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Newsletter of **Mullins Lawyers** | Issue Number 30 | October 2009

New award for sporting organisations

NIGEL INGLIS

The Sporting Organisations (Modern) Award 2010 has now been 'made'. It was made by the Australian Industrial Relations Commission (AIRC) on 4 September 2009. The award becomes operative on 1 January 2010.

Despite various submissions, including that of the Australian Services Union (ASU) on the point, the AIRC chose to adopt pay scales for this award that are above (in some cases well above) what many organisations may be used to.

The AIRC noted when making the award that a review will be conducted after two years. In the meantime, any variation sought to be made to the Award must be by application. On 26 June 2009 the AIRC published a statement about how applications to vary a modern award should be made, and how they may be dealt with (see www.fwa.gov.au). It is noteworthy that, in paragraph three, in discussing applications to vary, the AIRC stated:

"Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration."

In relation to coverage, the Award is expressed to apply, in clause four, to "...national and state sporting organisations throughout Australia with respect to their employees in the classifications in this Award to the exclusion of any other modern award."

Employees excluded from the Award under clause four are employees who:

(a) are employees of an employer bound by an enterprise award or enterprise Notional Agreement Preserving a State Award, or NAPSA;

(b) are excluded by the *Fair Work Act 2009;*

(c) chief executive officers;

(d) coaches employed by the AFL and VFL who do not earn their principal income as coaches;

(e) chief executive officers and executives at the second and third tiers of management including director of finance, assistant director and the state coach or similar at the Australian Cricket Board level, provided that the state coach is remunerated at a level greater than that specified in the award.

It is therefore timely for organisations to review their industrial arrangements. Questions to consider include:

1. What industrial instruments apply in our organisation?
2. Will this modern award apply to our organisation?
3. If the modern award will apply, what do we need to do now to ensure that on 1 January 2010 we will be able to comply with it?

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Defamation in sport

MATTHEW BRADFORD

It is no secret that reputations are important in sport. Stories and perceptions about sporting legends live on long after athletes have retired. But now administrators and officials are increasingly seeking to protect their reputations and, unlike athletes, they don't have a chance to prove themselves on the field so a loss in reputation may cost them their job.

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Defamation laws have changed in Queensland in an attempt to make the laws more consistent throughout Australia. Basically, defamation occurs when a person communicates a matter that is defamatory about someone to at least one other person. A matter is considered to be defamatory if it is likely to lower a person's reputation or cause others to avoid or ridicule that person. The matter can be communicated to another person in any form, including newspaper and internet articles, television stories, press conferences and even private conversations.

There are a number of defences to a claim of defamation, including:

- The matter in question was substantially true.
- The matter was partly true and it didn't cause any harm because of substantial truth of the context.
- It was a fair report of a proceedings of public concern (for example proceedings of a parliament, court, sporting association relating to its members, shareholders meeting).
- It was an honest opinion that related to a matter of public interest and was based on proper material.

The new laws provide a process for resolving disputes, without the need to go to court by providing an ability to `offer to make amends', which usually involves publishing a correction or apology and/or payment of some compensation. Generally any offer to make amends or any apology is not taken to be an admission of fault or liability, but it can be a mitigating factor when the court considers the amount of damages to award. The amount of damages that may be awarded for non-economic loss is now capped at $250,000.

Running a defamation case can be expensive, unpredictable and difficult to prove. This often means that threats to sue for defamation are not followed through. However, athletes, administrators and officials should still think twice before making a comment that could damage someone's reputation.

Expect the unexpected

ANTHONY O'DWYER

Force majeure clauses are usually found amongst the boilerplate provisions of contracts relating to sporting events. Like most boilerplate clauses, little attention is given to negotiating those clauses because the focus is on the meaty commercial issues - who is getting what for how much? While each force majeure clause may be different, the term is generally taken to describe a provision of a contract that excuses non-compliance with the obligations under the contract.

Hopefully, the contract can be placed in the bottom drawer once the terms are agreed and left there while the event proceeds swimmingly. Every now and again though, something gets in the way of the desired outcomes and the parties reach into the bottom drawer to work out where their obligations might lie. The force majeure clause might deal with a situation where a party is not able to comply with its obligations because of an event or circumstances outside their control. Usually those events or circumstances will be of a nature that was not foreseeable by the parties at the time the contract was agreed. The force majeure clause might allow for the suspension of the obligations under the contract while the circumstances continue. It may then allow the parties to terminate the contract if the circumstances do not abate.

