

BOOK REVIEW

Sport and the Law, an Australian Perspective by G. M. Kelly (Law Book Company, Sydney, 1987) pages i-xlvi, 1-472. Price \$55.00 ISBN 0 455 207127.

This book is a significant development in Australian legal literature. The rapid growth of leisure industries over the past two decades has spawned a small band of lawyers and other professionals interested in the legal problems of athletes and performing and non-performing artists, as well as the entrepreneurs and organizations that engage them. Legal books about the arts¹, leisure² and travel and tourism³ now grace the bookshelves of many a lawyer's library. Whereas the lawyer looking for sports related legal material in the past may have had resort to North American texts⁴ or a small body of Australian conference proceedings and seminar papers⁵, there is now available a well researched volume that draws together much of the case law, legislation and academic literature which has immediate relevance to Australian sport. This is an advance to be welcomed.

Over time sport has been the setting for some rather interesting cases. *R. v. Coney*⁶ ('prize-fighting'), *Bolton v. Stone*⁷ (the 'cricket ball case' in negligence) and *Miller v. Jackson*⁸ (nuisance) come easily to mind. However, the recent and major steps toward commercialization of professional and elite amateur sports have contributed to case law and learning that may be increasingly viewed as sport specific. In this respect, legal disciplines concerning tortious liability for injury, natural justice within disciplinary tribunals and the common law rule against unreasonable restraints on trade are prominent. Furthermore, lawyers and the sports community wish to know how a given body of law will apply to sport; for instance, what is the role of intellectual property rights in sports marketing?

As is clearly evident, sport is a broadly based activity that can give rise to almost any conceivable legal issue. For an author this represents a dilemma and it is one that Mr Kelly acknowledges. How is an appropriate balance to be found between breadth and depth of coverage? Another dilemma is how to structure the book. One the whole, a fairly good attempt is made at resolving these dilemmas.

The book is divided into six parts each pursuing a different theme. It may be helpful to comment upon each part and the constituent chapters.

1. *Law and the Sporting Scene: the Framework*. Two introductory chapters, *Sport in the New Community and Sporting Rules and the Legal System* provide an overview of the origins and nature of sport and its contemporary commercialization. The author divides rules in sport into two categories — those which regulate the playing of the game and those which govern the organization of sports bodies. Each category is explained in general terms and subcategorized. While considerable effort appears to have been expended in developing this conceptual analysis, it is employed only occasionally in later chapters.

Although these chapters are written with a certain flair, they may be criticised for requiring of the reader some knowledge of sport history and economics, as well as law, before the full benefit of the author's message is to be gained. As an introduction, they do not serve the legal or sport layperson as well as they might. Also, considerable reference is made to United States' and other foreign experiences with little attempt to explore the Australian origins of sport, its commercialization and whether the Australian legal system has made any special contributions to those processes.

¹ E. g. Sharpe, D., *The Performing Artist and the Law* (1985) and Simpson, S., *The Visual Artist and the Law* (1982).

² Sarre, R., *Leisure Time and the Law* (1987).

³ Cordato, A.J., *Australian Travel and Tourism Law Handbook* (1988).

⁴ E. g. Barnes, J., *Sports and the Law in Canada* (1983) (now in a 2nd edition, 1988) and Weistart, J.C., and Lowell, C.H., *The Law of Sports* (1979) and 1985 Supplement.

⁵ E. g. Centre for Commercial Law and Applied Legal Research, Monash University, *Sport and the Law* (1985).

⁶ (1882) 8 Q.B.D. 534.

⁷ [1951] A.C. 850.

⁸ [1977] Q.B. 966.

II. *The Law of Sporting Groups*. Chapter 3, entitled *Corporate Structures*, explains the law relating to unincorporated associations and the legal problems that such associations can face. The processes and requirements of incorporation for sports organizations under the Companies Code and the various Associations Incorporation Acts are outlined as alternatives to continued existence as an unincorporated body. Strangely, reference is made to only some of the Associations Incorporation Acts. Lawyers and administrators could have been easily referred to the specific legislation in each Australian jurisdiction as well as to the helpful incorporation and administration manuals that have been produced.⁹

Chapter 4 examines the circumstances in which courts will assume jurisdiction to supervise the affairs of sports organizations. Lawyers will be familiar with the problems raised by the restrictive approach of *Cameron v. Hogan*.¹⁰ The various circumstances in which the case's operation are avoided are well considered, although a significant oversight is the failure to refer to Queensland,¹¹ South Australian¹² and Victorian¹³ legislation which effectively reverses *Cameron v. Hogan*¹⁴ for associations incorporated in those States.

