
CHAMBERS GLOBAL PRACTICE GUIDES

Sports Law 2023

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Australia: Law & Practice

Sven Burchartz, Brighid Virtue and Jessica Bell
Kalus Kenny Intalex

Australia: Trends & Developments

Sven Burchartz, Brighid Virtue and Jessica Bell
Kalus Kenny Intalex



AUSTRALIA



Law and Practice

Contributed by:

Sven Burchartz, Brigid Virtue and Jessica Bell
Kalus Kenny Intelex

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Kalus Kenny Intalex 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 Intalex'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 it-

self, 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 Intalex is the sole Australian member of the International Lawyers Network, a global alliance of 5,000 lawyers in 66 countries.

Authors



Sven Burchartz is a partner of Kalus Kenny Intalex, 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 the Australian New Zealand Sports Law Association (ANZSLA).



Brigid Virtue has experience providing legal advice to local and international businesses, including in the Australian sports industry. Brigid advises on commercial contracts, statutory

and regulatory compliance, intellectual property licensing agreements, and privacy and the protection of personal information. Brigid is a member of the Australian New Zealand Sports Law Association (ANZSLA).



Jessica Bell brings unique practical knowledge and experience in the commercial, sports and motorsport space. She has extensive experience in advising on all aspects of trade

promotions and marketing. This is combined with a background in commercial agreements, transactional work, intellectual property and technology. Jessica has a long-held passion for motorsport, evident by her deep involvement in the industry from racing and leadership roles in car clubs to being an accredited Motorsport Australia Photographer.

Kalus Kenny InteleX

Level 1, 4 Riverside Quay
Southbank
Melbourne
Victoria 3006
Australia

Tel: +613 8825 4800
Fax: +613 9826 9909
Email: sburchartz@kkilawyers.com.au
Web: www.kkilawyers.com.au



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 constituting 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/or up to 1,000 penalty units.

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 Australia

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. The Sports Integrity Australia Act 2020 was most recently amended in December 2020 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, terri-

tory 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 recent example of misconduct of players in Australian sport is the conduct of former Australian Test Cricket captain, Tim Paine, who was accused of sending sexually explicit and unsolicited text messages to a former Cricket Tasmania employee. As a result, Tim Paine lost the support of the Cricket Australia board and was reportedly forced to stand down from his captaincy and has not played in the Australian side since.

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 recently renamed Victorian Gambling and Casino Control Commission Act 2011 provides for the creation of the Victorian Gambling and Casino Control Commission (VGCCC, formerly known as the Victorian Commission for Gambling and Liquor Regulation), 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 AUD5,000 and banned him from playing for two matches after he placed bets on 10 games during the 2021 AFL season. In 2022, the AFL also saw a betting scandal involving match umpires where votes for the Brownlow Medal (which is awarded to the AFL's best and fairest player in a season) were leaked by an umpire. The umpire in question subsequently lost his job with the AFL and at the time of writing, is subject to further criminal investigations.

Protecting the Integrity of Sport – Information Sharing

In some Australian states, approval by regulators (such as the Victorian Gambling and Casino Control Commission) 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 con-

fidence 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 mar-

ket” 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; and
- ticket scalping, whereby ticket scalpers resell tickets at an elevated price.

Scalping

There is no federal legislation making scalping illegal in Australia. In 2017, the Australian Senate passed an amended motion for the Australian federal government to introduce new legislation to combat the issue. However, to date no specific federal legislation has been enacted. Instead, ticket resale to sporting and entertainment events is regulated through various consumer protections under the Australian Consumer Law and state/territory specific legislation which sets out the manner and terms on which tickets can be resold, and provides for restrictions, or even prohibitions on scalping in that jurisdiction.

By way of example, in Victoria, amendments to the Major Events Act 2009 in 2022 made it an offence to advertise or sell a ticket package to a declared event without the written authorisation of the seller. The amendments also require that resellers of all tickets to declared major events now state the face value, the asking price and the seat details of tickets in sale advertisements.

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 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 and Kayo as a subsidiary of Foxtel, which are both subscription-style pay-TV services. These 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 and Kayo, 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, 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. 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 Australian sport, and has been in ongoing informal talks with several private equity firms in recent months to sell a minority stake and is expected to finalise a deal some time this year.

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.

