

FIELD OF PLAY DECISIONS AND FAIRNESS: LESSONS FROM SIRENGATE

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The general reluctance of the Court of Arbitration for Sport and local courts to review field of play decisions except in limited circumstances raises questions about fairness and access to natural justice. This article seeks to reconcile our understanding of fairness in sporting field of play decisions with the jurisprudence which has developed in recent years. In doing so this article takes a detailed look at the legal issues arising from the 2006 Sirengate football match between St Kilda and Fremantle and the ongoing implications for the AFL.

I Introduction

In over 100 years of competition the Australian Football League ('AFL')¹ has only overturned the result of three matches. Whilst the first two of these matches occurred prior to 1910 when the league was still in its infancy, the last, involving a game between the Fremantle Football Club ('Fremantle') and the St Kilda Football Club ('St Kilda'), occurred in 2006 in the context of a rigid and sophisticated framework of rules which governed the regulation of AFL matches.²

The original result in the 2006 match, which would later come to be known as 'Sirengate', was overturned after the AFL Commission decided to review the 'field of play' decision as to when the match had been completed.

The ability to have field of play decisions reviewed has garnered controversy over the years, often as a result of the perceived unfairness which results from a refusal to review such decisions. This article looks at the reviewability of field of play decisions from a legal perspective and, in examining the decision made in Sirengate, explores whether the legally correct outcome in the review of field of play decisions always reconciles with what might be considered the fair outcome.

Part II of this article begins by looking at what is generally accepted as constituting a field of play decision before Part III considers to what extent field

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¹ Prior to 1990 the Australian Football League was known as the Victorian Football League.

² Michelangelo Rucci, 'Drawn Out; Commission to Decide on Saints-Freo Result', *The Advertiser* (Adelaide), 2 May 2006, 83.

of play decisions may be reviewed through the interaction of private contracts, the jurisdiction of the Court of Arbitration for Sport ('CAS') and courts of general jurisdiction. Part IV then uses this foundation to look specifically at the facts of Sirengate and draws conclusions about whether, as a matter of law, the AFL Commission made the correct decision in overturning the result of the match. Part V then examines not only how these findings reconcile with our understanding of fairness but, perhaps more importantly, what organisations using private contractual relations to govern their sport, such as the AFL, can do to provide for fairer outcomes. Part VI concludes that ultimately, if a sporting organisation or league wishes to have the ability to have its field of play decisions reviewed and overturned on the basis of fairness, it is up to that individual sporting organisation or league to ensure that their governing rules are structured and drafted in a way that provides for the procedures which will allow for such a review to occur.

II Field of play decisions

Every sport has rules or laws which set out and govern how that sport is to be played and officiated. While the application of these rules is sometimes straightforward, umpiring in many sports is by its very nature subjective and judgemental.³ The application and interpretation of the rules which govern sporting competitions are what are known as 'field of play' decisions.

Examples of field of play decisions are wide and varied. They range from a 'purely sporting decision', such as determining whether a goal has been kicked or a foul committed, to more technical applications, such as procedures used to appeal decisions.⁴ The determination of whether or not swimming 'shark suits' are legal,⁵ a punch in boxing was below the belt⁶ and a race walker has committed an infraction⁷ are all examples of decisions which have been held by the CAS to be field of play decisions.

The CAS jurisprudence also supports the notion that a field of play decision is not just limited to the merits of a decision but also the procedures leading

³ R Jake Locklear, 'Arbitration in Olympic Disputes: Should Arbitrators Review the Field of Play Decisions of Officials?' (2003) 4 *Texas Review of Entertainment and Sports Law* 199.

⁴ Graeme Mew and Mary Jane Richards, 'More Than Just a Game: Resolving Disputes in Modern Sport' (Paper presented at the Fourteenth Commonwealth Law Conference, London, September 2005) <<http://www.arbitrationroundtable.com/mew/Alternative%20Dispute%20Resolution%20in%20the%20Sports%20Field%20-%20G%20Mew.pdf>>.

⁵ Advisory Opinion, Australian Olympic Committee, CAS 2000 K267 (1 May 2000) <<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/267.pdf>>.

⁶ *Mendy v Association Interantionale de Boxing Amateur* CAS OG 96/006 (1 August 1996) <<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/JO%2096-006.pdf>> ('*Mendy Case*').

