

By e-mail to rrat.sen@aph.gov.au

Stephen Palethorpe
Secretary
Rural and Regional Affairs and Transport References Committee

Dear Mr Palethorpe,

Thank you for your email of 17 May inviting ANZSLA to make a submission to the inquiry into the practice of sports science in Australia. ANZSLA was delighted to have been given the opportunity to comment.

In response to your request, ANZSLA sought comments from its members and a submission is attached. The views in the submission are of an individual ANZSLA member and are not representative of ANZSLA as an organisation.

Yours sincerely,

Venetia Stewart
President

Annette Greenhow
Faculty of Law
Bond University
University Drive
ROBINA QLD 4220

30 May 2013

Committee Secretary
Senate Standing Committees on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

Submission – Inquiry into the Practice of Sports Science in Australia

Thank you for the opportunity to make a submission in response to the Terms of Reference outlined in your email to the Australian and New Zealand Sports Law Association (ANZSLA). I am a member of ANZSLA but make this submission in my personal and professional capacity. The views expressed in this submission do not represent the views or policies of ANZSLA.

Please find **enclosed** my submission for your consideration. Please contact me if you have any questions regarding this submission. I am willing to appear as a witness if required.

Yours faithfully

Annette Greenhow
Assistant Professor

Encl.

**Submission in Response to Terms of
Reference, Inquiry into the Practice of Sports
Science in Australia**

**Submitted by
Assistant Professor Annette Greenhow**

May 2013

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Introduction

The Rural and Regional Affairs and Transport Reference Committee has called for written submissions on matters involving the regulation and governance of the practice of sports science. Scientific and technological advances in sport have created new risks requiring specialised management, necessitating a review of regulatory options in managing those risks. This submission identifies the current regulatory environment for sports scientists operating at the elite level of professional sport. In particular, the submission addresses the role of the governing body in those sports where the governing body has the authority as regulator, and in a position of significant control and influence to alter or influence the behaviour of others.

This submission will:

- (a) respond to the Terms of Reference with a focus on issues involving regulation and governance in professional sport;
- (b) identify available regulatory tools at the disposal of regulators to achieve broadly identified outcomes to procure compliance or eliminate risks associated with poor regulatory choices; and
- (c) outline possibilities for regulatory reconfiguration to minimise potential risks identified by the Australian Crimes Commission.

The allegations made by the Australian Crimes Commission (ACC) in the February Report “Organised Crime and Drugs in Sport” (ACC Report) identified alleged doping and match-fixing practices involving elite athletes and focussed on the role of sports scientists who, in some cases, were seen as having orchestrated or condoned the use of or administration of prohibited substances. These allegations are the subject of further investigation by ASADA and awaiting final determination. However, the reaction from government, politicians, governing bodies, sports administrators and other key stakeholders following the release of the ACC Report is indicative of the significance of the issue, leading to the current inquiry. This is further supported by the release of the AIS Sports Scientists Sports Medicine Best Practice Principles on 29 May 2013, prior to the closing date for submissions under the current inquiry.

The central plank of this submission is the preservation and maintenance of the wellbeing of elite athletes. It is focused on the special vulnerability of some athletes who place trust and confidence in others to protect their interests, with the expectation of technically competent practices and compliance with the law. The influence of a sports scientist, as a trusted advisor, could establish a fiduciary relationship. Operating within a highly competitive environment, with economic, social and psychological drivers to achieve peak performance, opportunities may arise for the possible exploitation of this special vulnerability in the pursuit of success.

The submission will conclude that there is scope for the governing body, as a regulator with significant degrees of power and control, to introduce regulatory tools designed to ensure a transparent, robust and an effective regulatory and governance framework for the management of sports scientists. Internally, the governing body has the authority to either set the standard terms of consultancy agreements. Alternatively, it has the power to establish minimum requirements for contractors and consultants including a requirement that accredited sports scientists provide services to athletes, and establish a register of consultants and services provided. Externally, opportunities exist to partner with peak industry groups and accreditation authorities to settle on clear definitions of sports science, and develop industry-wide standards.

In order to avoid a Pavlovian response to the issues raised in the ACC Report and the on-going ASADA investigation, any reconfiguration of the current regulatory regime should be based on clearly articulated goals and regulatory outcomes, developed after a detailed analysis of the regulatory space, the actors within the regulatory space in positions of control and influence, and a thorough review of the range and combination of regulatory tools available for use.

