Tackling racial hatred: conciliation, reconciliation and football

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> The first time someone walked up and said 'sambo', it sort of shocked me.
>
> An Aboriginal AFL player.[1]

> [Michael Long] wants to clean it up for his race, the indigenous people of Australia ... It's not in the footy area really. It's more a debate on how you want to live in Australia beyond 2000.
>
> Kevin Sheedy (coach of the Essendon Football Club).[2]

Introduction

Football is not just a sport.[3] It is a cultural practice imbued with the history of Australian race relations. The subjection of Aboriginal people to racist abuse was, until very recent times, simply a part of the game, witnessed and participated in by players, officials and spectators alike.[4] Racist slurs against indigenous players

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1 Interview. See note 27 and accompanying text below.

2 'Bombers to maintain the rage on racism' *The Australian*, 8 May 1995.

3 Although the term 'football' in this paper should be taken to mean Australian football, the same comment applies to all codes; the social, cultural and political significance of sport is widely documented. Almost any book on sport will refer to these matters, though too few Australian works on football take it seriously, especially when it comes to race. The standout exception is Colin Tatz's work; such relationships are the very essence of the analysis in his comprehensive history *Obstacle Race: Aborigines in Sport* (UNSW Press, Sydney, 1995).

4 Even the lengthier and more authoritative histories of Australian football pay scant attention to Aboriginality and treat it superficially when it is addressed: Piesse K *The Complete Guide to Australian Football* (Sun Australia, Sydney, 1993) pp 2-4; Hutchinson G *From the Outer* (McPhee Gribble, Melbourne,

embody the national history of dispossession and violence; they are not mere taunts but attacks on a person's being, a (re)statement of Aboriginal non-humanity.

The landmark attempt to combat racist abuse in Australian football occurred in 1995 when the Australian Football League (AFL) instituted a code which prohibited racial and religious vilification on the field. This change was in response to Aboriginal footballers' complaints of systematic abuse and subsequent 'revelations' that such taunts were an entrenched part of the competition. The new rules meant that when a player had been abused he could lodge a formal complaint; the matter would go first to conciliation and, if unsuccessful, to the AFL's disciplinary tribunal.

The AFL provisions are important on their own terms because they represent a significant non-governmental attempt to address racist slurs. In addition, because these provisions share substantive and procedural parallels with State and Commonwealth vilification laws, they warrant attention as a point of comparison for state-based laws and procedures. Nevertheless, the sporting rules have thus far attracted little analytical or empirical attention either in their own right or comparatively. In this context, and in a national climate of reconciliation, my objective in this article is to present some research into the impact of the AFL provisions and to draw some critical connections between the sporting experience and the various legislative regimes which prohibit racial vilification.[5]

This article moves through three core stages from the AFL context to more general concerns. In Part 1 the development and content of the AFL vilification rules is outlined. Part 2 draws on interviews with 12 Aboriginal players and aims to explain the impact of the rules and identify some of the key factors that have influenced the degree and nature of that impact. Part 3 broadens the scope of the inquiry beyond football; through a theoretical and empirical comparison the article seeks to examine how the experience of vilification complaints in AFL football might inform a

1984) pp 115-6; Fitzgerald R and Spillman S (eds) *The Greatest Game* (Heinemann, Melbourne, 1988) pp 112-5, though this piece has been the subject of criticism (see note 43 below); Sandercock L and Turner I *Up Where, Cazaly* (Granada, London, 1981) p 220; Hess R and Stewart B *More Than A Game: An Unauthorised History of Australian Rules Football* (Melbourne University Press, Melbourne, 1998) pp 13 and 241-5. Robert Pascoe's *The Winter Game* (Mandarin, Melbourne, 1996) pays more attention to race but there are few reflections on power.

5 I am concerned with the experience of indigenous rather than non-indigenous players primarily because the AFL vilification rules came into being following Aboriginal players' complaints. Moreover, vilification in sport occurs against the backdrop of community racism against Aborigines and the elusiveness of national reconciliation. There have, however, been at least three complaints from non-Aboriginal players: 'Stynes decides against official complaint' *The Age* 28 May 1997; 'Lockett claim draws no response' *The Sydney Morning Herald* 1 August 1997; 'Saint Race Slur' *Herald-Sun* 6 July 1999.

discussion of conciliation as a dispute resolution process in vilification complaints and the role of civil remedies in combating racial hatred.

My argument is twofold: the AFL provisions should not be credited with too much significance beyond the scope of their specific application (and even then there are significant problems), but this critique is nonetheless tempered with an optimistic caution. First, the particularity of the AFL circumstances necessitates scepticism. Although the AFL provisions have had a very positive impact on that competition, the effectiveness of the rules and procedures is so greatly dependent on the context that it appears atypical in relation to racist abuse and dispute resolution in the wider community. It seems, then, unwise to extrapolate legally beyond the specific circumstances which exist in the AFL. Moreover, the 'cultural' impact of the AFL changes has been inconsistent and perhaps even superficial — it would be a mistake to attribute too much cultural change to the AFL strategies. This article argues in closing that a penalty-based regime is appropriate in combating the degree and extent of racist abuse in football and in the community. The second aspect of the argument is, however, one of both caution and optimism. For all the flaws in conciliation at the AFL level and otherwise, and for all the specific contextual factors to which the AFL successes might be attributed, there still seems to be cause for some optimism because within conciliation there appear to be examples of real and effective reconciliation. Where such outcomes can be achieved, we should be reluctant to dismiss too quickly the processes which bring them about.

1. A racist code: the emergence of vilification rules in the AFL

The AFL is the highest profile sporting competition in Australia.[6] Of the 16 teams in the competition, 10 are based in Victoria, with one or two in each of Western Australia, New South Wales, South Australia and Queensland. The AFL, playing Australian football, also heads the most dominant code in Australia; even in the absence of international competition it is far more prominent than soccer, rugby union or rugby league.

League football, like many other sports in Australia, has a long and ugly history of racism.[7] This is so in spite of the numerous Aborigines who have excelled in sport at

6 Its predecessor was the Victorian Football League (VFL) which expanded during the 1980s and was formally renamed in 1989 to become the AFL.

7 Tatz documents racism across different sports and throughout post-1788 Australian history. He argues that sport is a mirror of the broader Aboriginal experience since the mid-19th century (above note 3, p 341).

national and international levels.[8] Colin Tatz has observed that Aboriginal sportsmen or sportswomen are 'Australian when they're winning but Aborigines at all other times'.[9] Attempts to combat racist abuse on the football field have consisted of playing harder, or sometimes responding with physical violence, which breaches the rules of the game. The latter action results in a striking charge against the assailant, who is then disciplined by a league tribunal and probably suspended for somewhere between two and six games. North Melbourne player Jim Krakouer went to the tribunal numerous times during the 1980s on striking charges which were often in retaliation against racist abuse. In 1995, former Footscray player Michael MacLean told stories of abuse he had experienced and, when asked why he had not spoken out earlier, explained 'If I spoke out, nothing would be done. I mean, Jimmy Krakouer was a superstar; what hope did I have?'.[10]

The rationale for the silencing of protest did not lie in the sporting tradition that 'what happens on the field stays on the field', though any complaint would be unsportsmanlike and earn one the tag of whinger or whistleblower.[11] The point is that to the dominant culture racist abuse was normal and legitimate; it was simply a part of playing the game.[12] If Aboriginal players were abused, they either had to accept the abuse or accept a penalty if they retaliated.

