Sport

CHAPTER CONTENT

Part 4: Integrity in Sport

Introduction

The professionalisation and commercialisation of sport has meant that many organisations that previously were amateur and driven by principles of recreation are now components of an industry and have to consider their legal and commercial position. This industry stretches from catering to casual participants to fully professional athletes, and the same spectrum applies for management of sporting organisations.

Virtually every area of law has some application to a sporting context, and other chapters in this book may need to be consulted to provided more depth on the specific principles involved. Areas of law include: torts, crime, intellectual property, discrimination, dispute resolution, contracts, and employment.

This chapter is divided into four parts, dealing with:

- internal governance issues—focusing on more inward-facing legal issues, such as organisational structure and dispute resolution
- managing sporting events—covering issues such as marketing and intellectual property
- liability issues—with a focus on civil (tortious) and criminal liability
- integrity of sport issues—covering doping, gambling and match-fixing.

Part 1: Internal Governance Issues

Structure of Sporting Organisations

A range of different entities organise sporting activities. The type of entity a club or organisation chooses to form will depend on a number of factors including:

- financial resources
- human resources
- protection of the organisation's assets and members from claims by other people
- contracts the organisation has with other parties
- the type of sport the organisation is involved with.

Whether to incorporate

People are free to form clubs and associations for any purpose. Informal groups could choose to remain unincorporated, that is, their club is not legally different to the individuals who are in it. For example, a group of four friends might meet weekly for a game of tennis, and refer to themselves as 'a club', without there being any legal effect to that term.

For most sporting organisations, the decision to incorporate is often a safer option because the organisation then becomes a separate legal entity to its members (with all the same powers as an individual). This separation protects the members and the management committee from potential liability (as long as the latter can show they have carried out their duties in good faith and exercised due diligence).

A sporting body can incorporate by establishing either a company or an incorporated association. Companies are dealt with under the *Corporations Act 2001* (Cth) and are more suited to large, national sporting bodies. Usually companies in sport are 'limited by guarantee', that is, their members do not pay money in advance but agree to guarantee, often only up to a fairly small amount, the company's debts should it fail (e.g. Australian Rugby League Commission Ltd). Some sporting companies are 'limited by shares' and aim to make a profit for those shareholders (e.g. Brisbane Broncos Ltd). For sporting bodies more at grass roots level, incorporation under the *Associations Incorporation Act 1981* (Qld) (Associations Incorporation Act) is often more relevant.

However, there are obligations and responsibilities associated with incorporation which may be seen as disadvantages (see the Incorporated Associations chapter for greater detail about the benefits and risks of incorporation).

Affiliation between organisations

It is quite common for different organisations to run a sport at different levels. For instance, a local club might be affiliated with a district or city-based association that organises competition between clubs. The club agrees to follow the rules that the district association imposes and, in return, the club benefits from having competition organised. The district association might be affiliated with a state-level association, who in turn might be affiliated with a national body. Most sports have a recognised national body (sometimes termed a 'National Federation' in sports literature), which governs that sport across the country. While it is possible that there may be multiple, rival organisations at any of the various levels (including nationally), it is usually the case that only one national body is recognised by the relevant sport's international federation, or for Australian Government financial support through Sport Australia. Many international federations are in turn recognised by the International Olympic Committee (IOC), especially if that sport participates (or aspires to participate) in Olympic Games. Through these many links of affiliation and mutual recognition, the IOC indirectly controls much of the governance of sport throughout the world, even at local levels.

For further information and resources to assist with the governance of clubs or sporting organisations, see the Sport Australia website.

Dispute Resolution in Sport

Many types of disputes can arise in a sporting context. For instance, where a participant breaks a rule of the sport, they may find themselves disqualified from the event or suspended from future events. In professional sport, off-field disciplinary issues may also

lead a player into conflict with their sporting association. Further, participants (especially in Olympic sports) may dispute their non-selection in a representative team. Because of the unique nature of sporting disputes, courts have often been reluctant to intervene. Sporting associations usually set out dispute resolution procedures in their governing documents that members agree to when registering. These procedures often provide for the use of domestic (or internal) tribunals. While this section refers to such tribunals, it should be noted that this term is intended to cover any internal dispute resolution process, whether the decisionmaker is a panel, an individual, or the membership as a whole.

Jurisdiction of domestic tribunals

The governing documents of a sporting association should clearly spell out what rules apply to members (whether relating to on-field performance or off-field behaviour) and how penalties may be imposed for their breach. When a person joins the association, agreement with these rules should be a condition of membership, and hence may be contractually enforceable. It is therefore somewhat up to the sporting association's discretion what rules it will impose and how any disputes will be resolved, subject to an important consideration of providing natural justice.

It should be noted that the racing industry (thoroughbred, harness and greyhound racing) have formalised dispute resolution procedures which are specified by legislation (see the *Racing Act 2002* (Qld) and also the *Racing Integrity Act 2016* (Qld)).

Professional football codes, such as the Australian Football League and National Rugby League, have implemented quasi-judicial tribunal systems whereby on-field infringements are reviewed post match by a citing officer or panel, who would then classify the infringement according to a scale of severity and charge the player. The player might plead guilty and receive a reduced penalty, or choose to appear before the tribunal in order to dispute the charge. It is not uncommon for players to engage legal representation for such hearings. If found guilty, the player's prior offences may be taken into account when imposing a sentence.

Appealing to a court from a domestic tribunal

Courts are not generally used as an appeal forum for decisions of domestic tribunals, unless it can be argued that a breach of contract has occurred in the way the tribunal operated. A court may also require that a party exhaust any other internal appeal avenues first.

When dealing with a sporting association that is an incorporated body, its constitution or rules of association have contractual force by virtue of the legislation mentioned earlier. However, it would still be necessary for the tribunal/dispute resolution policy or other document in contention to be somehow related to the organisation's constitution.

Unincorporated associations are more problematic as they are not a separate legal entity, and association rules have been seen by courts to be of 'consensual' effect rather than 'contractual', which means if a person is aggrieved by a decision of the association, they are

free to leave (see *Cameron v Hogan* (1934) 51 CLR 358). Some exceptions where a court may intervene in internal disputes include:

- where there is clear intention to be contractually bound
- to correct ongoing damage to a member's reputation
- where decision affects property rights of the member
- to prevent an unreasonable restraint of trade
- for other policy reasons.

Even if the organisation's dispute resolution process can be seen as contractual, a court will not look at the merits of the tribunal's decision (i.e. whether the tribunal made the notionally correct decision after they had heard all the evidence). Courts, however, may get involved if it can be shown that there has been a denial of natural justice where it was required in the decision process. This requirement for natural justice may be implied into the membership agreement between the parties, or in the case of sporting associations that are incorporated in Queensland, explicitly provided for under s 71 of the Associations Incorporation Act where the member's constitutional rights are at stake. Many sporting organisations choose to explicitly state that natural justice would be provided as part of their dispute resolution process, however, there may be considerable variation in how an organisation interprets that.

