

STEPPING OUT OF BOUNDS: THE OVER-PROSECUTION OF RECREATIONAL ATHLETES IN LIGHT OF *DFSNZ v XYZ*

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DFSNZ v XYZ presents a worrying precedent for anti-doping law. That case arose after New Zealand's anti-doping enforcement body, Drug Free Sport New Zealand (DFSNZ), expanded its jurisdiction over recreational athletes. It did so by internal administrative decision and without notice. This action was upheld in DFSNZ v XYZ by a majority of the Sports Tribunal resulting in an unsuspecting recreational golfer being banned for one year. The decision upheld DFSNZ's extension of onerous obligations and invasive testing powers designed for elite athletes to the large proportion of ordinary New Zealanders who partake in recreational sport. This article critiques the XYZ decision on two bases: (a) DFSNZ's illegitimate expansion of its jurisdiction to recreational athletes by mere administrative policy change; and (b) the pitfalls of extending a regime designed for elite athletes to recreational athletes. The World Anti-Doping Agency (WADA) has developed a new World Anti-Doping Code which will come into force in January 2021. The 2021 Code creates a new two-tiered system which treats "athletes" and "recreational athletes" differently. This article analyses the new Code and critiques its shortcomings with regards to defining the Code's jurisdiction and ensuring a proportionate response to doping in recreational sport. WADA's new code is a step in the right direction but fails to go far enough to align with the participation, health and education objectives of recreational sport.

I INTRODUCTION

Sport is an integral part of New Zealand's culture. In 2017, 73 per cent of adults reported that they had participated in sport or active recreation in the last seven days.¹ Sport enhances physical, mental

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¹ Janette Brocklesby *Active NZ 2017 Participation Report* (Sport New Zealand, 2018) at 13.

and social wellbeing, eases stress and builds thriving communities.² However, many sporting New Zealanders would be shocked to learn that they might be subject to a "potentially vast regime" that exposes them to the same onerous liability – sanctioning and testing for drugs – as elite athletes.³

When XYZ, an anonymous recreational sportsperson, ordered clenbuterol online in late 2014, he would have had no idea of the implications of his purchase. The drug clenbuterol assists in burning fat without compromising lean muscle mass; XYZ purchased it to deal with his excess weight. After the supplier of the drug was discovered in an investigation, XYZ's name was matched to a database of registered sports club members. He was shocked to have to front up to the Sports Tribunal, unaware that he had the same obligations as an elite athlete such as an Olympian or an All Black.

The ongoing series of proceedings in relation to clenbuterol has thrown the jurisdictional issues of anti-doping law into stark relief. Drug Free Sport New Zealand (DFSNZ) administers and enforces anti-doping law. Although this article places its focus on the "test case" of *DFSNZ v XYZ (XYZ)*,⁴ the implications of DFSNZ's overreach into the lives of ordinary sportspeople are widespread.

The XYZ decision gives DFSNZ invasive powers over recreational athletes. Regular weekend competitors are legally subject to drug testing at *any time* and *any place*, including their own home.⁵ Tests are for the prohibited list of substances which includes prescription medication and cannabis.⁶ An adverse finding could mean a lengthy ban from *all* sport. The lack of testing of recreational athletes means impositions of bans are rare. However, such invasive powers conferred on an unelected organisation *without notice* to affected sportspeople should give one pause.

This article begins by exploring two issues illustrated by XYZ. First, the jurisdiction asserted by DFSNZ is worrying in its scope, its implications for human rights and inconsistency with the rule of law. Second, the failure to differentiate between elite and recreational athletes raises concerns about the proportionality of the regime.

The World Anti-Doping Agency (WADA) conducted a review of the current World Anti-Doping Code (the Code), which culminated in the new 2021 Code which comes into force in January 2021. The 2021 Code creates a new two-tiered system which treats "athletes" and "recreational athletes" differently. This article additionally canvasses the 2021 Code and critiques its shortcomings with

2 EPPICentre and Matrix Knowledge Group *Understanding the drivers, impact and value of engagement in culture and sport: An over-arching summary of the research* (CASE, July 2010) at 36–41.

3 *Drug Free Sport New Zealand v XYZ* ST12/18, 4 March 2019 [*DFSNZ v XYZ* (Liability)] at [70].

4 *DFSNZ v XYZ* (Liability), above n 3; and *Drug Free Sport New Zealand v XYZ* ST12/18, 3 April 2019 [*DFSNZ v XYZ* (Sanction)].

5 Sports Anti-Doping Rules 2018, r 5.2.

6 World Anti-Doping Agency 2019 List of Prohibited Substances and Methods.

regards to delineating jurisdiction and ensuring a proportionate response to doping in recreational sport.

II NEW ZEALAND'S SPORT ANTI-DOPING ARRANGEMENTS

The law that governs sports doping in New Zealand is a product of international instruments and agreements. After the world woke up to the reality of doping in sport through the 1980s and 1990s, states organised to create a unified response to the problem.⁷

The first World Conference on Doping in Sport was held in 1999, leading to the establishment of the WADA. WADA administers a set of rules, the Code, which must be adopted and implemented by signatories. The Code is prescriptive, with a long list of prohibited substances, and is one of strict liability, which bites regardless of fault. The rationale underlying the strict liability principle is to protect the clean athlete by creating a level playing field to uphold the integrity of sport.⁸

New Zealand has ratified the United Nations Educational, Scientific and Cultural Organization (UNESCO) International Convention against Doping in Sport which directs countries to implement the Code.⁹ The Code is given effect to in domestic law through the Sports Anti-Doping Act 2006. This sets up DFSNZ, an independent Crown Entity, which translates the Code into domestic rules called the New Zealand Sports Anti-Doping Rules (the Rules). DFSNZ is New Zealand's National Anti-Doping Organisation (NADO).

To ensure consistency, all the operative offence and definition provisions in the Code are "mandatory in substance",¹⁰ so they cannot be substantively changed when implementing the Code into domestic rules.¹¹ The Sports Anti-Doping Act also sets up the Sports Tribunal which hears doping cases and interprets the Rules.¹² NZ Rugby has its own tribunal (the NZ Rugby Judicial Committee) to administer the Rules.

The scope and application of anti-doping rules to recreational athletes have recently become a concern. Traditionally, exclusively elite-level and national-level athletes received sanctions, as only the highest echelons of competition were subject to testing. In recent years, anti-doping enforcement

7 See Drug Free Sport New Zealand "A history of doping in sport and the anti-doping movement in New Zealand" <www.drugfreesport.org.nz>.

8 Jacob Kornbeck "The EU, the Revision of the World Anti-Doping Code and the Presumption of Innocence" (2016) 15 ISLJ 172 at [3.1].

9 International Convention against Doping in Sport 2419 UNTS 201 (opened for signature 19 October 2005, entered into force 1 February 2007); and Paul David *A Guide to the World Anti-Doping Code: The Fight for the Spirit of Sport* (Cambridge University Press, Cambridge, 2017) at ch 4.

10 World Anti-Doping Code 2015 (with 2019 amendments) [WADA Code] at 16.

11 WADA Code, art 23.2.2; and Sports Anti-Doping Act 2006, s 16(2).

12 Section 29.

bodies have entered into "intelligence" investigations in addition to testing athletes during competition.¹³ These investigations go after the suppliers and importers of banned substances, and often involve surveillance and raids. Though effective, this has had the consequence of revealing violations by low-level "recreational" athletes.

