

EDITORIAL

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The Rule of Law and Sporting Justice

Over the past two decades, the international sporting community has witnessed an extraordinary growth in both the number and the scope of sporting disputes occurring between sports organisations and individuals. Adjudicating over the majority of international and national sporting disputes has been the Court of Arbitration for Sport (“CAS”), which was created by the International Olympic Committee (“IOC”) in 1984, in accordance with the domestic law of Switzerland. Illustrative of the growth of these disputes and the jurisdiction of the CAS, the CAS’s published statistics reveal that in the 11 years between 1984 and 1995 it decided a mere 50 cases.¹ However, from 1996 (which at the time was the CAS’s busiest year in terms of the number of cases determined),² the caseload increased significantly. During the following 11 years from 1996 to 2006, the CAS decided 655 cases.³

The CAS has assumed legal primacy in the determination of most sporting disputes, by reason of the power invested in it by the Olympic Movement (which includes the IOC and the National Olympic Committees of most of the world’s states), the various international sporting federations which regulate and govern the majority of the world’s mainstream organised sporting activity and the majority of national governments (as a consequence of their support of the *World Anti-Doping Code 2003* and the UNESCO *International Convention Against Doping in Sport 2005*).

As an international *jus ludorem*⁴ has emerged in recent times, for most parties engaged in sporting disputes the CAS has been the final arbiter of such disputes, with there being limited or, in some instances, no right of appeal or review from its decisions to state courts (or the Swiss Federal Tribunal). The CAS plays an important role in guarding and upholding the rule of law as it applies in the sporting context, through the adjudication of sporting disputes, the characteristics of which are informed by the complex amalgam of private and public, domestic and international law (ie the *World Anti-Doping Code*

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¹ Court of Arbitration for Sport, <http://www.tas-cas.org/en/stat/frmstat.htm> (11 November 2007).

² Ibid. (The CAS determined 16 cases in 1996).

³ Ibid.

⁴ The law of games (sports law). See Opie, H., “Keynote Address” (ASPE 2005 Conference, Singapore, 4 July 2005).

2003 and the UNESCO *International Convention Against Doping in Sport* (2005) which governs the rights and obligations of individuals to participate in organised sporting activity and for some, to earn a livelihood from playing sport.

As the jurisdiction and functioning of the CAS have been stressed and tested by the large number and variety of cases which have been argued before it in recent times, it is pertinent to consider the extent to which the rule of law and fairness are observed in the conduct and determination of sporting disputes.

The rule of law itself has been subject to numerous differing interpretations and formulations by jurists and academics over time, usually in the context of public law considerations. Additionally, notions of fairness when publicly debated often become clouded in the fog of relativism. However, from these differing strands of thought as to what comprises the rule of law or fairness in the broader legal context, a number of key ingredients applicable to the determination of sporting disputes can be identified.

Central to all modern common law attempts to define the rule of law is the impartial administration of justice in society according to identifiable law and the presumption that no one person or entity in society (including its rulers) is above or beyond the law. It is in the struggle to ascertain the scope of this principle, though, that differences of opinion begin to emerge as to what precisely comprises the rule of law. A solution to this dilemma was recently offered by the senior Lord of Appeal in Ordinary of the House of Lords in the United Kingdom, The Rt Hon Lord Bingham of Cornhill KG, when he identified eight “sub-rules” of the rule of law:⁵

- the law must be accessible and so far as possible, clear and predictable;
- questions of legal right and liability should ordinarily be resolved by application of the rule of law and not the exercise of discretion;
- the laws of the land should apply equally to all;
- the law must afford adequate protection of fundamental human rights;

⁵ The Rt Hon Lord Bingham of Cornhill KG, “The Rule of Law” (The Sixth Sir David Williams Lecture, Centre for Public Law, Faculty of Law, University of Cambridge, 16 November 2006) at http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php (11 November 2007).

- the law must provide means for resolving, without prohibitive cost, or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- ministers and public officials at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred without exceeding the limits of such powers;
- the adjudicative procedures provided by the state should be fair; and
- the state must comply with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.

If the international sporting community is to maintain confidence and respect in the institutions which are responsible for the existence and operation of the body of private and public, domestic and international law which governs the playing of sport, then such institutions (for the sake of all stakeholders) must observe the rule of law as it applies to sport and the determination of sporting disputes.

