1. Indigenous Australia and Sport

The playing of games is one of the most intrinsically human things we can do. Games involve interaction with our fellow humans and provide an opportunity for us to socialise while enjoying the thrill and exhilaration of physical activity in the course of pitting ourselves against each other in contests of skill and/or athletic prowess.

Games are naturally derived from primordial aspects of human behaviour such as hunting (and combat). As stated by Ellis Cashmore, ‘the hunter-gatherer mode is central to our understanding of the origin of sports’.

Games have long featured in Australian indigenous society. This is particularly so with respect to the ball game played by the Wautherong people, ‘Marngrook’, a game similar to, and possibly linked to the development of Australian Rules football.

But when does the playing of games become sport?

* The Author would like to acknowledge the Wurundjeri people who are the Traditional Custodians of this Land and also pays his respects to the Elders both past and present of the Kulin Nation and extends those respects to other Indigenous Australians present.


‡ Cashmore, Ibid, 55.
Implicit in the modern understanding of the term 'sport', is the organised (as opposed to the ad hoc) playing of a game, of a physical nature, with a clear objective and rules, in which the outcome produces a winner and a loser.

By following this approach to the characterisation of modern 'sport', organisation is the central axis upon which the playing of games rests to materialise this activity as sport.

Sport plays an important role in all societies, especially Australia. The prominent role of sport in shaping modern Australian society is widely acknowledged in Australian sociological and historical literature. As stated by Richard Cashman, '[i]t has long been a cultural axiom that sport is central to the business of being Australian, that most (though not all) Australians are passionate about sport and that sport dominates the cultural and physical landscape'.

The importance of sport in Australian life was also recently acknowledged by the former Commonwealth Minister for the Arts and Sport, Senator the Hon. George Brandis S.C., when announcing increased funding for the operation of the Australian Sports Anti-Doping Authority in May 2007, when he succinctly stated, '[s]port is an important part of the Australian way of life and is integral to our culture'.

Additionally and amongst other consequences, sport can and does operate as a vehicle for social cohesion and mobility. As noted by Peter Kell:

Sport can provide alternate possibilities for earning an income – to make a break from the grinding poverty of the rural and isolated communities. It can provide a ticket out of the missions and institutions that contributed to Aboriginal dispossession and impoverishment.

The potential for the role which sport can play in terms of greater social equality has also been identified by former AFL player Gilbert McAdam, when addressing the topic of 'Sport and Reconciliation' he observed, '[t]he more aboriginal kids see their own people playing the more

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3 Richard Cashman, Sport in the National Imagination, (2002) 4. In his earlier writings, Cashman notes that '[o]ur culture of sport - the character of play, the behaviour of players and spectators, language, architecture and club identity - has become recognisably Australian, and its importance is generally agreed: most Australians would be surprised by the suggestion that sport was not a cornerstone of Australian life'. Richard Cashman, Paradise of Sport: The Rise of Organised Sport in Australia, (1995) 205.


interested they become’ and ‘[i]f you get a group of football-mad people together, whether they are black or white, you will find they come together despite their differences’.  

Perhaps though the potential for sport building a better community is best summed up in the 2006 Report to the Department of Immigration and Citizenship of the Human Rights and Equal Opportunity Commission:  

Sport can break down barriers in ways that other areas of society can struggle to match, by encouraging participation, integration and diversity. It also plays an important role in creating ‘social capital’ by developing connections, openness and respect between different individuals and groups. This can lead to better understanding, cooperation and social cohesion within communities.

Sport has also played a role in promoting a more unified Australia, especially in recent times, between non-indigenous and indigenous Australians. Cashman asserts that ‘aborigines have participated more readily in sporting culture than in any other form of Australian culture’, although other commentators such as Kell argue that such participation has not led to greater acceptance of indigenous peoples by mainstream Australia. However, the symbolism of Catherine Freeman lighting the Olympic cauldron at the opening ceremony at the Sydney 2000 Olympics and then in the women’s athletics winning the 400m race, put the social and political issue of indigenous reconciliation at the forefront of the hearts and minds of most Australians, as the entire nation and indeed the world, took pride in Freeman’s glorious achievement.

