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Sports Law

Australia
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AUSTRALIA

Law and Practice

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1. REGULATORY

1.1 Anti-doping

Criminal Offences Relating to Doping in Australia

Australia, unlike many other countries, does not have any legislation that specifically criminalises doping in sport. Instead, the Australian Commonwealth and each of the states and territories have all enacted legislation that criminalises certain conduct that also constitute a violation of the World Anti-Doping Agency's (WADA's) anti-doping rules. By way of example:

- Australia's Commonwealth Criminal Code Act 1995 criminalises the trafficking of certain substances that also appear on the WADA's list of substances and methods as being prohibited both in and out of competition, and in particular sports (World Anti-Doping Code Prohibited List); and
- Australia's Customs Act 1901 and Customs (Prohibited Imports) Regulations 1956 criminalise the importation of certain substances that also appear on the World Anti-Doping Code Prohibited List. This type of offence is punishable by up to five years' imprisonment and up to 1,000 penalty units in Australia.

Commonwealth and state and territory legislation in Australia also prohibits the use or administration of a substance on the World Anti-Doping Code Prohibited List without an appropriate medical or therapeutic justification.

Implementation of the World Anti-Doping Code in Australia

Australia is a signatory to the UNESCO International Convention against Doping in Sport, and is therefore required to implement an anti-doping scheme that is in accordance with the principles of the World Anti-Doping Code.

Sport Integrity Australia–an executive agency of the Australian government that brings together the Australian Sports Anti-Doping Authority (ASADA), the National Integrity of Sport (NISU) and the national integrity programmes of Sport Australia as one entity – implements the World Anti-Doping Code by way of a legislative framework that includes the Sport Integrity Australia Act 2020 and the Sport Integrity Regulations 2020 (in particular, Schedule 2 – the National Anti-Doping Scheme).

Sports Integrity Australia collaborates with the World Anti-Doping Agency (WADA), overseas anti-doping organisations and other stakeholders on an ongoing basis, to ensure (by way of regular amendments) that Australia's National Anti-Doping legislation remains consistent with the World Anti-Doping Code. As recently as 15 December 2020, the Sports Integrity Australia Act 2020 was amended to implement revisions to the World Anti-Doping Code.

Australian Sports Anti-Doping Authority

Further to the legislative measures outlined above, doping in Australian sport in particular is regulated by ASADA, which is Australia's national anti-doping agency. Its purpose is to protect the health of Australian athletes and the integrity of Australian sport.

1.2 Integrity

Match-Fixing – Legislative Measures

In 2011, the Australian Commonwealth and state and territory governments agreed to a National Policy on Match-Fixing in Sport (the National Policy), in an effort to "pursue [...] a consistent approach to criminal offences, including legislation by relevant jurisdictions, in relation to match-fixing that provides an effective deterrent and sufficient penalties to reflect the seriousness of offences, as provided for in Part 4.3 of the National Policy". A number of Australia's states and territories have since enacted legisla-

tive arrangements covering certain match-fixing behaviours, with penalties including a maximum of seven to ten years' imprisonment.

By way of example, Part 4ACA of the Crimes Act 1900 (NSW) criminalises conduct that is likely to affect the outcome of any type of betting on any event (that is lawful to bet on in any state, territory or the commonwealth), and which does not meet the standard of integrity that a reasonable person would expect of those in the positions that affect this outcome (ie, "corrupt conduct").

Role of Governing Bodies

Athlete misconduct, including match-fixing and/or cheating in sport, is also dealt with and regulated by the relevant sporting code's governing body, in accordance with their particular rules and the guidelines of participation in that particular sport.

Often, regardless of the code or league, player misconduct can trigger suspension, or in more serious cases, a player or players may have their player contracts terminated as a result of their misconduct.

A prominent example of misconduct of players in Australian sport is the 2018 Cricket Australia ball-tampering scandal, in which a number of Australian cricket players were found to have "roughed-up" a ball with sandpaper in a test match against South Africa, in order to manipulate the ball's direction in flight. In response, Cricket Australia suspended three players, including the Australian captain and vice-captain, and the Australian coach subsequently handed in his resignation.

1.3 Betting

No National Authority Regulating Sports Betting in Australia

Sports betting is not illegal in Australia, but there is no single overarching statute or authority regulating gambling activities, including betting, in the country.

Sports betting is, however, separately regulated by way of a series of federal statutes and by separate legislative frameworks in each of Australia's eight mainland states and territories. By way of example, the Victorian Commission for Gambling and Liquor Regulation Act 2011 provides for the creation of the Victorian Commission for Gambling and Liquor Regulation (VCGLR), which is empowered to regulate the gambling and liquor industries in Victoria.

Regulation of the Betting Activities of Professional Athletes

The betting activities of professional athletes are often regulated to a greater extent than non-athletes by the regulating body of their particular sport. The Australian Football League (AFL), for example, prohibits players from betting on AFL matches, and recently fined a player AUD20,000 and banned him from playing for 22 matches after he placed three, same-game multi-bets in three matches in which he played in in 2019.

