

# DISCIPLINING ATHLETES FOR OFF-FIELD INDISCRETIONS: A COMPARATIVE REVIEW OF THE AUSTRALIAN FOOTBALL LEAGUE AND THE NATIONAL FOOTBALL LEAGUE'S PERSONAL CONDUCT POLICIES

James J Paterson\*

*This paper compares the personal conduct policies of the AFL and NFL, which both act to govern the off-field behaviour of players and officials. It provides analysis of penalties imposed on participants, and a critique of how the leagues' commercial interests may influence the outcomes, as well as the judicial limits imposed on those disciplinary determinations. Both leagues have broad powers to act when conduct has occurred which they consider to be 'detrimental to the game', a term the author asserts is vague and which neither sport's policy adequately clarifies. This paper provides policy recommendations to address those limitations.*

## Introduction

*Sport, which occupies the professional time of a few and the spare time of many, is a fit study for ethics. Internationally it is becoming increasingly complex to organise and regulate and has become fraught with commercial and political pressures ... – Sir Roger Bannister<sup>1</sup>*

The professional version of Australian Rules football, the Australian Football League ('AFL'), is arguably the most high profile and profitable sport in Australia. The native version of 'football' in the United States, the National Football League ('NFL') gridiron competition, occupies a similar position with the American public and in the corporate arena.

The NFL is a corporate behemoth. In addition to a television broadcast rights

\* James J Paterson. BCom. LLB. (University of Melbourne). Admitted to practice as a barrister and solicitor in Victoria, Australia, and as an attorney in New York, United States. A version of this article was submitted for assessment under the University of Melbourne's Masters of Commercial Law program.

<sup>1</sup> Foreward, *Fair Play: Ethics in Sport and Recreation*, Professor McIntosh, 1979, cited by Edward Grayson, *Sport and the Law*, 3rd Edition.

package providing approximately \$2 billion a year in revenue,<sup>2</sup> the league has 21 'major marketing partners', including an official beer, an official wireless headset – even an official toiletries sponsor, from whom it receives an estimated \$10 million per year.<sup>3</sup> Sales of NFL authorised apparel are estimated at \$2 billion a year, in part thanks to a 10 year exclusive contract with Reebok.<sup>4</sup>

The AFL is no slouch in comparison. Its upcoming television broadcast rights package is speculated to top \$1 billion.<sup>5</sup> Sponsorship agreements with large multi-national corporations, such as Toyota and Coca-Cola provide significant funds. Sponsorship revenues are also received from government entities, such as WorkSafe Victoria and the Transport Accident Commission ('TAC'), which by their sponsorship seek to promote messages such as safe workplace practices and road safety.<sup>6</sup>

Not surprisingly, these 'commercial partners' of the two football codes are expecting a return on their investment – that being a positive, high-profile association with the sport, ideally with supporter loyalty for the club translating into brand loyalty for the sponsor. If this occurs, it in turn generates other monetary benefits for those commercial partners. Large audiences viewing broadcasts of games generate ratings and advertising returns for the networks, while ingraining the corporate brands of sponsors into the minds of spectators.

Unsavory off-field incidents by the sport's participants threaten such a positive association for the commercial partners, potentially clouding their message to the community. It may also tarnish a commercial partner's brand through a perceived endorsement of the off-field activity through its formal association with the league or club. Consequently, it is often speculated that the interests of the AFL's commercial partners weigh heavily on the minds of the clubs and the AFL in determining penalties for off-field indiscretions.<sup>7</sup>

<sup>2</sup> The NFL sells its broadcast rights across a number of competing television networks. In 2006, the NFL entered into the first years of a six year contract extension with the three major networks, CBS, Fox and NBC that provide an average income of \$2 billion a year until 2011. See Michael K. Ozanian, 'The Business of Football – How 'Bout Them Cowboys', *Forbes Magazine* <[http://www.forbes.com/2007/09/13/dallas-cowboys-stadium-biz-07nfl\\_cx\\_mo\\_0913nflintro.html](http://www.forbes.com/2007/09/13/dallas-cowboys-stadium-biz-07nfl_cx_mo_0913nflintro.html)> at 13 September 2007.

<sup>3</sup> The sponsors are Coors Light, Motorola, and Procter and Gamble (Old Spice), respectively. See Suzanne Vranica and Matthew Futterman, 'NFL wins Procter & Gamble sponsorship; Major league sports in hunt for new sources of ad dollars to replace financial services firms and car makers.' *Wall Street Journal* (New York), 5 August 2009, B8.

<sup>4</sup> Steve Gelsi, 'Reebok gets NFL licence – Shoemaker wins brand exclusivity in '02', CBS Marketwatch, <<http://www.marketwatch.com/news/story/reebok-gets-license-nfl-apparel/story.aspx?guid=%7B3B27BB9B-96D8-4D7C-A8E9-03C8D845DC96%7D>> at 19 December 2000.

<sup>5</sup> See Finn Bradshaw, 'AFL's billion dollar plan', *HeraldSun* (Melbourne), 1 April 2009.

<sup>6</sup> Sponsorship by the Victorian Government of both the AFL and individual clubs has promoted messages such as 'Speed Kills' and 'Wipe Off 5' to encourage drivers to travel at a slower speed, has involved various iterations of the long running 'You bloody idiot' campaign aimed at reducing the levels of drink driving on the State's roads, as well as incorporating messages to encourage workplace safety.

<sup>7</sup> See Samantha Lane and Caroline Wilson, 'North Players Still in Video Shock', *The Age* (Melbourne), 15 April 2009, <<http://www.realfooty.com.au/news/rfnews/north-players-still-in-video-shock/2009/04/14/1239474877013.html?page=fullpage#contentSwap1>> which speculated that Mazda was considering terminating its sponsorship of the North Melbourne Football Club as a result of the broadcast over the internet of an unsavory video made by the players.

Recent disciplinary penalties imposed on athletes in these two sports have highlighted a growing concern that while funds from sponsorship and broadcasting rights help advance the growth of the respective sports, the potential influence of those commercial interests on disciplinary determinations may lead to rules for some and not for all. Given the salaries and revenues for both players and teams, it is not surprising that inconsistent disciplinary action leads to judicial review. The often conflicting interests of governing bodies, athletes, sponsors and even government suggest that sport, commerce and the law are uneasy bedfellows when it comes to disciplining players and officials.

The AFL has frequently looked to the administration of the NFL as a 'best practice' benchmark in running a professional sporting competition. The AFL's competition management strategy of a central drafting of junior players, as well as its revenue maximisation strategy of allocating broadcast rights across a number of competing television networks, are derived from the NFL's strategies. The AFL has again unabashedly looked to the NFL for guidance in addressing the off-field conduct of its participants, having recently modelled its 'Individual Conduct Policy' on the NFL's 'Personal Conduct Policy'.<sup>8</sup>

Each code provides broad, and somewhat vague, disciplinary powers to its governing body under their respective policies. The AFL provides that it may discipline players found to have:

been involved in conduct which is unbecoming or likely to prejudice the reputation or interests of the AFL or to bring the game of football into disrepute,<sup>9</sup>

while the NFL's version provides that:

[A]ll persons associated with the NFL are required to avoid 'conduct detrimental to the integrity of and public confidence in the National Football League'.<sup>10</sup>

In each football code, the governing body determines whether the player or official's conduct has injured the public's confidence in the sport and brought the game into disrepute. In making such determinations, both leagues consider that the obligations of players and officials extend beyond

<sup>8</sup> In the lead up to the introduction of the AFL's policy, AFL CEO, Andrew Demetriou, stated that '[We] have borrowed other things from the NFL and we are looking closely at their conduct policy.' See Patrick Smith, 'Bad boys face sack – Demetriou adopts NFL code to clean up off-field image', *The Australian* (Melbourne), 12 May 2007, 51.

<sup>9</sup> See *Laws of the Game* r 1.6, as provided in Individual Conduct Policy, Australian Football League, 2009, 7. Sub-rule 1.6.2 provides that sanction for breach may include 'a monetary sanction in addition to or in lieu of any other sanction.'

<sup>10</sup> Personal Conduct Policy, National Football League, 2008, 1.

just complying with the laws of the game. The leagues also expect adherence with the 'laws of the land', and that conduct, both in and outside the playing arena, be 'reasonable'.

The AFL provides that being charged with an offence which could involve punishment by a term of imprisonment *may* be, but is not deemed to be, considered conduct unbecoming.<sup>11</sup>

The NFL's position is even stronger, expecting a standard of conduct higher than simply adherence to the law, stating:

Persons who fail to live up to this standard of conduct are guilty of conduct detrimental and subject to discipline, even where the conduct itself does not result in the conviction of a crime.<sup>12</sup>

The NFL's policy also provides examples in its introductory paragraphs of specific conduct where discipline will be imposed by the league.

If a player or official's conduct strays from this standard, they may face a variety of penalties imposed by the league – in addition to any they may face as a result of a breach of civil or criminal laws.

This article highlights issues arising from the introduction of such personal conduct policies, comparing the policies of the AFL and NFL and reviewing the powers under which each governing body disciplines its participants. This comparison will include a review of the limits imposed on the leagues as a result of natural justice principles and will highlight recent examples of penalties imposed on participants of each sport.

The article will then outline the key features of each sport's off-field conduct policy, highlighting their similarities and key differences. It will conclude with the author's opinion as to whether the scope of those policies is a reasonable intrusion on the lives of the players and the officials involved in these sports.

### **Powers of the governing bodies**

*The commissioner has '[a]ll the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial paterfamilias.'* – *Atlanta Baseball Club, Inc. v Kuhn*<sup>13</sup>

<sup>11</sup> Individual Conduct Policy, Australian Football League, 2009, 8, with reference to the *Laws of the Game* r 1.6.7.

<sup>12</sup> Personal Conduct Policy, National Football League, 2008, 1.

<sup>13</sup> 432 F Supp 1213 at 1220 (quoting *Milwaukee Am Ass'n*, 49 F 2d at 299).

In order to discipline a game's participants, the sport's governing body must first be delegated the power to make such determinations. The origins of that power and the limits placed on the administrators of the AFL and NFL are reviewed below.

### *Governing powers of the AFL*

The AFL began as a Victorian based league of professional teams over a century ago, called the 'Victorian Football League', or 'VFL'. Over time, the VFL came to be seen as the pre-eminent Australian Football competition in Australia. By the late 1970s and early 1980s, its teams attracted and employed the majority of the premier players from other states, in addition to employing the best footballers from Victoria.

In the mid 1980s many clubs were struggling to remain solvent under the weight of large player payments. The clubs, increasingly distracted by short term survival needs and parochial interests, were also dissatisfied with the lack of strategic direction provided by the VFL board of directors at that time.<sup>14</sup> In 1985, with these potential solvency issues looming in the background, the clubs ceded their control to administer the VFL competition to an independent commission.<sup>15</sup>

In the following seasons, the independent Commission then implemented a number of changes to the competition, most notably, expanding its membership base to admit new teams based outside of Victoria. To reflect the new national competition, the league changed its name to the 'Australian Football League', or 'AFL'.

In 1993 the Commission sought a further strategic review of the AFL competition (the 'Crawford Report'), considering issues such as the optimal structure and operation of the League. The Crawford Report provided recommendations regarding the appropriate division of powers between the Commission and that of the Clubs, indicating that there was virtual universal support among the clubs for the concept of and the role played by the independent Commission, with an acknowledgement that:

... the loyalty to one's own Club makes it extraordinarily difficult to make objective decisions in the interests of football as a whole, if such a decision will have an adverse impact on one's own Club.<sup>16</sup>

<sup>14</sup> David Crawford, *AFL Administrative Structure Review – Findings* (1993) 5 ('Crawford Report').

<sup>15</sup> The movement to an independent commission was recommended by external consulting review commissioned by the VFL Clubs. The review, titled 'Establishing the Basis for Future Success' was conducted by external consultants in October 1985. See Crawford Report 5.

<sup>16</sup> Crawford Report 13.

After adopting the Crawford Report's recommendations, the AFL Commission now has near exclusive right to take action which it considers to be in the best interests of Australian football.