The Conduct of Sporting Tribunals is the title of Chapter 5. It contains a thorough and valuable explanation of, *inter alia*, the applicable rules of natural justice. Given the importance of disciplinary tribunals in sport this chapter should prove popular.

III. *Liability for Sporting Injury or Damage*. This part contains six chapters and about one quarter of the text. It is an allocation of space that reflects the importance of injury litigation at the intersection of sport and law.

Chapter 6 considers the law of occupiers' liability as it applies to sports bodies. One can only sympathize with the author when he describes the chapter as having been 'almost torpedoed' by *Australian Safeway Stores Pty Ltd v. Zaluzna*¹⁵ which he discusses at length in the Addendum.

Chapter 7 continues with the theme of occupiers' liability and takes in vicarious liability and defences such as warnings and exemption clauses, *volenti non fit injuria* and contributory negligence. The various tort doctrines that may impose liability for harm occurring in the vicinity of sporting establishments, namely, negligence, nuisance (public and private) and *Rylands v. Fletcher*¹⁶ form Chapter 8.

The civil liability of the participant is dealt with in Chapter 9 which, along with Chapter 13 (criminal liability), must be the most interesting and controversial area of law and sport. For accidental contacts, the law has moved away from explaining absence of liability in terms of *volenti non fit injuria*. Preference is shown for ideas of modified standards of care, taking into account the risk-taking or hazardous nature of some sports. This is a trend which has recently been reinforced by the High Court of Australia outside the sporting context in *Cook v. Cook*.¹⁷ Again, this chapter should prove popular.

The expanding scope of liability of the supervisor is a matter of some concern in the community because of the possible negative impact on the supply of voluntary workers who are the mainstay of junior sport in particular. Coach and teacher responsibilities are examined in Chapter 10 and the recent and much publicized decision in *Watson v. Haines*¹⁸ is included in the Addendum. Consistent with wider trends in society, attention is focussed on the liability of providers of medical care.

The final chapter of this part concerns defamation and entails a summary of the relevant law built around, in the main, recent sports defamation cases. Given the relevance of reputation protection to media law and sports personality marketing, one wonders whether this chapter belongs later in the book where these topics appear.

⁹ E.g. Wright, R.P.D., *Manual for Incorporating Associations* (1986) and Vicsport, *Incorporation Guide* (1987 revision).

¹⁰ (1934) 51 C.L.R. 358.

¹¹ *Associations Incorporation Act* 1981 (Qld) s. 41.

¹² *Associations Incorporation Act* 1985 (S.A.) s. 40 and s. 61.

¹³ *Associations Incorporation Act* 1981 (Vic.) s. 14A.

¹⁴ (1934) 51 C.L.R. 358.

¹⁵ (1987) 162 C.L.R. 479.

¹⁶ (1868) L.R. 3 H.L. 330.

¹⁷ (1986) 162 C.L.R. 376.

¹⁸ (1987) Aust. Torts Reports 80-094.

IV. *Law and Order in the Sporting Arena*. Chapter 12 takes in the sporting crowd with emphasis on control of crowd behaviour (happily not the problem in Australia that is in the United Kingdom) including the rare but special situation of political demonstrations. Chapter 13 has been mentioned; apart from thuggery on the fields of play, the difficult issues of legality of the sport of boxing and problems of fraud in animal racing are touched upon.

V. *Sport and the Law of Business*. This part opens with a very useful chapter on the familiar common law doctrine against unreasonable restraints on trade. Also considered is the application of the *Trade Practices Act 1974* (Cth) which no doubt will come into greater prominence in commercial sports in the future.

The remaining three chapters encompass radio and television rights arrangements and other media issues, controls on advertising by the tobacco industry (although the recent revolutionary legislation in Victoria¹⁹ and South Australia²⁰ came after the book's publication), insurance, protection of certain merchandising and marketing rights and taxation (but not the averaging provisions²¹ which also came too late for more than the briefest mention). Obviously, these are very broad and complex areas of law and the author has done well to pluck from them that which may have special relevance to sport, often identified by past instances of litigation involving sport.

While this part of the book contains many matters of interest and value to lawyers and the sports community, it is disappointing that much has been overlooked. Growing attention is being directed toward contractual issues facing athletes. Yet player-agent relationships, enforcement of employment contracts (an issue well known in the United States²² and especially topical in Australia since *Buckenara v. Hawthorn Football Club Ltd*²³ and *Hawthorn Football Club Ltd v. Harding*,²⁴ although these two cases are too recent for inclusion in the book), and contractual provisions such as guarantee, option, performance and signing bonus clauses all escape proper attention. The special problems facing child athletes are not considered and in this regard it is disappointing that such an historically interesting case as *McLaughlin v. Darcy*²⁵ has been overlooked. One might have hoped that some examples of contracts in common use in the professional sports could have been appended. Also, a brief description of the history and organizational structure of the major professional sports such as Australian Rules football, cricket, golf, rugby league football and tennis would have been interesting and valuable.