Protecting the Integrity of Sport – Information Sharing

In some Australian states, approval by regulators (such as the Victorian Commission for Gambling and Liquor Regulation) as a Sports Controlling Body (SCB) enables an organisation to enter into agreements with sports betting providers for the provision of particular sports betting services, and to receive a financial benefit in return.

This also allows those SCBs to share information with betting operators – for example, in order to protect and support integrity in their sport. The intention of such a framework is to promote confidence in Australian sports and any associated betting activities.

1.4 Disciplinary Proceedings

Each of the major sporting codes in Australia have developed and implemented their own integrity unit, tribunal or similar body, to manage disciplinary proceedings against athletes.

The steps taken by each of those bodies in respect of investigating and penalising doping, integrity, betting and other offences differs amongst the codes.

By way of example, Rugby Australia has implemented a mandatory reporting scheme whereby "participants" in rugby (including players, coaches, managers and agents) are required to immediately report any breaches of their Anti-Corruption and Betting Policy to an appointed Integrity Officer. That Integrity Officer is then empowered to investigate the breach, issue the relevant participant with a written breach notice and if requested, establish an integrity tribunal to conduct a hearing in relation to the alleged breach.

2. COMMERCIAL RIGHTS

2.1 Available Sports-Related Rights

Ticketing Rights

One of the most notable sports-related commercial rights to be exploited in Australia are those relating to ticketing. The market for tickets in Australia is significant and comprises both primary and secondary ticketing markets.

The term "primary ticket sales" refers to a situation where tickets are first sold by an official ticket seller, whereas the term "secondary market" refers to a situation where those primary tickets are resold.

The Secondary Ticketing Market

The secondary market for tickets in Australia comprises two main components, as follows:

- authorised on-selling, whereby sporting bodies, such as Tennis Australia or the AFL, authorise other entities, such as travel companies, to purchase tickets to a sporting event and on-sell them to their customers;
- ticket scalping, whereby ticket scalpers resell tickets at an elevated price.

Scalping

There is no federal legislation making scalping illegal in Australia. However, some Australian states regulate the manner and terms on which tickets can be resold, and have legislated to restrict, or even prohibit, scalping in that jurisdiction.

By way of example, in Victoria, the Major Events Act 2009 provides that where an event is the subject of a major event ticketing declaration, it is an offence to resell a ticket to that event for more than 10% above the original face value of the ticket.

2.2 Sponsorship

Enhancing a Brand Through Sport

In Australia, many sports sponsors use their sponsorship rights as a marketing tool. Sponsors generally leverage the platform that a sports rights-holder can offer in order to increase public awareness of their brand and, in turn, the value of their business. The affiliation with a sports rights-holder can, in certain circumstances, improve the corporate image of the sponsor as they leverage the strong reputation and brand of a sporting team or player.

Attracting Sponsors to Sport

Sports rights-holders use sponsors to generate revenue for their business, by way of payment of sponsorship fees.

Sports rights-holders attract sponsor investment by offering a range of sponsor rights, which traditionally can include the right to use

the sports rights-holder's brand and player imagery, and to have the sponsor's brand displayed on player kits and at certain matches. More recently, sponsorship agreements may offer customised content, featuring players and team members, the right to feature on the sports rights-holder's social media channels and, in some circumstances, allow the use of the sports rights-holder's fan database for the sponsor's marketing purposes.

Key Provisions of Sponsorship Agreements in Australia

By way of a brief summary, the key provisions in any sponsorship agreement include clauses relating to:

- exclusivity, which may relate solely to a particular market or market segment;
- payment terms;
- sponsor benefits, including provisions dealing with the suspension of any sponsor benefits (such as, as a result of any COVID-19-related suspensions of sport);
- intellectual property rights, including where and how a sports rights-holder's brand can be used, and any required approvals;
- termination conditions; and
- the duration of the agreement.

2.3 Broadcasting

Exploiting Broadcasting Rights

Traditionally, broadcasters in Australia exploit available broadcasting rights by selling advertising space on their channels (especially in the case of free-to-air channels) and otherwise by offering paid subscription services to the public.

Broadcasting rights are one of the most valuable rights available for sports rights-holders in Australia to sell in order to generate revenue. Broadcasters will often seek exclusivity in the broadcasting rights to certain sports events because they can exploit those rights to encourage businesses to purchase advertising space on their channels during times of high viewership.

By way of example, the AFL currently has broadcasting rights agreements in place with both Channel 7, which is a commercial free-to-air television channel in Australia, and Foxtel, which is a subscription-style pay-television service. Both television companies exploit the popularity of the AFL amongst viewers in order to generate profits through advertising revenue (in the case of Channel 7) and in the case of Foxtel, through revenue derived from viewer subscription fees.

Exclusivity of Broadcasting Rights

Broadcasting rights in Australia are often obtained on an exclusive basis, meaning that the sale of particular broadcasting rights to a certain television channel or provider often precludes the sale of those same rights to another television company.

There are a number of "anti-siphoning" laws in Australia that require certain events (such as the AFL premiership competition) to be made available free of charge to the general public. This means that for these events, subscription-based television providers are not be able to acquire the exclusive rights to broadcast these sporting events, without a free-to-air television channel also holding those broadcasting rights.

