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Sports Law 2022

Australia: Law & Practice and
Australia: Trends & Developments
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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 enacted legislation that criminalises certain conduct that 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 Unit (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), international 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. 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 legislative 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 reg-

ulating 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 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, the Australian Senate has recently passed an amended motion for the Australian federal government to introduce new legislation to combat the issue. Further, some Australian states do 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

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 – for example, as a result of any COVID-19-related suspensions of sport events;
- 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 broad-

casting 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-TV 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 subscription-based television providers are not 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

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 that prohibit unauthorised broadcasting of sporting events. For example, Sections 43 and 44 of the Major Events Act 2009 (Vic) 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, particularly in relation to ticket scalping, as outlined in **2.1 Available Sports-Related Rights**.

3.2 Liability

Duty of Care

In Australia, a legal person may be held liable for their 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

In March 2020, the Australian Sports Commission (now Sport Australia) released an updated version of its Sport 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 the growth of the sports industry more generally; and

- the Australian Institute of Sport (AIS), a high-performance sports training institute.

The ASC distributes the funds it receives from the Australian government amongst sport at all levels. Some sporting organisations in Australia are also funded by way of private investment.

Whilst there has previously been government financial support for small businesses (including eligible community sporting organisations), in the wake of the COVID-19 pandemic, this support is being progressively phased out as social restrictions ease. However, it is possible that further government funding and support programmes may be considered in future following further engagement between government and industry stakeholders.

4.4 Recent Deals/Trends

Rugby Australia (rugby union's national governing body) is reportedly interested in exploring equity investment into the Australian sport, and has been in ongoing talks regarding this.

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 recently secured a near NZD200 million investment from Silver Lake, a US private equity investor, and Rugby Australia has reportedly been aiming to gauge New Zealand Rugby's view on and experience of private equity investment. It looks likely that Rugby Australia will wait until the 2027 Rugby World Cup host is announced in May 2022.

Another recent deal involved the sale of the entire V8 Supercars business to a private consortium for a reputed AUD80 million a; it promised to further boost the growth of the Supercars Championship through increased focus and investment as well as a number of diversification options.

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 athlete'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 under-

stand 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 EU’s 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 a 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

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 of Esports

The popularity of esports within Australia has grown significantly over the last few years, accelerated further by the COVID-19 pandemic, as spectators sought to satisfy their love of sport during periods of suspension of traditional sporting matches.

Esports in Australia have been forecast for major growth from AUD6 million in revenue during 2020 to a projected revenue of AUD16 million by 2025. However, the size of the esports market in Australia is still relatively small compared to the global market.

Whilst the Australian esports market continues to take shape, Australian players appear to have been utilising the international market. Notably, in 2018 an Australian teenager won USD3 million at the International Dota 2 Championships in Canada.

9. WOMEN'S SPORT

9.1 Overview of Women's Sport

Women's Sport Landscape and Growth in Australia

Australia has made significant progress in developing and growing its women's sporting industry in recent years, and it is expected that women's sports will continue to grow in the years to come. In the 2021 predictions report, Deloitte Australia (one of the country's largest accounting organisations) anticipated that women's sport sponsorship in Australia will grow to 20% of total sponsorship value by 2025; for further details, see [Women's sports get down to business: on track for rising monetisation](#).

There has also been significant investment in Australia into increasing the commercialisation of

women's sport, with the Australian government announcing AUD17 million of funding towards hosting two major international women's sporting events within the next two years. While this will certainly draw more attention to women's sport in Australia, it is fair to say that there is still a long way to go to bring women's sport in line with the men's market.

Notable Statistics

Whilst women's sporting sponsorships are expected to grow substantially by 2025, in 2021 sponsorship agreements with female athletes were reported to account for only 8% of sporting sponsorship deals in Australia. As of May 2020, it was reported that only 7.6% of broadcast coverage was allocated to women's sports, although this is also expected to increase to 25% by 2025.

New Competitions

The Australian Rules Football League (AFL) is one of the most (if not the most) popular spectator sports in Australia, and now the Women's AFL (AFLW) is one of the fastest growing competitions in women's sport in Australia. The first time that women were represented in AFL was in 2013, with the official AFLW professional competition beginning in 2017. At that time, the AFLW had only eight teams in participation. We will shortly enter the 2022 season with 14 teams in the league.