⁷ *Segura v International Amateur Athletic Federation*, CAS OG 00/013 (30 September 2000) <<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/OG%2000-013.pdf>> ('*Segura's Case*').

to that decision.⁸ This procedural aspect is particularly important in decisions such as the *NAOC Case* where an original decision is subjected to an appeal under the rules of the sport. To this extent, a field of play decision can in some circumstances encompass more than just the rules of the sport which are within the discretion of the field umpire.

While the type of field of play decisions can vary, what they all have in common is that they require an umpire or official to interpret and then apply certain rules within a limited period of time. This inevitably leads to some errors in the application, or disagreement as to the interpretation, of those rules. However, whether or not such errors can be corrected will come down to a question of whether or not the decision is open to review, either under the rules of the sport or more generally at law.

III Review of field of play decisions

As the laws which govern sports are commonly a matter of private contract, whether or not a field of play decision is reviewable will generally be determined by the specific provisions of the relevant rules and regulations which govern the sport.⁹ These rules and regulations will invariably provide the relevant sporting organisation with the exclusive jurisdiction to determine matters in respect of the sporting contests it oversees.¹⁰ However, as sporting organisations are not courts of law, they are only empowered to act to the extent that they follow the rules and procedures laid out in their rules and regulations. Given the monopolistic nature of many sporting organisations, from the athletes' perspective there is often no real freedom of contract and as such sporting organisations must be careful to ensure their rules accord with principles of natural justice.¹¹ Any examination of whether or not a field of play decision can be reviewed must therefore start with an examination of the relevant rules of the sport and the appeal procedures (if any) open to an athlete or team.

An example of a rule which provides for very limited review of the field of play decisions is section 9.12 of the Bylaws of the United States Olympic

⁸ *Netherlands Antilles Olympic Committee v International Association of Amateur Athletics Federations & United States Olympic Committee*, CAS 2008/A/1641 (6 March 2009), [85]–[89] <<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1641.pdf>> ('*NAOC Case*').

⁹ In respect of disputes which go before the Court of Arbitration for Sport, this general law position is supported by the Court of Arbitration for Sport's procedural rules, which provide that the Panel shall decide the dispute according to the applicable regulation and the rules of law chosen by the parties: *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes* (1 March 2013), r 58 <[http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20(en).pdf)>.

¹⁰ Jan Paulsson, 'Arbitration of International Sports Disputes' (1993) 9 *Arbitration International* 359, 361.

¹¹ Sharad Rao, 'Rules of Natural Justice as Applied in Sports' (2006) 32 *Commonwealth Law Bulletin* 247, 248.

Committee.¹² This section provides that the final decision of a referee during a competition regarding a field of play decision is not reviewable unless the decision was made outside of the referee's authority or was the product of fraud, corruption, partiality or other misconduct of the referee. As we shall see below, this accords with the general jurisprudence of the CAS.

By contrast, the International Association of Athletics Federations' ('IAAF') competition rules do provide for limited review of decisions to an internal body known as the Jury of Appeal.¹³ However, pursuant to rule 146.7 any decision of the Jury of Appeal (or the referee if no appeal is made) is final and there is no further right to appeal to the CAS.¹⁴

In the *NAOC Case*, which concerned the disqualification of Churandy Martina from the men's 200 metres final at the 2008 Beijing Olympics, the existence of rule 146.7, combined with the CAS doctrine described below, meant that the decision to disqualify Martina was not reviewable.¹⁵

This does not mean that courts do not have jurisdiction to hear disputes on field of play decisions, rather the rules of the sport may limit the extent to which the court can review the decision and specifically exclude a review of the merits of the decision.¹⁶ Where the rules of the sport are silent on the reviewability of field of play decisions, any review will depend upon the powers of the courts to undertake such a review.

A growing number of sporting organisations, in particular Olympic sports, have granted jurisdiction to the CAS to rule on disputes within their sport and as such the jurisprudence of the CAS is relevant to the availability of any review. The leading case of the CAS on field of play decisions is *Yang Tae Young v Federation Internationale de Gymnastique* ('FIG').¹⁷ In *Yang's Case* there was an error made in the calculation of Yang Tae Young's starting value for his parallel bar routine in the men's individual gymnastics artistic all-round event final at the 2004 Athens Olympics. The relevant rules required that any appeal be dealt with only within competition and not after. Yang's protest was determined to have occurred after the competition had been completed. The CAS panel felt that:

An absolute refusal to recognize such a [field of play] decision as justiciable ... would have a defensible purpose and philosophy.

