer to his club or the AFL and make him accountable, even when he is not under the direct control of his club.

Mad Monday

The traditional end of season celebration/commiseration of 'Mad Monday' is clearly an occasion where courts would find a link between the player and his Club. However, despite this, it has been one of the few times during the

²⁷ *AFL/AFLPA Collective Bargaining Agreement*, cl 11.4.

²⁸ Australian Football League, *Players Long Service Leave Agreement* [Adelaide Football Club Ltd] (6 December 2002), AG820230 PR925599.

²⁹ For break entitlements see: *AFL/AFLPA Collective Bargaining Agreement*, Sch B, cl 7.2.

year where a player has been able to drink, indulge, act out and attract public attention without there being severe ramifications from his club. There is the observation that it is ‘the one day of the year when guys can let their hair down’³⁰ and that we ‘expect footballers to have a bit of fun and let off a bit of steam at the end of the year’.³¹

However, from the end of the 2008 AFL season there was some mellowing of this view. The West Coast Eagles opted for a ‘Mild Monday’ and held a leadership development meeting to ‘remind players about the scrutiny the club was under by the AFL’.³² Barry Hall noted in an article in the *Daily Advertiser* that he:

could see where the powers that be in the game are coming from. The bad publicity the clubs receive and the tarnished image the game gets from these incidents are unwanted, and with the AFL’s head honchos really driving the point they want a good clean image for the game, I understand they would want to see the end of Mad Monday.³³

Then Carlton forward Brendan Fevola engaged in behaviour during his Club’s 2008 Mad Monday that had the Victorian Premier and family groups calling for restraint by the players during the celebrations. The spokeswoman for the Australian Family Association, Angela Conway, believed that it was the responsibility of the AFL to restrict player behaviour because the ‘league continually markets the game to families and yet this sort of behaviour is regularly going on’.³⁴ Clearly the public make a link between the job a footballer has and their behaviour on non-footballing days.

The ramifications for a Club of poor player behaviour were made clear when Fevola was traded by Carlton to Brisbane at the end of the 2009 season – following drunken behaviour at the AFL Brownlow Medal Ceremony. Fevola was originally fined \$10,000 by the Club,³⁵ however, despite having two years to run on his contract, was traded – his off field antics seemingly being the

³⁰ Barry Hall, ‘Mondays Can Still be Mad without Being Bad’, *Daily Advertiser* (online), 5 September 2008 <www.dailyadvertiser.com.au>.

³¹ Wayne Flower, Antonia Magee and Natalie Tkaczuk Skiora, ‘Push to Ban “Mad Monday”’, *Daily Telegraph* (online), 4 September 2008 <<http://www.dailytelegraph.com.au/sport/push-to-ban-mad-monday/story-e6frxni-111117383509>>.

³² AAP, ‘Mild Monday for Eagles’, *Herald Sun* (online), 2 September 2008, <<http://www.heraldsun.com.au/afl/teams/mild-monday-for-eagles/story-e6frf9no-111117370450>>.

³³ Barry Hall, above n 30.

³⁴ Flower, Magee and Tkaczuk Skiora, above n 31.

³⁵ Damian Barrett, Sarah Wotherspoon and Fiona Byrne, ‘Brendan Fevola Fined \$10,000 By His Club Carlton after Drunken Antics on Brownlow Medal Night’, *Herald Sun* (online), 23 September 2009 <<http://www.heraldsun.com.au/entertainment/confidential/fev-stumbles-through-night/story-e6frf96x-1225778329231>>.

driving force for the decision.³⁶ Note that Fevola was then subsequently delisted by Brisbane prior to the commencement of the 2011 season for further off-field indiscretions.

The off-field woes did not stop there for Carlton in the 2009 off-season. The players were involved in an ‘end of year booze cruise’ during which, it is alleged, rookie player Levi Casboult was handcuffed to another player and pressured into drinking. Two players were then involved in an altercation with security at Crown Casino and a third was arrested for being drunk. In discussing the fines and suspensions imposed on the three players, Club President Stephen Kernahan made a direct connection between the behaviour of the players in their private lives and the club in stating that ‘[t]he players are aware of the embarrassment and negative impact this has placed on the club and everyone connected with the Carlton Football Club’.³⁷ In condemning the behaviour, the Captain of Carlton, Chris Judd, referenced the place that players have as role models in society:

Using alcohol as a reward leads to binge drinking, and binge drinking really has no place at this club going forward. It is causing some pretty serious problems in the Australian community. As role models, we don’t want to be part of that.³⁸

Chris Judd has not always been as receptive to players being viewed as role models as he appears to be now, as is shown later in this article.

In the case of Mad Monday, the clubs appear to condone the behaviour of footballers – up to a point. That point appears to be violence at the instigation of the player. Involvement in ‘scuffles’ due to members of the public approaching players is not deemed to be an issue, even if the player is intoxicated. For example Melbourne football club’s Ben Holland was injured as a result of a fight that occurred when he was helping team mate Nathan Carroll into a taxi on Mad Monday.³⁹ This was not deemed serious for Ben Holland, but the fall out for Nathan Carroll, who was intoxicated, was that it contributed to his being delisted by Melbourne.⁴⁰ Also contributing to his delisting was Carroll’s

³⁶ Mike Sheehan, ‘Brendan Fevola Sacked by Blues’, *Herald Sun* (online), 30 September 2009, <<http://www.heraldsun.com.au/sport/afl/brendan-fevola-sacked-by-blues/story-e6frf9jf-1225781196915>>.

³⁷ Damian Barrett, ‘Carlton Punishes Drunken Trio Ryan Houlihan, Andrew Walker and Eddie Betts’, *Herald Sun* (online), 5 January 2010, <<http://www.heraldsun.com.au/sport/afl/carlton-punishes-drunken-trio-ryan-houlihan-andrew-walker-and-eddie-betts/story-e6frf9jf-1225816078946>>.

