

# THE ANZSLA COMMENTATOR

October 2020

**ANZSLA**  
Australian and New Zealand Sports Law Association Inc.

and  
The University of Melbourne  
Law School  
Continuing Education Program  
present a conference on

**THE LAW OF PROFESSIONAL TEAM SPORTS**

A Conference for Lawyers and Sports Administrators

17 May (evening) - 19 May 1991

at  
The University of Melbourne  
Parkville  
Victoria, Australia

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## EDITORIAL

**Author: Gerry Glennen**  
**October 2020**

**T**he Commentator editor discusses the National Redress Scheme

## PRESIDENT'S COLUMN

**Author: Martin Ross**  
**October 2020**

**I**n his President's column, Martin Ross reports that despite the huge disruption caused by Covid-19, ANZSLA membership has risen considerably since the same time last year.

## A FAIR GO: A NOTE ON THE NATIONAL SPORTS TRIBUNAL

**Author: Jack Anderson**  
**October 2020**

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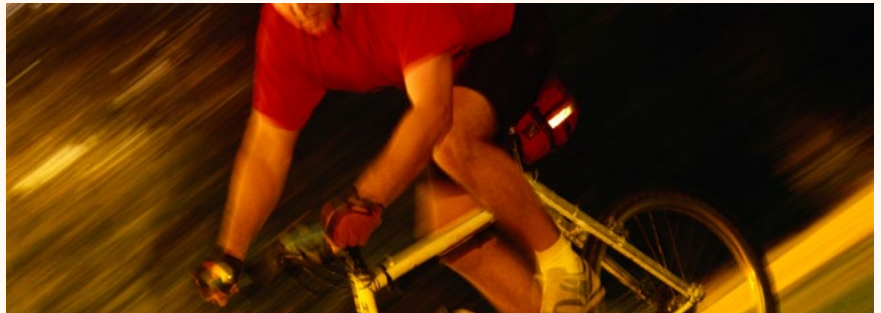


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## Volume 108 – October 2020



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In his President's column, Martin Ross reports that despite the huge disruption caused by Covid-19, ANZSLA membership has risen considerably since the same time last year.



This edition includes a profile of original ANZSLA member Sarah Kenny.



In my editorial I discuss the National Redress Scheme



Around the Grounds  
Webinars

### Disclaimer

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### Acknowledgement

The ANZSLA would like to thank NSW Rugby League for their support with this edition of The ANZSLA Commentator.





**W**elcome to the second edition of The Commentator for 2020. This is usually the edition timed to be published just prior to the ANZSLA Conference.

However, like so many things in our lives, the Conference has been postponed until next year because of the Covid-19 virus.

2020 will be a year that we all remember. On a personal note, a few landmarks have passed virtually unnoticed. I turned 70 without being able to celebrate with family and friends. I logged up 20 years in sports law as an employee of Basketball Victoria and it is 15 years since the ANZSLA Board asked me to take over as editor of The Commentator. No doubt there will be many of our members with similar experiences.

In the only article for this edition, Jack Anderson, Professor and Director of Sports Law Studies at the University of Melbourne, informs us of the establishment of the Australian Sports Tribunal. He believes it may take some time before the major professional sports utilise its services but argues that it may be attractive to them as a forum of last appeal, being cheaper than being dragged through the Courts.

## EDITORIAL

**Gerry Glennen | In-house counsel for Basketball Victoria**

Volume 108 – 13 October 2020

In his President's column, Martin Ross reports that despite the huge disruption caused by Covid-19, ANZSLA membership has risen considerably since the same time last year. He also thanks members who have been involved in the organisation of online webinars in place of regional events and the Conference.

### Member Profile

To mark the 30th anniversary of ANZSLA, this edition profiles another original member who has been and remains an active member. This edition contains information on Sarah Kenny.

### National Redress Scheme

As a result of the Australian Government appointing the Royal Commission into Institutional Response to Child Sexual Abuse, the Government has introduced a National Redress Scheme to allow victims to seek compensation, counselling and an apology. Sports are part of the scheme.

If a victim is compensated, part of the scheme is to prohibit them from taking separate legal action against the institution concerned.

If a claim is made against a particular body, that body is asked to join the scheme and accept responsibility for the redress. Government promised to name institutions which did not join in those circumstances and has done so. There has also been aired the possibility of Government funding being reviewed.

As members are aware, the various tiers in sports structures may have several levels, National, State, local Associations and local Clubs. Sports will have some particular difficulty in responding to claims.

Many claims are, as is the case in many settings, historical. Organisations may have no records of the abuse so have difficulty in responding. The abuse may not even have happened in a time when any person currently associated with the organisation was involved in the organisation at the time of the abuse. Many sporting organisations are conducted by volunteer parents who move on when their children are no longer involved.

There is an expectation that if the institution no longer exists or is financially unable to meet its obligations under the scheme but there is a parent organisation, that parent organisation should meet the redress obligations for the good name of the organisation.

