

Sweeping Up THE ASHES

By: James Woodgate

With the English cricket team looking more competitive than they have for some time cricket fans have been holding their breath to see whether the upcoming Ashes series would be telecast on free to air TV. Fox Sports will be telecasting the series having acquired the rights back in 2002. However, the major free to air stations decided not to acquire the rights despite a large amount of public interest. To the relief of many, SBS have acquired the rights and will be telecasting the series.

The existing Commonwealth anti-siphoning laws should have prevented Fox Sports from acquiring the Ashes rights before the free to air stations. The laws which are contained in the *Broadcasting Services Act 1992* prohibit Pay TV Licence Holders from acquiring the rights to major sporting events such as the Ashes series, NRL and AFL matches. If free to air stations do not acquire the rights to a listed event, then pay TV operators can acquire them, but no earlier than 6 weeks before the event starts (this will become 12 weeks from 1 January 2006). So how did Fox Sports acquire the Ashes rights in 2002 without breaching the law?

The answer is the anti-siphoning laws only apply to "Pay TV Licence Holders". Foxtel is a Pay TV Licence Holder but Fox Sports is not. Therefore, Fox Sports was not prohibited from acquiring the rights to telecast the Ashes series. Fox Sports is a separate entity which sells its channel to Foxtel. Reforming this loophole was discussed in a recent Senate Committee review of the anti-siphoning laws.

The uproar over the telecast of the Ashes series has brought to light not just this loophole but also the public's frustration with the attitude of major free to air stations to telecasting significant sporting events. The purpose of the anti-siphoning laws is to ensure the public is guaranteed access to events of national importance and cultural significance on free to air TV. The basis of this is the statistic that less than one in four households have access to pay TV. But the question remains - does the scheme actually serve the public interest? Does the general public always get the best access from free to air TV stations who are given the first opportunity negotiate exclusive rights to major events? It is not uncommon for major free to air stations to delay telecasts or cut parts of sporting events out at the expense of prime-time programs.

Pay TV operators argue the anti-siphoning laws obstruct the take-up of their product in Australia and should be less regulated. In support of this approach the Australian Competition and Consumer Commission has suggested that the existing scheme be replaced with a scheme whereby neither pay TV or free to air operators are able to buy exclusive rights to major sporting events.

As we have seen with the Ashes series, freeing up pay TV restrictions for major



sporting events may result in free to air stations not acquiring the rights to an event because it is no longer exclusive and therefore is commercially unviable. Until a larger proportion of the general public have access to pay TV, deregulation could result in less major sporting events being available to the public.

An alternative to deregulation may be to penalise free to air stations by taking away their exclusivity to an event if they acquire the rights and then do not televise it or give it appropriate recognition.



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ICC Addresses **CHUCKING**

By: Jodie Warren

...RADICAL OVERHAUL OF THE PREVIOUS SYSTEM AND SEES CHANGES IN THE TESTING, ANALYSIS AND REVIEW PROCEDURES...

The issue of illegal bowling actions has been a widely debated topic in cricket for decades. New regulations, in force as of 1 March, represent a radical overhaul of the previous system and changes to the testing, analysis and review of procedures used to assess bowlers with suspected illegal actions. Scientific evidence has now established that a degree of straightening while bowling is an inevitable biomechanical action. The new standardised interpretation allows bowlers to straighten their arms during delivery by up to 15 degrees, the point at which it has been found that any straightening becomes visible to the naked eye.

The new regulations can be seen as a positive for bowlers in terms of providing procedural fairness and a more expedient process. ICC umpires or a match referee will retain the right to report a bowler considered to have a suspect action at the end of an ICC sanctioned game. The bowler's team manager and the ICC will be notified of the report within 24 hours. Bowlers will now have the benefit of a reduction in the period of review and rehabilitation, down from six weeks to twenty one days, during which time the bowler remains eligible to play. Within this period a bowler will be required to work with

an independent member of the ICC's Human Movement Specialist Panel.

