

31-12-2015

Internal Policing of the Enduring Issue of Racism in Professional Team Sports

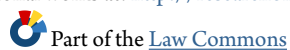
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Recommended Citation

Davies, Chris and Dunbar, Neil (2015) "Internal Policing of the Enduring Issue of Racism in Professional Team Sports," *The University of Notre Dame Australia Law Review*: Vol. 17 , Article 3.

Available at: <http://researchonline.nd.edu.au/undalr/vol17/iss1/3>

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INTERNAL POLICING OF THE ENDURING ISSUE OF RACISM IN PROFESSIONAL TEAM SPORTS

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AND
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Abstract

The issue of racism is one that is covered by both international treaties and domestic legislation. Most major sports, however, now have internal regulations, usually reflecting the treaties and legislation. Case studies from Australian, English and European sport, in particular, football, basketball, cricket and rugby league, indicate that the internal regulations have been effective in dealing with racism issues in those sports. The issues have involved players, managers, coaches, owners, officials and spectators, with the latter representing the main problem area for sport. The reasons for this are that it can be harder to identify the culprits and there is a lack of formal contracts between the sporting leagues and the spectators, though obligations can be enforced through ticketing and the law of licence. While banning spectators who have been identified as having made racist comments is important, it is suggested that education of culprits, be it player, manager, spectator or official, is also an essential requirement.

I INTRODUCTION

The 2014 World Cup in Brazil brought together players and spectators from diverse cultures to a vast global television audience. It therefore provided an opportunity for the Federation Internationale de Football Associations (FIFA) to highlight its stance on racism with prominent signs urging 'Say No to Racism' displayed around the grounds. However, the recent incident in Paris involving Chelsea supporters allegedly singing a racist song after the Champions League match against Paris Saint-Germain illustrates that the problem of racism in sport remains an enduring one. While that involved an overseas incident, the 2014 Australian Football League (AFL) season saw its own racism incidents involving officials, players and spectators.

This paper will therefore look at the ongoing problem of racism in sport. It will firstly provide a brief overview of the relevant international treaties, domestic racism laws, and sports internal regulations. It will then examine a variety of case studies from Australia,¹ United Kingdom (UK), the United States (US) and Europe involving alleged racist comments by owners, officials, managers, players and spectators. A question that will be considered is whether internal regulations provide a better outcome than a reliance on the general law. Suggestions will also be made as to how the various situations could have been handled better and what lessons can be learnt from these case studies.

II RACIAL DISCRIMINATION AND THE LAW

A *International Conventions*

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¹ For further information regarding the issue of racism within Australian sport, see Paul Oliver, Human Rights and Equal Opportunity Commission, *What's the Score? A Survey of Cultural Diversity and Racism in Australian Sport* (2006).

The United Nations' *International Convention on the Elimination of All Forms of Racial Discrimination* (the Convention) was held in New York in March 1966, with the Convention originally signed by 87 parties, and subsequently ratified by 177 countries. The vast majority of countries in the world have therefore accepted and acknowledged the importance of seeking to eliminate racial discrimination. Racial discrimination is defined in art 1 as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Australia signed the Convention on 13 October 1966, and it became domestic law with the enactment of the *Racial Discrimination Act 1975* (Cth). The legislation reflects the wording in the Convention, and remains the basis of Australian racial discrimination law. The *Racial Hatred Act 1995* (Cth) was subsequently enacted, with the purpose 'to prohibit certain conduct involving the hatred of other people on the ground of race, colour, or national or ethnic origin'. Section 3 inserted a pt IIA into the *Racial Discrimination Act 1975* (Cth), which remains the principal Act, to prohibit offensive behaviour based on racial hatred. Therefore, while participating in sport, a person cannot be singled out because of his/her race or ethnic origins and he/she is entitled to be free from taunts of a racist nature.²

The UK signed the Convention on 11 October 1966 and ratified it with domestic legislation on 7 March 1969. Racial discrimination was originally prohibited by the *Race Relations Act 1976* (UK), but is now covered in the all-embracing *Equality Act 2010* (UK), which deals with all forms of discrimination. Section 28 (1) of the *Crime and Disorder Act 1998* (UK) has also added a race element to a number of established offences, including wounding, assault and criminal damage. Thus, an offence is seen to be 'racially or religiously aggravated if:

- (a) [a]t the time of the offence (or shortly before or after) the offender demonstrates to the victim hostility based on the victim's membership (or presumed membership) of a racial or religious group, or
- (b) [t]he offender is motivated wholly or partly by hostility towards members of a racial or religious group based on their membership (or presumed membership) of that group.'

Besides these specific offences, under s 145 of the *Criminal Justice Act 2003* (UK) courts are required during sentencing to treat more seriously any offence which can be shown to be racially or religiously aggravated. Incitement of racial hatred is also covered by the *Public Order Act 1986* (UK), with s 18(1) providing that a person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if –

- (a) [h]e intends thereby to stir up racial hatred, or
- (b) [h]aving regard to all the circumstances racial hatred is likely to be stirred up thereby.

² Note also that within the jurisdiction of the Australian states and territories, racial discrimination is covered by wider discrimination, anti-discrimination and equal opportunity Acts that contain provisions that specifically prevent registered clubs from discriminating on the basis of race. Examples of these statutes include the *Anti-Discrimination Act 1991* (Qld), *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1998* (Tas) and the *Equal Opportunity Act 1984* (WA). Some states also have some specific legislation, for eg, the *Racial and Religious Tolerance Act 2001* (Vic) and the *Racial Vilification Act 1996* (SA). In addition, Victoria has a *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the Australian Capital Territory has the *Human Rights Act 2004* (ACT).

Racial hatred is described in s 17 as ‘hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.’

It should be noted that the UK also has a specific sport related Act, namely the *Football (Offences) Act 1991* (UK), s 3 of which makes it an offence to engage or to take part in chanting of indecent or racist nature at a designated football match, with racist nature being defined as including matter which is threatening, abusive, or insulting to a person by reason of colour, race, nationality, ethnic or national origins.

The US became a signatory to the Convention on 28 September 1966, and although it was not ratified domestically until October 1994, discrimination based on race, colour, religion, sex or national origin was prohibited by the *Civil Rights Act 1964*. This Act ended racial segregation in schools, at the workplace and facilities open to the public, while s 901 of the later *Civil Rights Act 1968* provided equal housing opportunities regardless of race, religion or national origin. The US Sentencing Commission meanwhile increased the penalties for federal crimes on the basis of actual or perceived race, colour, religion, national origin ethnicity or gender following the passing of the *Violent Crime and Law Enforcement Act 1994*. It should also be noted that the First Amendment to the *US Constitution* prohibits the restriction of freedom of speech. This restriction means that US citizens can make racial comments without the threat of legal sanction, if it fits within freedom of speech.