When a specific set of circumstances that might adversely impact a contracting party's return from the contract can be anticipated, the parties are usually able to deal with the issue easily in the contract. It might be that a sponsor of an event wants to ensure the field of competitors includes sufficient drawcards to justify the sponsorship dollar. The sponsorship contract can relatively easily cater for those outcomes and provide for different rates of sponsorship depending on benchmarks being achieved.

When the circumstances that might impact the event cannot easily be anticipated, the task of providing for the outcomes falls to the force majeure clause. It might be that competitors are unable to leave their home country or enter Australia because of some national or international disturbance (think back to the immediate aftermath of September 11). Should the event organiser suffer a reduction in the sponsorship dollar because of the failure to deliver the international drawcards? On the other hand, should the sponsor have to pay full freight when the exposure of the event is reduced because the international drawcards cannot get to the event?

Force majeure clauses are too often overlooked in the haste to get the agreement into writing and finalised so announcements can be made and collateral produced. The clauses are not easily drafted because the task is to deal with circumstances that are not easily anticipated. A little care when considering the clause might pay off in the long run and produce a fair result for both parties to a contract when the outcomes can not be delivered despite the best efforts of all concerned.

Legal liability for injured children

ROD ALLDRIDGE

Organisations providing advice or instruction to children will now be legally liable if a child is injured whilst under their care or control, even if the organisation engages a subcontractor to conduct the activity. The Queensland Court of Appeal expanded the legal boundaries when it held the owner of a martial arts academy had a non-delegable duty of care to the children attending its classes.

In Fitzgerald v Hill (2008) an eight-year-old child participating in a tae kwon do class conducted by an instructor, was struck by a vehicle as he and other class members were running beside a road at 7.30pm.

The owner and operator of the martial arts academy was held to be responsible for the conduct of the class and was held liable because the instructor was negligent in failing to exercise proper care for the child, even though the instructor was not an employee. Previously, if an organisation engaged a qualified contractor to conduct the activity, the organisation would have escaped liability.

The Court of Appeal adopted comments of the High Court in New South Wales v Lepore (2003) when it stated:

"In cases where the care of children, or other vulnerable people, is involved, it is difficult to see what kind of relationship would not give rise to a non-delegable duty of care. It is clearly not limited to the relationship between school authority and pupil. A day care centre for children whose parents work outside the home would be another obvious example."

The decision potentially affects sporting clubs, adventure clubs and organisations that provide instruction to children in the conduct of some activity. Organisations such as church groups organising recreational activities will not be exempt.

Parents can be confident that those people in control of an organised activity outside the home will be responsible if the child suffers injury because of negligence. Organisations conducting an activity involving care and supervision of children should ensure they are covered by personal liability insurance designed to indemnify against injury to participants in the activity.

STOP PRESS

Is drink driving enough TO LOSE YOUR JOB?

NIGEL INGLIS

As we go to press Frank Farina has been fired because he was caught drink driving. Of course, very often the story reported in the press is short on detail, and there's more to it than we are told. For example, the discipline issues at the soccer club appear to have played a role. But we query what those issues have to do with Frank Farina's drink driving charge, or his employment as coach.

Frank Farina – if he pleads or is found guilty of drink driving – will be punished, probably severely as it is his second offence. Why should he also lose his job? Is this a clear case of being punished for the same thing twice?

The impeccable behavioural standards required of high profile athletes and now, it seems, coaches too, appear at odds with other standards in the community.

Partners of a law firm would be highly unlikely to lose their jobs if they were caught drink driving – even twice.

Pressure from sponsors, or at the very least concern by the clubs of pressure or potential pressure from sponsors, is often the reason for such harsh treatment of these people. But what the club appears to be doing is punishing Frank Farina over and above what the law provides, and that's harsh, unreasonable and unfair. This is not to mention the damage to his reputation.

Players and coaches should review their contractual arrangements and, one would think (and hope they can) negotiate better contracts so if they do find themselves in the position of Farina, they can still keep their jobs, or get paid out in full.

The good behaviour clauses are often given very little attention by employees in the excitement of signing a new contract. When an employer is looking for a basis to terminate an employee these clauses are often the first looked at.

What happened to innocent until proven guilty?

NIGEL INGLIS

The Australian Sports Anti-Doping Authority (ASADA) indicates on its website that there is an increasing reliance on investigations by it to sanction athletes who have not had a positive doping test for a banned substance.

