

## Your scalp or mine? Ticket scalping in the Australian sports and entertainment market.

ADAM HAMREY



The upcoming Rugby World Cup in New Zealand has again brought ticket scalping to the attention of Australian sporting fans. This comes only four months after the Commonwealth Consumer Affairs Advisory Council published its final report into ticket onselling practices in the Australian sports

and entertainment market. The Report found that a widespread perception exists among Australian consumers that the unauthorised onselling of tickets for a profit ('scalping') is a major problem. This sentiment is growing despite the prevalence of scalping being extremely low in comparison to countries such as the United States where it is a well-established, sophisticated practice.

Concerns over ticket scalping in Australia have been principally driven by the increasing influence of technology. The evolution of the internet into a trade gateway, coupled with the popularity of websites like eBay, has assisted scalpers in obtaining easier access to a wider customer base. These websites also make ticket scalping increasingly visible to the general public. Disappointed fans often discover that tickets they missed out on moments before are available for purchase at grossly inflated prices. This can lead to significant

dissatisfaction among those "true

fans" who may feel robbed by the opportunistic scalper who is motivated solely by making a quick buck.

In an effort to address the perceived problem

of scalping, the Queensland Government amended the *Major Sports Facilities Act 2001* to prohibit the resale of tickets to "major sports facility events" at a price exceeding 110% of the original ticket value. The Act, which applies to various major sports and entertainment hubs throughout Queensland, exposes both the scalper and the purchaser to potential monetary penalties. Similar legislation exists in a number of Australian States and also in New Zealand. Not surprisingly, the 2011 Rugby World Cup has been offered special protection under the applicable New Zealand legislation.

Ticketing agencies, promoters and venue operators also attempt to discourage scalping by seeking to apply conditions to their tickets prohibiting onselling for a profit. These primary ticket sellers must be vigilant in ensuring that their anti-scalping conditions are effectively incorporated into the contract with the ticket purchaser. Online, telephonic and over-the-counter distribution channels must effectively draw the purchaser's attention to the ticket's conditions prior to purchase.

Primary ticket sellers also need to be extremely wary of overstepping legal boundaries when attempting to combat scalping. For example, the Courts have previously found that a condition purporting to automatically void a ticket if it was resold for a profit was misleading and deceptive.

Due to the sheer volume of tickets sold to high demand sporting and entertainment events, effectively enforcing anti-scalping laws and ticket conditions is extremely difficult. This is particularly the case in Australia where scalping is generally sporadic and unsophisticated. Despite this, primary ticket sellers can implement various strategies to minimise the likelihood of scalping taking place. These strategies include improving distribution methods and monitoring practices, requiring tickets to be purchased in the names of specific individuals, and staggering ticket release dates.



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# Sporting Organisations and the Modern Award

NIGEL INGLIS



We are often asked by sporting organisation clients about how to structure their employment and industrial arrangements. For coaches employed by National, State or Territory sporting organisations throughout Australia the *Sporting Organisations Award 2010* (Award) applies. Together with the NES, the

Award forms the safety net under the *Fair Work Act 2009*.

Under the *Fair Work Act 2009*, the National Employment Standard, or NES is comprised of the 10 minimum standards of employment. These underpin the national industrial relations system. The NES include:

