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David Mackay's Unpunished 'Bump': Why Australian Sports Must Do More To Tackle Head And Facial Injuries



Monday, 18 October 2021 By [Alexandria Anthony](#), [Alexandra Veuthey](#)

Professional team sports in Australia are dominated by two major codes: Australian Rules football and rugby league. These codes are governed by the Australian Football League (**AFL**) and the National Rugby League (**NRL**), both having the power to make their own rules.

Australian Rules football is considered to derive from rugby or Gaelic football, but also, due to the importance of its foot play, from football or even Aboriginal jousts. Rugby league is close to rugby union, but emerged as an independent sport following a schism in the late nineteenth century that saw it develop its own technical specifics and become a professional sport.

While incidents and collisions are very common in these sports, a particular case has recently focused the attention of sports commentators and experts in Australian Rules football: Adelaide midfielder David Mackay's unpunished "bump" (tackle), which left his opponent knocked out with a broken jaw. The reason this incident attracted so much attention is because it was viewed as a test case in the AFL's bid to protect players' heads amid increasing concern about concussion and long-term health and financial implications. It also highlights an issue that is common to all sports: the tension between the need to protect player welfare and to maintain the physicality and attractiveness of competitions.

This article is split into two parts. The first part summarises the general state of the situation regarding concussion in Australia and overseas. It argues that Australian leagues have a legal and moral duty, as well as a financial interest to protect athletes through appropriate rules of play and sanctions. The second part then provides an in-depth analysis of the Mackay case, illustrating the room for improvement that still remains in the AFL's approach to preventing concussion. It concludes with a summary of the main findings and proposals. The sections can be accessed here:

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The Growing Problem

The controversy surrounding concussion in sport has continually increased in professional team sports since the mid-2000s.

Numerous athletes have been forced into early retirement due to post-concussive symptoms affecting their cognitive, sleep, mood/behavioural and physical abilities. Others have been posthumously diagnosed with the degenerative disease, “Chronic Traumatic Encephalopathy” (CTE), which can cause various conditions including, but not limited to, memory loss, impulsive anger-control problems, disorientation, depression and dementia.^[1]

In 2012, the National Football League, the governing body for American football, was sued in a class action involving more than 5,000 former players. The class action, based on torts, resulted in a settlement of over US\$1 billion three years later and paved the way for similar proceedings in other sports and countries.^[2]

In North America, the National Hockey League was also sued and entered into a settlement. The Fédération Internationale de Football Association, USA Water Polo and the Canadian Football League in another claim escaped liability on procedural grounds.^[3]

In the United Kingdom, a class action is being prepared against World Rugby and British rugby unions. The plaintiffs, including World Cup-winning England player Steve Thompson, are all aged between 20 and 50 years old. Similar litigation is expected against the English Football Association (**The FA**).^[4]

In Australia, the AFL and the NRL are also affected.

Concussion In Australian Professional Leagues

Instances of concussion are prevalent in Australian professional leagues. Australian Rules football recorded 76 head or neck injuries in a single season across the AFL in 2021.^[5] Rugby league follows the same trend, with 59 concussion injuries already reported in the 2021 NRL mid-season.^[6] While comparisons across sports and countries should be viewed with caution,^[7] their incidence rate per 1000 player hours tends to place them among the highest worldwide in team sports.^[8]

Media reports have frequently suggested that a class action would be filed against the AFL in the Federal Court, with John Platten and John Barnes, who played in the 1980-90s, as the possible lead plaintiffs.^[9] Additionally, three Sydney law firms have announced their plans to launch a near-identical class action against the NRL, in the wake of the discovery of the first two CTE cases in former Australian rugby league players following autopsy.^[10]

The NRL litigation was eventually abandoned, but is now proceeding on an individual basis.^[11] The AFL is currently attempting to negotiate an AUD2-billion concussion compensation fund to avoid court action.^[12]

Plaintiffs, in compensation claims, have to face the Australian courts' past reluctance to hold sports governing bodies liable in cases of injury litigation arising from inherently dangerous contact sports.^[13] This reluctance has historically been justified by the absence of a general duty of care of sports governing bodies and the voluntary participation of amateur athletes, deemed to accept the risks related to the activity in which they take part.^[14]

These elements need to be revisited in light of the evolution of society and the recent public awareness about sports safety, as well as the structural changes that have occurred in the organisation of international sport.^[15] In addition, they should be assessed with more flexibility in professional sport, due to the existence of "employer-employee" type relationships, the substantial resources available to sports governing bodies and the athletes' wish to maintain their means of livelihood.^[16] Furthermore, "head hits" depart from other types of injuries in terms of consent, due to their potential long-term risks.