³⁸ *Ibid.*

³⁹ *Heat on AFL, Ben Holland, Brendan Fevola Over Wild Behaviour* (3 September 2008) Big Footy <<http://www.bigfooty.com/forum/showthread.php?t=488863>>, citing ‘Heat on AFL, Ben Holland, Brendan Fevola Over Wild Behaviour’, *Herald Sun* (online), 3 September 2008, <<http://www.heraldsun.com.au/story/0,21985,24285186-661,00.html>>.

⁴⁰ Ronny Lerner, ‘Carroll on the Outer’, *Sportal* (online), 13 October 2008 <<http://sportal.com.au/afl-news-display/carroll-on-the-outer-58492>>.

involvement ‘in bar fights in Greece and Germany’ during the summer break which resulted in him being locked up in jail at one point.⁴¹

The AFL confirmed at the end of the 2011 season that it would not ask clubs to ban Mad Monday celebrations. AFL Chief Executive Officer Andrew Demetriou stated that ‘[i]t is okay for people to get together and celebrate the end of the season but you’ve got to do it responsibly and I think clubs in the main have done that’.⁴² Demetriou continued that over the past few years the number of incidents attracting negative publicity have decreased and that ‘hopefully the message is getting through’.⁴³ Presumably this message is that behaviour which may impact negatively on the AFL or the Club are not acceptable.

While it is clear that the courts would agree with clubs disciplining players for indiscretions during Mad Monday, an activity falling within the work context, the parameters of discipline are unclear. If drinking to excess and engaging in anti-social behaviour is not condoned during the season, why is it condoned for this one day? It is suggested that players may have a case against their club should they be disciplined later because of inherent condoning of similar activities on this one day.

Eight weeks leave

Players are entitled to eight weeks leave each year from the date of their last match.⁴⁴ In addition, they receive one week’s leave between Christmas and the New Year. (The exact timing of the break can alter due to differing circumstances.) During this leave period a club can require the player to undergo two fitness tests at a place that is mutually agreed – one no earlier than four weeks into the leave and the second no earlier than six weeks into the leave. A player must also return from his leave with a fitness level appropriate for AFL players. Therefore, the player is regulated even during his leave and must appear at the approved location for a fitness test. This is vastly different from the requirements placed on traditional workers during their leave time.

Full-time traditional employees are entitled to four weeks leave each year (five weeks for designated shift workers). It is unlawful to terminate an employee on annual leave and use their annual leave as part of the required notice period.⁴⁵ Notice must begin following the return of the employee from leave. Annual leave is a benefit given to employees, so an employer could not enforce a requirement

⁴¹ Flower, Magee and Tkaczuk Skiora, above n 31.

⁴² Cited in Nino Bucci, ‘Tiger “Slapped Woman on Mad Monday”’, *The Age* (online), 8 September 2011 <<http://www.theage.com.au/afl/afl-news/tiger-slapped-woman-on-mad-monday-20110908-1jyh5.html>>.

⁴³ Ibid.

⁴⁴ For leave entitlements see: *AFL/AFLPA Collective Bargaining Agreement*, Sch B, cl 6.

⁴⁵ See, eg, *McSharer v Hospital Employees’ Industrial Union of Workers* (1974) 55 WAIG 1545.

that an employee attend work during this period – especially an employee not in a management position. This is because:

regardless as to whether the entitlement to annual leave arises under an award, industrial agreement or common law contract of employment, in any of those cases, the entitlement to leave constitutes a vested right which cannot be interfered with unless there are clear words in the contract of employment or industrial instrument to the contrary.⁴⁶

The annual leave entitlements and requirements for AFL players are written clearly into their contracts via the express incorporation of the CBA. As a result, players, irrespective of their role in the team, are required to attend for fitness assessments during their leave.

The obvious point of distinction for traditional employees is for lawful and reasonable directions given to high level employees. Requiring an employee who is not in a management position to return from overseas to attend to a trivial matter could not be considered reasonable; however, requiring a manager to return from overseas if the business was under threat of closure might be reasonable. The individual circumstances are relevant for traditional employees, whereas there appears to be a blanket approach for AFL players.

Use of image and private conduct

As part of the SPC and the CBA, a player agrees to allow the use of his likeness and image to promote the sport and be part of a range of licensing activities undertaken by the AFL. The CBA states that a '[p]layer cannot unreasonably withhold his approval to the use of his Image in AFL Licensing Activities'.⁴⁷ As a result of these regulations, the player's image is placed not only on information about his profession, such as the club and AFL websites, the AFL Record and other game day information, but also on trading cards, stickers, posters, greeting cards, badges, mugs, DVDs and computer games. This places the persona of the player in a wider sphere than a traditional employee and, arguably links them to their employer even when they are out in public undertaking a private activity. The player's image may be responsible for product purchases by the public. Tainting this image has a direct impact on the ability of the licensee to sell product. The sphere in which the player operates as an employee is very broad – consequently the range of player behaviours which may impact on the employer are also very broad.

The employment conditions of a player are therefore not simply to play football, but in addition to be an ambassador for his employer's club, the AFL, the sponsors and the licensees. These diverse roles are reflected in the policies and

⁴⁶ *Leahy v Liquor, Hospitality and Miscellaneous Union* [2009] WAIRC 00580, [243].

⁴⁷ *AFL/AFLPA Collective Bargaining Agreement*, Sch E, cl 2(b)(iii).

agreements that bind the players. The Code of Conduct specifically 'seeks to deter conduct which could have an adverse affect on the standing and reputation of the game, the AFL, AFLPA and all participants'.⁴⁸ The CBA also provides that the player will promote the various aspects of the sport. Clause 20.3 states that:

The promotional activities that a Player shall make himself available for, under clause 20.1, shall include those directed at:

increasing participation in, and development of, Australian Football;

- (a) increasing match attendance;
- (b) increasing AFL and AFL Club membership;
- (c) building and improving community relations; and
- (d) promotion of AFL or the AFL Club to Protected Sponsors or AFL Club Protected Sponsors (excluding appearances directly related to products or services of sponsors or the promotion of sponsors to the public ...⁴⁹

The link between the player and the sponsors is discussed in the next section.