Developing Women's Sport in Australia

There are a number of organisations in Australia whose purpose is to develop women's sport, including one notable organisation called Women Sport Australia. Since its incorporation in 2005, Women Sport Australia has worked with industry stakeholders to provide women and girls with greater opportunities in sport and physical activity. Women Sport Australia has conducted numerous initiatives in recent years, including a "Women in Leadership" workshop to provide

further access to women seeking coaching and other leadership roles in the sporting industry.

Soccer is one example of a female sport that is continuing to grow in Australia. According to Football Australia's National Participation Report for 2021, there were 174,380 women and girls participating in outdoor soccer, social and registered futsal that year. This represents a growth of over 21% or 30,507 players since 2020. These number are expected to increase in the coming years, with Australia hosting the 2023 Women's World Cup.

Further, the Women's Big Bash League (Australia's women's domestic Twenty20 cricket competition) was recognised as the fourth most-watched domestic sports competition in Australia in 2021, amongst both men's and women's sport.

There is optimism that the significant growth of the AFLW and women's cricket in Australia, paired with Australia playing host to the FIBA Women's Basketball World Cup in 2022 and the FIFA Women's World Cup in 2023, will encourage broadcasters to give women's sport more coverage in Australia in future and that the women's sporting industry will continue to grow.

10. NON-FUNGIBLE TOKENS (NFTS)

10.1 Overview of NFTs

Notable Usage of NFTs in Australia's Sport Industry

Cricket Australia (the national governing body for cricket in Australia) in conjunction with the Australian Cricketers Association is reportedly in talks regarding the creation of an online platform for the trading and sales of NFTs, in particular "digital memorabilia". Any such venture would, Cricket Australia hopes, create a lucrative new

revenue stream for the governing body. These hopes may be linked to the US National Basketball Association's recent success in the NFT market with selling basketball's greatest "moments" as NFTs, known as "NBA Top Shots".

While the AFL and National Basketball League are sitting behind Cricket Australia, who appears to be leading the charge with entering the NFT market, it has been reported that the AFL and NBL are also considering entering the NFT market and an announcement in this regard can be expected later in 2022.

Risks in NFTs in the Sports Industry in Australia

Some commentators hold concerns that the NFT market, including as it exists within the sporting industry in Australia, may be a rapidly expanding "bubble" that will eventually burst. Whilst sports fans may be soon scrambling to secure an NFT of their favourite sports team's memorabilia in the hope that the NFT will increase in value, there is no guarantee that sports-related NFTs will experience the same growth in value as other digital assets or currencies. This uncertainty and potential risk associated with investment in NFTs is certainly not unique to the sports industry.

11. REGIONAL ISSUES

11.1 Overview of Regional Issues

The strict vaccine mandates within the Australian states and territories continue to have an impact on the sporting industry. Whilst there is no federal requirement for players to be vaccinated to participate in sporting activities/events, some states and territories have taken a strong stance on mandatory vaccinations, which may prevent some athletes from participating in sporting events. In addition, each sporting code may also specify their own requirements for athletes to comply with mandatory vaccination policies in order to compete in major sporting events.

This interaction between mandatory vaccinations and sporting events has been thrust into the spotlight recently, notably in respect of the recent Novak Djokovic case. This issue is discussed further in the firm's adjacent **Global Practice Guide: Sports Law 2022, Australia – Trends and Developments** chapter.

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Trends and Developments

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Introduction

For almost two years now, Australians (along with the rest of the globe) have been thrust in and out of pandemic-related government lockdowns and restrictions. Since March 2020 and throughout the COVID-19 crisis, the Australian sports industry has adapted time and time again to the ever-changing landscape of social restrictions, including the postponement and/or cancellation of major sporting events.

There is no doubt that the Australian sports industry has suffered throughout the pandemic, but what remains clear is that Australians' love for sport is unwavering. The Australian government's appreciation of the importance of the sporting industry has been evidenced by their willingness to often allow major sporting events to go ahead even during the height of social restrictions, albeit without crowds. While only very few Australians (as compared to pre-pandemic numbers) have been able to attend live sporting events in the country in recent years, it is reported that television ratings for major sporting events have increased significantly.

