Acceptable Intervention? : When the “final” result is not necessarily so final...

It didn’t take long.

The 2006 AFL Season is now underway and by Round 5 we have already witnessed the first major off-field controversies of the season.

Inevitably, given the nature of professional sport nowadays, off-field controversy often demands a legal response.

Collingwood Football Club player Chad Morrison last week was convicted of a drink driving offence and consequently, contravened his playing contract, while also putting at risk Collingwood’s significant financial sponsorship derived from the Transport Accident Commission. Morrison was (with his consent) fined $20,000 by the Club. The penalty was considered significant by many media commentators and far exceeded the $5,000 limit prescribed as the maximum penalty applicable between player and club in such circumstances, as set out in the Australian Football League (“AFL”) Players Association (“AFLPA”) Code of Conduct. The AFLPA has been openly critical of the fine and has addressed its concerns with Collingwood, objecting to the imposition of any fine over and above the $5,000 limit. The resolution of this dispute between the AFLPA and Collingwood remains unresolved, with there now being legal ramifications beyond the scope of this case, as regards the ongoing enforceability of the AFLPA Code of Conduct.

More pertinently though, by the time this edition of The Commentator (Volume 63) is published, the AFL Commission will have considered whether or not to award Fremantle Football Club a win and four points as a consequence of the match it played against St Kilda Football Club last Sunday (30 April 2006). Until the matter is considered by the AFL Commission, the result of the match is recorded as a draw with each side taking away two points.
The dilemma arose during the match played at Launceston’s Aurora Stadium, one of the quaint venues still in use in Australian professional sport. As the game drew to its conclusion, Fremantle was leading St Kilda by one point. The full-time siren sounded, however the umpire in control of the play at the time appeared not to have heard the siren and allowed play to continue for nearly 20 seconds beyond full-time, notwithstanding the protests of some of the Fremantle players in the vicinity who had heard the siren. What ultimately then happened next was that St Kilda kicked a point and thereby forced a draw.

The essence of the debate so far has been that under the Rules of the Game of Australian Football (which in a dispute such as this must remain central to its determination), the game is over once the field umpire hears the siren (and signals the end of the game). However, also under the rules of the game, the timekeeper must sound the siren to signal the end of a quarter until the field umpire acknowledges that the siren has been heard. At Aurora Stadium, it seems that the timekeeper sounded the siren (which was clearly not sufficient for the purposes of conducting the match in accordance with the laws of the game) and then stopped, rather than sound it continually until it was heard and acknowledged by a field umpire. All rather tricky indeed.

The AFL through its rules relating to ‘salary caps’ and the ‘drafting’ of players, seeks to ensure that the AFL Premiership is by and large a relatively fair and even competition. The outcome of the match, for either team, come finals time, after the 22 rounds of the competition have been played, could be critical. The difference between scoring two, four or no points from the match could well impact upon whether a team plays in the finals, let alone enjoys the advantages of playing a final at home as opposed to perhaps having to travel to another city and play an ‘away’ final. (The incident also has repercussions for punters who placed bets on the outcome of the match through legally sanctioned betting agencies such as TAB Sportsbet).

Success in finals is what drives AFL clubs and the careers of players and coaches. This success and the ongoing health of football clubs (and in extreme cases their actual survival) is reflected in very real terms, both in terms of membership and in football clubs’ finances, be it through match day revenue derived from attendances, or more obliquely through broadcast exposure and sponsorship. In fact the professional nature of the game was sharply identified by Ashley AJA (as he then was), eight years ago back in 1998 in his dissenting judgment in Australian Football League and Others v Carlton Football Club and Another [1998] 2 VR 546, where he stated (at 572):

“The AFL and Carlton are parties to a contract which is at the heart of the proceedings before this court. Each of the AFL and Carlton is engaged in a large business undertaking, of which the contract is an incident. The fact that the core subject matter of the undertaking is Australian Rules Football has led to certain public comment that the law should be kept out of sport. The dimensions are such that this catchcry has a distinct air of unreality about it”.

It therefore comes as no surprise in the modern day environment of professional football, where there is much at stake for football clubs, players, sponsors and supporters that such a conundrum has created the necessity for a legal response with both Fremantle and St. Kilda now earnestly considering their legal options in light of the AFL Commission’s pending decision.

The Fremantle/St Kilda case throws up two key issues for legal consideration.

Firstly, can and should the result as it presently stands, that being a draw, be altered, by the AFL, or by a Court. And secondly, should a Court intervene and determine the dispute in light of the AFL Commission’s decision regarding the result of the match.