There is little evidence that abuse was ever taken into account when determining a penalty. The most curious exception is that of Carlton player Syd Jackson, who faced the tribunal for striking an opponent in the week prior to the 1970 grand final. Suspension would have denied him a place in the premiership team. At the hearing, he claimed he had been racially abused by his opponent and the punch was in retaliation. The tribunal only reprimanded Jackson and he played the following week. Recent media reports cite this version, though it has not been mentioned that Jackson was not served in the bar after the game.[13] However, Nadel draws on a 1993 news report to provide an unusual postscript which denies there was any racist abuse:

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8 Above note 3; Harris B *The Proud Champions: Australia's Aboriginal Sporting Heroes* (Little Hills Press, Sydney, 1989).

9 Tatz C *Aborigines in Sport* (Australian Society for Sports History, Adelaide, 1987) p 90.

10 MacLean M 'You won't stop racial abuse' *The Australian* 13 May 1995.

11 Russell Wright asserts in 'Skin Taunts' (1999) 42 (Aug-Sept) *Arena Magazine* 18 at 18 that this is a dimension of masculinity in sport. I am not sure that this is necessarily so, but it is in any event undeniable that that the attitude is traditionally prevalent.

12 McNamara L 'Long Stories, Big Pictures: Racial Slurs, Legal Solutions and Playing the Game' (1998) 10 *Australian Feminist Law Journal* 85; Warren I and Tsaousis S 'Racism and the Law in Australian Rules Football: a Critical Analysis' (1997) 14 *Sporting Traditions: Journal of the Australian Society of Sports History* 27 at 33-5 and 45.

13 'AFL tackles racism, dual complaints and Everitt' *The Australian* 8 April 1999; Tatz, above note 3, p 352.

> [At the Tribunal hearing] Jackson had allowed Carlton's advocate to imply provocation to explain a fight with Collingwood's Lee Adamson. Twenty-two years later he explained that there had been no provocation; Carlton president George Harris had devised the defence to ensure that the talented Jackson was available to play in the grand final ... Adamson is quoted as saying he blamed Harris, who 'set it up and I have despised him ever since for what he did'.[14]

There were two legal challenges in the 1990s involving racist abuse and football, though on discrimination rather than vilification grounds. The first case was in a regional Australian football competition[15] and the second concerned abuse in rugby union.[16] Where their league tribunals had suspended them for striking an opponent in retaliation to racist abuse, two players argued that the suspensions were racially discriminatory. On both occasions, Sir Ronald Wilson held in the Human Rights and Equal Opportunity Commission that there was no discrimination on the grounds of race.[17]

Was it known that racist abuse occurred on the field? It was widely known, but nothing was done. Players, and even a coach, openly acknowledged they would engage in racist slurs to put a player off his game.[18] The mood in the AFL began to change in 1993 when leading Aboriginal player for St Kilda, Nicky Winmar, was abused throughout a game by opposition supporters. At the end of the game, Winmar turned to the Collingwood fans and, lifting his jumper, pointed to his skin. Captured by photographers, the image appeared in the press nationally. It is unquestionably the moment at which race was placed publicly on the agenda for professional football.

On Anzac Day 1995, Collingwood played Essendon at the Melbourne Cricket Ground. After the game Essendon's Michael Long, then aged 25 and (like Winmar) a talented, popular and high profile-player, made the first ever formal complaint to the AFL, claiming that Collingwood opponent Damian Monkhurst had called him a 'black cunt' or a 'black bastard'. Mediation was arranged between the two players.

14 Nadel D in Hess and Stewart, above note 4 pp 242 and 280 (citing a report from the *Herald-Sun* 1 May 1993).

15 *Mead v Southern Districts Football League*, 15 November 1991 (unreported, HREOC, Sir R Wilson).

16 *Tamanivalu v Western Australia Rugby Union*, 17 August 1994 (unreported, HREOC, Sir R Wilson).

17 These findings are problematic. I have argued elsewhere that the HREOC decisions rely on an understanding of racism as a legitimate part of football: McNamara, above note 12.

18 'Back to the Dark Ages' *The Sydney Morning Herald* 8 May 1995.

No penalty was imposed on Monkhurst and the AFL announced that the matter had been resolved. A prepared statement was read on behalf of the players:

> We have met this morning to discuss this issue and believe it has been satisfactorily resolved. We are not prepared to make any comment other than to say it is now behind us and we both want to concentrate on playing good football for our clubs.[19]

Almost immediately after the announcement was made, Long took the extraordinary step of speaking to the media and explaining that contrary to the AFL statement he was not at all happy with the resolution of the matter.

Another mediation was arranged and Monkhurst subsequently apologised. Long demanded that the AFL institute rules which would mean fines and suspensions for players who engaged in racist abuse.[20] In the weeks that followed, players continued to be abused by both their opponents and spectators.[21]

In June 1995 the AFL implemented 'Rule 30: a Rule to Combat Racial and Religious Vilification'. Since that time, there have been at least 14 instances of on-field vilification in the AFL.[22] All these have occurred between players on opposing teams.[23] There may be other complaints which have not come to light, or other incidents which have not been the subject of complaint. Racial abuse has since been reported in Australian football in other States, and in other sports too numerous to mention. Within three years there were vilification rules (often replicating the AFL code) in Australian football in other States, in junior, suburban and regional competitions, and in other football codes.

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19 'Racism peace plan rebounds on AFL' *The Australian* 6 May 1995.

20 'Long demands severe abuse penalties' *The Australian* 18 May 1995.

21 'MacLean: You won't stop racial abuse' *The Australian* 13 May 1995; 'Human rights mediator to probe new AFL racism claim' *The Australian* 19 May 1995.

22 This includes matters alleged in the media but not pursued by players, matters pursued by players but resolved between clubs, and incidents formally reported under the AFL rules. For a review of the complaints to June 1997, see Gardiner G 'Racial Abuse and Football: The Australian Football League's Racial Vilification Rule in Review' (1997) 14 *Sporting Traditions: Journal of the Australian Society of Sports History* 3.

23 Although my interviews with Aboriginal players did not focus on the question, there were some indications that Aboriginal players are on occasion subjected to racism from their own teammates. None of the players interviewed said that they had experienced this situation themselves, but some said it had happened to others.

Rule 30: the Prohibition On Religious and Racial Vilification

The AFL is the regulating body of a professional sporting competition. It has no connection whatsoever with the government and players are bound to its rules by virtue of their contracts. The disciplinary body for players is the AFL tribunal, which (again contractually) can hand down penalties for 'reportable' forms of misconduct that are against the rules of the game, such as striking an opponent. Racist abuse is not a reportable offence in the same way, but instead an action that is subject to complaints. Rule 30 states:

> [N]o player ... shall act towards or speak to any other person in a manner, or engage in any other conduct which threatens, disparages, vilifies or insults another person ... on the basis of that person's race, religion, colour, descent or national or ethnic origin.

