THE SPORTS LAW REVIEW

FIFTH EDITION

Editor
András Gurovits

THE LAWREVIEWS

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PREFACE

The Sports Law Review, in its fifth edition, is intended as a practical, business-focused legal guide for all relevant stakeholder groups in the area of sports, including sports business entities, sports federations, sports clubs and athletes. Its goal is to provide an analysis of recent developments and their effects on the sports law sector in 20 jurisdictions. It will serve as a guidebook for practitioners as to how a selected range of legal topics is dealt with under various national laws. The guidance given herein will, of course, not substitute for any particular local law advice that a party may have to seek in connection with sports-related operations and activities. Specific emphasis is put on the most significant developments and decisions of the past year in the relevant jurisdictions that may be of interest for an international audience.

The Sports Law Review recognises that sports law is not a single legal topic, but rather a field of law that is related to a wide variety of legal areas, such as contract, corporate, intellectual property, civil procedure, arbitration and criminal law. In addition, it covers the local legal frameworks that allows sports federations and sports governing bodies to set up their own internal statutes and regulations, as well as to enforce these regulations in relation to their members and other affiliated persons. While the statutory laws of a particular jurisdiction apply, as a rule, only within the borders of that jurisdiction, these statutes and regulations, if enacted by international sports governing bodies, such as FIFA, UEFA, FIS, IIHF, IAAF and WADA have a worldwide reach. Sports lawyers who intend to act internationally or globally must, therefore, be familiar with these international private norms if and to the extent that they intend to advise federations, clubs and athletes that are affiliated with such sports governing bodies. In addition, they should also be familiar with relevant practice of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, as far as it acts as the supreme legal body in sport-related disputes. Likewise, these practitioners should have at least a basic understanding of the Swiss rules on domestic and international arbitration as Swiss law is the *lex arbitri* in CAS arbitration.

While sports law has an important international dimension, local laws remain relevant in respect of all matters not covered by the statutes and regulations of the sports governing bodies. This growing international dimension means that athletes, sports clubs and sports federations are increasingly operating in an international environment and dealing with a variety of jurisdictions. As a result, the need for an international regulation of international sport is growing, and more and more specific legal assessments of individual aspects of local law are required, in particular in respect of local mandatory provisions that may prevail over or invalidate certain provisions of regulations enacted by sports governing bodies. The primacy of local laws is of particular importance in international employment relationships; for example, between clubs and foreign players, where the local laws of the clubs usually provide for a set

of mandatory provisions that may impede performance by the athletes of their contractually agreed rights as regards the employers should they not fulfil the employment agreement.

Each chapter of this fifth edition will start by discussing the legal framework of the relevant jurisdiction permitting sports organisations, such as sports clubs and sports governing bodies (e.g., national and international sports federations), to establish themselves and determine their organisational structure, as well as their disciplinary and other internal proceedings. The section detailing the competence and organisation of sports governing bodies will explain the degree of autonomy that sports governing bodies enjoy in the jurisdiction, particularly in terms of organisational freedoms and the right to establish an internal judiciary system to regulate a particular sport in the relevant country. The purpose of the dispute resolution system section is to outline the judiciary system for sports matters in general, including those that have been dealt with at first instance by sports governing bodies. An overview of the most relevant issues in the context of the organisation of a sports event is provided in the next section and, subsequent to that, a discussion on the commercialisation of such events and sports rights will cover the kinds of event- or sports-related rights that can be exploited, including rights relating to sponsorship, broadcasting and merchandising. This section will further analyse ownership of the relevant rights and how these rights can be transferred.

Our authors then provide sections detailing the relationships between professional sports and labour law, antitrust law and taxation in their own countries. The section devoted to specific sports issues will discuss certain acts that may qualify not only as breaches of the rules and regulations of the sports governing bodies, but also as criminal offences under local law, such as doping, betting and match-fixing.

In the final sections of each chapter, the authors provide a review of the year, outlining recent decisions of courts or arbitral tribunals in their respective jurisdictions that are of interest and relevance to practitioners and sports organisations in an international context, before they summarise their conclusions and the outlook for the coming period.

Each chapter of this fifth edition of *The Sports Law Review* has been provided by renowned sports law practitioners in the relevant jurisdiction. As editor of this publication, I would like to take the opportunity to thank all of the authors for their skilful and insightful contributions to this publication. I trust that you will find this global survey informative and will avail yourselves at every opportunity of the valuable insights contained herein.

András Gurovits
Niederer Kraft Frey Ltd
Zurich
November 2019

Chapter 3

AUSTRALIA

Annie E Leeks, Prudence J Smith, Mitchell O'Connell and Lachlan J Green[1]

I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

i Organisational form

There is no legal requirement for a sporting club (whether professional, amateur, commercial or non-profit) to become incorporated in Australia. However, many sports clubs (including non-profit amateur sports clubs) choose to incorporate, either as 'incorporated associations' under the applicable state or territory legislation (the Associations Incorporations Acts) or as corporations under the Corporations Act 2001 (Cth) (the Corporations Act). There are a number of advantages to incorporating a sporting club, the main being that it provides the members of the club with a degree of limited liability. Additionally, under Australian law, unincorporated amateur sporting clubs are not considered legal persons separate from their members, which means that these sporting clubs do not have capacity to enter into contracts (other than through their members).[2] In the past, Australian courts have often found individuals involved with unincorporated sporting clubs liable for the actions of the clubs.[3]

In some instances, the governing body for a sport has imposed a requirement that sporting clubs be incorporated. For example, AFL NSW/ACT, the governing body for Australian football in New South Wales and the Australian Capital Territory, recently imposed a requirement that all Australian football clubs must be incorporated as either an incorporated association or a company.[4]

The national governing bodies for major sporting codes in Australia are structured as public companies, limited by guarantee and registered with the Australian Securities and Investments Commission under the Corporations Act. For example, the Australian Football League (AFL), the Australian Rugby League Commission (ARLC), which owns the National Rugby League (NRL), Football Federation of Australia (FFA), Cricket Australia and the Australian Rugby Union are all registered companies limited by guarantee. Companies limited by guarantee do not have shareholders or share capital, but rather the guarantors (the members) give an undertaking to pay a fixed, small amount in the event that the company is

1 Annie E Leeks and Prudence J Smith are partners, and Mitchell O'Connell and Lachlan J Green are associates at Jones Day. The authors appreciate and acknowledge the work of Michael Whitbread and Matthew Whitaker in previous versions of this chapter.

2 Australian courts have found contracts with unincorporated sporting clubs to be unenforceable; for example, see *Carlton Cricket and Football Social Club v. Joseph* (1970) VR 487.