Sponsors and private conduct

Due to the financial requirements of the competition, sponsors are an integral part of the sport. There are many reasons why businesses decide to sponsor sport, such as to: (a) demonstrate good citizenship; (b) demonstrate interest in the community; (c) generate visibility for products and services; and, (d) generate favourable media interest and publicity⁵⁰. It is important that the sport itself ensures it provides these benefits to the sponsor. It is clear that sportspeople take the benefits of sponsorship. This therefore means that they are caught by the subsequent intrusion into their personal lives. If a sponsor gains positive publicity from its links to a sport, then equally it will take on any negative connotations of an entity which does not control its players (ie one which allows its players to engage in conduct that is 'patently inconsistent with the desirable character' of an AFL player). Sponsors look unfavourably on poor player conduct and in some cases have ceased or threatened to cease

⁴⁸ Australian Football League, *Code of Conduct* (January 2008), cl 1.2 <http://www.aflpa.com.au/images/uploads/Code_of_Conduct_-_08_1.pdf> ('*AFL Code of Conduct* (2008)').

⁴⁹ *AFL/AFLPA Collective Bargaining Agreement*, cl 20.3.

⁵⁰ R J Ensor, 'The Corporate View of Sports Sponsorship' (1987) 11(19) *Athletic Business* 40, cited in Kristie McCook, Douglas Turco & Roger Riley, 'A Look at the Corporate Sponsorship Decision-Making Process' (1997) 1(2) *Cyber-Journal of Sport Marketing* <<http://fulltext.ausport.gov.au/fulltext/1997/cjsm/v1n2/mcook.htm>>.

their sponsorship because of player misconduct.⁵¹ The AFL and clubs believe that they must uphold community values and this is why they monitor a player's personal time. The 24 hours a day, 7 days a week, 52 weeks a year employee is a reality in sports that must protect their interests and those of their corporate partners.

Role model status and private conduct

The debate about footballers as role models is ongoing. While some players actively promote themselves as role models (such as those who participate in the *VFL's G Footy Role Model Program* or the *Whitellion Sports Role Model Program*) many find the title does not sit well.

A role model is essentially a person whose behaviour, example, or success is or can be emulated by others.⁵² Is this the same as a person who is in the public spotlight and who has their behaviour monitored by journalists?

Clearly many players are idolised by children. Walls are adorned with posters, guernseys with a player's number, image, and for those lucky enough, their autograph. But does this make the player a role model, or simply the centre of interest? Does this interest mean that a player must be made to take responsibility for his non-footballing behaviour? Or is the public interest in a player more a form of voyeurism than a genuine belief that the player's off-field behaviour can indeed be emulated by others?

In an article on 'Real Footy', sports psychologist Gavin Freeman noted that most footballers are not role models:

The notion that elite athletes are role models can be a real burden ... My personal belief is that they are not role models, they are athletes. They are no more a role model than a top CEO of a top company. You've got to ask yourself is an AFL player truly, really a role model for younger people? Would they still be a role model if they were not an elite athlete? The answer in most cases is no.⁵³

⁵¹ See, eg, Rafael Epstein, 'Sexual Misconduct Allegations Levelled at St Kilda AFL Team', *ABC* (online), 17 March 2004 <<http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/am/content/2004/s1067510.htm>>; Matt Brown, 'Tigers May Lose Sponsor over Drink-Driving Charge', *ABC News* (online), 1 April 2005 <<http://abconline.net.au/news/stories/2005/03/31/1335483.htm>>. This is not isolated to the AFL with NRL clubs also subject to these behaviour pressures: 'Sharks "Lose Major Sponsor LG"', *Yahoo 7 Sport* (online), 21 May 2009 <<http://au.sports.yahoo.com/news/article/-/5583586/sharks-lose-major-sponsor-lg>>; Steve Jancetic, 'Roosters in Crisis Talks with Sponsors' *WA Today* (online), 8 July 2009 <<http://www.watoday.com.au/breaking-news-sport/roosters-in-crisis-talks-with-sponsors-20090708-dda4.html>>.

⁵² See, eg, 'Role model' (2013) Dictionary.com <<http://dictionary.reference.com/browse/role+model?s=t>>.

⁵³ Chris Johnson, *On-Field Skills No Use to Errant Sports Stars, The Age – Real Footy* (online), 18 March 2008 <<http://www.realfooty.com.au/news/news/onfield-skills-no-use-to-errant-sports-stars/2008/03/18/1205602388374.html>>.

Chris Judd, in his days as Captain of West Coast Eagles, wrote an article on the West Coast Eagles website, questioning the role of footballers as role models:

I think many people in the community view footballers as role models, I would never dispute ... But if I were a parent, I would want my children to have as their role models someone they actually know. If people think that because someone is on TV, that makes them a better person than somebody else, then that is misguided.

However, the title of 'role model' is bestowed on players generally and both their on-field and off-field behaviour is subjected to the requirements that come with this title. Their behaviour is held up against a standard of conduct expected of professional employees – not the standard expected of young people of similar ages and backgrounds to the young men who play professional football.

Indeed, the AFL and the clubs have an expectation that players will be role models. The development of programs such as the Racial and Religious Vilification Policy, the Respect and Responsibility Program and the Alcohol Code of Conduct have elements of player role model status within them. It is believed that if AFL players can provide a positive example, then this will effectively 'rub off' on the community at large. When launching the Alcohol Code of Conduct, then Federal Minister for Sport, Kate Ellis stated that:

We know that sport is an important part of Australian culture and whilst it's not responsible for the wider problem of binge drinking, we do think sport can use its influence to be part of the solution.⁵⁴

Footballers are required to adhere to standards of conduct in their personal time which are completely separate from their main role as football players. Each of these Codes binds the players through incorporation into the SPC. This position as a role model means that the player is linked to the interests of his club and the AFL for all of his activities. The line is further blurred between public and private lives, making control of the players' private lives legally enforceable in a way that traditional employees are able to avoid.