Denial of natural justice

The concept of natural justice can be a somewhat fluid and satisfying it will depend upon the unique facts of each case. At a basic level, it requires a fair hearing including:

- notice of the tribunal hearing date, time and place
- notice of the alleged breaches in as much specific detail as possible
- the right to appear, produce evidence and have it considered by the tribunal
- the right to not face duplicitous (i.e. multiple overlapping) charges
- the right to be heard separately on the question of penalties (see *South Melbourne Football Club Ltd v Football Federation Victoria Inc* [2010] VSC 355).

It also requires an honest verdict where the tribunal must:

- come to its decision honestly and without actual bias
- make a bona fide decision in the association's interests and not for some other purpose.

It is important to note that the concept of bias in a sporting tribunal sense will be more limited than its application to a court. A judge in court must avoid any reasonable apprehension of bias, however, a domestic tribunal will often not be able to meet such a standard. This is because the tribunal members may already have some knowledge of the incident leading to the hearing, or may have been involved in its investigation, especially in smaller associations. Provided there is no actual bias in the decision, this should usually satisfy

natural justice requirements. Situations where bias has been proved include where the tribunal member has a financial interest in the decision to be made, and where a tribunal has prejudged a matter and published that prejudgment (*Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509).

While the same rules of evidence used in courts do not apply to a tribunal, it is still important that the decision be made honestly. This means that a tribunal should not base its decision on evidence that is clearly unreliable.

Note, too, that it is not a mandatory requirement of natural justice for a member to be allowed legal (or other) representation in a tribunal hearing. However, should a member ask for such, particularly when facing a serious charge or when under a particular disadvantage, it may be prudent for the sporting association to allow representation in order to show that the accused was afforded every possible fairness.

It is sometimes considered that providing reasons for a decision is part of providing natural justice. However, the courts have consistently held that a domestic tribunal is not required to provide reasons for its decisions unless its internal rules (or legislation) require it to (see *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447, *Waterhouse v Bell* (1991) 25 NSWLR 99). Invariably this means that tribunals are not required to provide reasons, but again, in the interests of fairness to the member in question and for the benefit of the membership at large (e.g. in deterring similar behaviour), it may be prudent to do so.

Should natural justice be lacking in the tribunal processes, a court may invalidate the tribunal's decision and require the decision to be remade with natural justice provided.

It is recommended that legal advice be sought before pursuing court action.

Court of Arbitration for Sport

The Court of Arbitration for Sport (CAS) was created by the IOC to settle sports-related disputes, be they domestic or international disputes, through the use of mediation or arbitration provided by panels composed of one or three arbitrators. Chartered under Swiss law, CAS is governed by its own statutes and rules of procedure, and is independent of any sports organisation. It operates under the administrative and financial authority of the International Council of Arbitration for Sport. The CAS is popular for international disputes because it eliminates the problem of determining in which jurisdiction a dispute is heard.

It is important to note that CAS gets its jurisdiction from the agreement of the parties. However, because of the relative bargaining positions of athletes versus international and national sports federations, it may be somewhat misleading to suggest a true agreement exists. Athletes usually consent through a contractual condition when they become a member of the respective team, affiliate or federation.

The CAS has three permanent arbitration sections:

- the Ordinary Arbitration Division (OAD)
- the Appeals Arbitration Division (AAD)

- the Anti-Doping Division.

Finally, CAS has the authority to set up as a temporary forum (the Ad-Hoc Division), which it does during major sporting events such as the FIFA Soccer World Cup or the Olympics, in order to provide timely resolution of disputes (usually within 48 hours).

The OAD is a first-instance forum that can resolve disputes arising from all types of legal relations between parties such as broadcasting, sponsorship, player contracts or rule interpretation. This division might be used instead of establishing a domestic tribunal within a sport or may be called upon to resolve one-off disputes where the parties consent to it. The Anti-Doping Division is also a tribunal of first instance, which is an available option for resolving doping matters (rather than the sporting organisation providing for their own internal doping tribunal as was often the case beforehand).

The AAD hears appeals from the OAD or from sporting organisations' internal tribunals where their rules allow for it. Such appeals might cover:

- disciplinary decisions (including anti-doping disputes)
- selection of athletes for representative teams
- decisions concerning the official recognition of events.

Arbitration is a dispute resolution process that involves an arbitrator making a decision, much like a judge does in court. However, what makes the decision binding is that, via the rules of the sporting organisation or a contract, parties agree to be bound by it. To strictly enforce an arbitration decision, parties may go to local courts. Many countries around the world are signatories to the New York Convention, whereby they have legislated to recognise international arbitral decisions. Like other forms of arbitration, CAS hearings are private and take place outside media and public scrutiny. The agreements or rules discussed above may require confidentiality of an arbitral decision (e.g. if the dispute involved commercial matters), however, parties can agree otherwise or CAS can decide to publish. Many decisions of CAS are available online.

The subject matters of CAS proceedings can be quite broad and anything related to sport. However, CAS has consistently opted to not involve itself in field-of-play disputes. These are decisions made by on-field officials (e.g. referees, umpires, judges) about the application of the rules of the sport. Unless it can be shown that such a decision was tainted by bad faith (e.g. the umpire was bribed), CAS takes the view that the on-field official is best positioned and possesses the most expertise to apply the rules of their particular sport. The position of CAS has not changed even where video evidence may show the official's judgment was objectively incorrect. Often, a sport may have its own internal process for a participant to protest an outcome. Opening up such decisions to further CAS appeal risks unduly delaying the finality of sporting results.

National Sports Tribunal

In terms of dispute resolution, the National Sports Tribunal (NST) is a developing option. It was established under the *National Sports Tribunal Act 2019* (Cth) and commenced operating under a pilot period from March 2020 to March 2022. The NST seeks to fulfil a role somewhat analogous to CAS but at an Australian level. It offers arbitration, mediation, conciliation and case appraisal services, and it operates a General Division, Appeals Division and Anti-Doping Division.

However, due to constitutional limits on the Commonwealth, the NST has a narrower jurisdiction compared to CAS. There are eligible parties and eligible disputes.

In terms of parties, the dispute must either involve a particular sporting body as a party or, where a dispute is between individual members, it must be the sporting body who applies to the NST. These sporting bodies are typically the recognised national sports federations, but can also be bodies designated by the NST CEO through delegated legislation (e.g. as at June 2021, any sports organisation with an anti-doping policy that has been approved by Sport Integrity Australia is a sporting body for an anti-doping dispute; as are state/territory institutes of sport and national multi-sport organisations for other disputes).

The parties to the dispute must also agree to the NST hearing the matter (whether by specific agreement or through a clause in the sporting body's constitution or rules).

The types of eligible disputes which the NST can resolve are:

- anti-doping rule violations
- disciplinary matters
- selection/eligibility disputes
- bullying/harassment/discrimination
- other disputes approved by the CEO of the NST in exceptional circumstances.

Different dispute resolution methods are used for different categories. Some require a binding arbitral decision (e.g. doping), while others require conciliation, mediation or case appraisal (e.g. discrimination; note that options outside of the NST exist for discrimination. See below in relation to sport or the general Discrimination and Human Rights chapter). The NST explicitly states that it will not handle contractual or employment disputes (other than ones involving disciplinary issues), where a party is seeking monetary compensation, or field-of-play disputes.

