Hayden Opie[1]

LEGAL REGIMES FOR THE CONTROL OF PERFORMANCE-ENHANCING DRUGS IN SPORT[2]

1. INTRODUCTION

Especially since the 1988 Olympic Games in Seoul, performance-enhancing drugs have become a controversial public topic in Australia. A finding by a sports organisation that an athlete has used these drugs can produce the most severe consequences. For that reason it is important that, at the very least, the athlete's basic legal rights are respected during the investigatory and disciplinary processes. This paper seeks to describe the main performance-enhancing drug proscription, detection and punishment regimes established by international sports organisations, and their impact in Australia.[3] The principal rights of athletes will also be identified and considered in the context of some recent cases.

2. THE PROBLEM OF PERFORMANCE-ENHANCING DRUGS IN SPORT

News of the use of drugs in sport is spicy material for the mass media. Disqualification of highly successful athletes from international competition receives sensational treatment. Overnight, mass adulation turns into revulsion as sporting heroes and heroines are perceived to be chemically-powered cheats.

As well, there is a ghoulish fascination with the dangers and side-effects of the drugs, especially anabolic steroids. In November 1987, the ABC television programme *Four Corners* shocked the nation with its allegations of drug use at the Australian Institute of Sport in Canberra. Yet one of the most startling revelations did not concern the Institute, but told the story of Sue-Ellen Law, a former anabolic steroid taking bodybuilder, who had suffered disastrous side-effects. To a significant measure her femaleness had been destroyed, including her capacity to bear children. Even Sue-Ellen's story pales into relative insignificance beside that of the world-ranked West German heptathlete, Birgit Dressel, who died in April 1987 in intensive care after three days of extreme pain. The diagnosis issued was 'suspected toxic reaction — blood disintegration'[4] — no doubt caused in large measure by

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1 B Com, LLB (hons) (Melb), LLM (Tor), Barrister and Solicitor of the Supreme Court of Victoria, Lecturer in Law, University of Melbourne.

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3 The sports to be considered are those which have been traditionally described as the amateur sports. Today, 'the Olympic sports' is a common title for them. While a growing number of other sports are adopting rules against performance-enhancing or recreational drugs (*eg*, rugby league, snooker, golf and, in the USA, American football and baseball), the diversity of these rules or their lack of immediate relevance to Australian circumstances places them outside the scope of the present inquiry.

4 'The Death of Birgit Dressel' *Athletics* (Toronto), February/March 1988, 6, 10.

the 'chemical cocktails' she had administered to herself, which had seen her world-ranking improve from 33rd to 6th in one year. Side-effects are not confined to physical harm. There is growing evidence of psychological problems among takers of anabolic steroids. Unusually aggressive behaviour is a prominent concern. Already, this abuse of anabolic steroids has been linked to murder,[5] armed robbery[6] and assaults by disco and hotel bouncers.

Regrettably, it is not possible to dismiss the issue of drugs in sport as affecting only a small group of elite athletes prepared to risk their health in the fanatical pursuit of sporting success. The problem is not one merely affecting muscle-bound or hyped-up 'freaks', as the takers of drugs are often portrayed. It goes much deeper.

First, there are serious risks for the wider community. Those who have no or little aspiration to becoming elite athletes are regular consumers of, for instance, anabolic steroids. Evidence presented to the Senate Inquiry into drugs in sport claims that children as young as 10 years have been given drugs to improve their performance in sports such as weightlifting.[7] A recent survey of American male year 12 high school students found that 6.64% use or had used anabolic steroids,[8] while other estimates put the percentage as high as 10%.[9] The reasons for taking these drugs may have little connection with sport. For instance, in October 1988 a 17 year old American high school football player died of cardiac arrhythmia, a heart condition caused in this case by a diseased and enlarged heart. The County Coroner was of the strong opinion that the use of anabolic steroids had in some way contributed to his death. This young man was not an especially serious football player; he mainly wished to improve his body's appearance to 'get girls'.[10]

Secondly, drug use by elite athletes undermines the image of sport as a wholesome pastime. Sports authorities may have good reason to fear an adverse effect upon participation levels as wary parents direct children away from sports with a bad image.[11] Similarly, sponsors seek a 'clean' image and

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5 'And Now the Steroid Defense?' *American Bar Association Journal*, 1 October 1988, 22; Lubell, A, 'Does Steroid Abuse Cause — or Excuse — Violence?' (1989) 17 *The Physician and Sportsmedicine* 176.

6 Dowsett J of the Supreme Court of Queensland has attributed a convicted armed robber's embarkation upon criminal activity in part to the use of anabolic steroids; *Courier Mail* (Brisbane), 22 April 1989. See also, *The Australian Magazine* (Sydney), 28-29 October 1989.

7 Australia, *Drugs in Sport, An Interim Report of the Senate Standing Committee on Environment, Recreation and the Arts* (1989) 65-68. This Report will be referred to in this paper as the Black Committee Report.

8 Buckley, WE, *et al*, 'Estimated Prevalence of Anabolic Steroid Use Among Male High School Seniors' (1988) 260 *Journal of the American Medical Association* 3441, 3345.

9 *Sports Illustrated* (New York), 20 February 1989, 68, 75.

10 Ibid 71.

11 Former Federal Minister with responsibility for sport, Mr John Brown, has claimed that parents have exhibited a reluctance to send their children to the Australian Institute of Sport since the making of allegations of widespread drug use at the Institute; 'Drugs inquiry destructive, says Brown' *The Age* (Melbourne), 3 June 1989.

may refuse to renew sponsorship arrangements.[12] Governments make large financial commitments to sport. They too are displaying an unwillingness to have their investment devalued. The upshot of these concerns has been a concerted effort to seek out and destroy a 'fast-growing cancer' perceived as undermining an important foundation of society. The consequences are a growth in rules banning the use of performance-enhancing drugs, detection programmes of increasing scale and sophistication and penalties of greater magnitude. A major role for lawyers in drafting, interpreting, applying and harmonising these controls is emerging.

Some commentators fear that these developments are a vortex threatening to engulf a significant part of sport. Instead, they advocate the legalisation of performance-enhancing drugs together with strict supervisory control. So a debate is developing which resembles that about the legalisation of heroin. Whereas with heroin, those who use and deal in it are perceived in the community as 'bad', our elite athletes are not. Confronted with a positive drug test, the community can easily develop a feeling of having been betrayed and, coupled with the high level of media interest, there is pressure to employ ever heavier sledgehammers to smash the evil. Accordingly, another role for the lawyer is indicated; that of protector of civil liberties and preserver of the dignity and privacy of those involved.

Thus, an important but difficult task for those charged with designing and implementing systems for control of performance-enhancing drugs is to strike a balance between society's interests and citizens' private liberties.

3. EARLY HISTORY OF DRUG TAKING AND CONTROL

Many of the growing number of books on drug use in sport point to athletes in ancient civilizations consuming all manner of potions to enhance sporting performance.[13] Whether it was 'the rear hooves of an Abyssinian ass, ground up, boiled in oil and flavoured with rose petals and rose hips' — as was known in ancient Egypt[14] — or a more palatable diet of dried figs — as in ancient Greece — taking drugs to improve performance is not a recent phenomenon.

Perhaps there lurks deep within the human psyche a desire for a remarkable, if not magical, formula for achieving success and overcoming dangers by forces not possessed by the normal human being. What else could explain our fascination with Popeye's unfailing ability to rescue Olive Oil from the clutches of the most evil of characters merely upon consuming the almighty can of spinach (other than to confirm our parents' advice about the desirability of eating green vegetables)?

The modern era of drug taking in sport can be viewed as having begun with the use of various stimulants and narcotics in swimming and endurance cycling events in Europe in the late nineteenth century. A

12 The President of the Australian Weightlifting Federation, Mr Sam Coffa, is reported as acknowledging that conclusive evidence of drug use by Australian weightlifters could cause sponsors of the sport to rethink their support, although the sport's main national sponsor had reaffirmed its sponsorship notwithstanding allegations made before the Black Committee about drug use by weightlifters at the Australian Institute of Sport; 'Sponsors are staying, says lifters' leader' *The Age* (Melbourne), 28 December 1988. See also, note 33.

