

THE CONTRACTUAL AND ETHICAL DUTY FOR A PROFESSIONAL ATHLETE TO BE AN EXEMPLARY ROLE MODEL: BRINGING THE SPORT AND SPORTSPERSON INTO UNREASONABLE AND UNFAIR DISREPUTE

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Professional athletes are sanctioned pursuant to a clause in playing contracts that authorises a sport association and/or club to take punitive action for conduct that is deemed to be in breach of the requirement not to bring the sport into disrepute. This can include conduct that occurs in a time and place unrelated to the sport. The sport associations claim they have a right to safeguard their brands and accordingly their well-paid athletes need to protect the association's commercial and reputational interests by being exemplary role models at all times. This article argues that the contractual terms that regulate such conduct are unreasonable and improper. Moreover, the associated role model expectations are either vague or unspecified, leading to uncertainty about the responsibilities of athletes beyond the playing field. This article proposes that the contractual terms must change, the discourse must be reframed, and education must be provided for the community, the stakeholders and the players.

Introduction

In 2009, Frank Farina, then coach of the Australian National Football team – the Socceroos – was dismissed because he was caught drink-driving. But, what did his drink driving have to do with his employment as a coach? ‘Why should he also lose his job [for that offence]?’¹ More recently,² James O’Connor, a member of the Australian National Rugby Union Team – the Wallabies – was granted an early release from his 2013 playing contract and advised he

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¹ Nigel Inglis, ‘Is Drink Driving Enough to Lose Your Job?’ 30 *Mullins Sport Newsletter* 1, 3.

² This article is written in relation to incidents up to December 2013.

would not be offered a new contract by his employer, the Australian Rugby Union ('ARU') following an incident at Perth airport when he was going on holidays.³ Many of the other major professional sport associations in Australia – the National Rugby League ('NRL'), the Australian Football League ('AFL'), Cricket Australia ('CA') and the Australian Olympic Committee ('AOC') – have also had their share of 'troublesome' individuals who have 'misbehaved' off the field in incidents totally unrelated to their sport. Similarly they have sanctioned their athletes, even though the conduct was unrelated to their work and occurred in their private time. The exemplary behavioural standards required of elite professional athletes appear very different to the standards generally expected of employees: 'shifts have occurred in the employment contract ... [for] players, whereby employers are beginning to manage and regulate the off-field behaviour of players and this is largely due to the role-model expectation'.⁴

There is no question that a sport association has the managerial right and indeed duty to maintain its reputation and brand image. This sporting reputation is connected to large sums of money invested into the sport by the supporters, sponsors and media rights holders. Elite professional sport has become a significant financial enterprise. The desire to fund a successful product and image is often fulfilled by substantial financial returns through the entertainment of the public and its support.⁵ Indeed, the many stakeholders in a sport – the athletes (past and present), officials, administrators, fans, sponsors, media rights holders – all have a vested interest and expectation to see the sport maintain its standing – both reputational and financial.

There is also no question that an athlete's off-field indiscretion can threaten the relationship a sport has with each of its stakeholders. A corporation which establishes a commercial partnership with a sport by investing significant sums of money to enhance its image and to promote its brand, products and/or services is a key stakeholder. As a result there is a view that an athlete is a '24 hours a day, 7 days a week, 52 weeks a year employee ... [who] must protect their interests and those of [the sport's] corporate partners'.⁶ This is because '[p]articipant/[a]thlete behaviours can build brand equity' but '[t]hey can also

³ Mike Dawes, 'Troubled O'Connor Axed by Australia with Embarrassing Airport Incident the Final Straw', *Mail Online* (online), 3 October 2013 <<http://www.dailymail.co.uk/sport/rugbyunion/article-2442308/James-OConnor-released-ARU-contract.html>>. This was not the first off-field incident in which O'Connor had been involved but it was, ostensibly at least, the reason why he was sacked.

⁴ Andrew Podbury, *AFL Players as Role Models: The Off-Field Expectations Placed on AFL Players as Role-Models and How This Has Affected the Traditional Employment Contract* (PhD thesis, La Trobe University, 2011) 351–2 <<http://arrow.latrobe.edu.au:8080/vital/access/manager/Repository/latrobe:33981?query=andrew+podbury>>.

⁵ See Patrick George, 'Sport in Disrepute' (2009) 4 *Australian and New Zealand Sports Law Journal* 24, 26.

⁶ Glen Bartlett and Regan Sterry, 'Regulating the Private Conduct of Employees' (2012) 7 *Australian and New Zealand Sports Law Journal* 91, 105.

depreciate it very quickly'.⁷ Consequently, the interests of stakeholders weigh heavily on a sporting association when determining the penalties to impose for unsavoury off-field player behaviour.⁸ In 2010, for example, NRL player Joel Monaghan resigned after his club's sponsors gave the club an ultimatum to either dismiss him or lose the sponsorship, after a picture of him in a sexual pose with a dog appeared on the internet.⁹

However, where an athlete's indiscretion has occurred in non-sport related circumstances, is it fair or reasonable for the sporting association to penalise him or her, particularly when the indiscretion involves activities that are non-criminal or unproven in court? There is another reality: 'that although protecting the "image" or "brand" that an organisation creates is important, the desire to do so at the expense of [an] employee[']s [athlete's] human rights [and to this can be added civil, including legal, rights] has real and problematic implications'.¹⁰

Human rights are not founded on contract, but are intrinsic rights enjoyed and respected by all humans. They are broadly articulated within the *Universal Declaration of Human Rights*¹¹ and are inalienable. In Australia, everyone is reportedly 'entitled to freedom of speech, association, assembly, religion, and movement'.¹² While not all human rights are enshrined in Australian law, Australia is a party to seven core international human rights treaties which protect most of these rights; one example is that of the *International Covenant on Civil and Political Rights*¹³ which protects the five rights listed.¹⁴

In the context of athlete misbehaviour and sanctions, we will discuss the implications of two rights: the presumption of innocence until proven guilty and the 'right' to privacy. Whilst Australian citizens have statutory rights of privacy in

⁷ Dale Wood, 'Let Them on the Monkey Bars', *Sports Business Insider* (online), 10 September 2013 <<http://sportsbusinessinsider.com.au/features/let-them-on-the-monkey-bars/>>. However, this in reality is questionable – eg, in 2012, the NRL had its best ever year in terms of audience both live and via television, yet had more off-field scandal than even before: Rugby League Central, *State of the Game* (2012) National Rugby League <http://www.nrl.com/portals/nrl/RadEditor/Documents/State_of_the_Game_2012.pdf>.

⁸ See, eg, James J Paterson, 'Disciplining Athletes for Off-Field Indiscretions: A Comparative Review of the Australian Football League and the National Football League's Personal Conduct Policies' (2009) 4 *Australian and New Zealand Sports Law Journal* 105, 142.

⁹ Chris Davies, 'The International World of Sport and Liability for Off-Field Indiscretions' (2011) 23(1) *Bond Law Review* 41, 59.

¹⁰ Podbury, above n 4, 15.

¹¹ GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN DOC A/810 (10 December 1948).

¹² Settlement and Multicultural Affairs, *Five Fundamental Freedoms* (7 March 2014) *Australian Government – Department of Social Services* <<http://www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/programs-policy/taking-the-initiative/resources/five-fundamental-freedoms>>.

¹³ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 12, 18, 19(2), 21, 22(1).

relation to the disclosure of personal information,¹⁵ there is no general actionable right of privacy. Hence athletes are 'fair game' for media intrusions into their private lives and activities. What may once have been commonly assumed to be 'off limits' to the public is today fodder for distribution through all media, including social media. But how far into an athlete's private life should this intrusion justifiably extend? Acts such as the *Privacy Act 1988* (Cth) reflect an acceptance that our rights are subject to reasonable and necessary limitations within a free and democratic society – so as to achieve an appropriate balance between freedom of expression, and protection of groups and individuals from offensive behaviour. Furthermore, the democratic civil liberties that Australians enjoy in their day-to-day lives are based on notions of equality, freedom from interference and self-determination. These liberties enable people to live their lives as they wish consistent with the enjoyment of the same liberties by others,¹⁶ and manifest themselves in the rights listed above as well as in the right to due process. Employment contracts should not interfere with these fundamental rights.¹⁷

What is of interest is the interaction between the athlete's status as a human being and as an employee, and what can be ethically justified as reasonable and fair as regards the demands and expectations of an athlete's employment. In the context of the AFL, its evolution to a 'business' has seen the emergence of a 'professional identity' for an AFL player and a lack of clarity surrounding what a professional AFL player 'is'.¹⁸ Athletes have gone from being sportspeople to taking on the expanded roles of entertainers and celebrities. These changes have been promoted by football leagues and in some instances the athletes themselves (typically via their managers) as they seek sponsors and public support to enhance their income streams. Where athletes follow this path they shift into another domain of responsibility by creating a second and auxiliary employment relationship with sponsors, and must accept the obligations that attach. But what of the athlete who avoids such notoriety and wants to be 'just a player'? There are role expectations, together with associated model behaviours, which are demanded by sport associations, and transgressions attract perverse media interest. A key problem is that the notion of role models is so vague that it has become a catch-all phrase for disciplining players outside of their immediate workplace and for managing their conduct in private spheres.

'A role is the expected pattern of behaviours associated with members occupying a particular position within the structure of the organisation'.¹⁹ This begs the

¹⁵ *Privacy Act 1988* (Cth), an Australian law regulating the handling of personal information about individuals. This includes the collection, use, storage and disclosure of personal information, and access to and correction of that information.

¹⁶ John Stuart Mill, *On Liberty and Other Essays*. (Oxford University Press, 1991) 70.

¹⁷ See Podbury, above n 4, 334–6.

¹⁸ Peter Kelly and Christopher Hickey, 'Professional Identity in the Global Sports Entertainment Industry: Regulating the Body, Mind and Soul of Australian Football League Footballers' (2010) 46 *Journal of Sociology* 27, 28–9, 32–3, 41.

