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INTRODUCTION

OVERVIEW

A brief perusal of the table of contents of this book will give some idea of the breadth of material it is necessary to cover to provide a comprehensive and accurate treatment of the legal issues arising out of sporting activity. Sport involves, at the very least, the organisation of a group of people with a common interest in a shared athletic activity.

The more organised and serious the participants become, the more complex the legal issues that are likely to arise. Make no mistake, for better or worse, the law has become an integral part of the life of the sporting administrator, athlete, coach and sports marketer even at the local, grassroots level.¹

This chapter examines:

- ‘Sports law’ or ‘sport and law’?
- A brief history of modern sport
- Organised activity
- Professionalism
- Commercialisation
- Management
- The aim of this book

‘SPORTS LAW’ OR ‘SPORT AND LAW’?

Books of this nature often contain a discussion of whether there is in fact such a thing as ‘sports law’. Sporting activity crosses a range of legal subjects, but scholars have been reluctant to agree that sports law is a distinct subject within the discipline of law.² There is no doubt that law is important in sport. Administering a domestic first-grade rugby league competition will

1 See Chapter 17 ‘Children’.

2 See discussion in D Healey, *Sport and the Law* (3rd edn, Sydney: UNSW Press, 2005) 12–14; T Davis, ‘What Is Sports Law?’ (2001) *Marquette Sports Law Review* 211.

involve, at a minimum: contract law (securing venues, retaining players,³ selling tickets); tort law⁴ (consideration of liability of competition organiser, risks of injury to players, possible liability for on-field conduct); intellectual property law (licensing of images and names, sponsorship arrangements, broadcasting arrangements)⁵ and more. In this sense, sporting activity is like no other field of human endeavour, conducted as it is under the umbrella of the rule of law, and outside it.⁶ At the very least, sport and law is a large topic.

However, as sporting activity has become more economically significant and as humans have managed to acquire more leisure time to play or watch others play, sporting situations have moved beyond the 'sport and law' contextual approach to the legal principle in question. Perhaps nowhere is this more clearly evident than in the competition law cases.⁷ Indeed, there are areas of law that are arguably unique to the sporting context, such as the complex international and national rules in place regarding doping.⁸ Sporting activity has contributed numerous developments to the application of general principles of law.

In addition to this impact on substantive law, the formalisation of sporting activity has led to the rise of a 'parallel world' of sporting organisations. Thus, any serious study of sport will involve consideration of institutions such as the International Olympic Committee (IOC), international and national sporting federations, the Court of Arbitration for Sport, and professional leagues and their constituent clubs.⁹

There are therefore a number of reasons to treat sporting activity as a relevant category for serious study including:

- sporting activity involves the application of legal rules in a unique context, and
- some legal rules are unique to the sporting situation.

Although the focus of this book is legal, it is important to acquire at least a rudimentary understanding of the nature of sporting activity so as to understand the context within which the rules are applied.

3 See Chapter 9 'Employment'.

4 See Chapters 5 'Negligence and Civil Liability', 6 'Common Law Torts, Insurance and Risk Management', 7 'Corruption and Gambling in Sport'.

5 See Chapters 12 'Intellectual Property', 13 'Marketing'.

6 See Chapter 3. These operate both under the law and independently of it.

7 There have been several legal battles between rival sporting administrators and their sponsors in Australia in both rugby league and cricket. Application of relevant principles of common law (restraint of trade) as well as statute law (*Trade Practices Act 1974* (Cth), especially pt IV) has led to a distinctly sports-related approach being adopted. See Chapter 11 'Trade and Competition'.

8 See Chapter 8 'Doping'. Although drug testing may occur in other environments (notably employment), the development of sports anti-doping programs is essentially unparalleled.

9 The organisation of sporting activity is the subject of Chapter 2 'Organisational Structure and Governance'.

A BRIEF HISTORY OF MODERN SPORT

For our purposes, it is not necessary to define what we mean by 'sport'. Some choose to distinguish between sporting activity and recreational activity generally. Perhaps differences between these concepts parallel other important sociological distinctions. In our case, we are interested in the legal issues arising out of a wide range of activity, from the local voluntary club to the fully professional commercial league.

Humans have always been involved in some form of recreation. Like any activity, recreation can generate situations where the desires and needs of one person conflict with those of another. This is the basic ingredient of any legal dispute. Indeed, what is probably the first English statute directed at 'sporting activity' was concerned with eliminating the distraction provided by village football games. In 1314, Edward II decreed that:

Forasmuch as there is great noise in the city, caused by hustling over large balls from which evils might arise which God forbid, we command and forbid, on behalf of the King, on pain of imprisonment, such game to be used in the city in future.¹⁰

Had sport not evolved beyond this, there would be no reason to treat sporting activity *sui generis* in a book of this kind. Clearly, the important development of rules for organised play is the first element in the development of what ultimately has led to a fully fledged sports industry.