Through sport, other indigenous Australians such as Mark Ella (Rugby Union), Maurice Rioli, Michael Long and Adam Goodes (Australian Rules Football), Anthony Mundine (Boxing and Rugby League), Nova Peris-Kneebone (Hockey and Athletics) and Patrick Johnson (Athletics) have also contributed towards closing the gap between the racist Australia we have been, and the more liberal and tolerant Australia we have the potential to become. Only time will tell whether the symbolism of the sporting endeavours of Australia’s indigenous communities will eventually result in a more tangible and permanent social legacy, but what is worth noting is that if the collective Australian mindset is ultimately enlightened and transformed on the topic of aboriginal reconciliation, sport will have played a very large part in this paradigm shift.

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9 Kell, above n5, 42-43.
This paper will examine the organisational aspect of sport so far as it affects the participation of Indigenous Australians in sport and the role sports law can and should play in promoting social justice for indigenous peoples throughout Australia, not just in the sporting context, but also beyond in the broader community.

2. Social Justice – An Ongoing Struggle

Social justice has long been and continues to be an elusive commodity for most Indigenous Australians.

Although minor improvements have been made in recent years in some areas of Australian society, such as education for instance, Indigenous Australians remain the most unfairly disadvantaged group in our community, as is illustrated by the following statistical snapshot:11

- On average, indigenous people have a life expectancy of 18 years less than non-indigenous peoples;
- Twice as many indigenous infants die before their first birthday than non-indigenous infants;
- Access to and the standard of housing and health care for indigenous peoples, especially in remote areas, remains sub-standard;
- Indigenous people in employment earn approximately 40% less per week, than non-indigenous people; and
- Indigenous people are fifteen times more likely to be in prison than non-indigenous people.

This current plight affecting the indigenous community in Australia remains unacceptable and the push for a fairer and more just society for Indigenous Australians must continue, until all of these and other disadvantages have been eliminated.

Unfortunately, Australian indigenous people are not alone in their predicament. In her taxonomy, The Rights of Indigenous Peoples: International Instruments, Janet Chernela concludes that ‘indigenous peoples [internationally] are among the most vulnerable and poorest populations in the world (OIT/IL0 2003; AIUSA 2003)’.12

Sport and more specifically fair sport, supported by the rule of sports law, is a means by which we all as a nation can take the first of many steps towards achieving a more socially just Australia. *Fair* sport not only encompasses fair participation in sport, but also fair access to sport and sporting facilities.

By firmly entrenching norms of fairness and equality for all on and off the sports field, hopefully, these values will drift beyond sport and permeate the broader community resulting in greater social justice for Indigenous Australians.

3. **Sports Law – What is it?**

Academia has for some time now been engaged in earnest debate seeking an answer to the question “What is sports law?”. Positions in response to this hypothesis range from, that sports law is nothing more than an amalgam of existing areas of substantive law which are applied in a sporting context, to, sports law already exists as a separate field of specialised case and regulatory law in its own right.\(^{13}\)

Irrespective though of the universally unsettled resolution of the sports law debate, the fact remains, in the real world legal domain of the courts, the need to find a definitive answer to this question, has been surpassed by the need to provide legal solutions and/or just outcomes to an increasing number of sporting disputes, which have required judicial determination.

If anything, the sports law debate which undoubtedly is being undertaken with the best of intellectual intentions by all participants, has overlooked a more fundamental and important issue at stake and that is, regardless of the answer to the question, “What is sports law?”, the more pressing question which should be posed is, “What are sporting disputes and how are they best resolved?”.\(^{13}\)

At the heart of whatever sports law is supposed to be or not be is a sporting dispute, based upon sports-specific regulation. The real issue therefore is, what is a sporting dispute, what makes it different from other legal disputes and how should the law approach the resolution of sporting disputes. (Coincidentally, perhaps in the search for an answer to this latter question now posed, an answer to the former “What is sports law?” question, will also be discovered).

