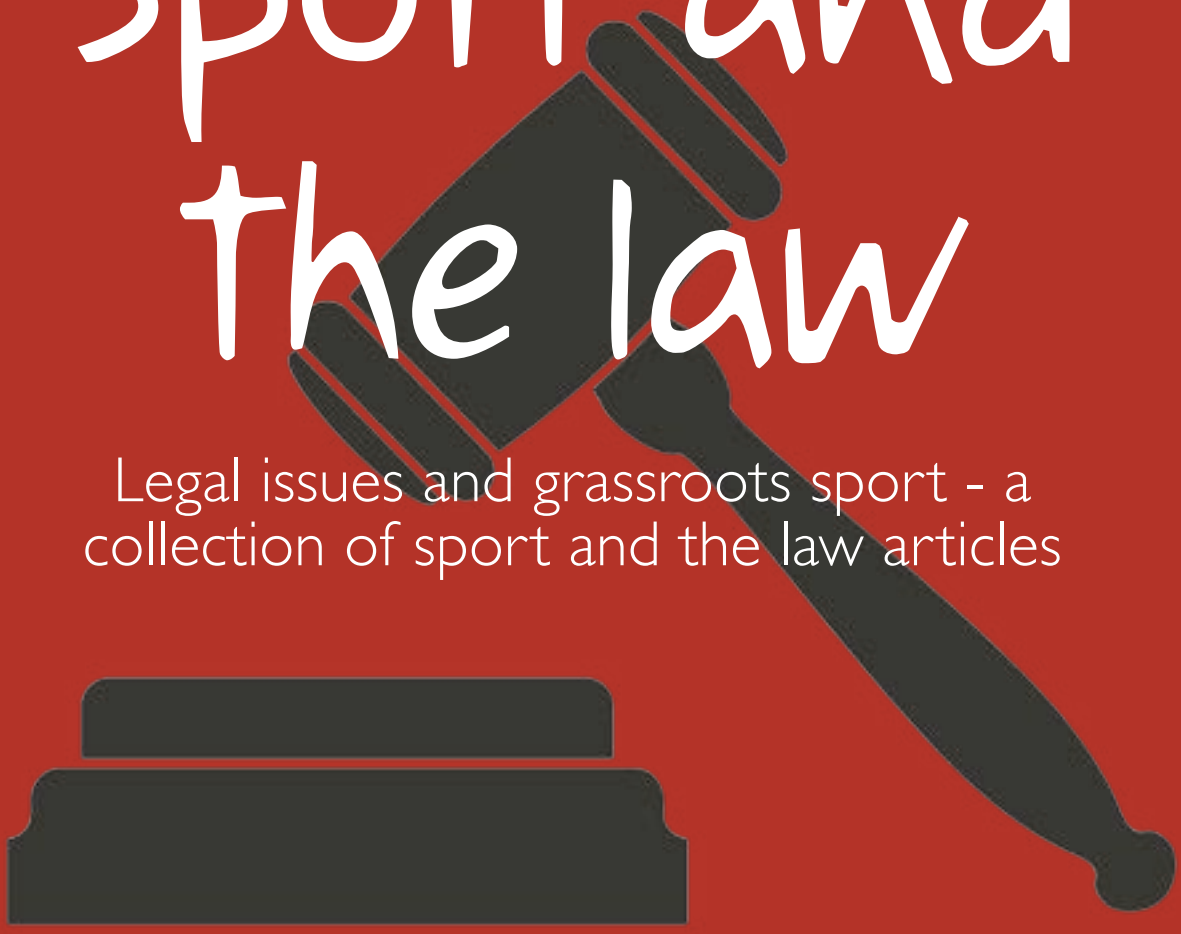
Sport and the law

Legal issues and grassroots sport - a collection of sport and the law articles



Play by the Rules
making sport inclusive, safe and fair

ANZSLA
THE SPORTS LAW ASSOCIATION

A production of Play by the Rules

In cooperation with the Australian and New Zealand Sports Law Association

Preface

We all know that sport is a great vehicle for community cohesion. It brings people together and unites us in a way that few areas of the community can. Australians love their sport and invest millions of hours and dollars into sport every week.

But sometimes community sport can have problems. Things can get out of hand as emotions run high and rivalries esculate. Even community sport can be serious business! This can mean understanding relevant legal issues and seeking legal advice.

Play by the Rules is all about keeping sport, safe, fair and inclusive. One of our key partners is the Australian and New Zealand Sports Law Association. We have partnered with ANZSLA to bring this collection of sport and the law articles. These articles cover a wide range of issues relevant for grassroots sport. They have been published individually in the Play by the Rules online magazine you can find here - www.playbytherules.net.au.

Peter Downs
Manager - Play by the Rules

The Australian and New Zealand Sports Law Association (ANZSLA) is delighted to continue its ongoing and successful association with Play by the Rules in producing this compilation of legal articles, advice, tips and tricks, designed to assist the sports industry navigate some of the legal issues confronting grassroots sports today. I would like to take this opportunity to extend gratitude to ANZSLA's members for their expert contributions to the book.

Sharon Scriven
Executive Manager - ANZSLA

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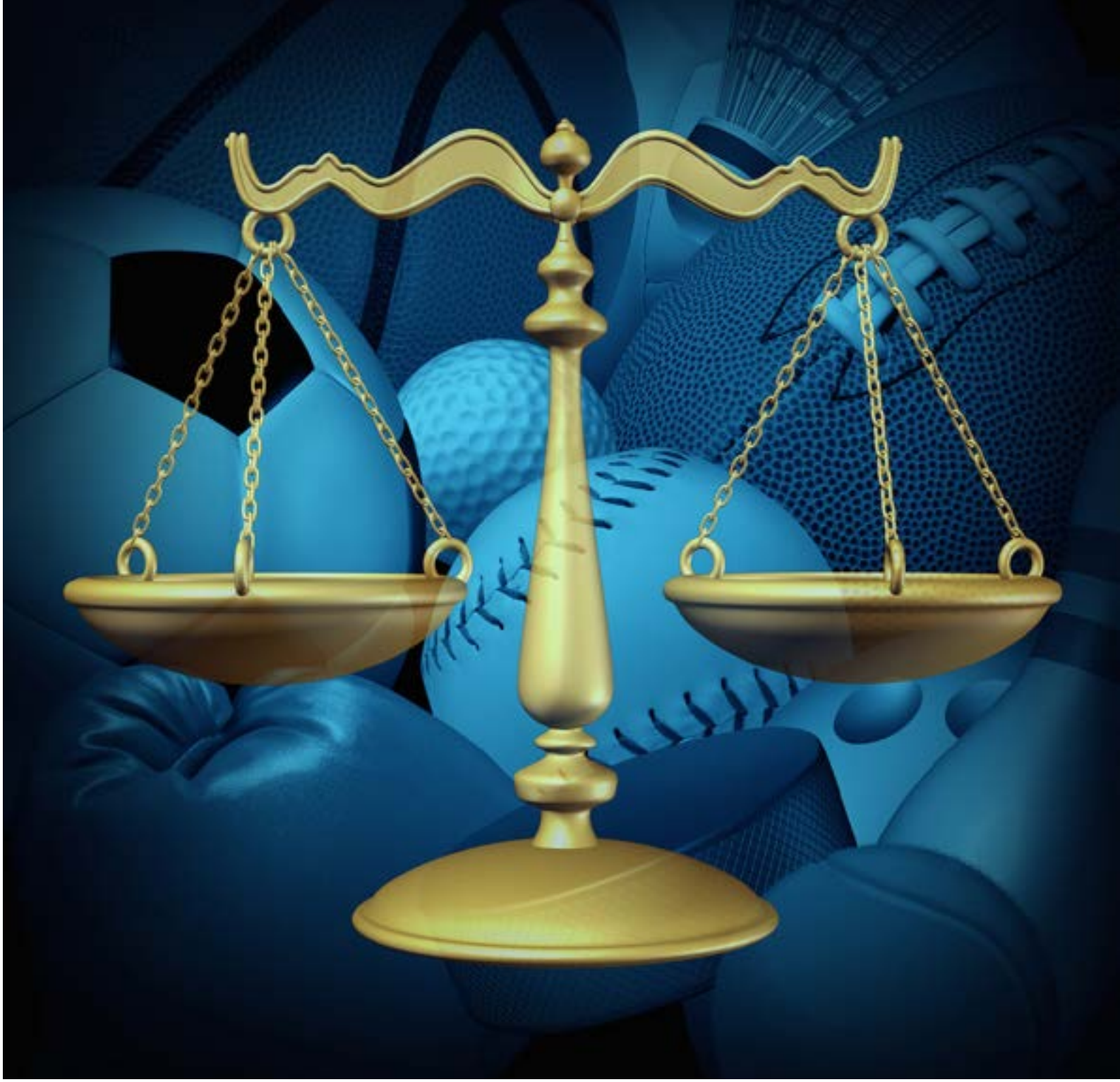

