

CURVE BALL FOR BASEBALL OVER LICENSING PROGRAM

JODIE WARREN



The Australian Baseball Federation (ABF) has found itself under the watchful gaze of the Australian Competition and Consumer Commission (ACCC) over the operation of its merchandise-licensing program. The ACCC has issued a draft notice proposing to revoke the exclusive dealing notification lodged by the Australian Baseball Federation Inc in March 2001.

Section 47 of the Trade Practices Act 1974 (TPA) generally prohibits exclusive dealing, which has the purpose or effect of 'substantially lessening competition' in a relevant market. Exclusive dealing involves one person who trades with another imposing restrictions on the other's freedom to

choose with whom, or in what, it deals. Third line forcing is a specific form of exclusive dealing and is a per se breach of the TPA.

Although third line forcing is prohibited, suppliers engaging in it may seek immunity from court action under the TPA's notification and authorisation processes, which are administered by the ACCC. The Commission may grant authorisation for third line forcing conduct if it is satisfied that the conduct would be likely to result in such a benefit to the public that it should be allowed. In applying this test, the Commission considers whether public benefit is likely to result from the conduct and whether such benefit would outweigh any accompanying anti-competitive detriment.

The ABF, a national body, supplies services including player development, registration, marketing and insurance to state, territory, and regional associations as well as clubs



and players. The ABF lodged its exclusive dealing notification in March 2001 as it offers the above services on the condition that the associations, clubs and players acquire uniforms and baseballs from licensed third party suppliers.

The Commission can choose to revoke an authorisation if material changes cause the relevant conduct to no longer result in public benefit, or cause the anti-competitive detriment to outweigh any remaining public benefit. The ACCC has monitored the licensing program over the years and expressed concern that the program imposes administration and compliance costs on clubs and regional and state associations that would not otherwise be payable if the licensing program did not exist. The ACCC has also considered the effect of the licensing program on competition, fearing that the program will deter potential manufacturers and distributors from supplying baseball uniforms and baseballs resulting in reduced competition among suppliers.

The ACCC's proposed revocation of the ABF's exclusive dealing notification sends a clear warning to other sporting organisation's looking to raise revenue through similar schemes. Organisations must ensure that revenue-raising schemes do not impose comparatively high administration, enforcement and compliance costs whilst at the same time ensure they generate identifiable benefits to the public.

The ACCC is seeking further submissions on whether clubs and state teams are being disadvantaged by present arrangements before making a final decision.



JOHN MULLINS
EDITORIAL

It is interesting that since we started publishing this Newsletter a few years ago it is becoming increasingly easy to find topics to comment upon. Sport and the Law coming together is not however a recent phenomena and there are many interesting and leading cases in relation to sport going back to the 1800's. The increased resort to law in sport probably reflects the position of sport in society generally. One of the great things about sport is that it has an amazing ability to mirror values and opinions of society generally.

It is easy to say that the reason law and sport is coming together more regularly is because there is more money in sport. Whilst undoubtedly this is true our lead article illustrates that people are prepared to take on matters and to take them to court over issues of principle not just money. The fact that law and sport seem to be so close together is unremarkable in a number of aspects:

- The law itself and sport are both controlled by rules and regulations, "the laws of the game".
- Both areas have arbitrators, judges, referees and umpires.
- Both are competitive and adversarial.
- Both are unpredictable but in the end the result is certain.
- Both are highly public and both draw great emotion from society.
- When there is dissent the laws can be changed to reflect public opinion.

I saw recently somewhere in the press the question was raised as to whether there should a court for sport in Queensland. We have the Court of Arbitration for Sport (CAS). CAS is seen by many as the court of the Olympics, it was set up and has its home in Lausanne, Switzerland. It is not very user friendly and apart from the Olympics it has not been used widely in Australia.

Whilst cost effective access to justice is desirable if there was a state sports court developed what law would it apply? Would it apply the law of the land or the law and cultures of sport. Whilst the law of the land did not require the club to act fairly in the case of Farrell (see page 1) would the law and culture of sport require them to do so? Should the test set out in the BP Refinery case be the basis for the law in a sporting case of this type? Would it be right for the sport not to be held accountable to the law of the land. Whilst a state sports court looks appealing I can't see that it will become a reality. If CAS cannot succeed I don't think any other pseudo sporting court will have any greater success.

