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SYDNEY • MELBOURNE

Level 2, 16-18 Grosvenor Street, Sydney NSW 2000

Ph: 02 9251 4155 Fx: 02 9251 7448 DX: 10182

Email: lawsport@browneco.com.au

Anti Doping Policies

Presented as part of the "Big Bucks in Sports Law" Seminar
on behalf of the CLE Department, College of Law, NSW

Friday 26 June 1998

Simon Rofe and Catherine Ordway¹

The issue of drugs in sport is one that has grown in importance over the past thirty years since the International Olympic Committee (IOC) first drafted its list of prohibited classes of substances and methods in 1968. Drug testing was introduced that same year at the Mexico Olympic Games. The prohibition on the use of drugs in sport reflected the philosophy that drugs either gave athletes an unfair advantage or were dangerous to health or both. In recent times, with the discussion on the prohibition of marijuana, there has been promoted a third philosophy, namely, that athletes have a public responsibility as role models.

Historical Perspective

This development must be understood in its historical context. Even a cursory examination of the archives will support the view that since time began, athletes have been searching for ways to improve their performance and overcome the opposition. Athletes are said to have ingested concoctions of wild mushrooms and plant seeds, and given their horses the same, in an attempt to improve upon their natural talents.² While the history prepared by the Australian Sports Drug Agency (ASDA) suggests that these attempts were "one of the significant reasons for the dissolution of the ancient Olympic games",³ it seems more likely that the stigma attached to the use of certain substances is a modern phenomena.⁴

The alteration of the athlete's diet to attain peak fitness remains an essential part of their routine. Historically it appears that no moral distinction was made between a heavyweight wrestler choosing to eat fatty meat and a Roman gladiator using non-dietary substances to

¹ Both of the Sydney office of Browne & Co which numbers amongst its clients the AOC and the AFL.

² The first physician to be considered a specialist in sports medicine was the Greek physician Galen, who prescribed; "the rear hooves of an Abyssinian ass, ground up, boiled in oil, and flavoured with rose hips and rose petals" to improve performance. *Olympic Gold: A 100 Year History of the Summer Olympic Games*, United States Olympic Committee, S.E.A Multimedia, 1995

³ ASDA – Drugs in Sport, <http://www.ausport.gov.au/asda/drugsin.html>, p2

⁴ G M Kelly, *Sport & the Law*, The Law Book Company, Sydney, 1987, p398

enhance bravery and aggression⁵. Products like mescaline were used in sport, after it was discovered that American indigenous men had taken it in preparing for battle. In the nineteenth century, Dutch canal swimmers dropped ether on sugar cubes and swallowed them to increase endurance. Strychnine with brandy and egg white was given to US runner, Thomas Hicks, when he collapsed during the marathon in the 1904 Olympic Games. He revived sufficiently to win the gold medal.⁶

Change in Philosophy

At some point in history however, society decided that a line had to be drawn between those substances that were 'fair' and those that gave the athlete an 'unfair' advantage. In the nineteenth century the word 'doping' appeared with its current negative connotations. It is believed that this word was derived from 'dop', which originated from a South African drink made of an extract of walnuts, with xanthines (found in caffeine) and alcohol added. The drink was intended to improve endurance in ceremonial dances. There is no suggestion that the drink or the word 'dop' had any moral restrictions attached to its original use.

Today, athletes are encouraged to eat carbohydrates in the form of pasta and bread, and plenty of fruits and vegetables. This is considered an acceptable form of performance enhancing, as is the use of vitamin supplements. Although it cannot be said that these supplements are 'food' in the common sense of the word, there is no suggestion that this constitutes doping. Vitamin tablets have endured a degree of processing and chemical enhancement, and yet Graham Kelly in his book, *Sport and the Law*, describes the early development of pharmacological recipes consisting of plant and animal extracts as "ominous". Arbitrarily, some substances are taken as 'foods' and have community acceptance, while others are labeled 'cheating' and attract a negative stigma.

The change in community attitudes, from no moral limitations on the ingestion of substances to one of extensive restriction, coincided with the rapid improvements in scientific knowledge in the nineteenth century and the consequent influx in laboratory manufactured substances. The change did not stem from a concern that athletes would not be able to afford the new pharmacological benefits, as the technology had in fact increased the quantity and quality of products available. The disapproval, reflected in Kelly's use of the word "ominous", stemmed from the number of deaths in sport attributed to the use of non-dietary substances.