Play by the Rules is a joint initiative of the Australian Sports Commission, the Australian Human Rights Commission, all state and territory departments of sport and recreation, all equal opportunity commissions, the Australian and New Zealand Sports Law Association and the Office of the Children's Guardian.

Discrimination and Equal Opportunity Issues in Sport

Membership of Private Sporting Organisations

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Discrimination and equal opportunity issues in sport: Membership of private sporting organisations

Sporting clubs often ask lawyers to consider the extent to which they must accommodate potential members with disabilities.

This article summarises some of the legal considerations that need to be taken into account by private sporting organisations in determining membership so as to avoid a potential discrimination claim.

How are sporting clubs governed?

Sporting clubs are governed by their own internal laws (e.g. the club's constitution, by-laws, rules and regulations and policies and procedures), as well as by external laws in the form of the common law and legislation.

In terms of discrimination, private sporting organisations throughout Australia are subject to anti-discrimination laws. In Victoria the relevant law is the Equal Opportunity Act 2010 (Vic) (the EO Act).

What constitutes discrimination?

Discrimination involves treating or proposing to treat a person less favourably because of a personal characteristic or 'attribute' protected by the law.

Protected attributes are set out in section 6 of the EO Act, and include a person's age, sex, race, religion, and, relevantly for this article, disability.

The EO Act protects people from discrimination in all areas of public life, including workplaces, schools, shops and clubs.

Specifically, section 64(c) of the EO Act prohibits discrimination by clubs in refusing a person's application for membership to a club.

Therefore, if a sporting club refused an applicant's membership request on the basis of the applicant's disability, at first glance it would appear that the sporting club has engaged in discrimination prohibited by section 64(c) of the EO Act.

Are there exceptions?

Section 13 of the EO Act provides that discrimination can be lawful in certain circumstances.

Different categories of discrimination (e.g. discrimination in employment, discrimination in schools, discrimination in accommodation, etc.) contain specific exceptions to the prohibition on discrimination.

For example, Division 6 of the EO Act deals with discrimination by clubs and club members, and provides specific exceptions for particular types of clubs to discriminate in determining membership . These exceptions apply to clubs for minority cultures, clubs for political purposes, clubs for particular age groups, single sex clubs and clubs which provide separate access to benefits for men and women. Accordingly, an-all female tennis club that refuses an applicant's membership request on the basis that the applicant is a male would be able to rely on the exception to discrimination in section 68 of the EO Act.

Additionally, Part 5 of the EO Act contains a number of general exceptions and exemptions which apply to all categories of discrimination.

One exception that often arises in the context of disability is the 'health and safety' exception in section 86 of the EO Act.

Section 86(1)(a) of the EO Act provides that a person may discriminate against another person on the basis of disability if the discrimination is reasonably necessary to protect the health or safety of any person (including the person discriminated against) or of the public generally.

It is often contentious whether the discrimination is reasonably necessary to protect health and safety of the person and others. Essentially, the determination of this issue comes down to an objective assessment of the facts and circumstances of a given case.

Another issue that may raise disrimination considerations is where sporting clubs seek to discriminate against members with disabilities by treating them differently to other members.

For example a private golf club may seek to offer an intellectually disabled person a modified membership. The terms of the person's modified membership might provide that he or she is only allowed to play golf on the putting green and practice fairway, rather than on the entire golf course on the basis that modifications to the membership terms are intended to address potential safety concerns relating to the person and other users of the golf course.

Whilst offering the person a membership on modified terms would constitute discrimination under section 64(e) of the EO Act, it may not be unlawful for the club to take 'special measures' (i.e. differential treatment) in order to promote substantive equality.

Section 12 of the EO Act provides that special measures must:

- be undertaken in good faith to help promote or achieve substantive equality for members of the group;
- be reasonably likely to achieve this purpose;
- be a proportionate way of achieving the purpose, and
- be justified because the members of the group have a particular need for advancement or assistance.

As this example illustrates, there are a variety of steps that can be taken in order to address and resolve potential discrimination issues relating to membership of a private sporting organisation.

Member Protection: a closer look at bullying in sport and the law

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Member protection: A closer look at bullying in sport and the law

The release of the Ted Wells Report to the NFL has tarnished the mystique of the professional locker room. The report found that Jonathan Martin (an NFL offensive tackle) was subjected to consistent harassment, bullying and hazing by three team mates while he played for the Miami Dolphins. Aside from losing two starters from their roster in the wake of the report, the Miami Dolphins terminated the employment of a coach and a trainer who were also involved in the scandal.

Unfortunately, this behaviour cannot be said to exist "only in America". We have felt its effects in our backyard too. Remember the London 2012 scandal involving allegations of bullying within the Australian Swimming Team? The issue is pandemic and sporting organisations can no longer turn a blind eye.

Member protection policies

Sporting organisations (at both the national and local level) have duties and legal obligations to protect their members and constituents and to ensure that their sports are safe, fair and inclusive. In fact, sports supported by the Australian Government must have acceptable member protection policies in place in order to receive government funding.

Member protection policies are risk management tools that outline the duties and legal obligations of sporting organisations and explain the decision-making process that will be used to ensure ethical and appropriate behaviour amongst members and constituents involved in a particular sport.

Effective member protection policies are the "first line of defence" in assisting sporting organisations with handling issues such as bullying, hazing and other inappropriate behaviours. However, the challenge for sporting organisations is to ensure that their member protection policies (or any policies for that matter) are worth more than just the paper they are written on. In the realm of member protection, confronting this challenge is only possible if sporting organisations:

- are aware of the current legal landscape affecting member protection;
- ensure consistent implementation of their member protection policies;
- establish and utilise effective complaints procedures and methods of investigation;
- establish effective reporting systems; and
- educate their members and constituents.

The legal landscape affecting member protection

Navigating the current legal landscape as it applies to member protection is challenging for sporting organisations, as member protection is governed by multiple areas of law (at both the state and federal level), including:

- occupational health and safety;
- anti-discrimination;
- child protection;
- common law;
- industrial relations;
- workers compensation; and
- criminal law.

The difficulty for sporting organisations is that the law is applied differently amongst their various constituent groups. For example, professional athletes who are subjected to bullying can pursue different legal avenues to say child athletes who face the same issues. Additionally, the process and remedies available to each group also vary.