It will be interesting times to see how it all works out as the scheme picks up steam.

**Gerry Glennen - Editor**



Dear members  
I hope you are all well.  
Although 2020 has been  
unique and challenging, ANZSLA  
has had a positive year.

I am pleased to report that ANZSLA's membership numbers are very strong. Incredibly, our membership is higher than the same period last year. We currently have more than 400 members. Unfortunately we won't be able to catch up this month for our annual conference. ANZSLA is committed to arranging networking functions as soon as we can and to delivering the best possible conference next year.

## PRESIDENT'S COLUMN

Volume 108, October 2020



ANZSLA has delivered high quality benefits to members during the year. We have provided a great webinar programme and the Board is very grateful to everyone who has contributed. Some recent highlights including sessions on:

- Anti-doping in the COVID-19 environment with Sports Integrity Australia and Drug Free Sport NZ;
- the impact of COVID-19 on US Sports a joint ANZSLA and Sports Law Association (US);
- the ICC Women's T20 World Cup 2020;
- navigating public health, sport and the duty of care;
- the impact of COVID-19 on major international sporting events with International Olympic Committee and Six Nations Rugby and the British & Irish Lions.

If you missed any of the webinars, you can find the recordings on the member-only resources section of the ANZSLA website.

ANZSLA has also continued to publish the quarterly Commentator e-publication and Sports Shorts e-newsletter quality publications. Volume 13 of the ANZSLA Journal, the only double peer reviewed sports law journal in Australia and New Zealand, will be published later this year.

By the time you read this, ANZSLA will have announced the winner of the inaugural ANZSLA Sports Law Scholarship, as well as the winner of the Denis Callinan Award for pro bono legal work and the Paul Trisley Award for sports law writing.

In the remainder of 2020 ANZSLA will be holding its annual general meeting (29 October) and conducting some further webinars.

On behalf of the ANZSLA Board, I thank you for your continued support of ANZSLA in 2020.

Best regards  
Martin





**A FAIR GO:  
A NOTE ON THE  
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TRIBUNAL**

Author: Jack Anderson  
September 2020

## A FAIR GO: A NOTE ON THE NATIONAL SPORTS TRIBUNAL

(September 2020)  
(2020) 108 The Commentator 1

*Jack Anderson is Professor and Director of Sports Law Studies at the University of Melbourne*

### ABSTRACT

The National Sports Tribunal (NST) was established by the National Sports Tribunal Act 2019 and opened its doors (virtually) on 19 March 2020. The NST is mandated to provide a cost-effective, efficient, transparent and independent forum to resolve sporting disputes within Australia. This note briefly reviews the operation of the NST and the challenges that lie ahead in its initial two-year pilot stage.

### INTRODUCTION

The future of sport in Australia will, for some time to come, continue to be shaped by how the industry deals with the participatory, commercial and legal ramifications of the Covid-19 pandemic of 2020. Somewhat, if understandably, lost in the economic and public health maelstrom that is Covid-19, have been two additional features in 2020 to the Australia sporting landscape: the launch of the National Sports Tribunal ('NST') in March; followed by the official opening of Sports Integrity Australia ('SIA') in July. Both the NST and SIA are products of a review into Australia's Sports Integrity Arrangements in 2018 ('the Wood Review'). This brief comment gives an overview of the objectives of one of those entities (the NST) and the immediate challenges faced by it in terms of acceptance, its authority and the added value, if any, it might offer to the efficient resolution of disputes in Australian sport.

### WHY THE NEED FOR A SPORTS TRIBUNAL?

In 2018, the Review of Australia's Sports Integrity Arrangements ('the Wood Review') recommended the establishment of an independent, statutory-based National Sports Tribunal. The Wood Review argued that, although leading sports bodies – particularly those under the COMPPS umbrella (the football codes, the rugby codes, tennis and netball) – have sophisticated internal dispute resolution mechanisms; many other sports do not have the capacity to offer same to their participants. Moreover, for those (mainly Olympic) sports who can theoretically avail of the services of the Court of Arbitration for Sport (CAS) – the Oceania registry of CAS being based in Sydney – the Wood Review noted that this geographical advantage was offset by the costs and delays now associated with CAS referrals.



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Accordingly, and based on examples from overseas – notably in the United Kingdom, New Zealand and Canada - the Wood Review determined that the credibility of Australian sport would be enhanced by the creation of an NST that could deliver cost effective, timely and independent dispute resolution for all recognised Australian sports bodies, as based on a suite of services ranging from conciliation to mediation to arbitration and even advisory opinions or case appraisals.

The Wood Review recommended that the NST be based around three divisions - an Anti-Doping Division, a General Division and an Appeals Division. The recommendations of the Wood Review in this regard found statutory expression in the National Sports Tribunal Act 2019 and the NST commenced activity on 19 March 2020. Prior to commencement, the Commonwealth Government appointed Mr John Boulton AM as the NST's inaugural CEO. The NST is administered by a Registry within the Australian Government Department of Health and one of its first tasks was to appoint, via a competitive process, 40 or so Tribunal Members, selected because of their expertise and experience in a range of sporting, legal and medical fields.