3 For example, see *Carlton Cricket and Football Social Club v. Joseph* (1970) VR 487.

4 AFL NSW/ACT, 'Incorporating Your Club', http://aflnswact.com.au/community-football/manage-your-club/incorporating-your-club/.

wound up. The sporting clubs that play in these leagues are the members. Similarly, many of the professional sporting clubs that play in these leagues are registered as public companies limited by guarantee, whose supporters pay an annual membership fee. For example, there were more than one million members of AFL clubs in 2019, and more than 300,000 members of NRL clubs in 2019.[5] Although registration as companies listed by guarantee is the most common legal structure for professional sporting clubs, other structures are also used. For example, in the NRL, there are also privately owned clubs, which are incorporated as private companies limited by shares (such as the Brisbane Broncos), and partially privatised clubs (e.g., the South Sydney Rabbitohs, who are currently 75 per cent owned by Russell Crowe and other individuals, and 25 per cent owned by members through a company limited by guarantee).[6]

ii Corporate governance

The Australian Sports Commission (ASC) has released a set of guidelines (the Sports Governance Principles), which, although not legally binding on professional sporting leagues or sporting clubs, are in effect mandatory, because adherence is a prerequisite to government funding. The ASC is the Australian federal government body responsible for distributing approximately A$300 million in public funds to sports governing bodies throughout Australia each year.[7] The Sports Governance Principles require, among other things, that national sporting organisations be registered under the Corporations Act as companies limited by guarantee, and sets out additional requirements for board composition, roles, powers and processes, governance systems, ethical and responsible decision-making and reporting.

There are no specific statutory requirements for corporate governance of sporting clubs or leagues. Corporate governance structures for amateur sporting clubs and leagues that are incorporated associations are set by the relevant state or territory Associations Incorporation Acts. These provide rules addressing, among other things, the associations':

a duties to hold general meetings;
b financial reporting obligations;
c duties regarding the constitution of the management committee;
d constitution; and
e duties to notify members of decisions.

For professional sporting clubs that are registered as companies limited by guarantee or companies limited by shares, their governance structures are dictated by the Corporations Act, with powers being split between the boards and the members. Both the Associations Incorporation Acts and the Corporations Act provide rules in relation to the constitution

5 'Thanks a million: AFL club memberships hit all-time record', AFL.com.au (6 August 2019), www.afl.com.au/news/2019-08-06/thanks-a-million-afl-club-memberships-hit-alltime-record; LeagueUnlimited Media, '2019 NRL Club Membership Tracker' (27 September 2019), https://leagueunlimited.com/news/32567-2019-nrl-club-membership-tracker/.

6 The company limited by guarantee that owns 25 per cent is the South Sydney Members Rugby League Football Club Limited.

7 ASC 2017–2018 Annual Report, Summary of Financial Outcomes, www.sportaus.gov.au/annual_report/chapter_4/summary_of_financial_outcomes.

of the sporting clubs, their reporting requirements and their management. Incorporated associations are required to establish a committee to manage their affairs, while registered companies are required to establish a board of directors.

Committee members and directors are bound by duties contained in the applicable legislation, including duties:

a to act in good faith in the best interests of the company and for a proper purpose;[8]

b to exercise care and diligence;[9]

c to disclose conflicts between the interests of the company and personal interests;[10] and

d to prevent the company trading while insolvent (that is, when it is unable to pay its debts as and when they fall due).[11]

iii Corporate liability

The Associations Incorporation Acts and Corporations Act both contain statutory provisions imposing liability upon managers and officers of sporting organisations (i.e., committee members and directors). For example, there are criminal prohibitions on officers dishonestly using their position, or information obtained by virtue of their position, to gain a financial advantage or cause detriment to their organisation.[12] As discussed above, the legislation also imposes duties on officers to carry out their functions for the benefit of their organisation, and the Corporations Act prohibits insolvent trading by directors. The prohibition on insolvent trading is particularly relevant for sporting clubs in Australia, who are often on the brink of insolvency. Clubs must be careful if they are operating on the assumption that either their creditors will absolve their debts, or their members or the governing body will contribute funds to bail them out.[13] For unincorporated associations operating as sporting clubs, Australian courts have in the past found the individuals responsible for management of the club liable for debts or an award of damages where the legal personhood of the club itself cannot be established.

Additionally, directors and officers also have obligations to ensure that their sporting club or organisation complies with its work health and safety obligations under the applicable work health and safety (WHS) laws. In most states and territories this legislation imposes a duty on directors and officers to exercise due diligence to ensure that their clubs comply with health and safety duties.[14]

A breach of this due diligence duty (and all health and safety duties) is a criminal offence, which can involve penalties for individuals of up to five years' imprisonment or a fine of A$600,000, or both. Corporations or associations can be fined up to A$3 million.[15]

8 Corporations Act 2001 (Cth) Sections 181 and 184.

9 Corporations Act 2001 (Cth) Sections 180 and 184.

10 Corporations Act 2001 (Cth) Section 191.

11 Corporations Act 2001 (Cth) Section 588G.

12 Corporations Act 2001 (Cth) Section 184.

13 In 2015, only six of 18 AFL clubs were profitable, and each club is heavily reliant on fund distributions from the AFL (see www.theage.com.au/afl/afl-news/unprofitable-clubs-get-millions-in-aid-from-afl-20150228-13rqwm.html).

14 For example, Work Health and Safety Act 2011 (NSW) Section 27(5); Occupational Health and Safety Act 2004 (Vic) Section 21; Work Health and Safety Act 2011 (QLD) Section 27(5); and Occupational Health and Safety Act 1984 (WA) Section 19.

15 See, for example, Occupational Health and Safety Act 2011 (NSW) Sections 31 to 33.

For example, in 2015, the Essendon Football Club was convicted by WorkSafe Victoria, the statutory body responsible for administering Victoria's WHS laws, of failing to provide its players with a workplace free of health risks. This prosecution followed a 'supplements saga' that saw 34 players being found guilty of using the banned peptide thymosin beta-4. The football club was fined A$200,000 for the breaches.

There has been increased attention on the activities of sports scientists in Australia after a number of professional sporting clubs in Australia came under scrutiny for employing sports scientists who are alleged to have facilitated the use of unlawful or banned substances.[16] In 2013, the Australian Senate Regional Affairs and Transport References Committee published the results of an inquiry into the 'practice of sports science in Australia'.[17] The publication identified three 'key governance practices' that should be established by all professional sporting clubs with the assistance and endorsement of the sports' governing bodies. These involve:

a regular reporting of the activities of sports scientists to the CEO and board;

b the primacy of medical advice and direction over the decisions of sports scientists, such that sports scientists must seek endorsement from club doctors where decisions affect athlete health and welfare; and

c the importance of ensuring that while the CEO and the board are kept informed of the activities of sports scientists, the privacy of athletes and the protection of personal medical information are ensured.