13 Donald, K, *The Doping Game* (1983) 26-27; Donohoe, T and Johnson, N, *Foul Play, Drug Abuse in Sports* (1986) 2-3; Kelly, GM, *Sport and the Law, An Australian Perspective* (1987) 398.

14 Donohoe, op cit 2.

number of deaths were recorded.[15] Scientific advances produced a wider variety of stimulants and other performance-enhancing drugs from the 1920s onwards. However, outside the upper echelons of the few sports where the drug-taking culture had become established (such as cycling and boxing), the topic received scant notice.

Moves towards regulation stem from the amphetamine-related death of a Danish cyclist, Knud Jensen, who died while competing in the 100km team time-trial on the opening day of the 1960 Rome Olympics. In relation to the early 1960s, the literature discloses allegations of drug-taking in cycling and some other sports (including soccer) on a wide scale and a consequential growing concern among members of the medical profession. A major International Seminar on Doping was held at the Universities of Brussels and Ghent in Belgium in May 1964;[16] and France and Belgium passed laws in 1963 and 1965 respectively aimed at controlling the supply of some drugs in use in sport.[17] Even so, only ineffectual attempts were made to detect or prevent drug use at the 1964 Tokyo Olympics.[18]

The catalyst for more serious action came in 1967 in the form of another stimulant-related death. Tommy Simpson, a former world professional cycling road racing champion, died while competing in the Tour de France. His collapse was captured on film, and the prestige of both the event and the competitor lent force to calls for stringent action against doping. The following year the International Olympic Committee ('IOC') established a Medical Commission to bring the doping phenomenon under control and anti-doping rules were in force for the 1968 Summer and Winter Olympics.

Those first tests were aimed at stimulants and narcotic analgesics.[19] Over the past 20 years the list of banned drugs and procedures has grown due to a combination of the expanding range of performance-enhancing means available to athletes and coaches on the one hand, and improvements in the technology available to administrators to detect breaches of the rules, on the other. Obviously, one significant aspect of the campaign against drug use in sport involves an expensive technological battle between the experts engaged by sports authorities and some athletes' and their advisors.

4. BANNED DRUGS, PERFORMANCE-ENHANCING CHARACTERISTICS AND SIDE-EFFECTS

The IOC is the pre-eminent sports organisation. Its stance against drug taking sets the standard for others. For that reason its approach warrants careful attention, even though other sports organisations may, and do, take different routes. Since May 1989 the IOC prohibits six classes of drugs and two classes of procedures.

A major reason for banning drugs and procedures by class is the difficulty of establishing a precise, global definition of doping. However, this approach is not without its critics. Selective banning (even by class) is arbitrary. For instance, it has been asked what is the difference between an athlete who takes Vitamin B12 (not banned) and another who takes an anabolic steroid, when each does so with the intent of improving

15 Donohoe, op cit 3-4; Kelly, op cit 398.
16 De Schaepdryver, A and Hebbelinck, M (eds) *Doping* (1965).
17 Donohoe, op cit 6.
18 Ibid.
19 Donohoe, op cit 8.

performance? Another criticism suggests that decisions about what is to be banned are dictated by whether there exists a practicable test for detection rather than whether a drug or procedure ought to be banned as a matter of principle. As the considerations relevant to this complex and provocative debate extend far beyond the realm of law,[20] the following analysis is confined to examining the rules which have been created by the existing policy of banning by class.

The principal means of detection is chemical analysis of a sample of urine provided by the athlete. The process is known as urinalysis. Urinalysis is performed in a small number of IOC accredited laboratories located in various cities around the world. Australia does not possess an accredited laboratory. There was one located in Brisbane and used during the Commonwealth Games in 1982;[21] but it failed to pass a reaccreditation test in 1987. The Australian Government Analytical Laboratory in Sydney has been nominated to seek accreditation and has so far succeeded in obtaining provisional accreditation from the IOC.

The method of urinalysis approved by the IOC is carried out in two stages.[22] The first is gas chromatography, which separates the individual components of urine and provides a provisional identification. If a banned substance is detected, mass spectrometry is used to confirm or reject the provisional identification.

When drug testing was first introduced in 1968, the drugs which were banned did not occur naturally in the human body; their presence could be explained by a limited range of circumstances. In 1989 the position is quite different. Some banned drugs occur naturally in humans and another is in common social use in our community. One of the banned procedures cannot be detected by urinalysis. Thus, the methodology for drug testing affords greater scope for challenge. Before considering the legal aspects of this regime it is necessary to describe the eight banned classes of drugs and procedures.

(a) Stimulants

Included here are 'amphetamines',[23] cocaine, caffeine, strychnine[24] and sympathomimetic amines. Amphetamines and related substances increase alertness and suppress fatigue. However, sound judgment can be impaired: sometimes causing grave accidents. In conjunction with strenuous exercise, they can be killers (as evidenced in cycling).

Sympathomimetic amines (such as ephedrine) have medicinal uses in commonly available cold and hay fever preparations as well as in the

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20 For a discussion of these issues, see the Black Committee Report, 43-60.

21 For the Commonwealth Games in 1982 the Brisbane laboratory was accredited by the International Amateur Athletic Federation as that body was the international organisation then responsible for laboratory accreditation for Commonwealth Games. In March 1985, the laboratory was accredited by the IOC; Australian Sports Commission, *Report into the Requirements for Sports Drug Testing in Australia* (1987) 21.

22 Other less reliable forms of urinalysis are available but not employed by IOC laboratories. See further, Greenblatt, DJ, 'Urine Drug Testing: What Does it Test?' (1988) 23 *New England Law Review* 651.

23 Amphetamine is a patent drug which has given its name to a particular class of manufactured drugs in much the same way as vacuum flasks are often referred to as 'thermos' flasks.

24 Strychnine appears to have been a popular stimulant among cyclists in the latter part of the nineteenth century and early this century. Donohoe, op cit 3-4. Today, it is recognised as too dangerous.

treatment of asthma. They improve respiratory capacity and increase the flow of blood, but large doses can produce side-effects, such as blood pressure and irregular heartbeat. As these drugs have widespread medicinal use, they are a frequent cause of cases of 'inadvertent doping'. The IOC Medical Commission has undertaken research and educational activity to identify the preparations suitable for treating colds, hay fever and asthma, which do not contain the proscribed stimulants.

Caffeine is also in widespread use in the community as an additive to food and drink. Hence, its presence in the body of an athlete can be consistent with ordinary social use rather than an endeavour to enhance performance. The IOC's response has been to set a threshold level of 12 micrograms per millilitre of urine. Only concentrations above this level amount to an offence. As the recent case involving banned Australian pentathlete Alex Watson indicates, the fixing of this level has not been without controversy in its effects.[25]

(b) Narcotic Analgesics

Some familiar drugs among this group are codeine, diamorphine (heroin), methadone and morphine. While these drugs have applications in the management of pain and might permit an athlete to compete in spite of injury, they possess addictive properties and have been found to have been abused in sport. Obviously, if the pain of serious injury is suppressed, the risk of dangerous aggravation is present. The IOC Medical Commission has identified other preparations suitable for the treatment of pain, such as Aspirin, which are permitted. Again, as many 'cough and cold' preparations contain members of this banned class of drugs, the class is responsible for a significant number of cases of inadvertent doping.

(c) Anabolic Steroids

Anabolic steroids are a synthetic version of the male sex hormone testosterone. In conjunction with heavy training and a controlled diet they are claimed to produce significant increases in muscle bulk and have been used widely by athletes in sports requiring 'explosive power' such as weightlifting, sprinting, field events and some swimming events. Outside the Olympic sports their use in bodybuilding, powerlifting and American football is widespread. The side-effects can be disastrous, especially for growing children. These include kidney, liver and heart disease, early cessation of bone growth, loss of fertility for females, changes to secondary sexual characteristics (such as facial hair) and psychological problems.

Banning has been directed also against testosterone, whose muscle building effects anabolic steroids seek to imitate. As testosterone occurs naturally in males and to a much lesser degree in females, it cannot be

25 This level applied for Olympic Games held in 1988. For games held in 1984, a higher level of 15 micrograms per millilitre of urine was fixed. Thus, Watson, who tested 'positive' at the Seoul Olympics in 1988 at 14.45 micrograms per millilitre of urine, would not have committed an offence in Los Angeles in 1984; 'Watson life ban lifted', *The Sun* (Melbourne), 12 May 1989.
It has been maintained that the 1988 level is set too low in that it may be exceeded inadvertently in the combined circumstances of strenuous exercise, dehydration and 'social consumption' of beverages such as coffee.

banned outright. Accordingly, action[26] having the effect of increasing the ratio of testosterone to epitestosterone to above six constitutes an offence.