¹⁹ Laurie J Mullins, *Management and Organisational Behaviour* (Prentice Hall, 6th ed, 2002) 816.

question: 'expected by whom?'²⁰ Social learning theories suggest that people use *models* because they can be useful in allowing an individual to learn new norms, skills and tasks. '*Models* are also a powerful means of transmitting attitudes, values and patterns of thought and behaviour'.²¹ Broadly speaking then, '[a] role model is an individual perceived as exemplary, or worthy of imitation'.²² Role models are therefore important because they demonstrate that goals can be achieved and act as symbols of possibility to inspire people.²³ They play an important function in childhood and adolescence, presenting 'children with ways to navigate their environment and society'.²⁴

Hence, elite athletes find themselves assigned the status of 'being' role models on and off the field through the influence of media and public expectations, and by virtue of the clauses within their contracts – regardless of whether they fully understand and appreciate the contractual implications or want to assume the status of a role model.

It will be shown that an athlete's contract goes beyond reference to on-field behaviour effectively extending into private off-field, non-sport related time and activities. Employees in other industries are not required to maintain such standards nor to do so at all times. We argue that the employment relationship for professional athletes has evolved toward what has been described as a 'master-servant' contract relationship typical of a bygone era, where the master owns the slave.²⁵ Clearly, there are stakeholders in sport who might be turned away by inappropriate behaviour. But what is reasonable as regards disciplinary power? More to the point, what kind of conduct is to be the focus of such discipline?

We also argue that the contractual terms that regulate the elite athlete are in some important respects unreasonable and improper, and that the associated role model expectations are either vague or unspecified, leading to uncertainty about the responsibilities of athletes beyond the playing field. To remedy the situation, the player associations need to seek changes to player contracts and to educate: firstly, the public and the stakeholders through a reframed discourse around the player role model status, and secondly, the players as to what is expected of them – which in itself needs to be negotiated.

²⁰ Sandra Lynch, Daryl Adair and Paul Jonson (2014), 'Professional Athletes and their Duty to be Role Models' in Michael Schwartz, Howard Harris and Alan Tapper (eds.) 12 *Achieving Ethical Excellence (Research in Ethical Issues in Organizations)*, 75–90.

²¹ Podbury, above n 4, 24 (emphasis added).

²² Antronette K Yancey, 'Building Positive Self Image in Adolescents in Foster Care: The Use of Role Models in an Interactive Group Approach' (1998) 33 *Adolescence* 253, 256.

²³ Podbury, above n 4, 37. See Barry R Schlenker, Michael F Weigold and Kristine A Schlenker, 'What Makes a Hero? The Impact of Integrity on Admiration and Interpersonal Judgement' (2008) 76 *Journal of Personality* 323, 326.

²⁴ Podbury, above n 4, 25.

²⁵ Podbury, above note 4, 73–4.

Controlling Player Behaviour

For more than ten years there has been ‘an erosion of a clear distinction between public and private domains’ for sports stars.²⁶ The leagues and the clubs are attempting to control the private life and behaviour of their employees by taking ‘a more active role in the regulation and management of their players’ off-field lives, often in the name of developing a professional identity for²⁷ the league. Their rationale is grounded purely and simply in economics²⁸ although it can no doubt be argued that it is also for the players’ personal and reputational, if not financial, benefit.²⁹

As numerous commentators have indicated, the extent of a club’s power to control its players is determined by balancing the competing interests – rights of players, administrators, the league, fans, sponsors and media rights holders.³⁰ However, the issue for the athlete is that such control results in a loss of the athlete’s rights in favour of ‘the good of the game’. The leagues and clubs claim that this loss is part of being a player in the 21st century. However, we argue that this does not automatically provide a justification for the expansion of the parameters of the traditional employment contract of elite athletes to include the regulation and sanctioning of a significant amount of off-field behaviour.³¹ This is because the stakeholders’ interest in the behaviour of the athletes should not necessarily mean that *all* regulation and intrusion is acceptable and fair. Fairness would suggest that the athlete’s inalienable human rights should not be infringed and attempts by the professional sport employers to diminish them should at least be resisted on the grounds of propriety. But the question of the extent to which ethical and legal rights and responsibilities accrue to players on the grounds of their contractual employment is a fraught one. Athletes have legal rights to have the terms of their contractual agreements met (e.g., salary and conditions). We recognise that they also have certain moral rights (e.g., the protection of confidential information) and that these legal and ethical rights are balanced by responsibilities. However, we also ask, what are the rights and responsibilities of sporting associations in these contexts?

It is clear the leagues feel they have the right to regulate off-field behaviour. For example, past and present executives of the AFL argue that all those formally

²⁶ Gary Whannel, *Media Sports Stars: Masculinities and Moralities* (Routledge, 2002) 145.

²⁷ Podbury, above n 4, 75.

²⁸ *Ibid.*

²⁹ The argument about players’ personal and reputational benefit might be taken to imply that clubs see themselves as responsible for the kind of persons their players become. But if they did assume that responsibility, they could be accused of adopting an attitude usually assigned to parents or schools in dealing with children. It seems difficult to argue strongly that clubs are responsible for the personal and reputational integrity of athletes and also recognise that the athletes are adults – a club which seeks to undermine the moral integrity of its players would be open to criticism.

³⁰ Paterson, above n 8, 143; and especially George, above n 5, 27–8, where the many interests are listed.

³¹ Podbury, above n 4, 121.

associated with their organisation are in a fortunate and privileged position. Former AFL Football Operations Manager, Adrian Anderson, noted that ‘the AFL competition expects the highest standards of its players and officials both on and off the field, to reflect the level of support we are privileged to enjoy from across the community’.³² Consequently, the level of support that the players receive is taken to indicate that, by comparison with others, they can be held to a higher standard of behaviour. This sentiment is in fact enshrined in the AFL Respect and Responsibility Policy,³³ which is predominantly aimed at addressing the off-field behaviour of *all* individuals involved with the AFL competition:

[P]eople associated with the AFL competition are expected to take personal responsibility for their actions and accept any consequences which may arise from inappropriate behaviour. ... the competition’s key stakeholders [including sponsors and media broadcasters] ... place a great deal of trust, support and investment in the hands of the clubs and the AFL. 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.³⁴

This raises important questions as to what is meant by ‘responsible conduct’ or by ‘inappropriate behaviour’. Fundamentally, as we argue below, professional athletes are required to live within parameters set out in contractual (including policy) documents which abrogate their civil (including legal) and human rights in their private time because the leagues and clubs have powers that enable them to discipline players if – in the league’s or club’s opinion – the players’ behaviour ‘brings the sport into disrepute’.

Terms and Scope of Employment

Professional employment contracts are fundamental to the off-field expectations placed on professional athletes. An employment contract is a transaction between employer and employee that encompasses the entitlements and obligations of the employer and employee. It is best understood as a tool that links together labour supply and work organisations to manage long term economic risks and place limits on an employer’s legal power. Within the employment contract the employee agrees to accept the authority of the employer, often in return for economic security and career advancement. Hence, fundamental to this employment relationship is the notion that employees must be diligent, loyal and obedient, in pursuit of their employer’s interests.

³² Sam Edmund, ‘League Expands Player Code’, *The Herald Sun* (Melbourne), 1 June 2009, 82, quoted in *ibid* 122.

³³ AFL, *Respect & Responsibility: Creating a Safe and Inclusive Environment for Women at All Levels of Australian Football* (November 2005) <http://www.afl.com.au/staticfile/AFL%20Tenant/AFL/Files/Respect_&_Responsibility_Policy.pdf>.

³⁴ Paterson, above n 8, 127–8.

Employee responsibilities – positive and negative – are generally found in the misnamed ‘Standard *Playing Contract*’ to which there are numerous supplementary documents that make up the totality of the athlete’s obligations, including the regulations applying to them as employees of the league and club on *and* off the field. These supplementary documents (variously titled), found in most professional sports, include:

- Laws of the Game;
- Player Rules;
- Collective Bargaining Agreement;
- Code of Conduct;
- Anti-Doping Code;
- Illicit Drugs Policy;
- Racial and Religious Vilification Policy;
- Respect and Responsibility Policy; and
- Alcohol Code of Conduct.³⁵

Collectively they can be described as the player employment contract.

Significantly, elite athletes do not earn their income only from training and playing. Under their contracts, they also have media responsibilities, sponsor obligations, and social and civic duties, such as visiting schools. For example, under clause 30 of the NRL Code of Conduct, they are required to attend promotional activities and make media appearances.³⁶ Professional rugby players are required to attend corporate functions and promotional activities,³⁷ and the AFL Collective Bargaining Agreement states that ‘[a]ll players shall be available for one half day per fortnight during each year of the term of this Agreement save and except for periods of leave, to participate in bona fide appearances for development of the game of Australian Football as well as AFL and AFL Club promotion.’³⁸

The players also have under the player employment contract generic positive duties such as under clause 13 of the NRL Code of Conduct, which states:

³⁵ Bartlett and Sterry, above n 6, 92.

³⁶ NRL, *Code of Conduct* (2012) <[http://www.nrl.com/portals/nrl/RadEditor/Documents/NRL%20Code%20of%20Conduct%202012%20\(Final\)-1.pdf](http://www.nrl.com/portals/nrl/RadEditor/Documents/NRL%20Code%20of%20Conduct%202012%20(Final)-1.pdf)>.

³⁷ *Australian Rugby Collective Bargaining Agreement Mark III* (2011) Rugby Union Players’ Association <<http://c1940652.r52.cf0.rackcdn.com/4f69616099c2ff5dfb000288/CBA+Mk+III.pdf>>.

³⁸ Australian Football League and Australian Football League Players’ Association Inc, *Collective Bargaining Agreement 2007-2011* (2011) cl 20.1(a) <http://old.aflpa.com.au/images/uploads/AFLPA_AFL_CBA_2007_2011_FINAL_1.pdf>.

