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# Anti-Doping Suspensions and Restraint of Trade in Sport

## **Abstract**

The regulator of doping in sport seeks to preserve the spirit of sport and act as the paternalistic protector of the sports participant. But sanctions originally designed to stop drug cheats using artificial performance enhancers in Olympic competition have expanded to cover the use of recreational drugs. There is emerging support for the view that the penalty must fit the crime and that governing bodies must ensure that their legitimate interests outweigh the detriment to the athlete. With doping sanctions imposed for the use of recreational drugs, a restraint of trade claim has prospects of success on the basis of a weakening of the public policy justification for imposing the sanction.

## **Keywords**

Anti-Doping suspensions

## **Disciplines**

Entertainment, Arts, and Sports Law

## ANTI-DOPING SUSPENSIONS AND RESTRAINT OF TRADE IN SPORT

ANNETTE GREENHOW\*

### INTRODUCTION

Few topics provoke as much emotional intensity as drugs in sport.<sup>1</sup> On the one hand, the role of the regulator<sup>2</sup> to preserve the spirit of the sport<sup>3</sup> and act as the paternalistic protector of the sports participant.<sup>4</sup> On the other, the 'artificial line in the sand' view<sup>5</sup> that drugs in sport are no different to other performance enhancing tools developed with the aid of technological advances.<sup>6</sup> But what often gets overlooked for a headline grab, is that what was originally designed to stop drug cheats using artificial performance enhancers in Olympic competition,<sup>7</sup> has now been expanded to cover the use of recreational drugs in the context of the private life of an athlete, carrying mandatory sanctions.<sup>8</sup>

One perspective that requires further examination is whether the 'one rule fits all' approach to disciplinary sanctions imposed by the regulators are reasonable or whether they could amount to a restraint of trade in certain cases, either at common law or under the *Trade Practices Act (Cth) 1974* ('the Act').

This article also considers whether the business of sport should be considered as part of a trading society<sup>9</sup> and whether the penalties imposed are still acceptable and necessary.

### COMMON LAW DOCTRINE OF RESTRAINT OF TRADE

A starting point when considering a restraint of trade is to consider the widely-quoted extract from Lord Macnaughten's judgment in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*.<sup>10</sup> In summary, Lord Macnaughten held the view that all restraints were void as being contrary to public policy.<sup>11</sup> This position could be reversed if the restraint were reasonable and not contrary to the public interest.<sup>12</sup>

A further issue arose in *Peters (WA) Ltd v Petersville Ltd*<sup>13</sup> where the High Court majority considered whether the restraint was upon or in respect of trade.<sup>14</sup> The 'trading society test',

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<sup>1</sup> See S Gardiner et al, *Sports Law* (3<sup>rd</sup> edn Cavendish Publishing Ltd 2006) 270.

<sup>2</sup> In this context, WADA and the governing bodies responsible for the implementation of anti-doping policies.

<sup>3</sup> World Anti-Doping Agency, 'A Brief History of Anti-Doping' [www.wada-ama.org](http://www.wada-ama.org).

<sup>4</sup> Above n 1, 288.

<sup>5</sup> Brown WM, 'Paternalism, drugs and the nature of sport', above n 1, 289.

<sup>6</sup> Above n 4; technological advantages such as training techniques, equipment, food etc.

<sup>7</sup> Above n 3.

<sup>8</sup> With the exception of cannabis which is on the Specified Substance List carrying a lesser suspension period.

<sup>9</sup> Lord Wilberforce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 335.

<sup>10</sup> [1874] AC 535.

<sup>11</sup> Interestingly, Lord Macnaughten's statement was expressly approved as the common law position in Australia in *Buckley v Tutty*, a case involving a dispute between a sports person and his football club.

<sup>12</sup> Above n 12, 565.

<sup>13</sup> (2001) ATPR 41-830.

<sup>14</sup> Above n 15, para 43,225.