In a previous generation when virtually all sport in Australia was considered a pastime and not a business, the umpire or referee’s decision was always final and beyond challenge. However, despite those most admirable of Corinthian ideals of fair play and sportsmanship, professional sport in the new millennium is driven by the brutal and Machiavellian reality of the final result, thereby provoking an unprecedented increase in the number of challenges to the results and outcomes of sporting contests over the last decade, both nationally and globally.
The first cracks have now begun to appear and in some instances, results of sporting contests have been overturned, post event. Legally, we are witnessing the emergence of “game rule” or “field of play” principles in the developing jurisprudence of the law of sport. Examples of such post event intervention include:

- Those instances of where a winning athlete returns a positive doping sample “in competition”, the athlete is subsequently disqualified and the results are adjusted following the event (by way of example, such was precisely the case with Australian Michael Rogers when he won the 2003 UCI Time Trial World Championship, while crossing the finish line in second place, after British cyclist David Millar, who although crossed the line in first place, was later disqualified after committing a doping offence by testing positive, in competition, to a prohibited substance);

- FIFA’s decision in September last year to order a replay of the World Cup qualifying match played between Uzbekistan and Bahrain, after the referee made an obvious error which decided a penalty shoot-out in overtime; and

- Again during October last year, the decision of Chinese Athletics Officials to strip 2004 Olympic 10,000 metres champion, Xing Huina, of her win and gold medal in the 1,500 metres, at the China National Games, after she was found to have fouled and impeded second place getter, Liu Qing, by elbowing Liu in the final metres of the race.

The AFL is not immune from altering results post match either. As reported this week in The Age, the AFL’s predecessor in 1900, the Victorian Football League (“VFL”), reversed the final score in the Round 1 match between St Kilda and Melbourne Football Club, after a successful protest by St Kilda (who at the time had endured 48 straight losses and not a single win during their three years in the competition), that a mark and a point subsequently kicked by Melbourne to force a draw for the match, occurred after the siren. The drawn result was annulled and the match was awarded to St Kilda. More recently in 1995, the AFL deducted a point from the final score of the winning side of the Round 16 encounter between Adelaide and North Melbourne Football Clubs. Adelaide had its winning margin reduced by the VFL from 12 points to 11 points, after a goal umpire incorrectly signalled and awarded a point during the match. While the decision of the VFL to amend the score did not alter the result, it still was not without significance, especially where places in the finals are sometimes determined on the narrowest of percentages, calculated on points scored for and against throughout the home and away season.

Granted, these kinds of outcomes are rare, but as seen from the above, they are not unprecedented. The Court of Arbitration for Sport (“CAS”) and conventional Courts internationally, for what are generally sound policy reasons, continue to demonstrate a reluctance to become actively involved in “field of play” cases. As stated by CAS Arbitrator The Hon Michael Beloff QC in the CAS Award of Yang and Korean Olympic Committee v International Gymnastics Federation (“FIG”) (CAS 2004/A/704) at 3.17:

“In short Courts may interfere only 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”.

The case of Yang involved a scoring error in the calculation of Korean gymnast’s (Yang) score at the conclusion of his performance on the parallel bars apparatus during this rotation in the Men’s Individual Gymnastics Artistic All-round Event Final, conducted at the 2004 Athens Olympics and ruthlessly illustrates the application of the above current legal approach to “field of play” or “game rule” cases. The consequences of the error were that Yang was awarded a bronze medal and not the gold medal for the event. It was accepted by the FIG that but for the error, Yang would have won the event. Unfortunately for Yang though, his appeal to CAS was unsuccessful as it was held (within the strict letter of the law of the FIG Rules), that the protests made by Korean team officials immediately following the final of the six rotations comprising the event, later that evening (and by letter subsequently), were outside the time limit prescribed under the FIG Rules for the lodgement of protests, which requires protests to be lodged during and not after the event.

A different and rather unusual outcome though was reached in the case of Sale, Pelletier and Canadian
Olympic Committee v International Skating Union (“ISU”), which although lodged with the Registry of the ad-hoc division of CAS at the 2002 Salt Lake Olympics, was resolved prior to any hearing of the appeal. This was the incident which was commonly referred to by the media at the time as “skategate”. At the completion of the Pairs Figure Skating event, the Canadian pair, Sale and Pelletier, skated what was considered by numerous seasoned observers, to be a near flawless routine and clearly the best routine in the competition. However, the Canadians were scored subordinate to and subsequently placed second behind the Russian pair of Berezhnaya and Sukharulidz. In a subsequent protest and appeal to CAS, the Canadians alleged that the voting in the event had been rigged and that some of the judges improperly colluded to hand victory to the Russians. This allegation was later confirmed in part by one of the judges who was sitting on the judging panel for this event and who admitted to being pressured about voting in the event. The International Olympic Committee intervened and pressed the ISU to review the final result. Accordingly, the ISU after investigating the Canadians’ allegations amended the final result, prior to the Canadians’ appeal to CAS being heard and determined, and declared the Canadians and the Russians joint winners, with such action culminating in the extraordinary step of an additional gold medal being awarded to the Canadians.

It is a trite proposition that the central philosophical pillar upon which sport, (as it is generally known and accepted), rests, depends upon a fair contest and a fairly obtained result. If the outcome of a sporting event is such that the final result is one which is reached as a consequence of a blatantly wrong error or mistake, and such an anomaly is not rectified post-event due a blinkered application of a broad over-riding policy of non-interference, (rather than the consideration of the precise circumstances of the particular case on its merits), then such an approach offends the very notion of sport itself.

