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2015 ‘Play the Game’ conference, Aarhus, Denmark – the role of athletes in delivering the good governance of sport

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On behalf of UNI World Athletes – the global voice of the world’s professional athletes – I would like to thank you for the opportunity to speak to today’s conference on the critical subject of the governance of sport and, in particular, the role of the athletes in delivering good governance.

Established only in December 2014 after three years of close cooperation, the affiliated organisations of UNI World Athletes include FIFPro (the world footballers’ association), the International Rugby Players’ Association, the Federation of International Cricketers’ Associations, EU Athletes, the US National Basketball Players Association, the US National Football League Players Association, the National Hockey League Players Association of the United States and Canada, the Japanese Baseball Players Association and the Australian Athletes’ Alliance. Together, they constitute a collective of 85,000 professional athletes through more than 100 independent player associations in over 60 countries. They have a vital role to play in not only advancing the interests of their members, but also shaping the direction of their sports.

Introduction

If one looks at the priority governance is being given in the world of sport today, a case can be made that it is the most important issue that confronts the administration of professional sports and, therefore, those that compete in sport for a living.

I approach today's discussion from two perspectives: first, as a lawyer and player association official with some 20 years experience mostly at the global level; and, second, as a sports administrator from Australia, a nation which points to key governance reforms in all of its major professional sports as having been fundamental to the development of those sports on the field of play, commercially, professionally and at grass roots level. I know that governance reform is hard and faces the staunchest of resistance and critics. For example, the reform of Australian soccer a decade ago required the closing down of both the governing body and the professional league as well as the nation's move from the Oceania to Asia's confederation. As the player union leader involved in that transformation, the players adopted the philosophical position that the wellbeing of the game was a precondition to the wellbeing of the players. Accordingly, the players were obliged to fundamentally shape the governance and decision making of the game for the better. For, if they did not, the players would pay an unacceptable price in terms of their own careers and livelihoods.

That philosophical position seems equally relevant to many sports at the global level today.

Plainly, the athletes have a stake in, and role to play, in the deliverance of good governance in sport:

- the livelihoods and careers of athletes are fundamentally impacted by poor governance due to the non-payment of salaries, the unjust termination of player contracts, abuses such as third party ownership and threats such as racism, victimisation, bullying, harassment, cheating and corruption. These problems are acutely felt by athletes who are young, often minors, and pursuing a career which is intensely competitive, short term and precarious;
- athletes play a fundamental role in the generation of sport's wealth. Of FIFA's revenue of \$5.72 billion for the 2011 – 2014 cycle, \$4.83 billion was generated from the 2014 FIFA World Cup Brazil, a tournament involving 64 matches and 736 players. Prize money to the

countries totalled \$354m, about 7% of the revenue generated. The players' share, however, would be lucky to be 2% of that revenue; and

- research such as FIFPro's 'Don't Fix It!' player questionnaire shows that players place great importance in their own sense of integrity, as well as their duties to their families, team mates and sport. Yet most approaches by governing bodies to protecting the integrity of sport see athletes as the problem, not the solution.

It seems obvious that sport will only be well governed if it is run in partnership with the players, for the players represent a fundamental stakeholder that necessarily has to take an objective, long term and well informed view of their industry. They are professionally and emotionally engaged with their sport. Players are involved at all levels of the game and in all parts of the world. They have come through the development systems, and work for clubs and countries of all sizes and in all parts of the world.

However, that partnership is only possible if the governance of sporting bodies is accountable to the players as well as other key stakeholders.

Reforming the governance of sport – the starting point

The effectiveness of any reform effort requires it to address the causes of the governance failures. For too long, the significance society places on sport has been misused by major sporting bodies to justify privilege instead of duty. Vague notions such as the specificity or autonomy of sport, which have been adopted at the highest levels of government, including in the Treaty on the Functioning of the European Union and by the General Assembly of the United Nations, have been emphasised unconditionally. However, the autonomy of sport, as first developed as a notion within the European institutions, is conditional. It demands good governance, social dialogue and the protection and development of young people, especially through education. Further, it does not affect sport where it is an economic activity.