¹² *Bylaws of The United States Olympic Committee* (8 March 2013) <<http://www.teamusa.org/Footer/Legal/Governance-Documents.aspx>>.

¹³ International Association of Athletics Federations, *Competition Rules* (2012–2013), r 146 <<http://www.iaaf.org/about-iaaf/documents/rules-regulations#rules>>.

¹⁴ *Ibid.*

¹⁵ *NAOC Case*, [90].

¹⁶ *Mendy Case*, [12].

¹⁷ CAS 2004/A/704 (21 October 2004) ('*Yang's Case*').

It would recognize that there are areas of human activity which elude the grasp of the law, and where the solution to disputes is better found, if at all, by agreement. It would contribute to finality. It would uphold, critically, the authority of the umpire, judge or referee, whose power to control competition, already eroded by the growing use of technology such as video replays, would be fatally undermined if every decision taken could be judicially reviewed.¹⁸

On this basis the CAS will only interfere with the autonomy of an official's decision if that decision is tainted by fraud, arbitrariness or corruption, otherwise, although it may have jurisdiction, it will abstain as a matter of policy from exercising that jurisdiction.¹⁹ What is required is more than just the fact that a decision is wrong or is a decision that no sensible person could have reached, there must be evidence, which generally must be direct evidence, of bad faith.²⁰ A finding of bad faith will require evidence to be shown of preference for, or prejudice against, a particular team or individual.²¹ In *Segura's Case*, corruption was given as one example of behaviour which would likely result in a finding of bad faith.

In *Yang's Case*, even though the FIG admitted that an error was made, the fact that the error was not made in bad faith ultimately meant it was not reviewable. Therefore, in the absence of some form of bad faith, an error on its own is not a sufficient ground for overturning a field of play decision. This doctrine is well established in the CAS and there are numerous cases supporting these principles, although some refer to the test using different terminology such as 'arbitrary', 'malicious intent' and 'breach of duty'.²² More recently, at the 2012 London Olympics the CAS confirmed that it would only review field of play decisions in circumstances where the decision has been made in bad faith or arbitrarily.²³

The rationale which underlies this policy is that sport cannot be continuously interrupted by athletes, coaches and team administrators appealing unfavourable decisions to outside decision makers.²⁴ The fact that umpires will make mistakes

¹⁸ Ibid [3.13].

¹⁹ Ibid [3.17].

²⁰ *Korean Olympic Committee v International Skating Union*, CAS OG 02/007 (23 February 2002), [17] <<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/OG%2002-007.pdf>> ('*Korean Case*').

²¹ Ibid.

²² See *Mendy Case*; *Segura Case*; *Korean Case*; *NAOC Case*; *Finnish Ski Association & Aino-Kaisa Saarinen v International Ski Federation*, CAS 2010/A/2090 (7 February 2011) <<http://www.tas-cas.org/d2wfiles/document/4546/5048/0/Award20209020INTERNET.pdf>>.

²³ *Swedish National Olympic Committee & Swedish Triathlon Federation v International Triathlon Union*, CAS OG 12/10 (11 August 2012) <http://juris.prod.advomatic.com/files/free_pdfs/cas_2012.og_12.10_snoc_v_itu.pdf>.

²⁴ Mew and Richards, above n 4.

is part of sport and a risk that players must accept. In a case involving the disqualification of a Korean ice skater the CAS stated:

Every participant in a sport in which referees have to make decisions about events on the field of play must accept that the referee sees an incident from a particular position, and makes his decision on the basis of what he or she sees. Sometimes mistakes are made by referees, as they are by players. That is an inevitable fact of life and one that all participants in sporting events must accept.²⁵

This conforms with the natural expectation of participants, spectators and the general public that at the completion of a sporting contest the identity of the winner should be known.²⁶ While this places a high burden on an athlete seeking to have a field of play decision reviewed, if the burden were any lower the 'flood-gates' would be opened and any disgruntled athlete would be able to seek a review of a field of play decision.²⁷

An example of where the burden in proving bad faith would likely have been met is the judging of the pairs figure skating at the 2002 Salt Lake City Olympics where the French judge, Marie Reine Le Gougne, was allegedly pressured into voting for the Russian pair of Anton Sikharulidze and Yelena Berezhnaya.²⁸ In anticipation of lodging an appeal against the awarding of the gold medals to the Russian pair, the Canadian Olympic Committee, whose pair of David Pelletier and Jamie Salé had originally been awarded the silver medals, made a successful application to the CAS to ensure potential evidence was preserved by requiring the judges to remain in Salt Lake City.²⁹ While the CAS ruled that the judges should remain in Salt Lake City, the case avoided going any further when the International Skating Union decided to also award gold medals to the Canadian pair. While no evidence was ever brought to establish corruption and therefore bad faith,³⁰ the fact that the French judge admitted to being pressured to cast her vote for the Russian pair would likely have satisfied the CAS that there was at least some evidence of prejudice against the Canadian pair which would have entitled the CAS to award gold medals to the Canadian pair.

