ISSUE 9
Newsletter of
Mullins & Mullins
Lawyers and Notary

M&M Sport

The impact of interlocking interests at the Olympics

By Alicia Hill

Selection appeals, image-management and sponsorship issues, injury lawsuits, venue suitability/fitness challenges, competition rules queries, adjudication appeals and drug disqualifications are some of the major legal issues that arose in connection with the Sydney Olympics.

Due to the large number of parties having interests requiring protection, the increasing commerciality of sport and the complexity of sporting federation rules, action was taken to alleviate the pressures of the interlocking interests in sport.

The International Olympic Committee (IOC) and the equivalent Paralympic body incorporated as a term of the entry documentation for the Olympics that a single dispute resolution process was to be utilised for all disputes. Athletes had to submit disputes through the usual sport federation appeals process and if a suitable resolution failed to be reached then to the Court of Arbitration for Sport (CAS).

The CAS convened an ad hoc division in Sydney and distributed specially adapted Arbitration Rules for use at the Games. Under the terms of the Rules, the CAS framework could only be utilised for disputes that arose in Australia between September 5, 2000 and 1 October 2000. Formal application procedures were outlined and, importantly, any application made was to be resolved within 24 hours of lodgement except in exceptional circumstances.

During the Olympics and Paralympics these facilities were utilised in relation to the following:-

Ability to Compete at Games

Cuban national, Angel Perez, a silver medallist in the 1992 Cuban kayak team, who has lived in the USA for seven years was allowed to compete for the USA despite Cuba trying to bar him. The CAS said that nationality does not give governments the right to use people as their property or as "instruments of their policy."

Competition Rules Queries

Australian Paralympian vice-captain Hamish Macdonald, applied to determine if he could change disability categories to compete in the shot-put when his category was cancelled due to lack of entrants. The CAS ruled that, in accordance with the Paralympic Charter, doctors should make the decision on his ability to participate and their decision was final.

An Indian shotputter, Yadvendra Vashishta, set a world record in the F42 category only to be told by officials after the event that he should have been in the F44 category. He was stripped of his gold medal and had his appeal rejected by the CAS.

Adjudication Appeals

Three Bulgarian weightlifters were thrown out of the Olympics for doping, resulting in the International Weightlifting Federation expelling the entire Bulgarian weightlifting team. The team appealed to the CAS and were then reinstated after the CAS found that the IWF lacked legal grounds for their decision to expel the Bulgarian team from the Olympics.

Chantel Petticlerc was confirmed by the CAS as the women's T54 800m Paralympian champion, with Louise Sauvage the silver medallist, despite officials having declared the race void and scheduling a re-race due to a crash in the opening stages of the event.

Drug Disqualifications

The CAS upheld the IOC decision to strip Romanian gymnast, Andrea Raducan, of an individual gold medal after she tested positive to a banned substance. Her team doctor had provided her with cold medicine that contained a banned stimulant. The team doctor was banned by the IOC until 2004.

The CAS stated when interpreting the Anti-Doping Code that:-

"It is the presence of a prohibited substance in a competitors bodily fluid which constitutes the offence irrespective of whether or not the competition intended to ingest the prohibited substance." Mitigating factors such as Raducan's age, weight, need for medication, reliance on the team doctor and the fact that it did not enhance her performance were considered irrelevant.

Romanian hammer thrower, Mihaela Melinte, lost an appeal to overturn an International Amateur Athletics Federation (IAAF) decision to suspend her from the games after she tested positive to drugs prior to the Olympics. The CAS, while upholding the decision, found that the manner in which she was notified that she could not compete was wrong. Melinte was allowed to warm up for the event and then was escorted from the field by athletics officials minutes before its commencement.

Print Post Approved PP 454 022/00073

Editorial

by John Mullins

As usual in this edition we have an interesting selection of articles on where the law and sport interact. Recently we have been asked to advise on certain anti-discrimination aspects in relation to sport, particularly the ability to separate men and women's competitions. Our article sets out the current position but we anticipate that this may be subject to change in the future.