The first known sporting death was a Dutch cyclist in 1886, who was found to have taken heroin and cocaine⁷. A Welsh racing cyclist, Arthur Linton, died in 1896 after taking strychnine⁸. Before amphetamines became widely available in the 1930's, strychnine was the drug of choice and was used with alcohol (and often with caffeine). During this period, and throughout this century, doping was used very effectively in the horse racing industry to both

⁵ "Milo of Croton, the most successful and famous of Greek Olympic champions, used special herbs and magic potions to make him bigger and stronger. His diet of raw meat would eventually lead to his early death from a massive heart attack, but his name is remains revered": Mercury, 'Get drugs out of locker rooms and into the hands of doctors', *The Bulletin*, 27 February 1996, p95

⁶ *Olympic Gold: A 100 Year History of the Summer Olympic Games*, United States Olympic Committee, S.E.A Multimedia, 1995 Hicks died in 1963. Cf ASDA – Drugs in Sport, <http://www.ausport.gov.au/asda/drugsin.html>, p6 which suggests that the concoction almost caused his death.

⁷ *Introduction to ISAF Doping Control Rules*, 4th Edition, p1 Dr F Newton, Chairman ISAF Medical Commission states that "Doping in modern sport was first reported as long ago as 1865."

⁸ G M Kelly, *Sport & the Law*, The Law Book Company, Sydney, 1987, p398
Cf ASDA – Drugs in Sport, <http://www.ausport.gov.au/asda/drugsin.html>, p6, which states that Linton died in 1886 from an overdose of trimethyl.

enhance and suppress the talents of particular horses. There were many questionable horse deaths, including that of our own Phar Lap.

The win at all costs mentality, began to be eroded by the increase in the number of deaths in sport, and the philosophy of protecting the health of the athlete took hold. There was also the growing view that the unrestricted use of performance enhancing substances had gone too far, and the athletes themselves could not be relied upon to look after their own health. Questions began to be asked at the 1952 Olympic Winter Games when syringes and empty drug vials were found in the speed skaters' locker rooms. Again at the Melbourne Summer Games of 1956, evidence of drug taking was discovered in the cyclists' locker rooms.⁹

International Anti-Doping Developments

The International Cycling Union (UCI) was the first international sports federation (IF) to introduce drug testing in the 1950's. It was known that professional cyclists used drugs freely, mainly stimulants such as amphetamines. Most of the cyclists of that era considered them a necessity.¹⁰ In 1959 the Association Nationale d'Education Physique in France formed a Doping Commission. At the 1960 Rome Games, Danish cyclist Kent Enemark Jensen collapsed and died during the cycling road race. He was later found to have taken amphetamines (Ronital) and a nicotine-type of stimulant. In 1960 the Council of Europe, a group of twenty-one western European nations, tabled a resolution against the use of drugs in sport¹¹. France enacted national anti-doping legislation in 1963, which was followed by Belgium in 1965.¹² Anti-doping policies were then developed in the 1960's by other IFs, including the International Amateur Athletics Federation (IAAF)¹³.

In the 1967 Tour de France, the great British cyclist Tommy Simpson collapsed and died while ascending Mont Ventoux. He was found to have been heavily dosed with stimulants. This death in particular received wide publicity and alerted the sporting authorities to the danger inherent in drug use in sports. That year, the IOC decided that it must take the initiative in a strong anti-drug stance, and established the IOC Medical Commission.¹⁴ By 1968 the IOC had drafted its list of prohibited classes of substances and methods, and drug testing was introduced for the first time at the Mexico Olympic Games held that same year.¹⁵

⁹ *Olympic Gold: A 100 Year History of the Summer Olympic Games*, United States Olympic Committee, S.E.A Multimedia, 1995

Introduction to ISAF Doping Control Rules, 4th Edition, p1 Dr F Newton, Chairman ISAF Medical Commission states that "In 1955 twenty-five urine tests were performed upon cyclists in one race in France of which five were positive."

¹⁰ Much like the concerns raised in cycling today over the deaths associated with the use of EPO (erythropoietin) and the suggestion that it's use is necessary to remain competitive: P Keegan, 'DISPA: News From the Field', *Outside*, April, 1998 p 26-28

¹¹ The Council subsequently adopted an Anti-Doping Convention in Strasbourg consisting of 19 Articles binding on the parties, which followed recommendations from several European Conferences on doping in 1979. The Council urged member states to combat drug abuse in sport. *Introduction to ISAF Doping Control Rules*, 4th Edition, p1, Dr F Newton, Chairman ISAF Medical Commission

¹² In 1965, the British Sports Council formed a working party on Drug Abuse in Sport. See also T Kavanagh, 'Doping in Sport - Australia's Anti-Doping Regime', ANZSLA Conference 1991.