The recent rise in the number and complexity of sporting disputes internationally is also reflected here in Australasia, where the region's governments, leading sports organisations, and the Oceania Division of the CAS have played an important role in the development of the modern sports jurisprudence. However, pioneering new legal territory has not been without its challenges and in some instances, adherence to the rule of law as it applies in the sporting context has been overlooked or is at risk in Australasia, primarily on three fronts.

Firstly, all persons and entities engaged in the participation in, or organisation of, sport should have access to sporting justice and ought not be prevented from having their bona fide sporting disputes determined because they are without sufficient financial means.

Lord Bingham points out that the law must provide means for resolving, without prohibitive cost, or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.⁶ As already stated above, for most mainstream sports, the CAS is the ultimate arbiter of sporting disputes. Until recently, the CAS has prided itself on providing specialised, swift and

⁶ Ibid.

affordable justice for those parties engaged in sporting disputes. According to the Secretary General of the CAS, Mr Matthieu Reeb:⁷

“One of the main objectives of the CAS was to establish a low cost procedure. For example, the appeals procedure is free of charge. It implies that the costs and fees of the arbitrators as well as the administrative costs are borne by the CAS. There is only a limited financial contribution from the parties in the other CAS procedures, on the basis of the fixed rates established by CAS.”

In the landmark case of *French v Australian Sports Commission and Cycling Australia*, the Appeals Panel of the CAS while considering the award of costs in the proceedings stated:⁸

“14. The Panel needs to be mindful of the role of CAS in hearing and determining sports related disciplinary disputes. The Secretary General of TAS/CAS in the preface to the third volume of the Digest of Awards [Matthieu Reeb, ed., Digest of CAS Awards, Vol III (The Hague: Kluwer Law International).], states at p. xxvi that:

‘... an international sports court like the CAS, which can offer specialist knowledge, low cost and rapid action, provides a means of resolving sports disputes adapted to the specific needs of the international sporting community’.

“15. The failure to maintain a low cost and rapid procedure could become the undoing of many positive developments associated with CAS. ...”

However, recently and without fanfare or precedent, the CAS has commenced the practice of applying Rule 64.2 of the *CAS Code of Sports-related Arbitration* (Edition 2004) to those sporting disputes of a “national” character, which are heard by Appeals Panels of the Oceania Division of the CAS.⁹ Rule

⁷ Reeb, M., “The Role and Functions of the CAS” (2002) 2 *International Sports Law Journal* 21.

⁸ *French v Australian Sports Commission and Cycling Australia* CAS 2004/A/651, Appeal Final Award dated 6 September 2005 at paragraphs 14 and 15. The Appeals Panel in *French* consisted of Professor Richard McLaren (President) and Appeal Arbitrators The Hon Alan McDonald QC and Henry Jolson QC. (The Editor appeared on behalf of the successful Appellant, French).

⁹ Mann, S., “Champ’s win hits sports drug sleuths”, *The Age*, Melbourne Australia, 8 September 2007, at <http://www.theage.com.au/news/national/champs-win-hits-sport-drug-sleuths/2007/09/07/1188783497253.html> (11 November 2007), referring to *Marinov v Australian Sports Anti-Doping Authority* CAS 2007/A/1311, Final Arbitral Award dated 26 September 2007 (Save as to Costs). In *Marinov*, the CAS required the Appellant (a person of no financial means), who was facing a life ban from participation in organised sport, to pay an arbitration fee of AUD\$8000 before the appeal (in which he was ultimately successful) was allowed to proceed. The arbitration fee for the Appellant Marinov was paid on his behalf by benefactors. (The Editor appeared on

64.2 (contained in Part F of the current *CAS Code of Sports-related Arbitration*, which addresses costs of arbitration proceedings) provides:

“Upon formation of the Panel, the Court Office shall fix, subject to later charges, the amount and the method of payment of the advance of costs. ...”

“To determine the amount to be paid in advance, the Court Office shall fix an estimate of the costs of arbitration, which shall be borne by the parties in accordance with Article R64.4. The advance shall be paid in equal shares by the Claimant and the Respondent. If a party fails to pay its share, the other may substitute for it; in the case of non-payment, the request/appeal shall be deemed withdrawn; ...”

The costs imposed by the CAS under Rule 64.2 can be significant¹⁰ and nowhere on the CAS website¹¹ (other than in the dry statement of the rule contained in the *CAS Code of Sports-related Arbitration*) or elsewhere in the public domain has this new policy of the CAS been made overtly clear.