3. SPORTS EVENTS

3.1 Relationships

No Proprietary Rights in a Spectacle

The High Court of Australia in the matter of Victoria Park Racing & Recreation Grounds Co Ltd v Taylor [1937] HCA 45 found that while event organisers may make a profit by charging entrance to a private area in which a spectacle (ie, a sporting event) is being held, no proprietary rights exist in the spectacle itself.

Organisers of sporting events must then find different ways to control rights at a particular sporting event. As sporting events are generally held on private property, event organisers have the right to issue admission requirements for attendees. Further, each state and territory in Australia has varying statutory regimes to that prohibit unauthorised broadcasting of sporting events. For example, Sections 43 and 44 of the Major Events Act 2009 make it a crime to broadcast, telecast, videotape or record a sporting event without prior authorisation from the organisers.

Management of Sporting Events

Each state and territory in Australia has legislated independently on the issue of event organisation, management and supervision. In recent years, a number of legislative repeals have been enacted to better protect the interests of event organisers, including in the area of ticket sales and resales. In particular, in relation to ticket scalping, as outlined in **2.1 Sponsorship**.

3.2 Liability

Duty of Care

In Australia, a legal person may be held liable for his or her failure to take reasonable care to avoid causing injury or loss to another person (negligence). One of the steps in proving that a person has been negligent is to prove that the person owed a duty of care to the person who was ultimately harmed, or who suffered a loss.

Although the tort of negligence and the principle of a duty of care traditionally developed in Australia by way of the common law, each of the states and territories have now legislated (to varying degrees) in relation to the general concept.

Generally, sports event organisers owe a duty of care to participants in the event, people working at the event and spectators who buy a ticket and attend the event.

Limiting Liability

Liability in negligence can be limited or excluded by way of agreement between the relevant parties. However, the agreement should explicitly identify the limitation or exclusion of certain liability, as general wording such as "all liability is excluded" will not ordinarily be construed by Australian courts to apply liability limitations or exclusions to liability for negligence.

4. CORPORATE

4.1 Legal Sporting Structures

There is no blanket legal requirement in Australia for a sporting club (whether that club is professional, amateur, commercial or non-profit) to become incorporated. However, in order to limit the liability of its members and officers, many sporting clubs do choose to incorporate, either as:

- incorporated associations under the applicable state or territory legislation (the Associations Incorporations Acts); or
- corporations under the Corporations Act 2001 (Cth) (the Corporations Act).

In some instances, however, governing bodies have imposed a requirement that small local clubs be incorporated. This includes the AFL NSW/ACT, the state body responsible for the growth of the AFL in those states, who do so to ensure that the legal rights and obligations of football clubs do not fall on the members.

4.2 Corporate Governance

Sports Governance Principles

Early last year, the Australian Sports Commission released an updated version of its Sports Governance Principles (Principles), which it

has developed for the purpose of guiding Australian sporting organisations to deliver good governance. The Principles apply to all organisations throughout the Australian sporting sector, whether they are small local clubs or large national organisations.

Directors' Duties

The Principles (outlined above) are not mandatory, but directors of sporting organisations are required to comply with the same behavioural requirements as any other company director in Australia, as outlined in the Corporations Act. This includes complying with a number of directors' duties such as the duty of care, skill and diligence, the requirement to avoid conflicts of interest and the duty to act in good faith.

Insolvent Trading

The Corporations Act also prohibits insolvent trading by directors of all corporations, which includes the directors of sporting organisations. Pursuant to Section 95A of the Corporations Act, "a person is solvent if, and only if, the person is able to pay all the person's debts as and when they become due and payable".

4.3 Funding of Sport

The Australian Sports Commission (ASC) is the Australian government agency responsible for supporting and investing in sport in Australia, and is funded by the Australian government.

The ASC is made up of:

- Sport Australia, which is responsible for driving the broader sport sector including participation in sports, supporting activities linked to sport and growth of the sports industry more generally; and
- the Australian Institute of Sport (AIS), a high-performance sports training institute.

The ASC will distribute the funds it receives from the Australian government to these two bodies, for distribution amongst sport at all levels.

Some sporting organisations in Australia are also funded by private investment.

4.4 Recent Deals/Trends

There have been a number of reports in recent months that Rugby Australia is interested in exploring and has been taking calls regarding private equity investment into the Australian sport.

Private equity investment refers to a situation where a private equity investor raises a pool of capital to form a fund, which, once the particular funding goal has been met, will be invested into a company that the investor believes will offer a return.

New Zealand Rugby are currently in advanced talks with private equity investor Silver Lake, and Rugby Australia has reportedly been aiming to gauge New Zealand Rugby's view on and experience of private equity investment.

5. INTELLECTUAL PROPERTY, DATA AND DATA PROTECTION

5.1 Trade Marks

Registering a Trade Mark

In Australia, any individual, company, or incorporated association may apply to register a trade mark in respect of certain goods or services by filing an application with IP Australia.

Subject to certain requirements, a letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent (provided it is capable of graphical representation) may be registered.

What Cannot Be Registered?

