Sport

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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. Many suburban sporting clubs now employ full-time management staff, as well as other part-time staff, in order to operate the organisation. While volunteerism in local sporting organisations is still critical, there is increasing dependence on professional management.

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.

Structure of Sporting Organisations

Incorporation

People are free to form clubs and associations for any purpose. Informal groups could choose to remain ‘unincorporated’ that is, their club is just the same as the individuals in it.

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 (usually ‘limited by guarantee’ in sport) are dealt with under the Corporations Act 2001 (Cth) and are more suited to large national sporting bodies. For bodies more at grass roots level, incorporation under the Associations Incorporation Act 1981 (Qld) (Associations Incorporation Act) may be 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).

Promotion and Ownership of Sporting 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. Notwithstanding this, the promoter does not have an exclusive legal ownership of the event. If a promoter wants to control the event, this is done through the use of 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) (Sports Facilities Act) applies to major stadiums and venues throughout Queensland, as prescribed by the Major Sports Facilities Regulation 2014 (Qld). Under the Sports Facilities Act, a ticket holder can resell a ticket, 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 prevents scalping, although on a one-off basis, scalping is difficult to police. Scalping on a commercial level can be prevented by injunction (a court order which restrains certain conduct).

**Sponsors**

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 Sports Facilities Act, ss 32-35 of the Major Events Act and s 52 of the Commonwealth Games Arrangements Act 2011 (Qld) are all legislative attempts to restrict the opportunities for ambush marketing at major sporting events.

**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.

**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 natural justice. The sports of racing (thoroughbred, harness and greyhound) have dispute resolution procedures which are specified by legislation (see the Racing Act 2002 (Qld) (Racing Act)).

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. It would be more likely for a court to hear a dispute where a breach of contract is alleged (e.g. where a participant alleges they were dealt with by the sporting association in a way contrary to the association’s rules, that is the contract).

When dealing with a sporting association that is an incorporated body, its constitution or rules of association have contractual force by virtue of legislation. 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 function damage, where decision affects property rights of the member, to prevent an unreasonable restraint of trade, or for other policy reasons.

A court will not look at the merits of the tribunal’s decision. Courts, however, will get involved if it can be shown that there has been a denial of natural justice where it was required. This may be implied into the contract between the parties, or in the case of sporting associations incorporated in Queensland under s 71 of the Associations Incorporation Act. A court may require that a party exhaust any other appeal avenues first.
Denial of natural justice

Natural justice can be a somewhat fluid concept, and satisfying it will depend upon the facts of each case. At a basic level, it requires:

- a fair hearing:
  - 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 duplicitious (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)

- an honest verdict:
  - the tribunal must come to its decision honestly and without actual bias
  - the tribunal decision must be bona fide 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 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 important that the decision be made honestly. This might mean than a tribunal should not base its decision on evidence which is clearly unreliable.

Note also that it is not a requirement of natural justice for a member to be allowed legal representation. However, should a member ask for such, particularly when facing a serious charge, it may be prudent for the sporting association to allow this.

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 the 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.

Should natural justice be lacking in the tribunal decision, a court may invalidate the decision.

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 International Olympic Committee 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 and has two permanent sections, the Ordinary Arbitration Division (OAD) and the Appeals Arbitration Division (AAD).

The OAD resolves 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. The AAD hears appeals from the OAD or from sporting organisations where the rules allow for appeals to go to CAS on matters such as disciplinary decisions (including anti-doping disputes), qualifications of athletes for competitive purposes and decisions concerning the official recognition of events. Private contracts may also provide for dispute resolution in the OAD and AAD. Both the OAD and the AAD are constituted by a panel selected from a large pool of arbitrators and mediators—people with experience in both the participation and management of sport.

The Court of Arbitration for Sport has the authority to set up a forum anywhere (the ‘Ad-Hoc Division’), which it does during major sporting events such as the Soccer World Cup or the Olympics. 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 the contract, parties agree to be bound. To strictly enforce an arbitration decision, parties go to court to enforce the contract. As a consequence, CAS is private and takes place outside media scrutiny. Generally, the contracts or rules discussed above require confidentiality of any arbitration, however, parties can agree otherwise.

The Court of Arbitration for Sport is popular for international disputes because it eliminates the problem of determining in which jurisdiction a dispute is heard.

As one might expect, CAS deals heavily with anti-doping disputes, as this now constitutes one of the main international sport law issues.

Discrimination in sport

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, race or religion. 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.

There are, however, certain exemptions which allow sporting organisations to restrict participation to:

- 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
• people who can effectively compete
• people of a specific age or age group
• people with a specific or general impairment (s 111(1) Anti-discrimination Act).