In order to stay abreast of legal developments, sporting organisations need to ensure that their member protection policies provide broad protection to their members and constituents, and that they are updated regularly.

Recent developments in bullying laws

On 1 January 2014, the Fair Work Amendment Act 2013 (Cth) came into effect. Under the amendment, if a worker experiences bullying at work they can apply to the Fair Work Commission for an order to stop bullying.

So, how is "bullying at work" defined, what is a "worker" and what does this have to do with sports?

Under the amendment, a "worker" is "bullied at work" if they experience "repeated unreasonable behaviour (at work)…that creates a risk to health and safety."

In the case of sports, an athlete who is employed by a sporting organisation (usually a professional athlete) would be considered "worker" under the amendment. In fact, the label of "worker" is quite broad and also includes contractors and volunteers.

The Commission has been given broad powers, under the amendment, to make any orders that it considers appropriate (except orders requiring penalty payments) to prevent workers from being bullied at work. The amendment also requires the Commission to deal with applications to stop bullying within 14 days. This will assist in providing an expeditious process for victims of bullying.

Another benefit to aggrieved workers is that they are able to commence and pursue multiple proceedings under other federal and state work health and safety laws, even if they have made an application to the Commission. This previously was not allowed.

The amendment provides another avenue for relief for aggrieved workers and may be utilised by athletes who are faced with situations like that of Jonathan Martin.

Way forward

Although the amendment should prove to be a worthwhile step forward, the fight to stop inappropriate behaviours such as bullying, hazing, and discrimination in sports does not solely depend on legislation. Sporting organisations must be proactive in their efforts to not only educate their members and constituents about appropriate behaviour, they must also create an appropriate culture for change. Conducting regular reviews of their member protection policies and rules will assist sporting organisations in their fight to prevent bullying and other inappropriate behaviours. Additionally, establishing effective reporting systems, complaints processes and methods of investigation will ensure that any grievances will be actioned appropriately and in a timely fashion.

Fair play: The importance of following a fair process in employee disciplinary matters

Kerryn Tredwell, Partner, Hall & Wilcox

Fair play: The importance of following a fair process in employee disciplinary matters

The Cronulla Sharks football club were recently on the receiving end of a claim of unfair dismissal by former high-profile five-eighth, Todd Carney. Carney was sacked from the club after a lewd photo of him appeared on social media last year.

Carney successfully challenged his dismissal through the NRL's appeals tribunal. According to media reports, the dismissal was found to be unfair because a proper process was not followed before the decision was made in that Carney was not given a chance to discuss his case with the club's board before the decision was made to sack him from the club.

Cronulla is not the first employer to fall foul of the rules of procedural fairness. Failing to follow a fair process or to afford 'natural justice' can often get employers into trouble. No matter how good the reason or grounds for dismissal, if a fair process is not followed, the ultimate decision will be tainted and, if challenged, may be declared unfair.

While Carney's case involved a decision by the NRL appeals tribunal relating to a player, the same considerations of procedural fairness will arise where a sporting organisation is looking to dismiss an employee for misconduct. In such cases, there will often be a risk of an unfair dismissal claim by the employee to the Fair Work Commission seeking compensation or reinstatement (or both).

What does a fair process look like?

Here are some of the key requirements for a fair process.

- Put the allegations to the individual. This is critical to a fair procedure. All too often employers fail to spell out the allegations to the accused in sufficient detail. If the employee or player does not know precisely what they have been accused of, how can they respond? Which leads us to…
- Give the individual a chance to respond to the allegations. An opportunity to respond is another critical feature of due process. No matter how bad that photo looks on its face, there may be more to the story and it is incumbent on employers to hear the employee out.
- Consider all relevant evidence. This might require further inquiries or an investigation to be carried out and an unbiased weighing of the evidence found.
- Consider any mitigating circumstances. Even where the misconduct is serious, the punishment needs to factor in any personal circumstances that might weigh against a penalty as harsh as dismissal. A previously unblemished record marred by a single lapse in judgment or a period of difficult personal circumstances leading to irrational behaviour, are mitigating circumstances that might weigh against a dismissal.

Often these elements of procedural fairness will be written into the employment contract, club rules or enterprise bargaining agreement. In such cases, a failure to follow these steps could expose the employer or club to more than just a claim for unfair dismissal (for example, a breach of contract claim).

Fair investigations

Employers and sports club administrators also need to consider procedural fairness when conducting investigations, whether into misconduct or complaints (such as under the club's member protection policies). Before the allegations can be put to an individual, it may be necessary to make further inquiries to find out what happened. As mentioned above, ensuring that you have all of the relevant evidence in front of you before you make a decision is critical to procedural fairness.

Sometimes a formal investigation will be appropriate. In other cases, less formal inquiries might be made.

There have been many cases where a flawed investigation has resulted in an unfair dismissal, so it is important to keep some basic principles in mind to keep the process on track. In particular:

- Make sure the investigator is unbiased and impartial. Anyone with a personal interest in the outcome of the investigation, or who appears to be biased one way or the other, should not be conducting the investigation. Sometimes this will require that someone external to the organisation be engaged to investigate.
- Confidentiality should be maintained as far as possible. This is important for a number of reasons, including to protect reputations, minimise the risk of anyone being victimised for participating in the investigation, and to instil confidence among other

employees, members or players that should they ever need to raise issues, those matters will be handled confidentially. Of course,

Tips for avoiding unfair dismissals

- No matter how bad it looks, make inquiries before making decisions. There may be another side to the story.
- Make sure you follow the organisation's policies and procedures, and any requirements in contracts or enterprise bargaining agreements.
- Give the individual details of the allegations against him or her and a chance to respond.
- Consider any mitigating factors when deciding on the appropriate penalty.

And remember, if you first hear about your dismissal from reading your club's press release, chances are that a fair process was not followed.

Child protection: the international transfer of minors in world football

James Kitching - Legal Counsel, Asian Football Confederation

Child protection: The international transfer of minors in world football

Every year, a myriad of young Australian footballers make the move overseas in order to further their burgeoning professional career. For the majority of those young Australian footballers, their final club in Australia before embarking overseas is not a professional club participating in the A-League, but a 'grassroots' club, where the seniors play in a 'semi-professional', state-based competition, and the 'administration staff' and Executive Committee are passionate volunteers. In an already saturated sporting market, for many of these clubs the transfer of their best young footballers overseas provides an alternate revenue stream to the traditional means by which sporting clubs source income. Where those footballers are minors, they are subject to the regulatory framework instituted by the Fédération Internationale de Football Association (**FIFA**). Thus, it is important for both players and clubs to understand their obligations and the relevant international rules to ensure that any such transfer is legitimate and binding.

The international transfer of minors is governed by Article 19 of the FIFA Regulations on the Status and Transfer of Players (**RSTP**). As a general rule, the international transfer of players is only permitted if the player is 18 or older[1].

International football therefore considers any player aged 17 or younger to be a 'minor'. In accordance with the jurisprudence of FIFA, the RSTP, which considers minors in a number of contexts (and not just simply international transfers), are applicable to individual players from the age of 12.

There are three written exceptions to the general rule, two of which are relevant to minors resident in Australia seeking to transfer internationally[2]:

i. the player's parents move to the country in which the new club is located for reasons not linked to football;
ii. the transfer takes place within the European Economic Area (**EEA**) and the player is aged between 16 and 18. In such a case, the new club must fulfill minimum requirements relating to the education and living arrangements of the player.