TERMS OF REFERENCE

A.The Current Scope of Practice, Accreditation and Regulation Arrangements for sports scientists

The ACC Report identified instances of alleged doping and match fixing practices involving elite athletes and focussed on the role of sports scientists as having, in some cases, orchestrated or condoned the use of or administration of prohibited substances. The ACC Report suggests that there were problems with the current regulatory arrangements for sports scientists, particularly in terms of the degree of influence and control, and proximity to elite athletes, coupled with limited or no due diligence investigations into the qualifications or backgrounds of contractors and consultants.

Subsequent reports indicated a lack of clarity and confusion surrounding the definition of 'sports science', leading to confusion as to who could be classified as a sports scientist. Questions then arose as to the minimum tertiary and professional standards required for those being contracted by sporting clubs, leading to questions over due diligence and background enquiries regarding contractors and consultants.

A single accreditation regime for sports scientists had been established, but it did not appear that this was one widely regarded as a mandatory pre-condition for contract purposes. Accreditation is a form of authorisational and informational regulation and has been described as establishing a 'token of trust' providing the assurance of a minimum level of competency. It provides a system where individuals voluntarily seek to meet certain minimum entry requirements and on-going compliance with standards and codes of conduct. One reason for establishing an accreditation system is to uphold standards and maintain public confidence in particular activities. However, central to the value and success of an accreditation system is the credibility of the accrediting authority. The ultimate decision rests with those who use the services and acceptance of the intrinsic value of the token of trust.

Exercise and Sports Science Australia (ESSA) has an accreditation regime and describes itself as the peak professional body for exercise and sports science in Australia. It currently has over 3000 members and an established accreditation system requiring minimum qualifications, minimum practical experience, compliance with a code of conduct and ethics policy, and a mandatory continuing professional development program to maintain accreditation. It has a structured dispute resolution mechanism for complaints against its members, and international alliances with exercise and sports science associations. It appears to be the only accrediting authority in Australia for sports scientists.

TERMS OF REFERENCE

B.The Role of Boards and Management in the Oversight of Sports Scientists Inside Sporting Organisations

Boards and management play a significant role in the oversight of sports scientists. However, the governing body is in a dominant position with the capacity to establish or review procurement policies and disclosure regimes involving sports scientists and athletes. In terms of regulating sports scientists, the current regulatory arrangement appears to rest solely with the club, with little or no involvement from the governing body. This was identified in the ACC report and suggested a lack of oversight and governance on the part of the governing body. As administrator, organiser and regulator of the national competition, the governing body is in a position of power and influence both in a practical and legal sense and has at its disposal a range of regulatory tools available to address issues or risks that arise within its environment.

Current Regulatory Framework

It is useful to provide an outline of the regulatory framework within which professional sport operates in Australia. For the illustrative purposes, the regulatory regime in Australian Rules football will be examined.

Professional football operates under a self-regulated model. Self-regulation is a broad concept and is founded on a voluntary and consensual basis upon which an individual, firm or organisation approaches an activity or responds to an event within its domain. Government takes a largely non-interventionist approach to professional football's domain and leaves the substantive elements to the governing body, as self-regulator to design, implement, interpret and enforce rules relevant to its environment. This 'government at a distance' approach does not mean that government disappears altogether. In fact, some suggest that the biggest deterrent to regulatory reconfiguration is the threat of 'substantive self-regulation'; with government through legal regulation, standing ready to intervene and impose a more onerous and less benevolent form of regulatory design should self-regulation fail.

Governing bodies act as stewards of the public interest in the promotion of their sport. It is fair to assume that the public has an expectation that they will carry out these obligations in a technically competent manner and establish robust regulatory and governance regimes in carrying out their functions. As companies limited by guarantee, they are not-for-profit and organised in a way that requires them to align their objects with specified community objectives. Trust features prominently, and can also form the basis upon which successful

partnerships are formed between the governing body, government and industry to assist in pursuing community benefits. By freeing up the sector from prescriptive or burdensome regulatory regimes, with greater flexibility, the theory is that the sector is encouraged to innovate and diversify to bring about positive social change. This theory is founded on the assumption that appropriate checks and balances are in place, supported by a robust and transparent governance regime.

Organisational Structure

The governing bodies are separate legal entities, often incorporated as companies limited by guarantee under the *Corporations Act*. The governing body has the constitutional power and legal power to control the sport. By way of illustration, the AFL, operating through the Commission, has the power and authority to take and implement all decisions relating to all aspects of the game of Australian Rules football.