When a player lodges a complaint, it goes first to compulsory conciliation. The conciliation process has attached to it a confidentiality requirement under which a player or club can be fined if they discuss the mediation. The confidentiality condition was included on the advice of the Equal Opportunity Commission of Victoria, which informed the AFL that:

> [M]aintaining confidentiality is critical to satisfactorily resolving disputes ... Once a racial abuse case gets into the media and claim and counter-claim is made by the parties concerned, it becomes almost impossible to resolve such cases through mediation. Mediation is a key part of the process, and includes educating an offender about the issue of racism.[24]

If conciliation is unsuccessful it will go to the AFL tribunal, where a player's innocence or guilt is determined and (if the complaint is sustained) a penalty is handed down which may include suspension and a fine of up to $50,000. Only two matters have so far gone to the tribunal, though in neither case was the complaint sustained.[25] If a complaint of vilification is lodged against a player for a second (or further) time, the matter goes directly to the tribunal.

24 *Australian Football League: Annual Report 1997* AFL Melbourne 1998 at <http://www.afl.com.au/insideafl/annual_9.htm>. Confidentiality concerns are more complicated in legislative complaints; issues arise on the one hand of providing a cheap, expeditious, supportive and non-threatening environment for complainants, and on the other it avoids publicity for the respondent and is a process that is immunised against scrutiny: Thornton M 'Revisiting Race' in *Racial Discrimination Act 1975: A Review* (AGPS, Canberra, 1995) pp 86-7.

25 These occurred in 1997 and both involved Aboriginal players.

The rules do not preclude or limit a player's right to instigate action under discrimination and vilification legislation, though no complaints concerning professional football have yet been lodged under any of the legislative regimes. The possibility of such legislative actions should not be discounted, especially with regard to players who continually use racist abuse as a playing tactic.[26]

2. After Rule 30: the experience of Aboriginal players

To what extent and in what ways have the vilification rules made a difference in football? Have the rules done anything to de-legitimise racism in football, to remove racism as part of the game and to make discrimination and hatred visible for what it is? With these questions in mind interviews were conducted with 12 out of the 24 Aboriginal AFL players. All interviews were arranged in consultation with the players' clubs and conducted on club premises, lasting between 10 and 30 minutes.[27] Some players were interviewed alone and others in groups of two or three. All players indicated they had been racially abused by opposition players at some point in their careers, and only a few had escaped on-field vilification in the AFL. Comments were mostly reflections on the players' own experiences, though on occasion they referred to experiences of teammates or friends in other AFL clubs.

26 Colin Tatz has argued that legal action is the most appropriate route: '[I]f I were an Aboriginal player, I wouldn't be wasting my time with football tribunals. I would be taking civil lawsuits and injunctions against various players ... that would rock the establishment to its very foundations'. Interview with Colin Tatz and Maurice Rioli, *The Sports Factor* ABC Radio National, 2 May 1997 <http://www.abc.net.au/rn/talks/8.30/sportsf/sstories/sf970502.htm>.

27 No approaches were made directly to players; clubs were in every instance the point of contact and arrangements were made through club officials. Clubs and players were provided with a written statement indicating the purpose and scope of the interviews and that it was not a media interview, and a guarantee of confidentiality. Where the confidentiality requirements of the AFL rules would be at issue (ie where a player had made a complaint), assurances were given that players would not be asked to discuss any details of their own complaints. No player volunteered any such details. In four cases where interviews were sought but not obtained, it appears the clubs did not follow up the interview request; that is, it seems that no player who was asked to be interviewed declined to do so. As a matter of method, the research represents an attempt to interview Aboriginal players because these views have traditionally been silenced. It is an example of what Matsuda has called 'outsider jurisprudence', which she defines as 'jurisprudence derived from considering stories from the bottom' or 'attempting to know history from the bottom'. The methodology is to examine 'stories from their [the outsiders'] own experiences of life in a hierarchically arranged world'. Matsuda M 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320 at 2323-6.

Whether or not they had lodged complaints, it was clear that all interviewees had given substantial thought to the issue and the processes for dispute resolution. The comments of players who had not lodged complaints were no less considered or comprehensive than the comments of players who had lodged complaints. Unless otherwise indicated, the quotes in this section are drawn from the interviews.

Introduction and impact of the rules

Across the board, the Aboriginal players interviewed saw the introduction of the rules as a good thing. Without intense media interest, it is almost certain the impact of complaints would not be so great, but there is no doubt that the incidence of on-field racist abuse in the AFL has decreased remarkably. On the other hand, some players viewed the media interest as a positive reflection of community interest in and disapproval of racism, rather than simple media sensationalism.

There was some cynicism as to why the prohibition was introduced, with doubts about sincerity and a tendency to attribute it more to commerce or shifts in community perceptions and the accompanying media spotlight. One player thought that the AFL could see that children would be more likely to play basketball or another sport if their parents think that football is racist. The instigation and use of the rules was seen very much as a direct outcome of pressure placed on the AFL arising from Michael Long's actions in 1995, and to a lesser extent those of Nicky Winmar two years before, and both of these players were identified as role models for Aboriginal players in the AFL.

The attitude that what happens on the field should stay on the field was largely rejected:

> It's a joke. That's an attitude from the past, and what happened in the past should stay in the past.
>
> Some people can take it by laughing or whatever — those days are gone.

The rejection was not straightforward; one player who held the traditional view did not discount the possibility of making a complaint, and all players indicated that not every single slur or abuse would make them complain. It seemed that to warrant a complaint, the abuse would have to be extraordinary in its ferocity, frequency or circumstances: '[Y]ou just know when to put your foot down ... you know when you've really been hurt'. There is, they almost all said, a line which would have to be crossed; each would draw the line in a different place but none would invoke the rules lightly. There was never any indication from those who would often let abuse

pass without complaint that it would be unreasonable if a different player had complained in the same circumstances.

Two core reasons emerged as to why players like the rules: first, the football field is a workplace and, secondly, the rules will change things 'for the kids who follow'. The AFL players are professional in every sense of the word. For them, football is not just a pastime. It is their career and they do not expect to be subjected to racist abuse: 'If you said that in [any other] workplace about me — "you black so and so" — you'd be fired, you'd be out of your job'. Another player made the same point:

> It's past the point of [staying on the field] because it's become a workplace for us ... In any other workplace, with agreements ... you get taken to certain tribunals and you get fined. I just think that's the way it's changed. [Football] is professional sport, and we play hard. We just put in too many hours to get rubbished by someone. We make too many sacrifices to put up with that stuff.

The more deep-seated reason for pursuing vilification issues arises from the players' concerns for others, especially children — not just those who will come up through the ranks to AFL level but 'kids playing at all levels'. Abuse should simply not happen. The days of 'copping it week in, week out' could not continue. There is a very genuine desire to ensure that it does not happen to the next generation of footballers:

> Sometimes you have to take a stand. You don't want to see the next generation going through the same thing, the same old thing.

> I'd probably [make a complaint] ... for the sake of stamping it out. I don't want Australia to be like South Africa ... The kids that are growing up, they don't need this sort of stuff, thinking these white people are racist.

It was pointed out by one footballer that children do not have the same defences through maturity — that 'it takes time for kids to become proud of their identity':

> It's not just Aboriginal kids, black kids — it's all different races ... It's OK for us now, but what about the kids at school who are still being called names?

These sentiments echo Michael Long's reasons for complaining publicly in 1994:

> [I did it] ... not only for myself but for the kids from all races of people to know they can't

> use that language anywhere. Not only in sport but off the ground as well as on the ground.[28]

Where children were among a group abusing him from the crowd, a player explained how disappointed he was:

> I turned around and there were like ten kids a part of it. I'm thinking "Why?" ... They're just young and shouldn't be like that.