Every Club and every person bound by this Code shall, so far as practicable, do *all things* reasonably necessary to promote the best interests, image and welfare of the ARLC, the NRL, the NRL Competition, the National Youth Competition, the Related Competitions, the Representative Competitions, the Clubs and the Game.³⁹

Clause 3.2 of the Australian Rugby Collective Bargaining Agreement states: ‘You agree to give your *best efforts and loyalty as and when required* to your Union.’⁴⁰

Under clause 2.4 of the AFL Code of Conduct, the players ‘must (unless granted express permission otherwise or provide an explanation satisfactory to the AFL Club) attend, and attend punctually, all AFL Matches, AFL Club training and related events’ and also adhere to the following requirements:

- generally promote AFL Football, the AFL and AFL Clubs
- assist the AFL, AFL Clubs and Sponsors in promotional and developmental activities
- attend, and attend punctually, AFL and AFL Club promotional events, and
- attend media-related activities including (without limitation) after-Match interviews, television appearances and other related activities.⁴¹

Two points of significance arise from clauses of this kind. First, these professional elite athletes are expected to perform duties beyond those expected of employees under other employment contracts. Other contracts may stipulate duties specific to a particular profession, but generally do not attempt to encapsulate the breadth of activity covered by these player contracts. Second, provisions indicating that players must not engage in activities that conflict with the best interests of the league or that they must give their ‘best efforts and loyalty as and when required’, provide the employer with the ability and discretion to monitor, regulate or punish off-field behaviour. Contrary to the traditional employment contract, this allows employers to control and regulate behaviour in an individual’s private life⁴² beyond what, we argue, is reasonable and fair. Indeed,

the amount of control and power that sporting organisations have granted themselves to regulate and punish the off-field behaviour of its athletes is quite unusual, even compared to the new formulation of

³⁹ NRL, above n 36 (emphasis added).

⁴⁰ *Australian Rugby Collective Bargaining Agreement Mark III*, above n 37 (emphasis added).

⁴¹ *AFL Players’ Code of Conduct* (2008) AFL Players Association, cl 2.6 <http://aflagents.com.au/images/uploads/Code_of_Conduct_-_08_1.pdf>.

⁴² See generally Podbury, above n 4, 137.

the ‘traditional’ employment contract, which allows some regulation of private behaviour ... [T]he current formulation of the sporting employment relationship is a throwback to the mentality of the master-servant whereby the master owns the servant.⁴³

Moreover, ‘[i]t is unlikely that such power could go unchallenged in a “traditional” employer-employee relationship’.⁴⁴ The employers – the leagues and clubs – are requiring in effect exemplary behaviour of their employees – the professional athletes – *at all times*, which is contrary to most, if not all, other employment contracts.

In traditional employment, employers retain the power to interfere and make decisions in relation to matters that have the potential to significantly influence work performance. More significantly, within Australian law, employers can have some control over the out-of-hours conduct of their employees, and may take punitive action, when the employee:

- harms the employer’s interests, reputation and good standing;
- demonstrates a lack of trustworthiness or competence on the part of the employee;
- is incompatible with the employee’s duties as an employee;
- causes serious damage to the relationship between employer and employee;
- demonstrates unfitness of the employee for a particular office, for example as a police officer, teacher or solicitor;
- renders the employee unable to perform his or her obligations (for example because he or she is imprisoned).⁴⁵

However, in the absence of any contractual provision, under the general law, an employer does not have the right to review the ‘out of hours’ conduct of an employee other than in ‘exceptional circumstances’.⁴⁶ In *Rose v Telstra Corporation Ltd*,⁴⁷ the Court said the conduct must be of such gravity as to indicate a rejection of the employment contract by the employee before the right would arise. This includes conduct likely to cause serious damage to the relationship between the employer and the employee, conduct that damages the employer’s interests, or conduct incompatible with the employee’s duty as an employee. Furthermore, commentary has suggested that:

⁴³ Ibid 73–4.

⁴⁴ Emma Bicknell Goodwin, ‘Rules, Referees and Retribution: Disciplining Employee Athletes in Professional Team Sports’ (2005) 18 *Australian Journal of Labour Law* 240, 255 (emphasis added).

⁴⁵ Ibid 264–5.

⁴⁶ See *Graincorp Operations Ltd v Markham* (2002) 120 IR 253.

⁴⁷ *Rose v Telstra Corporation Ltd* [1998] AIRC 1592.

in the traditional workforce, for a worker to be disciplined for private activities, *there must be a clear connection between their work and the activity under investigation*. If the employer may be adversely impacted by the behaviour of the employee ... the employer may have a right to discipline the employee.⁴⁸

Therefore, whilst the law requires a clear connection between an employee's work and non-working hours activities before they can discipline the employee, there are very few activities which would not link a professional athlete to his or her club or the league and imply accountability. For a professional athlete there are no set working hours, no clear limits on their work activities and exemplary behaviour is required at all times.

'Bringing the Game into Disrepute' – Punishing Players for Off-Field Behaviour

It is in these circumstances, that sport leagues and clubs incorporate 'morals clauses', with phrasing such as 'bringing the sport into disrepute', into their employment contracts. The general and vague wording of the clauses effectively extends to all player behaviour that can reach the public eye and in some sports beyond; and it provides broad sweeping powers to the sport associations to discipline players in their absolute discretion. By using these clauses, sport associations attempt to equip themselves to regulate off-field behaviour. We argue these are unreasonable and improper shifts in the traditional employment contract.

Morals clauses of varying kinds are found in the playing contracts of most Australian sporting bodies. For example, the NRL Code of Conduct states:

12. No Club or person bound by this Code shall:

- (1) Engage in any conduct that is detrimental to;
- (2) *Bring into disrepute*;
- (3) Act in a manner inconsistent with;
- (4) Act in a manner contrary to; or
- (5) Act in a manner prejudicial to

the best interests, image or welfare of the ARLC, the NRL, the NRL Competition, the National Youth Competition, the Related Competitions, the Representative Competitions, the Clubs and the Game.⁴⁹

⁴⁸ Bartlett and Sterry, above n 6, 97–8 (emphasis added).

⁴⁹ NRL, above n 36, cl 12 (emphasis added).

Clause 2.1 of the AFL Code of Conduct states that:

AFL Players must conduct themselves in a manner *so as not to bring* Australian Rules football, the AFL, AFL Clubs and other AFL Players *into disrepute*.

This clause applies to a Player's behaviour which: ...

- (ii) involves public comment or comments made to the media; or
- (iii) involves criminal conduct which directly impacts in a material way upon the Player's ability to perform his duties as an Australian Rules footballer or impacts upon the reputation of the AFL or the AFL Club *in any way*; or
- (iv) involves conduct deemed by his AFL Club and the Club's Leadership Group (or senior players...) in accordance with clause 5 of this Code to have brought the AFL and/or his AFL Club *into disrepute*.

The Players understand the obligations upon them as expressly stated in this clause 2.1, however, the AFL and AFL Clubs also recognise that Players may be subject to *significantly greater intrusion into their private lives than the average person*. *This notion should be respected when assessing a Player's conduct and the circumstances surrounding any potential breach of the Code.*⁵⁰

Furthermore, under the AFL Respect & Responsibility Policy, a player may be sanctioned for conduct unbecoming to women. 'Conduct Unbecoming' includes being convicted of sexual assault, the establishment of a prima facie case for sexual assault, a finding of civil liability or an inappropriate payment made.⁵¹ Sanctions range from:

- Termination/delisting
- Financial sanction
- Standing down
- Suspension for a period
- Restricted representational duties
- Other.⁵²

Under the Australian Rugby Union Collective Bargaining Agreement:

⁵⁰ *AFL Players' Code of Conduct*, above n 41 (emphasis added).

⁵¹ *Ibid.*

⁵² *Ibid.*

If you:

- (a) do *anything which may adversely affect or reflect on or discredits* the game of Rugby, the ARU, the [**Name of Relevant Union**] or any squad, team, competition, tournament, sponsor, official supplier or licensee, including, but not limited to, any illegal act or any act of dishonesty or fraud; ...
- (c) breach the ARU or [**Name of Relevant Union**] Code of Conduct or the ARU's Doping Bye-laws; ...

then your Union may do one or more of the following:

- (i) fine you;
- (ii) suspend you; or
- (iii) terminate your employment immediately without penalty, other than the payment of all amounts due to you up to the date of termination.⁵³

Furthermore under clause 3 of the ARU Code of Conduct:

All participants in the game are bound: ...

- (d) to promote the reputation of the game and to take all reasonable steps to prevent the game from being *brought into disrepute*; ...
- (m) not to do anything which *adversely affects or reflects on or discredits the game*, the ARU, any Member Union or Affiliated Union of the ARU, or any squad, team, competition, tournament, sponsor, official supplier or licensee, including, but not limited to, any illegal act or any act of dishonesty or fraud.⁵⁴

As illustrated, some clauses are more specific than conduct 'that brings', or was 'likely to have', or 'would likely have the effect of bringing' the sportsperson into disrepute, and identify what amounts to disreputable conduct. The scope of some clauses is limited to the effect on the reputation of the sportsperson alone while others extend to include the effect on the sport, the sporting body and/or the team. The 'effect on reputation' in some contracts means actual damage while in others, a broader meaning of actual and potential damage is adopted.

However, '[i]t is not possible for the rules and codes of conduct to expressly provide for all misbehaviour that may have an adverse effect on a sport. For this reason, wide-reaching clauses are employed to catch misconduct that falls

⁵³ *Australian Rugby Collective Bargaining Agreement Mark III*, above n 37, cl 21.2 (emphasis added).

