MONASH University

WHY THE BRAIN MATTERS:

REGULATING CONCUSSION IN AUSTRALIAN SPORT

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A thesis submitted for the degree of Doctor of Philosophy

at Monash University in 2018

Faculty of Law

Abstract

Concerns about the harm associated with sport-related concussion (SRC) have received widespread attention in Australia in recent years following a series of highly publicised legal proceedings in the United States (US). The brain is the epicentre of human behaviour and the mismanagement of SRC, as a brain injury, has the potential to cause serious and long-term harm. The mismanagement of SRC was a serious concern in the US, so the question of whether similar concerns could arise in the Australian context became the subject of an early inquiry.

This thesis critically examines the regulation of Australian sport with a specific focus on the regulatory capacity and motivations of actors who have key roles to play in promoting public policies designed to minimise the harm associated with SRC. The application of Hancher and Moran's regulatory space metaphor identifies the range of actors (state and non-state) who have the resources available to influence and alter behaviour and assists in unravelling the interdependent nature of relationships between actors within the regulatory space of sport, in general, and SRC in particular.

This thesis evaluates the adequacy and effectiveness of the current regulatory systems and undertakes an analysis of the tensions, conflicts and struggles that have arisen within sport, a domain that is a hybrid collection of public and private interests. With emerging scientific research suggesting that the risks of SRC are potentially serious and long-lasting, coupled with already declining rates of Australian's participating in sport, these issues have broad public policy, governance and social implications.

Until recently, the interplay between sport, regulation and SRC has been an under-developed area of scholarly enquiry in Australia. This thesis examines, through a qualitative empirical review and case study analysis, sport and regulation with a central focus on the 'disruption' caused by discoveries associated with SRC as a sporting injury in Australia.

This analysis contributes to the academic literature by identifying gaps in the current regulatory systems and advances reasons in support of the state, as a 'neutral umpire' and guardian of the public health, having a greater role to play in regulating SRC.

The central finding is that regulating to manage and minimise the harm associated with SRC in Australia lies in the hands of both state and non-state actors taking collective action within a polycentric regulatory system. Four supplemental findings support this proposition.

- First, the problem of SRC is a public health concern, justifying why it should be managed differently to other sporting injuries.
- Second, the regulatory space of SRC in Australia is dominated by the sport's governing body as a non-state actor under a private and voluntary self-regulatory system, relying on the law of contract and shared norms and values in establishing legitimacy.
- Third, there are inherent weaknesses in current self-regulatory approaches, undermining the effectiveness of achieving the regulatory objective of promoting public policies to minimise the harm of SRC.
- Lastly, that state actors can play a more significant and facilitative role in regulating SRC.

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Some of the material addressed in this thesis has been published as follows:

- Annette Greenhow, 'A Knock to the Head' (2018) *Law Institute of Victoria*
- Annette Greenhow and Lisa Gowthorp, 'Head Injuries and Concussion Issues' in Nico Schulenkorf and Stephen Frawley (eds), *Critical Issues in Global Sport Management* (Routledge, 2016) 93
- Lisa Gowthorp, Annette Greenhow and Danny O'Brien, 'An Interdisciplinary Approach in Identifying the Legitimate Regulator of Anti-Doping in Sport: The Case of the Australian Football League' (2016) 19 *Sport Management Review* 48
- Annette Greenhow and Dr Jocelyn East, 'Custodians of the Game: Ethical Considerations for Football Governing Bodies in Regulating Concussion Management' (2014) *Neuroethics* 65
- Annette Greenhow, 'Concussion in Court: A Review of the 2013 NHL and NFL Concussion Litigation', (2013) *Australian and New Zealand Sports Law Association Commentator* 89
- Annette Greenhow, 'The NFL Concussion Settlement and Injury Compensation Funds' (2013) *Sports Medicine Australia*
- Annette Greenhow, 'Concussion Policies of the National Football League: Revisiting the 'Sport Administrator's Charter' and the Role of the Australian Football League and National Rugby League in Concussion Management' (2011) 13 *Sports Law eJournal* 1

Signature: 

Annette Louise Greenhow Date: 14 November 2018

PHD CURRENCY

This thesis is current as at 31 December 2017.

Acknowledgements

The research for this project formally began in 2012, but its origin can be traced to an earlier time when I read an article from the United States warning of the possible dangers facing participants in sport arising from concussive injuries. The article focused on the National Football League and the sport of American football. My first reaction was as a parent; that surely our children were entering a safe sporting system and a system where administrators had the health and safety of participants as their number one priority, regardless of the level of participation. My second reaction was as a lawyer and the legal vulnerabilities associated with these workplace-related concussion concerns.

I wish to thank the Australian sports lawyer who first advised me in 2011 that concussion was not a problem in Australian sport; that I was, in effect, wasting my time. I didn't accept that advice and am grateful that I trusted my instinct to dig a little deeper. When I started taking a closer look, I realised that early concerns were raised, but those concerns had not made their way into the public domain to heighten public awareness.

The phrase 'It takes a village' has a tribal connotation and is particularly apt in describing the experience of bringing this project together. The phrase has even been used to explain the interdisciplinarity of concussion in sport, thanks to Professor Alison Doherty. There were many village people who helped me along the way. Special mention and thanks expressed to my supervisors, Emeritus Professor Arie Freiberg and Professor Christine Parker, who both supported me while I navigated my way through the PhD jungle. They excelled in the role and helped me untangle the many vines of random thoughts that made up those early chapter drafts.

My neighbours, Professor Rick Bigwood, red pen in hand, patiently explained to me the importance of the 'em-dash' and my supportive Bond Law colleagues who helped me find the balance. Many friends gave generously of their time and understanding, particularly M'lady Kim Weinert for quoting Churchill and the 2000-words a day writing goal, Dr Lisa Gowthorp for the regular check-ups and Dr Jocelyn (Joce) East for valuable Canadian contributions.

Josephine Brown and Sonia McMillian provided copyediting and proofreading services in accordance with the Monash University ‘Guidelines for Editing Research Theses’. Jane Hobler provided expert formatting skills to help master the table of contents.

To my loving big sisters and in-laws who all provided the essential village care to help raise this project. Of course, the co-chief of my tribe, my husband, Brett, who offered unwavering support; who diligently arranged our family life; who never complained about school lunches, drop-offs, pickups, dinners etc. during the many years I was lost in the jungle. And to the shining, loving, lights of my life—my daughters Mia and Ana. I dedicate this thesis to both of you in the hope that an optimally safe sporting system is available to you and for yours, and that my small contribution might help achieve that goal.

Contents

Tables and Diagrams

List of Abbreviations

AAN	American Academy of Neurology
ABS	Australia Bureau of Statistics
ACG	Australian Commonwealth Government
AFL	Australian Football League
AFLPA	Australian Football League Players' Association
AIS	Australian Institute of Sport
ALRC	Australian Law Reform Commission
AOC	Australian Olympic Committee
AOSSM	American Orthopaedic Society of Sports Medicine
ARU	Australian Rugby Union
ARLC	Australian Rugby League Commission
ASADA	Australian Sports Anti-Doping Agency
ASC	Australian Sports Commission
ASIPT	Australian Sports Injury Prevention Taskforce
BIF	Blended Intervention Framework
CASRO	Committee of Australian Sport and Recreation Officials
CBA	Collective Bargaining Agreement
CISG	Concussion in Sport Group
CLR	Civil Liability Regime
COMPPS	Coalition for Major Participation Professional Sports
CDC	Centers for Disease Control
CNS	Congress of Neurological Surgeons
CRT	Concussion Recognition Tool
CTE	Chronic Traumatic Encephalopathy
CTH	Commonwealth (of Australia)
DRA	Dangerous recreational activity
FIFA	Fédération Internationale de Football Association
IOC	International Olympic Committee
ISF	International Sports Federation
IRFB	International Rugby Football Board
KHPA	Key Health Priority Areas

MRT	Match Review Tribunal
MSRM	Meeting of Sport and Recreation Ministers
MTBI	Mild traumatic brain injury
NFL	National Football League
NFP	Not-for-Profit
NSARF	National Sport and Active Recreation Framework
NGB	National Governing Body
NHMRC	National Health and Medical Research Council
NOC	National Olympic Committee
NRL	National Rugby League
NSO	National Sporting Organisation
NSWRU	New South Wales Rugby Union
OH&S	Occupational Health and Safety
PCBU	Person conducting a business or undertaking
SCAT	Sports Concussion Assessment Tool
SGB	Sports Governing Body
SIA	Sport Investment Agreement
SIRC	Sport Information Research Centre
SIS/SAS	State Institute of Sport/State Academy of Sport
SMA	Sports Medicine Australia
SRC	Sport-related concussion
SSO	State Sporting Organisation
TBI	Traumatic brain injury
UK	United Kingdom
US	United States
UNESCO	United Nations Education Scientific and Cultural Organisation
USA	United States of America
VFL	Victorian Football League
WADA	World Anti-Doping Agency
WC	Workers Compensation
WHO	World Health Organisation
WH&S	Workplace health and safety
WR	World Rugby
YCL	Youth Concussion Laws

Part I Sport-Related Concussion: Background and Context

CHAPTER 1: INTRODUCTION

'For years, the entire sports world has been flicking off the periodic warnings from scientists as if their dire-sounding concussion studies were just pesky flies.'[1]

'There is no evidence of a concussion problem in Australian sport.'[2]

Concerns about the harm associated with sport-related concussion (SRC) have received widespread attention in Australia in recent years following a series of highly publicised legal proceedings in the United States (US). The increasing understanding of the nature of SRC and the attendant publicity have raised serious concerns about the dangers of mismanaging the injury and the potentially serious long-term harm caused by SRCs.[3] In Australia, concerns about SRC were raised over twenty years ago but with little effect.[4]

The purpose of this thesis is to critically evaluate the adequacy and effectiveness of current regulation of Australian sport in achieving the goal of managing and minimising the risk of this common sporting injury. This thesis specifically focuses on the various actors (state and non-state) who have shaped and influenced the regulatory space for minimising the harms associated with SRC.[5] Understanding the roles, responsibilities and actions of these actors, helps to explain the present state of regulation of SRC and to evaluate its impact.

An analysis of the tensions, conflicts and struggles in addressing SRC reveals a unique regulatory domain that reflects a hybrid collection of public and private interests with entrenched socio-cultural and customary assumptions. Regulation in the sports sector has traditionally been private and voluntary, with a 'hands-off' approach adopted by

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1 Linda Carroll and David Rosner, *The Concussion Crisis: Anatomy of a Silent Epidemic* (Simon & Schuster, 2012) 245.

2 Anonymous (2011).

3 SRC is not a new phenomenon with the first concussive-like injury traced to 779BC. William P Meehan and Richard G Bachur, 'Sports-Related Concussion' (2009) 123(1) *Paediatrics* 114.

4 National Health and Medical Research Council, 'Football Injuries of the Head and Neck' (Report, National Health and Medical Research Council, 1994) ('NHMRC Report'); National Health and Medical Research Council, 'Head and Neck Injuries in Football: Guidelines for Prevention and Management' (Guidelines, National Health and Medical Research Council, 1995) ('NHMRC Guidelines') <https://www.nhmrc.gov.au/guidelines-publications/si2b>.

5 The reference to SRC means concussive injuries sustained in sport. Reference to the harm associated with SRC refers to harm arising from the mismanagement of the primary concussive injury. See below, chapter 2, part I ('Evolving Definitions').

state actors. Private non-state actors are primarily entrusted with control over the production and delivery of sport. These private actors dominate the regulatory environment as rule-makers, standard-setters and organisers within a voluntary self-regulated system.

The self-regulated arrangements create several challenges, particularly in balancing private and public interests and managing community expectations to produce and deliver sport within an optimally safe environment. The way non-state actors handle these challenges and manage conflicting tensions have repercussions beyond the field of play. With scientific research emerging to suggest that the risks of SRC are potentially serious and long-lasting, coupled with already declining rates of Australians participating in sport, these issues have broad public policy, governance and social implications.

There are four parts to this introductory chapter. Part I provides the background to the discovery of SRC and explains why its mismanagement could lead to more serious medical conditions and long-term harm, presenting several challenges in the domain of sport. Part II examines the peculiar features that explain why sport is considered a special regulatory domain and what, therefore, might be an appropriate role for state actors in responding to SRC. Part III examines the gap in the literature around the application of regulatory studies to SRC and Part IV explains the structure of the thesis and its methodology.

I THE PROBLEM OF SPORT-RELATED CONCUSSION

A concussion, whether sustained in a sporting context or elsewhere, is a brain injury caused by the impact of biomechanical forces. In sport, these forces are sustained during participation, and the mismanagement of the initial injury can cause 'downstream' effects and complications leading to potentially serious and long-term harm. One of the inherent complexities and challenges of SRC is that, unlike other injuries, a concussive injury is a latent or 'invisible' injury with an evolving range of symptoms, the assessment and treatment of which rely heavily on subjective reporting by the injured party.[6]

[6] See below, chapter 2 part I ('Evolving Definitions').

Exactly how much time it takes for brain function to return to normal following SRC is a problematic assessment as current diagnostic imaging tools are unable to measure when a patient is asymptomatic.[7] This diagnostic limitation is a significant concern in sport, increasing the risk of further injury because of the competitive and often commercially-oriented sporting environment.

In several countries, participants have died from multiple concussive injuries sustained in sport, indicating that it is a serious and potentially life-threatening concern.[8] As explained in chapter 2, the importance of the brain from a biomedical perspective makes SRC distinguishable from other sporting injuries.

A *The US Discovery of a Silent Epidemic*

The genesis of this thesis lies in the American National Football League's (NFL) initial inadequate responses to SRC and the effect of their later decisions, under threat of litigation, that led to a significant reconfiguration of the regulation of SRC in that jurisdiction. In their 2013 book *The Concussion Crisis: Anatomy of a Silent Epidemic,* American health and sport journalists Linda Carroll and David Rosner likened scientific warnings about SRC to 'pesky flies' causing inconvenient and disruptive interruptions to the production and delivery of sport. In that work, the authors traced the discovery of concussion in American sport, with a focus on American football, and recounted stories of sports participants whose lives had been changed and negatively impacted by harm associated with SRC.[9] Describing SRC as a 'silent epidemic' that had longer-term neurological and potentially fatal consequences, Carroll and Rosner portrayed the struggle, conflicts and public cost of SRC in the US, bringing into public view the human side of concussion as a 'pressing public health crisis'.[10]

Released in 2015, the American biographical sports film 'Concussion' dramatised the story that led to the modern discovery of the dangers of progressive brain damage associated with playing professional American football.[11] The movie, albeit embellished for dramatic effect, highlighted warnings that were ignored, unheeded or suppressed

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7 A conservative medical management and graduated return-to-sport strategy is adopted based on the complexities associated with determining when a patient is asymptomatic. See Paul McCrory et al, 'Consensus Statement on Concussion in Sport - the 5th International Conference on Concussion in Sport Held in Berlin, October 2016' (2017) 51 *British Journal of Sports Medicine* 838, 840.

8 See below, chapter 2, part I ('Evolving Definitions').

9 Carroll and Rosner, above n 1, 245.

10 Ibid.

11 *Concussion* (Directed by Peter Landesman, LStar Capital, 2015).

and the disruptive nature of the independent studies that raised concerns about the harm of SRC. It questioned the authenticity of the assurances of safety given by the NFL who were balancing commercial interests of running a multi-billion-dollar sports entertainment business with the intrinsic health interests of football players.

For the most part, the NFL had dominated and driven the concussion agenda, with a significant degree of impunity and autonomy within a voluntary self-regulated system. As explained in chapter 4, a critical factor that contributed to the struggle to have SRC recognised as a serious public health concern in the US was the initial strategy adopted by the NFL. The NFL's public stance shifted along a continuum that ranged from equivocation, denial, doubt and delay until finally addressing concussion as a legitimate concern. This organisational strategy was criticised as placing private interests over the public's interest and brought into sharp focus the challenges associated with private and voluntary non-state actors managing significant public health concerns.

In the 2000s, external parties began to question the NFL's motivations and whether its actions were more concerned with protecting its brand and reputation than addressing the problem of concussion.[12] Two Congressional hearings and a US$1billion class action litigation settlement ultimately led to institutional changes within the NFL and the development of a proactive and precautionary-based approach to regulating concussion in professional American football.

What is striking about these events is that organisational and attitude change was brought about not by the internal responses of the NFL who had unilaterally determined that concussion was not an organisational priority and a regulatable concern. Instead, the catalyst for organisational change was the combination of external factors, each calling for a review of the NFL's approach to take measures to address SRC, measures that reflected the shifting social norms regarding the tolerance of harm in sport.

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[12] The first hearing occurred in 2007 and examined the NFL's management of compensation to players for career ending injuries: House of Representatives Committee on the Judiciary, Government of the United States of America (110th Congress), *Hearings on the National Football League's System for Compensating Retired Players: An Uneven Playing Field* (26 June 2007). The second Congressional Hearing occurred in 2009 and 2010: House of Representatives Committee on the Judiciary, Government of the United States of America (111th Congress), *Hearings on the Legal Issues Relating to Football Head Injuries (Part I & II)* (28 October 2009 and 4 January 2010). <http://judiciary.house.gov/hearings/printers/111th/111-82_53092.pdf.>.

The criticisms levelled at the NFL illustrated the limitations of non-state actors, operating within a private and voluntary self-regulatory system, to meet community expectations to properly manage the balance between the dynamics of sport, commercialised entertainment and player-health considerations. It also raised questions about transparency, public accountability and guardianship responsibilities owed across all levels of the sport.[13] The NFL case illustrated that achieving this balance necessarily involved a public-private collaboration and demonstrated the influence of state engagement in the regulatory space.

B *Early Concussion Concerns in Australian Sport*

The mismanagement of SRC was a serious concern in the US, so the question of whether similar concerns could arise in the Australian context became the subject of an early inquiry and laid the foundation for this thesis.[14] Had similar concerns been raised in respect of Australian sport or were Australian sports participants somehow immune from the possible hidden dangers associated with this sporting syndrome?

As explained below and in chapter 2, SRC had been raised earlier in Australian sport. The custodians of several Australian sports, through their respective sports' governing bodies (SGBs), initially either dismissed the NFL experience as a North American phenomenon or cast doubt on the applicability of the US research to Australian conditions, arguing that there was no comparable problem facing Australian sports. Instead, several SGBs[15], in their capacity as private non-state actors, reassured the Australian public—both explicitly and implicitly—that there was no evidence of US-style problems in Australian sport.[16]

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13 Daniel Goldberg, 'Concussions, Professional Sports and Conflicts of Interest: Why the National Football League's Current Policies are Bad for its (Players') Health' (2008) 20(4) *HEC Forum* 337.

14 Annette Greenhow, 'Concussion Policies of the National Football League: Revisiting the 'Sport Administrator's Charter and the Role of the Australian Football League and National Rugby League in Concussion Management' (2011) (13) *Sports Law eJournal* 1-18.

15 In this thesis, the term 'SGB' means the organisation that carries the ultimate rule-making authority for the sport. Where the sport is part of a transnational framework, the International Sports Federation (ISF) usually performs this role. In other cases where the sport is indigenous to a particular jurisdiction, the SGB is taken to be the rule-making authority recognised as the peak representative body for the sport. See chapter 6, part III ('Australian Sports System: Actors Relationships and Resources').

16 Greg Prichard, 'League and American Football Not Concussion Cousins, says Medic' *The Age* (online), 17 May 2012, <www.theage.com.au/rugby-league/league-news/league-and-american-football-not-concussion-cousins-says-medic-20120516-1yrbp.html>; Matt Thompson, AFL TV 14 May 2014, Interview with Dr Peter Harcourt <https://www.youtube.com/watch?v=ogXDEEgpkgE&feature=youtu.be>.

Notwithstanding these qualifications, a call was made for several Australian SGBs to proactively address SRC and 'work to ensure the implementation, compliance, and enforcement of the [guidelines], as well as consistent application of penalties and sanctions'.[17] At the time, an ambitious goal was set: that 'to ensure the highest degree of transparency, an independent review of implementation, compliance, and enforcement of the [SGBs] guidelines would be of benefit …'.[18]

The evidence presented in this thesis shows that early concerns were raised in Australia around the potential harm associated with sporting injuries generally and SRC specifically. In respect of the former, injury prevention and control was identified as a Key Health Priority Area (KHPA) in 1997 noting the need for intersectoral policy arrangements, and later recognising the role of the Australian Commonwealth Government (ACG) sports agency, the Australian Sports Commission (ASC), in coordinating policy responses at a national level.[19]

In respect of SRC specifically, the ACG research agency, the National Health and Medical Research Council issued a 134-page report in 1994 which raised concerns about the potential risks associated with SRC.[20] Guidelines for prevention and management were later issued in 1995.[21] The NHMRC Report made several recommendations that the SGBs as administrators of the sports of Australian football, rugby union, rugby league and soccer take preventative measures.[22] These recommendations were made notwithstanding the limited body of scientific research that existed at the time around the nature and extent of the harm caused by SRC.

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17 Greenhow, above n 14, 17. See also Brad Partridge, 'Hit and Miss: Ethical Issues in the Implementation of a Concussion Rule in Australia Football' (2011) 2 (4) *AJOB Neuroscience,* 62-63.

18 This was in the context of the allegations facing the NFL and the aim was to suggest a proactive and transparent approach to SRC management. Greenhow, above n 14, 17.

19 Commonwealth, Australian Institute of Health and Welfare, *National Health Priority Areas Report: Injury Prevention and Control* (1997) 67, 72; Public Health Association of Australia, *Policy for Injury Prevention and Control*, (2013), 2 [1].

20 The NHMRC is responsible for the development and maintenance of public and individual health standards in Australia <https://nhmrc.gov.au/about-us/who-we-are>. For details of the concerns around concussion, see NHMRC Report, above n 4, 7-22.

21 Above n 4, NHMRC Guidelines. The NHMRC Guidelines were subsequently rescinded in 2004 and are available for historical purposes only.

22 NHMRC Report, above n 4, xiii-xiv.

The NHMRC Report and NHMRC Guidelines suggested that a harmonised approach to managing SRC was needed.[23] Its recommendations included developing a better injury surveillance system, implementing mechanisms for sanctioning and addressing illegal play, and establishing both a centralised data repository to measure the significance of the problem and a central fund to finance research into the prevention and management of head injuries in football.[24] However, there is little evidence that either the SGBs or state actors took heed of these early warnings. Instead, the issue of SRC lay mostly dormant from 1994, while the sports that were the subject of the NHMRC Report, and their respective self-regulating SGBs, embarked upon a transformation that saw them evolve from loosely structured amateur sporting systems into highly organised and valuable businesses.[25] SRC was not prioritised as a regulatable concern by those who controlled or had a regulatory role to play in these sports, an approach that continued for the next 15 years.

Today, SRC receives widespread attention and is recognised in Australia as a challenge for the sports to manage. The regulation of SRC continues to be primarily entrusted to SGBs to voluntarily (and internally) self-regulate with limited involvement of other non-state or state actors.[26] These private non-state actors have been entrusted with the responsibility to determine the priority of SRC as a regulatable concern and to determine what arrangements will be implemented based on organisational capacities and motivations within each sport.

Consequently, the evolution and development of the regulation of SRC in Australian sport has resulted in a protracted and haphazard approach which varies across amateur and professional levels within the sporting hierarchy. The state, as the guardian of the public's health, has, for the most part, played a relatively minor role in the regulation of SRC in Australia. Whether this is the most adequate and effective way to achieve an optimally safe sporting system for all Australian sports participants is the central question that this thesis seeks to address.

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23 For example, Recommendations 1(i) and 2(c) provide that 'common guidelines for concussion should be adopted by all codes'. NHMRC Report, above n 4, xiii-xiv.

24 Full details of the recommendations are discussed below in chapter 2, part IV ('Scientific Uncertainty: Wait and See or Active Social Foresight?').

25 See below, chapter 6, part II ('Illuminating the Past: Customary Assumptions and Dominant Actors'). For further discussion around the evolution and development of Australian sport see John Bloomfield, *Australia's Sporting Success: The Inside Story* (University of New South Wales Press Ltd, 2003).

26 See below, chapter 7, part II ('Case Study One Australian Football and the AFL'). See also, chapter 7, part III ('Case Study Two: Rugby League and the NRL').

C *Thesis Arguments*

As the thesis title suggests, the premise of 'why the brain matters', particularly when it is injured or damaged in sport, is a central theme in this thesis. The current regulatory space of SRC in Australian sport is critically evaluated and several reasons presented in support of why state actors should play a more significant role in sport when SRC is viewed through the prism of public health. Further, this thesis argues that the perception of fear about the safety of the sports system has the potential to act as a barrier to participation in sport that can adversely affect the already declining participation rates in Australian sport. The state has an interest in acting to avoid these undesirable consequences.

Based on empirical studies across the US, Canada and the United Kingdom (UK), a central argument is that state actors have a necessary and legitimate role in regulating SRC. To that end, this thesis explains that state actors can access a broader range of regulatory tools to fill the regulatory gaps that otherwise exist in a privately self-regulated system. The US case study and the views of several regulatory and public health law scholars support the proposition that private non-state actors are ill-equipped to regulate SRC.

The regulation of SRC in Australian sport is dominated by voluntary non-state actors operating in a mostly autonomous and quasi-public role raising the question of 'who will guard the guards themselves' when decisions involve the public's health and have broader social implications?[27] When faced with complex issues involving the harm to sports participants across all levels of sport, questions arise as to the regulatory capacity and motivations of non-state actors and the extent to which they are held to account for their decisions as guardians of the sport and holders of the public trust in the production and delivery of sport.[28]

The central hypothesis of this thesis is that regulating to manage and minimise the harm associated with SRC in Australia lies in the hands of both state and non-state actors taking collective action within a polycentric regulatory system. It has five objectives. The

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[27] The Latin phrase *quis custodiet ipsos custodies* found in the work of Roman poet Juvenal from his Satires translates to 'who will guard the guards themselves'. See Michael Beloff, 'Judicial Review 2000 – A Prophetic Odyssey' (1995) 58 *Modern Law Review* 143.

[28] Annette Greenhow and Jocelyn East, 'Custodians of the Game: Ethical Considerations for Football Governing Bodies in Regulating Concussion Management' (2014) *Neuroethics* 65-82. For UK perspectives, see below, chapter 5, part III ('A Softer Collaborative Approach: Canada and the UK). For Australian perspectives, see below, chapter 6, part III ('Australian Sports System: Actors Relationships and Resources').

first is to identify an appropriate role for the state to play in regulating SRC. The second is to identify the dominant and subsidiary actors currently involved in the regulatory space of SRC; the third is to identify the resources available to actors to help explain the shape, character and capacity of those currently involved in regulating SRC; the fourth is to describe the nature of the relationships, connections and resources of actors to help explain the relative power and capital of those actors in shaping and influencing the regulatory space of SRC and the final objective is to evaluate the adequacy and effectiveness of the current regulatory arrangements deployed to address the risks of SRC, undertaking a retrospective analysis to identify the tensions, conflicts and struggles that have arisen within the domain of sport.

Until recently, the interplay between sport, regulation and SRC has been an under-developed area of scholarly enquiry in Australia.[29] A central focus of this research is on the 'disruption' caused by discoveries associated with SRC and the struggles to accept SRC as a serious concern in Australia. A comprehensive analysis of the regulatory space[30] of SRC identifies the actors, resources and relationships capable of influencing the actions of the target group to manage and minimise the harm associated with SRC, enhance the health and safety of sports participants and reduce potential barriers to participation due to the perception of fears around safety.

II REGULATION, SPORT AND SRC

A *Conceptualising Regulation*

Regulation is the defining feature of any system of social organisation but the task of identifying what regulation is 'obscure[s] as much as it illuminates'.[31] This thesis is informed by a broad notion of regulation which draws from Julia Black's description of regulation as:

> the sustained and focused attempt to alter the behaviour of others according to defined standards and purposes with the intention of producing a broadly identified outcome

[29] The author was the first to be published in Australia on legal issues involving SRC: Greenhow, above n 14.

[30] On the concept of 'regulatory space' see below, chapter 3, part III ('Regulatory Space and Collective Capital').

[31] Leigh Hancher and Michael Moran, 'Organising Regulatory Space' in Leigh Hancher and Michael Moran (eds) *Capitalism, Culture and Economic Regulation* (Oxford University Press, 1989) 271.

> or outcomes, which *may* [emphasis added] involve mechanisms of standard-setting, information-gathering and behaviour modification.[32]

This conceptualisation of regulation supports a pluralistic interpretation and involves a broader approach to understanding regulation as something more than the law and state intervention.[33] A pluralistic and flexible view of regulation is particularly apt in the context of sport due to many deeply entrenched cultural and customary assumptions about the legitimacy of actors and regulatory arrangements within this domain.

B *Sport as a Regulatory Domain in Australia*

Sport can take various forms but for present purposes, the focus is on *organised* sport, where there is some form of organisation of a sport within the structure of a club, association, school or another sporting organisation. It is estimated that around 6.5 million Australians participate in organised sports across community, semi-professional and professional levels many of which have a high incidence of SRC.[34]

One focus of this research is tracing the evolution and development of the regulation of sport to identify the unique characteristics that have shaped and influenced its regulation as a special domain.[35] Another focus is the right to a safe sports system and, importantly, the cost of an unsafe sports system. It is a fundamental human right to participate in sport.[36] The Australian public invests in and expects access to a sports system that offers a framework for promoting the health and wellbeing of its

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32 Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 26.

33 Christine Parker, 'The Pluralisation of Regulation' (2008) 9 *Theoretical Inquiries in Law* 349, 352. On the notion of plurality in regulation, see below, chapter 3, part II ('Regulation: Actors and Rationales').

34 For participation rates for Australians aged over 15 years involved in organised sport (4.7 million), see Australian Bureau of Statistics, *Participation in Sport and Physical Recreation, Australia 2013-2014*, Cat No.4177.0 <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4177.0>. For participation rates for Australians aged 5 to 14 years involved in organised sport (1.7 million) see Australian Bureau of Statistics *Children's Participation in Cultural and Leisure Activities in Australia 2000-2012* Cat No. 4901.0 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4901.0Explanatory%20Notes1Apr%202012?OpenDocument>.

35 The 'specificity' of sport and *sui generis* characteristics are common themes amongst several sports law scholars. See for example, Stephen Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press, 2017) 1-7; Ken Foster, 'Is there a Global Sports Law?' in Robert C R Siekmann and Janwillem Soek (eds), *Les Sportiva: What is Sports Law?* (T.M.C. Asser Press, 2012) 35,37.

36 *International Charter of Physical Education and Sport*, UNESCO, (signed Paris, November 1978). See also *Medium-Term Strategy 37 C/4 2014-2021 and Revised Charter*, UNESCO, CN 37th C/R 37 (signed Berlin, 2015) 23 [5].

participants. Indeed, the Australian sports system extols the positive attributes of sports participation and its high social utility in contributing to a healthy society.

Chapter six explains the evolution and development of the role of the state in Australian sport. Since European colonisation, successive state actors of all political persuasions have developed and implemented public policies designed to encourage participation in sport, recognising the strong public interest and population-wide benefits that sport is expected to deliver. Over the decades, government policies have shifted in line with changes in the prevailing social, cultural and economic conditions. In recent years, these policies have been directed towards encouraging mass participation in sport and to remove or reduce threats or barriers to participation.[37] Consequently, significant public funds have directly and indirectly been invested in supporting a sustainable Australian sports system.

The integrity of the Australian sports system and the ability to achieve public policy objectives are built on the premise that the system is, among other things, inherently 'safe'. Perceived fears over sports safety present a barrier to participation and are a cost burden on individuals and society.[38] In this context, a 'safe' system does not mean a 'risk-free' system. Such a notion is oxymoronic, particularly in the many popular Australian sports involving full bodily contact.[39] Instead, there is a legitimate expectation and public trust in a system that delivers collective benefits that will always outweigh the cost of production; that a mechanism exists to calibrate this balance, resulting in a net gain to society.

For these reasons, there exists a strong public interest in preserving the integrity of all sport through maintaining access to a safe sports system to avoid these undesirable consequences. A relevant consideration then is who is, or should be, safeguarding the public's health when discoveries threaten the equilibrium of benefits and burdens associated with participation in sport.

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37 See below, chapter 6, Part II ('Illuminating the Past').

38 Australian Sports Commission and La Trobe University, *Addressing the Decline in Sports Participation in Secondary Schools* (2017) 7; Australian Sports Commission, *SportSafe Australia: A National Sports Safety Framework* (1997) Canberra.

39 Bodily contact sports necessarily involve contact. Sport is classified according to the nature and extent of physical contact between participants. See Roger S Magnusson and Hayden Opie, 'HIV and Hepatitis in Sport: A Legal Framework for Resolving Hard Cases' (1994) 20(2) *Monash University Law Review* 214, 222-223.

1 *Private Non-State Actors in Sport*

An examination of the history of sport in Australia reveals that organised sport evolved and developed into a domain that was, and continues to be, primarily regulated by SGBs and a network of non-state actors, competing and holding varying degrees of power. Usually, SGBs are recognised as the peak representative bodies of their sport and have their origins, constitutions and functions independent of the state, enjoying a significant degree of autonomy in the regulation and governance of their sport.

In Australia, SGBs typically adopt the corporate form within the not-for-profit (NFP) sector. Most incorporate as companies limited by guarantee (CLG) under the *Corporations Act.*[40] This structure enables large SGBs to organise their operations on a national basis. The NFP status of CLGs enables the entity to enjoy significant tax benefits designed to foster the public functions performed by SGBs.

In return for state and taxpayer support, the expectation is that SGBs will promote an altruistic mission and deliver a wide range of public benefits to enhance, promote and develop their sport within a safe sporting system for current and future playing generations across all levels in the sporting hierarchy; from 'grassroots to the international arena'.[41] As a collective group, SGBs have been effective lobbyists in securing state support or additional taxpayer funding, relying upon their altruistic purposes as the basis for this support. [42]

(a) SGBs as Rule-Makers and Standard-Setters

The hierarchy of participation in sport is organised based on participant characteristics. It is a pyramid model and is arranged across three levels incorporating community and school sport on the lower tier, semi-professional (pre-elite) in the middle tier and elite professional level as the top tier.[43] Each level is part of the same vertically-integrated

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40 *Corporations Act 2001* (Cth) s 112 (1).

41 For example, the Coalition for Major Professional and Participation Sports ('COMPPS') acts as the collective lobby group representing seven large Australian SGBs. See the Coalition for Major Professional and Participation Sports (COMPPS) <https://www.compps.com.au/>.

42 When the value of broadcasting rights was potentially threatened by the introduction of cloud-based streaming by a third-party telecommunications company, the collective action of several large Australian SGBs led to a co-ordinated lobbying response through COMPPS following the Federal Court decision in *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34, subsequently overturned in *National Rugby League Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

43 For discussion on the hierarchy of sport in Australia see Deborah Healey, 'Governance in Sport: Outside the Box?' (2013) 23(3) *The Economic and Labour Relations Review* 39. For a comparison of the various models of sports organisation, see James A R Nafziger, 'A Comparison of the European and North American Models of Sports Organisation' (2008) 3-4 *International Sports Law Journal* 100.

structure, with SGBs at the apex of the sport and typically performing the function of rule-maker, controller and custodian of their sport. SGBs establish the playing rules and laws of the game at either the international or domestic level, and typically implement such rules but with varying degrees of enforcement and formality across all playing levels of the sport.

SGBs are recognised as legitimate actors who have exclusive authority over regulating their internal environment. Foster identifies several classes of rules within the purview of the SGBs' authority. These include the codes of technical rules or 'laws' and regulations of the sport and the ethical rules to preserve the integrity of the sport.[44] Further, internal mechanisms and organisational structures are established to monitor and enforce compliance with these rules and policies.

(b) Dual Roles and Responsibilities

SGBs are entrusted with the responsibility for the long-term development and sustainability of their sports, contributing to the overall and collective goal of growing participation rates.[45] SGBs perform a quasi-public and intermediary role through which states' health and sports policies are channelled and delivered to the wider population.[46] These organisations play a vital role in the production, delivery and promotion of sport and hold a social licence to carry out these quasi-public functions.[47]

As modern forms of professional sport evolved and developed from the mid-1980s, SGBs in several sports have evolved from loosely structured amateur sports to highly organised and profitable organisations involved in the production and delivery of professional sport often at a national level. At the elite level of many Australian sports, financial rewards are available to a small number of talented players who attract lucrative sporting contracts, sponsorships and product endorsements.

The corporatisation and commodification of sport has resulted in SGBs having to assume dual responsibilities for the organisation of the sport being run like a business with

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44 Foster above n 35, 39-40; See Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (Bloomsbury Professional, 3rd ed 2014) 71 [A.211], 91 [A3.7].

45 In the many submissions made by COMPPS, the role and function of the large SGBs are advanced based on the role of the SGBs as custodian of the sport. COMMPS, above n 41; Greenhow and East, n 28, 66.

46 See Julia Black, 'Constitionalising Self-Regulation' (1996) 59(1) *Modern Law Review* 24, 28.

47 Ibid.

significant revenues attaching to the licensing and broadcasting rights at the professional level. At the same time, SGBs are required to adhere to the mission-orientation of producing and delivering their sport across all levels of participation.[48] The duality of these roles has created challenges and conflicts when matters arise that have the potential to impact the brand of sport and create tension in managing private and public interests.

Community sport in Australia, where most sporting activity occurs, and where the greatest risk of SRC is thought to exist, attracts the highest number of sports participants but receives the least amount of funding.[49] Instead, SGBs typically receive direct state support and are expected to develop and deliver their sports to ensure the sustainability across all levels in the sporting pyramid.[50] State actors often include contractual terms that reflect this role of SGBs and impose eligibility requirements on the part of SGBs that are tied to participation numbers and cultural significance. This transactional mechanism is important because it goes towards establishing the capacity of state actors and the regulatory mechanisms and tools that they have at their disposal to address concerns around SRC.[51]

2 *The Role of the State in Sport*

When envisaging the notion of state regulation in sport the initial response is usually one of apprehension and concern that another regulatory burden will fall upon a sector that has traditionally enjoyed the privilege of self-regulation. Any attempt at state intervention is likely to be met with resistance and concerns that the sector, built on the premise of sport as being the antithesis of work and being mainly concerned with recreation and volunteerism, should not be overburdened.

However, the state has always participated in the regulation of sport through the provision of the political, economic and legal systems that underpin it. Since European colonisation in 1788, the state has supported the development of sport and from the

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48 See John K Wilson and Richard Pomfret, 'Government Subsidies for Professional Sport in Australia' (2009) 42 (3) *Australian Economic Review* 264; Richard Pomfret and John K Wilson, 'The Peculiar Economics of Government Policy Towards Sport (2011) 18 (1) *Agenda: A Journal of Policy Analysis and Reform* 85.

49 See below, chapter 6 part III ('Australian Sports System).

50 The Australian Sports Commission publishes funding provided to sport and national sporting organisations. See Australian Sports Commission, Grants and Funding < https://www.sportaus.gov.au/grants_and_funding/grant_funding_report>.

51 See below, chapter 8 part I ('The Publicness of Sport').

1970s onwards, supported the development of an Australian sports system. State support has come in many forms including the provision of sporting infrastructure, public and private partnerships in developing sporting pathways and significant taxpayer investment through financial grants and the development of sports policies. For these reasons, the state is a significant regulatory actor.

This thesis will argue, however, that the state does not typically occupy a dominant position within the regulatory space of sport and SRC. Moreover, the collective capital and resources to control and influence the regulation of sport and SRC primarily rest with non-state actors who have traditionally commanded legitimacy over the regulatory space. These non-state actors have actively guarded and protected their regulatory autonomy. They benefit handsomely from significant and generous state support, but categorically reject any direct state regulatory involvement that they consider a threat to their autonomy.[52]

C *SRC as a Regulatable Concern for the State*

If, as is posited above, regulation is a means of altering or influencing behaviour in pursuit of broadly identifiable outcomes, under what conditions should state actors play a role, or a more active regulatory role?

Many considerations support the engagement of state actors in regulation. For example, markets may fail to deliver the level and quality of goods or services expected by the community. Harms, hazards and risks can develop due to advances in technologies and diagnostic methods. Trust in the regulatory system can break down or information asymmetries arise, leading to inequality of knowledge, power or expertise.[53] Social conditions change, or situations arise where matters threaten the health, welfare and safety of the public, necessitating steps to protect and enhance public health and safety as socially desirable outcomes.

In sport, however, the reorganisation of regulatory arrangements has typically been considered a balancing act in preserving the social utility of sport on the one hand, while maintaining the autonomy of private non-state rule-makers, on the other. Further, the

[52] Several high-profile public disputes illustrate the collision of interests between state involvement and the autonomy of self-regulation in sport. See below, chapter 6 part I ('The Filter of Culture in Australian Sport').

[53] For further discussion on the rationales for state regulation, see Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017) 42-63.

motivations or rationales that might exist to support regulation are also subject to changing political, economic, cultural and legal influences. A scan of state regulation of Australian sport since colonisation reveals an ad-hoc and fragmented approach, where motivation in assessing what is regulatable is based on a process of 'selective filtering' without any discernible pattern that supports a consistent regulatory approach.[54]

A threshold issue considered within this thesis is why SRC might be a regulatable concern for state actors. Seven interrelated rationales are identified and explained as reasons why state actors should be involved in the regulation of SRC.[55] These reasons involve the state regulating to prevent or minimise harm; to manage potential risks; to address information asymmetries; to manage externalities and reduce excessive consumption costs; to enhance public trust; to address market failure and to promote and advance public policies.