Thus Australia, the UK and the US, as signatories to the Convention opposing racial discrimination, now have domestic legislation prohibiting racial comments that are likely to offend, insult or humiliate. While these can potentially apply to sport, what will now be examined are the internal regulations imposed by sporting organisations in regard to the issue of racism.³

B *Internal Regulations of Sporting Organisations*

A feature of modern professional sport is the heavy reliance on contracts, often with collateral code of conduct provisions. In Australia, for instance, the National Rugby League (NRL) has introduced a Code of Conduct, with s 15 providing that ‘[e]very Club and every person bound by this Code shall...[n]ot do anything to subvert or detract from ... the proper working of the *NRL Rules*...including... Schedule Three - *NRL Anti-Vilification Code*’. This *Anti-Vilification Code* prohibits speaking or acting in a way ‘which is likely to offend, insult, humiliate, intimidate, threaten, disparage or vilify another person on the basis of that person’s race, religion, colour, descent, nationality, ethnic origin, gender, sexuality, marital status, status as a parent, disability or HIV/AIDS status’. David Gallop, the then Chief Executive Officer of the NRL, was quoted as saying that ‘ours is a sport that is about working together and not one that tolerates racism or discrimination of any type’.⁴

The AFL has a Member Protection Policy in place, s 1 of which seeks ‘to promote ... responsible behaviour within Australian Football ... by setting out the standards of behaviour that the AFL requires of all individuals associated with Australian football’. The AFL also has a National Vilification and Discrimination Policy, s 4.1 of which states that ‘[n]o League

³ It should be noted that sport also has internal regulations in relation to a number of other areas, such as on-field assaults and off-field indiscretions. For more information see Chris Davies, ‘The Internal Policing of On-field Indiscretions in Australian Sport’ (2008) 4 *Malaysian Journal of Sport Science and Recreation* 47; Chris Davies ‘The International World of Sport and the Liability for Off-Field Indiscretions’ (2011) 23 *Bond Law Review* 41.

⁴ *Bulldogs and Tigers Celebrate Harmony Day* (15 March 2006) <<http://www.sportsaustralia.com>>.

Participant or Club Official shall engage in conduct which may reasonably be considered to incite hatred ... or discrimination against a person ... on ground of their race.’ The Policy then outlines the process to be utilised when a complaint has been made: s 8 sets out the conciliation process; s 9 states that if the matter is not initially resolved under s 8, then an investigation can be ordered; and s 10 allows the matter to be referred to a Disciplinary Tribunal by the Complaints Officer, if it is considered appropriate.

English football is controlled by the Football Association (FA), and under pt C, Conduct, Rule 3(1) of the Rules of the Association states that, inter alia, a participant shall not use ‘abusive, indecent or insulting words or behaviour’. Rule 3(2) provides for the Regulatory Commission to consider increasing any sanction it is about to impose if the breach includes an ‘aggravating factor’, which comprises reference to a person’s ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability. Rule 4 applies specifically to discrimination and states that ‘a participant shall not carry out any act of discrimination by reason of ethnic origin, colour, race, nationality, faith, gender, sexual orientation or disability’. Rule 5 of the Code of Conduct for the English Premier League (EPL) states that a manager ‘shall not use racist or other discriminatory behaviour ... [and] should demonstrate to Players and other employees under his control that discrimination in any form is unacceptable’.

FIFA’s Stadium Safety and Security Regulations sets out under Annexe C s 2(c) the requirement that stadium visitors are prohibited from bringing into the stadium ‘items of a racist, xenophobic, charitable or ideological nature or items that could detract from the sporting focus.’ Section 3(j) then sets out the requirement that ‘stadium visitors and accredited persons ‘shall not act in a manner that could cause offence to others, including but not restricted to acts of racism’. The Union of European Football Associations (UEFA) has also adopted a ‘racial equality practice’ with art 23 of the Club Licensing and Financial Fair Play Regulations stating that ‘the licence applicant must establish and apply a policy to tackle racism and discrimination in football in line with UEFA’s 10-point plan on racism as defined in the UEFA Safety and Security Regulations’. This 10-point plan is explicit in its nature and requires (in the Annex) that, inter alia, an anti-racism statement be printed in all match programmes and displayed permanently and prominently around the ground.

In the US, the National Basketball Association (NBA) places immense power in the hands of its Commissioner. Under art 24 of the Constitution and By-laws of the NBA, the Commissioner is ‘charged with protecting the integrity of the game of professional basketball and preserving public confidence in the League’. The Constitution and By-laws do not specifically refer to racial discrimination or vilification, but art 35A(c) refers to misconduct of persons, other than players, and provides the Commissioner with the authority to impose a fine not exceeding US\$1 million if ‘[a]ny person ... gives, makes, issues, authorizes or endorses any statement having, or designed to have, an effect prejudicial or detrimental to the best interests of basketball’. Article 35A(d) gives the Commissioner power to penalise an offender with either a definite or indefinite suspension, or a fine not exceeding US\$1 million, or both, for conduct prejudicial or detrimental to the NBA. Under art 24(1) the Commissioner may impose a penalty he/she considers to be in the best interests of the NBA, though any imposed fine cannot exceed US\$2.5 million. The Commissioner, however, does not have the authority under art 13 to expel an owner/club from the league as this can only be done by a vote of three-quarters of the clubs in the competition.

The International Cricket Council (ICC) has an Anti-Racism Policy For International Cricket, which under cl 6(a) states that the ICC and its members ‘should not at any time offend, insult, humiliate, intimidate, threaten, disparage, vilify or unlawfully discriminate between persons based on their race, religion, culture, colour, descent, and/or national or ethnic origin.’

Thus, the internal regulations of sport governing bodies can provide a means to deal directly with incidents of racial vilification, or indirectly under a broader principle that such occurrences are detrimental to the sport. It should be noted that these regulations usually reflect the wording of international treaties and domestic legislation. What will now be examined are case studies from various sports that illustrate the workings of these internal regulations in relation to (a) owners and officials, (b) managers and coaches, (c) players and (d) spectators.

III RACISM IN SPORT

A *Owners and Officials*

On 29 April 2014, Donald Sterling, the owner of the LA Clippers Basketball team was punished by the NBA Commissioner, Adam Silver, after a recording was released that apparently contained racist remarks made by Sterling. The remarks made to his friend, Ms Stivano, requested that she not associate in public with black people, nor bring them to basketball games. The penalty handed out to Sterling was a US\$2.5 million fine, as well as a lifetime ban from attending NBA games,⁵ with art 24 relied upon to impose the penalty. Sterling was initially unwilling to pay the fine, with his solicitor arguing ‘that Sterling’s “due process rights” were violated’ and that he had not breached any article of the NBA Constitution.⁶ However, he later accepted the penalties and after the backing of the other club owners, was also forced to sell his interest in the LA Clippers.⁷

The Sterling case can be contrasted with an earlier Australian case involving Eddie McGuire, President of the AFL Club, Collingwood, who on 29 May 2013 made a comment on Melbourne radio that indigenous footballer, Adam Goodes, could perhaps be used to promote the musical, *King Kong*.⁸ The then AFL Chief Executive, Andrew Demetriou, stated:

Mr McGuire’s comments about Sydney Swans player Adam Goodes were extremely disappointing and totally unacceptable. Given the impact they have had on Goodes as well as the Sydney Swans and the wider football community, the AFL has deemed that Mr McGuire as a club president, must go through the Racial and Religious Vilification Policy process required by the AFL Player Rules.⁹

⁵ Associated Press, ‘Donald Sterling Officially Charged with Damaging NBA with Racist Comments’, *The Guardian*, 20 May 2014 <<http://www.theguardian.com/sport/2014/may/20/donald-sterling-officially-charged-with-damaging-nba-with-racist-comments>>.

⁶ ‘Donald Sterling Reportedly Refuses to Pay NBA Fine, Threatens Lawsuit’ *Fox News*, 16 May 2014 <<http://www.foxnews.com/sports/2014/05/16/donald-sterling-reportedly-refuses-to-pay-nba-fine-threatens-lawsuit.html>>.

⁷ Brian Todd and Steve Almasy, ‘Donald Sterling Agrees to Sale of Los Angeles Clippers’, *CNN*, 5 June 2014 <<http://edition.cnn.com/2014/06/04/us/donald-sterling-nba/>>.