Junior sporting organisations must be aware of the application of s 111 (Anti-discrimination Act) and there is a similar provision in s 42 of the *Sex Discrimination Act 1984* (Cth). Boys or girls under 12 cannot be prevented from playing a particular sport, and after age 12, only if the restriction is reasonable because of strength, stamina or physique requirements of the sport. There is nothing in the legislation that allows a sporting club to prevent a girl from playing the sports, even against boys, if she can effectively compete (see *Taylor v Moorabin 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.

Racial abuse (or racial vilification) on sporting fields by players and umpires, as well as by spectators, has also received media attention. In response, the Australian Football League moved to sanction players involved in racial abuse by creating Rule 30, which prohibits racial discrimination and has incorporated new conditions for spectator entry that anyone found racially abusing players from the stands will be evicted. Suburban sporting organisations, while not having the same coercive power with respect to their players and spectators, still have a responsibility to prevent racial abuse of players, or anyone else, which is reinforced by s 124A of the Anti-discrimination Act.

In order to prevent discrimination of all forms (including sexual harassment) occurring within sporting organisations, procedures as outlined by the Australian Sports Commission and by Play by the Rules should be followed.

**Drugs in Sport**

The World Anti-Doping Code (Anti-doping 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 Anti-doping Code.

In Australia, the federal government is responsible for implementing national anti-doping arrangements that are consistent with the principles of the Anti-doping Code. To achieve this, the Australian Sports Anti-Doping Authority (ASADA) has developed a comprehensive anti-doping program encompassing deterrence, detection, enforcement and education activities. The authority’s powers and functions are contained in the *Australian Sports Anti-Doping Authority Act 2006* (Cth) (ASADA Act) and the *Australian Sports Anti-Doping Authority Regulations 2006* (Cth), which includes the National Anti-Doping Scheme (Anti-doping Scheme). The Anti-doping Scheme largely mirrors the most recent Anti-Doping Code. The Australian Sports Commission has also developed an anti-doping model for national sporting organisations.
Drug testing of competitors in Australia is the responsibility of ASADA. The term ‘athlete’ is broadly defined under s 4 of the ASADA Act, and the athletes able to be tested are listed in the Anti-doping Scheme. The Anti-doping Code also catches support persons who work with or treat an athlete participating in, or preparing for, sporting activities.

Professional sporting organisations such as the Australian Football League, the National Rugby League, the Australian Rugby Union and Cricket Australia 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. These sporting organisations then provide for penalties for failure of a drug test by ASADA. The penalties must be consistent with the penalties set out under the Anti-doping Code, although the period of ineligibility may be reduced or eliminated on exceptional circumstances, including cooperation with ASADA. If a national sporting organisation wishes to receive Australian Sports Commission funding, then they must have developed an anti-doping policy which conforms to the commission’s anti-doping policy standards and is compliant with the Anti-doping Code.

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.

Each year, WADA produces the ‘Prohibited List’ International Standard, 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 like stimulants are only banned in competition periods as their performance-enhancing effect is short lived.

There are a number of different types of anti-doping rule violation, 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 failure
- tampering with doping controls
- possession of a prohibited substance or method
- trafficking, or attempted trafficking, of a prohibited substance or method
- administration, or attempted administration, of a prohibited substance or method
- complicity (e.g. aiding, abetting) in any of the above
- prohibited association with people who have violated the Anti-doping Code.

Only ‘Presence of a prohibited substance’ is established by testing of the athlete’s blood or urine samples according to the International Standard for Testing and 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 reasonable doubt.

It is important to realise that doping violations 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. Depending on the substance, a first offence would normally result in a period of ineligibility from all Anti-doping Code-compliant sports for two or four years. Appeals are usually unsuccessful as an athlete is solely responsible for what they are taking and for their choice of support staff, so merely following a coach’s advice on supplements does not amount to ‘no significant fault or negligence’. Cooperation with a doping authority may constitute an exceptional circumstance which reduces the period of ineligibility.

The Australian Sports Anti-Doping Authority is a testing authority and does not act as a disciplinary body. Where a violation is suspected, ASADA refers the case to an independent statutory authority, the Anti-Doping Rule Violation Panel, whose function is to determine if a possible violation has occurred. Their decision can be appealed to the Administrative Appeals Tribunal. If it is found that a possible violation occurred, the athlete is then brought before a tribunal in their sport (as established in the sport’s anti-doping policy) for a determination of guilt and appropriate sentence. Depending on the particular sport’s policy, it may be possible to appeal to an appeals tribunal within the sport or to the Court of Arbitration for Sport (CAS) (for more information see the ASADA website).