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developed by Lord Wilberforce,<sup>15</sup> was found to be the most appropriate test. It acknowledged that societal values change, becoming,

part of the accepted machinery of a *type of transaction* which is generally found *acceptable and necessary*, so that instead of being regarded as restrictive they are accepted as part of the structure of a trading society. If in any individual case one finds a deviation from accepted standards, some greater restriction of an individual's right to 'trade', it is right that this should be examined in the light of public policy. (emphasis added)

This test begs the question whether applying sanctions to the athlete - imposing bans from competition - without regard to *mens rea*<sup>16</sup> - is still acceptable and necessary. Buti and Fridman,<sup>17</sup> also ask whether strict liability should apply in cases where the sanctions imposed are excessive and disproportionate: 'Where sanctions based on implementation of policy are excessive, the penalty may be held to be in unreasonable restraint of trade.'

### APPLICATION OF THE DOCTRINE TO SPORTS

A restraint of trade argument can be invoked when considering commercial arrangements, including those between employers and employees, vendors and purchasers of a business with goodwill, and trading agreements between manufacturers and retailers.

With professional athletes, there are a number of different commercial arrangements that may impose conditions that operate as a restraint of trade. For example, an athlete's contract of engagement with his or her club, an athlete's agreement with the sporting organization responsible for the organizing of competitions, and the athlete's agreement to abide by the rules of the governing bodies of the sport at a local, state, national and international level including the anti-doping specific rules imposed under the WADA Code<sup>18</sup> A restraint of trade argument could be mounted if the consequence of a breach of the commercial arrangement is an unreasonable restriction on the athlete's ability to carry on his or her 'trade'. Central to the issue of whether the restraint is reasonable or not, is an analysis of the benefit to be derived by protecting the interests of sport, the club, the players and the public, as against the detriment likely to be suffered by the athlete and the consequent deprivation of earning capacity.

In the sporting context, the doctrine has been applied in three broad categories. These are transfer systems between players and sporting bodies, disciplinary proceedings involving bans on athletes, and decisions restricting participation in competition.<sup>19</sup> The last category is considered below.

The threshold issue of trade needs to be considered. A number of arguments have been advanced as to what criteria must be met for an athlete to be in 'trade'. One argument was that amateurs were not in trade, (as advanced by the IAAF in *Grasser v Stinson*).<sup>20</sup> The other argument was that a contractual relationship must exist between the parties to sustain the action.<sup>21</sup>

On the first argument, Scott J found the necessary economic link between the rules of the IAAF allowing athletes to obtain income through sponsorship and that income was directly

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<sup>15</sup> Above n 10.

<sup>16</sup> Above n 1, 274.

<sup>17</sup> A Buti and S Fridman, *Drugs, Sports and the Law* (Scribblers Publishing 2001) 57.

<sup>18</sup> Above n 2.

<sup>19</sup> Above n 1, 211-17.

<sup>20</sup> *Grasser v Stinson* Unreported (1988) High Court of Justice No CH-88\_G\_2191 of 1988.

<sup>21</sup> The argument advanced by the respondent in *Eastham v Newcastle United Football Club* [1963] 1 Ch 413 and confirmed in *Greig v Insole* [1978] 1 WLR 302.

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related to participation in events governed by the IAAF. If the rules of the governing body allow athletes to obtain income through sponsorship, directly related to the participation in events organised by that body, then the athlete was in trade.<sup>22</sup>

On the second argument requiring a contractual relationship, the Court in *Eastham v Newcastle United Football Club*<sup>23</sup> expanded the class of persons to include a person not officially being a member of the league, but subject nonetheless to a mandatory penalty.<sup>24</sup>

### Disciplinary procedures – sanctions on athletes

The leading authority of *Greig v Insole*<sup>25</sup> involved the imposing of sanctions on cricket players who had signed with the World Series Cricket (WSC) organization to play a series of test matches. Justice Slade considered that the public interest demanded top players be allowed to play the first class games. To remove them from it could prove injurious to the sport.