In 2016, Medsafe conducted a background criminal investigation in relation to Medicines Act 1981 offending by a Christchurch man selling the anabolic steroid clenbuterol. Medsafe is a government body that administers medicine legislation and regulation.¹⁴ The investigation produced email "snapshots" of online clenbuterol purchases in 2014–2015 which were then passed on to DFSNZ. After matching up purchase information with DFSNZ's records, proceedings were issued against a number of elite-level, national-level and lower-level sportspeople. XYZ was the Sport Tribunal's 11th clenbuterol case as a result of the Medsafe investigation and a test case for DFSNZ's jurisdiction.¹⁵

III THE DFSNZ V XYZ DECISION

A Facts

The anonymous respondent, XYZ, was identified in the Medsafe investigation. He purchased clenbuterol and another drug to offset its side-effects, dianabol.¹⁶ Purchases were made between November 2014 and January 2015.¹⁷ Both clenbuterol and dianabol are prohibited substances, banned at all times.¹⁸ Proceedings against XYZ were initiated by DFSNZ in 2018 alleging violations of rr 2.2 (use) and 2.6 (possession) of the Rules.

XYZ was in common parlance a "recreational" athlete. He admitted to the alleged violation but said he did not take clenbuterol to aid his performance, but rather to lose weight.¹⁹ His evidence was that he was significantly overweight, in the range of 130 to 140 kilograms.²⁰ The respondent was not an "elite" sportsperson. Initially, he claimed that he was only a member of Surf Life Saving New Zealand by signing up his children and making a donation. He asserted his participation was merely

13 Antonio Rigozzi, Marjolaine Viret and Emily Wisnosky "A new code for a new era in the fight against doping in sports: A summary of the main changes in the 2015 WADA Code" (2014) 5 *GSLTR* 25 at 25–26.

14 Michael Wright "'Smart but dumb': Inside New Zealand's biggest sports steroids ring" (19 May 2018) *Stuff* <www.stuff.co.nz>.

15 *DFSNZ v XYZ* (Liability), above n 3, at [1].

16 At [3].

17 At [3].

18 Sports Anti-Doping Rules, rr 2.2 and 2.6.

19 *DFSNZ v XYZ* (Liability), above n 3, at [5].

20 At [5].

social, not ever involving competition.²¹ It subsequently emerged however that in October 2015 he had participated in a surf lifesaving event at the national level, around 10 months after he purchased the clenbuterol. It further emerged that XYZ was also a member of a golf club and, therefore, by virtue of the club's affiliation to New Zealand Golf, he was subject to the Rules. He admitted to competing regularly in club and inter-club events, but these events never reaching a national level.²²

B Sports Anti-Doping Rules 2018: Relevant Rules

The Rules apply to "National Sporting Organisations" such as Surf Life Saving New Zealand and New Zealand Golf which have agreed to be bound.²³ Members of clubs under those organisations are also bound.²⁴ The respondent was subject to the Rules by virtue of membership of his local clubs who are affiliated with their parent organisations, Surf Life Saving New Zealand and New Zealand Golf respectively.²⁵ However, just being subject to the Rules does not create liability for using or possessing prohibited substances such as clenbuterol and dianabol. That liability only extends to those defined as an "athlete".²⁶

"Athlete" is defined in the Rules:

Athlete: Any *Person* who competes in sport at the international level (as defined by each International Federation) or the national level (as defined by each *National Anti-Doping Organisation*). An *Anti-Doping Organisation* has discretion to apply anti-doping rules to an *Athlete* who is neither an *International-Level Athlete* nor a *National-Level Athlete*, and thus to bring them within the definition of "*Athlete*." In relation to *Athletes* who are neither *International-Level* nor *National-Level Athletes*, an *Anti-Doping Organisation* may elect to: conduct limited *Testing* or no *Testing* at all; analyse *Samples* for less than the full menu of *Prohibited Substances*; require limited or no whereabouts information; or not require advance *TUEs*. However, if a Rule 2.1, 2.3 or 2.5 anti-doping rule violation is committed by any *Athlete* over whom an *Anti-Doping Organisation* has authority who competes below the international or national level, then the *Consequences* set forth in the *Code* (except Article 14.3.2) must be applied. For purposes of Rule 2.8 and Rule 2.9 and for purposes of anti-doping information and education, any *Person* who participates in sport under the authority of any *Signatory*, government, or other sports organisation accepting the *Code* is an *Athlete*.

21 At [5].

22 At [11].

23 Rule 1.1.3.

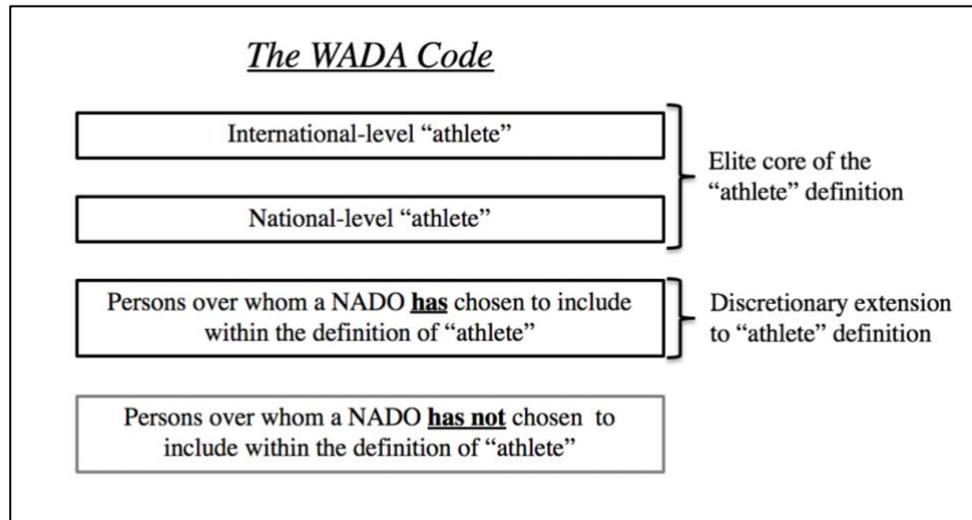
24 Rule 1.1.4.

25 *DFSNZ v XYZ* (Liability), above n 3, at [31].

26 Sports Anti-Doping Rules, rr 2.2 and 2.6.

The definition is poorly drafted and is more clearly represented by the diagram below (see Figure 1). The definition has a mandatory "elite" core that cannot be changed. It requires that National Anti-Doping Organisations (NADOs) have international-level and national-level sportspeople within their domestic definitions of "athlete". In addition to this mandatory core, the definition provides that NADOs have the "discretion" to extend the definition to lower-level sportspeople who are below the international or national level.

Figure 1: Components of the definition of "athlete" in the current WADA Code.



C Summary of the Sport Tribunal's Decision

The main issue for the Tribunal to decide was whether XYZ fell within the definition of "athlete". The Rules provide DFSNZ the "discretion" to extend the definition of "athlete" to lower-level sportspeople like XYZ. The question therefore was how must DFSNZ exercise this discretion? Was it required to do so by positive amendment to the Rules, or was it sufficient to do so by ad hoc administrative decision? Ultimately, the Tribunal held that the Code contemplated DFSNZ being able to expand the definition of "athlete" through administrative decision.²⁷

The Tribunal rejected DFSNZ's submission that XYZ was brought within the definition of "athlete" simply by virtue of his membership to Surf Life Saving New Zealand. Although this was obiter, the Tribunal was not persuaded that membership alone without active participation in a competitive event would be sufficient for the definition of "athlete" to apply.²⁸ Therefore, the

²⁷ *DFSNZ v XYZ* (Liability), above n 3, at [58].

