

## BOOK REVIEW

# *Doping in Sport and the Law*, edited by Ulrich Haas and Deborah Healey. Oxford: Hart Publishing Ltd, 2016, 344 pp (£80.00 hardback). ISBN: 9781509905881

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A review of the recently published book: *Doping in Sport and the Law*, edited by Ulrich Haas and Deborah Healey. Oxford: Hart Publishing Ltd. In the context of sports law and sports governance and of scholarly work on doping in sport in general the author assesses the book's contribution to the understanding of legal issues relevant to anti-doping in general notably the WADA Code.

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Issues relating to sports law and sports governance have attracted significant media attention, particularly in recent months, with doping issues taking centre stage following, for example, revelations of state-sponsored doping in Russia, and questionable conduct by members of the highly successful Team Sky professional cycling team. Issues such as these demand answers from those tasked with formulating, influencing and considering policy. The extended essays offered in this volume focus – as the title suggests – exclusively on doping issues, and therefore directly consider questions of this nature. This is in contrast to textbooks such as 'Sports Law',<sup>1</sup> and 'Modern Sports Law',<sup>2</sup> which although dedicate significant attention to doping, are both much broader in their focus and provide more of a general overview of sports law. This text adds to the existing literature on doping in sport and the law by providing more detailed analysis of specific areas of doping regulation, from different perspectives, and considering different sports.

This edited volume provides insightful international analysis of doping in sport and the law, albeit (perhaps unsurprisingly given the makeup of the contributors) with a major Antipodean focus. It considers the effect of doping regulation, namely the World Anti-Doping Agency's (WADA's) Code, from a variety of angles. All of the chapters offer an element of international commentary and analysis; although some will prove particularly instructive for anyone interested in comparative study and lessons from other jurisdictions, they may prove too specialist for others. It is, however, worth noting at this early juncture that detailed previous knowledge of sports law is unnecessary for the reader to draw many worthwhile lessons from this volume.

The cross-disciplinary nature, and inclusion of academic and practitioner commentary (with some contributors serving as both within their chapters) offer valuable insights, and importantly provide the reader with information on both the theory and practice of anti-doping, fostering a deeper, more complete understanding. The technique of examining issues from different legal perspectives is particularly helpful for breadth (and, to a lesser extent depth) of understanding, and the extensive references helpfully point the reader towards further relevant information on each distinct area of law. Many different sports are considered: cycling, athletics, baseball, Australian Rules Football, rugby league and union provide practical examples which facilitate the legal analysis.

The chapters are grouped into five parts, examining the WADA Code from different angles, each with distinctive themes: (i) the evolution of the Code, (ii) athletes and the Code, (iii) procedural questions relating to the Code, (iv) obligations and liabilities arising under the Code, and (v) the Code as regulation, examining issues of governance and compliance.

The book raises numerous questions fundamental to drugs and doping in sport. Many of the authors highlight areas of the Code and anti-doping law and regulation that warrant further scrutiny, and possible options for reform. As indicated above, and indeed as the volume's 'blurb' suggests, there are some prevailing themes: fairness, logic and that prospects for compliance are lenses through which anti-doping reforms are (and indeed, in this reviewer's opinion, should be), viewed. Moreover, the continued emphasis on the impact on stakeholders, particularly athletes and athlete support personnel, adds a further welcome element of practicality to the analysis, as does the discussion of breadth and depth of

anti-doping compliance. These consistent themes help to unite the chapters on discrete areas of law (e.g. employment or tort law), and aid the book in becoming a coherent whole: something for which the editors deserve much praise.