⁸ ‘Eddie McGuire Apologises to Adam Goodes for King Kong Comment but will not Resign’, *ABC News*, 29 May 2013 <<http://www.abc.net.au/news/2013-05-29/eddie-mcguire-apologises-for-adam-goodes-king-kong-comment/4720152>>.

⁹ Greg Davis, *Courier Mail*, ‘AFL boss Andrew Demetriou says Eddie McGuire will go through the League’s Religious and Vilification Process’, 29 May 2013 <<http://www.heraldsun.com.au/sport/afl/afl-boss-andrew-demetriou-says-eddie-mcguire-will-go-through-the-leagues-racial-and-religious-vilification-process/story-e6frf9jf-1226652958064>>.

Although McGuire offered an unreserved apology in a phone conversation with Goodes, this was only reluctantly accepted.¹⁰ McGuire also agreed to undergo counselling.¹¹ It is suggested that these two cases illustrate markedly different processes between the NBA and AFL, the former adopting more of an adversarial approach whereas the latter involved discussions between the parties that resulted in an apology. It is also suggested that McGuire should have received some form of punishment, such as having to step down as Collingwood President for an appropriate period of time. It is further suggested that the penalties handed down by the FA in the case involving David Whelan, owner of the English Championship club, Wigan Athletic, may provide a guide as to what could have constituted a suitable penalty for McGuire.

Whelan had made allegedly racist comments regarding Jewish and Chinese people in an article that appeared in the *The Guardian* on 20 November 2014, in which he supported his newly appointed manager, Malky Mackay. On 31 December 2014 the FA found that Whelan had indeed made racist remarks, and banned him from football-related activities for six weeks, as well as fining him £50,000 pounds, with the penalties based upon breaches of E3 (1) and E3 (2) of the Rules of the Association. He was also warned as to his future conduct and ordered to undertake a mandatory education program.¹² Thus, it was an incident that was resolved quickly, with the FA's firm action in handing out a suitable punishment hopefully acting as a deterrent.

While the above incidents involved racist comments, in US sport there has also been an ongoing debate about the use of team names that have racist overtones. The main debate is in regard to the Washington based NFL team known as the 'Redskins', which has a club logo featuring an Indian chief. As the term 'Redskin' is seen as a 'pejorative name for Native American,' there have been calls for the Washington Redskins to change that part of its name, with President Obama also suggesting that a name change was appropriate.¹³ The tough line taken by Commissioner Silver in the Sterling case prompted Democratic Senator, Harry Reid, to say that the NFL should follow the lead of the NBA, and called on the Washington Redskins' owner, Daniel Snyder, to change his club's name because of the offence it causes to Native Americans. Snyder, however, has denied the name is racist, arguing that only nine percent of Native Americans found the name offensive and that a change could lead to possible loss of support.¹⁴ It is suggested, however, that it is unlikely a name change would lessen support for

¹⁰ Melanie Dinjaski, 'Eddie McGuire Formally Apologises for Goodes' Radio Gaffe', 29 May 2013 <https://au.sports.yahoo.com/afl/a/17369360/eddie-mcguire-compares-adam-goodes-to-king-kong-on-radio/>;

C Le Grand, 'McGuire Clipped over Racist Slip' *The Australian*, 30 May 2013, 3. Le Grand stated that 'it is understood that Goodes was reluctant to accept McGuire's apology but did so after a phone conversation with McGuire.'

¹¹ Nathan Schmook, 'Eddie McGuire to Start Counselling over Racial Vilification', 14 June 2013 <<http://www.afl.com.au/news/2013-06-14/mcguires-counselling-to-start>>. In this article it was stated that McGuire was 'set to start his counselling program two weeks after he breached the AFL's racial vilification policy'. It was then described as an 'education program' with former AFL Chief Executive, Andrew Demetriou, quoted as saying 'the [education] program has been finalized ... It is a confidential program, it's been signed off by all the appropriate people and Eddie will commence that shortly. It's very substantial and he's ready, willing and able.'

¹² John Percy, 'Dave Whelan Banned for Six Weeks and Fined £50,000 by FA for "Rascist" Comments' *The Telegraph*, 31 December 2014 <<http://www.telegraph.co.uk/sport/football/teams/wigan-athletic/11319399/Dave-Whelan-banned-for-six-weeks-and-fined-50000-by-FA-for-offensive-comments.html>>.

¹³ 'Is the Washington Redskins' Name Racist? President Obama Thinks So,' *The Guardian*, 8 October 2013, <<http://www.theguardian.com/sport/shortcuts/2013/oct/08/washington-redskins-name-racist-obama>>.

¹⁴ Kyle Weidie, 'The Washington Redskins and the Stigma of Racism: Is there a Compromise?' 21 August 2008 <<http://www.truthaboutit.net/2008/08/washington-redskins-and-stigma-of.html>>.

the club since the club represents the city and its supporters would most likely continue to support it. While it is acknowledged that some cost would be incurred in such a change, this is likely to be offset by, for instance, the sale of merchandise depicting the club's new name and logo.

Thus, despite the fact club owners and officials may wield strong power, indeed perhaps because of it, it is essential sporting bodies display strong action against club owners and officials in relation to racist comments. The incidents involving Donald Sterling and David Whelan highlight the benefits of internal regulations to enable incidents involving racist comments to be resolved quickly and decisively, though it is equally important that the principles of procedural fairness be adhered to. Contractual clauses can provide the legal basis of such decisions, although the action in the Sterling case was taken by the NBA Commissioner relying on the relevant articles of the NBA by-laws. The penalties handed out to Sterling may appear harsh, but it should be acknowledged that the vast majority of the players in the NBA are Afro-American, with the issue of racism being more sensitive than in any other major sport. The NBA therefore had to make a governance decision that in the best interests of the game basketball did not need the involvement of someone like Sterling. The FA's handling of the incident involving Whelan was also quick and decisive, and an even longer ban than six matches could have been seen as not being excessive, given the severity of the incident. It is further suggested that in comparison to what had occurred in US and UK sport, Eddie McGuire was treated very leniently by the AFL, arguably inappropriately so, and that the AFL should perhaps have imposed a similar penalty to that imposed on Whelan.

The making of racist comments, however, is not limited to owners and officials of sporting clubs, with there being a number of incidents involving managers and coaches as discussed below.

B *Managers and Coaches*

An example of racist comments made by an Australian manager or coach is the 2010 incident involving Andrew Johns and Timanu Tahu. This incident occurred during an informal bonding session at a training camp for the NSW team in the lead up to its State of Origin match against Queensland. Johns made racist comments about the Indigenous and Polynesian players in the Queensland team,¹⁵ specifically referring to star centre Greg Inglis as a 'black c---'.¹⁶ Tahu expressed his disgust at such comments by walking out on the team, with Johns then finding himself 'hastily removed' from the NSW team.¹⁷ For Johns, however, this was far from the end of the matter as he also found himself suspended from various other professional commitments, such as writing a regular column for *The Daily Telegraph* and coaching consultancies at a number of clubs. There were even suggestions that he may lose some of these positions.¹⁸ The player at whom the comments were directly aimed, Greg Inglis, went even further suggesting that Johns should not have any further official involvement in the game as 'there is no excuse for racism in any sport, any code or culture.'¹⁹

¹⁵ Nicole Jeffrey, 'Points on the Board in Sport's Racist Fight', *The Weekend Australian*, 25 June 2010, 7.

¹⁶ Chris Barrett, 'Inglis Wants League to Cast Out Johns', *The Sydney Morning Herald*, 24 June 2010, 24.