The restraint of trade argument arises when we consider the imposition of penalties for doping offences. In *Gasser v Stinson*<sup>26</sup> the athlete argued that the International Amateur Athletic Federation (IAAF) rules were not binding, as they were an unreasonable restraint of trade. Gasser was given an automatic ban after having a prohibited substance found in a urine sample. She challenged the strict liability nature of the penalty and argued that the automatic ban was in fact a mandatory sentence, regardless of guilty intent. It was argued that to treat those who fell into this category as if they were known cheats, was unreasonable.<sup>27</sup>

The Court considered that a suspension from competition could be regarded as restraint of trade.<sup>28</sup> However, the difficulty of proving moral innocence would 'lead to an opening of the floodgates and the attempt to thwart drug taking would become futile'.<sup>29</sup> The interests of the IAAF in imposing the sanction was to deter athletes from taking performance enhancing drugs and ensure a drug-free sport. This was held to be a legitimate interest, sufficient to negate the restraint of trade argument.

In the early 1990s, two Australian cases involving professional cyclists challenging sanctions imposed for doping offences on the basis of a restraint of trade. Unfortunately, neither case sets a reliable precedent, for the reasons set out below.

The first case involved cyclists Stephen Pate and Carey Hall.<sup>30</sup> Both tested positive to steroid use. The International cycling body (UCI) imposed a fine, a deferred suspension and stripped them of their medals. The Australian Professional Cycling Council Inc (APCC) also imposed a 2 year ban that prevented them from qualifying for the World Championships. The cyclists argued that it was unreasonable for the Australian governing body to impose sanctions greater than the international body. The matter was settled by negotiation, so no legal precedent was set.

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<sup>22</sup> Above n 1, 214.

<sup>23</sup> [1963] 1 Ch 413.

<sup>24</sup> Above n 25, 437.

<sup>25</sup> [1978] 1 WLR 302.

<sup>26</sup> Above n 21.

<sup>27</sup> Above n 1, 213.

<sup>28</sup> Above n 19, 125.

<sup>29</sup> Above n 1, 214.

<sup>30</sup> Above n 19, 126.

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Australian cyclist, Bill Robertson<sup>31</sup> tested positive for steroid use and was banned for 2 years. The ban imposed by the APCC was greater than what would have been imposed by the UCI. The Court found the penalty to be in excess of the international counterpart, and therefore an unreasonable restraint of trade. The weight of this decision is undermined because the APCC (with a limited legal budget) did not mount any defence to the allegation.<sup>32</sup>

Recently in the UK, Ian Blackshaw commentated on the case of Dwain Chambers, the British sprinter suspended for 2 years for a positive test of a banned substance in 2003.<sup>33</sup> The athlete is now seeking to return to the sport, but is facing resistance from a number of sectors. Blackshaw considers the merits of a restraint of trade argument, and the hurdles to be overcome by the athlete.

### TRADE PRACTICES ACT 1974

Sections 45(2) (a) and (b) of the *Trade Practices Act* ("the Act") together amount to a statutory restraint of trade bar. These sections are complex and sometimes difficult to apply. In essence, a corporation in trade must not seek to enforce a contract, arrangement or understanding that falls within one of two limbs. The first is where the contract, arrangement or understanding contains an exclusionary provision, The second is where the contract, arrangement or understanding has the purpose or likely effect of substantially lessening competition.

#### 'Corporation in trade'

In *Hughes v Western Australian Cricket Association (Inc)*,<sup>34</sup> cricketer Kim Hughes argued that these sections of the Act had been breached as amounting to a restraint of trade.

The 'trading corporation' requirement was considered in *Hughes*:

In promoting and controlling cricket in Western Australia, the WACA had found itself in a complex and sophisticated organization, receiving and disbursing large sums of money, forever expanding the scope of its activities beyond cricket to other forms of entertainment ... and generally engaging in activities that were of a trading nature. By any test those activities were substantial.<sup>35</sup>

These provisions can apply as between clubs within a league or association if they are trading corporations. The Act can also apply to athletes engaged by those clubs.