The players are all conscious of being role models for Aboriginal children and of the significance of media coverage with regard to racism in football.

Conciliation

The conciliation processes involved in the AFL complaints — though not fully satisfactory — appear in the main to have been very successful from the Aboriginal players' perspective. Some held a degree of cynicism:

> [A]t the end of the day they're just going to apologise to get out of the punishment or whatever action's taken ... You'd never know whether they're sorry or not.

There was also a clear acceptance that conciliation is not a panacea: 'in some case[s] you have to [fine] them, the people you can't change. I mean, you can't change everything'. These views are consistent with recent calls for a tightening up of the vilification rules, arguing that the 'heat of the moment' is not an acceptable excuse and this needs to be made clear to players.[29] Nonetheless, most players viewed conciliation as a positive part of the rules because it allowed direct, mediated contact with the abuser. Even where players had not gone through the process, there was still quite clearly an awareness and appreciation of what it involved. The comments were suggestive of three ways in which conciliation was seen as important.

First, Aboriginal players want to make it clear they do not like it — *that racist abuse matters*. That it *hurts*. The rules give them a legitimate avenue and practical means through which to do this, removing the notion that what happens on the field stays there. There is a quicker, more supported and more accessible path than the legal process which would have to be invoked should a player wish to pursue a claim under legislation.

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28 'Racism peace plan rebounds on the AFL' *The Australian* 6 May 1995.

29 'AFL tackles racism, dual complaints against Everitt' *The Australian* 8 April 1999; interview with Colin Tatz and Maurice Rioli, *The Sports Factor*, above note 26; 'Bomber Che's disgust' *Herald-Sun* 23 April 1997.

The second point is that the Aboriginal players want to explain to the offender *why* it matters:

> The thing that they [the abusers] don't understand is that, especially Aboriginal people, they have to go through that kind of thing day in and day out. We walk into a shop, we get followed around like we're going to steal. Police pull us up because we're driving a flash car and they give us 101 questions: 'What are we doing here?', 'Whose car is it?', things like that. It's not just on the footy field we've got to bite our tongue; it's also in everyday life we put up with that kind of crap.

The issue of daily life came up often:

> They expect you to shake their hand after the game ... [They] don't understand ... some people go through all their childhood or most of their lives having to put up with it, they probably don't realise how much [racism and racist abuse] is also a part of [Aboriginal people's] day to day lives.

The conciliation process gives Aboriginal players an opportunity to explain their position to an abuser who does not understand it. This leads to the third positive aspect of conciliation — someone gets to know you, to understand you:

> If you get the opportunity to speak to these people and talk to them you put the onus back on those people who aren't Aboriginal ... Being Aboriginal, we get sort of put in the same basket as ... drinkers and smokers and dole bludgers and those sort of things. But as we know there's certain people in every sort of race that are like that, which unfortunately a lot of people don't realise. Unfortunately the media presents all the bad things. So it's quite hard for the everyday Australian, I suppose, to come to those sort of terms. But we find that if you make friends, or people make friends with us, they do change their ways. I think that's the way to go.

The theme of understanding was raised again:

> After they did that, they got along pretty well and his attitude changed towards ... calling people names ... You know, that was probably the best thing that we thought could sort things like that out, because if you just go up to them face-to-face and you talk about it or get to know them ... That's the point of it.

How does the conciliation process assist towards this understanding?

> It is a sort of a reconciling and understanding, that's the way I see it. I mean, I prefer that to happen than to have someone go away and still have that grudge about the person where they haven't learned anything about what they've actually done to the person. [I would]

> prefer to educate them than fine them.

Someone else explained this point differently:

> You've got to try and see if there's other ways around to try and fix it rather than [penalties] ... [Conciliation] gives you the chance to sit down with each other, talk and you explain to him how it felt being called that. You can say to him maybe what you had to go through, not with just that comment but in your own life and maybe that'll get across to him and maybe he'll understand: 'Oh, I'm sorry for what I've said to you. Now I understand how you feel when people call you that and what you have to go through in day to day life'. Hopefully [conciliation] might get the message across.

The players' comments reflect the viewpoint Michael Long expressed in the mid-1990s: 'Racism is not something that you're born with. It's something that you're taught'.[30] Consequently, the players see racism as something which can be changed with education and understanding. It was noted, however, that 'not many players or people ... know an Aboriginal person, so the understanding's not there'.

The comments above were all made in interviews conducted prior to the 1999 vilification complaint against St Kilda ruckman Peter Everitt, who had two years earlier racially abused Michael Long, subsequently apologising after a mediation arranged through the clubs. In April 1999, Everitt called Melbourne player Scott Chisholm a 'black cunt', also making references to petrol sniffing and the Aboriginal colours on Chisholm's mouthguard. Everitt initially denied ever making the comments, only conceding after several days that he had done so. The conciliation conferences which followed eventually resulted in Everitt making a public apology, voluntarily withdrawing from four games (costing him approximately $60,000 in match payments) and donating $20,000 to an Aboriginal community project.[31] Had the matter gone to the tribunal it was likely that Everitt would have been suspended for 12 games. The matter was closed when Everitt, 'with shaking voice and moist eyes said he was profoundly sorry for hurting Chisholm, for hurting Chisholm's family, for hurting the Aboriginal people'.[32]

30 'Back to the Dark Ages' *The Sydney Morning Herald* 8 May 1995.

31 'Race cases must stay in-house, says AFL' *The Advertiser* 8 July 1999; 'Saint race slur' *Herald-Sun* 6 July 1999.

32 'Everitt stands tall and does AFL a favour' *The Age* 10 April 1999. See also 'AFL tackles racism, dual complaints against Everitt' *The Australian* 8 April 1999; '$80,000 handshake ends racism row' *The Advertiser* 10 April 1999.

The outcome attracted favourable comments from Aboriginal groups,[33] but it was with the help of leading football writers Mike Sheahan and Patrick Smith that Everitt emerged in the media as little less than a hero:

> Many of us who watched Peter Everitt at [the media conference] emerged more charitably disposed to the man. It was Everitt as he's never been in public ... He was nervous, serious, contrite. Convincing ... [He] declined to read from a prepared statement ... and carried himself with aplomb and apparent sincerity. Perhaps we saw a more mature, if less secure, Everitt yesterday.[34]

> Peter 'Spider' Everitt is a lot of things. Today you can add courageous to the list ... Any fool can vilify; only brave men face the media and the world and admit they were wrong ... Face-to-face with Chisholm, Everitt realised the harm that he had done and the course he must take. Everitt is a tall man. Yesterday he became a big man.[35]

Media personality and *Footy Show* host Eddie McGuire saw Everitt's apology as a watershed and praised his regular guest: 'Last time he might have said sorry to Michael Long, but this time he really meant it'.[36]

While the comments by the Aboriginal players were often positive and there has been a remarkable turnaround in many respects, the range of negative reflections, differences of opinion and matters such as that involving Everitt indicate that the rules should certainly not be regarded as a wholesale success for the AFL or the players. Incidents are still both regular and vicious.