Fair Go Mate

JAMES WOODGATE



A recent decision of the Western Australian Supreme Court in *Farrell v Royal King's Park Tennis Club (Inc)* challenges one of the very basic principles of Australian Sport – fairness. Set out below are the facts and decision of the case. It probably disturbs every fair-minded Australian sportsman that a sporting club does not owe the obligation of fairness to its members. The judge in this case, which makes interesting reading, used the tests as espoused in a 1977 case involving a BP refinery and the tests outlined in that case. The decision which would appear to be sound... ignores the notion of fair play.



Farrell v Royal King's Park Tennis Club (Inc) (2006) WASC 51

Facts

The plaintiff became a member of the defendant's sporting club in the category of squash member. In addition to being a social club, the defendant enters squash teams into the local competition in various grades. The highest grade for female members is the women's A grade pennant team. The plaintiff wanted to play in this team but the defendant would not select her.

Plaintiff's Argument

The plaintiff argued that there was a contractual obligation on the defendant to act fairly in relation to her selection in the A grade team.

The defendant did not dispute that a contractual relationship existed between the plaintiff and the defendant and that the Constitution of the defendant operated as the terms of the contract. However, it did dispute that it was obliged to act fairly in relation to team selection.

Findings

His Honour held that there was no **express obligation on the defendant to act fairly in relation to selection of the plaintiff. The reasons for his finding were as follows:**

- 1 The Associations and Incorporations Act 1987 which the defendant is governed by has no express requirement for the management of an incorporated association to act fairly in relation to selection or other processes.
- 2 The Constitution of the defendant (which are the terms of the contract) provides for no procedures or processes in relation to selection of players who wish to participate in tournaments and competitions.

His Honour also held that there was no implied obligation on the defendant to

act fairly in relation to selection of the plaintiff. The reasons for his finding were as follows:

- 3 Unlike the federally governed Corporations Act 2001, the state governed Associations and Incorporations Act does not confer on members of an incorporated associations protection from oppressive conduct. However, the plaintiff argued that this protection exists under general law and should be implied into the contract. His Honour held that there is no basis for concluding that protection from oppression will lie in the implication of a contractual term.
- 4 The plaintiff's proposed implied term did not satisfy the test in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266* as to whether a term of fairness could be implied into the contract. His Honour applied four of the elements that must exist for a term to be implied in a contract:
 - 4.1 **The term must be reasonable and equitable**
His Honour held that it would not be reasonable to imply a term in the contract regarding the selection process, given the club is a voluntary organisation, established to promote and encourage the playing of certain sports at an amateur and social level and also given the potential for litigation and complaints to management as a consequence of such a legally binding obligation.
 - 4.2 **The term must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it**

The Constitution defines the membership category by reference to use certain facilities, not by reference to play A grade competition. Therefore, his Honour held that a term relating to the fairness of selection processes is not necessary to give business efficacy to the agreement. His Honour considered the contract to be workable and commercially effective without the implication of the proposed term, as it has been for many years.

4.3 **The term must be so obvious that "it goes without saying"**

His Honour held that this element was not satisfied on the basis that the members of a voluntary, private club, which has as an object of promoting and encouraging the playing of lawn tennis, squash and other sports, and the Club itself, would not have intended to include in its Constitution, which confers on members rights with respect to access to and enjoyment of premises and the relevant sporting facilities, a formal selection process for membership of sporting teams with obligations including fairness. As such, it cannot be concluded that the proposed term "goes without saying"

4.4 **The term must be capable of clear expression**

His Honour held that the term was not capable of clear expression because the terms of an agreement to conduct a fair selection process may take innumerable forms.

His Honour did not apply the fifth element of the BP Refinery test which was that the implied term must not contradict any express term of the contract.

BLOW YOUR WHISTLE REF!

JONATHAN BROUGHTON



A Court's ability to intervene and alter a result of a game has come into consideration following the end of the recent AFL game between Fremantle and St Kilda.