There does appear to be a distinction in the Australian psyche between the private lives of footballers and the private lives of other entertainers such as actors. While both groups are often called upon as role models, the negative publicity associated with poor AFL player behaviour appears far greater than the negative publicity associated with poor behaviour by Australian actors. In June 2009, two *Home and Away* actors were the subjects of negative press. One, Jodi Gordon, it was alleged, had called the police whilst she was having

⁵⁴ AAP, 'Alcohol Code Doesn't Stop Mad Monday Celebrations', *Herald Sun* (online), 18 January 2009 <<http://www.news.com.au/heraldsun/story/0,21985,24928292-661,00.html>>.

drug induced hallucinations⁵⁵. The other, Lincoln Lewis (coincidentally the son of Rugby League player Wally Lewis) ‘filmed a sex act with a teenage TV starlet and showed it to cast and crew on his mobile phone’.⁵⁶ Whilst both actions were viewed negatively in the press, there was no suggestion that either would lose their job or that Channel 7 would lose revenue from advertisers during *Home and Away*. This seems, on the face of it, to be a very different reaction than if either incident had involved an AFL player.

Media and private conduct

There are some 1,500 media personnel accredited by the AFL. This covers press, television, radio, internet, photographers and statisticians.⁵⁷ Given that the maximum number of listed AFL players (including veterans and rookies) is 792 (44 players per club), there is a ratio of nearly 2 accredited media per player. The outcome is that it is very difficult for a player to ever undertake an activity that does not attract the interest of the media, and therefore the public. Further, the high use of phone cameras, coupled with the dominance of social media also means that avoiding the public spotlight is difficult for AFL players during their private activities.

Therefore, simply because a player’s activities become known to the public, does this make the player accountable to his club and the AFL because of these activities? It seems that due to their status as role models, their involvement in licensing, their link to the attraction of sponsors and the promotion of the game, the answer is yes.

Social media and AFL players

The AFL Players’ Association website currently lists 190 current players and 45 former players’ twitter accounts.⁵⁸ The use of AFL player Twitter accounts came to the fore in 2011 when two Melbourne football club players were fined for their tweets. Both players tweeted their displeasure at a ban imposed by the Tribunal on a teammate.⁵⁹ Their tweets were found by the AFL to be a criticism of umpires and the pair received \$2,500 fines (which were suspended). The club was also given a \$5,000 suspended fine.

⁵⁵ Kara Lawrence and Holly Byrnes, ‘Home and Away Star Jodi Gordon Found Cowering in Bikie’s Bedroom’, *Herald Sun* (online), 5 June 2009 <<http://www.news.com.au/heraldsun/story/0,21985,25589025-661,00.html>>.

⁵⁶ Colin Vickery, ‘Todd Lasance is Wholesome Change for Home and Away’, *Herald Sun* (online), 28 July 2009 <<http://www.news.com.au/heraldsun/story/0,21985,25848601-5006022,00.html>>.

⁵⁷ *AFL and the Media*, Australian Football League (7 August 2009) <<http://www.afl.com.au/News/newsarticle/tabid/208/newsid/82192/default.aspx>>.

⁵⁸ As at January 2011, see: <http://www.aflpa.com.au/beyond_the_jumper/players_on_the_web/>.

⁵⁹ Guy Hand and Melissa Woods, ‘AFL Fines Melbourne Demons Players for Twitter Reaction to Teammate Jack Trengove’s Tribunal Ban’, *Foxsports* (online), <<http://www.foxsports.com.au/afl/afl-premiership/afl-fines-melbourne-demons-players-for-twitter-reaction-to-teammate-jack-trengoves-tribunal-ban/story-e6ffr3e3-1226055590286>>.

The AFL made it clear that a player's postings on Twitter are not immune to the rules of the AFL and subsequent sanction. To paraphrase Commissioner Bisset in *Fitzgerald v Dianna Smith t/a Escape Hair Design*, it would be foolish for an AFL player to think that they may say as they wish on their Facebook/Twitter page with total immunity from any consequences.

Sanctioning players for private conduct

In *Hussein*, the court found that a drink driving conviction would not affect the interests of employees unless they were engaged in a profession that involved driving. While a player is not employed to drive a taxi or a truck, a drink driving charge may still affect the interests of the AFL and his club. For example, in 2005 the Richmond football club lost its sponsorship from the Transport Accident Commission ('TAC') following a drink driving incident of a player⁶⁰ and in January 2008, the Collingwood football club withdrew from its sponsorship arrangements with the TAC following the drink driving of a player. Previously, in June 2004, following a speeding incident by one of the players, the TAC had fined the Collingwood football club \$10,000 of its sponsorship amount and 'Collingwood had also been put on notice that any similar offence by a Collingwood player or official could result in the instant termination of the TAC's major sponsorship of the club'.⁶¹ The actions of these players, on their own personal time, clearly impacted on their clubs and reflected on the 'conduct of [its] business'. Given the breadth of a player's employment responsibility, drink driving or speeding may damage the brand of the club and therefore leave the player open to sanctions even if the club does not have a sponsorship with the TAC. Indeed this has happened on several occasions.⁶²

Just as a police officer will be held accountable for private conduct that is 'patently inconsistent with the desirable character of a police officer', so too will an AFL player. Similarly, just as police officers 'voluntarily undertake the curtailment of freedoms which they would otherwise enjoy'⁶³ so too do AFL footballers. In upholding community values, the AFL and the clubs place

⁶⁰ Transport Accident Commission (Vic), *TAC Terminates Richmond Sponsorship – Media Release* (1 April 2005) TAC <<http://www.tac.vic.gov.au/media-room/media-releases/2005-media-releases/tac-terminates-richmond-sponsorship>>.