By way of disclosure, the author of this note is an NST Tribunal Member; proving that no appointment system, no matter how rigorous, is infallible.

Most recently, in July 2020, the NST sought expressions of interest from qualified legal practitioners with experience or interest in sports law to be listed on the NST Legal Assistance Panel and with a view to providing assistance for free or at a significantly reduced rates for athletes and other users of the NST. In addition, and in line with the NST's statutory commitment to transparency – section 3(1) of the National Sport Tribunal Act 2019 – the NST's practices, procedures and rules have been also been put on a statutory basis. The NST Registry has also published a 'Bench Book' to assist parties to NST applications.

### CHALLENGES AHEAD

On appointment, the NST CEO immediately and rightly recognised that his principal task would be to sell the idea, credibility and, ultimately, jurisdiction of the NST to the 90 or so recognized sports governing bodies in Australia. It must be remembered here that Australian sports bodies are not generally obliged to sign up to the NST; they can opt-in. As alluded to earlier, a key difficulty for the NST's CEO is that the largest professional and participation sports in Australia already have their own tribunal proceedings, including first instance hearings and rights of appeal. Moreover, the jurisdiction and legitimacy of these disciplinary processes is based, in part, on the collective bargaining agreements they have entered with their various professional players' associations. The argument is therefore that for the larger professional sports in Australia, the NST is neither needed nor in any event easily accommodated in their existing regulatory structures.



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Moreover, and a bit like Banquo's ghost, the Essendon doping saga appears to be the source of a lingering reticence in Australian sport ever again to consider handing over a dispute to an external entity. The Essendon saga appears, anecdotally at least, to contribute to the view still held in Australian sports administration, and not just within the AFL, that once a matter goes beyond the existing, sport-specific disciplinary remit of the 'host' sports body, and beyond arbitrators who are experts-familiar with the sport in question, a full contextual understanding of the game, its rules and its spirit, can be lost in interpretation to the detriment of that sport.

There are however at least three ways which might convince the larger sports to eventually acquiesce to or at least accept the jurisdiction of the NST.

### **NST AS THE ARBITER OF LAST RESORT**

The first step towards embedding the NST in the Australian sporting landscape might be to approach sports entities who already have a sophisticated dispute resolution mechanism and suggest that the NST would be available as a last resort of appeal - when all internal appeals within the sport are otherwise exhausted. Accordingly, and instead of the sports body possibly having to prepare for and defend a court action by an aggrieved player or club, the matter could go to a less costly and less disruptive NST-hearing based on alternative dispute resolution.

For example, say that one of the players in the infamous cricket 'sandpaper' scandal of 2018 had decided to challenge their 9/12-month ban. They would have been entitled to a full hearing of the matter under Cricket Australia's regulations and then a right of appeal. Imagine if one of the players (e.g., Warner) had, driven by the substantial reputational and commercial losses that accompanied the ban, remained aggrieved and decided to go to the ordinary courts on, say, the disproportionality of the sanction or on grounds similar to that which cost the cricket authorities dearly in the Kim Hughes proceedings at the Federal Court in 1986?

As a backstop against such (albeit rare) legal proceedings, could referral to the NST be written into Cricket Australia's rules as a less expensive, less public, speedier and more procedurally flexible option to litigation?

The current Cricket Australia Code of Conduct for Players (2019/2020), adopts the disciplinary process found in most Australian sporting organisations: an investigatory/prosecutorial stage led principally by integrity officers (Article 3); the right to a hearing (Article 5); and a right of appeal, confined largely to procedural matters (Article 8). The Code of Conduct (Article 8.3.3.7) says that appeals process 'shall be the full, final and complete disposition of the matter and will be binding on all parties.' Nevertheless, and as was made clear in the AFL v Carlton proceedings relating to Greg Williams, the Victorian courts retain a supervisory jurisdiction over private domestic tribunals such as those that pertain



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in sport. Amending Cricket Australia's Code of Conduct in full or in part to give the NST limited but exclusive appellate jurisdiction as the final arbiter of disputes arising out of the Code could be considered. In this, the NST's role would be very much one that seeks to supplement and not supplant the primary jurisdiction of Cricket Australia (or any other comparable sports body) to hear such disputes.

A similar example to illustrate where the NST could be integrated in a limited way into the extant disciplinary proceedings of a sports body can be seen in the Katie Brennan/AFLW dispute of 2018. Brennan was ruled out of the AFLW grand final after being suspended for infractions which under AFLM regulations would only have resulted in a fine. On the ground of gender discrimination, Brennan and her employers, the Western Bulldogs, contemplated (but did not pursue) both a court action and a referral to the Australian Human Rights Commission. Were that situation to arise again in the AFL, and where a player exhausts all their internal remedies (tribunal hearing and an appeal); then in the rare instance that that player is still minded to resort to litigation, a referral to the NST could instead be presented as an option.