In the country and in the crowd — what the rules don't do

Two places where it was suggested that racist abuse is still a significant problem were in competitions which do not attract mainstream media attention (especially rural competitions), and in the crowds at AFL matches.

Where the media profile is lower or non-existent the racist abuse often continues unchecked. All the players interviewed said the problems still exist in country, suburban and junior competitions. In these circumstances, there are either no vilification rules in the competition or if they do exist then they are just not viable

33 'Everitt's penalty cheered' *Herald-Sun* 10 April 1999.

34 Sheahan M 'The day a tall man grew as a person' *Herald-Sun* 10 April 1999.

35 Smith P 'Everitt stands tall and does AFL a favour' *The Age* 10 April 1999.

36 Eddie McGuire, quoted in 'Eddie says Everitt can teach many' *Herald-Sun* 14 April 1999.

avenues of redress. In local competitions in small communities it may be difficult to complain against someone with whom you will be working the next week. In some rural areas, players or perhaps even umpires may be local police officers.[37] Aboriginal players in such circumstances are far less likely to complain, the perception being that there would be little point: the response which would meet a complaint was mused upon with a tone of futility — 'what do you think they're going to say?'. The unanimous theme of the comments was that abuse still occurs in most lower level competitions and it would be extremely difficult to pursue a complaint using either league mechanisms or discrimination laws.

In communities where there is a very high Aboriginal population, the problem of racist abuse is less acute because of the number of Aboriginal players in teams. The reverse problem of indigenous offenders as abusers was occasionally identified. Players stressed the necessity of stamping out such abuse, arguing that there could not be double standards:

> [C]alling someone a 'white c' or whatever is just the same as calling you a 'black c' ... Both people, both sides have to adjust.[38]

At AFL level, the most significant problem appears to be the crowds. The targeting of Aboriginal players for racist abuse is longstanding. Umpire Glen James was subjected to vicious abuse from spectators in the late 1970s and early 1980s.[39] Michael McLean described a game in 1993 when the ball rolled over the boundary line: 'I went to pick up the ball ... when these four blokes over the fence started screaming, "You coon, go back where you came from. This is not your fucking country, nigger boy"'.[40] A fan described her views:

> Of course I sing out 'black bastard', but I don't mean it. It's all part of being at the footy on a Saturday arvo. The media makes too much of [racial taunts]. It's just a way of letting out your feelings.[41]

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37 One player stated that abuse often comes from the police officers.

38 An HREOC conciliator has indicated that in some rural and remote competitions there have been complaints that non-Aboriginal officials such as umpires have on occasion been abused by Aboriginal players (personal communication with the author).

39 Lyons G 'Racial prejudice at the footy' (1978) *Legal Service Bulletin* 105.

40 'McLean: You won't stop racial abuse' *The Australian* 13 May 1995.

41 Warren I and Tsaousis S, above note 12 at 37, citing 'Racial taunts part of the game, say footy fans' *Sunday Age* 25 April 1993.

In spite of the level of hostility, the issue of crowd behaviour and race has been rarely dealt with in Australian discussions of football.[42] According to the players it still goes on. The experience varies from state to state, and even at different grounds. The most crowd abuse occurs in Victoria and the least in Western Australia. Almost all players said Victoria Park, which was the Collingwood home ground until 1999, was the worst. A young footballer who played there said:

> I was going on to the field. I was waiting on the sidelines ... getting ready, and there was a whole row standing behind me and about 20 or 30 Collingwood supporters were making monkey noises.

Distinctions were not always drawn between the Victorian venues: 'They're all as bad as each other. At the Carlton Social Club in their ties or in the outer at Vic Park.'

The presence of an Aboriginal player on a fan's team can make some difference to crowd behaviour. The 'Black Magic' banners are praise, if perhaps tainted with

42 The issue of racist abuse by sporting crowds is under-investigated in Australia; even Tatz addresses it only briefly (above note 3 pp 154-5). Warren I and Tsaousis S, above note 12, provide perhaps the best general discussion of it, noting (at 47) the need for research. In the 2000 pages of football history and commentary in the sources cited at note 4 above, racist abuse from the crowd is mentioned just three times. Dave Nadel in Hess and Stewart, above note 4, pp 241 and 242, notes crowd abuse as an issue. Garrie Hutchinson's reflective pieces of 1984 express in a passing phrase some 'surprise' at anti-Semitism in the members' stand at the Melbourne Cricket Ground (above note 4, p 78), before delivering a dismissive apologia which was little more than a 'heat of the moment' defence of racist slurs: 'Racist insults seem to me to have declined ... but in moments of extreme passion an epithet pertaining to a player's racial or ethnic background does spit out' (p 115). In the US, see Williams P 'Performing in a racially hostile environment' (1996) 6 *Marquette Sports Law Journal* 287. In *Cox v National Football League* 889 F Supp 118 (1995), an African-American football player took action against the league for subjecting him to a racially hostile environment; spectators' actions included displaying a black dummy with Cox's number on it and the words 'wanted dead' written across its chest. A noose was tied around the dummy's neck. The UK experience has centred around the joint campaign by the Government's Commission for Racial Equality, which joined with the Professional Footballers' Association in 1993 in the *Let's Kick Racism Out of Football Campaign*: <http://www.cre.gov.uk/about/footbcam.hmtl>; on parts of the educational campaign, see Brown M 'Playing for Kicks' (1995) 8 (356) *New Statesman & Society* 32. Legislatively, the UK the *Football Offences Act 1991* is designed, among other things, to prevent racist chanting; for a discussion of the Act, see Parpworth N 'Football and racism: A legislative solution?' (1993) 137 *Solicitors' Journal* 1016. For an excellent discussion of the UK experience see Greenfield S and Osborn G 'When the whites go marching in: Racism and resistance in English football' (1996) 6 *Marquette Sports Law Journal* 315.

undertones of biological difference.[43] The opinion was also expressed by players that some fans see football only in terms of allegiance and though praising Aborigines in their own team will racially abuse opposition players. At least one incident was related where a group of spectators were abusing an opposition player; those fans were told by supporters of their own team 'to shut up or go somewhere else' because it was like abusing their own Aboriginal players.

In sum, the scope of the rules is limited insofar as they apply only within the AFL and the impact on crowd behaviour is uncertain, but the success of the vilification rules is clear at least with regard to the much-reduced incidence of on-field abuse. It seems safe to say that there has been substantial and meaningful change for indigenous players in that competition. The most significant aspect of this change appears to be founded first in the rules themselves, which represent normative statements accompanied by complaint processes, sanctions and education, making it clear that racist abuse is no longer viewed as acceptable. Secondly, it appears that some individual behaviours have changed due to the processes of conciliation and the resulting knowledge and understanding of others. How might these two processes of change in football inform a discussion of legislative provisions regarding racial vilification and the appropriateness of conciliation and civil remedies to combat racism? In what ways might changes in football be relevant to the deeper currents of reconciliation?