⁶¹ Transport Accident Commission (Vic), *TAC Fines Magpies \$10,000 over Speeding Incident – Media Release* (17 June 2004) TAC <[http://www.tac.vic.gov.au/media-room/media-releases/2004-media-releases/tac-fines-magpies-\\$10,000-over-speeding-incident](http://www.tac.vic.gov.au/media-room/media-releases/2004-media-releases/tac-fines-magpies-$10,000-over-speeding-incident)>.

⁶² See, eg, Aaron Edwards who was suspended from the NAB competition, the first four games of the season and fined \$5000 by the leadership group for driving 38 km over the speed limit while having alcohol in his system: Finn Bradshaw, 'Edwards Suspended For Speeding', *Herald Sun* (online), 26 January 2009 <<http://www.heraldsun.com.au/afl/teams/edwards-suspended-for-speeding/story-e6frf9m6-1111118668947>>; Lance Picioane and Danny Jacobs at Hawthorn football club: AAP, 'Drink-Driving Hawks Pair Fined \$5000' *Sydney Morning Herald* (online), 6 May 2004 <<http://www.smh.com.au/articles/2004/05/05/1083635206730.html?from=storyrhs>>; Chad Morrison of Collingwood football club being fined \$20 000 by the club in 2006; and Rookie Brisbane Lions player Daniel Dzufer being fined 5 % of his salary for a drink driving incident in 2008.

⁶³ *Police Service Board v Morris & Martin* (1985) 156 CLR 397, 409 (Wilson and Dawson JJ).

themselves in the position of the ‘fair minded member of the public’ in terms of their expectations of the players. Clubs clearly believe that a ‘fair minded member of the public’ expects an AFL footballer to reach standards that do not include alcohol abuse or public drunkenness, drug taking, drink driving, speeding, aggressive behaviour, lying, gambling or associating with people with criminal records. While the first four of these traits constitute illegal conduct, the remainder do not or may not, and yet all have been used by the AFL and/or the clubs to sanction AFL players.⁶⁴

How are players sanctioned?

Increasingly, players are sanctioned by a club’s Leadership Group. This group is made up of senior players of the club, who come together to decide an appropriate sanction for the player under the AFL Players’ Code of Conduct. The 2007 version of the Code was not intended to apply ‘to activities engaged in by a Player of a private nature’⁶⁵; however, the 2008 version has watered this statement down to ‘an AFL Player is entitled to have his privacy including that of his family and friends respected whenever possible’.⁶⁶ This change is perhaps an admission by the AFL that the players are no longer free to engage in activities as they choose during their own time. This change also demonstrates effectively that it is increasingly difficult to draw a line between the public and private life of a player due to the diverse interests of the AFL and the clubs and their sponsors.

The purpose of the Code is stated to be:

to promote and strengthen the good reputation of Australian Rules Football, the AFL Competition, the AFL, AFL Clubs and AFL Players by establishing standards of performance and behaviour for AFL footballers. The primary focus of the Code is to educate Players on the importance of maintaining appropriate standards and to provide further education, counselling and other assistance to Players whose conduct does not conform to the appropriate standard and on the adverse affect such conduct may have on the standing and reputation of the game, the AFL, the AFL Club and the player himself.⁶⁷

The use of the words ‘conform to the appropriate standard’ and the reference to the standing and the reputation of the game are very broad and allow the Code to be used by the AFL and the clubs to sanction a very wide set of behaviours.

⁶⁴ While it is unnecessary for the purposes of this paper to outline each instance, there have been examples of each of these types of conduct resulting in a player being sanctioned by his club.

⁶⁵ *AFL Players’ Code of Conduct* (2007), cl 1.2.

⁶⁶ *AFL Code of Conduct* (2008), cl 1.2.

⁶⁷ *AFL Code of Conduct* (2008), cl 1.2.

Clearly the Code is not confined to football related activities. The 2007 Code required the players to ‘uphold the highest standards of professional conduct so as not to compromise the integrity and the dignity of AFL football, the AFL, Clubs, the AFLPA and other AFL Players’⁶⁸ and sought ‘to deter conduct which could have an adverse affect on the standing and reputation of the game, the AFL, AFLPA and all participants.’⁶⁹ Fines of up to \$10,000 were payable by the player for a breach of this standard. Interestingly, a breach of the fitness clause (which impacted directly on the supposed reason for employment of the player) attracted a fine of only \$5,000 – again demonstrating the importance of the non-football playing related element of the players’ employment.

The 2008 Code has modified the way fines are imposed on players. There are two levels of conduct breaches: minor breaches and serious or persistent breaches. Minor breaches for conduct such as being late for or failing to attend training, wearing incorrect apparel, or being late for a match attract a maximum monetary forfeiture of \$200 for a first offence and \$500 for other breaches. Serious or persistent breaches, which include ‘public conduct by a Player that brings the Club, the AFL or AFL Football into disrepute’ attract a maximum fine of \$5,000 for a first offence (not exceeding 5 per cent of the player’s base salary) and a fine of between \$2,500 and \$10,000 for other breaches (not exceeding 7.5 per cent of the player’s base salary).⁷⁰

The 2008 Code also provides for the imposition of larger pecuniary penalties on the player. This clause reads:

Where a breach of this Code

- (a) involved wilful misconduct that would constitute grounds for summary termination of the Player’s contract; and/or
- (b) results in the Player’s AFL Club suffering significant pecuniary loss which is directly attributable to the specific conduct in breach of the Code

The AFL Club shall be entitled to impose a monetary forfeiture which exceeds the maximum amounts set out in Clause 5.2(c) above, provided that the amount of the forfeiture does not exceed:

- (c) the amount of pecuniary loss suffered by the Club; or
- (d) 15% of the Player’s base playing salary in the relevant year (whichever is the lesser).⁷¹

⁶⁸ *AFL Players’ Code of Conduct* (2007), cl 2.1.

⁶⁹ *AFL Players’ Code of Conduct* (2007), cl 1.2.