Now that we are seeing the light at the end of the pandemic tunnel, we are able to turn our minds to (for the most part, and with the important exception of athlete vaccinations) some of the non-pandemic-related trends and developments in the Australian sports industry and sport-related laws.

Broadcasting

Over the last 12 months, there have been significant developments in the Australian sports broadcasting market. Looking ahead, we antici-

pate that a number of major broadcasting deals will be re-negotiated. We also anticipate that movement in the market will continue throughout the course of 2022.

Throughout 2020, a number of major Australian broadcasters exercised their contractual rights to reduce the sums payable by them to sporting leagues for broadcasting rights. This was due to the pandemic forcing cancellations and postponements of major (and lucrative) sporting events. In some cases, this led to disputes. One of the most significant of those disputes was between one of the country's biggest television broadcasters (Channel 7) and the governing body for professional and amateur cricket in Australia, Cricket Australia.

However, it seems that this trend may not have continued throughout 2021, with some sporting leagues reportedly securing deals which reflect pre-pandemic sums. They have done so, in large part, by taking advantage of a rapidly growing aspect of the broadcasting market – sports streaming services. By way of example, in the past year Australia's elite professional netball league (Super Netball) and National Basketball League (NBL) both signed deals with Australian pay-TV provider, Foxtel Group. Both of these agreements reportedly require that a minimum number of matches are to be made available on Kayo Sports – Foxtel's sports streaming service.

This is an interesting development in the Australian sports broadcasting market, given Australia's unique anti-siphoning laws. Anti-siphoning legislation in Australia is aimed at preventing broadcasters from buying monopoly rights to

televised important and culturally significant events (including sporting events), and to ensure that all members of the public have access to view those events for free. Under anti-siphoning laws, pay-TV broadcasters cannot restrict public access to view certain events by requiring viewers to pay a subscription fee or similar, unless a free-to-air alternative is available.

Traditionally, streaming service providers have required that their customers pay a fee in order to access their service. However, despite this tradition, and despite Australia's strict anti-siphoning laws, pay-TV broadcasters are now opting to purchase the rights to televise sports events, which they can only offer for free.

Event Planning and Athlete COVID-19 Vaccinations

2022 marks the beginning of a decade in which Australia will host an array of major international sporting events. These include:

- FIBA Women's Basketball World Cup, taking place this year;
- ICC Men's T20 World Cup, taking place this year;
- FIFA Women's World Cup, taking place in 2023, and which Australia will co-host with our neighbour, New Zealand;
- UCI BMX World Championships, taking place in 2026;
- Netball World Cup, taking place in 2027; and
- Olympic and Paralympic Games, taking place in Brisbane in 2032.

The vaccination of athletes has been a topic of great discussion amongst Australian sports industry stakeholders of late. We hope that event organisers will not be burdened by pandemic-related variables by the time the Olympics make its way to Australia. Although the issue is likely to play a role (at the very least) at the sporting

events scheduled to take place in Australia this year.

The issue of athlete vaccinations became headline news early this year when the tennis player Novak Djokovic applied for an exemption to play at the Australian Open in Melbourne, despite a vaccine mandate in place for the tournament. By way of background, in late 2021, the world No 1 was informed by Tennis Australia that he had been granted a temporary medical exemption to play at the Grand Slam tournament. However, when Djokovic arrived in Melbourne in January 2022 for the tournament, Australia's Border Force denied him permission to enter the country, and notified him of their intention to remove him. He was detained and spent 72 hours in a hotel for asylum seekers. His visa was cancelled because, according to the Australian government, he failed to provide appropriate evidence to meet the entry requirements to Australia.

Djokovic appealed the decision to cancel his visa and was freed from detention when the judge hearing the appeal quashed the government's decision on the grounds that it was unreasonable. Australian Immigration Minister, Alexander Hawke, then used his personal powers to deport him anyway. Djokovic appealed again, but a three-judge panel of the Federal Court of Australia dismissed the appeal in a unanimous, final ruling and Djokovic was forced to leave the country. He could not participate in the Australian Open.

