ISSUE 14

Newsletter of
Mullins & Mullins
Lawyers and Notary

Risky Business........ P2
Rugby Drug Regulations........ P2
Fight for the Finals........ P2
Soccer Australia Review........ P3
Australian Sports Foundation gives $6m in Grants........ P4

M&M Sport

Does the Cap Fit? - Salary Cap review

By Joseph Carey

The controversy surrounding the Canterbury Bulldogs rugby league club has highlighted the difficulty in enforcing salary caps in Australian sport. While league administrators question how to enforce the cap on all clubs, there is a pressing issue as to whether salary caps are actually lawful tools.

In *Adamson & Ors v NSWRL (1991)*, the Federal Court determined a proposed 'draft' for rugby league players constituted a restraint of trade. While not directly considering the legality of the salary cap, the Court's decision offers some guidance as to the outcome of such a case.

Initially, the Adamson decision is helpful in determining whether the salary cap constitutes a breach of the Trade Practices Act. While this Act renders restrictive trade to be unlawful, section 4D requires the existence of a 'purpose' to restrain trade. In Adamson, the Court was not convinced the draft was introduced for the 'purpose' of restraining the supply of rugby league players. It could be suggested that any challenge to the cap under this section would fail on the same grounds.

There is a presumption at common law that any behaviour which restrains trade is void and unenforceable. This presumption flows from the public interest in not restraining persons from working in their chosen professions. However, Courts will allow the restraint if it is reasonably necessary to protect a party's interests. The Court in Adamson examined whether the draft was reasonably necessary to protect the interests of rugby league.

The Court found the draft conflicted with the common law principle which allows people to freely choose with whom and where they wish to work. By requiring players to submit to the draft, the clubs and the league would essentially determine where the players and their families would reside. Given the anguish an unrequested move from, for example, Townsville to Canberra, could cause to families, Wilcox concluded: "how, in a free society, can anyone justify a regime which requires a player to submit such intensely personal decisions to determination by others?".

Likewise, it may be possible to challenge the salary cap on the ground that it prevents players from maximising their income in their chosen profession. Due to the annual limit of $3.25 million, not all players will be able to stay at their chosen club and be paid their market worth. Therefore, in order to secure their financial future, they may be forced to accept offers from clubs they have no desire to play for.

The NRL's application of the salary cap to endorsements may also come under scrutiny from the Court. Presently, any endorsements negotiated at the same time as the players contract are included in the cap. For example, a car sponsorship deal organised for Craig Wing independently of his playing contract was deemed to be part of the Roosters' cap. Unless justified by the NRL as being reasonably necessary to protect the league, this approach to endorsements could be interpreted as restricting players from picking up commercial opportunities and maximising their earning potential.

If the salary cap was challenged, the NRL would have the onus of proving the cap is reasonably necessary to protect the interests of the competition. In attempting to justify the draft, the NSWRL argued it would lead to increased competition as well as ensuring the financial viability of the League. While the Federal Court rejected these contentions, we could assume these arguments would also be used to justify the salary cap.

While speculation on whether such goals would justify the salary cap, it may be difficult to suggest the cap does not aid competitiveness in the competition. Concerns about the possibility of 'chequebook warfare' still exist as do fears of talent being concentrated into one or two clubs. Moreover, a quick glance to overseas competitions such as US baseball and English soccer highlights how the absence of wage restraints may invariably lead to sports being dominated by wealthier clubs.

Given these concerns, the legality of the salary cap will ultimately hinge on whether the Court is satisfied the cap goes no further than is reasonably necessary to protect the interests of the NRL.

Print Post Approved PP 454 022/00073

Risky Business

By Kate Williams

The time has come for risk-takers to accept responsibility for their own actions. Crippling costs of public liability insurance premiums have forced many sporting organisations and small business which specialise in high risk sporting activities to shut their doors. The imminent introduction of both State and Federal legislation will aim to shift responsibility to participants in dangerous sports so that they take personal responsibility for obvious risks involved in those activities. The proposed legislation will also cap general damages at $250,000 in an attempt to encourage the insurance industry to cease charging inflated premiums to local councils and sporting bodies.