⁷⁰ *AFL Code of Conduct* (2008), cll 5.1-5.2.

⁷¹ *AFL Code of Conduct* (2008), cl 5.3.

This is an interesting addition to the 2007 Code and provides that there must be significant loss directly attributable to the breach by the player. This would work well for loss such as damage to a hotel room, where the amount of loss would be quantifiable. However it may not operate as effectively where a player's behaviour is the 'final straw' for the loss of a club sponsorship – how much could be attributable to that player and/or to other players who may also have caused the loss of the sponsor?

The Code does not include the processes for making a finding regarding the actions of a player. Rather, for a minor breach it states that 'the disciplinary action to be taken by the Club shall be determined by the Player Leadership Group'.⁷² The Code stipulates matters which must be considered when imposing a disciplinary measure⁷³ but is silent on the rights of the player to be heard or their ability to provide evidence on their own behalf.

Players can also be sanctioned through the dissolution of their contracts or brought before the AFL Commission for breaching the Player Rules. Rule 2.9 of the AFL Player Rules (January 2008) reads:

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 ...⁷⁴

It was under this clause that former West Coast Eagle player Ben Cousins was found guilty by the AFL Commission in November 2007 and had his AFL registration revoked thereby preventing him from playing football at a senior level. This case is interesting in that the criminal charges against Cousins that were deemed to be the 'final straw' in his behaviour were dropped by the police on the 13 November 2007, yet the AFL still sanctioned Cousins on 19 November 2007. Cousins had also been sacked by the Eagles on 16 October 2007 and therefore at the time of the Commission hearing, he was not an AFL player. The *West Australian* summed up the situation saying that:

While all charges were subsequently dropped, there is little doubt the 2006 premiership winner has done serious damage to the image of the game and AFL officials have well and truly tired of his repeated links to drug use and brushes with the law.⁷⁵

⁷² *AFL Code of Conduct* (2008), cl 5.1.

⁷³ *AFL Code of Conduct* (2008), cll 5.1 and 5.2.

⁷⁴ *AFL Player Rules*, r 2.9.

⁷⁵ 'Cousins to Face AFL Commission This Morning', *West Australian* (online), 19 November 2007 <www.thewest.com.au>.

In providing an explanation for the ban, AFL Chief Executive Officer, Andrew Demetriou touched on the broader responsibilities that players have and noted that their situation is not to be abused:

If you're a player out there that isn't appreciating the privilege that you've been given, isn't understanding that these opportunities don't come around that often, if you're willing to transgress or behave in a manner that is going to bring disrepute to our game, the commission will have no hesitation in dealing with it whatsoever.⁷⁶

The AFL Commission took the view that, as custodian of the game, it was required to ensure that the players protect the interests of the sport, interests that extend to players understanding their privileged position as elite sportspeople. The need to protect the image of the sport and its interests were the reasons for revoking Cousins' registration; it was not his football or athletic ability.

Investigation of an employee while there is a criminal investigation on foot

Although it may seem harsh that an employee, such as Ben Cousins, can be disciplined even when a criminal investigation has not yet run its course, employers should be aware that a criminal investigation by a law enforcement agency is entirely separate to an employer based investigation of employee conduct. An employer can make a decision regarding the discipline of an employee (including termination of employment) before a matter has been referred to the police and/or before a decision has been made by a court. This is because an employer is not obligated to prove the conduct on the balance of probability or beyond reasonable doubt.

In *Howell v John Bennell's Discount Fuel*⁷⁷ the Commission held that:

Provided the employer has fair and reasonable grounds for believing that the offence occurred, that there was a 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.

This decision was following the much quoted decision in *Bi-Lo Pty Ltd v Hooper*⁷⁸ where 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

⁷⁶ 'AFL Bans Cousins for 12 Months' *West Australian* (online), 19 November 2007 <www.thewest.com.au>.

⁷⁷ *Howell v John Bennell's Discount Fuel* (2001) 167 QGIG 202; [2001] QIRCComm 87.

⁷⁸ *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224.

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.⁷⁹

Therefore, the test for employers is that they have a reasonable belief that the employee has committed the action and not that they have reached the same level of knowledge as that of a police investigation. Note that there is no direct obligation under the *Crimes Act 1958* (Vic) for a person to report an offence such as theft by an employee to the police.

Can an employer fine a traditional employee?

Is it possible for an employer to follow the example of the AFL and fine employees for breaches in their behaviour whether for in-work or private activities connected to their role?

It is very rare in Australia for an employer to be able to fine an employee. Public Service employees are an exception to this and can be fined for breaches of the Public Service Code of Conduct,⁸⁰ however, the fine cannot be more than 2 per cent of the employee's yearly salary.⁸¹

In non-public service workplaces, a fine would be considered a contractual penalty. As such there would need to be an estimate of the damages that have been incurred by the employer as a result of the employee's behaviour. This is very difficult to calculate. Certainly employers can withhold wages where an employee has engaged in industrial action; however this is an amount able to be objectively calculated on the basis of the wages earned by that employee during the period of the industrial action. Similarly employers can recoup the cost of any losses caused directly by an employee's negligence⁸². However, where an employee has engaged in behaviour that is contrary to the interests of the workplace, but not engaged in behaviour that could lead to termination,

⁷⁹ Ibid 229.

⁸⁰ *Public Service Act 1999* (Cth), s15(1)(e).

⁸¹ *Public Service Regulations 1999* (Cth), r 2.3(2).

⁸² See, eg, *Rowell v Alexander Mackie College of Advanced Education* (1988) 25 IR 87; 7 MVR 157; (1988) Aust Torts Reports 80-183.

an employer cannot impose a fine as a disciplinary action. Therefore, it would be very difficult for an employer of a traditional employee to follow the behaviour of the AFL in fining employees for indiscretions which may damage the 'brand' of their company. An alternative for employers may be to provide terms in an enterprise agreement that allow for a short suspension without pay where the employee may otherwise be dismissed. This could apply in circumstances where the employee has engaged in serious misconduct and the employer would have a right to terminate the employment of the employee.