ORGANISED ACTIVITY

The development of modern organised rules for sport probably dates from the middle of the nineteenth century. It is not surprising that the industrial revolution and its labour-saving devices generated the leisure time necessary for sporting pursuits. The various football codes trace their roots to this period.¹¹ The establishment of rules governing play was probably one of the first orders of business for newly established sporting associations, many of which grew to become the national and international federations governing sports today. Indeed, the need to develop standardised rules was probably the principal reason for the formation of the sporting association in the first place. It is important to realise this, particularly when considering the question of who 'owns' sport, as there is little to prevent any group of like-minded people establishing an organisation, a game and a set of rules. As will be seen in this book,¹² though existing entities and individuals might take legal action to protect what can be protected, such as trademarks, confidential information, designs and other items of intellectual property, it cannot be seriously contended that the claimant in question 'owns' the sport.¹³

¹⁰ See N Mason, *Football! The Story of All the World's Football Games* (Sydney: Hick Smith and Sons, 1979) 100.

¹¹ See T Mason, 'Football' and G Williams, 'Rugby Union' in T Mason (ed), *Sport in Britain: A Social History* (Cambridge: Cambridge University Press, 1987).

¹² See Chapter 12 'Intellectual Property'.

¹³ The claim to 'own' a sport is often made, particularly in the context of a battle for control of a professional league. A sport that is often said to be 'owned' by a person is Formula One racing, where the founder of the modern competition, Bernie Ecclestone, is often referred to as the owner of the sport. In fact the various entities

Perhaps the most important organisational development in the nineteenth century was the establishment of the IOC in 1894. Originally aimed at reviving the spirit of the games festival conducted by the ancient Greeks, the modern Olympic Games were established as a quadrennial, multiple-sport contest open to participation by 'amateur' athletes.

PROFESSIONALISM

The Olympic Games remained officially closed to professional athletes until 1984. The original restriction of the Olympic Games to the amateur athlete was imposed at a time when there was a suggestion of something unseemly about a man deriving his living from sport.¹⁴ It was the expressed view of Baron de Coubertin, founder of the modern Olympics, that professional sport turned 'superior athletes into circus performers'.¹⁵ While it was true that some individuals were able to earn their livelihood from sport or recreational activity, the rewards available were, until the latter half of the twentieth century, generally modest.¹⁶ Nonetheless the human thirst for sporting entertainment led to the development of numerous professional leagues. At some point in the twentieth century, a few years before the Olympic Movement dropped its anti-professional stance, it became clear that, at least in some sports, the better athletes were opting for a professional career. The advent of the career athlete led to inevitable friction between league managers, team owners, players and others keen to maximise their share of the revenue generated by sport. As will be shown in this book, these contests have involved specific and contextual application of contract and competition law.¹⁷

COMMERCIALISATION

Certainly by the 1980s it was clear that sport was capable of generating enormous streams of revenue. Many of those interested in a popular sport were keen to maximise this revenue, often through sponsorship agreements and the sale of broadcasting rights. It is surely no coincidence that the relaxation of the amateur requirement coincided with a period of immense growth in the value of the Olympic spectacle. This increase in value was not unique to the Olympic movement. Player salaries mushroomed as well, as did the range of commercial activities

controlled by Mr Ecclestone own the rights (manifested in various legal ways) to conduct the competition known as Formula One. A host of other varieties of motor racing fall outside the scope of Formula One, although the Formula One competition, by virtue of its international reach, history and the romance associated with many of its drivers, may be the most valuable of the various motor racing competitions.

14 The Olympic Games were originally open only to male competitors. See the discussion of discrimination in sport in Chapter 16 'Discrimination'.

15 This remark was attributed to de Coubertin at the 1894 Sorbonne Congress in June 1894.

16 Babe Ruth is a good reference point. The star American baseball player, an icon in his sport, was said to earn 'more than the President of the United States'. Today, the minimum salary paid to a major league baseball player is several multiples of the salary of the President. Tiger Woods is likely to be the first professional athlete to pass \$1 billion in career earnings: Woods is not yet 35 and has his most productive sporting years ahead of him.

17 See Chapters 10 'Agency', 11 'Trade and Competition'.

associated with sport. Sport was now firmly established as part of the entertainment industry.¹⁸ Naturally, the range and complexity of the legal issues arising increased dramatically.

MANAGEMENT

This dramatic growth of the sport industry, at both voluntary and professional levels, and the accompanying complexity, signalled the evolution of sport management as a distinct career. Managers are now faced with ensuring their sport operates fairly and properly in multiple contexts. Issues as broad as properly constructed policies covering administered selection,¹⁹ discrimination,²⁰ and dealing with player misconduct²¹ and on-field violence²² are all part of the day-to-day activity of contemporary sport organisation. Increasing of claims of negligence in sport and recent concerns at multiple concussions and chronic traumatic encephalopathy are in media headlines. Every one of these is impacted by the law. Administrators and the organisations they serve, as well as the owners and participants and all the other stakeholders in sport in Australia, need to be well aware of their legal rights and obligations—hence the need for this book on Australian sports law.

THE AIM OF THIS BOOK

This book is primarily directed to those studying or practising law, but we have endeavoured to make it accessible to those without a formal legal background. We have chosen to write in plain English where possible and present complex legal concepts as simply as possible. Engaging in that exercise is a good way to test one's own grasp of concepts. We encourage readers to try it as a simple way to confirm their true understanding of the material presented here.

18 In *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 it was argued that the relevant 'market' to consider in applying competition law principles to a dispute concerning the right to establish a rugby league competition was the market for entertainment generally. In the final analysis, this market was rejected as being too wide for purposes of the application in question. See the discussion of this case and others in Chapter 11.

19 See Chapter 14.

20 See Chapter 16.

21 See Chapter 15.

22 See Chapter 4.