(d) Beta-blockers

Beta-blockers slow cardiac function and have medicinal uses in the control of conditions such as angina and hypertension. They have been used by athletes in sports requiring steadiness but not significant physical activity (for example, archery and shooting) and by ski jumpers to control palpitations of the heart. A wide range of side-effects can follow. Many are relatively minor, although cardiac failure can be precipitated. Where the use of beta-blockers may be warranted on medicinal grounds, hardship is avoided by the availability of alternative drugs not on the IOC banned list.

(e) Diuretics

Drugs in this class cause the rapid excretion of body fluids. Two reasons for their use in sport have been identified. Athletes may need to satisfy a maximum weight limit (for example, in boxing). Secondly, diuretics have been used to attempt to disguise the presence of another drug in athlete's system by increasing urine output and lowering that other drug's concentration to a level which may remain undetected. Rapid reduction of body fluids, coupled with very vigorous exercise, can produce dehydration — and sometimes death.

(f) Peptide Hormones and Analogues

This class has been added to the banned list since the 1988 Olympic Games. It includes human growth hormone ('HGH') and genetically engineered HGH, as well as other hormones which may increase the output of testosterone or have an equivalent effect.[27] The overall intent of athletes in using any of these banned drugs is to increase muscle bulk and strength, or overall physical size. There are dangerous side-effects, especially from HGH in large doses. Not all of the banned drugs can be detected by urinalysis and some occur naturally in humans. For instance, if HGH is detected by urinalysis it is not possible to determine whether it is the athlete's own HGH or an additive. So far a scientifically reliable 'impermissible level test' as is used for testosterone has not been identified. Thus, the offence in relation to HGH is defined in terms of the 'misuse' of HGH rather than its mere detection by urinalysis. Presumably, the IOC will have to rely on evidence other than urinalysis pending advances in detection methods.

(g) Blood Doping

Given a high profile by the confessions of United States' cyclists following the Los Angeles Olympic Games, blood doping involves the infusion of blood or a blood product shortly before an athlete event with the aim of increasing the ratio of red blood corpuscles in the blood stream. This assists the body with the delivery of oxygen to the muscles and removal of waste products. Blood doping often involves the withdrawal of an athlete's blood some weeks preceding an event and its storage until

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26 This may involve the administration of testosterone, or interfering with the body's chemistry so that it produces testosterone in abnormal quantities.

27 In this latter aspect of altering testosterone levels, the class overlaps with the anabolic steroid class.

shortly before the event. In the meantime the withdrawn blood is replaced naturally. The athlete is then reinfused or 'topped up' with the withdrawn blood. There arise the usual risks of a blood transfusion (not justifiable in the absence of an emergency). As blood doping is not detectable by urinalysis, the authorities have until recently had to rely on apprehension in the act of transfusion, or on confessional or third party evidence. Very recent research conducted in Norway indicates that blood doping can be detected by a series of blood tests taken shortly before and after an athletic performance. If such testing is to be undertaken it will involve a greater intrusion upon bodily privacy than is currently the case with urinalysis.

(h) Pharmacological, chemical and physical manipulation

Some amazing attempts have been made to foil efforts to collect true samples of an athlete's urine. 'Safe' or 'clean' urine obtained from another person has been catheterised into the athlete to be tested. Female athletes have used urine-filled vaginal balloons. Naturally, this behaviour is banned.

Drugs (such as probenecid) which slow the release into urine of banned drugs (sometimes inaccurately referred to as 'masking drugs') are prohibited, even though they do not themselves enhance performance.

5. THE OVERALL STRUCTURE OF THE ANTI-DOPING REGIME

For an athlete competing at an Olympic Games, a positive urinalysis test can trigger a 'domino effect' of sanctions imposed by Olympic authorities, international and national sports organisations, government agencies and sponsors. A similar effect can ensue if the athlete is found guilty of doping at another event, or in the course of the increasing number of random testing programmes. A convenient starting point is the Olympic Charter, which is the constituent document of the International Olympic Committee.

> Rule 26 of the Olympic Charter[28] is entitled the Eligibility Code. It provides:
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> 26. To be eligible for participation in the Olympic Games, a competitor must:
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> — observe and abide by the Rules of the IOC and in addition the rules of his or her IF [International Federation], as approved by the IOC . . .

The bye-law to Rule 26 fixes each international sports federation ('IF') with responsibility for devising an eligibility code for approval by the Executive Board of the IOC. The IFs and the National Olympic Committees ('NOCs') are primarily responsible for the observance of the eligibility provisions; but the IOC retains a supervisory brief through its Eligiblity Commission.

The guidelines for preparation of eligibility codes by the IFs contain the following provision:

> B. All competitors, men or women, who conform to the criteria set out in Rule 26, may participate in the Olympic Games, except those who have:
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> 1. . . .
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> 6. in the practice of sport and in the opinion of the IOC, manifestly contravened the spirit of fair play in the exercise of sport, particularly by the use of doping or violence.

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28 References to the Olympic Charter in this paper are to the 1989 edition.

Rule 28 of the Olympic Charter is entitled the Medical Code. It reads, 'All competitors must comply with the medical code drawn up by the IOC'. The bye-law to the Medical Code provides in part:

> A. Doping is forbidden. The IOC Medical Commission shall prepare a list of prohibited classes of drugs and of banned procedures.
> B. . . .
> C. All Olympic competitors are liable to medical control and examination carried out in conformity with the rules of the IOC Medical Commission.
> D. Any Olympic competitor refusing to submit to a medical control or examination or who is found guilty of doping shall be excluded from competition or from the present or future Olympic Games . . .

Insofar as they are relevant for present purposes, rules 26 and 28, together with their respective bye-laws and guidelines, mean that the IOC can exclude from a current Olympic Games and any future Games an athlete who is guilty of doping at the current Games. Furthermore, the IOC can regulate the entries of athletes[29] who have been found guilty of doping elsewhere (away from an Olympic Games) by requiring the IFs and NOCs to create (in the case of the IFs) and enforce (in both cases) eligibility rules which exclude such athletes.

While exclusion from the Games is a grave penalty owing to the event's importance, it is one of limited scope. However, a domino effect can be set in motion for later competition.

While the IOC and the local Olympic Organising Committee have responsibility for the Olympic Games overall, the conduct of specific events is left to the various IFs whose sports constitute the Games. For instance, track and field events at a summer Olympics are under the control of the International Amateur Athletic Federation ('IAAF'). As the Games are an official IAAF event, any athlete guilty of doping is likely to have committed an offence against the IAAF's own anti-doping rules and be liable to sanction from the IAAF as well as from the National Governing Body for athletics in the country of the athlete's origin.

The Australian Olympic Federation ('AOF') and the Australian Sports Commission (together with its operating arm, the Australian Institute of Sport) ('ASC') apply penalties against athletes found guilty of doping by the IOC (and other sports organisations). The ASC imposes a life ban on financial or other assistance subject to the right of the Executive to impose a lesser penalty.[30] This could affect scholarships to the Australian Institute of Sport, Sports Talent Encouragement Plan grants and access to government-controlled training facilities. The AOF also imposes a life ban. It applies to selection in any Australian Olympic team and the holding of any position in the AOF,[31] subject to the right of the Executive Board to impose a lesser penalty.[32]

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29 Strictly, entries of athletes are made by NOCs, not by the athletes.
30 Doping Policy of the Australian Institute of Sport and the Australian Sports Commission as at 16 May 1989, clauses 1 and 9.
31 Revised Doping Policy of the Australian Olympic Federation Inc, 3 February 1989, clause 7(1).
32 Ibid, clause 8.