²⁸ At [52].

respondent was within the definition of "athlete" by competing in swimming and golf at a recreational or club level at a time when he was in possession of and using the prohibited drugs.²⁹

There was also an issue of whether the Rules allowed for prosecutorial discretion or whether the Rules mandated DFSNZ to bring proceedings when it saw evidence of doping by recreational sportspeople. DFSNZ claimed it lacked discretion: if it found an athlete in violation of the Rules, it had no option but to issue proceedings.³⁰ The Tribunal found this submission unusual and at odds with the proportionate approach to prosecutions that is normally seen in New Zealand jurisprudence.³¹

The Tribunal issued a separate decision to decide the sanction appropriate for XYZ in this case.³² The mandatory starting point for the period of ineligibility was two years, given that the contravention was not intentional.³³ There was the question of whether the respondent could establish "no significant fault or negligence" which, if proven, would allow the Tribunal to reduce the two year period of ineligibility to a shorter period, though not less than one year.³⁴ The test for this reduction in sanction was found in the case of *DFSNZ v Mills*.³⁵ It was said that:³⁶

An athlete's level of fault is assessed against what a reasonable person acting in accordance with the strict obligations under [the Rules] ought to have done to avoid breaching the Rules, considering the perceived level of risk.

Counsel for XYZ argued that, as the respondent had no indication he would be bound by the Rules, it would be unlikely he would have researched into whether the drugs were prohibited.³⁷ DFSNZ instead said the starting point was that the respondent was bound by the Rules.³⁸ The Tribunal accepted DFSNZ's starting point and, from that position, could not find XYZ exercised appropriate care. The respondent had not made any attempt to discharge his obligations under the Rules to check to see if this substance was prohibited.³⁹

29 At [59].

30 At [46].

31 At [47].

32 *DFSNZ v XYZ* (Sanction), above n 4.

33 Sports Anti-Doping Rules, r 10.2.2.

34 Sports Anti-Doping Rules, r 10.5.

35 *Drug Free Sport New Zealand v Mills* ST06/17, 8 November 2017.

36 At [27].

37 At [9].

38 *DFSNZ v XYZ* (Sanction), above n 4, at [10].

39 At [16].

Given that finding, the starting point for a sanction was two years ineligibility. Both parties agreed that XYZ was entitled to six months credit for the delays in the prosecution and hearing process.⁴⁰ However, there was disagreement over whether he could be credited for a timely admission.⁴¹ The respondent argued that the admission was made immediately after he was charged when he "accepted the imposition of a sanction".⁴² DFSNZ conversely contended that, although the respondent admitted to using and possessing the drugs, he did not admit to violating the Rules. This was because he had advanced a legal argument that he was not bound by the Rules.⁴³ The Tribunal rejected this argument and highlighted the fact that there was an important and controversial jurisdictional issue that had to be determined.⁴⁴ To penalise the respondent for appearing with counsel to assist the Tribunal in this legal task would have been "unconscionable in all the circumstances".⁴⁵

The respondent was successful in arguing that the period of ineligibility should run from the date of the provisional suspension order, 3 October 2018.⁴⁶ Therefore the Tribunal imposed a two year ineligibility period, but allowed reductions for delay (six months) and timely admission (six months) to arrive at a one year ineligibility period.⁴⁷

The Tribunal constantly expressed its discomfort in reaching its conclusion throughout the decision. In a lengthy postscript, the panel members stressed that their decision would likely be met with shock and surprise by the wider sporting community.⁴⁸ DFSNZ's broad powers to apply anti-doping rules to recreational sportspeople was described as a "potentially vast regime" with implications that necessitated public debate.⁴⁹ The Tribunal reluctantly accepted DFSNZ's interpretation of its jurisdiction and expressed frustration over its powerlessness in assessing recreational athletes' culpability in a "common sense and proportionate way".⁵⁰

40 Sports Anti-Doping Rules, r 10.11.1; and *DFSNZ v XYZ* (Sanction), above n 4, at [17].

41 Sports Anti-Doping Rules, r 10.11.2; and *DFSNZ v XYZ* (Sanction), above n 4, at [18].

42 *DFSNZ v XYZ* (Sanction), above n 4, at [18].

43 At [18].

44 At [18].

45 At [19].

46 Sports Anti-Doping Rules, r 10.11.3; and *DFSNZ v XYZ* (Sanction), above n 4, at [22].

47 At [23].

48 *DFSNZ v XYZ* (Liability), above n 3, at [69].

49 At [70].

50 At [70].

Curiously, DFSNZ is pursuing an appeal of the Tribunal's decision to the Court of Arbitration for Sport (CAS).⁵¹ Details of the appeal are confidential, but it appears that DFSNZ is looking to appeal the level of sanction imposed by the Tribunal. This requires the case to be heard afresh by an international arbitrator and represents a large undertaking by DFSNZ which is sure to consume valuable investigatory resources.

IV DRUG FREE SPORT NEW ZEALAND'S VAST JURISDICTION

The XYZ decision represents a worrying precedent for New Zealand sports jurisprudence. A large proportion of New Zealanders participate in sport each year and now are under DFSNZ's jurisdiction as "athletes".⁵² The intrusive nature of DFSNZ's powers over "athletes" warrants a sense of alarm. Athletes are subject to unannounced testing for a wide range of prohibited substances. These prohibited substances include recreational drugs such as cannabis, and medicine prescribed by doctors. Many casual sportspeople would be unaware they are subject to the same invasive regime that applies to the elite athletes they see competing on TV. This incursion into regular sportspeople's liberty and human rights was not done after clear consultation and amendment, but rather by an unannounced "administrative fiat".⁵³ This ultimate result is that DFSNZ, an unaccountable executive body, now possesses wide coercive powers over a sizeable proportion of the population. This is exacerbated by the Rules giving little weight to culpability, instead imposing automatic sanctions.

There are three broad issues with DFSNZ's jurisdiction over recreational athletes. Firstly, the definition of "athlete" was expanded relying on ambiguous language and in an incorrect manner. Second, the assertion that membership of a sports club alone is enough to bind an individual to the Rules is particularly troubling for the scope of DFSNZ's jurisdiction. Third, the claim of no "prosecutorial discretion" for recreational athletes, coupled with a strict liability scheme, does not accord with a common sense approach to prosecutions found in New Zealand.

A The Expansion of the Definition of "Athlete"

The first issue regarding jurisdiction is the scope and manner in which the definition of "athlete" was expanded from elite athletes to included recreational athletes.

1 Submissions and the Tribunal's decision

The Tribunal identified that the area of inquiry was whether the respondent was an "athlete" at the time of his drug purchases. At this time, XYZ was competing at a sub-national level. The issue was whether DFSNZ had effectively exercised its "discretion to apply anti-doping rules to an Athlete who

51 Dana Johannsen "Drug Free Sport NZ to appeal Athlete XYZ ruling to the Court of Arbitration for Sport" (3 April 2019) Stuff <www.stuff.co.nz>.