The current application by the CAS of Rule 64.2 to those sporting disputes of a “national” character adversely impedes access to justice for those parties to sporting disputes who are of limited or no financial means, who may otherwise have meritorious cases with good prospects of success, but are prevented from pursuing their cases, solely because of the high costs imposed by the CAS. Parties falling into this category are the many athletes competing at the fringes of elite sport, together with the smaller and more impecunious national sporting federations. Often “national” sporting disputes will address important issues and sometimes will be of considerable complexity, as is the case with non-analytical positive doping infractions addressed under the *World Anti-Doping Code 2003* (a body of “international” sporting regulation). The outcome of such cases impacts on individuals’ rights to participate in organised sport (and for some, their right to earn a livelihood), or the conduct of sporting competitions and governance of sport by sporting organisations affecting other related individuals.

Ultimately, it is the responsibility of the International Council for Arbitration for Sport (“ICAS”) (which oversees the CAS) to ensure that the CAS is adequately funded so that it is able to confidently uphold the rule of law so far

behalf of the successful Appellant, Marinov). It is understood that the CAS does not levy a similar impost on parties pursuant to Rule 64.2 of the *CAS Code of Sports-related Arbitration* (Edition 2004), where arbitrations of an “international” nature (as opposed to “national” arbitrations) are conducted before the CAS.

¹⁰ Ibid.

¹¹ <http://www.tas-cas.org/default.htm> (11 November 2007).

as it applies to the determination of sporting disputes, in that all parties are able to have affordable access to the CAS.¹² Alternatively, should the ICAS be unable to guarantee the broader financial viability of the CAS to ensure affordable and accessible justice for all stakeholders, then by reason of the CAS being the final court of appeal in the determination of most sporting disputes for Australian athletes and sporting organisations (as a consequence of the standard “umbrella” arbitration clauses contained in the majority of athlete/member agreements applicable to most Australian mainstream sports which exclude appeals from the CAS to Australian domestic courts),¹³ the arbitration costs levied by the CAS under Rule 64.2 of the *CAS Code of Sports-related Arbitration* should be met by the Australian government, where a government agency or national sports federation is a party to the dispute. This arbitration cost should be also carried by the Australian government in those circumstances where the Commonwealth of Australia is upholding the rule of law as it applies to sport, in compliance with its international law obligations assumed through its adoption of *World Anti-Doping Code 2003* and the *UNESCO International Convention Against Doping in Sport 2005*.

This restriction on access to justice to parties to sporting disputes, on financial grounds as is presently the case for “national” sporting disputes determined by the CAS, is not only regrettable, but is contrary to the rule of law. As stated by Lord Bingham, “[t]he rule of law plainly requires that legal redress should be an affordable commodity”.¹⁴ Should this impediment remain uncorrected, then the present policy of the CAS in this respect not only has the potential in the future to cause injustice to those impoverished parties with meritorious cases, but also has the potential to undermine the legitimacy and reputation of the CAS in the international sporting community.

Secondly, the law relating to sport must be publicly accessible.

As the corpus of regulation and case law which comprises the international *jus ludorem* continues to grow, it is important that this body of law be readily available to all interested stakeholders in a timely fashion, so that participants in and administrators of sport are able to make informed assessments as to what their legal rights and obligations might be in any given circumstance.

¹² The responsibility of the ICAS to attend to the funding of the CAS is prescribed by Articles S2 and S6(5) of the *Code of Sports-related Arbitration*. Article S6(9) provides: “If it [ICAS] deems such action appropriate, it creates a legal aid fund to facilitate access to CAS arbitration and determines the terms of implementation.” While ICAS has the capacity to create a legal aid fund, it is not known at the time of writing this Editorial whether or not it has taken steps to implement such a fund in light of the recent policy of the CAS to apply Rule 64.2 of the *CAS Code of Sports-related Arbitration* to “national” sporting disputes. See also: Kavanagh, T., “The Doping Cases and the Need for the International Court of Arbitration for Sport” (1999) *University of New South Wales Law Journal* 721 at 736.

¹³ See *Raguz v Sullivan* (2000) 50 NSWLR 237.

¹⁴ n 5 above.