In this respect the CAS has been said to favour a quasi-common law approach where review is allowed; however, there is a strong and inflexible precedent for not overturning field of play decisions.³¹

²⁵ *Korean Case*, [12].

²⁶ *Yang's Case*, [3.7].

²⁷ *Korean Case*, [17].

²⁸ Selena Roberts, 'Canadian Skaters Awarded Share of Olympic Gold; French Judge Suspended, Her Scoring Thrown Out' *The New York Times* (New York), 16 February 2002, 1.

²⁹ *Canadian Olympic Association v International Skating Union* CAS OG 02/004 (14 February 2002) <<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/OG%2002-004.pdf>>.

³⁰ This is the example used in *Segura's Case* to demonstrate that a field of play decision would have been reviewable.

³¹ Locklear, above n 3, 222.

The same broad principles which apply to a sport which has deferred jurisdiction over its disputes to the CAS also apply to those which rely on the ordinary courts. For sports that do not defer to the CAS the principles of privity of contract will again be central to governing the legal relationship. In these circumstances there is a similar reluctance on the part of the courts to interfere with the determinations of domestic sporting organisations and their tribunals. As Tadgell JA stated in *Australian Football League v Carlton Football Club Ltd*:

the courts have been prepared to recognise that there are some kinds of dispute that are much better decided by non-lawyers or people who have a special knowledge of or expertise in the matters giving rise to the dispute than a lawyer is likely to have ... [t]hat is certainly not to say that such an organisation may treat itself as above the law: it is merely to acknowledge that the courts will not discourage private organisations from ordering their affair within acceptable limits.³²

Decisions which are not within 'acceptable limits' are those which are not made in good faith, are the product of bias or other dishonesty, or are not made in accordance with the principles of natural justice.³³ While natural justice is clearly important, the flexibility inherent in the principle of natural justice means that courts will take into account other important considerations such as the need for swift decision making.

The position in Australia is consistent with the reluctance of other jurisdictions, such as the United States and the United Kingdom, to substitute decisions of the court for those of an umpire or official involved in the sport.³⁴ In the United States, where attempts have been made to link the liability of umpires to field of play decisions, the courts have continued to decline to intervene in the decisions of umpires.³⁵ In this respect, United States courts are unwilling to 'merge the stadium bench and the judicial bench'.³⁶ Courts in the United Kingdom have recognised that where rules set up by a domestic body give that body discretion, it must be implied that such discretion must be exercised fairly.³⁷

Where disputes have made it to court, often the process and result can be unsatisfactory. As Nafziger points out, the drawn out litigation which followed Matt Lindland's exclusion from the United States Greco-Roman wrestling team for the 2000 Sydney Olympics shows the need to make it clear that the merits of

³² [1998] 2 VR 546, 549.

³³ Ibid 550.

³⁴ James A R Nafziger, 'Dispute Resolution in the Arena of International Sports Competition' (2002) 50 *The American Journal of Comparative Law* 161, 171.

³⁵ See *Shapiro v Queens County Jockey Club* (1945) 53 NYS 2d 135; *Georgia High School Association v Waddell* (1981) 285 SE 2d 7.

³⁶ *Snow v New Hampshire Interscholastic Athletic Association* (1982) 449 A 2d 1223, 1224.

³⁷ *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, 190.

a judgement call in a sporting competition and the rules of that competition more generally should not be arbitrated or litigated.³⁸ Although Lindland ultimately won a silver medal at the Olympics, it took thirteen stages of arbitration and litigation for him to secure his place on the US Olympic Team.³⁹

In Sirengate the decision as to when the match finished was ultimately dealt with in house by the AFL Commission and was not subjected to any legal review. However, it is worthwhile questioning whether the result would have been different had St Kilda decided to appeal the Commission's decision to the courts.