The concept of manifest unfairness in sport has already been recognised in the law of sport where results obtained through cheating or bad faith are set aside, post event, in cases involving “in-competition” doping. Surely then in the development of a doctrine of “result rectification” applicable to sporting events which result in a manifestly unfair outcome, such a doctrine ought not be confined to only one form of manifest unfairness (such as cheating or bad faith), but should also extend to those other cases where the final result is directly derived through blatant and identifiable error, especially given that the consequences of unfairness arising from this latter category are equal to those of the former.

Given what are often high stakes for those engaged in professional sport, perhaps the time has now arrived for sports officials and lawyers to formulate a test to accommodate the growing number of challenges to results and outcomes of sports events and widen the application of the current “game rule” or “field of play” principles to achieve a fairer result in individual cases, in appropriate instances where a result has been earnestly challenged. This is especially relevant where such a result is brought directly into question by a blatant and unjust error by an official, which can be simply remedied with reasonable certainty as to the likely outcome, without a tribunal being placed in a position where it is forced to consider one or more of a number of speculative possibilities or alternatives, which might have arisen from the incident in question, thereby affecting the outcome of the match or event.

Accordingly, it is submitted that a limited category of those “non-qualitative scoring” and “after the siren” cases, involving a clear and obvious error made by an official directly affecting the outcome of an event or match, capable of simple remedy with reasonable certainty as to a likely outcome, which unaltered would leave an unjust result, now provides fertile ground for a further examination and revision of the current narrow policy approach of Courts and Tribunals, that is, to refrain from interfering in final results and outcomes of sporting contests unless the final result is tainted by conduct tantamount to fraud or male-fides.

Secondly, the legacy of the High Court’s decision in Cameron v Hogan (1931) 51 CLR 358, is that it remains the seminal authority in Australia for the proposition that Courts should not interfere in the resolution of sporting disputes unless the dispute involves an infringement of a party’s recognised legal rights (ie. contractual, equitable, proprietary or statutory rights) and the infringement is accompanied with a traditional administrative ground of review (ie. a denial of procedural fairness, tribunal acting ultra vires to its constitution, Wednesbury unreasonableness, etc), or affects the livelihood of the party concerned. Notwithstanding the long held reluctance of Australian Courts to interfere in the resolution of sporting disputes, Courts (sometimes creatively) can and quite properly do find ways in which to
intervene in the resolution of sporting disputes. One need go no further than the relatively recent case of *Carter v New South Wales Netball Association* [2004] NSWSC 737, to see a better example of this practice in action.

In the present case, involving the interests of both the Fremantle and St Kilda Football Clubs, should any of the parties ultimately prevail upon the Courts to adjudicate upon the dispute, a Court would likely first need to determine whether the aggrieved party has suffered from an infringement of any recognised legal right it may have against the AFL (ie. for instance, a contractual right that the AFL do all things reasonably necessary to allow each match to properly take place in accordance with the Rules of the Game of Australian Football) and secondly, whether any decision regarding the outcome of the match by the AFL Commission was such that it amounted to *Wednesbury* unreasonableness.

The AFL is indeed in an unenviable position. Irrespective of whatever the AFL Commission may decide on the outcome of the match, one or the other club is likely to be not satisfied with the decision and will no doubt consider its legal position.

As such, the question begs. In light of the Fremantle v St Kilda drawn result, perhaps now is the right time and this dispute is the right vehicle for a Court to intervene and consider when final results of professional sporting contests can be revised and indeed amended by a Court or Tribunal.

Irrespective of whatever any legal outcome ultimately might be, should the incident escalate to the point where either party takes legal action against the AFL, in the court of public opinion and amongst the hearts and minds of supporters and other stakeholders in the game of Australian Rules Football, the result of the match and the merits of whether lawyers ought to assist in the resolution of this impasse, will remain in dispute for long time.

What is not in dispute though is the growth and development of an emerging body of law unique to sport, brought about by disputes such as these, where the demands of sport require legal responses tailored to sport’s specific needs.

“Sports Law” in Australia for a long time has functioned as a very broad church, encompassing virtually any aspect of law that happens to involve in some way, sport. Times do seem to be changing however. With more at stake now more than ever in the playing and conduct of professional sport and an increasing number of disputes where the participants demand a legal response, we are well on the way in Australia towards narrowing and focussing the definition of "Sports Law" as we develop our own *lex sportiva* or more appropriately (as recently referred to by University of Melbourne academic, Hayden Opie), *jus ludorem*.

These developments in the law of sport bring great challenges to sportspeople, sports officials and lawyers alike. The over-riding imperative for all is to accommodate the demands of the professional sporting environment and to ensure, notwithstanding occasional legal intervention in the resolution of sporting disputes, when the circumstances are appropriate, that sport still remains sport and that the contest takes place primarily “on the field”.

As flagged above, this edition of *The Commentator* (Volume 63) is our first for 2006. With much happening on the sports law agenda for the year, now that it is well underway, the fields for legal analysis and discussion of current sports law issues are ripe indeed. Contributions to *The Commentator* are always gratefully received and we look forward in the months ahead to receiving the thoughtful insights of our learned and enthusiastic members, in the form of articles submitted for publication. Why not explore that issue which has caught your interest in recent times, pen a few words and share your views with your fellow members. We would all like to hear from you!

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