For the necessary governance reforms to occur, a broad societal acknowledgement is required: that, as sports are structured as cartels, they warrant not special treatment and protection but enhanced scrutiny and accountability. As a stakeholder whose livelihoods are

fundamentally affected by the current structure, the world's athletes have organised themselves globally through their major player associations to help finally deliver good governance to sport.

The central case of FIFA

The events at FIFA, including the arrests of key officials, continued concerns over human rights abuses in the construction of stadia for the 2022 FIFA World Cup to be held in Qatar and the pending departure of long-serving FIFA President Sepp Blatter, have prompted an international consensus on the need to reform one of sport's major global institutions. In his surprise announcement of 2 June 2015 that he would 'lay down' his mandate at a to-be-convened extraordinary congress, the now provisionally suspended Mr Blatter said: *"While I have a mandate from the membership of FIFA, I do not feel that I have a mandate from the entire world of football – the fans, the players, the clubs, the people who live, breathe and love football..."*

The longstanding failure of FIFA's own efforts to reform its governance needs to be borne in mind. The recommendations of the Independent Governance Committee (IGC), chaired by Professor Mark Pieth of the Basel Institute on Governance and made up of critical stakeholders, including the players through then FIFPro president Leonardo Grosso, were largely ignored.

Some key lessons from the IGC report of 22 April 2014 are particularly relevant. These include the roles played by the six FIFA confederations in defeating principal reforms, the uncertainty that continues to surround the awarding of the hosting rights for the 2018 and 2022 World Cups and how the reform process is to be driven if it is to succeed. Yet, the current reform process being chaired by Dr Francois Carrard consists of representatives of the six FIFA confederations. Not surprisingly, the role of the confederations and the member associations in the structure of FIFA was not raised as a fundamental matter in the preliminary recommendations of the so called FIFA reform committee of 20 October 2015. Indeed, the committee recommends that elections of FIFA's governing body continue to be determined by the member associations within the confederations.

The Australian experience

Australia is certainly not complacent when it comes to governance in sport. In recent years:

- the Australian Rugby Union reviewed its corporate governance in 2012 with former Sports Minister Mark Arbib;
- an independent Australian Rugby League Commission was established in 2012 as the new governing body of that sport;
- cricket's governance was reviewed in 2011 by leading corporate governance expert David Crawford and former Australian Football League Commissioner Colin Carter, also of the Boston Consulting Group. Mr Crawford is somewhat of a governance guru in Australian sport;
- Football Federation Australia and Australian football had its governance reviewed in December 2011 by the former Chair of the Australian Sports Commission, Warwick Smith, which followed a landmark review of 2003 led also by the same Mr Crawford;
- *'The Future of Sport in Australia'* report of 2009 by the Independent Sports Panel, also chaired by Mr Crawford, reviewed the very governance and structure of the sporting industry in Australia and the bodies that make it up; and
- the Australian Football League (AFL), which almost uniquely has not been under review, is widely regarded as having a 'best practice' governance model. The AFL has not reviewed its governance since the famous 'Crawford report' of August 1992.

Delivered at a time when the AFL was struggling to secure the sustainability of the expanded Victorian Football League/national competition, Mr Crawford, even though he was commissioned somewhat in response to club discontent, recommended a further wave of reform and the handing of all major decision-making power to the independent AFL Commission, the clear demarcation between the responsibility of the Board (the Commission) and management and clear accountability to the "owners" (the Clubs) who retained veto rights over those decisions which truly changed the game, such as contraction and expansion in the size of the AFL competition.

What is good governance for decision-making and accountability?

When one examines what is good governance, the role of the athlete is yet to be embraced, although it would be wrong to say it has not been considered.

Messrs Crawford and Carter reflected on the principles of good governance in shaping their recommendations in their December 2011 report, 'A Good Governance Structure for Australian Cricket'. The report reads:

"We believe that cricket's interests will be best served by adopting the governance structure now regarded as 'the best' throughout the world. This is an 'independent and well-skilled' Board that is clearly accountable to the owners and which doesn't confuse its own role with that of management.

"In many of our meetings, this was described as the 'AFL model', but this is a misunderstanding. Twenty years ago, the AFL simply adopted what is now seen as the best governance model which is the same design as that of BHP Billiton and a not-for-profit like Mission Australia. These Boards are designed, as far as possible, to remove 'conflicts of interest' and attract relevant skills...