⁵⁴ ARU, *Code of Conduct By-Laws* (7 November 2005) <<http://www.rugby.com.au/LinkClick.aspx?fileticket=3cJMogqJdXg%3D&tabid=1968>> (emphasis added).

outside the scope of specific rules'.⁵⁵ Although, it is 'of fundamental importance to interpret the actual wording of the disrepute clause in any given case to ensure that a decision that breach has occurred is made in accordance with contract law',⁵⁶ it is concerning that these clauses can capture behaviour *both* on and off the field. This includes the previously outlined behaviour which is in the private time of the athlete and is unrelated to the athlete's employment as professional athlete, such as the 'extra-curricular' duties.

Furthermore, '[t]hese "disrepute" clauses and similar "catch-all" provisions ... give rise to concerns about their imprecise and wide-ranging character as well as their potential for stifling dissent and diversity.'⁵⁷ This is because they provide broad and somewhat vague disciplinary powers to the relevant governing body when the body has to determine whether a player or official's conduct has injured the public's confidence in the sport and brought the game into disrepute. In making the determination, the body considers that the obligations of players and officials extend beyond just complying with the laws of the game. For example, there is an expectation that the 'laws of the land' will be adhered to and 'conduct, both in and outside the playing arena, be "reasonable"'.⁵⁸ The difficulty for the elite athlete is that there are very few actions and behaviours which would not make him or her accountable, even though they occurred while he or she was not under the direct control of his or her association.⁵⁹

A number of decisions in the Court of Arbitration for Sport ('CAS') provide insight into the meaning of these morals clauses and when there is justification at law for sanctioning athletes for 'private time behaviour'. In *D'Arcy v Australian Olympic Committee*,⁶⁰ the swimmer D'Arcy signed the 2008 Australian Olympics Team Membership Agreement, which included a clause that the athlete 'must not ... engage in ... conduct which, if publicly known, would be likely to bring ... [themselves, the sport or the AOC] into disrepute or censure'.⁶¹ On 29 March 2008, he punched a fellow swimmer in the face at a nightclub causing him significant bodily harm, and on 18 April 2008, D'Arcy was duly sacked from the Australian Olympic Team for bringing himself and the sport into disrepute. D'Arcy appealed against his removal. CAS held that 'bringing a person into disrepute is to lower the reputation of the person in the eyes of the ... public

⁵⁵ Martin Kosla, 'Disciplined for "Bringing Sport into Disrepute" – A Framework for Judicial Review' (2001) 25 *Melbourne University Law Review* 654, 655 (citations omitted).

⁵⁶ George, above n 5, 25.

⁵⁷ Kosla, above n 55, 655.

⁵⁸ Paterson, above n 8, 108.

⁵⁹ See also Bartlett and Sterry, above n 6, 99.

⁶⁰ *D'Arcy v Australian Olympic Committee* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1574, 7 July 2008) ('*D'Arcy*').

⁶¹ *Ibid* [7]. The words 'if publicly known' in the current AOC Ethical By-Laws have been replaced with 'whether publicly known or not': AOC, *Ethical Behaviour By-Law* (8 February 2013) cl 3.4(1) <<http://corporate.olympics.com.au/files/dmfile/AOCEthicalBehaviourBy-Law080213.pdf>>.

to a significant extent' and given the seriousness of the misconduct and media coverage dismissed the appeal.⁶²

In *Jongewaard v Australian Olympic Committee*,⁶³ Jongewaard was charged for causing severe head injuries to a fellow cyclist in a motor vehicle accident while drink-driving and leaving the scene after the accident in 2007. On 14 July 2008, Cycling Australia nominated him for selection to the Australian Olympic Team but the AOC declined to select him because of the two serious criminal charges. Jongewaard appealed to CAS asserting the AOC's decision was 'obviously or self evidently so unreasonable or perverse ... to be irrational'.⁶⁴ CAS held that under the Team Membership Agreement he signed, he 'had a contractual obligation to not engage in (publicly known) conduct which, ... brought or would be likely to bring him into disrepute'.⁶⁵ The AOC's decision that Jongewaard's conduct had or was likely to bring him into disrepute was found to be reasonable.⁶⁶

The need for damage to reputation – be it to the person or the sport, depending on the wording of the contract – was also the foundation of the decision in *Zubkov v Fédération Internationale de Natation*.⁶⁷ CAS held that it must be shown that 'public opinion of the sport must be diminished as a result of the conduct in question'.⁶⁸

On the basis of the CAS decisions, an athlete can be deemed to have brought the sport or him or herself into disrepute when there is public exposure *and* his or her conduct caused damage to the reputation of sport or him or herself. The public exposure requirement will easily be satisfied given the variety of media, particularly social media available. How the behaviour is publicly exposed is likely to be irrelevant, although in some cases invasive media coverage may infringe privacy. Whether the conduct caused injury to the reputation of the sport or athlete becomes a problematic question to satisfy when it involves off-field non-sport or extra-curricular contractual duties. This is because 'misconduct will only be injurious to a sport if it affects the performance of an individual's public duties or functions in the sport, or if the individual has been put forward as subscribing to a particular standard of behaviour and that standard has been lowered in the eyes of the public.'⁶⁹ The latter point can be interpreted as referring to the athlete's failure to fulfil his/her duty to be a role model.

⁶² *D'Arcy* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1574, 7 July 2008) 15 [46], quoting *D'Arcy v Australian Olympic Committee* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1539, 27 May 2008) 8 [8].

⁶³ *Jongewaard v Australian Olympic Committee* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1605, 19 September 2008) ('*Jongewaard*').

⁶⁴ *Ibid* 2.

⁶⁵ *Ibid* 8 [18].

⁶⁶ *Ibid* 2–3, 5–7 [10]–[16], 8 [20].

⁶⁷ *Zubkov v Fédération Internationale de Natation* (Award, Court of Arbitration for Sport, Case No CAS 2007/A/1291, 21 December 2007).

⁶⁸ *Ibid* [12]–[28]. This was a case involving a coach but the same principles apply.

⁶⁹ Kosla, above n 55, 656.

Off-field activities include sport related duties, such as ‘giving media interviews, attending official functions, ... taking part in sponsor days’, going to schools and hospitals, *and* non-sport related behaviour that occurs ‘*during an individual’s time in private*’.⁷⁰ Although, it is accepted that ‘[a]n individual’s conduct in private and away from the playing field may ... be injurious to a sport if the behaviour has a negative bearing upon the individual’s capacity to perform their public responsibilities or functions in the sport’,⁷¹ we argue that it is unnecessary for an athlete to be a role model or an exemplary citizen at all times. ‘[I]t cannot be said that *all* off-field conduct deemed inappropriate by the governing body of a sport will automatically affect the performance of [an athlete’s] public duties in the sport.’⁷² unless the player is indeed a role model or an exemplary citizen at all times.

It is clear that ‘[a]n employer can make a decision regarding the discipline of an employee (including termination of employment)’⁷³ irrespective of any legal proceedings. This is because the employer has the contractual right – particularly via the ‘not bringing the sport into disrepute’ clause in relation to professional sport – and is ‘not obligated to prove conduct on the balance of probabilities [civil standard of proof] or beyond reasonable doubt [criminal standard].’⁷⁴ It is also accepted that ‘[a] person’s conduct off the playing field may have a negative bearing upon the person’s capacity to perform their public responsibilities or functions in the sport [particularly] if that conduct is criminal in nature.’⁷⁵ Our concern is with the propriety of the process and the reasoning used to justify sanctions against professional athletes for off-field, private time indiscretions, including those for which athletes may be convicted. This is because what is ‘sufficient to bring a person into disrepute may take many forms and depends upon community standards.’⁷⁶ Behaviour likely to be considered ‘disreputable’ may include: crimes involving excessive alcohol, sexual misconduct, illicit drugs or possibly any offence punishable by imprisonment; cheating by the use of drugs, aggression, public drunkenness and other antisocial behaviour, even if not criminal.⁷⁷ Consequently, it has been suggested that ‘[g]iven the large discretion afforded ... 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.’⁷⁸

⁷⁰ Ibid 670 (emphasis added).

⁷¹ Ibid 673.

⁷² Ibid (emphasis added). See, eg, *Chappell v TCN Channel Pty Ltd* (1988) 14 NSWLR 153, 166–7 (Hunt J).

⁷³ Bartlett and Sterry, above n 6, 112.

⁷⁴ Ibid.

⁷⁵ Kosla, above n 55, 673.

⁷⁶ George, above n 5, 30.

⁷⁷ Ibid.

⁷⁸ Paterson, above n 8, 136.

In short, the contract of employment for the professional athlete requires the athlete to undertake both specific and general positive duties both on and off the playing field and the negative duty 'not to bring the athlete/game/sport into disrepute'. The net effect of these contractual obligations as interpreted by the courts and in the context of player surveillance by all forms of media, is to require the player to be an exemplary citizen or role model at all times.

This leads to the unreasonable and improper situation whereby there are, arguably, for these players:

- (i) breaches of the laws of restraint of trade and consumer protection;
- (ii) denials of rights;
- (iii) unreasonable extensions of what should be expected of a professional;
and
- (iv) the invocation of an unreasonable "role model" status.

We argue that this is a situation that needs to be challenged as to its fairness.

Unreasonable and Improper Situations

We do not dispute that the leagues and clubs are, from a legal perspective, entitled to sanction their employees, the professional athletes, for off-field behaviour. We contend however that there are a number of reasons why this right of sanction needs to be modified. We will conclude with strategies about how this may be done.

Potential Breaches of the Laws of Restraint of Trade and Consumer Protection

A number of commentators have pointed to the possibility that sanctioning off-field behaviour could be illegal. Some argue that the expectation on the athlete to be a role model all of the time may be 'too onerous' and thus 'unconscionable' under the *Australian Consumer Law*.⁷⁹ However, 'in the context of proven disreputable conduct, it will be difficult for a player to obtain a sympathetic hearing on this issue' and it 'runs counter to ... the role model status recognised by codes of conduct for off-field conduct.'⁸⁰ It is this latter point which is at issue and will be further critiqued below.