There are routine doping control processes which are used to detect the use of prohibited substances or the use of prohibited methods, such as sample collection or sample analysis. These can result in what is called an adverse analytical finding and, if proven, may result in a positive test and ultimately a sanction. However, outside of routine processes ASADA also conducts 'investigations'.

ASADA has broad powers under the *Commonwealth Australian Sports Anti-Doping Authority Act 2006* (the Act) to investigate whether athletes or their support personnel may have breached any anti-doping rules.

Under the anti-doping rules, an athlete is not allowed to use a prohibited drug or doping method, nor is an athlete or support person allowed to possess or traffic in a prohibited drug or doping method. Routine sample collection or analysis will often catch out an athlete who uses prohibited substances.

However, under the Act and associated regulations, if ASADA 'believes' an athlete or support person 'may' have breached the ani-doping rules, it is entitled to make a finding to that effect. No doping test and no adverse analytical finding is required. This is an extraordinary power enshrined in legislation.

An avenue of appeal exists to the Administrative Appeals Tribunal. However, it is not until this stage of the process that an athlete or support person can expect any sense of judicial character to be brought to bear to the process.

An example of ASADA making findings without any sample collection or sample analysis being conducted or any adverse analytical finding includes the October 2008 report on Australian cyclist Daniel Galea, who accepted a two-year suspension for possession, use and attempted use of prohibited substances after a joint investigation by ASADA and the Australian Customs Service. Mr Galea attempted to import a banned substance concealed as another substance. These substances were posted to Mr Galea through the mail where the Australian Customs Service intercepted them. He was never the subject of a doping control test.

Interestingly, there does not appear to be an express power under the World Anti-Doping Code, Anti-Doping Rules, or the National Anti-Doping Scheme for investigators such as those appointed by ASADA to compel athletes to participate in interviews or answer questions in investigations. There is no power to detain an athlete or support person. In these circumstances serious questions arise regarding the investigation process, and the 'belief' ASADA may form when considering sanctions against athletes where no positive sample is available.

That said, often a decision to voluntarily participate in any investigation may be something an athlete is prepared to agree to. For instance, there may be a reasonable explanation that will exonerate the conduct. However, there are no guarantees that will satisfy ASADA. ASADA has not published any guidelines about how it conducts its investigations, nor does it publish information about athletes' rights other than some limited information on its routine doping control measures.

Before speaking with ASADA, voluntarily participating in any interviews, or giving any statements, we suggest speaking to a lawyer who is familiar with the process to determine the best approach.

JOHN MULLINS
EDITORIAL

The Global Financial Crisis has had far-reaching impacts, some of which could not have been predicted or anticipated. One of these was the impact on this publication – Mullins Sport.

I am pleased to say that as we move forward into economic recovery, Mullins Sport is now returning to your desk.

This edition deals with a wide range of matters and, importantly, touches on the current status and application of the Sporting Organisations (Modern) Award 2010. It is important for sporting organisations to ascertain what application this Act has on their operations, and to take appropriate steps as this Award becomes operative from 1 January.

Over the last few years, there has been a distinct shift in public sentiment on player behavior. Now everyone armed with a mobile phone is a potential newspaper reporter. People are encouraged, and dare I say paid, to provide news and reporting to the media. As a result, player misconduct is receiving significantly more publicity than in the past. In that respect, it is possible to have some sympathy for players whose behavior, whilst misguided, is perhaps not criminal or even not that unusual for people of their age. I am talking here about the milder aspects of drunken behavior.

Society will no longer tolerate this type of hoonish behavior from these highly paid and admired members of the community. Perhaps they have not asked to be admired, nor perhaps do they deserve to be, but they are. Beyond the simple drunkenness however, we have seen serious acts of violence (including against women).

Significantly, the people who fund the sport, vision and sponsors are equally tired of this behavior. It is curious to watch television stations turning on their own, which would not have happened a few years ago. The footage of Brendan Fevola making a fool of himself shown on the Footy Show might be good for short term ratings, but is ultimately not good for the individual or the sport.

Arising from this is pressure to ban alcohol sponsorship, which is what occurred with cigarette sponsorship a number of years ago. Whether we like it or not, sport needs alcohol advertising. Perhaps society doesn't but sport does. Advertising alcohol and cigarettes are two massively different things. These knuckleheads who continue to behave abysmally, affected by alcohol, provide a wonderful argument for those who oppose alcohol advertising.

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