III A LITERATURE LACUNA

While the sports medicine and biomedical scientific literature are replete with material articulating the medical construction of SRC as potentially serious harm, there is little research in Australia that focusses on the optimal regulatory arrangements for SRC in Australian sport.[56] Specifically, there has been no comprehensive analysis of the regulatory space of SRC nor an evaluation of the effectiveness of the regulatory arrangements currently in place. Such an analysis, however, is critical in establishing the basis upon which to determine whether the current approaches are adequate, or whether adjustments or reconfigurations are required to achieve the desired regulatory outcomes.

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54 Later in this thesis, the approach of state actors in regulating SRC is discussed, noting the absence of a national program or policy for sport. See below, chapter 8 part III ('State Actors and SRC'). In 1991, sports sociologist Dr Jim McKay was critical of the motivations of state actors, noting a process of 'selective filtering' in the approach to sports regulation. Jim McKay, *No Pain, No Gain? Sport and Australian Culture* (Prentice Hall, 1991) 76.

55 See below, chapter 8 part IV ('Additional Reasons for State Involvement').

56 An extensive database search as at 31 December 2017 reveals that the interplay between sport, regulation and SRC has been an under-developed area of peer-reviewed scholarly enquiry in Australia, with the author of this thesis being the first to publish on legal issues in SRC in Australia. See Greenhow, above n.14. A SPORTDiscus database search of keywords sport AND (law OR regulation OR policy) AND concussion AND Australia returned 12 results for Academic Journals. A database search of Lexis Advance legal database search engine of the same keywords found no results. A free text database search of Westlaw AU journals legal database search engine returned seven results. None of these addressed the topic of regulating SRC in Australia.

A *SRC Through a Legal Lens*

The literature that specifically addresses the problem of SRC in Australia from a regulatory perspective is limited to examining SRC through a legal lens. As noted earlier, regulation is conceptualised as more than the law and includes other mechanisms that can control, order or influence the behaviour of others.

Several Australian authors have investigated the legal issues involved in SRC in an Australian context. Legg reviewed the class action process involving the NFL and the compensation settlement and explained that there were several challenges in mounting such a claim in Australia, including the challenges associated with achieving class action certification.[57] Thorpe et al recently considered the legal issues associated with SRC in Australia and introduced new material on negligence and SRC. [58] The authors trace the evolution and development of SRC and examined both US and Australian legal perspectives, posing a discussion question around the liability for injuries associated with SRC in Australian sport.

In Canada and the UK, legal scholars Heshka and Lines considered the issues around SRC from their respective jurisdictional perspectives, identifying an opportunity to examine 'how principles of sports regulation and law could apply'.[59] Their research considers the regulatory process of compliance and enforcement as it applies to SRC.[60] Heshka and Lines suggest a transnational model similar to that used in the global regulation of anti-doping in sport, drawing on similar founding principles to justify a shift from private self-regulatory arrangements. The authors also recognise that SRC necessarily involves both state and non-state actors, describing the current 'helter-skelter' approach as ineffective in addressing the harm.[61]

In the US, several legal scholars have addressed the issue of SRC in response to the NFL litigation.[62] Koller has examined why US state actors were willing to abandon their traditional 'hands-off' approach to US professional sport and intervene to regulate SRC

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57 Michael Legg, 'National Football League Players' Concussion Injury Class Action Settlement' (2015) 10 *Australian and New Zealand Sports Law Journal* 47, 52.

58 David Thorpe et al, *Sports Law* (Oxford University Press, 3rd edition, 2017) 281-289.

59 Jon Heshka and Kris Lines, 'One Ding to Rule Them All: A Proposed New Approach to Regulating Brain Injuries in Sport' (2013) *The International Journal of Sport and Society* (3) 141.

60 Ibid 146-147.

61 Ibid 142-143, 149.

62 See below, chapter 4 part III ('A Call to Action').

by way of youth concussion laws (YCL).[63] Koller conceptualises regulation in the US to mean state legislative enactment, a view shared by several scholars who explain the influence of 'national peculiarity' and narrowly conceptualising regulation as being confined to law and legal regulation.[64] Koller contends that the involvement of state actors in directly regulating in response to concerns around SRC reflected the law's role in changing 'sports norms that can provide a new pathway for productive government regulation of youth and amateur sports in the future'.[65]

B *Other Perspectives*

The literature on SRC is similarly divided across disciplinary perspectives. The diversity of perspectives lends support to the view that SRC is a topic that is well suited for further consideration as the subject of an interdisciplinary research project.[66] The literature is replete with medical and clinical research, drawing from a wide range of perspectives within the human sciences. The most recent systematic review of the literature undertaken in 2016 involved over 60,000 medical studies on questions related to SRC.[67] The medical construction of the harm discussed in this thesis draws upon the medical literature to explain the potential harm, the incidence and prevalence rates and present understanding of the medical management of SRC in Australian sport.

Whether SRC is a private problem or a matter of public concern has been a theme explored in the literature across several jurisdictions, drawing from socio-cultural, clinical ethics and public health law perspectives.[68] Publications on the social construction of the harm of SRC primarily come from the US. In 2008, public health law scholar, Goldberg, identified SRC as a public health concern and went on to publish and co-author a series of articles on the ethical responsibility of the NFL, positioning SRC and

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63 Dionne L Koller, 'Putting Public Law into Private Sport' (2016) 43 *Pepperdine Law Review* 681.

64 Regulatory scholars Hancher and Moran explain 'national peculiarity' in the context of regulatory space and the influence of customary assumptions and attitudes as to the relevance of law and litigation in the regulatory process. See Hancher and Moran, above n 31, 280-281.

65 Koller, above n 63, 719.

66 See below, chapter 9 part IV ('Future Directions').

67 Ibid.

68 For a socio-cultural perspective, see Kerry R McGannon, Sarah M Cunningham and Robert J Schinke, 'Understanding Concussion in Socio-Cultural Context: A Media Analysis of a National Hockey League Star's Concussion' (2013) 14(6) *Psychology of Sport and* Exercise 891-899. For an ethical perspective, see Mike McNamee and Brad Partridge, 'Concussion in Sports Medicine Ethics: Policy, Epistemic and Ethical Problems' (2013) 13(10) *The American Journal of Bioethics* 15-17. For a public health law perspective see Goldberg, above n 13.

the role of non-state actors in a broader social context.[69] Goldberg raised early concerns about private actors organising and delivering the health-care model to sports participants, describing the model as 'ethically suboptimal'.[70]

Culhane has framed the issue of SRC in American football from a public health perspective, whereby 'public health advocates should be supportive of well-designed efforts to make sports safer: reducing the number of occurrences (incidence) and population burden (prevalence) of any harmful outcome is good public health practice'.[71]

Recently, Harvey, Koller and Lowrey (2015) developed a public health policy framework to assess the legislative interventions in the US.[72] The Network for Public Health Law has developed a repository of information about YCLs and recent reforms across the US.[73] There is now a well-established body of research in the US that supports SRC being framed as a public health concern.

IV THESIS OBJECTIVES, METHODOLOGY AND STRUCTURE

This thesis examines the regulatory space of SRC in Australia and, through that examination, seeks to understand better the role of actors in promoting and protecting the health of Australian sports participants in respect of SRC. The question of whether there is a more significant role for state actors to play in regulating SRC is analytically dependent upon the efficacy and effectiveness of the current regulatory arrangements. To answer these questions, this thesis discusses the nature of SRC as a harm to the physical integrity of participants and the rationales for state actors playing a more significant role in regulating SRC in Australia.

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69 Goldberg (2008) above n 13; Daniel Goldberg, 'Mild Traumatic Brain Injury, the National Football League, and the Manufacture of Doubt: An Ethical, Legal and Historical Analysis' (2013), 34 *Journal of Legal Medicine*, 337; Kathleen Bachynski and Daniel S Goldberg, 'Youth Sports and Public Health: Framing Risks of Mild Traumatic Brain Injury in American Football and Ice Hockey' (2014) 42 *Journal of Law, Medicine and Health* 323; Kathleen Bachynski and Daniel S Goldberg, 'Time Out: NFL Conflicts of Interest with Public Health Efforts to Prevent TBI' (2017) 24(3) *Injury Prevention* 180.

70 Goldberg 2008, above n 13, 349.

71 John G Culhane, 'Not Just the NFL: Compensation, Litigation and Public Health in Concussion Cases' (2012) 8(5) *Florida International University Law Review* 5.

72 Hosea H Harvey, Dionne L Koller and Kerri M Lowrey, 'The Four Stages of Youth Sports TBI Policymaking: Engagement, Enactment, Research, and Reform' (2015) 43 *Journal of Law, Medicine and Ethics* 87. See below, chapter 5 part I ('US State Responses').

73 The Network for Public Health Law Youth Concussion Laws Resource <https://www.networkforphl.org/topics__resources/topics__resources/injury_prevention_and_safety/youth_concussions_resources/>.

This analysis contributes to the academic literature that intersects the legal, regulatory and policy considerations associated with SRC in Australia. The approach adopted examines how state actors can utilise regulatory tools to establish a system that provides horizontal oversight and support to non-state actors who currently operate through vertical silos organised by individual sports. The existing literature tends to focus primarily on SRC as falling within the remit of private actors who address concerns across both sports-specific and disciplinary-specific lines. Instead, a broader regulatory landscape is revealed when reframing SRC as a high profile public health concern, offering a multitude of regulatory options and potential collaborations between state and private non-state actors.

This thesis contends that SRC is not merely a private matter, and moreover, that state actors must be proactive in managing and minimising the risks associated with SRC as a high profile public health concern. It argues that current private and voluntary regulatory frameworks are inadequate for ensuring a high level of protection for the health and safety of all sports participants. Public health and regulatory scholars agree that non-state actors are ill-equipped to unilaterally regulate high profile public health concerns within a private and voluntary self-regulatory system.[74] By reframing the risk through a public health prism, it argues for a broader and more expansive multilateral regulatory arrangement, identifying actors with capacity and motivation to promote public policies to minimise the risks associated with SRC and enhance the health and safety for all sports participants. A vital contribution of this research project is that it identifies where the regulatory gaps currently exist and articulates how a national regulatory framework can fill that gap.

A *Research Objectives*

The objectives of this research are to:

a) Identify an appropriate role for the state to play in regulating SRC;
b) Identify dominant and subsidiary actors currently involved in the regulatory space of SRC in Australia;

[74] See Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) *Current Legal Problems* 101, 115; Gostin et al explain that public health can be achieved by collective action rather than through individual endeavours. Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint,* (University of California Press 2008) 40-44.

c) Identify the resources available to actors to help explain the shape, character and capacity of those currently involved in regulating SRC;
d) Describe the nature of the relationships, connections and resources of actors to help explain the relative power and capital of those actors in shaping and influencing the regulatory space of SRC; and
e) Evaluate the adequacy and effectiveness of the current regulatory arrangements deployed to address the risks of SRC, undertaking a retrospective analysis to identify the tensions, conflicts and struggles that have arisen within the domain of sport.

B *Research Questions*

Three primary research questions and several sub-questions arise concerning the examination of the regulation of SRC in Australia:

1. Is SRC a regulatable concern for the state?

   (a) What reasons exist to justify the greater involvement of state actors in regulating SRC?

   (b) Should SRC be framed as a private matter or a high profile public health concern and treated differently to other sporting injuries?

   (c) If the evidence supports the framing of SRC as a public health concern, which actors are in the regulatory space of SRC with capacity and motivation to influence the behaviour of target groups and achieve the objective of reducing or minimising the risks associated with SRC?

2. How is SRC currently regulated in Australia?

   (a) How and why has regulation occurred in Australia?

   (b) What regulatory measures have been designed to manage and minimise the risks of SRC?

   (c) Have the regulatory measures been effective in managing or minimising the risks associated with SRC in the context of a rapidly evolving and complex medical, social and legal landscape?

3. How has SRC been regulated in other jurisdictions?

   (a) How have state actors responded to SRC in other jurisdictions?

   (b) What common themes emerge that might contribute towards designing future regulatory measures in Australia?

C *Methodology*

Regulatory research is a recognised interdisciplinary field of study and involves a 'kaleidoscope of lenses' through which to view relationships and networks. In interdisciplinary scholarship, Repko suggests developing a research map that 'provides clear routes on how to journey from a familiar place (the problem) to one that is foreign (the understanding)', enabling researchers to 'cast their gaze across all relevant …methods…to approach a problem'.[75] As the research objectives involves a critical analysis of the current regulatory arrangements of SRC in Australia, including who regulates and how regulation occurs, a qualitative research methodology is adopted to understand the complicated network of relationships and resources within the regulatory environment. The use of qualitative research is common in regulatory research and provides an opportunity to identify and analyse relationships between organisations and individuals. [76]

A three-phase research plan in Diagram 1.1 guides the research to address the research questions.

[75] Allen F Repko, *Interdisciplinary Research: Process and Theory* (Sage, 2012), 73, 74.

[76] Ibolya Losoncz, 'Methodological Approaches and Considerations in Regulatory Research' in Peter Drahos (ed) *Regulatory Theory: Foundations and Applications* (Australian National University Press, 2017) 77, 91.

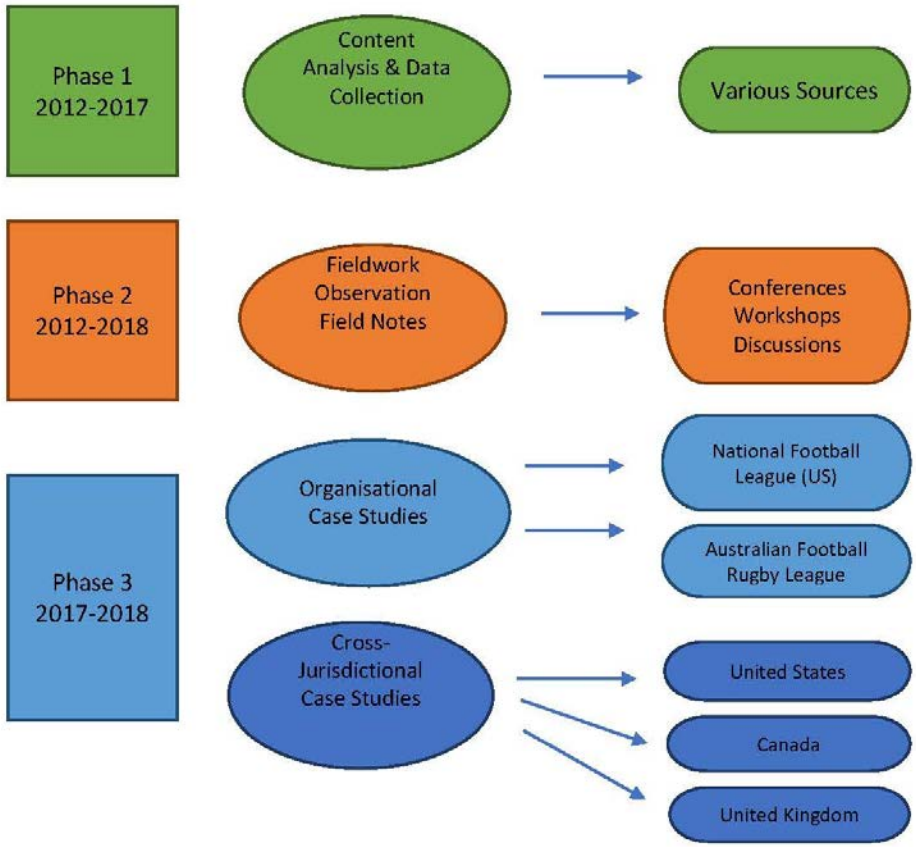

Diagram 1.1: Three-Phase Research Study Design

1 *Phase 1: Data Collection and Content Analysis*

According to Berg, content analysis is 'a careful, detailed systematic examination and interpretation of a body of material to identify patterns, themes, biases and meanings.'[77] This method was used to collect and examine a range of materials in the first phase in this study.[78] To some extent, content analysis represents a 'deep dive' into the data without any pre-determined framework or categories. This form of content analysis is described as 'conventional content analysis' and enabled an approach that

[77] Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (Allyn & Bacon, 7th ed, 2009) 303-304.

[78] The range of materials can include any form of communication, textbooks, journals, court judgments, court pleadings, websites, reports, news articles, field notes, conference attendances, observations and archival documents. See Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (Sage, 2nd ed, 2004).

was designed to describe the regulation of SRC, particularly when the literature on the topic was limited.[79] This approach helped explain the contextual use of words across different data sources and was particularly beneficial where several terms such as 'concussion' and 'regulation' were subject to multiple and mixed usages in different jurisdictional and disciplinary settings.

Materials were collected for this study from 2012. These materials included field notes, conference attendances and observations. Table 1.1 details a selection of the materials examined, how materials were obtained and the purpose of each text.

Document type	Content Obtained from:	Area of Focus
Constituent Documents (Constitutions, Memorandum and Articles of Association)	Public websites	Contextual data Rules and membership requirements Operating procedures Regulatory mechanisms
Organisational Documents Annual Reports (ASC, SGBs)	Public websites	Revenue sources Contextual data Goals and objectives Stakeholders Target groups Resources and Capital
Government Documents ACG, ASC, NHMRC, ALRC Sport Canada	ASC Website Clearinghouse for Sport website Requested materials Library Repositories Public Websites	Policy orientation Funding Planning Accountability Role and responsibilities Areas of concern
SRC-Related SGB Materials ASC, SGBs	Requested materials Public websites Journal articles Scholarly texts	Strategies Policy development and implementation Role and responsibilities Dissemination
US Government Inquiries	US Congressional Hearings Transcripts	State actors Regulatory mechanisms
Legislation and Legal Regulation	Public Websites Journal Articles	Objectives Regulatory mechanisms
Court Documents	Legal document website – Justis US Public websites Journal articles Scholarly texts	Legal Regulation

[79] Hsiu-Fang Hsieh and Sarah E Shannon, 'Three Approaches to Qualitative Content Analysis' (2005) 15(9) *Qualitative Health Research* 1277, 1279.

Media sources websites and newspapers	Public Websites Newspaper sites Sports information sites	Stories Public opinion Government stories Sport interest

Table 1.1: Selection of Materials examined for this research

Documents were collected by physical attendances at conference and workshop venues, libraries (excluding field notes), external universities, research institutions and sporting organisations visited during the period 2012 to 2017. Online documents were collected through Lexis and Westlaw legal database search engines. Electronic copies are stored in both desktop and cloud-based databases and collated in an EndNote library to manage references. Hard copies of documents were collected and organised in folders in topic order.

All collected materials were read and examined for information that would help in answering the research questions and provide background information to help understand the research topic being investigated. Specifically, the material examined developed understandings around the identity and key characteristics of actors, the resources and capital held by actors, the triggers for regulating, the nature of the relationships and connections between regulator and target group. Further, materials were examined to ascertain the regulatory mechanisms to address principles of transparency, accountability, legitimacy, expertise and efficiency to assist in evaluating the legitimacy of actors and the adequacy and effectiveness of the regulatory arrangements deployed to address SRC.

2 *Phase 2: Observation, Fieldwork and Field Notes*

This phase involved observational studies, fieldwork and field notes. Since 2012, 17 local, national and international conferences and workshops were attended by the writer on issues related to SRC. Attendance was either as an observer or presenter. Insights were gained by attending and observing these events and contributed to understandings around the research questions. Written field notes by way of diary entries were recorded at the time of observation or shortly after.

3 *Phase 3: Case Studies*

The final phase involved case study research. Yin describes the value of a case study regarding proximity to the subject because 'it deals directly with the individual case in

its actual context…'and 'case studies get as close to the subject of interest as they possibly can…'[80] A case study can explain how the organisation is internally constituted, and externally influenced; perspectives that are critically important in understanding the shape and allocation of power within the regulatory space of sport and SRC.[81]

A case study approach was used to describe 'how' SRC regulation has occurred and the reasons 'why' these regulatory arrangements are in place. This method involved organisational case studies to explain how non-state actors have regulated SRC and jurisdictional case studies to explain how state actors have regulated SRC.

The cross-jurisdictional case studies in chapter five help understand what motivated state actors to respond to SRC as a regulatable problem and how key policies were designed, developed, implemented, enforced and evaluated. The case study of the Australian Football League (AFL) and the National Rugby League (NRL) in chapter 7 helps explain how these SGBs have regulated SRC and why non-state actors commanded a dominant position to shape and influence the regulatory space.

D *Thesis Structure*

To answer the research questions identified earlier in this chapter, this thesis is structured in two parts. Part I (chapters 1-5) defines SRC, establishes the regulatory approach in addressing the research questions and describes how actors have regulated the risks through case study and comparative materials. Part II (chapters 6-9) analyses the regulatory space of SRC in Australia by examining the influence of socio-cultural and historical factors and the current regulatory arrangements. This part concludes by evaluating the effectiveness of the current approach and summarising the key findings to suggest areas for improvement and future directions.

Part I: Background and Context

To understand what SRC is and the interference it presents with the physical integrity of sports participants, chapter 1 (What is Sport-Related Concussion? Biomedical Perspectives) describes the biomedical and clinical understandings of SRC in Australian and international settings. This chapter explains the different injury phases associated

[80] Robert Yin, *Case Study Research, Design and Methods* (Sage, 4th ed, 2009) 9, 68.
[81] Hancher and Moran, above n 31, 277.

with SRC to explain the primary and secondary injury components.[82] This difference is an important and relevant distinction, especially when comparing SRC with other sporting injuries and the nature of acceptance of necessary risks associated with participation.

Chapter 3 (Regulatory Approach) establishes the theoretical and conceptual approaches that will be applied to examine the elements, processes and effectiveness of the current regulatory arrangements of SRC. The application of the regulatory space metaphor identifies the range of actors and resources available to influence and alter behaviour around SRC.[83] This theory assists in unravelling the complex and interdependent nature of relationships between actors within the regulatory space of sport and SRC. These key concepts and theories provide the basis to frame an understanding of the current regulatory arrangements to SRC and to proffer insights into any constraints or limitations.

To illustrate why SRC was a key challenge for non-state actors to regulate, chapter 4 (The Discovery of SRC in the US) traces the events that led to the discovery of SRC in the US and how this discovery disrupted the sport of American football. These events established the foundations for what would ultimately lead to organisational change and a precautionary-based approach to regulating concussion in American football. The reframing of SRC through a public health prism justified the regulatory intervention by state actors to influence and alter behaviour regarding SRC.

The US study is relevant to, and significant in the Australian context as it highlights the challenges faced by non-state actors to SRC and illustrates the ambiguity around ownership of the problem and the broader social implications. Further, the involvement of state actors in the US contributed towards a shift in the underlying social norms around acceptance of the serious nature of the harm of SRC.

To establish how state actors have addressed SRC in different jurisdictional settings, chapter 5 (SRC and State Regulation: A Cross-Jurisdictional Analysis) provides a cross-jurisdictional analysis of state interventions in the US, Canada and the UK. Each jurisdiction has adopted markedly different strategies to respond to SRC, but each case

[82] Matthew Dashnaw, Anthony Petraglia and Julian Bailes, 'An Overview of the Basic Science of Concussion and Sub concussion: Where We Are and Where We Are Going' (2012) 33(6) *Neurosurgery Focus* 9, 2.

[83] Hancher and Moran, above n 31, 271-299; Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) *Public Law* 329-353.

recognises the inherent public interest to justify state involvement. These experiences proffer insight into what strategies have been effective and are applied later in the thesis to inform policymaking in Australia.

Part II: Regulating SRC: The Australian Perspective

Part II establishes how and why SRC is regulated in Australia and evaluates whether the current approaches are effective in managing and minimising the risk of SRC. This Part analyses how regulation has occurred, the role of various actors (state and non-state) who have shaped and influenced the regulatory space of sport and SRC and whether these arrangements are effective. This Part also incorporates an analysis of the socio-cultural and historical factors that have influenced the development of Australian sport, providing the context for the current regulatory approach to SRC.

To understand the factors that have influenced the currently regulatory approach to SRC in Australia, chapter 6 (Socio-Cultural Influences and Historical Developments in Australian Sport) commences by explaining sport as a socio-cultural phenomenon. This chapter draws upon the literature to explain sport as a form of 'social Darwinism' and why there has been a struggle to accept the nature and harm of SRC as a sporting injury.[84] The chapter also explains the historical development of the regulatory space of sport in Australia as largely based on underlying social and cultural norms and customary assumptions as to the legitimacy of actors who dominate the space and influence regulatory arrangements within the Australian sports system.

In Australia, the current regulation of sport and SRC is part of a multi-dimensional and complex regulatory space that has evolved and developed from transplanted cultural and customary norms. Chapter 7 (Regulating SRC: Law and Non-State Actors) commences by examining how SRC is currently regulated. This examines the various functions of law as a form of regulation in sport and considers the actual and potential application of both private or public law to SRC. This chapter provides evidence about the regulatory space of SRC and the key characteristics of non-state actors, relationships and resources within the space. This analysis builds on chapter 6 by explaining how certain actors were in positions of dominance at the historical point in time when SRC

[84] Wolfgang Decker, *Sports and Games of Ancient Egypt translated by Allen Guttmann* (Yale University Press, 1992) 70; Douglas Booth and Colin Tatz, *One-Eyed: A View of Australian Sport*, (Allen & Unwin, 2000), 50.

became a regulatable concern. Non-state actors are examined through case studies of two major sports to illustrate how regulation has occurred in a real and practical sense.

Chapter 8 (Regulating SRC: The Role of the State) examines the notion of 'publicness' of sport and the public interest in SRC in Australia. Establishing the public interest in SRC lays the foundation upon which to then consider how state actors have responded to SRC and what rationales might underpin a more significant part to play in regulating SRC.

Chapter 9 (Evaluation, Findings and Future Directions) critically evaluates the effectiveness of the current regulatory arrangements in SRC against established principles of good regulation. The question of whether there is a more significant role for state actors to play in Australia is analytically dependent upon establishing the efficacy and effectiveness of the current regulatory arrangements. The overall findings reveal a regulatory space dominated by SGBs, focussing on the elite levels of their sport. Inherent weaknesses and regulatory gaps are exposed in the current approaches, undermining the effectiveness of regulating SRC. Areas for improvement and future directions are suggested.

While state actors have started to take some steps towards addressing SRC in an Australian context, the conclusion identifies future research directions, including the framing of a collaborative approach that draws upon the collective capacities and resources of state and non-state actors and the interdisciplinary nature of SRC. The challenge for Australian state actors is not to find new or novel approaches to regulating SRC. Instead, this thesis concludes that the challenge facing state actors in Australia is to be solely focussed on advancing the interests of all sports participants and to adhere to the role of 'neutral umpire' when faced with the possible resistance from non-state actors.[85]

This thesis has been undertaken at an interesting time in the development of SRC as a regulatable concern in Australia and has evolved significantly since the early study commenced in 2012. Recently, state actors have exhibited a willingness to become more engaged with SRC and have commenced working with other actors in addressing SRC. While these are encouraging developments, the following chapters explain that the

[85] McKay, above n 54, 75-76.

roadmap towards adequate and effective regulatory arrangements for all sports participants has further distance to travel.

CHAPTER 2: WHAT IS SPORT-RELATED CONCUSSION? BIOMEDICAL PERSPECTIVES

INTRODUCTION

In a sporting context, the interference with the physical integrity of a participant and risks associated with mismanaging injuries, particularly return-to-school, return-to-play or practice decisions, are recurring themes across sport, across jurisdictions and disciplines.[1] Yet SRC has been identified in the modern era as the 'number one injury risk' in contact and collision sports.[2] Many injuries occur in sport where physical bodily contact is an inherent or obvious risk. This chapter focuses on the question why SRC, as a brain injury, should be given special attention. This chapter establishes 'why the brain matters' from a biomedical perspective. By reframing the risk of SRC as a public health concern in the Australian context, this chapter lays the foundations to establish a case for an appropriate role for the state in proactively managing and minimising the risks associated with SRC.

There are four parts to this chapter. Part I examines the evolution and development of scientific understanding of concussion as an injury and specifically as an injury in a sporting context. Through an examination of the medical literature, two injury mechanisms are identified. Part II explains the challenges caused by a patchy and inconsistent approach to collecting accurate and reliable data of the incidence of SRC in Australia. The paucity of data on SRC has constrained efforts to fully understand its aetiology and long-term harm. Consequently, medical mismanagement of SRC is a serious threat to sports participants. Part III identifies the areas that have polarised medical opinions in the current debate on the issue of the potential effects associated with mismanaging SRC and the harm associated with repetitive concussive and sub-concussive

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1 National Health and Medical Research Council, 'Football Injuries of the Head and Neck' (Report, National Health and Medical Research Council, 1994) ('NHMRC Report'); National Health and Medical Research Council, 'Head and Neck Injuries in Football: Guidelines for Prevention and Management' (Guidelines, National Health and Medical Research Council, 1995) ('NHMRC Guidelines') <https:// www.nhmrc.gov.au/guidelines-publications/si2b>; See Colin .W. Fuller, 'Implications of Health and Safety Legislation for the Professional Sportsperson' (1995) 29 *British Journal of Sports Medicine* 5; Matthew J. Mitten, 'Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries' (1993-1994) *University of Pittsburgh Law Review* 129; G. Maurice Kelly, 'Prospective Liability of Sport Supervisors' (1989) 63 *Australian Law Journal* 669; Harold Luntz, 'Compensation for Injuries Due to Sport' (1980) 54 *Australian Law Journal* 588.

2 See Martin Raftery et al, 'It is Time to Give Concussion an Operational Definition: A 3-Step Process to Diagnose (or Rule Out) Concussion Within 48 h of Injury: World Rugby Guideline' (2016) *British Journal of Sports Medicine* 1.

injuries on long-term health. Part IV considers the harm from a public health perspective and examines the application of precautionary principles as a guide for decision-making when faced with incomplete knowledge about the nature and extent of the harm. The final part provides concluding observations.

I EVOLVING DEFINITIONS

A participant's health is taken to mean the physical and mental health and overall well-being of those who participate in sport, including the determinants necessary to lead a socially and economically productive life. The medical literature has established that SRC has always had the potential to adversely affect a participant's physical and mental health. What has not been fully understood, however, is the nature and extent of the risk and why certain individuals might be more susceptible to long-term problems.

A *A 'Kaleidoscopic Panorama' and the Challenge to Define SRC*

Irrespective of the significant increase in focus and attention given to SRC in recent years, concussive injuries and SRC are not new phenomena. Jefferson noted in 1944 that successive generations of scientists have been looking at the same problem; where 'the same patterns of things occur [but] in a new setting'.[3]

It has been known for many decades that concussive injuries affect the brain and that there are consequences of mismanagement. Scientific knowledge is vitally important in the quest to understand the aetiology of the harm but to suggest that concussion in the new 'setting' of sport is only a recent phenomenon is but one pixel in a bigger picture.

Concussions can occur in any setting, so it is useful to see how the definition has evolved in non-sporting contexts. This part will explain how understandings around the medical construction of concussive injuries have developed over time and how the early definitions of SRC developed from general definitions of a concussion.

There is no universal consensus, however, as to what precisely defines a concussion. A review of the literature identifies concussion as being described as a 'brain injury,' a 'mild brain injury', a 'head injury' or a 'mild Traumatic Brain Injury' (mTBI) without clearly

[3] Geoffrey Jefferson, 'The Nature of Concussion' (1944) *British Medical Journal* 4330.0.

distinguishing one term from the other, or outlining the different injury constructs.[4] Various authors across jurisdictions and disciplines use the term 'concussion' in a variety of ways, creating difficulties in drawing accurate comparisons across the literature.[5] This presents several challenges and limitations in this field of study with the absence of a universal definition contributing towards an 'overenthusiastic' use of the term in academic scholarship and misunderstandings in the minds of the public.[6]

1 *Early Definitions*

Derived from the Latin stem *concutere* to mean dash together or shake violently, the historical origins of concussion can be traced back to a short Hippocratic text describing the shaking or concussion of the brain produced by any cause leaving the patient with an 'instantaneous loss of voice'.[7] In the 15th and 16th centuries, researchers referred to *commotio cerebri* when describing the effects of brain injury without skull fracture, considered to be different from other traumatic effects due to the level of intensity and or shorter duration – a form of mild brain injury.[8] Since that time, the definition has continued to evolve, aligning with advances in scientific discovery and the development of more sophisticated diagnostic methods.

An early attempt to define concussion is found in the work of English Consulting Physician, Sir Charles Symonds, who in 1962, rather than seeking to define concussion preferred to describe concussion based on the characteristics, symptoms and sequelae.[9] Before this research, there had been a long-held view that the loss of consciousness was a precursor to diagnosis.[10] On this basis, Symonds considered that while the essential character of symptoms remained constant, they varied from case to case regarding degree and duration.

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4 Annette Greenhow and Jocelyn East, 'Custodians of the Game: Ethical Considerations for Football Governing Bodies in Regulating Concussion Management (2014) *Neuroethics* 65.

5 Paul McCrory, What's in a Name? (2001) 35 *British Journal of Sports Medicine* 285-286; Paul McCrory et al, 'Consensus Statement on Concussion in Sport - the 5th International Conference on Concussion in Sport Held in Berlin, October 2016' (2017) 51 *British Journal of Sports Medicine* 838 ('5th Consensus Statement').

6 McCrory (2001) above n 5, 285; Paul McCrory, 'Future Advances and Areas of Future Focus in the Treatment of Sport-Related Concussion' (2011) 30 *Clinical Journal of Sports Medicine* 201; Jon Patricios and Michael Makdissi, 'The Sports Concussion Picture: Fewer 'Pixels,' More HD' (2014) 48(2) *British Journal of Sports Medicine* 71.

7 J M S Pearce, 'Observations on Concussion. A Review' (2008) 59 (3-4) *European Neurology* 113-119

8 Ibid 113, 114; McCrory (2001) above n 5, 285.

9 Sir Charles Symonds, 'Concussion and Its Sequelae' (1962) 279 (7219) *Lancet* 1.

10 Ibid.

Importantly, Symonds cautioned that concussion was not always a transient and benign affair, and not confined to cases in which there had been a loss of consciousness with rapid and complete recovery. Even in cases where there appeared to be a rapid and complete recovery of cerebral function, Symonds hypothesised that there could still be a small number of neurons that had perished leaving the brain more susceptible to the effects of further damage of the same kind.[11]

Referring to earlier studies from the 1940s, Symonds described the causes of concussion in terms of impacts to the brain – where sudden, direct damage was inflicted causing the stretching or compression to the nerve cells or fibres of the brain and the excessive acceleration or deceleration of the brain and the shear strains set up by rotational forces causing neural damage.

Symonds identified the challenges faced by earlier researchers, whose experimental subjects were, for obvious reasons, non-human subjects.[12] Due to the invisible and latent nature of a brain injury, much reliance was placed on the subjectively-reported symptoms, a matter that continues to hinder accurate diagnosis in the 21st century.[13] Anxiety, irritability, difficulty in sustaining mental concentration, impaired memory and fatigue might already have been aspects of the patient's personality and disposition in the first place. The patient's whole 'attitude of mind', attitude towards illness, its causes and prospects, influenced the findings.[14]

2 *Concussion as a Clinical Syndrome*

In 1966, the Committee on Head Injury Nomenclature convened the Congress of Neurological Surgeons in the US to formulate a consensus definition of concussion as:

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11 Ibid 4, 5.

12 Ibid 2; See also Matthew Dashnaw, Anthony Petraglia and Julian Bailes, 'An Overview of the Basic Science of Concussion and Sub Concussion: Where We Are and Where We Are Going' (2012) 33(6) *Neurosurgery Focus* 9, 2.

13 See for example Andrew Gardner, 'The Complex Clinical Issues Involved in an Athlete's Decision to retire from Collision Sport Due to Multiple Concussions: A Case Study of a Professional Athlete' (2013) 4(141) *Frontiers in Neurology* 6.

14 Symonds, above n 9, 4-5.

> …a clinical *syndrome* characterised by an immediate and transient post-traumatic disturbance of neural function such as alteration of consciousness, disturbance of vision or equilibrium due to mechanical forces (the CNS Consensus Definition).[15]

Describing concussion as a 'syndrome' reflected the causative connection between the head trauma and the brain injury. The head trauma is caused by the blows and force of impact, transmitting to the brain and leading to concussion (the syndrome), resulting in brain injury.[16] Rather than a specific progression of symptoms, the reference to a concussion as a clinical syndrome reflected the wide and variable range of symptoms described in further detail later in this chapter.

The 1966 CNS Consensus Definition became the most referenced definition of concussion in the medical literature from the US and remained so for the next 30 years.[17] However, developments in scientific understandings around concussion resulted in the definition as too narrow in scope by focusing on brain stem dysfunction and loss of consciousness as necessary factors in diagnosing a concussion. Therefore, a new definition of concussion was developed by the American Academy of Neurology (AAN) in 1997 to recognise that concussion may or may not include a loss of consciousness.[18]

B *Sport-Specific Concussion Understandings*

1 *US Developments*

In the general population, the likelihood of full recovery following a concussive injury was expected where a patient was unlikely to be exposed to further harm, and there was minimal risk of further exposure of repetitive concussive or sub-concussive injury. However, in a sporting context, particularly in contact and collision sports, the risk of repetitive injury coupled with the intensity and competitive nature of the environment and playing schedule, meant that there was a higher risk of repetitive injury. This provided the catalyst for collaboration to develop more nuanced and sport-specific understanding in defining and managing concussive injuries in a sporting context.

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15 Congress of Neurological Surgeons. Committee on Head Injury Nomenclature: Glossary of Head Injury' (1966) 12 *Clinical Neurosurgery* 386-94.

16 5th Consensus Statement, above n 5.

17 See Karen Johnston, Paul McCrory and Nicholas Mohtadi, 'Evidence-Based Review of Sport-Related Concussion: Clinical Science' (2001) 11 *Clinical Journal of Sport Medicine* 150.

18 American Academy of Neurology, *Position Statement: Sports Concussion* (1997) (on file); Mark Aubry et al, 'Summary and Agreement Statement of the First International Conference on Concussion in Sport, Vienna 2001' (2002) 36(1) *British Journal of Sports Medicine* 3 ('1st Consensus Statement').

In 1997, the American Orthopaedic Society for Sports Medicine (AOSSM), the peak representative body of American Orthopaedic surgeons, sponsored the Concussion in Sport Workshop and found that while many concussions could be described as 'mild,' concussion was a subset of traumatic brain injury. In discussing the complexities associated with the risk of repetitive injuries or being returned to play or practice too soon, the report identified that the damaged brain cells were alive, but in an injury-induced vulnerable state, making the patient 'extremely vulnerable to the consequences of minor changes in cerebral blood flow and/or intracranial pressure and apnea.'[19] This was, and remains, a critical part of the medical management puzzle associated with SRC.

2 *International Collaborations*

In 2001, three international sporting organisations organised the First International Symposium on Concussion in Sport held in Vienna. The meeting was designed to establish a mandate and take leadership and develop consensus over the medical management and research in respect of SRC. These early initiatives were focussed on the medical aspects of SRC and reflected the early work of non-state actors in addressing concerns around SRC within a self-regulated system.

Several experts were invited to the meeting to express their opinions on the state of scientific understandings and best practice across a variety of areas relevant to SRC. One of the aims of the Vienna conference was to provide recommendations to improve the safety of athletes who suffered concussive injuries in sports such as ice hockey, football and other high impact sports and seek consensus on the definition of concussion.[20] At the end of the first conference, a small group of clinicians and scientists involved in sports medicine drafted a document describing the agreed position reached by those in attendance at the meeting.[21] The group became known as the Concussion in Sport Group (CISG), and the *Summary and Agreement Statement of the First International Conference on Concussion in Sport* was published the following year in 2002.[22]

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19 Edward M. Wojtys et al, 'Concussion in Sports' (1999) 27(5) *The American Journal of Sports Medicine* 676, 677.

20 1st Consensus Statement, above n 18.

21 Ibid 6.

22 Ibid.

(a) Consensus Statement Definitions and Guidelines

Since 2001, there have been a further four symposia conducted by the CISG and revised Consensus Statements issued by the CISG, with membership expanded from the original ten members to now comprising 36 members.[23] Twelve research questions were developed and approximately 60,000 scientific research papers were systematically reviewed. The findings were published and incorporated as part of the 2017 Consensus Statement.[24]

The CISG definition of concussion has evolved since the first consensus meeting in 2001. Table 2.1 identifies the evolving nature of defining SRC.

CISG Conference	Definition
First International Conference of Concussion in Sport, Vienna 2001	***Concussion*** *is defined as a complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces*. The classification of concussion by reference to different grading systems was abandoned.
2nd International Conference of Concussion in Sport, Prague 2004	The definition of concussion did not change, but incorrectly reported on the 1st Consensus Statement as referring to '*sports concussion'*. A new classification of concussion was established to distinguish between a simple concussion and a complex concussion. The latter category encompassed cases where athletes suffered persistent symptoms, prolonged loss of consciousness or prolonged cognitive impairment after the injury.
3rd International Conference of Concussion in Sport, Zurich 2008	***Concussion*** *is defined as a complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces.* Several common features that incorporate clinical, pathologic and biomechanical injury constructs that may be utilized in defining the nature of a concussive head injury include: 1. Concussion may be caused either by a direct blow to the head, face, neck or elsewhere on the

[23] Ibid. See also Paul McCrory et al, 'Summary and Agreement Statement of the 2nd International Conference on Concussion in Sport, Prague 2004' (2005) 39 *British Journal of Sports Medicine* 196 ('2nd Consensus Statement'); Paul McCrory et al, 'Consensus Statement on Concussion in Sport 3rd International Conference on Concussion in Sport Held in Zurich, November 2008' (2009) 19 *Clinical Journal of Sport Medicine* 185('3rd Consensus Statement'); Paul McCrory et al, 'Consensus Statement on Concussion in Sport: The 4th International Conference on Concussion in Sport held in Zurich, November 2012' (2013) 47 *British Journal of Sports Medicine* 250-258 ('4th Consensus Statement'); 5th Consensus Statement, above n 5.