¹⁷ Nicole Jeffrey, 'Points on the board in Sport's Racist Fight', *The Weekend Australian*, 25 June 2010, 7. Note, too, that Nathan Blake refused to play international football for Wales after its manager, Bobby Gould, had made similar style statements in the dressing room about opponents which Blake found offensive. It is also worth noting that, initially at least, Gould did not understand that he had even made racist comments. See Simon Gardiner, *Sports Law* (Cavendish, 3rd ed, 2006) 567-8.

¹⁸ M McDonald and D Koch, 'Johns in Sin Bin with his Employers', *The Australian*, 16 June 2010, 30.

¹⁹ Chris Barrett, 'Inglis Wants League to Cast Out Johns', *The Sydney Morning Herald*, 24 June 2010, 24.

While NRL chief executive, David Gallop, received criticism for taking too long to make a public comment on the Johns issue,²⁰ a leading academic on Indigenous issues, Colin Tatz, saw Johns' instant removal from the NSW team and the 'universal condemnation of his behaviour' as evidence of the progress that was made in Australian sport, expressing the view that even five years earlier, NSW would have backed Johns.²¹ Tahu, meanwhile, met up with members of the Australian Rugby League (ARL)'s Indigenous Council to discuss the issue of racism in rugby league, with suggestions arising from the meeting, including a review of rugby league's existing anti-vilification policies, finding ways to make it easier for players to make formal complaints, the setting up of cultural support officers to work with the clubs, and cultural awareness training for players and officials.²²

A football manager who faced allegations of racist comments in 2012 was Nathan Rudge, manager of Chippenham Town in English football's Evo-Stik Premier League Southern Division. Although the offence occurred in September 2012, Rudge's hearing did not take place until July 2013 as Rudge denied the charges and requested a personal hearing. He was, however, found guilty of making racist comments and given a four game ban by the FA,²³ the case highlighting the advantage of having a body like the FA which has control over the whole sport. This meant it had jurisdiction to impose a penalty for an incident that occurred in what is effectively the seventh tier of English football.

The FA is presently investigating comments made by Wigan manager, Malky Mackay.²⁴ It is alleged that, inter alia, Mackay referred to Chinese people as 'chinks' and Jewish people as those who 'chase money,' the comments made in relation to his departure from Cardiff City.²⁵ It is likely this matter will take longer to resolve as it is not clear as to what actually happened, for while Whelan's comments were published in *The Guardian*, Mackay's remarks were allegedly made in a series of text messages sent to Iain Moody, head of recruitment at Cardiff City,²⁶ raising an issue as to whether these texts were public or private communication. Procedural fairness will therefore require that the FA takes its time over the matter. However, it should be noted that the person Mackay's alleged racial remarks related to, namely the Malaysian-born owner of Cardiff City, Vincent Tan, has been reported in the media as saying that the FA needs to take action against Mackay, whom he described as racist.²⁷

²⁰ Patrick Smith, 'Father of Reform Says Racism Bigger Issue than Any Sport,' *The Australian*, 16 June 2010, 30.

²¹ Nicole Jeffrey, 'Points on the Board in Sport's Racist Fight,' *The Weekend Australian*, 25 June 2010, 7.

²² Margie McDonald, 'Players Face Bans for Racist Slurs,' *The Australian*, 25 June 2010, 43. Note that Tahu was later caught up in his own racism row after allegedly racially vilifying a teenage player at an Indigenous rugby league carnival: Brent Read, 'Tahu Returns as Race Row Lingers,' *The Australian*, 17 March 2011, 40.

²³ 'Nathan Rudge: Chippenham Boss Banned over Racist Remarks', 12 July 2013 <<http://www.bbc.com/sport/0/football/23287048>>.

²⁴ Note this matter is connected to the one involving David Whelan since Whelan employed Mackay to manage Wigan Athletic after Mackay left Cardiff. Whelan's matter arose when he made comments on Mackay's alleged racist remarks which were in relation to his departure from Cardiff.

²⁵ Tony Manfred, 'An ex-Premier League Coach Allegedly Sent Racist Texts about Players, and his Apology is a Train Wreck,' 22 August 2014 <<http://www.businessinsider.com.au/malky-mackay-texts-2014-8>>.

²⁶ Matt Lawton, 'FA Forced to Delay Verdict on Malky as New Information Emerges in Vile Texts Scandal', 3 March 2015 <<http://www.dailymail.co.uk/sport/football/article-2976482/FA-forced-delay-verdict-Malky-Mackay-new-information-emerges-vile-texts-scandal.html>>.

²⁷ 'Vincent Tan Accuses Dave Whelan and Malky Mackay of Being Racist', 21 November 2014 <<http://www.bbc.com/sport/0/football/30147475>>.

Like any other incident involving racist comments by managers and coaches, the legal basis for any sanctions imposed on Mackay by the FA will be contractual.²⁸ It is also suggested that with the Mackay case procedural fairness requires that the FA establishes exactly what actually happened. Thus, while the FA could be criticised for taking time to resolve the matter, unlike the Johns case, it is not one that can be settled quickly. While quick resolutions can be viewed as an indication of good sporting governance, there are times when the needs of procedural fairness must take precedence. However, if the allegations against Mackay are proven, it is suggested it may constitute evidence of a racist attitude, rather than a mere passing comment, and if so, the penalty handed down should reflect this.

What will now be examined are alleged comments by players which illustrate that the problem of racist comments is an on-field as well as an off-field one.

C *Players*

1 *Australian Case Examples*

The increase in the number of Indigenous Australians playing in the AFL during the 1990s meant that not only was there a good chance of comments being made which players would consider to be racist, but it also meant the Indigenous players would be less likely to accept such comments. It was an issue that reached a critical point in 1994 with an incident which highlighted the fact that, firstly, the AFL had a problem, and secondly, something had to be done about it. The incident in question involved racist comments made by Collingwood ruckman, Damian Monkhorst, to Essendon's Michael Long during a match between Collingwood and Essendon on 25 April 1994. Long complained to the AFL, and a mediation process was conducted with Long making it clear to Monkhorst, and the AFL as a whole, that such comments were offensive, both to himself and to his cultural heritage, and would no longer be tolerated. Long demanded that fines and suspensions be handed out to any player who engaged in racial abuse. This led to the AFL implementing new rules to combat racial and religious vilification, with fines and suspensions to be imposed on any offenders.²⁹ An example of implementation of the rules involved Western Bulldogs player, Justin Sherman, who admitted to racially vilifying Gold Coast Sun's Nigerian-born player, Joel Wilkinson during a match at Metricon Stadium on 25 June, 2011. After a conciliation meeting, Sherman suspended himself for four matches, made a public apology and agreed to attend an education program.³⁰

It is suggested therefore that the AFL can claim that it has acted strongly in regard to racism, though with the ever growing number of Indigenous players it had little choice, and as Lalor points out,³¹ it only did so after actions were taken by players, most notably Michael Long.

²⁸ Note that within professional team sports there exists a series of interlocking contracts; managers, coaches and players, for instance, having contracts with their clubs, the clubs then having arrangements with the governing body of that sport which can then bind the players to the rules etc of the governing body.

²⁹ Lawrence McNamara, 'Tackling Racial Hatred: Conciliation, Reconciliation and Football' (2000) 6 *Australian Journal of Human Rights* 5, 10. St Kilda's Peter Everitt, for instance, was later suspended for four weeks after making a racist comment to Melbourne's Scott Chisholm during a game in April 1999. While this suspension was self-imposed, the AFL had made it clear that the alternative was to go through formal AFL proceedings and an almost certain longer term on the sidelines, possibly as long as 12 weeks: at 17.