The short deadlines imposed by Australian statutes of limitations are an additional hurdle to be overcome by the plaintiffs.^[17] Finally, the jurisdiction of the state courts, which traditionally decide personal injury claims, should be clarified.

Apart from these legal considerations, leagues are fully aware of their moral duty to act.^[18] Additionally, legal proceedings expose plaintiffs to the risk of financial and reputational damage. A discovery process may, in particular, irreparably harm their image and could result in substantial financial loss in ticket sales, TV rights, sponsorship, and decrease in the participation of players at lower levels.

AFL And NRL's Measures To Tackle The Issue

The AFL and NRL have been proactive regarding concussion prevention and management. The prospect of litigation, together with advances in science, has resulted in them intensifying their efforts. They gradually put in place new rules of play (with an emphasis on tackles and bumps), concussion management protocols, financial support for injured athletes, education, research and data collection.^[19]

The AFL stands out with its commitment to spend at least AUD250 000 on concussion research annually.^[20] In 2021 the AFL also introduced medical substitutes.^[21] These medical substitutes involve a 23rd player which clubs are allowed to bring on only to replace an injured or concussed player that club doctors have assessed as being “medically unfit” to continue playing in the match.^[22] Similarly, the NRL instituted the 18th man, an independent process for return-to-practice, independent match-day doctors and spotters for State of Origin competitions and heavy fines for non-compliant clubs.^[23] Both leagues have also set mandatory stand down periods for concussed players.^[24]

In-depth research has shown that room for improvement still exists in all possible sectors of intervention.^[25] It has observed a lack of transparency and research independence, and has emphasised the need for a collaborative, harmonised approach to reforms, with an emphasis on prevention of harm.^[26]

In this context, the adoption of appropriate, evidence-based rules of play and sanctions remains crucial. It may, however, fundamentally alter the manner in which a sport is played at a professional and community level. This is exemplified by David Mackay’s unpunished “bump”.

Case Review: David Mackay’s Unpunished Bump

1. Facts

On 12 June 2021, a collision occurred between David Mackay of the Adelaide Football Club and Hunter Clark of the St Kilda Football Club (**Mackay incident**).^[27] The Mackay incident involved a forceful knock or “bump” by Mackay with his shoulder to the head of Clark.^[28] It left Clark suffering from multiple jaw fractures, requiring surgery, and caused him to miss the next six weeks of the season.^[29]

The incident was not sanctioned, nor reported, by the umpires during the game day, but was subsequently reviewed by the appropriate AFL bodies.

2. Preliminary Assessment Based On AFL Laws, Regulations And Guidelines

The relevant rules and guidance in the AFL are contained in the Laws of Australian Football 2021 (**Laws**),^[30] AFL Regulations (**Regulations**)^[31] and AFL Tribunal 2021 Guidelines (**Guidelines**) (collectively referred to as the **Rules**).^[32]

In the AFL, it is permissible under the Laws to bump another player with a hip, shoulder, chest arms or open hands, as long as the contact is not “Prohibited Contact”.^[33] As the Mackay incident involved high contact, it fell within the meaning of Prohibited Contact.^[34] It should have been punished on the day with a free kick. However, the key questions coming out of this incident were whether it was a “Reportable Offence” and, if so, whether a suspension was warranted.

A. Reportable Offences

The Regulations define Reportable Offences as those identified in the Laws and the Regulations, including Appendix 1 to the Regulations.^[35] There are three types of Reportable Offences: “Classifiable Offences”, “Direct Tribunal Offences” and “Fixed Financial Offences”.^[36] Classifiable Offences are usually graded by the Match Review Officer (**MRO**) in the first instance and, depending on the grading, may need to be heard by the Tribunal. However, the MRO and the AFL Executive General Manager of Football Operations (**AFL General Manager**) have discretion to refer an offence directly to the Tribunal without a grading.^[37] Direct Tribunal offences are directly referred to the Tribunal without a grading, whereas Fixed Financial Offences involve prescribed fines.^[38]

Only those Reportable Offences which fall within certain classifications will result in suspensions, whereas other less serious offences are punishable by a fine.^[39]