52 Brocklesby, above n 1.

53 *DFSNZ v XYZ* (Liability), above n 3, at [57].

is neither an International-Level Athlete nor a National-Level Athlete, and thus to bring them within the definition of 'Athlete'.⁵⁴

Importantly, the definition provision is simply copied verbatim from the WADA Code and placed into the domestic Rules. DFSNZ's position was that it exercised its discretion to expand the application of the Rules to lower-level athletes. It had done this by the making of the Rules themselves and the inclusion of the Code definition of "athlete" without amendment.⁵⁵

The majority of the Tribunal (Chairman Sir Bruce Robertson and Alan Galbraith QC) held that DFSNZ did have the discretion to take steps to expand the Rules by administrative policy change to include recreational athletes within the drug possession and use prohibitions.⁵⁶ This decision was a reluctant one, with the panel admitting in their postscript that their finding will have implications that an unwitting public may be "dismayed" to learn of.⁵⁷

The majority held that simply applying the definition to XYZ, without a rule change, was a valid exercise of DFSNZ's discretion to expand the definition of "athlete".⁵⁸ To support this finding, reference was given to the precedent of other countries that had done the same (other than the United Kingdom and Ireland). They stressed that a formal, positive amendment would have been preferable.⁵⁹

The minority panel member was Dr Jim Farmer QC who sided with the respondent's submissions.⁶⁰ Counsel for XYZ contended that the only valid way to extend the definition was by amendment.⁶¹ Simply copying the WADA definition unchanged into the domestic Rules was not sufficient to have exercised that discretion. The discretion was not in the definition, exercised at the whim of DFSNZ by ad hoc prosecution of recreational athletes like XYZ. What this means is that the Code gives a *rule-making* discretion to NADOs to create a provision that specifies whether the lower-level sportspeople are to be considered "athletes". The definition contains options for how NADOs can do so: whether to conduct testing, a full analysis of samples, require whereabouts information or

54 At [35].

55 At [36].

56 At [58].

57 At [69].

58 At [58].

59 At [56].

60 At [57].

61 At [36].

require advance "therapeutic use" exemptions.⁶² This is the approach taken in the United Kingdom and Ireland, though not followed in any other jurisdiction.⁶³

The implication of this approach is that the current definition was limited to its "elite core" and thus could only capture international-level and national-level athletes. Any extension without amendment would be held as void. On the facts, XYZ was not competing at an elite level at time of possession and use of the prohibited substances. He was merely competing at a recreational level in golf and swimming.

Ultimately, by majority, the Tribunal held that DFSNZ was entitled to extend the definition of "athlete" to recreational athletes by administrative decision. The respondent had competed in sports (swimming and golf) at a recreational level at the time when he was in possession and using the prohibited drugs.

2 Critique

The majority likely felt that their hands were tied to decide in favour of DFSNZ. To do otherwise would be to take an approach contrary to every other jurisdiction. Countries like Canada have simply copied in the Code definition and treated it as giving the NADO the discretion to change the rules at any time by administrative decision.⁶⁴ The Tribunal likely recognised that the power of the WADA Code is its consistency and universality across jurisdictions. In the face of all but two countries (Ireland and the United Kingdom) treating the Code definition as merely contemplating an administrative decision to expand the definition, they were cautious to adopt an interpretation that was out of step with the rest of the world.

However, it is the author's view that there was sufficient textual ambiguity and that, in light of the empowering Act's purpose and the human rights implications of DFSNZ's interpretation, this ambiguity should have been resolved to require a positive amendment.

The Tribunal stated that the Rules should be interpreted strictly and, where there is ambiguity or uncertainty, be construed in favour of the athlete.⁶⁵ This is consistent with international precedent which has held that imposing strict liability for doping on athletes must be done with clear rules.⁶⁶

62 See Sports Anti-Doping Rules definition of "athlete".

63 *DFSNZ v XYZ* (Liability), above n 3, at [23].

64 See Canadian Centre for Ethics in Sport *Canadian Anti-Doping Program 2015* (1 September 2017), appendix 1 definition of "athlete".

65 *DFSNZ v XYZ* (Liability), above n 3, at [53].

66 See *USA Shooting v Union Internationale de Tir* CAS 94/129, 23 May 1995 at 50–52. This statement has been endorsed many times by Court of Arbitration for Sport panels over the ensuing years.

The purposes of the empowering legislation are also instructive to an interpretation exercise.⁶⁷ The purpose contained in s 3 of the Sports Anti-Doping Act is "protecting athletes' fundamental right to participate in doping-free sport and in this way promote health, fairness, and equality for athletes worldwide". Evidently, fairness and health are important rationales for New Zealand in implementing the Code which should colour any textual interpretation.

Including a person within the definition of "athlete" heavily impinges on their liberties by imposing on them the strict regime designed for elite athletes. Athletes can be required to give whereabouts information regarding their location and be subject to medical testing.

The Code's definition envisages a NADO having the discretion to implement an extended regime to sportspeople below the national level. The majority's approach essentially holds that DFSNZ can exercise this discretion to develop an extended regime by simply restating the broad Code definition in the domestic rules. This then entitles them to exercise that discretion at any time, to the fullest extent allowed by the Code, by initiating proceedings against a recreational athlete. In other words, by copying the definition straight from the Code, DFSNZ can confer upon themselves the future option to expand the Rules via administrative policy.

This interpretation of the Code does not accord with New Zealand's jurisprudence regarding the constraint of executive power. Nothing within the Code allows a discretion *within the Rules* to expand the definition. The discretion is instead *within the Code*; the discretion is DFSNZ's task of translating the broad Code definition into domestic Rules. In other words, it is a rule-making discretion. Such a task requires amendment to the Rules, a process that allows major stakeholders a reasonable opportunity to comment on proposed changes.⁶⁸

Requiring a positive amendment accords with the fundamental principle of the rule of law. Counsel for the respondent argued along "natural justice" lines that, because the discretion was exercised by administrative fiat, lower-level competitors like XYZ had no say nor any idea they were now bound by the Rules as "athletes".⁶⁹ DFSNZ rightly invoked the principle that "ignorance of the law is no defence" and the Tribunal considered the issue to be one of interpretation, rather than natural justice.⁷⁰ However, it is a fundamental principle that our law should be certain and predictable to allow citizens to plan their affairs.⁷¹ Where possible, the courts have and should "read down" powers

67 Interpretation Act 1999, s 5.

68 Sports Anti-Doping Act, s 16(4).

69 *DFSNZ v XYZ (Liability)*, above n 3, at [42] and [44].

70 At [23].

71 Joseph Raz "The Rule of Law and its Virtue" (1977) 93 LQR 195 at 196.

in order to preserve rights and freedoms.⁷² Allowing DFSNZ to decide in this case to extend the definition to XYZ by policy decision means the wider public do not know whether they are covered. Executive decisions that may substantially affect rights should not be done by administrative action, but rather by actual rule change.

A correct process of exercising the discretion is found in an overseas example referred to throughout the judgment. The United Kingdom extended its definition to lower-level athletes through a positive amendment. Its definition is "... an Athlete is any Person who participates at any level in any sport under the authority of any Signatory, government or other sports organisation accepting the Code".⁷³

B The Claim That Mere Membership Suffices to Be an "Athlete"

1 Submissions and the Tribunal's decision

DFSNZ asserted its widest possible jurisdiction by arguing that it could bring people into the definition of "athlete" simply by virtue of their club membership. The basis for this argument was that DFSNZ had amended r 1.1.5.2.⁷⁴ That rule governs which "persons" the Rules are applicable to, though it does not govern which of those "persons" are considered "athletes". The rule was amended to include anyone who is a member of any national sporting organisation, club, team, association or league.⁷⁵ DFSNZ contended that by its expansive amendment of r 1.1.5.2, and by having the definition of "athlete" left as it was in the Code, it had the ability to bring persons into the definition by virtue of their membership to a club without needing to prove they had any participation in sporting activities.⁷⁶

The respondent disagreed and argued that while such membership binds club members to the Rules by r 1.1.5.2, it does not follow that by amending that rule the definition of "athlete" can then include the ability to prosecute those lower level participants.⁷⁷ Amending that rule would widen the effect of the complicity provisions. This refers to offences of assisting, aiding and abetting of athletes by coaches or other club members. This would mean that a person who did not compete in sport at

72 JF Burrows *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2003) at 219–227; and *R v Pora* [2001] 2 NZLR 37 (CA) at [50]–[51].

