AOC ATHLETES' AGREEMENT FOR SYDNEY 2000: THE IMPLICATIONS FOR THE ATHLETES

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I. INTRODUCTION

The draft copy of the *Australian Olympic Committee Inc (AOC) 2000 Australian Olympic Team Membership Agreement - Athletes* (the *Agreement*)[1] is a comprehensive agreement running to 40 pages (inclusive of schedules). It contains 25 clauses, many with a number of sub paragraphs, and six schedules. The front page states:

> Your selection to participate in the 2000 Olympic Games as a member of the 2000 Australian Olympic Team is conditional on you entering into this agreement and observing its terms.
>
> You should carefully read this document so as to understand it and the consequences flowing from any breach of its terms.

Athletes indeed should read the *Agreement* carefully as it places a number of obligations on athletes, affects their civil liberties and restricts their freedom to engage in media and sponsorship contracts.[2]

This paper examines the 'legality' of the *Agreement's* clauses dealing with (1) media, sponsorship, marketing and promotions, (2) anti-doping and strict liability, and (3) human immunodeficiency virus (HIV) disclosure and testing. The examination of the media, sponsorship, marketing and promotions will take

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1 Previous Olympics have included athletes' agreements by the AOC which have a number of restrictive clauses and 'onerous' obligations. However, this agreement goes further, especially in regards to media restrictions and HIV testing and disclosure.

2 Clause 1 of the *Agreement* reiterates that participation in the Olympics is precondition on the athlete signing the *Agreement* "and observing its terms and conditions". Clause 24 requires that an athlete who is a minor (under the age of 18 years) have their parents or guardians sign the acknowledgement form provided in Sch 6 to the *Agreement*.

place within a restraint of trade framework. In respect of the anti-doping discussion, the focus will be on strict liability and the defence of honest and reasonable mistake. The examination of the HIV requirements will centre on the need for proper medical procedures instead of mandatory disclosure of HIV; although it should be noted that any athlete barred from competing in the Olympic Games for contravening the anti-doping and HIV requirements may have recourse to a restraint of trade cause of action.[3] Thus the restraint of trade doctrine will be briefly touched on in the discussion on the anti-doping and HIV regimes. Before commencing the legal analysis, the paper will present a very brief overview of the *Agreement's* clauses.

II. THE CONTENT OF THE AGREEMENT

A. Conduct Clauses

Conduct provisions relate to matters such as performance,[4] doping, health and injuries. Clause 7 of the *Agreement* proscribes many of the conduct obligations for the athletes:

> 7. As a member of the [Australian] Team, I agree to comply with the Olympic Charter and this agreement and, in particular, I will:
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> 1. respect the spirit of fair play and non-violence and behave accordingly on the sporting field;
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> 2. conduct myself so as to obtain and maintain my best possible fitness and health to perform to the best of my ability;
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> 4. conduct myself in a proper manner so as to not bring myself, the AOC or the Team into public disrepute or censure and to the absolute satisfaction of the Chef de Mission...

Clause 4 obliges all athletes participating in the 2000 Olympic Games to comply with the Olympic Charter. Clause 8 relates to "Doping Requirements and Use of Drugs", cl 9 with medical requirements including HIV disclosure and testing, and cl 15 concerns obligations involved in wearing the team uniform. In

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3 Athletes may also seek to attack the legality of the *Agreement* on the grounds of common law and statutory unconscionability. This issue is very complex and deserves a separate paper. For a thorough discussion of the nature of common law unconscionability in Australia, see *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. Statutory unconscionability may also be invoked. Refer to s 51AC of the *Trade Practices Act* 1974 (Cth) and ss 7 and 9 of the *Contracts Review Act* 1980 (NSW). It is submitted that both Acts are applicable, as the *Agreement* by its own admission is not an employment contract (cl 18). It is also submitted that contrary to the second part of cl 18 ("I [the athlete], acknowledge that I am not required to provide services to the AOC and that any services provided by me under this agreement are provided to the Team and my fellow Team members as a whole."), athletes and the AOC are providing services to each other, thus provoking the jurisdiction of both Acts.

4 One author classifies performance provisions as 'playing clauses' rather than conduct clauses. Refer to M McDonagh, "Restrictive Provisions in Player Agreements" (1991) 4 *Australian Labour Law* 126. This paper amalgamates the playing clauses with conduct clauses as they are interconnected. To be at top fitness to compete, an athlete will need to follow a compatible lifestyle. McDonagh acknowledges that "many issues concerning player conduct are closely related to the playing of the sport".

accordance with the Olympic Charter, cl 11 prohibits the athlete from being involved in "any kind of demonstration or political, religious or racial propaganda in the Olympic areas" or on sportswear, accessories or any article of clothing or equipment "whatsoever worn or used by" the athlete. This does not prevent the identity of the manufacturer appearing on the relevant equipment or clothing (in accordance with published criteria) or "the colours and graphics of the brand of the Team as determined by the AOC".