As the book is edited by Ulrich Haas and Deborah Healey, special consideration will be given to their chapters here. Extensive review of all chapters is beyond the scope of this review, therefore only selected other chapters of particular interest to this author will be considered. It should, however, be noted that all the chapters offer valuable contributions to the book, depending upon which area of law (or science) is of particular interest to prospective readers. The Antipodean leaning provides this text with numerous further insights for those particularly interested in that region. For example, there is extensive discussion of hearings concerning anti-doping rule violations in New Zealand, and detailed consideration of the Australian Rules Football case involving the Essendon club; these also provide indications of how similar issues might potentially be dealt with in other jurisdictions. Furthermore, the discussion of the impact of the Australian Sports Anti-Doping Act of 2006 might provide some worthwhile insights for other countries considering drafting similar legislation.

In the opening chapter – ‘The Myth of the Level Playing Field in Sport’ – as well as neatly summarising the chapters to follow, Healey provides a brief explanation of why sport occupies such a unique place in society, and is so highly valued by diverse groups of stakeholders. Doping, she contends, is likely to represent a threat to this privileged position currently enjoyed by sport. She also pragmatically notes the impact doping might have on the significant commercial element of modern sport. These are some of the reasons that doping in sport urgently needs addressing. Healey insightfully observes that doping in sport must be considered within the context of trends in society more broadly, with greater emphasis being placed on performance and winning both inside and outside regulated professional/elite sport. This is an important point, which historically has been, and remains sometimes today, overlooked.

Healey highlights a number of the practical difficulties faced by the anti-doping authorities, and acknowledges the ‘fallacy of the level playing field for competition and, possibly, even for testing for prohibited substances based on current methods’ (8). She provides a balanced assessment of the Code, how it operates as regulation, the major challenges it faces, and a brief appraisal of its successes and failures, before then considering what it realistically can be expected to achieve. These overarching points help inform the analysis that follows, and serve as useful context for reading the remaining chapters in the volume.

Haas’s chapter considers in depth the 2015 Code (and the changes from previous iterations of the Code). He provides a helpful analogy, comparing the speed of the reform process to an ocean tanker. He then discusses some prominent challenges, for example the issue of positive tests for cannabis, and, among many others, raises a thought-provoking point about the quantitative versus qualitative assessment of anti-doping success. Haas notes that ‘The 2015 Code is a decisive step away from quantitative analysis towards a more quality-oriented approach’ (39). This is necessary for several reasons, not least because more athletes are now found guilty of anti-doping rule violations (ADRVs) on the strength of non-analytical findings; i.e. for reasons other than failing a drugs test for a substance on WADA’s Prohibited List. Haas also considers how the Armstrong case has led to notably tougher sanctions for ADRVs (24, 25).

In chapter three, Thomas Hickie raises some important concerns regarding the power wielded by the Olympic Movement and WADA, particularly as they are essentially private entities. This is compounded by the fact that, in certain countries, notably for example Australia, quasi-criminal investigations, and significant fines can be applicable for breaching what are, in essence, contractual obligations. Practical examples from Australia, and countries such as New Zealand (considered in detail by Paul David in chapter seven), which have relatively recently enacted legislation targeting doping in sport (e.g. The Sports Anti-Doping Act 2006 in New Zealand), which differs somewhat from the Australian approach, are helpful in considering this question. In chapter thirteen Jack Anderson reflects on the ‘Juridification and Criminalisation of Doping ...’. He notes that a number of European countries, notably France, Italy and Spain have ‘sports-specific legislation criminalising the use of WADA prohibited substances and methods, the supply and administration of such substances and methods, and any failure to cooperate with anti-doping investigators.’ (265) Is this an approach which should be pursued in other jurisdictions? David Howman, a recent former Chief Executive of WADA, and others believe it should be. Plainly steps in this direction should be subject to significant scrutiny, and not pursued without extremely strong justifications, and only following meaningful stakeholder consultation and agreement.

Two chapters, one by Joellen Riley and David Weiler on employment law as it relates to anti-doping, and one by Jason Mazanov on ‘The Chimera of Compliance with the World Anti-Doping Code’ are especially insightful. A highlight, which might be regarded on one level as amusing, is a comment in the former chapter on the two-line exchange between two All Blacks rugby legends – Tana Umaga and Sonny Bill Williams – over the latter’s contract:

‘Sonny Bill: “Bro, are you sure this is legit?”  
Coach Tana Umaga: “Yeah.”’ (181).