"The Board's main role is to agree strategy and appoint and oversee highly competent management on behalf of the owners. The owners appoint the Board as their representatives and are able to dismiss the Board if necessary. A good Board will be comprised of Directors who understand that their primary duty is to act on behalf of all owners and not sectional interests. A good Board will be of workable size and its members will be chosen for their complimentary skills and their capacity to contribute. A good Board understands that its role is different to that of management. The Board's delegations to management will be clear and those major decisions that are retained by the Board will also be clear. Similarly, the Board's accountability to the owners will be understood and those few matters that must be referred to the owners for approval will be clearly defined."

This raises the fundamental question: who are the owners? This is essential to effective accountability. According to the report:

“...an effective governance structure will clearly define to whom the Board is accountable, and how that accountability will be exercised. Put another way, it is to agree who can dismiss the Board. Unless a Board can be removed, it will lack the necessary accountability.

“The common view among cricket’s leaders is that the States are in fact the shareholders, and we agree. They are the custodians of the game on behalf of the wider community. As such, the States should continue to hold the right to appoint the members of the Board and, if circumstances require, remove them.”

The rights of the owners (the States) are then clearly defined: (1) the right to appoint the Board; (2) the right to dismiss a Director or the whole Board; and (3) approval for those very few decisions that fundamentally change the business, such as to add or delete teams or major competitions. The vesting of these rights in the owners delivers accountability.

Good governance and the athletes

Who are their rightful owners of international sporting federations?

Given the role of the players in the generation of FIFA’s wealth as well as in the promotion and development of the game, it seems that the players have a significant claim to ownership. This is particularly so given they, unlike the clubs and the leagues, do not have a dominant position within the governance of the national football associations. The ‘Sports Governance Observer 2015’, as prepared by Dr Arnout Geeraert and published by ‘Play the Game’ on the eve of this conference, states that, *“athletes are put in a complicated position regarding control. Even though (International Sporting Federations) ISFs are increasingly regulating their profession, athletes seem to lack direct control options...”*

The report of Messrs Crawford and Carter into Australian cricket looked into the specific position of the professional cricketers.

“In our interviews, we asked several times whether the professional players should be regarded as a shareholder? (Their stake in the game is obvious and also different to that of the many amateur participants in the game). Our view is that this is not preferable. Players will want their share of cricket’s income and will need to negotiate this share alongside game development priorities, the fans (admittance prices) and the need for facilities. As co-owners

and with a position on the Board, they would have an uncomfortable conflict of interest. Their long term position is best served working in partnership with CA rather than being viewed as a co-owner along with the States.”

The issue of the distribution of revenue is an issue that affects all stakeholders, such as clubs and member associations, and does not seem, given the essential role of the players in the generation of revenue, to justify excluding them from ‘ownership’.

Importantly, however, Messrs Crawford and Carter call for the sport of cricket to be run in partnership with the players. Like all owners, the players would continue to have a vested interest in the maximisation of revenue for the benefit of all, an essential component of any partnership, and will be dedicated to on-field success as well as the continued growth and development of the game.

Indeed, the key challenges facing the integrity of sport – match fixing, doping, financial sustainability – require the engagement and the commitment of the athletes in order to be effectively addressed.

In the words of leading US attorney Jeffrey Kessler, who has extensive experience in representing the NFLPA and the NBPA:

“What history has taught us is that there’s no inconsistency between having a fair system for players and having a healthy sport. Quite the contrary. What we’ve seen is that when sports have given players more freedom and have compensated them better the entire sport has grown on the revenue side. The players and the clubs can work together to build the sport much more easily in a fair system than in an unfair system.”

It seems that an effective integrity program requires the athletes to agree to regulations, undertake education, compromise on important legal rights such as privacy and to have trust in the process. Reporting approaches to fix games or undertaking testing for drugs can only occur if the athletes have trust and confidence in the established measures that will safeguard their security, health and privacy.

Financially, athletes agree to labour market restraints that arguably and, indeed, probably violate their legal rights. Yet, most sports exclude the athletes from the strategic

decision-making processes required to maximise revenue for the benefit of all stakeholders, including the players.