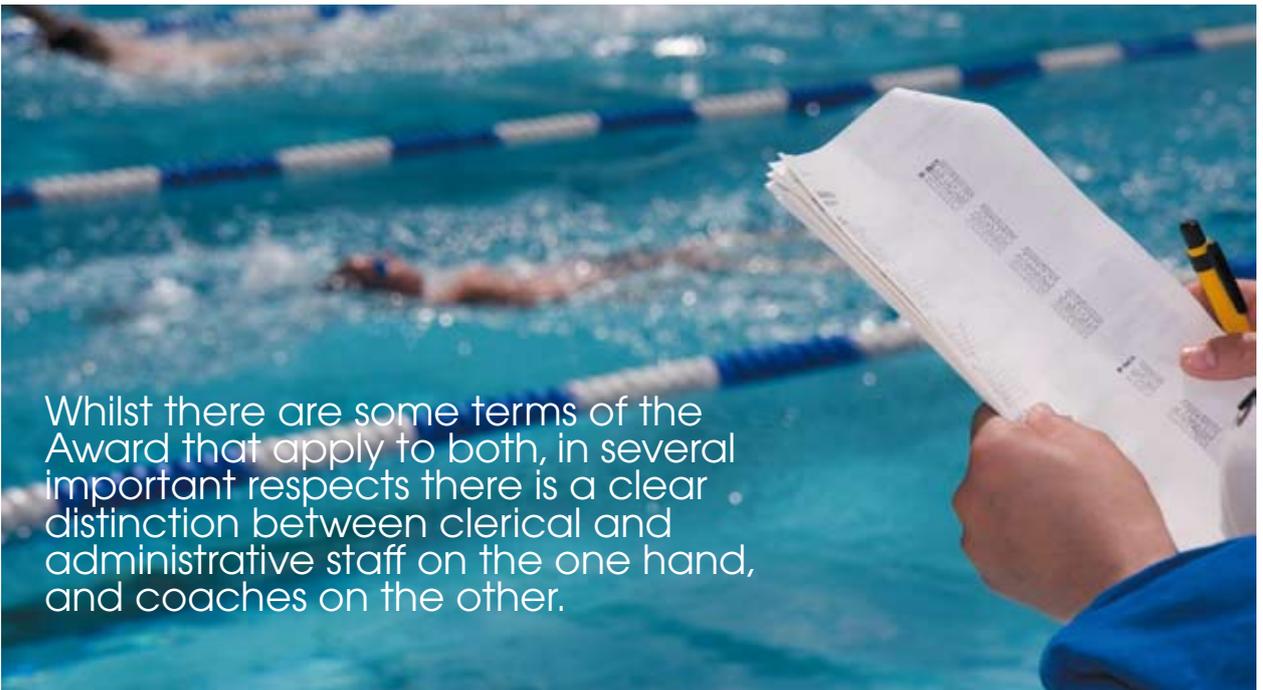
- Maximum weekly hours of work – 38 hours per week plus reasonable additional hours
- Requests for flexible working arrangements
- Parental leave and related entitlements of up to 12 months unpaid leave for every employee, plus a right to request an additional 12 months unpaid leave

Apart from the obvious difference between these two types of employees given what they actually do, an important distinction under the terms of the Award is the prescriptive terms in relation to hours of work.

For clerical and administrative employees, there are specific terms under the Award that apply. These employees are also entitled to overtime.

For coaches, the NES applies. The issue under the NES is what amount over 38 hours per week constitutes “reasonable additional hours”? In sport, it is commonplace for coaches to work more than 38 hours per week, and in some cases much more.

The *Fair Work Act 2009* is clear that an employee may refuse to work additional hours “if they are unreasonable”. The criteria for determining whether additional hours are reasonable or unreasonable are set out in the FWA and include the employee’s personal circumstances including family responsibilities, the needs of the organisation, whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or



Whilst there are some terms of the Award that apply to both, in several important respects there is a clear distinction between clerical and administrative staff on the one hand, and coaches on the other.

- Notice of termination and redundancy pay of up to 4 weeks notice of termination or 5 weeks for employees 45 years old and over and up to 16 weeks redundancy pay

These are the minimum terms and conditions of employment for employees in the national system.

A common question we are asked is whether the Award actually applies as there are some exclusions, such as employees in second tier management positions. It is unlikely that the title of a position in question would alone be enough to establish the employee is not covered. Instead, this question will also involve considerations of the tasks and duties performed by the particular employee.

Whilst there are some terms of the Award that apply to both, in several important respects there is a clear distinction between clerical and administrative staff on the one hand, and coaches on the other.

a level of remuneration that reflects an expectation of, working additional hours, and the usual patterns of work in the industry.

One way to try and ensure a sporting organisation satisfies the criteria is to enter into an Individual Flexibility Agreement (IFA) with a coach. As this is the *only* way a sporting organisations can take advantage of paying over award wage rates, which may be able to be offset against the a coach’s hours of work beyond 38 hours per week, we recommend sporting organisations consider using an IFA with their coaches.

We can assist you with this process.