When a “Reportable Offence” occurs, a player can be reported during the match by the umpire and the incident referred after the match to the MRO.^[40] Alternatively, if no report is made during the match, the incident can be referred after the match to the MRO by the AFL umpire, umpiring manager, umpiring observer, AFL club or AFL General Manager and sanctioned by the AFL Tribunal or MRO. For a finding of guilt to be made by the Tribunal, it must be satisfied that the offence has been established against the player on the balance of probabilities.^[41]

In relation to the Mackay incident, the MRO elected not to grade the offence, but the AFL General Manager referred it to the Tribunal.^[42] The AFL later clarified that, in its view, the incident should be graded as careless Rough Conduct that was severe impact, high contact and was unreasonable (in contravention of section 4.3(E)1 of the Guidelines).^[43] Under the

Guidelines, this would be a Classifiable Offence.^[44] The normal process for such an incident is that the MRO grades the offence, and if it grades the offence as careless Rough Conduct, severe impact and high contact, it will then refer the matter to the Tribunal.^[45] The Tribunal then deliberates, and if the player is found guilty, it could issue a 3+ match suspension.^[46] While the process followed here was unusual, it was allowed under a discretion given to the AFL General Manager under section 4.4(D) of the Guidelines.^[47]

Relevantly, the offences of, intentionally or carelessly:

- Charging;^[48]
- "Engaging in Rough Conduct against an opponent";^[49] and
- "Bumping or making forceful contact to an opponent from front-on when that Player has their head down over the football";^[50]

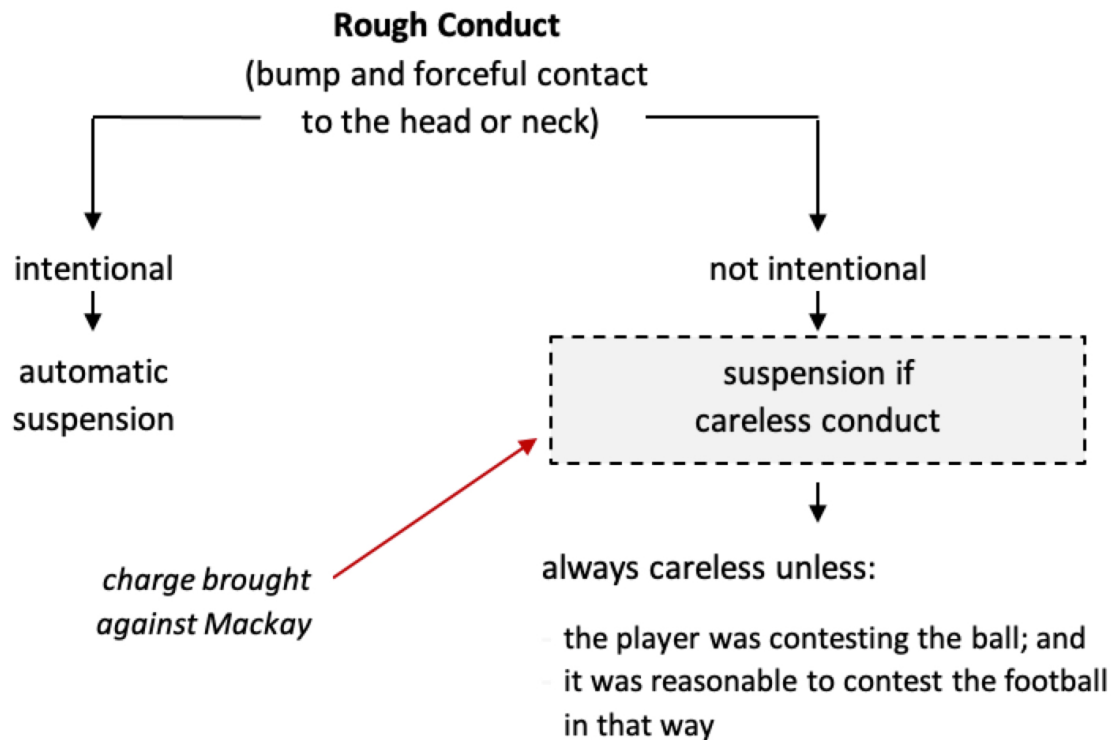
are all reportable under the Laws. Although the Mackay incident could arguably fall within the meaning of charging,^[51] or even forceful front-on contact,^[52] this article will focus on whether it falls within the meaning of "Rough Conduct", as this was the charge brought against the player by the AFL.^[53]