In broad terms, sporting disputes can be considered in two categories. Disputes concerning ‘external’ rights and those concerning the ‘internal’ rights of the respective aggrieved parties.

‘External’ sporting disputes for the purposes of this article, are those disputes connected in some way with the playing and operation of sport, where a party’s common law, equitable or statutory rights are adversely effected and that party has a right of re-dress through the traditional Court system. Such disputes falling within this category generally arise in the following areas:

- contract or tort (ie. personal injury, property damage, breach of contract, defamation, etc);
- intellectual property;
- trade practices and competition;
- criminal law;
- taxation;
- broadcasting and media; and
- other statutory based disputes (ie. discrimination, employment, etc).

‘Internal’ sporting disputes are those disputes which arise directly in the organisation of sport and are most often agitated between sporting organisations or bodies and their respective members, participants, officials and administrators and although not exclusively limited to, tend to encompass the following types of problems:

- doping infringements;
- eligibility;
- selection;
- rules infringements;
- conduct infringements;
- discrimination;
- results and outcomes;
- sponsorship;
- membership;
- internal management; and
- participant contractual disputes.

It is primarily, what are categorised above as ‘internal’ sporting disputes and the sports regulations to which these disputes are anchored, arising out of the contractual relationships
which exist between sports participants and sports organisations, which comprise what is now known as sports law.

The notion of a ‘fair’ contest is central to what we understand sport to be. Sports law now ensures that ‘fairness’ extends to all participants in sport on and off the field of play, through the development and application of regulations in the above areas and also in upholding these regulations through the determination of sporting disputes before various sports tribunals.

Regrettably though, it is sporting disputes which arise from issues of discrimination which have impacted most upon the participation of Indigenous Australians in sport.

4. The Importance of Sports Law in the Pursuit of Social Equality

As stated above, the primary role of sports law is to safeguard and facilitate the fair sporting contest. From a sports administrator’s perspective, one of the principal tasks of sport is its regulation, be it regulation governing the immediate sporting contest, or more broadly the conduct of and participation in the overall sporting activity. Sporting regulation, policies and rules are the machinery by which sport can be fairly organised and maintained. It is this corpus of private law which establishes the foundation for what is sports law, which in turn informs the nature of sporting disputes.

Not only is sports law important to ensure that the ‘fair go’ is sacrosanct to all participants in sport, but for Indigenous Australians even more is at stake, given the extent of the social and economic opportunities sport provides for those fortunate enough to excel in the sporting arena and also given sport’s potential to act as a catalyst for change in the normative behaviour of the wider community.

Most unfairness which arises in sport stems from how sport is organised. Without adequate sporting regulation and its enforcement (before sports tribunals) in the pursuit of good sports governance, fair sport remains vulnerable to the unscrupulous behaviour and conduct of individuals who promote their own personal agendas or position, ahead of those of other participants and the sport as a whole, often to gain an unfair personal advantage in the sporting contest.

Illustrative of this conduct is people who chose to dope (in breach of anti-doping regulations) and seek to place themselves at an unfair advantage ahead of the majority of their fellow
participants who choose not to cheat and those who prejudicially seek to exclude or subordinate others participation in sport on the ground of race.

Given the essentially ‘human’ character of sport as a natural and positive means of interaction between humans (as already addressed in part 1 above) while playing organised games (ie. sport), deliberate cheating and the exclusion or modification of a person’s participation in sporting activity, because of that person’s race or ethnic origin, is distinctly inhuman.

The tragic case of Pastor Sir Doug Nicholls exposes not only how poorly the sport of Australian football was once organised, but also provides an embarrassing reflection of what once was a deeply racist Australian society.\(^\text{14}\) Doug Nicholls was a champion South Australian footballer in the 1920s, who would later go on to play in the Victorian Football League (“VFL”) for Fitzroy and ultimately Victoria, in the 1930s. Sir Doug's rise to prominence in the community was not limited to his sporting feats and he was later to become Governor of the State of South Australia in 1977. However his rise to footballing stardom was interrupted in the 1920s, when he sought to play for the Carlton Football Club, in the VFL (which was the nation’s premier football competition before it evolved into the AFL), but was rejected by Carlton ‘because he smelled’.\(^\text{15}\)

Because racism of this kind had long been part of the normative make up of Australia, the issue of racial discrimination towards Indigenous Australians in sport was largely ignored throughout most of the twentieth century.