The biomechanical testing that takes place during this period has also been overhauled. The testing of bowlers is now standardised with the ICC ensuring all tests in all laboratories are consistent in the way they measure the degrees of straightening. If the action is found to be legal, the bowler can immediately resume their career. If, on the other hand the report finds that the bowler's action exceeds 15 degrees of straightening they will be immediately suspended from international cricket.

A bowler then has two options available; carry out remedial action to rectify bowling action to meet the ICC standard or contest the decision within 14 days and seek a hearing of the ICC Bowling Review Group (BRG) to make a final decision. A BRG hearing will be held within 21 days and the outcome will decide to either uphold the decision of the expert report and suspend the bowler, or overturn the decision and clear the player to resume their international career.

Arguably the new system is an improvement on the previous process as bowlers are dealt with faster, testing procedures are standardised and crucially, the process is now conducted under the direct supervision of the ICC rather than a player's home administration.

Carrying On A Business Or Playing For Fun

By: Jonathan Broughton

A recent Federal Court Decision, *Commissioner of Taxation v Stone* (2003) FCAFC 145, examined whether prize money won by an athlete and money provided by grants to an athlete are taxable income.

Ms Joanna Stone held a full time job as a Constable in the Queensland Police Force. She also represented Australia in numerous sporting events including the World Cup and Olympic Games as a javelin thrower. In the relevant financial year, Ms Stone received prize money, money from the Australian Olympic Committee (AOC), government grants, sponsorship money and appearance money for her javelin throwing. In her tax return for that year she submitted receipts for these amounts but only recorded her salary from the Police Force as taxable income.

The Commission of Taxation, however, included all the sporting receipts related to her javelin throwing activities as assessable income. At issue was whether the prize money, government grants, money from the Medal Incentive Scheme and appearance money were assessable income.

According to section 6-5(1) of the *Income Tax Assessment Act 1997*, assessable income is "income

according to ordinary concepts". The Court stated that receipts from the carrying on of a business was income according to ordinary concepts.

The Full Federal Court held the prize money was not assessable income, as Ms Stone was not carrying on a business. The Court stated that Ms Stone "... has not been engaged in a business activity to exploit her sporting prowess or turn her talent to account in money." Accordingly, the Court held "... it could not be said that Ms Stone's criteria for choosing contests and competitions in which she competed was indicative of a business activity ..."

The Court also held that the government grants were not income. However, the appearance money and money from the Medal Incentive Scheme were held to be assessable income because, like sponsorship payments, they were made as a reward for service.

While the AOC was disappointed with the decision and Ms Stone's lawyers have sought special leave to appeal to the High Court, the taxable income of amateur athletes who do not receive appearance money or sponsorship payments will not be affected by this decision.

CROWDS Vs PLAYERS

By: Jonathan Broughton

Sporting crowds are yelling abuse, throwing empty beer cups, coins and even fish at athletes. Are our sporting heroes in danger of being injured by missiles hurled from the crowd? The recent behaviour of the crowds in New Zealand during the one-day cricket series, and also in the English Premier League, has highlighted the potential danger that players face on the field.

Conflict between crowds and players is not a new phenomenon. On Australia's last tour to New Zealand in 2000, Steve Waugh threatened to take his team off the field when players were pelted with rocks, fish and even toilet seats. In that instance the crowd subsided and the game continued. These situations raise a series of legal issues. Would players be liable for breach of contract if they left the field and refused to continue the game? Could

the sports governing body be liable for violating Workplace Health and Safety regulations, for not ensuring a safe work environment; and what is the potential for stadium owners/sports administrators being found liable in negligence?

According to section 16(1) of the *Occupational Health And Safety (Commonwealth Employment) Act 1991*, an employer must take all reasonably practicable steps to

protect the health and safety at work, of the employer's employees. To expect a professional sportsman to remain on a field while dangerous objects are thrown from the crowd may find the governing body, as employer, liable for any injuries sustained.