'[T]he disrepute clause is an express term of the contract ... therefore ... any penalties handed out by ... [an association] must be reasonable in respect of

⁷⁹ George, above n 5, 40. The *Australian Consumer Law* is located under schedule 2 of the *Competition and Consumer Act 2010* (Cth).

⁸⁰ George, above n 5, 40.

th[e] objective [of protecting the brand of the sport], or otherwise it could be seen as representing an unreasonable restraint of trade'.⁸¹ It has been argued to be 'potentially a restraint of trade to suspend a player, purely on the basis of being charged with an alleged offence ... [as] there must be some other behaviour that brings the person or sport into disrepute'.⁸² For example, the sanctions imposed against D'Arcy, Jongewaard and Stewart (see below), in which all three were heavily intoxicated and behaved badly, are considered reasonable in this context.⁸³ However, this again presumes a certain role model expectation. In addition, it has been argued that once the possibility of disputed facts emerge in a review of an incident by an association, sanctions cannot be invoked without a hearing if a breach of both the restraint of trade doctrine and procedural fairness is to be avoided.⁸⁴ The latter point raises the issue of players' rights in general.

Denial of Rights

Observing the rules of 'natural justice' is fundamental to respecting players' rights. In essence these rules require that: the athlete be informed of the alleged conduct and charges related thereto and be given the opportunity to be heard; the matter be determined by an unbiased tribunal; and that the decision be rational, based on the information available.⁸⁵ A disciplinary tribunal is duty bound to provide procedural fairness unless the contract expressly excludes it.⁸⁶

As previously raised due to the celebrity status of professional athletes, the notion of separate private and public lives for them can be problematic, although there is some privacy protection in relation to the disclosure of personal information to third parties.⁸⁷ Clause 2.4 of the Football Federation of Australia ('FFA') code of conduct appears to acknowledge the separate lives, as it provides that '[p]layers ... are entitled to have their privacy respected and ... [conduct] 'not in the public domain' [is not sanctionable]'.⁸⁸ However, such a clause prompts the question – is a professional athlete to be held accountable to his or her club or association simply because his or her activities become known to the public?

In April 2007, NRL player Sonny Bill Williams was photographed in a 'compromising' position allegedly having sex in the toilet cubicle at a Sydney hotel. Williams effectively admitted to this behaviour but was not sanctioned

⁸¹ Davies, above, n 9, 64.

⁸² Ibid 50.

⁸³ Ibid 49.

⁸⁴ See *ibid* 50–1, 68.

⁸⁵ See generally *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456, 487–8; *Kioa v West* (1985) 159 CLR 550; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

⁸⁶ See *Cains v Jenkins* (1979) 42 FLR 188, 199 (J B Sweeney and St John JJ).

⁸⁷ *Privacy Act 1988* (Cth) sch 1 pt 3 ('*Australian Privacy Principles*').

⁸⁸ FFA, *Code of Conduct* (1 January 2007) <http://www.footballaustralia.com.au/site/_content/document/00000071-source.pdf>.

by his club, the Canterbury Bulldogs, or the NRL. While this behaviour was not criminal, it did have the potential to cause embarrassment to his club by association and is arguably 'disreputable' – it could serve 'to lower the reputation of the person in the eyes of the ordinary members of the public to a significant extent'.⁸⁹ In our view this was properly treated, given that the behaviour, while controversial, did not impact upon Williams' capacity to perform his duties on the field or those duties reasonably associated with being a professional footballer, including expectations of conduct at club or sponsor events. Relevantly, Williams was not representing the Canterbury Club or the NRL while socialising at a Sydney hotel.

The Canterbury Bulldogs *alleged* rape case is a more challenging example. The alleged incident took place at Coffs Harbour after a 2004 pre-season match and involved a 21-year-old local woman and, by accusation, a number of Bulldogs players. After a police investigation and a review by the Director of Public Prosecutions, it was determined there was insufficient evidence for a prosecution.⁹⁰ However, the NRL fined the Bulldogs \$150,000 with a further \$350,000 suspended for 'bringing the game into disrepute', 'failing to ensure appropriate dress standards and the players' behaviour towards the media'; the dress reference being to the very casual attire worn by the players when asked to attend the police station during the investigation.⁹¹

Why was the club sanctioned for the inappropriate dress of players at a police station answering questions not related to NRL business? The players were there as private citizens, albeit all from the one football club. Furthermore, whilst the *alleged* incident happened when the players were together on a club trip, it happened in their private time and secondly, no charges were ever laid, let alone a conviction. This, we argue, was a major intrusion by the NRL into the private lives of its players. Some argue that 'due to [the assumption of] their status as role models, their involvement in licensing, their link to the attraction of sponsors and the promotion of the game', the players are answerable for all publicly known albeit private time conduct.⁹² This position seems excessive and unrealistic. It makes sport organisations appear more concerned with protecting the image of the game than respecting a player's privacy away from sport, and their justification is found in the ill-defined notion of players' role model status.

The third transgression of players' rights is bound up in the cornerstone right to the presumption of innocence. For example, in 2004, AFL footballers, Milne and Montana from the St Kilda Football Club, were investigated by the police

⁸⁹ *D'Arcy* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1574, 7 July 2008) 15 [46], quoting *D'Arcy v Australian Olympic Committee* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1539, 27 May 2008) 8 [8].

⁹⁰ Davies, above n 9, 60–1.

⁹¹ Davies, above n 9, 61 n 101; Chris Stedman and Ray Gatt, 'Disrepute and Poor Dress Sense Cost Dearly', *The Australian* (Canberra) 29 April 2004, 35–6.

⁹² Bartlett and Sterry, above n 6, 107.

for an alleged rape. After a two month investigation, the police cleared both players due to insufficient evidence. 'St Kilda then stated that there would be no disciplinary action from the club.'⁹³ However, after further police investigations, in June 2013, Milne was charged with the alleged rape. He was then suspended indefinitely by his club on the grounds that the club felt they owed Milne a duty of care. The AFL Players Association CEO, Matt Finnis, disputed the propriety of that suspension:

We understand the seriousness of the charges, and sensitivity to all parties concerned, but remind the industry and wider community that in our society all members have the right to the presumption of innocence, which is integral to our system of justice. ... The St Kilda Board's position today in our view, sets a dangerous precedent on how our industry deals with a matter that is yet to be dealt with by the court. We don't consider the decision genuinely reflects a commitment to a player and his family as much as it does other interests of a club.⁹⁴

As detailed earlier, the AFL holds that a player or official being committed for trial by a Magistrate's Court on a charge of sexual assault *may* be, but is not inherently deemed as, 'conduct unbecoming'.⁹⁵ As such, the AFL still has absolute discretion to stand down that person from their usual AFL or club duties, pending the outcome of the proceedings.

Not all associations take the same view and nor have they always been consistent in their determinations. The NRL has recently taken the view in some situations that players should not be sanctioned for private off-field behaviour at least until they have been convicted. For example, when Ben Te'o, was accused by a Brisbane woman of punching her in the face, he denied the accusation and the NRL did not take any action to suspend Te'o and declared that a player must be presumed innocent until proven otherwise.⁹⁶ This departs from previous responses in which officials have used a charge of bringing disrepute to the game to suspend an under fire player while allegations hung over his head.⁹⁷

The response of the NRL in Te'o's case was also contrary to that of the FFA who suspended a player for breaching his disrepute clause when he was charged with

⁹³ Davies. above n 9, 61.

⁹⁴ Staff Reporter, 'AFLPA "Deeply Concerned" by St Kilda's Decision to Suspend Milne', *The Age* (online) 19 June 2013 <<http://www.theage.com.au/afl/afl-news/aflpa-deeply-concerned-by-st-kildas-decision-to-suspend-milne-20130619-2oj6k.html>>.

⁹⁵ AFL, *Respect & Responsibility Policy*, above n 40, 8.

⁹⁶ Chris Garry and Peter Badel, 'Queensland State of Origin Selectors Given Green Light on Ben Te'o', *The Daily Telegraph* (online) 24 May 2013 <<http://www.dailytelegraph.com.au/sport/nrl/queensland-state-of-origin-selectors-given-green-light-on-ben-teo/story-fni3fr51-1226649434238>>.

⁹⁷ See also Davies, above n 9, 50–1 nn 44–5 where NRL players Latu and Inglis were both suspended in 2006 and 2009 respectively as a result of charges being laid.

having sex with a girl who was under the age of consent.⁹⁸ The FFA disrepute clause deems the *laying* of the criminal charge as sufficient to bring the player into disrepute, irrespective of whether he has engaged in the conduct in fact.⁹⁹

The AOC's position is similar to the FFA's. As seen in *Jongewaard*, the CAS panel stated that Jongewaard 'had a contractual obligation to not engage in (publicly known) conduct which, in the absolute discretion of the President of the AOC, brought or would be likely to bring him or his sport or the AOC into disrepute'.¹⁰⁰ As such, the AOC did 'not require a guilty verdict since the behaviour that resulted in the charges were, in itself, sufficient'.¹⁰¹

It has been observed that '[a] disrepute clause is generally directed to the issue of reputation, not to whether a criminal offence has occurred. In many cases "damage to reputation" will already have taken effect as a result of the charge being laid.¹⁰² Surely, the player is entitled to the presumption of innocence, unless he or she is found to have engaged in criminal conduct. If no crime is ever proved, we argue that it is neither fair nor proper that players are sanctioned. The legal standards of proof should surely outweigh those currently employed by some sport associations and the presumption of innocence, a fundamental legal right, should be determinative in a sporting association's disrepute determinations.