B. Rough Conduct

The definition of Rough Conduct in the Laws is very broad and not particularly helpful.^[54] Schedule 1 to the AFL Regulations provides further information on the meaning of "Rough Conduct (High Bumps)" for the purposes of Law 22.2(a)(v) (Rough Conduct). It states that a player will be guilty of "Rough Conduct" where, in the act of bumping an opponent, the player "causes forceful contact to be made with any part of his body to an opponent's head or neck".^[55] The Guidelines include seven examples of Rough Conduct (High Bumps).^[56] Only one of these, a bump by Ben Long on Sean Darcy in 2020 (**Long Bump**), was graded careless conduct, severe impact and high contact.^[57] The Long Bump is very similar to the Mackay incident and is discussed below in section 5Bb(ii). Long received a three-match suspension for the incident.^[58]

For Rough Conduct to warrant suspension, it must have been **intentional** or **careless** conduct.^[59] In this case, it was not alleged that Mackay intended to cause forceful contact to Clark's head or neck. Therefore, the conduct would only be punishable by suspension if it could be considered "careless" conduct. Generally, the Guidelines state that conduct will be regarded as careless when the player breaches his duty of care, which is judged by reference to what a

reasonable player would regard as prudent in all the circumstances.^[60] The Guidelines also indicate that an act will be careless if the player fails to take reasonable care to avoid acts which can be **reasonably foreseen** to result in a Reportable Offence.^[61] In the case of "Rough Conduct (High Bumps)", more specific guidance is provided in Appendix 1 to the Regulations: if the conduct is not intentional, it will be considered to be careless unless relevantly "the Player was **contesting the football** and it was **reasonable** for the player to contest the football in that way" (emphasis added) ("**contesting the ball exception**").^[62] The "High Bumps rule" and contesting the ball exception are further described in the Guidelines at section 4.3(E)1.^[63]



The Guidelines also provide three examples of incidents that fall within "the contesting the ball exception" (and therefore are not "careless"):

- A bump by Jack Zeibell also on Hunter Clark in round 16 of the 2019 season;^[64]
- A bump by Aaron vandenBerg on Brody Mihocek in round 12 of season 2020;^[65] and
- A bump by Shannon Hurn on Joshua Corbett in round 7 of season 2019.^[66]

These exception examples are discussed below in section 5Bb(ii).

3. Reason For Controversy

A. Development Of Head “High Bumps Rule”

Bumps have always been an important part of the game, and any threat to their continued existence is contentious.^[67] However, over time and particularly in the last 12 years, the AFL has made numerous amendments to the rules in relation to head high bumps.^[68] These amendments were adopted in response to concerns of AFL Medical Officers arising out of specific incidents.^[69]

In 2009, Nick Maxwell’s unpunished bump^[70] on Patrick McGinnity during a preseason match caused the AFL to toughen the rules in relation to head high bumps.^[71] The changes made Rough Conduct (including head high bumps) punishable by suspension where the contact was unreasonable in the circumstances and the player had a realistic alternative open to him, including contesting the ball or tackling.^[72]

By 2018, a number of further amendments had been made to the rules on high bumps, and relevantly the 2018 tribunal guidelines included a statement that: “head clashes **may** be considered a reasonably foreseeable consequence arising from a bump” (emphasis added).^[73] Despite these changes, the MRO determined that a bump by Ryan Burton on Shaun Higgins in Round 5 of the 2018 AFL season (**Burton bump**)^[74] did not warrant suspension on the basis that the head high contact was not reasonably foreseeable.^[75] Burton’s conduct was therefore not judged to be careless. At the time, the AFL General Manager agreed with the MRO and stated: “If we suspend him for that, we’re throwing the bump out of the game. There is still a place in the laws of the game for the bump in our view.”^[76]

In 2019, the AFL changed the Rules^[77] such that if a player elects to bump, any resulting head clash will automatically be considered to have been reasonably foreseeable.^[78] This change ended the Tribunal’s discretion to find that high contact resulting from a bump was not reasonably foreseeable and that, therefore, the player’s conduct was not careless. It meant that the argument relied upon by the MRO to clear Burton was no longer open. This change is relevant to all high bumps, regardless of whether there was a contest for the ball.

The practical impact of the 2019 change to reasonable foreseeability is illustrated by the treatment of a bump by Patrick Dangerfield on Jake Kelly in Round 1 of the 2021 AFL season (**Dangerfield bump**).^[79] Despite its similarity to the Burton bump, the Dangerfield bump resulted in a three-match suspension.^[80] Unlike Burton, Dangerfield could not escape a grading of careless conduct, as his head high contact was mandatorily considered to be reasonably foreseeable due to his decision to bump.