¹³ In 1966 samples were first tested in the World Cup Football Championships.

¹⁴ In 1962 the IOC had passed a resolution against doping. *Introduction to ISAF Doping Control Rules*, 4th Edition, p1, Dr F Newton, Chairman ISAF Medical Commission

¹⁵ *Introduction to ISAF Doping Control Rules*, 4th Edition, p1, Dr F Newton, Chairman ISAF Medical Commission points out that; "the protocol for testing was only slowly evolving and many sports were not tested at the Olympic Games. Indeed many long established sports had no rules of the conduct of play which covered or even recognised the existence of doping to improve performance. Many sports were unsure whether improved physical performance was unethical, indeed there were many who saw the use of drugs as merely an extension of proper coaching and training techniques."

The first athlete to be disqualified from the Olympic Games for drug use was Sweden's Hans-Gunnar Liljenvall. Liljenvall was a modern pentathlete who had helped his team win a bronze medal at the 1968 Olympic Games. Prior to the shooting event, he drank a few beers to help steady his nerves. At testing, his blood alcohol level was over the allowable limit. Although drinking was commonplace among modern pentathletes in those days, the medal was withdrawn and the team suspended.

Anabolic steroids were not tested for until the 1972 Olympic Games, although the American physician, John Ziegler, had invented them in the late 1950's. Anabolic steroids were developed as replacements for natural steroids, such as testosterone, to help patients who were unable to maintain their body weight. It was found that anabolic steroids would allow the body to add protein, rather than it being taken away from the muscles. It was not long before athletes discovered their usefulness in building muscle mass, despite the serious side effects.

The first athlete to be disqualified for the use of anabolic steroids in the Olympic Games was Bukhaava Buida, who won the lightweight silver medal for Mongolia in the 1972 judo competition. He was found to have used Dianabol (methandienone) and his medal was withdrawn.¹⁶ That same year, swimmer Rick de Mont was penalised for using an asthmatic preparation containing ephedrine, which he had been openly using since he was a child, unaware that it was prohibited.¹⁷ The use of ephedrine also led to the suspension of Nordic skier, Galina Kalakova, from the Soviet Union in 1976. Also suspended at the Montreal 1976 Olympics was the Bulgarian weightlifter, Blagoi Blagoev, for using anabolic steroids to assist his second place result in the 82kg division.

Despite these findings, the IOC methods of testing for prohibited drugs were considered insufficient to prevent athletes from using drugs. Athletes, coaches, and their doctors were able to learn enough about the drugs to know how long they had to be withdrawn from the athlete before a competition. The athletes were then able to pass frequent drug tests despite being habitual users. While drug manufacturers will always be one step ahead of the testing agencies, these criticisms are being partially addressed by performing random out-of-competition tests on athletes all year round.¹⁸

Anti-Doping in Australia

In Australia, the drugs in sport issue was comprehensively addressed in 1987 when representatives of the Australian Olympic Committee (AOC) and the Australian Sports Commission (ASC) met with the then Federal Minister for Sport, John Brown, and his advisers. Agreement was reached for both the AOC and ASC to adopt anti-doping policies embodying the same principles and similar language. The AOC's policy was subject to its first major test the following year when Alex Watson tested positive at the Seoul Olympic Games for an excessive quantity of caffeine. Watson became the first member of an Australian Olympic Team to be disqualified from an Olympiad for a drug-related offence, and he was subsequently suspended under the AOC¹⁹ policy²⁰.

¹⁶ Today, Dianabol still appears to be popular, as it is featured in 15 of the 370 steroids listed in the 'Steroid Cross Reference Guide' by Big Al, *Huckster's E-mail Newsletter*, <http://www.nbaf.com/nbaf/july7pgj.htm>

¹⁷ De Mont had his gold medal for the 400m freestyle withdrawn, even though it was taken for medical and not performance enhancing reasons, and he did not know it contained a banned substance: J Webster, 'Riley's bureaucratic headache', *The Bulletin*, 27 February 1996, p94

¹⁸ Note however that many IFs limit the substances that can be tested for during the out of competition period.

¹⁹ AOF (Australian Olympic Federation) as the AOC then was known.