³⁰ Greg Denham, 'Western Bulldog Justin Sherman Outed for Racial Vilification', *The Australian*, 28 June 2011, 40.

³¹ Peter Lalor, 'Ugliness of Racism Will Not Go Away Quietly', *The Australian*, 7 January 2008, 19.

However, the AFL's conciliation and mediation process can now be seen as a leading example of how a sport should internally address the issue of racism.

The NRL, too, has had its problems with on-field racist comments,³² with Parramatta's Indigenous player Dean Widders, for instance, receiving racist comments from South Sydney's Bryan Fletcher in a match during the 2005 season. South Sydney acted quickly, stripping Fletcher of the captaincy and fining him \$10,000. This was despite the fact that Fletcher had made an apology which had been accepted by Widders.³³

Very few players in Australia, however, manage to reach the AFL or NRL, and the problem of racial abuse in country, suburban and even junior competitions, is therefore potentially more difficult to eradicate. McNamara also points out that in small communities it may be harder to make a complaint when it involves someone with whom you may perhaps be working with in the following week, and who may, for instance, be the local police officer.³⁴ Unlike the professional leagues, there may not be a binding contract that allows a relevant governing body to take action by relying either on an express term in the contract, or reference to a code of conduct.³⁵ However, all those involved in Australian sport are subject to the *Racial Discrimination Act*, and outside of professional sport, a breach of this Act may provide the best, and in some instances, perhaps the only remedy.³⁶

As international cricket is essentially played between Commonwealth countries, and with a number of diverse nationalities present, it is not surprising it has had its share of problems with racist comments. The most high profile example involved the claim that India's Harbhajan Singh had allegedly called Australia's Andrew Symonds a 'monkey' during the Second Test in Sydney on the 2007-8 tour, a comment that had racist overtones as Symonds is of West Indian descent. Harbhajan was initially found guilty in a code of conduct hearing, and

³² Note that for rugby league in England the Commission for Racial Equality (CRE) created a 13 point action plan for rugby league clubs to tackle racism, with point 6 directed at the players by insisting that rugby league has a code of conduct for both players and officials that prohibit racially abusive remarks against other players and officials, and also supporters. These are available at <www.cre.gov.uk>.

³³ Peter Kogoy, 'Widders' Racial Abuse Call' *The Australian*, 4 July 2005, 17; S Honeysett, 'Widders Accepts Racial Taunt Apology', *The Australian*, 5 July 2005, 18.

³⁴ McNamara, above n 29, 19.

³⁵ Note that the Court of Arbitration for Sport (CAS) upheld the decision of the Australian Olympic Committee's removal of swimmer, Nick D'Arcy, from the 2008 Australian Olympic team on the ground that criminal behaviour after the Olympic trials had brought himself into disrepute, which indicates the validity of these clauses. See *D'Arcy v Australian Olympic Committee* CAS 2008/A/1574 <www.tas-cas.org>.

³⁶ In *Tamanivalo v Western Australia Rugby Union* (1994) EOC 192-636, HEEOC for instance, Tamanivalo claimed he had been called a 'dirty black bastard' by an opposing player and when he was leaving the field after being sent off for an illegal tackle, someone from the opposing bench yelled out 'you got what you deserved, you black bastard.' He then made a complaint that the Western Australian Rugby Union had not protected him from the racial taunts of other players. It was held, however, that there had been no breach of the *Racial Discrimination Act 1975* (Cth) as a breach required there be a particular problem with racist abuse that the Western Australian Rugby Union had done nothing about, which was not the situation here: McNamara, above n 36, 90. This decision, it is suggested, indicated that there was a weakness in the legislation as this was an incident that should have been covered by the *Racial Discrimination Act*. The authors would also suggest that such an incident would now be in breach of pt IIA which was subsequently inserted by the *Racial Hatred Act*, and that this inclusion has therefore made the *Racial Discrimination Act* more effective in its ability to stamp out racist comments in sport. Section 18C for instance states that 'It is unlawful ... to do any act, other than in private, if that act is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person ... and this act is done because of the race, colour or national or ethnic origin of the other person. While this section has been used, for instance, against newspaper columnist, Andrew Bolt, it has not been, as yet, used in a sporting context, although it has the potential to be so used. See Andrew Crook, 'Bolt Decision, Guilty of Discrimination, Judge Declares', *Crikey*, 28 September 2011.

suspended for three tests by match referee, South African, Mike Procter. This then led to a threat by India to abandon the tour of Australia, with the episode being dubbed ‘Bollyline’ by the media.³⁷ Harbhajan, had been charged under the then pt 3.3 of the Player Code of Conduct,³⁸ but what infuriated the Indians was the fact that at the hearing the accounts given by the Australian players, Symonds, Matthew Hayden and Michael Clarke, were given more weight than that of the Indian players, Harbhajan and Sachin Tendulkar. This, in itself, was seen by the Indians as having racist overtones.

An appeal was subsequently heard before Justice John Hansen of New Zealand, an ICC Appeals Commissioner, which cleared Harbhajan of racial abuse, though he did receive a \$3000 fine. Justice Hansen praised the evidence of both Hayden and Tendulkar, therefore appeasing earlier Indian concerns that more weight had been given to the Australian players’ evidence. Justice Hansen then went on to state that he was left with ‘an honest uncertainty’ as to what had actually been said,³⁹ though it was a technicality that saved Harbhajan since Justice Hansen had been advised Harbhajan had a clean record when, in fact, he did not.⁴⁰ What the incident also illustrated was that there can be a cultural aspect to such problems, as calling someone a ‘monkey’ is not considered to be derogatory in India. Harbhajan also claimed that he had not actually used the English word ‘monkey’, but another similar sounding word from his own language.⁴¹

Thus, with both an Indigenous and immigrant population, Australia has seen racist incidents in its major sports, but a number of incidents in the EPL has highlighted that English sport is not immune to racist issues.

2 English Case Examples

One of the most talked about incidents occurred in an EPL match on 15 October 2011, when Liverpool’s Uruguayan international, Luis Suarez, called Manchester United’s French international, Patrice Evra, a ‘negro’ a number of times. The FA subsequently banned Suarez for eight matches,⁴² and although Suarez admitted using the term, he claimed that ‘in my country negro is a word we use commonly, a word which doesn’t show any lack of respect and is even less so as a form of racist abuse’. Liverpool stated that the claims were ‘unsubstantiated’ and totally backed its player, who stated that he would ‘carry out the suspension with the resignation of someone who hasn’t done anything wrong’.⁴³

The matter, however, did not end with the completion of Suarez’s suspension. On 12 February 2012 during the traditional pre-game handshakes for the return Liverpool and Manchester

³⁷ Peter Lalor, ‘Tour in Doubt as Indians Put Up the Shutters over Racism Conviction Against Harbhajan’ *The Sydney Morning Herald*, 8 January 2008, 1; A Brown and J Pandaram, ‘Indians May Still Quit Tour - BCCI’, *The Sydney Morning Herald*, 10 January 2008, 31; M Wade, ‘Sparks Fly, and India Burns over Bollyline’, *The Sydney Morning Herald*, 8 January 2008, 35.

³⁸ Note that the wording of this was similar to that of the present cl 6 of the ICC’s Anti-Racism Policy for International Cricket.

³⁹ Judgment of Justice John Hansen, 30 January, 2008, [50].

⁴⁰ Judgment of Justice John Hansen, 30 January, 2008, [66]. See also P Lalor, ‘Legal Bungle Saved Harbhajan’, *The Australian*, 31 January 2008, 20.