The approach taken here, summarised ironically by the chapter’s authors as a ‘comprehensive legal briefing’ (181) regarding a lucrative overseas contract of employment may also be viewed as rather concerning: it underscores an important point about the approaches and attitudes of many professional/elite athletes, and demonstrates the potential reliance and vulnerability in this context of even highly experienced, world-renowned sportsmen. It is hard to imagine another context in which a contract of this nature would attract such little scrutiny.

The psychological analysis provided by the Mazanov chapter helps in adding a very worthwhile cross-disciplinary dimension to the book, raising numerous practical points informed by information from the most important stakeholder group: athletes (and their support personnel). Mazanov also proposes other potentially useful changes: 'Another way to work towards depth of compliance based on the way in which decisions are made is to refocus employment contracts for both athletes and support personnel to prioritise health as a performance measure.' (247) This is particularly important as it would help achieve one – arguably the most important – of the Code's stated aims and values: promoting athlete health.

The volume also contains the influential chapter 'Governance and Anti-Doping: Beyond the Fox and the Hen House' by Marina Nehme and Catherine Ordway. This excellent analogy, which (to this reviewer's knowledge) originated from this chapter, has now become widely used in sports law circles to summarise the conflict of interest position sports regulators are often accused of occupying. The authors offer many ways in which this problem can be efficaciously addressed. Greater transparency, diversity, and improved governance structures would help to bolster the current anti-doping regime; this is something which urgently needs to be addressed, with not unjustified but arguably unprecedented amounts of criticism being levelled at WADA and the International Olympic Committee (IOC), and confidence in the regulation falling to critically low levels, following numerous high-profile scandals, for example, most notably involving Russian athletics, and other public anti-doping failures. One particularly valuable observation, which might well represent the best chance of improving the current position more than any other single factor, is the pressing need for a culture change, i.e. addressing the underlying culture of (expressed in slightly different terms from those used by the authors of the chapter), prohibited substance use in sport. Unless and until this is meaningfully confronted, the prospects of success from other measures are likely to be seriously diminished. This chapter, in keeping with a prevailing theme of the volume as a whole, highlights that the WADA Code, despite its predominant position in anti-doping regulatory framework, is nonetheless simply a piece of a greater puzzle, and therefore cannot succeed alone. The importance of this point is hard to overstate.

Several of the chapters (for example, chapter eleven considered directly above) help to provide some insight into the culture of elite sport. 'The Myth of the Level Playing Field in Sport' chapter raises many excellent points that would have been worth developing further. Also, if a second edition of the book were to be developed, perhaps a chapter focusing on jurisprudence, the morality of sport, and the evolution of sports ethics would be worthwhile, and help to shed further light on both the Russian Olympic revelations, and the issues raised by the events surrounding Team Sky and professional cycling. For example, in this connection, more consideration of the ethical implications of Therapeutic Use Exemptions (TUEs), and other ways of potentially circumventing the rules, would be valuable additions to a second edition.

In conclusion, this book is undoubtedly a valuable resource for anyone seeking to understand more about doping regulation, particularly the WADA Code, and especially how it operates across jurisdictions. It raises many pertinent questions, the answers to which should help to shape future regulatory policy, and address many current concerns. It succeeds in its ambitious aim of availing the reader with cogent and insightful analysis and comment on a range of legal issues germane to anti-doping generally, and the WADA Code specifically. It is likely to be of particular utility to anyone seeking an overview of the Code from a variety of legal perspectives.

## Notes

- <sup>1</sup> S. Gardiner, J. O'Leary, R. Welch, S. Boyes, and U. Naidoo, *Sports Law*, London: Routledge, Fourth edition, 2012.
- <sup>2</sup> J. Anderson, *Modern Sports Law*, Oxford: Hart, 2010.

## Competing Interests

The author has no competing interests to declare.


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