Discrimination in Sport

Unlawful discrimination

Discrimination has a significant effect on participation rates, performance levels and club morale. Each organisation should have in place a system whereby players, officials and spectators are made aware that the organisation does not tolerate unfair or discriminatory

treatment, and have procedures to deal with complaints by people associated with the club. It is possible for a person (including an incorporated body) to be vicariously liable for discriminatory acts done by their employees or agents, unless the person can show that they took all reasonable steps to prevent it.

The *Anti-Discrimination Act 1991* (Qld) (Anti-discrimination Act) makes it unlawful to treat people unfairly on the basis of personal characteristics such as gender identity, sex, age, race or religion. The full list of attributes that are covered are listed in s 7 of the Act. There are also a suite of Commonwealth laws that cover particular groupings of characteristics:

- *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act)
- *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act)
- *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act)
- *Age Discrimination Act 2004* (Cth) (Age Discrimination Act).

It may be possible that both state and federal legislation cover a particular instance of discrimination in which case a complainant must choose one to bring their complaint under. However, it is more realistic that only one or the other of the legislative schemes will apply in social sport or neither. The area of law is complex, and it is recommended that you consult the Discrimination and Human Rights chapter.

One reason why it is complex is that discrimination is only unlawful in certain areas of life. For professional athletes, they may be able to allege that they were discriminated in the employment area (e.g. on the grounds of religious beliefs). But for social athletes dealing with local clubs, the situation is more difficult.

Both state and federal legislation cover club membership and affairs, however, the meaning of ‘club’ is not always the ordinary meaning of the word and it is defined differently in both levels of legislation. For example, under the Queensland legislation, a ‘club’ is defined in sch 1 of the Anti-discrimination Act as an association formed for a sporting purpose, but it must also be carried on for the purpose of making a profit. Section 4 of the Commonwealth Sex Discrimination Act defines a ‘club’ as a sporting association, but it must have 30 or more members, maintain its facilities from club funds and sell or provide liquor for consumption on the premises. The Disability Discrimination Act defines ‘club’ as an association (whether incorporated or unincorporated) of persons for sporting or athletic purposes that provides and maintains its facilities from the funds of the association. The Racial Discrimination Act does not cover clubs per se.

Likewise, the provision of goods and services is also an area where discrimination is prohibited, but a sporting club is unlikely to fall into this category under Queensland law. Section 46 of the Anti-discrimination Act makes it clear that an association formed for sporting purposes does not provide goods or services. Therefore, a not-for-profit sporting association, for the purposes of the Queensland law, is likely neither a club nor providing goods or services (see *David Yohan representing PAWES v. Queensland Basketball Oncorporated & Brisbane Basketball Incorporated (No. 2)* [2010] QCAT 471). However, the

four Commonwealth Acts utilise the ordinary meaning of 'providing goods and services' or 'providing access to facilities'. Hence these Acts can potentially cover local sporting clubs, even where the services or facilities may be provided without a fee. A person must not be refused the goods, services or facilities, or provided with them on less-favourable conditions, on the grounds of their attribute.

Only in the Disability Discrimination Act (s 28) is there a specific prohibition of discrimination in sport**.** This makes it unlawful to exclude a person from a sporting activity (which includes administrative and coaching roles, and probably officiating too) on the grounds of disability. However, it does not apply where the person is not reasonably capable of performing the actions reasonably required for the activity, nor does it apply where sporting participants are selected by a reasonable method relative to the sport and each other (e.g. selection trials for a football team).

It should be noted that the legislation also prohibits sexual harassment and racial vilification, and these are not limited to specific areas of life (see ch 3 for sexual harassment, s 124A for racial vilification and s 131A for criminal offence for serious vilification on grounds of race, religious, sexual orientation or gender identity (Anti-discrimination Act); pt IIA of the Racial Discrimination Act; and pt 2 div 3 of the Sex Discrimination Act).

Exemptions to discrimination law for sport

In addition to matters discussed in the previous section, there are also specific exemptions in the legislation for sport. These allow sporting organisations to restrict participation in a competitive sporting activity to (s 11(1) Anti-discrimination Act and respective Commonwealth legislation):

- either males or females (over the age of 12) if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity (s 42 Sex Discrimination Act)
- people who can effectively compete (s 28(3) Disability Discrimination Act)
- people of a specific age or age group (sport is not specifically mentioned in the Age Discrimination Act, but it could come under a general exemption for positive discrimination in s 33)
- people with a specific or general impairment/disability (s 28(3) Disability Discrimination Act).

Junior sporting organisations in particular must be aware of the application of these exemptions. Boys or girls under 12 cannot be prevented from playing a particular sport by reason of sex, and after age 12 only if the restriction is reasonable because of strength, stamina or physique requirements of the sport (Queensland law) or relevant (Commonwealth law). And importantly, there is nothing in the legislation that requires a sporting club or federation to discriminate on the grounds of sex (see *Taylor v Moorabbin Saints Junior Football League and Football Victoria* [2004] VCAT 158).

It is important to note that it is possible for a club or association to apply for an exemption from the Anti-discrimination Act (s 113) by applying to the Queensland Civil and Administrative Tribunal. Some female-only gymnasiums have utilised this option to ensure they comply with the legislation.

Part 2: Managing Sporting Participants and Events

Promoters

Promotion of sporting events, sometimes called event management, involves a variety of activities and therefore a variety of different legal considerations, many of which are contractual. Promotion raises issues that are the subject of consumer law, employment law, law relating to personal injuries, intellectual property, advertising and trade practices, and laws dealing with smoking at certain venues.

Promoters are generally responsible for planning, organising finance, organising contractual relations with athletes and officials, organising broadcasting rights and advertising, and securing sponsorship. The vast majority of the aspects in managing and controlling an event are done through contracts (e.g. with spectators via the terms and conditions of purchasing a ticket. Such terms might include restrictions on photographing or videoing an event, what may be brought into the event and whether tickets may be resold. For these terms to be binding, it is important that they are clearly visible and made known to the buyer before they are committed to purchasing the ticket.

For larger events, government legislation may also assist in clarifying the rights and obligations of event organisers, spectators and others. The *Major Events Act 2014* (Qld) (Major Events Act) allows for the declaration of certain locations in order to stage major events such as V8 Supercar motor racing. The *Major Sports Facilities Act 2001* (Qld) (Major Sports Facilities Act) applies to major stadiums and venues throughout Queensland, which are prescribed by the *Major Sports Facilities Regulation 2014* (Qld). Under s 30C of the Major Sports Facilities Act, a ticket holder can resell a ticket for events at such facilities, but it is an offence to ask for a price greater than 10% of the original price (and an offence for someone to buy a ticket at such a price). This attempts to prevent ‘scalping’ to such events, although on a one-off basis, scalping is difficult to police.

Sponsorship and Marketing

Sponsorship is invariably the purchase of advertising or other similar services by the sponsor. The relationship between the promoter and the sponsor is always contractual, and it is important when drawing up these contracts that the specific advertising or service be precisely included in the contract. This protects both sponsor and promoter.