Rugby is prominent; the Australian Rugby Union has just announced two massive sponsorships since the Olympics, one with Bundaberg Rum and one with Vodafone. These sponsorships have illustrated two things, firstly, the appetite that corporate Australia has for Rugby and secondly, how the dollars are changing dramatically. A recent article in the BRW magazine suggested that sports sponsorship has grown from $350m in 1996 to an estimated $700m in the year 2000, excluding Olympic sponsorship.

In this edition we highlight two cases involving Rugby Union. One case is an interesting decision on the liability of administrators and the other is an equally interesting decision in relation to the ability of the sport to control corporate entertainment related to that sport.

With the rise and rise of Rugby Union we also report on the demise of South Sydney (at least currently). Some pundits are predicting that the demise of South Sydney is a pre-cursor to the demise of rugby league in general.

We pose the question as to whether those that control the television rights which are the key ingredient to the sponsorship and the financing of the codes could allow that to happen. Is it possible that the two Rugby codes could in fact get back together and, amazingly, if this was to occur because Rugby Union is the global game, would this merger occur on Rugby Union's terms?

The recent holding of the Rugby League World Cup again underlines the fact that Rugby League, though played at an extremely high level in Australia, is not a global game. The need for a global game is continually highlighted by the AFL's ongoing test matches against Ireland in some hybrid game.

The Court of Arbitration for Sport continues to grow in prominence and we outline some of its recent involvement and effectiveness at the Sydney Olympics.

Our new website is located at: www.mullins-mullins.com.au

Recent Rugby Union Cases

By Samantha McNeice

Australian Rugby Union V The Hospitality Group

This case, on appeal to the Federal Court, concerns the ability of the Australian Rugby Union Limited (ARU) to prevent its premium international rugby tickets from being resold at a profit by hospitality organizations without its consent.

At the time the case was heard the ARU estimated that it was losing approximately $1.5m per match to black market ticketing, profits which the ARU argued could have been injected into rugby union for the benefit of players and fans.

The Hospitality Group (THG) is a global company which provides catering and corporate hospitality for major sporting events. THG entered into contracts with clients for the provision of hospitality packages to rugby events during the 1999 domestic season. Packages sold included a variety of premium seating depending on the particular contract.

At no time did THG have contractual arrangements with ARU or its agents which assured the seating would be available. In addition, all tickets issued by the ARU during that season contained a condition that the tickets could not be re-sold at a premium without consent.

THG obtained tickets through various methods including:

- on-selling by various groups;
- unused member allocations;
- travel industry; and
- employing people to line up at ticket agencies.

In an attempt to tighten ticketing control, the ARU resolved to enter into Licence agreements granting retail licences to a limited number of agents entitling them to receive an allocation of tickets, promote themselves as ARU agents and make use of official logos. Pursuant to the agreement agents were not permitted to on-sell their ticket allocation for profit.

THG did not tender for a licence, instead entering into an agreement with one of the licence holders, ATFS (Australian Tours for Sport) to provide travel packages. This agreement clearly breached the agreement between ATFS and the ARU.

It was clear to the court that THG chose not to tender for off-site hospitality in order to remain outside the regulated ARU regime. As a result of this conduct, the court said that there was a real risk of further breaches with other licence holders. As the amount of profit gained was too difficult to ascertain there was no award for damages.

The difficulty was that the ARU did not actually suffer any loss, as the tickets had been paid for. Exemplary damages (which are awarded as a deterrent), for $100,000 were awarded to ARU.

THG counter-claimed that the ticket conditions introduced by the ARU acted as a restraint of trade which was not in the public interest. Evidence was introduced that there is no other organization in Australia which

Jurisdiction of Judiciaries

By John Mullins

Like it or not, modern sport is increasingly becoming "Big Business" with considerable player salaries, the sale of television rights and corporate sponsorships worth millions now the norm. With this amount of money at stake, it is no surprise that players aggrieved by decisions of disciplinary bodies are commonly mounting legal challenges against those decisions.