3. In law and in football: conciliation and reconciliation

In this part I want to examine some of the contextual and abstract matters arising out of the AFL experience and relate them to substantive and procedural issues in discrimination law. The potential to draw the reconciliatory successes of the AFL provisions into general attacks on hate speech is considered in the legal framework of conciliation and the cultural framework of sport. It will be argued first that the reconciliatory and anti-racist possibilities of vilification procedures — and especially of conciliation — are less than might be expected, given the success of the AFL

43 Tatz is wary of distinguishing admiration of style from an allegation of genetic or biological advantage (above note 3, p 149, criticising Martin Flanagan's 'Black Magic: Different Notions of Time and Space' in Fitzgerald R and Spillman S, above note 4, pp 112-5). Tatz prefers to discuss motive rather than biology (above note 3, pp 350-2). For an example of biologically characterising Aboriginal players at the AFL Tribunal, see Lyons, above note 39, at 108, where he criticises the players' advocate's submissions for Robert Muir: 'He's one of the few Aboriginal players who's got a bit of spirit and go ... most of them haven't ... He's got more go than the average fellow of his race'.

measures, because the context of vilification in elite football is atypical. From here, it is suggested that the common individualistic foundations of conciliation as a strategy for tackling racial hatred constitute fundamental shortcomings and do not bring about the possibility of meaningful conciliation or reconciliation. The article turns its attention in the closing sections to the extent to which penalties may be an effective and appropriate path to reconciliation.

Contrasting the AFL and legislative provisions

There are legislative provisions prohibiting racist hate speech in most Australian jurisdictions.[44] The civil remedies under New South Wales and Commonwealth Acts provide the most useful points of comparison.[45] The first Australian laws were enacted by the 1989 amendments to the *Anti-Discrimination Act 1977* (NSW). Under s 20C (1): '[I]t is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person ... on the grounds of the race of the person'. The prohibition is far from absolute, being qualified by a range of exemptions including the broadly stated s 202(c): '[A]cts done reasonably and in good faith for academic, artistic, scientific or research purposes, or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter'.

The Commonwealth *Racial Discrimination Act 1975* as amended by the *Racial Hatred Act 1995* states in s 18C that:

> It is unlawful ... to do an 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.

An act is not done in private if it is done in a public place, or in the sight or hearing of people who are in a public place. The federal law is also qualified by s 18D, which lists exemptions similar to those in New South Wales.

The process under all the legislation is that a vilification complaint is lodged with the relevant governmental body, such as the federal Human Rights and Equal

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44 *Discrimination Act 1991* (ACT) ss 65-67; *Criminal Code 1913* (WA) ss 76-80; *Racial Vilification Act 1996* (SA) and *Wrongs Act 1936* (SA) s 37; *Anti-Discrimination Act 1991* (Qld) s 126. There are also criminal provisions in some States.

45 The discrimination and vilification provisions in these jurisdictions have attracted the most attention with regard to empirical data.

Opportunity Commission or the New South Wales Anti-Discrimination Board. The complaint is first assessed and (provided it has substance and falls within the relevant jurisdiction) investigated, and in most cases there will then be some form of conciliation.[46] If conciliation is unsuccessful, the complaint will go to a hearing for determination by the relevant tribunal.

The AFL rules clearly take their substance from the legislative models, but there are still notable differences. Significantly, the AFL rules do not require hate speech to have a particular effect (incitement) nor that it be a public act. The rules are concerned with a private exchange between two parties, perhaps unseen and unheard by anyone else. There are no exceptions, exemptions or justifications for racist abuse. In this sense the AFL rules prohibit a more pure form of hatred and hate speech than does the legislation, proscribing what Patricia Williams has called 'spirit murder'.[47]

Secondly, although the prohibition on abuse is stronger, the target population is strictly limited. It applies only to AFL players and not to officials or spectators.[48] Fans are, of course, still subject to the general laws regarding racial hatred, though no legal action has yet been taken. The most specific discussion of crowd liability is that by Greg Lyons, who raised the question in 1978 of whether abuse such as 'useless fucking boong', which was screamed at Aboriginal umpire Glen James, could have constituted the criminal act of offensive language. He concluded that only the word 'fucking' could have possibly made the phrase offensive, but that in the context of a football game even that would have been unlikely to be considered offensive by a court.[49] Given the history of abuse by fans, the absence of discussion on this matter is arguably a significant shortcoming in the AFL's attempts to combat racial hatred.

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46 The conciliation may not be a conference; see text accompanying note 52 below. Voluntary conciliation is the most likely approach, though the parties can also be compelled to go to conciliation.

47 Williams P *The Alchemy of Race and Rights* (Harvard University Press, Cambridge MA, 1991) p 78. The sentiment is echoed remarkably closely by Michael Long in his calls for the league to make racist abuse a reportable offence: 'Take the offence straight to the tribunal and fine the player heavily for a first conviction. Players who physically strike opponents are sent straight up. Why not the racists, the people who strike at one's soul?'; 'Despite racial setbacks I still have my dreams' *The Age* 23 April 1997. On this theme as it relates to legislation, see Jones M 'Empowering Victims of Racial Hatred by Outlawing Spirit Murder' (1994) 1 AJHR 300 at 300-1 and 306-13.

48 The Australian Sports Commission has recently produced generic guidelines for behaviour which address, among other things, crowd abuse, though these were met with derision regarding AFL football: 'Fans face abuse ban' *Sunday Herald-Sun* 7 June 1998.

49 Lyons, above note 39, at 105-6.

Thirdly, there are procedural differences. In the triggering of an action, both the AFL rules and the legislation require a complainant who is willing to pursue a matter. In the civil arena this is recognised as problematic because it requires time, energy, capacity and perhaps also the need to feel protected from reprisal.[50] AFL players may not face such significant problems in these respects.[51] Following a complaint, the conciliation process for complaints in the AFL consists of a conference. This contrasts with legislative complaints, where conciliation conferences in NSW were attended by just 20 per cent of discrimination complainants to June 1995 in all categories, and only 9 per cent of vilification complainants between 1993 and 1995.[52] Moreover, the average duration for complaint handling was 6.7 months; AFL complaints are conciliated within three working days of the incident.[53]

Authenticity, authority and conciliation

Although conciliation — and alternative dispute resolution (ADR) more generally — have been subjected to numerous criticisms, not all of these necessarily apply to the AFL situation. ADR has attracted criticism first on the grounds that it represents 'a truce more than true reconciliation'.[54] The underlying assumption, argues Owen Fiss, is that there is 'a rough equality between the contending parties' which simply does not exist with regard to 'distributional equalities' of wealth and power; this

50 Reid SF and Smith R 'Regulating Racial Hatred' in *Trends and Issues in Crime and Criminal Justice No 79* Australian Institute of Criminology Canberra 1998; Antonios Z 'The Racial Hatred Act 1995' in *Hate Crimes and Discrimination 1999 Seminar Papers* (LAAMS, Sydney, 1999) p 19.

51 One player commented on the time and energy which was involved in running a complaint and felt that it was detrimental to his playing, which is, after all, his profession.

52 New South Wales Law Reform Commission *Discrimination Complaints Handling: A Study*, Research Report 8 (NSW LRC, Sydney, 1997) at 43; McNamara L 'Research report: A profile of racial vilification complaints lodged with the New South Wales Anti-Discrimination Board' (1997) 2 *International Journal of Discrimination and the Law* 349 at 359. *The Complaint Guide* (HREOC, Sydney 1999) produced by HREOC explains at 14 that 'The Commission is always sensitive to the circumstances which have led to the complaint. It recognises that it is not always necessary or desirable for both parties to meet face to face'. The New South Wales Law Reform Commission's study (at 112) indicates that discrimination complainants who had attended a conciliation conference were generally more satisfied with the outcomes than those who had not attended a conference, while respondents were less satisfied with the outcomes when a conference occurred than when it did not.

