ISSUE 11
DECEMBER 2001
Newsletter of
Mullins & Mullins
Lawyers and Notary

M&M Sport

Sports Clubs & Competition - Gaming Revenue

By Alicia Hill

There are two common types of sports clubs. The first type are operated on the voluntary labour of its members, their parents or partners and are usually run from the "clubhouse" on the Council ovals, these are the "Sports Associations". The second type are operated on the labour of its committee, a paid Manager and employee workforce and run from a purpose built Club, containing or having control over sporting facilities, bar and gaming facilities, restaurants or bistros and function rooms, these are the "Sports Businesses".

In what is an increasingly competitive environment some Clubs are thriving and others are not surviving. The biggest headline relating to Clubs recently is the announcement that the QEII Sports Club has been placed into voluntary administration. Sadly this headline reflects an ever increasing number of situations with many Clubs fighting for survival.

"Competition" for Clubs now is not solely restricted to the playing fields. As the principal source of funding for the operation of Clubs comes primarily from moneys raised from the licensed business run by the Club anything that hurts the return from the business operation hurts the Club.

A particularly lucrative source of profits for Clubs is the moneys retained from revenue raised from Electronic Gaming Machines (better known as "poker machines" or "pokies") after payment of operational expenses, gaming taxes etc.

To emphasise the lucrative nature of this particular aspect of Club's operation, the Queensland Office of Gaming Regulation's ("QOGR") Statistics for the Financial Year 2000-2001 saw a total metered win for Queensland Clubs of $548,583,560.00. This figure excludes the moneys raised by the hotel industry.

The point though is that the total amount of revenue is, to borrow Darryl Eastlake's phrase, "HUGE"!

Clubs running a business that has the appropriate licences and facilities can access the market for gaming as a source of revenue to subsidise all aspects of the Club's aims and objectives.

This has been identified and accessed by many Clubs. The QOGR statistics reveal that at the bottom end of the scale 195 clubs operate on average 6 to 10 poker machines. At the other end of the scale 10 clubs operate more than 200 poker machines each.

The ability of Clubs to access this market saw the development of fierce competition between Clubs and the Hotel industry. One of the advantages Clubs have had in relation to poker machines is found in the Gaming Machine Act which places maximum limits on the number of machines that can be operated from a Club up to 240 poker machines, whereas Hotels are limited to a maximum of 40 poker machines. On 8 May 2001 the State Government threw further assistance to the Club industry with a cap announced on the number of poker machines for Hotels. No new licences or increases for poker machines to any hotel are to be made. No such restriction was placed on Clubs.

A further positive for Clubs raising revenue from poker machines are the progressive tax rates levied on Clubs which are based on a metered win returned by the Clubs. As at July 1998 these tax rates ranged from 10% on metered wins of up to $10,000 per month, up to 45% on metered wins of over $1,400,000 per month.

Despite these favourable elements, competition and increasing numbers of hotels opening and introducing poker machines hurt Clubs.

To support the sporting endeavours of the Club, provide services to its members and remain financial, the ability of a Club to operate pokies in a competitive environment is a prized commodity which increases the value of a Club business. Committees overseeing the functioning of the Club and Managers should be aware of the value of developing and maintaining this aspect of Club operations. Administrators should also maintain the gaming licences for operation to add value and increase potential returns for distribution to creditors and on any deregistration of a Club.

Salary Cap

By Michael Simpson

One of the most contentious off-field issues in the Rugby League world today is the Salary Cap. Each Rugby League club in the NRL competition must ensure that the combined salaries of their players do not exceed $3.25 million. If they do exceed this amount, then they face heavy penalties, which include fines of up to 50% of the amount that the salaries exceed the cap, and loss of competition points.

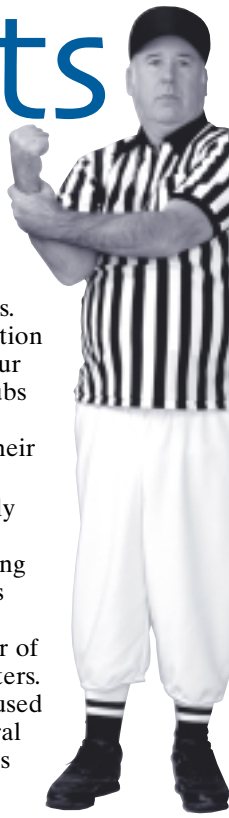
The salary cap issue has become increasingly heated recently with 1999 Clive Churchill Medalist, Brett Kimmorley, almost being left without a club to play for in the 2002 season because no club in the NRL competition can afford him, and stay under the salary cap. Kimmorley has now signed with the Sharks for the 2002 season.