Each sport is governed by its own set of laws or rules generally determined by a governing body that is essentially self regulating. The interpretation and enforcement of these rules is the responsibility of the relevant governing body, normally through a disciplinary body or Tribunal set up specifically for that purpose.

How and when the courts may be relied upon to review the decision of a disciplinary tribunal depends firstly on whether or not the sporting club is incorporated. Where a Club is incorporated under the Corporations Law, that legislation imposes an obligation that the affairs of the company will not be conducted in a way that is "oppressive or unfairly prejudicial or unfairly discriminatory". If a player is not happy with a decision of a tribunal of an incorporated body they may base an action under the Corporations Law by showing that the conduct of the company was oppressive or unfairly prejudicial and "unfair".

However where the tribunal is set up by an incorporated association such as a club it may be more difficult for an aggrieved player to establish a cause of action. The courts have traditionally refused to interfere in the business of private organisations. The inclusion of large player contracts and fiscal consequences of suspensions and expulsions have, however, added to the options available to an aggrieved player. In the so called "livelihood cases", restraint of trade and procedural fairness are two common avenues for aggrieved players to approach the courts for adjudication on a dispute.

Procedural Fairness

Where it appears that a person has not received a fair hearing, the Courts may intervene. The laws relating to a fair hearing are known as the laws of natural justice or procedural fairness. They are based on three (3) premises that:-

competes with the ARU in relation to international rugby marketing and sales. The court said that the ARU had a legitimate commercial interest to protect and that it was entitled to control those who entered the stadium and capture all available profit. The ARU was entitled to ensure tickets were sold at reasonable prices and not "scalped".

Agar v. Hyde

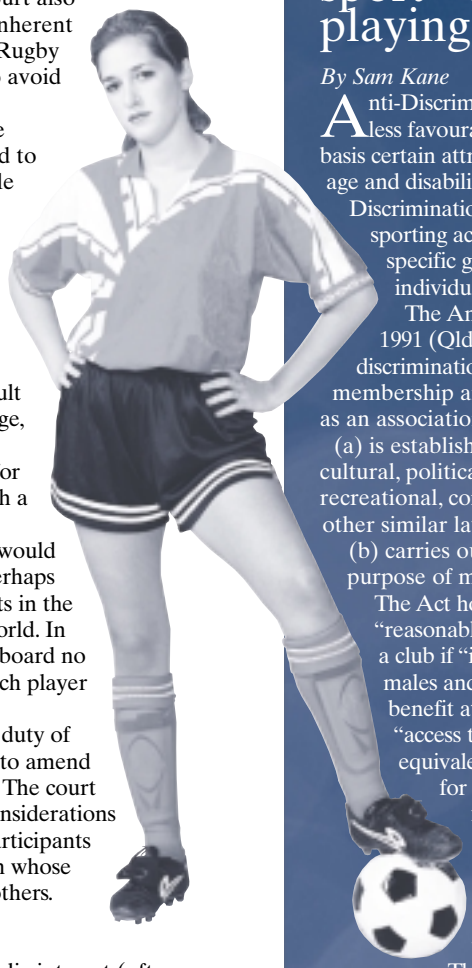
By Michael Simpson

In August 2000, the High Court delivered final judgement in the case often referred to as "the case of the footballer with the long thin neck." It involved 2 men who, whilst playing Rugby Union in local competitions, were left paraplegic when scrums were formed prematurely. They brought their actions against a large number of defendants including competitors, match referees, local authorities involved with the control and management of the sport, and National and International Rugby Union Boards.

The appeal to the High Court was to determine the liability of the International Rugby Football Board (IRFB). It was alleged that each individual member of the IRFB owed a duty of care to all players of the sport by reason of the board's capacity to make and change the laws of the game. The duty was to take reasonable care to ensure that the laws did not provide for circumstances where risks of serious injury were taken unnecessarily.