Sponsorship of sporting events is an important vehicle used by businesses to create brand awareness, and sponsors are prepared to pay large sums of money to have their brand and the event linked together. A problem for a promoter is the protection of the sponsor against ambush marketing. This occurs where an unrelated organisation markets its product or

service in a manner that gives the appearance of being officially associated with an event, when in fact this is not the case (e.g. through using billboards outside the event stadium or aerial blimps and skywriting). An ambush marketer attempts to obtain the benefits of being an official sponsor of an event without paying licence or sponsorship fees sought by the organiser. Part 4B of the Major Sports Facilities Act and pt 5 div 3 subdiv 3 of the Major Events Act are legislative attempts to restrict the opportunities for ambush marketing at major sporting events. It is highly likely that special-purpose legislation will be passed in the future to protect the 2032 Brisbane Olympic Games.

Intellectual Property

Intellectual property is generally concerned with creating rights over things such as literature, music, ideas, art and images. Unlike rights over other property, such as cars or houses, intellectual property is a little more complex because the 'thing' for which the property right exists is intangible. One of the main areas of intellectual property is copyright, which is regulated by the *Copyright Act 1968* (Cth).

Copyright exists in the physical media (e.g. a television broadcast of a sporting event). Once a broadcaster (e.g. a TV station) obtains the right to broadcast a sporting event, then the exclusive right to record the broadcast (on video, audio cassette or as a digital file on the internet), sell the record, transmit the signal interstate or internationally, or to re-broadcast generally lies with the broadcaster, who in effect buys that right from the organisation that owns or runs the event (see Copyright and Moral Rights chapter).

Trade marks are another form of intellectual property governed by the *Trade Marks Act 1995* (Cth). A trade mark is generally a letter, word, name, signature or other form of sign that is used to distinguish goods or services. The use of trade marks is particularly relevant in professional sport, where teams and leagues have trade marks over names and logos, or an athlete might seek to trade mark something distinguishing about themselves (e.g. a nickname), which they wish to use in marketing a product. Before a person or company can use a trade mark or declare it to be intellectual property capable of attracting rights, it must be registered as a trade mark pursuant to the legislation mentioned above. Such a trade mark should not mislead or deceive people as to who it refers to, and the trade mark should not be used where it gives the wrong impression that a sportsperson or sporting organisation endorses the product associated with the trade mark.

Finally, it should be mentioned that athletes (or anyone) do not have intellectual property rights in their own images (i.e. to prevent someone from taking a photograph or video recording of them). However, a broadcaster or company cannot use the image or name of a famous sportsperson in a way that gives a misleading impression that the athlete is connected in some way to a certain product or endorses it. This is potentially actionable under the civil wrong of 'passing off', or via consumer protection statutes for 'misleading or deceptive conduct' (see Consumers and Contracts chapter). The use of endorsements (where well-known sportspeople endorse a particular product) can be a powerful commercial

tool for prudent sportspeople and organisations, however, it must be properly agreed upon through contractual means.

Privacy of Sportspeople

Sportspeople at all levels of sport, like every individual, have a right to privacy in certain areas of life (e.g. personal medical information). Unless the player gives authorisation to publish details of injuries, treatments and recovery, such publication could be unlawful.

However, it will not prevent clubs, via their doctors or spokespersons, to detail the availability of any player, much the same way as a medical certificate does not fully disclose an illness to an employer, but details how long an employee might be away from work.

Another issue for player privacy is unauthorised photography or broadcasting. Provided a photographer is not breaking any other law (e.g. trespass), the law cannot prevent a person from taking another person's photograph. Once that photograph is taken, copyright in the image belongs to the photographer or their employer. However, if photographs of sportspeople are taken, and those photographs incorrectly imply a certain behaviour, attitude, morality or social standing of the player that is defamatory, the player can sue (see the Defamation chapter).

Athletes, Contracts and Restraint of Trade

A contract is a binding agreement between two or more parties. In most cases, a binding contract need not be in writing, nor must it contain formal terms. Provided the parties have agreed, then there can be a legally binding contract. That contract then determines the legal relationship between the parties. For this reason, athletes can contract with sporting organisations with respect to the terms of their playing conditions. This may be an employment contract or as an individual contractor. For example, an athlete might agree to:

- not play for any other team (particularly after retiring to end an existing contract)
- not discuss playing terms with any other club during the life of a contract
- only change employers (clubs) in designated periods or through set means (e.g. a player draft)
- accept restrictions on the level of income which can be earned (e.g. a salary cap)
- importantly, abide by any rules that require them to be suspended (or disqualified permanently) from playing as a result of any infringement of those rules.

Courts will, however, declare as invalid a clause that restrains a person's trade because of public policy grounds. To not be invalid, the restraint must be reasonable, both to the interests of the parties involved (e.g. a club and a player) and to the public.

Unreasonable or invalid clauses might include:

- stating that a player will never play for any other team

- establishing provisions for suspensions or disqualifications that are not directed at maintaining the rules but at removing the player
- preventing players from permanently supporting or endorsing the product of a sponsor's rival
- preventing players from using rival products.

There are further restrictions on anti-competitive behaviour in pt IV of the *Competition and Consumer Act 2010* (Cth), however, these do not apply to employment contracts.

Insurance in Sport

To minimise exposure from breaches of duties of care, public liability insurance is essential. Other essential insurances necessary to the wellbeing of any sporting organisation include players' medical insurance, insurance covering the premises and contents of buildings, and vehicle insurance.

Whether or not a sporting organisation can or should have insurance is a matter for the management committee to decide, but it must explain to the members at each annual general meeting if it decides not to take out public liability insurance, why it feels it is unnecessary and advise the members that the association's assets might be at risk if there was a successful claim against the association (s 70 Associations Incorporation Act). The management committee must also inform potential members (or potential management committee members) whether the association has public liability insurance and, if it does, the amount of coverage. If it is an owner or lessee of land or a trustee of trust land, public liability insurance must be taken out (s 70A Associations Incorporation Act).

For professional athletes, their employer may provide health insurance as part of the employment agreement. Statutory workers compensation schemes could apply (WorkCover in Queensland). Administrators of smaller social sport organisations might build in some basic insurance cover into the participants' membership fees, in which case players should consider their own more extensive insurance (which includes income protection for adult players). For further information on the law of insurance see the Insurance chapter.

Part 3: Liability Issues

Sport and Duty of Care

Occupier's liability to people on the premises

An occupier is a person or company in actual possession of a place or area. This could be an owner, landlord, a tenant, a licensee or any other person who has some legal authority to control how land is used and who is able to come onto the land. It does not have to be the person who owns the land. It is the person who has control over the land who owes a duty of care to participants, spectators and visitors who have lawfully, or even unlawfully, entered onto the land and suffered an injury. In each case this is a question of fact. Thus, if a local

council exclusively leases a ground to a tenant sporting club and gives it money for ground maintenance, the club is the occupier for the term of the lease.