73 Sports Anti-Doping Rules 2015 (UK), definition of "athlete".

74 *DFSNZ v XYZ* (Liability), above n 3, at [16].

75 Rule 1.1.5.2.

76 *DFSNZ v XYZ* (Liability), above n 3, at [16].

77 At [39].

any level would be subject to the Rules by virtue of club membership, but not subject to the provisions for testing or breach of the anti-doping prohibitions that only apply to athletes.⁷⁸

The Tribunal found DFSNZ's argument unattractive, characterising it as an "unsatisfactory feature of the case".⁷⁹ DFSNZ pursued the respondent on the basis of his membership, irrespective of whether he actually competed in sporting events.⁸⁰ The anti-doping body continued this line of argument even after it transpired that XYZ had competed in competitive (but wholly recreational) events in his local golf club.

The Tribunal rejected DFSNZ's assertion with reference to the text of the definition. The definition of "athlete" has an appended comment which refers to the possibility of including "individuals who engage in fitness activities but do not compete at all".⁸¹ The Tribunal stressed that the comment was merely an interpretative aid and not a part of the definition.⁸² The underlying purpose of the definition was to cover persons who participated in sport. This was clear from first line of the "athlete" definition: "any person *who competes in sport*".⁸³ The definition was meant to capture true competitors not those who are merely members of a club.⁸⁴ The Tribunal considered the dividing line to be "active participation in a competitive event".⁸⁵ On the facts, this requirement was satisfied as the respondent had actively partaken in club and inter-club level competitions while consuming the prohibited drug. Therefore, the Tribunal's rejection of DFSNZ's position is obiter.

2 Critique

The Tribunal rightly rejected DFSNZ's assertion that people who are merely members of clubs can be considered "athletes". In its postscript the panel was clear that if DFSNZ's view was accepted, people who were members for purely social or dining reasons would be considered "athletes" which was clearly outside the purview of the Code.⁸⁶

The Tribunal ought to have had further reference to the purposes of the Code when rejecting DFSNZ's argument. International precedent is clear that rules must be interpreted in a purposive

78 At [38].

79 At [6].

80 At [6].

81 At [53].

82 At [53].

83 Emphasis added.

84 *DFSNZ v XYZ (Liability)*, above n 3, at [53].

85 At [52].

86 At [70].

manner which "seeks to discern the intention of the rule-maker, and not to frustrate it".⁸⁷ The Code has its purpose grounded in protecting the clean athlete and applying the harsh regime to people who are merely members does not in any way further that purpose. Imposing bans on social members of the many sports clubs around New Zealand fails to protect clean athletes as those social members never compete in any events.

The UNESCO Convention against Doping in Sport also provides a strong basis for rejecting DFSNZ's argument.⁸⁸ As a signatory, the Convention contains New Zealand's international anti-doping obligations. The convention contains its own definition of athlete: "'Athlete' means ... any additional person who *participates* in a sport or event at a lower level".⁸⁹ Anti-doping efforts were thus not intended to be directed at those who never participate in sporting events.

C The Claim of No Prosecutorial Discretion for Recreational Athletes

The third issue regarding jurisdiction is DFSNZ's claim that it has no prosecutorial discretion and thus it is obliged to bring proceedings against recreational athletes when it has evidence of prohibited drug use.

1 DFSNZ's argument

The justification advanced by DFSNZ for its lack of prosecutorial discretion was that the anti-doping regime required automatic sanctions for it to be observed.⁹⁰ DFSNZ felt it could not be seen to be making decisions whether to prosecute athletes or not as this would insert an element of leniency into the Code that unscrupulous countries may abuse.⁹¹

The Tribunal found this approach incongruent with a "sensible, principled assessment of all the circumstances" that is "at the heart of all New Zealand jurisprudence".⁹² As the proceedings against XYZ were brought before the Tribunal, they had no option but to consider his liability.

87 See *AC v Fédération Internationale de Natation Amateur* CAS96/149, 13 March 1997 at [22], relied on in *Lv Fédération Internationale des Luttes Associées* CAS2000/A/312, 22 October 2001 at [23].

88 International Convention against Doping in Sport, above n 9.

89 Article 2 (emphasis added).

90 *DFSNZ v XYZ* (Liability), above n 3, at [46].

91 See the well-documented state-sanctioned doping by Russia and China.

92 *DFSNZ v XYZ* (Liability), above n 3, at [47].

2 *Why is there prosecutorial discretion for recreational athletes?*

DFSNZ's argument is not one to be dismissed lightly. The existence of a harmonised set of global rules has been the basis for successful anti-doping efforts.⁹³ It is clear there should not be prosecutorial discretion for elite athletes (national-level and international-level) that could be abused by unscrupulous countries. Following from that rationale, DFSNZ's position is that it has no prosecutorial discretion for all "athletes", including recreational athletes like XYZ.

There is a robust argument that prosecutorial discretion is available for recreational athletes. Recreational athletes are part of the discretionary extension of the definition of "athlete". Given that NADOs can use their discretion to extend the definition of "athlete" to lower-level sportspeople, it follows that they can also use their discretion when deciding whether or not to prosecute those lower-level sportspeople.

Such an approach is preferable for a few reasons. The position does not harm the international consistency of the rules as they apply to elite athletes. It also ensures that the limited resources of enforcement agencies are not being wasted chasing recreational athletes that, on any objective view of the circumstances, have no need to be prosecuted. It also recognises that it is often not in the public interest to prosecute someone where there would be disproportionate punishment. It enables NADOs to take into account individual circumstances for rules that, on their face, would apply the same to all recreational athletes.

3 *Relevance of the Solicitor-General's prosecution guidelines*

The Solicitor-General provides prosecution guidelines which require an evidential and public interest test before proceedings are issued.⁹⁴ The public interest test includes factors such as the seriousness of the offence, the availability of proper alternatives to prosecution and the need for deterrence.⁹⁵

These guidelines apply to government agencies and Crown entities.⁹⁶ DFSNZ is an independent Crown entity.⁹⁷ However, whether DFSNZ's enforcement of anti-doping rules is considered within the criminal law (and thus subject to prosecution guidelines) is disputed.

93 SH Backhouse and others *Study on Doping Prevention: A map of Legal, Regulatory and Prevention Practice Provisions in EU 28* (European Union, 12 December 2014) at 29.