[24] The writer was present at the 5th International Conference on Concussion in Berlin. See 5th Consensus Statement, above n 5.

	body with an impulsive force transmitted to the head. 2. Concussion typically results in the rapid onset of short-lived impairment of neurologic function that resolves spontaneously. 3. Concussion may result in neuropathological changes, but the acute clinical symptoms largely reflect a functional disturbance rather than a structural injury. 4. Concussion results in a graded set of clinical symptoms that may or may not involve loss of consciousness. Resolution of the clinical and cognitive symptoms typically follows a sequential course; however, it is important to note that, in a small percentage of cases, post-concussive symptoms maybe prolonged. 5. No abnormality on standard structural neuroimaging studies is seen in concussion. A decision was made to abandon the simple and complex classifications made at the second international conference.
4th International Conference of Concussion in Sport, Zurich 2012	***Concussion*** *is a brain injury and is defined as a complex pathophysiological process affecting the brain, induced by biomechanical forces.* Several common features that incorporate clinical, pathologic and biomechanical injury constructs that may be utilised in defining the nature of a concussive head injury include: 1. Concussion may be caused either by a direct blow to the head, face, neck or elsewhere on the body with an ‘‘impulsive’ force transmitted to the head. 2. Concussion typically results in the rapid onset of short-lived impairment of neurological function that resolves spontaneously. However, in some cases, symptoms and signs may evolve over a number of minutes to hours. 3. Concussion may result in neuropathological changes, but the acute clinical symptoms largely reflect a functional disturbance rather than a structural injury and, as such, no abnormality is seen on standard structural neuroimaging studies. 4. Concussion results in a graded set of clinical symptoms that may or may not involve loss of consciousness. Resolution of the clinical and cognitive symptoms typically follows a sequential course. However, it is important to note that in some cases symptoms may be prolonged.

5th International Conference of Concussion in Sport, Berlin 2016	**Sport related concussion** is a traumatic brain injury induced by biomechanical forces. Several common features that may be utilised in clinically defining the nature of a concussive head injury include: • SRC may be caused either by a direct blow to the head, face, neck or elsewhere on the body with an impulsive force transmitted to the head. • SRC typically results in the rapid onset of short-lived impairment of neurological function that resolves spontaneously. However, in some cases, signs and symptoms evolve over a number of minutes to hours. • SRC may result in neuropathological changes, but the acute clinical signs and symptoms largely reflect a functional disturbance rather than a structural injury and, as such, no abnormality is seen on standard structural neuroimaging studies. • SRC results in a range of clinical signs and symptoms that may or may not involve loss of consciousness. Resolution of the clinical and cognitive features typically follows a sequential course. However, in some cases symptoms may be prolonged. The clinical signs and symptoms cannot be explained by drug, alcohol, or medication use, other injuries (such as cervical injuries, peripheral vestibular dysfunction, etc.) or other comorbidities (e.g. psychological factors or coexisting medical conditions).

Table 2.1: CISG Definitions

Two observations can be made about these evolving definitions of concussion. First, the definition has only recently been described as a 'sport' concussion rather than 'a concussion'. Second, the reference to 'brain injury' has only recently been introduced. The language has changed to now reflect the notion that SRC is a form of traumatic brain injury, bringing the definition in line with other jurisdictions and noting that the reference to a brain injury explains the seriousness of the injury.

Since the first meeting in 2001, the CISG Consensus Statements is generally recognised globally as setting the standard for SRC management.[25] For this reason, the CISG definition of SRC in the 2017 consensus statement has been adopted in this thesis. [26] Moreover, the CISG 5th Consensus Statement is recognised as establishing best practice guidelines and

[25] There has been some criticism of the CISG guidelines. For example, see Neil Craton and Oliver Leslie, 'Time to Re-Think the Zurich Guidelines? A Critique on the Consensus Statement on Concussion in Sport: The 4th International Conference on Concussion in Sport, Held in Zurich, November 2012' (2014) 24(2) *Clinical Journal of Sports Medicine* 93.

[26] 5th Consensus Statement, above n 5, 838.

adopted by state actors in several jurisdictions.[27]

C *Injury Mechanisms, Signs and Symptoms*

In identifying whether SRC is a private or a public problem, it is necessary to explain the different injury mechanisms to establish whether the risk of SRC is one that a participant should reasonably be assumed to accept. Further, a key challenge with the medical assessment and management of SRC is the variable and evolving nature of symptoms which rely upon self-reporting by the injured participant.

1 *The Egg Yolk Analogy*

A way of understanding concussion and the relationship between the skull and the brain is to use the analogy of an egg, its shell and the yolk. A concussion has been described as 'shaking an egg where the yolk moves around inside the shell, yet the shell remains intact.'[28] The force of impact causes the egg (the brain) to move inside the shell (the skull). The egg yolk is protected by the shell, but if sufficient force is applied, the eggshell will break, and the yolk will be damaged. Even in circumstances when the eggshell is not broken, the yolk can be damaged, invisible to the naked eye.

This egg yolk analogy is intended to demonstrate the difficulty in determining the impact of a head knock. The medical evidence is uncontentious; if a participant returns to play, to practice, to school or work before asymptomatic or suffers a further concussion, there is a higher risk that serious harm can result.

2 *A More Scientific Explanation - Metabolic Dysfunction*

Biomedical scientists explain the injury mechanism of SRC as involving two injury phases.[29] The injury mechanism and the two injury phases are essential to understanding as they help explain the nature of the risk in SRC and the extent to which a participant can be

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[27] In Australia, see Australian Institute of Sport and Australian Medical Association, 'Concussion in Sport Position Statement' (2017) ('AIS/AMA Concussion in Sport Position Statement 2017'); See below, chapter 8 part III ('State Actors and SRC'); In Canada, the Federal and Provincial Territories Working Group on Concussion in Sport recognises the CISG Consensus Statement as best practice. See below, chapter 5, part II ('A Softer Collaborative Approach: Canada and the UK).

[28] Lynne Anderson, 'Concerned about Concussion and Brain Injuries? 4 Essential Reads' *The Conversation* (27 July 2017) <https://theconversation.com/concerned-about-concussions-and-brain-injuries-4-essential-reads-81656>.

[29] See Dashnaw et al, above n 12, 2.

considered to have consented to the risk; a matter revisited later in this thesis.[30]

(a) Primary Injury Phase

The primary injury phase involves the moment of impact and the translation of kinetic energy and force vectors in the acceleration and deceleration mechanism.[31] The research identifies the importance of measuring the velocity of impacts of the collisions at the primary injury phase. Without diagnostic tools that can measure the G-force nature of the impact, this is a difficult assessment to make.[32] Doctor Kevin Guskiewicz explained the impact of concussion as analogous to a motor vehicle crash,

> If you drive your car into a wall at 25 mph and you weren't wearing your seatbelt, the force of your head hitting the windshield would be around 100 g: In effect, a player who sustained two hits around 80 G's, had two car accidents that morning.[33]

The primary injury phase is an obvious or inherent risk of participating in contact or collision sports. The only way to remove the risk is not to play these sports.

(b) Secondary Injury Phase

The secondary injury phase involves the indirect result of the trauma, described as the 'pathophysiological processes,' and involves immediate and delayed cellular events. The 'downstream' effects of mismanaging SRC during this phase is where the most significant harm arises.[34] This is the most critical part of the injury mechanism and where the most damage is thought to arise if mismanaged.

To explain what happens at a cellular level, Doctor Cantu compared the functioning of a concussed brain to that of a healthy functioning brain.[35] In a healthy brain, Doctor Cantu explained signals arrive at the nerve cell (a neuron) and are transmitted along the axon.

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30 See below, chapter 7, part I ('Law, Sport and SRC').

31 See Dashnaw et al, above n 12, 2.

32 See, for example, x2 Patch is a small patch worn on the back of the ear and can measure the G-force of impacts. For further discussion about measuring concussive impacts in sport, see Doug King et al, 'Measurement of the Head Impacts in a Sub-Elite Australian Rules Football Team with an Instrumented Patch: An Exploratory Analysis' (2017) 12(3) *International Journal of Sports Science and Coaching* 359.

33 Malcolm Gladwell, 'Offensive Play' *The New Yorker (online), 19 October 2009 <http:// http://www.newyorker.com/magazine/2009/10/19/offensive-play>*.

34 Kerri McGowan Lowrey and Stephanie R Morain, 'State Experiences Implementing Youth Sports Concussion Laws: Challenges, Successes, and Lessons for Evaluating Impact' (2014) 42 *Journal of Law, Medicine and Ethics* 290.

35 Dr Robert Cantu, Massachusetts School of Law Educational Forum, published 24 April 2012, <http://www.youtube.com/watch?v=uEGXcNNyzpY>.

The message is passed using neurotransmitters that are released, propagating the message along to the next nerve cell in the chain. The nerve cells comprise of potassium ions and an in-built regulator that operates as the ATP mechanism – a type of pump that regulates the existence of potassium within the nerve cell. The cerebral blood flow is thought to be highly regulated in an uninjured brain.[36]

According to Doctor Cantu, a concussed brain shows signs of a chemical reaction caused by the chaotic metabolic event (shaking) where the potassium ions leave the nerve cell, allowing positively charged calcium ions to enter. These calcium ions shut down the ATP mechanism that would usually regulate the ions by shutting down the 'pump' and causing a build-up of calcium ions in the nerve cell, leading to metabolic dysfunction and interference with the neurotransmitters. The nerve cells are still alive but not functioning.

If the brain is stressed physically or cognitively before the balance of potassium has been reinstated, the nerve cells can die or be severely damaged. It is this vulnerability of the nerve cells that support the requirement for conservative management until the patient is asymptomatic. The neurotransmitters are re-connected only when the potassium ions return to the nerve cell, replacing the calcium ions and regular function returns.

This secondary injury phase is where the patient's brain is described as in 'an injury-induced vulnerable state.' [37] The sensitivities associated with detecting the chemical reactions at the cellular level present obvious difficulties and are not currently detectable using imaging methods due to the absence of a visible marker. Routine MRI or CT scans (as standard structural neuroimaging tools) are said to have limited diagnostic value in detecting functional changes.[38] As such, the medical management of SRC and determining when it is safe to return to activity is based on the clinical judgment of healthcare professionals, which is heavily dependent on the self-reporting by the injured patient.

This secondary injury phase is not an obvious or inherent risk of participating in contact or collision sport. Instead, only a medically qualified person can assess when it is safe to return to activity. As such, a participant is unlikely to be considered to have accepted the risk of being clinically mismanaged during this secondary injury phase. This is a necessary

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[36] Dashnaw et al, above n 12, 3.
[37] Wojtys, et al, above n 19, 677.
[38] 4th Consensus Statement, above n 23, 250; 5th Consensus Statement, above n 5, 838.

and important qualification and relevant to this thesis in the context of assessing responsibility for the harm.[39]

3 *Evolving Symptoms*

No two concussions are the same and the reasons why continue to remain elusive to even the most advanced scientific minds. The latent nature of concussion and the subjective elements of its sequelae contribute to the difficulties and complexities associated with measuring the nature and scope of the risks it presents. There are many variables and evolving cognitive and neurological symptoms that manifest in different ways, at various times and to varying degrees. The difficulties described above when seeking to objectively measure the point in time when brain function has returned to normal after concussive injury is a consistent theme in the medical literature, justifying why a brain injury has been described as an 'invisible' injury.[40]

(a) A Range of Possibilities

A list of symptoms and the different clinical manifestations in SRC was developed by the CISG in 2001 and later expanded in 2016, identifying 22 possible symptoms across one or more clinical domains. Symptoms are classified as somatic, cognitive and/or emotional, physical signs, balance impairment, behavioural changes, cognitive impairment and sleep-wake disturbance.[41]

In addition to the latent nature of many symptoms, the complexity associated with concussion is due to the evolving nature of the injury. The symptoms that present in the first few minutes can be different from those that manifest in an hour, 6 hours and beyond.[42] According to the 2009 and 2012 CISG consensus statements, symptoms in 80 to 90 per cent of adult patients resolve in a short period, estimated to be between seven to ten days—if managed properly.[43] This statistic was omitted in the latest version of the

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[39] See below, chapter 7, part I ('Law, Sport and SRC').

[40] For example, see Michael Makdissi et al, 'Natural History of Concussion in Sport: Markers of Severity and Implications for Management' (2010) 38 *The American Journal of Sports Medicine* 464, 468.

[41] Symptoms are classified and listed by the CISG. The CISG designed a Sideline Concussion Assessment Tool (SCAT™). The latest version is the SCAT™5 ('SCAT™5); 5TH Consensus Statement, above n 5, 840.

[42] *Professor Winne Meewissee on Concussion in Sport*, April 2013 (Podcast) <https://soundcloud.com/bmjpodcasts/professor-winne-meeuwisse-on>.

[43] 4th Consensus Statement, above n 23, 251.

CISG Consensus Statement.[44]

A more conservative approach is adopted for children and adolescents due to the vulnerabilities associated with concussion of a developing brain.[45] The more complicated cases are those where symptoms continue beyond the recommended time frame, defined now in the 2017 Consensus statement as 'persistent symptoms'.[46]

According to Alzheimer's Australia (NSW), some symptoms can last months or longer, with cognitive changes the 'most common, long-lasting and most disabling symptoms', affecting the ability to learn and remember new information, the capacity to pay attention, organise thoughts, plan and make sound judgments.[47] The recognition by this public interest group illustrates that non-state actors, independent of the sports, have engaged in seeking to understand the biomedical perspectives around SRC.

(b) Diagnostic Tools

The CISG developed a tool to assist in managing SRC while recognising SRC as a latent syndrome with no direct and immediate methods available to objectively and conclusively determining when brain function has returned to normal. The Sideline Concussion Assessment Tool (SCAT™) was initially developed by the CISG in 2001 as a free diagnostic tool. The Concussion Recognition Tool (CRT©) has also been developed for use by non-medically trained personnel. The fifth version of the SCAT was released in 2017, known as the SCAT5©, and is a standardised tool for use by licensed healthcare professionals as one method to assist in evaluating concussions.[48]

Over the years, a flourishing market has developed with the emergence and development of a wide variety of commercially marketed diagnostic tools for use in concussive injuries. Described as 'Concussion Inc.', entrepreneurs and commercially savvy scientists have

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44 There is no reference to this recovery statistic in the 5th Consensus Statement with no explanation given for this departure from earlier consensus statements. 5th Consensus Statement, above n 5.

45 Mark E Halstead, Kevin D Walter and The Council on Sports Medicine and Fitness, 'Clinical Report- Sport-Related Concussion in Children and Adolescents' (2010) 126 (3) *American Academy of Pediatrics* 597-615.

46 5th Consensus Statement, above n 5, 842.

47 Kylie Sait, 'Football, Head Injuries and the Risk of Dementia', 17 March 2013, 7 <https://nsw.fightdementia.org.au/sites/default/files/AlzNSW_Football_head_injuries__the_risk_of_dementia_final_130313_web.pdf>.

48 SCAT5™, above n 41; 5th Consensus Statement, above n 5, 851.

flooded the market with a range of products, some with questionable scientific merit.[49]

D *Why the Brain Matters – The Costs of an Invisible Injury*

Based on the above discussion, there are four reasons advanced in support of a special case for SRC. The first is that the brain is a 'sacrosanct anatomical structure' and the epicentre of human behaviour. Brain function is vitally important to the maintenance of long-term quality of life.[50] Altering the brain will, in turn, alter a person and can fundamentally change personality and disposition. Irrational behaviour or disruptions in personality might be misunderstood, misdiagnosed or confused without a full appreciation of the context; where the underlying reason might be more to do with earlier trauma.

The second reason why the brain matters as a special case is due to the nature of the injury as a latent or invisible injury. When the brain is damaged by the mismanagement of SRC, there is no objective measure or diagnostic tool currently available to accurately assess when a player is asymptomatic and ready to return to activity. Accurate diagnosis relies upon full and frank self-reporting by patients. Herein lies a key challenge in sport. In a competitive sporting environment, performance-driven motivations, structural constraints and other sociocultural influences are likely to constrain voluntary self-reporting by players, leading to serious concerns of under-reporting of SRC.[51]

The third reason why the brain matters over other sporting injuries is that the costs associated with the injury are not immediately realised or visible. Unlike the immediate cost associated with a torn ligament or a broken bone, the current medical debate raises the possibility that there is a heightened risk of more serious longer-term harm; where the costs are not realised until many years earlier. In the US, there is concern that SRC will render participants susceptible to other medical conditions such as binge drinking, epilepsy, increased risks of depression and Alzheimer's disease.[52] The cost of SRC,

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[49] Usha Lee McFarling, 'Concussion, Inc.: The Big Business of Treating Brain Injuries', *Stat News* (online), 16 December 2015 <https://www.statnews.com/2015/12/16/concussion-brain-big-business/>. See also Irvin Muchnick, *Concussion Inc. The End of Football as We Know It* (ECW Press, 2015).

[50] Gardner, above n 13, 6.

[51] The 42, 'Almost 50% of Irish Rugby Players Have Hidden a Concussion', December 28, 2013 <http://www.the42.ie/rugby-concussion-player-survey-1241570-Dec2013/>.

[52] Jean A Langlois, Wesley Rutland-Brown and Marlena Wald, 'The Epidemiology and Impact of Traumatic Brain Injury: A Brief Overview.' (2006) 21 *Journal of Head Trauma Rehabilitation* 375,376; See also Kylie Sait, above n 47.

therefore, is an invisible cost which may or may not materialise until many years later.

Finally, and perhaps the most significant reason is that the mismanagement of SRC or multiple concussive injuries can cause death or significant neurological harm, making SRC a serious and potentially life-threatening concern. Indeed, several cases have identified a cause of death as connected with brain injury in a sporting context and associated complications.[53]

In several jurisdictions, coronial inquests have been undertaken to identify the cause or causes of death from SRC-related concerns. Notably, English soccer player, Jeff Astle, died in 2002 of 'industrial disease' linked to the many head knocks sustained in soccer in heading the ball. According to the coroner, the 59-year-old had suffered early onset dementia, and the coronial inquest found that his death was caused by the damaging effects on his brain of repeatedly heading footballs during his 15-year professional career.[54]

In Northern Ireland, 14-year old rugby player Ben Robinson died while playing rugby for his school. He had sustained three head injuries and been sent back to play each time, leading the coroner to find that the young player died from Second Impact Syndrome (SIS).[55] SIS is described as a 'catastrophic swelling of the brain caused by a second injury that occurs before a previous injury has healed'.[56] Despite the coronial finding, there are polarised views in the medical literature around whether such a syndrome exists; little comfort for the parents of this young man.

In Canada, 17-year-old rugby player Rowan Stringer died after sustaining three concussions in less than a week. The coronial inquest confirmed the cause of her death was from SIS and evidence presented at the inquest indicated that there were significant

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[53] Annual injury surveillance of football fatalities began in 1931 in the US and since 1960, most direct fatalities have been caused by brain injuries. See National Center for Catastrophic Sport Injury Research, 'Annual Survey of Football Injury Research 1931 -2017' (2017) 1-38.

[54] Steven Morris, 'Sam Peters FA Chairman Dyke Issues an Apology to the Family of Jeff Astle as Game's Governing Body Admit Vital Concussion Study was Abandoned' *The Guardian* (online), 25 March 2014 <https://www.theguardian.com/uk/2002/nov/12/football.stevenmorris>.

[55] Andy Bull, 'Death of a Schoolboy: Why Concussion is Rugby Union's Dirty Secret, *The Guardian* (Australia) (online), 14 December 2013. <https://www.theguardian.com/sport/2013/dec/13/death-of-a-schoolboy-ben-robinson-concussion-rugby-union>. See also, BBC News, 'Ben Robinson's Rugby Death is First of its Kind in Northern Ireland' *BBC News* (online), 3 September 2013. < https://www.bbc.com/news/uk-northern-ireland-23943642>.

[56] Ontario, Ministry of Tourism, Culture and Sport, Rowan's Law Advisory Committee, 'Creating Rowan's Law: Report of the Rowan's Law Advisory Committee' (2017), 8.

information asymmetries around the impact of repetitive concussions and a fragmented system that was ineffective in managing the risks associated with SRC.[57] After a 12-day coroner's inquest, 49 recommendations were made to improve concussion awareness, prevention, management and education. [58] The deceased parents, Mr and Mrs Stringer, are vocal campaigners for change and have been effective in influencing Canadian state actors to engage with the management of SRC proactively.[59] The Canadian state response is discussed further in chapter 5.[60]

Other cases have been reported in the US and several jurisdictions, illustrating the potential harm associated with SRC as a sporting injury.[61] Many other cases involve serious injury resulting from the mismanagement of SRC and, based on current evidence, have been caused by chronic information asymmetries and a lack of education and awareness about the seriousness of the harm. This evidence supports the view that SRC is different from other sporting injuries and state actors in Australia must be proactive to address the harms of SRC.

II PATCHY DATA: CHALLENGES IN MEASURING THE SIGNIFICANCE OF SRC

Aman et al argue that epidemiology and aetiology are essential as the foundation for sports injury research.[62] Epidemiology is a fundamental and critical step to understand how the problem is defined and to measure the impact and significance of the problem. This is also important from a regulatory perspective.

Despite SRC being the subject of the NHMRC Report in 1994, there is a paucity of reliable evidence to measure the actual incidence rates across sport in Australia. The lack of

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57 Ibid. Appendix A, 36-44; Rowan Stringer's Brain was Not Healed from Previous Concussions, Surgeon Says', *CBC News* (online), 21 May 2015 <http://www.cbc.ca/news/canada/ottawa/rowan-stringer-s-brain-wasn-t-healed-from-previous-concussions-surgeon-says-1.3081408>.

58 Ontario, Ministry of Community Safety and Correctional Services, Office of the Chief Coroner, *Verdict of Coroner's Jury* (Report, 3 June 2015. The full details of the coronial verdict can be found in the Verdict of Coroner's Jury Office of the Chief Coroner Report 3 June 2015. See <http://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/Inquests/Verdictsandrecommendations/OCCInquestStringer2015.html>.

59 Mr Stringer was at the SIRC Workshop attended by the author in Ottawa on 8 June 2018. Field notes from the workshop reflect the powerful impact he and his family have had in coordinating efforts in Ontario and at the Federal level to address the harm of SRC. See below, chapter 5, part II ('A Softer Collaborative Approach: Canada and the UK').

60 See below, chapter 5, part I ('US Governments' Responses').

61 Kurt Bayer, 'Coach Calls for Forum on Rugby Head Injuries After Teen's Death' *The New Zealand Herald* 8 July 2014 <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11289305>.

62 Aman Malin, Magnus Forssblad and Karin Henriksson-Larsen, 'Insurance Claims Data: A Possible Solution for a National Sports Injury Surveillance System? An Evaluation of Data Information Against ASIDD and Consensus Statements on Sports Injury Surveillance' (2014) 4 *British Medical Journal Open*, 5.

consistent data collection methods and absence of transparency in some sports makes it difficult for researchers to make epidemiological findings and, significantly, makes it difficult for participants, parents and the Australian public to assess the safety record of the individual sports. These information asymmetries are reviewed later in this thesis.

Estimated incidence rates of SRC in Australian sport (albeit an incomplete and imperfect data source), are crucial to understanding why SRC should move from being a private matter to being a public health concern because of the critical information asymmetries that currently exist. It also explains the current view that the occurrence of SRC at the community level of sport is likely to be high, creating legitimate concerns as to the absence of oversight, capacity or resources to address SRC at this level.

Gathering evidence of the significance of the risk of SRC is a fundamental part of the regulatory process, which provides the necessary evidence base upon which to develop regulatory measures. Moreover, the importance of injury data is fundamental to understanding and measuring the impact of SRC, determining who should be acting, and informing what measures should be taken to address the resultant harm.

A *The Importance of Data*

In Australia, there is no uniform system across sports as to how to collect injury surveillance data. Despite early calls for action for a national injury database and consistent surveillance systems in sport, Australia currently lacks a consolidated and reliable method for calculating actual incidence rates of SRC.[63] This has led to a lack of data which can be used to define and identify the actual incidence rates of SRC across all sports and all playing levels.[64] Usually, the focus is on capturing this information at the professional level, with limited coordination across the community levels of the sport, creating critical gaps in this area.

Even in those sports that have sophisticated injury surveillance data collection methods, there is a significant difference in the quality of the data collected at the elite level of the sport when compared to the other levels in the same sport. Furthermore, there is limited data available in male and female sports and epidemiologists and others have been calling

[63] NHMRC Report, above n 1.
[64] AIS/AMA Concussion in Sport Position Statement 2017, above n 27.

for this information gap to be closed.[65] The approaches to injury surveillance reporting by each of the SGBs has been haphazard and ad-hoc across sport, making it difficult to ascertain the incidence of SRC within sports.[66]

Moreover, there is no requirement for the SGBs to disclose this information publicly. Instead, each sport is responsible for its injury surveillance and data collection methods. This self-regulated system is necessarily dependent upon the motivations and capacity of non-state actors, governed by the SGB for each sport, to recognise the importance of injury surveillance and data collection across all levels of the sport. In many cases, this data is either not publicly available, difficult to locate or only partially disclosed by the collecting body.[67]

1 *Fragmented Data Sources*

Incidence and surveillance data can provide vital evidence and understandings about the nature and scope of the problem and should be the platform upon which effective and efficient responses are designed, developed and deployed. This evidence identifies both the existence and significance of the problem, the characteristics of the affected target group/s and provides an evidence base upon which to design regulatory responses and strategies.[68]

A review of the literature identifies three primary methods for data collection; by individual sports through the internally organised injury surveillance systems; second, efforts of government agencies; and third, through the efforts of researchers with a focus on injury prevention and control.

2 *Individual Sports Injury Surveillance*

In sport, there is no universal system for injury surveillance data collection and analytics and much depends on the capacity and motivation of the individual sports in designing a

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[65] In the sport of Australian football, calls have been made to address knowledge gaps to assist epidemiological understandings about female participation in the sport. See Lauren V Fortington and Caroline F Finch, 'Priorities for Injury Prevention in Women's Australian Football: A Compilation of National Data from Different Sources' (2016) 2 (1) *British Medical Journal Open Sport and Exercise Medicine* 1.

[66] John Heshka and Kris Lines, 'One Ding to Rule Them All: A Proposed New Approach to Regulating Brain Injuries in Sport (2013) 3 *International Journal of Sport and Society,* 141-152.

[67] See below, chapter 7, part II and III.

[68] Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017) 136-137.

system for their own use. In many cases, this data is either not publicly available, difficult to locate or not fully disclosed by the collecting body.

Anderson identified a duty of surveillance on the part of a sport's governing body to organise injury surveillance studies through the collection of data across all playing levels of the sport, describing this as the 'first critical step' to optimising injury management in the sport.[69] A benefit of injury surveillance data, especially data made publicly available, is that it can address information asymmetries and enable parties to make informed decisions about the safety of the sport and choices about whether or not to participate.

Such aspirational goals for injury surveillance and data collection were first identified in Australia in 1994 when the NHMRC suggested a central repository of data for injuries such as SRC, considered later in this chapter. Despite these recommendations by the NHMRC, efforts to collect data has been a relatively recent development, and even then, primarily focused on the elite level of the sport. The efforts of non-state actors have been ad-hoc, inconsistent and fragmented across the sporting codes which operate within their self-regulated system.

3 *Towards a Harmonised Approach*

The integrity of injury surveillance data depends on a variety of factors, including the way the sport defines a concussion, the existence of a robust injury monitoring system and the efforts of researchers in the area with access to the internal sporting systems or through external collection through the analysis of hospital admission data. In 2006, researchers identified the challenges associated with 'patchy data' collection, primarily due to incorrect recording methods capturing only those concussions where there was a loss of consciousness.[70] Such methodological challenges were likely to be the product of an independent approach to injury surveillance by each sport of the incidence of concussion, with little or no coordination across sports. However, there have been some steps in recent times towards a more harmonised approach, but more needs to be done.

4 *State Co-Ordinated Data Collection*

Another method to obtain data relating to incidence rates in SRC is through the efforts of state agencies involved in data collection and dissemination. In the US, the Centers for

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[69] Jack Anderson, 'Concussion, Sport and the Law' (2016), *The Sports Integrity Initiative,* (11 February 2016) <http://www.sportsintegrityinitiative.com/concussion-sport-and-the-law/>.

[70] Langlois, above n 52, 375.

Disease Control and Prevention (CDC) acts, among other things, as the central repository of data collection for the 'Injury Prevention & Control of Traumatic Brain Injury'. The CDC has been collecting information on sport-related concussion based on hospital admission data. Similarly, in Canada, the Sports Information Resource Centre (SIRC) has played a significant role in collecting data on incidence rates in Canadian sport.

In Australia, however, there is no coordinated state approach to SRC data collection. The absence of a proactive approach to injury data is surprising for two reasons. First, injury prevention and control were identified as a KHPA by the ACG in 1986, and the role of the Australian Sports Commission recognised as being involved in prevention activities at the national level.[71] State funding towards several studies identified the need for a national injury data system to collect information to help understand the incidence of sporting injuries. Second, the 1994 state-funded NHMRC Report made the recommendation to establish a central repository of data. This presents a missed opportunity and is considered later in this chapter.

B *Information Asymmetries*

The data collection limitations noted above have created challenges for epidemiologists in seeking to measure the actual incidence rates in sport. The primary sources of information come from hospital-treated statistics, insurance claims records and sports injury data records if available.[72] In 2002 and 2003, a national survey was conducted of sports and recreation activities to ascertain injury incidence rates in Australia.[73] Football accounted for 27.7% of sports-related hospitalisations in the reporting period. Nearly one in 10 admissions involved Australian football and rugby union.

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[71] National Health Priority Areas identified injury prevention and control as an area of focus. See Commonwealth, Australian Institute of Health and Welfare, *National Health Priority Areas Report: Injury Prevention and Control* (1997) 11, 67-72 ('AIHW Report'); Public Health Association of Australia, *Policy for Injury Prevention and Control*, (2013), 2 [1], 11.

[72] The data collection limitations have created challenges for epidemiologists in seeking to measure the actual incidence rates in sport. Hospitalitalised sport-related concussion data has been captured and reported by the Australian Institute of Health and Welfare. For further information, see Australian Institute of Health and Welfare, Renate Kreisfel, James Harrison and Amanda Tovell, 'Hospital Care for Australian Sports Injury, 2012-13' Injury Research and Statistics series no 105, Cat no INJCAT 181, Canberra 18 -21 ('AIHW Report 2017'). For further discussion about data collection limitations, see Caroline F Finch, Angela J Clapperton, and Paul McCrory, 'Increasing Incidence of Hospitalisation for Sport-Related Concussion in Victoria, Australia' (2013) (8) *Medical Journal of Australia* 198 427-430.

[73] Louise Flood and James E Harrison, 'Hospitalised Sports Injury, Australia 2002-03' *Injury Research and Statistics Series* Number 27 (2006), 26.

1 *Patchy Data Estimates*

It is difficult to accurately determine the actual incidence rates of SRC in Australia. Based on a wide range of sources, there are several different views as to the incidence of SRC in Australia. A 2010 study of Victorian hospital admission data estimated between 300 000 and 500 000 cases of SRC occur each year.[74] In this study, concussion rates were measured by hospital admissions over a 9-year period and revealed that Australian football had the highest number of concussion. Rugby league and rugby union accounted for a 10.1% increase of hospitalisations from concussions. But not all SRCs result in hospital admissions and not all concussive injuries are reported, meaning these statistics do not fully capture the actual occurrences of SRC.

The contact sports of Australian football, rugby league and rugby union are estimated to have the highest rates of concussion of any team sports, reporting incidence rates ranging from three to 10 concussive injuries per 1 000 player hours, equating to five injuries per team per season, regardless of the level of competition.[75]

Based on injury surveillance data collected by the AFL, six to seven concussions occur per team per year. There are currently 18 teams in the national competition. A 2016 audit showed one concussion every 50 games over a 14-year period, with 80.7 per cent of those players concussed returning to the field of play the same day.[76] Other methods of calculation are based on per 100 000 participants reported through hospital admission data, with the highest concussion rates to be motorsports (181.8/100 000), Equestrian (130/100 000), Australian football (80.3/100 000), all codes of rugby (49.9/100 000) and roller sports (44.8/100 000).[77] In 2017, the AIS Chief Medical Officer presented incidence data as being a common injury, reporting 'approximately 100,000 cases per year in Australia', and noting that only '1:10 cases go to hospital'. [78]

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[74] Finch et al above n. 72; AIHW 2017 Report, above n 72. See also Paul McCrory, 'The Concussion 'Crisis' – Media, Myths and Medicine: The Florey Institute of Neuroscience and Mental Health', 7 April 2016 <https://www.youtube.com/watch?v=oPrpTj2Edp8>.

[75] Michael Makdissi, Gavin Davis and Paul McCrory, 'Updated Guidelines for the Management of Sports-Related Concussion in General Practice' (2014) 43(3) *Australian Family Physician* 94.

[76] Peter Harcourt, Paul McCrory and Michael Makdissi, *Concussion Research Strategy* (2014). See also, Nathan Gibbs and M Watsford, 'Concussion Incidence and Recurrence in Professional Australian Football Match-Play: A 14-year Analysis (2017) *Journal of Sports Medicine* 1-7.

[77] Finch et al, above n 72. See also AIHW 2017 Report, Table 3.2, above n 72, 17.

[78] See David Hughes, 'Sport-Related Concussion' (Paper presented at Rural Medicine Australia, Melbourne, October 2017).

2 *Lack of Central Repository*

There is no national injury database or a central repository of data to draw upon, so a review of the literature on SRC frequently relies on 10-year old data from the US, where the incidence rates are estimated to be up to 3.8 million per year.[79] Researchers believe the actual figure is likely to be around six to 10 times higher due to under-reporting, different injury constructs and the fact that many concussions are unreported.[80] At the community level, the Australian Centre for Research into Injury in Sport and its Prevention (ACRISP) estimates that concussion is the fourth most common injury in Australian football but explains that this figure is likely to be higher due to concerns of underreporting.[81]

Based on research from the US, SRC in children is thought to be a common injury with reports of incidence rates of SRC in organised sports involving children between ages six and 16 in the US estimated at six times higher than in adult populations.[82] Higher incidence rates are reported in female athletes, possibly due to a reporting bias (female athletes are thought to be more honest in reporting injuries than males) or poorer neck strength, demonstrating greater susceptibility to injury.[83]

Incidence rates in many contact sports have increased in recent times. One of the causes has been thought to be the result of widespread coverage of the issue and efforts of the SGBs to improve education and awareness. Information asymmetries, however, continue to exist and state actors play a significant role in closing the gap.[84]

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79 Langlois, above n 52, 375; Tamerah Hunt, *Cram Session in Evaluation of Sports Concussion: A Handbook for Students and Clinicians* (Slack Incorporated, 2013). AIS/AMA Concussion in Sport Position Statement 2017, above n 27, 14.

80 Finch et al, above n 72. For further discussion on the under-reporting of concussion, see Emily Kroshus et al, 'Understanding Concussion Reporting Using a Model Based on the Theory of Planned Behavior' (2017) 54(3) *Journal of Adolescent Health* 269-274.

81 Several findings based on an Australian study concluded that contextual factors influenced reporting of concussions at the community level. See Peta White et al, 'Australian Football League Concussion Guidelines: What do Community Players Think?' (2016) 2 *British Medical Journal Open Sport and Exercise Medicine*, 1-6.

82 Hunt, above n 79.

83 Ibid.

84 See below, chapter 5. See also, chapter 8 part III ('State Actors and SRC').

3 *Other Knowledge Gaps*

(a) Children

Medical research identifies children at higher risks of harm associated with SRC.[85] In Australia, children are recognised as a target group when considering the diagnosis and management of SRC. There are several reasons for this due to the physical, cognitive and emotional characteristics of young children. In adolescents, there is growing evidence that recovery times might also be longer than in adults.

There is a paucity of research in Australia on children and concussion. This is consistent with the CISG findings that very little research has been done on children under the age of 13. The CISG cautions that 'children, adolescents and young adults with a pre-injury history of mental health problems or migraine headaches appear to be at somewhat greater risk of having symptoms for more than one month.'[86]

In North America, a recent large-scale research study involving children and SRC noted concussion as a 'serious public health epidemic', with an estimated 750,000 paediatric concussions reported in emergency hospital departments.[87] Of these, around 33% were noted as having ongoing 'somatic, cognitive, psychological, behaviour symptoms or a combination of symptoms.[88] The impact of these symptoms was noted as causing 'school absenteeism, impaired academic performance, depressed mood, loss of social activity and lower quality of life'.[89]

With the many millions of Australian children and adolescents involved in sports with a high incidence of SRC, this vulnerability increases support of substantial public interest in SRC.[90] There are several relevant questions pertaining to children and SRC. For instance,

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85 Based on data collected through hospitalisation from sports injuries in Australia, concussion is the most common among children and young people, particularly in the 10-14 age group. See AIHW Report 2017, above n 72, 18.

86 CISG 5th Consensus above n 5, 843.

87 The study involved 3,063 children and adolescent patients. Persistent post concussion symptoms lasting longer than 28 days were present in 801 patients, representing 33%. Roger Zemek et al, 'Clinical Risk Score for Persistent Postconcussion Symptoms Among Children with Acute Concussion in the ED' (2016) 315 (10) *Journal of America Medical* Association 1014-1025.

88 Ibid.

89 Ibid 1015, 1025.

90 ASC Participation data in 2017 reported that 3.5 million children aged 15 and under (74&+%) participated in some form of organised sport or physical activity outside of school hours. See Australian Sports Commission, *AusPlay Focus, Children's Participation in Organised Physical Activity Outside of School Hours*, (April 2018). See also Australian Bureau of Statistics *Children's Participation in Cultural and Leisure*

parents and guardians would likely be interested to know more about the risk profile of individual sports in deciding which sport their child should play. Another critical question is when it is safe to return to play for a child who has sustained a concussion, and when should a decision be made to withdraw from sport altogether if too many concussions have been sustained.[91] Currently, there appear to be more questions than answers.

(b) Gender Differences

In Australia female players are involved in the several sports with a high incidence rate of SRC. For example, Australian football, rugby union, rugby league and soccer each field female competition with growing popularity, with around 150 000 female participants.[92] The evidence suggests that gender is an essential factor to consider in SRC research and SRC is a significant concern for female participants. Most of the biomedical research on SRC has been conducted involving male sports participants, primarily due to the dominance of male participants involved in team sport. With the emergence of many female team sports, calls have been made for further research to understand incidence in this population group, why the symptoms are more severe in females and why there are more extended recovery periods.[93]

Several studies have suggested higher incidence rates with one finding that female athletes report 'triple the rate' of SRC compared to male athletes.[94] The American Medical Society has recognised that female athletes sustain more concussions than their male counterparts and identify differences in head-neck mass and girth between women and men, as contributing factors.[95] In Australia, the AIS/AMA Concussion in Sport Position Statement recognises female gender as a factor that may be associated with more protracted recovery time.[96]

Activities in Australia 2000-2012 Cat No. 4901.0 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4901.0Explanatory%20Notes1Apr%202012?OpenDocument>.

91 These questions are considered later in the context of framing the public interest in SRC. See below, chapter 8 part II ('The Public Interest in SRC').

92 'Battle of the Codes: Australia's Four Sports Leagues Compared – Interactive', *The Guardian* (online) 15 April 2014<https://www.theguardian.com/news/datablog/interactive/2014/apr/15/australia-football-interactive-statistics>.

93 Pink Concussions is a NFP group seeking to improve the pre-injury education and post-injury medical care for females suffering concussions and TBI <http://www.pinkconcussions.com/new-page-1>.

94 Hunt, above n 79, 7; Laurel A Borowski et al, 'The Epidemiology of US High School Basketball Injuries, 2005-2007' (2008) 36 (12) *The American Journal of Sports Medicine* 2328, 2334.

95 Kimberly Harmon et al, 'American Medical Society for Sports Medicine Position Statement: Concussion in Sport' (2013) 47 *British Journal of Sports Medicine* 15,22.

96 AIS/AMA Concussion in Sport Position Statement 2017, above n 27, 4.

III SCIENTIFIC DEBATE

A review of the medical literature identifies several areas that have polarised medical opinions. An issue that dominates public discourse and presented a fundamental challenge to the NFL, as explained in the introductory chapter, is chronic traumatic encephalopathy (CTE) and the extent to which repetitive concussions and sub-concussive injuries contribute to long-term harm. Independent research studies published in the US suggested that CTE was a real risk to professional footballers in the NFL. Chapter 4 explains how these studies disrupted the sport of American football and presented a fundamental challenge to the NFL in how to manage and minimise harm.

A *Polarised Views on CTE*

The focus of the debate around CTE has been on whether CTE occurs because of repetitive mild traumatic brain injury; a view advanced by researchers from Boston Group,[97] or alternatively, whether 'a cause-and-effect relationship' between CTE and sport-related concussion is yet to be established, identifying that there is 'much more to learn' about the potential relationship.

1 *CTE and SRC*

CTE is a progressive and degenerative disease of the brain and has been linked to those patients with a history of exposure to repetitive head impacts or head injuries, triggering progressive degeneration of the brain tissue caused by a build-up of abnormal tau protein. [98] The disease is associated with memory loss, confusion, impaired judgment, paranoia, impulse control problems, aggression, depression and, eventually progressive dementia.

Several research groups in the US have published studies suggesting that the years of playing certain sports and exposure to SRC was associated with the risk of CTE, with researchers suggesting that the higher the level of play, the higher the risk of developing the disease. The difficulty with CTE diagnosis is that it presents after a prolonged latent

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[97] Ann McKee et al, 'The Spectrum of Disease in Chronic Traumatic Encephalopathy '(2013) 136 *Brain: A Journal of Neurology* 43-64.