B. Media, Sponsorship, Marketing and Promotional Clauses

The *Agreement* places restrictions on the athlete's ability to engage in media, sponsorship, marketing and promotional activities. This much is recognised by cl 19, which states:

> I [the athlete] acknowledge that this agreement restricts my freedom to exploit my likeness, name and performance at the Games and I agree such restraints are:
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> (1) necessary and reasonable for the purpose of:
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> (a) funding the preparation, participation and reward of potential and actual members of the Team;
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> (b) protecting and promoting the IOC [International Olympic Committee], the Olympic Movement, the AOC and the Team; and
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> (c) the development and participation of competitors in future Olympic Games;
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> and
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> operate only for a limited period of time and therefore do not substantially reduce my said freedom.[5]

Clause 10 requires athletes to "comply with the media guidelines issued from time to time by the Chef de Mission". The guidelines currently in force are contained in Sch 5 to the *Agreement*. The guidelines prescribe that on Olympic venues, athletes are restricted in their freedom to be interviewed by media outlets other than the Seven Network and ABC Radio and Sydney radio station 2UE. These three outlets are known as "rights holders"[6] Only rights holders may interview athletes on Olympic venues. All interviews with non-rights holders must be outside Olympic venues.[7]

Clause 12 places restrictions on athletes' freedom to obtain sponsorships. There are restrictions in regards to sponsorship or advertising that relate to membership or performance at the 2000 Olympic Games or any previous

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5 Unreasonable restraint of trade is examined below.

6 *Agreement*, Sch 5, 2000 Australia Olympic Team Media Guidelines, para 8: "The IOC has granted exclusive Australian television rights to the Seven Network and exclusive Australian radio rights to 2UE and ABC. These organisations are known as 'rights holders'."

7 *Ibid*, para 12: "It is anticipated that, as in the past, the non-rights holders will only be able to broadcast limited Olympic material as part of their regularly scheduled daily news programmes under the News Access Rules issued by the IOC." Pursuant to para 15, "representatives of non-rights holders may attend [Australian] Team media conferences on condition that they cannot have cameras, tape recorders, high frequency micro transmitters or any other form of recording or transmission of images or sound and also do not interview Team members during the period commencing 30 minutes before and concluding one hour after those conferences".

Olympics, and utilisation of the Olympic motto, the Olympic anthem or the words "Olympic", "Olympiad", "Summer Games", "Gold", "Silver" or "Bronze" or any combination of these words.[8]

Likewise, the *Agreement* places obligations and restrictions on the athlete's marketing and promotional activities. For example, cl 13.2(2) obliges the athlete not to:

> appear or participate in, or permit my likeness or name to be used for any fundraising activities for or on behalf of or purportedly for and on behalf of the AOC, the Team or members of the AOC or the Team without the prior written consent of the AOC.

C. Litigation and Dispute Resolution Clauses

The *Agreement* restricts legal action by the athlete. Clause 17(2) states:

> I [the athlete] promise that I will not commence any legal proceeding against any Assistant in respect of his or her acts or omissions to act in connection with the administration, management and/or operation of the Team and Australia's participation in the Games. I expressly agree that my promise in this clause 17.2 extends to cover all and any loss, damage or injury of any kind I may suffer whether arising directly or indirectly from any act, neglect or fault (whether negligent or otherwise) on the part of the Assistants or any of them in connection with the administration, management and/or operation of the Team and/or Australia's participation in the Games.[9]

The *Agreement* requires the athlete to "irrevocably agree" that the AOC and the "Olympic Movement in Australia" may commence injunctive proceedings to prevent the athlete suing Assistant(s).[10] Further the athlete must "irrevocably agree" that the AOC and the "Olympic Movement in Australia" may seek a permanent injunction requiring the athlete "to indemnify and keep indemnified the Assistant or Assistants" in accordance with the athlete's promise under the *Agreement*.[11]

Under cl 20, "the Secretary-General of the AOC or his nominee" will be the athlete's agent and attorney in legal action or other actions against persons or bodies who wrongly use the athlete's "likeness, name or performance at the Games". The AOC will indemnify the athlete "against all costs, expenses and any judgment or damages awarded against...[the athlete] arising out of any such proceedings, suits or actions".

Pursuant to cl 21, the athlete agrees to the exclusive jurisdiction of the Court of Arbitration (CAS) in disputes over team selection, the *Agreement* or any matter arising in relation to it. The athlete agrees that the decision of CAS is final and binding on the parties and there is no liberty to commence proceedings

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8 Also, athletes' sponsorships cannot contravene the *Olympic Insignia Protection Act* 1987 (Cth) or the *Sydney 2000 Games (Indicia & Images) Protection Act* 1996 (Cth).

9 *Agreement*, Sch 3, provides insurance coverage to the athlete for a variety of losses and harms including "injury assistance benefit" of "a maximum benefit of $100 per day" (total benefit paid must not exceed $5000). An interesting provision is a maximum benefit of $500 000 for kidnap and ransom.

10 *Agreement*, cl 17.5(1).

11 *Ibid*, cl 17.5(2).

in any other court or tribunal. The CAS is to "determine any matter referred to it according to the laws applicable in the State of New South Wales".[12]

D. Rewards, Breaches and Sanctions Clauses

Clause 6 provides for the athlete to receive a number of benefits, free of charge, as described in Sch 3. These benefits include, inter alia: one off payment of no more than $3000 (if the athlete has not received payments either from the Fosters' Sports Foundation during 2000, under the AOC's Medal Incentive Scheme or a State Government grant in excess of $3000 for his or her preparation for the 2000 Olympic Games); daily allowance, medical and other health services and insurance cover.