Significant penalties apply for breaching the Award or NES of up to \$33,000 for the organisation or \$6,600 for individuals.

# Disciplinary Tribunals Get it Right

JOHN MULLINS



**W**e continue to see, almost on a weekly basis, sporting administrators and clubs making a mess of disciplinary proceedings within their organisation. These errors generally fit into a few specific categories:

1. The failure to follow their own procedure or flawed procedures
2. Bias and lack of independence of the Tribunal
3. Imposition of inappropriate penalties

Organisations almost without exception have some disciplinary provisions contained in their Constitution or By-Laws. Some of these are standard, some of these come from Model Rules, standard Constitutions and many are inherently flawed.

Flawed processes include giving the right to appeal a decision back to the body that made the decision. Another example is requiring the rules of evidence to be applied strictly at a Disciplinary Hearing. Supreme Court Judges struggle to strictly apply the rules of evidence because of their complexity. The prospects of a domestic tribunal being able to do this are almost nil.

Bias and lack of independence is a huge problem. A person is entitled to have the matter heard by independent people who have not prejudged the matter. Very commonly Management Committees are given the responsibility for disciplining members. Typically by the time someone faces the disciplinary proceedings there have been a number of issues over the years and the Management Committee already have a view as what should happen to the member.

It is established law that when one member of the tribunal has bias the whole committee is biased. I am constantly advocating the use of independent tribunals involving people who have no existing relationship with the member.

Organisations only have authority to impose penalties within their control. We have seen recent examples of penalties being imposed that ban people from playing a sport, when clearly the organisation only has the ability to ban people from playing in competitions which they control.

We have also seen examples of people being banned from consuming alcohol. This is a different issue to issues of responsible service of alcohol. Unless the power is specifically given in the rules (which I doubt) you cannot simply impose penalties on people that they do not consume alcohol on the premises or such things as attend anger management classes and a ban from all venues playing that sport.

The stress and anxiety of flawed processes creates great drama within organisations, which sucks up enormous amounts of time and energy and inevitably leaves everyone bruised and bitter. I can assure you that it is relatively easy to get disciplinary processes right and to give people procedural fairness and Natural Justice. To do so however you must have a will and you must start with a good set of Disciplinary By-Laws.

A final word about Member Protection By-Law. The Member Protection By-Law is not meant as a general disciplinary By-Law for members. It relates to disciplinary action that specifically relates to those matters to which the Member Protection By-Law applies.

## Fixed Term Contracts For Players And Admin Staff

NIGEL INGLIS

**O**ur sports clients often ask us about whether a contract they have with a coach or other staff member is "fixed term". The client often says that was the intention.

Some of the time we are asked this question, the contract is not a fixed term contract. If the contract provides for termination on notice (even if a period the contract is due to run out is stated), the courts have consistently said that such a contract is not for a "fixed term".

One advantage of a true fixed term contract is that the person is excluded from making an unfair dismissal claim. However, there are significant dangers with fixed term contracts. The two main dangers with a true fixed term contract are that firstly, if the relationship breaks down early in the term and the sports organisation wishes to "let the person go", then so long as serious misconduct is not involved, the organisation is most likely going to have to pay out the balance of the entire period owing to the person, including entitlements for the entire period. For high profile coaches or players, the payouts can be significant.

Secondly, if the person works a single day past the stated "end date", then the organisation and the person will be,

as a matter of law, taken to have agreed to continue the relationship on the same terms and conditions as set out in the original contract, the only change being to terminate, "reasonable notice" would be required. If the person is senior, and the relationship continues for a long period, the "reasonable notice" to be paid could be significant, perhaps as high as nine months (or more) of the salary plus entitlements. More often than not, we are asked for advice after the contract has been entered into, or after the "end date" has passed.

One advantage of a true fixed term contract is that the person is excluded from making an unfair dismissal claim. However, there are significant dangers with fixed term contracts.

To minimise these risks, you should carefully consider whether you wish to enter into a true fixed term contract, bearing in mind these risks. We can assist you with that process and as always, it is best to seek advice *before* you commence your discussions with the person to come on board, and certainly before you put a written contract forward.