In 2022, New Zealand Rugby secured a NZD200 million investment from Silver Lake, a US private equity investor. This partnership saw the US technology investment firm providing investment into the game at all levels and support for the development of new capabilities.

Outside of rugby, private equity funding has recently been considered in both netball and cricket in Australia. No such deals are yet to proceed, with a AUD6.5 million deal to privatise Super Netball falling over in August last year following the Netball Australia's rejection of the proposal.

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; and
- 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; and
- 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 authorises 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

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 ana-

lysts 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.

The Australian government is currently conducting a review of the Privacy Act, which we expect to see later this year. It is anticipated the review will lead to strengthened privacy protections to better align it with the EU’s General Data Protection Regulation. Included in those amendments will be increases to the penalties associated with series breaches of the Privacy Act and enhancing the powers of the Office of the Australian Information Commissioner to investigate and resolve privacy breaches.

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 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:

- workers engaged, or caused to be engaged, by the person; and
- 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 under-

take 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, 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 AUD25 million in revenue during 2023 to a projected revenue of AUD34 million by 2027. However, the size of the esports market in Australia remains 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, Anathan “ana” Pham won the International Dota 2 Championships in both 2018 and 2019. His success in esports tournaments has won him over USD6 million in prize money to date.

9. Women's Sport

9.1 Overview

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 2022 and 2023. This meant Basketball Australia saw a AUD5 million investment to support the delivery of the FIBA Women's Basketball World Cup and associated legacy programmes. While this has and will continue 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. A recent study by Foxtel has also revealed that 70% of Australians watch more

women's sport now than prior to the COVID-19 pandemic.

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. The 2023 season will begin with 18 teams in the league, with teams from all 18 AFL clubs.

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 numbers 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 hosting the FIBA Women's Basketball World Cup in 2022 and the upcoming 2023 FIFA Women's World Cup, 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

Notable Usage of NFTs in Australia's Sport Industry

Following the success of the US National Basketball Association in the NFT market, selling basketball's greatest "moments" as NFTs called "NBA Top Shots", in 2022 Cricket Australia (the national governing body for cricket in Australia) in conjunction with the Australian Cricketers Association signed a multi-year official licensing deal with Rario and BlockTrust regarding the creation of an online platform for the trading and sales of NFTs, in particular "digital memorabilia".

2022 also saw the launch of the "AO Artball" NFT collection by Tennis Australia, which was recently expanded in time for this year's Australian Open. There was also the launch of the AFL Mint, which sells exclusive AFL NFTs showcas-

ing iconic "moments, highlights and champion players" in AFL history.

In late 2022, the National Basketball League also announced its intention to enter the NFT market, with their online marketplace opening in February 2023.

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 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

The rise in athlete activism continues to be a prominent feature in perhaps not just Australian sport, but internationally. Most notably, late 2022 saw tensions rise between the competing interests of athletes' ideals and brand identity, with that of corporate partnerships in Australian netball where Netball Australia lost its AUD15 million sponsorship from Hancock Prospecting. This issue is discussed further in the Australian Trends & Developments chapter in this guide.

Trends and Developments

Contributed by:

Sven Burchartz, Brigid Virtue and Jessica Bell
Kalus Kenny Intalex

Kalus Kenny Intalex 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 Intalex'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 it-

self, 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 Intalex is the sole Australian member of the International Lawyers Network, a global alliance of 5,000 lawyers in 66 countries.

Authors



Sven Burchartz is a partner of Kalus Kenny Intalex, 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 the Australian New Zealand Sports Law Association (ANZSLA).



Brigid Virtue has experience providing legal advice to local and international businesses, including in the Australian sports industry. Brigid advises on commercial contracts, statutory

and regulatory compliance, intellectual property licensing agreements, and privacy and the protection of personal information. Brigid is a member of the Australian New Zealand Sports Law Association (ANZSLA).



Jessica Bell brings unique practical knowledge and experience in the commercial, sports and motorsport space. She has extensive experience in advising on all aspects of trade promotions and marketing. This is combined with a background commercial agreements, transactional work, intellectual property and technology. Jessica has a long-held passion for motorsport, evident by her deep involvement in the industry from racing and leadership roles in car clubs to being an accredited Motorsport Australia Photographer.