Unfortunately, the current system of reporting decisions of the CAS is ad hoc and inadequate to the needs of sports law practitioners and academics. At present, practitioners in Australasia obtain copies of CAS Awards from three sources: the CAS Digests (most recently published in 2004 by Kluwer Law International—Volume III, Digest of CAS Awards 2001–2003); the CAS website, which only displays selected current awards, is infrequently updated, and does not archive previous awards displayed on the CAS website; and informally and directly from legal practitioners who have appeared in CAS arbitrations, who are known to their fellow sports law practitioners to have appeared in such cases. Accordingly, it is often difficult for interested parties to identify CAS Awards which may be relevant to a legal enquiry or case, especially recent cases, let alone obtain copies of such decisions.

Increasingly, the arbitrators conducting CAS arbitrations, especially appeal arbitrations, rely upon precedent and regularly refer to previous CAS awards to assist in the adjudication of sporting disputes. This reliance of CAS arbitrators upon CAS precedent plays an important role in the development and shaping of the emerging international *jus ludorem*,¹⁵ especially since the CAS has sought to position itself as the supreme court for the determination of the world's sporting disputes.¹⁶

The importance of the law being readily accessible was emphasised by Lord Bingham in his acknowledgement of the statement of the European Court of Human Rights in *Sunday Times v United Kingdom*:¹⁷

“... the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case ... a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

¹⁵ By way of illustration, the World Anti-Doping Agency has specifically acknowledged the “growing jurisprudence from the CAS”, as supporting the tenets of the World Anti-Doping Code 2003. See: http://www.wada-ama.org/rtecontent/document/QA_Code_Consultation_En.pdf (16 November 2007).

¹⁶ Reeb, M., *Digest of CAS Awards II 1998–2000* (2002), xii. In the Foreword, the then President of the ICAS and the CAS, H.E. Judge Keba Mbaye states (with respect to the establishment of the CAS): “The international sports community needed a court of arbitration with the power effectively to resolve disputes connected with sport and its practice. It was essential to create a ‘supreme court of world sport’, to borrow the expression used at the beginning of the 1980s by Juan Antonio Samaranch.”

¹⁷ n 5 above, Lord Bingham referring to *Sunday Times v United Kingdom* (1980) 2 EHHR 245 at [49].

The extent to which accessibility to the law informs the rule of law has also been acknowledged by the Chief Justice of Australia, The Hon Murray Gleeson AC,¹⁸ referring to the High Court of Australia's decision in *Incorporated Council for Law Reporting of the State of Queensland v The Commissioner for Taxation of The Commonwealth of Australia*.¹⁹ In *Incorporated Council for Law Reporting*, Windeyer J (while considering whether or not the Incorporated Council for Law Reporting was a charitable institution for the purposes of taxation) observed:²⁰

“In any country governed by the common law, the publication of the reports of decisions of the superior courts is essential for the continuance of the rule of law. The continuity of the common law and its characteristic capacity for development and change depend upon those who are concerned with its administration having a means of knowing the current course of precedents. Without that the law would become stagnant and cease to be a living stream.”

Even the CAS itself has recognised the importance of legal principles and regulations being widely available to, and understood by, the community they affect. In *USA Shooting and Quigley v International Shooting Union (UIT)*,²¹ (a case which considered an issue of ambiguity in the applicable anti-doping rules in the context of overall strict liability), the CAS Appeals Panel²² observed:

“The fight against doping is arduous, and it may require strict rules. But the rule-makers and rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.”

¹⁸ Chief Justice of Australia, The Hon Murray Gleeson AC, “Courts and the Rule of Law” (Speech delivered at “The Rule of Law Series”, University of Melbourne, 7 November 2001) at http://www.hcourt.gov.au/speeches/cj/cj_ruleoflaw.htm (11 November 2007).

¹⁹ (1971) 125 CLR 659.

²⁰ Ibid at 672.

²¹ Reeb, M., *Digest of CAS Awards 1986–1998* (1998), 187, 197–198. CAS 94/129, Award of 23 May 1995, [34].

²² The Appeals Panel in *Quigley* consisted of Jan Paulsson (President) and Appeal Arbitrators Denis Oswald and Luc Argand.

More recently, the CAS Appeals Panel in *United States Olympic Committee and Others v International Olympic Committee and Another*,²³ applying *Quigley*, noted:

“The rationale for requiring clarity of rules extends beyond enabling athletes in given cases to determine their conduct in such cases by reference to understandable rules. As argued by the Appellants at the hearing, clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply”.