The case of the NRL player Brett Stewart illustrates these points. In 2009, Stewart had attended an official NRL season launch function at which he became intoxicated. In a further incident it was alleged that after the function and outside his home, he sexually assaulted a 17-year-old female. Stewart was suspended by the NRL for four matches. '[T]he NRL emphasised that his guilt or innocence in relation to the sexual assault was irrelevant, as his behaviour in regard to being intoxicated at a club function was sufficient to bring the game, the club and the NRL into disrepute'.¹⁰³ 'The importance of basing the penalty on a factor other than actual criminal charges can be gauged from the fact that in September, 2010, Stewart was found not guilty of the charges'.¹⁰⁴

There is an obvious tension between the criminal process, the presumption of innocence and contractual rights. It was held in *Howell v John Bennell's Discount Fuel*¹⁰⁵ that even if it is later established that an employee had not committed

⁹⁸ See Tom Smithies, 'Ryall Loses Ban Appeal', *The Daily Telegraph* (online) 19 August 2009 <<http://www.couriermail.com.au/news/ryall-loses-ban-appeal/story-e6freon6-1225763611735?nk=d6c236b0650c51ebd8cc91443b1b3556>>.

⁹⁹ FFA, above cl 2.2 (j).

¹⁰⁰ (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1605, 19 September 2008) 8 [18].

¹⁰¹ Davies, above n 9, 48.

¹⁰² George, above n 5, 45.

¹⁰³ Davies, above n 9, 49.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Howell v John Bennell's Discount Fuel* [2001] 167(3) QGIG .53.

an offence for which she or he has been charged, an employer could dismiss an employee for misconduct if: the employer had reasonable grounds for believing the offence occurred; there had been a full and proper investigation; and the manner of dismissal was just.¹⁰⁶ Hence, employers only require a reasonable belief that the employee has committed the action – they do not have to reach the level of evidence required in criminal proceedings. This was also illustrated in *D’Arcy*, where CAS found that the AOC had acted properly in sacking D’Arcy from the Olympic swimming team as the charge was found to be sufficient for a ‘reasonable member of the public to think considerably less of ... [D’Arcy, and so bring or possibly bring the person into disrepute] albeit realising that he may have a defence to the criminal proceedings and might be acquitted at trial.’¹⁰⁷

It has been suggested that where charges are serious and the presumption of innocence is therefore more important, it may be more pressing for the sporting body to protect the sport and sanction the player ‘while the matter awaits trial. Otherwise it may be detrimental to the interests of the team, the [association] and the sport’.¹⁰⁸ Again the interests, indeed the legal rights, of the individual are being sacrificed under this view: ‘[I]ssues of criminal activity that may result in a warning or suspended sentence do not prevent a player from playing, and yet can be deemed to have brought the game into disrepute and result in the termination of employment.’¹⁰⁹ But, ‘[i]f it is clear that there are disputed facts in regard to criminal charges ... the player cannot be suspended without there being a denial of procedural fairness or restraint of trade issues as players in this situation must have the opportunity to present their case’.¹¹⁰ We argue that there needs to be greater sophistication than this in the action taken by sporting associations. Where an athlete is alleged to commit a criminal act in his or her private time and this is publicly known and being investigated by state authorities, no action should be taken by an association pending those investigations. The legally established standards of proof and rules of evidence should override the contractual interests of a sport. Once there is a conviction *then* the sport may take such steps as it deems appropriate to protect its brand.

The clubs and the associations may well believe ‘that a “fair minded member of the public” expects an AFL footballer to reach standards that do not include alcohol abuse or public drunkenness, drug taking, drink driving, speeding, aggressive behaviour, lying, gambling or associating with people with criminal records’.¹¹¹ Even so, we argue that if the misconduct is a potential criminal

¹⁰⁶ *Ibid* 54 (Commissioner Blades).

¹⁰⁷ *D’Arcy* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1574, 7 July 2008) 15 [46], quoting *D’Arcy v Australian Olympic Committee* (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1539, 27 May 2008) 8 [8].

¹⁰⁸ George, above n 5, 49.

¹⁰⁹ Podbury, above n 4, 146.

¹¹⁰ Davies, above n 9, 68.

¹¹¹ Bartlett and Sterry, above n 6, 109. All of these examples have been used by the AFL to sanction players.

offence, the club or association should wait until any criminal proceedings are determined. If the misconduct is not criminal and not reasonably related to the profession of being an elite athlete, the club or association should not take any action. Elite athletes cannot reasonably be expected to be exemplary role models – or paragons of virtue – at all times.

What Should Be Expected of a Professional: Unreasonable Extensions

While the associations must be mindful of maintaining constructive relationships with legitimate stakeholders, such as their sponsors and the media, they appear to be unduly influenced by those stakeholders to the detriment of the players who are entitled to their rights as normal citizens, but are being treated differently to members of other professions. Do medical or legal practitioners have their right to practice suspended if they have a sexual dalliance at a conference, let alone the allegation of one? Are they suspended if they are convicted of drink driving? In *Ziems v Prothonotary of the Supreme Court of New South Wales*,¹¹² a barrister was disbarred after being convicted of manslaughter for killing another driver in a car accident while intoxicated, and was sentenced to two years' imprisonment. He appealed his disbarment. The High Court held that the conviction had 'neither connexion with nor significance for any professional functions as a barrister and therefore did not involve conduct that made the barrister unfit to be a member of his profession.'¹¹³ This can be contrasted with *Jongewaard*, where an athlete charged with causing serious harm by dangerous driving and leaving the scene of an accident, was held to involve conduct and circumstances sufficiently connected with his sport to bring it into disrepute and justify the imposition of a sanction.¹¹⁴ Despite this contrast, '[m]isconduct in a person's private affairs may be relevant to his or her fitness to practise in a profession... if it brought disgrace on the profession which the person practised'¹¹⁵ but, we argue that a clear and unequivocal connection to the sport, an observance of the presumption of innocence, and a conviction or judgment against the athlete is needed before a sport association exercises any sanctions against a professional athlete. 'No employee is either employed or paid 24 hours per day.'¹¹⁶

The Invocation of an Unreasonable 'Role Model' Status

In relation to the ascription of role model status to an athlete, a relevant consideration is 'has the player chosen to be held out in this way, or has a

¹¹² *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279.

¹¹³ *Ibid* 289 (Fullagar J), 299 (Kitto J), 301–3 (Taylor J).

¹¹⁴ (Award, Court of Arbitration for Sport, Case No CAS 2008/A/1605, 19 September 2008) 8 [18]–[20].

¹¹⁵ Kosla, above n 55, 668, citing *Marten v Royal College of Veterinary Surgeons' Disciplinary Committee* [1966] 1 QB 1, 9 (Lord Parker CJ).

¹¹⁶ Paul Horvath, 'Anti-Doping and Human Rights in Sport: The Case of the AFL and the WADA Code' (2006) 32 *Monash University Law Review* 357, 375.

standard been effectively imposed on him by the governing body and the various club and league sponsors?'¹¹⁷ A compelling answer is that:

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 ... policies. Given the lack of comparative alternative employment options, the player has no viable alternative but to try and meet these standards.¹¹⁸

In short, the professional athlete is contractually required to behave to a high standard at all times, including all things that are or become publicly known. Furthermore, as we have illustrated, the behaviour of individuals does not necessarily have to impede their ability to effectively perform their public duties for the conduct to be injurious to their sport. The contention by a sport's governing body that an individual engaged in a professional sport is a role model permits any misconduct which falls outside the scope of the rules and codes of behaviour (as required under the contract of employment) to be classified as injurious to a sport. However, 'not all persons engaged in a sport are [or want to be] role models or ambassadors for the sport'.¹¹⁹ For example, NBA player Charles Barkley once famously declared that he was not a role model and that parents, teachers and significant others in a child's life are. He thought of himself as a celebrity.¹²⁰

In the AFL context:

'[t]he debate about footballers as role models is ongoing. While some players actively promote themselves as role models ... many find the title does not sit well'.¹²¹ They continue:

A role model is essentially a person whose behaviour, example, or success is or can be emulated by others. *Is this the same as a person who is in the public spotlight and who has their behaviour monitored by journalists?* Clearly many players are idolised by children But does this make the player a role model, or simply the centre of interest? Does this interest mean that a player must be made to take responsibility for his non-footballing behaviour?¹²²

¹¹⁷ Paterson, above n 8, 141.

¹¹⁸ *Ibid.*

¹¹⁹ Kosla, above n 55, 677.

¹²⁰ Christopher Wellman, 'Do Celebrated Athletes Have Special Responsibilities to Be Good Role Models? An Imagined Dialog between Charles Barkley and Karl Malone' in Jan Boxhill (ed), *Sports Ethics: An Anthology* (Blackwell Publishing, 2003) 333, 333-6.

¹²¹ Bartlett and Sterry, above n 6, 105.

¹²² *Ibid* (emphasis added).

We argue that the answer to each of these questions is 'no'. Professional athletes have higher behavioural standards expected of them than the rest of the community as a consequence of being held up as 'role models' effectively all the time and in all things that become public. However, it is difficult to see how that is within the scope of their employment as professional athletes and how it can reasonably be expected of them. This position leads us to the second issue that we explore in this article: the reasonableness and propriety of the role model expectations that regulate elite athletes.

The Professional Athlete: Role Model for What?

Some research shows that 'role models are more likely to inspire and motivate already existing behavioural tendencies In contrast to mentors, role models do not require an interaction'.¹²³ Further, '[m]edia projection of the behaviour of athletic role models has been found to influence the behaviour of the young people observing them.'¹²⁴ The research suggests that role models influence young folk and, that 'young people obtain their role models from a variety of areas including family members, athletes and teachers.'¹²⁵ 'The individuals selected will naturally change over time as new people enter the scene; however, the notion of athletes, pop stars and celebrities as role models will, based on the evidence from a variety of years, continue to hold true.'¹²⁶

It also worth noting that 'research suggests young people are less likely to see public figures as role models than most assume.'¹²⁷ Nonetheless, although the impact of 'role models requires further examination in many varied areas, the reality that they have the ability to influence people is widely accepted.'¹²⁸

'Based on their exceptional status, professional athletes could be defined as role models.'¹²⁹ Although, some have warned against expecting sports stars to take on this status because doing so sets them up for failure. The influence of athletes may be overstated within society – athletes, whilst good at changing attitudes, struggle to transform this into a change of behaviour, often due to their lack

¹²³ Felix Mutter and Tim Pawlowski, 'Role Models in Sports – Can Success in Professional Sports Increase the Demand for Amateur Sport Participation?' (2014) 17 *Sport Management Review* 324, 326 (citations omitted).