Fremantle Vs St Kilda

In an attempt to broaden appeal and exposure of AFL, the game between Fremantle and St Kilda was held at Launceston, Tasmania. At the end of the game the siren sounded but because of the substandard PA equipment the on field umpire did not hear the siren

Traditionally Courts have been reluctant to intervene in Field of Play cases. In CAS Award of Yang and Korean Olympic Committee v International Gymnastics Federation (CAS 2004/A/704) it was stated:

"In short Courts may only interfere if an official's field of play decision is tainted by fraud or arbitrariness or corruption; otherwise although a Court may have jurisdiction it will abstain as a matter of policy from exercising it."

In contrast there has been more willingness to intervene where a Game Rule has been breached. In September 2005 soccer's governing body FIFA ordered the World Cup



and allowed play to continue giving St Kilda the opportunity to kick a behind and snatch a draw.

According to the Rules of the Game of Australian Football (**Rules**) the game is at an end when the on field umpire acknowledges the siren and blows full time.

The AFL Commission ultimately intervened stating that the game should have been at an end when the siren sounded and awarded the game to Fremantle. If the AFL Commission had not made this decision could Fremantle have appealed to the Courts to make a determination?

Game Rule or Field of Play

In deciding whether a Court will intervene, regard is given to whether a breach of a rule of the game (**Game Rule**), such as the number of players on the field, has occurred, or whether a playing rule on the field has been breached (**Field of Play**).

qualifying match between Uzbekistan and Bahrain to be replayed after the referee made an error in applying the rules which ultimately decided the result of the game.

Australian Position

In Australia the High Court decision of *Cameron v Hogan* (1934) 51 CLR 358 is authority for the proposition that Courts should not intervene unless some breach of the rules affects a member's civil right of a proprietary nature.

It is arguable that had the AFL Commission not intervened and amended the result, Fremantle may have claimed that by not blowing full time when the siren sounded, the AFL breached a contractual right to play each match in accordance with the Rules. The growing importance of the business of sport will no doubt see further issues moving from the playing field into the Courts.

UPDATE Wendell's Doping Saga

MATT BRADFORD

As most readers would be aware, Wendell Sailor returned a positive drug test result for cocaine and has been banned from rugby for two years. Rather than accepting the mandatory ban, Sailor requested that a tribunal hearing be conducted into the matter.

The argument put forward by Sailor before the tribunal was that as the cocaine was ingested at least four days before the match, the violation was not an "in competition" violation. He provided expert evidence which showed that any performance enhancing effects from cocaine were only short-lived and would not have given him a performance advantage during the rugby match in question. As a result, Sailor argued that he had not breached the Anti-Doping By-Law because cocaine is only a prohibited substance when taken in competition. The tribunal rejected this argument on the basis that cocaine metabolites were still present in the sample, which was taken in competition, and therefore a violation has occurred.

Sailor also argued that his penalty should be reduced from the two year ban to 12 months, on the basis that the drug was not performance enhancing, the penalty for using a recreational drug should not be the same as for an anabolic steroid and that the length of the ban was an unreasonable restraint of trade. He suggested that tribunal had a discretion to impose a lesser ban and referred to the recent Court of Arbitration for Sport decision involving tennis player Mariano Puerta, whose ban was reduced from two years to 12 months. The tribunal rejected these arguments and distinguished Puerta's case, as unlike Sailor, Puerta had not intentionally ingested the substance.

The Anti-Doping By-Laws do provide that where a player can establish that a substance was not intended to enhance performance, a number of lesser penalties may be imposed, ranging from a warning to a two year ban. However, this only applies to certain prohibited substances that are available in general medical products and does not include cocaine.

The tribunal concluded that Sailor had breached the Anti-Doping By-Law and ruled that he was ineligible to participate in rugby for the mandatory two year period. Sailor still has the option to appeal against this decision, but there does not appear to be much chance of an appeal being successful. In any event, this has been one of the most high profile drug cases in recent years in Australian sport, particularly as it involves the use of recreational drugs rather than traditional performance enhancing steroids.

