

THE INTERNATIONAL WORLD OF SPORT AND LIABILITY FOR OFF-FIELD INDISCRETIONS

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The recent terminations of the contracts of NRL player, Joel Monaghan and the AFL's Brendan Fevola, for off-field indiscretions, has highlighted the significance of the bringing the game into disrepute clauses contained in standard player contracts. Tiger Woods' extra-marital affairs received extensive world wide media attention, and the outcome of this negative coverage was the loss of millions of dollars in sponsorship deals. This indicates that such contracts can be terminated on the basis that a sportsperson's behaviour was having a negative impact on the sponsor's image. It is for the same reason that sponsors have put pressure on the governing bodies of team sports to take appropriate action for off-field indiscretions. The Court of Arbitration in D'Arcy v Australian Olympic Committee, has also held that a competitor's behaviour in an incident where criminal charges were laid, may, in itself be sufficient to bring a sport, or themselves, into disrepute, regardless of whether the competitor is later found guilty or innocent. This case would therefore indicate that these 'bringing the sport into disrepute' clauses in standard playing contracts are valid, and allow clubs or sport governing bodies to fine and/or suspend players for off-field indiscretions. The recent incident involving Joel Monaghan also highlights the fact that what happens off the field may become public, not through the traditional media outlets, but through other members of the public making it available on the internet.

I Introduction

The recent decision by Australian Football League (AFL) club, the Brisbane Lions, to terminate the contract of star full-forward, Brendan Fevola, after a series of off-field indiscretions highlights the fact that a player's off-field behaviour can be as much a consideration as their on-field performances in regards to their employment. Another recent incident involving National Rugby League (NRL) player, Joel Monaghan, has raised the further issue as to when it is appropriate for a professional player to lose his or her job for an off-field incident that was not initially reported by the mainstream media, but became public by means of a photograph taken on a mobile phone and then published on the internet.

In overseas sport, meanwhile, golfer Tiger Woods' off-field behaviour not only received extensive media coverage, but also cost Woods millions of dollars in lost

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sponsorship income. Another overseas sport, namely English soccer, had to cope with the media investigation into the sexual affairs of Chelsea's Ashley Cole and John Terry, the latter of whom tried unsuccessfully to obtain an injunction to prevent information about the affair being published. Thus, these incidents involving bringing a sport, or the person, into disrepute¹ is an area with a strong international aspect to it, as highlighted by the fact that there are two Court of Arbitration (CAS) decisions on the matter, *D'Arcy v Australian Olympic Committee*,² and *Jongewaard Australian Olympic Committee*.³

This paper will therefore examine the legal issues regarding the 'bringing the game into disrepute' type clauses contained in standard playing contracts⁴ used by leagues such as the NRL, AFL, and the English Premier League. This will involve examining three types of situations, the first being when criminal charges have been laid, the second where players have been sanctioned for off-field alcohol related incidents, with the third being when players have been involved in allegations of sexual assaults, or been involved in extra-marital affairs.⁵ First, however, a brief overview will be made of the principles of contract law and how they apply, and relate, to this particular aspect of sport.

II Principles of contract law and sport

A Terms of standard player contracts and team agreements

A feature of modern sport is the emphasis on the use of contracts to determine the rights and obligations of the players/competitors and their club and/or organising governing body. What may also be relevant in regard to off-field behaviour is a players' code of conduct which outlines what behaviour is expected from the players, as well as what sanctions can be taken against any player who contravenes the code.

¹ See also Emma Bicknell Goodwin, 'Rules, Referees and Retribution: Disciplining Employee Athletes in Professional Team Sports (2005) 18 *Australian Journal of Labour Law* 240.

² CAS 2008/A/1574, www.tas-cas.org.

³ CAS 2008/A/1605, www.tas-cas.org. Despite both cases involved Australian athletes, the CAS decisions will be applicable to other cases, and both cases should be considered as international cases rather than merely applying to Australia.

⁴ For further discussion on the clauses see Patrick George, 'Sport in Disrepute' (2009) 4 *Australian and New Zealand Sports Law Journal* 24-54.

⁵ It is acknowledged that there is some overlap in regard to these categories, and in the Brett Stewart case for instance it involved heavy drinking preceding a sexual assault that led to criminal charges being laid. In this situation such as this, it has been put into the most serious of the three categories, namely criminal charges. For the purposes of this paper, drink driving offences have been treated as not involving an actual criminal charge and instead have been put into the alcohol related incidents category.

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In most sports both the standard player contract and the player code of conduct are negotiated between the relevant governing body and the players' association for that sport. This means that through their representatives, players have a direct input into the documents.

The NRL, for instance, like most professional leagues, utilises a standard contract, in this case the National Rugby League Playing Contract (NRLPC). It forms a standard employment contract for all players in the NRL, though as well as the standard clauses, specific clauses can be added for certain players if the club feels it is necessary. Likewise, players can have clauses added to the contract, such as being able to terminate their contracts if, for instance, the coach leaves the club. One of the items that the NRLPC sets out is the obligations of the player and under clause 3, for instance, a player is limited to what other sporting and leisure activities he can engage in, with this being limited to activities where the chance of injury is unlikely. However, the terms of the contract that are most relevant to the topic of this paper are contained in clause 8 with 8.1 (b) stating that a player must 'not engage in any misconduct or otherwise act in a manner inconsistent with the integrity of the Game'. The disrepute clause meanwhile is contained in clause 8.2 (1) which states players must not 'engage in any other form of conduct that may be detrimental to, or bring into disrepute the interests, welfare or image of the ARL, the NRL, the Club, the NRL Competition or the game.'

While a player signs the contract with the club, the terms of the contract also state that the player is bound by, and must comply with, the decisions and determinations of the NRL. The clubs meanwhile are also contracted to the NRL and are bound by the decisions of the NRL through this contract. The basis of the legal relationship between the players, clubs and NRL is therefore a contractual one with each party bound by the terms of a contract.

The AFL, likewise, has a similar standard player contract, the AFL Player's Contract, which contains similar provisions to the NRL contract.⁶ There is also an AFL Players Code of Conduct (the Code), though under clause 7.2. it is stated that the Code is not intended to supplant the Collective Bargaining Agreement, or the AFL's Player Contract. A feature of the Code is that while it acknowledges players can be delisted or summarily dismissed for serious offences, it also states, in clause 1.2, that the parties be 'desirous of utilising Alternative Sanctions where appropriate.' Clause 2.1 contains the bring the game into disrepute clause which states that 'AFL Players must

⁶ For further discussion on the AFL see James J Paterson, 'Disciplining athletes for off-field indiscretions: a comparative review of the Australian Football League and the National Football League personal conduct policies (2009) 4 *Australian and New Zealand Sports Law Journal* 105-144.

conduct themselves in a manner so as not to bring Australian Rules football, the AFL, AFL clubs or other AFL Players into disrepute.’ Clause 2.2 meanwhile sets out the more specific requirement that players must not engage in activities which may cause or aggravate any injury. A set of suitable sanctions is then set out in clause 5 which states it is the player leadership group who is to determine the sanctions for minor indiscretions, and while the sanctions for serious or persistent breaches are determined by the club, it is to be in consultation with the leadership group.

Those selected for events such as the Olympic Games, however, will not have the employer-employee relationship that exists in professional team sports, but may still be subject to a written agreement which contains conduct clauses. The legal basis, for instance, of the Australian Olympic Committee (AOC)’s decision to drop swimmer Nick D’Arcy and mountain bike rider Chris Jongewaard from the 2008 Olympic team was the agreement both had signed in which the AOC had outlined the conditions they would be subject to, if selected for the Olympic Games. Most significant was Clause 2.2 (6) of the AOC’s Ethical Behaviour By-law which stated that an athlete ‘must not by his or her acts or omissions, engage in or participate in ... conduct which, if publicly known, would be likely to bring ... themselves into disrepute or censure’.⁷ The updated version of this agreement now requires the athlete to declare whether they have any criminal convictions. The fact that both D’Arcy and Jongewaard lodged appeals with CAS indicates that this body has a significant role to play in regard to the interpretation of these clauses, which in turn raises the issue of CAS’s legal status.