Prior to Round 1 of the 2021 season, the “contesting the ball exception” was also amended to be in its current form. The expression “[the Player] did not have a realistic alternative way to contest the ball”^[81] was replaced with the words “it was reasonable for the Player to contest the ball in that way”.^[82] As a result, it is no longer a sufficient defence to a charge of Rough Conduct (High Bumps) to allege that there was no realistic alternative to the bump available. It is now necessary to show that the player’s conduct in contesting the ball was reasonable.

The 2021 rule change did not impact the treatment of the Dangerfield bump. The “contesting the ball exception” (whether in its pre-2021 form or its current form) could not apply to the Dangerfield bump because Kelly was already in possession of the ball. The conduct consequently fell within the meaning of careless Rough Conduct and was graded severe impact and high contact.^[83] This was the same charge and classification as the AFL alleged applied in the Mackay case.

B. Mackay Incident – Contesting The Ball

The Mackay incident differed from the Burton bump and the Dangerfield bump due to Mackay’s intent to contest a loose ball rather than to bump another player. Punishing a straightforward and genuine contest for the ball between two players intent on the ball was seen by many as taking the rule changes a step too far. Hence, the decision to refer the Mackay incident to the AFL Tribunal was controversial because some commentators and players considered that if Mackay was to be suspended, this would cause a drastic change to the sport of Australian Rules football.^[84]

Although the ball was loose and in contest immediately prior to the contact, it is clear from the video^[85] that:

- Clark was initially much closer to the ball;
- Mackay had a wider view and should have been able to see Clark;
- Mackay was moving at high-speed, coming from a different line to the movement of the ball and from afar and therefore Clark would likely not have been aware of him;
- Mackay should have known that regardless of who reached the ball first, he was bound to make contact with Clark that could cause serious injury;
- Clark was ultimately first to the ball;
- By the time Clark gained possession of the ball, contact between Clark and Mackay was inevitable;
- Mackay turned his body to protect his own head; and
- Mackay's feet left the ground upon contact with Clark.

Clark beat Mackay to the ball by a fraction of a second, but by the time Clark gained possession of the ball the risk of serious injury had already arisen. The key decision therefore occurred prior to that moment. The incident could only be punishable if Mackay was required to consider the risk to Clark when deciding whether to contest the football prior to the moment when Clark took possession of the ball.

There are hundreds of contested situations in a typical game of AFL football.^[86] If a suspension was applied in Mackay's circumstances, this would suggest that every time a player contests the ball, he must consider whether or not the decision to contest the ball would cause a risk of serious injury to another player.

The issue was therefore whether Mackay was required to:

- Take into account the likelihood of serious injury to Clark when determining whether to contest the ball; and
- Having considered that risk, to decide not to contest the ball on the basis of the likely risk to Clark.

Most commentators, journalists and former players discussing the incident considered that requiring Mackay to take the above steps would result in a fundamental and unjustified change to the game.^[87] Many viewed it as an unfortunate accident, but one that is expected and permissible under the Rules as they now stand.^[88] Those who considered that Mackay should not be suspended generally focused on his intent to contest the loose ball. For example, when asked about the incident on AFL 360, Geelong coach Chris Scott stated:

On first glance most football people that I know I think would take the view that if you approach the contest with good intent, to go for the ball, and there are unfortunate consequences, that you shouldn't be held liable.^[89]

Others contended that, in light of the evidence of serious long-term impact of head injuries, change was necessary and the bump should be punishable, if not under the current Rules, then at least in the future.^[90] Mark Robinson, from the Herald Sun, maintained that, given the link between traumatic brain injuries and mental illness, an intent to contest the ball should not always be sufficient. He stated: "... we've got to stop saying, 'He's going for the ball'."^[91]

4. AFL Tribunal Hearing And Decision

The AFL Tribunal hearing took place on 17 June 2021. It lasted for two hours, including the hearing and cross-examination of witnesses, as well as the legal counsels' oral submissions.

[92]

In his defence, Mackay's counsel said that his client's intention was to contest a "50-50" ball and this was shown by the fact that at the time of the collision he had his hands out for the ball.^[93] He argued that the incident did not even involve a "bump".^[94]

While Clark beat Mackay to the ball, Mackay claimed that up until the last moment, he believed that he would be the first player to the ball, and that, therefore, his actions were reasonable.^[95]

Two witnesses, a data analyst and a biomechanics expert, were called to support this view.^[96]

The AFL counsel argued that Mackay must have known that he would not be first to the ball.^[97] Whether or not it was characterised as a "bump", a high-speed collision was foreseeable because of the speed at which he approached the contest. In the circumstances, his conduct was unreasonable.^[98]

After almost one hour of deliberations, the Tribunal eventually cleared Mackay of the Rough Conduct charge, with the tribunal chairman Geoff Giudice stating:^[99]

It was not unreasonable for Mackay to go for the ball, both players got there at virtually the same time and both were seeking to collect the ball. Mackay's contact was not unreasonable.