Sporting administrators and/or stadium owners may also be found liable in negligence if a player sustained injury as a result of being hit by an object thrown from the crowd. The more frequently crowds act in a dangerous manner towards players, the more likely a court will find sporting administrators/stadium owners negligent for ignoring a foreseeable risk to players' safety.

However, to restrict crowd interaction with players completely would detract from the spectacle of the sporting event. No sports person expects a warm welcome when attending their opponent's home ground. To wrap players in cotton wool and remove them from the field because of a hostile, but not dangerous, crowd would be to place the culture of sport in a straight jacket.

When assessing the potential dangers faced by athletes, administrators should view what is reasonable in the circumstances. Obviously what is reasonable on the field in the player's "workplace", would not be tolerated in a normal work environment. Administrators should take this into account in determining what level of crowd interaction is acceptable, keeping in mind that, when crowd behaviour goes beyond what is reasonable, player's safety is jeopardised.

SPORTING ADMINISTRATORS AND/OR STADIUM OWNERS MAY ALSO BE FOUND LIABLE IN NEGLIGENCE IF A PLAYER SUSTAINED INJURY AS A RESULT OF BEING HIT BY AN OBJECT THROWN FROM THE CROWD.

Who owns Sporting Trophies?

By: Matthew Bradford

This raises an interesting question regarding the ownership of major sporting trophies, such as the Bledisloe Cup or the America's Cup, and should act as a reminder to sporting associations to ensure that they establish and protect their intellectual property rights in order to preserve the integrity of their competitions.

In February, the National Hockey League ("NHL") in Canada announced that it had cancelled the 2004/05 ice hockey season because of a pay dispute with its players, who have been on strike since the scheduled commencement of the season last September. The league and the team owners had sought to introduce a salary cap to limit spiralling player payments, which have risen from an average salary of \$500,000 to \$1.83 million per year over the last 10 years.

As a result, the prestigious Stanley Cup ("the Cup"), which is awarded to the winner of the NHL competition, will not be awarded for the first time since 1919 when the finals were cancelled because of a flu epidemic.

An organisation named Free Stanley has been investigating the possibility of awarding the Cup to another team from a different competition. Lord Stanley decided in 1893 to award the Cup to the team that won an annual ice hockey challenge, with the purpose of promoting the sport of ice hockey in Canada. Although the Cup is now associated with the NHL, the NHL does not own the Cup, rather, the Cup is awarded by its two trustees.

The trustees must award the Cup to a team that they believe deserves to be awarded the Cup, as long as it is in the interests of furthering the sport in Canada. Although the NHL largely consists of American teams, it is considered that awarding the Cup to the winner of the NHL is in the interests of furthering the sport in Canada.

In 1947, the trustees entered into an agreement with the NHL that the trustees would only award the Cup to a team from a competition authorised by the NHL and that this agreement was to remain in force as long as the NHL was the world's leading ice hockey league.

However, this agreement may be invalid, as trustees have an absolute discretion in respect of trust property, to the extent of the terms of the trust, and they are not allowed to delegate this discretion to anyone. Therefore, the trustees of the Stanley Cup would not be able to delegate to the NHL the discretion to award the Cup. In any event, it could also be argued that the NHL is no longer the world's leading ice hockey league, at least for the 2004/05 season, therefore the agreement would no longer be in force.

But even if the trustees were permitted to award the Cup to a team from outside the NHL, it is unlikely that they would do so. This option would be within their powers as trustees, because they may feel that awarding the Cup to a team from another league will diminish the prestige of the Cup or have a detrimental effect on the sport in Canada.

Cancellation of NHL Season

By: Matthew Bradford

In February, the National Hockey League ("NHL") announced that it had cancelled the 2004-2005 ice hockey season because of a pay dispute with its players, who have been on strike since last September. The league and the team owners had sought to introduce a salary cap to limit spiralling player salaries, which have risen from an average of \$500,000 to \$1.83 million per year over the last 10 years.