[98] Sports Legacy Institute, Chronic Traumatic Encephalopathy (2011), Center for the Study of Traumatic Encephalopathy, Boston University <http://www.sportslegacy.org/index.php/cte-and-concussions/what-is-cte>.

period as a composite syndrome of mood disorders, neuropsychiatric disturbance, and cognitive impairment and is only diagnosed post-mortem.

(a) Early Studies in Boxing

The first studies of head trauma in a sporting context came from the early studies of boxers in the 1920s that identified possible neurological effects of repetitive head trauma and later described as 'dementia pugilistica' literally meaning 'dementia of a fighter.'[99] In 1928, Doctor Harrison Martland, a pathologist who conducted a post-mortem examination in 23 cases discovered neurological lesions in the brains of boxers. At the time, Doctor Martland expressed the view that CTE presented such a risk that it 'can no longer be ignored by the medical profession or the public' and considered it a duty of the medical profession to establish…'accurate statistical data as to its incidence'.[100]

(b) Other Sports

Between the late 1930s and the late 1940s, growing recognition and associations with other sports led to the preferred use of progressive traumatic encephalopathy and recognition of what is now described as the CTE. [101] In 1976, CTE was reported not only in boxers but other sports with a high risk of head injury including jockeys (especially steeplechasers), professional wrestlers and parachutists.[102]

Over the past decade, public awareness of CTE has heightened following reports around CTE and American football. Research involves post-mortem examinations on the brains of hundreds of deceased athletes. The highest number of individuals with CTE have been in their 40s, 50s, and 60s but there have been cases of younger players.[103]

In the United Kingdom, the death of soccer player, Jeff Astle, referred to earlier in this chapter, is referred to as 'the first British professional footballer confirmed to have died from CTE' due to a history of head injury and multiple concussions caused by repeatedly

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[99] Harrison S Martland, 'Punch Drunk Syndrome' (1928) 19 *Journal of American Medical Association* 1103-7. See Sait, above n 47, 7.

[100] Ibid 1107.

[101] Robert Cantu, 'Chronic Traumatic Encephalopathy in the National Football League' (2007) 61 Neurosurgery 223, 224. Also, see McKee et al, above n 97, 44.

[102] J A Nicholas Corsellis, 'Brain Damage in Sport', (1976) *Lancet* (1) 401-402; J.A Nicholas Corsellis et al, 'The Aftermath of Boxing' (1973) 3(1) *Psychological Medicine* 270.

[103] McKee et al, above n 97, 59.

heading footballs during the course of his 40 year career.[104] In recognition of poor awareness and the need to offer support to others, his family established the Jeff Astle Foundation in 2015.[105]

In December 2015, the Mayo Clinic reported that around one-third of male participants in amateur contact sport displayed evidence of CTE pathology. The significance of this report indicated that risks associated with SRC were not confined to the elite professional levels of sport and noted by US Congress members as 'strongly suggesting that the disease is more prevalent than previously thought'.[106]

2 *Brain Bank Deposits*

(a) US Brain Bank

In 2008, a 'brain bank' was established through a partnership between the US Department of Veterans Affairs and Boston University to create the VA-BU-CLF Brain Bank (the Boston Group). The purpose of this group was to undertake scientific research on the brains of former sports participants. In 2010, the Centre received a US$1 million grant from the NFL and was appointed as the NFL's preferred partner for brain donations. In 2009, the brain tissue of 18 out of 19 deceased former NFL footballers had shown evidence of CTE.[107] In 2013, McKee et al reported finding CTE in the brain tissue of 34 out of 35 former professional American football players. [108] In 2017, this number had increased, finding CTE in the brain tissue of 110 of 111 former NFL players, described by Doctor McKee as the 'largest study of individuals who developed CTE that has ever been described.'[109] The most recent data suggests that there are now 189 cases of CTE.[110]

In February 2014, the first confirmed Australian case of CTE was reported and involved a former Australian rugby union player when researchers at the Centre for the Study of

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104 The Jeff Astle Foundation, Our Story. <http://www.thejeffastlefoundation.co.uk/our-story/>.

105 Ibid.

106 US Congressional Meeting, House Energy and Commerce Subcommittee on Oversight and Investigations, Roundtable Concussion Research and Treatment, 'Statement of Rep Diana DeGette' ('2016 Congressional Meeting') <https://www.c-span.org/video/?406450-1/hearing-concussions>.

107 Case Studies, Boston University Centre for the Study of Traumatic Encephalopathy <http://www.bu.edu/cste/case-studies/>.

108 McKee, et al, above n 97, 43, 50.

109 Jesse Mez et al, 'Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football' (2017) 318(4) *Journal of American Medical Association* 360-370.

110 2016 Congressional Meeting, above n 106. Evidence of Lisa McHale, Concussion Legacy Foundation, Family Relations Director, <https://www.c-span.org/video/?406450-1/hearing-concussions>.

Traumatic Encephalopathy at Boston University diagnosed CTE in the brain of Barry Taylor, discovered on post-mortem examination. Until this time, there had been no reported cases involving an Australian football player. The deceased had played rugby for 19 years and participated in 235 games. In his later years, the deceased had suffered from severe memory loss. His family reported his memory had been degenerating for at least 20 years and expressed some relief in knowing the reasons.[111]

(b) Australian Brain Banks

A call was made in Australia for the establishment and coordination of a national brain bank needed urgently to establish whether CTE was a concern in Australian sport.[112] Since that time, two groups have established brain banks in Australia both interested in researching the effects of SRC on the brains of former Australian sports participants.

The first brain bank was established by the Florey Institute of Neuroscience and Mental Health in Victoria where it currently holds 1 500 brains of deceased AFL footballers.[113] The Florey Institute has partnered with the AFL and has received research funding over the years from the AFL.

The second brain bank is the Australian Sports Brain Bank, partnership between the Royal Prince Alfred Hospital and the University of Sydney.[114] This bank has partnered with the Boston Group and is part of the 'Global Brain Bank' network, an initiative that seeks to accelerate research by collaborating with brain banks around the globe.

The existence of two brain banks in Australia with interest on the effects of SRC is surprising, particularly considering the relatively small Australian population. Instead of collaborating their research efforts, these Australian brain banks appear to be undertaking independent studies based on their self-determined research agendas and perception of priority areas. A question arises as to whether these research groups can collaborate, mainly when there exists an urgent need for clear understanding in an

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111 'Brain disease CTE Found in Former Manly Rugby Player Barry Taylor', *The Courier Mail* (online), 18 February 2014 <http://www.couriermail.com.au/sport/rugby/brain-disease-cte-found-in-former-manly-rugby-player-barry-taylor/story-fnii0ksb-1226840201898)>.

112 Michael Carayannis, 'Calls for Brain Bank to Help Concussion Research', *The Daily Telegraph* (online), 26 July 2017, <http://www.dailytelegraph.com.au/sport/nrl/calls-for-brain-bank-to-help-concussion-research/news-story/7c063333df005781a8348ea0b522a2f6>.

113 The Florey Institute 'Creating a 'Concussion' Bank' <https://www.florey.edu.au/about/news-media/creating-a-concussion-bank>.

114 Esther Han, 'Australia's First Sports Brain Bank Launched to Find Head Injury and Disease Link', *The Sydney Morning Herald* (online), 26 March 2018 <https://www.smh.com.au/healthcare/australia-s-first-sports-brain-bank-launched-to-find-head-injury-and-disease-link-20180326-p4z6aa.html>.

Australian setting. Otherwise, fragmented approaches to research can constrain the development of scientific understandings instead of multiple actors working together towards collective goals. State actors could also proactively participate in setting the research agenda around SRC, as the NHMRC tried to do in 1994, to work towards the achievement of collective goals.

3 *Insufficient Evidence of CTE*

While the brain banks and research groups continue in their quest to understand CTE, the CISG has publicly addressed the issue of CTE in two of the last five consensus statements. In 2009, the issue of CTE was first mentioned in the CISG 3rd Consensus Statement in the following terms:

> Clinicians need to be mindful of the potential for long-term problems in the management of all athletes. However, it was agreed that chronic traumatic encephalopathy represents a distinct tauopathy with an unknown incidence in athletic populations. It was further agreed that a *cause and effect relationship* [emphasis added] had not been demonstrated between CTE and concussions or exposure to contact sports.

Later in 2017 the 5th Consensus Statement proceeded along similar lines regarding CTE, but this time added suggestions for future research to investigate the impact of repeated concussive or sub-concussive impacts, noting 'more research on CTE is needed to better understand the incidence and prevalence…. Ideally, well-designed case-control or cohort studies can begin to answer these important questions'.[115] This was a significant step towards identifying that while the CISG does not agree with the Omalu/Boston Group that repetitive concussive injuries cause CTE, it does indicate an acknowledgement that more research is required and indicates how that research might develop.

The polarised debate in the literature is focused on whether a history of repetitive concussive and sub-concussive injuries in sport causes or contributes to CTE, described by Solomon and Zuckerman as 'multivariate equation' as opposed to a univariate phenomenon.[116] One view is that CTE occurs as a *consequence* of repetitive mild traumatic brain injury; a view advanced by the Boston Group.[117] The other view, expressed by the CISG in the 2017 consensus statement, is that 'a cause-and-effect relationship' between

[115] 5th Consensus Statement, above n 5, 838, 844.
[116] Gary S Solomon and Scott L Zuckerman, 'Chronic Traumatic Encephalopathy in Professional Sports: Retrospective and Prospective Views' (2015) 29(2) *Brain Injury* 164, 169.
[117] McKee et al, above n 97.

CTE and SRC has not as yet been demonstrated, identifying that there is 'much more to learn' about the potential relationship. The view of neuropathologist Dr Michael Buckland who is leading the research at the Australian Sports Brain Bank is

> If we can gather the evidence that CTE exists in Australia associated with sporting activities, that will force the codes to sit up and take notice and to make real change and to enforce concussion rules that are being developed…I think we will find it is just as prevalent in the Australian sports population as it is in the American's.[118]

Suffice to say, scientific uncertainty abounds, and more research is urgently needed.

IV SCIENTIFIC UNCERTAINTY: WAIT AND SEE OR ACTIVE SOCIAL FORESIGHT?

The discussion in this chapter has established that SRC presents a risk to those involved in the sports with high incidence of SRC. There currently exists, however, a significant amount of scientific uncertainty around the long-term concerns associated with SRC. In the absence of scientific certainty, a valid question to consider is what principle should guide decision-making to mitigate the risks and potential harm when there is incomplete knowledge about the nature and extent of the harm.

A *The Precautionary Principle*

> A clear distinction should be made between what is not found by science and what is found to be non-existent by science. What science finds to be non-existent, we must accept as non-existent; but what science merely does not find is a completely different matter… It is quite clear that there are many, many mysterious things. [119]

The above quote illustrates the subtle tensions that can arise in distinguishing between *no evidence* of a problem and the *non-existence* of a problem. This highlights tensions in establishing the intervention threshold when measured against incomplete scientific knowledge. On the one hand, the need to ensure that policy and decision-making is based on objective and rigorous scientific methodology. On the other, what action is required to be taken in circumstances where society is faced with risks of harm that are not

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[118] Tracy Bowden, 'Head Knocks Left, Right and Centre': Jockey's Brain Could Unlock Impact of a Career on the Track', *ABC News* (online), 27 June 2018 <http://www.abc.net.au/news/2018-06-27/jockey-dale-spriggs-donates-brain-to-reveal-impact-of-falls/9898428>.

[119] The 14th Dalai Lama, *The Path to Tranquillity*, 1999 cited by Lawrence O Gostin, Lindsay F Wiley and Thomas R Frieden, *Public Health Law: Power, Duty, Restraint,* (University of California Press, 3rd ed, 2016) 68.

completely understood. The precautionary principle establishes a guide for decision-makers under conditions of scientific uncertainty.

1 *A Public Health Perspective*

Gostin et al explain that the public health community advocates use of the precautionary principle for risk management when faced with scientific uncertainty but compelling reasons to support interventions. According to Gostin et al, the precautionary principle is 'not passivity but rather active social foresight, stimulating planning, innovation and sustainability.'[120] State actors play a central role in advancing the precautionary principle, acting as the 'neutral umpire', particularly when private actors are involved in creating the harm.

A central plank of the precautionary principle is that scientific uncertainty should not be an excuse or reason for inaction. Many decisions are made by policymakers with incomplete knowledge. For example, Gostin et al refer to several high profile public health events such as the Ebola and SARS outbreaks, and several environmental hazards that present harm to human health to illustrate this point.[121]

There are also examples in Australian sport where decision-making has been made with incomplete scientific knowledge as to the nature and extent of risks. To illustrate, concerns around the potential exposure to HIV in sport led to a flurry of activity by sports organisers, notwithstanding the uncertainty over the risk of contracting HIV in a sporting context. [122]

Two possible options are available to guide decision-making when faced with scientific uncertainty and incomplete knowledge. The first is to wait for discoveries and evidence-based findings that support decision-making and policy formation. In effect, this option waits for science to lead the way. The second option is to apply the precautionary principle to guide decision-makers and to engage in active social foresight to manage and minimise the risk, notwithstanding the incomplete knowledge that exists at the time. Chapter 4

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[120] Ibid.

[121] Ibid 57, noting that the public's perception of risk is influenced by its salience and media attention.

[122] The Chief Medical Adviser to the Commonwealth once expressed the risk of contracting HIV in the sport of basketball as 'the same as being kicked to death by a duck'. See Roger S Magnusson and Hayden Opie, 'HIV and Hepatitis in Sport: A Legal Framework for Resolving Hard Cases' (1994) 20(2) *Monash University Law Review* 214, 223.

explains that the former option was initially preferred by non-state decision-makers in the NFL case study but was later shifted due to external pressure.

2 *Early Precautionary Approaches in Australia*

In Australia, there have been several opportunities to apply the precautionary principle to guide decision-making around SRC. As earlier noted, injury prevention and control in Australian sport was identified as a key concern and later endorsed as a KHPA in Australia. State actors were also presented with several other opportunities to proactively engage and advance the state of scientific understanding around SRC in Australia.

The paucity of evidence of state involvement with SRC suggests that these opportunities were missed and there has been limited investment by state actors in SRC. This is surprising when one considers the central tenet of the ACG's National Science Statement recognised the 'widespread and important economic, social and environmental benefits' from public investment in science, notwithstanding the complex long-term and uncertain outcomes.[123] This also recognised the role of the state as an 'active participant' in science with health recognised as a National Science and Research Priority.

(a) 1994 - SRC Specific Concerns and the NHMRC Report

As earlier noted, SRC was recognised as a public health concern in the four codes of football in 1994 when the NHMRC Report was issued. Later, in 1995, the NHRMC issued medical management guidelines and made recommendations to manage and minimise the risks associated with SRC.[124] This reflects an early precautionary-based approach by the state acting as the 'neutral umpire', albeit in a fiercely guarded regulatory domain.

Table 2.2 identifies the recommendations made by the NHMRC in 1994.

No.	NHMRC Recommendation	Details
1	**Management and Administration**	1 (g) Guidelines for recognition of concussion and spinal injury should be promulgated to referees and umpires to enable them to conduct their administrative responsibilities

[123] Commonwealth, *Australia's National Science Statement* 2017 <https://publications.industry.gov.au/publications/nationalsciencestatement/index.html>.

[124] NHMRC Guidelines, above n 1.

		1 (h) common guidelines for concussion should be adopted by all codes. Retrospective grading of concussions, if utilised, should also be by a system agreed by all codes.
2	**Data Collection**	2 (a) there should be a national registry of deaths, brain injury with permanent functional disability established to commence data collection during the 1995 season. 2 (b) such reporting of prior notification of injury should be the responsibility of each individual code of football. Initial reporting should occur at the completion of each game. 2 (c) since concussion is so important… it is recommended that this be targeted for prospective research using uniform data coding. **Guidelines for the management and of concussion recommended for adoption by all codes.** Certification of recovery should be by a medical practitioner.
3	**Equipment**	3 (a) the use of custom-made mouth guards in contact sports including football (or codes) is strongly recommended. 3 (c) possible obstacles to players such as goalpost boundary fences and television cameras should be covered with soft material to reduce the possibility of serious injury to the player collide with any of these
4	**Research and Education**	4 (b) Programs of prevention of head injury should include: (i) Research into the selection of the player for a position according to body type; (ii) Education of players, coaches, administrators and sports trainers; and (iii) Research into specific aspects of fitness training 4 (d) Research should be undertaken to determine whether standardised soft head protection reduces brain injury without creating additional hazards. 4 (e) Video recording of illegal conduct and play which results in injury and football game should be made readily available for research purposes. 4 (f) A central fund for specific research into the prevention and management of head and neck injuries in football should be established. In addition, administrators of each code should be encouraged to direct additional funds towards safety measures in the care of injured players.

Table 2.2: 1994 NHMRC Recommendations – Relevant to Concussion

The NHMRC recommendations illustrate that safety was a paramount concern in respect of managing SRC. The NHMRC Report and guidelines were subsequently rescinded in 2004 for administrative reasons, likely to be due to advances in the scientific understanding

around the guidelines and updated medical management of SRC.[125] However, the substance of the Report and the NHMRC recommendations around SRC signified that SRC presented a potential risk to the sports and that precautionary measures were necessary to address the concerns.

While the NHMRC recommendations were directed to the SGBs of the four football codes in Australia, the data collected and analysed in this research finds no evidence of any follow-up or proactive steps taken by the SGBs or state actors. Instead, matters were left to the SGBs and based on the paucity of empirical evidence for the period 1994 to 2011, the NHMRC recommendations received little attention.[126]

(b) 1997 - Injury Prevention and Control

In 1997, the Australian Institute of Health and Welfare (AIHW) identified the establishment of a national sports injury data collection and reporting system as an opportunity and future direction under the auspices of injury protection and control as a NHPA.[127] Since that time, various initiatives have been launched focusing on sports injury prevention, but Australia is yet to have a national sports injury data collection system or a coordinated approach to sports injury prevention and control.[128] In addition to a lack of action by state actors, there has also been limited state investment in sports injury prevention in Australia.

(c) 2003 - Genetic Susceptibility to Sporting Injury

The Australian Law Reform Commission (ALRC) conducted an enquiry in 2003 that provided relevant information as to the issue of SRC because it dealt with the issue of genetic susceptibility to brain injury in sport. [129] The ALRC Report provides evidence of early concerns in sport as part of a broader inquiry into the use of genetic information in Australia.

The ALRC referred to research, described at the time as mostly experimental, relating to the use of genetic testing and information in sport. [130] One aspect of the ARLC inquiry

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125 Ibid.

126 See below, chapter 7, part II ('Australian Football and the AFL') and part III ('Rugby League and the NRL').

127 AIHW Report, above n 71, xii.

128 Australian Government Department of Health and Aging '*Sports Safety in Australia 2003'* (Rescinded) <https://www.health.gov.au/internet/main/publishing.nsf/Content/739B15D171D9D14DCA257BF000209CC5/$File/sportssafety.pdf>.

129 Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information* Report No. 96 (2003) Vol 2, 957-969 ('ARLC Report').

130 Ibid 964-969.

involved issues regarding the use of genetic information for the screening of genetic predisposition and susceptibility to sport-related injuries.

The ALRC Report refers to early research around the potential risks associated with brain injury in sport and links to CTE or punch-drunk syndrome. Of significance is the reference in the ARLC referred to research that suggested that 'a milder form of this condition (CTE or punch-drunk syndrome) could occur in players of rugby, soccer and other sports associated with repetitive blows to the head'.[131]

The ARLC Report recognised several advantages to knowing of genetic susceptibility to injury in sport. These advantages were based on improved decision-making for both the athlete concerned and the treating physician who would have the opportunity to advise athletes of the potential risk and decision-making. Another involved the election by the athlete to participate in a different sport or modified training or playing techniques.

The ALRC Report recommended that the ASC should, in consultation with other government agencies and stakeholders, 'develop policies and guidelines for sports organisations and athletes on the use of genetic information concerning a predisposition to sport-related illness or injuries'.[132] Based on the data analysed in this research, there is no evidence that these recommendations were adopted. In recent times, the use of genetic information for any purpose continues to be a polarising and challenging issue for policymakers, so it is not surprising that the ALRC recommendations were not adopted. This ARLC Report, however, does identify a point in time when proactive steps could have been taken to better understand the genetic predisposition to brain injury in Australian sport.

V OBSERVATIONS AND CONCLUSION

This chapter explained the medical construction of SRC and the nature of the harm as a threat to the physical integrity of sports participants. This chapter also traced the current state of scientific understandings in Australia and internationally. Several themes

[131] Ibid 964 [38.29].
[132] Ibid 72, 969, Recommendation 38–2.

emerged from this discussion and illustrated the key challenges from medical and scientific perspectives.

The first challenge is associated with the absence of a universally accepted definition of SRC and different terminology across jurisdictional settings.[133] The North American approach of defining concussion as a mild traumatic brain injury, and the delay in the CISG in adopting a definition that incorporated reference to SRC as a brain injury has constrained efforts to harmonise research approaches across different sports and jurisdictional settings.

Another challenge is associated with the absence of a consistent and reliable method to record incidence rates within and across sports. Access to accurate and reliable data is a critical first step in understanding the nature of the problem and patchy data around SRC has constrained efforts to develop epidemiologic understandings.

Information asymmetries and inconsistent data have existed in some sports for decades. Despite injury prevention and control being a KHPA, and the publication of the 1994 NHMRC Report, little has been done by state actors. Had a uniform data collection system and national injury register been established in 1994, current understandings, at least regarding incidence rates in Australia, would be far more advanced.[134]

Further, this chapter identified several areas of disagreement between research groups and polarised views around terminology and the impact of CTE. There is little doubt that SRC will continue to be a fertile area for scientific research in future years. Consequently, the state of scientific knowledge and discovery about the risks associated with SRC will continue to evolve.

A review of the literature demonstrates that the 100-year quest to understand the aetiology and epidemiology of SRC has, to date, dominated the research agenda. This information is of vital importance, and the state of scientific knowledge and discovery about the risks associated with SRC concussion will continue to evolve. However, how much longer this will take and how many more injuries might occur, is an unknown

[133] 5th Consensus Statement, above n 5, 838.
[134] NHMRC Report, above n 1, Recommendations 2 and 4, xiii, xiv, 7-22.

quantity and depends heavily on the capacity and motivations of those who set, drive and control the research (and the regulatory) agendas.

Since the 1980s, Australian state actors have recognised injury prevention and control as an area of concern with SRC explicitly recognised in 1994.[135] Despite this early recognition, state actors in Australia have had limited involvement in setting, directing or controlling the medical and scientific research agendas to advance biomedical understandings.[136] Instead, non-state actors with expertise in sports medicine have formulated several consensus guidelines around the medical management of SRC and SGBs have participated in directing clinical research agendas based on their individual, organisational priorities and own assessments of SRC as a regulatable concern. While some progress has been made, this self-regulated approach to establishing research priorities and approaches to the harm of SRC has been protracted and haphazard with reliance on scientific uncertainty to justify approaches. Research and scientific understandings are likely to evolve for many more years to come.

While the Australian public waits for the outcome of scientific discoveries, reliable and accurate incidence rates across all sports, and consensus amongst research groups, many vulnerable Australians participate in sport and are potentially exposed to the risks associated with SRC. Australian parents and carers have unanswered questions about several critical matters pertaining to the vulnerability of children participating in sport. This chapter has established that the answers to many of these questions are currently in the hands of non-state actors, and while state actors have recently become more engaged in SRC, that there is much more to do.

The challenge now is whether to wait for science to lead the way or whether other precautionary measures can be implemented to protect those at the highest risk of exposure. Common sense dictates that the latter applies, and that the precautionary principle is a useful tool to guide decision-makers, foreshadowing potential regulatory reconfigurations.[137] The medical construction of the harm established in this chapter provides the basis upon which to consider the nature of SRC as a risk to participants and, potentially, a regulatable concern.

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135 AIHW Report, above n 71; NHMRC Report, above n 1.
136 See below, chapter 8 part III ('State Actors and SRC').
137 See below, chapter 9, part IV ('Future Directions').

The next chapter explains the approach for analysing and evaluating the regulatory space for minimising the harm associated with SRC. This establishes the framework upon which the reminder of this thesis is based and provides the foundation to test the hypothesis that SRC is a regulatable concern for state actors to address.

CHAPTER 3 REGULATORY APPROACH

INTRODUCTION

This thesis tests the hypothesis that state actors must be proactive in managing and minimising the risks associated with SRC in Australia because SRC has the potential to be a serious public health concern. A corollary is that non-state actors are ill-equipped to regulate public health concerns within a purely private and voluntary self-regulatory system. This requires an understanding of how SRC is currently regulated, providing a framework through which to evaluate the adequacy and effectiveness of the current regulatory arrangements. This chapter therefore sets the foundation for the discussion of the approach used for analysing and evaluating the regulatory space for minimising the harm associated with SRC.

This chapter commences in part I by outlining the two main regulatory lines of inquiry addressed in this thesis; the foundational and the evaluative. Part II sets out the rationales for state actors to engage in regulation. This analysis assists in conceptualising regulation in the context of SRC and provides the basis upon which to consider what factors might trigger state actors to engage more actively in regulating SRC.

The remainder of the chapter sets out the regulatory literature and analytic tools used to address these lines of inquiry. The regulatory space metaphor, explained in Part III, is the primary analytical tool applied in this thesis. This part also explains how Bourdieu's social theory of symbolic capital can be applied to help expand understandings of how collective forms of capital are resources that actors can use to dominate the regulatory space. These studies are relevant to mapping the regulatory terrain of sport in general and SRC. Regulatory arrangements are examined in Part IV and include the various systems and tools used in regulation.

I REGULATORY LINES OF INQUIRY

Regulatory theory is well suited to the sport domain, one that reflects a mix of public and private interests operating primarily within the not-for-profit sector. Several regulatory approaches have been selected to assist in explaining the regulation of SRC in Australia. The application of these approaches will identify how regulation applies and whether

regulatory arrangements are adequate and effective to manage and minimise the risk of SRC to participants.

Regulatory theory embodies principles of flexibility and pluralism, two critical features necessary within the unique regulatory domain of sport. There are two lines of inquiry that guide the theoretical approach: the foundational and the evaluative as illustrated in Diagram 3.1. The foundational line of enquiry is designed to explain the current regulatory arrangements to address SRC. The evaluative line of enquiry is designed to evaluate the adequacy and effectiveness of the current regulatory system and the effectiveness of the regimes.

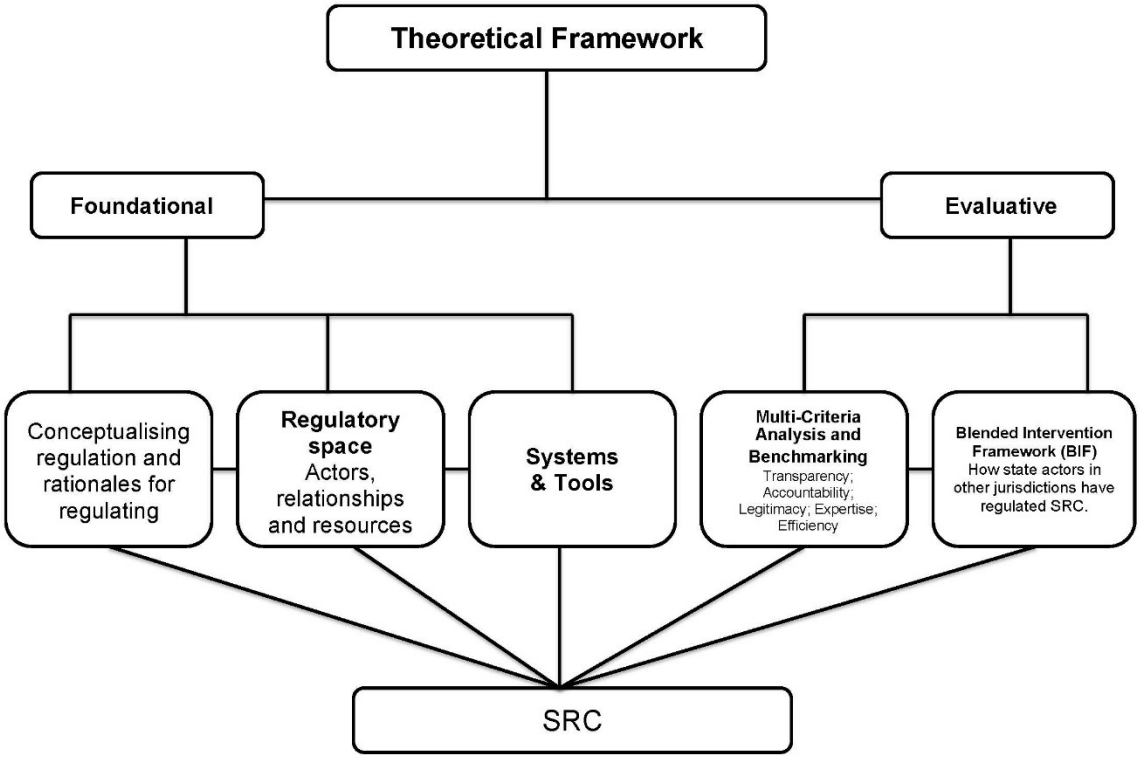

Diagram 3.1: Theoretical Framework

A Foundational Line of Enquiry

Regulatory theories contribute to addressing the research questions in several ways. First, they clarify the constitutive elements of SRC as a regulatable concern. Next, they map the regulatory terrain and scope the regulatory space of SRC to identify the wide diversity of actors who have the capacity, both actual and potential, to control, order or influence behaviour concerning SRC. This insight also reveals the nature of relationships and

connections between actors and target groups, and the resources and capital held by actors who control how regulation occurs. Bourdieu's social capital theory is used to supplement this analysis.

The foundational line of inquiry commences by conceptualising what is meant by 'regulation' to explain who acts, how it happens and the evolution and development of the shifting balances and influences of actors. The regulatory space metaphor is then applied as an analytical construct to identify the constellation of actors who occupy positions within the regulatory space of sport and SRC. The aim is to identify dominant and subsidiary actors, the nature of the relationships and interconnections, and the resources available to shape and influence the space. The final part of this line of inquiry involves an analysis of the systems and tools employed by actors in responding to SRC. Law is a regulatory system, so the role and purpose of the law are examined together with relevant aspects of public and private law.[1]

B Evaluative Line of Enquiry

Implementation without evaluation overlooks a vital component of the regulatory process. Evaluating whether regulatory mechanisms are effective in meeting desired regulatory objectives is an essential part of the regulatory lifecycle.[2] By applying principles of effective regulation as performance criteria and a method of multi-criteria analysis, the aim is to measure whether current regulatory arrangements are working, identifying gaps and shortcomings.

Several regulatory approaches assist in evaluating the adequacy and effectiveness of regulatory arrangements. The first incorporates methods to measure the effectiveness of the current regulatory systems and assists in understanding principles of good regulation. Five criteria are used to measure the legitimacy of regulatory actors and effectiveness of regulatory arrangements.[3]

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1 See below, chapter 7, part I ('Law, Sport and SRC').

2 There are five components to the Stylised Regulatory Life Cycle, ranging from identification of policy priorities and desired outcomes and options, leading to design/development, then implementation, then administration and enforcement and then post implementation evaluation. Feedback loops are embedded within the cycle. For further discussion, see Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017), 134.

3 Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2nd ed, 2011).

To guide the discussion in the cross-jurisdictional review, a framework has been developed to position the stage of state interventions in responding to SRC. This model is the Blended Intervention Framework (BIF) and has been developed to explain that state intervention in SRC follows several predictable steps. The development of the BIF was influenced by two existing models; one from regulatory scholarship and the other from public health law.[4] Its purpose is to situate the stage of state regulatory intervention across the four stages of the framework.

II REGULATION: ACTORS AND RATIONALES

The task of defining what regulation means has proven to be an evolving and elusive exercise.[5] Settling on a universal understanding is described as a process that 'obscure[s] as much as it illuminates'.[6] 'Regulation' is inextricably linked to the evolving political, economic and social systems, changing with the 'ebbs and flows' of civic life. Questions such as whether regulation is a function of the state, an exclusive function of the law or a shared space are fertile areas of scholarly debate; described as 'shifting and complex'.[7] In many contexts, regulation is identifiable while in others, it works quietly in the background, shaping social order. This 'chameleon-like' characteristic makes it a 'notoriously difficult' concept to define with any clarity and precision.[8]

A *Conceptualising Regulation*

A review of the literature reveals this absence of consensus in conceptualising regulation. To illustrate, database searches using the keyword 'regulation' returns millions of results, across 39 disciplines and sub-disciplines, in over 30 different languages.[9] Definitions and

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4 Freiberg, above n 2, 134. See also Hosea H Harvey, Dionne L Koller and Kerri M Lowrey, 'The Four Stages of Youth Sports TBI Policymaking: Engagement, Enactment, Research and Reform', (2015) 43 *Journal of Law, Medicine & Ethics* 87. See below, chapter 5 Part I (US Governments' Responses').

5 Leigh Hancher and Michael Moran, 'Organising Regulatory Space', in Leigh Hancher and Michael Moran *Capitalism, Culture, and Economic Regulation* (Clarendon Press, 1989) 271.

6 Christel Koop and Martin Lodge, 'What is Regulation? An Interdisciplinary Concept Analysis' (2015) *Regulation & Governance*, 1 2.

7 Julia Black, 'Critical Reflections on Regulation (2002) 27 *Australian Journal of Legal Philosophy* 16.

8 See Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation, Text and Materials* (Cambridge University Press 2007) 3.

9 Monash University Library search returned 8,163, 823 results using the word 'regulation', from 39 disciplines or sub-disciplines and in 41 languages (included one undetermined and one multiple languages). <http://monash.hosted.exlibrisgroup.com/primo_library/libweb/action/dlSearch.do?institution=MUA&vid=MON&search_scope=au_everything&tab=default_tab&indx=1&bulkSize=10&dym=true&highlight=true&displayField=title&query=any%2Ccontains%2Cregulation&query2=regulation#>; Bond University

perspectives of 'regulation' abound, with different disciplines applying their nuanced interpretations based on their disciplinary frameworks.[10] Lawyers tend to view regulation as being a species of law whereas regulatory scholars contend that law is a technique or instrument that is an optional part of the regulatory process. Economists, political scientists, biomedical scientists, to name a few, have disciplinary-nuanced understandings of what 'regulation' means.[11] To add further complexity, scholars have recently recognised a shared conception of 'regulation' as one that has crossed disciplinary lines and expanded understandings of regulation from an interdisciplinary perspective.[12]

1 *Early Perspectives – The 'Very Tight Hand' of Government*[13]

Head and McCoy trace early usage of the term 'regulation' to the 18th-century jurist William Blackstone, a contemporary of Adam Smith, who explicitly referred to 'governments' regulation of manufacturing and commerce. This context established a distinctive economic association of 'regulation'.[14] As a function of government, a state-centric approach to regulation prevailed for much of the 18th and 19th centuries.

In 1985, political scientist, Phillip Selznick examined the role of public agencies in exercising 'sustained and focused control' over activities valued by the community. Selznick's conceptualisation of regulation as a function of government perpetuating the view that regulation and the state were synergistic concepts.[15] On closer examination, scholars suggest that Selznick's disciplinary background influenced his views and focused his theory on the regulatory capacity and resources of the state exercising a monopoly over a regulated domain.

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library search of the word 'regulation' returned 1,718, 987 results from 39 disciplines or sub-disciplines and in 33 languages (including one undetermined). <https://apac-tc.hosted.exlibrisgroup.com/primo-explore/search?institution=61BON&vid=BOND&search_scope=all_resources&mode=Basic&displayMode=full&bulkSize=50&highlight=true&dum=true&query=any,contains,regulation&displayField=all&pcAvailabiltyMode=false> Medicine (in English) has the top results across both databases.

10 Christine Parker et al, 'Regulating Law' in Parker et al, (eds) *Regulating Law* (Oxford University Press, 2004) 1.

11 Baldwin et al, above n 3, 1.

12 Koop and Lodge, above n 6, 1. See also Allen F Repko, *Interdisciplinary Research: Process and Theory* (Sage, 2012).

13 Brian Head and Elaine McCoy (eds), *Deregulation or Better Regulation? Issues for the Public Sector* (Macmillan, 1991) 10.

14 Ibid.

15 Koop and Lodge, above n 6, 2.

2 *Changing Perspectives – The 'Invisible' Hand*

This state-centric approach to regulation prevailed globally until the 1970s and 1980s. Regulatory failures by state actors lead to questions over the efficiency and effectiveness of public control over private sector activities.[16] Political, economic and social conditions had also evolved, and the creation of new and evolving marketplaces created demand for a more pluralistic view of regulatory legitimacy.

Drahos and Krygier expanded the understandings of the state's role by suggesting that if regulation was confined to mean 'rules commanded by a *sovereign* (author's emphasis added) for guiding or restraining behaviour' a significant part of the regulatory processes surrounding the activity under review would be missed with only 'glimpses' revealed.[17] Shearing developed a broader conceptualisation of regulation, arguing that the task of regulating had never been a 'state monopoly' and any claim by the state to sit at the apex of the regulatory hierarchy, delegating power to non-state actors, is a claim that is yet to be substantiated.[18]

Despite the differing views about the role of the state in regulation, one area that appears uncontroversial is that the state as embedded in regulation has, since European colonisation, provided the political, economic and legal systems that underpin Australian society. Perhaps what changed across time is the role of non-state actors in the regulatory landscape.[19]

3 *Regulatory Pluralism*

Contemporary academic discourse supports pluralistic and flexible notions of regulation. The concept of regulatory pluralism developed in the 1980s with several commentators identifying elements of regulatory pluralism; where state and non-state resources are harnessed in furtherance of regulatory compliance: where governments and private actors engaged in regulation and that regulatory systems were necessarily complex and

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16 Head and McCoy, above n 13, 1.

17 Peter Drahos and Martin Krygier, 'Regulations, Institutions and Networks' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University, 2017),1. See also, Black, above n 7.

18 Clifford Shearing, 'A Constitutive Conception of Regulation' (1993) in Paul Grabosky and John Braithwaite (eds), *Business Regulation and Australia's Future* (1993) *Australian Institute of Criminology* 73.

19 Peter Grabosky, 'Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process' (2013) 7(1) *Regulation & Governance* 114, 115.

fragmented.[20] Parker expanded upon regulatory pluralism by explaining that there exists both macro-level and micro-level ordering that influences the whole regulatory space, incorporating 'rule systems, normative orderings, symbolic meanings, economic forces and the laws of nature'.[21]

The re-organisation of the various forms of regulation laid the foundations for more contemporary conceptualisations that recognise the role of private non-state actors in the regulatory landscape, in some cases wielding significant influence.[22]

B *A Diversity of Actors*

In applying the concept of regulatory pluralism, a diversity of state and non-state actors is revealed who have access to a broader range of resources to regulate behaviour and activities. Indeed, regulatory tools are more considerable than rules or regulatory burdens and include innovative and facilitative tools and instruments developed to deliver regulatory outcomes.[23]

As noted above in chapter 1, this thesis is informed by Black's broad and flexible conceptualisation of 'regulation' as:

> 'the sustained and focused attempt to alter the behaviour of others according to defined standards and purposes with the intention of producing a broadly identified outcome or outcomes, which *may* [emphasis added] involve mechanisms of standard-setting, information-gathering and behaviour modification.[24]

Black's approach is apt for the analysis of SRC for three reasons. First, implicit in the definition is that regulatory actors can be both state or non-state. Second, the definition explicitly gives an actor the discretion as to what methods it may choose to use and the range of resources it might need to deploy. The ability to deploy resources does not of itself imply formal legal authority of the actor. Instead, actors may not possess authority in the legal sense but possess social capital that supports their ability to alter or influence

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[20] Peter Grabosky 'Meta-Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University, 2017), 151.

[21] Christine Parker, 'The Pluralisation of Law', (2008) (9) *Theoretical Inquiries in Law*, 348.

[22] Grabosky above n 19, 116.

[23] To illustrate, Freiberg developed a typology of regulatory tools across five categories. Freiberg, above n 2, 201, Figure 12, 201.

[24] See above, chapter 1 Introduction. See also Black, above n 7, 26.

the behaviour of others.[25] Third, the definition explicitly includes intentionality regarding the 'sustained and focused attempt' and the intention of the actor designed to bring about the desired result.

1 *Legitimacy*

Scott also identifies legitimacy as a factor that underpins regulatory authority.[26] Legitimacy is a critical feature in evaluating the effectiveness of regulation.[27] To illustrate, Sunstein explains the expressive role of law as a form of regulation and a method of 'norm management' but cautions that actors need to be trusted by those whose 'norms are at issue'.[28] Ensuring compliance is also likely to depend upon establishing legitimacy. In a heavily contested domain such as sport, the question of legitimacy is critical, whether it is derived from legal or non-legal sources. The application of social capital theories will also support the notion that legitimacy is not necessarily connected to legislative or legal mandate but can be derived from other forms of capital.

2 *Power*

The locus of regulatory power is an essential consideration in determining the capacity to achieve regulatory outcomes. An analysis of why non-state actors have come to control and influence the regulatory space of SRC is centrally rooted in the power they have been able to accumulate and retain.

Recognising that power comes in multiple, complex and conflicting forms and can change depending on disciplinary perspectives, sociologists expand the concept to include the influence of social fields, drawing from the collective social capital possessed by the relevant actors.[29] This is appropriate to use in the context of assessing the power of actors in the regulatory space as being derived from sources other than the law.

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[25] Pierre Bourdieu, 'The Forms of Capital' in John G Richardson (ed) *Handbook of Theory and Research for the Sociology of Education*, (Greenwood Press, 1986) 241 - 258; See also Peter Grabosky, above n 19, 118.