As a consequence, sporting organisations that have control over land, especially where they can control who is able to enter onto the land, must ensure that any premises, and the playing and training surfaces are safe. The duty of care that arises from occupation as a result of the occupier's control and management is a duty to take reasonable care to avoid foreseeable risk of injury to anyone who attends a sporting event, and the scope of that duty will be adjudged on a case-by-case basis.

It is not possible to say if people want to come onto the land (including trespassers) that they assume any and all risks associated with that. As noted above, the basis of the duty is control over the premises or land (i.e. the control the occupier has over the conduct of others, knowledge of the state of the premises or land and knowledge of who is coming on to the premises or land).

Sporting organisations must ensure that:

- land and buildings are properly maintained
- dangerous areas and equipment are secured
- play equipment is maintained and is as safe as possible
- playing fields are at the standard that will not cause or exacerbate injuries.

Clearly, an occupier is liable to a sporting participant if they do not take reasonable steps to ensure that the venue or area is safe for participants. This does not mean that the occupier is an insurer for the injured party. What it does mean is that the occupier takes all reasonable steps to reduce or eliminate real or significant risks of which they have, or ought to have, knowledge, and to make the venue or area as reasonably safe as possible (see *Woods v Multi-Sports Holdings Pty Ltd* (2002) 208 CLR 460). Failure to ensure participant safety can arise from inadequate sporting surfaces, negligent conduct of operations at the venue, lack of warnings or proper signage warning of risk and not adequately providing for the safety of participants. Not all playing surfaces need to be 'first class'—many social sporting competitions take place on surfaces well below what professionals would play on. It will be a question of fact in each case as to whether the occupier has acted reasonably in the circumstances. For instance whether the costs of upgrading the surface and the social utility (benefit) that comes from community sporting facilities outweighs the risk of harm from their less-than-perfect state.

An event organiser is also under a duty of care to ensure that premises are reasonably safe for officials and spectators. The organiser needs to take into account the knowledge of the ordinary official or spectator. The court will consider whether reasonable diligence would have enabled the sporting organisation to have foreseen the accident that took place, and whether it should have taken steps to minimise the risk of injury to the official or spectator. To reduce the risk of liability (it is almost impossible to remove risk entirely), event

organisers should have risk assessment strategies in place in conjunction with risk management programs for players, officials and spectators.

It should be noted that the normal duty of care is increased once children become involved, whether as participants or spectators (see *Ohlstein bht Ohlstein & 3 Ors v E & T Lloyd trading as Otford Farm Trail Rides* [2006] NSWCA 226).

See the chapter on Accidents and Injury for more information on the elements of the civil wrong of negligence.

Sporting organisation's liability

Where a sporting body assumes the role of a rule maker in a sport where safety is important or where dangers abound, there is, arguably, a risk of a duty being owed by the organisation to each and every participant. The assumption of responsibility may be greater when the sporting body has extensive resources, such as full-time employees and administrators, insurance and sponsorship designed to attract viewers, and has extensive control of the sport's rules and their implementation.

On the other hand, administrators of an organisation whose sole purpose is to enable the sport to be enjoyed and who are part-time amateurs, assume less of a duty (see *Peter Joseph Haylen v New South Wales Rugby Union Limited* [2002] NSWSC 114, and *Agar v Hyde* [2000] HCA 41). As stated earlier, it is a question that would depend on what the sporting body is able to control and who is foreseeably at risk of suffering harm.

The courts are entitled to look at the public utility of sport weighed against the consequence that placing onerous duties upon administrators might have for the sport. Where there is little difficulty in terms of people power or cost to minimise the effects of a known sporting danger, there should arguably be steps taken to minimise the danger.

Ensuring a governing body's duties are satisfied is no easy task. Where the assumption of a duty is at the semi-professional or professional level, it at least involves the creation of specific rules, the authority and ability to enforce those rules through umpiring, the authority to sanction in the event of breach of the rules by a participant and the maintenance of an effective system whereby breaches of rules can be detected.

A sporting organisation may also find itself vicariously liable for the actions of a participant, coach or official, who causes injury to a third party. It is a form of strict liability, as the person held responsible for the acts or defaults of another may not have been personally at fault. The most common example is the relationship of employer and employee such as football club (employer) and football player (employee). If the player causes injury to a third party (e.g. an opposing player) in the course of their employment, the club as the employer may be vicariously liable.

For the club to be found liable, it has to first be established that the player was an employee, and then that they were acting in the course of their employment when they injured the third party. While a participant is authorised to play according to the rules, and it is expected that there will be infringements of the rules during the course of play, infringements will only be

tolerated up to a certain point. Thus, using illegitimate means, especially deliberately, to cause serious injury will not be tolerated (see *Canterbury Bankstown Rugby League Football Club Ltd v Rogers; Rogers v Bugden* (1993) Aust Torts Reports ¶81–426 and *McCracken v Melbourne Storm Rugby League Football Club and 2 Ors* [2005] NSWSC 107). If the act of the employee occurred in a way unrelated to their sporting role (e.g. an assault at a nightclub), this would likely not come under the employer's vicarious liability. However, a punch thrown after a scrum in a melee might result in liability for the employer if it can be shown that the melee and the punch were part of the game and thus part of the employee's employment.

Athlete's liability

An athlete owes a duty of care to other athletes and spectators. However, it may be that the standard of care that a player owes to another player is regulated by the legal relationship between the players. While this section focusses on the tort of negligence, it is also possible that liability for physical injuries might also arise under the tort of battery.

The courts have recognised that a participant is expected to do their best to win and have consistently stated that the duty of care owed by a participant must be regulated by what is reasonable in the circumstances. The rules of the sport are a good starting point for determining what is acceptable conduct, and what is not. It must, however, be stressed that the rules of any sport or game are not going to exhaustively determine the level or existence of a legal duty owed by one player to another. The sport's rules may be relevant to defences based on consent and acceptance of risk.

What the law seeks to avoid is injuries caused to players by reckless or dangerous play well outside the rules (*McCracken v Melbourne Storm Rugby League Football Club & 2 Ors* [2005] NSWSC 107). If the defendant has simply made an error of judgment in the heat of playing a fast-paced sport, generally the plaintiff is likely to fail in a negligence action (*Ollier v Magnetic Island Country Club Inc & Anor* [2004] QCA 316).

In situations involving participants and spectators, it will have to be shown that the participant failed to exercise such care as was reasonable in all the circumstances (i.e. that they blatantly disregarded the spectator's safety). Again, it must be necessary to consider the context in which the player is acting and the nature of the sport. For instance, kicking a football into a crowded stand is likely to be reasonable, as there are often legitimate reasons why a player would do this in a game, and the player would not be expected to consider whether their kick is likely to hit a particular person. This might be contrasted with a tennis player smashing a ball blindly into the crowd after a frustrating umpiring decision, where it could be argued that the player should have considered the risk of harm to others.

The liability of umpires, officials and coaches

Umpires and referees owe participants in a match a duty of care by sensibly applying the rules of the game.