Clause 14 deals with financial rewards for winning an Olympic medal under the "Olympic Dream Medal Reward Scheme". These include $15 000 for gold, $7500 for silver and $5000 for bronze. The amounts may be increased if a sponsor or other official supporter of the "Olympic Dream Medal Reward Scheme" can be found. If so the athlete agrees to the use by the sponsor or official supporter of their "likeness, name and performance at the Games". Restrictions and conditions are placed on athletes receiving any other medal reward or gift not part of the "Olympic Dream Medal Reward Scheme". The athlete also acknowledges "that the AOC has negotiated with Australia Post to pay each Australian gold medallist at the Games the sum of $20 000 for the right to produce a stamp featuring such gold medallist". If the event is a team sport, the stamp will feature the whole team and the $20 000 "will be divided equally between the team members". The athlete's obligation under cl 14 ceases on 31 December 2000.[13]

Breaches of obligations in cl 7 and other parts of the *Agreement* carry a number of possible sanctions including dismissal from the Olympic Games. Clause 16.2 states:

> I agree that, should I breach this agreement, the AOC or the Chef de Mission may in their absolute discretion:
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> 1) terminate my membership of the Team;
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> 2) require me to leave the Games;
>
> 3) exclude me from competition; or
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> 4) cancel or impound my Olympic identity card

Clause 16.2 does not provide for removal of a medal won prior to being excluded from the Games and/or Team. By contrast, cl 16.1 does so provide in the event that the IOC Executive Board withdraws the athlete's accreditation for infringement of the Olympic Charter.

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12 *Ibid*, cl 22. Clause 22 also states that the *Agreement* is governed by the laws applicable in New South Wales and "[s]hould any provision of the agreement or the application thereof be held invalid or unenforceable then the remainder of this agreement and the application thereof will not be affected and will continue valid and enforceable to the fullest extent permitted by the law or equity".

13 *Ibid*, cl 14.6.

E. Accreditation and Operative Clauses

Under cl 5 the athlete agrees that "the AOC is solely responsible for the entry and accreditation of participants" of Australian athletes at the 2000 Olympic Games and the *Agreement* takes precedence over any other agreement the athlete may have.

Clause 3 of the *Agreement* states: "[t]his agreement will commence upon the latter of: (1) the receipt by the Director of Sport of the AOC...of this agreement signed by me; and (2) my selection as a member of the Team". Team selection for most sports will not take place until the early months of 2000. Thus most clauses are operative for less than 12 months. Some clauses cease to operate midnight on 1 October 2000, "the day of the Closing Ceremony of the Games or such later date as [the athletes] finally depart the Olympic Village", some on 31 October 2000, some on 31 December 2000 and others indefinitely.[14]

III. RESTRAINT OF TRADE AND THE MEDIA, SPONSORSHIP, MARKETING AND PROMOTION CLAUSES

A. General Principles of Restraint of Trade

Any restrictions on the athletes' freedom to exploit their skills and abilities for economic reward brings into relevance the common law doctrine of restraint of trade. The doctrine seeks to protect the right of individuals to work for economic reward. The general approach of Courts since *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*[15] has been that contracts to restrain a person's liberty of action in carrying on his or her trade, business, occupation or profession and all restraints of trade of themselves are contrary to public policy and therefore void, unless it is (1) reasonably necessary to protect the interests of the persons in whose favour it is imposed; (2) not unreasonable as regards the person restrained; and (3) not unreasonably injurious to the public.[16]

The doctrine of the common law that invalidates restraints of trade is not limited to contractual provisions, and the rules as to restraint of trade apply to all restraints, however imposed, and whether they are voluntary or involuntary.[17] Restraints imposed by the rules or practices of professional or other bodies controlling particular activities fall within the doctrine.[18] The restraint of trade cases concerning athletes treat as irrelevant, for the purposes of the doctrine, that

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14 *Agreement*, cl 23. Clause 23 deals with the continuing effect of clauses in respect to any termination of the *Agreement*.

15 (1894) AC 535.

16 For discussion and summaries on the issue in sport refer to *Adamson v New South Wales Rugby League Ltd (1990)* 27 FCR 535 (the *League Draft Trial Case*); *Adamson v New South Wales Rugby League Ltd* (1991) 103 ALR 319 (the *League Draft Appeal Case*); AN Wise and BS Meyer, *International Sports Law and Business (Vol 2)*, Kluwer Law International, (1997) pp 1564-92; and A Buti, "Salary Caps in Professional Team Sports: an Unreasonable Restraint of Trade" (1999), 14(2) *Journal of Contract Law* 130.

17 *Buckley v Tutty* (1971) 125 CLR 353.

18 *Eastham v Newcastle United Football Club Limited* [1964] Ch 413; *Nagle v Feilden* [1966] 2 QB 633; *Greig v Insole* [1978] 3 All ER 449; and *League Draft Appeal* case, note 16 *supra*.

the athlete is playing the sport only on a part-time basis and is engaged in another occupation for reward.[19]

Contracts in restraint of trade are prima facie void. The onus is on the party supporting the contract to show that the restraint goes no further than is reasonably necessary to protect the interest of the convenantee.[20] Further, as the *League Draft Appeal Case* illustrates, the covenantee may need to prove that there does not exist any less restrictive alternative. If this onus is discharged, the onus of showing that the restraint is nevertheless injurious to the public is on the party attacking the contract.[21] The Court must decide, as a matter of law, whether in the circumstances the restraint of trade is reasonable.[22]

The time at which a covenant is to be assessed for reasonableness, both as between the parties and in the public interest, is at the time it was entered into.[23] In a restraint of trade challenge to disciplinary rules, the court's jurisdiction can be invoked on the basis of the threat to someone's ability to trade; actual disciplinary action is not needed. Evidence on what the covenantee or other persons think is reasonably necessary is not relevant to the validity of the covenant,[24] nor are subsequent events.[25]

In deciding on the reasonableness of a restraint, the period of restraint is an important consideration.[26] Any penalty which would effectively end an athlete's career have been viewed negatively by the Courts.[27] Concern has also been directed at rules which are rigid and provide for arbitrary exercise of control over athletes.[28]

In deciding whether a restraint is unreasonable, the inquiry into the effects on the covenantor or even third parties is not restricted to economic effects. Non-economic effects, such as effects on personal lives, should be discussed.[29] In the *League Draft Appeal Case*, Wilcox J considered the effect of the restrictive covenant on personal autonomy. He stated that:

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19 *League Draft Appeal Case*, note 16 *supra* at 364; and *Hughes v Western Australia Cricket Association Incorporation* (1986) 60 ALR 660.