[26] Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) *Public Law* 329,331.

[27] See below, chapter 9 part I ('Evaluating the Legitimacy of SRC Regulation in Australia').

[28] Cass Sunstein, 'On the Expressive Function of Law' (1996) 144(5) *University of Pennsylvania Law Review* 2021, 2049.

[29] Lisa Gowthorp, Annette Greenhow and Danny O'Brien, 'An Interdisciplinary Approach in Identifying the Legitimate Regulator of Anti-doping in Sport: The Case of the Australian Football League' (2016) 19 *Sport Management Review,* 48-60.

3 *Engaging State Actors*

There are numerous reasons why state actors might be motivated to 'control, order or influence' other state or non-state actors. Baldwin et al provide several rationales for regulating, noting that in any one sector, the case for regulating is likely to be based on a combination of rationales, rather than a single reason.[30] Moreover, the motivations or rationales do not present as a 'closed list'. Instead, the overarching public policy goals might address the promotion of social policies, human rights and social justice principles, reflective of the prevailing social perspectives of the time.[31]

Several interrelated rationales are identified to support a case for state regulation. These involve regulating to prevent or minimise harm; to mitigate risk; to address information asymmetries; to balance costs and externalities; to restore or enhance trust; to address market failure and to advance and promote public policies. Each rationale is further explained in chapter 8 and applied to SRC to establish support of state regulation.[32]

III REGULATORY SPACE AND COLLECTIVE CAPITAL

Hancher and Moran explain that regulation is a defining feature of any system of social organisation and expanded understandings on the use of the regulatory space metaphor to scope the regulatory landscape.[33] They argue that multiple actors compete to control and shape regulatory space within a polycentric and multilayered system. Actors who possess specific characteristics and attributes are then capable of asserting control both at the time when regulation is initiated and into the future. This regulatory space metaphor is a useful analytical tool to conceptualise the pluralistic and polycentric systems that exist within a regulated domain and are applied in this thesis to analyse the regulatory space of sport and SRC in Australia.

A *Regulatory Space*

The genesis for the regulatory space metaphor is found in the work of political scientist

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30 Baldwin et al, above n 3, 40-67.

31 In explaining reasons why governments regulate, Freiberg explains that 'governments frequently act to promote social policies, human rights or social justice, and to pursue other regulatory goals that are held to be desirable in themselves. Freiberg, above n 2. 47, 58.

32 See below chapter 7 part IV ('Additional Reasons for State Involvement in SRC').

33 Hancher and Moran, above n 5, 271.

Colin Crouch who developed the 'policy space' metaphor as a way of explaining the polycentric system of public government.[34] In 1989, Hancher and Moran expanded the use of this metaphor to examine the regulatory model of European economic regulation. In their analysis, Hancher and Moran characterised the regulatory system as one that involved 'interdependence and bargaining between powerful and sophisticated actors against a background of extensive state involvement'.[35] Actors were characterised based on their capacity to influence regulatory compliance, rather than on their state or non-state classifications. Further, actors could occupy the regulatory space and exert different levels of influence across both macro and microeconomic levels.

This approach challenged the orthodox view of total state-controlled hierarchical models and questioned 'conventional distinctions between public and private roles and actors', contending that the allocation of roles obeyed 'no obvious public-private dichotomy'.[36] In this way, Hancher and Moran built on existing scholarship to expand understandings of regulatory domains to include state and non-state actors in possession of a wide range of resources capable of bringing about regulatory compliance.

In 2001, Scott expanded on the work of Hancher and Moran and applied the regulatory space metaphor in other domains to re-evaluate central propositions concerning core regulatory processes.[37] Scott developed a pluralist understanding of the regulatory process operating in a non-hierarchical way; where government is but one regulatory actor, who together with other non-state actors are capable of effectively wielding regulatory power (derived from power sources including but also beyond the law).

1 A Constellation of Actors, Resources and Relationships

The concept of regulatory space is an analytical construct and is used to describe the range of actors, resources and relations in a regulated setting.[38] As part of this analytical construct, Hancher and Moran describe the concept of 'space' as being available for occupation, capable of being unevenly divided between major and minor participants, where positions can be 'furiously contested' with 'ferocious struggles' for advantage. In

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34 Colin Crouch, 'Sharing Public Space: States and Organised Interests in Western Europe' in John A. Hall (ed), *The States in History* (Oxford University Press, 1986) 177, 180.

35 Hancher and Moran, above n 5, 272.

36 Ibid 276.

37 Scott, above n 26, 333.

38 Hancher and Moran, above n 5, 277.

this sense, competing within the regulatory space resembles a sporting contest, where the 'power of play' is at the centre of the process and the dominant actor will exert the most influence and control.[39]

The regulatory space metaphor adopts a 'birds-eye' view of the regulatory system and is not so concerned about the hierarchy of relationships between the regulators and the target group, or even distinguishing between state and non-state actors. Instead, one of the critical attributes of the regulatory space metaphor is the notion of pluralism. There exist many state and non-state actors within the regulatory space, acting in a pluralistic manner with varying degrees of control and influence over the regulatory domain. Actors have varying capacities to alter or influence the behaviour of the targets in the context of seeking to achieve the regulatory objective.

Through an analysis of the regulatory space, a system of regulation begins to emerge and provides a holistic view of the interconnectedness and interactions within the regulatory framework, described by Scott as:

> …drawing attention to the fact that regulatory authority and responsibility are frequently dispersed between several organisations, public and private, and that authority is not the only source of power within a regulated domain. The regulatory space approach is 'holistic' in the sense that it looks at the interactions of each of the players in the space and can recognise plural systems of authority and other resources and a complex of interests and actions.[40]

These plural systems of authority can be classified as systems of social coordination.[41] These include the influence of social norms, market influences (economic systems), political systems and legal systems. The regulatory space metaphor recognises that many different actors occupy positions within the regulatory system and that a polycentric system involves the interaction between the regulatory space and these other systems of social coordination.[42]

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39 Ibid 277, 284.

40 Scott, above n 26, 331.

41 Frank Vibert, *New Regulatory Space: Reframing Democratic Governance*, (Edward Elgar, New York, 2014) 12, 16.

42 Ibid 19.

2 *Application of the Regulatory Space Metaphor*

This metaphor is apt for regulation of SRC for several reasons. First, given the nature and high social utility of sport, particularly its tradition, historical and cultural evolution, the role of state actors is not the central focus, and a hierarchical state-driven approach does not typically exist in sport. Consequently, the tradition of non-interference by state actors means that legal regulation, although one regulatory option, is unlikely to be the first method to address SRC. Further, a more holistic view of the regulatory space can reveal a richer and more diverse range of actors who occupy positions and who could potentially occupy greater positions within the space. Another reason is that sport is a social construct and built on the foundation of social capital. Norms are made through mechanisms that are more likely to involve non-legal rules, standards and conventions, so, for this reason, the application of the regulatory space metaphor is more likely to reveal the key characteristics based on cultural and customary assumptions as features of regulatory capacity

B *The Composition of the Space*

This thesis analyses the characteristics of actors, relationships and resources that have shaped and controlled how SRC has been regulated. An understanding of the various characteristics of actors and the collective power accumulated to dominate the space are important considerations. The actor or actors who possess these characteristics are likely to exercise control and dominance over the regulatory process. To illustrate, the dominant actor determines whether a matter is classified as a regulatable matter. If the issue is determined to be regulatable, the dominant actor then determines who is included in the regulatory space (and, likewise, which actors are excluded). The dominant actor can set, direct and control how to regulate the concern and the regulatory measures to address the issue under consideration.[43]

1 *Regulatory Power*

The notion of regulatory space assumes that regulatory power can involve state and non-state actors in a non-hierarchical model. While modern conceptualisations have resulted in a diminished presence of state actors by way of active engagement in regulatory space,

[43] Hancher and Moran, above n 5, 278.

the state, as representative of the public, has always occupied a position within the regulatory space, acting as the body politic and provider of the legal, economic and political frameworks.[44]

Regulatory power is dispersed throughout the space and involves actors who individually or collectively have the authority to alter or influence the behaviour of others. In such cases, the regulatory system is described as polycentric and,

> marked by fragmentation, complexity and interdependence between actors, in which state and non-state actors are both regulators and regulated, and their boundaries are marked by the issues or problems which they are concerned with, rather than necessarily by a common solution.[45]

This approach provided a more flexible and responsive method of analysis when approaching the task of analysis of regulatory systems, with a focus on the influencing characteristics of principal actors within the regulated domain.

2 *Key Characteristics of Dominant Actors*

Regulatory actors can include individuals, peer groups, associations, firms (both incorporated and unincorporated), unions, NGO's, various levels of state and government actors, supra-governmental agencies, standard-setting organisations and global organisations.[46] Hancher and Moran identify the importance of both internal and external factors through the notion of network analysis; where internal 'rules of the game' are expanded to include external forces of legal tradition, and a wide range of social, economic and cultural factors.[47]

Actors can also vary based on the size and purpose. Hancher and Moran argue that large firms, whether they be private or public, often acquire the status of 'governing institutions', carrying out functions that are of an essentially public nature.[48] Rather than

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[44] Vibert, above n 41, 17. See also Paul Grabosky, Clifford Shearing and John Braithwaite, 'Introduction' in Paul Grabosky and John Braithwaite (eds) *Business Regulation and Australia's Future*, (1993), 2.

[45] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137.

[46] Freiberg, above n 2, 100. For discussion on the non-hierarchical conceptions of regulatory power, see Scott, above n 26, 335.

[47] Hancher and Moran, n 5, 292.

[48] Ibid 275.

focus on their state or non-state characteristics, the focus rests on the functions and organisational characteristics of actors.

Large firms make rules and enforce standards with a degree of interdependence between influential organisations which share public characteristics. The rules and standards developed by the large firms are formally or informally 'interwoven into a larger fabric of intervention' involving a multitude of other actors and influenced by both internal and external factors.[49] The 'publicness' of large firms and their rule-making capacities resonate in sport; a domain where SGBs are dominant actors and rule-makers, rely upon a framework of formal and informal networks.[50]

There are four interlinking characteristics of dominant actors in the regulatory space who typically influence the shape and allocation of power. Diagram 3.2 identifies these characteristics.

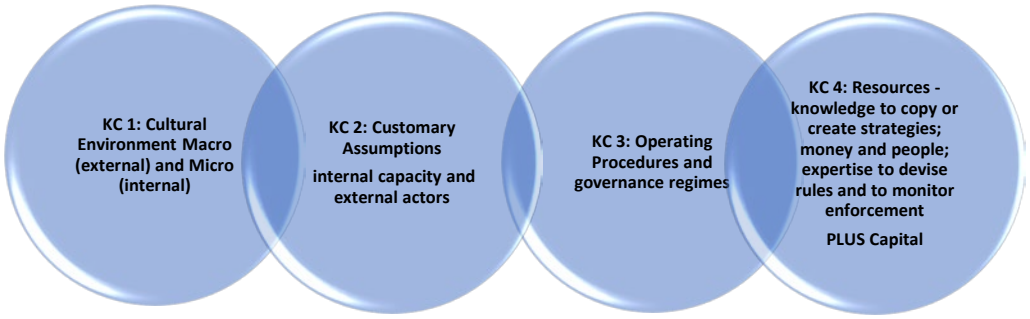

Diagram 3.2: The Four Characteristics of Dominant Actors

(a) Key Characteristic 1: The 'Filter of Culture'

Cultural settings are significant features that underpin the legitimacy and key characteristics of actors who compete for power in the regulatory space. Culture is also significant in determining whether something is classified as 'regulatable', and who is included and excluded from the process.

The cultural environment exists both at a macro and micro level. The culture of a society (macro-level) and the culture of an actor (micro-level) both influence the shape of

[49] Ibid.
[50] Ibid 276. See below, chapter 6, part III ('Australian Sports System: Actors, Relationships and Resources').

regulatory space. In the former case, cultural attitudes are a product of the different historical settings and different national traditions underpin the development of legal and political cultures.[51]

Different jurisdictional settings also reflect different socio-cultural attributes, built mainly on the foundations upon which these societies evolved. A significant consequence associated with the filter of culture is determining whether something is classified as a problem worth regulating, described as 'regulatable'. Hancher and Moran explain that the culture of society differs across jurisdictions and is influenced by attitudes, citing the US penchant for litigation as part of the regulatory process as an example. [52] Culturally formed assumptions influence the legitimacy claims of state actors in different jurisdictional settings. An example of this in the context of sport can be found in the different political ideologies and approaches of state actors in producing and delivering sport.[53]

Sport is a domain replete with socio-cultural influences across macro and micro-levels. To illustrate, the purpose and role of law in sport is influenced by culturally formed assumptions. Machismo or sport as social Darwinism illustrates the influence of culture on the motivations of sports participants. Cultural attributes will, therefore, be examined to ascertain the influence of the filter of culture in the context of the regulation of sport and SRC.[54]

(b) Key Characteristic 2: Customary Assumptions

Customary assumptions and cultural settings are inextricably linked whereby culture underpins customary assumptions. In many settings, state actors have traditionally assumed legitimacy over activities as the body politic with little or no resistance. In other cases, non-interference and deference to non-state actors have prevailed. Customary assumptions about the role and purpose of the law, for instance, determines the parameters of legal regulation and legislative intervention. [55]

Customary patterns of relationships can form and therefore dictate how actors perceive

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51 Hancher and Moran, above n 5, 280.

52 Ibid 279, 281.

53 For example, the 1956 Olympic Games in Melbourne involved several former Eastern bloc countries and involvement of state actors in directly regulating sport. See Harry Blutstein *Cold War Games: Espionage, Spies and Secret Operations at the 1956 Olympic Games* (Allen & Unwin, 2017).

54 See below, chapter 6, part I ('The Filter of Culture in Australian Sport').

55 Hancher and Moran, above n 5, 280.

legitimacy within the regulatory space. Large firms who have acquired the status of governing institutions with quasi-public characteristics engender trust and the capacity to perform regulatory responsibilities.

(c) Key Characteristic 3: Operating Procedures and Governance Regimes

The internal organisation of operating procedures and governance systems are characteristics of dominant actors. As noted above, large firms have acquired the status of governing institutions and carry out public-like functions. Hancher and Moran explain that rules embedded within standard operating procedures and governance systems of large firms resonate in the public sphere and permeate beyond the private interests of the firm. [56]

Actors who are highly organised and adhere to governance regimes to conduct their activities and operations are likely to attract the attention of other large firms and state actors, so this is a relevant consideration when assessing the relationships that exist between dominant actors. McKay identified this as a characteristic in sport when he described the 'selective filtering' adopted by state policymaking around sport, where the state, instead of being a neutral umpire, instead responded to the influence of the larger and more organised sectors in society.[57]

Associated with customary assumptions as noted above is the characteristic that large firms can foster trust that their internal governance systems and operating procedures can respond and voluntarily self-regulating to address regulatable matters that might, in other settings, be considered public concerns. Hancher and Moran identify that representative associations can be classified as large firms, a feature that is highly relevant in the context of sport and the regulation of SRC by SGBs as the representative associations of their sports.[58]

(d) Key Characteristic 4: Resources (and Capital)

Resources give these actors the capacity to dominate and exert more significant influence over the regulatory space. The actor or actors with the greater access to resources, the more significant potential to exert influence over the regulatory process. Timing is an

[56] Ibid 275.
[57] Jim McKay, *No Pain, No Gain? Sport and Australian Culture* (Prentice Hall, 1991) 75-76.
[58] Hancher and Moran, above n 5, 278.

essential aspect of control over the regulatory space; the actor who has access to resources at the historical moment when an issue arises is thought to stand a 'good chance of exercising a continuing dominant influence'.[59]

In the context of economic regulation, Hancher and Moran identified resources as including knowledge, money, people and expertise.[60] Scott described resources as including law and legal authority, organisational capacity, wealth, information and legal and non-legal resources.[61] The range of resources demonstrates the pluralistic nature of the regulatory space metaphor. Scott further considered that resources were fragmented and disbursed in a non-hierarchical way.

C Collective Capital and Bourdieu's Theory

The above conceptualisation of the regulatory space draws attention to the multitude of actors who compete for power to gain control over the regulatory domain. The actors who control the space can alter the behaviour of others. Control can be based on legal and non-legal forms of authority, and various forms of resources and traditional views explain resources comprise of knowledge, money, people and expertise. An extension of Hancher and Moran's theory is to consider how social theorists have conceptualised capital as a mechanism through which to exert and sustain control over a field.

1 *The Classic View of Capital*

The classic view of the collective value and influence of social fields and collective capital can be found in the work of French social theorist, Pierre Bourdieu.[62] This work has been of interest to the domain of sport in both academic and political spheres to help explain and quantify the value of social and physical capital generated through sport.[63]

Bourdieu's concept explains that social fields are the space for actors to assert their dominance based on the accumulation of capital.[64] Bourdieu explains that capital is a

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59 Ibid 284.
60 Ibid.
61 Scott, above n 26, 334.
62 Bourdieu, above n 25, 241 - 258.
63 Grant Jarvie, *Sport, Culture and Society: An Introduction* (Routledge, 2nd ed, 2012) 247-250; Bob Stewart, Daryl Adair and Aaron Smith, 'Drivers of Illicit Drug Use Regulation in Australian Sport' (2011) 14 *Sport Management Review* 237, 241; Gowthorp, Greenhow and O'Brien, above n 29.
64 Stewart et al, above n 63, 241.

source of power and the actor with the most capital, therefore, asserts dominance and control over the field. This dominance also enables the actor to advance vested interests despite the absence of formal legal authority over the field.[65]

Social fields comprise networks of social relations where actors seek to establish supremacy over other actors by using power, influence and domination. Bourdieu conceptualises capital in several 'fundamental guises' as economic capital, cultural capital, symbolic and social capital[66] Actors can influence their social field utilising these various forms of capital. The symbolic power of an actor is enhanced when the actor has accumulated the most collective capital.

Legitimacy is fostered by the collective capital accumulated by the actor rather than any legal forms of authority. Instead, symbolic power is generated by the actor's authority, knowledge and reputation and is not necessarily derived from, or dependent upon, formal sources of authority. This enables the actor to build capacity by relying upon supportive relationships and enables dominant actors to manipulate outcomes based on their vested interest.

2 *Collective Capital*

Bourdieu's social theory as it relates to the various forms of capital identifies that the accumulation of various forms of capital (the collective capital) is held by the dominant actor. This theory can help expand understandings of the informal mechanisms by which individual actors, in regulating SRC, have come to control and influence the behaviour of target groups. The complementary nature of the regulatory space metaphor and Bourdieu's theory is a relatively novel concept and, as noted above, has only recently been examined in Australia in sport management literature on the influence and control of non-state actors in regulating anti-doping in sport.[67]

D *Relationships*

Through an analysis of the regulatory space and the identification of dominant actors who have accumulated various forms of capital (collective capital), the relationships of influences and connections between actors and targets are likely to be revealed. Actors

[65] Grabosky, above n 19, 118.
[66] Bourdieu, above n 25, 243.
[67] Stewart et al, above n 63, 237-245. See also Gowthorp, Greenhow and O'Brien, above n 29.

all compete for power to control or influence the regulatory agenda and to promote their interests in the regulatory space. As such, there is a strong notion of interdependence, recognising that individual actors necessarily depend on gathering support from other actors. Understanding these relationships and interactions is vitally important to gain an insight into who dominates, or seeks to dominate, the regulatory process under review.

When an actor has the attributes, and key characteristics explained in the above discussion, Hancher and Moran explain that these actors are more likely to form power relationships with other actors, including state actors.[68] This facilitates a set of power relationships and is likely to enable dominant actors to establish and maintain dominance to control and influence the shape of the regulatory space.

Actors and regulatory targets can be formally connected through legal or economic frameworks, or informal mechanisms through interconnecting relationships based on social or cultural norms. Parker describes 'pre-existing and potential indigenous normative orderings' as social and private ordering systems.[69] In this way, the influence of private social norms and practices within the regulatory domain are recognised as essential factors that already regulate how people behave.[70]

These relationships may be complex and involve actors holding different positions of power and influence that can change over time. Hall et al adopt the metaphor of 'shifting balances' as a set of scales or 'servomechanisms' highlighting the changes that are brought about when configurations of power and influence change within the regulatory domain.[71] Furthermore, Hancher and Moran recognised that actors could be identified as 'early and late regulators', with early regulators providing a model for others 'following later along the regulatory road'.[72]

IV REGULATORY SYSTEMS AND TOOLS

In the complex structure of any political society, there exist multiple levels of regulatory

[68] Hancher and Moran, above n 5, 278.
[69] Christine Parker, 'Reinventing Regulation Within the Corporation: Compliance-Orientated Regulatory Innovation' (2000) 32 (5) *Administration and Society* 529, 531.
[70] Parker, above 21.
[71] See Clare Hall, Christopher Hood and Colin Scott, *Telecommunications Regulation* (Routledge, 2005) 204.
[72] Hancher and Moran, above n 5, 285.

systems ranging across the broad categories of self-regulation, co-regulation, meta-regulation and direct government regulation. Self-regulation is the 'regulatory model of choice' and the default position when deciding on the arrangement of regulatory controls addressing areas for review or consideration that fall outside the purview of direct state or legislative interventions.[73]

When reconfiguration occurs, existing regulatory systems shift along a regulatory continuum, moving towards (or away from) more coercive forms of control. This reconfiguration also involves an adjustment to the roles of regulatory actors, with some taking a more active role in the regulatory space and employing a range of regulatory tools to achieve the desired objectives.

A *Regulatory Systems*

The following analysis of the various forms of regulation demonstrates the differing roles of the state, ranging in scope from a silent witness or passive observer (in private self-regulation) through to direct intervenor using command and control regulatory mechanisms (direct government regulation).

1 Self-Regulation

Self-regulation can be understood as a formal or informal form of voluntary and consensual regulation by an actor or actors with responsibility or influence over the specific domain.[74] In formal settings, the 'voluntary' nature of self-regulation is based on the absence of any mandate, sanction or coercion on the part of government.[75] Braithwaite et al, describes this as 'voluntarism'; where an individual or organisation undertakes to 'do the right thing', without any coercion.[76]

The 'self' can mean the collective group asserting control or influence over the conduct of its members or others. In this sense, self-regulation describes the situation where a group

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[73] Self-regulation has been described as an 'attractive alternative to direct governmental regulation because the state simply cannot afford to do an adequate job on its own'. See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 103.

[74] Christine Parker Self-Regulation and the Not-For-Profit Sector (State Services Department, Victoria 2007) 2.

[75] Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 *The Modern Law Review* 24-55.

[76] John Braithwaite, J Healy and K Dwan, 'The Governance of Health Safety and Quality', Commonwealth of Australia, 2005, vii.

of persons (natural or corporate) acting together perform a regulatory function in respect of themselves, over which others accept their authority.

A key component of self-regulation involves regulatory actors, connected through formal and informal organisational structures, taking the initiative in the formation and operation of the regulatory system.[77] Consequently, this system of regulation is relationship and consensus-based, driven and managed by self-regulating actors.[78]

The state plays no direct role in self-regulation. Instead, the self-regulatory system takes the place of the state over the specific domain and can develop organically or may be driven by the threat of state intervention. The state, underpinned by the legal authority as the body politic, sits outside the regulatory environment, providing the legal, political and economic systems that facilitate the self-regulated activities but allowing the self-regulator to get on with the business of regulating its activities. In this sense, the state is a passive observer or silent witness to the actions of non-state actors directing, controlling, influencing and shaping their regulatory domain.

Regulatory scholars agree that self-regulation is not considered an appropriate option for regulating activities that involve matters of 'high public interest or profile'.[79] In such cases, perceived conflicts of interest could threaten safety, cautioning that self-regulation should not be used for regulating activities which pose unusually high risks. This is a significant limitation of self-regulation and one that is particularly apt in the context of SRC which is primarily self-regulated.

(a) Strengths of Self-Regulation

Areas that are well suited for voluntary self-regulation involve those where the actors are in the best position to understand and respond to issues within their regulatory domain. Where society values the activity, the expectation is that the voluntary nature of self-regulation will deliver results that meet both the internal private interests of the organisation on the one hand and the external stakeholder, community and government expectations, on the other. If these interests conflict, questions arise as to whether adjustments need to be made to the existing system or whether other forms of regulatory

77 Ibid.

78 Morgan and Yeung, above n 8.

79 Commonwealth, Department of the Prime Minister and Cabinet, 2014, *The Australian Guide to Regulation* (Canberra, 2014),28. See Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) *Current Legal Problems* 101, 115.

interventions are required.

(i) Proximity and Trust

The proximity of actors is a critical strength in a self-regulated system. Parker identifies proximity as a strength regarding effectiveness, efficiency and legitimacy.[80] One of the key ingredients to achieving the success of a self-regulated system is through the recruitment of competent and experienced regulatory actors from within the organisation, industry or sector, and the utilisation of these skills and expertise in the formation of effective regulatory design. Internally recruited actors are thought to possess 'superior informational capacities' to external state actors, incorporating a higher level of expertise or technical knowledge about the organisation, industry or sector.[81]

When actors are 'generally rooted in the industry', they are thought to have access to reliable, accurate and relevant information and sensitivity to the peculiarities of the regulatory terrain.[82] This proximity facilitates the development of regulatory responses thought to be more in tune with existing problems and be more sensitive to the conditions that might give rise to future problems in need of regulatory review.

The proximity of regulators can also facilitate greater degrees of flexibility to encourage the 'innovatory possibilities' within the self-regulated environment.[83] Self-regulators are not subject to the limitations or constraints that might exist for state regulators. Furthermore, where technology or other aspects of the industry are changing rapidly, the self-regulator is best positioned to adapt to changing circumstances and has the flexibility to implement appropriate regulatory responses promptly.[84]

The relationship between the self-regulator and participants within the self-regulated community is based on mutual trust, underpinning many of the strengths of self-regulation. Trust leads to lower levels of scepticism and suspicion about the legitimacy of the self-regulated system and results in the higher likelihood of acceptance and compliance. This, in turn, fosters the creation and maintenance of an ethical culture

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80 Parker, above n 74, 4.

81 Morgan and Yeung, above n 8, 93.

82 In explaining the advantages of external self-regulation, Freiberg identifies self-regulators as being 'closer to the action' and likely to be better suited to identify potential problems. See Freiberg, above n 2, 112.

83 See Morgan and Yeung, above n 8, 93.

84 Ibid 93. Parker, above n 74, 4.

within the self-regulated environment. The higher the internal involvement in the regulatory design, the higher compliance and adherence to relevant industry standards and ethics due, in part, to the internal policing of compliance.[85]

In summary, the overarching benefit of proximity leads to higher levels of legitimacy in their regulatory role by possessing higher levels of specialist knowledge and expertise, flexibility, increased compliance, and the promotion of ethics and standards within the regulatory domain.[86]

(ii) Reduced Burdens

Self-regulation is the least burdensome regulatory approach both from government and the regulatory target's perspective. From the state's perspective, there is no need to be directly involved in the drafting of any detailed rules or have the need to consult with a wide range of stakeholders on regulatory interventions. Nor is there a great need to spend money on enforcement mechanisms. This approach leaves the task of regulating to others, translating into economic savings through the internalisation of regulatory costs, alleviating the public need to bear those costs. From a regulatory target's perspective, economic savings are made in not having to spend time and money understanding what the regulatory standards require and the flexibility to enable the target to determine their approach and interpretation of what is required to comply.

This correlation between trust and compliance reduces the burden of self-regulation in some direct and indirect way. The information costs are reduced due to the role of the self-regulator in formulating, implementing and interpreting the regulatory tools; the monitoring and enforcement costs are reduced due to higher levels of compliance, and the administrative costs are internalised rather than carried by the taxpayer as is the case of direct government regulation. Questions have been raised as to whether this is merely *shifting* the burden rather than *reducing* it. In other words, is it merely moving the burden of the regulatory process down a level from the government, to compliance officers, rather than reducing the cost or burden?[87]

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[85] Achieving compliance is a key component in the regulatory process. Freiberg explains that an advantage of external self-regulation includes higher levels of compliance. Freiberg, above n 2, 112, 113.

[86] Baldwin et al, above n 3.

[87] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 135.

(b) Weaknesses of Self-Regulation

Self-regulation has been described as a privilege but acknowledged that such privilege could be open to lethargy, abuse or exploitation.[88] In that regard, the simple fact that the state, empowered by the law, signals a willingness to intervene is potentially an incentive for the self-regulator to respect its privileged position, or face the consequences of a more coercive form of intervention. It has been suggested that this possibility—the threat of 'substitutive self-regulation'—is perhaps the most influential of factors in motivating self-regulators.[89]

(i) Proximity as a Weakness

The proximity and subjectivity of a regulatory actor who is intimately connected to the self-regulatory environment can have positive and negative outcomes. There are risks that self-regulation may fail due to a relaxed compliance posture brought about by the proximity of the regulator to the regulatee. Problems arise when self-regulators are faced with competing interests that create potential conflicts and are challenged in deciding the value and priority of these interests.

Examples of private regulatory failure in recent times highlight the seriousness of what can go wrong within a self-regulatory environment due to proximity of actors.[90] To illustrate, the self-regulated responses of non-state actors in addressing child safety in sport led to state actors engaging in developing a national policy framework to minimise the harm.[91] Another example involved the failure to address doping in sport by non-state actors within a self-regulatory framework.[92]

The greater the proximity, the greater the potential for conflicts of interest. In situations where conflicts arise, there is no immediate third-party umpire with the capacity to effectively deal with these conflicts. The criticism levelled at self-regulation focuses on this proximity and the many 'hats' worn by the self-regulator as designer, interpreter, implementer, enforcer and evaluator. By mixing these functions, traditional criticisms

88 Ibid 38.

89 Ayres and Braithwaite, above n 73, 39; Pauline Westerman, 'Who is Regulating the Self? Self-Regulation as Outsourced Rule Making', (2010) (4) *Legisprudence: International Journal for the Study of Legislation* 225, 230.

90 Grabosky, above n 19, 119; Parker, above n 87, vii- viii.

91 See below, chapter 7 part I ('The Publicness of Sport').

92 Ibid.

levelled at self-regulation suggest that there is the potential for a fundamental breach of the 'separation of powers doctrine', at least as a theoretical rather than formally legal, consideration.[93] From an economic perspective, proximity gives self-regulators exclusive power to control or restrict entry into the regulated environment through the imposition of barriers such as prescriptive registration and licensing regimes.

As earlier indicated, capacity and motivation are critical factors in self-regulation. They also feature when considering the negative side of proximity in self-regulation. When the levels of intimacy between the regulator and target of regulation increases, capacity and motivation levels change and can lead to impairment of judgment and loss of objectivity when executing regulatory functions.

The self-regulator in a self-regulated system has the power to determine who, when and what it will sanction. This wide discretion can sometimes lead to either no action being taken or allegations of a disproportionately lenient sanction for otherwise serious violations. This quarantines the self-regulatory regime from being held accountable to the body politic and leaves it only to be judged by the self-regulator.[94] The 'checks and balances' that exist under direct government regulation do not exist to the same extent within the self-regulated system.

When the weaknesses outweigh the strengths of self-regulation, questions arise about the effectiveness of the regulatory model itself or the selection of the regulatory tools used in meeting the goals and objectives. Paradoxically, it is at these times, when self-regulation has been thought to have 'failed' or ineffective in achieving regulatory objectives, that calls are made for increased intervention or protection from the state.[95] In such cases, the escalation in the regulatory system might result and a reorganisation or shift in the balance of regulatory actors and mechanisms.

Questions arise as to who regulates the 'self' in the self-regulated model and cast doubt on the motivations and capacities of the self-regulator. To work effectively, the self-regulator needs to have both the motivation and the capacity to act. It might be that there

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93 See Morgan and Yeung, above n 8, 94.

94 Parker, above n 74, 5.

95 See Fiona Haines *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot (*Edward Elgar, 2011) 1,28-29.

is little motivation but great capacity to achieve the regulatory goals. Alternatively, there might be significant motivation but little capacity to act.[96] Pinpointing the combination of capacity and motivation is necessary to identify potential imbalances that might lead to regulatory failure and calls for reconfiguration.

(c) Self-Regulatory Systems in Sport

SGBs[97] primarily regulate sport, operating as voluntary self-regulated associations. National sport operates through a private self-regulated system either as part of a transnational network or a domestic network of non-state actors. In each case, the self-regulatory functions are primarily controlled or directed by SGBs. Their functions incorporate all parts of the regulatory 'lifecycle', including the promulgation of rules and policy formation, the interpretation of the rules, adjudication and enforcement (including the imposition of sanctions) and evaluation of the effectiveness of their regulatory strategies.[98] Given the transnational character of global sport, SGBs necessarily rely on a network of actors, encased within a self-regulatory system, to perform some of the operational aspects of these functions. [99]

2 *Co-Regulation*

Co-regulation also referred to as 'enforced co-regulation', is an example of regulatory delegation and monitoring by state actors.[100] Co-regulation is a collaborative approach to regulation that involves both state and non-state actors, in a hybrid model of regulation, drafting and adhering to a unique set of rules to meet minimum standards. The system is best suited to situations where there is a public interest in the problem or issue under consideration requiring the involvement of both industry and government.

There are five elements in co-regulation. First, the state sets the criteria or default standards. Second, industry customised regulatory responses to meet the criteria, based on individual circumstances. In this way, the industry provides the 'problem-solving creativity' through the development of appropriate regulatory mechanisms such as codes of practice. The third step involves the state approving the regulatory arrangements and

96 Parker, above n 74, 5.
97 SGBs are the rule-makers of the sport. See above, chapter 1 part I ('The Problem of SRC').
98 Freiberg, above n 2, 134.
99 See below, chapter 6, part III ('The Australian Sports System').
100 Ayres and Braithwaite, above n 73, 102-109.

providing the legislative backing. Industry then monitors compliance, primarily through the enforcement and sanctioning role.[101] The final step involves the state taking enforcement action for non-compliance, if necessary.

This model allows private actors to control significant portions of the regulatory process, but ultimate enforcement rests with the government as the protector of the public interest through the provision of the statutory enforcement framework. Co-regulation is relevant in the context of sport as it has been a model deployed by state and non-state actors in regulating issues in Australian sport when self-regulation has failed.[102]

3 *Meta-Regulation*

Meta-regulation or process-based regulation is a form of risk management regulation focused on the design of a process or system rather than the mandate of an outcome or control. In this way, meta-regulation involves both public and private actors with the former monitoring compliance and the latter possessing unique skills and understandings about the regulatory domain.[103]

According to Freiberg, the development of meta-regulatory systems was a response to the increased sensitivity to risk. State regulatory agents took on the role of regulating the risk management systems of organisations.[104] Unlike co-regulation, the focus in meta-regulation is on the design, development and deployment of a risk management strategy or process for an activity. Under meta-regulation, organisations not only manage their risks but also manage how their partners manage their risks. The state monitors compliance and enforcement through a state agent or the use of external agencies involved in compliance activities.[105]

Meta-regulation is best suited to situations where private actors have greater knowledge than state actors of the risks and how to mitigate the risks. In this way, non-state actors carry responsibility for the design of the risk management system to the satisfaction of the state regulatory agent. There are currently no meta-regulatory systems in sport.

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101 Freiberg, above n 2, 118-120.
102 See below, chapter 8, part I ('The Publicness of Sport').
103 Braithwaite et al, above n 76, 13.
104 Freiberg, above n 2, 121.
105 Ibid.

4 *Direct State Regulation*

This form of regulatory system involves the state playing a central and dominant role in the regulatory regime as the designer, developer and enforcer of legal, regulatory mechanisms. Control over these elements of the regulatory process is vested in the state through legislation. In this way, the state promulgates legal rules that restrict and prohibit specified conduct, breach of which gives rise to coercive sanctions in either civil or criminal jurisdictions.

Morgan and Yeung describe this as the law operating in its classical form, using rule-based coercion as 'command and control' regulation, utilising the 'command' of law by the state to facilitate policy objectives and the resources of the state for this purpose.[106] Through the use of direct government interventions, policy objectives are promoted by the state with private non-state actors playing a limited role in the regulatory system.

The state has directly intervened in sport, albeit in very few cases. An example of direct government regulation can be found in the legislative regimes that have been implemented in some jurisdictions to regulate combat sports with the object of promoting a safe sporting system.[107] There is no consistent approach, however, across state and territories.

Control over significant aspects of the sports covered by the legislative regime is vested in the state through a state-controlled agency based on the role of the state to prevent or minimise harm.[108] Direct government regulation is a heavily contested and highly controversial approach due to some sensitivities that surround the unique characteristics of sport.[109]

B *The Functions of Law in Regulation*

Law is a significant form of regulation and plays a vital and essential role in regulation through its capacity to alter or influence behaviour. The role of law as a system of authority within the regulatory space, however, depends upon cultural and customary assumptions and different social and political settings. Regulatory scholars explain that

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[106] Morgan and Yeung, above n 8, 81.
[107] See below, chapter 6 part I ('The Filter of Culture').
[108] See *Professional Boxing and Combat Sports Act 1985* (Victoria) ss 3 and 14.
[109] See below, chapter 6 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors').

while omnipresent, law does not necessarily occupy a central position in the regulatory space.[110] Instead, Scott argues its role is 'more marginal to actions within the regulatory space than lawyers might assume'.[111]

As noted above, law is seen in its 'classical form' in direct state regulation and command and control enforcement by state actors. The significance of law as a form of regulation, however, is greater than just through direct state regulation.

Within each of the above described regulatory regimes, the function of law can be explicit and targeted at changing behaviour. In other cases, the function of the law can be implicit and indirect. To illustrate the former, direct regulation is an obvious example where the function of law is seen through the shaping of behaviour through the creation of statutory forms of regulatory arrangements. To illustrate the latter, the state provides the legal system as a system of authority to provide dispute resolution mechanisms and the legal framework to support formal relationships between actors in a self-regulated system. Law, therefore, as a system of authority, features in all regulatory systems, and its function can range in scope from direct enforcement to indirect expressive or symbolic. Even in voluntary self-regulated or 'hands off' domains, the law features in some way.

While legal regulation is directed to control, alter or influence the behaviour of the target audience identified in the statutory objectives, Sunstein explains that the expressive or symbolic function of law also impacts a wider audience.[112] This expressive function of law manifests through the law's symbolic effect in shifting or replacing underlying social norms by 'making statements' or signalling appropriate behaviour. In a similar vein, Freiberg explains the shaping function of law.[113] In this way, behaviour is altered or influenced by the function of law as setting the expectation as to the standard of behaviour and, therefore, influencing the compliance posture of targets who chose to comply or avoid the law.

While the law is a significant form of regulation, Drahos and Krygier consider that law is one part of a 'much larger regulatory world'; a world where there are many 'defenders,

110 Scott, above n 26, 334.
111 Ibid.
112 Sunstein, above n 28, 2021, 2031.
113 Freiberg, above n 2, 203,204.

guardians and protectors of public interests'.[114] It is worth examining the range of other tools that co-exist in the ecosystem of regulation.

C *Regulatory Tools and Instruments*

A central focus of this thesis involves assessing how regulation has occurred to manage and minimise the risk of SRC in Australia. This involves a consideration of what tools, instruments and techniques have already been used by regulatory actors and what tools might be still be available to use to address concerns around SRC.

1 *A Range of Tools*

In the design and development phase of the regulatory process, actors have at their disposal a wide variety of regulatory tools that can be deployed to address a regulatory problem. Freiberg has developed a taxonomy of regulatory tools illustrating five categories and identifying 31 regulatory tools.[115] Most of these tools are available to both state and non-state actors. Legislative enactment, however, is only available to state actors based on constitutional or legal authority.

2 *Classification of Tools*

Freiberg's taxonomy classifies regulatory tools into broad categories of regulation as economic, transactional, authorisation as regulation, structural, informational and legal.[116] The six categories of tools are not mutually exclusive and several different tools are likely to be required to achieve the desired objective.[117] These tools can be configured based on the activity under review and the ability of actors to access the tools.

Economic tools are those that aim to manipulate the production, allocation or use of material resources such as money or property to make or influence markets.[118] Price regulation, taxes, subsidies and rebates are examples of economic regulation.

Transactional tools are those designed to affect commercial arrangements through

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[114] Drahos and Krygier, above n 17, 6.
[115] Freiberg, above n 2, 201 Figure 12.
[116] Ibid 200-201.
[117] There are many influencing factors to consider when selecting or matching tools to address a problem. Freiberg describes the task of matching regulatory tools to policy problems as a complex one, involving a range of considerations and concluding that 'no single tool may be appropriate or sufficient'. Freiberg, above n 2, 199.
[118] Ibid Chapter 7.

contracts, disqualifications and grants between parties. Contracts are private forms of regulation and establish the parameters of the bargain and the nature of obligations including sanctions for non-performance or breach. These transactional tools, however, can be constrained by the bargaining positions of the parties so that inequalities can arise when one party occupies a dominant position in the bargaining process.[119] These considerations arise in sport, particularly when standard playing contracts are presented to 'rookies' with potential vulnerabilities arise.[120]

Licensing, permissions, registrations, certifications and accreditations are examples of authorisation as regulation with the power to alter or influence behaviour through the selection process of who can participate in an activity. Litigation is another form of authorisation as regulation. Freiberg explains that the use of the state-provided court system is an indirect form of state regulation; where the state authorises litigants to use this system to advance either public interests (in the case of public litigation) or private interests (in the case of private litigation).[121]

Structural regulation involves tools and mechanisms designed to manipulate the physical, environmental and process design.[122] Informational tools are tools related to the access and availability of information, through disclosure, setting of key performance indicators and addressing information asymmetries.[123]

Legal regulation uses tools backed by sanctions, either state-endorsed through primary or secondary legislation, or non-state endorsed through soft laws such as standards and codes of conduct.[124] Although legal regulation is a separate category in this taxonomy, Freiberg recognises the triple function of law through its capacity to create, shape and

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[119] Ibid 278.