# Anti-siphoning reforms good news for sports fans

ZOHEB RAZVI



After Australia were knocked out in the recently completed ICC Cricket World Cup, certain members of the public were questioning the telecast of remaining games on free-to-air television. In fact, free-to-air television did not broadcast the entire quarter-final match between Australia and India or any part of the semi-final between India and Pakistan where coincidentally an estimated 1 billion viewers watched it. This is due to the current anti-siphoning laws which were recently reviewed by the

Australian Government. As a result of the review, a number of changes have been proposed which should ensure that major sporting events, like the ICC Cricket World Cup, are shown for free.

The Commonwealth Government introduced anti-siphoning laws in 1994 to prevent the "siphoning" of events of "national importance and cultural significance" by subscription television broadcasters and accordingly restricting who may be able to watch them.

Under the Broadcasting Services Act 1992 (Cth) (Act), the Minister for Broadband, Communications and the Digital Economy has the power to choose events which should be televised to the public for "free". These events are incorporated into an "anti-siphoning list" and can be changed from time to time at the discretion of the Minister.



On 25 November 2010, the Minister announced a number of changes to the Act. These proposed changes included a two-tier list (Tier A and Tier B effective on 1 January 2011) and a "must-offer" obligation on free-to-air broadcasters to televise anti-siphoning events they acquire or offer those rights on to another broadcaster. This will prevent rights to important sporting events going unused. This change, amongst others, is still under wraps and may not come into force until later in the year. So, at this stage, the current anti-siphoning laws still apply.

An example of how the proposed reforms will benefit the sporting community is as follows. The Minister considered that all Australian games, the

semi-finals and final of the ICC Cricket World Cup are of "national importance and cultural significance". As such, these were included in the previous anti-siphoning list and also in the new Tier A list. This means free-to-air broadcasters were given priority to purchase these games ahead of subscription television broadcasters. However, the Act (as it applies now) does not require free-to-air broadcasters to show these matches "live" or in "full". The result was that free-to-air television only showed some Australian matches, some coverage of one semi-final and some coverage of the final.

If the proposed reforms were in effect prior to the ICC Cricket World Cup, then the free-to-air television broadcaster who acquired the rights would have been obliged to show all matches involving Australia, all semi-finals and the final "live" and in "full".

As such, the proposed reforms, if passed, should enhance television coverage of key sporting events and should be viewed as a positive step for the sporting community and television.



JOHN MULLINS  
EDITORIAL

It has long been said that for a team to perform well on the field the back room must be in good order.

The financial woe of the Brisbane Roar appears to have had no impact upon their record unbeaten run.

The business affairs of a team will probably be impacted upon by their performance on the field, but the Roar has proved their performance on the field is not necessarily linked to their business performance. There is certainly a linkage between all of these things, but it is very unclear and uncertain.

The Reds seem to have well and truly turned the corner both off and on the field and now have had the same Chairman, CEO and Coach for a couple of seasons. They are currently on top of the competition in Australia and are reporting a remarkable change in their financial situation.

The bottom line appears to be that the most important element, unremarkably, is simply having good players. From time to time teams like the Broncos, the Reds and the Roar, you put together a good collection of players and almost invariably this good collection of players is not about pursuing the "biggest stars" in the game. It will come almost unexpectedly from putting a group together with a good coach that creates a group dynamic that is successful. Generally the players off field behaviour will be acceptable or better.

Without a good team you are no chance, but a good team is only the start. The interaction then between the coach, the executive, how that team manages its behaviours and expectations, and luck will determine how successful the team will be off and on the field.

To be successful and to be in the press for all the right reasons you need a good plan, you need good people, you need good luck. Sometimes you can see it coming and some times you can't, but all of a sudden as I dictate this piece the Brisbane / Queensland Teams are close to the top of the Super 15 and NRL, and have won the A League. How does that happen? Anyone who can work that out definitively will be extremely successful.

As the golfer Graham Marsh famously said, "the more I practice the luckier I get". I suspect with sports administration the more you try, the more you hang in there, provided you are doing that with a good plan, with capable and competent people, both players and administrators, eventually you will get there. The key is to find the right people on and off the field not necessarily the biggest stars.