⁴¹ Ibid. Note that Andrew Symonds and Harbhajan Singh later played for the same team, Mumbai, in the Indian Premier League (IPL) with the two reportedly forming a good, friendly relationship: Will Swanton, ‘Burying the Monkeygate Hatchet’, *The Weekend Australian*, 7 May 2011, 41.

⁴² T Barrett, ‘Liverpool Fury at Suarez Penalty’, *The Australian*, 22 December 2011, 24.

⁴³ ‘Luis Suarez and Liverpool Statements in Full’, *The Guardian*, 4 January 2012
<<http://www.theguardian.com/football/2012/jan/03/1>>.

United match at Old Trafford, Suarez very publicly publically refused to shake Evra's hand. Manchester United's manager, Sir Alex Ferguson, labelled Suarez a 'disgrace'⁴⁴ and while Liverpool, initially at least, continued to back its player, in the following few days it issued an apology to Evra, with even Suarez acknowledging that he 'had got things wrong.'⁴⁵

Another EPL incident involved Chelsea's John Terry who allegedly shouted racially abusive comments to Anton Ferdinand during a match between Chelsea and Queens Park Rangers at Loftus Road. Unlike Suarez, Terry was not suspended, but instead found himself charged with a racially aggravated public order offence that he used 'threatening, abusive or insulting words or behaviour or disorderly behaviour' which were likely to cause 'harassment, alarm or distress'.⁴⁶ Terry, however, was found not guilty on the grounds that the Magistrate, Howard Riddle, could not be sure Terry intended to insult Ferdinand.⁴⁷ The FA, however, banned Terry for four matches and fined him £220,000, after its independent Regulatory Commission determined that Terry's racist language towards Ferdinand was used as an insult and finding 'no credible basis' for his defence that he was only repeating words he believed the Queens Park Ranger's defender (Ferdinand) said to him'.⁴⁸ The FA then banned the pre-game handshakes before the next Chelsea and Queens Park Rangers match, and while this did prevent a repeat of what had happened at Old Trafford, it still brought public attention to the fact that the matter had not been resolved between the two players.

This raises the question as to what the FA could have done to prevent the two incidents escalating beyond the initial incident on the football pitch, and in discussing this matter it should be noted that after the Suarez-Evra incident, British Prime Minister, David Cameron, called on the FA, the EPL and the Professional Players Association to try and resolve the issue of racism in football.⁴⁹ FIFA President, Sepp Blatter, had meanwhile suggested that if racist comments are made on the football field, a handshake at the finish of the match was sufficient to bring an end to the matter. Blatter was rightly vilified for his comments, with some, such as British Minister for Sport, Hugh Robertson, even calling for his resignation as FIFA President.⁵⁰ Robertson described his statements as a 'disgrace' and 'completely unacceptable'.⁵¹ Manchester United's Rio Ferdinand, likewise, called for Blatter's resignation, stating that 'your [Blatter's] comments on racism are so condescending it's almost laughable'.⁵² It is suggested, however, that Blatter was in fact on the right track, and simply missed out on mentioning the other important steps needed before a handshake can effectively resolve the matter, namely mediation and agreed sanctions.

The AFL's internal regulations, for instance, would have prevented the Suarez-Evra non-handshake incident from happening since if Suarez had been an AFL player, he would have been forced to attend a mediation or conciliation meeting in order to resolve the matter behind

⁴⁴ 'Ferguson Brands Suarez A Disgrace', *The Australian*, 13 February 2012, 36.

⁴⁵ M Savage, 'UK PM to Flag Racial Abuse at Meeting', *The Australian*, 14 February 2012, 39.

⁴⁶ 'Terry to Face Race Trial after Euro 12', *The Australian*, 3 February 2012, 38.

⁴⁷ 'John Terry Acquittal – Magistrate's Summing Up', *The Guardian*, 14 July 2012 <<http://www.theguardian.com/football/2012/jul/13/john-terry-acquittal-magistrate>>.

⁴⁸ 'FA Reveals Written Reasons Behind John Terry Verdict', 5 October 2012, <<http://www.goal.com/en/news/9/english-football/2012/10/05/3426876/fa-reveals-written-reasons-behind-john-terry-verdict>>.

⁴⁹ M Savage, 'UK PM to Flag Racial Abuse at Meeting', *The Australian*, 14 February 2012, 39.

⁵⁰ 'British PM latest to blast Blatter in racism row', *The Weekend Australian*, 19 November 2012, 46.

⁵¹ Patrick Smith, 'Blatter's racist blather bad enough but golf needs to clean up its own game', *The Weekend Australian*, 19 November 2011, 43.

⁵² 'Blatter on back foot in racial abuse row', *The Australian*, 18 November 2011, 39.

closed doors. The purpose of the process would have been to make it clear to Suarez that, regardless of how the word used is perceived in his own country, there are going to be players from other countries who find such on-field comments offensive and unacceptable. Under the AFL system, it would have been Suarez who would have imposed his suspension, and based on AFL precedents, probably four matches, half of what he received from the FA, would have been acceptable. It is at this point that a handshake could have taken place between the players, either privately and/or before the next match between the two clubs, the latter option providing an opportunity for a public indication the matter had been resolved to the satisfaction of both parties.⁵³

The Terry-Ferdinand incident, likewise, could have been better resolved through a mediation-conciliation process, with again the pre-match handshake tradition providing an opportunity for a public display of this reconciliation. It is also suggested that it is unlikely the police would have become involved, had the matter been initially handled by the FA.⁵⁴ Instead an incident that occurred on 23 October 2012 was ultimately dealt with in the West London Magistrates' Court on 13 July 2013. Furthermore, Terry was found not guilty in the Court proceedings; yet when the FA finally dealt with the matter, it found Terry had used racist language towards Ferdinand, though on a lower standard of proof than required for the criminal trial.

The potential expediency of an FA investigation was also highlighted in the incident involving Nicolas Anelka. Anelka was found guilty of a racist act in an EPL match between West Bromwich Albion and West Ham United on 28 December, 2013, in which he performed a gesture known in France as a 'quenelle'.⁵⁵ A quenelle has been described as an 'inverted Nazi salute', and was considered to be an anti-semitic gesture. Anelka was banned for five matches and fined £80,000, the matter finalised at a FA hearing on 27 February, within two months of its occurrence. It should be noted that the FA's independent commission accepted Anelka's insistence that he was not intentionally anti-semitic, which is why he was banned for the minimum number of games.⁵⁶ This matter therefore highlights that intention can be taken into account in regard to the penalties handed out by a governing body.

⁵³ While it did not involve racist comments, there is another incident from the AFL which shows just how effective a public handshake can be in defusing a potential volatile situation, and illustrates just how differently the outcome could have been at Old Trafford. The incident in question involved media comments made by Essendon captain, James Hird, imputing that AFL umpire Scott McLaren was somehow biased against Essendon. Predictably McLaren took offence to the comments, with there being suggestions defamation action could occur. The AFL fined Hird \$20 000 with Hird also making a public apology. The following weekend McLaren was appointed to officiate the Essendon match, and at the pre-match toss of the coin made the point of offering a handshake to Hird and thanked him on national television for the apology, stating that it was 'much appreciated.' Thus, the very public handshake made it clear the potentially difficult matter had been amicably resolved to the satisfaction of both parties. See Chris Davies, 'A Storm Drifting By? Defamation Law and Sport in Australia and New Zealand' (2009) 40 *Victoria University of Wellington Law Review* 669, 690.