IV Sirengate

Facts

On 30 April 2006, Fremantle and St Kilda played a match against each other at Aurora Stadium in Launceston, Tasmania. In what was to become one of the most controversial finishes in an AFL match, Fremantle was leading by one point in the final quarter when the siren sounded to end the game. However, the field umpire in control of the play, Mathew Nicholls, did not hear the siren and allowed play to continue. St Kilda's Steven Baker then kicked a point to tie the scores before the siren was sounded for a second time and the game ended by the umpire.⁴⁰

It appears that the other two field umpires, Hayden Kennedy and Michael Vozzo, also did not hear the siren although it has been claimed that the emergency umpire situated on the boundary, Brett Rosebury, did hear the siren.⁴¹

Immediately after the match the AFL officially declared the match to be a draw and betting agencies paid out on this basis. Fremantle protested this decision to the AFL as they believed that they 'deserved to win' and the AFL subsequently handed the matter over to the AFL Commission for it to decide the final result.⁴²

Ultimately the Commission decided to award the win to Fremantle and this was not challenged by St Kilda, who did not wish to put the focus on any legal action.⁴³

³⁸ Nafziger, above n 34, 172.

³⁹ Ibid.

⁴⁰ St Kilda originally scrambled through a point before the siren sounded again, however, the point was not counted and instead St Kilda's Steven Baker was awarded a free kick. Baker subsequently missed the shot at goal after the siren, scoring only a point to tie the game.

⁴¹ Mark Stevens, 'We Want our Four Points Back; Dockers Protest Final Siren Farce' *Herald Sun* (Melbourne), 1 May 2006, 32.

⁴² Cameron Schwab and Michelangelo Rucci, 'Drawn Out; Commission to Decide on Saints-Freo Result' *The Advertiser* (Adelaide), 2 May 2006, 83.

⁴³ Martin Blake, 'A Serious Case of Justice Served' *The Age* (Melbourne), 4 May 2006, 4.

Relevant Contractual Provisions

As identified earlier in Part III of this article, most sports are played in accordance with a set of rules which govern the participants, teams and league through the principles of contract law. In the AFL there are a number of documents which bind together the players, teams and the league. In respect of the Sirengate dispute the relevant ‘contracts’ were the AFL Laws of Australian Rules Football 2006 (‘Rules’) and the AFL Regulations (‘Regulations’) which the AFL’s teams (and its players) are bound to by virtue of a set of contracts and licences.

The relevant rules in respect of when a match finishes were rule 10.4.1 (which was mirrored by regulation 12.4) and rule 10.4.2. These rules provided:

- 10.4.1 End of Quarter: The Timekeepers shall sound the siren to signal the end of a quarter until a field umpire acknowledges that the siren has been heard and brings play to an end.
- 10.4.2 Siren Heard by Field Umpire: Play in each quarter shall come to an end when any one of the field umpires hears the siren.

While there was no express dispute resolution mechanism in the Rules or Regulations, at the time of Sirengate, rule 1.4 (which was also mirrored by regulation 1.5) provided:

- (a) Save and except for a matter which comes before the Tribunal or Appeal Board, the Commission shall interpret all provisions contained in the Memorandum and Articles of Association, the AFL Regulations, the AFL Player Rules and any other rules or regulations passed from time to time by the Commission and any interpretation of a provision by the Commission shall be final and binding on every person.
- (b) The Commission may from time to time amend these Rules or make such further or other Rules as it in its absolute discretion deems fit.

Legal Analysis

For Fremantle’s appeal to be successful it needed to rely on the Commission’s power to interpret the Rules as being sufficient to overturn the determination of the umpire that the match had ended when the umpire had heard the siren in accordance with rule 10.4.2.

The power of interpretation would seem to extend only to circumstances where the interpretation of the Rules was unclear. However, in these circumstances

the Rules seem unequivocally clear and as such there would be no ambiguity requiring clarification from the Commission.

Under the Rules a quarter clearly comes to an end only when the umpire acknowledges that they have heard the siren and brings play to an end. While there is an obligation on the timekeeper to continue to sound the siren until the umpire does bring the quarter to an end, the fact that the timekeeper made an error in not continuing to sound the siren does not mean that there was a breach of rule 10.4.2 by the umpires to the extent that the game did not finish in accordance with the Rules. In these circumstances, while the Commission had the jurisdiction to review and interpret the Rules, it appears that as there was no ambiguity requiring interpretation it acted outside its power in reviewing the merits of the original decision.