### *Powers of the AFL Commission*

The AFL Australian Football League is a company limited by guarantee and has a representative member from each AFL club. Its internal workings are governed by an independent commission ('AFL Commission'), which comprises independent persons appointed by the clubs' representative members.<sup>17</sup>

The clubs, through the provisions of the AFL constitution, have granted the AFL Commission broad rights to manage the national competition and further the interests of Australian Football in general. In return, the clubs are permitted to compete in the competition by way of a licence agreement with the AFL Commission.<sup>18</sup>

The AFL Commission can make enforceable decisions about virtually any aspect relating to the AFL competition, save for certain key competition structure issues such as relocation of teams, which are referred back to the member clubs.<sup>19</sup>

### *Role and powers of the AFL CEO*

The Chief Executive Officer ('CEO') of the AFL is both an AFL employee and a voting Commissioner. The CEO is given the powers that the AFL Commission deems necessary to administer the competition – potentially as broad as the powers granted to the AFL Commission itself. The AFL describes the CEO as being 'responsible for the implementation of the policies adopted by the Commission, the operating performance of the AFL, and [be] the public face of the Commission.'<sup>20</sup> The AFL Commission – and the CEO – can therefore make enforceable decisions about virtually any aspect of Australian Rules Football

<sup>17</sup> When this action was first taken in 1985, the league was then known as the 'Victorian Football League', and the newly formed commission the 'VFL Commission'.

<sup>18</sup> See article 2(d), Australian Football League, *Memorandum of Association* (as at 2 November 2006).

<sup>19</sup> The issues referred back to the league members for determination are 1) admission, expulsion or takeover of a club; 2) the granting of financial assistance to clubs; or 3) amending the laws of the game. See David Crawford, *AFL Administrative Structure Review – Findings*, (1993). For example, while the AFL Commission is permitted '[T]o grant, suspend or terminate the right of a football club to representation on the League or to relocate or merge any football clubs' the AFL clubs may veto an exercise of that power. The representative members of the clubs may call a general meeting to review the AFL Commission's decision, which can be reversed if at least two-thirds of the club representatives disapprove (see Article 15(a) and Article 2(d)(xi), Australian Football League, *Articles of Association* (as at 2 November 2006)).

<sup>20</sup> David Crawford, *AFL Administrative Structure Review – Findings* (1993) 2.

relating to the AFL competition, including taking disciplinary action against its participants.<sup>21</sup>

### *Limits on powers*

Outside of issues of restraint of trade (in relation to the free movement of players between clubs), there has been little litigation challenging the scope of the AFL Commission's power, or that of its CEO.<sup>22</sup> Indeed, the prevailing judicial view is that 'courts ought to be particularly reluctant to interfere with the standards set by sporting bodies for the conduct of their sport.'<sup>23</sup>

There has, however, been litigation surrounding the powers granted by the Commission to the AFL Tribunal, and the extent of discretion provided to the tribunal in making its rulings, illustrated in *Mitchell v Australian Football League* ('*Mitchell*'),<sup>24</sup> and most notably in *Australian Football League v Carlton Football Club Ltd* ('*Williams*'),<sup>25</sup> both discussed below.

Players, by virtue of the standard terms in the collective bargaining agreement with clubs, submit to jurisdiction of the AFL Tribunal.<sup>26</sup> The AFL Tribunal is the internal AFL body established to hear and determine charges of breaches of the 'Laws of Australian Football', including 'any conduct ... where it had the effect or potential to prejudice the reputation of any person, club or the AFL or to bring the game of football into disrepute.'<sup>27</sup>

Penalties imposed by the AFL Tribunal (or by the clubs under the terms of the playing contract) can range from direct monetary penalties, to suspensions

<sup>21</sup> Clause 2(d)(x) of the AFL's Memorandum of Association empowers the AFL 'to inflict fines or penalties by way of suspension, expulsion or otherwise for any breach of the Articles of the Association or the Rules and Regulations of the League, the laws relating to football or any other Rules and Regulations relating to the control and management of football matches and competitions ...' See *Carlton Football Club Ltd and Williams v Australian Football League* BC9702142, 29 May 1997 per Hedigan J.

<sup>22</sup> This is contrary to the legal position in the United States, where there have been numerous decisions refining the scope of the NFL Commissioner's power, on issues ranging from disciplining of players, through to expansion and contraction of the number of teams in the league.

<sup>23</sup> *Skelton v Australian Rugby Union Ltd* [2002] QSC 193 (unreported, Qld SC, Chesterman J, 11 June 2002, BC200204939) at [21]. See also *Australian Football League v Carlton Football Club* [1998] 2 VR 546 at 549 per Tadgell JA: 'The reasons for the courts' declining to interfere in cases such as these have been ... the courts have been prepared to recognise that there are some kinds of disputes 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.'

<sup>24</sup> *Mitchell v Australian Football League* (unreported, Vic SC, Tadgell J, 12 June 1992).

<sup>25</sup> *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 (Tadgell JA) ('*Williams*').

<sup>26</sup> See Standard Playing Contract, Australian Football League, 2008, clauses 10 and 16.

<sup>27</sup> See *Laws of Australian Football*, r 19.2.2, which determines 'misconduct' to be a 'reportable offence' which may be referred to the tribunal. See also Australian Football League, *AFL Tribunal Booklet* 2008, 11.

from playing in games, an indirect monetary penalty through lower wages.<sup>28</sup> Notwithstanding the impact on employee revenue, the courts have only been prepared to interfere in the AFL Tribunal's decision making process in limited ways.

In *Mitchell*, the on-field conduct of a player, Barry Mitchell, was investigated prior to the AFL bringing a striking charge against him. The AFL Tribunal suspended Mitchell, and this outcome was appealed to the Victorian Supreme Court. In granting an injunction allowing Mitchell to continue to play, Tadgell JA found that that AFL had breached its own rules in relation to procedural fairness when investigating the charge.

In *Williams*, a player for the Carlton Football Club, Greg Williams pushed an umpire aside during the course of a match and was charged with a breach of the AFL's rules for unduly interfering with an umpire.<sup>29</sup> He was found guilty by the AFL Tribunal and suspended for nine matches. Williams and the club then sought to overturn the decision on the basis that it was unreasonable.

While the decision of the AFL Tribunal was eventually upheld, the judgment of Tadgell JA provided guidelines on the minimum conduct expected of a private disciplinary tribunal.

Firstly, a court will not intervene simply because the tribunal has reached a wrong decision. Rather, it needs to be proven that the tribunal's decision appears not to be made in good faith, or was the product of bias or other dishonesty, or was not made in accordance with the principles of natural justice.<sup>30</sup> Private tribunal's must also undertake due inquiry into the facts surrounding the conduct, and not simply go 'through the motions' of such an enquiry.<sup>31</sup> Further, Tadgell JA indicated that:

... the courts will interfere if the conclusion reached by the tribunal is plainly absurd or unreasonable or such that no reasonable man could come to the conclusion or that no reasonable man could honestly arrive at it ...<sup>32</sup>

However, as private organisations often have broadly drafted categories of misconduct, Tadgell JA found a criterion of misconduct may exist which:

<sup>28</sup> Under the Collective Bargaining Agreement between the AFL and the AFL Players' Association, players are required to abide by the 'AFL Player's Code of Conduct', under which item 2.2 provides that for 'significant breaches' of the policy, players can be fined up to \$5,000 for a first offence, and up to \$10,000 for a second offence.

<sup>29</sup> *Laws of Australian Football* (1998) r 16.9.1.

<sup>30</sup> *Williams* 550.

<sup>31</sup> *Ibid* 551.

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

is so imprecise, and its application so much a matter of impression, that different decision-makers, each acting rationally, might reach differing conclusion when applying it to the facts of a given case.<sup>33</sup>

These principles effectively mean that for a matter as broad as ‘conduct detrimental to the game’, a court will only substitute its own opinion for that of the tribunal, if the tribunal’s decision is ‘so aberrant that it cannot be classed as rational.’<sup>34</sup>

The AFL has recognised the principles established in *Williams* by codifying an appeal process within its revamped Tribunal system. A player can now appeal a determination if it considers that there was an error in law, the decision was so unreasonable that no Tribunal acting reasonably could have come to that decision with the evidence before it, or if the sanction imposed is manifestly excessive.<sup>35</sup>

#### **Governing powers of the NFL**

The NFL, an unincorporated association not operated for profit, is constituted by member clubs, typically referred to as ‘franchises’. These franchises operate in United States cities designated by the NFL. The NFL Constitution provides administrative authority to an Executive Committee and a Commissioner.<sup>36</sup>

#### **Powers of the NFL Executive Committee and the NFL Commissioner**

The NFL is run by an Executive Committee, which includes one representative from each club. The owners of the clubs also elect an independent Commissioner, who is employed to control the internal affairs of the organisation.

The NFL Constitution delegates to the Executive Committee the power to impose fines or additional penalties upon any members (that is, the owners of the ‘franchise’ clubs) after action of the Commissioner,<sup>37</sup> which it may exercise by an affirmative vote of at least three-fourths of the members.

As the Commissioner is an employee of the NFL, the owners can terminate his contract. However, once in office, the Commissioner is generally able to

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Australian Football League, *AFL Tribunal Booklet* 2008, 5. A further ground for appeal is if the player considers that the classification of the offence under the AFL Tribunal’s rules was manifestly excessive.

<sup>36</sup> Gregor Lentze, ‘The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective’ 6 *Marquette Sports Law Journal* 65 (1995) 68.

<sup>37</sup> Lentze at 68, with reference to NFL Constitution article VI, section 6.5.

perform the role without direct supervision or control by the member clubs<sup>38</sup> and is unlikely to be removed by them.<sup>39</sup>

The powers granted to the Commissioner are so broad that his influence on the league has been described as ‘more powerful than a chairperson of a board of a corporation, and probably wields more power than a typical president of a company.’<sup>40</sup> Effectively, the Commissioner is granted executive power over issues relating to the NFL league and its operation, unless an issue has been specifically addressed in the collective bargaining agreement with the NFL players’ association.<sup>41</sup>

One of the authorities granted to the Commissioner is the power to discipline persons involved with the game.<sup>42</sup>

### **Role of the NFL Commissioner**

Tasks performed by the NFL Commissioner include being the lead negotiator for league-wide contracts such as broadcasting agreements, acting as the mediator for collective bargaining agreement negotiations, and providing a centralised administrative authority to facilitate decision making on behalf of the league and its member clubs.<sup>43</sup>

The Commissioner is also expected to create a fair and impartial internal authority to resolve disputes within the league and to independently enforce a disciplinary process. These tasks are essential to maintain the game’s integrity and provide due process protections necessary to avoid judicial oversight of

<sup>38</sup> Matthew Mitten, Timothy Davis, Rodney Smith, and Robert Berry, *Sports Law and Regulation: Cases, Materials and Problems* (2005) (‘Mitten’) 437.

<sup>39</sup> Unless there was an egregious abuse of the responsibilities of the role, or a dispute with greater than three-fourths of the owners. Such a removal (or resignation) is not without precedent. In 1992, Fay Vincent resigned as the Major League Baseball Commissioner under pressure from the league’s member club owners after making a number of controversial decisions, including an intervention during a 1990 lockout of the players, and negotiating a television rights contract for lower amounts than expected by the owners. See Mitten 437.

<sup>40</sup> Mitten 436.

<sup>41</sup> Lentze 68. See also Marc Edelman, ‘Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade’, 58 *Catholic University Law Review* (2009), 631 available at <SSRN: <http://ssrn.com/abstract=1428480>> at 8 October 2009. Edelman raises a novel argument that as the NFL Personal Conduct Policy is not expressly written into the NFL Collective Bargaining Agreement, the NFL has not properly collectively bargained its mandatory terms and conditions of employment, potentially exposing it to anti-trust liability in certain states. As part of his detailed review of the interaction of anti-trust and employment laws in the United States, Edelman notes that there are various splits in its Circuit Courts on the key areas of review – particularly whether the NFL clubs constitute two or more parties to then act in a collusive manner. However, Edelman states at 641 ‘[B]ased on various splits in the circuits, it is impossible to predict with certainty whether a reviewing court would find the NFL Personal Conduct Policy to violate § I of the Sherman Act’.

<sup>42</sup> Ibid.

<sup>43</sup> Mitten 437.

league affairs.<sup>44</sup> Clearly, the drafting, implementation and ongoing oversight of the NFL Personal Conduct Policy fall within this scope.