20 *Mason v Provident Clothing and Supply Company Limited* [1913] AC 724 at 733; *Herbert Morris Limited v Saxelby* [1916] AC 688 at 700, 707; and *Attwood v Lamont* [1920] 3 KB 571 at 587.

21 *Herbert Morris Limited v Saxelby*, note 20 *supra* at 700, 708.

22 *Lindner v Murdock's Garage* (1950) 83 628 at 645.

23 *Ibid* at 653; *Amoco Australia Pty Limited v Rocca Bros Motor Engineering Company Pty Limited* (1973) 133 CLR 288 at 318; and *Bridge v Deacons* [1984] AC 705 at 718.

24 *League Draft Appeal* case, note 16 *supra* at 356.

25 *Townsend v Jarman* [1900] 2 Ch 698 at 203; and *Dowden and Pook Limited v Pox* [1904] 1 KB 45 at 55.

26 *Halsbury's Laws of England*, Butterworths (4th ed, 1974) Vol 47, para 35 and cases therein.

27 *Greig v Insole*, note 18 *supra* at 504. Also see S and L Owen-Conway, "Sports and Restraint of Trade" (1989) 5 *Australian Bar Review* 208 at 223.

28 *Hall v VFL and Clark* [1982] VR 64; and *Foschini v VFL and South Melbourne Football Club Ltd* (Unreported decision, SC Vic, 15 March 1983).

29 *League Draft Appeal Case*, note 16 *supra* at 353-4 per Justice Wilcox.

> The internal draft is contrary to the common law principle that people are entitled to practice their trade as and where they wish, exercising and developing their skills as they see best and making their own decisions as to their employment and lifestyle. Instead, the draft imposes upon a player a requirement which limits his [or her] freedom to select his [or her] employer, coach and team mates ...the more fundamental question is, however, in a free society, can anyone justify a regime which requires a player to submit such intensely personal decisions to determination of others?[30]

So in viewing the *Agreement*, its effect on the civil liberties of the athletes needs to be considered. The courts must also consider whether the restraint acts against the public interest.[31] The courts in the sport cases have emphasised various considerations of public interest or policy in assessing athlete restraints, such as depriving an athlete from earning a living in whatever lawful way he or she chooses and unreasonably depriving the public of the 'services' and pleasure of an athlete's performance and employment.[32] Finally, it should be noted that consent to the *Agreement* such as by an athlete's signature, does not eliminate an action for unreasonable restraint of trade if such a restraint is contrary to public policy and unlawful.

B. The Media, Sponsorship, Marketing and Promotion Clauses

The limitation the media clause places on an athlete's capacity to secure media contracts is recognised in the *Agreement*. Clause 10 states: "I [the athlete] acknowledge that the Olympic Charter contains restrictions on my ability to act as a representative of the media". The attractiveness of non-high profile athletes to non-right media holders is reduced as athletes must agree only to interviews by right holders on Olympic venues. High profile athletes, such as Australian Olympic swimming gold medallist Susie O'Neill remain attractive due to 'star quality' and the business attitude "if we have her they don't".[33]

Presumably, O'Neill and other athletes in a similar position (that is, contract with a non-rights media holder) can agree not to give interviews to the right holders. Paragraph 5 of Sch 5 states: "each Team member is at liberty to accept or decline to be interviewed by the media". It would not be unreasonable to assume this would allow athletes to decline an interview with sections of the media (that is, those outlets the athlete does not have a contract with). However, does para 5 also allow an athlete to boycott a "Team media conference"? Schedule 5 or any other part of the *Agreement* is silent on the issue. It is submitted that it is highly unlikely that para 5 of Sch 5 would allow athletes liberty to decline participation in a "Team media conference". Media conferences have been an integral part of sporting competitions in Australia and internationally for many years (especially post the event). They are different to a one on one interview with the media.

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30 *Ibid* at 355.

31 *Beetson v Humphries*, (Unreported decision, SC NSW, Hunt J, 30 May 1980).

32 *Buckley v Tutty*, above note 17 at 380. Also refer to S and L Owen-Conway, note 27 *supra* at 223.

33 Susie O'Neill has a media contract with the Nine Network, a non-right holder.

In respect to media, sponsorship and marketing restrictions, Hunt J in *Beetson v Humphries*[34] upheld the reasonableness of restraints on media, sponsorship and marketing arrangements by athletes, where the restraints went no further than reasonably necessary to protect the legitimate concerns or interests of the relevant rugby league organisation:

> The plaintiffs claim that their short professional life and lack of superannuation benefits should entitle them to reap those benefits [from media, sponsorship and marketing activities] without any restrictions which is imposed solely to protect the League's legitimate interests. Any restraint upon their ability to reap those benefits exceeds what is necessary for the League's protection, they say. I do not accept that claim. The existence of those opportunities depends upon the continued health and existence of their source, which is the game itself; it is, in my view, reasonable to ensure that the enjoyment of those opportunities does not affect that source. If the restraint does not go beyond what is reasonably necessary to protect the League's interests, then it does not, in my opinion, impose a greater degree of restraint in relation to these other opportunities than is reasonably necessary.[35]