The factual context within which particular events take place will shape the duty of care. The level of care required is that which is appropriate in all the circumstances, and the threshold for liability is generally high because the officials only have limited prospective control over what occurs in the game. An umpire or referee is unlikely to be held liable for errors of judgment, oversights or lapses in applying the playing rules. However, liability may arise where the umpire or referee fails to ensure the safety of players by negligently allowing breaches of the rules that endanger the safety of the players and ultimately lead to the injury of a player. It follows, that an organising body that engages umpires or referees may also be vicariously liable as well as independently liable in negligence, if it can be established by the plaintiff that they suffered the injury because the umpire or referee had not undergone sufficient or proper training.

Officials and coaches owe a duty of care to participants. For example, it is often the responsibility of an official (or the relevant council if they have responsibility for the field of play) to determine the playability of the field, including for training purposes. If they fail to ensure that the ground is in a safe condition to train or play on, the official may be in breach of their duty of care towards the plaintiff (see *Wagga Wagga City Council v Mark Sutton* [2000] NSWCA 34). And it is certainly the responsibility of officials to set safe standards of competition. A coach must ensure that their training methods are safe and appropriate to the skill level of the athlete. While a coach's role is to 'push' their athletes, this must not be done carelessly by expecting the athlete to perform at a level that is too advanced.

Importantly, sporting organisations, coaches and officials should ensure that adequate first aid and emergency services are available to respond to any injury. The more dangerous the sport, the more comprehensive the service should be, particularly if there is little difficulty in terms of people power or cost to minimise the effects of a known sporting danger.

Liability towards children

Many parents coach or umpire junior sports. Obviously, as parents or carers of children, those people have a special responsibility to ensure children are not unnecessarily hurt. Where children are concerned, it is also necessary to recognise that those responsible for coaching or umpiring/refereeing children may owe a higher standard of care than they would to adults, because a child is less able to appreciate the risks involved.

Supervision of activities is a critical element of the duty, especially in dangerous situations such as swimming training, trampolining, boxing and wrestling. The coach should have knowledge of anatomy and the injuries common to the particular sport, and risks of playing or training when it is hot (for more information see Sports Medicine Australia's resources on hot weather).

Coaches should be appropriately qualified or at least have a basic knowledge of the skills of coaching (Sport Australia offers free online basic coaching and officiating courses) and provide adequate preparation.

Children must not be allowed to participate in competitive sport until the coach believes that the child has a good understanding of the rules, is physically capable of playing and is

physically prepared on the playing day. This also includes providing appropriate instruction, especially in terms of how to avoid unnecessary injury. This instruction must be prioritised ahead of instruction on how to win.

Coaches and umpires must explain to the child and the parents the danger of any sport and, more particularly, the danger of any particular element of the sport. Further, dangerous play by children must be warned against and sanctioned.

Coaches, other officials and sporting organisations may be liable for poorly maintained equipment or grounds that cause injuries to children. Examples may include protective clothing and equipment for hockey and cricket, suitable padding for gymnastics, suitable padding around goalposts in football and ensuring the wearing of mouth guards, eye protection and helmets where necessary.

Liability may even extend to injuries caused by other people if it was reasonably foreseeable that the injury might occur. An example of this is where a coach asks a child to fit goalpost pads, but that child fails to do it or fails to do it properly and another child is injured.

Defences to Civil Liability

Contracting out of responsibility

Waivers, indemnity or exclusion clauses abound in contracts, but in most cases actually provide little if any real protection for the person relying on the clause at common law and are often seen by courts as being attempts to circumvent legal duties and responsibilities. In practice, courts may interpret any ambiguity in such exclusion clauses ‘strictly’, that is, against the person relying on them.

Courts will, however, uphold indemnity or exclusion clauses when they are easily understood and not ambiguous in any way, well known by the people they may affect and cover the incident that causes the injury. Provided the clause fully explains the risks of harm that are possible in the sport and notice of the clause is provided prior to the contract being finalised, this should protect a sporting organisation should those risks materialise. However, an exclusion clause will not provide protection where the injury occurred outside of what the clause could have contemplated (e.g. that the sporting organisation had knowingly allowed competition to take place on an unsafe field or knowingly provided defective equipment).

In addition, sch 2 of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) contains the Australian Consumer Law (ACL) and deals with various aspects of consumer protection. If an exclusion clause is likely to mislead or deceive, then it might breach s 18 of the ACL. There are also important guarantees for consumers (e.g. s 60 of the ACL provides that services will be provided with due care and skill), which cannot be contracted out of.

However, there is also protection available to recreational service providers under the ACL (i.e. providers of services which consist of participation in a sporting activity or similar leisure-time pursuit, or an activity that involves a significant degree of physical exertion or

risk). Recreational service providers are permitted to limit their liability for death or personal injury caused by their failure to provide services with due care and skill under s 139A of the Competition and Consumer Act by the use of an exclusion clause, which would otherwise be void under s 64 of the ACL. However, the exclusion clause will still not protect the provider if their conduct is deemed 'reckless' as opposed to merely 'careless' (s 139A(5) Competition and Consumer Act).

Notwithstanding the protection available under the ACL to recreational service providers, if a sporting organisation wishes to have an indemnity or exclusion clause for any reason, it should consult a lawyer to draft the clause.

Defences to negligence

Even if a breach of duty is proven and loss or damage occurs as a result, the defendant can still evade liability, partially or fully, by successfully proving one of the defences to negligence. These defences are detailed in the Accidents and Injury chapter, and include two 'general' defences:

- voluntary assumption of risk (which incorporates the legislative notion of 'obvious risks')
- contributory negligence (where the injured person failed to take reasonable care of their own safety).

Consent, which may be expressed or implied, also operates as a defence to the tort of battery.

A specific defence that applies to sport is that of 'dangerous recreational activity' under s 19 the *Civil Liability Act 2003* (Qld). A dangerous recreational activity is one which is '… engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person'. If someone is injured from an obvious risk (i.e. a risk that is obvious to a reasonable person in the same circumstances) of such an activity, there is no liability imposed, regardless of whether the injured person was in fact aware of the risk.

Some examples where a court has found an activity to be dangerous include horse racing, white water rafting, skiing and riding a BMX bike at a skate park. Riding a bicycle in a normal way and sports designed to minimise contact, such as Oztag, have been found not to be dangerous.

Sport and Criminal Law

Violence in sport and offences against the athlete

The rules of any sport may determine what is acceptable conduct for the purpose of that sport. Sporting rules, however, never displace society's rules, particularly the criminal law. For example, a punch in the heat of a football game may result in injuries the law calls 'actual bodily harm' or even 'grievous bodily harm' (e.g. loss of a body part/organ, serious disfigurement or injuries that, if left untreated, might cause permanent injury to health or endanger life).

Any application of force to another person, regardless of whether injury results, is potentially an assault (s 245 *Criminal Code 1899* (Qld) (Criminal Code)). However, consent of the victim plays a very important part in determining whether or not a criminal offence has been committed. Players consent to the normal occurrences that are to be expected when playing the game, even if these actions are breaches of the rules of the game. In a game of rugby league, players expect to be physically tackled, even where a defending player tackles an opponent from an offside position (i.e. in breach of the rules), this would not revoke the implied consent of the attacking player to be tackled, because this type of rule infringement is a regular occurrence in rugby league. By contrast, a rule infringement in the form of a punch to an opponent's head, may be considered outside of a what a player has consented to.