The NFL Constitution provides disciplinary power to the Commissioner via a broad provision authorising investigation of any activity which is deemed to be 'detrimental to the welfare of the league.'<sup>45</sup> This power is considered so broad that it 'can be used to justify nearly any action taken by the Commissioner.'<sup>46</sup> The players, via their collectively bargained contractual relationship with the franchises, are subject to the disciplinary powers of the Commissioner.<sup>47</sup>

#### *Limits on those powers*

United States courts have been reluctant to assume jurisdiction over the affairs of private associations, such as the NFL, and to review their internal actions,<sup>48</sup> reinforcing the broad powers afforded the NFL Commissioner. Indeed, judges themselves have noted that if there were to be judicial review of every sanction imposed by the Commissioner, it would produce an unworkable system for a professional sporting league.<sup>49</sup>

In reviewing the conduct of the Commissioner of Major League Baseball ('MLB'), United States courts have flatly rejected claims that the commissioner of a professional sports league must act consistently with prior traditions of the game. Further, their actions are not limited to regulating immoral or unethical conduct, or violations of league rules.<sup>50</sup>

In *Atlanta Baseball Club, Inc v Kuhn*<sup>51</sup> ('*Atlanta Baseball Club*'), a District Court found that the MLB Commissioner could validly consider the conduct of a player or an owner of a Club to be detrimental to the best interests of the game where neither rule violations nor moral turpitude were involved. The Court stated

The Commissioner has general authority ... to punish both clubs and/or personnel for any act or conduct which, in his judgment, is 'not in the best interests of baseball' ... What conduct is 'not in the

<sup>44</sup> Ibid.

<sup>45</sup> Lentze 73 with reference to NFL Constitution Article Vii, section 8.13.

<sup>46</sup> Lentze 73 with reference to the MLB Commissioner, who holds similar virtual autonomous power.

<sup>47</sup> A player would not be able to exclude themselves from such disciplinary scope by way of amendment to his playing contract, as under the NFL Constitution the Commissioner may disapprove any contract entered into by a franchise with a player (See NFL Constitution article X, section 10.1 as cited in Lentze 74).

<sup>48</sup> See, eg, *Charles O Finley & Co v Kuhn*, 569 F 2d 527 (7th Cir 1978) ('*Finley*') at 542.

<sup>49</sup> *Finley* at 537.

<sup>50</sup> Ibid.

<sup>51</sup> 432 F Supp 1213, 1222 (ND Ga 1977) ('*Atlanta Baseball Club, Inc*').

best interests of baseball' is, of course, a question which addresses itself to the Commissioner, not this court.

In *Charles O Finley & Co v Kuhn*<sup>52</sup> ('*Finley*'), a matter which again challenged the scope of the MLB Commissioner's powers, the Seventh Circuit Court indicated that it did not consider it appropriate for the judiciary to act as a referee for the operations of the sporting league itself, stating:

Standards such as the best interests of baseball, the interests of the morale of the players and the honor [sic] of the game ... are not necessarily familiar to courts and obviously require some expertise in their application.<sup>53</sup>

The determinations in *Atlanta Baseball Club* and *Finley* have been cited as relevant precedent by other United States Circuit Courts when reviewing the conduct of commissioners of other professional sports leagues, confirming a reluctance to interpose the judiciary to act as the arbiter to determine the appropriateness of a commissioner's rulings.<sup>54</sup>

While *Atlanta Baseball Club* and *Finley* established that a United States court will generally not second guess a league commissioner's exercise of discretionary judgment, the *Finley* decision did impose some rudimentary limits on the powers of a commissioner. For example, in order for the courts to allow a commissioner such broad discretionary power, it requires the commissioner to have valid authority for his actions under the sporting league's constituent documents.<sup>55</sup> In addition, when exercising their disciplinary authority, the commissioner must:

- provide due process to the party subject to sanctions;<sup>56</sup> and
- follow established procedural rules and act in an impartial and fair manner without prejudging the matter before them.<sup>57</sup>

The virtual unlimited power granted to a commissioner of a sports league as a result of a 'best interests of the game' clause has raised concern among legal commentators that the scope of that power is 'closely analogous to

<sup>52</sup> 569 F 2d 527 (7th Cir 1978) ('*Finley*').

<sup>53</sup> *Finley* at 537.

<sup>54</sup> See, eg, *Crouch v National Ass'n for Stock Car Auto Racing*, 845 F 2d 397, 403 (2d Cir 1988) ('*Crouch*') referred to in Matthew Pachman, 'Limits on the discretionary powers of professional sports commissioners: A historical and legal analysis of issues raised by the Pete Rose controversy', (1990) 76 *Virginia Law Review* 1990, 1409 at n 113 ('*Pachman*').

<sup>55</sup> Mitten at 448.

<sup>56</sup> See *Finley* at 544 which states 'the procedure must not be a sham designed merely to give colourable [sic] propriety to an inadequate process' and *Crouch* at 401 which states '[C]ourts have demonstrated more of a willingness to intervene in the internal matters of private associations when they conclude that there are inadequate procedural safeguards to protect members' rights.'

<sup>57</sup> *Rose v Giamatti*, No A8905178, 1989 WL 111447 (Ct Com Pl Ohio, Hamilton o June 26, 1989) referred to in Mitten at 449.

statutes deemed too vague to be legally enforceable.<sup>58</sup> However, the courts have generally upheld a commissioner's authority to act in disciplining those involved with the game, by giving the commissioner alone the power to interpret the conduct required to be meet the vague standard of the 'best interests' of the game.<sup>59</sup>

One important restriction on the NFL Commissioner is that due to the collective bargaining of the standard playing contract, its terms take precedence over the NFL constitution in the case of a dispute.<sup>60</sup> However, the terms of the standard playing contract provide limited practical restraint, as it contains an acknowledgement from the player that his conduct impacts upon the public confidence in the league, and that if the Commissioner reasonably judges the player's conduct to be detrimental:

... the Commissioner will have the right, but only after giving Player the opportunity for a hearing ... to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.<sup>61</sup>

Indeed, the clause is drafted to provide for such broad scope of application, that it effectively mirrors the Commissioner's broad authority noted to determine issues they consider to be detrimental to the game.<sup>62</sup> The restraints imposed on the NFL Commissioner relate only to the monetary punishment issued,<sup>63</sup> not to the invocation of the disciplinary power itself.

In short, the courts have made clear that the NFL Commissioner has broad discretion in determining issues which they consider to be detrimental to the game. Such determinations will only be overturned by a court if

<sup>58</sup> See Jeffrey Durney, 'Fair or Foul?', *The Commissioner and Major League Baseball's Disciplinary Process*, (1992), 41 *Emory Law Journal* 581 at 607 citing *Baggett v Bullitt*, 377 US 360 (1963) where the United States Supreme Court stated '[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its applications violated due process of law.' at 367.

<sup>59</sup> See, eg, *Finley, Atlanta Baseball Club, Inc, and Milwaukee American Ass'n v Landis*, 49 F 2d 298.

<sup>60</sup> *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1040 (6th Cir. 1989), cert. denied, 110 S. Ct. 2204 (1990) at [27] which states 'The national policy encouraging a uniform body of labor law, and encouraging arbitration as the strongly preferred means by which disputes involving collective bargaining agreements ought to be resolved, requires that the federal labor principles and the methods for dispute resolution provided by collective bargaining agreements should and must take precedence.'

<sup>61</sup> See Pachman, n 63, citing the relevant clause of the NFL standard playing contract.

<sup>62</sup> The NFL's constitution provides that the commissioner has the authority to impose disciplinary measures against a player or coach who has 'violated the Constitution or by-laws of the [NFL], or has been or is guilty of conduct detrimental to the welfare of the [NFL] or professional football' (emphasis added). See Constitution and By-Laws of the National Football League, art. VIII, §8.13(A), as cited in Michael Mahone, 'Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy', 11 *Vanderbilt Journal of Entertainment & Technology Law* 2008, n 69.

<sup>63</sup> Lentze 75, n 66 which cites NFL Constitution Article VIII, section 8.13.

the commissioner is proven to have failed to observe minimal procedural requirements in the exercise of their duties. Chief among those are a requirement that the Commissioner not be biased to the point that he has prejudged the facts of a particular case.<sup>64</sup>

### The introduction of personal conduct policies

*All I can probably say is that we were lucky we played then, not now. Because the misdemeanours that went on ... were just as regular or more regular then than they are now. Usually if you made a mistake the journalist would look after you and say, "you owe me one" ... – Ian Stewart<sup>65</sup>*

While the AFL and NFL have only recently introduced specific policies addressing 'conduct unbecoming', both sports have had plenty of experience in grappling with off-field incidents and determining appropriate penalties. A brief history of those instances is set out below.

#### *History of AFL disciplinary action as a result of 'conduct unbecoming'*

The first example of the AFL (or then VFL) acting to prevent a player competing as a result of 'conduct unbecoming' was in 1985, when the captain of the Hawthorn Football Club, Leigh Matthews, was de-registered as a player for 4 weeks after an on-field incident.

Matthews deliberately hit another player during a game, breaking his jaw. The incident was outside general play, unsighted by the umpires and there was no report of the incident by the game officials. As there was no suspension, despite clear video footage of the blow,<sup>66</sup> there was significant community outrage. The VFL subsequently conducted an investigation and deregistered Matthews as a VFL player through its broad 'conduct unbecoming' authority.<sup>67</sup>

At that time, off-field incidents were rarely publicised, due to a different set of media priorities. Club officials were also keen to quickly sweep issues under the carpet.

<sup>64</sup> Pachman 1439.

<sup>65</sup> Ian Stewart is a former AFL player, a two time Brownlow Medallist and was awarded 'Legend' status in the AFL Hall of Fame (see 'Stewart empathises with Cousins', *The Age*, (Melbourne) 15 April 2009).

<sup>66</sup> At the time there was no use of video footage in post game reviews by the AFL Tribunal to consider potential rule breaches that warranted potential suspension and this incident was widely seen as a catalyst for that process to occur.

<sup>67</sup> Andrew Hamilton and Jon Anderson, 'Lethal's Shame', *Herald Sun* (Melbourne), 17 April 2008. In another first from the incident, Matthews became the first VFL footballer to be charged with assault for on-field actions.

However, off-field incidents did occur. One prominent example was Wayne Carey, the then North Melbourne Football Club captain, who was found guilty of assaulting a female in the early 1990s. While the story gained media attention, it was not the saturation coverage of off-field events seen in recent times. Neither the AFL nor the club imposed any further sanction in addition to the court imposed penalty on Carey.

Since the turn of the decade, there appears to have been an increased frequency of the use of the 'conduct unbecoming' rule by the AFL in order to influence player and club behaviour. The rule, or at least threat of sanction under the rule, has been used by the AFL in a number of on-field circumstances involving players. Instances included the fining and suspending a group of players from the one team which 'gang wrestled' an individual opposition player prior to the commencement of the game,<sup>68</sup> as well as fining players who had made obscene gestures to members of the crowd, captured on the television broadcast.<sup>69</sup>

The AFL also used the rule to address a wide range of off-field incidents involving players including for issues surrounding competition integrity, such as allegations of umpire bias,<sup>70</sup> the involvement of players in salary cap

<sup>68</sup> In 1997 three Western Bulldogs players, Craig Ellis, Steven Kretiuk and Danny Southern, acted in an aggressive manner towards a rookie player for the West Coast Eagles, Michael Gardiner, before the first bounce of the game. The AFL Tribunal considered this to be a breach of its conduct unbecoming at that time. The Bulldogs players were fined 2/52nds of their base salary and two match payments. See Michael Davis, 'Pre-match attack fines turn AFL into netball: Smorgon', *The Australian* (Melbourne), 29 August 1997, Sport 20.

<sup>69</sup> In 2002, Port Adelaide Power player Chad Cornes was fined \$3,000 by the AFL for conduct unbecoming when he made a vulgar gesture to the crowd during a game against the Fremantle Dockers, with the AFL stating that no player had 'the right at any time to taunt supporters at a game, even if there are mitigating circumstances'. The Port Adelaide Power also disciplined Cornes by requiring he perform extra community service activities. Earlier in the same season, Western Bulldogs player Nathan Brown made a one-fingered gesture to the crowd during a game and was fined \$5,000, with the AFL treating it as a breach of the same 'conduct unbecoming' rule. See Michaelangelo Rucci, 'Tigers, Power bad lad Chad cop fines', *Herald Sun* (Melbourne), 16 July 2002, 61.