The dominoes can continue to fall in relation to State institutes of sport and sponsorship agreements, actual and prospective.[33]

Apart from the direct effect of exclusion from the Olympic Games and consequential sanctions imposed by international, national and local sports organisations, the anti-doping regime of the IOC has influence as a model for the establishment of such regimes by others. The ASC conducts random drug testing of athletes in receipt of Australian Institute of Sport scholarships, Sport Talent Encouragement Plan grants and other ASC financial or material assistance. The ASC's policy is simply to test for the drugs and procedures banned by the IOC and in accordance with the established IOC procedures.[34] As would be expected, the AOF takes a similar approach when testing athletes in the lead-up to an Olympic Games.[35] The Australian Commonwealth Games Association adopted the IOC list of banned drugs and procedures and IOC testing practices in its preparation for the 1990 Commonwealth Games in Auckland.

Despite the widespread influence of the IOC's anti-doping regime, many IFs have created their own regimes which differ in some significant respects from that of the IOC. The stimulus for difference can be the jealous guarding of an IF's independence, or merely a perception that the IOC's regime in all respects may be inappropriate for a particular sport. For instance, the IAAF does not prohibit beta-blockers[36] (and thus waste financial resources testing for them) as a track and field athlete would not gain advantage from slowing his or her cardiac functions.

Notwithstanding the unifying influence that the IOC regime provides for anti-doping rules around the world, there remain many different testing programmes and their lack of uniformity is one of the most significant problems facing sport in relation to both the substantive rules of doping and their practical application. Major efforts at all levels of sport, supported by government involvement, will be necessary to achieve that degree of harmonisation which may be considered desirable. The following examples serve to establish the need for harmonisation.

1. Many sports use IOC-accredited drug testing laboratories, even though the IOC list of banned drugs and procedures may not have been adopted by the authorities of the particular sport. This can produce what appear to be curious results. In the 1988 Tour de France, the eventual winner, Spanish cyclist Pedro Delgado, was tested positive by an IOC laboratory for the drug probenecid which is banned under IOC category (h) above. However, the International Cycling Union did not prohibit probenecid and so the competitor was innocent.
2. Apart from differences in the list of banned drugs and proceures, there may be crucial variations in the wording of offences. For example, it is quite possible to ingest a banned drug innocently in consequence of, say, a dispensing error made by a pharmacist. Is it sufficient for an offence to be committed that the athlete is detected with the banned

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33 Ben Johnson, who was disqualified from the Seoul Olympic Games following a positive test for anabolic steroid, is reputed to have lost potential earnings exceeding $20,000,000 from advertising and sponsorship arrangements over the period 1988-1992; *The Globe and Mail* (Toronto), 16 September 1989.

34 Doping Policy of the Australian Institute of Sport and the Australian Sports Commission, 16 May 1989, clauses 4, 5 and 7.

35 Revised Doping Policy of the Australian Olympic Federation, 3 February 1989, clauses 1, 3, 4 and 5.

36 IAAF, *Procedural Guidelines for Doping Control.*

drug in his or her urine, or must the drug be consumed 'knowingly'? Arguably, the rules of the IOC and the IAAF diverge on this crucial issue.[37]

3. Much work has been done toward standardising procedures for the collection and testing of urine samples. The leading status accorded to IOC-accredited laboratories has facilitated this process. Nevertheless, new problems arise. The validity of drug tests taken at the 1989 Australian national athletic championships was called into question because the laboratory used for preliminary tests was IOC-accredited but thought not to be IAAF-approved. The Black Committee Report sought to address such problems by recommending that all sport drug testing in Australia be carried out under the control of a new Commonwealth statutory authority.[38] To highlight the need for harmonisation, any such initiative is not likely to have total success without the active co-operation of national governing bodies for sport and the IFs. In particular, the former bodies must accept the rulings of the IFs notwithstanding any conflicting Australian government policy if they wish to avoid international sanction.
4. While the IOC provides the model for anti-doping regimes, the penalties which it can impose upon offenders are confined to participation in Olympic Games. It is left to the IFs and the national governing bodies for sport to impose and enforce penalties in relation to other competition — international, national and local. There is thus some scope for divergence and inequity. Concern has emerged from time to time over the absence of appropriate penalties against convicted athletes. Even athletes disqualified from international competition have continued to compete at national and local levels.[39] At the other extreme, national bodies have been accused of overzealousness in punishing offenders.[40]

6. SOME KEY LEGAL ISSUES

While anti-doping rules have been in use for about 20 years, they have received scant attention from lawyers other than those who may 'double' as sport administrators at the international level. That state of affairs is changing. A small number of court actions in recent years have sought to challenge the validity of disciplinary measures consequent on positive tests. These herald the arrival of a new era in sport related litigation.

Several factors can be identified as contributing to this change. The most significant have been the increased financial rewards available to successful

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37 This issue is considered further under heading 6(a) Defining the Offence of Doping.

38 Black Committee Report, Recommendation Four, 140.

39 The National Collegiate Athletic Association ('NCAA') in the United States may be viewed as a 'prime offender' in this respect because of its failure to recognise punitive measures imposed by national and international sports bodies. For instance, prominent swimmer Angel Myers tested positive for anabolic steroids at the United States Olympic Trials in August 1988 just before the Seoul Olympics and was barred from selection in the United States team. Also, she was banned by US Swimming for 1989. Nevertheless, she was permitted by the NCAA to compete in its 1989 National Championships, *Sports Illustrated* (New York), 27 March 1989.

40 The president of the IOC's Medical Commission, Prince Alexandre de Merode, was reported as being critical of the AOF's life ban on pentathlete Alex Watson saying it was stupid and too harsh for a first offence; *The Age* (Melbourne), 20 February 1989. The ban against Watson representing Australia at future Olympics was subsequently lifted; *The Age* (Melbourne), 12 May 1989.

elite athletes, the progressively tougher penalties and the public contempt displayed toward those athletes found guilty of doping. Obviously, an athlete charged with a doping offence has a great deal at stake and can be expected to use every means at his or her disposal to avoid a guilty finding. Similarly, sports bodies and governments have a strong interest in establishing and protecting the legal integrity of the anti-doping rules.

The remainder of this paper seeks to identify some of the key legal issues and record how the early court contests have been resolved.

(a) Defining the Offence of Doping

The thrust of anti-doping regimes has been to create a list of banned drugs and to detect those drugs by means of urinalysis. While this may be a convenient way of approaching the detection and punishment of performance-enhancing drug use, it is a narrow, focused approach that has produced rigid drafting of the rules. This drafting is likely to be sorely tested in practical applications and court actions.

The IOC and the IAAF define 'doping' in the following terms. Rule 28 of the Olympic Charter (the Medical Code), bye-law A provides:

> Doping is forbidden. The IOC Medical Commission shall prepare a list of prohibited classes of drugs and of banned substances.

Rule 144 of the IAAF's rules provides:

1. Doping is the use by...an athlete of certain substances which could have the effect of improving artificially the athlete's physical and/or mental condition and so augmenting his athletic performance.
2. Doping is strictly forbidden.
3. Doping substances, for the purposes of this rule, comprise the following groups:- [a list is set out].
4. The practice of 'Blood Doping' is forbidden . . .
5. A competitor found to have a doping substance and/or a metabolite of a doping substance present in his urine at an athletics meeting shall be disqualified from that moment . . .[41]

From 1 January 1990, new anti-doping rules will come into effect for the IAAF. Most of the important legal issues will remain unchanged, and since the court cases have concerned Rule 144, it is proposed to consider the new rules only briefly.

A fundamental legal issue is whether the IOC's and the IAAF's rules create 'strict liability' offences, or whether they require 'intention' on the athlete's part? Deriving from the preoccupation with urinalysis, a likely interpretation is that an athlete found to have a banned drug in his or her urine will be guilty irrespective of how it came to be present. Indeed, IAAF sub-rule 144(8) seems to be to that effect.

It takes little imagination to identify circumstances in which a banned drug may have found its way into an athlete's urine without his or her knowledge — or even fault. Putting to one side situations where a urine sample is tampered with after its donation, a list of such circumstances could include a doctor's prescription error, a pharmacist's dispensing error, an honest and reasonable mistake that a tablet taken is a vitamin tablet and

41 IAAF, *Doping Control Regulations*, August 1986.

not, say, an anabolic steroid, forcible administration against an athlete's will and where someone deceitfully places a banned substance in the food or drink of an athlete.[42] This class of situation may be described as 'innocent doping'.