In a recent decision, the Court of Arbitration for Sport held that minors aged between 16 and 18 and residing outside of the EEA were permitted to rely on the second exception to transfer to a club within the EEA, so long as they held European citizenship.[3] Accordingly, any Australian player aged between 16 and 18 whom is also a European citizen may transfer to a club within the EEA presuming their new club meets the minimum requirements stipulated in the RSTP.

The exceptions apply to: (i) minors previously registered with a club; and (ii) minors never previously registered with a club and not a national of the country in which they wish to be registered for the first time.[4] The jurisprudence of the relevant FIFA judicial bodies provides an unwritten further exception for 'first registration' minors; they must demonstrate that they have lived continuously for five years in the country where the club that they wish to register for is based.

In order to facilitate the international transfer of players, FIFA has introduced the Transfer Matching System (**TMS**), an online-based registration programme. For all international transfers, the relevant national association must submit a request within TMS for the transfer to be undertaken on behalf of its affiliated club. For the international transfer of minors, such requests must be accompanied by compulsory supporting documents (set out in Annexe 2 of the RSTP) in order to justify the relevant exception that is requested.

Requests are judged individually by a sub-committee of the FIFA Players' Status Committee. Should a minor be registered by a club and national association without the approval of the sub-committee, the club and national association may be sanctioned by the FIFA Disciplinary Committee.[5]

FIFA takes its obligations to protect minors very seriously. In April 2014, the FIFA Disciplinary Committee heavily sanctioned FC Barcelona and the Spanish Football Federation relating to the registration of ten minor players whom had participated for FC Barcelona during the years 2009-2013. In a written statement, FIFA set out that:

> *"the protection of minors in the context of international transfers is an important social and legal issue that concerns all stakeholders in football… while international transfers might, in specific cases, be favourable to a young player's sporting career, they are very likely to be contrary to the best interests of the player as a minor… the interest in protecting the appropriate and healthy development of a minor as a whole must prevail over purely sporting interests".*[6]

Thus, as well as social, economic, and emotional considerations, the parents or guardians of Australian footballers aged 17 and below who seek to transfer internationally, as well as their current Australian club who may be leading negotiations with an overseas club, must ensure that their particular circumstances fall within one of the regulatory exceptions provided for in Article 19 of the RSTP.

1. Article 19.1, RSTP.
2. Article 19.2, RSTP.
3. TAS 2012/A/2862 FC Girondins de Bordeaux c. FIFA.
4. Article 19.4, RSTP.
5. Article 19.3, RSTP.
6. FIFA, "Spanish FA, FC Barcelona sanctioned for transfer of minors" <http://www.fifa.com/aboutfifa/organisation/news/newsid=2313003/index.html>.

The pregnant player: where duty meets discrimination

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The pregnant player: Where duty meets discrimination

You Tube was recently abuzz with images of a very pregnant Jana Pitman, training for athletics the day before she gave birth to her new baby[1]. The relevance of her trademark bumble bee tattoo became even greater as she once again defied physics to perform amazing feats.

Remaining fit and physically active as long as possible into a pregnancy, for the health of each of the mother and their unborn child is uncontentious.[2]

Jana is at an advantage, in that her training was individual, and presumably she was monitored by specialised staff and equipment to assist her in her training.

Since the decision in *Gardner v All Australia Netball Association Ltd*,[3] it has been widely accepted that pregnant women have the choice to participate in sport, and, subject to some limited exceptions, they cannot be excluded on the grounds of their pregnancy.[4] There is no defence of 'reasonableness' in discriminating against a pregnant participant. [5]

People running a local club or association, which has female adult participants will invariably face, at some stage, the issue of participation by pregnant women. In most instances individual women should be permitted to make their own decisions about

participating after considering any relevant medical advice and the policies prepared by peak sporting bodies. Organisations such as Netball Australia and Touch Football Australia have sound policy about the pregnant athlete, said to be taken from the Australian Sports Commissions recommended policy.[6]

The Australian Sports Commission issued guidelines for the management of the issue for sporting organisations in 2002.[7]

In some instances sporting clubs might have concerns about their liability for any mishaps because of the nature of the sport or there might not be any relevant guidelines or policies prepared by a peak body. In these circumstances it is very useful to have a general understanding of the law concerning participation in sport by pregnant women.

While the law is relatively clear, there are some grey areas.

And whilst there are however examples of sport in which women are currently excluded from participating if pregnant, such as boxing;[8] horse racing riding;[9] and Tae kwon do,[10] it is unlawful to prevent a woman from participating in a sporting activity simply because she is pregnant.[11] Yet, there are cases in which it has been held that, in some circumstances, a woman owes a duty of care to her unborn child for in utero events.[12] That has yet to be applied in a sporting context.

While an opposing player has no reason to treat a pregnant woman any differently from other members of the opposition,[13] some sporting clubs might choose to take some steps to assist pregnant club members to make a well-informed decision about their own participation in a sporting activity, particularly one where participants are prone to injury.

This is consistent with the duty the sporting organisation has to any person to ensure reasonable care to prevent them from being harmed. A sporting organisation should not purport to give advice as to the risks or otherwise of playing whilst pregnant, as that may give rise to an action in negligence if the advice is incorrect.

In some instances sporting organisation may owe a duty of care to participants to warn of the possible risks in playing whilst pregnant and encourage women to obtain their own medical advice about the effects playing may have on them or the unborn child.

The decision to participate should be that of the mother, and she is responsible for the health of her child.

Consequently, it is advisable for clubs to have a very clear policy that deals with participation by pregnant women for it is not helpful to anyone if the issue is first raised when a very evidently pregnant woman arrives to play.

The requirement to sign an indemnity may also lead to discrimination, depending on its wording, and an indemnity may not be successful if there was failure to take reasonable care in any event. It would be prudent for sporting organisations to ensure that they hold current, valid, up to date insurance that does not contain exclusions for pregnant participants.[14]

The management of the pregnant athlete will continue to be perplexing, dependent upon the sport, and the risks that may be associated. To prevent discrimination, and yet protect the athlete, the child, and the organisation, the best approach at this time is to recommend the athlete work closely with, and follow the advice of their medical practitioner in relation to the participation in the relevant sport.

Very clear guidelines should be adopted by grassroots sporting organisations where the issue is likely to arise with regularity. Adapting and adopting the guidelines and policy recommended by the ASC is a good place to start.

1. https://www.youtube.com/watch?v=CV8jXNOh4LY
2. See http://sma.org.au/resources-advice/policies-guidelines/active-women/ ; Susan White, 'Banning Pregnant Netballers – Is this the Answer?' (2002) 36 British Journal of Sports Medicine 15
3. (2003) 197 ALR 28; the Court finding that the organisation had discriminated against the South Australian player by 'banning' her from participating whilst pregnant.
4. Sex Discrimination Act (Commonwealth) 1984 ss 7, 7B, 7D, 22 and s 44.
5. An exemption can be sought and obtained; see n4 s44.
6. See n6; n5
7. Australian Sports Commission 'Pregnancy in Sport – Guidelines for the Australian Sport Industry', 2002. www.ausport.gov.au
8. The AIBA Technical and Competition Rules, 27 March 2012. Rule 6.10
9. AR.81G. After the first trimester of her pregnancy riding is prohibited, and during the first trimester she is required to provide to the Stewards a medical certificate that it is safe for her and the foetus for her to ride 'and that her pregnancy creates no impairment to her
10. capacity to control a racehorse.'
11. TKD Australian Taekwondo Inc. [1997] VADT 68 (9 May 1997)
12. Sex Discrimination Act (Commonwealth) 1984, s 22, subject to any exemption sought and granted pursuant to s 44.
13. See for example Lynch v Lynch (1991) NSWLR 411, 414-16
14. To simply ensure their conduct is not outside of the usual rules of the game, or what one would expect when playing.
15. Including Professional Indemnity, Public liability, and Officers and Directors liability.