In 1988²¹, amid considerable publicity, the Senate Standing Committee on Environment, Recreation and the Arts conducted an inquiry into the use by Australian athletes of performance enhancing drugs and the role to be played by Federal agencies²². As a result, in 1990 the Federal Government enacted the *Australian Sports Drug Agency (ASDA) Act* to set up ASDA as Australia's premier and independent drug testing and education organisation by 1991. The actual analysis of samples is conducted by the Australian Government Analytical Laboratory (AGAL) at Pymble, which had already achieved IOC accreditation by 1990. In 1996, AGAL set up the Australian Sports Drug Testing Laboratory (ASDTL) specifically to conduct drugs in sport analysis.

The policies of the AOC and ASC have both been revised over the years, with the AOC adopting amended policies in 1992, 1995 and 1996. The amended policies were revisions of the initial policy. During 1997 however, the AOC embarked upon a major review involving a consideration of the policies of the IFs, the decisions of the Court of Arbitration for Sport (CAS) and in consultation with its Athletes Commission²³ and the ASC²⁴. As a result a new policy was adopted and became effective on 1 December 1997²⁵. The ASC adopted its new policy in March 1998.

From July 1997 the AOC and the ASC have had discussions to develop the direction of the ASC and the AOC anti-doping policies and model policies for the NFs (Olympic and non-Olympic). The two policies are substantially the same, although worded differently, with only a few key areas that agreement is yet to be reached on. To assist the national federations (NFs) that are members of the AOC in complying with their obligations under the AOC policy, a model policy was prepared and sent out to the NFs at the end of 1997 for them to use as a template in developing their own policy.

Each NF is subject to the rules of its IF, and therefore the NF policy must incorporate the key requirements of the IF anti-doping policy to comply with those obligations. Where the IF rules conflict with domestic rules set down by the AOC, ASC or even the NF, the IF rules will prevail.²⁶ The NFs must strictly follow the IF's policy on sanction periods²⁷ and definitions of prohibited substances and methods (and any therapeutic allowances). If the IF stipulates the

²⁰ For more complete details see 'The Circumstances Surrounding the Positive Drug Test on Mr Alex Watson', A Report by the Senate Standing Committee on Environment, Recreation and the Arts, May 1992, Canberra.

²¹ The First Permanent World Conference on Anti-Doping in Sport also took place in 1988 in Ottawa, Canada and the Elements of a Model for a National Anti-Doping Programme was drawn up.

²² First and Second Report of the Senate Standing Committee on Environment, Recreation and the Arts, *Drugs in Sport*, May 1990, Canberra.

Other NOCs, such as the British Olympic Association, also set up similar Drugs Working Parties (BOA 1988).

²³ The Athlete's Commission advises the AOC on all matters relating to the Olympic movement including: the IOC, the International Federations, the National Olympic Committees, the Olympic Museum, Olympic Solidarity, doping, eligibility, Olympic Village facilities, Olympic ceremonies, sport and politics. All members of the Commission must have been competitors in the Australian Team at either or both of the previous two summer or winter Olympic Games.

²⁴ Reference was also had to international discussions that had been taking place throughout this period, such as; The 4th Permanent World Conference on Anti-Doping in Sport, London 1993.

²⁵ The AOC Executive adopted the policy on 20 November 1997, and on 20 March 1998 amended clause 8 to reflect the current position of the IOC on sanctions for class III drugs: alcohol, corticosteroids, cannabinoids, local anaesthetics and beta blockers. These amendments are retrospective to 1 December 1997.

²⁶ H E Judge K Mbye, 'Juridical problems of the IOC Medical Commission', Lausanne, 1997.

²⁷ Cf. *Robertson v Australian Cycling Council Inc*, Waddell CJ, NSW Sup Ct found that the UCI regulations were only binding on the APCC in relation to international events, or where a foreign rider failed a drug test in Australia.

hearing body for the NF to refer matters of dispute to, then this requirement will over-ride the AOC and ASC preference for using the CAS.

During the Olympic Games however, the IOC and its Olympic Charter is the governing body. Accordingly, competitors in the Olympic Games are bound by the IOC Medical Code and, therefore, the substances and methods prohibited by the IOC. That there may be differences between the substances and methods prohibited by the IOC as against the relevant IF is clearly shown by the recent Rebagliati matter at the 1998 Nagano Winter Olympic Games concerning the detected presence of marijuana in a sample provided by the snowboarder.

Strict Liability - AOC Anti-Doping Policy.

1. "Doping" and "Doping Offence".

"Doping" is a defined term under the AOC policy, meaning a positive test result for a prohibited substance or the use of a prohibited method.