Published awards of the CAS significantly add to the overall body of sports law which governs the rights and obligations of those individuals and entities engaged in the participation in and governance of sport. It is this collective body of law and regulation which must be readily available in its entirety to all stakeholders in sport, if the rule of law in the sporting context is to be observed. The broad and timely publication by the CAS of arbitral awards it delivers (in English and in French) would squarely and adequately address the collective concerns which continue to be expressed anecdotally by sports lawyers worldwide, as to the availability of and accessibility to decisions of the CAS.²⁴

It is as a consequence of the practical difficulties presently confronted by sports law practitioners and academics in obtaining copies of CAS decisions (especially those recently handed down), that the *Australian and New Zealand Sports Law Journal* has added a reports section, in order to publish important CAS decisions (together with other significant sports law decisions of the domestic courts of Australia and New Zealand and the New Zealand Sports Disputes Tribunal) as they are relevant to Australian and New Zealand sports lawyers. In adding the reports section to the *Australian and New Zealand Sports Law Journal*, the Editorial Committee gratefully acknowledges the kind permission of the CAS (and in particular, its Secretary General, Mr Matthieu Reeb) to publish the decisions of *Baggaley v International Canoe Federation*²⁵ and *Marinov v Australian Sports Anti-Doping Authority*²⁶ in this edition of the journal.

²³ CAS 2004/A/725, Award of 20 July 2005, [73]. The Appeals Panel in *USOC v IOC* consisted of Kaj Hober (President) and Appeal Arbitrators Yves Fortier CC QC and David Williams QC.

²⁴ See, for example, Beloff, M., Kerr, T., Demetriou, M., “Sports Law” (1999), 13, [1.26], where as early as 1999, the authors argue for the *regular* publication of CAS decisions.

²⁵ CAS 2007/A/1168; (2007) 2(1) ANZSLJR 1.

²⁶ CAS 2007/A/1311; (2007) 2(1) ANZSLJR 2.

The *Australian and New Zealand Sports Law Journal* is committed to continuing its publication of significant sports law decisions of courts, tribunals and the CAS which affect the interests of those stakeholders in Australasian sport and remains hopeful that the CAS will continue to extend to the journal its generous permission to publish important decisions of the CAS in the future. The *Australian and New Zealand Sports Law Journal* also hopes that the CAS (and indeed other sports law publications) will be inspired by our initiative in publishing certain CAS arbitral awards and that CAS decisions in the future will be published more widely and more frequently throughout the international sporting community.

Thirdly and finally, although the CAS has a substantial role to play in ensuring that sports laws and regulations are properly applied and enforced, sports officials or organisations themselves, which are responsible for policing these legal provisions, must do so reasonably and in good faith, and when engaged in sporting disputes must also act fairly. The need for fairness is implicit from the manner in which power should be exercised by those persons or entities responsible for the governance of sport and the application of sporting rules and regulations, if the rule of law is to be maintained. As observed by Lord Bingham:

“at the core of the rule of law principle ... ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers”.

In the current environment of international sporting politics, rhetoric plays a significant role in shaping sporting norms and policy which in turn inform the nature of the rules and regulations pursuant to which sport is conducted. In support of this proposition, one need look no further than the unrestrained tough talk of sports administrators and politicians when addressing the vexed issue of drugs in sport. Phrases such as “[battling cheaters would require] unwavering vigilance and the willingness to tackle those people who are the sociopaths of sport”²⁷ and “[the job of WADA President] requires a certain level of aggressivity”,²⁸ employed by World Anti-Doping Agency (“WADA”) chief, Mr Dick Pound QC and “[t]he government supports a zero-tolerance approach to

²⁷ Macur, J., “Australian wins contentious vote to become next chief of WADA”, *The New York Times* (New York), 18 November 2007 at http://www.nytimes.com/2007/11/18/sports/othersports/18drugs.html?_r=1&ex=1353042000&en=093c547c3c4b095c&ei=5090&partner=rssuserland&emc=rss&oref=slogin (18 November 2007).