Certain marks cannot be registered in Australia, including:

- marks that are purely descriptive;
- some geographical names and surnames;
- certain words related to banking and financial services;
- certain prohibited signs and marks which are scandalous by nature or contrary to law.

The Benefits of Registration

The benefits of having a registered trade mark include that:

- the registered owner will have the exclusive right to use the mark in respect of the goods and services covered by the registration;
- the registered owner will have the right to bring an action against anyone using a mark that is substantially identical or deceptively similar mark to the registered owner's registered mark, in respect of the same or similar goods or services and where customers are likely to be deceived or confused.

5.2 Copyright/Database Rights

Australian Copyright Law

In Australia, copyright law is contained in the Copyright Act 1968 (Copyright Act). There is no system of copyright registration in Australia. Instead, subject to certain requirements, particular forms of expression (including text, images and music), will be automatically protected by copyright under the Copyright Act.

Section 101 of the Copyright Act provides that the copyright in a literary, dramatic, musical or artistic work "is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright". This includes using or reproducing the copyright works and offering articles for sale which contain infringing copyright material.

Defences for Copyright Infringement

Common exceptions and defences to copyright infringement include:

- fair dealings with the copyright works (which includes use in reporting, for research, review or criticism);
- certain private or incidental dealings with copyright works and other subject matter; and
- educational copying and archiving of works.

No Specific Database Right

As there is no specific law in Australia providing for database rights, databases may only be protected in Australia if they fall within the scope of protection offered by the Copyright Act. The Copyright Act will likely only cover a database in respect of the compilation of the data, and provided that the creators used intellectual effort in creating the database, and that the database itself is sufficiently original.

Copyright and Australian Sport

In 2019, the Australian Football League (AFL) issued a cease and desist notice for copyright infringement to a company called League Tees. The AFL alleged that a line of t-shirts and badges marketed and sold by League Tees, and which featured an iconic photograph of an AFL Women's League player that was taken by AFL Media's chief photographer, infringed the copyright of the AFL. Whilst League Tees maintained a position that their designs were substantially different to the photograph, they ultimately withdrew the products from the market.

5.3 Image Rights and Other IP

No Image Rights in Australia

In Australia, there is no legally recognised image right. This means that the protection of an ath-

lete's image is not a specific cause of action. Instead, a number of other more traditional causes of action need to be relied upon in order to protect a celebrity's image. These causes of action include:

- the tort of passing off;
- breach of Australian Consumer Law;
- defamation; or
- trade mark and copyright infringement.

The Australian Consumer Law and the Tort of Passing Off

Passing off is a common law tort in Australia, and refers to a situation where one party misrepresents that their goods or services are associated with the goods or services of another.

Similarly, the Australian Consumer Law prohibits a party from engaging in conduct that could mislead or deceive consumers. In relation to the image of an athlete, this means that any use of an athlete's image is prohibited if that use could lead consumers to believe that there is a relationship in place between the business and the relevant athlete.

5.4 Licensing

Licensing

Sports bodies and athletes can exploit their intellectual property (IP) rights in order to leverage the value of their brand and to generate revenue by licensing those IP rights to third parties. These licensing rights might include the right to apply a registered or unregistered trade mark to goods or services, or other advertising materials.

Restrictions on Assignment

In Australia, there are very few restrictions on assignment of intellectual property.

For an assignment of copyright to be valid and enforceable, that assignment must be in writing by way of deed of agreement. The ownership and intellectual property rights in an unregistered trade mark can only be assigned with the goodwill of a business. Under Australian law, a collective trade mark cannot be assigned or transmitted.

5.5 Sports Data

In Australia, sports data, including both athlete and spectator data, is predominantly used by stakeholders to track player performance, increase fan engagement and encourage and expand partnerships.

Player Performance

Australia's elite sports teams collect and analyse athlete data to identify strengths and weaknesses in any given player, or a team's performance. Analytics can help players and teams understand the key factors that contributed to their winning or losing any given game or season.

In the AFL, for example, football clubs have developed their own data management systems and have recruited their own teams of data analysts to enable them to determine where they can improve and even how they can win.

Fan Engagement

Data and analytics are also used in Australian sport to improve the fan experience and to increase fan engagement with a particular sport or team.

Clubs and sports event organisers use data to create a better experience for fans within the stadium by collecting data in relation to ticket sales, spectator movement around the stadium and the purchases made at the stadium including purchases of merchandise and food and beverage. Not only does this help clubs and sporting event organisers to increase sales of products and merchandise, it also assists in the delivery of a better spectator experience.

Partnerships

Historically, sports rights-holders did not have a substantial amount of information or data, however, a growing trend in sport is the increasing value of data that can be used by sports rights-holders and offered to potential partners. This data includes information in respect of sponsorships, broadcasting rights and advertising.

Sports rights-holders can now leverage data and analytics to not just encourage partners to get on board but to increase the value in their offering.

5.6 Data Protection

In Australia, the primary piece of legislation regulating the collection and use of personal information is the Privacy Act 1988 (Cth) (Privacy Act). The Privacy Act only applies to certain organisations and government agencies.

"Personal information" is defined by the Privacy Act as "information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not and whether the information or opinion is recorded in a material form or not".