VI. *Sports Law in the International Arena*. Three chapters deal with quite diverse topics: sex discrimination, doping (principally controls on the use of performance enhancing drugs by humans, but horse racing is considered as well) and international sports organizations and contacts (the structure and role of the Olympic Movement and the complex issue of sporting contacts with South Africa).

One wonders about the appropriateness of placing sex discrimination under this heading. Certainly some important international comparisons can and are made, but it is just as much a multi-national problem as is violent behaviour on the field of play, and sex discrimination is certainly not dealt with by the international community like doping. The doping chapter tends to leave the reader with the feeling that the author has not quite come to grips with all the issues. What problems are presented by differing international testing and enforcement regimes between sports? What controls exist in relation to the supply and movement of banned substances? In fairness, a detailed consideration of these matters may not be warranted in this book, although recent events suggest that they are concerns which will have to be addressed at some stage.²⁶

¹⁹ *Tobacco Act 1987* (Vic.).

²⁰ *Tobacco Products Control Amendment Act 1988* (S.A.).

²¹ *Income Tax Assessment Act 1936* (Cth) ss. 158B-158L.

²² E.g. *Philadelphia Baseball Club Ltd v. Lajoie* (1902) 51 A. 973.

²³ [1988] V.R. 39.

²⁴ [1988] V.R. 49.

²⁵ (1918) 18 S.R. (N.S.W.) 585.

²⁶ E.g. there have been allegations that an international and national trade exists in anabolic steroids (ABC *Four Corners* November 30, 1987). With respect to the need for regime harmonization, it has been reported that a rider in the 1988 Tour de France tested positive for the International Olympic Committee banned substance, probenidol. However, this substance was not banned by the cycling authorities in charge of the event.

Some general criticisms can be made. If the book aims to reach the sport administrator market, there is a fair chance that it will not be entirely satisfactory. At times the book will prove too technical and at others the style is neither as concise nor as clear as it might be. Secondly, there is no consistent effort to address the worthy question of whether sport as an activity needs or is producing a body of 'sports law'. Thirdly, endnotes at the conclusion of each chapter are used rather than footnotes. This is especially irritating as many notes are not confined to matters of reference but extend to amplification and digression. Fourthly, significant developments between the time of finalization of the text and printing necessitated the preparation of a substantial Addendum which is placed at the front of the book. The effect is awkward but probably unavoidable. Perhaps matters might have been improved if the Addendum had been placed at the end.

Notwithstanding these criticisms, *Sport and the Law, an Australian Perspective* is a significant and pioneering achievement for which the author is to be warmly congratulated. As a resource for lawyers involved with sport administration it will no doubt be a great asset. Even so, as with many things which are first in their field, it may prove to be a starting point rather than an exhaustive treatment.

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BOOKS RECEIVED

A Green Light by Ray Mooney (Penguin Books Australia, Victoria, 1988) ISBN 0 14 009964.

A Dictionary of Modern Legal Usage by Bryan A. Garner (Oxford University Press, Melbourne, 1987) ISBN 0 19 504377 4.

Australia's Seventh State edited by Peter Loveday and Peter McNab (North Australia Research Unit, Casuarina, N.T., 1988) ISBN 0 73150161 6.

Introduction to Property Law by G. Teh and B. Dwyer (Butterworths Pty Ltd, N.S.W., 1988) ISBN 0 409 49308 2.

Understanding Crime and Criminal Justice edited by Mark Findlay and Russell Hogg (Law Book Company, N.S.W., 1988) ISBN 0 455 20775 5.

Evidence and Advocacy by W.A.N. Wells (Butterworths Pty Limited, N.S.W., 1988) ISBN 0 409 49349 x.

Australian Independence by W.J. Hudson and M.P. Sharp (Melbourne University Press, Melbourne, 1988) ISBN 0 522 84360 3.

Administrative Justice: Some Necessary Reforms. Report of the Committee of the Justice — All Souls Review of Administrative Law in the United Kingdom (Clarendon Press, Oxford, 1988) ISBN 0 19 825587 X.

Criminal Defences by D. O'Connor and P.A. Fairall (Butterworths Pty Limited, N.S.W., 1988) ISBN 0 409 49276 0.

Australian Evidence by A.L.C. Ligertwood (Butterworths Pty Limited, N.S.W., 1988) ISBN 0 409 49356 Z Hard, 0 409 49328 7 Limp.

Judicial Ethics in Australia by the Hon. Mr Justice Thomas (Law Book Company, N.S.W., 1988) ISBN 0 455 20782 8.