B CAS and contract law

CAS is not a court of law, but is an arbitral body set up to entertain disputes that have been referred to it,⁸ usually as a result of an agreement between the parties. This provides a distinct advantage since, as an arbitral body CAS must, if the agreement of the parties requires it to do so, ‘enter into the procedural affairs of the relevant domestic body.’ A court on other hand can ‘only interfere on a strictly limited basis in the affairs of a domestic tribunal.’⁹ The potential non-binding nature of a CAS decision is avoided by the use of contracts, with CAS requiring that the parties who are involved in the case sign a binding arbitration agreement. This agreement states that the parties to the dispute agree to comply with whatever is decided by CAS, and CAS will not assume jurisdiction over the matter in dispute until this agreement has been signed. It is therefore this agreement, the contract made between the two

⁷ *D’Arcy v Australian Olympic Committee* CAS 2008/A/1574, [25].

⁸ *Ibid*, [25].

⁸ *Ibid*, [30].

⁹ *Ibid*, [25].

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parties, which makes the decision binding, not the jurisdiction of an actual court. The fact that it is an arbitral award means that, strictly speaking, it will only be binding on the parties who have signed the agreement and are therefore contractually bound by the decision. CAS has also made it clear that it operates under its own rules, the CAS Code, and in *D'Arcy* it was stated that this 'code is a template for contractual dispute settling processes for parties to incorporate by reference into their agreement.'¹⁰

The usual situation is that there will be a contractual relationship between a national body and an individual with CAS noting that 'the law recognises that several interlocking documents may evidence or constitute the agreement between the parties.'¹¹ However, the fact that CAS is a world wide organisation raises issues as to what law will actually apply, with this again being determined by contract, or by the sport itself. For instance, in any dispute involving athletes, it is the law of Monaco which will apply as under Article 16 of the IAAF Constitution the parties to any dispute agree, by means of a contract, that the law of Monaco is to apply to substantive issues of law.¹² Parties who have incorporated the CAS Code into their agreement will have a choice of law clause, and any CAS Appeals Panel, under R58 of its Code, is to 'decide the dispute according to ... the rules chosen by the parties.'¹³ In the absence of a 'choice of law' being made by the parties, R58 then states that an Appeals Panel is to apply the law of the country in which the federation, association or sports related body that has issued the challenged decision is domiciled, or 'according to the rules of law, the application of which the Panel deems appropriate.'¹⁴ However, for proceedings in the ordinary division of CAS Article R45 requires that the dispute be decided 'according to the rules of law chosen by the parties [or] in the absence of choice, according to Swiss law.'¹⁵

While the CAS decisions in relation to the dispute clause will be discussed shortly, the final aspect of contract law that needs to be addressed is that of implied terms.

C Implied terms of contracts

A general principle of contract law is that if a term is not expressly stated in a contract, then the law may recognise it as an implied term, and where such term is implied it will usually form a contractual promise and will therefore create a legal

¹⁰ Ibid, [39].

¹¹ Ibid, [7].

¹² CAS 2008/A/1480 *Pistorius v International Association of Athletic Federations* at [25].

¹³ *D'Arcy v Australian Olympic Committee* CAS 2088/A/1574, [21].

¹⁴ Ibid.

¹⁵ Ibid.

duty. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*¹⁶ the Privy Council held there were five requirements that needed to be satisfied before a term would be implied into a contract. These were:

- (i) It must be reasonable and equitable;
- (ii) It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
- (iii) It must be so obvious that it goes without saying;
- (iv) It must be capable of clear expression; and
- (v) It must not contradict any express term of the contract.¹⁷

As will later be discussed, implied terms may potentially have been of relevance in the Woods situation. First, however, the express disrepute clauses will be discussed in relation to the situation where criminal charges have been laid.

III Criminal charges and the disrepute clauses

A The Court of Arbitration for Sport Decisions

Nick D'Arcy competed in the 2008 Australian Olympic swimming trials and was duly selected for the Olympic team on 29 March. In the early hours of the following day, D'Arcy, while out celebrating at The Loft bar in Sydney, became involved in an altercation with a former Australian swimmer, Simon Cowley, who suffered serious facial injuries.¹⁸ D'Arcy was subsequently charged by the police, and then received a letter from the President of the AOC, John Coates, on 7 April that raised concerns about the incident. D'Arcy replied to this letter,¹⁹ but on 18 April Coates informed D'Arcy that, in his capacity as President of the AOC, he was terminating his membership of the Olympic team.²⁰ D'Arcy then appealed to CAS and on 27 May, 2008, the First Panel made a Partial Award which determined that the decision to terminate his membership of the Olympic team should be set aside on the grounds that proper procedure, as set out in Clause 2 of the agreement, had not been followed.²¹ It then ordered the matter be remitted to the AOC for the purposes of deciding whether the discretion contained in Clause 2 of the agreement should be

¹⁶ (1977) 180 CLR 266.

¹⁷ *Ibid*, 282-83.

¹⁸ *D'Arcy v Australian Olympic Committee* CAS 2008/A/1574, [2].

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Ibid*.

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exercised.²² On 11 June, however, the AOC Executive unanimously resolved that D'Arcy's membership of the Olympic team should be terminated,²³ and made the point of stating that 'the matter of criminal proceedings is entirely separate from today's decision.'²⁴ D'Arcy again appealed to CAS.

In regard to the clause of the agreement which referred to bringing himself into disrepute, CAS stated that 'bringing a person into disrepute is to lower the reputation of the person in the eyes of ordinary members of the public to a significant extent.'²⁵ It was stated that D'Arcy's conduct was 'serious misconduct' even after 'putting to one side the allegations of criminal misbehaviour.'²⁶ This conduct involved the 'grossly excessive consumption of alcohol' that resulted in intoxication and then led to the altercation with Crowley. It was held that this was 'conduct that could form an ample basis for the exercise of discretion to terminate [D'Arcy's] membership of the team.'²⁷ It was further stated that the unanimous decision of the AOC Executive 'must be given great weight',²⁸ and it was a decision that could not be considered 'perverse or irrational' and it 'could not be said that the AOC Executive could not honestly and reasonably have come to the decision it did.'²⁹ D'Arcy's appeal was therefore dismissed and the decision of the AOC to terminate his membership of the Olympic team upheld.³⁰

Like D'Arcy, Jongewaard faced criminal charges, in his case in relation to a road accident that occurred in Adelaide in February, 2008, which left fellow cyclist Matthew Rex with severe head injuries and a broken leg. Rex was also required to be placed in a medically induced coma for 12 days after the accident that occurred after both Jongewaard and Rex had been drinking at a local pub to celebrate Rex's birthday.³¹ Like D'Arcy, Jongewaard received a letter from AOC President stating that his conduct had brought himself into disrepute. Coates went on to state that:

[P]utting to one side the allegations of criminal misconduct, your conduct, namely your admitted consumption of alcohol during the course of the day, driving while likely, in my view, to be under the influence of alcohol and being involved in an accident while in that state are sufficient for me to form

²² Ibid, [3].

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid, [46].

²⁶ Ibid, [49].

²⁷ Ibid.

²⁸ Ibid, [50].

²⁹ Ibid, [52].

³⁰ Ibid, [54].

³¹ CAS 2008/A/1605, [3].

the view that your conduct was likely to and did bring yourself into disrepute.³²

Jongewaard then appealed to CAS, but the decision of the AOC to exclude him was upheld on the same reasoning as that given in *D'Arcy*, the Panel stating 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 into disrepute.'³³ Thus, CAS has made it clear that the bringing the athlete into disrepute clause contained the AOC agreement was valid and that it not require a guilty verdict since the behaviour that resulted in the charges were, in itself, sufficient.

Although these two decisions do not provide binding precedents for domestic sports, it is suggested they do provide a sound authority that disrepute clauses can be used to sanction players for off-field indiscretions. George is of the view that the bringing the person into disrepute is easier to prove than would be the bringing the sport, or in the cases involving *D'Arcy* and Jongewaard, bringing the AOC into disrepute.³⁴ The author, however, would apply a broader interpretation of *D'Arcy* and *Jongewaard* and suggest that the reasoning in these cases is also applicable to contracts in domestic sports containing a bringing the sport into disrepute clause, rather than a bringing themselves into disrepute clause.

B National Rugby League incidents

In 2009 advertisements for the NRL season launch included images of Manly's star fullback, Brett Stewart. However, within weeks Stewart was facing sexual assault charges after an incident that occurred on 6 March, 2009, when Manly had its own pre-season launch at the Manly Wharf Bar with players, club officials, sponsors, friends and supporters being invited. Alcohol was available at the function with the players 'given carte blanche to consume alcohol as they spend time mingling with sponsors and supporters.'³⁵ Stewart was reportedly refused service, then asked to leave the Manly Wharf Bar due to his state of intoxication.³⁶ When he arrived back at

³² Ibid.