Additionally, the athlete may have consumed a stimulant or narcotic analgesic by taking a patent medicine, such as a nasal spray, headache tablet or cough mixture, without serious attention to whether the medicine might contain a banned drug. These situations may be described as 'inadvertent doping'.

Quite apart from whether athletes who fall into these categories warrant the same treatment as, say, deliberate takers of courses of anabolic steroids, do the rules distinguish between innocent and inadvertent offenders on the one hand and deliberate offenders on the other?

The rules of the IAAF were considered from this aspect in a recent decision of an English court. In *Gasser v Stinson*[43] a Swiss competitor in the women's 800 and 1500 metre running events sought declarations that a two year ban imposed by the IAAF was invalid.[44] Gasser finished third in the final of the 1500 metre event at the world championships in Rome in 1987. She was subjected to a routine urine test as a placegetter and was found to be positive to an anabolic steroid, methyltestosterone. The IAAF disqualified her from the event and rendered her ineligible for all competition held under IAAF rules for two years. Significantly, this meant she would not compete at the Seoul Olympics. Gasser pursued two main lines of attack: irregularities in the laboratory test results meant the results should have been disregarded, and that the anti-doping rules were an unreasonable restraint of trade. The import of these arguments will be considered further on; but for present purposes a statement of the presiding judge, Scott J, warrants attention. Without discussing the point at any length, His Honour was of the view that Rule 144 created an 'absolute offence, independent of any guilty state of mind on the part of the athlete'.[45]

What meaning is to be attributed to this statement? It may be that Rule 144 creates an offence of strict liability such that one or more of the elements of the *actus reus* of the offence do not require a guilty state of mind. Presumably such a guilty state of mind would encompass the intentional, reckless[46] and, quite possibly, negligent taking of a banned

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42 Two athletes disqualified from the Seoul Olympics have at various stages claimed they were victims of the actions of others. Alex Watson of Australia (pentathlon, caffeine) as reported in *The Age* (Melbourne), 26 September 1988 and Ben Johnson of Canada (100 metres spring, stanozolol — an anabolic steroid) as reported in *The Age* (Melbourne), 11 October 1988. Johnson has since admitted to being a user of anabolic steroids; *The Globe and Mail* (Toronto), 13 June 1989.

43 Unreported, High Court of Justice, Chancery Division, Scott J, 15 June 1988, (No CH-88-G-2191).

44 The IAAF is an unincorporated association with headquarters in London. The proceedings were commenced against its treasurer (Mr Stinson) and general secretary (Mr Holt) in their capacites as IAAF representatives.

45 *Gasser's* case, op cit 38.

46 Recklessness is a difficult concept to define. In this context it could require some subjective realisation that the substance consumed may be banned, but the athlete nevertheless proceeds to consume it, not caring whether it is banned, or being prepared to take the risk that it is so. What degree of knowledge of the chance of the substance being banned must the athlete possess before this test can be satisfied? Must the chance of its banning be, for instance, a possibility that is not far-fetched, a serious possibility, more probable than not, a high chance, say, 75%, or almost certain?

drug. Thus, if no guilty state of mind is required, athletes who only test positive because they fall into the class of inadvertent doping, or even innocent doping arising from a prescription error, will be held to have offended rule 144 (in addition to those who do have a guilty state of mind).

Sub-rule 144(8) is the operative disqualifying provision for doping substances (as defined in sub-rule 144(3)) and it supports a strict approach by requiring merely a situation where a '...competitor is found to have a doping substance...present in his urine at an athletics meeting...' The presence of a guilty state of mind seems unnecessary under sub-rule 144(8). By contrast, sub-rule 144(1) defines doping as '...the use by...an athlete of certain substances...' The word 'use' in this context appears to bear the meaning of employing or of applying to a purpose. If an athlete is unaware that he or she is consuming a performance-enhancing substance, an allegation that the athlete is 'using' the substance does not suffice. Which rule is to prevail: sub-rule 144(1) with its suggestion of requiring *mens rea* in the form of intention (or, perhaps, recklessness) or sub-rule 144(8) which appears to stand on its own as a punitive provision needing proof only of the presence of the doping substance? The latter interpretation accords with the brief views of Scott J in *Gasser's* case. Also, it gains support from one of the policies behind the drug testing regime; namely, the aim that one competitor should not obtain an 'unfair advantage' over another. This means that an athlete who has received the benefit of a performance-enhancing drug should be disqualified in fairness to other competitors (but arguably receive no further punishment), notwithstanding that the disqualified competitor is 'innocent'. However, a banned drug could be present in innocent circumstances, and no performance enhancement gained, as where a quantity of anabolic steroid is dishonestly placed in a drink two or three days before an event. What should happen here? The question is yet to be answered.

It is arguable that sub-rule 144(8) and the statement in *Gasser's* case go even further. Scott J described rule 144 as creating an 'absolute offence'. Does this mean these anti-doping rules are contravened even though the athlete has not *caused* the drug to be in his or her urine as when, for example, the drug is administered by injection during sleep or forcibly, against the athlete's will? This appears comparable to the much condemned decision in the 'status offence' case of *R v Larsonneur*.[47] While these scenarios may be extreme, they cannot be dismissed as fanciful. Some thought needs to be given to revising the rules to indicate how these scenarios are to be resolved in a manner fair to all concerned.

The position under the IOC's rules 26 and 28 may be different. Rule 28 merely forbids doping; it does not define doping, other than to make provision through the bye-laws for the establishment of a list of banned drugs and procedures. Given the emphasis placed on the methods for collection and testing of urine samples in the Medical Code, it is tempting to draw the inference that the IOC's anti-doping rules require only proof of the positive test in order to establish breach. The IOC and IAAF rules would be in harmony. However, the IOC rules are not as explicit as those of the IAAF and courts tend to refrain from interpreting offences as imposing strict liability if that result can be avoided. Furthermore, doping

47 (1933) 24 Cr App Rep 74. See, Smith, JC and Hogan, B *Criminal Law* (6th ed, 1988), 46-47.

is linked to eligibility under rule 26 of the Olympic Charter. Guideline A6 to rule 26 requires IFs to exclude athletes who have contravened the spirit of fair play by the use of doping. Arguably, an athlete who tests positive through inadvertent or innocent doping does not contravene the spirit of fair play. How far this can be transposed from a situation of determining eligibility rules for IFs and NOCs to an alleged doping in an Olympic Games remains to be seen.

One advantage possessed by a rule that defines an offence in terms of the presence or absence of a positive test is the removal of discretion in reaching the conclusion that doping has occurred. If a positive test result is to be constrained by an overarching principle of 'fair play', there is scope for discretion and interpretation. Positive test results for stimulants and narcotic analgesics are not infrequently received, but no action is taken because the cause is identified as the inadvertent use of a patent medicine. It is not always clear whether the decision of the authorities has been that no offence was committed or that as a matter of discretion the athlete ought not to be proceeded against.[48] The desirable position is that outcomes in terms of innocence or guilt be predictable through the application of defined rules and not left to discretionary factors.

Another problem of inflexibility arising from the emphasis upon urinalysis as the means of testing is that other evidence of doping may be ignored. Although Ben Johnson was disqualified from the Seoul Olympics for anabolic steroid doping and the world record time he achieved in the 100 metres sprint was not recognised, he remained the world champion and record holder for his exploits at the world championships in Rome in 1987. Johnson has now confessed to Canada's Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance (the Dubin Commission) that he had taken anabolic steroids since 1981 with a view to improving his athletic performance. Included within this period was his preparation for and participation in the 1987 Rome event. Before this confession, but even after the emergence of evidence suggesting that Johnson had obtained advantage from the use of anabolic steroids at the time of the Rome championships, the IAAF indicated that it was powerless to revoke his victory since his urine test conducted at the championships was negative.[49] No doubt the IAAF's professed inability to act stemmed from the remarkably narrow wording of the operative disqualifying provision, sub-rule 144(8), which focuses exclusively on the presence of a doping substance in the athlete's urine *at an athletics meeting*. It is well known that the performance-enhancing effects of anabolic steroids derive from their use in conjunction with a diet and training regimen over the months and years preceding an event, not merely their use on the day of the event. In fact, users of anabolic steroids cease their use some weeks before an event at which testing is planned to allow their bodies to be rid of traces of the steroids in time for the event.