Kalus Kenny Intalex

Level 1, 4 Riverside Quay
Southbank
Melbourne
Victoria 3006
Australia

Tel: +613 8825 4800
Fax: +613 9826 9909
Email: sburchartz@kkilawyers.com.au
Web: www.kkilawyers.com.au



Introduction

In the past year, several notable Australian athletes have publicly expressed their disapproval of the corporate partners of the teams or leagues that they represent. Instances of such disapproval are varied – but generally stem from a misalignment the actions or values of certain corporate partners and the athlete’s personal values, including their views on important social issues such as climate change and indigenous rights.

Of course, athlete activism is not a new phenomenon. However, with social media now being an everyday part of our lives, athletes now have unrestricted access to their own public platform and greater control over their personal brand identity. As a result, we are seeing athletes become more vocal about their social values and (in Australia, at least) appear to be turning their attention to the social consciences of their teams’ corporate partners.

We anticipate that this new trend in athlete activism will cause stakeholders across the Australian sports industry to reconsider (if they have not done so already) how they can strike the right balance between individual athlete values and team sponsorship arrangements.

While the Australian sports industry is no stranger to change – whether that be from the effects of the COVID-19 pandemic or otherwise – the recent examples of the changing nature of athlete activism in Australian sport are significant. They have highlighted the importance of developing synchronised sponsorship arrangements that align with, and “make sense” within the context of, the evolving social values of players, the broader team and corporate partners.

An Overview of Athlete Activism

“Athlete activism” is a term used to describe when an athlete uses their name and brand to raise awareness for a cause or issue they feel passionate about. These can include social or political causes, with the intention generally being to give rise to social change or create awareness around a particular issue.

Athlete activism has a long history in Australian sport. In 1971, for example, a group of players from the Australian rugby team refused to play against the racially selected, apartheid-era South African national rugby team—the Springboks—during the Springbok’s 1971 tour of Australia. The Springbok’s 1971 tour was polarising, with many anti-apartheid protestors calling for it to be cancelled. The Wallabies’ boycott helped to boost the broader anti-apartheid protest movement in Australia.

In 1993, Aboriginal Australian Football League (AFL) player Nicky Winmar made an iconic on-field gesture. After he and his St Kilda Football

Club teammate Gilbert McAdam were subjected to an onslaught of racial abuse from the crowd and opposition during an AFL match in Perth, Nicky Winmar lifted his shirt, pointed at the skin on his chest and shouted: “I’m black, and I’m proud to be black”. This is a significant moment in Australian sporting history. Nicky Winmar’s activism led the AFL to establish a code of conduct for AFL players and teams.

Some further historical examples of athlete activism in Australia and globally include:

- American athletes Tommie Smith and John Carlos each giving the Black Power salute on the winner’s podium at the 1968 Olympic games;
- Australian sprinter Cathy Freeman OAM carrying both the Australian flag and Aboriginal flag on her victory lap after winning gold in women’s 400 metre race at the 2000 Olympic Games – this has become a symbol of reconciliation in Australia; and
- legendary boxer Muhammad Ali refusing to fight in the Vietnam War and stating: “my conscience won’t let me go shoot my brother, or some darker people, or some poor hungry people in the mud for big powerful America”.

Historically, athlete activists tended to use their platforms to make political and social statements and address social injustices, without making any specific mention of the social conscience of their sporting league’s or team’s corporate partners.

Today, however, we are seeing athlete activism develop substantially, and in some instances athletes are deciding to boycott corporate sponsors if they feel that their personal social or political values do not align with those of corporate sponsors. This trend is expected to continue.

The Rise of Sponsor-Related Athlete Activism in Australian Sport

In 2022, we saw three major instances of activism by Australian athletes against individual corporate sponsors.

The first was in late October 2022 when Australian netballer Donnell Wallam requested an exemption from wearing Netball Australia sponsor Hancock Prospecting's logo on her player uniform. Reportedly, Donnell Wallam requested the exemption because of historic racist remarks made against First Nations people by Hancock Prospecting's late founder, Lang Hancock.

After Wallam's Australian Diamonds teammates publicly expressed their support, discussions between Netball Australia, Hancock Prospecting and the player group failed to resolve the matter and Hancock Prospecting withdrew its sponsorship. The deal would have seen the governing body for Australian netball receive AUD15 million from the mining business over a term of four years.