Anti-smoking laws and sporting venues

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Anti-smoking laws and sporting venues

An interesting question for anyone involved in sport is to consider how far the law interfaces with sport today. Well here is an area that often slips under the radar of sports administrators — anti-smoking laws.

Most people are aware of the anti-smoking campaigns that have been run by federal, state and territory governments, as well as the Cancer Council of Australia, to encourage people to stop smoking.

Most people are also aware that governments at all levels and in all jurisdictions have passed anti-smoking legislation banning smoking in enclosed public places such as office buildings, shopping malls, schools and cinemas. What they are not aware of is the exact extent of these smoking bans and the fact that they can and do catch out sporting clubs and associations.

Overview of state/territory legislations

There is a degree of commonality among jurisdictions regarding where smoking bans should be applied, but there is a great deal of variability in terms of exemptions from indoor and outdoor bans, how to manage smokers lighting up in outdoor areas, and the penalties that apply.

What follows is a brief overview of the legislation in each jurisdiction that can apply to sporting clubs and associations.

Australian Capital Territory

The Australian Capital Territory (the 'ACT') has banned smoking in enclosed public places, including enclosed sporting or recreational places (Smoke-Free Public Places Act 2003). To be considered an 'enclosed' place, a public place must have an overhead cover, and be 75 per cent or more enclosed.

The ACT also has a complete ban on smoking in enclosed areas of clubs, and outdoor eating and drinking areas (other than designated outdoor smoking areas of licensed premises), and the Act requires occupiers of premises to take reasonable steps to prevent smoke entering no-smoking areas, including neighbouring premises.

New South Wales

The Smoke-Free Environment Act 2000 bans smoking in spectator areas at public sports grounds and other recreational areas when an organised sporting event is being held.

The smoking ban applies to all spectator areas (covered and uncovered, whether there is seating or not) for the duration of the event, including pre- and post-match times and during any breaks, as well as at swimming pool complexes, fitness centres, bowling alleys and other sporting and recreational facilities (unless they were declared an exempt area). Under the Act, occupiers of premises where smoking is allowed must take reasonable steps to prevent smoke from entering smoke-free areas.

There is provision to exempt an outdoor public place or class of outdoor public places under the regulations from being smoke-free areas.

It is worth noting that numerous local councils in New South Wales have passed by-laws banning smoking in outdoor areas, including sporting fields and swimming pools.

Northern Territory

The Tobacco Control Act 2002 requires that 50 per cent of fixed seating in sporting venues and other outdoor events (for example, racetracks, grandstands and showgrounds) be smoke free. Outdoor drinking or eating areas are all required to be smoke free.

Queensland

The Tobacco and Other Smoking Products Act 1988 banned smoking in stadiums managed by the Queensland Major Sports Facilities Authority, and between the flags at patrolled and artificial beaches.

Liquor licensed premises that hold a general or club licence can designate an outdoor smoking area where only smoking and drinking can occur.

South Australia

The Tobacco Products Regulation Act 1997 banned smoking in public places that are more than 70 per cent enclosed or at public events declared to be smoke free at the request of a local council or other incorporated entity.

Tasmania

The Public Health Act 1997 has declared that any area of an outdoor sporting venue containing reserved seating and all outdoor sporting venues when an organised sporting event is being held must be smoke free. Other smoke-free areas include public swimming pools, between the flags at beaches and within 20 metres of any permanent or temporary public seating and the competition area at all outdoor sporting venues.

Victoria

Under the Tobacco Act 1987 smoking is prohibited within 10 metres of sporting venues during under-age sporting events (including training or practice sessions and outdoor dining and drinking areas), as well as in the outdoor areas of public swimming pools and in between the flags on all of Victoria's patrolled beaches. Some councils have also introduced local laws that prohibit smoking in public outdoor places, including beaches and sporting grounds.

Western Australia

The Tobacco Products Control Act 2006 requires sports clubs to be smoke free inside. Smoking is also prohibited between the flags of patrolled beaches.

What is a 'public place'?

Because of the intention of the legislation, that is that smoking is to be discouraged, the courts will probably interpret the legislation fairly broadly. 'Public places' will include places to which the public, or a section of the public, has access, such as members of a sporting club derived from, for example, their membership.

Functions held by clubs or associations for their members will not generally be considered private functions and if functions are held in enclosed public places, smoking will not be allowed.

Who gets fined for a breach?

In all jurisdictions, breach of the anti-smoking legislation carries fines for the offenders. This can be the smoker but can also be the occupier, because most jurisdictions provide that if someone is committing an offence by smoking in a place that is prohibited under the Act, the occupier of that place also commits an offence.

In the case of the occupier, this can be a person or club that has the management or control, or is otherwise in charge of the premises, and includes the manager or supervisor.

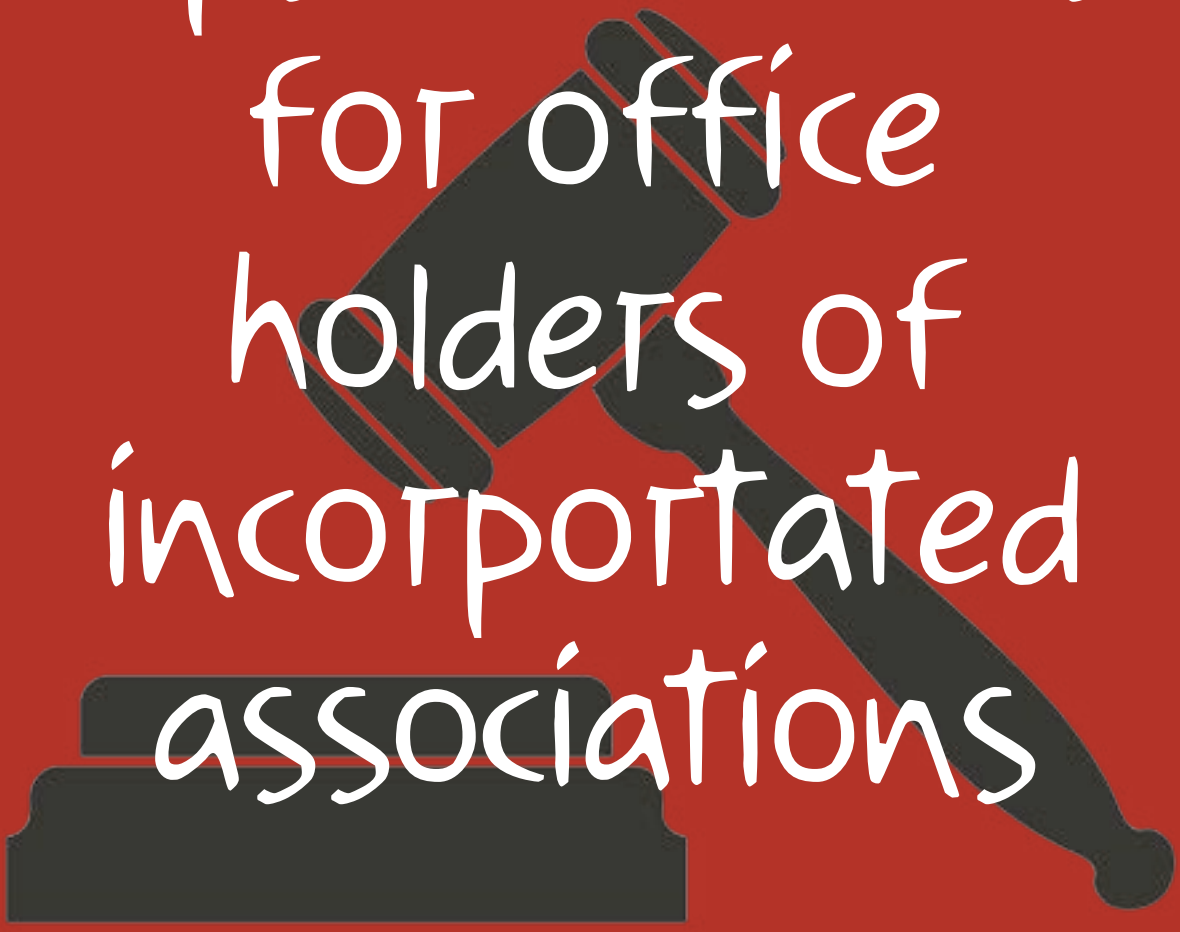
What is the penalty for a breach?