The substances that are prohibited are determined on a sport by sport basis by the relevant IF except where:

- (a) the IF does not prohibit substances; or
- (b) during the Olympic Games;

in which case the prohibited substances are those prohibited by the IOC.

The AOC has adopted the policy of strict liability for a positive test result of a prohibited substance, and states that the intention of the athlete is irrelevant in determining whether a doping offence has been committed. This does not mean that liability for the positive test result is 'absolute'. The AOC must prove the presence of a prohibited substance in an athlete's sample, and then a legal presumption of the athlete's guilt arises²⁸. This mirrors the approach of the IOC and CAS because, as Matthieu Reeb, Counsel to CAS, points out; "*if for each case the sports bodies had to prove the intentional nature of an act in order for it to be deemed an offence, the fight against doping would become virtually impossible.*"²⁹

In respect of prohibited methods, the policy defines these in terms of "use" and relies on each IF's definition of prohibited methods. Accordingly, there is no single answer as to whether there is strict liability for using a prohibited method. It must be determined on a sport by sport basis. However, most sports have adopted the IOC definition of prohibited methods, which is in the following terms:

"Pharmaceutical, chemical and physical manipulation

Pharmaceutical, chemical and physical manipulation is the use of substances and of methods which alter, attempt to alter or may reasonably be expected to alter the integrity and validity of urine samples used in doping controls, including, without limitation, catheterisation, urine substitution and or tampering, inhibition of renal excretion such as by probenecid and related compounds and alterations of testosterone and epitestosterone measurements such as epitestosterone application and bromantin administration.

²⁸ TAS 96/156: J Foschi v FINA, 6 October 1997, p40.

²⁹ M Reeb, 'General principles of CAS case law in doping issues', Sport & Law, *IOC Olympic Review*, p67

*The success or failure of the use of a prohibited substance or method is not material. It is sufficient that the said substance or procedure was used or attempted for the infraction to be considered as consummated.*³⁰

As the methods are prohibited according to the rules of the relevant IF, different issues may arise on a case by case approach. For example, in the recent Nick McDonald Crowley matter, the relevant IF was the Federation Internationale des Societes D’Aviron (FISA) – the international rowing federation. In that case, the rower had been administered Probenecid whilst an in patient at the Calvary Hospital in order to promote the efficiency of penicillin to treat a serious infection. Probenecid is a renal excretion retardant and is therefore a prohibited method, as opposed to a prohibited substance. The CAS held that FISA’s strict liability for prohibited methods was subject to an express exception according to FISA’s rules, namely that the prohibition was subject to a rebuttable presumption of voluntary use. McDonald Crowley established to the satisfaction of the CAS that his use of Probenecid was other than voluntary.

Under the AOC policy, the offence of ‘doping’ can be overturned by the CAS, where the athlete demonstrates on the balance of probabilities that exculpatory circumstances exist to challenge the validity of the test results, namely:

- (1) *the sampling or testing procedure was not conducted in accordance with [the IOC Medical Code or the IF regulations];*
 - (2) *the samples which led to the positive test result were not those of the Athlete;*
or
 - (3) *the samples which led to the positive test result were so contaminated as to affect the result of the test;*
- or any combination of these factors.*³¹

There are, however, ‘doping offences’ additional to ‘doping’ itself. These include:

- the refusal to provide a sample for testing;
 - trafficking; or
 - (1) aiding, abetting, counselling or procuring;
 - (2) inducing (whether by threats or promises or otherwise);
 - (3) being in any way, whether directly or indirectly, concerned in, or party to; or
 - (4) conspiring with any other person to effect;
- any of the above doping practices.

The term “trafficking” is defined according to the IOC Medical Code as meaning:

- (a) *manufacturing, extracting, transforming, preparing, storing, expediting, transporting, importing, transiting, offering (whether subject to payment or*

³⁰ IOC Medical Code: Prohibited Classes of Substances and Prohibited Methods, 31 January, 1998.
³¹ AOC Anti-Doping Policy, 20 March 1998, cl. 9.2.

free of charge), distributing, selling, exchanging, brokering, obtaining in any form, prescribing, commercialising, making over, accepting, possessing, holding, buying or acquiring in any manner the products or substances which are prohibited under this policy;

(b) *acting in the above respect, financing or serving as an intermediary for the finance of the latter, provoking in any way the consumption or use of such products or prohibited substances or establishing means of procuring or consuming such substances; or*

(c) *being concerned or involved in methods which are prohibited by this policy;*

other than in the course of the legal exercise of professional medical, pharmaceutical or analogous activities.