Meaningful and enforceable disclaimers of liability for high risk sporting activities are proposed via amendments to the *Trade Practices Act 1974*. Under the Act companies who supply recreational services to consumers will be allowed to exclude their implied contractual liability for death or personal injury where services are supplied without due care and skill. This excluded liability will take the form of a waiver signed by the person proposing to engage in an inherently hazardous activity. A waiver signed in these circumstances would operate as a defence against personal injury claims where the supplier of the service has complied with the relevant safety requirements. This defence, known as volenti non fit injuria, provides that a person who signs a waiver has accepted a voluntary assumption of risk and will therefore be barred from bringing a negligence action in certain circumstances.

At present, the courts scrutinise waivers carefully in cases where service providers are excluded from negligence particularly in situations where there is an inequality of bargaining power. Waivers are often expressed in legalistic terminology and consumers frequently misunderstand the effect of legal documents. Furthermore, waivers ignore the fact that there is an information imbalance between the party's. The service provider is always going to be in a better position to understand the risks of the sport and take the necessary precautions. For these reasons, courts have required evidence that the provider has explicitly brought the waiver to the party's attention and they have been reluctant to construe the terms of the waiver against the party bound. Under the new law reform proposals, the Government intends to strengthen the effectiveness of the waivers by protecting them from judicial scrutiny, subject to preserving adequate protection for consumers under the Trade Practices Act.

Rugby Regulations in

By Alexandria Meyers

Following the decision by the Anti Doping Tribunal of the Australian Rugby Union (ARU) not to apply a sanction on Queensland Red and Wallaby Ben Tune for an alleged breach of anti doping regulations, the International Rugby Board (IRB) has called on the ARU to provide full facts of the case for the consideration of the IRB Anti Doping Advisory Committee.

The ARU did not apply a sanction as it was satisfied Tune was administered a prohibited drug for "genuine therapeutic reasons" and there were exceptional circumstances. Tune took the advice of medical practitioners, including the official team doctor, and an orthopaedic surgeon. Tune, at no time, tested positive for a banned substance. An athlete can be selected by ADA for drug testing any-time, anywhere.

In accordance with Clause 20.3.5 of the IRB Anti-Doping Regulations, Tune sought clarification from his doctor and the Australian Sports Drug Agency (ADA) as to whether the treatment and prescribed medication were prohibited. Because he notified the ARU and ADA that the drug had been prescribed for medical purposes, he was said to have acted openly and honestly at all times.

Pursuant to IRB Regulations 20.9.2 and 20.9.5, the ARU is obligated to implement and apply the IRB's Regulations with matters being dealt with in accordance with ARU's own anti-doping by-laws and national law. IRB Regulation 20.3.3 states:

"a person is absolutely responsible for any Prohibited Substance found to be present in his/her body...it is not necessary that intent or fault on the Person's part be shown in order for a Doping Offence to be established. Nor is lack of intent or fault a defence to a doping offence...".

Similarly, ADA guidelines stipulate it is the athlete's responsibility to ensure that he or she is aware of and complies with the doping rules of their particular sport. The athlete is rendered responsible for any banned substances found in their body. They are responsible for checking the status of all substances and medications they consume. Ignorance is no excuse.

The ARU is obliged to implement and apply the IRB's Anti-Doping Regulations and adhere to recommended procedures. Had the ARU immediately complied with Regulation 20.3.3, Tune would have faced suspension for a period of two (2) years. However, John O'Neill, ARU Managing Director, stated in a recent press release that the decision surrounding Tune was made in accordance with national law, ARU Ant-Doping by-laws, and IRB Regulations 20.9.2 and 20.9.5. He said:

"...Our Regulations give the Tribunal discretion because a mandatory two year ban in certain circumstances is not sustainable in the Australian Legal Environment...The Tribunal quite rightly exercised its discretion in this case".

The IRB Regulations do not distinguish between doping and inadvertent doping. The ARU does not appear to have complied with IRB Regulations 20.9.2 and 20.9.5 in a literal sense. That is not to say, the decision reached by the ARU is not supported by clubs, players, and fans all over the world.