Implied terms of good faith and mutual trust and confidence

There is an area of evolving case law in Australia regarding implied rights under a contract of employment – specifically the implied term of mutual trust and confidence. The implied duty of good faith is owed by employees to employers. The implied duty of mutual trust and confidence, if it exists under Australian law, is owed by employers to employees.

The duty of good faith and footballers

As discussed previously, the interests of the AFL and clubs are very broad. In these circumstances, a breach of the duty of good faith is a real issue for AFL footballers. As the duty 'can be understood to prohibit acts outside the employment which are inconsistent with the continuation of employment'⁸³ a breach of this duty might involve drunkenness, lack of fitness, injury caused by non-footballing activities or not attending training on time. Interestingly, for traditional employees, not obeying a lawful instruction is a breach of this duty. When applied to AFL players, it is possible that consistent breaches of on-field team rules/tactics could be a breach on this basis. These actions may not be consistent with the fulfilment of the player's duty as a professional footballer. It is more likely, however, that the player would have a footballing career substantially shorter than the four season average previously mentioned.

The duty of good faith has another application in employment: that of a duty to act honestly.

Honesty during an investigation into conduct

There is an obligation on employees to act honestly during any investigation into their conduct. Failure to do so could result in a breach of trust between the employer and employee and provide grounds for dismissal.

⁸³ Carolyn Sappideen, Paul O'Grady and Geoff Warburton, *Macken's Law of Employment* (Lawbook Co, 6th ed, 2008), 228.

In *Streeter v Telstra Corporation*,⁸⁴ Acton and Cartwright SDP noted that it was the employee's dishonesty that was at the core of the break down of the working relationship:

Ms Streeter's dishonesty with Telstra during the investigation, however, meant Telstra could not be confident Ms Streeter would be honest with it in the future. The relationship of trust and confidence between Telstra and Ms Streeter was, thereby, destroyed.⁸⁵

At first instance, the employee's dishonesty was not viewed as a valid reason for termination as the matter was a personal one and not related to her day to day duties at Telstra. As a result it did not destroy the working relationship between the parties. On appeal, the Commission held that Ms Streeter had an obligation to answer 'reasonable enquiries honestly'⁸⁶ and that the Commission could not see that the 'relationship of trust can be compartmentalised'. If an employer, during an investigation, makes 'reasonable enquiries' regarding the personal behaviour of an employee, the employee must answer these enquiries honestly. To not do so places them in danger of destroying the working relationship and therefore facing termination.

AFL players and honesty

In 2008, Collingwood football club players Heath Shaw and Alan Didak were suspended by the club following a drink driving incident. However, the suspension was not due to the car accident or that Heath Shaw had a blood alcohol concentration ('BAC') reading of 0.14. Rather, the suspension was because Shaw lied about Didak being in the car at the time of the accident. Shaw was also fined \$10,000 and Didak \$5,000. It was viewed that lying about the incident was worse than the incident itself.

In the last five years, an average of 302 people have lost their lives on Victorian roads and in 2010 (1346 Australia wide), 24 per cent of all Victorian drivers and motorcyclists killed had a BAC of over 0.05.⁸⁷ Yet despite these statistics, the players' conduct in lying to the club was seen as more harmful than the drink driving incident. Gary Pert, Chief Executive Officer of Collingwood told the media '[w]hen you have two of your key players looking the president, the coach and their own teammates in the eye and actually lying to them, it really destroys the essence of the club'.⁸⁸ Former Collingwood Captain and then media commentator, Nathan Buckley was also adamant that lying to the club

⁸⁴ *Streeter v Telstra Corporation* [2008] AIRCFB 15; (2008) EOC ¶93-488; (2008) 170 IR 1.

⁸⁵ *Ibid* [17].

⁸⁶ *Ibid* [20].

⁸⁷ For road safety statistics, see: *Road Safety Summary* (October 2011) Transport Accident Commission (Vic) <<http://www.tacsafety.com.au/upload/rss-oct-2011.pdf>>.

⁸⁸ Reko Rennie and Adrian Lowe, 'Didak, Shaw Out For Season', *The Age* (online), 5 August 2008 <<http://www.theage.com.au/national/didak-shaw-out-for-season-20080805-3q6a.html>>.

was a breach of trust: ‘by being dishonest to the people in an environment where you rely on honesty and you rely on trust is unforgivable.’⁸⁹

This stance by the club is similar to that taken by the courts in the *Streeter* case – that breaching the relationship of trust and confidence, even though the behaviour involved was out-of-hours, destroyed the ability of the parties to work together. Given the stance by the courts, it would have been open for the Collingwood football club to terminate the playing contract of Heath Shaw.

All employees, including AFL players should be made aware of the obligation to answer reasonable questions honestly during an investigation into their behaviour. It is irrelevant if this behaviour is out of hours, as long as it touches on the interests of the workplace – for an AFL player, these interests are those of the club and the AFL and therefore reach into nearly every corner of their personal lives.

Where does an AFL player go to seek remedies?

Workplace remedies are predominately sought in the relevant industrial relations commission – and therefore now via FWA. However, while the Australian Industrial Relations Commission (‘the Commission’) was instrumental in initial development (or forced development) of collective agreements in the AFL, the ensuing development of the regulations has seen the AFL fall outside the sphere of the Commission/FWA largely because the CBA is not a registered agreement. Interestingly, although the major document, the CBA is not registered, each AFL club’s Players Long Service Leave Agreement is a registered Agreement with FWA.

AFL players are subjected to a raft of policies, agreements and regulations, some of which have already been mentioned. Each of these documents are tied to the SPC signed by the player when he is drafted or renews his contract. All players must sign this standard contract, with changes only being able to be made to the remuneration section.