HOW MUCH WILL

JAMES WOODGATE



An unprecedented demand for tickets to the Ashes test matches saw tickets at many venues sell out in record time. As expected it did not take long for the tickets to start appearing on internet auction sites such as eBay.

Cricket Australia understandably took objection to this and immediately began lobbying all forms of government to legislate against this practice which is not currently prohibited by law. However, while it is not a criminal offence to re-sell the tickets on eBay, it is a condition of entry and a condition of the

ticket purchaser's contract with Cricket Australia that the purchaser cannot re-sell the ticket at a premium. Therefore, to re-sell the ticket at a premium on eBay would constitute a breach of contract and the terms of entry clearly stipulate that the consequence of such a breach is that the holder of the ticket will be denied entry into the venue.

The difficulty Cricket Australia now face is enforcing this contractual term. They initially placed pressure on eBay to stop the tickets from being sold on their website. However, eBay refused to do this on the basis that they are not the ones selling the tickets and are merely a market place where the tickets can be traded. As a result eBay have no contractual relationship with Cricket Australia, unlike the people who have bought tickets and are re-selling them.

Consequently, Cricket Australia have taken matters into its own hands and hired a private investigator to track down tickets being sold for a premium on internet auction sites. The Australian Rugby Union took similar action and already cancelled a number of tickets to the recent Bledisloe Cup match at Suncorp Stadium.

Cricket Australia has cancelled hundreds of tickets already but most of the cancellations seem to be for breaching the condition of purchase which prohibits someone from buying more than a certain number of tickets.

YOU



PAY?

LEGAL SCRUM OVER HAKA

MATT BRADFORD



One of the most powerful images on a rugby field is when New Zealand performs the Haka prior to the start of a rugby test.

Recently however, there has been a legal fight over the use and intellectual property rights of the Haka.

The most popular Haka is the Ka Mate. This Haka was written by the Chief Te Rauparaha of the Ngati Toa tribe in 1821 after he escaped from a neighbouring tribe. The New Zealand Rugby Union (NZRU) have been using this Haka for approximately 100 years and they have done so with the permission of the Ngati Toa tribe. However, the NZRU have never expressly acknowledged that the Ngati Toa tribe are the rightful owners of the intellectual property of the Haka.

In response to the large scale commercial use and representation of the Haka in recent times, a trust that represents that Ngati Toa tribe has sought to trademark the Ka Mate Haka. Examples of the Haka being used outside of its traditional context include the Spice Girls performing the Haka on a Ball tour, strippers performing the Haka at a club in Auckland and more recently Fiat having an advertisement featuring women stomping to the Ka

Mate in a motor vehicle commercial.

Following a lengthy battle, the Intellectual Property Office of New Zealand has decided that it will refuse the application to trademark the Ka Mate Haka.

There have also been intellectual property issues raised in respect of the All Blacks' new Haka, the Kapa O Pango, which was first performed in 2005. The NZRU have denied claims

have been numerous concerns raised regarding the throat-slitting gesture that is performed as the finale to the new Haka. Indeed, an official from a local rugby union club in New Zealand has even suggested that he may lodge a "threatening to kill" complaint to the local police.

The NZRU has stated that this final gesture has a very different meaning in Maori culture and that the motions

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that the new Haka was created for the purpose of allowing the NZRU to create a valuable asset by protecting the copyright of the new Haka, which they were unable to do with the old Haka. However, it appears that this was not the intention, because despite spending over a year developing the new Haka, the NZRU failed to resolve the ownership of the intellectual property rights with the composer and it appeared as though this would lead to another dispute, although this seems to be resolved now.

This is not the only controversy that has dogged the new Haka. After its recent performance against Australia, there

signify energy being drawn in to the heart and lungs, rather than a slitting of the throat. Regardless of this explanation, this gesture is still clearly aggressive and threatening, and a recent survey of New Zealanders revealed that 37% thought that this final gesture should be removed.

This article once again highlights the complex issues of intellectual property in sports and shows that even the most sacred of traditions is not immune from legal claims in today's environment, particularly where there is a significant commercial advantage to be gained by incorporating these symbols into advertisements.