In September the IRB's Anti-Doping

The Fight for

By Jason Walsh

With the Australian Football League (AFL) premiership heading north to Brisbane for the second consecutive year, this article reflects upon the 'preliminary final' issue, which threatened to steal the spotlight from the 2002 final series. An agreement entered into between the Australian Football League, the Melbourne Cricket Club (MCC) and the Melbourne Cricket Ground (MCG) Trust in the early 1990's guarantees that one preliminary final will be played at the MCG in each final series. For years the agreement has existed without controversy, however, in 2002 there existed a real possibility that an interstate team may lose its home ground advantage, with their preliminary final match being transferred to the MCG. This article examines the basis of the agreement, the challenge made upon it by the Premiers' of South Australia and Queensland and the response of the Australian Competition and Consumer Commission (ACCC) in relation to claims the agreement was anti-competitive in nature.

The Agreement

The AFL, MCC and MCG Trust agreement saw the AFL committing itself to the playing of four finals, including one preliminary final and the Grand Final at the MCG. In return, the MCC and MCG Trust agreed to fund the $430 million redevelopment of the Melbourne Cricket Ground. The agreement was renegotiated in mid 2002 with the introduction of a 'banking system' in relation to the number of finals played at the 'G'. The banking system, which was introduced to accommodate those interstate teams who threatened to take a stranglehold on the premiership, relaxed that part of the agreement which required at least one final be played at the MCG for every week of the finals. However, despite the concessions introduced via the banking system, the MCC and MCG trust remained steadfast in requiring at least one preliminary final be played at the 'G'.

The refusal of the MCC and MCG Trust to negotiate their position on the preliminary final issue agreement was the catalyst for

need of Fine Tuning

Advisory Committee concluded its review of the ARU's decision. In accordance with IRB Regulation 20 - Anti-Doping, the Committee unanimously agreed to refer the matter to a Board Appeal Committee for further consideration. The matters for consideration surround the ARU's use (or misuse) of protocol, management of the matter, and reasons for decision; not whether a doping offence can be established against Tune. Tune has been cleared and is eligible to continue playing.

Uniform state, national and international regulations are favourable to effect consistency within the Code. However, what regulations must be literally applied or applied with discretion is unclear. The ARU and IRB must rethink their present stance on inadvertent doping in order to achieve uniform outcomes for players who may find themselves in Tune's predicament. Whether doping and inadvertent doping should be distinguished is a matter of perception demanding a workable practical framework for regulation and procedure.

The decision of the Board Appeal Committee is pending.

the Finals

the entry of the South Australian Premier into the debate.

The Challenge

With the possibility that an Adelaide preliminary final could be relocated to the MCG the Premier of South Australia had sought ACCC intervention on the issue. Backed by the Premier of Queensland, it was claimed that the 'preliminary final guarantee' between the Australian Football League, the Melbourne Cricket Club and the Melbourne Cricket Ground Trust was in breach of the Trade Practices Act (TPA).

The ACCC, after investigating the Agreement, found that it came within the ambit of the TPA as the agreement was between sporting bodies who operated as a business enterprise. Despite this, however, the agreement was not between competitors as intended under the Act and such, it was not anti-competitive in nature. Furthermore, the ACCC held for the agreement to contravene the TPA, the Agreement must substantially lessen competition in the marketplace and a marketplace which comprised the stadiums across the different states of Australia was difficult to contemplate in the circumstances.

The Outcome

The agreement which guarantees that at least one preliminary final be played at the MCG was, therefore, found to be valid and was not thought to be anti-competitive in its operation. As luck would have it, however, the 2002 final series was spared the wrath of disgruntled players, administrators and supporters as both Adelaide teams made early exits from the series. The Agreement, for now, has been put to bed for yet another AFL season. However, with the growing success of non-Melbourne based teams in the competition there is little doubt that the ghost of Agreements past still lingers, waiting once again to rear its head. As the League becomes increasingly nationalised and Victoria's stranglehold on the competition disappears.

Soccer Australia Review

By Michael Highfield

On 2 September 2002, the Federal Minister for Arts and Sport, Senator Kemp, announced the committee members and terms of reference for the review of soccer in Australia.

The committee will:

- make recommendations on how soccer in Australia should be structured to provide the most effective and efficient governance framework and management structure for the sport; and
- recommend an appropriate change management plan that will enable soccer in Australia to meet current and future demands and expectations.

The Committee is currently seeking submissions from the Australian soccer community before it considers its recommendations.

Senator Kemp previously announced that Soccer Australia had agreed to a major structural review of soccer in Australia. The announcement followed news of a bid for the 2014 World Cup by the New South Wales and Victorian State Governments and a meeting between Prime Minister John Howard and FIFA President Sepp Blatter.