In making its decision, the Commission's Chairman, the late Ron Evans, stated that the 'match concluded immediately after the siren was first sounded in the final quarter' and that the 'effect of this interpretation is that the Fremantle Football Club won the match'.⁴⁴ In doing so the Commission placed supreme importance on rule 10.4.1 over rule 10.4.2 on the basis that had the timekeepers correctly continued to sound the siren the match would have ended at the appropriate time. This finding relies on an assumption that if the timekeeper had continued to sound the siren the umpires would have heard the siren shortly thereafter and would have ended the match before Steven Baker had kicked a point. However, it is not possible to definitively know when the umpires may have heard the siren and ended the match. As *Yang's Case* and the case of Brazilian marathon runner Vanderlei De Lima⁴⁵ show, making assumptions about how a sporting contest may have played out had something else occurred is one of the reasons why field of play decisions are not generally reviewable.

If the reasoning of the Commission is accepted, if a field umpire missed an obvious decision to award a free kick in front of goals the result should be retrospectively changed on the assumption that had the umpire made the correct decision to award the free kick, the player would have kicked the goal. The AFL tried to distinguish between these two cases on the basis that a disputed umpiring decision would be on field and a decision under rules 10.4.1 and 10.4.2 would be off it. However, such a distinction is clearly artificial under the established doctrine of field of play decisions and the fact that the relevant rules relating to the end of a match were contained in the official rules that govern the playing of the sport.

⁴⁴ Ron Evans and Martin Blake, 'A Serious Case of Justice Served' *The Age* (Melbourne), 4 May 2006, 4.

⁴⁵ *Vanderlei De Lima & Brazilian Olympic Committee v International Association of Athletics Federations* CAS 2004/A/727 (8 September 2005) <<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/727.pdf>> ('*De Lima's Case*').

On the above analysis, it seems highly likely that, had St Kilda challenged the Commission's decision, the courts would have ruled that the Commission acted outside its powers and incorrectly overturned the original decision of the field umpire.⁴⁶

Despite this, it appears that the majority of people felt that the right decision from a moral, sportsmanship and fairness perspective was arrived at by the AFL and that justice had been seen to be done.⁴⁷ This public perception is presumably one of the reasons why St Kilda did not pursue a legal challenge.

How does the law therefore reconcile that the generally accepted fair decision may not accord with the legally correct decision? Should courts be able to intervene in order to ensure that a fair decision is reached not just when there is corruption or fraud but more generally when there is a mistake?

V Achieving fairness

Review of decisions for fairness

As explained in Part III, courts will only interfere in field of play decisions where there is some evidence of fraud, arbitrariness or corruption and not simply because a decision seems to be unfair. In cases such as Sirengate, where there appears to have been a fundamental mistake in the application of the rules which did not require specialised interpretation from an umpire, some may suggest that there should be some form of limited review. However, any attempt to expand the limited ability of courts to review field of play decisions to include fairness would bring with it a number of issues.

One of the underlying reasons why courts do not interfere with field of play decisions is the need for quick and conclusive decisions over certainty. There may be many decisions throughout the course of a sporting contest which could be seen, to varying degrees, to be unfair. To stop and review every decision which someone thought was unfair would be impracticable. Fairness therefore needs to be seen in terms of the need to have a swift decision being made as well as the right decision. As Rao points out:

‘Field of Play’ decisions reflect a compromise between a correct and just decision on the one hand, and a swift decision in order to have no interruption of the game on the other. The fairness principle underlies this compromise.⁴⁸

⁴⁶ Any legal challenge would have had to be heard by Australian courts as the Australian Football League has not deferred its jurisdiction to hear disputes to the Court of Arbitration for Sport.

⁴⁷ Blake, above n 43, 4.

⁴⁸ Rao, above n 11, 251.

As many sports, including the AFL, increasingly turn to betting as a source of revenue there could also be significant legal implications in not having in place proper rules and procedures to conclusively and quickly decide the result of a match. The AFL's decision to initially declare the Sirengate match a draw resulted in some punters who had backed Fremantle lodging legal proceedings against the AFL.⁴⁹

Fairness is also subjective: what is fair from one party's perspective may not be fair from the perspective of the other party. For example, when Pakistani players were penalised by the umpires for ball tampering in a 2006 cricket test match between England and Pakistan, the Pakistani players decided not to return to the field of play. Under the Laws of Cricket this left the umpires with little choice but to declare a forfeit and award England the win. Law 21(10) of the Laws of Cricket provides that once the umpires have agreed with the scorers the correctness of the scores at the conclusion of the match the result cannot be changed.⁵⁰ Despite this clear rule the International Cricket Committee ('ICC') decided to overturn the decision and declare the match a draw. The decision by the ICC to act without legal power to do so was unpopular with many, including the London based Marylebone Cricket Club.⁵¹ This example draws parallels with Sirengate except that the ultimate decision reached by the ICC did not garner wide spread approval.