There is a complex set of Australian laws and regulations which relate to the requirement for athletes to be vaccinated before they enter Australia and/or before they are permitted to play at particular sporting events, including:

- the public health orders which are currently in place in each Australian state and territory and are applicable to certain workers to

prevent the transmission of COVID-19 in their populations;

- federal laws requiring entrants and visitors with eligible visas to declare their vaccination status and which provide that, generally, travellers will need to show that they cannot be vaccinated in order to receive an exemption; and
- event organisers' policies.

Athletes and entourages seeking to enter Australia and participate in the array of sports events set to run over the next few years will likely need to be vaccinated to do so, and event organisers should consider whether any of their drawcards will be absent for this reason.

Anti-doping

In June 2019, Shayna Jack (an Australian World Championship swimmer and Commonwealth Games gold medallist), returned a low-level positive result for a banned substance known as Ligandrol after being subject to an out-of-competition drug test. Ligandrol is included on the list of prohibited substances in the World Anti-Doping Code 2015 (the "Code"), which is also replicated in the Swimming Australia Limited Anti-Doping Policy 2015 (the "Policy"). As a result, Shayna was found to have committed an "anti-doping rule violation".

The relevant articles of the Code and the Policy provide that an athlete will receive a four-year ban from competing and training with other athletes if they cannot demonstrate that an anti-doping rule violation was unintentional.

In January 2020, Shayna Jack brought proceedings before the Court of Arbitration of Sport on the basis that she had not intentionally ingested Ligandrol and therefore her ban should be reduced. The hearing was conducted by a sole arbitrator who found that Shayna's anti-doping rule violation was indeed unintentional and sup-

ported her claim by reducing her ban to two years.

Both Sport Integrity Australia and the World Anti-Doping Authority appealed the Court of Arbitration of Sport decision, citing that they were appealing to gain more clarity in relation to anti-doping legal principles.

In September 2021, the World Anti-Doping Agency and Sport Integrity Australia's appeal of Shayna Jack's two-year doping suspension was dismissed by the Court of Arbitration for Sport and Shayna Jack was free to swim again.

The decision is important because, historically, international sports law jurisprudence has taken two competing approaches to the application of anti-doping rule violations. The approaches differ in terms of whether they require that an athlete must establish precisely how the relevant prohibited substance entered their body, as well as the level of evidence required to demonstrate that they did not intentionally ingest the substance.

Shayna Jack was unable to prove how the substance entered her body, but her appeal nonetheless was upheld. This appears to support the approach that, in certain circumstances, an athlete may not be required to establish exactly how the prohibited substance entered their body.

Conclusion

There have been a number of significant trends and developments emerge in the sports industry in Australia in the past year, and a number which we anticipate may become relevant in the not-so-distant future.

The value in live broadcasting of sport in Australia is making a comeback following a significant hit during the pandemic. Throughout 2020, broadcasting deals became, in some cases, far

less lucrative than in the years prior to the pandemic. This is in large part due to the fact that sporting event organisers have been subject to ever-changing public health orders that require them to reschedule and even cancel planned events. In the last year, however, broadcasting deals are looking more and more like they did pre-pandemic. Leagues are managing to negotiate deals with sums payable that are far closer to what they were receiving before the outbreak of COVID-19. Interestingly, many of those deals now include provision for streaming services.

Hopefully, we are past the worst of it in relation to COVID-19. However, a significant issue which remains relevant is athlete vaccinations. Event organisers should consider, and account for, the financial impact which they may suffer if a drawcard athlete such as Novak Djokovic is unable to participate in their event due to their vaccination status.

Finally, the Court of Arbitration for Sport's recent decision to maintain the two-year sanction imposed on Shayna Jack following an anti-doping rule violation has provided some clarity for athletes and regulators in relation to the application of anti-doping legal principles. The decision demonstrates that, in certain circumstances, athletes may not need to demonstrate how a banned substance entered their body in order to prove that their ingesting of that substance was unintentional.

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AUSTRALIA TRENDS AND DEVELOPMENTS

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