⁵⁴ One further point should be noted and that is the apparent inconsistency to the public eye, which the Terry case has provided. On the one hand, the English court system found Terry not guilty of using threatening, abusive or insulting conduct likely to cause harassment, alarm or distress, whereas the FA Commission found him guilty of using racist language to insult Ferdinand. To the lawyer this would not necessarily be surprising when you take into account matters like the different wording of the charges, the burden of proof used, and the different evidence provided at the respective hearings and how it may have been interpreted. However, to the general public it is probably difficult to reconcile the conflicting decisions. To his credit Terry accepted the decision of the FA Commission but if he had contested the decision, the matter may well have become considerably more messy and difficult for the public to accept the outcome.

⁵⁵ 'Soccer – Anelka Says No Proof He's Racist or Anti-Semitic', 4 April 2104
<<http://uk.reuters.com/article/2014/04/04/soccer-anelka-idUKL4N0MW32920140404>>.

⁵⁶ 'Nicolas Anelka Banned and Fined £80 000 for Quenelle Gesture,' 27 February 2014
<<http://www.bbc.com/sport/0/football/26326484>>.

It is suggested that a factor that needs to be acknowledged when dealing with comments made by players is that they are often made in the heat of the game, and in some instances can be considered little more than passing comments, rather than being intentionally racist and highlighting an underlying racist attitude. This, for instance, was the reason why the Magistrate in the Terry hearing found him not guilty of the offence, since he was not certain that Terry had intended to racially abuse Ferdinand. This case therefore indicates that the problem of showing intent may make reliance on domestic criminal laws and the courts difficult in situations involving players, and highlights that the use of internal regulations may be a better option. It is also suggested that other sports, like English football, should look at the AFL's mediation and conciliation process as an appropriate model in these cases.

Overall, however, it is suggested that these case studies indicate that sport governing bodies are acting appropriately in regard to alleged racist comments by players, and can rely on clauses within player contracts to provide the legal basis for imposing suitable sanctions. What remains more problematic, however, are racist comments made by spectators.

D *Spectators*

A pivotal moment in Australian sport in regard to racist comments and attitudes by spectators involved St Kilda's Nicky Winmar and his treatment by some members of the Collingwood Social Club during a match in which he starred at Collingwood's home ground, Victoria Park, during the 1993 season. After receiving a torrent of racial abuse during the match, Winmar raised his jumper after St Kilda's win, bared his chest to the crowd and pointed with pride at his dark skin as he walked off the field. It was a demonstrative reply to the Collingwood supporters, with McNamara stating that it was 'unquestionably the moment in which race was publicly on the agenda for professional football.'⁵⁷

Despite the AFL acting after the Winmar incident by implementing a process by which potential penalties could be laid against clubs, further incidents have occurred, such as during the 2011 season when Hawthorn's Lance Franklin received racist taunts from an unknown fan during an AFL match in Launceston.⁵⁸ More recently during a match between Collingwood and Sydney on 25 April, 2013, a young girl called the Sydney Swans player, Adam Goodes, 'an ape'.⁵⁹ The 13-year old later apologised to Goodes who 'explained to her why it deeply offended him,' with Goodes and AFL's then Chief Executive, Andrew Demetriou, also urging people to treat the girl with compassion since there were concerns about the impact the incident could have on her.⁶⁰ It is suggested that the matter was dealt with as quickly and efficiently as possible, with the main protagonists involved in its resolution, and that given the offender's age, a deterrent penalty was not a suitable option.

This approach, however, was not considered appropriate in a further incident involving Adam Goodes during an Essendon and Sydney game on 16 May 2014. During this match an Essendon spectator referred to Goodes as a 'gorilla,' and was subsequently reported to security

⁵⁷ McNamara, above n 29, 9. It was also reported that he yelled to the crowd, 'I'm black and I'm proud of it'. See McNamara, above n 36, 88.

⁵⁸ Greg Denham, 'Western Bulldog Justin Sherman Outed for Racial Vilification', *The Australian*, 28 June 2011, 40.

⁵⁹ Adrian Crawford, 'Adam Goodes 'Gutted' by Racial Slur But Wants AFL Fan Educated', 27 May 2013 <<http://www.abc.net.au/news/2013-05-25/goodes-gutted-but-places-no-blame/4712772>>.

⁶⁰ *Ibid*.

by another Essendon fan, who in shaking his head in disbelief, stated: ‘After all our club has done to combat racism on and off the field, this individual felt it was ok to refer to an indigenous player in such a manner’.⁶¹ Essendon itself, took further action by not only evicting the offender, but also suspending his club membership, the club reporting that the offender was ‘remorseful and would be readmitted if he undertook a racial vilification program’.⁶² Goodes indicated that he would be happy for the offender to be allowed back to matches, and stated he saw it as a positive sign that a fellow supporter had reported the incident, that Essendon had acted promptly, and that the offender was remorseful.⁶³

An incident in the NRL in the 2008 season similarly illustrated the problem of racist attitudes by spectators, with Penrith’s Petero Civoniceva, a player of Fijian descent, being called a ‘monkey’ by fans during a match against Parramatta. The offenders were later identified and were banned from attending NRL games for five years.⁶⁴ After the incident Civoniceva also indicated that he has previously been subjected to racist taunts on the field, and stated that Australian rugby league may have a major problem in regard to racism.⁶⁵

International cricket, too, has experienced problems with racial slurs from spectators, with South Africa’s Andre Nel reportedly called a ‘Kaffir lover’ during an international match at the Sydney Cricket Ground in 2006, while other racial comments aimed at the South Africans were made at the WACA in Perth during the same season.⁶⁶ This led to police warnings before the Test match against England the following year that racist taunting would result in criminal charges, with Cricket Australia encouraging fans to report such incidents by means of SMS messages.⁶⁷ Clause 9 of the Anti-Racism Policy for International Cricket, now contains a statement outlining the ICC’s position in relation to racism, and the potential penalties, including ejection from the ground, a potential ban from the venue, or even criminal prosecution.⁶⁸ The clause states the statement must be publically displayed during matches.

An incident in a match between Barcelona and Villarreal in the Spanish La Liga on 26 April 2014 highlights how a player’s reaction can help to diffuse the situation. During the match a banana was thrown at Barcelona’s Dani Alves, who simply reached down, picked it up, peeled and ate it, before taking the corner kick. Former England and Barcelona striker, Gary Lineker, praised the actions of Alves, describing it as a ‘top response’, an ‘utterly brilliant reaction’ that treated ‘the racist berk with complete disdain’.⁶⁹ The offender was later arrested for his act and the Villarreal club was fined €12,000.⁷⁰ A similar incident occurred in the Italian Serie A a

⁶¹ Patrick Smith, ‘Second Dons Fan Accused of Goodes Taunts’, *The Australian*, 21 May 2014, 40.

⁶² Peter Lalor, ‘Goodes Extends an Olive Branch to his Taunter’, *The Australian*, 23 May 2014, 35.

⁶³ Ibid.

⁶⁴ Brent Read and Stuart Honeysett, ‘Eels Fans Handed Five-Year Ban Despite Apology over Monkey Slur’, *The Australian*, 10 July 2008.

⁶⁵ A Prosenko, ‘Racism is a Ticking Bomb: Petero’, *The Sun-Herald*, 13 July 2008, 104.

⁶⁶ A Brown, ‘Security on Alert after Racist Yobs Taunt Nel’, *The Sydney Morning Herald*, 5 January 2006, 33. Note that the comments were in Afrikaans and were therefore made by South Africans rather than Australians.

⁶⁷ ‘Criminal Charges for Racist Abuse’, *The Australian*, 8 December 2006, 33.