II THE DISPUTE RESOLUTION SYSTEM

i Access to courts

In Australia, it is settled law that a sporting organisation's rules cannot completely remove the jurisdiction of the courts, because to do so would be against public policy.[18] However, each sporting league has established quasi-judicial tribunals that are responsible for administering and enforcing the rules of the sport, including in relation to on-field infringements. Courts will generally only be able to be called upon to resolve disputes where:

a an issue of law arises;

b the sporting organisation makes a decision that is outside its jurisdiction under its rules;

c there is a breach of natural justice;

d the sporting organisation does not comply with its own rules, which constitutes a breach of contract with its members; or

e the sporting organisation, its members or athletes are alleged to be involved in breaches of statutory obligations or criminal laws being investigated or prosecuted by a regulator or third party.

Examples can include where a sporting participant claims that they were not dealt with in accordance with the sporting league's rules (and this constitutes a breach of contract), or

16 For example, Stephen Dank, see 'Stephen Dank handed lifetime ban by AFL Anti-Doping Tribunal following Essendon supplements saga', ABC (26 June 2015), www.abc.net.au/news/2015-06-26/stephen-dank-handed-lifetime-ban-from-afl-tribunal/6575962.

17 www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Completed_inquiries/2012-13/sportsscience/report/index.

18 For example, see *Stollery v. Greyhound Racing Control Board* (1972) 128 CLR 509.

where a sports tribunal fails to accord a participant procedural fairness in making its decision. In cases where the issue of procedural fairness is raised, the court will not substitute its own decision for that of the tribunal; it will instead mandate that the tribunal remake its decision such that the participants are afforded natural justice.

An example of an alleged breach of statutory obligations by a sporting organisation can be seen when Cricket Australia dismissed the head coach of the Australian cricket team, Mickey Arthur, two years before his employment contract was to expire. Mr Arthur was the first non-Australian coach of the Australian cricket team. He was dismissed abruptly and replaced by former Australian cricketer, Darren Lehman. Mr Arthur subsequently brought a claim under the anti-discrimination provisions of the Fair Work Act 2009 (Cth), which alleged, among other things, that he was subjected to discrimination owing to his South African heritage. Cricket Australia and Mr Arthur subsequently reached a confidential settlement.

ii Sports arbitration

Most major Australian sporting leagues have established quasi-judicial tribunals, which are responsible for administering and enforcing the rules of the sport, including in relation to on-field infringements (e.g., the NRL Judiciary, the AFL Match Review Panel and Tribunal and the FFA Tribunal). Additionally, collective bargaining agreements and standard players' contracts often provide that it is a condition precedent to bringing court proceedings that the dispute is first referred for determination by a tribunal (e.g., in standard contracts with AFL players), or that the tribunal has exclusive jurisdiction, and its determination is final and binding (e.g., in standard contracts with A-League players).[19] However, this does not prevent recourse to the courts in the situations described above.

The appeals process for a decision depends on the rules governing a particular sporting organisation. In some cases, decisions can also be appealed to the international sporting organisation responsible for the sport, such as the International Cricket Council or FIFA. For example, these tribunals make decisions about, among other things:

a eligibility of players to play for a particular sporting club or nation;
b disputes between members of the international organisation;
c disputes between sporting clubs in different leagues;
d contractual disputes between players and sporting clubs; and
e sanction to players for breaking of sports' rules or doping.

If all avenues of appeal within a sporting organisation's tribunal system are exhausted, a case can usually be appealed to the Court of Arbitration for Sport (CAS) and then the Swiss Federal Tribunal for the resolution of the dispute.[20] A recent example can be seen in the decision of the AFL Anti-Doping Tribunal not to suspend 34 Essendon Bombers players for alleged violations of anti-doping rules. The World Anti-Doping Authority (WADA) appealed the Tribunal's decision, backed by the Australian Sports Anti-Doping Authority (ASADA), to the CAS, who suspended the 34 players for 12 months. The players then appealed to the Swiss Federal Tribunal, who upheld the CAS decision.

19 See, for example, the AFL and AFL Players' Association Collective Bargaining Agreement 2012–2016, www.aflplayers.com.au/wp-content/uploads/2014/09/CBA-2012-2016-FINAL.pdf.

20 However, like other jurisdictions, the CAS only has jurisdiction to hear a dispute if an agreement between the parties (e.g., in the rules governing the sport), specifies the CAS as the avenue of appeal.

The CAS has an Oceanic registry based in Sydney, Australia. This registry hears a broad range of selection and doping disputes. A recent example is the dispute between Mitchell Iles, a professional trap shooter, and Shooting Australia, in relation to Mr Mitchell's non-selection for the 2016 Olympic Games. Mr Mitchell first appealed to Shooting Australia's Appeals Tribunal, where his appeal was dismissed, and he subsequently appealed to the CAS. The CAS overturned the decision of the Appeals Tribunal and remitted the matter to Shooting Australia to reconsider his non-selection, which then selected him to compete.[21]

iii Enforceability

Decisions made by Australian courts are directly enforceable within Australia. However, decisions made by sporting organisation tribunals are not directly legally enforceable. In practice, parties must either accept a decision if they wish to continue participating in the sport or appeal the decision to a court on the grounds that the tribunal did not have jurisdiction to make the decision.

III ORGANISATION OF SPORTS EVENTS

i Relationship between organiser, spectators, athletes and clubs

There is no special or unique relationship under Australian law between organisers and spectators. Their relationship is governed by, among other things, consumer, contract and tort law. However, each state has implemented, to differing degrees, legislation that applies to the staging of major sporting events.[22] This legislation provides protections to organisers, spectators and athletes, including through provisions governing the resale of tickets for major events and the control and management of event venues during events.

The primary contractual relationship that exists between organisers and spectators is in the terms and conditions of the ticket sale. Under contract, organisers can impose terms and conditions of access to the sporting venue, such as restrictions on resale or transfer or restrictions on entry. However, ticket sales and membership conditions are also governed by the Australian Consumer Law (ACL), which contains additional protections for consumers, including protection against unfair contract terms for standard form consumer contracts. For example, a term or condition to a ticket sale that excludes all liability of the organiser for death, personal injury or loss by the consumers, or that denies refunds in all circumstances, will be held to be unfair and consequently void. Additionally, spectators are entitled to expect that organisers and clubs will comply with anti-discrimination laws.

The primary contractual relationships that exist between organisers, clubs and athletes are in the playing contracts of the athletes and the contracts between the sporting clubs and sporting leagues or organisations, including the relationship of the clubs as members of the league (as an incorporated association). This also includes the rules of the sport, which may be incorporated as a contract between the sporting organisation, clubs and athletes.