As previously noted the onus rests with the AOC to show the restraint goes no further than is reasonably necessary to protect their interests. Arguably the restrictions on media, sponsorship, marketing and promotional agreements and activities are reasonably necessary to protect the interests of the AOC. Broadcasting and sponsorship dollars provide a significant proportion of the Olympic Games revenue. It is unlikely that the AOC would be able to attract sufficient revenue from television and radio broadcasting without 'exclusive access rights' to the right holders.[36] Of course whether the commercial necessity for 'exclusive access rights' should go as far as prohibiting athletes from being interviewed on Olympic venues by non-right media holders is an interesting question to ponder. The athletes may argue the exclusivity should be confined to the events themselves, not to interviews. The athletes might also seek to argue that it is in the public interest to allow them to maximise their commercial opportunities during their short careers (with the Olympic Games period providing the most opportunities). This will economically assist athletes, which may encourage younger people to become involved in sport and lead a healthy lifestyle.[37]

The AOC may also seek to bolster their case on reasonableness by arguing that many of the obligations and restrictions imposed on the athletes by the *Agreement* go no further than required to comply with the Olympic Charter and the rules of the IOC. Of course this begs the question: are the Olympic Charter and rules of the IOC reasonable? Also, the AOC may argue that in regards to the media, sponsorship, marketing and promotional restrictions, the period of restraint is 'minimal' or limited.[38] As noted above, the briefer the period of restraint the more likely it will be consider reasonable.

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34 Note 31 *supra*.

35 *Ibid* at 35 of the printed decision.

36 Likewise, similar justification by the AOC will probably be argued in regards to sponsorship and marketing restrictions.

37 Note 4 *supra* at 135-6.

38 For example, the media restrictions relate to the period of the 2000 Olympic Games. The relevant sponsorship, marketing and promotional restrictions operate for less than 12 months.

Both the athletes and the AOC have merit to their argument. However, it is submitted that the commercial significance of media and sponsorship revenue to the profitability of the Olympic Games will give the AOC the advantage in any restraint of trade challenge to the clauses contained under this category.

IV. STRICT LIABILITY AND ANTI-DOPING REGIME

It should be noted that the anti-doping regime provisions in the *Agreement* do not in themselves add to the existing obligations all elite athletes have to meet. Although there are some differences between the anti-doping regimes of the various National and International Sports Federations, National Olympic Committees and the IOC (which are not discussed here) the doping requirements and what constitutes an offence are basically the same for all Olympic sports. In fact, Sch 3 to the *Agreement* obliges all Australian National Sports Federations whose sport is in the Olympics to comply with the AOC's anti-doping regime (which is in conformity with the IOC's anti-doping regime). So, the *Agreement* does not add more onerous obligations on the athletes but arguably the *Agreement* potentially increases the ramifications flowing from a doping offence. Section 8.3 of the *Agreement* states:

> In the event that I commit a doping offence (as defined in the AOC Anti-Doping Policy)...
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> between the time I am accredited as a participant in the Games and midnight on 1 October 2000 (being the conclusion of the day of the Closing Ceremony of the Games) and in respect of which I am found to have breached the IOC Medical Code and also in respect of which a suspension of two years is imposed on me under the AOC's Anti-Doping Policy, I will repay to:
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> (a) the AOC all grants and other money paid to me by the AOC associated or in connection with my participation in the Games including, but not limited to the Medal Incentive Scheme Payments, the Olympic Dream Medal Reward Scheme and payments under this agreement; and
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> (b) Carlton and United Breweries all (sic) grants and other money paid by the "Fosters's Sports Foundation".[39]
>
> ...I acknowledge that this obligation is in addition to my obligations and the sanctions which may be imposed on me under the AOC's Anti-Doping Policy and reflects the shame which I will cause to the AOC and the Team arising out of my breach

The ramifications of a doping offence may be very significant, affecting the reputation and income capacity of a guilty athlete (in addition to repaying any grants or other money received from the AOC and/or Foster's Sports Foundation). This is why the strict liability aspect of the AOC's anti-doping regime, incorporated in the *Agreement* by cl 8 and Sch 4 should present major

39 I wonder if the irony of Carlton and United Breweries being included in a provision on anti-doping is appreciated by administrators and athletes alike?

concerns for the athletes.[40] Even though the strict liability nature of doping offences in sport has already generated considerable discussion,[41] it requires further consideration as the *Agreement* imposes very serious sanctions and penalties on athletes 'committing' a doping offence.

Generally, a doping offence occurs where a urinalysis records a positive test for a banned substance. It is not relevant how or why the substance was ingested.[42] Therefore "an athlete is denied a defence of moral innocence and is liable to mandatory exclusion from the sport".[43] It is therefore possible that if a banned substance enters an athlete's body without his or her knowledge, for example by means of ingesting a beverage 'spiked' by another, then that athlete may be subjected to the same sanctions as one who voluntarily or deliberately ingests a banned substance with the specific intention of improving performance. It is not too fanciful that spiking of drinks could take place at a training camp, the Olympic Village or some official function. When the rewards for success can be substantial, one should not underestimate what human beings may do to remove a rival from the scene.[44] Allegations of 'spiking' have been made in the past by athletes,[45] and on at least one occasion, evidence has been forthcoming to substantiate the 'spiking' charge.[46]

The practice of imposing sanctions on the basis of strict or absolute liability for doping offences is, I submit, wrong in policy and possibly in law. In *Abbott v Sullivan*[47] Denning LJ (as he then was) stated:

> [bodies] which exercise a monopoly in an important sphere of human activity, with the power of depriving a man of his livelihood, must act in accordance with the elementary rules of justice.