The current AFL Regulations (2020), adopts a disciplinary process similar to Cricket Australia: an investigatory/prosecutorial stage, led principally by the Match Review Officer (Regulation 16); the right to a (tribunal) hearing (Regulation 19); and a right of appeal, confined largely to procedural matters (Regulation 20). The AFL Regulations (Regulation 20.30) say that 'A person shall exercise their right of appeal under this Regulation 20 and have any appeal heard and determined by the Appeal Board before commencing any relevant proceedings or becoming a party to any relevant proceedings in a court of law.' Again, amending the AFL's Regulations in full or in part to give the NST limited but exclusive appellate jurisdiction as the final arbiter of disputes arising out of the Code could be considered.

Most likely a sports body such as the AFL, or others who might consider the NST has an arbiter of last resort, would not permit the NST to have de novo jurisdiction over a referred dispute and would likely confine any NST referral along 'judicial review' lines i.e., that any last resort NST referral would be limited to grounds such as: an error of law; the internal decision was unreasonable and was one that no entity acting rationally could have arrived at having regard to the evidence before it; or the classification of the level of the offence was manifestly excessive or inadequate; or that the sanction imposed was manifestly excessive or inadequate.





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In this, the NST's role in Australian sport might be usefully compared to the rationale underpinning the establishment of, and the current remit and operation of, the Victorian Racing Tribunal ('VRT'). The VRT as a statutory body hears matters referred to it by Harness Racing Victoria, Greyhound Racing Victoria and Racing Victoria. It was introduced to streamline a system that previously had allowed de novo hearings of racing-related disputes in the courts (principally, the Victorian Civil and Administrative Tribunal) despite such disputes having already been through a complex disciplinary process entailing both a hearing and appeal (the Racing Appeals and Disciplinary Board system).

It must be noted here that as the arbiter of last resort, the NST would likely rarely be used. Even in the professional sports, the tendency in Australia is that once participants obtain a full and fair hearing of the matter – a fair go – they tend to accept the verdict and rarely appeal. For instance, in the AFL in the 10 years from 2009, the average percentage of players who accepted a prescribed penalty from the Match Review Officer was just over 91%; there were 178 tribunal hearings; and only 10 appeals. That being said, and as was the case in the Katie Brennan proceedings, a driver in a player seeking to challenge a suspension is often what is at stake – both in terms of immediacy and substance.

On the former, the immediacy of an AFL Grand Final, which for the majority of players will be a singular opportunity, means that aggrieved players might be motivated to exhaust all internal avenues and even consider the courts, as was the case in the AFL with Sydney Swans player Andrew Dunkley in 1996. On the latter, the substantive matter in question in the Brennan case was one of wider public law and policy – gender discrimination. Similarly, all three factors – what was at stake (the termination of a multimillion dollar contract); the issue of immediacy (in a World Cup year); and the substance (from contract of employment law to religious freedom) – combined to disruptive effect in the proceedings involving Israel Folau and Rugby Australia in 2019. It is posited that in future instances there may be a role for an entity such as the NST in the resolution of sports dispute of such range, complexity and import and including, as noted recently by the UN, that sport is, as it should be, open to arguments invoking athletes' human rights.

Finally, it is noteworthy that in a case where a player exhausts the internal remedies of a sport but seeks to challenge it in order to play in an upcoming game, history shows that the preferred remedy is that of an injunction. That order will be sought either to put a stay on the sport's disciplinary processes or have an imposed suspension lifted on the grounds that there is an arguable case of procedural irregularity or substantive unfairness. History also shows that on obtaining injunctive relief and playing the game, the player may well not even contest any subsequent sports or court hearing. Frustration with this tactic led to the creation of the AFL's appeals board in the late 1990s. It is suggested that the NST could provide an alternative to such sporting injunctions and may, even in a condensed period of time, (in the week before a Grand Final etc) be in a position to hear any matter in full or resolve it by way of mediation or conciliation.



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### THE NST AS AN EDUCATIONAL RESOURCE

It is argued that one way of extending the jurisdictional remit of the NST is to educate sports organisation in the range of services that it can offer. The NST is not just an arbitral hearing body but also has the power to offer conciliation and mediation services and case appraisals i.e., it offers a suite of services similar to the Fair Work Commission. Further, the NST (as a 'Fair Sport Commission') can thus embed itself in the landscape of Australian sports by being a repository – the go-to source - of good dispute resolution practice for sports bodies, athletes and other stakeholders or users of its services. In this, the model provided by Sport Resolutions UK in assisting sports bodies in ensuring that their dispute resolution processes are in line with best practice and that their regulations are embedded with highest standards of procedural fairness, is a good one to adopt.