³³ Ibid, [18]. It should be noted that both *D'Arcy* and Jongewaard were later found guilty, with *D'Arcy* being given a 14 month suspended prison sentence and was suspended from swimming for Australia until 3 August, 2009, while Jongewaard received a six month jail term.

³⁴ Patrick George, 'Sport in Disrepute' (2009) 4 *Australian and New Zealand Sports Law Journal* 24-54, 37.

³⁵ Brent Read and Stuart Honeysett, 'Pressure grows to dump Stewart', *The Australian*, 11 March, 2009, 18.

³⁶ Stuart Honeysett, 'Stewart to fight for his future', *The Australian*, 12 March, 2009, 16.

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the unit complex where he lived it was alleged that he spoke to a 17 year old neighbour who was having a cigarette outside her parent's unit. Eyewitnesses then claimed he crash tackled her, with the victim also claiming he sexually assaulted her during the attack. After a police investigation into the incident Stewart was charged with sexual assault that allegedly involved tongue kissing and digital penetration.³⁷

Initially Manly refused to take any action against Stewart, and in the week following the incident the club indicated that Stewart would be selected for the first round match against the Canterbury Bulldogs on 14 March, provided the club was satisfied he was mentally fit to play.³⁸ This decision by the club was then overturned by the NRL who suspended the player for four matches, with the NRL also fining Manly \$100,000 for failing to police the consumption of alcohol at the official club function. In relation to Stewart, the 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. It is suggested that this is consistent with the reasoning of the CAS decisions in both *D'Arcy* and *Jongewaard*, with the incident also having the similarity that the criminal charges in those two cases arose after the heavy consumption of alcohol. The importance of basing the penalty on a factor other than the actual criminal charges can be gauged from the fact that in September, 2010, Stewart was found not guilty of the charges.³⁹

The NRL's decision to suspend Stewart was still being criticised by Manly two years later when the West Tiger's Benji Marshall was not suspended by the NRL after being charged with assault on 6 March, 2011, following an incident in the early hours of the morning at a McDonalds' outlet in Sydney's CBD.⁴⁰ The difference, however, was that the NRL found nothing about Marshall's conduct prior to the incident that had bought the game into disrepute.⁴¹ Despite Manly's strong criticism about the seeming

³⁷ Brent Read and Stuart Honeysett, 'Pressure grows to dump Stewart', *The Australian*, 11 March, 2009, 18.

³⁸ Brent Read and Peter Kogoy, 'Stewart to play despite allegations', *The Australian*, 9 March, 2009, 13.

³⁹ Kim Arlington, 'Brett Stewart breaks down as jury finds him not guilty of sexually assaulting girl', *The Sydney Morning Herald*, 29 September, 2010.

⁴⁰ Glenn Jackson and Les Kennedy, 'Benji charged', *The Sydney Morning Herald*, 7 March, 2011, 32.

⁴¹ Stuart Honeysett and Brent Read, 'Benji charged with assault, but he'll avoid suspension,' *The Australian*, 7 March, 2011, 13. Note that in 2007 the Gold Coast likewise continued to select a player, Anthony Laffranchi, during the early part of the season, despite the fact that he had been charged with sexual assault. This was fully supported by the NRL with chief executive, David Gallop, defending the right of the Gold Coast to continue to select Laffranchi since it was a situation involving disputed facts that needed to be left to the

inconsistency,⁴² the author agrees with the NRL's decision, since it is potentially a restraint of trade to suspend a player, purely on the basis of being charged with an alleged offence. From a legal perspective there must be some other behaviour that brings the person or sport into disrepute, being heavily intoxicated in public can be sufficient, as illustrated by the *D'Arcy, Jongewaard* and Stewart cases.

It should be noted, however, that the Newcastle Knights terminated the contract of Danny Wicks after he was arrested in relation to drugs, with Wicks later pleading guilty to three accounts of supplying drugs on 5 November, 2010.⁴³ The case was different therefore in that, while the contract was terminated purely on the basis of the criminal charges, it was clear that Wicks was involved in some way with the supply of drugs. Thus, while it could be argued that Newcastle may have left itself open to possible legal action for terminating a contract purely on the basis of criminal charges, from a more practical view, the facts, and Wick's guilt or innocence, were not in dispute.⁴⁴ It is suggested, however, that whenever there are disputed facts then it is essential, from a procedural fairness perspective, that the player be given sufficient opportunity to present their side of the incident.⁴⁵

court: Brent Read, 'Titans back player on sex charge,' *The Australian*, 7 March, 2007, 20. Note too that Laffranchi was later cleared off the charges: Dan Koch, 'Ghosts of the past brought to life,' *The Australian*, 12 March, 2009, 16.

⁴² Stuart Honeysett, 'Manly anger over Benji's let-off,' *The Australian*, 8 March, 2011, 36. It should be noted that Marshall, like Stewart, had been used as one of the faces to help launch the 2011 season: Peter Kogey, 'League poster boy charged with assault,' *The Australian*, 7 March, 2011, 3.

⁴³ James Gardiner, 'Drug talk off limits as Houston rejoins team,' *The Sydney Morning Herald*, 5 January, 2011, 32.

⁴⁴ Criminal charges, however, have in some cases lead to the termination of a player's contract with Cronulla, for instance, having terminated the contract of Tevita Latu, with the NRL then deregistering him. This was the result of him being charged with assault after breaking the nose of a woman after a disagreement in a service station for which Latu was originally sentenced to eight months periodic detention, though this was later reduced to 200 hours of community service: Margie McDonald, 'Detectives to probe Bronco complaint,' *The Australian*, 2 August, 2006, 19.

⁴⁵ This is further illustrated by another NRL situation involving Greg Inglis, who was both an indigenous ambassador and one of the focuses of rugby league's advertising campaign. However, after he had been charged with assaulting his former partner, Sally Robinson, Inglis was stood down indefinitely by his club, the Melbourne Storm. He returned after just two weeks with there were suggestions that Inglis had actually been trying to prevent Robinson from hurting herself: Stuart Honeysett and Margie McDonald, 'Inglis says sorry and is clear to play,' *The Australian*, 28 August 2009, 15. Stuart Honeysett and Margie McDonald, 'Inglis faces uncertain NRL future,' *The Australian*, 12 August, 2009, 18. This is supported by the fact he was later acquitted of the charge. Thus, while it initially looked like

C Australian Football League incidents

The AFL, meanwhile, has also seen a player's contract terminated, seemingly purely on the basis of criminal charges. This involved St Kilda's Andrew Lovett, with the charges being laid after Lovett had allegedly attacked a woman while she was sleeping in a Melbourne apartment on Christmas Eve, 2010. However, when announcing that Lovett's contract had been terminated, St Kilda's Chief Executive, Michael Nettlefold, stated that the sacking was unrelated to the rape charge, but was the result of his unacceptable behaviour during the off-season, which included failures in relation to training commitments. It was also suggested that some of the other St Kilda players did not want to take the field with him. The club indicated that, as Lovett had brought St Kilda into disrepute, the club was able to rely on the player's code of conduct, as well as specific clauses within Lovett's standard playing contract.⁴⁶

Thus, the criminal charges, in themselves, were not the reason for sanctioning a player for an off-field indiscretion, with Nettlefold indicating that the club's decision was not based on whether or not Lovett was innocent or guilty, but on his general behaviour.⁴⁷ It should also be noted that an out of court agreement was later made between St Kilda and Lovett, indicating that even though clubs' may decide to terminate a player's contract, a good proportion of what is owed for the remainder of the contract may still need to be paid.

The case involving Geelong's premiership player, Matthew Stokes, meanwhile resulted in a suspension, rather than termination, after Stokes was charged with trafficking and possession of cocaine. The club imposed suspension was until round 8 of the 2010 AFL season, though he was free to play for Geelong in the second tier Victorian Football League (VFL). It was the trafficking charge that carried the greatest implication, since under the World Anti-Doping Agency's (WADA) Code, the minimum penalty for a trafficking offence is a four-year ban which would have effectively ended 25 year old Stokes' AFL career.⁴⁸ The trafficking offences, however, were later dropped, with Stokes pleading guilty to the lesser possession charge. Geelong, however, retained the club imposed ban to the seventh round of the AFL,

there was some undisputed facts in regard to some form of assault having taken place, further evidence started to raise questions as to whether there was any criminal liability. It is suggested, however, that once the possibility of disputed facts emerged, neither the Melbourne Storm nor the NRL could continue suspending Inglis without there being a breach of both the restraint of trade doctrine and procedural fairness.