It is also clear from the CAS jurisprudence in *Yang's Case* and *De Lima's Case* that to retrospectively change an umpire's decision, no matter how fair it may be, may itself lead to a further unfairness in that other athletes had continued to compete on the basis of the umpire's original decision. Any power to review a decision would therefore have to be limited to circumstances where there could be absolute certainty that the correction of the original decision would produce the alternative outcome. Charlish has argued that in these circumstances flexibility is required so that where, but for an error of an umpire or official, the outcome of the sporting contest was certain.⁵²

Such an approach may have been appropriate in the case of Shin Lam, a South Korean fencer, who lost her women's épée semi-final at the 2012 London Olympics following a timing error. In circumstances not dissimilar to Sirengate, Lam's opponent was able to score the winning point when the clock was incorrectly set from zero to one second.⁵³ Although there would have been

⁴⁹ Fiona Hudson, 'Sued over Sirengate', *Sunday Times* (Perth) 6 July 2008, 7.

⁵⁰ Marylebone Cricket Club, *The Laws of Cricket* (2000 Code; 4th ed, 2010) <<http://www.lords.org/mcc/laws-of-cricket/>>.

⁵¹ Tim Lane, 'Rules Just Made to be Broken?; Cricket' *Sunday Age* (Melbourne), 2 November 2008, 5.

⁵² Peter Charlish, 'Marathon Mugging: Athens 2004' (2006) 6 *International Sports Law Review* 87, 95.

⁵³ John Paul Ford Rojas, 'Tearful Fencer in Sit-Down Protest' *Daily Telegraph* (London), 31 July 2012, 1.

certainty that Shin would have won had the correct time been recorded, Lam and the Korean Olympic Committee decided against appealing to the CAS, presumably on the basis of the strong precedent against reviewing field of play decisions.

A review in these circumstances would arguably promote fairness and natural justice and ensure that such principles are not neglected in favour of certainty and consistency.⁵⁴ However, limiting reviews to only certain decisions depending upon the time in the sporting contest when that decision was made would in itself present some inherent unfairness.

This is not to say that fairness cannot be a means for overturning decisions, however, as the framework for governing sports is based on contract, the power to do so must clearly derive from the rules of the sport itself, not from the courts. Charlsh's notion of fairness could be incorporated into the relevant rules of a sport by setting out the specific circumstances in which fairness may justify the review of a decision.

Vieweg suggests that in order to ensure a 'fair' decision is reached the rules governing a sport need to ensure three things are present: technical support for umpires and referees (such as video replays); external control through a superior jury; and the ability of athletes and teams to protest a decision.⁵⁵ As such, in order to achieve a level of fairness, it is important for the rules of a sporting organisation to clearly contemplate these items. Arguably, the AFL's Rules do not adequately provide for these requirements.

AFL action post Sirengate

Other than the recent introduction of a limited ability for umpires (not players) to review a scoring decision,⁵⁶ it does not appear that the AFL has taken any substantive steps since Sirengate to deal with how field of play decisions may be dealt with more generally or to address the specific problems that may have existed with rules 10.4.1 and 10.4.2.

Rules 10.4.1 and 10.4.2 have been amended to now allow the emergency umpire, as well as the field umpires, to call to an end of a quarter when they hear the siren.⁵⁷ This was no doubt introduced after it was revealed that the emergency

⁵⁴ Charlsh, above n 52, 95.

⁵⁵ Klaus Vieweg, 'Sports Rules and 'Field of Play' Decisions – Can the Fairness Principle be Applied?' in Martina Ghosh-Schellhorn and Roland Martini (eds), *Jouer Selon Les Regles Du Jeu – Playing by the Rules of the Game – Spielen Nach Den Spielregeln: Transcultural Anglophone Studies* (LIT Verlag, 2008) 93, 106.

⁵⁶ Peter Kogoy, 'Video Umpire to Make Debut with the Giants', *The Australian* (Australia), 24 March 2012, 39.