This was financially significant for Netball Australia, who had been operating at a loss for the two years prior. However, a week after Hancock Prospecting pulled out, the Victorian Government announced they would sponsor Netball Australia under a new deal, also worth AUD15 million.

In the same week as the Netball Australia controversy, Australian Test cricket captain Pat Cummins announced that he would not be featuring in any advertising for Alinta Energy (a principal partner of the Australian men's cricket team) during the final year of its sponsorship deal with Cricket Australia. Reportedly, this was due to Cummins' personal views on climate change and Alinta's parent company Pioneer Sail Hold-

ings' reported status as one of Australia's highest carbon emitters. Although it has been denied by Cummins, there have since been questions around whether his views are the reason that Alinta Energy is not extending its AUD40 million sponsorship deal with Cricket Australia beyond 2023.

Also in late October, ten high profile figures associated with AFL Club the Fremantle Dockers publicly demanded that the Dockers cease its agreement with one of its major sponsors, Woodside Energy. The group of ten expressed in an open letter to the club that a fossil-fuel company should not be allowed to sponsor the Dockers while climate change remains a global issue.

Navigating the Risks

Sports industry stakeholders in Australia are currently in a complex position. The relevant dichotomy is by no means an easy one to navigate. More and more organisations are sponsoring sport with one goal in mind – to leverage the “clean”, “family friendly” and socially valuable reputation of sport in order to veil negative associations with issues such as human rights abuses or climate change.

Naturally, this can mean that the sponsor's social values don't align with the team, and the marketing and financial decisions of team managers come into conflict with the social values of their athletes.

More complex still is the fact that individual athletes have their own personal brands to maintain. We are seeing that a greater proportion of an athlete's commercial value is attributable to their reputation, including their reputation as it relates to their social values. Younger fans are expecting athletes to support social causes that

they feel are important, and to speak out about injustices.

In the worst-case scenarios, athlete activism that is aimed at corporate sponsors and managed poorly can result in:

- sports losing valuable sponsorship;
- sports losing players;
- players feeling disillusioned; and/or
- teams, players and/or sponsors suffering irreparable reputational damage.

It will always be an option for sponsors and/or teams to negotiate strong non-disparagement and morality clauses into their sponsorship agreements and/or player contracts.

We have seen sponsors include and rely on clauses in their sponsorship agreement which provide that if any player, coach or staff member associated with the team does anything which brings the sponsor into disrepute, then they have the right to immediately terminate the agreement and seek damages. The clauses are incredibly important and should always be included. They should also be relied on when the circumstances call for it.

However, in the current climate and in certain circumstances, it appears that stakeholders may be better served by adopting a co-operative and collaborative approach.

The following strategies for teams, corporate partners and athletes can assist with navigating the risks.

- Ensuring that teams and corporate partners undergo suitable due diligence in respect of all parties potentially impacted by the sponsorship. Sports sponsorships, while they can

be a great source of revenue for teams, and exposure for brands, do (as we have recently seen) carry with them a degree of risk. The consequences of a partnership gone wrong can be great, so teams and corporate partners alike need to ensure that they are undertaking an appropriate level of due diligence prior to signing on. For corporate sponsors, this means looking into the history of the team and its players. For teams, this means looking into the history and social standing of the corporate partner. For both, it means asking, at the outset, whether a particular partnership will “make sense” in the minds of sports fans and other consumers.

- Carefully drafting agreements to allow counterparties to deal with disputes quickly and without the need for public input. The circumstances under which an athlete may have a right to refuse to promote a brand should be reasonable and should be clearly stated in their player contract. The contract should also comprehensively set out the process and parameters through which players can resolve their concerns about a sponsor in collaboration with the team and its management. Further, team sponsorship agreements should be drafted consistently with the team’s players’ contracts, such that they acknowledge and account for circumstances where players may be exempt from wearing a team sponsor.
- Taking a co-operative approach when things go wrong. A co-operative approach can minimise costs associated with these kinds of disputes, including reputational costs, and, arguably most significantly, can assist with maintaining important commercial relationships and a positive public image for all involved. At the end of the day, it is in the best interests of all parties that these issues are resolved as quickly and as quietly as is possible.

Conclusion

In 2022, we saw a shift in the way that athletes express their activism. Instead of focusing on broad social issues as they have done in the past, athletes are scrutinising the social values of their teams' corporate sponsors. This is an interesting development and a trend that is anticipated to continue to develop.

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