Regulatory Space

Regulatory scholars conceptualise regulation through a virtual prism – a cosmos known as ‘regulatory space’. Within the regulatory space of professional football and the regulation of sports science, it is possible to identify a constellation of actors who collectively occupy the space, influenced by a variety of factors, and holding varying degrees of power and influence. There are often interconnecting relationships, based on social or cultural norms, or more formal legal or economic relationships. These relationships are complex and involve actors holding different positions of power and influence that can change over time.

In professional football, the governing body is the dominant actor in the regulatory space and has the capacity to control and influence behaviour of others. Examples can be found in the control over funding, salaries, collective bargaining agreements and player contracts, and the development, implementation and enforcement of policies designed to promote the public interest in areas such as anti-doping, behavioural standards and codes of conduct. Clubs and licensed teams are also in significant positions of degree and control, but remain subject to the terms and conditions of licensing agreements granted by the governing body to participate in the relevant national competition, and funding allocations.

Regulatory Tools

Regulatory tools can be classified under a number of different categories including economic, transactional, authorisational, structural, informational and legal. Examples include forms of regulation that affect pricing, contracts, grants, licensing, registration and accreditation, to name a few. These tools can be used by all regulators in the regulatory arena, and can be combined to address the particular problem or risk under review. Through the licensing and franchising arrangements, the governing body uses authorisational regulatory tools to regulate the clubs. This establishes the legal obligations of the clubs to comply with the policies of the governing body in exchange for the right to participate in the competition. It

establishes fundamental terms and conditions that are binding on the clubs competing in the competition. In addition, the governing body has the right to determine the objective criteria for licences, and importantly, the standard upon which a club will be measured.

There is an opportunity for the governing body to reconfigure the current regulatory arrangements involving sports scientists, in consultation with key stakeholders, and design regulatory tools with broadly defined goals and objectives. Further details are outlined under Terms of Reference D.

TERMS OF REFERENCE

C. The duty of care of sports scientists to athletes, and the ethical obligations of sports scientists in relation to protecting and promoting the spirit of sport

Sports Scientist/Athlete Relationship

A threshold issue for consideration is to examine the nature of the relationship between the sports scientist and the athlete. The relationship will be established when the sports scientist undertakes the care of the athlete – whether driven by the athlete in seeking out advice, or through team or club organised services made available to athletes. The essential element in establishing the relationship is the provision of treatment or services to the athlete.

Skill and Care

The common law duty of care can be described as a single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment. This duty falls under the law of torts and is known as the tort of negligence. A component of this duty is to warn about material risks of physical injury inherent in the proposed treatment. A material risk is one which a reasonable person in the position of the athlete would be likely to attach significance, or a risk that was known or ought reasonably to be known to the practitioner that the particular athlete would be likely to attach significance in choosing whether or not to proceed with the proposed treatment. The policy underlying the imposition of the duty to warn is to equip the athlete with the information relevant to the choice. In medical negligence cases, the common law duty is ordinarily breached where the doctor has failed to exercise reasonable care and skill to warn a patient of a material risk of physical injury inherent in the proposed treatment.

In attributing legal responsibility, it is also necessary to consider the applicable civil liability legislation of the relevant jurisdiction, and consider whether the no-duty limitations for a ‘dangerous recreational activity’ apply. For example, there is no duty of care to warn of obvious risks when participating in a ‘dangerous recreational activity’ in New South Wales under the *Civil Liability Act 2002* (NSW). There is no such limitation in Victoria under the *Wrongs Act 1958* (Vic).

Fiduciary Duty

It is worth considering whether a sports scientist is in a fiduciary relationship with an athlete, triggering obligations not to act in conflict with the athlete’s interests. The law is prepared to recognise the existence of a fiduciary relationship even in circumstances where there is no direct contractual relationship. A fiduciary relationship can be established when the

practitioner provides advice and assistance to the athlete, underpinned by the athlete's trust and confidence in the practitioner. This duty of loyalty has been described as the 'core liability' requiring the fiduciary to suppress personal interests where they conflict with the interests of the beneficiary.

In the competitive environment of professional football, the ACC Report identified the increased role and influence of sports scientists. This creates a number of potential issues, including the possibility of competing loyalties and potential conflicts. The 'glamour' associated with being engaged by a professional football club can lead to what has been described as the 'fan syndrome'—when elements of subjectivity compromise professional judgment leading to potential conflicts of interest and a breach of fiduciary duty. As a trusted confidant and the 'most enthusiastic of fans', the possible risk is the distortion of professional judgment.