Sports data that is personal information will be subject to the requirements of the Privacy Act, which restricts the way in which that data can be collected, used and disclosed, transferred to and used by other entities.

It is still unclear whether metadata, cookies and IP addresses fall within the definition of personal information pursuant to the Australian Privacy Act. However, it is expected that Australia will eventually align with the position under the GDPR and determine that metadata, cookies and IP addresses should be specifically regulated as personal information under the Privacy Act.

6. DISPUTE RESOLUTION

6.1 National Court System

Sporting associations in Australia ordinarily set their own dispute resolution procedures, which are provided for in their governing documents and also in their agreements with partners. These procedures are often set out in a dispute resolution clause which provides that the association's internal tribunals (or other form of alternative dispute resolution) must be utilised before parties may take a dispute to court.

Generally, Australian Courts will only get involved in sporting disputes if there has been an allegation that natural justice has been denied, or if there is a contractual dispute to be determined – for example, if player alleges that a club has breached its own rules, as set out in the club's governing documents.

6.2 ADR, Including Arbitration

Australia's Civil Dispute Resolution Act (2011) (Civil Dispute Resolution Act), aims to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted. The Civil Dispute Resolution Act provides that an applicant who institutes civil proceedings in an eligible Australian court must file a "genuine steps statement" (a statement outlining the steps taken by the applicant to resolve the dispute prior to litigation or the reasons why no such steps were taken) at the time of filing the application.

For the purposes of the Civil Dispute Resolution Act, "genuine steps" include considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process such as mediation.

Alternative dispute resolution processes, including mediation and arbitration, are often utilised

in the sports industry in Australia. For example, early in 2020, one of Australia's largest free-to-air television channels, Channel 7, was in dispute with Cricket Australia in relation to its cricket broadcasting rights. In an effort to resolve the dispute, Channel 7 made an application to the leading Australian arbitration body, the Australian Chamber for International and Commercial Arbitration (ACICA) seeking a ruling on the dispute.

6.3 Challenging Sports Governing Bodies

Sports governing bodies are able to provide for sporting and financial sanctions (including suspensions and monetary penalties) in their own rules, and do regularly impose financial and other sanctions on players or clubs who fail to comply with the rules and associated codes of conduct.

Parties may challenge decisions made by a sports governing body in certain circumstances, including where the parties did not act unreasonably or acted in such a way that would offend natural justice. Australian courts may intervene in a dispute of this kind where a party contends that the governing body has breached or failed to follow one of its own rules.

7. EMPLOYMENT

7.1 Sports-Related Contracts of Employment

Employment

The particular arrangements in place between an athlete and a sporting club or team will determine whether that athlete is in fact an employee and therefore covered by Australia's strict framework of employment law.

Given that the express terms of player contracts often include promises to play the sport whenever and wherever directed by the club, wear the club uniform, attend training, and follow the instructions of the coach and team managers – a relationship of employer and employee exists in most circumstances.

Salary Caps

Many of the major sporting codes in Australia have implemented salary caps. This means that the major clubs are subject to a limit in respect of the amount which they are allowed to spend on player contracts.

7.2 Employer/Employee Rights

Most jurisdictions in Australia have implemented a single set of work health and safety laws that are known as the model Work Health and Safety (WHS) laws. The main object of the WHS laws is to provide a framework to secure the health and safety of workers and workplaces which is consistent across the states and territories of Australia.

Within those states and territories which have implemented the model WHS laws (currently all jurisdictions in Australia other than Victoria and Western Australia), any "person conducting a business or undertaking" must, so far as is reasonably practicable, ensure the health and safety of (i) workers engaged, or caused to be engaged by the person, and (ii) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

The duty to ensure the health and safety of workers captures both the relationship between sporting clubs and the athletes that they employ, as well as between the governing bodies and the athletes that play in the competitions that they manage and oversee.

7.3 Free Movement of Athletes

Relevant Visas

The Department of Home Affairs in Australia offers a Temporary Activity visa, which allows

foreign persons to play, coach, instruct or adjudicate for an Australia sports team, or to undertake high-level sports training within a sporting organisation in Australia, for a period of up to two years.

In order to be eligible for a Temporary Activity visa, applicants must:

- have a sponsor or supporter;
- have a contract and letter of support from a peak sporting body; and
- not work outside of the specified sporting activities.

8. ESPORTS

8.1 Overview

The popularity of esports within Australia has grown significantly over the last few years, accelerated further by the COVID-19 pandemic, with spectators seeking replacement forms of entertainment during periods of suspension of traditional sporting matches.

Esports in Australia have been forecast for major growth. However, the size of the esports market in Australia is still relatively small compared to other markets internationally.

9. COVID-19

9.1 Impact of the Pandemic

The COVID-19 pandemic has had a significant impact on the sports industry in Australia, with most of the major sporting codes having to cancel or postpone their premiership competitions or otherwise holding matches in controlled locations and without spectators.

The Australian government, as well as each of the state and territory governments, has implemented strategies to attempt to mitigate the impact that the COVID-19 pandemic has had on industry, including two key stimulus packages – the JobKeeper and JobSeeker programmes. These government measures are discussed further in the firm's adjacent **Global Practice Guide: Sports Law 2021, Australia –Trends and Developments** chapter.