21 CAS A1/2016 *Mitchell Iles v. Shooting Australia*.

22 For example, the Major Sporting Events Act 2009 (Vic) and the Major Events Act 2014 (Qld).

ii Liability of the organiser, athletes and spectators

Under both common law and statute, as the occupiers of the sporting venue, organisers owe a duty of care to avoid causing harm to spectators and athletes that is 'reasonably foreseeable'. Under the civil liability legislation of each state and territory, organisers owe a duty of care to take reasonable precautions against risks of harm that are foreseeable and not insignificant.[23]

For example, in a well-known case before the High Court of Australia, an indoor cricketer sued the organiser after serious injury during a game, alleging that the organiser breached its duty of care by failing to provide protective eyewear, and by failing to erect a sign warning of possible hazards (although in this case, the High Court of Australia held that the organiser's duty of care did not extend to require these precautions be taken).[24]

Additionally, if a professional athlete causes injury to a third party, such as an opponent, both the athlete and his or her sporting club (as his or her employer) may be liable for damages. In another well-known case, a professional rugby league player for the Wests Tigers in the NRL brought proceedings against Melbourne Storm and two of its players after being seriously injured in a tackle that ended his career. The two players and Melbourne Storm (as their employer) were held to be liable for damages for the injury.[25]

In Australia, like many other jurisdictions, consent to minor assaults will often absolve the accused from criminal liability.[26] This means that although minor assaults technically occur in contact sports, there is usually no liability as it is implicit in the participation of the athletes that they have consented. However, consent is not a defence for athletes where the assault is outside the rules of the sport. For example, rugby league players have previously been convicted of assault for punching an opponent and causing a fractured jaw in one case, and biting an ear after a tackle in another case.[27] However, in other cases, on-field actions by athletes that could lead to a criminal conviction for assault have been met with only sanctions from the sports' governing body, rather than police prosecution. For example, there have been several high-profile instances of footballers violently punching opponents on the field that have not been prosecuted, in both the AFL and NRL and also at lower levels of the sport.[28] The fact that such athletes have not been charged with criminal offences is a consequence of the police's discretion in enforcing the criminal law.

IV COMMERCIALISATION OF SPORTS EVENTS

i Types of and ownership in rights

Broadcasting rights are arguably the most valuable and lucrative rights available to sporting organisations to gain revenue from a sporting league. For example, the AFL currently has

23 Civil Liability Act 2002 (NSW) Section 5B; Civil Liability Act 2003 (Qld) Section 9; Civil Liability Act 1936 (SA) Section 32; Civil Liability Act 2002 (WA) Section 5B; Civil Liability Act 2002 (Tas) Section 11; and Wrongs Act 1958 (Vic) Section 48.

24 *Woods v. Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

25 *McCracken v. Melbourne Storm Rugby League Football Club and 2 Ors* [2005] NSWSC 107.

26 *R v. Brown* [1994] 1 AC 212.

27 *R v. Billinghurst* (1978) Crim LR 553; and *R v. Johnson* (1986) 8 Cr App R (S) 343.

28 For example, see the incidences described in an article published by *The Age* in July 2017 involving Barry Hall, Bachar Houli and Thomas Bugg (professional footballers) and Ali Fahour (an amateur footballer in a lower division) www.theage.com.au/afl/afl-news/ali-fahour-incident-would-the-police-act-on-an-afl-punch-20170707-gx6yom.html.

a broadcast rights agreement in place with Channel 7 (a commercial free-to-air television station), Foxtel (a subscription television station) and Telstra (a telecommunications provider) that is worth approximately A$2.5 billion.[29] The ARLC currently has a broadcast rights agreement in place with Channel 9 (another commercial free-to-air station) Foxtel, News Corp Australia (a media outlet) and Telstra, which is worth approximately A$1.8 billion.[30]

Additionally, Australia has enacted 'anti-siphoning' laws, which provide a list of events that must be made available free to the general public.[31] This means that in practice, subscription television providers, such as Foxtel, are prohibited from acquiring the rights to these events unless a free-to-air television channel also has the right to broadcast them. Any rights that are not acquired by free-to-air channels can then be acquired by subscription television providers. Currently, the list of 'anti-siphoning events' that 'should be available to the general public' includes the following:[32]

a each event in the Olympic Games and Commonwealth Games;

b each match of the AFL and NRL;

c each international rugby union test match and cricket match involving the Australian team; and

d each match of the FIFA World Cup, each match of the FIFA qualification tournament involving the Australian team and the English Football Association Cup final.

Image rights, sponsorship and merchandising are also valuable rights available to be exploited. However, the relatively small size of the Australian market, and the fact that many of Australia's major sports are primarily, if not solely, domestic (e.g., the AFL and NRL) or played at an international level but among a relatively small number of nations (e.g., cricket and rugby union), mean that their value is often limited.

ii Rights protection

Broadcasting, image rights, sponsorship and merchandising are primarily protected by the contractual provisions in place between the owners and licensees of these rights, but also by the statutory intellectual property rights. Primarily, this consists of ownership in:

a trademarks under the Trade Marks Act 1995 (Cth), in property such as club names, logos and mascots; and

b copyright under the Copyright Act 1968 (Cth), in property such as rulebooks, recorded images and footage of events, and photographs.

Additionally, rights owners are able to take action under the common law tort of 'passing off', to protect the goodwill of their brand from misrepresentation through unauthorised use. In this context, passing off occurs when one person misrepresents that their goods (e.g., merchandise) are the official, sanctioned goods of the rights owner (usually the sporting organisation or sporting club), or that he or she is affiliated with the rights owner. Similarly, action can be taken against persons who engage in misleading or deceptive conduct or make false or misleading representations via the ACL. These laws can apply to examples of ambush marketing.

29 www.afl.com.au/news/2015-08-18/afl-on-the-verge-of-signing-new-tv-deal.

30 www.nrl.com/nrl-broadcast-rights-deal-announced/tabid/10874/newsid/91023/default.aspx.

31 Broadcasting Services Act 1992 (Cth).

32 Broadcasting Services (Events) Notice (No. 1) 2010 (Cth).

Australia also has several other legislative protections, in addition to laws protecting intellectual property rights that can be used to prevent ambush marketing at sporting events. Legislation was enacted to regulate the commercial use of images associated with the 2015 Asian Cup, the 2015 Cricket World Cup and the 2018 Commonwealth Games to restrict the ability of entities that are not official sponsors to use event images, or represent that they are associated with the event.[33] Similar legislation prohibits the unauthorised use of images and phrases associated with the Olympics.[34]

Recently, the Australian Olympic Committee (AOC) brought proceedings against Telstra in relation to alleged ambush marketing. Telstra had entered into an agreement with Channel 7 under which Telstra would sponsor Channel 7's broadcast of the Olympics and create a mobile app called 'Olympics on 7', which would allow Telstra customers to view Olympic events. Telstra's advertising campaign then promoted watching the Olympics on the Olympics on 7 app, despite the fact that it did not have any direct association with the Olympics. The AOC alleged that Telstra engaged in misleading and deceptive conduct and made false or misleading misrepresentations in representing that they were associated with the Olympics, in breach of the ACL, and engaged in an unlawful use of protected Olympic expressions for commercial purposes in breach of the Olympic Insignia Protection Act 1987 (Cth).[35] However, the Federal Court of Australia ruled against the AOC and held that Telstra's advertisements did not suggest to the reasonable person that Telstra was a sponsor of an Olympic body. The Court held that the legislation was not breached if the advertisements simply created uncertainty as to the nature of Telstra's association with the Olympics.[36] The AOC appealed the decision, which was heard in February 2017. However, in October 2017, the Full Court of the Federal Court of Australia upheld the first instance decision, and agreed that the advertisements did not suggest to a reasonable person that Telstra was a sponsor of bodies and teams associated with the Rio Olympic Games.[37]

V PROFESSIONAL SPORTS AND LABOUR LAW

i Mandatory provisions

Labour laws in Australia are largely dictated by the Fair Work Act and associated regulations and industrial instruments. The Fair Work Act sets out national employment standards that act as the minimum requirements for employers to abide by, including in relation to hours of work, annual leave, compassionate leave and notice of termination. Additionally, the Sporting Organisations Award 2010 sets out further minimum requirements in relation to employment for national, state and territory sporting organisations of coaching, clerical and administrative staff. Matters such as workers' compensation and WHS and anti-discrimination laws are addressed in state and territory legislation (which is broadly universal around Australia).