⁴⁶ 'St Kilda sacks Andrew Lovett a day after star recruit was charged with rape,' *Herald Sun*, 16 February, 2010, <http://www.heraldsun.com.au>.

⁴⁷ Greg Denham, 'Lovett to fight Saints' sacking', *The Australian*, 17 February, 2010, 30.

⁴⁸ See Article 2.6.7 of the WADA Code www.wada-ama.org.

even though the Magistrates Court decision was handed down after the fifth round of the AFL season.⁴⁹

A feature of the AFL's handling of off-field indiscretions is that the punishments can, and often are, determined by the leadership group of the respective club. Essendon's Michael Hurley, for instance, was charged with allegedly punching and kicking a taxi driver at 5.30am on 25 September, 2009, after drinking at a party. Hurley was therefore suspended by the club until the fourth round of the AFL season, with the punishment being agreed to by the Essendon player leadership group.⁵⁰

While a number of these cases where criminal charges were laid involved a heavy consumption of alcohol, other cases involving alcohol have also created image problems for governing bodies, even without criminal charges being laid.

IV Alcohol related incidents and the disrepute clauses

A National Rugby League incidents

Perhaps more than any other sport, rugby league has had its share of recent off-field incidents involving alcohol that have required either the club, or the NRL to impose sanctions on the players.⁵¹ One such incident involved Cronulla's Brett Seymour who had been drinking with teammates and officials after a match, but had then continued drinking until the early morning. He was captured on a mobile phone staggering down the Cronulla mall, falling on top of a woman who was trying to help him, with further shots being taken of him collapsed on the ground.⁵² He was initially cleared of any wrong doing by Cronulla, but under pressure from the NRL, the club banned him for two matches and fined him \$20 000. It should also be noted

⁴⁹ Stephen O'Reilly, 'Court clears Stokes to play.' *The Australian*, 28 April, 2010, 30.

⁵⁰ Such a penalty was relatively light in comparison with, for instance, Fremantle's Jeff Farmer who was suspended by the club for effectively seven matches and fined \$5000 after being charged with assaulting a nightclub bouncer. A significant factor in Farmer's case, however, was that the incident was just the latest in a long series of off-field indiscretions, while in Hurley's case, it was his first offence. Like St Kilda, Fremantle made it clear in a club statement that the suspension was 'a result of Jeff Farmer placing himself in these circumstances – and not with any presumption of his guilt to the charges.' Courtney Walsh, 'Dockers star banned after big night out,' *The Australian*, 30 April, 2007, 22.

⁵¹ It should be noted that as the incident involving Brett Stewart at the Manly pre-season launch at the Manly Wharf Bar on 6 March, 2009, there was another incident involving Anthony Watmough, with Watmough allegedly striking one of the sponsors, though Watmough later made an apology and was not suspended by the club: Stuart Honeysett, 'Stewart to fight for his future', *The Australian*, 12 March, 2009, 16.

⁵² Stuart Honeysett and Brent Read, 'Rooster call for talks on hardline booze stance,' *The Australian*, 20 March, 2009, 16.

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that Seymour, together with Neville Costigan, had previously been sacked midway through the 2006 season by the Brisbane Broncos after a number of alcohol related incidents,⁵³ one of which involved an investigation by the police for an assault on a woman.⁵⁴

While these images of Seymour were far from good for the NRL, they were not as bad as the mental images created by the facts of the incident involving the Sydney Rooster's Nathan Myles. Myles had volunteered to attend a junior rugby league function on the Central Coast on Saturday 4 July, 2009, but the following morning, he was 'naked in a corridor at the Crowne Plaza, Terrigal, as he attempted to gain entry into the room of a family who were checking out,'⁵⁵ Myles having accidentally locked himself out of his own room. It was later established that he had defecated in the corridor, and was found in a fire escape by a hotel employee at around 8am. He was subsequently banned for six matches, with the NRL also taking action against the club, fining the Roosters \$50,000 after a 'string of alcohol-related scandals.'⁵⁶

Other incidents have involved drink driving offences, with Sydney Rooster's Jake Friend, for instance, recorded a reading of .16 after being breath tested on his way home from a club function. He was then charged with a high range drink driving offence, with the Sydney Roosters fining him \$10 000, which was a sixth of his \$60 000 a year salary, but selected him for the next match.⁵⁷ The NRL, however, stepped in and added a two match ban to the fine that had already been imposed by the club,⁵⁸ again relying on the disrepute clause.⁵⁹ More recently, the Sydney Roosters,

⁵³ Stuart Honeysett and Brent Read, 'Serial offenders sent packing,' *The Australian*, 11 August, 2006, 31.

⁵⁴ Margie McDonald, 'Detectives to probe Bronco complaint,' *The Australian*, 2 August, 2006, 19.

⁵⁵ Stuart Honeysett and Dan Koch, 'Myles banned for hotel disgrace,' *The Australian*, 7 July, 2009, 16.

⁵⁶ *Ibid.* Note that the drinking related scandals at the Sydney Roosters had not been limited just to the players, with former coach, Brad Fittler, having problems finding his room at a Townsville hotel following a drinking session after the team's match against the North Queensland Cowboys. Fittler fined himself \$10,000, and was later sacked by the Roosters.

⁵⁷ Stuart Honeysett and Brent Read, 'Rooster call for talks on hardline booze stance,' *The Australian*, 20 March, 2009, 16.

⁵⁸ Brad Walter, 'Sponsors have had a gutful of drunks,' *The Sydney Morning Herald*, 20 March, 2009, 29.

⁵⁹ It should also be noted that a further drinking incident prior to the 2010 season saw the Roosters terminate Friend's contract: Margie McDonald, 'Detectives to probe Bronco complaint,' *The Australian*, 2 August, 2006, 19. It should also be noted that the fine imposed by the Roosters was consistent with what other clubs have given, with the Canterbury

Todd Carney, recorded a level of .052, and while he escaped with just a club imposed \$10,000 fine for what was a low alcohol reading, NRL chief executive, David Gallop made it clear that any more incidents from Carney would see the end of his NRL career,⁶⁰ Carney having been previously deregistered for the 2009 season after a number of alcohol related incidents while playing for the Canberra Raiders.⁶¹

These incidents, however, are simply the most recent in a long line of alcohol related indiscretions by rugby league players,⁶² and suggest that a heavy drinking culture does exist in rugby league, which, as will later be discussed, has put the NRL at odds with its sponsors. Sponsorship problems caused by off-field indiscretions have also occurred in the AFL.

B Australian Football League incidents

No incident highlights the wider ramifications that an off-field indiscretion can cause for a club than the drink-driving charge made against Collingwood's Sharrod Wellingham who recorded a 0.13 reading after moving another player's car 150m to avoid a parking ticket. The reason for this was that it cost Collingwood its \$500,000 sponsorship with the Transport Accident Commission.⁶³ Despite the loss of a substantial sponsorship the club had had since 2001, from a public relations perspective, a more damaging alcohol related incident occurred later in 2008 when three players, Alan Didak, Rhyce and Heath Shaw were involved in a drink driving incident in which the car driven by Heath Shaw side swiped a number of other cars. Heath Shaw recorded a blood alcohol reading of 0.14, with both Didak and Heath Shaw then lying to the club about Didak's presence in the car on account of his previous off-field indiscretions.⁶⁴ Rhyce Shaw was suspended for two matches, and

Bulldogs for instance fining Reni Maitua \$7500, with a further \$7500 suspended after he recorded a similar blood alcohol reading of 0.165.

⁶⁰ Brent Read and Stuart Honeysett, 'Hasler, Gallop in standoff over punishment imposed on Carney,' *The Weekend Australian*, 5 March, 2011, 42.

⁶¹ Stuart Honeysett, 'Sharks shame as Bird bailed,' *The Australian*, 26 August, 2008, 20

⁶² One of the worse incidents involved players from the Newcastle Knights who went on 'an alcohol-fuelled rampage' through the campus of the Charles Sturt University at Bathurst after a 2005 pre-season match. In all, 12 players were fined a total of \$50,000: Stuart Honeysett and Natasha Robinson, 'Dozen fined for uni rampage,' *The Australian*, 22 February, 2005, 18. The main culprit, Dane Tilse, meanwhile, had his contract terminated by the Knights with the NRL then deregistering him for 12 months for 'bringing the game into disrepute: Peter Lalor, 'Bad boys,' *The Australian*, 23 February, 2005, 18. The NRL also fined Newcastle \$100,000. It is also worth noting that the other Knight players not involved insisted on those that were being named to ensure their reputations were not smeared.