The court said that the members of the board, and the board itself, did not owe a duty. The court affirmed the principle that a duty of care is not negated merely because participation in the sport is voluntary and agreed that the IRFB assumed some control over the game by virtue of their law making power.

The board only met once a year in London and no individual from the board could change the laws. The court also stated that there is an inherent risk in participating in Rugby Union. The only way to avoid this is not to play. They said that the laws of the game could be amended to make it safer, but people who enjoy playing or watching the game "have other priorities".



Participating in the law making process for an activity (albeit hazardous) to which adult people voluntarily engage, does not of itself, carry potential legal liability for injuries sustained in such a contest. If such a duty existed, then the board would owe a similar duty to perhaps thousands of participants in the game throughout the world. In the court's opinion, the board no more owed a duty to each player to amend the laws, than parliamentarians owe a duty of care to factory workers to amend the factories legislation. The court did say that different considerations may apply where the participants are school aged children whose decisions are made by others.

1. the accused person knows the nature of the accusation or accusations made;
2. the accused person has the right to be heard; and
3. they will be given a fair hearing by a decision maker or authority who will pay due regard to material considerations and ignore all that is immaterial or irrelevant.

The expectation or right to procedural fairness does not emerge from the employment contract. Rather, it emerges from the fact that those bound by rules can expect to have those rules imposed fairly. Industrial Relations legislation now recognises an employees right to be dealt with fairly in processes leading to dismissal. In cases where dismissal does not result, but where an employed player is "suspended" from playing by force of the rules, there may be access to the civil courts to redress the denial of procedural fairness.

Restraint of trade

Under a restraint of trade action a player may challenge the rules and decisions of committees and disciplinary bodies whose findings can adversely affect the player's livelihood. This claim may be made regardless of whether the laws of procedural fairness have been followed. A player must prove a connection between the decision and a loss of income, and also that the restraint injures the public interest (often the supporters of the club). Where these elements can be proven the Court may intervene. Very rarely will the courts take any action where the appropriate process has been followed.

Unfair Contracts

Most professional sporting contracts have provisions whereby the player agrees to be bound by disciplinary rules. Where the rules are unfairly imposed the courts may intervene on the basis of the principle of procedural fairness discussed earlier. Where the rules themselves are unfair, one very effective remedy is to apply to the State Industrial Relations Commission. The Queensland provision is S276 of the Industrial Relations Act 1999. This provision empowers the Commission to amend or declare void a contract.

A contract may be varied in such a way as to ameliorate the unfair consequences of disciplinary rules. Sporting bodies have always enjoyed wide powers to discipline amateur sports persons who voluntarily bound themselves to observe the rules of the sport. The intrusion of professional players and their contracts of employment puts the disciplinary rules and the employment relationship on an inevitable collision course. We have not yet seen all the fall out.

Discrimination & sport - an even playing field

By Sam Kane

Anti-Discrimination laws prohibit less favourable treatment on the basis certain attributes, including gender, age and disability. How do these Anti-Discrimination laws impinge upon sporting activities restricted to a specific gender or 'category' of individuals?

The Anti-Discrimination Act 1991 (Qld) prohibits discrimination in the club membership area. "Club" is defined as an association that:

(a) is established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purposes; and

(b) carries out its purposes for the purpose of making a profit.

The Act however permits "reasonable sex discrimination" by a club if "it is not practicable for males and females to enjoy the benefit at the same time" and "access to the same or an equivalent benefit is supplied for the use of males and females separately" or "access arrangements offer males and females a reasonably equivalent opportunity to enjoy the benefit".

There are also exemptions in relation to clubs established to preserve or assist a minority culture.

The Act creates an exemption in relation to sport. It provides that a person may restrict participation in a "competitive sporting activity":

(a) to either males or females, if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity;

(b) to people who can effectively compete;

(c) to people of a specified age or age group; or

(d) to people with a specific or general impairment.

It is worth noting that the exemption in (a) above does not apply to a sporting activity for children who are less than 12 years of age. "Competitive sporting activity" does not include coaching, umpiring, refereeing or the administration of a sporting activity.