The Supreme Court of Western Australia, in *Maynard v Racing Penalties Appeal Tribunal of Western Australia*[48] held that these 'elementary rules of

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40 Under para 1 of the AOC's Anti-Doping Policy, "Doping" means: "(a) the presence in a person's body tissue or fluids of substances belonging to classes of pharmacological agents; or (b) the use of the various methods; prohibited by a relevant *IF* [International Federation], or if the *IF* does not prohibit substances and/or methods or during the Olympic Games, then substances and methods described in Chapter 11 of the (IOC's) *Medical Code*". An example of an IF strict liability offence is Rule 55(2) of IAAF (International Amateur Athletic Federation): "[t]he offence of doping take place when either (i) a prohibited substance is found to be present within an athlete's body tissue or fluids".

41 For example, for a very recent discussion on strict liability offences in sport, refer to P McCutcheon, "Sports Discipline, Natural Justice and Strict Liability" (1999) 28 *Anglo-American Law Review* 37.

42 Note 40 *supra*.

43 Note 41 *supra* at 37.

44 Gambling (whether legal or illegal) on the outcome of an Olympic event, may invite a number of actions to ensure the 'preferred result'.

45 Alex Watson, a modern pentathlete, was disqualified from the Seoul Olympics for reason that test results showed a level of caffeine in his urine in excess of the allowable level. He argued that his drinks had been tampered with. See "Watson: a Victim", *The Age*, 26 September, 1988.

46 In 1994, weightlifter Ron Laycock, at a hearing convened to determine what penalty should attach to his alleged steroid use, argued that his drink had been tampered with. Subsequent confessions from other players in the incident corroborated Laycock's allegations.

47 [1952] 1 KB 189 at 198.

justice' implicitly make available a defence of honest and reasonable mistake. By a majority, the Court also applied principles set out in the High Court case of *He Kaw Teh v The Queen*[49] so as to read into the Rules of Racing a 'defence' of honest and reasonable mistake. Justice Ipp held:

> In the same way as the rules of natural justice have been held to be a necessary implication, by operation of law, to the Rules of Racing, so do I consider that the elementary rules of justice are so necessary. It could hardly be unnecessary for the Rules of Racing not to conform with elementary rules of justice.
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> I would therefore grant a declaration that it is implicit under Rule 175(h)(ii) that, provided there is evidence which raises the question (cf *He Kaw Teh v The Queen* at 535), there can be no finding that an infringement has been committed unless there has been a negation of an honest and reasonable but mistaken belief that any prohibited substance administered or caused to be administered to a horse had been excreted by the race day and therefore would not be present in the blood or urine.[50]

In a subsequent case heard by the Full Court of the Supreme Court of Western Australia,[51] the *Maynard* decision was not followed. In *Harper* the Court held that here was no need for the Stewards of the Western Australian Trotting Association to negate a claim of honest and reasonable mistake on the part of the person charged with the offence.

However, the result of *Harper* does not rule out a defence of honest and reasonable mistake.[52] The case does not maintain that the offence in question is one of strict liability. Rather, the licensed person will still have the opportunity to satisfy the Stewards that he or she "took all reasonable and proper precautions to prevent the administration of the drug".[53] *Harper's* case places the onus of proving the presence of an honest and reasonable mistake on the alleged offender. In *Maynard* the Court had placed the onus of disproving such a

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48 (1994) 11 WAR 1. The case involved a horse trainer being disqualified from training for three years by the stewards of the Western Australia Turf Club for causing a prohibited substance to be administered to a horse contrary to the rule 175 (h) (ii) of the "Rules of Racing". Rule 175 provided that racing stewards were authorised to punish: "(h) Any person who at any time administers, or causes to be administered, any prohibited substance as defined...(ii) which is detected in any pre- or post-race sample on the day of any race".

49 (1985) 157 CLR 523. The High Court judgments in *He Kaw Teh* can be read as requiring that in the case of statutory offences the 'defence' of honest and reasonable mistake will apply unless "excluded by the words of the statute creating the offence or by the subject matter with which it deals" (per Gibbs CJ at 528 and Brennan J at 565). Gibbs CJ at 533 remarked: "if it is held that guilty knowledge is not an ingredient of an offence, it does not follow that the offence is an absolute one. A middle course, between imposing liability and requiring proof of guilty knowledge or intention, is to hold that an accused will not be guilty if he acted under an honest and reasonable mistake as to the existence of facts, which if true, would have made his act innocent".

50 Note 18 *supra* at 24.

51 *Harper v Racing Penalties Appeal Tribunal of Western Australia and Ors* (1995) 12 WAR 337. This case involved the licensed trainer being convicted of a doping offence under the Rules of Trotting (similar to the Rules of Racing) and subsequently being disqualified for eight months.

52 McCutcheon argues "the court in *Harper* did not expressly overrule *Maynard* and, as has been shown, there is a significant number of points of agreement between the decisions...The decisions can be partially reconciled if *Harper* is construed in the light of the limited reverse onus defence that was provided in the Rules. If this view is taken, it would follow that *Harper* is not authority for a proposition that a defence may never be read into what would otherwise be a strict liability disciplinary rule, much less that a court is precluded from intervening on a question of substantive justice." Note 41 *supra* at 61.

53 Note 51 *supra* at 350.

mistake on the Stewards. The result of *Harper* is therefore consistent with the idea that such offences are not to be construed as offences of strict liability.

The horse racing (including trotting) industry is substantially different to the Olympic Games. The substantial justification for the interpretation of the relevant rules in *Harper* was the need to protect public confidence in the integrity of results of races due to the heavy reliance of the sport on gambling revenue. This is clearly not the case in Olympic sports. Furthermore, the financial support for the Olympic movement is based on more than revenue from spectators. In any event, it is likely the case that spectators' attendance would not be significantly diminished because of 'the drug problem', as up to now, spectators have attended the Olympic Games notwithstanding the knowledge that there is a chance that some athletes might 'beat the system' by using performance enhancing drugs that are undetected or undetectable.