94 Crown Law Office *Solicitor-General's Prosecution Guidelines* (1 July 2013) at 6.

95 At 8–9.

96 Law Commission *Criminal Prosecution* (NZLC R66, 2000) at 16.

97 Sports Anti-Doping Act, s 7.

The first anti-doping rules came from the Olympics and were firmly contractual in nature.⁹⁸ Competitors could participate if they agreed not to take performance-enhancing substances. Doping regulation grew in the context of modern sport and modern doping advancements. A recent legal opinion commissioned by WADA concluded that the Code was civil in nature in an European Union context.⁹⁹ However, it is arguable that the contractual model of anti-doping law is unsustainable in the context of sanctioning recreational sport,¹⁰⁰ an activity a sizeable proportion of the population partakes in. The Code shares many features of the criminal law, from the wording of offences to sentencing. A layperson reading the language employed by the Tribunal in *XYZ* would reasonably conclude that the criminal law was at play.

If the guidelines were to apply, a reasonable prosecutor would have likely concluded that it was not in the public interest to pursue *XYZ*. The offence was not serious as he was merely competing at a social level where clenbuterol would have a negligible impact on his performance. Imposing a period of ineligibility from all sport is counterproductive to educating and meeting the health goals of a person seeking to lose weight. Prosecution would not provide adequate deterrence to recreational athletes at large who likely do not realise their obligations.

V THE ISSUE OF PROPORTIONALITY: RULES FOR ELITE ATHLETES BEING APPLIED TO RECREATIONAL ATHLETES

A Examining the Rationale for the Code

The Code has the clearly stated purposes of protecting athletes' fundamental right to participate in doping-free fair competition and ensuring harmonised and effective anti-doping measures at national and international level.¹⁰¹ The Code prescribes which substances are banned and rests on the principle of strict liability; if a prohibited substance is found to be present, a ban is automatically imposed. Why is this approach considered desirable for elite athletes?

The strict liability principle exists to uphold the clean athlete's right to participate in doping-free competition. By imposing automatic bans, athletes who take prohibited substances are not advantaged over clean athletes, whether they intended to dope or not. Furthermore, automatic bans regardless of fault remove the possibility for certain sporting countries to use any leniency within the Code to favour their athletes. The corollary of a strict liability regime is that it puts the onus on the athlete and their

98 Drug Free Sport New Zealand "A history of doping in sport and the anti-doping movement in New Zealand", above n 7.

99 Jean-Paul Costa *Legal opinion regarding the draft 3.0 revision of the World Anti-doping Code* (World Anti-Doping Agency, 1 June 2013) at [4].

100 See Alan Sullivan "The World Anti-Doping Code and Contract Law" in Ulrich Haas and Deborah Healey (eds) *Doping in Sport and the Law* (Bloomsbury, London, 2016) 61 at 66–68.

101 WADA Code, at 11.

entourage to ensure that prohibited substances do not enter the athlete's system. Elite athletes possess the knowledge, resources and support systems to navigate their obligations which results in the strict liability rule creating a strong deterrent to doping.

B Why the Code's Rationale Does Not Extend to Recreational Athletes

The strict liability principle at the heart of the Code is not appropriate for athletes outside the elite arena. The key rationale of ensuring a level playing field does not feature as strongly in recreational sport. Low-level competitors do not compete primarily for honours or victory but rather for personal achievement, health benefits and collegiality. Furthermore, doping in the recreational arena often provides little benefit to the athlete with playing conditions, teammates, technique and skill all being bigger factors than artificial enhancements like hormone levels or increased oxygen intake.

As opposed to elite competitors, recreational athletes lack knowledge and support about how to meet their strict obligations of the Code.¹⁰² Recreational athletes do not have access to expert advice regarding the extensive list of banned substances. Further, recreational athletes lack adequate education from NADOs. This means that imposing a strict liability regime is counterproductive to cleaning up sport as a lack of awareness undermines deterrence. The UNESCO Convention recognises that education must be cast wider than the net of liability. The Convention's definition of "athlete" makes the term as wide as "any person who participates in sport" for the purposes of anti-doping education and training programmes.¹⁰³ Creating liability wider than education does not result in improvements in deterrence or health outcomes for recreational athletes.

There are real harms in imposing ineligibility sanctions on recreational athletes. The Tribunal in *XYZ* acknowledged the stigma of the "cheat" label that is applied to those who violate the Rules.¹⁰⁴ There is a real risk of job prospects being lost as a result.¹⁰⁵ Furthermore, recreational sport and elite have different objectives. It is trite to state that sports participation leads to increased physical health and fosters a sense of community. To take that away from a recreational athlete due to what was, in all probability, an inadvertent and harmless violation does more harm than good.

Moreover, the lack of flexibility in sanctions is disproportionate when applied to lower-level sport. Intentional doping carries a four year ineligibility period¹⁰⁶ and unintentional doping carries a two

¹⁰² Backhouse and others, above n 93.

¹⁰³ International Convention against Doping in Sport, above n 9, art 2(4).

¹⁰⁴ *DFSNZ v XYZ* (Sanction), above n 4, at [13].

¹⁰⁵ See Dana Johannsen "Vince Whare is barred from his sport for a decade, because he smoked dope" (26 September 2018) Stuff <www.stuff.co.nz>.

¹⁰⁶ Sports Anti-Doping Rules, r 10.2.1.

year ineligibility period.¹⁰⁷ By establishing "no significant fault or negligence" an athlete can receive a minimum of one year ineligibility.¹⁰⁸ A period of ineligibility *must* be imposed; no reprimand is available. All of the sanctions and consequences set down in the Rules apply to recreational athletes in the same way as they apply to an Olympian. The Tribunal characterised this lack of flexibility "difficult to rationalise" for low levels of athletic participation.¹⁰⁹ In light of recreational athletes' lack of awareness about their obligations, a tribunal's inability to respond to actual culpability does not accord with common sense.

Doping in recreational sport is a growing and pressing issue.¹¹⁰ However, a punitive approach is an ineffective solution. Recreational athletes who dope are not rational actors who respond to the deterrence of a strict liability regime. Instead, doping is justified irrationally through "moral disengagement" from the consequences of doping.¹¹¹ Body image, peer pressure and supplement culture are all major drivers which are best dealt by an education and health-based approach.¹¹²

The Code should have a separate approach that meets the specific needs of each group. Applying the same regime that was designed for elite athletes to lower-level participants is inappropriate and counterproductive. The preceding analysis relating to the health, participation and proportionality objectives of recreational sport ought to colour and guide any proposed amendment to the Code.

VI A NEW WAY FORWARD? THE 2021 CODE REVIEW

The Code's approach to recreational athletes is not fit for purpose. This is internationally recognised, with many countries feeling uneasy about imposing the same level of sanctions and liability on weekend sportspeople as on elite competitors.¹¹³ WADA sought to address this issue in their periodic Code review. On 16 November 2017, WADA initiated the 2021 Code Review Process,

107 Sports Anti-Doping Rules, r 10.2.2.

108 Sports Anti-Doping Rules, r 10.5.

109 *DFSZNZ v XYZ* (Liability), above n 3, at [51].

110 EuroScience Open Forum 2016 "Doping in sports and society: a growing problem" (26 July 2016) ScienceDaily <www.sciencedaily.com>; and EuropeActive "BBC Sport Poll Confirms the Alarming Situation of Doping in Recreational Sport" (24 March 2017) <www.europeactive.eu>.

111 Andrew Curtis and others "Drug misuse in sport: A New Zealand perspective" (2015) 128(1426) NZMJ 62 at 65.

112 Jim McVeigh and Emma Begley "Anabolic steroids in the UK: an increasing issue for public health" (2017) 24 Drugs: Education, Prevention and Policy 278.