Highlighting for sports bodies, in plain language, how they can remain in line with developments in, and the principles of, CAS jurisprudence is also a way in which the NST can enhance the quality of sports dispute resolution in Australia e.g., informing them of the six key principles of a sports disciplinary system outlined in CAS 2014/A/3630 Dirk de Ridder v International Sailing Federation [108]; as well as the reminder in the recent proceedings involving Manchester City and UEFA on the necessity for a sport body's rules to avoid ambiguity – in that instance relating to a statute of limitations clause – and for a sport's disciplinary system, and those involved, to be operationally independent and free of bias.

Offering education and capacity building programs for all sports in order to ensure that their disputes are resolved as near as practicable to the source of the dispute should be an important element of the NST's remit. There would also to be an element of self-interest here for the NST, given that by the time a dispute emerges from a national or state sporting body and heads towards the NST, it will be likely be impossibly fractious, surrounded by considerable procedural, substantive and personal grievance and the focus of much media attention. Every year in Australia – as evidenced by the review of cases presented at the annual ANZSLA conference by Andy Gibson and previously Hayden Opie - it is surprising how many sports-related disputes end up in the courts system at considerable costs to all involved.

In short, the NST should not just be a forum for the final prosecution of sports dispute but also a means by which such disputes are first prevented.



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### EARNING ITS AUTHORITY

It is noteworthy that within 10 days of the NST's opening in March 2020, the CEO of the Australia Sports Anti-Doping Agency (ASADA, now subsumed into SIA) wrote to national sporting organisations about recognising the NST as a hearing body for anti-doping disputes. As with the Sports Tribunal of New Zealand (STNZ, established in 2003 and now operating on a statutory basis under section 29 of the Sports Anti-Doping Act 2006 (NZ)) the authority of the NST will be earned through, and benchmarked against, how it handles anti-doping disputes.

As seen recently in NZ in decisions involving recreational athletes and the so-called "Medsafe NZ Clenbuterol investigation", tension between entities such as STNZ, who adjudicate on such matters, and agencies such as Drug Free Sport NZ (DFS NZ) who pursue anti-doping violations, is inevitable and welcome. As has been the case in New Zealand, the forensic review by STNZ of anti-doping and integrity investigations by DFS NZ has rightly focused on and tested all aspects of such cases and including: whether the powers used to investigate such matters have been used properly; the length of time taken; the discovery, admissibility and quality of evidence; strict compliance with the principles of procedural fairness as well as an analysis of the substantive merits of the each case; and the proportionality of any recommended sanction.

And that oversight is exactly as it should be in Australia: there should always be a clear separation of power between sport's regulatory bodies (including Sport Australia), prosecutors (SIA) and its judiciary (now the NST) and, indeed, under Article 8 of the amended World Anti-Doping Code, effective 1 January 2021, such operational independence is required in anti-doping hearings.



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### CONCLUSION

At present the NST is operating under a 2-year pilot scheme, though the difficulties posed by Covid for sports dispute resolution services globally might see this extended. In any event, 2 years is a very short period of time to evaluate the NST. It must be noted, by way of comparison, that its UK counterpart, Sport Resolutions, though first established in 1999 did not really achieve any traction until a decade later when it convinced larger sports bodies, such as the Football Association, to sign up to its services. Similarly, CAS was largely ignored as a 'vassal of the IOC' for the first decade of its existence.

The NST will take time to establish itself as a presence in Australian sport but if it survives the pilot stage it can make a significant contribution to critical pillars of the National Sport Plan: Sport 2030. For instance, the NST could, as Sport Resolutions UK has, develop an active investigatory remit – or even, together with Sports Integrity Australia, develop a sports ombudsman system – to carry out independent inquiries into allegations of maladministration in the governance of a sport and/or into some of the issues raised globally (and recently in Australia) relating to the abusive treatment, at both the institutional and individual level, of child-athletes.

This would ensure that the NST could offer such vulnerable athletes - indeed, all athletes - that most Australian of privileges: a fair go.

Jack Anderson, Professor and Director of Sports Law Studies at the University of Melbourne; National Sports Tribunal Member.





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### ENDNOTES

<sup>1</sup>Department of Health, Commonwealth of Australia, Report of the Review of Australia's Sports Integrity Arrangements (Final Report, 2018) chap 5 ('the Wood Review').

<sup>2</sup>Ibid 149-151.

<sup>3</sup>See also the National Sports Tribunal (Consequential Amendments and Transitional Provisions) Act 2019 and full details on the legislative underpinning of the NST can be found at <https://www.nationalsportstribunal.gov.au/about-us/legislative-framework>.

<sup>4</sup>Full details available at <https://www.nationalsportstribunal.gov.au/about-us/who-we-are>.

<sup>5</sup>See National Sports Tribunal Rule 2020 and National Sports Tribunal Practice and Procedure Determination 2020, both of which can be found at <https://www.nationalsportstribunal.gov.au/about-us/legislative-framework>

<sup>6</sup>The Bench Book can be accessed at <https://www.nationalsportstribunal.gov.au/resources/bench-book-2020>.