The CBA provides a grievance procedure⁹⁰ if a player (or a club) has a dispute arising out of the operation of the CBA. This clause provides for a grievance tribunal. It is stipulated that a matter must go before the grievance tribunal prior to legal proceedings being instigated in any other tribunal or court. Given that the CBA references the SPC, it is likely that grievances under each of these must follow the same grievance path prior to instigating legal proceedings. The CBA is governed by the laws of Victoria and as such, any legal proceedings against the CBA would take place in Victoria.

⁸⁹ Ibid.

⁹⁰ *AFL/AFLPA Collective Bargaining Agreement*, cl 33.

A player has the right to appeal a sanction imposed on him under the Code of Conduct through the AFL's Dispute Resolution Panel.⁹¹ The Panel must conduct a new investigation into the incident and form its own view about appropriate disciplinary action within 72 hours of a player instigating an appeal. However, there appears to be minimal use of the appeal right. This may be due to the way discipline is handed out. Discipline by a group of team mates (or the Senior Coach) has a downside – a player risks appearing churlish and also further exclusion from the group. Disciplinary action taken by the club administrators would make it easier for the player to appeal and retain his status within the playing group.

Appealing against a decision of the AFL Commission is not as straight forward. The Appeals clause of the AFL Player Rules means that the Commission is unable to exercise judicial power.⁹² Appeals cannot therefore be made through this mechanism. Players wishing to appeal a decision made under rule 2.9 must therefore seek assistance through the common law courts.

The AFL is an incorporated not-for profit organisation. Traditionally courts did not intervene in the relationship between associations and their members. This was discussed at length in the Victorian Court of Appeal case of the *Australian Football League v Carlton Football Club Ltd*.⁹³ Tadgell JA stated that:

the courts have been prepared to recognise that there are some kinds of dispute that are much better decided by non-lawyers or people who have a special knowledge of or expertise in the matters giving rise to the dispute than a lawyer is likely to have. Again, the courts have been willing to understand that not every aspect of community life is conducted under the auspices of the State, that it is right that this should be so and that, sometimes, it is appropriate that State-appointed judges stay outside disputes of certain kinds which a private or domestic tribunal has been appointed to decide.⁹⁴

As the AFL is in control of the trade of elite football in Australia, decisions made by the AFL Commission could also amount to a breach of the common law doctrine of restraint of trade. Deregulation of a player could be challenged in the courts as a restraint. Similarly, a suspension of a player from the competition via the Code of Conduct may be a restraint in which the courts would become involved. Whether such an intervention would be successful is not clear. It remains to be seen how many players would take up this option. In the authors' view, very few would venture to do so. The potential for success may be small, with the negative outcomes of any complaint likely to be high.

⁹¹ AFL Players' Code of Conduct 2007 cl 6.

⁹² *AFL Player Rules*, r 11.1.

⁹³ *Australian Football League v Carlton Football Club Ltd* [1988] 2 VR 546, 549–52.

⁹⁴ *Ibid* 549.

If a player's contract is terminated, he may have remedies under the *Fair Work Act 2009* (Cth). This provides that an employee can take action against an employer for unfair dismissal if they are covered by a Modern Award, an enterprise agreement, or earn less than the high income threshold (currently \$129,300 per annum⁹⁵). As AFL players are not covered by a Modern Award or an enterprise agreement (the CBA is not a registered agreement), it is only those players who are paid less than \$129,300 who would have access to this mechanism. As noted above, this would be a minority of AFL players.

Under the *Fair Work Act*, a player may have the right to bring a claim for a breach of workplace rights if the player was dismissed because the player had brought a complaint under their contract, CBA and/or any of the AFL policies. The *Fair Work Act* provides that a person must not take adverse action against another person because that person has a workplace right, has or has not exercised a workplace right, or proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right.⁹⁶ The *Fair Work Act* also provides that a person has a workplace right if they are able to make a complaint or inquiry in relation to his or her employment. As AFL players are entitled to have a dispute under their Contract, the Player Rules, the CBA and the Code of Conduct, they become eligible to bring an adverse action claim. There is no exclusion for high income earners under this clause, and there is a reverse onus of proof, meaning that the club would need to demonstrate that it had not acted against the player because of his workplace right. This very broad section of the *Fair Work Act* means that AFL clubs (and employers generally) need to ensure that any disciplinary or termination proceedings they bring against an employee are not as a result of an employee exercising workplace rights.

Players may also be able to commence a common law action for breach of contract. Where an employer summarily dismisses an employee, the onus is on the employer to prove that the alleged misconduct occurred and, further, that the behaviour of the employee was sufficiently serious to warrant immediate dismissal. It is important to note that if the player is given a warning or a fine by the club, the club cannot then rely on this incident to dismiss the player at a later stage – that is, an employee cannot be seen to be given two 'punishments' for the same act. To attempt to justify summary dismissal on the basis of this past act of misconduct may amount to a breach of contract and make the employer liable to pay damages. This would impact on an AFL player if they had first received a fine under the Code, and then, based on that same behaviour, were dismissed by the club. The implied terms discussed above may be able to be used in such a case to demonstrate that the player had breached the duty of good faith, however this would need to be examined in the context of each case.

⁹⁵ This amount includes salary and fixed payments but does not include SGC 9.25 % superannuation contributions and payments which are variable such as incentives and bonuses.

⁹⁶ See *Fair Work Act 2009* (Cth), Div 3, Pt 3–1.

Conclusion

Although a 'traditional employee' can be disciplined where his or her behaviour harms the employer's interest or undermines the trust and confidence necessary between employer and employee, the parameters in which this can occur are generally quite limited. This marks the difference between the lawful disciplinary action against a traditional employee and that which can be taken against an AFL footballer. By virtue of the large number of interests of the employing body of the player (the AFL and clubs), the player is responsible for the brands of not only their employer but the employer's sponsors and licensees. They are therefore responsible to the members of the public as they are the ones who buy the memberships, licensed products and on whom the game relies for its revenue and popularity. What may harm the interests of each of these groups is therefore very broad and will impact upon the player even when he is not 'running, jumping, tackling and kicking'.