Significantly, Australian law does not recognise the concept of 'at will' employment. This means that employers are required to provide a period of notice, or payment in lieu of notice, to terminate an employment contract. Additionally, where an employer makes a decision to terminate an employee's employment, this decision can be challenged through various claims

33 Major Sporting Events (Indicia and Images) Protection Act 2014 (Cth) Section 16.

34 Olympic Insignia Protection Act 1987 (Cth).

35 *Australian Olympic Committee, Inc v. Telstra Corporation Limited* [2016] FCA 857.

36 id. at [94].

37 *Australian Olympic Committee, Inc v. Telstra Corporation Limited* [2017] FCAFC 165.

that can be made in the Fair Work Commission (an industrial tribunal) or Australian courts. However, this is often not applicable to contracts between professional athletes and sporting clubs, as these are usually fixed-term contracts that terminate automatically at the expiry of the term.

In general, contracts between sporting clubs and athletes are set as standard form agreements by the sport's governing body, and are not subject to individual negotiation (with some exceptions, for example, remuneration and term). Many professional sportspersons in Australia, including players in the AFL, NRL, A-League and representative cricket, are represented by players associations that are responsible for, among other things, negotiating the terms of standard contracts and engaging in collective bargaining (not dissimilar from a workers' union).

ii Free movement of athletes

Most major sports in Australia impose restraints of trade in their player contracts and sport's rules.[38] These restraints include salary caps, player draft rules, player transfer limitations and limitations on the ability of players to license their image and identity through endorsements. The common law doctrine of restraint of trade applies to such restraints. Australian courts have applied this doctrine to enforce these restraints only to the extent that it is:

a reasonably necessary to allow the sport to protect a legitimate interest; and
b reasonable having regard to the public interest.[39]

Australian athletes have used this doctrine to challenge a number of different types of restraints that appear in their contracts (as unreasonable). In *Beetson v. Humphries*, rugby league player Arthur Beetson challenged a bylaw of the Australian Rugby League (ARL) that restricted him from writing newspaper columns critical of the league's referees.[40] In *Adamson v. New South Wales Rugby League Ltd*, 154 players who competed in the NSW rugby league challenged a rule that provided that when a player wished to change clubs, they could only do so by participating in the NSW rugby league draft.[41]

Australian sports also impose restrictions on the number of foreign athletes who can play in their leagues. For example, the A-League restricts each club in the league to five foreign players (at least one of whom must come from a member of the Asian Football Confederation). Further, foreign athletes will only be able to compete in Australian sporting leagues if they receive appropriate visas from the Australian Department of Immigration and Border Protection.

VI SPORTS AND ANTITRUST LAW

The key antitrust legislation is the Competition and Consumer Act 2010 (Cth) (CCA). The CCA contains, among other things, prohibitions against:

a cartel conduct;
b anticompetitive agreements between competitors;

38 D Thorpe, 'The use of multiple restraints of trade in sport and the question of reasonableness', 2012, *Australian and New Zealand Sports Law Journal,* Vol. 7(1).

39 See *Adamson v. New South Wales Rugby League* (1991) 31 FCR 242 per Wilcox J at 266.

40 *Beetson v. Humphries* (unreported, Supreme Court of New South Wales, Hunt J, 30 April 1980).

41 *Adamson v. New South Wales Rugby League* (1991) 31 FCR 242.

c exclusionary provisions in agreements; and
d misuse of market power by a corporation with substantial market power.

Each major domestic sporting league in Australia constitutes a monopoly (e.g., the AFL and the A-League). While there have been several instances where rival leagues have emerged, including in cricket and NRL, these have ultimately been unsuccessful in establishing a foothold in the Australian market.

Arguably the most notable application of Australian antitrust laws in a sporting context involved a dispute between a media organisation, News Limited, and the predecessor to the ARLC, the ARL.[42] At the time, News Limited was attempting to establish a rival 'Super League' to replace the ARL. In response, the ARL sought commitment agreements and loyalty agreements requiring the current ARL clubs to commit themselves to the ARL for an extended period. News Limited alleged that these agreements contained exclusionary provisions or constituted a misuse of market power in seeking to prevent the entry of the proposed Super League into the market, in breach of Australian antitrust legislation.

A single judge of the Federal Court of Australia found that there had been no breach of the antitrust legislation. However, on appeal, the Full Federal Court reversed the decision and concluded that the agreements constituted an illegal collective boycott, and were therefore void.[43] A collective boycott occurs when a group of competitors agrees not to acquire goods or services from, or not to supply goods or services to, a business with whom the group is negotiating, unless the business accepts the terms and conditions offered by the group. In this case, the Full Federal Court held that there was a boycott of the Super League by the ARL and the clubs. Subsequently, the Super League and ARL merged to form the NRL, restoring the monopoly.

VII SPORTS AND TAXATION

Under Australian taxation legislation, a sporting organisation is exempt from income tax if it meets all of the following requirements:[44]

a it is a non-profit organisation;
b it has been established for the purpose of the encouragement of a game or sport;
c it is not a charity; and
d it meets either the 'physical presence in Australia' test, the 'deductible gift recipient' test or the 'prescribed by law test'.[45]

42 *News Ltd v. Australian Rugby League Limited* (1996) ATPR 41-466.

43 *News Ltd v. Australian Rugby League Ltd* (No. 2) (Superleague) (1996) 64 FCR 410.

44 ATO, 'Sporting organisations', www.ato.gov.au/Non-profit/Your-organisation/Do-you-have-to-pay-income-tax-/Types-of-income-tax-exempt-organisations/Sporting-organisations/.

45 An organisation will meet the 'physical presence in Australia' test if it has a physical presence in Australia and, to the extent it has a physical presence in Australia, it pursues its objectives and incurs its expenditure principally in Australia. An organisation will meet the 'deductible gift recipient' test if it is either listed by name as a deductible gift recipient (DGR) in the legislation, or if it meets the requirements of a general DGR category set out in the legislation. An organisation will meet the 'prescribed by law' test if it is prescribed by name in income tax regulations, and it is located outside Australia and is exempt from income tax in its country of residence.