<sup>7</sup>Rob Harris, 'New National Sports Tribunal Boss Promises to Woo Codes to Independent Body' The Age (online) 2 March 2020 at <https://www.theage.com.au/politics/federal/new-national-sports-tribunal-boss-promises-to-woo-codes-to-independent-body-20200301-p545so.html>

<sup>8</sup>See David Mahoney, 'Doping Appeals at the Court of Arbitration for Sport: Lessons from Essendon' (2018) 59(5) Boston College Law Review 1807, 1827-1829 and, more generally, David Thorpe, 'The Evidential Gap in the Essendon Doping Case and its Continuing Influence on Sport Arbitration' (2015) 10(1) Australian and New Zealand Sports Law Journal 67-96. See also and relating to corporate governance issues, Matt Nichol and Mike Duffy, 'Performance-enhancing Drugs, Sport and Corporate Governance – Lessons from an Australian Football Club' (2017) 46(2) Common Law World Review 83-111.

<sup>9</sup>In terms of procedure, the Essendon saga and the difficulties therein in obtaining access to key witnesses, seems to have been the inspiration for Recommendation 28 of the Wood Review, above n 1, 157 - the power to compel witnesses to appear before it to give evidence. See now section 42 of the National Sports Tribunal Act 2019 and compare to the powers available to CAS in Elizabeth Brimer, 'Third Party Witness Compulsion in the Court of Arbitration for Sport' (2016) 11(1) Australian and New Zealand Sports Law Journal 27-40.

<sup>10</sup>Hughes v Western Australian Cricket Association Inc [1986] FCA 357 (27 October 1986).



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<sup>11</sup>AFL v Carlton [1998] 2 VR 546 and see also Article 10.5 of Cricket Australia's Code of Conduct (2019/2020) as found at <https://www.cricketaustralia.com.au/cricket/rules-and-regulations>

<sup>12</sup>The AFL's Regulations (19 March 2020) can be found at <https://www.afl.com.au/policies>

<sup>13</sup>Ibid, AFL Regulation 20.3.

<sup>14</sup>For an accessible array of background sources including the relevant legislation, policy documentation and VRT decisions, see <https://djpr.vic.gov.au/priority-industries-sectors/racing/victorian-racing-tribunal>

<sup>15</sup>Figures taken from the AFL Tribunal Guidelines 2019 which can be located at <https://www.afl.com.au/policies>

<sup>16</sup>Sydney Swans & Dunkley v AFL (unreported, Supreme Court of Victoria, SCI 7176, Hampel J, 26 September 1996). Similarly, if Barry Hall of the Sydney Swans had been ruled out of the 2005 AFL Grand Final for striking St Kilda's Matt McGuire or if Trent Cotchin of Richmond Tigers had had to miss the 2017 because of his clash with Dylan Shiel, it would have been likely that both would at least have considered the legal route, as did Collingwood's Anthony Rocca in 2003, 'Court bid to have Rocca suspension postponed ruled out.' The Age (online) 29 September 2003, <https://www.theage.com.au/sport/afl/court-bid-to-have-rocca-suspension-postponed-ruled-out-20030929-gdwfkx.html>

<sup>17</sup>The matter was settled late in December 2019 in a Federal Circuit Court hearing. Key documentation including the statement of claim and responses can be found here: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/media/pic/folau>

<sup>18</sup>Report of the United Nations High Commissioner for Human Rights, Intersection of Race and Gender Discrimination in Sport, 44th sess, UN Human Rights Council, A/HRC/44/26 (15 June 2020) and discussing CAS 2018/O/5794 Mokgadi Caster Semenya v IAAF.

<sup>19</sup>For an account of the case law and the establishment of the AFL appeals system, see Andrew Coffey, 'The AFL Tribunal System – An Insider's Perspective on Early Neutral Evaluation, Arbitrary Power and Judicial Intervention' (2013) 24 Australasian Dispute Resolution Journal 230-241.

<sup>20</sup>See for example the array of templates and guides provided by the Fair Work Ombudsman at <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/effective-dispute-resolution>

<sup>21</sup>See for example, the 'plain language' guidance for sports bodies in the UK provided by Sport Resolutions at <https://www.sportresolutions.co.uk/resources/dispute-resolution-guidance/disciplinary-procedures>



**A FAIR GO:  
A NOTE ON THE  
NATIONAL SPORTS  
TRIBUNAL**

Author: Jack Anderson  
September 2020

## A FAIR GO: A NOTE ON THE NATIONAL SPORTS TRIBUNAL

(September 2020)  
(2020) 108 The Commentator 1

<sup>22</sup>CAS 2019/A/6298 Manchester City FC v UEFA. The European Court of Human Rights recently discussed the issue of operational independence in sports disputes in *Ali Rıza and Others v. Turkey*, European Court of Human Rights, 30226/10, 28 January 2020.