[120] Standard form contracts as employment contracts in sport are criticised as lacking the element of negotiation and balance of bargaining positions. In sport, Thorpe et al, explain this is significantly reduced for elite level players who are likely to be able to capitalize on their 'star quality' to attract high salaries, albeit constrained by labour market controls such as salary caps and draft and trade rule). See David Thorpe, Antonio Buti, Chris Davies and Paul Jonson, *Sports Law* (Oxford University Press, 3rd edition, 2017) 518-519.

[121] Freiberg, above n 2, 326-330

[122] For example, the use of equipment, physical space, planning and zoning laws and environmental design are all forms of structural regulation. Ibid 362-379.

[123] For example, mandatory disclosure, labelling and information to be available in the public domain are forms of informational regulation. Ibid 331-361.

[124] Legal regulation includes both public and private law and involves both direct and indirect mechanisms. Ibid 203-250.

enforce regulatory tools. [125] In this sense, the law is a constitutive component of the other five categories and interwoven through its inherent capacity to create, shape and enforce.

Regulatory tools can achieve goals and outcomes that have both restrictive and facilitative objectives. Restrictive or 'red-light' regulatory tools restrict behaviour or preventing undesirable activities. On the other hand, facilitative 'green-light' regulatory tools have an enabling role in bringing about desired regulatory behaviour in furtherance of the regulatory objective.[126] The challenge is finding the right balance in the selection of tools and evaluating and monitoring compliance to determine if the regulatory strategies achieve their intended outcomes.

3 *A New Tool*

A further tool was recently added to the toolbox as a form of informational regulation.[127] The use of nudge theory has been adopted by state actors to achieve public health objectives. Within this theory, the trigger points of liberaltarian paternalism and choice architecture are inherent in the design of the regulatory strategy and a shift towards nudging as a critical method of encouraging optimal public health behaviour has become a tool available to public health regulators.[128] According to the proponents of 'nudge theory', targets feel in control of their decision-making, while choice architects provide the framework within which the choice is made.[129]

In this thesis, the six categories of regulatory tools are examined through the analysis of the current regulatory systems about SRC.[130] Furthermore, the role of public and private law as a regulatory mechanism is considered in the context of current regulatory systems, with an emphasis on public health law, workplace health and safety law and the private tort of negligence, illustrating the several roles and function of law as regulation.[131]

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[125] Ibid 203-204; Sunstein, above n 28.

[126] Richard Pomfret and John K. Wilson, 'The Peculiar Economics of Government Policy Towards Sport (2011) 18 (1) *Agenda: A Journal of Policy Analysis and Reform* 85, 93-96.

[127] Freiberg, above n 2, 351-357.

[128] Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Penguin, 2008) 4-6, 13.

[129] Ibid 11-13,83.

[130] See below, chapters 7 and chapter 8.

[131] See below, chapter 7 part I ('Law, Sport and SRC').

4 *Evaluating the Effectiveness of Regulatory Tools*

The central hypothesis is centrally rooted on the premise that the current regulatory arrangements in Australia are inadequate to manage and minimise the risks of SRC to all participants. A critical part of the thesis, therefore, involves evaluating the adequacy and effectiveness of current regulatory measures. To that end, a cross-jurisdictional analysis is undertaken in chapter 5 to pinpoint the status of state regulatory arrangements in responding to SRC across several jurisdictional settings.[132] Later, in the final chapter, the evaluative line of inquiry is applied to measure the effectiveness of current regulatory arrangements in Australia against five evaluative criteria, namely legislative mandate, accountability, transparency, expertise and efficiency.[133]

V CONCLUSION

This chapter has explained the approach used for analysing and evaluating the regulatory space for minimising the harm associated with SRC. Two main regulatory lines of enquiry are applied to understand foundational and evaluative considerations.

These lines of inquiry and the regulatory studies approach applied in this thesis are focused on establishing the notion that regulating sport and SRC is a defendable concept; that the regulatory space of SRC is replete with a rich and diverse range of actors who have the capacity to respond to SRC in a proactive and effective manner; that various rationales exist and support state actors to play a more significant role; and that an extensive range of tools and regulatory measures are available to be employed to achieve the collective goal of managing and minimising SRC in Australia. This provides the framework for the remaining chapters which consider what factors might trigger state actors to engage more actively in regulating SRC.

The next chapter applies the first branch of the foundational line of enquiry by conceptualising the regulatory space of SRC in the US. It traces the inconvenient and disruptive discovery of SRC in the sport of American football. This case study continues the discussion around why SRC, when reframed as a public health concern, attracted the attention of state actors and eventually led to a reconfigured regulatory space.

[132] See below, chapter 5.
[133] See below, Chapter 9.

CHAPTER 4: THE DISCOVERY OF SRC IN THE UNITED STATES

INTRODUCTION

As outlined in chapter 1, the genesis of this thesis lay in the American National Football League's (NFL) initial inadequate responses to SRC and the effect of their later decisions, under threat of litigation, that led to a significant reconfiguration of the regulation of SRC in that jurisdiction. This chapter provides a more detailed case study of how SRC emerged as a public health issue in the US, the initial role of the NFL as the dominant actor and the reasons why the regulatory space was subsequently reorganised when self-regulation failed. By tracing the evolution of regulation of concussion in American football, this chapter highlights the shortcomings of the initial measures taken by the NFL as a voluntary non-state actor within a self-regulated system and evaluates the strengths and weaknesses of self-regulation in managing a public health concern. The United States experience provides a useful insight into SRC as a regulatory issue and can serve as a guide as to what might, or might not, be the best approach to regulating SRC in Australia.

This chapter commences in Part I with a preliminary review of how sport was regulated in the US at the time that SCR emerged as an issue. This highlights the key characteristics of the NFL as the key actor in the regulatory space, a position it continued to occupy for a significant period. Part II then examines how the NFL responded to the specific challenges presented when independent discoveries were made about the serious nature of concussion in a sport that glorified violence as part of its inherent appeal for players, fans and spectators. Part II explains the nature and extent of the mounting pressure that was brought to bear on the NFL to reshape its regulatory responses. This was driven by independent scientific discoveries, government scrutiny, media attention and private litigation. Part IV offers some observations on the NFL case study and how it provides compelling evidence to support the central hypothesis of this thesis that SRC is a public health concern and that non-state actors are ill-equipped to regulate it within a private voluntary self-regulatory system. Part V provides concluding remarks.

I THE DYNAMICS OF THE NFL AND THE REGULATORY SPACE: ORGANISATION, CULTURE AND CUSTOMARY ASSUMPTIONS

A *A 'Hand's Off' Approach to State Regulation of Sport*

Since the early 1900s, American football, a full-body contact sport, has been dominated by non-state actors within a private self-regulated system. The public and private divide between state and non-state roles in sport are well-established in the US, with state actors openly displaying a 'hands-off' approach to regulating sport and well-established (and accepted) customary assumptions as to who controls the space.

Reflective of the regulatory lethargy in other domains and, indeed in Australian sport as explained in the previous chapter, state actors in the US have traditionally adopted a non-interventionist approach towards regulating the sport.[1] State involvement in the US has primarily been designed to support and facilitate the development of sport through the granting of regulatory exemptions and concessions, pathways through school and college sport-based programs and access to state-funded research and innovation in sport.[2]

The justification for the traditional non-interventionist approach by state actors in the US is based upon several reasons with some common features similar to the regulatory posture of state actors in the Australian setting. First, sports participation in the US has traditionally been characterised as a private activity, not an economic one, and therefore not the business of the US state actors. [3] Sport is considered a 'special' domain and fundamentally different to other domains, where activities were pursued for economic or commercial gain.

Second, sociocultural reasons are relevant in the US setting. Koller describes the notion of sport as 'made up games' and sports participation as the consensual playing of games, evolving from leisure time pursuits.[4] The high social utility of sport has generally insulated the domain from state regulatory intervention and perpetuated the prevailing social and political norms that sport fell outside the remit of the state with deference to non-state

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1 Peter Grabosky, 'Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process' (2013) 7(1) *Regulation & Governance* 114,115.

2 *Federal Baseball Club v National League*, 259, US.200 (1922); Kathryn L Heinze and Di Lu, 'Shifting Responses to Institutional Change: The NFL and Player Concussions' (2017) 31 *Journal of Sport Management* 497, 505.

3 Dionne L Koller, 'Putting Public Law into 'Private' Sport' (2016) 43 *Pepperdine Law Review* 681, 687-688.

4 Ibid 688.

actors to autonomously and voluntarily self-regulate the domain. Indeed, Koller identifies patterns where US courts have exhibited a tendency not to intervene in sport, particularly around matters dealing with internal decision-making processes. Limited access to the courts has resulted in fewer cases and limited rights to access the torts system for compensation arising for sport-related injuries; somewhat surprising in a jurisdiction renowned for its cultural fondness for litigation as a popular form of regulation.[5]

There is, however, one notable exception relevant to safety and sporting injuries. The history of American football reveals an early case of state involvement. In 1905, President Theodore Roosevelt convened a group of university professors and athletic coaches from the prestigious Harvard, Yale and Princeton Universities at the White House and expressed concern over the high incidence of deaths and serious injuries in college football.[6] The convening of this meeting and the risk that the sport could be banned was enough to motivate non-state actors to adopt regulatory measures to minimise risks and make the sport safer.

B *NFL: A Dominant and Early Actor*

Against the backdrop of the state's non-interfering regulatory posture, the NFL has evolved to dominate the regulatory space over professional American football in the US.

The NFL was initially established as an unincorporated association in 1920 under the name, the American Professional Football Association, operating as a not-for-profit association.[7] The Association was a collection of the clubs and teams who had participated in the sport. Thus, the NFL's origin, constitution and function evolved and developed independently of government through the collective interests of participants and organisations in playing American football from the 'ground up'.[8]

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5 Ibid 694 to 697; See also Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017) 473.

6 Alexander Hecht, 'Legal and Ethical Aspects of Sports-related Concussion: Merrill Hoge Story' (2002) 12 *Seton Hall Journal of Sport Law* 27; James P Kelly and Jay H Rosenberg, 'Diagnosis and Management of Concussion in Sports' (1997) 48(3) *Neurology* 575; Linda Carroll and David Rosner, *The Concussion Crisis: Anatomy of a Silent Epidemic* (Simon & Schuster, 2012) 49-51. For discussion on early concerns in the United States regarding concussion in American football, see Emily Harrison, 'The First Concussion Crisis: Head Injury and Evidence in Early American Football' (2014) *American Journal of Public Health,* 104(5) 822-833.

7 Matthew Mitten et al, *Sports Law and Regulation: Cases, Materials and Problems* (Aspen Publishers, 2005) 397.

8 James A R Nafziger, 'A Comparison of the European and North American Models of Sports Organisation' (2008) 3-4 *The International Sports Law Journal* 100, 102.

Organised as a separate stream under the North American Sports Model, the NFL is the governing body for the professional league of American football. This Model involves a professional franchise structure which divides the governance of the sport across two separate and distinctive streams – the amateur stream and the professional stream. Each stream has its governance structures and separately organised as silos in producing and delivering sport to the American population. The NFL, as a sporting league, is described as an entertainment sport and part of a multi-billion-dollar entertainment sporting network, controlling the professional stream of American football.[9]

1 *Governance, Rulemaking and Standard Setting*

The NFL describes itself as the promoter, organiser and regulator of American professional football in the US and acts as the centralised body for obligations and undertakings shared among its members.[10] Its constitution states that the purpose of the NFL is 'to promote and foster the *primary business* [emphasis added] of League members, each member being an owner of a professional football club located in the US'.[11]

The constitution clearly states that the NFL's mandate is to represent the primary business of the NFL Teams as the league members. This objective has been the decisive factor in determining the priority of what is a regulatable matter and influences the decision-making within the NFL. In addition to this formal mandate, some suggest that the NFL is also the 'unilateral guardian of player safety', a claim, they say, began in the 1930s and continues to the present day.[12]

As a governing institution, the NFL establishes the standards and rules for the professional stream of American football. The NFL is responsible for designing, implementing, interpreting and enforcing the rules of the game and developing standards and operating procedures over the professional league in American football. Through its rulemaking function, the NFL prepares guidelines and policies that cover a range of matters including

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9 Ibid 103.

10 Christopher R Deubert et al, 'Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations' (2016) Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics, Harvard Law School ('Harvard Report'), 202; *In re National Football League Players' Concussion Injury Litigation,* No. 2:12-md-02323-AB, Memorandum of Law of Defendants National Football League and NFL Properties LLC in Support of Motion to Dismiss the Amended Master Administrative Long-Form Complaint on Pre-emption Grounds.

11 National Football League Constitution and Bylaws 2012 ('NFL Constitution and Bylaws'), Art II, § 2.1.

12 *In re National Football League Players' Concussion Injury Litigation*, 307 FRD 351, 362 (ED Pa, 2015) ('NFL Concussion Litigation'); See NFL Concussion Litigation <http://nflconcussionlitigation.com/?page_id=18>.

guidelines to protect the health and safety of players for sporting injuries.

The functions of the NFL are consistent with the role of a regulator and falls within the definition of regulation here adopted as involving the sustained and focused attempt to alter the behaviour of others. The NFL's rule, standards and other powers are regulatory mechanisms designed to achieve the goals and objectives that the NFL decides are worth pursuing.

The NFL employs a range of regulatory tools to directly regulate its sport and the professional players. It is beyond the scope of this thesis to examine these in any detail. For present purposes, two mechanisms are worthy of note and relevant in this context. First, the NFL uses economic regulatory tools to control players using labour market controls involving restraints on players through the draft system and salary caps on how much players can be paid by their employee clubs. Nafziger explains that this is an essential mechanism by which the NFL controls those who participate in the competition.[13] Second, the NFL controls the terms of the players' contract by prescribing uniform player contract terms. The NFL does this as part of the collective bargaining process that determines, inter alia, the player compensation regime to assist players who sustain injuries during their professional career.

2 *Legislative Mandate and Licence to Dominate*

Since the late 1960s, the NFL has operated a legislatively-sanctioned monopoly, where the state has formally recognised the NFL's status to monopolise and regulate its activities, contributing to the legitimacy and authority over the regulatory domain.[14] The US Congress enacted specific provisions to recognise the exemption of the NFL from anti-trust laws.[15] According to Ross, this legislative mandate enabled the NFL to operate 'with no significant governmental check upon their ability to exercise monopoly power'.[16]

Several consequences flow from the legislatively-sanctioned monopoly. First, this mandate has meant that the NFL has leveraged its financial capacity and benefit from

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[13] Nafziger, above n 8, 103.

[14] Stephen F Ross, 'Monopoly Sports Leagues' (1989) 73 *Minnesota Law Review* 643, 645. See also Act of Nov. 8, 1966, Pub.L.No. 89-800, 80 Stat.1515 (US) and amended at 15 U.S.C. §§ 1291-1293 (1982).

[15] The US Congressional Committee recognised this monopolistic power. See House of Representatives 111th Congress. 2009, 2010. Legal Issues Relating to Football Head Injuries (Parts I and II): Hearing Before the H. Comm. on the Judiciary, 111th Cong. Congressional Record, 28 October 2009 and 4 January 2010. ('2010/11 Congressional Hearing').

[16] Ross, above n 14, 645.

anti-trust exemptions in allowing professional football teams to collaborate when negotiating radio and television broadcasting rights. Second, this mandate together with the non-interventionist approach by state actors has meant that the NFL has effectively held a licence to self-regulate its domain for many decades.

The NFL has enjoyed a 'diplomatic-style immunity' over its regulatory domain, free from government involvement. The state has adopted this 'hands-off' approach based on the prevailing view that government (courts, Congress, executive branch agencies and state legislature) should defer to sports to regulate themselves.[17] Furthermore, this deference has been built on the traditional view noted earlier in this chapter that sports are an individual and private pursuit, different from commerce and not appropriate for state regulation.[18]

The special characteristics of sport as a regulatory domain, however, is not to suggest that courts have never intervened in the sport in the US or that the NFL is outside the reach of the law. Indeed, the courts have been prepared to intervene in cases involving the application of, inter alia, contract law, torts law and antitrust law labour law in professional leagues in the US.[19] Recently, legislative intervention was triggered by revelations of sexual abuse in some sports, prompting the enactment of the *Safe Sport Act* in 2018 but with a focus on youth sport.[20] On balance, however, a 'lack of litigation' and limited legislative and administrative action are two significant reasons why sport has enjoyed 'legal insulation' and self-regulatory autonomy in the US.[21] Koller describes this as creating a 'powerful space for sports regulators'.

3 *The NFL Commissioner*

The organisational characteristics of the NFL elevate the role of the Commissioner to be the dominant actor within the corporate structure. The Commissioner is the principal executive officer of the NFL and responsible for the general supervision of the NFL's

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17 Koller, above n 3, 684.

18 Ibid 687, 688.

19 *American Needle, Inc. v. National Football League, 560, U.S. 183 (2010)*. See also Matthew Mitten et al, above n 7, 358-359,403-433.

20 The *Protecting Young Victims from Sexual Abuse and Safe Sport Authorisation Act of 2017,* 36 U.S.C § 220503 (15), passed on 14 February 2018, was enacted with the establishment of a Center for Safe Sport and the objective 'to promote a safe environment in sports that is free from abuse, including emotional, physical, and sexual abuse, of any amateur athlete'. See §201.

21 Koller, above n 3, 694.

business affairs.[22] The authority of the NFL Commissioner is broad and far-reaching and usually includes duties of a chief executive officer involved in running a business.[23] In addition to the business is the sport, the NFL Commissioner also has a broad discretionary power that includes enforcement and sanctioning for matters 'detrimental to the welfare of the League or professional football'.[24]

The internal disciplinary process vests the NFL Commissioner with significant disciplinary powers and final arbiter of many internal disciplinary matters involving players, teams and associates. For example, the NFL Commissioner has the power to discipline players for breaches of the NFL's rules, standards and guidelines.

In 2013, the Commissioner was paid $44.2 million by the NFL. While the Commissioner has a great deal of influence, the Commissioner is answerable to the owners who have the power to vote to remove the Commissioner from office.[25]

The NFL employs 1,858 staff and is highly structured and administratively complex.[26] It has the characteristics of a large firm and has acquired the status of a governing institution over the sport of American football within the professional stream. Suffice to say, the NFL is big business and has significant financial resources at its disposal, enabling it to dominate the regulatory space in professional football.[27]

4 *Other Actors*

As a large firm, the NFL is a representative association of the NFL teams who comprise its membership. Thirty-two privately owned franchise teams are members of the NFL and compete in the national competition organised by the NFL. The 32 teams operate as separate legal entities under separate franchise agreements authorising the team to operate in a nominated city within the US. Each member is entitled to incorporate a sole purpose entity for operating their team and has a complex corporate structure involving

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22 NFL Constitution and Bylaws, above n 11, Art II §8.4(b).

23 Ibid. Art II 8.4(a), 8.10.

24 Ibid Art II, §8.13(A).

25 National Football League 'League Governance', <http://operations.nfl.com/football-ops/league-governance/>.

26 Daniel Kaplan, *NFL expands staff by 20 per cent in a year* Street & Smith's Sports Business February 24, 2014, <http://www.sportsbusinessdaily.com/Journal/Issues/2014/02/24/Leagues-and-Governing-Bodies/NFL-staff.aspx>.

27 Leigh Hancher and Michael Moran, 'Organising Regulatory Space', in Leigh Hancher and Michael Moran *Capitalism, Culture, and Economic Regulation* (Clarendon Press, 1989), 275.

directors, senior managers and shareholders.

Collectively, the 32 teams are the NFL owners and have significant power to control and dictate the direction of the NFL. The NFL adopts a traditional model of membership, requiring individuals to be members of the NFL, rather than corporate members.[28] A representative from each team is a member of the NFL executive committee. By way of illustration, the Commissioner of the NFL is appointed by a two-thirds majority vote exercised by the NFL owners, who also have the power to dictate duties, obligations and determine the scope of the Commissioner's authority.[29] Despite this capacity to influence and control the NFL, the NFL teams are still recognised as operating as separate legal entities and not as a single economic unit.[30]

(a) NFL Players

Players are employees of the NFL Clubs. It is well-established that professional football players earn their living from playing their sport and participate in delivering the services of football as part of the entertainment industry. Due to the professional sports model involving team sports, these players are also likely to be highly motivated by economic considerations.

(b) The NFL Players Association

As a representative body, the NFL Players Association (NFLPA) is responsible for the representing the players through the collective bargaining negotiations with the NFL. While the NFLPA is not directly included in the NFL's administrative structure, it is an actor that can influence outcomes for players through its role in protecting the interests (including the health interests) of NFL Players. As the union for current players originating out of a loosely formed association between players in 1956, the NFLPLA is the 'exclusive representative' of all the players, as employees, and has been responsible for representing the players' interests through the collective bargaining agreements with the NFL over many years.[31]

The NFLPA was established as a not-for-profit entity. Its constitution establishes the purpose of the NFLPA:

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28 NFL Constitution and Bylaws, above n 11, Art. III. See Harvard Report, above n 10, 202.
29 NFL Constitution and Bylaws, above n 11, Art. VIII.
30 *American Needle, Inc. v. National Football League, 560, U.S. 183 (2010)*.
31 Harvard Report, above n 10, Chapter 7.

> to provide professional football players employed by clubs of the NFL with an organisation dedicated to the promotion and advancement of all players and of the sport of professional football; the improvement of economic and other working conditions of players; the negotiation, execution and administration of collective bargaining agreement; the representation of members in connection with common problem…'[32]

C *Cultural Environment and Customary Assumptions: The NFL's Influence*

As noted earlier, the NFL is a powerful private non-state actor responsible for the management of professional football in the US. The NFL's constitution, by-laws and rules create legally binding contractual relations between the NFL, teams, players, the NFL Players Association and other associates including sponsors, broadcasters and other NFL business partners.[33]

The NFL's power is derived from several sources. Significant power is derived from the NFL's constitution, the legislatively-sanctioned status, the state's deference to the NFL and the contractual arrangements between the NFL, its franchised teams, players and associates. Furthermore, the NFL's regulatory power is also based on informal mechanisms including a system of trust, underpinned by a network of economic and personal relationships bound by social and cultural norms.

Based on the North American Model, the NFL's organisational charter covers the professional stream of American football. This means that the NFL does not have any direct regulatory or governance control over the amateur stream in the sport. However, the NFL wields a significant degree of symbolic and cultural power and influence across all playing levels in the US.

The symbolic capital and capacity of the NFL to exert influence over the entire social field of American football was recognised by NFL Commissioner in his testimony at the 2009/2010 Congressional Hearings into Concussion in Football:[34]

> We are fortunate to be the most popular spectator sport in America. In addition to our millions of fans, more than three million youngsters aged 6 –14 play tackle football each year; more than one million high school players...We must act in their best interests even if these young men never play professional football…We know that the playing rule

[32] See NFL Players' Association Constitution, §4.01(b).

[33] Mitten et al, above n 7, 433; Harvard Report, above n 10.

[34] 2010/11 Congressional Hearing, above n 15. William B Magnus and Linda J Alonso, *Concussions in Sports: Protecting the Players*, (Nova Science Publishers, 2011) 41.

> changes the NFL makes in the interests of safety will be copied at the lower levels of play…the millions of dollars we spend on prevention, treatment and research of injuries will pay off for current and future generations of players…

As a governing institution, the NFL carries out social functions that could be described as public in character. As such, the influence over the entire sport of American football and the impact of the NFL's decisions 'resonate in the public sphere', transcending the boundaries of its private internal environment and possessing the key characteristics of a large firm within the regulatory space.[35]

The NFL is also recognised as a sophisticated, organised and influential political lobbyist in advancing its private interests.[36] In this sense, the NFL exerts its influence both directly and indirectly over the American football, as well as over the community and political settings. The position of the NFL has established customary assumptions that govern the NFL's interactions with external stakeholders and the broader community.

1 *NFL Resources and Capital*

In addition to the attributes of a governing institution, the NFL also has access to an extensive pool of resources and has an established and sophisticated network of relationships that underpin its dominant position and ability to exert influence within the regulatory space of sport. Resources include both financial and non-financial resources. Indeed, Hancher and Moran describe resources as including knowledge, money, people and expertise; all of which are (and have been) at the disposal of the NFL as a dominant actor in the regulatory space of sport.[37]

Economists observe that the NFL is the 'most lucrative and economically powerful' sport's governing body in the world.[38] The commercial business arm of the NFL operates through several corporate entities including NFL Properties LLC, a Delaware company and the holder of valuable intellectual property and licensing rights.

The NFL underwent rapid expansion attributable to strategic decisions that involved

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35 Hancher and Moran, above n 27.

36 NFL Commissioner Roger Goodall Testimony 2010/11 Congressional Hearing, above n 15; Koller, above n 3, 710.

37 Hancher and Moran, above n 27, 284.

38 Heinze and Lu, above n 2, 7,31.

merging with rival leagues, expanding from 14 to 32 teams and the development of a revenue-sharing model involving its lucrative broadcasting income.[39] The legislative mandate to monopolise the sport meant that the NFL was able to collectively negotiate broadcasting rights, now estimated to be worth US$27 billion.[40] Further, the collective value of the NFL teams is estimated to be over $30 billion, with each team equally sharing the profits distributed by the NFL.[41]

The NFL has also directly benefited from other forms of government support. Historically, the NFL was a not-for-profit association and for many years, held a special status that entitled it to access tax-free exemptions under the US Internal Revenue Code, saving the NFL (and costing the US taxpayer) around $10 million per annum.[42] In 2015 mounting public pressure and criticism led the NFL to relinquish this special tax-free status.[43]

2 *NFL Collective Capital and Social Responsibility*

The NFL also has high levels of economic (funds, resources and property), social (networks, connections and political contacts), cultural (knowledge, skills and insight) and symbolic capital leading to prestige and honour.[44] The accumulation of this capital, together with the significant economic capital and financial resources controlled by, and at the disposal of the NFL, means that the NFL is in a position to establish 'supremacy over its social field'.[45] From a regulatory perspective, the importance of the NFL in having established this position means that it is well-placed to exert its dominance when crises arise, asserting itself as the more dominant organisation at the right historical moment to retain and consolidate control over the regulatory agenda.[46]

The corollary of this dominant position is the public expectation and trust placed in the NFL to design appropriate responses to protect the safety of all players of American

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39 Ross, above n 14, 643-760.

40 *The Sports Broadcasting Act* of 1961, 15 U.S.C § 1291 (2012); See also Koller, above n 3, 698.

41 Kevin G Quinn, 'Getting to the 2011-2020 National Football League Collective Bargaining Agreement' (2012) 7(2) *International Journal of Sport Finance* 141.

42 26 U.S.C § 501 (c)(6) (2012).

43 Roger Groves, 'NFL Chooses to Lose its Tax Exempt Status but Loses Little Else' (28 April 2015) *Forbes* <https://www.forbes.com/sites/rogergroves/2015/04/28/nfl-chooses-to-lose-its-tax-exempt-status-but-loses-little-else/#3a8a47e61490>.

44 Pierre Bourdieu, 'The Forms of Capital' in John G Richardson (ed) *Handbook of Theory and Research for the Sociology of Education*, (Greenwood Press, 1986). See above, chapter 3 part II ('Regulatory Space and Collective Capital').

45 Ibid. Hancher and Moran, above n 27.

46 Ibid 284.

football.[47] In this sense, the NFL acts as the guardian of the sport, carrying a burden of social responsibility to ensure strategies are designed to meet the standards expected of a broader constituency, cognisant of stakeholder, community and political expectations.[48] Further, the expectation is that the NFL will apply its expertise in a technically competent manner when faced with challenges or crises that have a broader societal impact than just the private interests of those within the internal NFL network.

According to Hancher and Moran, the organisation that controls the resources at the historical moment when regulation is initiated has a good chance of exercising a continuing dominant influence over the regulatory space.[49] Based on the above analysis, this is exactly what occurred in the regulatory space of SRC. For many decades, the NFL, as a large firm, had both the capacity and motivation to assert influence and control over the regulatory space and determined the allocation of power within the space during this phase. The NFL had the financial and non-financial resources at its disposal, giving it the capacity to maintain this position, assuring other actors that it had the issue of SRC under control.[50]

II CONCUSSION AS A CHALLENGING PROBLEM IN THE NFL

American football evolved from the game of English rugby in the late 19th century but quickly developed into a more aggressive sport. The sport has always been known for its high impact physical contact and propensity to cause serious harm to participants. The independent studies suggesting that concussion in American football was a serious and potentially life-threatening condition presented a key challenge for the NFL and proffered insight when seeking to understand how non-state actors responded to the inconvenient discoveries.

A *SRC Concerns*

SRC in American football is not a new phenomenon. Indeed, at the 17th Annual Meeting of the American Football Coaches Association in 1937, concerns were raised as follows:

47 Koller, above n 3, 681-741.
48 NFL Concussion Litigation, above n 12, [7].
49 Hancher and Moran, above n 27,284.
50 Ibid 275, 278.

> During the last 7 years, the practice has been too prevalent in allowing players to continue playing after concussion. Again, this year it is true… Sports demanding personal contact should be eliminated after an individual has suffered one concussion.[51]

A review of the literature around SRC in the US identifies that the first published study on the risks associated with concussion in sport in the US was in 1928. Over the next forty years, the issue was intermittently referenced in the medical literature, predominately involving the sport of boxing. In the mid-1980s, research emerged suggesting issues of concern around SRC in American football.[52] Most notably, Doctor Robert Cantu published research in 1986 identifying concussion as a leading cause of athletic death, seeking to debunk the prevailing views that concussion was a minor issue.[53] Since 1986, Doctor Cantu has focused on the medical management of SRC and has authored over 330 scientific publications.[54]

1 *The NFL's Internal Concussion Committee*

Some years after Doctor Cantu's research was first published, the NFL commenced internally organised research into concussion in 1994. The NFL Commissioner Paul Tagliabue established the Mild Traumatic Brain Injury Committee ('the MTBI Committee'). The MTBI committee was convened following concerns that some players were being forced into premature retirement due to concussive injuries and post-concussion syndrome. These concerns also caught the attention of the media which began reporting on the NFL concussion issues from the mid-1990s.[55] As the spokesperson for the NFL, Commissioner Tagliabue described the concussion problem as a relatively small problem, dismissing the issue as a 'pack journalism issue'.[56]

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51 NFL Concussion Litigation, above n 12, [110] and [322]; *Courtney and Ors v The National Collegiate Athletic Association,* 468 U.S. 85 (1984), *US DC Southern District of Indiana Case No 1:16-CV-2674* [49]; *Arrington and Ors* v *The National Collegiate Athletic Association* (1:17-cv-02129). For discussion on the early history of concussion in American football, see Harrison, above n. 6.

52 *Maxwell et al v National Football League et al* (Superior Court of California, County of Los Angeles, BC 465842, 19 July 2011), [117].

53 National Centre for Catastrophic Sports Injury Research and Centre for Chronic Traumatic Encephalopathy, Boston University. See also Robert Cantu, 'Guidelines to Return to Contact After Cerebral Concussion' (1986) 14 *The Physician and Sports Medicine* 75; Hecht, above n 6, 38.

54 2010/11 Congressional Hearing, above n 15, 68. Statement of Robert C Cantu. See also Sports Legacy Institute, *Our Team* (2011), <http://www.sportslegacy.org/index.php/about-sli/our-team>.

55 Elliot Pellman et al, 'Concussion in Professional Football: Reconstruction of Game Impacts and Injuries' (2003) 53(4) *Neurosurgery* 799–814.

56 Michael Kirk, Jim Gilmore and Mike Wiser, *League of Denial: The NFL's Concussion Crisis,* (2013) Frontline, <https://www.pbs.org/wgbh/frontline/film/league-of-denial/>. See also Harvard Report, above n 10, 208.

The action of the NFL in establishing this committee illustrates the first stages of the NFL's regulatory measures and could be classified as the first stage in the design and development of a form of informational regulation, albeit not necessarily described as this at the time. The NFL exercised its position of dominance to control and determine who would be included on this committee and, importantly, who was excluded from the committee. The chair of this Committee was a rheumatologist, an NFL team doctor and the personal doctor of the NFL Commissioner.[57] The Committee also included several NFL team doctors, two team athletic trainers, a consulting engineer a club equipment manager, a neurologist and a neurosurgeon.[58] There was no player representative on the MTBI Committee.

The decision by the NFL as to the composition of the MTBI Committee would later be described as 'asking the tobacco companies if smoking was bad for your health'.[59] The MTBI Committee became the target in the first legal proceedings issued against the NFL in misleading players and falsely mandating the safe return to play.[60]

Shortly after the MTBI Committee was established, legal proceedings were filed in 1996 in a high-profile case involving the premature retirement of a young NFL player. Proceedings were issued against the team doctor for negligence and breach of duty in failing to warn of the dangers associated with repetitive concussive injuries while playing professional football. In 2000, damages of US$1.55 million were awarded against the team doctor and received widespread attention in the US media.[61] The focus, however, was not on the actions of the NFL. Instead, the team and the team doctor came under scrutiny in that case, particularly in respect of the challenges in managing a patient/doctor relationship within the confines of an intensely competitive sporting environment.[62]

While the NFL, though the MTBI Committee, was slowly conducting its research, an accidental discovery was soon to be made that would have significant consequences and

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57 Steve Fainaru and John Barr, 'Questions Over NFL Doctor Cloud League's Concussion Case', *Frontline* (online), 18 August 2013 <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/questions-over-nfl-doctor-cloud-leagues-concussion-case-3/>. See also Harvard Report, 208.

58 Harvard Report, above n 10, 208.

59 2010/11 Congressional Hearing, above n 15, 116.

60 John G Culhane, 'Not Just the NFL: Compensation, Litigations and Public Health in Concussion Cases' (2012) 8 (5) *Florida International University Law Review* 5, 11.

61 Hecht, above n 6, 17.

62 Ibid; For a description of the unique relationship between teams, players and team doctors, see Matthew Mitten, 'Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice' (2005-2006) 50 *Saint Louis University Law Journal* 211, 212.

lead to significant changes for the NFL and American football. The pending crisis would 'punctuate' the organisation and institutionalised procedures of the NFL, testing the strength of its position of dominance within the regulatory arena.

2 *A Crisis Punctuating the Space: Early (and Inconvenient) SRC Concerns*

As a sign that more work was needed to understand SRC, particularly in regard to the long-term effects, the American Academy of Neurosurgery (AAN), the peak representative body for Neurosurgery in the US, released return-to-play guidelines for players who had sustained concussive injuries in sport, signalling concerns that repeated concussions can cause cumulative brain injury.[63] At the annual AAN Conference in 2000, research was presented into the potential significance of concussive injuries, signalling an urgent need for further investigation.[64]

In 2002 Doctor Bennet Omalu, a forensic pathologist in Pittsburgh conducted a routine autopsy on the body of deceased NFL footballer and Hall of Fame 'enshrinee', Mike Webster.[65] Curious as to why the deceased had died in impoverished circumstances after many years of clinical depression, Doctor Omalu arranged for further analysis to be undertaken of the deceased's brain. Perhaps the most confronting (and controversial) account of the risk of multiple concussions was brought to light following the publication of a case note by Doctor Omalu following the autopsy results in 2004 finding 'a sentinel case of autopsy-confirmed Chronic Traumatic Encephalopathy and a retired professional football player because of long-term repetitive concussive brain injury'.[66]

After the Webster autopsy was conducted but before Doctor Omalu had published his autopsy findings, the NFL's MTBI Committee commenced publishing the first of a 16-part series of scientific papers which suggested that the NFL's concussion problem was relatively small, citing the fact that 92% of concussed players return to practice in less

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63 AAN Guidelines.

64 See above, chapter 2 part I ('Evolving Definitions').

65 Joseph Hanna and Daniel Kain, 'The NFL's Shaky Concussion Policy Exposes the League to Potential Liability Headaches' (2010) 21 *NYSBA Entertainment, Arts and Sports Law Journal* 33. See also Interview with Dr Bennett Omalu, PBS website http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/the-frontline-interview-dr-bennet-omalu/>.

66 Bennet. I. Omalu, 'Chronic Traumatic Encephalopathy and the National Football League' (2004) 63 *Journal of Neuropathology and Experimental Neurology* 535, Case Note 99.

than seven days and stating that symptoms resolved in a short time in the vast majority of cases. [67]

Doctor Omalu was of the view that the cause of Mike Webster's death was the result of a degenerative brain disease that he classified as Chronic Traumatic Encephalopathy (CTE). Doctor Omalu described CTE as a condition that was like dementia pugilistic, a condition had earlier been linked to boxers in research undertaken in the 1920s and commonly referred to as 'punch drunk syndrome'.[68] For present purposes, CTE is a brain disease that causes Parkinson's-like symptoms and can only be diagnosed through a post-mortem examination.

Omalu's case note entitled *Chronic Traumatic Encephalopathy and the National Football League* was a call to action to the NFL, with the author suggesting that 'a forensic autopsy registry is established for retired NFL players to generate empirical data on the association of professional football and long-term neurodegeneration'.[69]After the case note was published in 2004, Doctor Omalu coordinated a team of researchers to prepare and publish a paper about these findings. The article was submitted to the scientific journal *Neurosurgery* for blind peer review. According to Doctor Omalu, over 18 people were eventually involved in the peer-review process before it was finally published in 2005 (the 'Omalu Research').[70] The Omalu Research concluded that

> The case study by itself cannot confirm a causal link between professional football and CTE. However, it indicates a need for comprehensive cognitive and autopsy-based research on long-term post-neurotraumatic sequelae of professional American football. Empirical cognitive and post-mortem data and CTE are currently unavailable in the population cohort of professional NFL players. Our report, therefore, constitutes a

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67 Pellman et al, above n 55; Elliot Pellman et al, 'Concussion in Professional Football: Location and Direction of Helmet Impacts' (2003) 53 (6) *Neurosurgery* 1328–1341; Pellman et al, 'Concussion in Professional Football: Epidemiological Features of Game Injuries and Review of the Literature' *Neurosurgery*, (2004) 54 (1) 81–96.

68 See above chapter 2 part I ('Evolving Definitions'); Robert Cantu, 'Chronic Traumatic Encephalopathy in the National Football League Players' (2007) 61 *Neurosurgery* 223, 224.

69 Omalu, above n 66. See also Carroll and Rosner, above n 6, 213.

70 Frontline, *Interview with Dr Bennett Omalu*, (2016) PBS <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/the-frontline-interview-dr-bennet-omalu/>.

> forensic epidemiological sentinel case that draws attention to a possibly more prevalent yet unrecognised disease …[71]

Other researchers, while not explicitly associating CTE with repetitive concussions in football, raised other health concerns. To illustrate, Guskiewicz et al identified an increased risk of clinical depression in retired football players who had sustained recurrent concussions in a study published in 2007.[72] Doctor Guskiewicz concluded that three or more concussions led to a five-fold prevalence of mild cognitive impairment.[73]

B *The NFL's Response*

1 *Manufacturing Doubt*

The Omalu Research came to the attention of the NFL and, through the MTBI Committee, the NFL publicly denied the existence of any link between CTE and football. The NFL embarked upon a campaign to minimise the issue, by discrediting the methodology and quality of the Omalu Research and questioning the personal and professional integrity of Omalu.[74] This strategy provides evidence of the dominance of the NFL in deciding the exclusion of external actors in the regulatory space of SRC.

The NFL, through the MTBI Committee, sought a retraction of the Omalu Research; a move reserved for only the most serious breach of research ethics. A series of letters to the editor between the MTBI Committee and the Omalu Research team were subsequently exchanged and published, framing the debate that would polarise the football and scientific communities; a debate that continues today.[75]

In response, in 2006 the Omalu Research team offered to collaborate with the NFL's MTBI committee in 'developing and implementing an optimal research program that will

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[71] Bennet I Omalu et al, 'Chronic Traumatic Encephalopathy in a National Football League Player' (2005) 57 *Neurosurgery* 128; Bennet Omalu et al, 'A Comparison of Chronic Traumatic Encephalopathy in Two National Football League Players' (2006) 16 *Neurosurgery* S77; Bennet I. Omalu et al, 'Chronic Traumatic Encephalopathy in a National Football League Player: Part II' (2006) 59 *Neurosurgery* 1086.

[72] Kevin M Guskiewicz et al, 'Recurrent Concussion and Risk of Depression in Retired Professional Football Players' (2007) 39 *Medicine and Science in Sports and Exercise* 903.

[73] Kevin M Guskiewicz et al, 'Association Between Recurrent Concussion and Later-Life Cognitive Impairment in Retired Professional Football Players' (2005) 57 *Neurosurgery* 722.

[74] Carroll and Rosner, above n 6, 216. See also Frontline, *Interview with Dr Bennett Omalu* (2016) <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/the-frontline-interview-dr-bennet-omalu/>.

[75] Ira R Casson, E J Pellman and D C Viano, 'Chronic Traumatic Encephalopathy in an NFL Player letter to the editor' (2006) 58(5) *Neurosurgery* E1003. See above, chapter 2 part III ('Scientific Debate').

address these newly emerging issues.'[76] The MTBI Committee did not accept this offer, instead of continuing its campaign to discredit Doctor Omalu's reputation, his scientific credentials and the Omalu Research findings.[77] A summary of independent research and NFL responses appears in Table 4. below.