113 World Anti-Doping Agency *2021 Code Review – First Consultation: Questions to Discuss and Consider* [2021 Code Review – First Consultation: Stakeholder Comments] at 24 (Anti-Doping Denmark submission), 50 (Spanish Agency for Health Protection in Sport (AEPSAD) submission), 175 (International Paralympic Committee submission), 207 (Anti-Doping Norway submission) and 234 (NADO Flanders submission).

embarking on a two-year, three-phase stakeholder consultation. This culminated in a new 2021 Code which comes into force in January 2021.

A Introducing a "Recreational Athlete" Category

1 Introduction

WADA took a new path from previous Code iterations and recommended a new two-tiered approach. This retains the regular category of "athlete" and introduces a new category of "recreational athlete".

Comments from stakeholders in response to a discussion document expressed concerns over the current sanctioning regime applying to recreational athletes.¹¹⁴ Submitters framed their comments around the issue of proportionality and fairness in treating recreational athletes the same as elite athletes.¹¹⁵ The disproportionality concerns stemmed from recreational athletes having very little knowledge of their stringent obligations and from the way the current Code hinders countries from achieving health objectives for recreational sports. Anti-Doping Denmark stressed that it tests lower-level athletes purely for public health reasons, and not necessarily to create a level playing field.¹¹⁶ The Code in its current state runs against that objective by mandating that the full sanctioning regime applies to recreational athletes. Furthermore, submitters wanted a more flexible sanctioning regime for recreational athletes that included rehabilitation, education and probation, rather than pushing social competitors away from sport by imposing a period of ineligibility.¹¹⁷

Interestingly, DFSNZ submitted in favour of reforming the Code's treatment of recreational athletes.¹¹⁸ Although taking a tough line in its submissions to the Sports Tribunal in XYZ, its submission to WADA was far more lenient to recreational athletes. It had concerns over the rise of anti-doping investigations, like Medsafe's clenbuterol investigation that caught XYZ, which expose greater numbers of lower-level athletes to liability who are not traditionally tested. DFSNZ submitted that "[i]mposing the full force of the Code in such situations may lead to sub-optimal outcomes."¹¹⁹ It also advocated for an optional formal warning for recreational athletes possibly combined with mandatory anti-doping education.¹²⁰

114 At 22 (Anti-Doping Denmark submission), 50 (AEPSAD submission), 175 (International Paralympic Committee submission), 207 (Anti-Doping Norway submission) and 234 (NADO Flanders).

115 At 22 (Anti-Doping Denmark submission).

116 At 22 (Anti-Doping Denmark submission).

117 At 230–231 (Drug Free Sport New Zealand (DFSNZ) submission).

118 At 230–231 (Drug Free Sport New Zealand (DFSNZ) submission).

119 At 230–231 (Drug Free Sport New Zealand (DFSNZ) submission).

120 At 230–231 (Drug Free Sport New Zealand (DFSNZ) submission).

In light of those stakeholder comments, the 2021 Code Review introduced a new category: "recreational athlete".¹²¹ The final iteration of the 2021 Code is analysed and critiqued.

2 *Increased sanctioning discretion*

Essentially, a "recreational athlete" will be subject to a different sanctioning regime from an "athlete". If a "recreational athlete" can establish "no significant fault or negligence", then they can access a lower band of sanctions. A tribunal can give a reprimand and no period of ineligibility, or, at a maximum, two years ineligibility.¹²²

Therefore, the new provision allows tribunals to give essentially a discharge without conviction. The onus is on the "recreational athlete" to establish "no significant fault or negligence". Once that is established, it is still up to the judicial body to assess the degree of fault in deciding whether to grant a mere reprimand or up to two years ineligibility.

In addition to added sanctioning flexibility, there is a starting point of no public disclosure for violations by "recreational athletes". Article 14.3.7 provides that mandatory public disclosure is not required, and any optional disclosure should be proportionate to the facts and circumstances of the case. This recognises public disclosure has detrimental and disproportionate effects on recreational athletes' job prospects.

3 *The definition of "recreational athlete"*

Which individuals are able to receive this new sanctioning discretion? The new category of "recreational athlete" is defined as follows:¹²³

Recreational Athlete: A natural *Person* who is so defined by the relevant *National Anti-Doping Organization*; provided, however, the term shall not include any *Person* who, within the five years prior to committing any anti-doping rule violation, has been an *International-Level Athlete* (as defined by each International Federation consistent with the *International Standard for Testing and Investigations*) or *National-Level Athlete* (as defined by each *National Anti-Doping Organization* consistent with the *International Standard for Testing and Investigations*), has represented any country in an *International Event* in an open category or has been included within any *Registered Testing Pool* or other whereabouts information pool maintained by any International Federation or *National Anti-Doping Organization*.

WADA has left it to NADOs, such as DFSNZ, to decide their own definition subject to three limitations. These limitations are that within the previous five years the individual has not:

- been an international-level or national-level "athlete";

121 World Anti-Doping Agency 2021 Code Review: *Draft Two*.

122 World Anti-Doping Agency Code 2021 [WADA Code 2021], art 10.6.1.3.

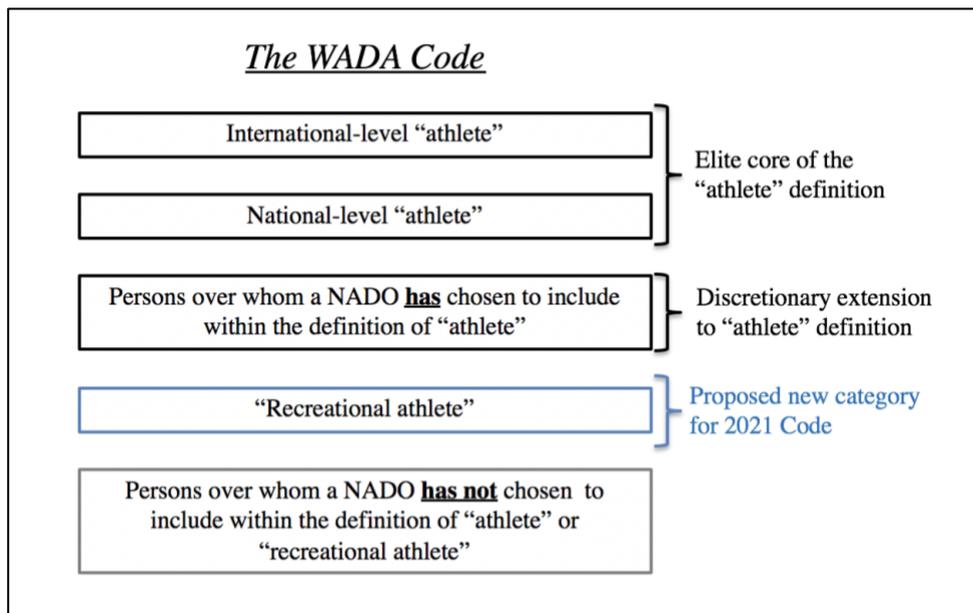
123 WADA Code 2021, definition of "recreational athlete".

- represented any country in an international event; or
- has been included in a registered testing pool or whereabouts information pool by any international federation or NADO.

The flexibility of this definition allows NADOs to determine an appropriate formulation that suits their own resource constraints, sporting structures and appetite for enforcement.¹²⁴

The diagram below highlights how the new category fits into the existing Code. NADOs can still extend the definition of "athlete" to individuals below the "elite" level. However, they have the ability to provide sanctions on recreational sportspeople in a more proportionate manner by defining them as a "recreational athlete".