⁶³ Michael Davis, 'Young Magpie repentant,' *The Australian*, 10 January, 2008, 13.

⁶⁴ Stephen Reilly, 'Didak to be boned by Pies,' *The Australian*, 6 August 2008, 20.

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later traded to the Sydney Swans, while Heath Shaw and Didak were suspended for the rest of the season, but were allowed to continue playing for Collingwood. It should also be noted that the decision to suspend the three players was made by both the players' leadership group and the club executive, with it being based on the conclusion that the integrity of the football club had been compromised.⁶⁵

Previous off-field indiscretions involving Collingwood players, however, had not always been dealt with as harshly, with Chris Tarrant and Ben Johnson, for instance, being fined the maximum of \$5000, but allowed to continue to play after being involved in an early morning brawl at a Melbourne nightclub in 2006.⁶⁶ For both players it was not the first such incident, with the club being criticised for making on-field success the priority, with coach Mick Malthouse stating that if 'they had been youngsters on the fringe of selection, I might have thought a playing ban was in order.'⁶⁷ It is suggested, however, that, given the fact the right to discipline players for off-field indiscretions is derived from standard player contracts and in the case of the AFL, a standard player code of conduct, it is questionable whether players can be treated differently for similar offences based purely on their on-field playing ability and their importance to the team.

Other clubs, however, have been stronger in their discipline, with 2007 and 2009 premiers, Geelong, for instance, suspending star forward, Steve Johnson, for the first six rounds of the 2007 season after he was arrested for public drunkenness on the previous Christmas Eve.⁶⁸ More recently Richmond not only suspended Daniel Connors for eight weeks for causing problems at the Continental Hotel in Sydney after a drinking session following a 2010 match against the Sydney Swans, but also suspended a number of other senior Richmond players, including Ben Cousins, for one week for not taking sufficient steps to prevent it happening.⁶⁹

⁶⁵ Ibid.

⁶⁶ Chip le Grand and Jenny McAsey, 'On field success priority as Pies name Tarrant, Johnson,' *The Australian*, 4 August, 2006, 35.

⁶⁷ Ibid.

⁶⁸ Courtney Walsh, 'Drunken arrest puts Johnson in more strife,' *The Australian*, 3 January, 2007, 14; 'Johnson on last of Cats' nine lives' *The Australian*, 9 January, 2007, 16.

⁶⁹ Malcolm Conn, 'Tigers to probe new Cousins escapade', *The Australian*, 12 April, 2010, 35; Malcolm Conn, 'Cousins of no value as Tiger rebuild culture', *The Australian*, 13 April, 2010, 35. Cousins was at Richmond after having his contract terminated by the West Coast Eagles after being taken into custody after allegedly possessing an illegal drug, though the charges were later dropped. However, it was just the latest incident involving either drugs or alcohol, including an arrest for public drunkenness in 2006: Courtney Walsh, 'Cousins arrested for drunkenness,' *The Australian*, 4 December, 2006, 30.

While termination of the player's contract is undoubtedly the most severe penalty, and from a legal perspective is only sustainable in serious situations, another possibility, at least in the AFL, is to offer the player as a trade in the national draft. Former Carlton full-forward, Brendan Fevola, for instance, was traded to the Brisbane Lions at the end of the 2009 season, with a well-publicised, 'booze-fuelled Brownlow Medal rampage'⁷⁰ being the last straw for the club after a number of off-field indiscretions, including being sent home from the Australian International Rules tour of Ireland after a 'booze-fuelled fracas with a Galway bartender.'⁷¹

Fevola's off-field indiscretions have not stopped with a change of club, and he was placed on what amounted to indefinite leave from the Brisbane Lions after being arrested by the police after further drunken behaviour in the early hours of 1 January, 2011.⁷² Fevola then went into a rehabilitation centre for treatment in relation to both his alcohol and gambling problems, but Brisbane still decided to terminate his contract on 22 February, 2011.⁷³ While the club could rely on the bringing the game into disrepute clause in the contract, it is suggested that, like St Kilda with Andrew Lovett, another factor was the negative influence he was having on the team.

C International incidents

International players, too, have faced the consequences of alcohol related incidents, and the career of Australian cricketer Andrew Symonds, for instance, ended after a series of misdemeanours over a number of years. The first incident occurred when he

⁷⁰ Courtney Walsh and Dan Koch, 'Fresh Fevola sex scandal,' *The Weekend Australian*, 10 October, 2009, 3. Note there was also a claim of sexual harassment. The incident in question was said to involve a female journalist from the *Herald Sun* newspaper and was understood to have occurred in the women's toilets during a party at the Crown Casino that took place after medal ceremony: Courtney Walsh and Dan Koch, 'Fresh Fevola sex incident', *The Weekend Australian*, 10 October, 2009, 3. It appears that Fevola later had a meeting with the woman and offered an apology as well as making a more general apology to the AFL and those who were there on the night: Stephen Rielly and Dan Koch, 'Star struck by sexual harassment allegations', *The Weekend Australian*, 10 October, 2009, 41.

⁷¹ Chip le Grand, 'Banished Fevola goes on European vacation,' *The Australian*, 2 November, 2006, 35.

⁷² Jon Pierik and Laine Clark, 'Brown unsure if Fevola will play this year as treatment continues', *The Age*, 11 January, 2011.

⁷³ Peter Lalor, Fevola plots way back to the top,' *The Australian*, 2 March, 2011, 44. Note that Fevola indicated that he wished to continue playing football in the VFL and was even training with the Casey Scorpions. However, reports emerged of him being asked to leave Melbourne's Crown Casino, less than three days after leaving the rehabilitation clinic, making it unlikely a club will risk signing him: Peter Kogey, 'Fevola has a casino relapse,' *The Australian*, 11 March, 2011, 36.

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was suspended for two one-day matches after turning up drunk before a one-day match on the 2005 England tour, with a further alcohol related incident occurring at the Normandy Hotel, Brisbane, after the First Test against New Zealand in 2008.⁷⁴ The following year, his contract was terminated after breaching the specific alcohol related clauses that Cricket Australia had insisted be inserted into his contract.

Another player whose international career was interrupted after an alcohol related incident is that of Welsh rugby union forward, Andy Powell. Following a thrilling win over Scotland in Cardiff in a 2010 Six Nations rugby international, the Welsh team celebrated with some post-match drinks at their training base. In the early hours of the morning, Powell decided to drive a golf buggy down the motorway in order to obtain some food. He was then picked up by the police and charged with driving a golf buggy 'while unfit through drink',⁷⁵ and was subsequently dropped from the Wales team for the remainder of the 2010 Six Nations, a move supported by team captain, Ryan Jones.⁷⁶

What the incident also indicates is that there is no reason why players cannot be left out of national teams for off-field indiscretions, for even if there is a contractual relationship with the sports national governing body, there is no clause stating that a player must be picked for the team. While involving a sexual affair, rather than an alcohol related incident, similar principles apply to the decision to sack John Terry as captain of the English soccer team.

IV Sexual scandals and affairs and the disrepute clause

A English Soccer incidents

Early in 2010 it was revealed that the English captain had been having an affair with the ex-partner of England teammate, Wayne Bridge. On 5 February, 2010, England manager, Fabio Capello, stripped Terry of the England captaincy, with the manager later commentating on the fact that this, and another affair involving Ashley Cole, were impacting on the team's preparation for the 2010 World Cup.⁷⁷ Given the potential negative impact on team morale, it is suggested that Capello had no choice but to take the captaincy off Terry, with it again being a pure selection decision, one

⁷⁴ Malcolm Conn, 'Symonds international career in jeopardy again,' *The Australian*, 25 November, 2008, 16.

⁷⁵ Brendan Gallagher, 'Jones takes reshuffle in his stride,' *The Daily Telegraph*, 24 February, 2010, Sports 11.

⁷⁶ *Ibid.* Note that Powell has since returned to the Welsh side and competed in the 2011 Six Nations.