It is submitted that on any reasonable interpretation of *Harper* it would be inappropriate to apply any sanction where an athlete tests positive to a banned substance by reason of an honest and reasonable mistake.[54] As a practical matter, it may be that making available a defence of honest and reasonable mistake will make proof of the commission of a doping offence difficult. Justice Scott in *Gasser v Stinson*[55] had sympathy for this view when he remarked: "if a defence of moral innocence were open, the floodgates would be opened and the IAAF's attempts to prevent drug-taking by athletes would be rendered futile".[56] However, such difficulty is not sufficient to exclude the defence. As Brennan J remarked in *He Kaw Teh*: "[a] pragmatic concern about unmeritorious acquittals does not warrant the imposition of strict liability".[57]

In the absence of judicial acceptance of the existence of a defence of honest and reasonable mistake, it may be possible for an Australian court to hold that the strict liability rule of the AOC anti-doping regime, as incorporated into the *Agreement*, is void for being an unreasonable restraint of trade. The restraint of trade doctrine is ultimately concerned with the reasonableness of the impugned rule. Here, the *Agreement* contemplates a rigid strict liability offence coupled with mandatory sanctions. As noted previously, actual disciplinary action is not

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54 This may, implicitly, have been the basis on which Australian swimmer Samantha Riley was permitted to continue to compete notwithstanding that she tested positive to a banned substance in competition. Riley tested positive to a banned substance contained in a pill 'innocently' given to Riley by her coach. The Minutes of FINA's (international swimming federation) Executive Committee Meeting decision state in part: "the FINA Executive decided to sanction her with a STRONG WARNING, as the consequences of any other decision would not be in proportion to the fault committed by the swimmer." Refer to AN Wise and BS Meyer, note 16 *supra*, (Vol 1) at footnote 313.

55 (Unreported decision, Queen's Bench Division, Scott J, 15 June 1988).

56 The combination of strict liability doping rule and mandatory sentence of the IAAF was held not to amount to an unreasonable restraint of trade. McCutcheon comments that the question of strict liability was not thoroughly analysed or considered in the case. See note 41 *supra* at 47. McCutcheon argues that the strict liability rule can be argued on grounds of natural justice, although both doctrines (restraint of trade and natural justice) are concerned with the "reasonableness of the impugned rules".

57 Note 49 *supra* at 580. Note however that if an athlete has not taken effective precautions "to avoid the possibility of the occurrence of the external elements of the offence" the defence of honest and reasonable mistake may not be successful. Also at 567 per Justice Brennan.

needed; the threat to someone's ability to trade will invoke the restraint of trade doctrine.

In the end the court must decide if the difficulties of such a defence and the interests of the AOC (and the Olympic movement) justify a strict liability offence. It is submitted that the ramifications to an athlete of a doping offence are too severe for the justification argument to be sustained.

V. HIV DISCLOSURE AND TESTING

Pursuant to cl 9.1 of the *Agreement*, the athlete must authorise any medical practitioner, sports scientist or therapist the athlete has consulted in the 12 months preceding the commencement of the 2000 Games, to disclose to the Team Medical Director any illness, disease or injury the athlete has suffered or "any pre-existing medical condition and all drugs and medications prescribed to the athlete". The Team Medical Director is authorised to disclose such information to the AOC and the Chef de Mission. This clause allows disclosure of HIV status of the athlete. Under cl 9.2 the athlete agrees:

> to undergo such medical testing as may be reasonably required by the Team Medical Director, including, but not limited to, giving blood samples for analysis. I [the athlete] agree that such analysis may include testing for human immunodeficiency virus (HIV).

Athletes are being required to disclose very private information about HIV status and possibly, to be tested for it. Notions of privacy and 'voluntary consent' to medical testing are being thrown out of the window. This is a matter of some public policy significance.

Even though the law does not recognise any general right of privacy in Australia,[58] Kirby P (as he then was), in *Carrol v Mijovich*[59] stated that our common law has "vigilantly defended the privacy of the individual". Furthermore, privacy protection is recognised under Art 17 of the International Covenant of Civil and Political Rights (the Covenant), to which Australia is a party,[60] but is given only limited effect in the form of the *Privacy Act* 1988 (Cth) and *Human Rights (Sexual Conduct) Act* 1994 (Cth).[61] In respect of Art 17, the Commonwealth declared that it reserved the right to compromise the privacy rights of individuals "in the interests of national security, public safety, the economic well-being of the country, the protection of public health or morals, or the protection of the rights and freedoms of others".[62]

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58 See *Victoria Park Racing Co v Taylor* (1937) 58 CLR 479.

59 (1991) 25 NSWLR 441 at 446.

60 The Covenant was ratified by Australia on 12 August, 1980.

61 The *Human Rights (Sexual Conduct) Act* 1994 (Cth) was enacted in response to the United Nations' Human Rights Committee finding that Australia was in violation of Art 17 of the Covenant. In fact, it was the Tasmanian criminal laws that were contrary to Art 17, but the Australia Government were the respondent, as they, not Tasmania, are a party to the Covenant. Refer to *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (8 April 1994).

62 Aust TS (1980) No 23, annex.

The right to privacy is closely linked to individual autonomy. The right to be free from, amongst other things, bodily intrusion or unwanted access by others to personal information and attention.[63] As previously noted, the right to individual autonomy was espoused by Wilcox J in the *League Draft Appeal Case*.[64]

A restraint of trade argument could arise in respect of the HIV clause if an athlete were to be prevented from being a member of the Team and competing in the 2000 Games where they refused to consent to cl 9 and its obligations and sign the *Agreement*, or they were banned from the Team and the Olympic Games because they were HIV positive.[65] As the earlier discussion on restraint of trade principles illustrates, the AOC will need to establish that cl 9 goes no further than reasonably necessary to protect their legitimate interests.