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48 Eg, at the Seoul Olympics, United Kingdom sprinter, Linton Christie, was found positive to the stimulant pseudoephedrine. He consumed it unwittingly when taking the Chinese dietary supplement 'ginseng' to which the pseudoephedrine had been added. Even though Christie produced medal winning performances, the authorities cleared him of wrongdoing as 'we did not consider it was an important level', *Sunday Observer* (Melbourne), 18 October 1988. Presumably this could be justified as an example of the application of the maxim *de minimis non curat lex*.

49 *The Age* (Melbourne), 4 March 1989. An interesting comparison can be made with earlier reports that claimed the IAAF dismissed suggestions that Johnson was using anabolic steroids because he had passed the urine test, *Sunday Press* (Melbourne), 16 October 1988.

The wording of the IOC's rules, which is in more general terms, seems less likely to be so inhibiting.

The new IAAF anti-doping rules seek to address this particular inflexibility and no doubt they have been prompted by the Johnson case. A substantial revision has occurred, but, as mentioned earlier, most of the major legal issues remain unchanged. New rule 55 is the principal provision:

1. Doping is strictly forbidden and is an offence under IAAF Rules.
2. The offence of doping takes place when either
   (i) a prohibited substance is found to be present within an athlete's body tissue or fluids; or
   (ii) an athlete uses or takes advantage of a prohibited technique; or
   (iii) an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique.
3. Prohibited substances include those listed in Schedule 1 to the 'Procedural Guidelines for Doping Control' . . .
4. The expression 'prohibited substance' shall include a metabolite of a prohibited substance.
5. The expression 'prohibited technique' shall include:
   (a) blood doping;
   (b) use of substances and of methods which alter the integrity and validity of urine samples used in doping control . . .

Paragraph 55(2)(iii) is directed to the Johnson case. Under new sub-rule 60(4) any result obtained or title gained subsequent to an admitted doping offence ceases to be recognized by the IAAF. World records will be similarly affected by new sub-rule 148(3). Thus, from 1 January 1990 (the effective date of the new IAAF anti-doping rules) Johnson's victory and world record at Rome will cease to be recognized.

Notwithstanding these changes, one wonders whether the IAAF continues to cast its net too narrowly. For the athlete who uses a prohibited substance, say, an anabolic steroid, the offence of doping is only established if the substance is found in his or her body tissue or fluids, or if the athlete admits having used the substance. Third party evidence, no matter how compelling, remains excluded from consideration.

The new rules continue to raise the issues identified above about the strict liability nature of the offences which are created. In particular, there appear to be added grounds to argue that the rules exhibit inconsistency. With respect to prohibited substances, the offence is committed if the substance is 'found to be present', whereas for prohibited techniques, the offence occurs if the athlete 'uses or takes advantage' of the technique. The former creates an offence of strict liability, but the latter more likely requires some knowledge or intent on the athlete's part. Further problems arise from the fact that the definition of prohibited technique in paragraph 55(5)(b) includes substances that alter the integrity and validity of urine samples. An example of such a sustance is probenecid. Thus, an innocent athlete whose drink was 'laced' with probenecid might argue successfully that he or she had not used or taken advantage of the prohibited technique, while an innocent athlete whose drink was 'laced' with a prohibited stimulant would be guilty because the stimulant was found to be present in his or her urine.

(b) Authority to Test and Rights of Privacy

The process of collecting and analysing urine samples invades an athlete's privacy. The sample must be provided in the presence of a chaperon. Sometimes a wait in 'captivity' for some hours is needed until the sample is available (aided by the consumption of copious quantities of fluids). The sample can also disclose a good deal about an athlete's habits. Apart from drugs to which the urinalysis one is directed as a matter of course (the use of some of these may be contrary to criminal law in many jurisdictions, eg, heroin), the IOC is permitted to test for alcohol and marijuana if the IF so requests.[50] Another matter for concern is that athletes are forced to undergo tests in order to establish their innocence, without any reason for suspicion of guilt. This can be viewed as contrary to basic principles of justice.

Obviously, it is essential that the testing be conducted in a way that preserves the athlete's dignity and privacy to the maximum degree possible and does not entail breaches of the criminal or civil law; the testing must be in accordance with the principles of civilized society.

It is commonplace for these objectives to be pursued primarily by obtaining the athlete's consent to undergo urinalysis either on a specific event or, indeed, a random basis. Consents are obtained routinely under team membership agreements,[51] scholarship agreements[52] and event entry forms providing for testing to be carried out in accordance with the rules of the relevant sports organisation, which will in turn often adopt the IOC's procedures promulgated under rule 28 of the Olympic Charter. Without this consent it is trite law that any endeavours to force the provision of a sample of urine will risk the commission of criminal assault and the trespassory torts of assault, battery and false imprisonment, depending on the circumstances. Furthermore, a consent once given can be withdrawn. While in many circumstances the withdrawal may breach the terms of a team agreement or other rule, the wrongfulness of the withdrawal does not justify undue persistence in obtaining a sample against an athlete's will.

The confidentiality of test results appears to be unregulated to any significant degree by the rules of the main sports authorities. The rules of the IOC and the IAAF contemplate that a public announcement of positive results and sanctions imposed will be made after the athlete has been advised. It is not usual for an athlete to explicitly agree to a public announcement, but his or her consent would probably be implied from the act of donation of the sample and acceptance of the procedures for testing which mention a public announcement. However, the rules are silent in relation to destruction of samples and test records as well as to disclosure of information not related to a positive test result. The law of breach of

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50 IOC, *List of Doping Classes and Methods - 1989*, Heading III.

51 Eg, Australian Olympic Federation Inc, Competitor's Agreement and Indemnity for Membership of the 1988 Australian Olympic Team, clause 8:

> I [the athlete] agree that if required, at the sole discretion of either the General Manager or the Chief Medical Director, I shall undergo a test or provide a sample which may be analysed to determine whether or not I have taken or used drugs or stimulants or participated in other practices prohibited by the IOC . . .

52 Eg, Australian Institute of Sport Scholarship Holder's Agreement, clause 2, which is in similar terms to clause 8 of the 1988 Australian Olympic Team Agreement.

confidence and its application may be uncertain because, although the urinalysis is a form of medical examination, it is doubtful that the laboratory or the sports body in their relationship with the athlete would be within the confidential relationship of medical practitioner and patient. However, it may be implied that the sample is given in confidence subject to the right of the sports body to announce a positive test result publicly.

Whatever may be the level of concern in the community over questions of privacy (and there is every indication that it is increasing), there is no general right to privacy recognised by the law. As the community is very concerned about performance-enhancing drug use in sport it is to be expected that elite athletes will be asked to accept the curtailment of privacy inherent in progressively tougher drug testing regimes. Those who might seek to bask in the limelight will have to accept the consequences. In other jurisdictions the conflict between human and constitutional rights on the one hand, and the imperatives of anti-doping regimes on the other, is already taking shape. While Australian law lacks the constitutional complexities of the United States[53] or even Canada,[54] the influence of United States and Canadian developments may be felt in Australia to the degree that international testing regimes might need to be modified to make the regimes workable in those important countries.

(c) Authority to Discipline

A brief mention can be made of the obvious proposition that a sports body will require legal authority to impose a disciplinary measure. Two situations will warrant disciplinary measures. They are the refusal to submit to a test after having agreed to do so[55] (the official suspicion here is that

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53 Principally, the debate in the United States centres upon the Fourth Amendment to the Constitution which protects people against unreasonable search and seizure by the state. One issue which is working its way through the courts is whether the NCAA engages in 'state action' by requiring and implementing drug testing programmes, *O'Halloran v University of Washington* 679 F Supp 997 (1988), *rev'd* on procedural grounds 856 F 2d 1375 (1988). Cf, *Hill and McKeever v NCAA* (Case No 619209, California Superior Court, Santa Clara County, 1988) which considers the impact of the Californian constitution and *Bally v Northeastern University* 532 NE 2d 49 (1989) which considers the impact of the Massachusetts State Civil Rights Act. See generally, eg, Brock, SF and McKenna, KM, 'Drug Testing in Sports' (1988) 92 *Dickinson Law Review* 505; Cochran, JO, 'Drug Testing of Athletes and the United States Constitution: Crisis and Conflict' (1988) 92 *Dickinson Law Review* 571; Fonti, JV, 'Does the National Collegiate Athletic Association's Drug Testing Program Test Positive if it is Subjected to Constitutional Scrutiny?' (1987) 37 *Drake Law Review* 83; Lock, E and Jennings, M, 'The Constitutionality of Mandatory Student-Athlete Drug Testing Programs: the Bounds of Privacy' (1986) 38 *University of Florida Law Review* 581; Scanlan, JA, 'Playing the Drug-Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument' (1987) 62 *Indiana Law Journal* 863.