#### 'Contract, arrangement or understanding'

Club rules have been held to be a 'contract' under s 45.<sup>36</sup> It could be argued that rules imposing a sanction for doping offences satisfy the first requirement of 'contract, arrangement or understanding'.

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<sup>31</sup> Above n 19, 127; *Robertson v Australian Professional Cycling Council Inc* (unreported decision, Supreme Court of New South Wales).

<sup>32</sup> P Horvath, 'Anti-Doping and Human Rights in Sport: The Case of the AL and the WADA Code' (2006) 32 *Monash University Law Review* 383.

<sup>33</sup> 'Dwain Chambers and his Quest for Rehabilitation', Ian Blackshaw, 12 March 2008 <[www.sportslaw.nl](http://www.sportslaw.nl)>.

<sup>34</sup> *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-736.

<sup>35</sup> Above n 36.

<sup>36</sup> Above n 36, para 3 of judgment.

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*'Exclusionary provision'*

The first limb of 45 (2) has been considered in a number of cases involving athletes and their clubs, and the associations or governing bodies responsible for the sport. The distinction has been drawn between the two limbs of section 45 (2), and the majority of cases have concluded a possible breach of the first limb of the section.<sup>37</sup>

The Act provides a highly technical and complex definition for "exclusionary provision" but in essence, it requires the contract, arrangement or understanding to be made between persons, any two of whom are in competition with each other, with the purpose to restrict or limit the supply or acquisition of goods or services from particular persons or class of person in particular circumstances.

*'Purpose'*

The 'purpose' must be a substantial purpose as referred to in s 4F.<sup>38</sup> This will be a difficult point to establish in a doping case. Is the substantial purpose of the rule banning an athlete from competition for a doping offence designed to substantially lessen competition in the market? Or is it the risk of loss of financial support for the organization in not following the relevant doping policy?<sup>39</sup> What about the moral and ethical considerations?

*'Substantially lessening competition'*

Substantially lessening competition is not defined in the Act. Justice Toohey<sup>40</sup> stated that this term is one of relativity. Hughes argued that the placing of the ban on him and other senior players would substantially lessen competition in the market. There must be a market for the services being restrained. In *Hughes*,<sup>41</sup> the Court found that there was a market in which the services of cricketers were sought by clubs in circumstances involving a financial incentive. Hughes lost the Trade Practices Act claim, but was successful in proving the ban was an unreasonable restraint of trade at common law.

The courts have considered the issue of the legality of conduct in a restraint of trade argument and have held that illegal conduct does not preclude the court from examining whether there is an unreasonable restraint of trade.<sup>42</sup> In the case of a doping offence for recreational drugs, could it be argued that despite the athletes' conduct being 'tainted with illegality', the court should not be deterred from finding the rules unenforceable?<sup>43</sup>

In *Canas v ATP Tour*,<sup>44</sup> the CAS rejected the athlete's argument that the rules imposing the sanction were in breach of the *Sherman Antitrust Act*.<sup>45</sup> In a single paragraph, the CAS decided

<sup>37</sup> Above n 33, *McCarthy v Australian Rough Riders Association Incorporated* [1987] FCA 391.

<sup>38</sup> Section 4F details the relevant quantum of purpose required if the Act is to be infringed. It is sufficient if the anti-competitive purpose is one of a number of purposes so long as the anti-competitive purpose is a substantial purpose [3-410] *CCH Trade Practices Reporter*.

<sup>39</sup> Suggested by Buti and Fridman when considering the *Robertson* case at pp 127-8 and the interests in a common law restraint of trade issue.

<sup>40</sup> Above n 36.

<sup>41</sup> Above n 36, para 7 of judgment.

<sup>42</sup> *Cedar Hill Flowers & Foliage Pty Ltd v Spierenburg* (2002) ATPR 41-898.

<sup>43</sup> The appellant, a former employee of the respondent, was subject to a 1-year restraint from competing with the respondent. Within the relevant period, the appellant set up in competition with the respondent. However, the appellant did not have the necessary statutory licences for the business and was operating illegally.