<sup>70</sup> In comments made on a television show broadcast nationally, James Hird, the captain of the Essendon Football Club, made a number of comments about umpire Scott McLaren, stating "... at the moment there's a feeling at Essendon that he's not doing the right thing by us ... hopefully the club and he can come to some arrangement where the umpiring is a bit better." See Patrick Smith 'Hird mentality just a sign of players running the asylum', *The Weekend Australian* (Melbourne) 10 April 2004, 45. Hird was charged with 'conduct unbecoming'. After making a public apology to McLaren, Hird was fined \$20,000, and was required to act as the AFL's umpires' ambassador for three years. See 'In Hird's world talk isn't always cheap', *Sunday Mail* (Adelaide) 19 November 2006, 68.

breaches by Clubs,<sup>71</sup> and misbehaviour resulting in physical altercations with members of the public.<sup>72</sup>

Actions of Clubs and their administrators have also received AFL scrutiny. In 2004 the AFL threatened the Brisbane Lions with sanctions under the 'conduct unbecoming' rule to ensure it acted in accordance with the AFL's wishes in protecting its commercial partners. The Brisbane Lions had entered into five year, \$2.5 million sponsorship and pourage rights agreement with Cadbury Schweppes (the Australian distributor of 'Pepsi' drinks) without first obtaining the approval of the AFL. It subsequently faced charges of conduct unbecoming, as the AFL's protected sponsor for non-alcoholic drinks was Coca-Cola.<sup>73</sup> The CEO of the Club, Michael Bowers said that '[W]e are a little bit surprised about the linking of this to conduct unbecoming because I thought that would normally be known to relate to things other than sponsorship arrangements.'<sup>74</sup>

After admitting that it had breached the league's marketing guidelines, Brisbane was fined \$100,000, as well as receiving a \$400,000 suspended fine. The Club was required to modify several components of the sponsorship arrangement, including removing any Cadbury Schweppes presence from the Club's changerooms, coach's box and interchange area at its home ground.<sup>75</sup> However, it was not formally sanctioned under the 'conduct unbecoming' rule.<sup>76</sup>

The above incidents were all considered under the same broad conduct unbecoming rule,<sup>77</sup> at a time when the league had not introduced a policy providing guidance on the likely application of the rule. As these examples demonstrate, while the AFL's initial use of the rule related to on-field incidents, it has increasingly been used to address the behaviour of players and officials outside the playing field.

<sup>71</sup> In 2003, Carlton player Matthew Allan was found guilty of 'conduct unbecoming' for receiving three undisclosed payments from the Club totalling \$75,000. The AFL fined Allan \$10,000 and he was banned from participating in any of the pre-season matches for the 2003 season. See 'Blue pays price for "cash bundle" wages', *Hobart Mercury* (Hobart) 22 February 2003, 106.

<sup>72</sup> In 2006, Port Adelaide Power player Dean Brogan broke the nose of a fan who was verbally taunting him at Adelaide airport. While the incident received much media attention, Port Adelaide chose only to fine him \$5,000. See Andrew McGarry, 'AFL star fined for hitting heckler', *The Weekend Australian* (Adelaide), 10 June 2006; 3. While it was reported that the AFL considered the club imposed punishment to be unsatisfactory, and there was speculation that Brogan could face 'conduct unbecoming' charges, the AFL did not take any further action over the incident. See Caroline Wilson, 'AFL to take over player penalties', *The Age* (Melbourne) 23 April 2007, 1. Brogan also faced criminal assault charges over the incident, and was eventually fined \$750. Andrew McGarry, 'AFL player convicted of airport assault', *The Australian* (Adelaide), 21 March 2007, 8.

<sup>73</sup> See Darren Cartwright, 'Sponsor clash comes to crunch', *Courier Mail* (Brisbane) 15 May 2004, 46.

<sup>74</sup> 'Lions' sponsorship deal investigated', *The Advertiser* (Adelaide), 6 April 2004, 83.

<sup>75</sup> Damian Barrett, 'Lions plead guilty', *Herald Sun* (Melbourne), 18 May 2004, 77.

<sup>76</sup> Damian Barrett, 'Lions plead guilty', *Herald Sun* (Melbourne), 18 May 2004, 77.

<sup>77</sup> See above n 9.

### **Introduction of AFL policies to influence player and official's behaviour**

Today football is covered by three television channels, various radio broadcasters, as well as 24 hours-a-day sport specific media outlets. Rarely is a blade of grass touched on a football field, or a drink consumed by a player off the field, without a breathless media covering the events.

The value of these broadcast rights and sponsorship of the AFL and the clubs is dependent on a game with mass appeal to the general public. The AFL recognised the value of this earlier than many other professional sports in Australia, building a broader fan base representative of the wider community.

To do this, the AFL Commission considered that policies regulating on and off-field conduct of players were necessary 'to ensure the integrity and public confidence in the AFL competition.'<sup>78</sup> By introducing policies, such as the 'Racial and Religious Vilification Policy',<sup>79</sup> the AFL attempted to shape the behaviour of its playing base to move from a 'win at all costs' mentality, to instead becoming more attune to changed community standards.<sup>80</sup>

As a result the league is now seen (and no doubt likes to be seen) as one of the leading agents of positive behavioural change in the Australian sporting landscape.

### **Recent conduct addressed by the AFL Commission**

#### *Ben Cousins*

In a spectacular fall from grace over only a two year period, Ben Cousins went from being a Brownlow medallist (the award for the AFL competition's most valuable player) and the recognised club leader of the West Coast Eagles, to losing the club captaincy, being suspended by the club for more than half the season, having his contract terminated by the club, and finally being deregistered as a player by the AFL Commission for 'conduct unbecoming'.

Cousins' career is littered with notorious off-field incidents, including refusals to assist police in enquires related to nightclub shootings, an incident where he abandoned his car at a police 'booze bus' stop, and evading testing of his blood

<sup>78</sup> Individual Conduct Policy, Australian Football League, 2009, 7.

<sup>79</sup> The policy was introduced 'to reinforce the view that abuse based on a person's race, colour or religion has no place in Australian football or anywhere else for that matter' (see AFL Personal Responsibility Policy 7).

<sup>80</sup> In addition to the 'Racial and religious vilification policy', the AFL also introduced a number of other policy documents seeking to modify the behaviour of the players and officials, including, eg, an 'Anti Doping Code', prohibiting the use of performance enhancing drugs, as well as a policy on 'Respect and Responsibility', with a focus on creating a safe and inclusive environment for women at all levels of Australian Football, among other policies. See further AFL Personal Responsibility Policy 7.

alcohol content by running away from police and swimming across the Swan River. The West Coast Eagles removed Cousins as the captain of the club for that last indiscretion.

However, those incidents paled into comparison to those involving Cousins in 2007. Prior to the start of the season, Cousins was suspended indefinitely by the club. It was later revealed that this was for erratic behaviour resulting from his addiction to illicit drugs.<sup>81</sup> While on suspension, Cousins attended a drug rehabilitation clinic in the United States, before returning to football in the latter part of the season.

After the end of the season, a vehicle in which Cousins was a passenger was stopped by police in the middle of a busy Perth street. Following a search (captured on camera by the media), Cousins was arrested for possession of an illegal drug and refusing to take a blood test. While the drug charge was subsequently dropped due to insufficient evidence, the club had already acted, sacking him the day after his arrest. The actions of the club sacking Cousins before the determination by the courts received strong criticism, being described as 'one of the blackest days in Australian sport.'<sup>82</sup>

The AFL Commission called a meeting to hear a charge against Cousins of bringing the game into disrepute.<sup>83</sup> Cousins was given (and took) the opportunity to address the charge against him at the Commission's meeting. Cousins was eventually deregistered as a player for 12 months.

In November 2008 Cousins was re-registered by the AFL on conditions of strict drug testing. These conditions were far more arduous than those required of other players in the competition. To date he has passed all tests while representing his new club, Richmond.<sup>84</sup>

<sup>81</sup> Cousins later acknowledged as such in a public apology to the club and its supporters broadcast on television.

<sup>82</sup> See Tim Lane, 'AFL compromised in case of *Cousins v Pratt*', *The Age* (Melbourne), 22 June 2008 ('Lane'), which stated 'International sports labour law lecturer and consultant to various Australian sports organisations, Braham Dabscheck, was moved to observe at the time that West Coast "abdicated their common law obligation to an employee – an employee who was in rehabilitation seeking to overcome problems with drugs. This demonising of Ben Cousins constitutes one of the blackest days in Australian sport.'"

<sup>83</sup> This meeting occurred after the drug charge against Cousins had been withdrawn. The AFL stated the commission was 'empowered to refer the matter to its tribunal, appoint any person to inquire into it, conduct its own inquiry into the charge and/or impose a monetary sanction.' Damien Barrett, 'AFL charges Cousins; Commission to decide if game brought into disrepute', *Herald Sun* (Melbourne) 3 November 2007.

<sup>84</sup> After his re-instatement as an eligible player, he was selected in the 2009 pre-season draft by the Richmond Football Club and has represented the club in the 2009 season.

### *West Coast Eagles*

At the same time as the Cousins incidents, the AFL also turned its attention to the culture at the West Coast Eagles Club, following indiscretions by other players at the Club.<sup>85</sup>

While the Club eventually acted on some of the issues causing the AFL concern – in addition to the disciplining of Cousins, one player was delisted and another received a suspended match suspension – the AFL considered that club officials had acted belatedly and the issues were symptomatic of broader cultural issues at the club which had the potential to bring the game into disrepute. The Commission indicated that it was not convinced the Club took the matters sufficiently seriously.<sup>86</sup> The AFL Commission engaged a Victorian Supreme Court Justice, Gillard J., to investigate the governance structure of the club and ultimately to provide a recommendation whether the club should be sanctioned through draft penalties or removal of premiership points for games already won. His Honour he found that the club had put in place a series of educational programs and committees aimed at improving player discipline, which the AFL accepted.<sup>87</sup>

### *Richard Pratt*

The actions of club officials have not escaped scrutiny, with a prime example being the former Carlton Football Club president, Richard Pratt. In 2007, Pratt's integrity was called into question during Federal Court proceedings concerning his personal company, Visy Board Pty Ltd ('Visy').

The Australian Competition and Consumer Commission ('ACCC') commenced proceedings against Visy for price fixing with a competitor over a lengthy period, with Pratt's role being central to the conduct. In arriving at a settlement of the matter, Visy was fined a record \$36 million and Justice Heerey provided

<sup>85</sup> In addition to the problems surrounding Ben Cousins, the AFL Commission considered incidents by West Coast Eagles who had: provided unsatisfactory and unreliable evidence at the AFL tribunal (Daniel Chick); sledged opposing players with an anti-female comment in contravention of its respect and responsibility policy (Adam Selwood); convictions relating to forgery of drug prescriptions and assault (Daniel Kerr); alleged incidents of drug overdoses on end of season trips (Chad Fletcher); the club's inadequate disciplining of players associating with persons with links to criminal gang connections in WA and failing to co-operate with police investigations (Cousins and Michael Gardner).

<sup>86</sup> See Courtney Walsh, 'Eagles pay price for Cousins', *The Australian*, (Melbourne), 18 October 2007, quoting AFL Commission chairman Mike Fitzpatrick: 'The Eagles have been put on notice that if they appear before the commission again, they will be subject to the full force of the 1.6 rule of conduct unbecoming, which can lead to a fine, suspension, loss of draft picks or premiership points.'

<sup>87</sup> Jason Phelan, AFL endorses West Coast's direction on club culture, AFL website, 2 December 2008, <<http://www.afl.com.au/News/NewsArticle/tabid/7106/Default.aspx?newsId=70560>> at 11 May 2009.

a stinging criticism of Pratt's personal role in Visy's conduct and lack of respect for the law.<sup>88</sup>

After much public criticism of his actions, Pratt returned a number of public honours granted to him. However, despite media pressure, Pratt remained as the president of the Carlton Football Club, the club board refusing to remove such a large benefactor and the AFL seemingly unwilling to step in and interfere.

Facing growing media criticism, and criminal charges stemming from evidence provided during the Visy court proceeding, Pratt eventually resigned as the president of the club in the middle of 2008. However, throughout that time, the AFL refused to intervene and seek the removal of Pratt as president, despite claims by prominent commentators that Pratt's continued association with the club was damaging the brand of the AFL.