Ethical Obligations

In professions with a licensing, registration or accreditation system in place, a condition of membership is the requirement, by contract, to comply with ethical standards. Those standards reflect the specific attributes of the profession and align with community expectations. A member is required to adhere to those standards to maintain their on-going association with the industry group. A failure to adhere to the standards can result in disciplinary action and possible suspension. In many cases, membership is voluntary. However, there can be financial consequences in situations where membership, registration or accreditation is a pre-requisite to qualifying as being eligible to supply services. It is this pre-condition which carries significant weight and influence in regulating behaviour. For example, if the governing body and club required accreditation as a pre-requisite for the appointment of a sports scientist, it is most likely that the number of accredited practitioners would increase.

TERMS OF REFERENCE

D. Avenues for reform or enhanced regulation of the profession

Regulatory scholars advance a number of reasons justifying reconfiguration of a regulatory regime. One reason is market failure and consequential negative externalities. Another is to facilitate the promotion of public policies, or build and restore trust. In terms of the current issues, these reasons are legitimate to justify a reconfiguration to ensure the integrity of the sport is maintained.

One of the allegations levelled at clubs and governing bodies under the ACC Report was the lack of appropriate due diligence in vetting business arrangements. Presumably, this included the engagement of sports scientists and those who played a role by introducing athletes to performance-enhancing substances. Using this allegation as the platform for regulatory reconfiguration, there are a number of transactional and authorisational regulatory tools that can be designed to counter such allegations from arising in the future. These include:

- i. the development of industry-wide definitions and standards for the profession;
- ii. the recognition of an accreditation regime and review of procurement policies to establish this as an eligibility requirement for contractors and consultants;
- iii. the direct or indirect involvement of the governing body in the contracting process through the setting of standard term contracts, or establishing and maintaining a central register of contractors, detailing qualifications, accreditation, and treatments provided.

Enforcement Mechanisms

In a self-regulated environment, the above regulatory mechanisms require a commitment to genuine enforcement, regular review and transparent evaluation. The consequences of non-compliance can range from cancellation, suspension, disqualification or variation of conditions. In the reconfiguration of any regulated environment, it is obvious that the regulatory benefits be assessed in terms of regulatory burdens. Clearly, the benefits must outweigh the burdens. By simply pushing compliance obligations down through the various organisational levels will limit the effectiveness of any regulatory measure.

CONCLUDING REMARKS

There is scope for the governing body, as a regulator with significant degrees of power and control, to take the lead role and co-ordinate a reconfiguration of the regulatory arena to achieve a transparent, robust and effective regulatory framework for sports scientists in professional sport. There are legitimate reasons to reconfigure the regulation based on the ACC Report and the subsequent responses from key stakeholders. To avoid a Pavlovian response, any reconfiguration should be based on clearly articulated goals and regulatory outcomes and a thorough review of the range and combination of regulatory tools available for use. These need to be cost effective, and supported by appropriate enforcement and evaluative mechanisms.

BIBLIOGRAPHY

A. Articles/Books/Reports

Articles

De Zwart, Francesco and George Gilligan, 'Comparative Corporate Governance and Their Relevance to the Sporting Sector, (2008) Monash University, Department of Business Law & Taxation, Working Paper no. 16

Dietrich, Joachim, 'Duty of Care under the 'Civil Liability Acts' (2005) 13 *Torts Law Journal* 2

du Plessis, Jean Jacques, Anil Hargovan and Mirko Bagaric, 'The Meaning of Corporate Governance' In *Principles Of Contemporary Corporate Governance* (Cambridge University Press, 2nd Ed, 2011)

Flannigan, Robert, 'The Core Nature of Fiduciary Accountability' [2009] (3) *New Zealand Law Review* 399

Lessing, J, 'The Checks and Balances of Good Corporate Governance, 2009, *Corporate Governance eJournal* 16

Mitten, Matthew J, 'Emerging Legal Issues in Sports Medicine: A Synthesis, Summary and Analysis' (2002) 76 *St. John's Law Review*, 42-44

Mitten, Matthew J, 'Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice' (2005 – 2006) *Saint Louis University Law Journal* 211

Opie, Hayden, 'Australian Medico-legal Issues in Sport: The View from the Grandstand' (2002-2003) 13 *Marq. Sports L. Rev.* 113

Opie, Hayden, 'The Sport Administrator's Charter: *Agar v Hyde*' (2002) (12) *12 Seton Hall J. Sport L* 199

Paterson, James, 'Community Interest and Stakeholders Aplenty but to whom are the Duties owed? Directors' duties in the not-for-profit arena of the Australian Football Ltd, (2012) 30, *Companies and Securities Law Journal*, 420