⁷⁷ Mark Ogden, 'Capello lays down law to errant England stars,' *The Daily Telegraph* (UK), 24 February, 2010, Sport 4-5.

which had no contractual ramifications. The affair, however, had further impact on the England team with Bridge making himself unavailable for England's 2010 World Cup squad, despite calls for him to do so.⁷⁸ Bridge has also publicly expressed his displeasure at Terry's action by refusing to shake his hand before the game when his side, Manchester City, played Terry's Chelsea side.⁷⁹

It should be noted that news of Terry's affair had come to the public's attention, despite his attempts to prevent its publication. Terry had initially been successful in being granted an injunction, but this was later lifted by Justice Tugendhat in the England and Wales High Court on 30 January, 2010.⁸⁰ His Honour noted that there was nothing in or about the relationship that was likely to be unlawful,⁸¹ and that the basis of the case was 'the protection of reputation, and not of any other aspect' of Terry's private life.⁸² It was his Honour's opinion therefore that the claim was 'essentially a business matter' for Terry, and that the real basis for Terry's concern was 'likely to be the impact of any adverse publicity upon the business of earning sponsorship and similar income.'⁸³

Another Chelsea and England player, Ashley Cole, meanwhile, also became caught up in a sex scandal after it was revealed that Cole, a married man, had taken a woman back to the team's Seattle hotel while Chelsea were on a pre-season tour of the United States. He had then sought the assistance of head of communications, Steve Atkins, with Cole informing Atkins that the rumours of the affair were not true, with Atkins subsequently being unwittingly involved in a cover up.⁸⁴ Chelsea indicated that it would punish Cole for bringing the game into disrepute, with Cole claiming that he was being victimised since he was being treated differently to Terry for whom Chelsea was showing full support. Chelsea, however, were of the opinion that the two situations were completely different, since Terry's 'indiscretions were private matters, carried out in his own time'⁸⁵ while Cole's not only involved breaking team rules, but also involved deceiving a senior club official into making a

⁷⁸ David Hytner, 'Tortured Bridge rejects call for change of heart,' *The Guardian*, 27 February, 2010, Sport 4.

⁷⁹ Chris Boffey, 'Terry left empty handed as Bridge gives him the cold shoulder,' *The Observer*, 28 February 2010, 7.

⁸⁰ *Terry v Persons Unknown* [2010] EWHC 119 (QB).

⁸¹ *Ibid*, [10].

⁸² *Ibid*, [95].

⁸³ *Ibid*.

⁸⁴ Matt Hughes, 'Punishment could push victimise Cole close to Chelsea exit,' *The Times*, 23 February, 2010, 76.

⁸⁵ *Ibid*.

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cover-up. While there were suggestions that Cole would seek to leave the club,⁸⁶ or that Chelsea would terminate his contract,⁸⁷ neither eventuated, with the maximum allowed fine of two weeks wages being the final outcome.⁸⁸

B National Rugby League incidents

On 9 November, 2010, a 'tearful' Joel Monaghan resigned from the Canberra Raiders⁸⁹ after the club's sponsors had essentially given the club a clear, 'he goes, or we go' ultimatum after a picture had been made public on the internet depicting Monaghan in a compromising, sexually related position with a dog. The picture had been taken on a mobile phone at a friend's house during the Canberra players' end-of-season drink session.⁹⁰ It is therefore a situation that highlights the need for disrepute clauses in professional sporting contracts since a sport's good image is essential in order to retain all-important sponsors, and while Monaghan made an unreserved apology immediately after the incident became public,⁹¹ this was never going to be sufficient. If Monaghan had not resigned, there is little doubt Canberra would have terminated his \$250,000 contract, nor is there much doubt that it would have had the legal right to do so, given the seriousness of the incident. There were,

⁸⁶ Ibid.

⁸⁷ Jason Burt, 'Chelsea staff told to clean up act,' *The Daily Telegraph* (UK), 23 February, 2010, Sport 4.

⁸⁸ The Ashley Cole case has similarities to that involving Australian rugby international, Lote Tuqiri, who had his contract terminated by the Australian Rugby Union (ARU) after allegedly bringing a woman back to the team hotel while in the Australian squad for the 2009 international match against Italy in Canberra. From the ARU's perspective this was just the latest in a number of off-field indiscretions by Tuqiri which is why it terminated his contract. Legal proceedings then commenced in the NSW Supreme Court and a number of media outlets were successful in obtaining an order to be granted access to the court file in the proceedings: *Lote Tuqiri v Australian Rugby Union Limited* [2009] NSWSC 781, [39]. Justice Einstein, at [3], who heard the application, stated there was a need for justice to take place in an open court, and that 'one of the normal attributes of a court is publicity.' (at [4]). The matter was eventually settled out of court, and it would appear Tuqiri was paid most of the money still owed to him under the contract. The case therefore further illustrates that while clubs or governing bodies may wish to terminate a player's contract for off-field indiscretions, they may still be required to make an agreed payout in regard to what is owed for the rest of the contract.

⁸⁹ Stuart Honeysett, 'Shattered Monaghan quits Raiders in tears after dog prank,' *The Australian*, 10 November 2010, 48.

⁹⁰ Ibid.

⁹¹ Brent Read, 'Raiders forced to axe Monaghan,' *The Weekend Australian*, 6 November 2010, 43.

however, other options for Monaghan and he subsequently signed to play with the Warrington Wolves in the English Super League.

The fact that rugby league players do have other options is illustrated by the incident involving former Penrith captain, Craig Gower, who faced disciplinary measures after what was described as a two day drinking binge at the Jack Newton Celebrity Golf Classic held on Queensland's Sunshine Coast in December, 2005. As well as the drinking, Gower had allegedly run naked on the golf course, but from a legal perspective, the most serious allegation was that he had sexually assaulted a 17 year woman.⁹² Despite making an apology to the woman, Tatum Pearce, the daughter of former rugby league player, Wayne Pearce,⁹³ Penrith stripped Gower of the captaincy and fined him \$100,000, \$70,000 of which was suspended.⁹⁴ The NRL then made it clear that Penrith would have to explain itself if it attempted to 'water down' the punishment amidst fears that Gower would accept an offer to play in England.⁹⁵ This illustrates that the NRL, because it faces competition from other leagues and codes, may face risks that the AFL, for instance, does not, when disciplining players for off-field indiscretions. While Gower did not accept any of the offers from English rugby league clubs, he did accept an offer to play club rugby union in France, and because of an Italian grandparent, also international rugby union with Italy.

Australian sport's biggest sexual scandal, however, is undoubtedly the allegations of a pack rape made against the Canterbury Bulldogs. The alleged incident took place at Coffs Harbour after a 2004 preseason match and involved a 21 year-old local girl and a number of Bulldogs players. When news of the incident became known the NRL made it clear that it could de-register any player who was convicted, and could fine the club up to \$1m.⁹⁶ It also ordered that all images of Bulldogs players be removed from the code's \$3.5m advertising campaign,⁹⁷ while the club itself lost \$600,000 in sponsorship as direct result of the scandal.⁹⁸ After a month long police investigation,

⁹² Peter Kogey and Dan Koch, 'Footy career on line after binge', *The Australian*, 23 December 2005, 3.

⁹³ Peter Kogey, 'League star sorry over discomfort', *The Australian*, 29 December, 2005, 5.

⁹⁴ Jacquelin Magnay, 'Gower stripped of captaincy, fined \$100,000', *The Sydney Morning Herald*, 5 January 2006, 34.

⁹⁵ Brent Read and Stuart Honeysett, 'NRL edict on Gower leniency', *The Australian*, 7 February 2006, 18.

⁹⁶ Stuart Honeysett, 'NRL has power to sack any offender', *The Australian*, 23 February 2004, 20.

⁹⁷ Simon Canning, 'Bulldogs culled from ads', *The Australian*, 4 March 2004, 36.

⁹⁸ Drew Warne-Smith, Peter Kogey and Louise Milligan, 'Sponsors pull the plug on Bulldog deals', *The Australian*, 10 March 2004, 5.

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all the relevant documents were handed over to the NSW state prosecutor,⁹⁹ though the final decision was that there was insufficient evidence for a prosecution.¹⁰⁰ However, the incident again highlights that even without criminal charges being laid, off-field incidents can still have a significant impact on a sport's sponsorship.¹⁰¹

C Australian Football League incidents

While the previously mentioned rape charges against Andrew Lovett is a recent AFL incident, it should also be noted that in 2004, the same year as the NRL's Coffs Harbour incident, two other St. Kilda players, Stephen Milne and Leigh Montana, faced rape allegations after an incident following St. Kilda's win in the pre-season Wizard Cup. A two month police investigation, however, cleared both players, with the decision being made that there was insufficient evidence to support a conviction. St Kilda then stated that there would be no disciplinary action from the club.¹⁰²

While, like the Terry and Cole cases, the Tiger Woods case only involved inappropriate, rather than criminal offences, it received an incredible amount of international coverage.