Figure 2: Components of the definition of "athlete" in the new 2021 WADA Code.



B Evaluating the Changes

1 Proportionality

The new 2021 Code does well in recognising the disproportionality of applying the current regime to recreational athletes. Tribunals now have greater power to assess actual culpability by being able

¹²⁴ World Anti-Doping Agency *2021 Code Revision: Second Draft (Following the First Consultation Phase) – Summary of Major Proposed Changes Found in the First Draft of the Code* (December 2018) at [13].

to award a reprimand if "no significant fault or negligence" is established. "Recreational athletes" benefit from the same flexibility in sanctioning as minors. This recognises the similarities between the two groups: a lack of education and low-stakes competition means that imposing the full force of the Code is counterproductive to the objectives of health and participation.¹²⁵ However, the changes in the 2021 Code do not go far enough.

Firstly, the new sanctioning flexibility applies only when "no significant fault or negligence" is established. If this cannot be established, then the "athlete" is still subject to the same sanctions as elite athletes: a minimum sanction of two years for unintentional violations,¹²⁶ and four years for intentional violations.¹²⁷ Arguably, this will result in recreational athletes being over sanctioned. Tribunals may interpret "no significant fault or negligence" as requiring a high level of care that recreational athletes will not exercise. In *XYZ*, the Tribunal found that *XYZ*'s actions were not in accordance with what a "reasonable person acting in accordance with the strict obligations under ... [the Rules] ought to have done" as he failed to inform himself whether his purchases involved a prohibited substance.¹²⁸ Arguably this test is too stringent on recreational athletes who may not be aware of their liability or how to assess whether a certain product is compliant. Such a high bar will undermine the accessibility of the lower sanctioning band.

Furthermore, recreational athletes who intentionally or negligently take prohibited substances will be subject to the full force of the Code. These substances may have little performance enhancing benefits at lower levels of competition (like clenbuterol for *XYZ*). Those who intentionally violate the Code are better off to have shorter bans and be referred to education and rehabilitation than lengthy bans that have little effect in protecting the clean athlete in social sport settings.

A further issue is that the sanctioning regime does not give countries leeway to impose different consequences that are not foreseen by the Code. Many submitters, including *DFSNZ*, advocated for a power to require novel consequences such as rehabilitation programmes or mandatory anti-doping education.¹²⁹ Such a power would better give effect to the health and education rationales of the Code.

Finally, the three limitations in the "recreational athlete" definition operate for too long a time period. Five years is a considerable period of time for retired "elite" athletes to have the full

125 Backhouse and others, above n 93, at 7–8.

126 WADA Code 2021, art 10.2.2.

127 Article 10.2.1.

128 *DFSNZ v Mills*, above n 35, at [27]; and *DFSNZ v XYZ (Sanction)*, above n 4, at [8]–[16].

129 *2021 Code Review – First Consultation: Stakeholder Comments*, above n 113, at 22 (Anti-Doping Denmark submission), 50 (AEPSAD submission), 175 (International Paralympic Committee submission), 207 (Anti-Doping Norway submission), 230–231 (*DFSNZ*) and 234 (NADO Flanders submission).

consequences of "athlete" imposed on them when they engage in recreational sport.¹³⁰ Furthermore, the limitation of an international event could capture the growing number of recreational international events, like the World Masters Games.

2 *Jurisdiction/operation of the Code*

The new 2021 Code does little to recognise the jurisdictional issues illustrated by the XYZ decision.

How NADOs are to exercise their discretion has not been addressed. The definition of "athlete" still gives NADOs discretion to expand the full sanctioning regime to lower-level sportspeople. The issue of how a NADO can exercise this discretion, either through positive amendment or merely through ad hoc administrative policy, is left unresolved. In Part IV, the case was made for requiring a positive amendment as this accords better with constraining executive power and upholding the rule of law. The Code should make it clear that NADOs are required to exercise a *rule-making* discretion. This should apply to the discretionary extension of "athlete" and to whatever formulation of "recreational athlete" is decided on. Countries retain their sovereignty to extend the definition of athlete, but this should not be done "by stealth" without a rule change.

The Code also fails to clarify whether NADOs can formulate their definition of "recreational athlete" so wide as to capture individuals who are members of clubs but do not participate in sport. It is questionable whether WADA's sports anti-doping mandate could ever be used to justify regulating the lives of club members who do not compete at all. Individuals who are club members for social purposes should not face possible sanctions for possession of recreational drugs or the "wrong" medication by a body originally conceived to regulate elite sport.

C *A Preferred Approach*

It is important to draw together the threads of the preceding analysis in light of the XYZ case and the WADA 2021 Code review. This preferred approach urges WADA to go further in acknowledging the differences between elite and recreational athletes.

Recreational athletes should have further sanctioning leniency. A narrower sanction band should be available when "no significant fault or negligence" is established of zero to one year ineligibility. For negligent violations the band should be one to two years; for intentional doping it should be two to four years. Ideally, these lower bands should be supplemented by sanctioning factors that reflect the unique position of recreational athletes. This should guide tribunals' sanctioning decisions within the range available. Such factors would include the stigma of a sanction, effect on job prospects, deterrence value, degree of fault, degree of performance enhancement and benefit of continued sport

¹³⁰ See *World Anti-Doping Agency v South African Institute for Drug-Free Sport* CAS 2017/A/5369, 21 June 2018).

participation on the individual's physical and mental wellbeing. Further, NADOs should be able to impose novel consequences such as mandatory education programmes.

Furthermore, the Code should clarify that "no significant fault or negligence" ought to be a different test for recreational athletes. Such a legal test should be a capacity-based objective test which recognises the lower ability of recreational athletes to meet their Code obligations. There should be a presumption that recreational athletes satisfy the "no significant fault or negligence" test, and the onus on NADOs to prove otherwise.

The limitations on the "recreational athlete" definition should also be changed. The limitations should be reduced from five years to two years to alleviate the unfairness on retired athletes. The limitation of being a competitor in an international event should also be removed as this is too broad. To mitigate concerns that this shorter timeframe would be abused by injured or up-and-coming athletes, the Code could allow NADOs to retroactively elevate to full sanctions if the guilty "recreational athlete" goes on to elite competition within two years of the violation.

The operation of the Code should be clarified to ensure NADOs cannot assert a broad jurisdiction by simple administrative policy change. The Code should clarify that the definitions of "athlete" and "recreational athlete" contemplate a rule-making decision. A clear limitation on jurisdiction is also needed to ensure NADOs cannot extend their enforcement regime to club members who do not actively participate in sport.

VII CONCLUSION

Doping in both elite and recreational sport is widespread and is a serious problem. However, the case of *XYZ* has shown the pitfalls of extending by administrative fiat a regime designed for elite athletes to regular recreational athletes. The current law results in the imposition of disproportionate sanctions on unaware recreational athletes which does little to advance the participation, health and education objectives of lower-level sport.

The new WADA 2021 Code comes into force in January 2021. It is to be commended for recognising the special position of recreational athletes. However, it does not go far enough to remediate the proportionality issues of the current Code. Furthermore, the review fails to address the troubling manner in which jurisdiction has been asserted by anti-doping agencies like *DFSNZ*.

Participation in sport is an integral part of New Zealand society and contributes to an individual's physical, mental and community wellbeing. WADA should go further than its current 2021 Code to create an anti-doping regime that properly supports and enhances recreational sport.