What incentive is there for a sporting body, especially one with the power of an international sporting federation, to work in partnership with the players if it lacks any political accountability to them?

Unfortunately, some sporting bodies seem to go out of their way to reject the role of player representatives despite the long history of players' associations acting responsibly and being key partners in addressing some of sports most fundamental challenges. The response by WADA to the initial moves to establish UNI World Athletes is a case in point. It is reported that then WADA Chairman John Fahey stated that, *"giving such associations credibility and recognition would only encourage them to develop into a more prominent position than he believed they should"*, that he *"in no way saw their role as being representative of sportsmen and women"* and that he has *"urged all members not to give them any oxygen"*.

As a consequence, athletes are again resorting to the law and industrial action to install much needed accountability into the governance of sport, to make it clear that sport is not above the rule of law and that the voice and interests of the athletes must be heeded. The current landmark proceedings involving German speed skater Claudia Pechstein and the Court of Arbitration for Sport (CAS), together with the recent complaints to the European Commission by Dutch ice skaters Mark Tuitert and Niels Kerstholt and FIFPro, suggest an increasing tendency on the part of athletes to reinstall the law as a central player in the good governance of sport. Women professional footballers have recently been on strike in Australia and Italy to achieve better pay and conditions, and US players led a class action in Canada last year over FIFA's decision to play the 2015 FIFA Women's World Cup on artificial pitches.

IOC Vice President, Australia's John Coates, who is the President of both the CAS and the International Council of Arbitration for Sport, the body responsible for financing and administering the CAS, has moved quickly to involve athlete commissions in some minor changes to the CAS in response to Claudia Pechstein's case. Nevertheless, this will not introduce the necessary levels of accountability. The Charter of the Athletes' Commission of the Australian Olympic Committee ("AOC"), for example, provides that the commission's role is to

“advise” the executive of the AOC and obliges each member of the commission not to act in the best interests of the athletes or even sport, but “solely in the best interests of the Committee (i.e. the AOC) and its members as a whole” (emphasis added).

In contrast, let us look at what occurs when a strategic partnership with the players is embraced, as recommended by Messrs Carter and Crawford in their review of Australian cricket. In the midst of two major lock-outs in the National Football League and the National Basketball Association, Major League Baseball and the MLB Players Association signed a new Collective Bargaining Agreement through to 2016, guaranteeing 21 years of labour peace in the sport that has a history of the most bitter player relations affected by industrial action by both sides. On 26 November 2011, Jon Pessah writing in *The New York Times* commented on how three key players in American baseball – former MLB Commissioner Bud Selig, former MLBPA Executive Director Don Fehr (now the President of UNI World Athletes) and New York Yankees owner the late George Steinbrenner – forged two decades of labour peace.

“Just how far did this partnership propel baseball? Consider these two elements in the sport’s newest agreement,” Pessah writes.

“One calls for the realignment of the game into two 15-team leagues, an idea first put on the table by the union more than 10 years ago. Not only did management adopt an idea developed by the players, it gave the union the credit it deserved. Gone is the acrimony that held the game back for so long...” (emphasis added)

On the issue of the luxury tax and revenue sharing, which holds down the payroll of even the Yankees but rewards and encourages the smaller clubs to increase revenues (and payroll) by fielding better teams, “the union got what it wanted and management got what it wanted – on the same issue.” (emphasis added)

In 2014, the benefits of the partnership were revealed in the critical area of integrity with a collectively bargained anti-doping regime. In the words of the late Michael Weiner, the former Executive Director of the MLBPA:

“The players are determined to do all they can to continually improve the sport’s Joint Drug Agreement. Players want a program that is tough, scientifically accurate, backed by the

latest proven scientific methods, and fair; I believe these changes firmly support the players' desires while protecting their legal rights."

Conclusion

With the establishment of UNI World Athletes and the development of the player association movement throughout the world and across sport, the opportunity exists for sport through its international federations to work in partnership with the athletes to install good governance and address many of the fundamental challenges sport faces today. However, that partnership must be underpinned by genuine accountability to the athletes. The requisite level of accountability can only be achieved if the athletes, through their associations, are recognised as critical stakeholders within the governance of sporting bodies and that good governance, social dialogue and respect for the rule of law become the principal means by which any notion of the autonomy of sports can be recognised.