Criminal liability could also extend to a coach, as an accessory to an assault, if it could be shown that the coach encouraged or instructed their player to illegally injure an opponent.

While consent negates what might otherwise constitute a common assault, there are levels of serious assault in which the applicability of the criminal law does not rely on a lack of consent (s 246(2) Criminal Code). This can vary across jurisdictions but, for example in Queensland, a person cannot consent to grievous bodily harm (because an assault is not an element of that offence, and consent is not otherwise mentioned in it (s 320 Criminal Code)).

Players do not impliedly consent to dangerous or violent conduct outside the normal occurrences of the game. Coaches and selectors who select violent players and encourage their style of play by continually selecting them and giving them no warning to stop their activities might be considered to be aiding and abetting.

The fact that players rarely sue for injuries sustained on sporting fields (for a notable exception see *McCracken v Melbourne Storm Rugby League Football Club & 2 Ors* [2005] NSWSC 107) and that police rarely investigate assaults on sporting fields does not mean that some future criminal liability may not attach to actions that are within the rules of the sport but outside the boundaries of criminal law. Combat sports such as boxing, and perhaps more particularly, mixed martial arts, may occupy an uncertain position with respect to criminal liability, because of the potential seriousness of the harm that can be caused. Queensland does not currently regulate combat sports, whereas some other states do.

Protecting children from abuse in sport

It is a sad reality that some children are abused, both physically and emotionally, while participating in sporting activities. A common form of abuse occurs when sporting organisations, officials or parents place undue pressure on children to perform. The result is that children can suffer psychologically, emotionally, perform below their normal standard at school and in sport, and generally resist participation in activities they formerly enjoyed. From a criminal law perspective, physical and sexual abuse are offences.

Sport Integrity Australia (not to be confused with Sport Australia) took over responsibility for safeguarding children in sport policies in 2020. They provide access to guidelines and resources to assist clubs in creating child-safe sporting environments. These also include

templates for recording incidents of potential abuse. The resources from both Sport Australia and Sport Integrity Australia can be located on the Clearinghouse for Sport website.

There are also screening requirements in place for people who work with children, commonly referred to as a 'Blue Card'(see *Working with Children (Risk Management and Screening) Act 2000* (Qld) (Working with Children Act) and the Blue Card Services website for further explanation). Volunteers, trainee students, paid employees and people operating a business who work with children in sport may need a Blue Card or exemption card. A volunteer generally does not need a Blue Card if they are volunteering at the same place as their own child is participating in the activity (unless that person has been previously disqualified).

Criminal offences exist for individuals for example for starting to work with children without a blue card or for continuing to do so if charged with a disqualifying offence. Offences also exist for organisations in running a child-related business without having a risk management strategy that complies with the Working with Children Act or for employing someone without a Blue Card.

Organisations falling within the Blue Card system are required to implement a child and youth risk management strategy. This requires an organisation to include in their strategy eight minimum requirements:

- a statement of commitment to maintaining the safety and wellbeing of children and young people
- a code of conduct outlining the organisation's values and setting out clear expectations of stakeholders
- policies for recruiting, selecting, training and managing employees and volunteers
- procedures for handling disclosures and suspicions of harm to ensure a rapid response to a disclosure, allegation or suspicion of harm
- a plan for managing breaches, which must include a statement about the consequences for stakeholders who fail to follow procedures
- policies and procedures for screening and keeping track of all blue card or exemption holders
- a risk management plan for high-risk activities and special events
- strategies for communication and support.

There are resources online to assist in drafting your risk management strategy, as well as many other aspects of compliance with the Blue Card system. It is highly recommended that all junior clubs and organisations consult these resources.

Finally, it should be noted that the law regarding the reporting of child sexual abuse was strengthened in July 2021. It is now an offence for any adult not to report to police the sexual offending against a child by another adult (s 229BC Criminal Code). A child is someone

aged under 16, or 18 if they have a mental impairment. The obligation arises once an adult believes on reasonable grounds, or should reasonably believe, that the child has been a victim of sexual abuse (even if the abuse itself happened prior to this law taking effect).

Part 4: Integrity of Sport Issues

Drugs in Sport

Anti-doping bodies and framework

The World Anti-Doping Code (WAD Code), with over 193 countries and 570 sporting organisations as signatories, is administered by the World Anti-Doping Agency (WADA) and attempts to harmonise anti-doping policies and practices across all sports and countries by ensuring that athletes are treated the same and that similar penalties apply for breaches of the WAD Code. The most recent version of the WAD Code commenced in 2021. International sporting federations must have an anti-doping policy that complies with the WAD Code.

In Australia, the federal government is responsible for implementing national anti-doping arrangements that are consistent with the principles of the WAD Code. To achieve this, Sport Integrity Australia (formerly known as the Australian Sports Anti-Doping Authority (ASADA)) is established by the *Sport Integrity Australia Act 2020* (Cth) (Sport Integrity Australia Act) to be Australia's national anti-doping organisation. It has developed a comprehensive anti-doping program encompassing deterrence, detection, enforcement and education activities.

Under that Act, Sport Integrity Australia is empowered to make a National Anti-Doping Scheme (NAD Scheme). The NAD Scheme is contained in sch 1 of the *Sport Integrity Australia Regulations 2020* (Cth) and largely mirrors the most recent WAD Code, with additional sections to support domestic investigation and enforcement.

The term 'athlete' is broadly defined under s 4 of the Sport Integrity Australia Act as '… anyone who has competed in sport in the last 6 months …' if that sport has an anti-doping policy. If a national sporting organisation wishes to receive Sport Australia funding, they must have developed an anti-doping policy that is compliant with the WAD Code and NAD Scheme. The rules on doping are not confined to just professional athletes, however, as a matter of practical enforcement, such athletes are the focus of testing efforts. Support persons who work with or treat an athlete (e.g. medical staff, coaches, advisors) are also bound by sections of the WAD Code and NAD Scheme.

While all athletes competing at international and national events will definitely be subject to WADA and Sports Integrity Australia testing (both in and out of competition), some professional sporting organisations, such as the Australian Football League and the National Rugby League, also include clauses within standard player contracts requiring players to submit from time to time to drug tests and provide biological samples at the request, expense and under the direction of those organisations.

For amateur sport and local and suburban sporting organisations, the response to doping is no less important. Whilst there may be limited resources to regularly test players, it is incumbent on officials, coaches and players to ensure that their sport is drug free.

Violations

Each year, WADA produces the *World Anti-Doping Code International Standard Prohibited List*, which lists the prohibited substances and prohibited methods. Some substances are banned at all times (e.g. drugs having an effect on growth or recovery such as anabolic steroids) while other substances such as stimulants, are only banned in competition periods as their performance-enhancing effect is short lived.

There are 11 different types of anti-doping rule violation under the WAD Code and NAD Scheme, with the most common including:

- presence of a prohibited substance
- use, or attempted use, of a prohibited substance or method
- evading, refusing or failing to provide a sample
- whereabouts failures.