53 McNamara L, above note 52, at 362

54 Fiss O 'Against Settlement' (1984) 93 *Yale LJ* 1073 at 1075.

inequality drives the settlement which is achieved.[55] Where vilification is concerned, the criticism is compounded: the opportunity for conciliation arguably legitimises the discourse of racism because in reality there is simply nothing to talk about.[56] The conciliation process in the AFL is perhaps not as amenable to this criticism to the same extent as legal discrimination or vilification procedures. First, the parties in the AFL context are equal in ways that do not characterise civil matters. In AFL situations, the respondent is an individual, not an organisation. Approximately 39 per cent of complaints under Commonwealth legislation from 1996 to March 1999 related to the media, public debate or racist propaganda.[57] In NSW between 1993 and 1995, 60 per cent of complaints related to the media alone.[58] In the procedure for complaint handling, the AFL complainant is in every instance publicly supported by his club, so that wealth is not an issue. In the conciliation process itself, contrary to Fraser's argument that there is nothing to say, the experience of the Aboriginal players seems to be that often there is much to say. The process does not appear to legitimise the racist discourse; the fact that the process exists at all has de-legitimised the racist discourse. The criticisms founded in the inequality of the parties do not apply as strongly to the AFL situation.

Secondly, it has been argued that conciliation processes are not capable of binding external parties in the same way that judicial decisions can through statutory interpretation and the doctrine of precedent.[59] Conciliation does not provide for visibility or systemic change.[60] This argument appears to have some force with respect to legislative complaints of vilification. Most complaints under Commonwealth and NSW racial hatred legislation occurred in neighbourhood disputes, the media and public debate.[61] The first site of complaints is unsuited to a policy-based impact and the frequent inequality of the parties in the latter two categories would perhaps mitigate against other than individual outcomes. In the AFL, it seems that vilification *can* have a broader outcome. Education programs within the AFL and other competitions have arisen directly out of the complaints and conciliation process. However, the question of

55 Above note 54, at 1076, 1087. See also Hunter R and Leonard A *The Outcomes of Conciliation in Sex Discrimination Cases* (Centre for Employment and Labour Relations, University of Melbourne, Melbourne, 1995) p 14.

56 Fraser D 'It's alright Ma, I'm only bleeding' (1989) 14 *Legal Service Bulletin* 69 at 70.

57 Antonios, above note 50, pp 12-13.

58 McNamara, above note 52, at 356.

59 Fiss, above note 54, at 1080-81; Astor H and Chinkin C *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) p 55.

60 Thornton M *The Liberal Promise: Anti-Discrimination Legislation in Australia* (OUP, Melbourne, 1990) p 151.

61 Antonios, above note 50, pp 12-13. Compare the analysis of discrimination matters by Hunter and Leonard, above note 55, pp 10, 14, 29-30.

whether repeat offenders are appropriate targets for conciliation or even the limited sanctions of the AFL rules still lingers.

The third criticism of ADR is that its procedural focus results in the ignoring of substantive law and the norms within it; outcomes are derived from 'the unguided justice of compromise' and 'mediated results may differ significantly from the "public values" inherent in the formal ... positive law'.[62] For Fiss, the value of judgment relies upon the duty of the judiciary to 'explicate and give force to the values embodied in the authoritative texts ... to interpret those values and to bring reality into accord with them'.[63] There is, he argues, 'a genuine social need for an authoritative interpretation of the law' and this is not found in settlement through ADR.[64] The ADR process does not possess the authority and authenticity which is found in judgment.

This claim is problematic. It privileges the views of institutional bodies, ascribing to them interpretive moral and social power capable of constituting understanding. It simultaneously denies (or at least places a caveat upon) the authority and authenticity of the parties' interpretation of the values enshrined in the law. The criticism relies upon a conceptual distinction between conciliation as a process of dispute resolution and conciliation as a process of knowledge, understanding and reconciliation. What constitutes a 'successful' conciliation appears to be appraised against the dispute resolution process rather than any genuine understanding which might arise.[65] Conciliation as dispute resolution is at odds with the views of the Aboriginal footballers, for whom a conciliation outcome is really only successful if there is understanding between the individual parties and some constructive or systemic approach to eradicating the problem across the competition.

In sum, contextual factors suggest that the conventional criticisms of conciliation and ADR do not appear to be generally applicable to the AFL situation, but are still relevant to general vilification laws. It does not seem that success at the AFL level would

62 Brunet E 'Questioning the Quality of Alternative Dispute Resolution' (1987) *Tulane Law Review* 1 at 15-31, especially 15, 16 and 17; Astor and Chinkin, above note 59, at 55. The New South Wales Equal Opportunity Tribunal has strongly expressed the moral and policy aspects of vilification laws: *R v D & E Marinkovic* (1996) EOC 92-841 and *Daniels v Hunter Water Board* (1994) EOC 92-626. Conversely, such values are all too often not stated in judicial pronouncement but nevertheless guide the law and its interpretation.

63 Fiss, above note 54, at 1085.

64 Above note 54, at 1087.

65 Ronalds C *Discrimination Law and Practice* (Federation Press, Sydney, 1998) p 163; Antonios, above note 50, pp 13-15; Thornton, above note 60, p 148.

meaningfully translate to the legislative structures and procedures. An alternative line of inquiry might, however, be whether the contribution of the AFL provisions to reconciliation is more appropriately conceived of in cultural rather than legal terms.

Football as culture: reconciliatory possibilities?

In the context of AFL football, Warren and Tsaousis question whether cultural change is substantive or symbolic.[66] A parallel to the proposition that law has a guiding significance through legislative statements, the significance of the success of AFL conciliation arguably lies not so much in the translation of it to general vilification laws — as I have argued, there are simply too many differences — but in the reconciliatory possibilities of football itself to move understanding beyond the field and into the community. Where players are role models for young people and spectators, the changes in the AFL represent a shift in the dynamics of race and the birth of a dialogue about why race matters. Attitudes regarding race and football are not a substitute for the values expressed in legislation and judgment; they instead complement these normative legal expressions in an authoritative and authentic way through the voices of the complainant and the respondent. But the cultural shift is far from certain or strong.

The reconciliatory potential of the game has been seen at its best in Channel Nine's *The Footy Show*.[67] The grand final week production had a live audience of 12 000 people and the television audience in Melbourne alone exceeded one million viewers. Aboriginal band Yothu Yindi played their song 'Treaty' and six Aboriginal players carried Australian flags, as did six non-Aboriginal players. This group was led by Michael Long and Damian Monkhurst — the players at the centre of the 1995 complaint which inspired so much of the change. The host, Eddie McGuire, concluded the piece with a call for an end to racial vilification in football.

66 Warren I and Tsaousis S, above note 12 at 47.

67 The proposition that football might hold within it some reconciliatory or emancipatory potential is tempered by the gendered nature of the game itself; the degree to which women are excluded as participants in playing or spectating may be greater or lesser depending on the context, but seems always to be present. On the AFL (then VFL), see Mary Brady's excellent 'Miss and Mrs Football, but no Ms Football' in Sandercock and Turner, above note 4, p 249-56. On rural sports, see Dempsey K 'Women's leisure, men's leisure: A study in subordination and exploitation' (1989) 25 *Australian and New Zealand Journal of Sociology* 27. On the gendered nature of racial vilification in football, see McNamara, above note 12 at 105-6; Wright R, above note 11 at 19; 'Taking the 'c' out of football' *The Age* 5 May 1997.