### **National Football League**

The NFL has also had its share of problem children over the course of time. A selection of recent off-field incidents and their treatment by the NFL Commissioner of the time are set out below.

#### **History of NFL disciplinary action relating to detrimental conduct**

Throughout the 2000/01 season, the NFL saw many stomach churning headlines, with players facing criminal charges, and two players facing murder charges for separate incidents towards the end of the season.

In December 2000 a Carolina Panthers player, Rae Carruth, was found guilty of conspiracy to murder, after his pregnant girlfriend was shot and killed. Carruth is currently serving a maximum jail term of 24 years. Given his incarceration, whether he is (or was) suspended by the NFL became a moot point.

Following that incident, the NFL's reputation suffered further in January 2001. Ray Lewis, a player from the Baltimore Ravens, was indicted for murder after two men were stabbed outside an Atlanta nightclub hours after the Super Bowl. Lewis was not convicted of murder charges, but did plead guilty to lesser crimes of obstruction of justice relating to those charges. Despite those convictions, Lewis was not suspended by the NFL, a decision which – in addition to highlighting the discretion afforded to the NFL Commissioner – attracted much criticism from many sections of the media, as well as from support groups for victims of violence.

<sup>88</sup> *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited* (No 3) [2007] FCA 1617. At [323] Heerey J observed '... Mr Pratt's conduct ... was of major importance to the operation of the cartel. ... [Yet] he gave his personal sanction to this obviously unlawful arrangement and an assurance of its continued operation. It would not have continued without his approval'.

However, the incidents and the accompanying bad publicity continued to mount for the NFL throughout the decade, best illustrated by 10 players from the Cincinnati Bengals being arrested for separate incidents during 2006 to 2007.<sup>89</sup>

During that time, the NFL Commissioner broadly based his disciplinary decisions on a 'violent crime policy' where punishment was triggered only by a criminal conviction.<sup>90</sup> While the introduction of the policy was hailed as proactive, in practice the punishment often resulted only in counselling or fines.<sup>91</sup>

Officials and owners involved in the NFL have also faced disciplinary action. In 1997 the former owner of the San Francisco 49ers, Eddie DeBartolo Jr., pleaded guilty to a failure to report a felony arising from a Louisiana gambling fraud and extortion case. Prior to facing the charges, DeBartolo Jr. transferred his interests and management control of the team to other family representatives.

Notwithstanding DeBartolo Jr. was no longer the figurehead of the organisation, the NFL Commissioner suspended him for the 1999 season and fined him \$1 million on the basis that his conduct was detrimental to the NFL.<sup>92</sup> Since being disciplined, DeBartolo Jr. has had no further involvement with the 49ers or the NFL.

#### **Recent conduct addressed by the NFL Personal Conduct Policy**

While a new NFL Personal Conduct Policy was introduced in 2007 by Commissioner Robert Goodell, the off-field incidents continued to occur. The most recent example is that of Michael Vick, the former quarterback for the Atlanta Falcons.

In 2007, Vick was charged and found guilty of involvement in an illegal dog fighting ring at his home. After a high profile lead up to a potentially lengthy trial, Vick settled on a plea bargain with the United States Justice Department, leading to a 23 month jail sentence. Vick was suspended indefinitely and the Commissioner indicated that Vick would have to demonstrate true remorse for his actions in order to return as a player.<sup>93</sup>

<sup>89</sup> See ESPN website 'Lewis: We support the Commissioner's ruling' <<http://sports.espn.go.com/nfl/news/story?id=2832378>> at 13 October 2009.

<sup>90</sup> or an equivalent to a criminal conviction, such as a plea of no contest or a plea to a lesser charge to settle the matter. See Dave Anderson, 'Sports of The Times; When Laughter Stops: No Fun for Eddie D.', *The New York Times* (New York), 4 December 1997 ('Anderson').

<sup>91</sup> Mike Freeman, 'Pro Football; NFL and Union With Players' Violent Acts', *The New York Times* (New York), 26 March 2000.

<sup>92</sup> See Anderson, above n 90.

<sup>93</sup> 'Vick is released from prison', *The New York Times* (New York), <[http://www.nytimes.com/2009/05/21/sports/football/21vick.html?\\_r=1&hpw](http://www.nytimes.com/2009/05/21/sports/football/21vick.html?_r=1&hpw)> 20 May 2009 at 21 May 2009.

After completing his sentence, Vick was conditionally reinstated by the NFL, making him eligible to sign and practice with a team, but not eligible to compete in regular season games until he received a complete reinstatement from Commissioner Goodell.<sup>94</sup> Vick signed a contract with the Philadelphia Eagles, and then held a series of meetings with the Commissioner, in order to demonstrate to him a changed mindset. Commissioner Goodell then truncated Vick's indefinite suspension so that it ended after the first two regular season games of the 2010 NFL season.<sup>95</sup>

To list all of the recent examples of inappropriate off-field conduct by NFL players would be an exhausting exercise. A handful of the recent incidents of include:

#### *Tank Johnson*

In 2007, Terry 'Tank' Johnson of the Chicago Bears, pleaded guilty to misdemeanour weapon charges, which led to 45 days in jail.<sup>96</sup> The Commissioner invoked his powers under the 'disrepute' provisions suspending Johnson for a half-season, later reduced to six games as Johnson attended counselling.

#### *Plaxico Burress*

Plaxico Burress was a New York Giants wide receiver, famous for catching the winning touchdown pass of the 2007/08 Super Bowl. Burress was attending a Manhattan nightclub in late 2008 with a concealed weapon when he accidentally fired a bullet into his thigh. In addition to the embarrassment of being injured, Burress faced criminal charges for unlawful possession of the weapon, which led to him being convicted and sentenced to two years in prison.<sup>97</sup>

Pictures of Burress graced the front and back pages of the New York tabloid newspapers and attracted commentary from various political leaders as to the unacceptable nature of his behaviour.

The Commissioner has not yet handed down a suspension. However, while Burress was injured and preliminary legal issues were being heard, the New York Giants cut him from their team. Burress was not signed by any other team prior to his sentencing.

<sup>94</sup> *The New York Times*, 'Times Topics: Michael Vick', < [http://topics.nytimes.com/top/reference/timestopics/people/v/michael\\_vick/index.html](http://topics.nytimes.com/top/reference/timestopics/people/v/michael_vick/index.html) > 14 August 2009, at 2 October 2009.

<sup>95</sup> Judy Battista, 'Eligible to Play in Week 3, Vick Gives a Preview' *The New York Times* (New York), 3 September 2009, < <http://www.nytimes.com/2009/09/04/sports/football/04vick.html?scp=4&sq=Vick&st=cse> > at 2 October 2009. The article stated that Goodell said his decision was based largely on what he felt was best for Vick.

<sup>96</sup> Police raided Johnson's home, finding a number of unlicensed handguns and assault rifles, in breach of a probation condition relating to an earlier unlawful gun possession charge.

<sup>97</sup> John Eligon, '2-Year Sentence for Plaxico Burress', *The New York Times* (New York), 22 September 2009 at < <http://www.nytimes.com/2009/09/23/nyregion/23plaxico.html?scp=3&sq=plaxico&st=cse> >.

### *Pacman Jones*

Adam 'Pacman' Jones, a player from the Tennessee Titans, had been involved in various off-field incidents throughout 2007, including facing criminal charges after an alleged fight and shooting at a strip club which left a person paralysed. Jones was suspended by the NFL Commissioner for the entire 2007/08 season, with the NFL Commissioner writing a letter to the player stating:

Your conduct has brought embarrassment and ridicule upon yourself, your club, and the NFL, and has damaged the reputation of players throughout the league.<sup>98</sup>

When it appeared to the Commissioner that Jones was not remorseful of his earlier actions, he extended the suspension through the pre-season training period of the 2008/09 season.<sup>99</sup>

From these examples alone, it is clear that the issue of disciplining players is not new. Increased involvement of media looking to maximise association with both codes has not only led to increased profiles of the players, clubs and the sports within the community, but also to greater publicity for indiscretions.

### **Comparison of the personal conduct policies**

*When you have got that conduct-unbecoming rule, you can do what you like, when you like – Leigh Matthews<sup>100</sup>*

#### **Key objectives of the AFL's Personal Responsibility Policy**

The AFL's Individual Conduct Policy is predominately aimed at addressing the off-field behaviour of all individuals involved with the AFL competition – not only players and coaches, but also umpires, team support staff, board members and club and AFL employees. The policy's introductory comments contain broad motherhood statements that, given its involvement in the community, the AFL has a desire to ensure its participants behave with respect and integrity.

The Policy's core principle is that '[P]eople associated with the AFL competition ... are expected to take personal responsibility for their actions and accept

<sup>98</sup> See ESPN website, <<http://sports.espn.go.com/nfl/news/story?id=2832015>> at 11 May 2009. Chris Henry, a player from the Cincinnati Bengals, also received an eight-game suspension at the same time Jones was suspended. Both had committed numerous violations of the NFL's personal conduct policy and both received the letter from the Commissioner.

<sup>99</sup> Jones was eventually re-admitted by the Commissioner in the early part of the 2008 season and was traded to the Dallas Cowboys.

<sup>100</sup> Leigh Matthews is a former AFL player and coach awarded 'Legend' status in the AFL Hall of Fame. See Dan Koch, Chip Le Grand, 'Cousins flies home to calls for 12-week ban', *The Australian* (Melbourne) 1 May 2007.

any consequences which may arise from inappropriate behaviour.<sup>101</sup> The Policy states that the AFL considers that the competition's key stakeholders – supporters, members, media and corporate partners, and various levels of government – place a great deal of trust, support and investment in the hands of the clubs and the AFL.<sup>102</sup> As such, the AFL considers that those partners are entitled to expect that is repaid by the game's participants through responsible and lawful conduct.

Under the Policy the member clubs perform the primary disciplinary role in addressing inappropriate off field behaviour. The clubs have an opportunity at first instance to discipline the offenders, but if the AFL considers that the club has not dealt satisfactorily with an incident of 'inappropriate off-field behaviour', the AFL itself may address the matter.

While it may seem that the AFL is 'passing the buck' of the tough decisions to the clubs, the Policy does have teeth, should the AFL choose to act. If the AFL deems the issue to be one of 'serious misconduct' it has the power to refer the matter directly to the AFL Tribunal for a recommendation of a sanction, or it may deal with the matter itself without giving the club an opportunity to first deal with the matter.<sup>103</sup> This has yet to occur.

The AFL Policy also seeks to extend its scope over club board members, persons with whom it does not have a contractual relationship. In order to address this, the AFL Policy again looks for its member clubs to act, stating that it is the primary responsibility of each AFL club board to deal with any incident involving inappropriate behaviour by a board member.<sup>104</sup>

### **Clarification of 'conduct unbecoming' and 'bringing the game into disrepute'**

The AFL has recognised that the implementation of the Individual Conduct Policy requires further work, as neither the other relevant AFL policies and procedures nor the standard player contract refer to the new conduct procedures.<sup>105</sup>

The Policy states that one of its key focus areas is clarification of the type of actions that might constitute conduct unbecoming.<sup>106</sup> However, it does not provide much assistance in that regard, again illustrating the broad discretion being provided to the AFL. As it currently stands, the Policy simply provides generic statements that persons must not be involved in conduct which:

<sup>101</sup> Ibid 4.

<sup>102</sup> Individual Conduct Policy, Australian Football League, 2009, 1.

<sup>103</sup> *Laws of the Game* r 1.6.

<sup>104</sup> Individual Conduct Policy, Australian Football League, 2009, 8.

<sup>105</sup> Ibid 2.

<sup>106</sup> Ibid.