<sup>23</sup>See the example used in Jack Snape, 'National Sports Tribunal can deliver justice for unsung sportspeople, but it needs backing' ABC News (online) 23 February 2020 at <https://www.abc.net.au/news/2020-02-23/national-sports-tribunal-needs-backing/11986096>

<sup>24</sup>The letter is available at <https://www.nationalsportstribunal.gov.au/resources/asada-letter-national-sporting-organisations>

<sup>25</sup>See generally the resources at <http://www.sportstribunal.org.nz>

<sup>26</sup>See, for example, *ST 12/18 Drug Free Sport New Zealand v XYZ and Surf Life Saving New Zealand* (4 March 2019).

<sup>27</sup>See "The impact of COVID-19 on procedures in Sport Disputes Resolution - First Report" Lawinsport.com (online), 12 June 2020 <https://www.lawinsport.com/topics/covid19-impact/item/the-impact-of-covid-19-on-procedures-in-sport-disputes-resolution-first-report-12-june-2020>

<sup>28</sup>For an insight into the role Sport Resolutions now plays in football in England, see Matt Slater, 'Explained: The "hard-hitting" hearings having a big impact on the EFL' The Athletic (online) 26 August 2020 <https://theathletic.com/2022128/2020/08/27/efl-sports-resolutions-sheffield-wednesday-derby-wigan/>

<sup>29</sup>The phrase used in *Lazutina and Danilova v IOC, FIS & CAS*, Swiss Federal Tribunal, 27 May 2003, reported in the Official collection of the Federal Tribunal's Decisions (ATF) 129 III 445, XXIX Y. B. COM. ARB, 206, 219 (2004).

<sup>30</sup>See the investigations and reviews (past and ongoing) listed at <https://www.sportresolutions.co.uk/services/investigations-and-reviews/service-overview>

<sup>31</sup>On how such an Ombudsman might work in sport, see Jack Anderson and Neil Partington, "Duty of Care in Sport: Making the case for a Sports Ombudsman in the UK" Lawinsport.com (online) 26 September 2017 <https://www.lawinsport.com/topics/item/duty-of-care-in-sport-making-the-case-for-a-sports-ombudsman-in-the-uk>

<sup>32</sup>See the initiative led by the Australian Olympic Committee, Commonwealth Games Australia and Paralympic Australia as reported by Jessica Halloran and Julian Linden, "Katia's Law: Stars Death Sparks Reform" The Australian (Sydney), 4 September 2020, 8.



## KNOW OUR MEMBERS

# Sarah Kenny

### Professional position in sport

Voluntary positions :Council Member World Sailing, Chair Events Committee World Sailing, Immediate past Vice President Australian Sailing

### Involvement in sports law at the time of joining ANZSLA

Recently introduced to sports law working with honorary solicitor for Australian Rugby Union in my early years at Freehills and also worked on first private ownership deal for the Sydney Swans.

### What prompted you to join ANZSLA?

Love of sport and opportunity to combine sport and my career in law.

### Has your involvement in sports law changed since then and how?

I have had some great opportunities to be involved in both challenging and exciting sports law work over a long career at Freehills now Herbert Smith Freehills, where I still consult. Clients have included almost every variety of football, international and national federations, sponsors, broadcasters and others. I worked almost fulltime for 5 years on matters relating to Sydney 2000 Olympics for many different clients but particularly the owners of the Olympic stadium. Over time I added voluntary roles in the administrative side of sport ranging from being an Olympic selector for sailing (now doing my 4th Games), through to director and VP of Australian Sailing, Council member of World Sailing and chairing a key policy committee at world level for Sailing.

### Any highlights in your involvement with ANZSLA?

Well I remember being on secondment in Melbourne with a stress fracture and being on crutches when invited to be an observer at meetings of the committee organising the first ever ANZSLA conference which was a great warm up for the following year. My best memories are working with the organising committee for the second conference in Sydney. We had a great committee chaired by Colin Love and including Ian Robson and David Garnsey and we had great fun – hard work but we really enjoyed pulling it together and that was really the start of some great friendships forged through ANZSLA.

### Any amusing moments in ANZSLA?

“After party” for Organising committee of second conference- hilarious speeches completely bagging everyone. Fortunately it was in the pre-internet and email days so only long-buried hard copies of the reputation damaging material still exist..... I hope.

### Are you an active supporter of any sport or team and how active?

My sons have been very active in youth sailing at elite level and one is now in the Olympic Sailing Squad campaigning for Paris 2024 - they have taken up most of my supporter hours in the last 10 years. Casual fan of many sports when I have time.

### Aspirations for the future in sport/sports law.

I am standing as a World Sailing Vice-President Candidate in the upcoming election to serve on the World Sailing Board for the 2021-2024 Quad. I am back on the Windsurfer and I am going to race this season for the first time in over 20 years!

### Other interests

Staying fit. Sailing and windsurfing.

### Anything else about yourself you think ANZSLA members may be interested in.

I met Maria Clarke in the very early ANZSLA days. We connected immediately and have much in common. It has been wonderful to reconnect in the last few years through her governance work with World Sailing and see how Maria has reached the pinnacle in her career as a sports lawyer from our humble beginnings in the early ANZSLA days.