The AOC will no doubt seek to justify cl 9 by arguing the clause is necessary for the AOC to comply with their duty of care to other athletes, coaches and medical staff. They may well point to the 1988 Seoul Olympics when the champion United States diver, Greg Louganis hit his head on the three metre springboard. One of the US coaches, without gloves, applied first aid to the bleeding head of Louganis. Subsequently, also without gloves, a team doctor treated the diver. At the time the US officials did not know of the HIV positive status of Louganis. The US coach and doctor concerned did not contract HIV.[66]

The AOC may argue it is necessary to know the HIV status of athletes to ensure that the necessary protective measures and procedures are followed. However, this argument does not stand up to close scrutiny. It is submitted that athletes may sign cl 9 but direct their personal doctor not to inform the Team Medical Doctor of their HIV status. As the doctor has no contractual obligations to the AOC, it is reasonable for them to obey the wishes of their patient. The two main reasons for this are the doctor-patient confidentiality relationship and the very minimum risk of transmission of HIV in a sporting context. The only known case of possible HIV transmission in sport involved an Italian soccer incident reported in the *Lancet* medical journal in 1990. However, it was not a clearly established case.[67] The only way to be certain of an athlete's HIV status is to test them for it. To the best of the writer's knowledge, the AOC is not planning to undertake HIV testing of all Australian athletes competing in the 2000 Olympic Games.

Thus, the likely basis on which cl 9 is justified is not actually achieved by the clause. The best way for the AOC to minimise any risk of HIV transmission is to

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63 Refer to *Coco v R* (1994) 120 ALR 415.

64 Note 29 *supra* and accompanying text.

65 The *Agreement* does not state what will happen in the event of an athlete being HIV positive. The HIV issue may bring into play anti-discrimination legislation such as *Disability Discrimination Act* 1992 (Cth) and *Anti-Discrimination Act* 1977 (NSW). Anti-discrimination legislation and legal actions pursuant to the legislation will not be discussed here due to word length restrictions. Nor will the issue of legislative regulation of disclosure of medical information (that is, *Health Administration Act* 1982 (NSW)) be explored here.

66 For a very personal account of the incident, refer to G Louganis (with E Marcus), *Breaking The Surface*. Plume (1995) pp 3-11.

67 Referred to in *Mathew Hall v Victorian Amateur Football Association (VAFA)* <http://www.vcat.vic.gov.au/1999-vcat-ad-30.htm> at 5 of 11.

take the necessary precautions such as protective medical procedures[68] and ensure a 'blood rule' in contact sports such as soccer and hockey.[69]

In the *Hall* case, the Victorian Civil Administrative Tribunal held that the Victorian Amateur Football Association (VAFA) had unlawfully discriminated against Hall.[70] The Tribunal held that it was not reasonably necessary for the football authority to ban Hall from football because the risk of HIV transmission is so low and players can be adequately protected by a proper application of the VAFA infectious disease policy.

The same reasons for deciding against the VAFA would also hold true in a restraint of trade argument against the AOC. It is submitted this would be so whether an athlete is prevented from competing in the 2000 Olympic Games because he or she opposes cl 9 and refuses to sign the *Agreement*, or whether he or she signs but does not comply with the obligation in cl 9 (for example, refuses an HIV test), or because he or she is HIV positive. The *Agreement* does not include the last scenario: which begs the question, what are the AOC going to do if they know an Australian athlete is HIV positive? It is unlikely they would ban the athlete (at least it is hoped they would not contemplate such action). So what is the point of the HIV disclosure and testing? The AOC should treat every athlete as a potential HIV carrier and act accordingly; that is, follow appropriate protective medical procedures.

VII. CONCLUSION

The *Agreement* carries a message from John Coates, President and Chef de Mission of the AOC. In part it says: "[o]nce selected in the Australian Olympic Team, you become an Olympian and you are a member of an exclusive club which probably has the most difficult entry requirements in the world". This is probably true. It is also true to say that the *Agreement* is one of the most comprehensive documents any athlete has to sign as a precondition to compete in a single sporting event. It is also true that the *Agreement* places a number of obligations on athletes, affects their civil liberties and restricts their freedom to engage in commercial activities.

The restrictions placed by the *Agreement* severely curtail the athletes' freedom to exploit their skills and abilities to obtain media, sponsorship, marketing and promotional contracts. This raises concerns of unreasonable restraint of trade. It is however, submitted that the AOC is more likely than not to succeed in defending any restraint of trade challenge to such clauses. In contrast, it is submitted that the anti-doping and HIV regimes as currently prescribed in the

68 Which all doctors and first aid personnel now practice.

69 For example, as the blood rule operates in a number of sports in Australia, players must leave the playing field if they are bleeding or have blood on their clothes. However this may present some problems in a sport like boxing, in which case HIV testing may be justified, although there has been no recorded cases of HIV transmission in the sport. HIV testing does already take place in boxing in Australia (the only sport to do so).

70 VAFA had discriminated against Hall in breach of s 65 of the *Equal Opportunity Act* 1995 (Vic).

Agreement have major difficulties, which may lead to successful restraint of trade litigation by athletes. The anti-doping regime should be read to include the defence of honest and reasonable mistake; it should not be interpreted as a strict liability offence. There should be concerns about the HIV regime prescribed in the *Agreement*. The focus should be on ensuring that proper medical procedures are followed rather than prescribing mandatory disclosure and possible testing for HIV.