Kimmorley was previously contracted to the Northern Eagles, reputedly earning around $500,000 per year, but was left in a position where he had to renegotiate his contract after the Northern Eagles club folded at the end of the 2001 season. Kimmorley entered into discussions with several clubs, including the newly formed Manly Norths Club, and St George Illawarra Dragons. Whilst Kimmorley identified St George Illawarra as his preferred club, "the Dragons" CEO Peter Doust notified Kimmorley that he would not be contracted to the Dragons because of "very complex circumstances, particularly in relation to the Salary Cap".

Since being notified of this, Kimmorley instituted proceedings in the NSW Industrial Relations Commission against the NRL, the St George Illawarra Rugby League Club, and the Manly Norths Rugby League Football Club for restraint of trade. Kimmorley is claiming that the NRL Salary Cap, and its enforcement by the clubs against which he is proceeding, has restricted him in his ability to play for the Dragons. Kimmorley's action commenced on Monday 5 November 2001.

We will deal with another contentious off-field off season football issue of the "draft" in a future edition.

Ugly Parents



By Louise Conlan

In recent times we have seen a number of media reports in relation to violent outbursts by parents against both referees and rival supporters of childrens sport. In September 2001, police were called to break up a brawl between supporters of two Brisbane Clubs which occurred during an under 13 rugby league match. Police were also called to rescue a young female referee who was forced to seek refuge in a dressing room after threats by players parents, again after an under-13 rugby league match.

This unfortunate behaviour known as 'ugly parent syndrome' has brought about the development of Codes of Conduct by the Australian Sports Commission, for parents, coaches, players, administrators, media, officials, spectators and teachers.

The Codes reiterate the idea that sport is for the enjoyment of the children, not the parents. These codes are in addition to the codes of behaviour or rules which many clubs and associations have drafted for governing their own sport.

Some clubs are actually considering banning players from participating in club organised games on the basis of the inappropriate behaviour of their parents or supporters. This practice has been used in America where several serious violent outbursts

SPORTS SHORTS

Instructor found to Owe a Duty of Care to Students

By Alicia Hill

For hazardous sports, or sports where there is an increased risk of injury through participation it has historically been the position that those who partake in the sport accept the dangers that are inherent in it thus having no claim against another for any injury they may incur.

Arguments of volenti non fit injuria and more recently contributory negligence were the staple defences raised against claims from injured persons in these situations.

Increasingly the scope of these defences is being eroded and the parties found to owe others a duty of care is expanding to meet the varied circumstances of the cases.

In Kosciuski Thredbo Pty Ltd v Smith (2001) the New South Wales Court of Appeal was asked whether the Ski Instructor had allowed adequate runout for his students in teaching them snow ploughing and if not whether the failure to do so was a mere error of judgment or negligence.

Photo Courtesy of Thredbo.

The Court dismissed the appeal upholding the decision of the Trial Judge that the ski instructor owed a duty to take reasonable care for the safety of those students whom he was instructing which he failed to meet by not factoring into his decision the environmental conditions on the day, the safety of his students by identifying potential obstacles nor taking actions to minimise the impact of those hazards.

Pain Killer, or Career Killer?

By Michael Simpson

AFL Footballer Adrian Whitehead has commenced unprecedented action in the Supreme Court of Victoria for damages against his former club Carlton, for injuries he claims he sustained as a result of the

Violence against referees

have been seen. Incidents include the death of a man in Massachusetts following a beating he received by another father at an ice hockey training session for 10 and 11 year olds, and the sacking of a volleyball coach in Chicago after she attempted to take a meat cleaver into school to protect herself against potential attacks by parents.

In America, some children as young as four are banned from playing organised sport unless their parents sign 'behaviour contracts' and go through counselling to be taught appropriate behaviours at their children's sporting events.