Many professional sporting clubs meet these requirements, which are satisfied by inserting relevant clauses into the constitution of the club. For example, the Carlton Football Club's Constitution provides that 'The assets and income of the Club shall be applied solely in furtherance of the objects of the Club set forth in this Constitution and no portion shall be distributed directly or indirectly to the members of the organisation except as bona fide compensation for services rendered or expenses incurred on behalf of the organisation', which establishes it as a non-profit organisation. The Constitution also provides that 'If a surplus remains following the winding up or dissolution of the Club, the surplus will not be paid to or distributed among members, but will be given or transferred to another corporation or club with similar objects to that of the Club'.[46]

For individual athletes, prize money, playing fees, sponsorships, salaries and media fees are each considered to be taxable income.

VIII SPECIFIC SPORTS ISSUES

i Doping

State and federal criminal laws cover conduct involving some (but not all) substances that appear on the WADA World Anti-Doping Code Prohibited List, including a large number of anabolic steroids.[47] These laws include the following offences associated with these substances:

a trafficking or supplying a prohibited substance;[48]

b using or administering a prohibited substance without appropriate medical or therapeutic justification;[49]

c possession of a prohibited substance;[50] and

d aiding, abetting or concealing any of the above offences.[51]

Individuals who are found guilty of the above offences can potentially face life imprisonment and fines in excess of A$1 million (in particular, for serious trafficking offences).

It has also been suggested by some commentators that doping by professional athletes may constitute the offence of fraud, which is defined as where a person gains a financial advantage, property, services, a benefit, dishonestly or by deceit.[52] However, this has not been judicially established, and doping itself is not a criminal offence in Australia.

46 Carlton Football Club Constitution, www.carltonfc.com.au/staticfile/AFL%20Tenant/Carlton/Documents/Constitution.pdf.

47 For example, see Schedule 3 of the Criminal Code Regulations 2002 (Cth); and Schedule 2 of the Drugs Misuse Regulation 1987 (Qld).

48 For example, Drug Misuse and Trafficking Act 1985 (NSW), Section 25.

49 For example, Drug Misuse and Trafficking Act 1985 (NSW), Sections 12 and 13.

50 For example, Drug Misuse and Trafficking Act 1985 (NSW), Section 10.

51 For example, Drug Misuse and Trafficking Act 1985 (NSW), Sections 19 and 20.

52 For example, see Christopher McKenzie, 'The use of criminal justice mechanisms to combat doping in sport' (July 2007), *Sports Law eJournal*.

ii Betting

Betting on sporting events is legal in every state and territory, but highly regulated.[53] The licensing laws vary between each state and territory jurisdiction, but each jurisdiction provides that customers must be over the age of 18 to place a bet, and that licensees must obtain reasonable proof of identity from their customers. The state and territory gambling laws are supplemented by federal legislation that, among other things, has banned online 'in-game' betting on sports (although customers can still place in-game bets over the phone).[54]

In 2008, the Western Australian government attempted to implement legislative amendments that would prohibit the operation of betting exchanges, such as that operated by Betfair Pty Ltd.[55] Specifically, the legislation prohibited 'out-of-state' betting exchanges, where the operator is licensed in another jurisdiction (e.g., Betfair was licensed in Tasmania), and preventing Western Australian residents from placing wagers through such betting exchanges.

The High Court of Australia held that it was constitutionally unlawful for a state or territory government to protect local betting operators from online bookmakers that were licensed in other jurisdictions, as an impermissible restriction on free trade between the states.[56] As such, online betting operators licensed in one state or territory can offer wagering products to anyone in Australia. Most online operators are now licensed in the Northern Territory, owing to its lower taxation and less stringent regulation.[57]

In 2015, legislation was introduced to Parliament proposing a ban on gambling advertising during sports events, and the establishment of a national regulator and national self-exclusion register for people struggling with a gambling habit. This legislation, however, is not supported by the two major political parties in Australia.[58]

iii Manipulation

Each state and territory has implemented, or is in the process of implementing, laws designed to prevent match fixing. For example, in New South Wales, South Australia and Victoria it is an offence to knowingly or recklessly corrupt a betting outcome of an event with the intention of obtaining a financial advantage or causing a financial advantage in relation to any betting on an event.[59] It is also an offence to facilitate conduct that corrupts a betting

53 For example, the Betting and Racing Act 1998 (NSW); Gambling Regulation Act 2003 (Vic); Wagering Act 1998 (Qld); Betting Control Act 1954 (WA); Authorised Betting Operations Act 2000 (SA); Gaming Control Act 1993 (Tas); Racing and Betting Act 1983 (NT); and Racing and Sports Bookmaking Act 2001 (ACT).

54 See the Interactive Gaming Amendment Act 1997 (Cth), which amended the Interactive Gaming Act 2001 (Cth).

55 In a betting exchange, the operator acts as the facilitator, matching the wagers of participants betting on opposing outcomes, and takes a commission of the winner's payout.

56 *Betfair Pty Limited v. Western Australia* (2008) 234 CLR 418.

57 Many of the large corporate online bookmakers in Australia are subsidiaries of UK corporate bookmakers, licensed in Australia. This includes the three largest corporate bookmakers by turnover: Sportsbet is a subsidiary of Paddy Power, Sportingbet is a subsidiary of William Hill and Ladbrokes operates a subsidiary in Australia. Each of these is licensed in the Northern Territory.

58 See the Interactive Gaming Amendment (Sports Betting Reform) Bill 2015 (Cth); and the Senate Environment and Communications Legislation Committee inquiry report (March 2017), www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/SportsBetting/Report.

59 See Crimes Act 1900 (NSW) Section 193N; Criminal Law Consolidation Act 1935 (SA) Section 144H; and Crimes Act 1958 (Vic) Section 195C.

outcome of an event. In Queensland, it is an offence to engage in match-fixing conduct for the purpose of obtaining a pecuniary benefit for any person, or causing a pecuniary detriment to another person.[60] For each of these jurisdictions, a person found guilty of an offence is liable for imprisonment up to 10 years.