This verdict was greeted with relief by the defence, while the AFL announced its intention not to file an appeal with the AFL Appeal Board.^[100] Despite this desire for appeasement, concussion crusader Peter Jess accused the AFL of failing to protect its players, and breaching Occupational Health and Safety laws.^[101] The AFL announced that change was imminent, with new rules to be introduced in a bid to avoid further incidents.^[102]

A full written set of reasons was not drafted, nor published.

5. Analysis Based On AFL Rules

To assess the validity of this decision, the following elements must be considered:

1. Was there Rough Conduct within the meaning of the Rough Conduct (High Bumps) rule as described in Appendix 1 of the Regulations and in section 4.3(E)1. of the Guidelines ("High

Bumps rule”)? This will be a question of whether:

- i. There was a "bump"; and
- ii. There was forceful contact to the head or neck.

2. If there was Rough Conduct within the meaning of the High Bumps rule, was the conduct careless? This will be question of whether:

- i. Mackay was contesting the ball; and
- ii. It was reasonable for Mackay to contest the ball in the way that he did.

A. Was There “Rough Conduct” Within The Meaning Of The “High Bumps Rule”?

(i) Did Mackay "bump" Clark?

The main intention of both players seemingly was to gain possession of the loose ball rather than to make contact with each other. This does not necessarily mean that the contact did not involve a "bump". The meaning of "bump" is not defined in the Rules. Nevertheless, it is known in the English language as: "to hit something with force",^[103] or to "knock or run into someone or something with a jolt".^[104] In light of this definition, it is uncontroversial that Mackay did in fact "bump" Clark.

(ii) Was there forceful contact to the head or neck?

This element is indisputable and will not be discussed further.

(iii) Conclusion on “Rough Conduct”

Mackay engaged in Rough Conduct within the meaning of the “High Bumps rule”.

B. Was The Conduct Careless Within The Meaning Of The “High Bumps Rule”?

(i) Was Mackay contesting the ball?

When Mackay began moving towards Clark, the ball was loose and, therefore, “in contest”. At the moment of contact, Clark had possession of the ball, which was therefore no longer “in contest”.^[105] However, Clark only gained possession of the ball marginally before Mackay made contact and at the moment of contact Mackay was reaching for the ball. This implies that Mackay was intending to contest the ball, and differentiates the Mackay bump from the Dangerfield bump.^[106] This element is thus satisfied.

(ii) Was the contestation of the ball reasonable?

By including the language around reasonableness, the Regulations and Guidelines establish that the fact that the player was contesting the ball will be an insufficient defence. Ultimately, the question is whether Mackay's actions in contesting the ball in the manner he did were reasonable. The concept of reasonableness is considered in two contexts in this section (i) by reference to reasonable foreseeability; and (ii) by reference to the examples in the Guidelines.

Reasonable foreseeability

There is a case to be made that Mackay's actions were unreasonable: even if he did not intend to bump Clark, he could have foreseen the risk to Clark of a severe impact collision. Despite this, he proceeded to run in at high speed. This was the argument of the AFL's legal counsel.

^[107] As reasoned above,^[108] Clark was evidently in the better position to possess the ball as he started much closer to the ball and Mackay was in a better position to observe Clark contesting the ball. This suggests that while the ball was contested, it was not really a "50-50" ball situation. Mackay was only in the contest because he ran in at a significant pace, which created a greater risk of injury to Clark. Arguably, he should have anticipated that Clark would beat him to the ball, and therefore elected to slow his pace to a less dangerous speed. On the other hand, such judgments are difficult in Australian Rules football due to the unpredictable manner in which the ball bounces and the necessity to make quick decisions.

Mackay's evidence was that he was aware of Clark in his peripheral vision, but believed he was going to get to the ball first.^[109] If Mackay had elected to slow his pace, this would not necessarily have required him to not make any contest. Rather, he could have taken the time to instead apply a safe bump or tackle after Clark gained possession of the ball in an attempt to dispossess him of the ball. Mackay claimed that if he had believed he would not be there first, he would have stopped, changed his run in, or tried to tackle or provide pressure.^[110] However, given the way the action unfolded,^[111] he should probably have realised that he was unlikely to get to the ball first, and that even if he did get there first, he could still cause significant injury given the pace at which he was moving.