The penalties vary from jurisdiction to jurisdiction. Three examples show the disparity that exists in all jurisdictions. In Western Australia, an offence carries a maximum penalty of $2,000 and for a continuing offence a daily penalty of not more than $50 may apply. In the Northern Territory an occupier may receive an on-the-spot infringement notice of $100 but penalties of up to $2,000 for an individual or $11,000 for a body corporate may apply if the matter goes to court and is proven. In Queensland a smoker at a major sports facility can be fined $220 while an occupier could be fined up to $16,800.

But whatever the jurisdiction, there is a strong financial incentive on club and association administrators to avoid any penalties in the first instance. The penalty may in fact prove to be the cheapest part of breaching the anti-smoking laws if lawyers have to be brought in and court costs are also involved.

Smart administrators are the ones who are aware of the anti-smoking laws and take the necessary steps to find out whether their organisation is 'caught' under the rules and if they are, take appropriate steps to put in place a system that will ensure compliance.

Tips and Tricks for office holders of incorporated associations



Jeremy Loeliger - Holding Redich partner

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Tips & Tricks of office holders of incorporated associations

A large proportion of community based sporting organisations are registered as incorporated associations, with more than 38,000 incorporated associations registered in Victoria alone.

In most instances, at least in a sporting context, the members of those associations will be either the relevant individual participants, or the teams who compete in the relevant league or association. The office holders of those associations, being the people responsible for its administration, governance and decision making will often be a handful of individuals who have volunteered their time to take a particular interest in developing the competition and community associated with the organisation.

While individual members of incorporated associations are largely protected from the debts and liabilities of these organisations, the same is not necessarily true for in respect of its office holders, who should be made aware of the existence of certain duties and potential liabilities that exist because of their volunteering to participate in that capacity.

Note: *This article focuses on Victorian incorporated associations under the Associations Incorporation Reform Act 2012 (Vic) (**the Act**), however the laws in other states and territories are largely similar.*

Who is an 'office holder'?

You might be surprised to learn the term 'office holder' refers to a wide range of people, not just the CEO, President or other persons given an official title in the association's hierarchy.

In fact, 'office holders' will include:

- committee members;
- the secretary;
- anyone who makes decisions affecting the association's operations, or have the capacity to significantly affect the association's financial standing; and
- anyone (other than professional advisers such as lawyers or accountants) whose instructions or wishes the committee generally follows.

TIP: *If your involvement in an incorporated association involves active participation over and above that of a member, you should use your best efforts to comply with the legal duties of an office holder in relation to the association.*

Legal duties of office holders

Office holders of incorporated associations have both positive and negative legal obligations, that is, there are certain things the office holders **must** do, and things they **must not** do. These obligations are designed to protect the organisation, its members and any third party dealing with the organisation.

Broadly, office holders must

- carry out their duties with care and diligence;
- carry out their duties in good faith in the best interests of the association, and for a proper purpose (i.e. not for their own profit); and
- not use information acquired through their position for personal advantage, the advantage of others, or to the detriment of the association.

TIP: *when making decisions, or acting on behalf of the organisation, ensure that you always act with the best interests of the organisation in mind.*

If an office holder makes a business decision relating to the operation of the association, they must:

- make that decision in the best interests of the association; and
- not have a personal interest in the decision.

TIP: *If you have a personal interest in any transaction of the organisation, make sure that your interest is documented and the transaction is conducted on commercial, arms-length terms. Ensure the terms of the transaction are documented and you abstain from any vote on behalf of the organisation in relation to that transaction.*

Potential penalties for office holders

If an office holder misuses their position or information obtained from their position or breaches their duties of care and diligence or good faith and proper purpose, the office holder may face a personal civil action with a potential liability of up to $20,000.

If an office holder misuses their position for a personal advantage, or deliberately allows the association to trade while insolvent, the office holder may face personal criminal action.

Protection for office holders

It's not all doom and gloom for office holders. An incorporated association is required at law to indemnify its office holders from any liability for the activities its office holders undertake on behalf of the association – as long as those activities are carried out by the office holder in good faith.

This requirement is designed to protect individuals that incur a liability in the performance of their office holder duties on behalf of the association, but it will not protect an office holder who has deliberately (or potentially negligently or recklessly) broken the law or breached their duties.

Any payment that must be made by an association under such an indemnity must be funded by the association. For this reason, larger associations that deal with contracts of significant value often take out specific officers' indemnity insurance.

TIP: Ensure that your organisation regularly considers its insurance requirements. While officers' indemnity insurance may not be required or desirable at present, as your sporting organisation grows it may become more financially feasible.

A final word

While the duties are not overly onerous and generally reflect common sense, it is important for office holders to understand their duties to ensure they comply and are not faced with any unexpected liability or legal action, either in a personal capacity or on behalf of the association. More information on incorporated associations and office holders' duties is available from Consumer Affairs Victoria at www.consumer.vic.gov.au or from your legal adviser.

A guide to the sporting organisation award 2010

Athena Koelmeyer - Managing Director, Workplace Law

A guide to the sporting organisation award 2010

While sports organisations are a unique form of workplace – it is important to note that they are just that – a workplace with the organisation in the role of employer.

As for all employers, a perennial question and one that seems notoriously difficult to get right is whether employers are paying employees correctly. Often this can seem far too complex for sports administrators or volunteers to work out and as a result people are paid incorrectly – leading to disputes and unhappy organisations.

In this article, we provide a quick guide to the Sporting Organisations Award 2010 (the Award) which came into existence in 2010 and largely binds sporting organisations now.

Background

Some sporting organisations may be familiar with the Federal National and State Sporting Organisations Award 2001, Australian Cricket Award 2002, Sportspersons, Coaches, Umpires and Associated Support Staff Interim Award that previously governed entitlements for employees.

These were all replaced by the Sporting Organisations Award 2010 (the Award).

Is our organisation covered by the Award?

The Award covers national, State and Territory sporting organisations throughout Australia.

In order for this Award to apply, the organisation must be a sporting organisation as defined below:

National Sporting Organisation means the national governing body for a sport or the organisation conducting the elite level national competition for a sport.

State or Territory Sporting Organisation means the governing body for a sport at a State or Territory level or the organisation conducting elite level State or Territory competition for a sport or, in the case of a sport where governing bodies are split between metropolitan and non-metropolitan areas, the governing body for the non-metropolitan areas (e.g. country)

Which organisations are not covered by the Award?