INDEPENDENT RESEARCH	NFL RESPONSE
2002—2005: clinical and neuropathological studies found connection between multiple concussion and cognitive problems.[78] 2005—2006: Reports of Dr Bennet Omalu reporting on evidence of CTE in brain tissue of deceased NFL Players.[79]	NFL MTBI Committee denied knowledge of a link and claimed that several more years of research was required to reach a definitive conclusion. Published Part 4 of its own studies.[80]
2005 Report of Dr Guskiewicz finding the association between recurrent concussion and later-life cognitive impairment in retired professional football players[81]	NFL MTBI Committee member Dr Mark Lovell stated 'We want to apply scientific rigor to this issue to make sure that we're really getting at the underlying cause of what's happening… You cannot tell that from a survey.'[82]
2008: Report of Dr Ann McKee discovered evidence of CTE in the brain tissue of two deceased NFL players, concluding that there was overwhelming evidence that CTE is the result of repeated sub-lethal brain trauma.[83]	In the material presented to the Congressional Committee Hearing in 2009, the then MTBI Committee Chair, Dr Ira Casson, was reported to have denied the link on six separate occasions, stating that it had never been scientifically, validly documented.[84]

Table 4.1: Independent Research and NFL Responses[85]

[76] Bennet I Omalu et al, 'Letter to the Editor in Reply to NFL letter' (2006) 58(5) *Neurosurgery* E1003.

[77] Carroll and Rosner, above n 6, 216. See also Frontline, *Interview with Dr Bennett Omalu* (2016) <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/the-frontline-interview-dr-bennet-omalu/>. See also, Jennifer Ann Heiner, 'Concussion in the National Football League: Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan and a Legal Analysis of the NFL's 2007 Concussion Management Guidelines' (2008) 18 *Seton Hall Journal of Sports and Entertainment Law* 255.

[78] Hanna and Kain, above n 65, 9.

[79] Bennet I Omalu et al, above n 71.

[80] Pellman et al, above n 67.

[81] Kevin M Guskiewicz et al, above n 73.

[82] Alan Schwarz, 'Expert Ties Ex-Players' Suicide to Brain Damage from Football', *NY Times* (online), 18 January 2007 <http://www.nytimes.com/2007/01/18/sports/football/18waters.html>. Alan Schwarz would go on to write more than 100 articles on the subject to concussion in the NFL. Review of NY Times. <https://www.nytimes.com/by/alan-schwarz?mcubz=0>.

[83] Ann McKee, 'Chronic Traumatic Encephalopathy in Athletes Progressive Tauopathy After Repetitive Head Injury' (2009) 68 *Journal of Neuropathology and Experimental Neurology* 709, 732.

[84] 2010/11 Congressional Hearing, above n 15, 10.

[85] Annette Greenhow, *'Concussion Policies of the National Football League: Revisiting the 'Sport Administrator's Charter and the Role of the Australian Football League and National Rugby League in Concussion Management'* (2011) (13) Sports Law eJournal 1-18.

2 *A Missed Opportunity*

The NFL had three possible options when faced with the Omalu research. In no order, the first option was to ignore the findings and proceed with its MTBI-driven research agenda. The second was to adopt the precautionary principle and engage in 'active social foresight', collaborate with partners (including government and other public health partners) to take steps to understand, despite scientific uncertainty, the substance of the concerns and risk to all players.[86] The third option was to attack the credibility of the research and engage in a strategy to manufacture doubt around the issue due to the absence of scientific certainty. The NFL choose this last option, and an opportunity was missed to recognise the public interest in the issue.[87] Choosing this option would later come back to haunt the NFL, costing time, money and potentially lives.

3 *The NFL's Reactionary Response*

The choice to attack the credibility of the research and manufacture doubt in the minds of the public meant that the NFL could 'buy time' to work out the nature and scope of the problem it was facing. Comparisons have been made between the tobacco industry and the NFL's handling of SRC as comparable public health issues, with patterns of equivocation, denial, delay, and doubt adopted by the NFL.[88]

The NFL's strategy was to promote doubt and uncertainty in the minds of the public.[89] Its strategy involved manufacturing doubt over the validity of independent research; to confuse the minds of the public, effectively 'buying time' to enable the organisation to frame its response.[90] Instead of engaging with key external stakeholders, government and the community openly and transparently, the NFL instead adopted a strategy that prioritised its private interests ahead of others. Mitigating reputational risk and protecting commercial interests appeared to be the driving factors that influenced the design of the NFL's initial approach.

What was overlooked in the NFL's initial strategy, however, was the effect that its actions

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86 See above, chapter 2 part IV ('Scientific Uncertainty: Wait and See or Active Social Foresight.

87 Ibid.

88 Daniel Goldberg, 'Mild Traumatic Brain Injury, the National Football League, and the Manufacture of Doubt: An Ethical, Legal and Historical Analysis' (2013) 34 *Journal of Legal Medicine*, 157, 160.

89 Ibid.

90 Above n 59.

would have on the broader population and the perpetuation of the potentially harmful effects. Mitigating reputation and protecting private interests overshadowed the intrinsic value of health and the broader societal impacts of the NFL's approach. While the NFL spent many years moving along a continuum of denial, doubt, and final acceptance of the significance of the harm, many millions of participants, from all levels of the sport, sustained concussive injuries each year, unaware of the potential risks.[91]

While the scientific debate was being played out in the editorial section of *Neurosurgery,* New York Times journalist, Alan Schwarz, became interested in the Omalu Research and in 2007 published the first of what would later become over 100 articles on the link between concussion, football and brain disease in American football.[92]

C *The Proximity of Actors and Conflicts of Interest*

"… there is not enough valid, reliable or objective scientific evidence at present to determine whether or not repeat head impacts in professional football result in long-term brain damage"[93]

As earlier noted, the MTBI Committee was convened in 1994. It would take 13 years before it published the findings from its internal investigation. The above statement was made in 2007 by the then Co-Chairman of the NFL's MTBI Committee, Doctor Ira Casson. These findings were relied upon by the NFL in formulating its Concussion Management Guidelines in 2007 and were in complete contradiction to the independent body of research that had been developing since the 1980s.

Allegations of conflicts and competing interests were suggested together with concerns about the integrity of the NFL's research regarding its design, data collection, and analysis, with leading independent researcher, Doctor Kevin Guskiewicz noting 'I think that some of the folks within the N.F.L. have chosen to ignore some of these earlier findings, and I question how many more… it will take for them to wake up'. [94]

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91 Jean A Langlois, Wesley Rutland-Brown and Marlena Wald, 'The Epidemiology and Impact of Traumatic Brain Injury: A Brief Overview.' (2006) 21 *Journal of Head Trauma Rehabilitation* 375 376.

92 Schwarz, above n 82.

93 Frontline, *2007 MTBI Research findings. Statement from former NFL Co-Chairman of the NFL's MTBI Committee, Dr Ira Casson* (2013) <https://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/>. See Frontline, Lauren Ezell*, Timeline: The NFL's Concussion Crisis,* (2007) PBS <https://www.pbs.org/wgbh/frontline/person/lauren-ezell/>.

94 Schwartz, above n 82; Peter Keating, 'Doctor Yes' *ESPN The Magazine* (online), 24 October 2006, <http://espn.go.com/expn/print?id=2636795>.

In response to these criticisms, the NFL coordinated the first NFL Concussion Summit in 2007, when it adopted the NFL Concussion Management Guidelines and invited researchers to debate the science. This summit was convened by the new NFL Commissioner, Roger Goodall, who had been appointed earlier in 2007.

Despite warnings from independent researchers at the Concussion Summit of the increased risk of cognitive impairment from multiple concussions, the NFL relied upon its own MTBI Committee findings in formulating the NFL Concussion Management Guidelines in 2007. The NFL also published a player informational pamphlet in August 2007 which stated that there was 'no magic number' as to how many concussions were too many.[95] This contradicted the published research of Doctor Guskiewicz and the advice of the independent experts at the Summit.[96]

In 2009, the NFL commissioned the University of Michigan to conduct a study on the health of retired NFL players.[97] The study was designed around a lengthy phone survey of 1063 former NFL players.[98] While the methodology and design of the study were flawed, it had found that NFL players were 19 times more likely to develop Alzheimer's or similar memory-loss diseases than members of the same class in the general population. This study was widely covered in the media and raised public awareness around the issues of concussion in football.[99]

Around the same time, Doctor Ann McKee and other researchers from the Department of Veterans Affairs and Boston University were conducting studies on deceased NFL players and published research that identified CTE in the brain tissue of 18 out of 19 deceased former NFL footballers. [100] Doctor McKee indicated disbelief at the NFL's assessment of the research noting 'I have never seen this disease in the general population, only in these

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95 Roger Goodell and Ted Johnson 'Concussion and Congress and The Future Game', The Fifth Down (blog), *The New York Times* (online), 1 November 2009 <http://fifthdown.blogs.nytimes.com/2009/11/01/concussions-and-congress-and-the-future-game/>.

96 Hanna and Kain, above n 65, 9.

97 *Amended Class Action Complaint In Re the National Football League Concussion Litigation* [218]; See Hanna and Kain, above n 65, 10.

98 2010/11 Congressional Hearing, above n 15, 69. Statement of Dr Robert Cantu.

99 Alan Schwarz, above n 82.

100 Ann C McKee et al, 'Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury' (2009) 68 *Journal of Neuropathology and Experimental Neurology* 709; Bob Hohler, 'Major Breakthrough in Concussion Crisis' *The Boston Globe* (online), 27 January 2009 http://www.boston.com/sports/other_sports/articles/2009/01/27/major_breakthrough_in_concussion_crisis/?page=full>.

athletes … It's a crisis, and anyone who doesn't recognise the severity of the problem is in tremendous denial'.[101]

This research captured the attention of the media, with worldwide coverage, including coverage in Australia from 2010.[102] It also led to external parties initiating a search for alternative approaches, involving a call to action by state actors to fully engage with the issue as a public health concern.

III A CALL TO ACTION

Heinze and Lu identified mounting external pressure for organisational change on the NFL coming from three primary sources: disruptive events, the growing interest in SRC from independent researcher groups and increased media attention, each contributing to heightened awareness during this phase.[103] Other non-state actors were growing in number and influence, accumulating further resources and social capital.

The mounting pressure mobilised state actors to take a close look at how the NFL was managing its regulatory space. The basis upon which this call to action was made was through a public health framework. Public health law scholars in the US were early advocates suggesting that there were key challenges with the NFL privately regulating matters that held significant interest for the American public.[104]

A *Shifting Balances*

With the body of independent scientific research questioning the link between repetitive concussions and football, forensic journalists continued in their pursuit of the NFL, with the media labelling this a 'concussion crisis'.[105] Congressional hearings in the US are a forum to investigate public concerns, where testimony is given under oath, recorded and publicly available free of charge. These transcripts provided vital research information and

[101] Hohler, above n 100.

[102] Lee Lin Chin, SBS World News Australia, 17 October 2010. In 2011, ABC Four Corners reported on the NFL concussion issues in 'Brain Explosion', Four Corners, 19 May 2011, ABC (Kerry O'Brien) <https://www.abc.net.au/4corners/4c-full-program-brain-explosion/8961402> and later in 2012 on 'Hard Knocks', Four Corners, 10 May 2012 (Kerry O'Brien) <http://www.abc.net.au/4corners/stories/2012/05/10/3499950.htm>.

[103] Heinze and Lu, above n 2, 505.

[104] Goldberg, above n 88.

[105] Carroll and Rosner, above n 6.

evidence of the NFL case study, demonstrating the informational value of this aspect of the US political process.

The first Congressional Hearing had been convened in June 2007 to investigate the adequacy of the NFL's disability benefits scheme for NFL players who retired through injury. Interestingly, the deceased player, Mike Webster from the Omalu Research, had filed in 1999 a disability application seeking benefits and claiming that years of repetitive concussive injuries had caused him to suffer from dementia. His claim was subsequently approved under a private and confidential ruling, finding that the result of head injuries he suffered as a football player had left him 'totally and permanently' disabled.[106] This finding brought into sharp focus the administration and management of the self-regulated MTBI Committee who had earlier dismissed Webster's claim and denied entitlement to career-ending compensation.

Concern had been raised that the private scheme did not account for the high incidence rates of concussion in the sport or adequately cover the needs of injured players. Of note was the reference to the high incidence rates of injury, where

> Half of all players retire because of injury, 60% of players suffer concussion, and at least one-fourth of players suffered multiple concussions, and nearly two-thirds suffer an injury serious enough to sideline them for at least half a football season[107]

Perhaps with the benefit of hindsight, the 'writing might have been on the wall' at the time of this Congressional Hearing when the fundamental question was expressed to be 'whether the disability process was fair for the retired players as employees of the NFL with evidence suggesting that the vast majority of former players needing benefits do not receive them from the NFL'.

In 2009 and 2010, a further Congressional Hearing was convened to investigate the actions of the NFL particularly about the legal issues relating to football head injuries.[108]

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[106] Frontline, *Timeline: The NFL's Concussion Crisis,* PBS (8 October 2013) <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/>.

[107] House Hearing, [110 Congress] National Football League's System for Compensating Retired Players: An Uneven Playing Field? House of Representatives Committee on the Judiciary, Government of the United States of America (110th Congress), *Hearings on the National Football League's System for Compensating Retired Players: An Uneven Playing Field* (26 June 2007).

[108] 2010/11 Congressional Hearing, above n 15.

This hearing provided a forum where the internal strategies and operations of the NFL were exposed to public scrutiny. Questions arose around whether the NFL had put its interests ahead of the interest of its players' health and welfare.[109]

Doctors Cantu and McKee testified at the hearings. The NFL's capacity to influence the broader population was also canvassed in the hearings. NFL Commissioner, Roger Goodall testified and acknowledged that the NFL owed a duty to the public at large to educate them as to the risks of concussion.[110]

The NFL was criticised during the Hearing for a failure to regulate its sport in the best interests of its players and the public, with comparisons being made comparing the actions of the NFL to those adopted by the tobacco companies from the early 1990s:

> The NFL sort of has this kind of blanket denial or minimising of the fact that there may be this, you know, link. And it sort of reminds me of the tobacco companies pre-1990s when they kept saying no, there is no link between smoking and damage to your health or ill health effects. And they were forced to admit that that was incorrect through a spate of litigation in the 1990s.[111]

Further criticism was levelled at the NFL when the Chairman of the House Judiciary Committee observed that '…Until recently, the NFL has minimised and disputed evidence linking head injuries to mental impairment in the future.'[112]

B *State Interventions and Reconfigurations*

The concatenation of state, media and public scrutiny significantly influenced the NFL as evidenced by a shift towards acceptance, away from doubt or denial. The combined effect of these external factors shifted social norms around the management of concussion by the NFL. After the initial sitting of the US Congressional Hearing in December 2009, the NFL admitted for the first time that concussion could lead to long-term problems.[113] In response to the increased awareness brought about by external pressures brought to bear, the NFL embarked upon a public relations campaign and underwent significant

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109 Ibid 116.

110 NFL Concussion Litigation, above n 12 [222].

111 . 2010/11 Congressional Hearing, above n 15, 116; Schwarz, above n 82; Carroll and Rosner, above no 6, 255.

112 NFL Concussion Litigation, above n 12, [225]

113 Alan Schwarz, 'NFL acknowledges long-term concussion effects' *The New York Times* (New York December 20, 2009).

organisational change to implement significant reforms and adopt policies based on concussion management, prevention, research and education.

In the years following the Congressional Hearings, the NFL acted by endorsing stricter policies designed to protect the health and safety of the players. Twenty-five health-related rule changes were implemented endorsing, among other things, stricter return-to-play protocols and rules designed to minimise the harm associated with concussion in American football.[114]

One of the earlier changes was to include a whistle-blower program introduced in the NFL in 2007 to encourage and facilitate players to report behaviours that would constitute a breach of the NFLs concussion policy. The intention was to allow players to anonymously report when doctors were pressured to clear players or players were being pressured to play with concussion. The program was later abandoned due to a lack of trust by players in the NFL.[115]

The MTBI Committee was rebranded with a new name and a new committee. Significantly, Doctor Guskiewicz, one of the most vocal critics of the earlier MTBI Committee research, joined the new Head, Neck and Spine Committee in 2010, with new externally-appointed neurologists and neurosurgeons.[116] The Committee announced new measures to independently clear concussed players, taking return-to-play decisions out of the hands of the team doctors alone.[117] In 2012, the NFL donated US$30 million to the Foundation for the National Institutes of Health (FNIH) as unrestricted funds to research concussion and CTE, signalling the importance it was now placing on the issue.[118]

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[114] NFL Health and Safety website <http://nflhealthandsafety.com/commitment/evolution>. For further analysis, see the Harvard Report, above n 10, 203 and Appendix 1.

[115] Len Pasquarelli, 'Concussion Policy to Include 'Whistle-Blower' Provision' June 20, 2007, ESPN, <www.espn.com/nfl/news/story?id=2909463>.

[116] Pellman had earlier resigned from the Committee but was involved with the NFL as an 'advisor' until 2016. Casson and Viano resigned their positions. New co-chairs appointed. Other former members of the MTBI Committee went to some lengths to distance themselves from the earlier findings of the MTBI Committee; Harvard Report, above n 10, 211.

[117] Carroll and Rosner, above n 6, 254.

[118] See NFL, National Football League Grants $30 million in Unrestricted Funding to the Foundation for the National Institutes of Heal for Medical Research, September 5, 2012 <http://www.nfl.com/news/story/0ap1000000058447/article/nfl-donates-30-million-to-national-institutes-of-health>. See also Matthew Futterman, 'NFL Funds Brain-Injury Study' *The Wall Street Journal* 5 September 2012. <http://online.wsj.com/article/SB10000872396390443589304577633973062347962.html>.

Educational campaigns were launched, and the NFL became a vocal supporter of youth concussion laws across each state within the US. Since 2008, youth concussion laws have been enacted in all states and the District of Columbia in the US. This step represents a significant departure from the traditional 'non-interference' approach to sport by state actors in the US.[119] This legislative engagement is examined in further detail in chapter 5.[120]

C *NFLPA's Enhanced Role and Benefits to Players*

As noted earlier, the NFLPA is the representative body that advances the interests of players in negotiations with the NFL. In the early stages of the NFL's concussion 'crisis', the NFLPA was heavily criticised for failing to protect the interests of retired players. Indeed, allegations were made by some retired players that the NFLPA had underestimated or failed to appreciate the significance of the impact of costs of concussive injuries on retired players.[121] The power differential between the dominance and control of the NFL on the one hand, and the NFLPA, on the other, was potentially a contributing factor that led to this position.

Earlier iterations of the collectively bargained agreements between the NFL and the NFLPA had inadequate provisions for benefits to retired players who had retired due to concussive injuries. The NFLPA appeared to act in a way that prioritised the rights and interests of the current players and members of the NFLPA and was persuaded by the findings of the MTBI Committee rather than the emerging body of independent research. These 'warring factions' and functional divisions did little to portray a strong and cohesive organisation. Rather, the internal dysfunction within the NFLPA was such that it undermined the NFLPAs influence in the regulatory arena, eroding its 'internal social and political cohesion'.[122] In 2009, a new CEO was appointed to the NFLPA who was quick to acknowledge past mistakes when addressing the US Congressional hearings and adopted a more assertive position in protecting the interests of all players.[123]

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[119] NFL Health and Safety website <http://nflhealthandsafety.com/zackery-lystedt-law/lystedt-law-overview/>.

[120] See below, Chapter 5 Part I ('US Governments' Response').

[121] Class Action Complaint, *Ballard v National Football League Players Association* 123 F.Supp.3d 1161 (2015).

[122] Hancher and Moran, above n 27, 289.

[123] 2010/11 Congressional Hearing above n 15, 34.

Following the US Congressional hearings, the NFLPA and the NFL settled a dispute over players' entitlements and rights by negotiating a new Collective Bargaining Agreement (CBA) in 2011. This agreement, operating until 2020, included a new disability benefit explicitly dealing with neurocognitive disorders, supplementing the existing disability benefit scheme that had been called into question in the first Congressional hearing.[124]

There are some limitations to this accessing this benefit, including a release and covenant not to sue the NFL.[125] Furthermore, a broadly-drafted disclaimer of liability is built into the agreement in the following terms:

> The parties acknowledge and agree that the provision of the benefit under this Article shall not be construed as an admission or concession by the NFL that NFL football caused or causes in whole or in part, the medical conditions covered by the benefit, or as an admission of liability or wrongdoing by the NFL, and the NFL expressly deny any such admission, concession, liability or wrongdoing.[126]

In addition to the disability benefits, the NFL also committed to allocating US$22 million per annum to health-care and related benefits, funds and programs for retired players, increasing by five per cent per annum. A portion of these funds was used to establish The Football Players Health Study at Harvard University. In November 2016, the research group published an extensive report, citing funding of US $1.25million allocated to several projects. [127] The NFLPA also established a trust fund in 2013 to support retired players with a focus on overall health and transition from professional sport. One of the focus areas is on 'Brain and Body Health'.[128] This illustrates the ability of advocacy groups such as players' associations as regulatory actors in designing strategies to achieve collective goals associated with SRC.

Collaborations between the NFL and the NFLPA have improved outcomes for NFL players and these parties now work together and have developed programs to help past and present players.[129] From a regulatory perspective, this illustrates how multiple actors are

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[124] National Football League and National Football League Players Association, *Collective Bargaining Agreement 2006 -2012* ('CBA') Art 65, 247–248.
[125] Ibid 247.
[126] Ibid.
[127] Ibid Art. 12, §5.
[128] Press Release, NFLPA Announces the Launch of the Trust, 13 November 2013 <www.playerstrust.com/press-releases/the-trust-launch>.
[129] Harvard Report, above n 10, 17.

necessary and collective action to achieve the desired regulatory outcome of managing and minimising the risks associated with SRC.

D *The Influence of Litigation*

1 *NFL Concussion Litigation*

Despite the moves by the NFL signifying a shift towards acceptance and management of concussion rather than passive denial, litigation was commenced against the NFL in 2011 by retired professional football players seeking compensation arising from the alleged NFL's negligence and fraudulent concealment in respect of concussion.[130] Over 240 separate complaints were filed against the NFL representing over 5,000 players.[131] The claims were ultimately consolidated into one class action eventually representing over 5,000 retired NFL players seeking compensation from the NFL across four decades from the 1960s.[132] The US is a jurisdiction recognised as having an 'adversarial' and 'litigation-orientated' cultural approach.[133] Litigation as a response to SRC in the US was, therefore, somewhat unsurprising.

Consistent with the earlier strategy to dismiss or dispute contrary opinions, the NFL's initial response was to vehemently deny the allegation, a position it has maintained throughout proceedings. The NFL applied to strike out the complaints based on their classification as workplace disputes under various collective bargaining agreements, arguing that arbitration was the mandatory grievance procedure.[134] This claim was unsuccessful, and the matter proceeded through interlocutory steps until court-ordered mediation was undertaken.[135]

The common allegation in the NFL Concussion Litigation was that the NFL owed a duty of care to protect its players, to inform, educate and warn players about a possible link to

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130 NFL Concussion Litigation. *Maxwell et al v. National Football League*, C.A. No. 2:11-08394 was the first complaint filed on 19 July 2011.

131 NFL Concussion Litigation, above n 12.

132 Ibid.

133 Freiberg, above n 5, 473.

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

135 Michael Legg, 'National Football League Players' Concussion Injury Class Action Settlement' (2015) 10 *Australian and New Zealand Sports Law Journal* 47, 52.

CTE.[136] These allegations were based on the role of the NFL as the ultimate controller and rule-maker within the game of American football. As the governing body, vested with organisational and promotional responsibilities, it possessed financial power, control and influence and effectively monopolised American football. The NFL Concussion Litigation alleged that these factors resulted in the NFL exerting significant influence over those involved in the sport including doctors, trainers, coaches and players.[137] Because of the NFL's influence, it was alleged that the NFL assumed the obligation to ensure that it managed, prevented, researched and educated players about the diagnosis, treatment and effects of multiple concussions within the sport.

2 *The Litigation Settlement*

In 2013, after extensive court-ordered settlement negotiations, an agreement was reached between the parties where the NFL agreed to a compensation package of US$765 million without admission of liability. A large part of this package was a Monetary Award Fund which over 20,000 claimants could access over a period of sixty-five years.[138] The Court was not prepared to certify the settlement until actuarial advice had been received to confirm the fund was adequate to meet the needs of the class of claimants.[139] Further, according to actuarial data released in the US, 14 per cent of NFL players will develop Alzheimer's disease, and 14 per cent will develop moderate dementia across their lifetime.[140] The final settlement amount was increased to approximately US$1billion. The settlement was finally certified as effective from January 2017.[141]

The most substantial part of NFL's settlement involved an unrestricted Injury Compensation Fund to pay monetary awards to retired NFL players, representative claimants or derivative claimants (which currently includes approximately 21,000 eligible former players) who show symptoms of several 'Qualifying Diagnoses' that include severe

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[136] See *Maxwell et al v National Football League et al*, No. BC465842 (Cal Super. Ct, 2011). [525] [526]; *Easterling et al v National Football League et al*, 2:2011cv05209, [55] (Pa ED, 2011) [47], Evans *et al v. National Football League et al*, No. 2:12-cv-02682-AB (Pa ED, 2012) [81].

[137] *Evans et al v. National Football League et al*, No. 2:12-cv-02682-AB (Pa ED, 2012) [81].

[138] A Greenhow, 'The NFL Concussion Settlement and Injury Compensation Funds' (2013) *Sports Medicine Australia*.; Legg, above n 135, 54-60.

[139] Ibid.

[140] Dan Diamond, 'NFL Players Have 30% Chance of Alzheimer's or Dementia, New NFL Concussion Data Suggest' *Forbes* (online), 9 September 2014 <http://www.forbes.com/sites/dandiamond/2014/09/12/nfl-players-have-30-chance-of-alzheimers-or-dementia-new-nfl-concussion-data-suggests/>.

[141] NFL Concussion Litigation <www.nflcconcussionsettlement.com>.

cognitive impairment, dementia, Alzheimer's disease, CTE or amyotrophic lateral sclerosis (ALS). These are modified by age and number of NFL playing seasons, and in some cases, subject to strict timeframes for certain conditions. Compensation benefits are divided across these modifying factors based on the classification of Qualifying Diagnosis.[142]

The NFL Concussion Litigation settlement was monumental, both regarding quantum and significance, despite being reached on a 'no admission of liability' basis, justified by the NFL benevolence towards the immediate needs of the claimants and the desire to avoid protracted and expensive litigation. Although the proceedings were settled on a confidential basis, the informational function of the NFL Concussion Litigation brought private information into the public domain and was likely to have influenced the NFL's organisational response and strategy in addressing SRC.[143]

E *A Barrier to Participation*

Following the heightened public awareness of SRC, several events contributed to SRC being presented as a barrier to participation. First, a 2013 poll indicated that 33% of Americans were so concerned about the link between head injuries in football and long-term brain trauma that they would be less likely to allow their children to enter the sport. A subsequent 2014 Bloomberg Politics poll reported this figure had increased to 50%.[144] Studies were published that identified a decline in participation rates in junior levels of football, fuelled by the fear that football caused brain damage.[145]

Reduced participation rates in any sport, particularly across childhood and adolescence age groups, and within a society already struggling to cope with the health effects of obesity and sedentary behaviour, created another public health concern. This concern led to the convening of the Healthy Kids and Safe Sports Concussion Summit at the White

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[142] *In re National Football League Players' Concussion Injury Litigation, Amended Class Action Settlement Agreement as of February 13, 2015* No. 2:12-md-02323-AB, MDL No. 2323.

[143] Heinze and Lu above n 2, 507.

[144] See Marist College Institute for Public Opinion. Poll October 23, 2013. <http://maristpoll.marist.edu/1023-youth-football-takes-hard-hit-one-third-of-americans-less-likely-to-allow-son-to-play-football-because-of-head-injury-risk/>. Annie Linskey, 'Half of Americans Don't Want Their Sons Playing Football, Poll Shows' *Bloomberg Politics* (United States 10 December 2014) <https://www.bloomberg.com/news/articles/2014-12-10/bloomberg-politics-poll-half-of-americans-dont-want-their-sons-playing-football>.

[145] Steve Fainaru and Mark Fainaru-Wada, 'Youth Football Participation Drops' (2013) <http://espn.go.com/espn/otl/story/_/page/popwarner/pop-warner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor>.

House, a youth concussion summit initiated by former President Obama in May 2014.[146] The convening of this summit recognised the inherent value of the public health and the risks posed by SRC and, moreover, demonstrated the role of the state in addressing these concerns.[147]

IV OBSERVATIONS

The NFL case study identifies several factors that explain how the NFL came to influence and shape the regulatory space, and why other actors were excluded from the process. Significantly, the NFL case study illustrates the weakness of a voluntary self-regulatory system in managing a high-profile public health concern, leading to a shift in the balance of roles and responsibilities of actors.

A *The Dominance of the NFL*

The NFL is a large organisation with the status of a governing institution to carry out the production and delivery of the professional stream of American football. When the 'concussion crisis' punctuated the regulatory space, the NFL could influence and shape how the issue would be addressed and exerted control over which actors would be included (and excluded) within the regulatory arena. The 'play of power' vested in the NFL to enable it to shape and influence how the issue would be addressed.[148]

The NFL possessed all four characteristics to dominate the space; it commanded legitimacy over the external and internal cultural environment; customary assumptions supported the NFL's assertion of control as the SGB for the sport; the internal operating procedures and governance regimes were sophisticated and highly organised; the NFL had the resources and possessed the collective capital over the regulatory arena and social field. These characteristics meant that the NFL asserted autonomous control and legitimacy over the regulatory arena; a position it maintained until the concatenation of external events created momentum for change.

B *Weaknesses in Self-Regulation of Public Health Concerns*

When the potential dangers of concussion first arose in the NFL, the initial response was

[146] Fact Sheet: President Obama Applauds Commitments to Address Sports-Related Concussions in Young People, 29 May 2014 <http://www.whitehouse.gov/the-press-office/2014/05/29/fact-sheet-president-obama-applauds-commitments-address-sports-related-c>.

[147] Harvard Report, above n 10, 38, 131.

[148] Hancher and Moran, above n 27, 277.

to internalise the issue and develop strategies to address what it perceived were adequate responses to address the harm. This process of internalisation was not surprising, particularly considering the NFL as a powerful and sophisticated organisation, and the customary assumptions and organisational structure that reflected the dominant position of the NFL.

In applying Hancher and Moran's approach to understanding the dynamics of regulatory space, the NFL was a dominant actor; its shape and characteristics reflecting essential attributes. These included the cultural environment, the NFL's internal governance capacity, the customary assumptions made by external and internal actors, and the NFL's resources available to be deployed to address the issue. These attributes underpin the NFL's command of the concussion agenda for many years, with a significant degree of impunity until external parties started questioning their actions.[149]

1 *A Reactionary Approach*

Rather than engaging with external stakeholders, government and the community, the NFL instead adopted a strategy that involved an internalisation of the issue and failed to embed the precautionary principle into the development of its response strategies. Reputational risk and threats to its commercial interests were also factors that were likely to have influenced decision-making. This process of internalisation enhances the importance of self-regulation, while at the same time weakening the regulatory capacity of state actors.[150]

In the NFL, government has already adopted a non-interventionist approach, further weakening its regulatory capacity, or at least, impacting government's motivation to intervene. It was only following the US Congressional Hearings that the NFL started to engage in open self-regulation, becoming cognizant of government, stakeholder and community expectations in designing its responses.[151]

The NFL has utilised both transactional and economic regulatory tools in responding to the concussion issues. Rule changes have been implemented using the regulatory tool of contract. Independent neurologists—not team doctors—are now required to clear players. Athletic trainers are in the press box watching players to ensure someone with a

[149] Schwarz, above n 82; 2010/11 Congressional Hearing, above n 15.
[150] Hancher and Moran, above n 27, 289.
[151] See <http://nflhealthandsafety.com/commitment/evolution>.

head injury is promptly removed from play. The NFL has introduced a new disability benefit into the collective bargaining agreement recognising an obligation to pay benefits to players who, subject to specific qualifications, and under certain conditions.

Self-regulation by the NFL over the issue of SRC was voluntary and consensual.[152] The proximity, however, of the NFL was both a strength and a weakness of self-regulation. Indeed, the NFL had access to resources and relationships such that it dominated the space and had the key characteristics of a dominant actor. The NFL, however, lacked the motivation to change, or the incentives were insufficient to trigger organisational change.

To the outside world, the NFL was the locus of power and the reservoir of expertise. However, a retrospective review of the NFL's response illustrates that there was a loss of trust in the capacity of the NFL to respond to the harm. Nonetheless, the NFL could withstand the impact of the 'punctuated' concussion crisis and maintain its position of dominance over the space.

The NFL was centrally rooted in the industry and had the resources and relationships to access to the necessary expertise to remain at the forefront of issues. Because of this proximity, the NFL was expected to identify potential problems, design responses and evaluate those responses all within a flexible procedural framework.

Proximity was a weakness in the NFL self-regulated model, and, together with the lack of accountability and transparency, the NFL fell short in meeting government, stakeholder and community expectations. The catalyst for change was the willingness of government to intervene through the convening of the congressional hearings.

One of the earlier responses of the NFL was to establish the MTBI Committee. As explained above, the proximity of the committee to the NFL resulted in a weakening of the self-regulatory system. This contributed to a lack of transparency and willingness to be permeable to external influences, including the findings of other researchers.[153]

2 *Not the Gold Standard*

The performance criteria for assessing the legitimacy of the NFL as a regulatory actor across several elements identifies weaknesses in the regulatory arrangements. While the

[152] See above, chapter 2 part III ('Regulatory Systems and Tools').
[153] Heinze and Lu, above n2.

legislative mandate supported the legitimacy of the NFL as a regulatory actor, underpinned by cultural and customary assumptions, the lack of accountability and due process diminished the effectiveness of the regulatory arrangements.

Further, the NFL had resources and collective capital in the regulatory space to support high levels of expertise to address the harm. However, the expertise of the NFL specialists was tainted by actual or potential conflicts of interest due to prior relationships of key actors. This, in turn, led to distrust in the decisions made by those who oversaw the research agenda. As noted earlier, the chair of the MTBI committee was particularly vulnerable due to the multiple roles and functions as NFL team doctors and personal physician of the NFL Commissioner.

C *Influencing Factors that Led to Change*

The NFL's power to self-regulate was recognised through the legislative mandate recognising its position of dominance but also based on strong customary assumptions that it was the legitimate actor to address SRC when the issue arose. The NFL had the capacity to respond, possessing the financial and non-financial resources and in possession of high levels of collective capital which it could use to control the regulatory space. When the issues first arose, however, the NFL lacked the motivation to respond, and dismissed the issue of concussion as a 'journalist issue'.[154] As explained above, the NFL asserted its dominance over the space in deciding that concussion was not, at that time, a regulatable concern but its proximity was a weakness that constrained its regulatory judgement.

1 *Restoring Public Trust*

The cumulative effect of the events described earlier in this chapter led to a loss of trust in the NFL and its capacity to safeguard the health and welfare of its players and those within the broader population. This loss of trust had been developing over time and is likely to have first arisen when the MTBI committee elected to adopt the strategy to manufacture doubt following the publication of the Omalu Research in 2005. One can only speculate as to where the entire concussion narrative would be today had the NFL accepted the Omalu Research team's offer to collaborate to help understand the biomedical dynamics of SRC.

[154] Kirk et al, above n 56.

The evidence presented in this chapter suggests that the NFL was not motivated to change based solely on the independent research findings since 1986. Instead, as journalists Carroll and Rosner noted, these periodic warnings were being dismissed and 'flicked off', like 'pesky flies'.[155] At the time of the Omalu Research findings, the NFL appeared convinced that its expert team through the MTBI Committee had things well under control. This demonstrates that the NFL was not amenable to external influences.

2 *Symbolic Effect of State Intervention*

What seemed to be the real catalyst for change was the intervention by the US Congressional Committees, particularly the 2009/2010 hearings, and the ensuing public scrutiny of the NFL's handling of concussion within its sport. The open public (and televised) hearings and the availability of transcripts provided vital information and demonstrated the influence of the US political process contributing to organisational change.

3 *Concussion Litigation as a Powerful Tool*

The NFL Concussion Litigation, while at first appearing to benefit only those falling within the plaintiff group entitled to compensation, also served an important function and influenced the organisational strategy and direction of the NFL, including a significant unrestricted investment from the NFL towards medical research involving concussion. While acknowledging the 'no-fault' nature of the $1billion settlement terms, the NFL response brings into sharp focus the inadequacy of a private self-regulatory regime in handling a matter that has far more significant public health implications.

As a regulatory tool, litigation proceedings, including the interlocutory discovery process, illustrate two regulatory mechanisms. The first is an informational mechanism. The actual or potential disclosure of private information in the public domain through the court process can be a powerful tool in changing, altering or influencing behaviour and addressing information asymmetries.[156] The details of the court-ordered mediation in the NFL Concussion Litigation were confidential, the terms of the NFL Concussion Litigation

[155] Carroll and Rosner, above n 6.

[156] The regulatory function of private litigation is explained by Frieberg as a form of authorisation where litigants use the state-provided court systems to advance the litigant's self-interest. Freiberg, above n 5, 326-330.

settlement were disclosed in the public domain. Disclosure of what the NFL knew about SRC was likely to be an influencing factor in the decision-making process.

As noted earlier, litigation is also a form of authorisation by the state by using the state-provided court system.[157] The NFL litigants used the state-provided court system as a forum for dispute resolution. The litigation itself served a critical informational function through the disclosure of what would otherwise be privately-held information by making it available in the public domain. It also provided a rich source of references for future research around the issues of SRC.

D *Precautionary and Proactive Approaches*

From 2010, the NFL's responses could be described as 'precautionary' rather than 'reactionary'.[158] Notwithstanding the continuing debate around the nature and extent of the harm associated with SRC, the NFL engaged in 'active social foresight', deploying resources and developing strategies which stimulated planning and innovation around the collective goal of reducing the harm to players of American football.[159] In this way, the NFL continued its dominant influence over the agenda of concussion in American football. These strategies and resources were designed around the following four areas.

1 *Concussion Prevention*

It is impossible to eliminate the risk of concussive injury in the NFL as a contact sport, so preventative steps have been designed with the aim of reducing or minimising the risk of injury. In 2011 and most recently in 2016, the NFL has introduced new playing rules, including the design of rules to reduce high-speed collisions, seen as the most dangerous plays in the game and to slow the game down to prevent heavy impacts on players.[160]

Several rule changes also affect the physical and environmental design of the game. In this way, the NFL has engineered an environment in a manner intended to reduce harm to players. These actions evidence the nature of structural regulation; where rule changes

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[157] See above, chapter 3 part IV ('Regulatory Systems and Tools').

[158] Freiberg, above n 5, 142.

[159] Lawrence O. Gostin, Lindsay F. Wiley and Thomas R. Frieden, *Public Health Law: Power, Duty, Restraint,* (University of California Press 3rd ed, 2016), 81.

[160] Harvard Report, above n 10, 131, Appendix 1. Also see Judy. Battista, 'New Touchback Rule: Another Step Toward Eliminating Kickoffs?' NFL Evolution <http://www.nfl.com/news/story/0ap3000000648647/article/new-touchback-rule-another-step-toward-eliminating-kickoffs>.

resulted in alteration of the physical, environmental and process designs of the game.[161]

The use of protective equipment such as headgear, helmets and mouth guards are a feature in the NFL as preventative measures. This included mandating the use of this equipment as a means of reducing or minimising the risks associated with concussion.

2 *Concussion Management*

The NFL has the contractual power to establish and enforce rule changes and concussion guidelines based on the contractual relationship with franchised clubs. The binding nature of these contractual relationships means that the contracting parties are bound to adopt these rule changes (including guidelines and policies) and illustrate the influence of this mechanism as a method through which to bring about change.

Due to the inherent or obvious risk of concussive injury in the NFL, concussion management is aimed at reducing or minimising the risk of further injury that can arise from mismanaging concussive injury. To that end, the NFL has designed, developed and deployed concussion management guidelines for players suspected of sustaining a concussion.[162] Breach of these guidelines can lead to sanctions that include monetary fines and the forfeiture of rights in the drafting of players.[163]

3 *Concussion Education*

The public nature of the Congressional Hearings and the class action litigation against the NFL increased public awareness and provided education around concussion. The NFL itself adopted several strategies designed to educate players and the public about the effects of concussion. By way of illustration, in 2012, the NFL-funded youth concussion awareness initiative "Heads Up" and its Commissioner presented a talk on concussion at the Harvard School of Public Health.[164]

The importance of injury surveillance data is a critical mechanism in understanding

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161 See above, chapter 3 part IV ('Regulatory Systems and Tools'); Freiberg, above n 5, 362-379.

162 See NFL Media Release, *NFL, NFLPA Announce Policy to Enforce Concussion Protocol,* July 25, 2016. <http://www.nfl.com/news/story/0ap3000000676669/printable/nfl-nflpa-announce-policy-to-enforce-concussion-protocol>.

163 Ibid.

164 NFL Evolution 'NFL Foundation Commits $45 million to USA Football programs', *NFL Evolution* (online), 25 March 2014 <http://www.nfl.com/news/story/0ap2000000336295/article/nfl-foundation-commits-45-million-to-usa-football-programs>.

incidence and prevalence rates of SRC.[165] The NFL discloses its 'performance indicators' in the sport through injury surveillance data made available to the public. The NFL engaged Quintiles Injury Surveillance and Analytics to produce and publish Injury Data Reports on injury rates including incidence rates of concussion.[166] Franchised NFL teams are contractually required to provide this data.

4 *Concussion Research*

The NFL has allocated significant amounts towards research funding. One of the earlier criticisms levelled at the NFL was the failure to utilise its significant resources to invest in concussion research and address information asymmetries.[167] Since 2011, the NFL has allocated over US$100 million toward research associated with concussion.[168] These grants will help to increase knowledge and awareness around concussion. Importantly, and to demonstrate transparency, the NFL has promised to disclose and make public the findings of research undertaken.