²⁸ Grohmann, C., “Next WADA president must be aggressive too, says Pound”, *The Guardian* (London), 15 November 2007 at <http://sport.guardian.co.uk/breakingnews/feedstory/0,-7080598,00.html> (16 November 2007).

drug use”,²⁹ as recently stated by the then Australian Federal Minister for Arts and Sport, Senator the Hon. George Brandis SC, are liberally cast into the public arena in order to win the hearts and minds of the international sporting community, in pursuit of the policy objective of the elimination of drugs in sport, or what is more universally expressed in war-like terms, “the fight against drugs in sport”.³⁰

Drawing upon the example of sports doping, while virtually all stakeholders in sport are united in their support of the goal to eliminate the use of performance-enhancing drugs in sport, the pursuit of this goal must not descend into a tunnel-visioned “all’s fair in love and war” crusade, but must be pursued (still firmly), fairly, and with regard to the rule of law, if sport’s administrators and regulators are to maintain any degree of legitimacy or credibility in the eyes of those who are affected by these regulations. Failure to do so on the part of sport’s governors could not only result in significant injustices for certain individual sportspeople,³¹ but such a blinkered and Machiavellian approach in combating drugs in sport could ultimately act counter-productively to the anti-doping efforts of the entire international sports community.

So what is acting reasonably, acting in good faith or acting fairly in the context of enforcing sport’s rules and regulations?

It means that those charged with enforcing or upholding the laws of sport, should:

- act not arbitrarily but with consistency, having regard to the facts of each individual case;
- not pursue cases with some overriding or broader political objective in mind;
- ensure that the case presented is reasonably arguable at law;

²⁹ Australia, *Parliamentary Debates*, Senate, 27 March 2007, 31 (Senator the Hon. George Brandis SC, Minister for the Arts and Sport).

³⁰ Senator the Hon. George Brandis SC, “Tough on drugs in sport – combating illicit drugs” (Media Release 6 October 2007) at

http://www.minister.dcita.gov.au/brandis/media/media_releases/2007/tough_on_drugs_in_sport_-_combating_illicit_drugs (16 November 2007).

³¹ See for instance: *Carter v New South Wales Netball Association* [2004] NSWSC 737 and *Carter v New South Wales Netball Association (No. 2)* [2004] NSWSC 778, where the relevant injustice concerned child protection issues. See also earlier publication by the Editor addressing this issue: Hayes, P.J., “Burnt at the stake: unfairness and the ‘ugly parent’” (2005) 60 *The Commentator* 1.

- ensure that there is sufficient evidence available for there to be reasonable prospects for each of the elements of the allegation made, to be proven to a *Briginshaw*³² standard of proof;
- not make allegations which are not supported by evidence;
- provide the opposing party with any evidence which could be considered to be reasonably exculpatory of the subject of the allegation, or which may otherwise be relevant to the determination of the dispute;
- not conduct the case in a manner which is unfairly oppressive to the opposing party, especially where there exists a disparity of financial resources between the parties;
- conduct the case objectively and dispassionately; and
- ensure that a fair and independent process exists under its regulations for the determination of any sporting dispute.

Support for these principles is more specifically grounded in numerous legal sources which often come into play in the resolution and determination of sporting disputes.

For those sporting disputes where the Australian Government or one of its agencies is a party (ie the Australian Sports Commission or the Australian Sports Anti-Doping Authority), s 55ZF of the *Judiciary Act* 1903 (Cth) requires that all legal work undertaken on behalf of the Commonwealth of Australia be undertaken in accordance with the Attorney General's *Legal Service Directions* 2005. In particular, such work which involves dispute resolution or litigation is subject to the Commonwealth's "model litigant" policy,³³ and requires the Commonwealth to act "honestly and fairly", generally by: dealing with cases promptly and not causing unnecessary delay; not pursuing cases where there are not reasonable prospects of success; conducting litigation economically; not taking advantage of parties who lack the resources to litigate a legitimate claim; and not requiring another party to prove a matter which the Commonwealth otherwise knows to be true.³⁴

³² *Briginshaw v Briginshaw* (1938) 60 CLR 336. See also *French v Australian Sports Commission and Cycling Australia*, CAS 2004/A/651, Appeal Partial Award dated 11 July 2005 at [42].

³³ Legal Services Directions 2005 (Cth), Appendix B.

³⁴ The full nature of the Commonwealth's obligation to act as a "model litigant" is described in paragraph 2 of Appendix B of the *Legal Services Directions* 2005 (Cth) and extends to alternative dispute resolution proceedings. See also: Lee, S., "The State as a Model Litigant" (September Lunchtime Seminar Series, Victorian Government Solicitor's Office, 28 September 2006) and Australian Government – Attorney General's Department, *Summaries of Court and Tribunal model litigant cases – 2005* (2005),