The Award makes clear in clause 4 that it does not cover:

- employees who are covered by a modern enterprise award or enterprise instrument (ie organisations who have their own special award or enterprise agreement);
- employees who are covered by State reference public sector award, or a State reference public sector transitional award (for example some State Government authorities);
- coaches employed by AFL and the Victorian Football league who do not earn their principal income as coaches and does not apply to those coaches in the Victorian State Football League Under 18 program which is conducted by the AFL;
- CEOs and Executives at the second and third tiers of management, including Director of Finance, Assistant Director and the State Coach or similar at the Cricket Australia level, provided that the State Coach is remunerated at a level in excess of what is provided in the Award; and
- Employees of racing clubs.

Which employees are covered by this Award?

Employees who are employed as coaches and all the clerical and administrative staff.

The sporting organisation may employ other people who may not be covered by this Award such as canteen attendants (who may be covered by the Fast Food Industry Award 2010) or an IT Manager (likely to be not covered by any award).

How much does the employee need to be paid under the Award?

The Award provides the minimum wage an employee is to be paid (note casual employees receive an additional 25% casual loading).

Coaching Staff – Adult Rates

Classification	Per annum ($)	Weekly ($)	Approximate Hourly Rate ($)	Approximate Casual Hourly Rate ($)
Coach Grade 1	44,171	847.20	22.29	27.86
Coach Grade 2	49,564	950.60	25.02	31.28
Coach Grade 3	59,565	1,142.40	30.06	37.58
Coach Grade 4	67,538	1,295.30	34.09	42.61

Clerical and Administrative Staff – Adult Rates

Classification	Weekly ($)	Hourly ($)	Casual Hourly Rate ($)
Grade 1	695.40	18.30	22.88
Grade 2	718.50	18.91	23.64
Grade 3	746.20	19.64	24.55
Grade 4	777.30	20.46	25.58
Grade 5	814.40	21.43	26.79
Grade 6	853.90	22.47	28.09

If a sporting organisation employs an employee who is 20 years or younger junior rates will apply. However, if the employee is 18 years or older and has been continuously employed by the organisation for 12 months, they will be paid the adult rate for the classification.

What if the employee works on a Saturday or a Sunday?

The Award does not provide penalty rates for employees working Saturday and Sunday. While this is unusual for a modern award – clearly this is appropriate for the sporting industry where most activity takes place on a weekend!

The Award does specify that ordinary hours for clerical employees are Monday - Sunday between 6.00am and 6.00pm.

What about overtime?

The Award provides overtime provisions for clerical employees. Daily overtime is compensated as follows:

a. Up to and including the first hour of overtime:
   i. The employee will be given either time off instead of payment or paid for at the rate of 150%.
   ii. Overtime in excess of one hour will be paid for at the rate of 150% for the first two hours and 200% thereafter.

Clerical employees will be entitled to overtime in circumstances where the employee has worked:

- in excess of 38 hours over five days per week;
- in excess of 11 hours in a day;
- prior to 6.00am or after 6.00pm; or
- In excess of their agreed hours and days they were contracted to work (part – time employees only).

Reviewing and checking is important

It is important for sporting organisations take the time to review their current arrangements and ensure employees are receiving the correct pay and entitlements.

Employees who are not paid correctly are able to lodge claims of underpayment going back six years.

Apart from the technical underpayment issue – sporting organisations are often close knit groups and there is nothing more damaging to a group than people feeling disgruntled because their pay is wrong.

For the Future

All the modern awards are currently undergoing review b the Fair Work Commission – so it is worth keeping an eye out to ensure that your organisation is across any changes. Anyone can subscribe to the Fair Work Commission updates for a modern award and this would be well worthwhile over the coming year.

Social media and sport: considerations for sporting bodies

Gene Goodsell and Kosta Hountalas, Goodsell Lawyers

Social media and sport: Considerations for sporting bodies

Sporting bodies need to ensure that they have an effective social media policy in place to guide what gets published online by its employees, including athletes. Of particular importance is the role that such policies can play in pre-empting unfair dismissal claims arising from alleged social media misuse.

When it comes to sport, most teams, leagues and federations have social media accounts in an attempt to engage with social media users. Each social media account will usually have a social media manager who will publish material on behalf of the account holder.

Notwithstanding instances where such an employee has 'gone rogue', these representations are mostly aligned with the account holders' views, policies and general ethical and moral standards. This is achieved with relative ease, as there is usually just the one outlet per social media platform that 'speaks' on behalf of the organisation, and can therefore be regulated by an effective and instructive social media policy.

However, when it comes to individuals in sport, such as athletes, coaches, training staff, or members of the management or executive team, there are a number of challenges that social media presents. The most pressing of these, arguably, is distinguishing between personal and professional use and wider considerations of balancing the rights of an employee or athlete to engage in free speech with an employer's ability to control what is posted on social media.

Sporting bodies should be implementing a social media policy which outlines what is considered to be acceptable employee or athlete conduct when using social media platforms. This should be made clear in any employee or athlete contract, whether it be a club's star player or an administrative staff member. The focus of such a policy should revolve around the often-forgotten fact that once something has been posted online, it is usually immediately made public.

Examples of guidelines provided by sporting bodies include the Australian Olympic Committee's 2014 Australian Olympic Winter Team Social Media Guideline, which states that 'comments should reflect and enhance Olympic values, particularly fair play and respect for others. They must not be offensive, inappropriate, defamatory, misleading, deceptive or otherwise illegal'.

The importance of social media guidelines was recognised by the Fair Work Commission in the case of Stutsel v Linfox [2011], where the Commission held that it would be expected that employers implement such a policy and convey its substance to employees. In other words, there may be cases where an individual has posted inappropriate comments or material online, but due to the fact that their employer had not implemented a social media policy, may be found not have conducted themselves in a way which gives rise to their termination. Of course, termination should be a last resort and only reserved for severe circumstances, however it is likely that tribunals within each sport will take such considerations into account when reviewing a sporting body's decision to act on social media misuse.

While guidelines such as this are an effective starting point for managing social media use, they don't always deal with the tension caused by trying to distinguish between personal and professional social media use. This will often be an important factor in trying to ascertain whether an individual has breached a social media policy, particularly when what has been posted is not explicitly offensive or inappropriate, but may be nonetheless controversial.