Only 'presence of a prohibited substance' is established by testing of the athlete's blood or urine samples according to WADA's International Standard for Testing and Investigations, and International Standard for Laboratories.

Other violations can be proven with any reliable means (e.g. documentary evidence, witness testimony). The standard of proof used is to the 'comfortable satisfaction' of the tribunal, which is described as more than balance of probabilities but short of proof beyond a reasonable doubt.

It is important to realise that doping violations of 'presence' and 'use' are offences of 'strict liability', which means that there is no need for an athlete to be shown to have acted intentionally, recklessly or negligently.

Sanctions and mitigating factors

Any violation committed in competition automatically results in disqualification from the even and the forfeiture of any medals, prizes or points. Depending on the type of substance involved, a first doping offence would result in a period of ineligibility from all WAD Code-compliant sports for either two or four years.

This period can be reduced through the athlete establishing 'no fault or negligence' (which is exceptionally difficult to do. The example given in the WAD Code is where the violation occurs through deliberate sabotage from a competitor), or 'no significant fault or negligence' (articles 10.5 and 10.6 of the WAD Code). Where an athlete seeks to argue these in relation to a 'presence' violation, they must then also satisfy the decisionmaker of how the substance did enter their system. For example, it is not enough to speculate that contamination of

vitamins or meat may have been the cause, but rather to prove this on the balance of probabilities.

A different route to reducing the sanction is for the athlete to establish that the violation was not intentional (article 10.2 WAD Code). While this looks similar to no fault, it does not require an athlete to establish the source of how a substance entered their system. This difference was upheld in the case of Australian swimmer Shayna Jack, who in 2021 successfully had a four-year ineligibility reduced to two years on the grounds that the presence of a prohibited substance in her system was not intentional. She had spent considerable amounts of money in trying to establish the actual source, but had ultimately been unable to pinpoint it. However, the Court of Arbitration for Sport accepted that she had not intentionally ingested what was a very small quantity of the prohibited substance.

Athlete pleas for reduction are not often successful, as an athlete is solely responsible for what they are taking and for their choice of support staff. Merely following a coach's or doctor's advice on supplements does not amount to no significant fault or negligence.

Prompt admission of wrongdoing or cooperation with a doping authority may constitute an exceptional circumstance that reduces the period of ineligibility.

Procedural issues

Sport Integrity Australia is a testing authority and does not act as a disciplinary body. Where a violation is suspected after a Sport Integrity Australia test or investigation, there is a process that is followed. This process will be governed by anti-doping policy of the particular sport. Since 2021, many sports have agreed to adopt the National Anti-Doping Policy, which is a standard template policy created by Sport Integrity Australia for consistency across sports. At the time of writing, 96 national federations have transitioned to this option. However, even for those sports who retain their own anti-doping policies (current examples include AFL, Rugby League, Cricket and Football), there will be some level of consistency, as these policies must be consistent with the NAD Scheme, which itself is consistent with WADA documents, including the International Standard for Results Management.

Initially the CEO of Sport Integrity Australia, if satisfied an anti-doping rule violation has occurred will issue an assertion to the athlete, as well as notifying the athlete's international and national federation. The athlete is provided with information about the violation and the sanctions being recommended. Should the athlete wish to contest this assertion, a hearing will be convened.

Many sports have their own internal doping tribunal, either at national or international federtion levels. Other sports in Australia may choose to utilise the National Sports Tribunal as the first-instance decisionmaker. This body is the default provided for the sports who utilise the standard National Anti-Doping Policy. Where a violation occurs at an international meet or event, the relevant international federation may have chosen to use the anti-doping division of the CAS as their independent panel. Ultimately, it is up to the anti-doping policy of the relevant sporting organisation, however, all options require the athlete to receive a fair hearing (article 8 WAD Code).

The decision of the initial tribunal may be appealed depending on the anti-doping policy of the sport in question. Such appeals may be to an internal appeals tribunal, to the Appeals Division of the National Sports Tribunal or the Appeals Division of CAS. Sometimes an appeal can be made more than once. WADA reserves the right to appeal any decision to CAS in order to protect the consistent application of anti-doping rules around the world.

It should be noted that many prescription medicines contain prohibited substances. If an athlete is required to take such a prohibited substance to control a health problem, there is process to apply for a 'therapeutic use exemption'. Such an exemption protects an athlete from an anti-doping violation resulting from the standard use of that product.

Gambling and Match Fixing in Sporting Events

Gambling on sporting events is estimated to be a $20 billion per year industry. Despite the gambling sector being regulated, questions are being asked about the integrity of Australian sport and the possibility of match fixing.

Racing industry

Notwithstanding some federal intervention, gambling is basically governed by state legislation. In particular, horse and greyhound racing in Queensland is covered by the Racing Act. The Racing Act governs the regulation of racing codes by establishing control bodies. In conjunction with this Act, the *Wagering Act 1998* (Qld) also regulates the licensing and operations of bookmakers and the TAB, and provides for offences for certain other types of racing-related betting. Finally, the *Racing Integrity Act 2016* (Qld) aims to safeguard the integrity of racing sports, primarily through the creation of an independent Racing Integrity Commission, as well as protecting the welfare of the animals involved in the industry.

Match fixing

In addition to traditional criminal sanctions for 'fraud' (s 408C Criminal Code), all Australian state and territory jurisdictions have specific offences related to match fixing. The Commonwealth Government also created the National Integrity of Sport Unit, which has now been absorbed into Sport Integrity Australia (the same body who is responsible for anti-doping).

The specific match-fixing offences in Queensland are found in ch 43 of the Criminal Code. It covers:

- engaging in match-fixing conduct (s 443A)
- facilitating match-fixing conduct or arrangement (s 443B)
- offering a benefit or threatening a detriment to engage in match-fixing conduct (s 443C)
- using or disclosing knowledge of match-fixing conduct or arrangement for betting (s 443D)
- encouraging a person not to disclose match-fixing conduct or arrangements to authorities (s 443E)

- using or disclosing inside knowledge for betting (s 443F).

‘Match-fixing conduct’ means any conduct that affects (or could reasonably be expected to affect) the outcome of a sporting event or the happening of sporting contingency. This definition covers the more recent markets in contingency betting (sometimes known as spot bets), where the bet is placed on the happening of certain micro-events within a match (e.g. whether a cricket bowler will bowl a no-ball or not). A player’s willingness to join a spot-fixing conspiracy may be greater as the corrupted contingency may not affect the overall result of the match.

There is no requirement for the fix to be successful. Conduct that could reasonably be expected to affect outcomes is still covered. Additionally, a person who engages in match-fixing conduct does not need to personally profit from doing so.

All of these provisions, except s 443F of the Criminal Code, carry a maximum jail sentence of 10 years.

The s 443F offence (using or disclosing inside knowledge for betting), is somewhat different to the other five because it is not match fixing per se. It is protecting the integrity of the gambling market against those with greater knowledge than the rest of the market, much the same way that insider trading laws seek to do that with trading in shares. Its maximum sentence is two years imprisonment.

Legal Notices

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