Whilst many sporting activities will be covered by the exemptions contained within the Act, bodies administering sporting activities must be wary of the precise terms of the legislation.

Rabbitohs fail in Federal Court

By Matthew Stapleton

South Sydney lost the first round of their fight to remain in the National Rugby League when on November 3, the Federal Court upheld the decision of the NRL to exclude the club from its 14 team competition.

As discussed in an earlier edition of M&M Sport, the Rabbitohs commenced proceedings in the Federal Court in a bid to be reinstated in the competition in 2001. Justice Finn dismissed each of the claims of the Rabbitohs that the decision of the League to exclude Souths:

1. breached the Trade Practices Act because it was exclusionary (of Souths fans);
2. breached the Trade Practices Act because the League had behaved in a misleading and deceptive manner because of certain representations they had made that the criteria would be applied fairly; and
3. was in breach of a contract (partly express and partly implied) between Souths and the League that Souths would be included in the 2000 competition.

In summing up his reasons Justice Finn made the observation that the real matter of contention between the parties appeared to be whether the game of rugby league was something that should be preserved and not "carved up to the media for their own financial gratification". He noted that usually it is fortuitous that a legal principle can often be found to support such a belief, however in this case he was unable to do so.

The decision has left many fans disillusioned and Rugby League now faces an uncertain future. Souths and their ever growing number of supporters have vowed to fight on and it is likely that this matter will soon be before the appeals court. In the meantime the league faces an uphill battle to win back public support.

Sports Medicine Australia

By Louise Conlan

Sports Medicine Australia (SMA) is a non-profit professional and community education organisation, made up of a variety of professional groups throughout Australia, all interested in the many sides of sports medicine.

The primary role of the SMA is to communicate information on the relationship between sport, exercise science and health to its members, the general public, government and sports governing bodies and their organisations with the objective of making Australian sport safer. SMA is a valuable source of information on the wide range of sports medicine issues. It provides a network and information referral service on general sport and health enquiries, maintenance of a national directory of sports medicine clinics, and information brochures. The organisation also acts as an adviser to Federal, State and Local Governments and to individuals, clubs and sporting organisations.

In addition to providing information and advice about sports medicine issues, SMA provides hands on assistance at many sporting events. Services offered include medical examination and clearance for athletes and game players at all levels, and medical and physiotherapy cover for sporting events. SMA has recently provided their services at the Asia Pacific Masters Games and looks forward to being involved in the 2001 Goodwill Games to be held in Brisbane.

Sports Funding

By Michael Simpson

In the wake of the Sydney Olympics and Australia's best result ever, much is being said about the funding that sport is to receive from the government in the future. Leading up to the Olympics there was an additional $135m poured into the Olympic Athlete Program (OAP) to develop Australia's elite athletes to their highest potential for 2000.

As part of the program several sports were added to the Australian Institute of Sport (AIS), including sailing, slalom, canoeing, triathlon, women's cricket, boxing, archery and women's soccer.

Almost undoubtedly, Australia would not have enjoyed the sort of success that it did without that level of financial commitment from the government, but can this level of funding be maintained?

Public sentiment appears to have impacted upon the Federal Government as although the level of funding for the OAP will be reduced, there will be some funding over last budget's allocation.

Minister for Tourism and Sport, Jackie Kelly, stated that this 'industry' now accounts for 2% - 3% of our GDP and there have been no cuts to basic funding. She has hinted that the government is now looking at another Olympic Program for Athens 2004.

In the last budget, the Australian Sports Commission (ASC), the single national body through which the government directs its contribution to sport, received $96m with an additional $15m in off budget revenue. In a breath of fresh air to Olympic medal winners whose sports faced AIS axing, the head of the ASC, Mr Peter Bartels, has announced that no existing programs will be cut from the AIS and it will be a major priority of the Commission to enhance its community sport programs under the Active Australia Banner, so that grass roots level sport is also nurtured.