That all changed however one afternoon at Victoria Park in Melbourne in 1993, when indigenous footballer, Nicky Winmar, playing for St Kilda Football Club against Collingwood Football Club, at the end of the match lifted his team jumper and pointed to his skin in defiance of the racist taunts he had been receiving from the crowd at the match that afternoon.\(^\text{16}\) The moment was captured in the famous photograph of Winmar which has since been adopted as a metaphor for the abhorrence of racism in sport. As a result of Winmar’s proud and defiant stance, racism in sport was placed firmly on the table for discussion and demanded a response.\(^\text{17}\)

It was not until 1995 however, that a meaningful response was forthcoming from the AFL, which was the year it implemented its rule outlawing on-field racial and religious vilification.

\(^\text{15}\) Human Rights and Equal Opportunity Commission (Australia), above n7, 7.
\(^\text{16}\) Kell, above n5, 50-52.
In the meantime, two other incidents drew upon a growing public discomfort with the status quo and provoked the need for immediate reform of broader Australian attitudes towards racism in sport.

After winning both the 200m and 400m events at XV Commonwealth Games in Victoria, Canada, Catherine Freeman while completing a victory lap around the stadium, proudly carried both the Australian national flag and the Australian Aboriginal flag as a 'heartfelt gesture in recognition of both her community and her country', which regrettably drew a hostile reaction from team chef de mission, Arthur Tunstall, rebuking Freeman for carrying an 'unofficial' flag. Tunstall himself was then squarely rebuked by the then Prime Minister, The Hon. Paul Keating AC, who was drawn into the controversy which publicly ensued in Australia, following Tunstall's response to Freeman's gesture.18

Fittingly, it was on ANZAC day in 1995, during the traditional encounter between Essendon and Collingwood Football Clubs that the scales finally tipped to force an immediate response on the part of the AFL to prohibit racism in Australian football. During the match, Essendon’s Michael Long (an indigenous player and one of the most talented players then playing in the competition) was called a ‘black cunt’ or a ‘black bastard’ by Collingwood’s Damien Monkhurst. Following the match, a meditation between the players was arranged and the matter was said to have been satisfactorily resolved ‘in-house’. However, following the mediation, Long spoke out and stated he was not ‘satisfied’ with the outcome of the mediation. The AFL then arranged a further mediation, which resulted in Monkhurst issuing Long with a formal, public apology. Long then also called upon the AFL to institute new regulations which banned players from engaging in racial abuse.19

As a result of Long’s courageous stance against racism in his sport, the AFL implemented its racial and religious vilification rule, which carries the possibility of significant fines and match suspensions for players who repeatedly infringe. The rule states:20

No person subject to these rules shall act towards or speak to any other person in a manner, or engage in any other conduct which threatens, disparages, vilifies or insults another person (“the person vilified”) on the basis of that person’s race, religion, colour, descent or national or ethnic origin.

17 McNamara, above n14, 3.
18 Kell, above n5, 48.
19 McNamara, above n14, 4.
20 Australian Football League, Player Rules, Rule 30, (As at February 2007).
The justification for the rule was sharply identified in its broader social context, transcending its sporting purpose, by Long’s coach, Kevin Sheedy when at the time he observed, ‘[Michael Long] wants to clean it up for his race, the indigenous people of Australia … It’s not in the footy area really. It’s more a debate on how you want to live in Australia beyond 2000’.21

The AFL’s leadership in the sporting community in implementing its racial and religious vilification rule is to be commended. As a result, many other national and local sporting organisations have followed the AFL’s lead and introduced similar rules and policies. This is a good example of how sporting regulation (implemented through good sports organisation), or more globally, sports law, can make a difference, not just on the field of play, but also in the wider community.

Because of the important and all pervasive role sport plays in the Australian community, it intuitively follows that changes in the normative behaviour of people participating in sport, should filter back into the general community and act as a catalyst for change for the better.