10. REGIONAL ISSUES

10.1 Overview

Early last year, the Australian government was involved in a sports funding scandal, when it was found that the then Sports Minister was using her ministerial discretion to favour marginal or targeted electorates in the allocation of sports grants, in the lead-up to the 2019 Australian federal election.

The Minister was alleged to have favoured clubs in such a way that might benefit her electoral campaign, and to have provided grants which had not been approved by the Australian government or Sports Australia.

The Minister at the centre of the scandal eventually resigned from her role as deputy leader of the Australian political party, The Nationals, and from her ministerial portfolio early in 2020, after it was found that she had breached ministerial standards by not declaring her membership of one of the clubs that had received funding from the government.

This is not an isolated incident and similar acts have been committed by Australian politicians in the past. Therefore, there is an expectation that government funding in Australian sport is likely to be more heavily scrutinised in the future.

Kalus Kenny Intelex is a progressive, commercially oriented firm, specialising in sport, property, commercial and dispute resolution. The firm shares its clients' successes by becoming a true strategic partner in their pursuits, and always seeks to deliver more value by offering business outcomes in addition to legal advice. Kalus Kenny Intelex's personal and proactive approach, combined with a straightforward nature, makes it a different kind of law firm. The sports law team understands that, like sport itself, the business of sport is dynamic, emotionally charged and highly competitive. With local and global experience in the sports and leisure sector, its sports law team supports professional and amateur sporting organisations, clubs/teams, athletes, sponsors and other key stakeholders in their pursuit for sporting and commercial success. Kalus Kenny Intelex is the sole Australian member of the International Lawyers Network, a global alliance of 5,000 lawyers in 66 countries.

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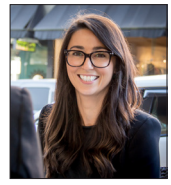

Natalie Lasek is a partner of the firm. She has substantial experience providing legal, commercial and strategic advice to local and multinational sporting businesses. Natalie advises on commercial contracts, sponsorship and intellectual property licensing agreements, intellectual property protection and privacy. In 2020, she advised Sportsbet.io, a cryptocurrency-based sports betting platform, on the sponsorship of three English Premier League football teams, Arsenal, Watford and Southampton. Natalie is a member of ANZSLA, the Australian New Zealand Sports Law Association, and a thought leader in business and sport, particularly around intellectual property, brand protection and privacy.

Brighid Virtue provides legal advice to local and international businesses, including in the sporting industry. Brighid has experience preparing and advising on brand-licensing agreements, privacy and the protection of personal information, and preparing and negotiating commercial contracts. She has a strong understanding of the disruption that COVID-19 has caused in sport, and the commercial realities of force majeure clauses. Brighid's solid legal understanding and commercial perspective makes her an integral part of the Kalus Kenny Intelex sports law team.

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Trends and Developments

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Kalus Kenny Intelex see p.20

Industry Overview

The sports industry in Australia is made up of a diverse range of economic activities and entities, ranging from local associations and clubs to professional leagues and national corporations. With more than 90% of Australian adults professing an interest in sport and 8.4 million adults participating in sport in Australia every year, the sports industry contributes in a big way to Australia's national identity, as well as its national economy.

Last year, as part of the Australian government's national sports plan, one of the country's largest accounting organisations was commissioned to complete an economic analysis of the sports industry in the country. That analysis recognised that, in 2016–17, the sports industry contributed approximately AUD14.4 billion (approximately 0.8%) to Australia's gross domestic product (GDP), generated AUD32.3 million in sales and supported 128,000 full-time jobs.

More recently, however, the COVID-19 pandemic has had a profound impact on all Australian industries – and sport is no exception. In order to protect the health and safety of those who work in the sector (including athletes, coaches, managers and stadium staff), as well as spectators, and to comply with the Australian state and federal governments' COVID-19-related lockdowns and restrictions, most (if not all) major sporting event organisers postponed or cancelled their scheduled plans.

As recently as December 2020, the CEO of Tennis Australia announced that the Australian Open tennis tournament would be postponed and that players and their entourages would be required to undergo a 14-day mandatory hotel quarantine if they were to participate in the event. Less than halfway through the Australian Open tournament, the Victorian government announced a five-day snap lockdown across the state, and the tournament had to continue without spectators. Once the five-day lockdown was lifted, spectators were able to return, with spectator numbers capped at approximately 50% of the capacity of Melbourne Park, Melbourne's sporting and entertainment precinct, in which the Australian Open is held each year.

The disruptions to major sporting schedules have been widespread in Australia, and have had what is, at this stage, an immeasurable adverse impact on all industry stakeholders.

Whilst the Australian federal, state and territory governments have provided some economic relief to those organisations impacted by COVID-19, stakeholders in the sports industry have been forced to consider the legal risks and implications of the pandemic, navigate COVID-19-related contractual disputes and negotiate mutually acceptable solutions with contracting parties.