The drug testing programmes of private bodies such as the IOC and the IAAF, as well as their national counterparts in the United States, would most likely not be considered to entail state action.

54 One commentator has concluded that Canada's *Charter of Rights and Freedoms*, section 8, which protects against unreasonable search and seizure, does not preclude a random drug testing programme: Connelly, P, 'Random Drug Testing: the Constitutional Ramifications', paper presented to a conference of the Canadian Institute, *The Business of Sports in Canada, Capitalizing on Opportunities in a Dynamic Industry*, 8 and 9 May 1989. See also, Trossman, J, 'Mandatory Drug Testing in Sports: the Law in Canada' (1988) 47 *University of Toronto Faculty of Law Review* 191 where that view gains some support at least in regard to the private, amateur sports.

55 This is to be distinguished from an occasion where an athlete refuses to agree to submit to the possibility of a drug test — in which case the athlete could expect to be denied entry into the event or team.

the athlete has used a prohibited drug or procedure and is fearful of being discovered by the test), and the finding that an athlete is guilty of doping. The conferral of disciplinary power is usually given careful attention,[56] but occasionally it is overlooked. For instance, IAAF sub-rule 144(4) forbids the practice of blood doping but no penalty is provided under either rules 53 or 144.[57] This oversight will be corrected by the new rules 55 and 60.[58]

(d) Rules Governing the Drug Test and the Disciplinary Process

Pursuant to rule 28 of the Olympic Charter the IOC has established detailed procedures for the selection of athletes to be tested and for the collection, security and scientific analysis of urine samples. In general terms they provide for the collection of an 'A' and a 'B' sample. If the 'A' sample tests as positive, the positive test must be confirmed by testing the 'B' sample, at which time representatives from the athlete's team, may be present. If the positive result is confirmed, a meeting of the IOC Medical Commission is convened to make a recommendation to the Executive Board of the IOC. The athlete may attend the meeting of the Medical Commission. This process occurs within a very short time, two to three days of the event. No specific procedures appear to be established for the deliberations of the Medical Commission or the Executive Board.

For the athlete wishing to challenge the validity of a disciplinary measure, two main avenues may be open. First, the procedures for the collection, security and scientific testing of the samples may not have been followed. Secondly, the deliberations of the body imposing the disciplinary measure may not have accorded with natural justice.

The Australian athlete must overcome two very important jurisdictional hurdles before the merits of any challenge can be considered. The first stems from the significant international component of the drug testing of athletes. An Australian athlete, disqualified by the IOC or an IF, may be faced with insurmountable jurisdictional difficulties in bringing proceedings in an Australian court against one of these international organisations if the disqualification arises from competition occurring overseas. The international dimensions are clear from *Gasser's* case. There a Swiss athlete disqualified from an event in Italy and desirous of competing in an event in the Republic of Korea, brought proceedings in an English court, because the IAAF (an unincorporated association of national athletic federations) maintained its office in London. Such jurisdictional issues will have to be resolved in any particular case in accordance with the rules of private international law.

The second jurisdictional hurdle facing the Australian athlete will be that of identifying a 'justiciable issue' on which to invoke the aid of the Australian courts. The decision the athlete challenges is one given by a private or domestic tribunal. Under Australian law there is no general right

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56 Eg, Australian Olympic Federation Inc, Competitor's Agreement and Indemnity for Membership of the 1988 Australian Olympic Team, clause 8 (ineligible for team if fail or refuse test); IAAF sub-rule 144(6) (deemed positive test if an athlete refuses to submit to a test); new IAAF sub-rule 56(1) (refusal to submit to test is a doping offence); IOC rule 29, bye-law D (refusal to submit to a test or found guilty of doping results in exclusion from present or future Games).

57 Contrast IAAF sub-rule 144(8) which disqualifies a competitor found to have a doping substance (as defined in sub-rule 144(3)) present in his urine at an athletics meeting.

58 IAAF rule 60 will establish sanctions for 'doping offences'.

have proceeded in accordance with its own rules or the rules of natural justice. The High Court of Australia in *Cameron v Hogan*[59] held that the rules of associations formed for sporting, social or similar purposes do not normally constitute a contract between the members. The Court also considered that expulsion from an association could not usually be interpreted as depriving a member of a proprietary interest in the association's assets. The result of this decision has been that in the absence of interference with a contractual or proprietary right, difficulties have been faced in obtaining a court's hearing let alone having it decide in the plaintiff's favour on the merits. While *Cameron v Hogan* is a decision about the affairs of a political party in the 1930s and in a very diffferent era in terms of the role of sports associations in our community, the case has some continuing effect in contemporary decisions.[60] However, as the consequences of following the case often appear out of harmony with the needs of the community, various ways have been found to cirumvent the decision, and in many cases statutory developments have overtaken it.[61] For instance, legislation may dictate jurisdiction to take proceedings notwithstanding the association's sporting character,[62] a contract may exist because the sports body is incorporated as a company[63] or an association,[64] a broad view may be taken of proprietary rights,[65] a person's ability to derive income through participation in sport may be protected by the rule against unreasonable restraints on trade[66] and there have been cases where the decision in *Cameron v Hogan* has been overlooked[67] or rejected.[68]

The task of finding a justiciable issue is not always a real concern for courts in other common law countries.[69] Two recent cases involving the anti-doping regime of the IAAF illustrate this point. In *Gasser's* case, the plaintiff sought relief upon two grounds. First, although she was not a member of the IAAF (mere membership of an unincorporated association under Australian law does not confer jurisdiction), she alleged that a contract had arisen between her and the IAAF when she participated with its consent in the world championships, or at the latest when she presented herself to donate the urine sample, to the effect that the test would be

59 (1934) 51 CLR 358.

60 Eg, *Shepherd v South Australian Amateur Football League Inc* (1987) 44 SASR 579; *Smith v South Australian Hockey Association Inc* (1988) 48 SASR 263.

61 See further, Sievers, AS, *Associations Legislation in Australia and New Zealand* (1989), 46-53, 113-115.

62 *Bailey v Victorian Soccer Federation* [1976] VR 13.

63 Companies (Victoria) Code, s78.

64 Associations Incorporation Act 1981 (Vic), s14A.

65 Eg, *ex parte Appleton* [1982] Qd R 107; *Millar v Smith* [1953] NZLR 1049.

66 The right to work doctrine developed in *Nagle v Feilden* [1966] 2 QB 633 can now possibly be viewed as part of the broader doctrine against unreasonable restraints on trade, *Hughes v Western Australian Cricket Association (Inc)* (1988) 19 FCR 10, 52.

67 *Malone v Marr* [1981] 2 NSWLR 894.

68 *McKinnon v Grogan* [1974] 1 NSWLR 295.

69 Eg, a less restrictive approach seems to have been the tradition in New Zealand, Kelly, GM, *Sport and the Law, an Australian Perspective* (1987), 50. See also, *Finnigan v The New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159. Contrast, however, *Michels v United States Olympic Committee* 741 F 2d 155 (1984) in which the United States Court of Appeals, Seventh Circuit, held that a weightlifter rendered ineligible to represent the United States at the 1984 Los Angeles Olympics because of an impermissible testosterone level detected at the Pan American Games in 1983, did not have standing under the Amateur Sports Act of 1978 to challenge the decision of the United States Olympic Committee to hold him ineligible.

carried out in accordance with the rules of the IAAF (which she alleged had in fact not occurred). Scott J rejected this argument for the reasons that national federations make entries, not the competitors, and that an intention to enter into legal relations could not be inferred from the athlete's act of presenting for a drug test. The latter reason is consistent with *Cameron v Hogan*, although it overlooks the very serious consequences for an athlete should there be any departure from the rules leading to an incorrect finding of guilt.