There have been inquiries into Soccer Australia before. The Bradley Report of over a decade ago was one which, at the time, sparked much promise, but it was self-funded and though its findings were visionary, they were, in the end, ignored and forgotten.

In the mid-90s came the Stewart Inquiry, followed by a Senate Inquiry, into the game. That too gave rise to much new hope, but had only dealt with allegations of corruption.

The latest review will be undertaken by Mr David Crawford, the recently retired National Chairman of KPMG and current director of BHP, Lend Lease, Foster's Group, Westpac Banking Corporation and others. Mr Crawford previously conducted a review of the Australian Football League.

"Soccer Australia, the national body for the sport, has experienced financial difficulties over many years, much of which relates to the cost of Australia's involvement in the international game and other issues associated with running an effective national league, the retention of younger players through to the senior game and a national focus to the game's development", Senator Kemp said.

"The Commission has been working with Soccer Australia for some months to assist in a change process. The review...will cover Soccer Australia and its federations and member affiliates and make recommendations for improvements and include implementation strategy options", he said.

The Review Committee is expected to finalise its report by April 2003 and will release their report in May/June 2003.

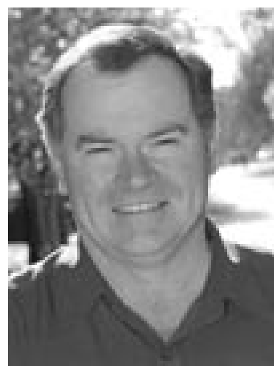
Australian Sports Foundation gives $6m in grants

Netball WA, Port Adelaide AFC, St Margaret's Anglican Girls School in Brisbane, Bemm River Community in Victoria and Westfield Sports High School in Sydney all have something in common.

All registered during 2001/02 with the Australian Sports Foundation Ltd (ASF), a company of the Australian Sports Commission that recently moved back to Canberra after a sojourn in Sydney. Along with over 250 other current projects, they have the potential to benefit financially through their registration.

Set up by the Federal Government in 1986, this unique organisation has a mandate to support the development of sport in Australia. In doing so, it facilitates tax breaks for businesses, philanthropic trusts and individuals who want to make an unconditional donation to a community sports project.

The ASF has made grants totalling over $70 million since 1986 and facilitated the donation of over $6 million to some 150 projects in 2001/02 alone.



But that's not good enough for ASF manager Rod Philpot (pictured left) who has been given the task of growing the business from the $4 million it issued in grants the 2000/01 financial year. For Rod, the big problem is that not enough of Australia's tens of thousands of local councils, sporting organisations, clubs, schools, and community groups know about the ASF.

Certainly many organisations - including those mentioned above have discovered the benefits of donations through the ASF. But many more either don't know about it or choose not to use it. A mail out to all shires and councils earlier in the year evoked a positive response but there is still a huge potential for involvement.

Many schools also benefit but interestingly all except one are private schools. Rod Philpot is not in the job of discriminating against any group wishing to take advantage of the ASF; rather he just wants more people to know about it and to understand how it works. And how it works is very simple:

Any not-for-profit sporting organisation, council, club, sporting association, community group or school can register a project with the ASF. (Clubs who do not issue a dividend and who put all profits back into their organisations qualify under the guidelines.)

Those groups can then begin a fundraising campaign, encouraging donors to make an 'unconditional' donation to the ASF. ASF staff will help here in educating fundraisers on how to build and work their database of potential donors.

Donations must be 'unconditional' to receive a tax deduction under the requirements of the Tax Act.