The Australian Government's Efforts to Mitigate the Pandemic-Related Damage

Government relief packages specific to the sports industry were rolled out all over the country in 2020, by state and territory governments. For example, in June 2020, the Victorian government announced an AUD16 million National Sport Organisations and Professional Clubs Coronavirus (COVID-19) Short-term Sur-

vival Program to provide eligible professional sporting organisations with funding to support their business operations and to assist them to recover from the financial impacts of COVID-19 and the associated restrictions on the sporting industry.

Arguably the most significant government measures relate to changes to Australia's employment benefit schemes and insolvency laws. Although these were not specifically aimed at assisting the sports industry, their impact on it has been significant.

Employment

On 30 March 2020, the federal government of Australia announced what has become one of the most important economic measures taken to support private industry, including the sports industry, throughout the COVID-19 pandemic – a wage subsidy scheme called the JobKeeper programme. The purpose of this wage subsidy scheme is to help eligible businesses cover the cost of their employees' wages during the pandemic and through periods of various state-wide lockdowns. Generally, businesses are eligible for support under the scheme if they have suffered a reduction in turnover of at least 30%. At its peak, eligible employers were paid AUD1,500 per fortnight, per eligible employee, with the payment intended to go directly to employees.

In terms of the sports industry in Australia, the JobKeeper programme has provided, and is still providing, much-needed relief for thousands of employees who were stood down from their employment in the sports sector when the COVID-19-related restrictions were first announced. This stand down meant employees were asked to take indefinite leave without pay because those employees were unable to be usefully employed as a result of an interruption of work that their employer was not responsible for. Sports organisation have been able to re-engage some employees whom the organisations had to stand down at the beginning of the pandemic.

Insolvency

In addition to the JobKeeper programme, the Australian government made a series of changes to the nation's bankruptcy and insolvency laws in order to provide further relief to individuals and businesses, including businesses within the sports industry. Pursuant to these legislative changes:

- for individuals, the minimum debt required for a creditor to serve a bankruptcy notice was temporarily increased from AUD5,000 to AUD20,000; and
- for businesses, the minimum debt was temporarily increased from AUD2,000 to AUD20,000 for statutory demands issued from 25 March 2020.

Directors of Australian companies were also temporarily relieved of their obligations to ensure that companies do not trade while insolvent, under the Corporations Act 2001 (Cth). Provided that the company's debt was incurred in the ordinary course of the company's business, after 25 March 2020 and before the appointment of an administrator or liquidator of the company during the temporary safe harbour application period, directors could not be held personally liable for their company's debt.

For the sports industry, these legislative changes have allowed some sports organisation to remain solvent (when otherwise they would not have been able to do so) while they navigated the unprecedented impact that COVID-19 has had on the industry.

However, the legal implications of the pandemic have still been significant, and while some have been able to avoid insolvency, many sports

industry stakeholders have been forced to consider whether they can avoid their contractual obligations too, including through the invocation of force majeure clauses.

Contractual Disputes

The COVID-19 pandemic has had a profound effect on the commercial arrangements for a multitude of stakeholders in the sports industry. While sponsors and advertisers have been reviewing their contracts to determine whether they can exit their applicable deals, at the same time the leagues, teams, venues and the players have been reviewing their contracts to ensure that they will be paid. In the majority of circumstances, the answers to these questions have depended heavily on the language incorporated into the force majeure clauses of those relevant contracts.

In Australia, a force majeure clause must be specifically included in a contract, because there is no Australian force majeure remedy imposed by the common law or statute. That is, an event of force majeure (an event that triggers the rights of the parties including to suspend or terminate a contractual agreement) must be specifically defined in the contract.

A force majeure clause often relieves a party from liability arising if/when they become unable to fulfil their contractual obligations due to circumstances beyond their reasonable control. Whether a standard force majeure clause will work in a party's favour will depend on the relationship between the parties, and each party's rights and obligations under the contract. A party seeking relief under a contract may have a different preference for treatment of the contract in a force majeure situation than a party with merely a payment obligation.

The issue for the sports industry in 2020 and 2021 has been that no one anticipated a pandemic when drafting force majeure clauses. Essentially, what the sports industry has seen is that many contracts are not flexible enough to deal with the most significant impact that COVID-19 has had on the sector – revised schedules and cancellations of events – and this has led to disputes.

One of the biggest disputes which has arisen within the sports industry in Australia is between one of the country's biggest television broadcasters (Channel 7) and the governing body for professional and amateur cricket in Australia, Cricket Australia. When Cricket Australia announced that it would be changing its summer schedule of cricket due to COVID-19, the broadcaster sought to argue that this was in breach of its broadcasting rights under the relevant contract. Cricket Australia sought to rely on the force majeure clause to argue that it had no choice but to make the changes. Unless the parties are able to resolve the dispute, it is expected that the dispute will end up in court.

Negotiated Solutions

Generally, stakeholders throughout the Australian sports industry seem to be preferring commercial negotiation to reach a mutually acceptable outcome in relation to the continuation of contracts in light of the COVID-19 pandemic. Through significant renegotiation, some contractual parties have agreed to modify their contracts, to provide replacement assets, benefits or services – and in some cases even to modify the fees owed – noting that a commercially sensible approach goes some way to preserving the ongoing relationship between the contracting parties.