D The Tiger Woods affair

It was in December 2009 that the world began to hear about the off-field behaviour of Tiger Woods after he had crashed his car into a tree near his Florida home, allegedly because his wife had attacked it with one of his golf clubs after she had become aware of his extramarital affairs. Once the news broke more women came forward stating that they had had affairs with the married Woods, the number quickly reaching double figures, with later reports suggesting that the number may have been as high as 120.¹⁰³ Evidence also emerged that Woods' team had been able to

⁹⁹ Les Kennedy, Jacquelin Magnay and Stephen Gibbs, 'Police hand Bulldogs file to state prosecutor,' *The Sydney Morning Herald*, 2 April, 2004, 33.

¹⁰⁰ Chris Stedman and Stuart Honeysett, 'Vindicated Bulldogs face fines', *The Australian*, 28 April 2004, 20.

¹⁰¹ The NRL, however, fined the Bulldogs \$150,000 with a further \$350,000 suspended, 'for bringing the game into disrepute', and also for '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: Chris Stedman and Stuart Honeysett, 'Vindicated Bulldogs face fines', *The Australian*, 28 April, 2004, 20; Chris Stedman and Ray Gatt, 'Disrepute and poor dress sense cost dearly,' *The Australian*, 29 April 2004, 36.

¹⁰² Chip le Grand, 'Saints pair can breathe again', *The Australian*, 8 May 2004, 47.

¹⁰³ 'Tiger beds 120 and a neighbour', *The Australian*, 30 April 2010, 34.

prevent news of his affairs becoming public for a number of years.¹⁰⁴ Woods then announced he was taking an indefinite break from golf to work on his personal issues and try and save his marriage with his wife, Elin,¹⁰⁵ though this attempt at reconciliation ultimately proved unsuccessful.

From a legal perspective the only offence Woods had committed was a relatively minor driving offence. However, there were other legal ramifications in regard to his highly lucrative sponsorship deals, with Gillette for instance being one high profile sponsor which indicated it would be winding back its involvement with Woods. Sports company, Nike, on the other hand indicated it would be standing by Woods. The author would therefore suggest that there were two groups of sponsors in regard to Woods: sport related sponsors and non-sports related sponsors. It is also suggested that his case indicates that the sports related sponsors are more likely to retain a sportsperson who is dealing with off-field issues than non-sports sponsors, the reason being that a clean-cut, off field image is more important with the latter.

With contracts like Woods' sponsorship deals there is likely to be an expressed term allowing a sponsor to terminate the contract should situations like that involving Woods ever arise. If not, then there is a strong argument an implied term applies to the contract that would allow a sponsor to terminate the contract, should a sportsperson such as Woods present an image that is incompatible with that of the company's corporate image. Finally, there is the practical aspect that Woods would almost certainly be unwilling to take the matter to court should a company decide to terminate a sponsorship contract despite having no legal basis to do so.

As far as golf is concerned, there was no suggestion that Woods would be suspended from tournaments in 2010, and there would appear to be no legal basis for preventing him from playing, the incidents being non-sports related and did not involve serious criminal matters. In fact, the fear was the potential loss of money for the US Professional Golfers Association (PGA) tour, with some estimates being that up to 50 per cent of TV viewers and sponsorship would be lost if Woods had remained absent.¹⁰⁶

Thus, the only real legal implication for Woods in regard to his numerous affairs was the loss of sponsorship contracts. However, the issue raised by Woods' situation, and

¹⁰⁴ Reed Albergotti, 'How Tiger's team hosed down an expose two years ago,' *The Weekend Australian*, 19 December 2009, 38.

¹⁰⁵ 'Golf will survive', *The Weekend Australian*, 19 December, 2009, 38.

¹⁰⁶ Ibid. It should also be noted that during the time news of his off-field activities were surfacing, Woods was voted athlete of the decade by US sports editors, ahead of cyclist Lance Armstrong and tennis player, Roger Federer: 'Athlete of the decade, sport forgives tiger', *The Australian*, 18 December 2009, 38.

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all the other incidents discussed in this article, is to what extent players should be held liable for off-field indiscretions that are often conducted in their own time and in private venues.

VI Is it right to make sportspersons liable for off-field behaviour?

The fact that the major reference source for this paper are newspaper reports reflects the fact that players' off-field indiscretions are now of great interest to the media. It also highlights that the contractual aspects of these incidents were generally resolved internally by the sports themselves, without the need to take the matter to court.

The media interest in these incidents does, however, raise the issue as to whether the media have the right, legally or morally, to investigate and report on players off-field indiscretions, which in turn raises the question as to whether sportspersons should be held liable for their off-field behaviour, given the fact that the incidents occur in their own time. Linked to this is the question as to whether the media have acted responsibly in regard to the reporting of these indiscretions.

In regard to the sexual affairs of Tiger Woods, John Terry and Ashley Cole, it should be noted that no crimes were committed, and the behaviour engaged in was, at all times, consensual. The fact that all three were married men, raises private moral questions for which both Woods and Cole paid a heavy price, given the fact that the affairs ended both their marriages.

The Terry case, meanwhile, would appear to provide an answer to the legal aspect of the media's coverage since the lifting of an injunction to prevent the news of his affair becoming public strongly endorses the fact that such news is in the public interest. While it needs to be acknowledged that, in regard to the granting of an injunction, every case needs to be judged on its merits, it is suggested that news of a sexual affair is at the lower end of the scale as far as off-field indiscretions are concerned. It is suggested therefore that it would appear even less likely that an injunction would be granted for alcohol related incidents or incidents leading to a criminal charge, since the reporting of these would seem to be even more in the public interest than that of a sexual affair.

What of the moral perspective? Can it be said that even if the media have the legal right to report private, off-field incidents does it any way have a moral duty not to report these matters? It should be noted that in regard to Woods, he has made far more money off the golf course than on it, this being achieved through endorsements that made as much use of his clean-cut, happy family man image as they did of his sporting prowess. Thus, it can be argued that there is a strong link between his off-field behaviour and how he earns the majority of his money which indicates that his private life is connected to his professional life in a way that justifies his off-field

indiscretions being the subject of intense media scrutiny. While Wood has not, unlike the members of various football teams, suffered direct sanctions for his actions, he has certainly been indirectly heavily punished by the loss of lucrative sponsorship deals, with the 'market' effectively providing suitable 'penalties' for Woods.

Terry's sanction was the loss of the English captaincy which like, the non-selection of Andy Powell by the Welsh Rugby Union, indicates that from an internal sporting perspective, selection in international representative teams is never guaranteed, and such national governing bodies are, from a legal perspective, perfectly entitled to drop players or remove them from the captaincy for off-field indiscretions. Considering that these players are firstly representing their country, and secondly that off-field indiscretions like that of Terry can seriously affect the national team's morale, it is suggested that the media, rather than having a moral duty not to report such incidents, perhaps arguably has a moral duty to ensure that the public is informed about them.

The disrepute clause is an express term of the contract, its purpose is to preserve the image of the sport, and it is therefore suggested that any penalties handed out by a club, or a governing body, must be reasonable in respect of that objective, or otherwise it could be seen as representing an unreasonable restraint of trade. A question that therefore arises is whether the penalties discussed in this article were appropriate for the respective incidents. After Stewart was suspended, for instance, there was a threat from the rest of the Manly players that they would boycott the annual Dally M awards ceremony for the best player in the competition. The reason for this was that the players were disenchanted by the penalty handed out to Stewart with the Manly players questioning why Stewart was suspended when other players involved in alcohol related incidents had escaped penalty. The Rugby League Players Association meanwhile stated that Stewart had been 'hung out to dry'¹⁰⁷ while the Manly club called on the NRL to be consistent in the penalties given to other players who were involved in alcohol related incidents.¹⁰⁸ The author, however, would suggest that for such an incident involving heavy intoxication at an official team function held in a public venue, a four week suspension was reasonable, though a longer suspension may have been in restraint of trade.

It was also clear that, after intervening in the Stewart case, the NRL had to ensure that there was consistency in the penalties given for incidents involving other players, and in the case of both Friend and Seymour, the author would suggest that the penalties were consistent with that handed out to Stewart. Of the three players,

¹⁰⁷ Stuart Honeysett and Brent Read, 'Manly players threaten boycott', *The Australian*, 13 March 2009, 16.