<sup>44</sup> CAS 2005/A/951 delivered 23 May 2007.

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that the governing body was entitled to regulate its members. The purpose was not to exclude the player from the market by imposing sanctions for a doping offence. The CAS did not expand on what it considered to be the purpose or interests of the governing body in this particular case.<sup>46</sup>

### UNCONSCIONABILITY UNDER PART IVA OF THE ACT

It is worth considering whether the unconscionable conduct provisions of the *Trade Practices Act* could be applied by an athlete to a commercial arrangement where there is an inequality of bargaining power between the athlete and the club, organisation or governing body.

Section 51AC of the Act prohibits a corporation from engaging in unconscionable conduct in commercial transactions with small businesses.<sup>47</sup> Unlike in s 45, there is no requirement in s 51AC that the corporation must be in engaging in trade to fall foul of the section. This potentially broadens the application of the section to capture those less formal arrangements between athletes and their clubs.

The Act goes further to provide a non-exhaustive list of factors to take into account in determining whether a corporation or person has engaged in unconscionable conduct.<sup>48</sup> In addition to the relative strength of the bargaining positions of the parties, the factors include a consideration of whether conditions imposed by the corporation were necessary for the protection of the legitimate interests of the corporation and whether the other party was able to understand any documents relating to the supply of the services. The last factor in this list is the extent to which the supplier and business consumer acted in good faith.<sup>49</sup>

If the athlete is regarded as the business consumer, and the club, organisation or governing body as the corporation (without the need to be a 'trading corporation'), then the conduct of the club could be called into review under the scope of s 51AC.

The doctrine of unconscionability was narrowly interpreted by the High Court in *ACCC v CG Berbatis Holdings Pty Ltd*.<sup>50</sup> The ACCC, as the regulator vested with the power to enforce the unconscionable conduct provisions of the Act, has had limited success in cases involving s 51AC of the Act.<sup>51</sup> However, if it is accepted that the business of sport has developed to such an extent that it regarded as a series of commercial arrangements, then it is open to argue that the athlete, as a business consumer, is entitled to the protection afforded by s 51AC, just as any other business consumer engaged in commercial dealings, particularly if the conditions imposed on the athlete go beyond what is necessary to protect the legitimate interests of the club, organisation or governing body.

### LEGITIMATE INTERESTS

When considering the purpose of the sanctions, and the interests that are to be protected, Buti and Fridman<sup>52</sup> draw a parallel between the sports context and the criminal law context and

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<sup>45</sup> 2 July 2 1890, 15 USC. § 1–7. This was the first US statute to limit monopolies and cartels. It says: 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal'.

<sup>46</sup> Above n 47, para 8.17.3.

<sup>47</sup> Section 51AC.

<sup>48</sup> Section 51AC.

<sup>49</sup> Section 51AC(3)(e)-(k).

<sup>50</sup> (2003) 214 CLR 51.

<sup>51</sup> A summary of the 10 most significant cases can be found in Michelle Sharpe and Christine Parker, 'A bang or a whimper? The impact of ACCC unconscionable conduct enforcement' (2007) 15 TPLJ 139, 145.

<sup>52</sup> Above n 19, 129.

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discuss underlying policy considerations in respect of imposing penalties on convicted criminals.<sup>53</sup> They argue that the incarceration of convicted criminals (and the resultant loss of income) is acceptable to society as a reasonable way to protect the public. They pose the question whether the same assumption could be made when dealing with athletes.