- is unbecoming or likely to prejudice the reputation or interests of the AFL and its member clubs; or
- brings the game of Australian football into disrepute.<sup>107</sup>

The Policy provides some broad examples of infringing conduct, noting that it *may* be constituted by:

- conduct which has or may give rise to a charge or offence which in the event of a conviction could involve punishment by a term of imprisonment;<sup>108</sup> or
- public comment or conduct which damages or puts at risk the integrity and reputation of the AFL, its clubs, players and match officials and which is detrimental to the interests of, or public confidence in, the AFL, its member clubs, players and match officials.<sup>109</sup>

The Policy also deems certain conduct to be ‘unbecoming’, such as payments to alleged victims in order to persuade them not to pursue criminal proceedings.<sup>110</sup>

The Policy notes that a person will *not* be deemed to have engaged in conduct which is unbecoming simply as a result of being charged or committed for trial. However, the AFL still has absolute discretion to stand down that person from their usual AFL or club duties, pending the outcome of the proceedings.<sup>111</sup>

The Policy provides no guidance as to the potential penalties which may be imposed by the AFL Tribunal. This does not provide great clarity to players and officials of exact standards expected of them, other than ‘Don’t get arrested’. As the Ben Cousins example has demonstrated, innocent or guilty, an arrest can put a career at the discretion of the AFL Commission.

### **Procedural requirements of the AFL Policy**

Once an AFL club becomes aware that a club employee or board member is involved in an off-field incident involving ‘Notifiable Conduct’ – conduct which may constitute an offence for which the prescribed maximum penalty is a term of imprisonment<sup>112</sup> – the club must immediately report the matter to the AFL, which will determine whether further investigation is required.<sup>113</sup>

If the AFL undertakes further investigation, the club may not make a decision – that is, impose a penalty on the player or official – prior to its findings being

<sup>107</sup> Ibid 8.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> See *Laws of the Game* r 1.6.5(b).

<sup>111</sup> *Laws of the Game* r 1.6.7

<sup>112</sup> Ibid r 1.7(c).

<sup>113</sup> Ibid r 1.6 states that this decision can be made by the Commission or the AFL General Manager – Football Operations.

reviewed by the AFL. The person concerned also has the opportunity to address the matter to assist the investigation.

At the AFL's discretion, the matter is either resolved by the club's disciplinary processes (which may include educational programs, fines of up to \$5,000 per incident, or suspension)<sup>114</sup> or if the incident is considered sufficiently serious, be referred directly to the AFL Tribunal.

If the person is disciplined by the club but the AFL considers the penalty is manifestly inadequate or excessive, or that the club has not used proper processes, the AFL *may* refer the matter to the AFL Tribunal.

If the matter is referred to the AFL Tribunal, it is not simply a panel of ex-footballers or football administrators which review the conduct, but a panel more broadly representative of the community, versed in the issues of due process and procedural fairness and qualified to consider the relevant issues. If requested to consider an issue under the Policy, the AFL Tribunal must comprise:

- a retired Judge/Senior Legal Practitioner;
- a retired AFL player; and
- another person who in the opinion of the AFL is suitably qualified given the circumstances of the matter to be considered.<sup>115</sup>

The Policy states that the AFL Tribunal is obliged to issue written reasons for a decision upon request.<sup>116</sup> This indicates that the AFL has intends to implement a transparent decision making process.

The person receiving the sanction can appeal the AFL Tribunal's decision to the courts. To be successful the person would need to meet the principles established under the *Mitchell* and *Williams* decisions.

The Policy does not make clear whether the AFL Commission can choose to overturn the AFL Tribunal's decision, as unlikely as that may seem. Presumably that power still exists under the broad right to act in the 'best interests of the game', but it would certainly provide scope for judicial appeal by the person sanctioned.

Ultimately, while the structures and procedures implemented by the AFL appear to give the players an opportunity to be heard in front of a jury of qualified professionals and peers, it is not mandatory for the Tribunal to be involved. Broad discretionary powers to discipline remain with the AFL Commission, should it choose to invoke them.

<sup>114</sup> See above n 17.

<sup>115</sup> Individual Conduct Policy, Australian Football League, 2009, 9.

<sup>116</sup> The policy does not state who may request reasons – presumably it is at the request of the person whose conduct is the subject of the decision, rather than a media outlet hungry for a headline.

The reality is that the AFL's policy provides sweeping powers to the AFL Commission, with the AFL being able to discipline players (and others involved in the game) if, in the Commission's absolute discretion, their behaviour 'brings the game of Australian football into disrepute.'<sup>117</sup>

### **Comparison with the NFL's Personal Conduct Policy**

#### *Similarities between the NFL and AFL policies*

Given the recent public statements by the AFL on the influences of its Individual Conduct Policy, it is not surprising that there are many similarities between the AFL and NFL versions. The scope of coverage and overarching goals of the NFL's Person Conduct Policy are akin to the AFL Policy, as it is to be applied to the broad category of 'all persons associated with the NFL' who are required to avoid 'conduct detrimental to the integrity and public confidence' in the sport.<sup>118</sup>

The NFL policy provides a number of generic examples of inappropriate conduct, including the 'catch-all' category of 'conduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs or NFL players.'<sup>119</sup>

Other similarities with the AFL's policy include:

- players and club employees must report any incidents to the club, which in turn must report to the NFL;
- the NFL has the ability to impose a large range of disciplinary measures, from fines or suspension, through to banishment from the NFL; and
- the person involved has the opportunity to address the conduct and may be represented by counsel and/or a union official.

Finally, both the NFL and AFL strongly endorse the role of counselling and education of players. The NFL refers to counselling the 'offender' as a key obligation, not as part of discipline or a penalty, but to provide assistance to the person, and requires that the offender may be required to undergo a formal clinical evaluation.<sup>120</sup> Treatment of the offender under the AFL policy *may* require such a clinical evaluation, but it is not a mandatory part of the review process.

### **Differences between the NFL and AFL policies**

Given the broad similarities between the two policies, it is illuminating to review the key differences, which are set out below.

<sup>117</sup> Individual Conduct Policy, Australian Football League, 2009, 8.

<sup>118</sup> Personal Conduct Policy, National Football League, 2008, 1.

<sup>119</sup> *Ibid* 2.

<sup>120</sup> *Ibid*.

### *References to criminal conduct*

Unlike the AFL Policy, the NFL Policy contains many references to criminal conduct. The preamble to the NFL policy provides that employees of the NFL or its member clubs are to be held to a higher standard than simply avoiding being convicted of a criminal charge.<sup>121</sup> The NFL policy specifically states that unlawful possession of a weapon by a player outside of the workplace is a breach of the Policy. A person associated with the NFL found to possess a gun or other weapon in any workplace setting, or unlawfully possessing a weapon outside the workplace, may be disciplined.<sup>122</sup>

Possession of weapons has been a particular bugbear of the NFL and has attracted much recent media attention. This is highlighted earlier in the paper by the Tank Johnson and Plaxico Burress incidents, as well as the numerous charges faced by players from the Cincinnati Bengals.

The specific references to weapons in the NFL policy reflect a cultural difference between the two countries. The second amendment to the US constitution provides a citizen's right to 'bear arms', a legacy of colonial times long since passed and a particularly contentious current day issue. This personal right is not replicated in Australia and it is not an issue which appears to resonate as strongly with its general population, hence the differing emphasis in the policies.

### *Delegation of issue to persons other than the Commissioner / CEO*

Unlike the AFL, the NFL does not refer to member clubs disciplining a player. Further, there is no suggestion that the Commissioner may delegate the decision to a jury of peers. Indeed, while the affected person under the NFL's policy may appeal the Commissioner's decision, the appeal hearing is to be conducted by the Commissioner (or his designee).<sup>123</sup> Given the broad decision making discretion afforded the Commissioner by the courts, this effectively makes the Commissioner judge, jury and executioner.

This is in contrast to the AFL's policy which, in addition to allowing clubs to act in the first instance, allows its Tribunal to be involved.

Ultimately, however, the policies may be more similar than they appear at first glance. Both provide ultimate discretion in the Commissioner / Commission to determine penalty, notwithstanding notions that a tribunal including ex-players or qualified experts *may* at times make the judgment.

---

<sup>121</sup> Ibid.

<sup>122</sup> Ibid 1.

<sup>123</sup> The NFL Personal Conduct Policy states that the person 'shall be entitled to a prompt hearing pursuant to Article XI of the Collective Bargaining Agreement and the NFL Constitution and Bylaws.'

*Danger to a person's safety and well-being*

The NFL's policy draws a distinction between 'ordinary' off-field incidents and those which impose 'inherent danger to the safety and well being of another person.'<sup>124</sup> Where the conduct in question relates to an issue of 'significant bodily harm', the NFL policy indicates that it will likely postpone any imposition of discipline until the issue has been dealt with by the relevant court proceedings.

The AFL's policy is silent on the timing of when it (or the clubs) will become involved. However, recent examples involving an Adelaide Crows player, Nathan Bock, and the even higher profile Brendan Fevola, late of the Carlton Football Club, are perhaps an indication that for public relations purposes, wherever possible the AFL will wash its hands of the matter and let the clubs deal with the issue.

Bock, one of the premier players in the Adelaide team, was arrested for assaulting his girlfriend and public drunkenness at an Adelaide hotel, and was subsequently restricted from further contact with his girlfriend through a court intervention order. While Bock was initially suspended 'indefinitely' by his team, that suspension lasted only one game. Bock was also fined \$5,000 and ordered to spend 50 hours in community service time assisting women's shelter. The AFL did not intervene to seek a longer penalty, nor did it provide any formal comment on the club penalty. At the time the 'indefinite' suspension was announced, it was reported that the AFL had supported the club's stance.<sup>125</sup> Given the adverse publicity surrounding the incident, it was curious to see pictures of Bock used as part of an AFL advertising campaign throughout the remainder of the season, as well as in the promotional activities during the 2009 grand final week.<sup>126</sup>

Fevola is a champion full-forward, but notorious for flouting team rules. His mercurial goal kicking, coupled with frequent on-field displays of petulance, as well as high profile off-field incidents, lead one former coach to describe him as the 'girl with the curl' – when he is good, he is very, very good, but when he is bad, he is horrid.<sup>127</sup> For much of Fevola's time with Carlton, the club was floundering, its membership revenues as dependant on his ability and personality as was its on-field success. This led to much speculation that the club

<sup>124</sup> Personal Conduct Policy, National Football League, 2008, 2.

<sup>125</sup> See Stephen Reilly, 'Banned Bock at the mercy of Adelaide Crows', *The Australian* (Australia), 7 April 2009.

<sup>126</sup> Images of Bock were displayed in AFL promotional materials, including TV and print commercials and banners, for the AFL finals. See eg the 2009 AFL Grand Final Promotional materials available through the AFL website <[http://www.afl.com.au/portals/0/afl\\_docs/AFL%20Grand%20Final%20Week%20Flyer.pdf](http://www.afl.com.au/portals/0/afl_docs/AFL%20Grand%20Final%20Week%20Flyer.pdf)> at 21 September 2009.

<sup>127</sup> Caroline Wilson, 'Fevola is acting like a selfish dill', *The Age* (Melbourne), 13 July 2008.

inadequately punished Fevola when confronted with his frequent behavioural issues.<sup>128</sup>

Due to his drunken antics during the televised Brownlow medal count in 2009, including the inability to coherently complete on-air reporting duties, the club fined Fevola \$10,000. The subsequent adverse publicity surrounding his behaviour – prominent media outlets described the Brownlow celebrations and grand final week as ‘tarnished by his disgracefulness’<sup>129</sup> – led Carlton to seek to trade him to another club, eventually landing with the Brisbane Lions.<sup>130</sup>

While the extent of Fevola’s antics on Brownlow night are the subject of much speculation, including media reports of an alleged assault against a female journalist, it would appear that his behaviour included, at a minimum, verbal assault of players, and senior club and AFL staff.<sup>131</sup> At the time of writing, Fevola has not been charged with any offence, nor has he been sanctioned under the Individual Conduct Policy.

The AFL’s inaction has been criticised, with claims it is not prepared to act due to Fevola’s star appeal, and that his behaviour ‘[has] manifested into a maelstrom of chaos because of repeated inaction from forgiving and sycophantic AFL officials.’<sup>132</sup> Clearly his behaviour has negatively impacted upon the AFL’s public image.

The football season is in hiatus for the summer months, so the AFL still has an opportunity to discipline Fevola prior to him playing another game. With the media continuing to report on the incidents, it continues to cast a shadow over the AFL. It will be interesting to see whether the AFL imposes any penalty as a result of the damage caused by Fevola’s actions.