2. Sanctions.

Under the AOC policy a person who commits a doping offence is ineligible for membership of or selection in any Australian Olympic Team, or to receive funding from or to hold any position on the AOC. In addition to these sanctions, there must be repayment to the AOC of all of the grants paid to the person by the AOC unless otherwise determined by the CAS.

The AOC has imposed fixed periods for sanctions for doping offences³² but has given CAS the discretion to reduce any sanction (although it cannot overturn the doping offence) where the athlete demonstrates on the balance of probabilities that 'extenuating circumstances' exist. These "extenuating circumstances are expressly limited to those where the athlete:

(1) *did not know or suspect that the relevant substance was prohibited and had no reasonable grounds to know or suspect the substance was prohibited; or*

(2) *did not know that they had taken or been administered the relevant substance, provided they had acted reasonably in all the relevant circumstances.*

This approach accords with the decisions of the CAS as reflected in cases such as Jessica Foschi³³ (a USA swimmer) and Antony Cullwick³⁴ (a New Zealand water polo player), which examined the wording of the swimming IF policy (FINA). The CAS Panel in Foschi stated that; "*if defences of a lower degree of guilt or no fault at all can be proved by an athlete, sports federations may (for legal reasons) have to introduce some flexibility in their sanctions taking into consideration the offender's level of guilt. . . . If a federation wants to allow no defences at all . . . it must express this in a manner which is absolutely crystal clear and unambiguous."*³⁵

An issue that arises from the application of 'extenuating circumstances' is whether the athlete needs to establish either that:

(a) the product containing the prohibited substance was not taken intentionally; or

³² Note, however, that there is a maximum only period of sanction for a first infraction in cases of a positive result for ephedrine, phenylpropanolamine, pseudoephedrine, caffeine, strychnine and related compounds.

³³ TAS 96/156: J Foschi v FINA, 6 October 1997.

³⁴ TAS 96/149: A Cullwick v FINA, 13 March 1997

³⁵ TAS 96/156: J Foschi v FINA, 6 October 1997, p49-50.

- (b) the athlete did not intend to take the prohibited substance^{S Y D N E Y • M E L B O U R N E} that was an element of the product taken.

The answer to this question will have effect of deciding what is “reasonable”³⁶.

For example, is it unreasonable for an athlete, upon their admission into hospital, not to notify hospital staff that they are subject to elite sport anti-doping provisions? Is this any different to treatment by a medical practitioner?³⁷ What of self administered medications, such as herbal preparations³⁸ or health tonics³⁹?

In considering these issues, bear in mind that the standard of care that must be observed by an elite athlete has been found to be “above that of the ordinary man in the street or even the ordinary swimmer [athlete]”.⁴⁰

ASC Exceptional Circumstances

As with the AOC, the ASC prohibits substances and methods according to the rules of each IF. Accordingly, it also has a ‘sport by sport’ prohibition concerning doping methods.

However, in contrast to the AOC, the ASC policy does not apply strict liability in that it provides for exceptions to the finding of a doping offence where; “the person uses the prohibited substance for a therapeutic purpose, or where there are exceptional circumstances.”

Under the ASC policy, “*exceptional circumstances exist if the presence of the prohibited substance is beyond the person’s control. For example:*

- *the person has a natural Testosterone:Epitestosterone ratio above 6:1, or*
- *the person is administered the prohibited substance in hospital without their knowledge.*

Exceptional circumstances do not exist merely because the person:

- (a) *took the prohibited substance inadvertently, or*
- (b) *did not know that the substance was prohibited.”*

The onus is on the athlete to demonstrate the above elements.

It is interesting to note that the ASC imposes fixed sanctions, yet has not given any discretion to enable the reduction of these periods in circumstances similar to those envisaged as “extenuating circumstances” under the AOC policy.

³⁶ The National Sports Disputes Centre found that Harvey Goodman had been “recklessly indifferent” as to the content of a herbal preparation he consumed and found that he had not satisfied the requirements of the Australian Weightlifting Federation. (NSDC: AOC & AWF v H Goodman 17 May 1998, p8).

³⁷ As in the case of Richard Upton.

³⁸ As in the case of Harvey Goodman.

³⁹ As in the case of Robbie O’Davis.

⁴⁰ CAS A 7/98: AOC v Richard Upton, 27 April 1998, p12.

Therapeutic Use.