In the course of acting fairly, sporting regulators while prosecuting cases against sportspeople should also provide to the person who is the subject of the allegations before the relevant tribunal, all such documents in their possession which are relevant to the pending proceedings (together with the names of relevant witnesses), sourced during the preliminary investigation, before the hearing of the case takes place. Often, the determination of sporting disputes may involve the imposition of significant penalties for the sportsperson concerned, thereby affecting the substantive rights of such individuals to participate in sport and/or earn a livelihood from playing sport. Therefore fairness in such circumstances requires that the respondents to cases brought against them by sporting regulators have access to all of the available relevant evidence which is in the possession of the prosecuting party.³⁵ Fairness on the part of sporting regulators and their legal representatives in this respect is consistent with the principles of prosecutorial fairness in the criminal law³⁶ and discovery in the civil law,³⁷ and such principles should also be applicable to hearings conducted before domestic or arbitral tribunals (such as the CAS), despite the views of more conservative commentators which do not support this practice.³⁸

Sports regulators and their legal representatives should at all times be mindful of the need to act in accordance with the rule of law and resist pressure where it arises to pursue proceedings for purely political or face-saving reasons. Sometimes this will require those in whom the governance of sport is entrusted to confront the fact that the case they may wish to present simply falls short of the appropriate legal threshold necessary to commence or continue proceedings, either as a matter of law or on the strength of the available evidence. If there is no reasonable possibility that the tribunal concerned could find for the sporting regulator prosecuting the allegation(s) against the individual or persons concerned, then the case should not be brought. This approach also acts in favour of the sporting regulators by ensuring that when infringements of sporting rules and regulations are prosecuted (for good reason), such cases will

http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_SummariesofCourtandTribunalmodellitigantcases-2005 (11 November 2007).

³⁵ See for example: *Modahl v British Athletic Federation* (2002) 1 WLR 1192 at 1230 per Mance LJ at [128]: “The principles of natural justice or fairness must adapt to their context and be approached with a measure of realism and good sense.”

³⁶ Fox, R.G., *Victorian Criminal Procedure* (2000) at Chapter 2.4. See also: *R v Anderson* (1991) 53 ACrimR 421. Also, the *Rules of the New South Wales Bar Association*, Rule 66, provide: “A prosecutor must disclose to the opponent as soon as practicable all material available to the prosecutor or of which the prosecutor becomes aware which constitutes evidence relevant to the guilt or innocence of the accused, unless such disclosure, or full disclosure would seriously threaten the integrity of the administration of justice in those proceedings...”. The *Practice Rules of the Victorian Bar* impose similar duties on Counsel pursuant to Rules 134 to 148.

³⁷ See *Esso Australia Resources Ltd v Federal Commissioner for Taxation* (1999) 168 ALR 123 and *Mitsubishi Electric Aust Pty Limited v Victorian Workcover Authority* [2002] 4 VR 332.

³⁸ Forbes, J.R.S., *Justice in Tribunals* (2002), [10.13]. Cf. *Rajan v General Medical Council* [2000] UKPC 1.

be thoroughly prepared and pursued under a well-drafted and comprehensive body of sporting regulation and will most likely result in a successful outcome. Failure on the part of sporting regulators to uphold the rule of law in this respect carries not only the immediate risk of failure when cases without legal merit are injudiciously prosecuted, but also the more lasting and serious reputational risk of diminished public confidence in the sports agency or organisation and the principles which they are entrusted to uphold, throughout the international sporting community.

If those charged with the administration and regulation of sport are to retain the moral authority to do so in the international sporting community, it is essential that regard be had to the rule of law. As pointed out by Chief Justice Gleeson, “[t]he rule of law is not enforced by an army. It depends upon public confidence in lawfully constituted authority”.³⁹ And, as noted by Lord Bingham, “John Finnis has described the rule of law as ‘[t]he name commonly given to the state of affairs in which a legal system is legally in good shape’”.⁴⁰ Without the rule of law, the world of sport is vulnerable to being governed or regulated by tyranny and not justice. Sport should be about fair play and this fairness should extend beyond the field of play, to sports governance and the determination of sporting disputes, not just for the good of all of sport’s stakeholders, but also for sport itself. Justice demands it.

Finally, it is with much pleasure that the Editorial Committee welcomes CCH Australia and Mr Peter Rodrigues to the *Australian and New Zealand Sports Law Journal* team. CCH Australia has agreed to print and distribute the *Australian and New Zealand Sports Law Journal* and we are appreciative of its support and look forward to working with CCH Australia in the publication of future editions.

Melbourne
November, 2007.

³⁹ n 18 above.

⁴⁰ n 5 above.