### *External application of the policy to third parties*

In contrast to the AFL, the NFL policy specifically attempts to influence the behaviour of third parties affiliated with teams, encouraging clubs to make clear

<sup>128</sup> Eg, Fevola was only stood down from the club’s leadership group and fined \$10,000 as a result of video footage surfacing displaying him urinating on a nightclub window and jostling with staff at 4am, just days before the start of the 2008 season. See Angus Morgan, ‘Last Chance for Fevola’, Sportal Australia, <<http://sportal.com.au/afl-news-display/last-chance-for-fevola-45101>>, 18 March 2008 at 15 May 2009. See Tim Lane, ‘Fevola presents a challenge for his second-year coach’, *The Sunday Age* (Melbourne), 11 October 2009 for commentary on the adequacy of Carlton’s treatment of the player during his time at the club.

<sup>129</sup> Ron Reed, ‘Legends set the example’ *HeraldSun* (Melbourne), 15 October 2009.

<sup>130</sup> Jake Niall, ‘None trampled in rush for Fevola’, *The Age* (Melbourne), 7 October 2009.

<sup>131</sup> Fiona Hudson, Sam Edmund, ‘Brendan Fevola accused of assaulting female Herald Sun journalist at the Brownlow Medal count’, *HeraldSun* (Melbourne), 9 October 2009.

<sup>132</sup> Jacqueline Magnay, ‘Out of control Fevola is a recidivist of Demetriou’s own making’, *The Age* (Melbourne) at < <http://www.theage.com.au/news/rfnews/outofcontrol-fevola-is-a-recidivist-of-demetriou-own-making/2009/10/12/1255195744379.html> > at 14 October 2009.

to independent contractors and consultants ‘that violations of this policy will be grounds for terminating a business relationship.’<sup>133</sup>

By including this statement within the Policy, the NFL provides an impression that it has sufficient legal authority to terminate contracts clubs have entered into with third parties. It is highly likely that no contractual nexus with the NFL would exist in a contract simply between a team and an independent contractor, thus making it unlikely that the NFL could legally enforce such a right or impose such a requirement. However, by the inclusion of the statement, it is apparent that the NFL will use whatever commercial pressure it has to bear to ensure that relationships between clubs and undesirable independent contractors (in the minds of the NFL) do not continue.

The NFL also seeks to extend the scope of its policy to persons who are not currently involved in the league, stating it applies to those with a ‘potential’ relationship with the league. This includes all undrafted ‘rookie’ players, unsigned veterans who were under contract in the prior year, and other prospective employees once they commence negotiations with a club concerning employment.

Should the NFL impose a penalty on any of those persons with a potential relationship with the league, a court may find no contractual nexus to support the NFL’s actions. The threat of NFL sanctions, however, may be sufficient to scare teams away from hiring such persons.

Neither football code’s policy, however, attempts to provide a comprehensive list of specific conduct which would be considered in breach.

### Recommended policy alterations

*The fact that the core subject matter of the undertaking is Australian Rules Football has led to certain public comment that the law should be kept out of sport. The dimensions of the business relationships are such that this catchery has a distinct air of unreality about it. – Ashley AJA in Carlton v Australian Football League*<sup>134</sup>

As argued earlier in the article, the AFL policy has improved upon its NFL counterpart by providing that a jury of qualified peers may be involved in reviewing conduct. The AFL policy also takes a more realistic view of the scope of the league’s powers by not attempting to over-extend its application outside the sphere of the game’s core participants of players, employees and officials.

<sup>133</sup> Personal Conduct Policy, National Football League, 2008, 3.

<sup>134</sup> [1998] 2 VR 546 at 570.

There are, however, a number of areas within the AFL policy which the author considers could be improved.

*Improved framework to define 'conduct unbecoming'*

Given the large discretion afforded to the leagues (and the potential financial sanctions facing players and officials), this article suggests the parameters surrounding actions which constitute 'conduct unbecoming' should be more clearly defined. Participants would then have a clearer expectation of the standard they are required to uphold while they are involved with the sport.

Legal commentary on the disciplining of players for off-field incidents has attempted to further define actions which constitute 'conduct unbecoming'. Martin Kosla has suggested that 'conduct unbecoming' should amount to actions which are 'so outrageous that the sport itself is subjected to public ridicule.'<sup>135</sup> A recent sporting example of conduct which would likely meet that requirement is the Matthew Johns/Cronulla Sharks group sex controversy which engulfed the National Rugby League competition in 2009.<sup>136</sup>

Kosla provides a framework of determining 'conduct unbecoming' based on the legal principles of equity and the law of defamation,<sup>137</sup> whereby to warrant disciplinary action, the off-field conduct would be required to involve:

- an impact on the person's competence or ability to perform their public duties (which could include an impact on the performance of their contractual sponsorship duties);<sup>138</sup>
- media exposure or public knowledge of the incident;<sup>139</sup> and
- injury to the sport itself, which could be described as the incident having a negative impact on the public view of the professional athlete and the sport.<sup>140</sup>

<sup>135</sup> Martin Kosla, 'Disciplined for bringing a sport into disrepute' – A framework for judicial review', 25 *Melbourne University Law Review* 654 ('Kosla'), 672.

<sup>136</sup> See Fiona Curruthers, Neil Shoebridge, 'League scandal allows sponsors to wield knife' *The Australian Financial Review* (Melbourne) 19 May 2009, 60, which provides 'The Cronulla Sharks club has lost several sponsors over the past week, including Westfield Holdings' Miranda shopping centre and Tyrepower. Its biggest sponsor, LG, is said to be reviewing its deal with the club.' The article quotes the Chairman of Aussie Home Loans, John Symonds, an NRL sponsor, as 'If our contract was up next week, we wouldn't renew it ... [I]f this behaviour by NRL players continues, we won't wait until late next year to have a look at our contract. The contract has an "out" clause for us. ... We don't want our brand damaged by association.'

<sup>137</sup> Kosla 670.

<sup>138</sup> Kosla 673-4.

<sup>139</sup> This might involve the issue becoming generally known to people engaged in, or engaged in activities associated with, pursuit of the sport in question. See Kosla at 667-8, with reference to *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 166.

<sup>140</sup> Kosla 672.

Another legal commentator, Emma Bicknell Goodwin, has viewed the relationship between the league and the person as ultimately being akin to (if not actually) the dynamics of an employment relationship. Using that viewpoint, Bicknell Goodwin has applied Australian legal determinations on unacceptable 'out of hours' behaviour in an employment relationship to 'conduct unbecoming' in the sporting context.<sup>141</sup> Bicknell Goodwin argues that 'conduct unbecoming' could be considered to have occurred if an off-field incident:

- harms the employer's interests, reputation and good standing;<sup>142</sup>
- demonstrates a lack of trustworthiness or competence on the part of the employee;<sup>143</sup>
- is incompatible with the employee's duties as an employee;<sup>144</sup>
- causes serious damage to the relationship between the employer and employee;<sup>145</sup>
- demonstrates unfitness of the employee for a particular office, for example as a police officer, teacher or solicitor<sup>146</sup> (which from the AFL's standpoint could be the 'office' of captain of a club, or an official in an executive role, such as Richard Pratt during his time as the president of the Carlton Football Club); and/or
- renders the employee unable to perform their obligations (for example, because they are imprisoned).<sup>147</sup>

As Bicknell Goodwin notes, the two 'conduct unbecoming' frameworks have similarities in that they require the conduct to be public in nature, to be injurious to the employer, and require the conduct to be inconsistent with the position of employment.<sup>148</sup>

<sup>141</sup> See Emma Bicknell Goodwin, 'Rules, Referees and Retribution: Disciplining Employee Athletes in Professional Team Sports', (2005) 18 *Australian Journal of Labour Law* 240 ('Bicknell Goodwin'), 242 with reference to *Rose v Telstra Corporation*, (unreported, AIRC, Print Q9292, Ross VP, 4 December 1998), and *McManus v Scott-Charlton* (1996) 70 FCR 16; 140 ALR 625.

<sup>142</sup> Bicknell Goodwin, 242 referring to *Smith v Christchurch Press Co Ltd* [2001] 1 NZLR 407, 413 which considered the more relevant consideration to be the nature of the injurious conduct to the business, rather than the specific location of the conduct.

<sup>143</sup> Bicknell Goodwin, 242, citing L Kurlantzick, 'John Rucker and Employee Discipline for Speech' (2001) 11 *Marquette Sports Law Review* 185, 186.

<sup>144</sup> Bicknell Goodwin, 242, citing 'Employee Privacy in the Electronic Workplace Pt 2: Drug Testing, out of Hours Conduct and References' (2000) 7(7) *Privacy Law and Policy Reporter* 139, 143.

<sup>145</sup> Bicknell Goodwin, 242, citing L Kurlantzick, 'John Rucker and Employee Discipline for Speech' (2001) 11 *Marquette Sports Law Review* 185, 187.

<sup>146</sup> Bicknell Goodwin, 242 citing, eg, *Henry v Ryan* [1963] Tas SR 90; *R v Teachers Appeal Board; Ex parte Bilney* (1984) 6 IR 476 and *Re Weare* [1893] 2 QB 439.

<sup>147</sup> Bicknell Goodwin, 242 citing G Nicolau, *Discipline in Sports* (1999) 17 *Hofstra Labor & Employment Law Journal* 145, 148.

<sup>148</sup> Bicknell Goodwin, 248.

This article recommends that instead of providing a vague concept that players should act in a 'responsible and lawful' manner,<sup>149</sup> the AFL policy should include references clarifying 'conduct unbecoming' that are consistent with the existing legal framework regulating out of hours conduct of employees. The policy should note that for the AFL to consider an action to be 'detrimental' it must be off-field conduct which:

- has been made public;
- is inconsistent with the standards expected of a law abiding member of the community (and for those players and officials included within formal leadership roles within clubs – namely, captains and vice captains, board members and executive employees – is conduct inconsistent with that expected of a person within such a position of leadership); and
- a reasonable person would consider likely to harm the interests of the league or its member clubs, which includes behaviour:
  - which places revenues from current sponsorship contracts or broadcasting contracts in jeopardy; or
  - which a reasonable person considers likely to lead to fewer people participating in the sport at a 'grass roots' level and/or likely to discourage juniors from participating and becoming the next generation of amateur and professional players.

Clearly, the inclusion of the recommended references clarifying 'conduct unbecoming' does not completely eradicate some subjective interpretation by the league of the actions of players and officials. However, while there would still be some uncertainty, the inclusion of those clarifying provisions within the AFL Policy would assist players and officials in understanding their obligations.

Under that standard of review, it is certainly possible – indeed, probable – that were a player or official to be arrested, their actions would harm the interests of the league simply through the adverse publicity.<sup>150</sup> The NFL Policy expressly states this is a likely outcome, and as noted, provides specific examples of conduct which will be penalised.<sup>151</sup> As noted in the introduction to this article, the AFL notes that such disciplinary action *may* occur simply as a result of the adverse publicity. However, it is recommended that the AFL follow the NFL lead and expand on this possibility within its policy, providing examples which further clarify incidents which would lead to disciplinary action.

<sup>149</sup> Individual Conduct Policy, Australian Football League, 2009, 1.

<sup>150</sup> See Robert Ambrose, 'The NFL Makes it Rain: Through Strict Enforcement of its Conduct Policy, the NFL Protects its Integrity, Wealth, and Popularity', 34 *William Mitchell Law Review* (2008) 1069, 1108-09, which notes that the introduction of the NFL's policy, which specifically addresses disciplinary players and officials charged with criminal offences, is likely to decrease the risk that children will be influenced by the negative actions of professional football players.

<sup>151</sup> See above n 11 and n 12.

### *Increased role of the AFL Tribunal*

As noted earlier, the AFL Policy indicates that it has the option of referring issues considered to be ‘conduct unbecoming’ to its internal tribunal.

Arguably the involvement of a broader panel of individuals versed in the issues at hand – compared to the United States version of a commissioner solely making a determination – increases the likelihood of a decision being reached which is in both the best interests of the game and reasonable in the eyes of the general community. However, were the AFL to structure its policy so that it was *mandatory* for all matters reviewed under the ‘conduct unbecoming’ rule to first be considered by the Tribunal, this article contends that there would be a greater likelihood of a determination which not only passes the not ‘so aberrant that it cannot be classed as rational’<sup>152</sup> test, but that it is also a *reasonable* determination.