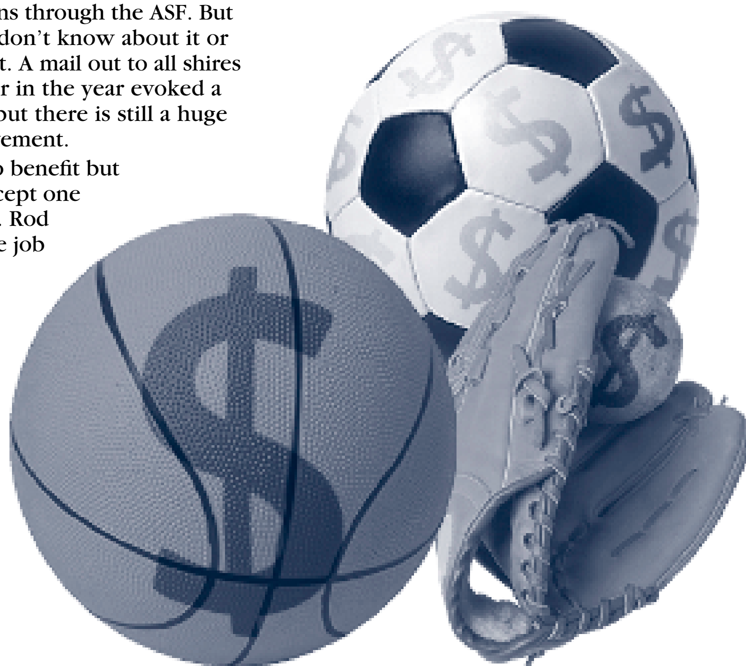
Donors can, however, nominate a preferred specific sporting project, though they're not allowed to receive any other benefit, advantage, right or privilege from their donation apart from tax deductibility.

Six times each year, the ASF assesses project applications and donations received for preferred projects and makes discretionary grants.

Rod Philpot sees his job over the next year or so as 'getting into people's faces' and letting them know about the benefits of using the ASF.

He's come back from a trip to the 'Leaders in Sport Conference' in Brisbane where he spread the good news to Australia's sporting community. In mid-July Rod attended the 'Who's Minding the Bush' conference in Yeppoon and welcomed the opportunity to speak with local sporting, community and governement groups.

The ASF can be contacted at
PO Box 176 Belconnen ACT, 2616,
by calling **02) 62147 868** or
by facsimile **02) 6214 7865**.
The email address is **info@asf.org.au**
and web-site **www.asf.org.au**.



Editorial

By John Mullins

Constitutional change of sporting organisations has over the last few years become a major issue. Traditionally, organisations tended to have constitutions which were representative based. That is, that the representative groups of the organisation had the ability to appoint or control the election of the Board.

What we are seeing almost across the board is a shift away from this position so that organisations can be more fluid and responsive and have the ability to have people appointed or elected to the boards who are able to bring skills and talents to the Board to enable the organisation to achieve its objectives.

Constitutions which traditionally sat in bottom drawers are now being dusted off and looked at by many sports to see how they can assemble boards of management with the ability to give direction for the growth of the sport to attract players, spectators, television and sponsorship. From the mighty Carlton Football Club to Soccer Australia to Sydney Rugby League Clubs, to just about any sport you care to name, there is increasing complexity surrounding and competition for seats on the Board.

There isn't, and never has been, a one size fits all constitution. The standard rules under the Associations Incorporation Act is an example of an attempt to assist people in forming a constitution but that has the effect of suggesting a one size fits all model.

Inevitably, for there to be constitutional change someone must give up some or all of their power base and naturally this leads to dispute within organisations as to the changes necessary. The best constitution for any club is a mechanism by which that organisation can prosper, succeed and enable people from within or outside that organisation to make valuable contributions to the future success.

One prominent Queensland sport provides in its Constitution for the ability of the Board to appoint independent directors to enable people who would not otherwise be elected to be appointed to the Board to make unique contributions.

In this competitive age, organisations need to look to their constitution to see whether this enables them to attract the appropriate people to run and give direction to their sport or organisation.

Our firm is involved in acting for many organisations who are going through these changes. We would be happy to discuss this with you if your organisation or sport needs to change.

M&M
Mullins & Mullins
LAWYERS AND NOTARY

Level 22 Central Plaza One
GPO Box 2026, Brisbane Q 4001
345 Queen Street, Brisbane Q 4000
Phone: (07) 3229 2955
Fax: (07) 3229 8075
Email: jmullins@mullins-mullins.com.au

Quality Endorsed Company
AS/NZS ISO 9001:1994
QEC 5492
Standards Australia

Postscript: The information contained herein, whilst accurate, is of a general nature. If you have any queries in relation to the information contained herein, we ask that you consult the partners or solicitors of Mullins & Mullins with whom you usually deal. If you have any comments regarding our newsletter, we would like to hear from you.

Should you not wish to receive this newsletter or any other marketing material from Mullins & Mullins, please advise us immediately.