The second ground for relief advanced by the plaintiff was restraint of trade. Notwithstanding that 'amateurs' compete in events organised by the IAAF, the rules of that Association permit the earning of substantial prize-money and endorsement income through the mechanisms of trusts. Gasser could have expected to earn a substantial income but for her suspension. Consistent with the established trend of authorities in Australia and elsewhere, Scott J held there was jurisdiction to seek relief.

There is one interesting jurisdictional point which in the end the judge did not need to address. Gasser had two grievances: first, the rules of the testing process had not been followed and, secondly, if that allegation failed, an absolute offence carrying a mandatory sentence of two years' suspension was an unreasonable restraint of trade. It having been decided that the 'contract jurisdiction' failed but the restraint of trade jurisdiction succeeded, was Gasser to be deprived of the opportunity to challenge the methods by which the test had been conducted? That is, could she establish jurisdiction to challenge the alleged non-compliance with the testing rules by employing the restraint of trade ground? This issue has not received much attention in the cases, although Forbes suggests that jurisdiction would exist.[70] A wrongful application of the disciplinary rules resulting in suspension would amount to a restraint and in many instances (but maybe not all) be unreasonable.

As mentioned, the judge did not need to address this issue since he found an additional ground of jurisdiction upon which to base a challenge of non-compliance with the rules. He held that the

> 'plaintiff, as an athlete under disqualification, has an obvious and sufficient interest in establishing whether the disqualification was imposed in accordance with the Rules under which the IAAF have purported to act . . .'[71]

This is a far-reaching but simple proposition. It is inconsistent with Australian authority; but it offers a more direct route to court and accords to a greater degree with the modern realities of elite sport. Nevertheless, it opens the 'floodgates' for many athletes who would not be able to bring themselves within the exceptions to *Cameron v Hogan*. It will be up to the Australian courts to determine to what extent they wish to entertain disputes over the application of club rules and disciplinary proceedings: matters which in the past were not sufficiently serious to warrant the court's attention in the view of *Cameron v Hogan*.

The other recent case touching jurisdiction is a decision of the High Court of Ireland in *Quirke v Bord Luthchleas Na heireann*.[72] The defendant

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70 Forbes, JRS, *The Law of Domestic or Private Tribunals* (1982), 43-44.
71 *Gasser's* case, op cit 25.
72 Unreported, Hihg Court of Ireland, Barr J, 25 March 1988.

was the Athletic Board of Ireland which had disqualified the plaintiff, an elite shot-putter and discus thrower, for failing to provide a urine sample for testing at the national championship in 1987. The disqualification was for a minimum of 18 months; and its main effect was that Quirke would not compete at the Seoul Olympics for which he was otherwise almost certain to gain selection. Barr J acknowledged the plaintiff had jurisdiction

> '. . . committees of clubs and other voluntary organisations exercising functions of a disciplinary nature involving the imposition of a substantial sanction [are under a duty to act judicially].[73]

Again, this reasoning is not favoured in Australia but it does reflect an undoubted trend toward not using over-technical jurisdictional points to deny athletes the opportunity of challenging decisions having very significant import for them.

Once the jurisdictional hurdles are overcome, an allegation of non-compliance with the rules usually take one of two forms.[74] First, that the sports body has interpreted or applied the rules incorrectly. For instance, if the true meaning of the IOC's anti-doping rules is to require a guilty mind, an interpretation that it is a strict liability offence would be open to challenge.

Secondly, a particular requirement of the rules may be overlooked. In *Quirke's* case, the plaintiff had not been handed a notice in the form of Appendix 1 to the IAAF's Procedural Guidelines for Doping Control which, *inter alia*, informs the athlete that failure to attend for doping control may result in disqualification. This notice was a mandatory requirement of paragraph 1(a) of the Guidelines. While the court did not have to decide whether on its own this error was sufficient to invalidate the disqualification, the court held it was a matter which Quirke was entitled to place before the Board at a hearing that had been improperly denied to him.

Gasser's case challenged the technical veracity of the test. Both of Gasser's samples proved positive to a metabolite of the anabolic steroid methyltestosterone. Other anabolic steroids were discovered as well. However, the 'steroid profile' differed between tests with the exception of methyltestosterone. A properly conducted test should not produce different steroid profiles. Therefore, the allegation made was that the test of the B sample should be identical in result to that from analysis of the A sample. Otherwise, the B sample did not confirm the A sample. The scientist in charge of the tests offered an explanation as to how the results differed (defective ether was used in the gas chromatography) without affecting the accuracy of the finding that the presence of methyltestosterone had been confirmed. The IAAF, and then an Arbitration Panel, accepted this finding and disqualified Gasser. The court agreed it was not enough that the banned substance be present in both samples. Under the rules the second test must confirm the presence of the banned substance in the athlete's urine. On the other hand, the wording of the rules did not require the test results to be identical. The court concluded that the finding of guilt did not involve any breach of the IAAF's rules.

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73 Ibid 7.

74 There is a third, although less common, situation where there is no evidence upon which to base an application of the rules; Kelly, *op cit* 72-73.

This judgment illustrates the fine dividing-line between review to ensure the rules have been followed and review on the merits. The court confined its decision to the former issue; that is, the findings that the rules required the tribunal to make. Review on the merits would entail an assessment of the accuracy of the finding that the test of the B sample confirmed the test of the A sample. Obviously, the differences in the test results might be such as to suggest the samples came from two different people. However, given the scientist's explanation (and presumably the absence of any irregularity in the security procedures) the IAAF decided that confirmation had occurred. The 'merits' issue is one which courts do not review even if they may be inclined to a different conclusion on the facts. They do not have an appellate function.[75]

The second right of the athlete is to be proceeded against in accordance with natural justice. This right is a flexible one with its content varying according to the circumstances. It involves the notion of procedural fairness[76] affording the athlete the opportunity of a hearing from an unbiased tribunal. This is not the occasion for an exposition of the law of natural justice, especially as its application to tribunals in sport is considered thoroughly elsewhere.[77] A simple example of the rule's application to anti-doping regimes comes from *Quirke's* case. Quirke was asked to tender a written explanation as to why he had not attended to provide a sample for testing. At no stage was he aware that a formal complaint had been made and that he was under investigation — with the possibility of serious disciplinary action being taken against him. This action contravened one of the basic tenets of natural justice, the right not to be tried without one's prior knowledge, and the disqualification was invalid.

A final brief word about appeal procedures is warranted. Sports bodies are considering the establishment of appeal mechanisms to afford athletes a means of having decisions about breaches of anti-doping rules reheard. Many advantages exist: speed, lower costs, privacy, the possibility of curing defects in the initial decision and, if the appropriate provision is made, the right to require an athlete to exhaust the internal appeal process before taking court proceedings.[78] On the other hand, the presence of an appeal mechanism may invite appeal. One suspects that courts will be only too happy to encourage developments in this direction because the greater reliability of result that an appeal mechanism is likely to produce will afford a solid basis for the view of Megarry V-C in *McInnes v Onslow-Fane*, and reiterated by Scott J in *Gasser's* case, that,

> 'courts must be slow to . . . review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts.'[79]

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75 Forbes, op cit 8.

76 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321, 345-348 per Mason J.

77 Forbes, op cit, 97-198; Kelly, op cit 73-88.

78 Even in the absence of a mandatory appeal mechanism, a court may exercise its discretion against granting interlocutory relief if the athlete has not taken the opportunity to engage an available appeal mechanism; *Gray v Canadian Track and Field Association* (1986) 39 ACWS (2d) 483.

79 [1978] 1 WLR 1520, 1535.

7. CONCLUSION

Many people were deeply shocked by the specific instances of drug use detected at the Seoul Olympic Games. That situation has been compounded by public hearings at inquiries in Australia and Canada, which have begun to reveal the extent of a very significant problem. An even tougher 'crack-down' on drug use is the likely result. As, more is at stake for athletes, legal challenges to the testing and disciplinary processes can be expected. However, it may not be an easy task before the courts for the challengers. In *Gasser's* case, Scott J firmly rejected the plaintiff's submission that the IAAF's 'absolute offence', coupled with a mandatory sentence was an unreasonable restraint on trade.[80] One can anticipate a busy time for the lawyers.

80 *Gasser's* case, op cit 38-40.