As stated above, in the ASC policy there is an express recognition of therapeutic use of otherwise prohibited substances. The express conditions concerning this use are:

- (a) *the person had written approval prior to testing from a recognised medical authority for the therapeutic use of the prohibited substance;*
- (b) *the level of the prohibited substance in the sample is consistent with the approved therapeutic use, and*
- (c) *the therapeutic use of the prohibited substance is not inconsistent with the rules of the relevant IF.*

As can be seen, this policy permits therapeutic use of otherwise prohibited substances if this is not inconsistent with the relevant IF rule.

This approach contrasts with that of the AOC that does not include such an express provision in its policy. This is not to say that the AOC does not recognise therapeutic use, for the interpretation of the AOC is that it is only the substances prohibited by a relevant IF which are prohibited. If an IF permits therapeutic use of a particular substance by an athlete, then that substance is not prohibited by the IF for that athlete assuming the use is consistent with any conditions attaching to the IF permission. Accordingly, and in such circumstances, there would be no doping offence by the athlete under the AOC policy.

Where a specific procedure or limitation is imposed by the IF, the Australian NF must include these in its policy. The International Tennis Federation (ITF), for example, stipulates a specific procedure for determining applications for exemption, which must be followed by Tennis Australia. This involves appointing a panel of two medical experts, who will also be available to provide advice and counselling as requested.

As a further example of express therapeutic use provisions, the Australian Football League Anti Doping Code contains the following provision:

- 7.1 *Where a Player through his Club has received authorisation from the AFL Medical Commissioner to use a substance otherwise prohibited under this Code then, solely for the Player concerned and subject to the conditions attaching to the authorisation, the substance concerned will be deemed not to be prohibited under this Code. The authorisation must be in force before the Player concerned provides a sample for testing.*
- 7.2 *All applications for therapeutic use of an otherwise prohibited substance must be made on behalf of a Player solely by his Club Medical Officer to the AFL Medical Commissioner. The application must include a description of the Player's medical condition, length of treatment and verification there is no alternative medication that does not contain prohibited substances. The AFL Medical Commissioner may require the provision of additional information and may also require the Player to undergo a medical examination by the AFL Medical Commissioner or his nominee.*

7.3 *The AFL Medical Commissioner^{S Y D N E Y} will determine the application according to the following criteria:*

- (1) *the Player would experience significant impairment of his health if the prohibited substance were withheld;*
- (2) *no enhancement of the Player's normal level of performance would result from the administration of the prohibited substance as medically prescribed;*
- (3) *the Player would not be denied the prohibited substance if he were not competing in an AFL Competition;*
- (4) *no permitted alternative medication can be substituted for the prohibited substance; and*
- (5) *no authorisation may be given in respect of anabolic steroids.*

7.4 *The AFL Medical Commissioner may give authorisation subject to this Code but otherwise upon such conditions as he deems appropriate in his absolute discretion.*

As can be seen, this provision does not permit retrospective therapeutic permission after a positive test result and also permits the AFL Medical Commissioner to give permission subject to conditions. These conditions will normally relate to dosage of the substance and the period of time the substance can be used or administered.

On this point, it is also worthwhile to note that not all substances are prohibited per se. The IOC and the IFs conditionally prohibit a number of substances - for example, FISA prohibits 'salbutamol' as both a stimulant and beta 2 agonist. A footnote to this particular drug states that it is "*permitted by inhaler only and must be declared in writing, prior to the competition, to the relevant medical authority.*"⁴¹

'Doping' Definitions under Different Sports.

Prior to its most recent policy, the AOC prohibited those substances and methods described in the IOC List. Whilst the IOC List has been adopted by most IFs as describing the prohibited classes of substances and methods in their respective sports, there are a number of sports which have used this list a base document only and either prohibit additional drugs or permit the use of drugs which are on the IOC List.

As there are thirty-two NFs who are members of the AOC, and who each control in Australia a sport on the Olympic programme, there existed the strong possibility that an athlete could use a substance prohibited by the IOC but that its use would not be prohibited in their sport - or vice versa.

It was for this reason that the AOC and ASC moved to defining prohibited classes of substances, drugs and methods on a sport by sport basis.

The ASC's definition of 'prohibited substance'⁴² is that stipulated by the IF. This definition does not recognise the IOC's position during the Olympic Games period, as required by the IOC Charter. "*The anti-doping policy of . . . the IOC*" (the IOC Medical Code) is only referred to under this definition where neither the IF, or "*a relevant sporting organisation [the*

⁴¹ Readers are referred to the attached IOC List current as at 31 January 1998.

⁴² The same definition is used for 'prohibited methods'.