⁵⁷ See *Laws of Australian Football* (2013), rr 10.4.1–10.4.2 <<http://www.afl.com.au/staticfile/AFL%20Tenant/AFL/Static%20Files/Laws-of-Australian-Football-2013.pdf>>.

umpire in Sirengate heard the siren but was unable to take any action. However, it does not appear that the Rules have been amended to address the wider problem exposed by Sirengate: the risk that an umpire may not hear the siren. Furthermore, there is no provision under the Rules if the siren does not work at all.

There is no reason why the AFL cannot amend its Rules to provide that play in a quarter shall come to an end when the timekeepers sound the siren. This would eliminate the need for the umpire to hear the siren. It is suggested that rules 10.4.1 and 10.4.2 could be amended to provide one rule as follows:

10.4.1 End of Quarter: The Timekeepers shall sound the siren to signal the end of a quarter and play in each quarter shall come to an end when the siren is sounded by the Timekeepers.

Rule 10.4.3 could be renumbered as Rule 10.4.2 and continue to provide that the umpire shall be responsible for signalling that they have heard the siren and deciding if any free kick or mark is awarded prior to the siren being sounded. However, the actual end of the quarter shall be when the siren sounds. To deal with any instances where the umpire may not have heard the siren before a mark was awarded, it is suggested that video reviews could be used. The use of video review in this limited circumstance would not stop the flow of the game as the match would have paused in any event for a break at the end of the quarter or match.

The use of video reviews is becoming more accepted in sports as a means by which a field of play decision can be reviewed relatively quickly and without interrupting the flow of the sport. Even decisions which are largely seen as subjective, such as a leg before wicket decision in cricket, can potentially be reviewed through the use of video replays. As noted above, the AFL itself has recently introduced video reviews to assist umpires make decisions in respect of scoring. The use of such reviews is commonplace in American sport. For example, in the National Basketball Association video replays are used to assist with a range of decisions, including to help determine if a field goal was made with no time remaining on the clock at the end of a period. In these situations the officials are able to review the video to determine whether time on the game clock expired before the ball left the shooter's hand.⁵⁸ It is suggested that the AFL could extend the use of video reviews to include an ability to review when a quarter ends. This could be extended to cover not just situations where the umpire does not hear the siren, but in situations where a siren fails to sound or, as occurred in a 2012 match between Gold Coast and Fremantle, the timekeepers fail to properly record time.⁵⁹

⁵⁸ See r 13, *Official Rules of the National Basketball Association (2012–2013)* <<http://mediacentral.nba.com/media/mediacentral/Official-NBA-Rule-Book.pdf>>.

⁵⁹ Jesse Hogan, 'Time Officials in Gun after Late Clock-up', *The Age* (Melbourne), 7 May 2012, 26.

As well as amending rule 10.4 and providing for video review, it may also be beneficial for the AFL to provide in its Regulations that field of play decisions may, in limited circumstances, be appealed to the AFL Commission who shall have the final say. This could be similar to the procedure set out in the IAAF's competition rules. Prior to implementing any such regulation the AFL would need to carefully consider circumstances in which a field of play decision could be appealed, who could bring the appeal and the time period within which the appeal could be made. However, the inclusion of such a regulation would at least clarify that the AFL Commission has the ability to review a field of play decision in limited circumstances. This would allow it to make future field of play decisions without fear of legal reprisal.

VI Conclusion

The Sirengate saga and the CAS cases such as *Yang's Case* and *De Lima's Case* highlight the inherent unfairness which arises because of the general reluctance on the part of the CAS and the courts to review field of play decisions except in limited circumstances of fraud, arbitrariness and corruption. This reluctance recognises that sports themselves are best placed, through private contract, to provide for rules and procedures which allow decisions to be reviewed in accordance with the principles of natural justice.

It also acknowledges that sports need be careful about allowing field of play decisions to be reviewed as people have a general expectation that sports will not be continuously interrupted by athletes, coaches and team administrators who disagree with decisions. The fact that umpires do occasionally make mistakes is part of the appeal and drama of sport and a risk all participants accept.

While placing the onus back on the sports can result in situations where the legally correct decision does not necessarily reconcile with the right decision, it is ultimately a matter for the sports to determine the circumstances in which they want to allow field of play decisions to be reviewed. Although sports are easily accessible to the public they largely remain private organisations, the courts are reluctant to interfere in their affairs.

Ultimately if a sporting organisation or league, such as the AFL, wants field of play decisions to be reviewed and overturned on the basis of fairness it is up to that organisation to ensure that its governing rules provide procedures to allow a review to occur. It may also need to invest in the resources, such as video review technology, to enable such reviews.