It is unclear whether the Rules, as they currently stand, required Mackay to make such an assessment. He was expected under the Rules to consider certain foreseeable risks of harm. If he had elected to bump Clark, then any high contact would have been considered a reasonably foreseeable risk.^[112] In this situation, he elected to contest the ball rather than to bump. Nonetheless, the reasonably foreseeable result of his election was that he ultimately bumped Clark. It requires another step to conclude that the high contact was a reasonably foreseeable risk of the election to contest the ball. The Guidelines state that the purpose of

the “High Bumps rule” is to reduce the risk of head injuries to players and that “this purpose needs to be kept firmly in mind by all Players and will guide the application of the rule”.^[113] However, beyond this, the Rules give little guidance on what should be considered reasonable in the circumstances and how this purpose is to be taken into account by players. It is unclear whether and to which extent they must foresee the risk of high contact when they elect to contest the ball.

Examples in the Guidelines

As previously mentioned,^[114] the Guidelines provide a number of examples to assist the Tribunal to interpret the Laws and Regulations (including the three “contesting the ball exception” examples for careless conduct). In the three exception examples:

- The player who made forceful contact with the injured player first made clear contact with the ball; and
- The injured player did not touch the ball at all, or only at the same time as the contact with the other player.

This suggests that when assessing reasonableness, it is relevant to consider whether, firstly, the player made contact with the ball, and secondly, the timing of such contact. This may in particular be relevant because of what it implies about the intent of the player(s). In Mackay's case, there was possibly contact with the ball by Mackay prior to the contact with Clark, but Clark was first to the ball. The Mackay incident therefore differs from the three exception examples in this respect. This could indicate that the contact was unreasonable within the meaning of the “High Bumps rule”.

On the other hand, the Long bump on Darcy is used in the Guidelines as an example of unreasonable careless Rough Conduct (High Bumps) with severe impact. This bump is factually similar to the Mackay incident, but was treated differently by the AFL Tribunal. The two incidents are compared below.

Darcy started slightly closer to the ball than Long, and leaned straight in front for the ball. Both Darcy and Clark (the “victims”) were in a better position to possess the ball. Mackay and Long (the “perpetrators”) came in at greater speed from the side and turned their bodies at the last moment. This turning action protected the perpetrators’ heads while the victims suffered head injuries. Relevantly though, whereas Mackay touched the ball, Long missed and overran the ball. It is unclear whether Long missed the ball because his primary intent was to lay a bump or whether he was primarily intending to gain possession of the ball and accidentally overran

it. Given its close similarity to the Mackay incident, this distinguishing factor could further support the theory that intent (or contact with the ball) is the key consideration when determining whether contact was reasonable.^[115]

If intent (or contact with the ball) is the key consideration, comparison with the Long bump could provide grounds for arguing that Mackay acted reasonably within the meaning of the “High Bumps rule”. This may also explain the different treatment by the AFL Tribunal. However, the discussion in relation to the “contesting the ball exception” examples suggested that the same consideration should lead to the conclusion that Mackay acted unreasonably. Such comparisons therefore cannot be definitive.

The Mackay incident seems to fall somewhere in between those incidents that have previously been considered reasonable and those that have previously been considered unreasonable. This makes it difficult to assess whether Mackay’s conduct was unreasonable.

(iii) Conclusion on whether the conduct was “careless”

Given the uncertainty as to whether the conduct was unreasonable, it is questionable whether the conduct could be considered “careless” for the purposes of High Bumps rule.

C. Was The Decision Correct Under The AFL Rules?

As it stands, under the current Rules, it is unclear what decision the Tribunal should have made, as the reference to the concept of “reasonableness” in the Regulations and Guidelines is not explained. The Tribunal’s decision suggests that intent (judged mainly by contact with the ball) was the key consideration, or at least intent alongside timing of contact with the ball. This approach seems consistent with the examples in the Guidelines.