There have been several recent high-profile match-fixing incidents in Australian sport:

a In 2011, a professional rugby league player in the NRL was convicted of 'conspiring to gain financial advantage for others', namely that he intentionally gave away a penalty to the opposing team so that others could succeed in a 'first points scorer' bet. He was convicted prior to the introduction of specific match-fixing laws in New South Wales, but his conduct would now be caught by the prohibition against corrupting the betting outcome of an event. He was fined A$4,000 and placed on a 12-month good behaviour bond.[61] He was also banned for life from the NRL.

b In 2016, Australian tennis player Nick Lindahl was convicted of match-fixing after deliberately losing a match at a Towoomba Futures event in 2013. He was given a 12-month good behaviour bond and fined A$1,000. He was also subsequently banned from professional tennis by the International Tennis Federation and fined US$35,000.

iv Grey market sales

The extent to which sporting event ticket sales in the grey market, also referred to as 'scalping', is prohibited depends on the state or territory. For example, in New South Wales, ticket scalping is only prohibited in areas around particular sporting venues.[62] In Queensland, there are prohibitions on reselling tickets to 'major sports facility events' at a price greater than 10 per cent of the original ticket price.[63] Major sports facilities are listed in the regulations, and a declaration that a facility is a major sports facility may only be made with the agreement of the owner. In Victoria, if the Minister for Sport declares a particular event to be a 'major sport event', and it is a condition of sale of the ticket that the buyer is not authorised to sell or distribute it, it is an offence for the buyer to redistribute the ticket.[64] In South Australia, if the Minister declares an event a 'major event', ticket scalping is prohibited inside declared areas. It is also prohibited in South Australia to resell 'major event' tickets at a price that exceeds the original ticket price by more than 10 per cent.[65]

Additionally, the ACL contains general consumer protections that apply to ticket resellers. For example, it is prohibited for an unauthorised reseller to represent that they are authorised to sell the tickets, or to misrepresent the original face value of the ticket, and the consumer guarantee provisions ensure that tickets purchased from unauthorised resellers are valid, and for the event they are represented to be for.

Recently, the Australian Competition and Consumer Commission instituted proceedings in the Federal Court of Australia against Viagogo AG, a ticket reseller for live sporting events (among other events). In 2019, the court held that, by referring to tickets as 'official' in online advertising, failing to disclose substantial fees and claiming tickets to

60 Criminal Code 1899 (Qld) Section 443A.

61 M Whitbread, 'Fixing match-fixing in Australia – Australian sporting administrators propose stricter criminal sanctions' (October 2010) 18 SLAP 6.

62 Major Events Act 2009 (NW) Section 41.

63 Major Sports Facilities Act 2001 (Qld) Section 30C.

64 Major Sporting Events Act 2009 (Vic) Section 166.

65 Major Events Act 2013 (SA) Section 9.

certain events were scarce when the scarcity referred only to tickets available on the Viagogo resale platform, Viagogo had made false or misleading representations and engaged in misleading or deceptive conduct.[66] For example, the total price for three Ashes 2017–2018 (cricket matches) tickets increased from A$330.15 to A$426.82 (29 per cent increase) when the A$91.71 booking fee and A$4.95 handling fees were included.[67] Penalties for the infringements are yet to be handed down.

IX THE YEAR IN REVIEW

i Rugby Australia – unfair dismissal claim by Israel Folau

The most controversial saga in Australian sport in 2019 has been the ongoing dispute between Rugby Australia and Israel Folau. After posting inflammatory and homophobic comments on social media, Israel Folau was issued with a breach notice by Rugby Australia recommending termination of his four-year, A$4 million contract. Folau appealed the notice to a code of conduct hearing held by an independent panel, who ruled in May 2019 that he was guilty of a 'high-level breach' of the Professional Players' Code of Conduct.[68]

Following the panel's decision, Folau's contract was terminated. Following an unsuccessful mediation in the Fair Work Commission, he then launched legal proceedings against Rugby Australia in the Federal Court, alleging that his contract had been unlawfully terminated on the basis of religious discrimination and stating that he would seek A$10 million in compensation for the remainder of his contract and lost commercial opportunities.[69] The matter has been adjourned to a hearing in early 2020.

In September 2019, the Tongan National Rugby League issued a media release stating that Folau and his brother would play with the Tongan team later in the year. However, this would require the approval of the Rugby League International Federation, made up of eight national sporting bodies including the ARLC. The ARLC has indicated it will oppose the request.[70]

ii Essendon Football Club doping saga

As discussed above, in 2016, CAS suspended 34 Essendon Football Club players for violations of anti-doping rules, and this decision was subsequently upheld by the Swiss Federal Tribunal. Subsequently, however, in late 2017, separate proceedings were commenced by a third party against the AFL, its CEO and its former chair, alleging that they engaged in misleading and deceptive conduct in comments made to the media during the course of the ASADA investigation in 2016 and 2017.

66 *Australian Competition and Consumer Commission v. Viagogo AG* [2019] FCA 544.

67 ACCC Media Release, 'ACCC takes ticket reseller Viagogo to court' (28 August 2017), www.accc.gov.au/media-release/accc-takes-ticket-reseller-viagogo-to-court.

68 Rugby Australia Media Release, 'Code of Conduct Hearing for Israel Folau concludes' (7 May 2019), https://australia.rugby/news/2019/05/07/code-of-conduct-hearing-for-israel-folau-concludes.

69 David Mark, 'Israel Folau launches court proceedings against Rugby Australia, NSW Waratahs over unfair dismissal claim' (1 August 2019), www.abc.net.au/news/2019-08-01/israel-folau-court-action-against-rugby-australia-waratahs/11372714.

70 ABC News, 'Israel Folau plans to return to rugby league with Tongan national team' (23 September 2019), www.abc.net.au/news/2019-09-23/israel-folau-to-make-shock-rugby-league-return-for-tonga/11540494.

The AFL sought a 'mini-trial' in early 2018 to determine three preliminary issues, including the question of whether the impugned comments were made in 'trade or commerce', a prerequisite element that must be determined to establish a breach of Australia's consumer laws. However, this was opposed by the plaintiff, and in June 2018, the Court rejected the AFL's application and found in favour of the plaintiff.[71]

The plaintiff sought declarations from the Victorian Supreme Court that the AFL, its CEO and its former chair acted unlawfully, on the basis that they attempted to 'engineer outcomes' before players and officials were actually interviewed by ASADA. The plaintiff has also sought an order that the three defendants publish corrective advertising in relation to their alleged conduct. In July 2018, the plaintiff withdrew their claim and the proceeding was dismissed. The AFL was ordered to pay an amount towards costs as a result of the preliminary hearing.

iii Application of anti-discrimination laws in the AFL

In the past years, several events have occurred in relation to alleged discriminatory conduct by the AFL. Most recently, in June 2019, the AFL and the 18 AFL clubs came together to make an unreserved apology to indigenous player Adam Goodes, following the release of a documentary regarding discriminatory and racist treatment that ultimately led to his retirement from the AFL in 2015. The AFL apologised for its failures during the period and reaffirmed its commitment to diversity and inclusion.[72]

In May 2018, a former Australian footballer for the Gold Coast Suns filed a complaint with the Australian Human Rights Commission, alleging that he was subject to discrimination, vilification and harassment on racial, sexual and religious grounds by AFL staff, the Gold Coast Suns, club officials, teammates, opposition players and spectators. He alleges that the AFL did not do enough to prevent the discrimination, and has sought compensation for loss of both past and future wages, in addition to compensation for pain, suffering and humiliation.[73]

Additionally, in early 2017, the AFL ruled that a transgender player was ineligible for selection in the 2018 draft for the AFLW, the professional women's AFL league. It cited the Victorian Equal Opportunity Act 2010, which provides that a person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity 'in which the strength, stamina or physique of competitors is relevant'.[74] In 2018, the AFL then released its gender diversity policy, in which it advised that transwomen would need to maintain certain maximum levels of testosterone for at least two years to ensure that the competitive advantage of higher levels of testosterone have 'dissipated to an acceptable degree at the time the trans or non-binary person proposes to play in the AFLW competition'.[75]

71 'Court ruling on Essendon drugs saga edges AFL boss nearer to trial' (6 June 2018), The Age, www.theage.com.au/sport/afl/court-ruling-on-essendon-drugs-saga-edges-afl-boss-nearer-to-trial-20180606-p4zjr8.html.