AOC, Australian Commonwealth Games Association⁴³, Australian Paralympic Committee or any organisation recognised, assisted or funded by the ASC and includes their member and affiliated organisations] do not have an anti-doping policy.”

For Australian domestic sports, the Australian Football League has used the IOC list as a basis only for prohibiting substances and has published its own list. In contrast, the NRL has adopted the IOC List with the named exception of pseudoephedrine. The difference in these approaches may be minor, given that both policies prohibit the same classes of substances. However, it should also be noted that the IOC List is updated effective 31 January each year. In the Alastair Lynch matter involving the AFL, counsel for Lynch made much of the fact that the AFL list had not been updated to reflect the addition of DHEA to the examples of androgenic anabolic steroids in the IOC List as from 31 January 1997.

Procedure

1. General

Most policies including those of the ASC, NRL and AFL require a hearing to be convened. This is the traditional approach adopted by most sports federations. There is also the discretion to by-pass the hearing stage where the person attempts to avoid service or where the offence is admitted. This normally can only be done where the period of sanction is fixed.

The benefits of the use of an independent decision-making body are well recognised. The AOC refers its hearings to CAS, both the NRL and AFL use independent tribunals. The ASC also refers their hearings to the CAS, but allows the ASC Executive Director to await the outcome of a hearing on behalf of a sporting organisation (such as the AOC or the NF) and may then decide whether to refer the matter to a hearing⁴⁴. The AOC Secretary-General does not have that discretion. The ASC recommends to the non-Olympic NFs to use the National Sports Dispute Centre.

2. AOC Policy

Upon advice to the AOC of a positive test result, or if the AOC Secretary-General believes another doping offence to have occurred, the Secretary-General is required to send an infraction notice to the athlete or person concerned. This notice must:

- (1) *be in writing and be delivered to the person's address as notified to the AOC by the Member Body concerned;*
- (2) *set out the nature and particulars of the alleged Doping Offence;*
- (3) *set out the sanction that may be imposed under this policy should the Doping Offence be established or deemed to be established; and*
- (4) *state that:*
 - (a) *the person may, by notice in writing to be received by the Secretary-General within 14 days of the date of the infraction notice, require the AOC to refer the matter to the [CAS] for a hearing;*

⁴³ The ACGA does not have an anti-doping policy, and leaves the anti-doping jurisdiction to the sports.
⁴⁴ ASC Anti-Doping Policy, April 1998, cl. 4.3.

- (b) *in the absence of such notice to the Secretary-General, the person or person will be deemed to have committed the Doping Offence and will be subject to sanction in accordance with clause 8; or*
- (c) *the person may admit the Doping Offence.*⁴⁵

As can be seen, there is no requirement for personal service of the notice, but the AOC's practice is to have the person sign for its receipt as an acknowledgment of delivery. However, the policy allows for flexibility of advising the person of the contents of the notice and of the alleged doping offence. There is only a hearing before the CAS if the person affected so requests. If there is no such request, or if the person admits the offence, the offence is deemed to have been committed and the applicable sanctions are automatically imposed.

Both the person concerned and the AOC have the right to appeal to the Appeals Division of the CAS against either or both of the finding and sanction of the Ordinary Division of the CAS. There is no other right of appeal and the decision of CAS is final and binding. Any hearing before the CAS is conducted according to the CAS rules, known as the Code of Sports-Related Arbitration.

Conclusion

Anti Doping Policies have moved a considerable distance in recent times. There are no doubt many factors which have caused this to happen – including social, moral and legal factors. As readers will be aware, the issue of drugs in sport is receiving considerable media publicity. This undoubtedly reflects a greater public interest and awareness of this issue.

Whilst there have been differences of opinion between the AOC and ASC, as to how to promote and prosecute the fight against the use of drugs in sport, this has not affected the key underlying resolution of either of these bodies to stop this practice.

A major benefit of the recent ^{review} ~~revue~~ of the anti doping policies of all Australian sports and of the publicity that has surrounded doping cases is that the level and extent of knowledge on this subject in the Australian sporting community has greatly increased.

With press reports indicating an increase in drug use in sport in the lead up to the 2000 Olympic Games, it can be confidently expected that anti doping policies will continue to be refined and amended to incorporate the lessons as they are being learned and to ensure a consistent approach to defining doping offences and the imposition of sanctions.

⁴⁵

AOC Anti-Doping Policy, 20 March 1998, cl. 7.2.

Acknowledgement.

For further information, readers are directed to the following sources:

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We gratefully acknowledge these sources for much of the factual history recited in this paper.