¹²⁴ Podbury, above n 4, 62.

¹²⁵ Warren Payne et al 'Sports Role Models and Their Impact on Participation in Physical Activity: A Literature Review' (Report, University of Ballarat, 2002) 14 <http://fulltext.ausport.gov.au/fulltext/2002/vic/Role_Model.pdf>.

¹²⁶ Podbury, above n 4, 60.

¹²⁷ Earl Spurgin, 'Hey, How Did I Become a Role Model? Privacy and the Extent of Role-Model Obligations' (2012) 29 *Journal of Applied Philosophy* 118, 118.

¹²⁸ Podbury, above n 4, 59.

¹²⁹ Mutter and Pawlowski, above n 123, 326, citing John Jung 'How Useful Is the Concept of Role Model? A Critical Analysis' (1986) 1 *Journal of Social Behaviour and Personality* 525.

of perceived expert knowledge. Although people admire athletes, they are less likely to be influenced by them than by family and friends.¹³⁰

It is trite to say that '[i]n Australia, sports stars are regarded as national heroes',¹³¹ which may be interpreted to mean role models. Moreover, as athletes do have some influence on attitudes, if not on behaviour, this partially explains why professional sports associations are so concerned with the off-field behaviour of their playing groups and try to control them. Also it is probable that at least some modelling behaviour is based on players' on-field, as well as off-field activities.¹³² And as noted, where we drew attention to the evolution of the AFL as a business to the emergence of a 'professional identity' for its players (and by extension all professional sports and their athletes), nearly every established profession or calling places some limits upon its members' off-duty behaviour.¹³³ But one significant problem with this construction of identity is the lack of clarity surrounding what a professional AFL player 'is'.

Hence, whilst it may be true to say 'when you reach a certain level of visibility, you are a role model whether you like it or not',¹³⁴ the expectations held by the professional sports associations and their clubs may be different from those held by the public or the players, which may result in conflict. 'The players may also feel that the extra behavioural requirements that arise from being a role model are not part of the "defined" job'.¹³⁵ More significantly, 'the fact that a common-sense virtue produces an obligation entails only that one must follow that prescription, not that one must *model* it'.¹³⁶ The concept of role model might be taken to imply moral excellence, but such a concept 'lacks conceptual clarity'.¹³⁷ This is because 'much of the [role model] discourse involves ... claims that are based on matters quite different from role-model status and obligations'.¹³⁸ A question to consider is '[i]f doctors cannot ethically smoke, can they sky dive? Or ride motorbikes? Or eat fatty food?'¹³⁹ Certainly, there are clear associations between smoking or poor diet and ill health. However, associations between high-risk sports and ill health are tenuous; and if obese individuals were not allowed to practice medicine, we would make the mistake

¹³⁰ See Daniel L Wann, et al, *Sport Fans: The Psychology and Social Impact of Spectators* (Routledge, 2001).

¹³¹ Podbury, above n 4, 26.

¹³² Lindsay Fitzclarence, and Christopher Hickey, 'Learning to Rationalise Abusive Behaviour through Football', in C Hickey, L Fitzclarence and R Matthews (eds), *Where the Boys Are: Masculinity, Sport and Education* (Deakin University Press, 2000) 67, cited in Payne et al, above n 12.

¹³³ See, eg, Jacob M Appel, 'Smoke and Mirrors: One Case for Ethical Obligations of the Physician as Public Role Model' (2009) 18 *Cambridge Quarterly of Healthcare Ethics* 95, 98.

¹³⁴ Cheryl Miller, US Olympic Gold Medallist: Sheila Globus, Athletes as Role Models' (1998) 24(6) *Current Health* 2 25, 27 cited in Payne et al, above n 11.

¹³⁵ Podbury, above n 4, 24.

¹³⁶ Spurgin, above n 127, 123 (emphasis added).

¹³⁷ Mutter and Pawlowski, above n 123, 325.

¹³⁸ Spurgin, above n 127, 127.

¹³⁹ Appel, above n 133, 99.

of requiring ‘that all evils of the same genus be eradicated or none at all’.¹⁴⁰ ‘[J]ust because a person is capable of submitting to one type of discipline (required to be a top-flight athlete [or an accomplished medical practitioner]) is no guarantee that he or she is capable of submitting to another’.¹⁴¹

Exemplarism

A distinction may be made between ‘the narrow and broad senses of the meaning of “role model”’:

To be a role model in a *narrow* sense is limited to a particular context in which some person or persons would attempt to imitate the behaviour of the role model. In this sense, the emphasis is on the particular role or station in which the supposed role model is involved, whether it is as a teacher, lawyer, or baseball player In the narrow sense, a celebrated athlete is a role model qua athlete.

In the *broad* sense, role models are significant not simply for how they typically act in a particular role they play in life. In the more global [broad] sense a role model shows us how to navigate our way through life in all sorts of situations In this sense, the significance of ‘Be like Mike’ [in reference to the very famous American basketballer Michael Jordan] transcends basketball and extends to nonathletic areas of life.¹⁴²

This is helpful because part of the ambiguity of speaking of “role models” may be removed by distinguishing role models from moral exemplars, the latter term referring to role models in the broader sense. ‘There is nothing intrinsic to being a celebrated athlete that merits the status of being a moral exemplar’.¹⁴³ Whereas,

the title of ‘role model’ is bestowed on players generally and their on-field and off-field behaviour is subjected to the requirements that come with this title. Their behaviour is held up against a standard of conduct expected of professional employees – not the standard expected of young people of similar ages and backgrounds to the young men who play professional football.¹⁴⁴

¹⁴⁰ *Railway Express Agency v New York*, 336 US 106, 110 (Douglas J) (1949).

¹⁴¹ Podbury, above n 4, 91, quoting William Skidelsky, ‘The Trouble with Boys’ (2003) *New Statesman* 16 (779): 14.

¹⁴² Randolph Feezell, ‘Celebrated Athletes, Moral Exemplars, and Lusory Objects’ (2005) 32 *Journal of the Philosophy of Sport* 21 (emphasis added).

¹⁴³ *Ibid* 22.

¹⁴⁴ Bartlett and Sterry, above n 6, 106.

Further, as noted, '[f]ootballers are required [by their contracts, codes of conduct etc] to adhere to standards of conduct in their personal time which are completely separate from their main role as football players.'¹⁴⁵

Feezell concludes that:

[c]elebrated athletes are role models, not moral exemplars. They are lusive objects whose meaning and significance are internal to the world of sport in which they excel. The major error of exemplarism is a confusion about the proper meaning of our sports heroes as lusive objects, inhabitants of a world set apart from the ordinary world by virtue of the conventions without which their heroic efforts would have no meaning or significance. ... Admire the athlete as a player, but withhold judgment and the disposition to imitate the player when he [or she] leaves the arena.¹⁴⁶

It is also argued that '[w]henver one voluntarily adopts role model status, one is subject to the obligations that accompany that status'.¹⁴⁷ That is, an individual may put him or herself forward as subscribing to a particular standard of behaviour by taking on a leadership role. If that standard is subsequently lowered in the eyes of the public as a result of his or her misconduct, then the sport association or club has the right to sanction the athlete and the courts would not be justified in overturning that decision.¹⁴⁸ However, not every athlete engaged in a sport wants to be a role model or ambassador for exemplary behaviour at all times. The question then is: What are the obligations that accompany the status of 'elite professional athlete'?

One view is that '[t]ypically, one's role model obligations are limited to the virtues associated with success in one's field and do not involve one's life beyond one's field'.¹⁴⁹ We agree. Professional athletes should be classified as 'narrow', 'particular' or 'specific' role models, who 'demonstrate attributes and behaviour only in those domains of life in which they have achieved excellence'.¹⁵⁰ In short, we recommend admiring them for their ability as athletes, not because they are moral exemplars.¹⁵¹ Athletes do not 'choose to share their lives [away from the sport] with fans ... or whomever their roles touch. They automatically choose instead to share such things as their talents, skills and knowledge',¹⁵² which includes attitudes and habits related to play (as expressed in honest play, fair dealing with and respect for opponents). Accordingly, unless athletes 'hold

¹⁴⁵ Ibid.

¹⁴⁶ Feezell, above n 142, 32–4.

¹⁴⁷ Spurgin, above n 127, 122.

¹⁴⁸ Kosla, above n 55, 668–9.

¹⁴⁹ Spurgin, above n 127, 123.

¹⁵⁰ Mutter and Pawlowski, above n 123, 326.

¹⁵¹ See also Feezell, above n 142.

¹⁵² Spurgin, above n 127, 124.

themselves out to be role models regarding other aspects of life, we are justified in demanding only that they be good role models with respect to their behaviour in their' particular sport.¹⁵³ That is, professional athletes are only properly and reasonably accountable for role model aspects beyond "excellent sportsperson" should they choose to add to that profile.

The problem for athletes is the circularity of their contractual obligations. The leagues and clubs require under their standard employment contract that these professional athletes should be liable for bringing their sport into disrepute because they are role models (by which they mean broad/general role models). However, the only reason they are role models is because the league, media, government authorities¹⁵⁴ characterise them as such. For example, 'the AFL itself may have contributed to the notion that AFL players are role models' since the identification of these [morals] clauses and the extra conditions that appear to be placed on AFL players in an *off*-field context seem based on the claim that AFL players are role models.¹⁵⁵

Research into AFL player attitudes to these matters found 'that AFL players by and large accept the role-model title placed on them'.¹⁵⁶ It 'also suggested that players felt that off-field behavioural expectations, both implicit and explicitly stated in their employment contract, ... and the requirement to promote the game, contributed to the societal expectation or impression that AFL players are in fact role models, both on- and off- field'.¹⁵⁷ The 'participants [also] consider many of the off-field expectations ... have roots in the perception or expectation of them as role models. Therefore the extra scrutiny, pressure, sanctions and behavioural expectations exist in part because they are seen by others as role models'.¹⁵⁸

The research also confirmed that AFL players felt they faced higher expectations than the average person, given that they were expected to be 'broad' role models. 'The "groups" identified by the AFL players as contributing to these off-field expectations were the AFL, clubs, media, AFL Players, players' families, sponsors, supporters, the public and the culture.'¹⁵⁹ The players did not identify the government, however as shown above, they certainly are part of the mix.