¹⁰⁸ Stuart Honeysett, 'Manly wary of double standards,' *The Australian*, 18 March 2009, 18.

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the drink driving offence by Friend could perhaps be considered to have been the one that has caused the least impact on the NRL. However, it was a high range drink driving charge and with a blood alcohol level of .16, Friend was in a state where he could have caused a serious accident. It should also be noted that while Seymour's penalty was eventually imposed by his club, Cronulla, the NRL had made it clear that it would have stepped in had the club not imposed suitable penalties.

What a drink driving offence like Friend's involving a court imposed fine also raises is whether an additional fine from a club or sporting governing body constitutes 'double jeopardy', that is, a second penalty for the same offence. It should be noted, however, that a basic principle of our legal system is that defendants convicted and punished under criminal law for say an assault, can still be subject to a civil action for the same incident. Since clubs and sports governing bodies rely on contractual terms to enforce their penalties, it amounts to a civil penalty which is independent of any criminal sanction a player may face, and therefore does not constitute double jeopardy.

The reason why it is now essential that sports have these bringing the game into disrepute is reflected in a headline that appeared in *The Sydney Morning Herald* on 20 March, 2009, which read 'Sponsors have had a gutful of drunks'.¹⁰⁹ It therefore indicates why the NRL had to take strong action, since major sponsors were informing the NRL they would consider walking away if tough action was not taken over a number of off-field indiscretions that had taken place around that time. NRL chief executive, David Gallop, stated that 'the games stakeholders are tired of seeing the game in the headlines because of incidents involving players and alcohol' and that 'the damage done to the game when alcohol is abused is acute and we've fielded calls from a range of stakeholders, including one of the game's major sponsors, expressing concern about where the game is at'.¹¹⁰ The later incident involving Joel Monaghan also highlights that the views of the sponsors can be a major factor in determining what the appropriate penalty should be for an off-field indiscretion.

What the Monaghan situation also illustrates is that in the modern, technological world, players have to be even more cautious in regard to off-field behaviour, since it is not only the media who can make an incident public, but anyone with a suitable device, such as a mobile phone. While this certainly raises privacy issues, it is suggested that it would appear that there is little that can be done to prevent it, since, unless the person involved is a child, it is legal to take such photographs. It is also suggested that the fact that off-field indiscretions can be made public by sources

¹⁰⁹ Brad Walter, 'Sponsors have had a gutful of drunks', *The Sydney Morning Herald*, 20 March 2009, 29.

¹¹⁰ *Ibid.*

other than the mainstream media indicates that this issue of players having to accept the consequences of their off-field behaviour is something that is only likely to increase.

With the advent of modern technology, even innocent off-field incidents can become public, as highlighted by the situation involving the AFL's Nick Riewoldt when photographs of him naked were placed on Facebook.¹¹¹ These had been taken by team mate Sam Gilbert in the hotel where the team were staying during an end of year trip to Miami, and which were then stolen from Gilbert's computer by a seventeen year old girl. While the situation was an embarrassing one for Riewoldt, it also had implications for his club, St Kilda, since it created a situation where relationships between key players were strained, despite Gilbert making a public apology to Riewoldt and the two other players involved, Nick Dal Santo and Zac Dawson.¹¹²

A feature of the AFL has been the fact that most of the punishments have not been handled by just the clubs themselves, but have involved the leadership group at that club, in what could be described as judgment by one's peers. As far as the actual penalties handed out are concerned, they are not dissimilar to those imposed in the NRL, and those which have been longer, such as the eight week suspensions handed out to Daniel Connors, was imposed on a player with a series of previous indiscretions.

As with the NRL, the punishments within the AFL need to be seen as being at least reasonably consistent, if such punishments are going to be accepted by the players. It is also suggested that this is a contractual requirement, given the fact that the penalties rely on the use of a term of a standard contract and a standard player code of conduct. Thus, the comments by Collingwood coach, Mick Malthouse, suggesting that good players such as Chris Tarrant and Ben Johnson would not have been suspended, but a younger, fringe player may have been, is, from a contractual perspective, unacceptable. This is because if clubs and governing bodies are relying on the disrepute clause to sanction players for off-field indiscretions, then all players must be treated the same. While each incident needs to be treated on its merit, basing punishments purely on playing ability, and therefore on the on-field impact on the

¹¹¹ 'Explicit photos of footy stars posted on the web', *The Australian*, 21 December 2010, 3.

¹¹² Stephen Rielly, 'Facebook scandal splits St Kilda ranks as Riewoldt slams Gilbert over nude photos', *The Australian*, 22 December 2010, 31. Note that a further development in this case saw the same girl accuse high profile player manager, Ricky Nixon, take leave from this position after incidents with the same 17 year old girl in regard to supplying alcohol and alleged sexual activity: This illustrates therefore that is more than just the players who need to ensure that they conduct themselves in an appropriate manner.

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team, not on the merits of the case, is not legally acceptable when it is the wording of a standard playing contract and/or a standard player code of conduct that is being relied upon. In fact it could be argued that the better players should be the subject of stronger penalties, given the fact that their higher profile is more likely to 'bring the game into disrepute.'

There is little doubt that the bringing the game into disrepute clauses are likely to remain in sport, and would appear to be valid terms of the contract, as long as the subsequent punishments are reasonable. It is also suggested that the other legal requirement is that of natural justice, or procedural fairness. The first thing that should be noted about natural justice is that, as a common law principle, it applies to bodies other than judicial ones, namely the courts. In the AFL, for instance, Sydney Swans player, Andrew Dunkley, successfully obtained an injunction from the NSW Supreme Court to delay an AFL tribunal hearing before the 1996 AFL Grand Final.¹¹³ Two years later, Carlton's Greg Williams was initially successful in court action on the grounds of the denial of natural justice against a nine week suspension handed out by the AFL tribunal.¹¹⁴ This, however, was overturned on appeal on the basis that a player agreed to abide by the decisions of the AFL tribunal through the terms of their standard player contracts.¹¹⁵ Thus, the Dunkley case indicates that if a player is not satisfied that they have been given sufficient time to prepare their case, then an injunction can be sought to prevent the governing body from making a decision. Once a decision, has been made, however, *Williams* suggests that the player may then be bound by the decision, if it is reasonable, because to the terms of the standard player contract.

VII Conclusion

It is suggested that the following conclusions can be made in relation to the question of a sportsperson's liability for off-field indiscretions:

1. The 'bringing the sport into disrepute' clauses included in standard playing contracts would appear to be valid terms and have received international approval through CAS.
2. Any penalty imposed for the off-field indiscretions must be appropriate for the respective incidents since the basis for imposing these penalties is a contractual

¹¹³ NSW Supreme Court, Unreported, 23 September, 1996.

¹¹⁴ *Carlton and Williams v Australian Football League*, Victorian Supreme Court, Unreported, 29 May 1997.

¹¹⁵ *Australian Football League v Carlton Football Club* [1998] 2 VR 546, 567-8. Note that one of the outcomes of this case was that the AFL implemented an internal appeals system so that players and/or clubs could appeal internally if they were dissatisfied with a decision.

one, and therefore if the penalties are not reasonable they may represent a restraint of trade.

3. The contractual nature of the right to impose these penalties means it is essential all players are treated equally and any penalties handed out must be consistent and be linked purely to the merits of the case, not the player's perceived value to the team.
4. The injunction decision in relation to John Terry indicates that the media have a legal right to report on such as matters since it is in the public interest, while the Joel Monaghan and Nick Riewoldt incidents indicates that the exposure of these off-field incidents may not, initially at least, involve the media.
5. The reason why the bringing the game into disrepute clauses are an important, and arguably an essential, feature of modern day professional team sport is the reliance sport has on sponsorship revenue and sponsors may not be prepared to be involved if players are bringing themselves and/or the game into disrepute.
6. The Tiger Woods situation highlights the fact that even competitors in individual sports will face serious ramifications for non-sporting related indiscretions in the form of the loss of lucrative sponsorship deals.
7. If it is clear that there are disputed facts in regard to criminal charges, it is suggested that 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.
8. While procedural fairness applies to situations involving sporting bodies, players may still be bound by the decisions of sporting tribunal type bodies by the terms of their playing contract.

Finally, it is suggested that all the incidents discussed in this paper highlight the significance of contract law in regard to the disciplining of off-field indiscretions and that contracts underpin how professional sport operates in the 21st century.