This would also allow clubs the opportunity to review the matter with the Tribunal members and in the event of a sanction, and would require that the AFL Tribunal publish its findings. As the recent (inadequate) club imposed sanction on Adelaide’s Nathan Bock suggests, clubs have an obvious interest in wanting to see players back on the field. This has the potential to conflict with the longer term goal of growing of the game. This proposal allows clubs to participate in the process without the concern of conflicts. There may be instances where some time elapses between the start of an investigation and an eventual determination by Tribunal. In those circumstances the person should be permitted to continue their role, unless the alleged discretion was of a nature that directly related to their role (such as a club’s chief financial officer facing fraud charges).

Finally, in recognition of the independence of the AFL Commission, the proposed structure would provide it with the possibility of overruling the determination if it considered it unsatisfactory and replacing it with its own sanction (albeit it would have run the gauntlet of public opinion if it were to go against a publicised decision of the Tribunal).

If the person sanctioned thought the determination unreasonable they could pursue the matter further via court proceedings, with the AFL Tribunal’s decision (or AFL Commission’s decision, in the event of the Tribunal’s determination being overruled) being reviewed according to the principles established in *Mitchell* and *Williams*.

---

<sup>152</sup> See above n 35.

**Broader commentary on off-field conduct policies**

*We think that AFL footballers are the best role models to help promote a healthy lifestyle and send out messages to kids and adults about unhealthy lifestyles.* – Eugene Arocca<sup>153</sup>

Penalising players or officials for off-field conduct which, in the eyes of the league is ‘detrimental’ to its image, raises a number of issues. These range from whether the League acts in a consistent fashion in disciplining its participants, through to broader questions of whether footballers are held to a higher behavioural standard than that expected of the rest of the community.

*Consistent application of the policy*

Perhaps the biggest issue with the AFL policy is not so much the discretion afforded to the governing body, but the potential for lack of consistency in its application.

Legal scholars have argued that consistent application by a League of this discretionary power should impact upon a court’s judgment of whether the league is actually acting to protect the long term future of the sport. For example, Paul Weiler argues that unless there is a consistent approach from the League in disciplining all seriously illegal behaviour, there cannot be a legitimate claim that they are acting to protect the integrity of their sport and upholding high standards of behaviour.<sup>154</sup>

This potential for inconsistency is most clearly demonstrated by the AFL’s proactive handling of the off-field indiscretions of Ben Cousins prior to the determination of pending criminal charges, while at the same time allowing Richard Pratt to remain as Carlton Football Club president as he faced criminal charges.

This resulted in much commentary by journalists on the AFL’s differing levels of involvement in each matter. Many observers considered that the AFL was asking players to abide by one set of standards, while not applying those same standards to rich, powerful officials involved within the game.

When it was announced that Pratt was to face criminal charges, the AFL’s CEO, Andrew Demetriou, commented that it was important for the community to adopt a presumption of innocence – as indeed it should. However, by not making similar statements at the time of Cousins’ arrest, and by not commenting on

<sup>153</sup> North Melbourne Football Club CEO, as quoted in Caroline Wilson, ‘We are right to want decency from players’, *The Age* (Melbourne), 15 April 2009.

<sup>154</sup> Bicknell Goodwin 248 citing P Weiler, ‘Leveling the Playing Field: How the Law Can Make Sports Better for Fans’, *Harvard University Press*, Massachusetts, 2000, 31-55.

the West Coast Eagles decision to terminate Cousins' contract prior to having the charges against him heard, the AFL Commission's conduct '... somehow managed to condemn Cousins while giving the green light to Pratt.'<sup>155</sup>

Unrest among the sport's participants is sure to grow if the AFL continues such an inconsistent application.

*Players and officials as fall guys for broader social objectives?*

Martin Kosla's commentary argues that discipline for 'conduct unbecoming' may be legitimate where the athlete in question has been held out to the public as subscribing to a particular standard, and has failed to do so.<sup>156</sup> But has the player chosen to be held out in this way, or has a standard been effectively imposed on him by the governing body and the various club and league sponsors?

While some players may embrace the notion of being a role model in the community, the more realistic view is that the governing body has built a commercial image of 'players as role models' and imposed that on the players through collectively bargained employment terms and various AFL policies. Given the lack of comparative alternative employment options, the player has no viable alternative but to try and meet these standards.

Governments and quasi-government agencies have recognised the increasing profile of the AFL and looked to sponsorship of the AFL and clubs to increase the profile of its messages to the community, which often aim to alter community standards and behaviour. Messages such as 'Speed Kills' and 'Wipe off 5' (used to encourage drivers to drive at a slower speed) are common on playing jumpers of AFL players, as well as on stadium signage. So too are slogans promoting 'Worksafe', encouraging awareness of a safer workplace.

State and federal government agencies also buy prominent advertising time during the telecast of games to highlight the dangers of mixing alcohol and driving, or the dangers of illicit drugs. Further, political parties sometimes see an association with clubs as beneficial in election campaigning. For example, in the lead up to the 2007 federal election the Government provided funding to the re-development of the Western Bulldogs training facilities in order to provide a community athletic centre, which also happened to be located in a marginal electoral seat.

Some commentary has suggested that increased role of the government in the sport has led to the players being political pawns of the government's broader

<sup>155</sup> Lane 1. See also Braham Dabscheck, 'Bare-chested footballer Cousins and well-dressed thief Pratt', 13 December 2007 <<http://www.eurekastreet.com.au/article.aspx?aeid=3792>> at 11 May 2009.

<sup>156</sup> Kosla 673-8.

social agenda, holding them to a higher standard than the rest of the public and destined to fall short. A contrary view, subscribed to by this author, is that the players are simply being asked to abide by existing laws, while at the same time benefiting through the large salaries provided through increased government sponsorship funds.<sup>157</sup> However, it is clear that the relationship between the players, the clubs and the AFL is unique and high profile. Players are readily identifiable in public, meaning that bad publicity for relatively minor offences which occur on a frequent basis within the community is more likely to harm the employer (and sponsors) than in a more traditional employment relationship.<sup>158</sup> Indeed, the Richmond and Collingwood Football Clubs have seen the monetary impact of such incidents. Players from both clubs have had highly publicised driving infringements, which resulted in the cancellation of sponsorship agreements with the TAC.<sup>159</sup> Collingwood's stance in response was interesting, given a legal termination right had not arisen as a result of its player's conduct. However, the club felt it had not lived up to its moral obligations to the TAC and the community in general, and it cancelled the sponsorship agreement.

Given the money involved in most sponsorship agreements (and that not all clubs may have the financial wherewithal of Collingwood to make a principled decision or absorb such a financial hit), clubs may not always act in the best interests of the AFL in disciplining its participants. This suggests that mandatory involvement of the AFL Tribunal in the determination process would be a good idea.

In contrast, government association with sport in the United States is less prevalent. Given the NFL's focus on private ownership of clubs and stadiums, local government is not as intertwined with the operations of the sport as

<sup>157</sup> See eg, comments from Matt Finnis, vice-president of the AFL Players' Association in Matt Finnis, 'Playing its role in social leadership', *The Age* (Melbourne), 26 April 2009.

<sup>158</sup> Compare this, for example, to the situation of a partner from a high profile national law firm being charged with driving offences or public drunkenness. No doubt there would be embarrassment for both the person and firm, but it is unlikely that the incident would harm the interests of the law firm and reduce the chances of the firm to attract other talent as employees, notwithstanding that the age and the education levels of the law firm partner and the AFL player are likely to be markedly different.

<sup>159</sup> Sharrod Wellingham, a Collingwood player, was caught drink-driving and in addition to losing his licence for a year, was fined \$5000 by Collingwood (approximately 10% of his wage). Wellingham's incident was the third serious driving incident involving Collingwood players in the prior four years. The club decided to forfeit their \$500,000 a year sponsorship agreement with the Transport Accident Commission, with President Eddie McGuire stating 'That we have transgressed means we've forfeited the right and the privilege of being associated with the Transport Accident Commission.' In 2005, the Transport Accident Commission terminated its deal with Richmond after a player, Jay Schulz, was caught drink-driving. Despite the various incidents, the TAC maintained its partnership with the AFL, sponsoring the AFL's under-18s competition ('The TAC Cup'), indicating that 'With people aged between 18 and 25 accounting for 81 deaths on Victorian roads last year, sport was still the correct instrument to sell its message to the age group.' See Karen Lyon, 'The rookie who cost Collingwood \$500,000', *The Age* (Melbourne) <<http://www.realfooty.com.au/articles/2008/01/09/199554741612.html?page=fullpage#contentSwap1>> 10 January 2008.

in Australia.<sup>160</sup> Further, the monies generated through the sale of broadcast rights in the NFL are so vast that subsidies from the federal government are not required to support the operations of the sport, diluting government influence.<sup>161</sup>

## Conclusion

*Players are right to request some privacy, but we are right to request from them some decency* – Caroline Wilson<sup>162</sup>

Most observers would consider that the governing body of a sport requires some reasonable disciplinary power to ensure that the conduct of its participants are, at least to some extent, regulated and that adequate considerations are taken into account for the future popularity and success of the sport. It is obviously important that those closely associated with the game do not behave in a fashion which turns the public away from watching the elite level of the sport, or which leads to lower participation at junior levels.

This article has demonstrated that potentially damaging off-field issues caused by players and officials are not a new phenomenon. However, an increased media focus on the game (bringing with it increased revenues for the league and its clubs) has led to wider coverage of incidents, leading to concerns about damage to the AFL 'brand', and the effect of that on the future health of game.

For the AFL, this issue is an off-field game of balancing competing interests, with the individual rights of players and officials being matched up against those of media broadcasters and sponsors, and the broader vision of best interest and future directions of the independent commission. The review of these often competing interests has highlighted that sport, commerce and the law can be uneasy bedfellows when it comes to imposing discipline.

<sup>160</sup> All NFL clubs are privately owned corporations with the exception of the Green Bay Packers, which is the NFL's only publicly owned, not-for-profit corporation. See 'The Green Bay Packers', Wisconsin Policy Research Institute Report, November 1995, No8 Vol. 9 at < <http://www.wpri.org/Reports/Volume8/Vol8no9.pdf> > at 2 October 2009. Compare this to the AFL, where none of the clubs are privately owned, and have instead adopted a not-for-profit, membership based ownership structure. Further, the key stadium used for the competition in Melbourne, the MCG, is built on land owned by the Victorian government, which also manages the MCG by way of the Melbourne Cricket Ground Trust. See *Melbourne Cricket Ground Act (Vic)* 1933.

<sup>161</sup> The United States government has influence over the NFL, as recent investigations into the alleged use of performance enhancing drugs has seen some of the sports participants testify in front of Congressional committees. However, these investigations have been more keenly felt by Major League Baseball, as it seeks to pacify Congress to ensure it maintains its broad exemption from the application of federal anti-trust laws (which does not apply to the NFL or any of the other professional sports in the US).

<sup>162</sup> Caroline Wilson, 'We are right to want decency from players', *The Age* (Melbourne), 15 April 2009.

The AFL should be commended for introducing an ‘Individual Conduct Policy’ to clarify its disciplinary powers relating to off-field behaviour. While using many of the core elements of the NFL’s Personal Conduct Policy, the AFL Policy includes a role for a jury of peers through the inclusion of the clubs and the AFL Tribunal. The involvement of a relevant group of peers in the determination process should increase the likelihood of reaching a decision which is both rational and reasonable, which this article considers an improvement on the NFL model.

However, this article contends that the AFL Policy could be improved by providing a clearer definition of off-field actions which constitute ‘conduct unbecoming’ which is consistent with the existing legal framework regulating defamatory conduct as well as out of hours conduct of employees – that being, the conduct is public in nature, causes injury to the AFL or its member clubs, and is conduct which is inconsistent with actions expected of an AFL footballer.

This article also considers a mandatory involvement of the AFL Tribunal in reviewing the conduct in question would not only ensure that the principles of natural justice are observed, but also improve the likelihood of a reasonable decision for both the AFL and the players and officials involved.

Ultimately, however, the biggest issue with the AFL policy is not so much the discretion afforded to the governing body, but the potential lack of consistency in its application.

Unrest among the sport’s participants is sure to grow if the AFL chooses easier targets, such as a lone player, while leaving more contentious issues unregulated by the Policy. Such inconsistent treatment would surely lead to greater judicial involvement in the game and ultimately, unwanted adverse publicity for the governing body and the game as a whole.