Intent is evidently relevant to the consideration of both the reasonableness of a player’s actions and the seriousness of the offence. The Laws state: “A player who makes the football their sole objective shall be provided every opportunity to do so.”^[116]

The AFL’s view, as expressed in the Guidelines, seems to be that intent is not the sole consideration when assessing reasonableness. This is consistent with the AFL’s treatment of bumps to the body. When describing whether a bump to the body is “unreasonable”, the Guidelines refer to factors such as degree of force and the vulnerability of the player.^[117] Based on this, it appears it is incorrect to focus solely on intent. However, it remains ambiguous whether the additional element to be considered is contact with the ball, or whether, and to what extent, the player is also required to consider risk to other players.

D. What Should Be Done In Future?

The Mackay case demonstrates that while significant measures have been adopted to prevent head and facial injuries, there is still some uncertainty in regards to what steps players must take to protect other players against head injuries. In particular, it is unknown to what extent they are required to take into account the risk of injury to another player when making a decision to contest the ball.

The AFL has suggested it intends to make rule changes as a result of the Tribunal decision.^[118] Since the AFL's intention is to better protect players, the risk of head injuries must also be considered alongside intent when determining whether conduct is "reasonable". However, to ensure that players, the MRO and the Tribunal are aware of this, the AFL should define the meaning of the word "reasonable" in the "contesting the ball exception". Alternatively, the AFL could provide an explanation of what is meant by the reference to it being "reasonable for the Player to contest the ball in that way". Any such definition or explanation will need to establish how and to what extent risk is a relevant consideration.

In this context, it might not be appropriate to suspend players where:

- Contact was unintentionally made in a true "50-50" contest;
- The evident focus of the player was possessing the ball; and
- The player did not have time to make a proper assessment of the risk.

On the other hand, it may be necessary to suspend a player where:

- The player had a genuine opportunity to assess the risk;
- The player should have concluded that contesting the ball would cause significant risk to themselves or another player; and
- The player nevertheless elected to contest the ball despite having another option (e.g. slowing down and safely tackling the opposition player).

As the Mackay case itself demonstrates, it is difficult to determine where to draw the line and also to foresee all potentially relevant situations that may arise in a match of Australian Rules football. Nonetheless, difficult decisions will need to be made to ensure that players are adequately protected, while also ensuring that the AFL retains an appropriate level of physicality.

Alongside any rule changes, it may also be necessary to alter attitudes amongst the AFL viewing public, coaches and players. In a context where players are frequently lauded for putting their body on the line to contest the ball, even where this increases the risk not just to

themselves but also to other players, players will be under significant pressure to make the same decision as Mackay made in 2021. Change in attitudes could be attained through educational campaigns that clearly state the potential long-term medical complications associated with head injuries. It could also be assisted by internal bodies publishing reasoned decisions.

This reflection would also benefit other competitions, such as the semi-professional female competition (AFLW), which is receiving increasing attention, both from a media and medical point of view, and grassroots sport.

Conclusion

Australian leagues have a legal duty to ensure that players' welfare is protected through the adoption of appropriate rules of play and sanctions. Previous case law does not oppose this finding, given the evolution of society and the recent public awareness about sports safety, the structural changes that occurred in the organisation of international sport, the specificities and financial resources of professional sport, and the potential long-term effects of head and facial injuries. Beyond legal considerations, leagues' moral obligations and commercial interests should also be an incentive for them to act.

The AFL and NRL have already taken significant steps to reduce the occurrence of head and facial injuries by clamping down on head high incidents through adjustments to the rules of play. They have also tried to maintain the essence and spirit of their sport, in which tackles and bumps are not just permissible, but also a defining part of the game.

However, as the Mackay case illustrates, there is still some way to go in clarifying and potentially tightening the rules around what types of physical contact will be punishable by suspension. There is a gap in the current AFL Rules in situations where the player's intent was to contest the ball rather than to make contact with the player, but it was nonetheless reasonably foreseeable that there would be high contact with severe impact. This gap creates a risk of serious injury, which the AFL must address as part of its duty of care to players. This would, in turn, reduce the likely exposure to a legal claim against the AFL and clubs in the future.

While the AFL has a clear intent to protect against head and facial injuries, there is nonetheless a tension between protecting against these injuries and maintaining important physical aspects of the game. Naturally, this must create some hesitancy against taking an

absolute position as to what is reasonable conduct in a contested situation. However, without taking a clear stance, accidental but avoidable head-high incidents such as the Mackay incident will continue to occur and go unpunished.

Undoubtedly, similar issues will arise in other contact sports around the world. Sports organisations should therefore continuously work to adapt their rules of play, with the view to better protect players against the occurrence and impact of head and facial injuries. This could primarily be achieved through the identification of the positions at risk and the adoption of clear rules and sanctions that can be easily implemented.

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