The onus of proof is on ASADA to establish that an anti-doping rule violation has been committed to the ‘comfortable satisfaction of the tribunal’. If the athlete wishes to argue that an exceptional circumstance exists, they must prove this on the balance of probabilities.

If an athlete is required to take a prohibited substance to control their health problem, they can apply for a therapeutic goods exemption and if tested positive will not have breached the Anti-doping Code.

**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, the publicity given to the Australian Crime Commission’s paper *Organised Crime and Drugs in Sport* has led to questions being asked about the integrity of Australian sport and the possibility of match fixing.

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 boards. It also regulates the licensing and operations of bookmakers and the TAB, and provides for offences for certain other types of racing-related betting.

Much more difficult to control is interstate and international gaming via telecommunications (including the internet). The Commonwealth Government’s *Interactive Gambling Act 2001* (Cth) regulates internet-based gambling services.
In addition to traditional criminal sanctions for fraud (s 408C Criminal Code Act 1899 (Qld) (Criminal Code)), all Australian jurisdictions have specific offences related to match-fixing, and the Commonwealth government has also been proactive by creating the National Integrity of Sport Unit.

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 which 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 fixed contingency may not change 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.

**Intellectual Property and Broadcasting of Sporting Events**

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 a right is given is intangible. One of the main areas of intellectual property is copyright which is regulated by the *Copyright Act 1968* (Cth).

Once a broadcaster (e.g. a TV station) obtains the right to broadcast a sporting event, 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 which owns or runs the event (see *Copyright and Moral Rights* chapter).

Trademarks are another form of intellectual property governed by the *Trade Marks Act 1995* (Cth). A trademark is generally a letter, word, name, signature or other form of sign that is used to distinguish goods or services. The use of trademarks by sponsors is increasingly important in all levels of sport. Before a company can use a trademark or declare it to be intellectual property capable of attracting rights, it must be registered as a trademark pursuant to the legislation mentioned above. Such a trademark should not mislead or deceive people as to which product it refers to, and the trademark
should not be used where it gives the wrong impression that a sportsperson or sporting organisation endorses the product associated with the trademark. This means that before trademarks can be used, trademark owners must engage in contractual sponsorship relations with sportspeople or sporting organisations. The use of selective endorsement (where well-known sportspeople endorse a particular product) can be a powerful commercial tool for prudent sportspeople and organisations.

Finally, it should be mentioned that athletes do not have intellectual property in their own images. However, a broadcaster or company can be stopped from publishing an image that gives the wrong impression that the athlete is connected in some way to a certain product or endorses that product. 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).

**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 will 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 means that they can agree to:

- not play for any other team (particularly after announcing a retirement)
- not discuss playing terms with any other team during the life of a contract
- most 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 a clause restraining a person’s trade to be invalid 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 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) (Competition and Consumer Act), however these do not apply to employment contracts.

**Privacy of Sportspeople**

Sportspeople at all levels of sport have a right to privacy, and unless the player gives authorisation for any person to publish details of injuries, treatments and recovery, such publication will 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, it is clear that if photographs of sportspeople are taken, and those photographs imply a certain behaviour, attitude, morality or social standing of the player that is defamatory, the player can sue (see the Defamation chapter).

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 Incorporated Associations 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 Incorporated Associations Act).

Administrators of smaller organisations often encourage players to have their own insurance (which includes income protection for adult players). For further information on the law of insurance see the Insurance chapter.

Sport and Duty of Care

Obligations, civil wrong and contract

When a spectator buys a ticket that entitles entry into a tennis match, the spectator and the sporting organisation hosting the game have a contract. The sporting organisation owes the spectator a duty of care (usually implied) pursuant to contract (see the chapter on Accidents and Injury for more information on the elements of the civil wrong of negligence).

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 risk associated with the land. 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 as safe as possible
- playing fields are at the standard that will not cause or exacerbate injuries.

Clearly, an occupier is liable to a 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’. It will be a question of fact in each case as to whether the occupier has acted reasonably in the circumstances.

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 which 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).

**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 may be greater when the administration has extensive resources, such as
full-time employees and administrators, insurance and sponsorship designed to attract viewers, and the threshold for liability is very high.

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).

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 maintaining 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, the authorisation of the use of illegitimate means that lead to serious injury of a third party 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 was a spontaneous act of retributive justice, such as a punch thrown in a scrum in rugby, an employer will not be liable. 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. It must be stressed that the rules of any sport or game do not determine the level or existence of a duty of care owed by one player to another.