It is estimated that NHL players receive 75% of the league revenue. By comparison, Australia's international and first-class cricketers receive approximately 25% of Cricket Australia's revenue.

The NHL players' union eventually agreed to a salary cap but demanded that the minimum amount of the cap be \$49 million per team, whilst the NHL would not go any higher than \$42.5 million. The current base salary cap for NRL teams is \$3.25 million.

In America, restrictions such as a salary caps or draft systems are exempt from anti-competitive or restraint of trade laws, if they form part of a collective bargaining agreement negotiated by a players' union. The law is different in Australia and it may be that the NRL salary cap or the AFL draft system would be considered illegal if challenged, although such a challenge may not be in the best interests of the sport.

Taking the Hard Line

By: James Woodgate

How sport's governing bodies should regulate and discourage the use of banned substances was considered in the last issue of this publication. In a further development in this area the Australian Sports Commission (ASC) is proposing that all Australian Institute of Sport (AIS) scholarship holders be subjected to random inspections of their rooms to search for traces of banned substances or drug taking equipment.

This proposal treads a fine line between a player's right to privacy against the greater good of keeping our sports drug free. The intention of the ASC is to require all AIS athletes to sign a contract consenting to the searches. However, without an athlete's consent the inspections may be an unlawful trespass to the athlete's property, giving rise to an action in tort.

Ultimately, what choice do the AIS scholarship holders have but to sign? The ability of most to train and compete would completely depend on their scholarship funding. Don't sign and your career could be over.

Interestingly, this hard line approach will not apply to non-AIS athletes and sports persons. It would have to be asked whether this is fair on AIS athletes.



EDITORIAL

By: John Mullins

The case of Jarrod McCracken has reverberated all around the sporting community of Australia. The Plaintiff in that case was awarded damages for an incident which occurred on a football field which led to an injury to him. This has highlighted the potential liability of sporting participants.

Last year we had the case of the injured golfer and the damages awarded against the fellow golfer who hit the ball. The question is widely being asked as to where do you draw the line? In sport the line was traditionally what was permitted by the laws. I would suggest that this line had blurred and extended to what is accepted within the culture of the sport. A rugby player who is injured as a result of rucking which may be outside the law, may have great difficulty in arguing that it did not consent to rucking when it is such a large part of the game.

The British Journalist, Peter Roebuck, was suggesting that Australian fast bowler Brett Lee, may be liable if he injured a player as a result of a full toss. If it could be shown that Lee deliberately bowled full toss with the intention of hurting the player, that might be the case but it is well accepted within cricket that full tosses are bowled. I think it would be extremely difficult for the batsman to claim that he did not consent to such a ball unless it could be shown to be deliberately bowled to injure the batsman.

An interesting by-product of all this is the area of defamation. We saw in recent weeks the incident of the St Kilda player being shoulder charged by the Brisbane Lions players and some of them noting his injury. From what I can see of AFL, shoulder charging off the ball is a regular occurrence and players appear to consent to this. This ultimately is the position of the AFL in taking no action against the players.

There was however a lot of criticism of the players and a lot of extremely negative comments made about them for their involvement in this incident. It seems that the journalists run the risk of defaming the players and will have damages awarded against them if the players chose to sue them for defamation.

Sporting commentators and journalists love sensationalism. They will need to exercise caution in how they describe events on the field. In the midst of all of this we have the incident of John Hopoate being suspended and subsequently sacked by his club. What right does that injured player have to sue in relation to that incident? Whilst each case needs to be judged on its individual facts there may be some Plaintiff lawyer rubbing his hands together keen to take on this action.

My view is that we will continue to see an increasing number of actions for on field injury. Players will need to take increasing care in regards to their on field behaviour and journalists will need to be careful as to how they describe and report these incidents.