In our experience, parties to major sports deals have been well served by varying their contracts in such a way as to include cascading provisions to deal with different scenarios that the pandemic has either already prompted or that

may in future impact upon each of the parties' obligations. For example, what should happen if another lockdown is announced, or if state borders close and athletes are unable to travel? A co-operative approach has minimised costs associated with lengthy litigation and, arguably most significantly, has allowed important commercial relationships to withstand what has been a devastating global event.

Returning to Play – Liability Considerations

Australians have fortunately not experienced COVID-19 to the same extent that others have around the globe. With low, and sometimes even non-existent case numbers, sports organisations and governing bodies have been able to negotiate with state governments to come up with ways to return to play sooner and, in a lot of cases, with spectators in attendance.

However, with this return to play comes a number of liability considerations, and Australian sports event organisers and clubs have had to find ways to not only have fans and athletes return to stadiums safely, but to limit their liability in the event that a fan or athlete can reasonably allege that they contracted COVID-19 while attending or competing in an event.

Requiring fans and players to abide by federal, state or territory restrictions that apply to certain events, and requiring them not to attend if they are experiencing any COVID-19-related symptoms is an essential first step, but event organisers have also been amending their liability waivers and releases to provide themselves with an even greater level of protection in light of the increased and changing risk profile associated with hosting sporting events.

In approximately June 2020, when fans began to re-enter stadiums after a long-awaited return, in their ticket terms and conditions they had often already agreed to release the relevant event organiser, to the full extent allowed by relevant laws, from any liability arising from or in relation to the health risk of COVID-19 and the potential of contracting the virus at the event.

In relation to smaller, local sports and recreation businesses, and under Australian Consumer Law, a service provider, such as a sports event organiser, can limit or exclude their liability for accidental death or physical injury resulting from sporting activities and other recreational activities that involve significant risk. Since sports have made a return, sports event organisers, and particularly recreational activity businesses and operators, have been updating their waivers to account for COVID-19-related risks.

Stakeholders within the Australian sporting industry have taken a significant economic hit as COVID-19 has forced substantial changes to the nature of the industry and, at times, temporarily ceased their operations. With the economic strain and resultant operational changes, businesses within the sports industry have faced significant legal implications, including COVID-19-related contractual disputes and liability considerations. Although the Australian governments have attempted to mitigate the impact of the pandemic on the sports industry, the legal implications are noteworthy. However, stakeholders can and have taken important steps to navigate their way through these challenging times.

Kalus Kenny Intelex is a progressive, commercially oriented firm, specialising in sport, property, commercial and dispute resolution. The firm shares its clients' successes by becoming a true strategic partner in their pursuits, and always seeks to deliver more value by offering business outcomes in addition to legal advice. Kalus Kenny Intelex's personal and proactive approach, combined with a straightforward nature, makes it a different kind of law firm. The sports law team understands that, like sport itself, the business of sport is dynamic, emotionally charged and highly competitive. With local and global experience in the sports and leisure sector, its sports law team supports professional and amateur sporting organisations, clubs/teams, athletes, sponsors and other key stakeholders in their pursuit for sporting and commercial success. Kalus Kenny Intelex is the sole Australian member of the International Lawyers Network, a global alliance of 5,000 lawyers in 66 countries.

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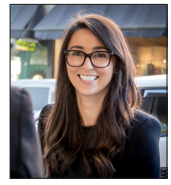
Sven Burchartz is a partner of the firm, and has significant experience in complex commercial transactions and dispute resolution, particularly in sport. He advises sporting organisations, governing/sanctioning bodies, peak bodies/associations, professional/amateur athletes, sponsors, venue owners, promoters, event managers, suppliers and agents. In 2020, Sven advised Sportsbet.io, a cryptocurrency-based sports betting platform, on the sponsorship of three English Premier League football teams, Arsenal, Watford and Southampton. He is a specialist motorsport adviser to a number of key motor racing teams, drivers and international manufacturers in the automotive, motorsport and related industry supply sector. Sven is a member of ANZSLA, the Australian New Zealand Sports Law Association.



Natalie Lasek is a partner of the firm. She has substantial experience providing legal, commercial and strategic advice to local and multinational sporting businesses. Natalie advises on commercial contracts, sponsorship and intellectual property licensing agreements, intellectual property protection and privacy. In 2020, she advised Sportsbet.io, a cryptocurrency-based sports betting platform, on the sponsorship of three English Premier League football teams, Arsenal, Watford and Southampton. Natalie is a member of ANZSLA, the Australian New Zealand Sports Law Association, and a thought leader in business and sport, particularly around intellectual property, brand protection and privacy.

Brighid Virtue provides legal advice to local and international businesses, including in the sporting industry. Brighid has experience preparing and advising on brand-licensing agreements, privacy and the protection of personal information, and preparing and negotiating commercial contracts. She has a strong understanding of the disruption that COVID-19 has caused in sport, and the commercial realities of force majeure clauses. Brighid's solid legal understanding and commercial perspective makes her an integral part of the Kalus Kenny Intelex sports law team.

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