⁶⁸ It should also be noted that the ICC’s crackdown on racial taunts between players and spectators works both ways with South African player, Herschelle Gibbs, for instance, banned for two Test matches after verbally abusing Pakistan supporters, even though Gibbs claimed he was simply responding to racial comments aimed at the South African players by the spectators. Although the penalty was imposed by Cricket South Africa (CSA) it was made under the terms of its regulations that were formulated from the ICC’s anti-racism policy which was outlined in the then pt 3.3 of its Player Code of Conduct.

⁶⁹ ‘Dani Alves: Barcelona Defender Eats Banana After it Lands on Pitch’, 28 April 2014

<<http://www.bbc.com/sport/0/football/27183851>>.

⁷⁰ ‘Dani Alves: Villarreal Fined £9,850 for Banana Throw Racism’, 7 May 2014

few weeks later on 11 May 2014. It was in a match between Atalanta and Milan, with two bananas thrown at Milan's Kevin Constant. Constant showed the fruit to the match officials while team-mates, Philippe Mexes and Nigel de Jong, sarcastically applauded the culprits. The Atalanta football club was later fined €40,000.⁷¹

It is suggested that both Alves and Constant's reactions illustrate that how a player reacts can be an important factor in defusing the situation. Although the two approaches were different, both were equally effective, with Alves showing contempt to the transgressor while Constant immediately brought it to the attention of the match officials.⁷² However, one of the worst examples regarding racist comments by a 'spectator' did not actually occur at a match, but on the social networking site, Twitter.

Twenty-one year old student, Liam Stacey, made comments regarding Bolton's Fabrice Muamba after he had collapsed with a cardiac arrest during an FA Cup quarter final against Tottenham Hotspur. Stacey was charged with a racially aggravated public order offence to which he pleaded guilty. He was also remorseful, stating that he had been drunk at the time, but in sentencing him to 56 days jail, Judge Charles stated that:

It was racist abuse via a social networking site instigated as a result of a vile and abhorrent comment about a young footballer who was fighting for his life. At that moment, not just the footballer's family, not just the footballing world but the whole world was literally praying for his life. Your comments aggravated this situation.⁷³

The case was clearly one that required the intervention of the law, rather than being handled internally by sporting bodies. This was not only because of the need for the deterrent aspect of criminal punishment due to the seriousness of the incident, but also because of the lack of contractual or licence agreements between Stacey and the FA. However, the recent incident involving Chelsea supporters in Paris highlights a situation where the sport was able to impose a suitable penalty far quicker than the justice system could have.

The incident in question happened on 18 February 2015, immediately after the Chelsea match against Paris Saint-Germain in the UEFA Champions League. At a Paris Metro station a phone video was taken of a group of Chelsea supporters, on a train, chanting, 'We're racist, we're racist, and that's the way we like it'. They were then seen pushing a black man away, preventing him from boarding the train, with the actions receiving 'quick condemnation from the football establishment and political leaders'.⁷⁴ Chelsea manager, Jose Mourinho, stated

<http://www.bbc.com/sport/0/football/27316855>.

⁷¹ 'Atalanta Supporters Throw Bananas at Milan's Kevin Constant', 12 May 2014

<<http://www.theguardian.com/football/2014/may/11/kevin-constant-atalanta-ac-milan-banana>>.

⁷² Both responses can also be contrasted with the actions of Spartak Moscow's Emmanuel Emenike. Dynamo Moscow fans made monkey noises whenever Emenike touched the ball in a Russian Premier League match in March 2012. He was subsequently fined US\$17000 and given a suspended sentence to the end of the season for his response in gesturing to the crowd: 'Spartax's Nigerian Striker Fined for Finger Gesture', 30 March 2012 ><http://www.reuters.com/article/2012/03/30/ozasp-soccer-russia-emenike-idAFJ0E82T0AD20120330>>.

⁷³ S Morris, 'Student Jailed for Racist Fabrice Muamba Tweets,' *The Guardian*, 27 March 2012 <<http://www.theguardian.com/uk/2012/mar/27/student-jailed-fabrice-muamba-tweets>>. For further discussion of the issue of racism on social media in relation to English football see J Cleland, 'Racism, Football Fans, and Online Message Boards: How Social Media Has Added a New Dimension to Racist Discourse in English Football', (2014) 38 *Journal of Sport and Social Issues* 415. For further information regarding racism within English football see James Cleland and Ellis Cashmore, 'Football Fans' View of Racism in British Football,' (2013) *International Review for the Sociology of Sport* <<http://irs.sagepub.com>>.

⁷⁴ 'Hunt for Metro's Racist British Fans,' *The Australian*, 20 February 2015, 10.

that he wanted to invite the commuter (later identified as a French-Mauritian named Souleymane S) to Stamford Bridge, Chelsea's home ground, for the return match. Chelsea also announced that five supporters had been quickly identified and immediately banned from Stamford Bridge.⁷⁵ Thus, a process that could have taken months if not years, through the criminal justice system was handled within days by Chelsea, the club relying on the law that supporters attend matches on licence, one that can be revoked at any time. It is also suggested that even a life ban would not be inappropriate, given the fact the remarks indicate an ingrained racist attitude, rather than represent a passing comment. It is further suggested that a ban from attending home matches is a far more significant penalty to the perpetrators than the likely fine from the criminal justice system.

IV CONCLUSION

It is now nearly sixty years since the United Nations Convention against racial discrimination, and forty years since Australia enacted it into domestic legislation. While these racial discrimination laws provide protection to all Australians, including those involved in sport, what also has been important are sport's internal regulations, the wording of which often reflect these international conventions and domestic legislation. These internal regulations, it is suggested, can often provide a quicker and better outcome than the courts. One reason is that the criminal law normally requires the defendant to 'intend' to commit an offence, rather than impose the strict liability that can potentially be imposed by sport's internal regulations. Another factor is the lower standard of proof required, since sports often adopt a 'comfortable satisfaction' standard, usually defined as being above balance of probabilities, but below beyond reasonable doubt. However, cases like that of Liam Stacey highlight the fact that there will be instances where the involvement of the criminal justice system would be essential.

The internal regulations rely on clauses within player contracts or in codes of conduct as the legal basis for imposing penalties and can therefore be effective in dealing with comments made by players, officials and managers/coaches. It is also suggested that the AFL style dispute resolution processes involving conciliation and mediation should be seen as the ideal model for incidents involving players, and should therefore be adopted by other organisations, such as the English FA.

While there will always be the occasional on-field comment by players, it is suggested the most problematic area for sport are the racist comments made by spectators. However, many of these incidents can still be handled internally, primarily by using the general law relating to licence in order to ban perpetrators from the grounds.

In relation to a number of recent incidents as discussed above involving owners and a president of a club, it appears that the AFL has created double standards - in dealing with Collingwood President, Eddie McGuire, no suspension was imposed, but players received self-imposed suspensions. Thus, while the FA can learn from the AFL in regard to the internal handling of comments made by players, it is likewise suggested the AFL can learn from the FA as to how it dealt with the David Whelan incident.

⁷⁵ 'Chelsea Apologies to Metro Victim', 20 February 2015 <<http://www.sportinglife.com/football/news/>>, <http://www.sportinglife.com/football/news/article/165/9723325/chelsea-apologise-to-metro-victim-racially-abused-by-club-supporters>>.

Overall, it can be said that sport is playing its part in the attempt to eliminate racism by providing suitable penalties against players, managers, officials and spectators by means of contract law and licence. Education, however, is an essential element in the eradication of racism within sport, as it is within society in general. Thus, the investment of time and money into education programs for those involved in sport can provide a potential preventative measure, and as in the AFL, should be compulsory whenever there has been an incident involving a racist comment in a sporting context.