This article does not analyse the differences between a lay person found in possession of a dangerous drug and an athlete in possession of a dangerous drug. However, two of the most significant differences involve the presumption of innocence or guilt, and the burden of proof resting with the enforcer. What policy underlies the rationale of strict liability and the reversal of Blackstone's theory in a sporting context?<sup>54</sup> It seems that the rationale is that it is justifiable that the morally innocent are punished to ensure that the guilty do not go free.<sup>55</sup>

In applying Lord Wilberforce's 'trading society test', it could be argued that the business of sport has evolved to such an extent that this issue may require closer review. His Lordship had been willing to examine a restraint of trade argument in the sporting context<sup>56</sup> and 'to consider whether it goes further than is reasonably necessary to protect legitimate interests of the Club'.<sup>57</sup>

### A TEST CASE?

In considering WADA Code penalties in the Australian Football League, Paul Horvath<sup>58</sup> argues that a suspension of an AFL player for the use of an illicit drug either out of competition, or in circumstances where it cannot be shown to enhance performance, would be open to challenge as a restraint of trade.<sup>59</sup>

The most recent high profile case in Australia involved Ben Cousins, the former West Coast Eagle. An out of competition incident in October 2007 led to criminal charges being laid against Cousins for possessing a dangerous drug. The club then terminated his contract.<sup>60</sup> The criminal charges were later dropped. The AFL then suspended Cousins for 12 months for bringing the game into disrepute.<sup>61</sup>

Was the restraint of trade (ie, the suspension of Cousins for 12 months, and consequent loss of income) reasonable, having regard to what Horvath suggests are the three criteria? These criteria are:

1. The protection of the legitimate interests of the AFL;
2. The suspension must not be unreasonable in relation to the player suspended; and
3. It must not be unreasonably injurious to the public.<sup>62</sup>

In applying Horvath's rationale to the *Cousins* case, and recognizing that the suspension was not for a doping offence, what were the legitimate interests of the AFL in taking this stand? Horvath suggests (in the context of a doping offence) that the interests to be protected are the AFL image, the game of Australian Rules, and the status of the role model in the eyes of the

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<sup>53</sup> Above n 49.

<sup>54</sup> William Blackstone, *Commentaries on the Laws of England*: 'It's better that 10 guilty persons escape than one innocent suffer' [http://en.wikipedia.org/wiki/Commentaries\\_on\\_the\\_Laws\\_of\\_England](http://en.wikipedia.org/wiki/Commentaries_on_the_Laws_of_England).

<sup>55</sup> Above n 21.

<sup>56</sup> Above n 22.

<sup>57</sup> Above n 22.

<sup>58</sup> Above n 35.

<sup>59</sup> Above n 35, 383.

<sup>60</sup> [http://en.wikipedia.org/wiki/Ben\\_Cousins](http://en.wikipedia.org/wiki/Ben_Cousins).

<sup>61</sup> [http://en.wikipedia.org/wiki/Ben\\_Cousins](http://en.wikipedia.org/wiki/Ben_Cousins).

<sup>62</sup> Above n 35, 381

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community.<sup>63</sup> Would an alternative penalty have been more reasonable in the circumstances? And could the public policy justification for the suspension be sustained in these circumstances?<sup>64</sup>

It is difficult to tease out the morals of the case from the justice of the case, and not be seen to condone illicit drug use. But, in any other livelihood, Cousins may have been afforded a fair trial, with an assumption of innocence, and possibly more effective rehabilitative outcomes. Instead, he has lost his livelihood and become a soap opera, feeding the media and the public appetite.

### CONCLUSION

It remains to be seen whether an athlete will be successful in mounting a dual restraint of trade challenge against a doping sanction. There appears to be emerging support for the view the penalty must fit the crime<sup>65</sup> and that governing bodies must ensure that their legitimate interests outweigh the detriment to the athlete.

In the case of doping sanctions imposed for the use of recreational drugs, arguments have been advanced to suggest that a restraint of trade claim would have strong prospects of success on the basis of a weakening of the public policy justification for imposing the sanction. It will be interesting to see if the 'trading society test' could be advanced to permit a review on the basis that the business of sport has evolved to such an extent to question whether the sanctions imposed are still 'acceptable and necessary'.

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<sup>63</sup> Above n 35, 383.

<sup>64</sup> Above n 19, 134.

<sup>65</sup> Above n 19, 143.