It remains to be seen if the introduction of 'behaviour contracts' for parents in Australia will, in time, be deemed necessary. The ASC has suggested a range of measures to discourage 'ugly parent syndrome' including sending spectators away from the field if they are being negative and suspending repeat offenders, penalising teams during games if their supporters are negative, and awarding bonus points to those teams whose supporters are cheering and being positive.

The option of excluding players because of the behaviour of their parents is also an option for some clubs in their attempts to discourage inappropriate behaviour. The ability of a club to exclude participants will depend upon the nature of the participants membership, and the nature of the entry to the sporting event.

administration of a pain killing injection by Carlton Club doctor Phillip Perlstein.

Whitehead suffers from a rare foot ailment that is usually linked to ballerinas. He has a chronic problem in the area of the big toe of his right foot, caused by unnatural pressure on his toes when he runs.

Prior to a match on 16 August 1997, Whitehead, who was suffering from extreme pain, was injected with a local anaesthetic to numb the pain. Throughout the course of the game, Whitehead fractured the sesamoid bone in his foot, which required a plate to be inserted in the foot. The plate fractured, and ruptured a tendon in his foot which is responsible for his big toe's ability to hyper-extend. He has undergone further surgery, and his career has effectively been killed.

Whitehead is proceeding against the Carlton Football Club, the Club Doctor and the AFL, alleging that the injection deprived him of his natural ability to protect his foot from further injury or damage.

He is alleging that the AFL, as the administrative body of the competition, the doctor and the club owed him a duty of care to use reasonable skill, care and diligence in treating and advising him. He further alleges that the duty was breached by the defendants' failure to warn him properly, or adequately educate him about potential risks of injury if such an injection was administered.

The club doctor is denying that he breached his duty of care, advancing that the injection was given after an explanation to Whitehead, and after full consent. Whitehead's solicitor responded by saying that a player's consent to this kind of treatment must not be a nod of the head prior to or during the heat of the game. It must be a clear, reasoned and fully informed consent.

Harrigan v Jones [2001] NSWSC 623 (27 July, 2001)

By Michael Highfield

In the NSW Supreme Court, Matthews J awarded Rugby League referee Bill Harrigan $90,000.00 damages for being defamed by Radio 2UE broadcaster Alan Jones.

Alan Jones defamed Bill Harrigan during a radio program in 1998 by implying he was biased, that he favoured ex-Super League teams over ex-ARL teams and that he favoured the Brisbane Broncos when awarding penalties.

Alan Jones claimed in his defence that statistics showed Bill Harrigan was biased.

Matthews J held that the statistical information relied upon was inadequate to prove the truth of the imputations and the material was not reasonably capable of supporting opinion. Jones conclusions did not follow logically, fairly or reasonably from information provided.

Her Honour also found that it was highly probable that Bill Harrigan's reputation, both professional and personal, was seriously diminished in the minds of a large sector of Alan Jones' listening audience.

Pregnant Athletes Update

By Michael Highfield

Netball Australia have stuck by their stance on banning pregnant women from playing in its competitions.

The Association is awaiting a determination from the Human Rights and Equal Opportunities Commission as to whether the imposed interim pregnancy ban is discriminatory.

The Association's decision has prompted the Australian Sports Commission to call together a forum consisting of experts in medicine, law, ethics, insurance and sport to address the various medical and legal issues.

Uninsured as a Result of the HIH Collapse?

by Alexandria Meyers and Michael Klatt

Non-profit sporting organisations may be able to apply to the HIH Claims Support Scheme in the following circumstances:

- a participant in a sporting event held prior to 11 June 2001 suffered personal injury in the course of a competition organised by a sporting organisation formerly insured by HIH;
- or, suffered the injury at a venue under the control of the sporting organisation; and
- has made a claim for compensation against the organisation.

The HIH Claim Support Scheme is a government scheme established following the demise of the HIH Group of Insurance Companies. The support scheme is available to Australian-based, not-for-profit organisations who were policy holders under HIH, and who have a claim under an insurance policy issued by the HIH Group.

There is no means test applied for not-for-profit organisations and in the event that the claim is accepted, the Scheme will pay 100% of the amount which HIH would have been obliged to pay for a claim relating to a personal injury.

The Scheme will not cover the legal costs involved in preparing and lodging the Application for acceptance under the Scheme. However, if the claim is accepted, legal costs associated with the defence of the action will be met by the assigned insurance company managing the claim.