## AROUND THE GROUNDS



### WEBINAR - 20 MAY 2020 - COVID-19 CONTRACTUAL ISSUES FOR SPORT

In this sports law webinar, Tony O'Reilly, Partner, Kardos Scanlan, interviewed Alan Sullivan QC and Paul David QC, exploring the contractual issues which have to be considered to address the effect of the shutdown and rebuild sport. Alan and Paul focussed on the legal principles giving practical examples and guidance.

### WEBINAR - 25 JUNE 2020 - GENDER, ATHLETES' RIGHTS, AND THE COURT OF ARBITRATION FOR SPORT

A presentation by Helen Jefferson Lenskyj, Professor Emerita, University of Toronto. The Court of Arbitration for Sport (CAS), established by the International Olympic Committee (IOC) in 1983, poses a threat to athletes' rights by depriving them of access to their own countries' court systems. CAS loosely follows the model of international arbitration tribunals. As in forced arbitration outside of sport, employees – in this case, high performance athletes – sign contracts agreeing to arbitration rather than litigation as the sole means of dispute resolution.

### WEBINAR - 23 JUNE 2020 - THE IMPACT OF COVID-19 ON US SPORTS

ANZSLA and the US Sports Lawyers Association collaborated to present this sports law webinar, discussing the impact of COVID-19 on US sports. Panelists: Gregg E Clifton (Principal, Jackson Lewis P.C. & Co-Leader of the Collegiate and Professional Sports Practice Group); and Prof Stephen Ross (Lewis H. Vovakis Distinguished Faculty Scholar, Professor of Law, Director, Penn State Institute for Sports Law, Policy, and Research); and moderated by Prof James Paterson (Legal Counsel at Melbourne City FC; Senior Fellow, Sports Law Program, The University of Melbourne).

This webinar was followed by a Q&A session on 30 June.

### WEBINAR - 23 JULY 2020 - ANTI-DOPING IN THE COVID-19 ENVIRONMENT WITH SIA AND DFSNZ

ANZSLA sports law webinar with Hayden Tapper (Acting Programme Director, Testing and Investigations, Drug Free Sport New Zealand), Emma Johnson (Deputy CEO, Legal, Education and Engagement, Sport Integrity Australia), and Ian Hunt (ANZSLA Life Member; Partner, Young Hunter Lawyers; & Director, High Performance Sport NZ), discussing anti-doping in the COVID-19 environment.

## AROUND THE GROUNDS



### WEBINAR – 29 JULY 2020 – BEHIND THE SCENES OF THE RECORD-BREAKING ICC WOMEN'S T20 WORLD CUP 2020

ANZSLA sports law webinar discussing the legal challenges of the record-breaking ICC Women's T20 World Cup 2020, with Paul McMahon (Legal Counsel, International Cricket Council) and Courtney McKay (Legal Counsel, ICC T20 World Cup 2020 Local Organising Committee), and moderated by Rebecca Hooper (ANZSLA Director; Legal Counsel, ICC Women's Cricket World Cup 2021).

### WEBINAR – 17 AUGUST 2020 – NAVIGATING PUBLIC HEALTH, SPORT AND THE DUTY OF CARE

ANZSLA sports law webinar with Dr David Hughes (Chief Medical Officer, Australian Institute of Sport) and Juanita Maiden (Senior Associate, Murdoch Lawyers), and moderated by Dr Annette Greenhow (Assistant Professor, Faculty of Law, Bond University).

This webinar examined the challenges for sport in navigating public health, legal and governance considerations associated with COVID-19.

### WEBINAR – 18 AUGUST 2020 – THE IMPACT OF COVID-19 ON MAJOR INTERNATIONAL SPORTING EVENTS

Garth Towan (Commercial Counsel at International Olympic Committee (IOC Television and Marketing Services)) discussed the postponement of the 2020 Olympic Games in Tokyo and James Stebbing (General Counsel & Company Secretary at Six Nations Rugby and the British & Irish Lions) discussed the disruption to the 2020 Six Nations Championship and the quadrennial tour of the British and Irish Lions rugby team to South Africa. The session was moderated by Will Aplin (Senior Legal Counsel at Football Federation Australia and ANZSLA Board Member).

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# "The Commentator"

The Commentator is an electronic publication forwarded to ANZSLA members three times each year.

### EDITORIAL POLICY

- ☐ To focus on publishing quality sports law or sports administration material dealing with current topics of interest to professionals, academics and sports administrators.
- ☐ Articles to be of a high standard demonstrating thought and intellectual rigor in the manner in which current issues are addressed by the author.
- ☐ To publish three editions of The Commentator per annum.
- ☐ The material is to consist of professionally orientated Commentator style articles approximately 1,000 to 3,000 words in length.

### SUBMISSION OF ARTICLES

- ☐ Articles must be accompanied by an Article Submission form and sent via email to:  
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at [anzsla@anzsla.com](mailto:anzsla@anzsla.com).
- ☐ A license and authority to ANZSLA to publish the material and a photo to accompany the article.

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