72 AFL, 'AFL statement in response to Adam Goodes films' (7 June 2019) www.afl.com.au/news/2019-06-07/afl-statement-in-response-to-adam-goodes-films.

73 Ashleigh Stevenson, 'Joel Wilkinson, former Gold Coast Suns player, takes action against AFL over alleged racial abuse, sexual harassment', ABC (9 May 2018), www.abc.net.au/news/2018-05-09/joel-wilkinson-action-against-afl/9742962.

74 Equal Opportunity Act 2010 (Vic), Section 72.

75 Scott Spits and Martin Blake, 'AFL settles on blood testosterone threshold for AFLW footballers', *The Age* (31 August 2018), www.theage.com.au/sport/afl/afl-testosterone-threshold-afl-aflw-trans-20180831-p50143.html.

Subsequently, in early 2018, the AFL announced that the transgender player would be permitted to play in the state and territory women's leagues in 2018. It also stated that it was in the process of developing a more comprehensive policy on the participation of trans and gender-diverse athletes. Because the AFL's initial ruling only applied to the 2017 draft and the transgender player declined to nominate for the 2018 draft, the AFL's policy moving forward is not yet clear. However, it has not ruled out the possibility of allowing her to nominate for the AFLW draft in future.[76]

iv NRL referees industrial action and enterprise agreement

The year 2018 saw a high-profile pay dispute in the NRL. The Professional Rugby League Match Officials (PRLMO) have been engaged in negotiations with the NRL in relation to agreement of a new enterprise bargaining agreement. This followed an increase in the salary cap for players of approximately 30 per cent, a new broadcast rights deal for the NRL worth approximately A$2 billion and an increase in revenue for the NRL of approximately A$530 million, without a comparable increase in remuneration for referees.

In early September 2018, on the eve of the NRL's finals schedule, the PRLMO obtained a ruling from Australia's Fair Work Commission, allowing its members to vote on whether they wish to take industrial action over the dispute through a 'protected-action ballot'. This was the first time in the NRL's history that the Fair Work Commission has been approached by a union seeking recourse.[77]

Pursuant to the Fair Work Act, a protected-action ballot is required to authorise industrial action, before that industrial action can be lawfully taken.[78] Following the ruling, the PRLMO asked its members to vote in a ballot to authorise industrial action. More than 50 per cent of the PRLMO's members voted and of those who voted, more than 50 per cent voted in favour of industrial action.[79] Following further negotiation, the NRL was able to secure an enterprise agreement with a four-year term in early 2019, avoiding industrial action and raising salaries for match officials.[80]

X OUTLOOK AND CONCLUSIONS

In 2019, we have continued to see prominent members of Australian sport take action to progress:

a equality of opportunity; and

b greater distribution of revenue (often through collective bargaining and industrial action).

76 Melissa Coulter Ryan, 'Hannah Mouncey withdraws AFLW draft nomination, hits out at AFL', *The Age* (10 September 2018), www.theage.com.au/sport/afl/hannah-mouncey-withdraws-aflw-draft-nomination-hits-out-at-afl-20180910-p502r4.html.

77 Adrian Proszenko, 'Referees threaten industrial action over pay war on the eve of finals', *Sydney Morning Herald* (5 September 2018), www.smh.com.au/sport/nrl/referees-threaten-industrial-action-over-pay-war-on-the-eve-of-finals-20180905-p501zm.html.

78 Fair Work Act 2009 (Cth), Section 437.

79 Adrian Proszenko, 'Top NRL referee to earn $315k if pay demands met', Sydney Morning Herald (22 September 2018), www.smh.com.au/sport/nrl/top-nrl-referee-to-earn-315k-if-pay-demands-met-20180922-p505e2.html.

80 NRL Media, 'Match officials enterprise agreement' (12 March 2019), https://www.nrl.com/news/2019/03/12/match-officials-enterprise-agreement/.

In the Australian chapter of the fourth edition of *The Sports Law Review*, we discussed similar trends developing in 2018, which were apparent in:

a enterprise bargaining undertaken by the PRLMO to ensure improved pay conditions; and

b the expansion of opportunities for transgender athletes to participate in the AFLW.

In 2019, we continue to see a focus from athletes, the Australian public and sports organisations on diversity and equality in Australian sport. This year, this was demonstrated by the apology issued by the AFL for past failures in addressing racism, and the termination of rugby player Israel Folau by Rugby Australia for his homophobic and incendiary social media posts.

Australian sport is part of a broader public movement that acknowledges the importance of diversity and equality of opportunity. To remain relevant, our most successful sporting codes now target much broader bases.

We have also seen a continued focus on integrity in sport. Sports governing bodies are prepared to take strong action to protect (or salvage) public confidence in their code, particularly in the face of international scrutiny following the 2018 Australian men's cricket team ball tampering scandal.

Appendix 1

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Annie E Leeks is a partner in the global disputes group at Jones Day. She has a particular focus on international arbitration and dispute resolution. While her practice focuses primarily on large scale commercial litigation and arbitration, she has represented professional sports people in civil disputes and in sports arbitration. She holds a Master of Laws from the University of Toronto and is admitted to practise in Queensland, Australia and New York State.

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Prudence J Smith is a partner in Jones Day's Sydney office. Prudence is a highly experienced competition and antitrust law practitioner who advises clients on a full range of competition regulatory law issues and has experience in a range of matters in Australia, New Zealand and throughout ASEAN. Prudence has a particular interest in complex litigation involving expert evidence and regulatory bodies. She has been involved in disputes in the Federal Court of Australia, the Australian Competition Tribunal, state supreme courts and also in regulatory matters involving the Australian Competition and Consumer Commission, the Therapeutic Goods Administration, the Australian Energy Regulator and the Department of Health.

Prudence holds a Bachelor of Arts, Master of Commerce, Master of Arts and Bachelor of Laws from the University of New South Wales. She is also presently studying for a Master of Law at the University of Melbourne. Prudence holds practising certificates in New South Wales and The High Court of Australia.

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Mitch has acted in large-scale, high-value disputes in the Supreme Court of Queensland; acted for a financial institution in relation to the Royal Commission into Banking, Superannuation and Financial Services; and advised on complex contractual disputes.

Mitch holds a Bachelor of Laws and a Bachelor of Business (Management) from Bond University in Queensland.

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