At present, there is no cut off date by which an application must be lodged. If you have any problems with this we would be happy to advise you on your rights.

Brisbane City Council v Victoria Park Golf Club Inc.

by Alexandria Meyers

In this case, the Victoria Park Golf Club Inc. (the Club) entered lengthy negotiations with the Brisbane City Council (the Council) to lease a golf course. Prior to negotiations, commencing in or about September 1995, the Club held no record of the relationship that existed with the Council who held the course land under a deed of trust.

Interim arrangements subject to a formal lease were made in or about January 1997. No formal lease or a licence agreement was completed despite discussions and correspondence exchanged between the parties.

A tender proposal was discussed between the parties at a meeting on 13 January 1999. The Club unsuccessfully submitted a tender. The Council wrote to the Club in July 1999 enclosing a copy of the proposed "Heads of Agreement".

The Club accepted the agreement put forward by the Council. This agreement was documented in a letter dated 3 September 1999 by a Council officer who worked from the course in the capacity of Club Secretary and Manager.

The Council decided to go to public tender on 16 October 1999 to obtain funds needed for the redevelopment of the clubhouse and associated facilities, including the development of a driving range. However, tender was placed "on hold" subject to the potential effects of the inner city bypass and busway, and associated issues of compensation.

In January 2000, the Club sought to enter further negotiations with the Council "to deliver the outcomes sought by the [request for tender]". Simultaneously, the Council entered negotiations with a preferred developer for agreement and lease. The Council was concerned the arrangements with the Club would compromise any negotiations with the developer.

Letters were exchanged between the parties in or about June 2000. The Council held the terms of the letter of 3 September 1999 as "formally withdrawn".

Upon initiating proceedings, the Club argued the Council officer (the author of the letter of 3 September 1999) had authority to bind the Council. Based on the principles established in Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd & Anor (1964) 2 QB 480, the Council officer was held not to have actual authority as the representation had not been made by the Council, as principal, to bind the Council. There was no record held by either party indicating the Council officer had the authority to conclude a binding agreement.

Moynihan J held the letter of 3 September 1999 did not constitute a concluded agreement as certain provisions had not been resolved, but rather, were left open for further negotiations with a view to reaching a conclusive agreement (i.e. the terms were neither final or complete).

The Club was unsuccessful in their action against the Council. It was deemed no lease or agreement existed between the parties.

The Club appealed the decision and the matter was heard in the Court of Appeal on 30 November 2001. The Appeal was dismissed.

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

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.

Editorial

by John Mullins

As I write this editorial the cricket world is faced with the drama associated with the penalties handed out by the match referee to Indian players and that the ICC did not sanction the final 'test match' in South Africa. Across the Atlantic Ocean the Australian Soccer team was given an extremely inhospitable welcome to Uruguay and there were threats that the match would have to be relocated to another South American country unless the security can be assured.

This soccer incident follows on from the dramas associated with the France vs Australia match and the availability of players. The position of the international controlling body in many sports is under threat. In years gone by we have seen renegade tours in tennis, cricket, rugby and surf lifesaving. The ability to control the sport seems to be coming more closely aligned to the ability to control television rights and the preparedness of constituent organisations be they national sporting bodies or 'clubs' to comply with the direction of the international committee and put the interests of the sport ahead of the individual interests.

Undoubtedly this is simply going to continue and it will lead to dispute, conflict, litigation and in most cases this will be to the overall detriment of the sport.

In this edition of M&M Sport we again deal with a wide range of issues, mostly on a more local basis than the issue I have just been speaking about. In fact, in this article we deal with issues as local as the Victoria Park golf course in Brisbane and Alan Jones defaming Rugby League Referee Bill Harrigan.

The demise of HIH insurance has had and will continue to have, because of its effect on the overall general insurance market, a major affect on sporting clubs in Australia. In Queensland, the Associations Incorporations Act requires clubs to have a minimum public liability insurance cover of $5 million. In years to come, if not already, clubs may find this almost impossible to obtain. Whilst there may be a safety net out of the demise of HIH the legacy of this will last for a long time.

Another phenomenon which we speak about in this edition is the development of the poker machine club in Queensland and the relevant advantages that these type of 'clubs' have over normal sporting clubs and other licenced premises. Our firm has a particular speciality and expertise in the area of gaming and hospitality and if your organisation has any questions in this respect we would be happy to answer these.