The same program also illustrated the worst of football less than two years later when Nicky Winmar failed to appear at a scheduled interview on the show. Commentator and former player John 'Sam' Newman blackened his face in mockery of Winmar, accusing him of 'going missing'.[68] It was not Winmar's behaviour but his very being that was held in contempt. His identity as an Aborigine was publicly ridiculed.

In the face of criticism, the ubiquitous McGuire — television personality, participant at the 1999 Constitutional Conventions, campaigner for the Australian Republican Movement, and currently president of the Collingwood Football Club — stood by Newman and defended this act of vilification as *The Footy Show* maintained all the way that it was leading the campaign against racism in football.[69] The editorial in *The Australian* argued that Winmar had been vilified but this meant only that '*The Footy Show* [was] guilty of carelessness and stupidity'.[70] There was no reprimand from Channel Nine management; Newman was 'counselled ... in understanding that there is a minority of the community that may not see the funny side of these things'.[71] Following a mediation, McGuire eventually apologised on behalf of the program. Newman would not take personal responsibility.[72]

Football, I would like to suggest, is good, but not good enough.

Questions of strategy

The apparent inadequacy of conciliation-based rules as a reconciliatory step forward in either legal or cultural terms can be understood to some extent by the foundations which lie beneath it: conciliation rests upon highly contestable assumptions about what the problem is that needs to be solved. In short, it conceives of discrimination as an individual problem and not a social phenomenon. Thornton argues:

> The atomism inherent within the confidential conciliation process underscores the notion that acts of discrimination are of an isolated and individualistic nature and that

68 'Newman dumped as Nicky declares war' *Herald-Sun* 30 March 1999. '*Footy Show* star out of bounds' *The Australian* 26 March 1999.

69 'Newman shrugs off racial parody' *The Advertiser* 27 March 1999; 'McGuire attacks, but AFL acts on racism' *The Age* 27 March 1999.

70 'Racial ridicule is very unfunny' *The Australian* 31 March 1999.

71 Channel Nine chief executive Ian Johnson, quoted in 'Newman dumped as Nicky declares war' *Herald-Sun* 30 March 1999.

72 'Newman to stay on same tack' *Mercury* 1 April 1999.

individualistic solutions alone are appropriate.[73]

Colin Tatz views conciliation as a futile approach in attacking racism:

> The educational approach is to refashion the *individual* racist. There is almost no effort to tackle the really difficult issue of how to educate a corporation, a health or housing commission, a bureaucracy, a police force, the corrective services, the 'tabloid' media or the presidents or captains of some football clubs. It is the corporate or institutional racism that occasions the harm, not the perennially powerless Joseph Blow down at the pub who sits, afroth his beer, mouthing obscenities about boongs or yids or wogs.[74]

The assumption of individual pathology, which underpins the preference for conciliation, is implicit in the AFL's narrow approach to racial hatred. Even while the Aboriginal players interviewed found a degree of success in the processes and there has been an impact on the quantity of abuse in the AFL, there remain fundamental matters which it is yet to address. A regime of fines or suspensions does not yet exist independently of conciliation, nor is there a strategy to address racist abuse from spectators. The persistence of racism remains unexamined, as does its history (no word of an apology has been uttered). Beyond the AFL, racism in rural competitions continues with little abatement.

Racism is historically a part of the game, an institutionalised discourse that has been accepted on its own terms and by the law as the legitimate dynamic of indigenous and non-indigenous relations in football. The analysis in this article suggests that any shift in this systemic understanding of racism in football has occurred only at AFL level and even then it is idiosyncratic; the blend of media focus, atypical equalities of power and a selection of remarkable Aboriginal sportsmen have overcome the inherent problems in conciliation-based approaches to racial hatred. The outcomes of highly public apologies and the saturation media coverage has been a peculiarity of a process which is private and confidential; the value of conciliation is doubtful in contexts where the core criticisms apply.

Tatz argues against conciliation in sport:

> If we believe racism is a serious matter then we must take appropriately serious steps, such as to criminalise all such behaviour ... Controlling bodies, sport associations and clubs don't

73 Thornton, above note 60, p 151. She argues (at 144) that discrimination comprehends violations of rights as 'private pecadilloes' rather than 'public transgressions'.

74 Tatz, above note 3, p 353

> have to wait for enabling State legislation: they can establish tough codes of conduct, with sanctions of fine, expulsion, suspension in order to establish that certain behaviours are not merely *illegitimate* but manifestly *illegal*.[75]

It was argued earlier that within conciliation there is authenticity and authority in the voices of the participants. The prospect of sporting sanctions which rely on penalties rather than reconciliation will not remove such voices — as player comments regarding country competitions made only too clear, these voices are currently not heard at all. A sanction based approach, especially in legislative form, has the capacity with the authority of the state to recognise the individual, institutional and cultural dimensions of racism in circumstances where the parties are manifestly unequal.

Conclusion

Vilification rules in the AFL make a significant contribution to the eradication of racist abuse in league football; it should not be doubted for a moment that Michael Long moved mountains. In the AFL competition the rules provide a mechanism by which conciliation can become a process of understanding and not simply a process of dispute resolution, but the success of conciliation occurs in circumstances which differ markedly from those that characterise the resolution of legislative racial hatred complaints. The operation of vilification rules in league football should not be too readily transposed to legislative schemes, nor even to sporting arenas outside the AFL. The behaviour of crowds at sporting events and the incidence of abuse in lower level sporting competitions continue and require investigation regarding the success and appropriateness of current strategies for tackling racial hatred in sport. Although the vilification rules and football itself are cultural phenomena which speak to the wider community, this is not enough.

The positive impact of the AFL rules cannot be permitted to overshadow their shortcomings. It is only around 560 men that play senior AFL football each year, and only 20 or 30 of those are Aboriginal; to attribute too much success in either the procedural or cultural import of the rules may be to indefensibly ignore the thousands of others who endure racism in sports and in day to day life without the oasis of AFL protection. We should be aware — and wary — of the limitations of conciliation. The aim must be to do justice to the kids who will follow Michael Long, Nicky Winmar and the Aboriginal players who have endured racial hatred, excelled in spite of it, and grasped the opportunity to eradicate it.

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75 Above note 3, p 354 (emphasis in original).

In the end there may be a place in sport and law for both conciliation and penalty. The understanding and respect upon which reconciliation must be predicated exist as abstractions. Criminal penalties are an essential recognition by the state of the institutional dimensions of racism; the messages they send are a positive force for anti-racism. To criminalise racial hatred would give substance to the abstract concepts and lay stronger foundations for reconciliation. But criminalisation is exclusionary, passing power to a paternal (and perhaps untrustworthy) State. It is within conciliation that there lies, if only from time to time, the possibility of understanding between individuals. As a strategy for both dispute resolution and reconciliation, it need not necessarily individualise racism, nor make heroes out of villains like Peter Everitt. Carefully maintained, it can give rise to concrete examples of indigenous empowerment and respect; of non-indigenous redemption and understanding; of authentic and authoritative reconciliation. ●