Paterson, James, 'AFL club membership: A glorified stadium entry ticket, or a genuine ownership stake in the club? (2010) 28 *Companies and Securities Law Journal*, 507

Pearce, Jeremy and Lisa Thomas, 'National Sporting Organisations and Director Independence: Best Practice or a Response to Crisis?' (2011) 83 *Australian New Zealand Sports Law Commentator* 4

Turner, Paul, 'Regulation of professional sport in a changing broadcasting environment: Australian club and sport broadcaster perspectives (2012) (15) *Sport Management Review* 43–59

Westerman, Pauline, 'Who is Regulating the Self? Self-Regulation as Outsourced Rule Making', (2010)(4) *Legisprudence: International Journal for the Study of Legislation* 225

Windholz, E and Graeme Hodge, 'Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity', (2012) 38(2), *Monash University Law Review*, 212

Books

Austin, RP and IM Ramsay, *Ford's Principles of Corporations Law*, (LexisNexis 14thed, 2010)

Black, Julia, 'Law and Regulation' in Christine Parker et al (eds) *Regulating Law* (Oxford Scholarship Online, 2004).

Bruckner, Peter, Karim Khan, *Bruckner & Khan's Clinical Sports Medicine* (McGraw Hill, 4th ed, 2012)

Fishel, David, *The Book of the Board, Effective governance for non-profit organisations*, (The Federation Press, 2nd ed, 2008)

- Freiberg, Arie, *The Tools of Regulation*, (The Federation Press, 2010)
- Hancher, L, M Moran, 'Organizing Regulatory Space', in Robert Baldwin, Colin Scott and Christopher Hood, *A Reader on Regulation* (Oxford Scholarship Online, 2012)
- Healey, Deborah, *Sport and the Law*, (UNSW Press, 4th ed, 2010)
- Morgan, Bronwyn and Karen Yeung, *An Introduction to Law and Regulation, Text and Materials* (Cambridge University Press, 2007) 93.
- Opie, Hayden, 'Legal Requirements' in Maria Zuluaga et al (eds), *Sports Physiotherapy: Applied Science and Practice* (Churchill Livingstone, 1995)
- Parker, Christine, *The Open Corporation: Effective Self-regulation and Democracy*, (Cambridge University Press, 2002)
- Szymanski, Stefan, *The Comparative Economics of Sport* (Palgrave Macmillan, 2010)
- Thorpe, David et al, *Sports Law*, (Oxford University Press, 2009)

Reports

- Australia, Can Sport Be Bought? The Second Report on an Inquiry into Sports Funding and Administration, Australian Government Publishing Service, Canberra, 1990)
- Australian Bureau of Statistics, Perspectives on Sport, 4156.0.55.001, May 2009
- Australian Football League, Memorandum of Association (as at 2 November 2006).
- Australian Football League, Articles of Association (as at 2 November 2006)
- Australian Football League Annual Report 2011
- Australian Rugby Union Annual Report 2011
- Australian Sports Commission Annual Report 2012
- Australian Sports Commission, Independent Review of Swimming Report (2012)
- Australian Standard 8000-2003, Good Governance Principles, SAI Global, <http://www.saiglobal.com.ezp.lib.unimelb.edu.au/online/autologin.asp> (Australian Standards), Accessed 25 February 2013
- BHP Billiton Ltd, Annual Report 2011
- Crawford, David, AFL Administrative Structure Review – Findings (1993)
- Football Federation Australia Limited, Constitution, May 2007.(check date)
- Frontier Economics, The Economic Contribution of Sport to Australia
- Independent Soccer Review Committee (Chair: David Crawford), Report of the Independent Soccer Review Committee into the Structure, Governance and Management of Soccer in Australia (2003)
- Segal, Jillian, The Role of the CFO in Corporate Governance, ASIC, Financial Executives International Luncheon, Sydney, 13 May 2002.
- Woodward, Susan and Shelley Marshall, A Better Framework: Reforming Not-For-Profit Regulation, Centre For Corporate Law and Securities Regulation, University of Melbourne, 2004.

B Cases

- Agar v Hyde* (2000) 201 CLR 552
- Wallace v Kam* [2013] HCA 19

C Legislation

- Corporations Act* (Cth)

D Other

- Andrew Heathcote, 'Not Just a game', *Business Review Weekly* (Sydney), August 2 - 8 2012
- John Stensholt, 'Meet the Boardroom Players' *Australian Financial Review* (Sydney) 7 September 2012
- AFL Standard Player Contract
- AFL Collective Bargaining Agreement 2007- 2011