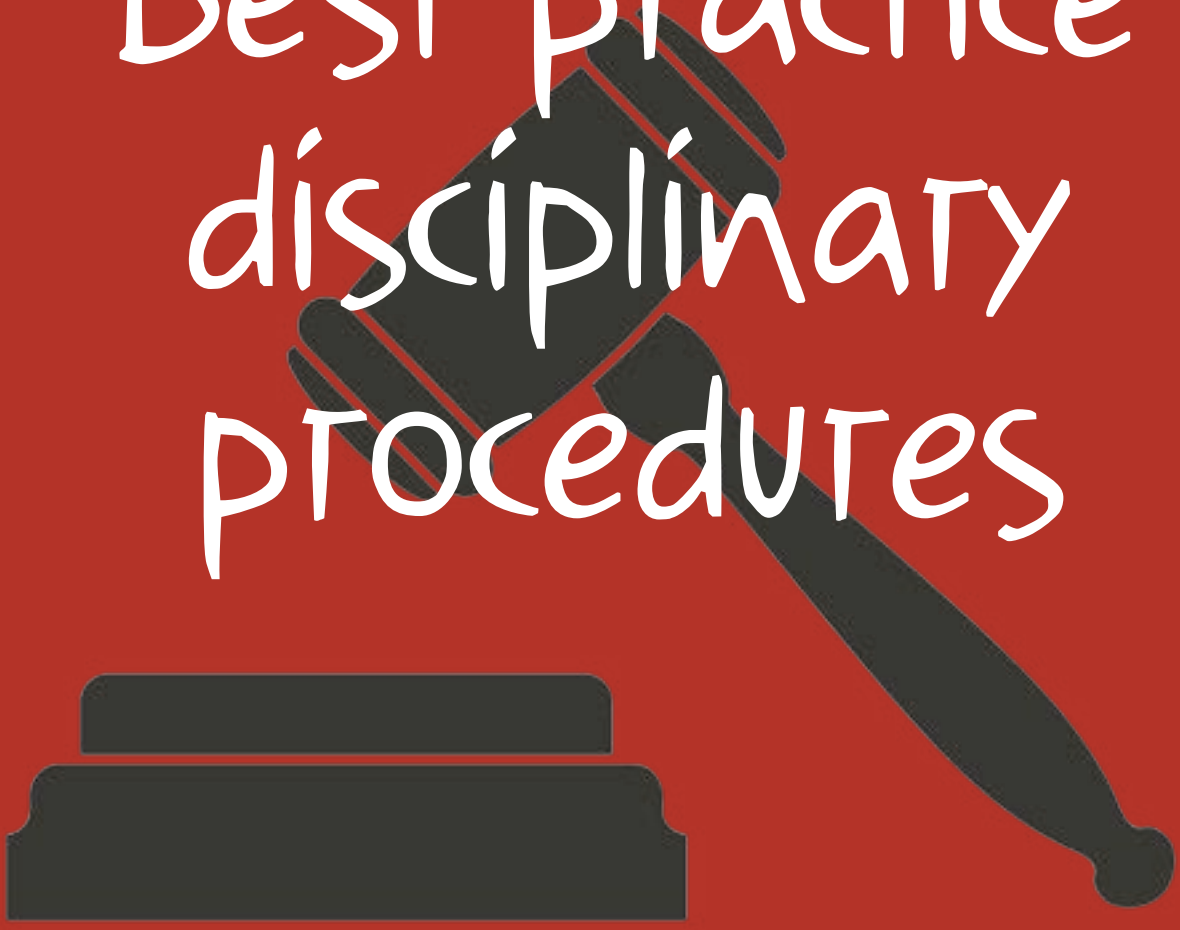
This is especially the case for high-profile sporting personalities. For example, if a popular athlete has a Facebook fan base of several hundred thousand users by virtue of their sporting popularity, does that mean that anything that he or she posts must be regarded in a professional capacity? If so, are they entitled to set up separate, personal social media accounts if they wish to discuss, for example, controversial rather than inappropriate matters? Or are they bound to the social media policy of the club they play for as long as they are playing for them?

Such rhetoric will always fall back onto the debate over the responsibility that comes with fame and popularity, and many will argue that such responsibility — to the sport, to their club and to their fans — outweighs the right for an individual to be able to speak their mind. A lot of this will be up to the sporting body to decide how they want to engage with their fans and followers on social media.

Notwithstanding these wider considerations, if sporting bodies, as employers, are ensuring that they have effective social media policies, that these policies are clearly communicated and accessible to all employees and athletes, and that these policies are regularly followed up by training and briefs, they should be in a good position to prevent social media misuse. In the event that such misuse nevertheless occurs, evidence of the existence of policies and the exercise of continuing training will work in favour of the sporting body in an unfair dismissal claim.

Smart administrators are the ones who are aware of the anti-smoking laws and take the necessary steps to find out whether their organisation is 'caught' under the rules and if they are, take appropriate steps to put in place a system that will ensure compliance.

Best practice disciplinary procedures



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Best practice disciplinary procedures

The need to take disciplinary action against players, officials and other participants is an issue that any sporting organisation can face. This article gives an overview of what 'best-practice' disciplinary procedures look like, and highlights why it is important to ensure disciplinary proceedings are conducted in a fair and transparent manner.

Ensuring the organisation has a legal basis for taking disciplinary action

It is important to note that if a sporting organisation wishes to be able to impose club or competition rules, and sanctions for breaches of those rules (together 'disciplinary procedures'), it will need to ensure it has a legal basis for doing so. The most effective way of achieving this is to ensure that anyone who is involved with the organisation, or participates in a competition run by it, is required to comply with the disciplinary procedures as a condition of their engagement or participation. For example, when a coach or player joins the organisation, they should be asked to agree, in writing, to comply with all rules, and acknowledge that any disciplinary procedures adopted by the organisation are binding on them.

Conducting disciplinary proceedings

When developing and implementing disciplinary procedures, sporting organisations should ensure that principles of natural justice are observed. This means disciplinary proceedings should provide participants with a fair hearing, within a reasonable time-

frame, that is conducted by an independent and impartial decision-maker.
What each of these things might look like in practice can vary, but at a minimum, the following elements should be incorporated.

1. Notifying the person

A person should always be told that they are facing disciplinary action, and should be provided with as much information as possible, including:

- the relevant rule that is said to have been breached, including a full description of the relevant conduct, and the date, time and place it occurred;
- the evidence that will be used to determine whether the rule has been breached (for example, a match official's report) and copies of that evidence where possible;
- the steps in the disciplinary process (including hearing dates and times, and possible sanctions); and
- the options the person has to respond (for example, accept a sanction or attend a hearing).

Providing this information ensures the person has the information they need to assess their options, and prepare for any hearing.

2. Conducting the disciplinary process

Disciplinary hearings should be conducted at a time and place that is suitable for all parties, to ensure the person has the opportunity to attend, provide their version of events and be heard on any other relevant matters.

The organisation should consider whether the person is allowed to have legal or other representation, but it is best-practice to allow the person to be assisted or represented particularly where there are compelling reasons (for example, the person is a minor, or there are language barriers).

It is best-practice for disciplinary matters to be heard and determined by a tribunal comprising of at least three members, particularly where the alleged conduct or the potential sanctions are serious, as this reduces the risk of bias and assists in achieving a fair and transparent process. One member should be appointed as chair to ensure there is structure to the process, and to guide the tribunal in weighing up the facts, considering the relevant rule and making a well-reasoned determination.

It is important that all information to be considered by the tribunal is provided to the person, and they are advised of the possible sanctions that could be imposed if a breach of the rules is found to have occurred.

The person should be given the opportunity to respond, including in writing.
Where the organisation's rules provide a range of sanctions, the organisation should

ensure the tribunal members understand, and only apply, available sanctions. Tribunal members should also be required to create a written record of their decision, including reasons.

3. Advising the person of the decision

Once the tribunal has made a decision, the person should be advised of the decision, including the tribunal's reasons, and any sanction that has been imposed. Providing the person with this information assists them to understand how the tribunal has arrived at its decision, and consider whether there might be any grounds for appeal.

4. Appeal rights

Providing an avenue for appeal is also an important part of any best-practice disciplinary procedure. The procedures should outline what appeal rights exist (including review of a tribunal's decision, or the sanction imposed), and should require a new tribunal be convened to hear the appeal proceedings. The same principles of natural justice should be observed in any appeal.

Concluding remarks

Conducting fair and transparent disciplinary proceedings is important because where proceedings or appeals are not conducted in a way that is consistent with principles of natural justice, the individual concerned may have grounds to ask a court to review the decision.

If your organisation needs assistance in relation to its disciplinary procedures, ANZSLA maintains a list of legal practitioners in each State and Territory who may be able to assist, as well as a list of members who have indicated their willingness to participate on sports tribunals. Both lists can be accessed on the ANZSLA website at http://anzsla.com/content/legal-issues.