¹⁵³ Ibid 118–19.

¹⁵⁴ See, eg, Annette Ellis MP, then Chair of the Family and Youth Committee, who was quoted as saying, 'Given the nation's obsession with sport, it is not surprising that our elite sportsmen and women are powerful role models for many young Australians. *This clearly brings with it a great responsibility to set good positive examples of appropriate behaviour*': House of Representatives Standing Committee on Family, Community Housing and Youth (Cth), 'Elite Athletes as Role Models for Young Australians' (Media Alert, 26 March 2010) (emphasis added).

¹⁵⁵ Podbury, above n 4, 180.

¹⁵⁶ Ibid 321.

¹⁵⁷ Ibid 321–2.

¹⁵⁸ Ibid 320.

¹⁵⁹ Ibid 322.

It was deduced from this research ‘that players feel the role model expectation is created or contributed to by the AFL and its clubs based on the requirements outlined in their employment contract’.¹⁶⁰ This reinforces the point that the contractual obligations imposed by the leagues and clubs and the morals clauses and sanctions exercised pursuant thereto, contribute to the image of players as ‘broad’ role models. Hence, professional sports contribute to the extra off-field expectations placed on elite athletes and this has led to the expansion of the traditional employment contract and its encroachment into athletes’ private lives; in turn the imposition of sanctions for bringing the game into disrepute is justified as a result of the extra off-field expectations. The circle is complete.

Some AFL players ‘did note that there needed to be some balance between the need for players to repay the support and investment of stakeholders and the right of players to have a private life.’¹⁶¹ The findings also suggest ‘that participants maintain a considerable level of resistance to these increases in expectations, conditions, sanctions and rules for off-field behaviour.’¹⁶² This leads to the conclusion that:

the balance between protecting the brand and the individual rights of the players has been skewed too far towards the league, at the expense of the players’ rights, compared to a traditional employment contract and even compared to a traditional employee in another context in current-day employment. Therefore, from an ethical, not legal, perspective, this shift would seem to be unreasonable and unfair and therefore should be wound back.¹⁶³

We strongly endorse this view and claim, based on our arguments above, that this shift is ethically *and* legally unreasonable and improper. A sport association should only sanction an athlete if he or she breaches the role of athlete qua athlete (i.e. as ‘narrow’ role models) unless they have explicitly sought to be recognised for something more than that.

Recommendations

Define role of athlete as role model

The precise role of ‘athlete qua athlete’ needs further discussion. We have argued that it should *never* include private behaviour that is totally unrelated to the sport – even if the athlete is convicted of an offence in relation to private behaviour. The exception to this proposition is where the player has accepted a specific role or obligation in their playing contract. For example, the athlete,

¹⁶⁰ Ibid 323.

¹⁶¹ Ibid 329.

¹⁶² Ibid 330.

¹⁶³ Ibid 346.

his or her club, or the league to whom he or she is contracted is sponsored by a corporation to which his or her behaviour is cognate. (For example being convicted of speeding when sponsored by a Road Safety authority).

Need for Clarity

Parameters surrounding actions which constitute 'conduct unbecoming' for an athlete should be properly defined since 'participants would then have a clearer expectation of the standards they are required to uphold while they are involved with the sport.'¹⁶⁴ Therefore, policies should be 'consistent with the existing legal framework regulating out of hours conduct of employees' and should make sanctionable off-field behaviour which 'a reasonable person would consider likely to harm the interests of the league or its member clubs'.¹⁶⁵ This has been suggested to include behaviour that places revenues from sponsors or broadcasters in jeopardy or is likely to dissuade current or future participants from participating.¹⁶⁶ However, we argue that the latter requirements are overreaching and too vague – 'such clauses [should] be wound back, as opposed to [being] more clearly defined, as all individuals, ... should be able to enjoy private lives as citizens, not employees'.¹⁶⁷ Having said that, if the morals clauses are to remain, more clarity and examples of disreputable and unbecoming conduct will assist with defining what it is to be a role model for an athlete qua athlete.¹⁶⁸ In addition, more can and should be done to clarify and protect the fundamental civil rights of athletes.

Reframe the Discourse

The current discourse surrounding role models primarily seeks to convince professional athletes that they are community leaders whether they like it or not, that behaviour which does not accord with their role-model obligations will be sanctioned and that they should change their behaviour for the sake of those who might imitate them or support them. This focus is problematic for three reasons:

1. far too much of the discourse attributes, but does not justify, role-model status and obligations to individuals;
2. much of the discourse involves, often but not always intentionally, claims that are based on matters unassociated with the narrow conception of role-model status and obligations; and

¹⁶⁴ Paterson, above n 8, 136. The AFL has partially attempted to do this, see: AFL, *Respect & Responsibility Policy*, above n.

¹⁶⁵ Ibid 138.

¹⁶⁶ Ibid.

¹⁶⁷ Podbury, above n 4, 345.

¹⁶⁸ See, eg, Paterson, above n 8, 136–8.

3. the current discourse has little if any chance of successful adoption since many athletes are often too young and inexperienced to understand and appreciate the demands of that role-model status – they are expected to be something they are not equipped to be.¹⁶⁹

Sport associations often feel pressured by media and public discourse to punish players for their off-field private time indiscretions. This pressure may influence the decisions of employers and contribute to the shift in the traditional employment contract. Hence, the discourse needs to be re-framed in accordance with our arguments, in particular as athlete qua athlete.

Educate the Community about Role Models

Those who try to convince public figures to be better role models:

should redirect their efforts toward educating young people about who are proper role models and about what aspects of role-models' lives young people should imitate ... – and [they should] help young people recognize that public figures are not above the human frailties that afflict us all....Such a focus would allow us to impress upon young people the importance of imitating the specific traits persons display in particular aspects of their lives rather than imitating the persons themselves.¹⁷⁰

An alternative approach we support, is that because the behaviour of celebrated athletes is assumed to have such an influence over others, athletes should actively and vigorously promote the notion that they are not moral exemplars and that people should look elsewhere for their moral models.¹⁷¹

It has been suggested that attempting to shield players from the demands of life – which is in effect what the leagues and clubs do with their employment contracts – is not the answer.¹⁷² Young male athletes are often not well equipped to manage social situations that the wider population manages with ease. It may be time to adjust approaches to managing players to give them some room to transition to adulthood. Not doing so might not only make the occupation of being a professional sports person less attractive, it might have wider ramifications for the quality of the product itself'.¹⁷³ Young athletes deserve the opportunity to develop an identity or conception of self, unimpeded by unreasonable external demands.¹⁷⁴

¹⁶⁹ Spurgin, above n 127, 127–8.

¹⁷⁰ *Ibid* 129.

¹⁷¹ Feezell, above n 142, 26.

¹⁷² Wood, above n 7.

¹⁷³ *Ibid*.

¹⁷⁴ Spurgin, above n 127, 120.

Educate the Athletes

It has been argued that:

the subtleties and complexities of fame and celebrity may make ... [meeting club and public expectations difficult for some sportspeople] who are often only equipped with their physical talent and skill, rather than with the wisdom and discretion required to avoid situations which encourage or tempt them to engage in misconduct.¹⁷⁵

Hence if these athletes are expected to be role models then they need to be educated and trained to recognise and understand what is expected of them. However, as regards contractual obligations, these expectations should be modest and not go beyond those related to the sport.

We propose sports associations at least do the following:

1. refuse to hold the athlete accountable for non-sport related/off-field activities that occur in their private time and leave the general authorities of the state to do that;
2. hold an athlete accountable for any areas for which the athlete seeks or holds him or herself out to be 'exemplary';
3. provide greater clarity by significantly modifying the player employment contract; and
4. reframe the discourse to educate athletes and the community about what are reasonable expectations.

Conclusion

This article aims to draw attention to the limitations of morals clauses that currently occur in the employment contracts of professional athletes. In particular, we have argued that morals clauses are exceedingly broad and therefore subject to wide interpretation by clubs, the media, public opinion, sponsors and sporting associations. We have also argued that morals clauses are built on assumptions that professional athletes are role models, in the sense of being moral exemplars.

Players have rights as private citizens, as well as responsibilities as public figures, and contractual rights which strike a fairer balance between them is needed. Off-field accountability in professional athletes' employment contracts is presently too vague – sportspeople need boundaries that specify their responsibilities as

¹⁷⁵ George, above n 5, 27.

representatives of their clubs and sports, and the limits of those responsibilities. Their accountability should reflect a narrow interpretation of the concept of a role model – the athlete qua athlete. Deciding the extent to which professional athletes have off-field responsibilities, both within the sport and beyond it, requires recognition of the complex nature of professional sport in the 21st century. Those responsibilities should not result in an absence of any privacy in players' personal lives. Consequently, this article calls for reform and review of the development of employment contracts for professional athletes.

Our recommendations are that: the athlete's rights, in particular the presumption of innocence and the right to privacy, are taken into consideration, notwithstanding the legitimate rights of other stakeholders to have their interests protected; the responsibility of clubs and associations in re-framing morals clauses, and in assisting players to understand and appreciate the nature of those clauses be promoted; and that a public debate on the designation and expectation of the athlete as role model in sport be encouraged to ensure reasonableness and propriety of treatment for our athletes. We urge the players associations, in due course, to seek changes to the employment contract of their athletes to more fairly reflect their status as athlete qua athlete.