While it is not suggested that sport has eliminated the blight of racism in the Australian community, or even on the nation’s sports fields,22 anecdotally it seems that the incidence of racism is decreasing in both spheres and that changes in sporting regulation (such as Rule 30 of the AFL Player Rules), may have played a role in this outcome. Likewise, it seems that sporting regulation addressing racism in sport, may also have played a role in what now seem to be increased levels of participation amongst Indigenous Australians in mainstream sport. Obviously both of these observations will be subject of future research and the results will no doubt indicate whether or not changes made to the rules of sport have brought and are bringing about improved social justice outcomes for Indigenous Australians on the sports field.

Sporting regulation addressing issues of race is not the only aspect of sports law which affects indigenous people.

Other aspects of sports law, such as rules or policies related to selection (in individual competitive events), together with on and off-field conduct and doping regulations, ensure that indigenous people cannot be singled out on the grounds of race and that they are treated equally in the sporting arena and on the same criteria as their fellow competitors, thereby reinforcing the ideal of sporting meritocracy.

21 McNamara, above n14, 1.
22 For instance, the dispute concerning an alleged racial slur made by South Sydney Rugby League player, Bryan Fletcher to Parramatta indigenous player, Dean Widders during an NRL match in 2005.
If sports law can ensure equality and justice on the sports field, then hopefully this emerging culture in sport will ignite positive change to broader aspects of community endeavour for the benefit of all Australians, resulting in greater social justice for our nation’s oldest inhabitants.

5. An Optimistic Future?

Fairness and social equality in sport is not simply achieved through exclusive adherence to sports law which seeks to uphold the fair and even contest on the field of play.

It also demands that indigenous people have every opportunity to get to the starting line as non-indigenous people. This is especially the case for those indigenous people living in remote areas. Social justice demands that Australia continues to provide and improve access to sport and sporting facilities for Indigenous Australians. Such access to sport benefits Indigenous Australians not just on an individual level, but also as a community.

Australian football is one sport where the future looks bright for Indigenous Australians, especially in the celebration of its 150th anniversary. Presently over ten per cent of the players registered in the AFL are indigenous and yet the indigenous community in Australia represents only two per cent of the overall national population. Additionally, although only 23 indigenous footballers played in the AFL/VFL up until 1980, 156 indigenous men have played at the elite level since that time. These are statistics of which all of Australia should be proud.

The importance of sport and its power and reach was recently remarked upon by Simon Barnes:

Sports matters because people care about it. Sports excites the passions, but far more importantly, it stirs the imagination. It produces heroes and villains, people we admire, people we identify with, people who become part of ourselves.

Because Australians care deeply about sport, change in sport can bring about broader social change. Certainly so far as racism is concerned, sport seems to have played some role in the improved changes in community attitude towards Indigenous Australians, which have started to occur in Australia over the past two decades. However, as a nation, we must not become complacent and must remain vigilant to ensure that the fairness of the sporting contest, both in terms of participation and play, remains in place. This fairness is guarded by what has now

24 Simon Barnes, ‘Compelling drama of two nations shows sport does matter’, The Times, 6 December 2007 at http://www.timesonline.co.uk/tol/sport/cricket/article3007175.ece (7 December 2007).
become, ‘the rule of sports law’ and in particular those sports regulations which outlaw racial vilification.

With better sports organisation through the adherence and promotion of sports law, resulting in fairer sporting outcomes for all participants, including Indigenous Australians, hopefully the fairness which is being achieved on the sports field, will also provoke greater social justice for Indigenous Australians in the general community.

If the non-indigenous Australian community can strive for equality and fairness for Indigenous Australians in the sporting world, then there is no excuse for Australians to resile from this stance in everyday life. It is not a huge leap of faith for non-indigenous Australians to take a ‘sporting approach’ to social justice for their indigenous brothers and sisters in all other aspects of community endeavour. To do so, will ensure that there are greater opportunities for social justice for Indigenous Australians and if there are, then we are all winning in what is really a much bigger and much more important game than sport itself.