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. What the law seeks to avoid is injuries caused to players by reckless or dangerous play well outside the rules (McCacken v Melbourne Storm Rugby League Football Club & 2 Ors [2005] NSWSC 107). If the defendant has simply made an error of judgment, generally the plaintiff is likely to fail in a negligence action (see also 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).

**Umpire’s and official’s liability**

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 high. 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, which 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 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 ensure safe standards of competition.

Importantly, sporting organisations, coaches and officials are responsible for providing first aid and emergency services 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.

**Umpire’s and official’s liability regarding 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 owe a higher duty of care than they would to adults.

Supervision of conduct 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, or playing or training when it is hot (for more information see Sports Medicine Australia’s UV Exposure and Heat Illness Guide).

Coaches should be appropriately qualified or at least have a basic knowledge of the skills of coaching (the Australian Sports Commission 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 person to fit goalpost pads, but that person fails to do it or fails to do it properly and a child is injured.

**Contracting out of a Duty of Care in Sport**

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 tend to interpret such exclusion clauses strictly 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.

In addition sch 2 of the 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 would breach s 18 (and probably s 29) of the ACL. 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 that involves a significant degree of physical exertion or risk, although it probably does not extend to extreme adventure sports). Recreational service providers can 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.
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

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.

Sport and Liability in 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 grievous bodily harm (i.e. injuries that, if left untreated, might cause permanent injury or death, even if treatment is available).

The criminal law of Queensland states that a person cannot consent to punches that cause grievous bodily harm.

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 which are within the rules of the sport but outside the boundaries of criminal law.

In terms of simple assault (or common assault) where the injuries are less serious, consent plays a very important part in determining whether or not a criminal offence has been committed. Players consent to the normal occurrences to be expected when playing the game. However, there will be some actions that will still constitute common assault even though they may appear to be insignificant because they may or may not involve physical contact.

Players never consent to dangerous or violent conduct outside the rules of the game and 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 may be considered to be aiding and abetting.

Administrators of sport have an important duty to minimise unnecessary violence (i.e. violence that is not directed towards achieving the purpose for which the sport is played) via the sport’s disciplinary procedures.

Liability and children 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.

The Australian Sports Commission produced guidelines for sporting organisations including a document entitled Harassment-free sport: protecting children from abuse in sport. There are also screening requirements in place for people who work with children (Commission for Children and Young People and Child Guardian Act 2000 (Qld) (Commission for Children and Young People and Child Guardian Act)). 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 does not need a blue card if the:

- person is a volunteer at a national or state sporting event organised by a recognised body
- event is attended by more than 100 people
- work is for 10 days or less on no more than two occasions per year
- person is unlikely to be alone with a child without another adult being present.

Applicants must apply for a Working with Children Check, and successful applicants are issued with a Blue Card, which is valid for three years. The program provides for ongoing monitoring of an individual’s suitability for child-related work. If a criminal offence (e.g. a sexual offence or an offence related to the harm or mistreatment of a child) is committed during the card’s validity, or if a person is subject to a relevant work-related disciplinary matter, the commission may inform the relevant employer of the offence and alter or withdraw the certification. All sporting organisations should be aware of their obligations under the Commission for Children and Young People and Child Guardian Act and should particularly pay attention to the recommendations of the Australian Sports Commission.

Sporting organisations should:

- use only accredited coaches and officials. Such accreditation is to include information regarding the correct treatment of children
- adopt a code of ethics and conduct for all people involved with children in sport
- use a screening procedure
- make clear statements that child abuse within the sporting organisation is totally unacceptable
- appoint a responsible person within the organisation to ensure that child abuse does not occur within that sporting organisation
- adopt thorough recruitment practices.

A sporting organisation that wishes to employ a person in child-related employment, and employment is broadly defined to catch both employees and volunteers (s 161 Commission for Children and Young People and Child Guardian Act), must apply to the Commission for Children and Young People and Child Guardian for a notice stating whether that person is a suitable person. It is an offence to employ a person, either as an employee or volunteer, unless the person has a current
Suitability Notice. Volunteer parents coaching or managing a team that contains their own child do not need 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.

It is unlikely that many suburban sporting organisations employ people on a full-time basis to deal directly and specifically with children. If they do, or if they use volunteers (e.g. volunteer coaches for children, parents volunteering in an official capacity on a club’s committee), the screening procedure is compulsory. A failure to implement these procedures not only attracts a penalty under the Commission for Children and Young People and Child Guardian Act but can attract litigation by parents on behalf of children who have suffered as a result of some form of child abuse from an employee or volunteer within the sporting organisation. Finally, it is important to realise that child abuse is not simply the unlawful interference with children, it can be as simple as excessive criticism by parents of children’s performance on the sporting field.
Legal Notices

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