V CONCLUSION

Eighty years have passed since American Football coaches first expressed their concerns about concussion. Over many decades, periodic warnings and scientific concerns have arisen about the potential harm associated with concussion in sport, particularly American football. The NFL case study illustrates that private non-state actors have struggled to find solutions to adequately address the harm, falling short of community standards and resistant to the growing body of independent research. The case study also reveals that organisational change within the NFL was triggered by the concatenation of external interventions, leading to full engagement by the NFL from 2010.

There are many differences in the political, legal and cultural settings between the US and Australia. However, there are some striking similarities in respect of the laissez faire approach of state actors in regulating sport, facilitating non-state actors to dominate the regulatory space. Further, key characteristics such as culture, complex operating procedures governance retimes, customary assumptions and resources all contributed to

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165 See above, chapter 2 part II ('Patchy Data: Challenges in Measuring SRC').

166 National Football League, *2015 Injury Data*, 2016, 1–6.

167 Goldberg, above n 88.

168 See Mark Maske, 'NFL Donating $30 million to NIH for Brain Injury Research' *Washington Post* (United States September 5, 2012) <http://www.washingtonpost.com/blogs/football-insider/wp/2012/09/05/nfl-donating-30-million-to-nih-for-brain-injury-research/>.

the NFL as SGB as a representative association being able to exert control over the regulatory space.

The NFL case study revealed the struggle to find the balance between safeguarding public interests on the one hand and protecting private interests on the other. Only when the state intervened and questioned the efficacy of the self-regulated system did organisational change come about. There were limitations, however, as to how far the NFL could go. As noted in this chapter, the NFL did not have governance oversight in respect of the amateur stream of the sport.

The next chapter will explain that US state actors have used direct legal regulation through the enactment of youth concussion legislation primarily in response to the issues in the sport of American football. Direct engagement by state actors in the US reflected a departure from the traditional 'hands-off' regulatory approach. State actors in Canada and the United Kingdom have also responded, albeit adopting different regulatory tools to address SRC. The insights from these jurisdictions contribute towards explaining the role of the state in responding to SRC noting, however, that different jurisdictional settings are also important.

CHAPTER 5: SRC AND STATE REGULATION: A CROSS-JURISDICTIONAL ANALYSIS

INTRODUCTION

This chapter undertakes a cross-jurisdictional review of state interventions in relation to SRC in the US, Canada and the UK. These jurisdictions have been chosen as suitable jurisdictions for review for two reasons. First, state actors in each jurisdiction have responded to changing social, political and legal norms around their roles in sport regulation, shifting away from the traditional non-interventionist approaches discussed earlier in this thesis towards a more facilitative approach, responding to mounting pressure to address SRC in each of their jurisdictions as a public health issue. [1] Second, each jurisdiction illustrates different state intervention approaches to manage and minimise the harm associated with SRC.

State intervention is taken to mean any action of the state that is intended to achieve the desired outcome. In this sense, both direct and indirect forms of regulation are included in this discussion. The regulatory arrangements adopted by state actors range in scope from non-legal strategies designed to effect organisational change and information-based regulation designed to develop capacity and effect attitude change to more targeted legislative-based mechanisms involving law enactment in response to SRC.[2]

This chapter identifies what factors triggered state engagement in responding to SRC and highlights relevant regulatory strategies adopted by state actors in each jurisdiction. Due to the issues faced in the sport of American football,[3] the US has been the most active in responding to SRC, a surprising observation noted by several commentators, particularly considering the traditional 'hands-off approach'.[4] Part I therefore examines US state responses through youth concussion legislation. Part II examines the state responses in

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1 For US perspectives, see Daniel Goldberg, 'Concussions, Professional Sports and Conflicts of Interest: Why the National Football League's Current Policies are Bad for its (Players') Health' (2008) 20(4) *HEC Forum* 337; Hosea H Harvey, 'Refereeing the Public Health' (2014) XIV (1) *Yale Journal of Health Policy, Law and Ethics* 55.

2 See above, chapter 3 part VI ('Regulatory Systems and Tools').

3 See above, chapter 4.

4 Dionne L Koller, 'Putting Public Law into 'Private' Sport' (2016) 43 *Pepperdine Law Review* 681. See also Hosea H Harvey, Dionne L. Koller and Kerri M. Lowrey, 'The Four Stages of Youth Sports TBI Policymaking: Engagement, Enactment, Research, and Reform' (2015) 43 *Journal of Law, Medicine and Ethics* 87.

Canada and the UK. Part III undertakes a cross-jurisdictional analysis to identify the common themes to emerge from the implementation of regulatory arrangements in these different jurisdictional settings utilising the Blended Intervention Framework as a tool to situate the stage each jurisdiction has reached in regulating SRC. Part IV provides concluding observations.

The analysis within this chapter is not intended to be a comprehensive comparative review across the jurisdictions. Indeed, different legal and constitutional settings within each of these jurisdictions constrains such an approach and falls outside the scope of this research. Instead, the focus is on analysing the regulatory space of SRC within these jurisdictions by *identifying* state actors within each jurisdiction with the capacity and motivation to regulate SRC, *describing* the nature of relationships and interconnections and *evaluating* the effectiveness of the mechanisms used to regulate the issue of SRC. These experiences proffer insight into relevant considerations examined later in this thesis as grounds for the design of future state regulation to minimise harm from SRC in Australia.[5]

I US GOVERNMENTS' RESPONSES

As earlier noted, the US was the first jurisdiction where SRC caused significant disruption to the sport of American football, leading to a shift in the traditional deferential approach by state actors towards the self-regulation of sport. The series of events in the US provides a window through which to witness the evolution of the public health debate involving SRC. As mentioned previously, US state actors have traditionally adopted a non-interventionist or 'hands-off' approach towards regulating sports participation in the US.[6]

A Shifting Responses

As a sign that US government actors have considered sport falling outside their remit, there is no office or ministry for sport in the US at either federal or state levels. Further, there are only a few examples of statutory involvement in sport, focused on sports integrity in the areas of bribery, gambling and doping.[7] Other forms of government

5 See below, chapter 9, part IV ('Future Directions').

6 See above, chapter 4; Koller, above n 4.

7 *Sports Bribery Act*, 18 U.S.C. § 224 (2012); *Professional and Amateur Sports Protection Act*, 28 U.S.C §§3701-04 (2012).

involvement have primarily been designed to support and facilitate the development of sport through the granting of 'green light' regulatory exemptions and concessions, pathways through school and college sport-based programs and access to government-funded research and innovation in sport.[8]

Until the issues around SRC gained momentum in the US, politicians and governments had exhibited a willingness to adhere to this regulatory dichotomy and normative relationship, signalling a preference to defer to non-state actors to regulate sports participation. However, as earlier explained, mounting pressure derived from several sources would eventually lead to a seismic shift in the social, political and legal settings in the US around the issue of SRC and a more expanded role for state actors to play in regulating SRC.[9]

1 *US Governments' in the Regulatory Space of SRC*

While other sports were also subjected to issues around SRC, the following discussion focuses on the position of the NFL to complement the earlier discussion on dominant actors and to illustrate the shifting balances in time and space.

As explained in chapter 4, the NFL continued to exercise a dominant influence over the professional stream of American football in setting, directing and controlling the regulatory agenda within a self-regulated system despite emerging concerns around concussion during the 1980s and 1990s. While the NFL had the capacity during this period, it appeared to lack the motivation to be genuinely permeable to external influences, suggesting that the high level of organisational capital was more influential on the NFL than the total capital possessed by other actors. Indeed, Heinze and Lu describe the NFL's action during this period as being more structural or symbolic rather than substantive, reflective of the power and influence of internal stakeholders who 'fostered inertia' at the time and resistant to change.[10]

Other state and non-state actors did occupy some space during this phase. The National College Athletic Association (NCAA), a voluntary non-state actor responsible for the

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8 *Federal Baseball Club v National League*, 259, US.200 (1922)

9 See above, chapter 4.

10 Kathryn L Heinze and Di Lu, 'Shifting Responses to Institutional Change: The NFL and Player Concussions' (2017) 31 *Journal of Sport Management* 497, 502- 504.

collegiate sports system in the US has regulatory oversight for the amateur intercollegiate stream of American football.[11] The NCAA also enjoyed non-interference from government actors, primarily due to customary assumptions as to sport being a private matter and the notion of amateurism that continues to prevail today.[12]

State-funded agencies such as the CDC had been collecting data around traumatic brain injuries and producing statistical analysis and reports involving sport-related injuries.[13] The state provided the political, legal and economic systems for the support of football and continued supporting the NFL through the granting of 'green light' regulatory exemptions. However, the government adhered to the traditional regulatory dichotomy and did not directly intervene regarding SRC during this phase.

2 *Public Engagement*

Chapter 4 explained the background to the events that ultimately precipitated a 'shift' in the regulatory space.[14] From the mid-2000s, further discoveries and understandings around SRC led to mounting pressure from external sources calling for a review of the NFL's self-regulated approach. The state exercised its investigative power and convened the US Congressional Hearings to examine the private regulatory arrangements implemented by the NFL.

Congressional examination of the NFL's private self-regulated regime was a public expose of the inner-workings of the NFL and signified a willingness to shift towards a more 'hands-on' approach towards addressing the impact of concussion. There was still, however, at this stage a reluctance on the part of Congress to directly intervene, preferring instead to encourage discussion and to 'avoid the temptation to legislate in this area'.[15]

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[11] The NCAA has also been subjected to high profile SRC-related litigation and settled for a 50-year medical monitoring program for college athletes and US$5million to start a program to research the prevention and treatment of concussion. See *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation,* No. 13 C 9116, 2014 WL 7237208 (N.D III. Dec. 17, 2016).

[12] The notion of amateurism is based on the view that athletes are not paid for their participation or involvement in sport. Koller traces the deference to the NCAA as a self-regulatory actor to the time of US President Theodore Roosevelt White House summit to urge colleges and universities to regulate themselves and make the game safer. See Koller, above n 4, 692.

[13] Jean A Langlois, Wesley Rutland-Brown and Marlena Wald, 'The Epidemiology and Impact of Traumatic Brain Injury: A Brief Overview.' (2006) 21 *Journal of Head Trauma Rehabilitation* 375 376.

[14] See above, chapter 4 part III ('A Call to Action).

[15] Statement of Rep. Lamer Smith, Member, H. Comm. on the Judiciary, House of Representatives Committee on the Judiciary, Government of the United States of America (111th Congress), *Hearings on*

State actors also engaged in campaigns designed to increase awareness in preventing, recognising and managing concussion. An illustration of this was the state-funded CDC's campaign around concussion, Heads Up, built around principles of prevention, recognition and management of concussive injury. It is focused on raising the awareness of parents, coaches, health-care professionals and school professionals and educating them about minimising SRC. Since the Heads-Up program was introduced in 2006, it has distributed 6,000,000 informational materials and pamphlets and trained 3,000,000 coaches in efforts designed to raise awareness of the importance of SRC.[16]

Collaborations between state and non-state actors involves the formation of a public health partnership; where state actors co-ordinate with non-state actors to achieve collective goals, triggered by adopting the precautionary principle to public health concerns. An illustration of this public health partnership can be found in NCAA-Department of Defence Grand Alliance CARE Consortium.[17] The objective of the CARE Consortium is to undertake a large-scale research project involving student-athletes and military personnel with over $30 million invested by the DOD and the NCAA.[18] As noted above, the NCAA is the non-state actor responsible for administering the amateur stream of American football.

B *Legal Regulation and Policy Responses: State-based Youth Concussion Laws (YCL)*

Public interest groups and powerful and influential lobbyists, including the NFL itself, mounted arguments that there was a need for state regulatory intervention at the youth level of sport. It might at first seem somewhat surprising that the NFL would become a vocal advocate and lobbyist for the introduction of YCLs across the US. The NFL's motivations, however, might not have been completely altruistic.

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the Legal Issues Relating to Football Head Injuries (Part I & II) (28 October 2009 and 4 January 2010) ('2010/2011 Congressional Hearing'), 5.

16 United States Congressional Meeting, House Energy and Commerce Subcommittee on Oversight and Investigations, Roundtable Concussion Research and Treatment ('2016 Congressional Meeting'). Dr Baldwin from the CDC presentation at the US Congressional Meeting, March 2016, 52.26 <https://www.c-span.org/video/?406450-1/hearing-concussions&start=5455 1.31ms=>.

17 Concussion Assessment Research and Education Consortium (CARE Consortium) <http://www.careconsortium.net/ >. began in 2014.

18 2016 Congressional Meeting, above n 16. Dr Brian Hainline from the NCAA presenting at the US Congressional Meeting on March 14, 2016. https://www.c-span.org/video/?406450-1/hearing-concussions&start=5455 1.31ms=

1 *Lobbying Efforts of NFL*

Several commentators suggest the NFL was likely to have been driven more by the need to repair reputational damage caused by the earlier scandals it faced,[19] and the chance to lobby congress to improve its standing in terms of social responsibility. Koller, citing Harvey, explains that there was regulatory capture in that the legislative outcomes were 'directly relevant to the NFL's private commercial goals in protecting the image and reputation of football'.[20] Whatever the reason, the support of the NFL probably garnered legitimacy of the state as a regulatory actor in enacting YCLs and has been attributed as significant contributing factor that would eventually lead to the adoption of YCLs.[21]

The reconfigured posture of government actors, supported by the NFLs enthusiastic endorsement, led to a 'flurry of government activity' based on the role of the state in protecting the health and safety of youth participants.[22] Harvey et al suggest that state actors succumbed to mounting pressure to reframe the risk from a public health perspective, thereby finding a 'nexus' between education, public health and youth sports safety that enabled state legislation.[23] Further, the heightened public awareness campaign raised the visibility of the cost of SRC, leading to changing social and cultural norms around the tolerance and appetite for dangerous play in the name of sport.

2 *State Rationales for Regulating*

Mitten et al, explains that while state actor traditionally defer to sport to self-regulate, this increased state activity is unsurprising given the vulnerability of younger participants and the need to limit or prevent injuries.[24] Further, the medical evidence discussed earlier in chapter 2 explained the serious concerns associated with the impact of SRC on developing brains in younger participants.[25] Similar concerns underpinned the focus of

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19 Koller, above n 4, 710.

20 Ibid 717.

21 Hosea Harvey 'Refereeing the Public Health', (2014)14(1) *Yale Journal of Health Policy, Law and Ethics* 66, 103.

22 Koller, above n 4, 684.

23 Harvey et al, above n 4, 88.

24 Matthew Mitten et al, *Sports Law and Regulation: Cases, Materials and Problems* (Wolters Kluwer, 4th ed 2016) 104.

25 See above, chapter 2 part II ('Patchy Data: Challenges in Measuring SRC').

state actors on the vulnerabilities in children and the higher risks of repetitive or aggravation of injuries.[26]

State actors utilised regulatory powers to legislate over matters involving SRC at the youth and amateur levels in each of the 50 states in the US and the District of Columbia through the enactment of YCL.[27] State actors in the US came to recognise SRC as a significant public health concern by acknowledging that SRC had the potential to affect all athletes, across all sports, at all levels. While the NFL had legitimacy over its internal field, the policy mandate in the US recognised the significance of SRC as a public health concern beyond professional footballers.

3 *Three Principles of YCL*

Each jurisdiction has now passed YCL promoting three principles of education, removal from play and medical clearance before returning to play. There is no attempt to ban or proscribe contact on the field of play, nor any effort to interfere with the rule-making power of the SGBs in that regard. Instead, the focus is on mitigating the risks associated with the 'downstream' effects, of mismanaging the initial injury, explained above in chapter 2.[28]

The first state to enact YCL was the state of Washington in 2009 with the enactment of the Lystedt Law, following the catastrophic traumatic brain injury sustained when Zachery Lystedt, a middle school football player, returned to a game of football following an earlier concussion.[29] Zachery Lystedt's case achieved high profile status and galvanised public support to demand change around SRC in youth and amateur sport.[30]

The Lysaght Law provided the template for other states to follow. Several commentators have observed, YCL focus on these three principles and designed to prevent the mismanagement of the initial concussive injury.[31] There are, however, some variations

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26 Koller, above n 4, 712.

27 Harvey et al, above no 4, 88.

28 See above, chapter 2 part I ('Evolving Definitions').

29 <https://www.cdc.gov/media/subtopic/matte/pdf/031210-Zack-story.pdf>.

30 Harvey et al, above n 4, 88.

31 Kerri McGowan Lowrey and Stephanie R Morain, 'State Experiences Implementing Youth Sports Concussion Laws: Challenges, Successes, and Lessons for Evaluating Impact' (2014) 42 *Journal of Law, Medicine and Ethics* 290; Hosea Harvey, 'Reducing Traumatic Brain Injuries in Youth Sports: Youth Sports Traumatic Brain Injury State Law, January 2009 to December 2012' (2013) 103(7) *American Journal of Public Health*, 1249.

across jurisdictions as how the legislation is implemented and enforced and several inconsistencies among states.[32]

The regulatory targets of YCL are athletes, parents and coaches. To illustrate, the central tenet of promoting awareness and improved education the signing of a 'concussion awareness form'.[33] In several jurisdictions, legislation requires coaches to receive concussion training and the development of school concussion policies.[34] Legislative provisions provide the removal of play of an athlete who suffers or is suspected of suffering a concussion. The principle of medical clearance to return to play requires a mandatory twenty-four-hour period and a sufficient medical clearance.

4 *Reform and Redesign of YCLs*

The YCL have been criticised as being introduced too early and without adequate evidence-based approach.[35] Several commentators identify a missed opportunity to introduce a more comprehensive and consistent collection and analysis of data around SRC[36] and a lack of focus on returning an athlete to studies after concussion.[37]

Several other concerns have been raised regarding the ineffectiveness of the YCLs by not focussing on prevention of the initial injury and only focussing on the secondary prevention phase. A countervailing argument suggests that the YCLs provide a 'false sense of security' to parents and athletes; that the legislation will somehow integrate safety into the sports as currently played when the real risk is the inherent nature of contact in the rules as formulated.

Another significant criticism of the YCL is the absence of mechanisms of implementation and enforcement as contributing factors that have undermined the efficacy of the legislative intent of the YCLs. The lack of enforcement has been attributable to both the absence of direct language within the legislative framework as to enforcement but also

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32 McGowan Lowrey and Morain, above n 31, 296.

33 Harvey, et al, above n 4, 89-90.

34 Ibid.

35 Several public health law commentators critique the YCL, suggesting the first iteration lacked an evidence-based approach and lack of enforcement mechanisms; Harvey, et al, above n 4, 87.

36 Kathleen Bachynski and Daniel S Goldberg, 'Youth Sports and Public Health: Framing Risks of Mild Traumatic Brain Injury in American Football and Ice Hockey' (2014) 42 *Journal of Law, Medicine and Health* 323; 325.

37 The Network of Public Health Law, 'Return to Learn': Academic Reentry for Student Athletes Recovering from Sports-Related TBI' Issue Brief, 1-7.

compounded by uncertainty as to whose responsibility it is regarding the enforcement task. While evaluative studies have criticised this ambiguity, it is generally acknowledged, however, that the introduction of YCLs has led to an increase in awareness by the enactment of legislation, contributing towards the promotion of more vigilance and mindfulness 'around the risk of head injuries'.[38] This expressive and symbolic function of law illustrates the standard expected and elevated the seriousness of SRC beyond a private matter and into the public domain.[39]

Following the roll-out of the YCLs, the importance of a nationally co-ordinated injury surveillance system has been identified in the US as a critical priority. In 2013, the Institutes of Medicine highlighted concussion in youth sports and the need to understand better and address concerns.[40] Recent funding from the US government to the NIH is spending in the fiscal year 2015 US$93m to understand a problem that costs over US$70billion a year.[41]

II A SOFTER COLLABORATIVE APPROACH: CANADA AND THE UK

A *Canada and SRC: Early Public-Private Partnerships*

The Canadian model of sports regulation is like the US with a clear distinction between professional sport and amateur sport.[42] Within both streams, non-state actors occupy dominant positions and sports management is primarily undertaken free from state interference. When the crisis of SRC punctuated the regulatory space of sport in Canada, a Ministerial mandate and coronial inquiry recommendations established a solid foundation upon which state actors signalled they were ready to engage in developing regulatory arrangements.

1 *Federal/Provincial-Territory Approach*

Motivated by widespread reporting of independent scientific studies and high-profile retirements of prominent athletes, the Federal Government signalled the importance of

38 McGowan Lowrey and Morain, above n 31, 295.

39 Cass Sunstein, 'On the Expressive Function of Law (1996) 144(5) *University of Pennsylvania Law Review* 2021, 2024; Koller, above n 4, 721-722.

40 2016 Congressional Meeting, above n 16.

41 Ibid. Evidence from Geoffrey Manley MD.

42 James A.R. Nafziger, 'A Comparison of the European and North American Models of Sports Organisation' (2008) 3-4 *The International Sports Law Journal* 100.

SRC in the Canadian context as a high profile public health concern. Indeed, action on SRC was an election promise in 2015 and subsequently manifested into a Ministerial Mandate for the Trudeau administration.[43] This Mandate directed the Minister of Health to,

> Work with the Minister of Sport … in *increasing funding* [emphasis added] to the Public Health Agency of Canada to support a national strategy to raise awareness for parents, coaches, and athletes on concussion treatment.[44]

Later, in 2017, a further Ministerial Mandate Letter was issued by Prime Minister Trudeau directed to the Minister of Health to,

> Work with the Minister of Sport and Persons with Disabilities to *implement* [emphasis added] a pan-Canadian concussion strategy and raise awareness for parents, coaches, and athletes on concussion treatment.[45]

The national sport of Canada is ice hockey, a full bodily contact sport and one described as a 'tough sport played by tough athletes'.[46] Due to the climate in Canada, winter sports such as ice hockey tend to attract high participation and spectator rates. Consequently, widespread publicity followed when several high profile professional Ice hockey players who had played professional ice hockey regulated by the National Hockey League, (NHL) complained about the impact of concussion and their battles following multiple concussive injuries in the sport.[47]

(a) Triggers for State Engagement

The tragic death of 17-year old Rowan Stringer on Mother's Day in 2013 following multiple concussions she suffered playing high school rugby received widespread public and political attention in Canada. The sporting culture around reporting SRC was

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[43] See Mandate Letters from the Prime Minister to Ministers on Expectations and Deliverables, November 13, 2015 <http://sportmatters.ca/news/minister-sport-and-persons-disabilities-mandate-letter-published>.

[44] Ibid.

[45] Minister of Health Mandate Letter (October 4, 2017) <https://pm.gc.ca/eng/minister-health-mandate-letter>.

[46] James Goodfellow, 'NHL Concussion Litigation: Much Ado About Not So Much' in Lewis Kurklantzick (ed), *Legal Issues in Professional Hockey: National and International Dimensions* (W.B. Sheridean Law Publishers, 2017), 253.

[47] One of the most popular players, 30 year old Sidney Crosby, announced that he was retiring from the sport due to concerns about his cognitive and neurological health. For discussion on the issue of concussion in professional ice hockey, see Jeffrey G. and Gordon A. Bloom, 'Ethical Issues Surrounding Concussion Safety in Professional Ice Hockey' (2015) 8(1) *Neuroethics* 5.

unsupportive, so much so that the young player did not tell anyone she was suffering from multiple concussive injuries. Her death resulted in a coroner's inquest and the lobbying efforts of her parents campaigning for greater public awareness contributed to SRC being elevated as a policy priority for government.

The 2015 coronial inquest into Rowan Stringer's death concluded the cause of death was SIS[48] and, as earlier noted, 49 recommendations were made to address the absence of a harmonised and coordinated system to ensure a safe sporting system.[49] One of the major gaps identified in the coronial findings was the 'absence of concussion laws and a coherent youth sport concussion system'.[50]

The coronial recommendations demonstrate the variety of actors who have significant roles to play in regulating SRC. To illustrate, the recommendations were directed to three separate Ontario Ministries, several provincial agencies, the Federal Public Health Agency and the sport's governing body for rugby across federal, provincial and district levels, to name a few.[51] Recommendation 49 was directed to state actors recognising 'the Federal, Provincial and Territorial Ministers Responsible for Sport should play a leadership role in raising awareness regarding the education of players, parents and officials and for the management of concussions in sports that occur in non-school environments'.[52]

Following the coronial recommendations, the Rowan's Law Advisory Committee was convened with a mandate that included the role to 'make recommendations…on how to prevent, mitigate and create awareness about head injuries in sport in Ontario.'[53] As part of that role, the Committee found a fragmented system and concluded that

> …there is no common approach in Canada for addressing concussions across the many sports setting in which they can occur, including schools, fields of play, and recreation centres…

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48 Second Impact Syndrome. See above, chapter 2 part I ('Evolving Definitions').

49 Ibid.

50 Rowan's Law Advisory Committee, 'Creating Rowan's Law: Report of the Rowan's Law Advisory Committee' (2017) 8.

51 Recommendations were directed to the Ministry of Tourism, Culture and Sport, The Ministry of Education, the Ministry of Health and Long Term Care. Several provincial agencies were also included, namely the Ontario Physical and Health Education Association, the Ontario School Boards' Insurance Exchange, the Ontario Boards of Education. Ibid.

52 Recommendation 49, <http://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/Inquests/Verdictsandrecommendations/OCCInquestStringer2015.html>.

53 Rowan's Law Advisory Committee, above n 50, 9.

Like the distribution of constitutional power in Australia, Canada operates a bifurcated system across states and territories. It is beyond the scope of this chapter to investigate constitutional issues in greater detail. For present purposes, the power differential rests with states and territories, who have significantly more power to raise taxes and other heads of power that would vest in Australia with the Commonwealth. Consequently, state actors in Canada necessarily compete for power in the regulatory space, and regulatory arrangements in respect of SRC are no exception.

Around the same time, nine separate SRC-related class action claims involving over many hundreds of former ice hockey players were filed between 2013 and 2015, raising the profile of SRC as a legal concern. The SGB for professional ice hockey, the National Hockey League (NHL) had been sued in litigation like that taken against the NFL. [54] Proceedings against the NHL were filed in the US using the state-provided legal framework. Coupled with the coordinated lobbying efforts, SRC was escalated to become a key priority for the incumbent Federal Canadian government.

2 *Federal Leadership: A Multi-Actor Public Health Partnership*

Unlike the US response, key stakeholder engagement and establishing partnerships with multiple state and non-state actors has been a critical part of the Canadian approach. At the Federal level, the leadership has brought together the actors who could formulate a strategy to achieve the collective goals to develop a harmonised approach to address the issue of SRC.

(a) Health-Care Partners

An initial step in the Canadian approach involved the collaboration of experienced clinicians, researchers and health-related organisations through the formation of the Canadian Concussion Collaborative (CCC). The mission of the CCC was to create 'synergy between organisations concerned with concussion'.[55] The CCC developed several recommendations including the requirement for 'organisations responsible for operating, regulating or planning sport and sporting events with a risk of concussion' to develop and

[54] The first class action claim was filed in 2013 and involved ten former NHL players. See Class Action Complaint *In Leeman and Ors v National Hockey League and anor* Case 1:13-cv-01856-KBJ.

[55] Pierre Fremont et al, 'Recommendations for Policy Development Regarding Sport-Related Concussion Prevention and Management in Canada', 2015, *British Journal of Sports Medicine,* 88-89.

implement SRC concussion management protocols.[56] Several Canadian scientific researchers have already been studying SRC in the Canadian context for many years and many participated in the international consensus meetings as part of the CISG. [57]

(b) Cross-Department Engagements

Sport Canada, the Federal sports agency and the Public Health Agency of Canada, were early state actors and performed a pivotal step in 2015 by establishing a Federal/Provincial-Territory Working Group on Concussion in Sport (FPT Group), engaging with non-state actors Gostin describes as the public health partners.[58] The mission of the FPT Group was to create synergy between health organisations concerned with concussions to improve education about concussions and the implementation of best practices for the prevention and management of concussions.

A vital feature of these regulatory arrangements involved a cross-department collaboration between the sport and health portfolios. This collaboration was an essential part in delivering key messaging around health concerns in a sporting context. Instead of vertical silos around the remit of the sport and health departments, the legislative mandate required ministers to work together. Behind the scenes there were likely to be power struggles, particularly in respect of funding allocation. However, to the external world, the Canadian approach illustrates the need for cross-department collaboration.

(c) Public Interest Advocate and Knowledge Dissemination

Another strength of the Canadian approach was the engagement of the public interest group, Parachute, a charity and advocate for injury prevention and control. Parachute was initially funded by Sport Canada and later supported by the Public Health Agency and served to some extent as a neutral and legitimate non-state intermediary through which state actors engaged with the public.

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56 Ibid 88.

57 For example, the National Hockey League Co-Chair of the NHL and NHLPA Joint Health and Safety Committee is Dr Winne Meeuwisee, a founding member of the CISG <https://www.sportmed.ucalgary.ca/node/226>.

58 Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press 2nd ed, 2008), 40-44. Note that in the 3rd edition of this text, reference to 'public health partners' is omitted without any reason being advanced to explain this omission. See Lawrence O. Gostin, Lindsay F. Wiley and Thomas R. Frieden, *Public Health Law: Power, Duty, Restraint,* (University of California Press 3rd ed, 2016). For present purposes, the public health partnership as explained by Gostin in the 2nd edition is applied.

The Canadian Guideline on Concussion in Sport was developed by Parachute and its expert advisory group following key stakeholder engagement and consultation. These guidelines formed a central part of the Concussion Protocol Harmonisation Project; a project designed to develop core principles and achieve consistency across the entire Canadian sport community.[59]

The Canadian Sport Information Research Centre (SIRC) has also played an instrumental role in the translation and knowledge dissemination on behalf of the Canadian Federal Government. One of the central functions for SIRC was to bring about a change in the sporting culture; to shift perceptions around stigmas associated with self-reporting. Indeed, the most recent update in the Canadian strategy is around reframing the key message with the Concussion Smart project developed by SIRC; a public communication campaign designed to deliver the key message that self-reporting becomes the new norm and under-reporting the exception.[60]

3 *Provincial Regulation*

The Provincial government of Ontario has been an early actor in SRC. The Ministry of Education recognised concussion as a policy concern in the school setting in 2014 with the development of School Board Policies on Concussion.[61] This policy recognised the importance of schools developing and maintaining a policy on concussion and set out expectations as to awareness, management, implementation and staff training.[62] Concussion has been included in the school curricula and taught since 2014.

(a) Direct Legal Regulation

Ontario introduced concussion legislation in 2016 and 2017 with the enactments of *Rowan's Law Advisory Committee Act, 2016* and *Rowan's Law (Concussion Safety), 2017*.[63]

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[59] Two goals of this harmonisation initiative were to ensure that National Sport Organisations have 'evidence-based concussion protocols that were harmonised with the Canadian Guideline…yet tailored to meet the specific needs of each sport', and to provide continuing education to health professionals. See Parachute Canada <http://www.parachutecanada.org/home/print/2231/>.

[60] Sport Information Resource Centre, (SIRC) 'We are Headstrong Concussion Smart Campaign' <https://sirc.ca/concussion>.

[61] Ministry of Education, Ontario *Policy/Program Memorandum No. 158*, (March 19, 2014) 1-4.

[62] The Memorandum identifies minimum components including development of awareness, prevention, identification, management procedures for a diagnosed concussion and training. Ibid 3.

[63] *Rowan's Law Advisory Committee Act*, S.O. 2016, c 11, ss2,5 and 6. This Act established an advisory committee to make recommendations on the jury recommendations made in the inquest into the death of Rowan Stringer<https://www.ontario.ca/laws/statute/s16011>; In 2017, the *Rowan's Law (Concussion*

Currently, the legislation is awaiting the development of regulations to be set established. The intention is to develop these in consultation with sport, education, community sectors and partners.[64] Further, the Act does not contain any enforcement or compliance provisions. It, therefore, remains to be seen whether legal regulation in Ontario will achieve the desired regulatory outcomes.

B *The UK and SRC: A Co-Regulatory Option and Public-Private Partnership*[65]

The UK Charter for Sports Governance, developed by Sport England as the state agency, explains the role of SGBs in the UK as follows

> Bodies tasked with organising sport are holders of public trust. They are the guardians of something which is precious to millions and in many cases they are recipients of substantial public funding. Public funding is a privilege, not an entitlement, and carries a responsibility to uphold the highest standards of integrity, creating a trustworthy, safe and inclusive environment not only for those wishing to take part but also for those investing or donating time and money.[66]

This explanation signifies the guardianship role of SGBs and illustrates the regulatory posture of state actors, prepared to intervene if the privileges afforded to SGBs as non-state actors are disrespected. The investment of 'substantial public funding' appears to be a central plank upon which UK state actors base their rationale for regulating sport.[67]

Lewis and Taylor explain the UK approach to sports regulation has shifted from the traditional 'non-interventionist approach' towards a model akin to a 'public-private

Safety) Act was enacted to require sport organisations to implement an annual review of concussion rules and protocols. See *Rowan's Law (Concussion Safety) Act*, S.O. 2018, c 1, ss 1-7.

64 Summary of Proposal, Ontario's Regulatory Registry, <https://www.ontariocanada.com/registry/view.do?postingId=25966&language=en>.

65 The relationship between state and non-state actors in sport has been described as a public/private partnership. See for instance, Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (Bloomsbury Profession, 3rd ed, 2014) [A1.13].

66 Sport England, A Charter for Sports Governance in the United Kingdom, <https://www.sportengland.org/about-us/governance/a-charter-for-sports-governance/>.

67 The justification for state involvement in sport has been discussed recently in respect of the governance of football in the UK. The Minister for Sport explained this as 'we invest quite a considerable amount of public money in football, and so I think it is my responsibility as the Minister to make sure that the corporate governance arrangements surrounding the spending of that money are as they out to be'. Lewis and Taylor, above n 65, [A1.13].

partnership'.[68] They cite several reasons for this shift, including social, cultural, economic and political influences.[69]

1 *The UK Duty of Care Review*

Motivated by media reports, scientific concerns and anecdotal evidence of matters concerning the welfare and safety of participants, the UK Sports Minister in 2016 commissioned an independent review to develop a framework for 'Duty of Care' considerations in sport (the Duty of Care Review).[70] The terms of reference for the Duty of Care Review were:

> To make recommendations to government and its agencies on the establishment and content of a formal 'Duty of Care' to athletes and participants, in both elite and grassroots sport, with the aim of ensuring that as many people as possible can engage in sport and that they can do so in a safe way, with their career and life after their career supported.[71]

The duty of care around SRC fell within the remit of the review panel as an area of concern. Media coverage of the coronial findings into the death of former professional soccer player, Jeff Astle, caused by 'industrial disease' from the multiple head injuries he sustained in the sport,[72] received widespread attention in the UK. Public campaigns were targeted at raising awareness, playing a significant role in raising the profile of the risk associated with SRC.

The failure of the voluntary self-regulated sports system in adequately addressing these matters motivated state interest. State actors justified their involvement in sport based on the significant public investment in sport in the UK, and 'a reasonable expectation that

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68 Ibid [A1.10]- [A1.13], [A.14].

69 Lewis and Taylor advance four reasons why this shift has occurred as 'partly because of the social, cultural and economic importance attributed to sport in modern society, partly because politicians have come to understand the power of sport as an instrument for achieving public policy imperatives, partly because SGBs have had to turn to government for assistance in addressing issues that are beyond their jurisdiction and/or competence to control and partly because the public and the media expect the Government to stay on top of a sector that is of enormous public interest.' Ibid [A1.13].

70 Baroness Tanni Grey-Thompson, *Duty of Care in Sport – Independent Report to Government*, House of Commons, Department for Digital, Culture. Media and Sport (21 April 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/610130/Duty_of_Care_Review_-_April_2017__2.pdf> ('Duty of Care Review') 4, 5.

71 Other concerns involved child sexual abuse in sport, bullying in sport and mental health concerns when players retired from professional sport. Ibid Appendix A, 34.

72 See Chapter 2 (Part I 'Costs of an Invisible Injury').

there should be a return on the investment, not only in terms of sporting achievement, but social benefit...'.[73]

The commissioning of the Duty of Care Review signified a shift in the traditional non-interference approach in the UK; where the state regulatory approach shifted to 'sport cannot think of itself as special or different and able to behave outside what are considered acceptable behaviour patterns'.[74]

2 *Duty of Care Report and Recommendations*

The Duty of Care in Sport Independent Report to Government was published in April 2017 and identified several themes around the concept of the duty of care towards participants in sport, including a duty of care regarding concussion in sport.

The report does not explicitly refer to the existence of a legally enforceable duty of care but more the principle of a duty of care vis-a-vis the welfare and safety of participants. 'Duty of Care' is conceptualised to mean everything from personal safety and injury; to a mental health issue; to the support given to people at the elite level. Further, 'participants' are defined as athletes, sportspeople, including working or volunteering in sport.

(a) Duty of Care and SRC

Safety, injury and medical issues are covered in the Duty of Care report and include strategies designed to address concussion management, prevention, education and research in the UK. Government and its agencies are expected to play a more active role to investigate how parties can work together on concussion.[75]

(b) Priority Recommendations

The Report identified seven priority recommendations. To illustrate the significance of the issue, Priority Recommendations 1 called for the creation of a Sports Ombudsman; an administrative body with powers to hold SGBs to account and provide 'independent assurance and accountability' regarding the duty of care owed to participants.[76] To

[73] Duty of Care Review, above n 70, 4.
[74] Ibid.
[75] Duty of Care Review, above n 70, 25.
[76] Ibid 6.

complement the role of the Sports Ombudsmen, Priority Recommendation 3 calls for the establishment of a Duty of Care Guardian to be appointed by SGBs.

The recommendations are designed to address information asymmetries and invoke the transparency principle to require disclosure of information. As explained in chapter 2, this is significant in respect of SRC where accurate data on incidence and prevalence of SRC is limited.[77] The disclosure requirement of information in the annual report of the number of athletes leaving the sport due to health or injury issues is an example of an informational regulatory tool.[78]

These recommendations expand the regulatory space to include additional factors that could play a future role in the regulatory space of sport-related concussion should the recommendations be adopted. Principles-based legislation would be required to provide legislative recognition of the state to monitor compliance or compel the reporting to an external party about the regulatory and compliance activities of the SGBs.[79]

The UK Government is currently reviewing the Duty of Care Report and consulting with the sports sector. In the meantime, research at the community and club level of sport in the UK suggests that while there are sector-wide benefits to be delivered by adopting a consistent approach to duty of care considerations in community sport, there exists a need to build the capacity at this level to effectively achieve the collective goals.[80] Several research projects have been undertaken to assess the impact of implementing the Duty of Care recommendations while waiting for the UK state actors to decide the direction to follow.

III CROSS-JURISDICTIONAL ANALYSIS

The above discussion highlights a range of state responses in addressing SRC. Several regulatory tools and mechanisms were used with the objective of altering or influencing behaviour to manage and minimise the risk of SRC. The target group are players, parents and those involved in producing and delivering sport with high risk of SRC.

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77 See above, chapter 2 part II ('Patchy Data: Challenges in Measuring the Significance of SRC').

78 Duty of Care Review, above n 70, 27, 29.

79 Ibid 6, 15.

80 Sports Think Tank, *Duty of Care: A Summary Report Investigating the Level of Duty of Care Understanding in Community Sport Setting in the UK*, January 2018 <http://www.sportsthinktank.com/uploads/final-copy---duty-of-care-report-2018.pdf>.

A *Triggers for State Engagement*

The above discussion identifies that state actors in each jurisdiction have adopted different regulatory arrangements for responding to SRC. There are, however, several common patterns regarding the trigger events that lead to state involvement and continued engagement.

1 *Deaths or Serious Trauma from SRC-Related Injuries*

In each jurisdiction, players from both professional and amateur levels of certain sports had died or were seriously and permanently injured from SRC-related injuries. The widespread media reporting and coronial investigations following these incidents were significant contributing factors that has led to state involvement. Non-state actors played a vital role through the co-ordination of advocacy and lobbying to increase public awareness.

2 *Reframing SRC as a Public Health Concern*

Once the problem of SRC was reframed from a private matter into a public health concern, particularly one that involved a vulnerable subset of participants, state actors were recognised as legitimate actors in the space. In the early phase, institutional ambiguity clouded judgements as to who owned the problem of SRC. In the US, the self-regulatory arrangements of the NFL revealed gaps and weaknesses in their capacity to reach a critical target group. Government actors participated in a more significant way and address the gaps and weaknesses in response to SRC when framed as a public health concern.

The YCLs in the US, as public health regulation, demonstrate the role of law in changing behaviour. Burris explains that the direct legislative approach, albeit without enforcement mechanisms, 'sends information about the seriousness of the issue' with the goal of changing beliefs and norms around the seriousness of SRC; that 'social norms must emerge that make it unacceptable to ignore possible injuries or to fail to seek immediate medical attention'. [81]

[81] Scott Burris, 'Scientific Evaluation of Law's Effects on Public Health' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU, 2017), 555.

3 *Failure of Self-Regulation*

The NFL did not necessarily concede any of its power and influence over the professional level of the sport but the willingness of government actors in the US to enact legislation crystallised the issue as a public health concern and put beyond doubt any reluctance on the part of government actors to intervene. Many US states are now in the process of reviewing and amending the YCL, positioning the US at the 'Reform and Redesign' stage of the BIF. While government actors in the US started off in a 'flurry of activity' using the full force of legal regulation to solve the SRC problem, the recent steps to reform the legislation in each jurisdiction provides valuable insights as to gaps that needed to be addressed.

The process of regulation involves predictable stages, and public health law advocates interpose several additional elements in the process. Jumping ahead in the process is likely to undermine the foundations of any subsequent regulatory arrangements. For these reasons, the US government actors to SRC provide valuable insights and can help inform policymakers in Australia in addressing SRC. There are, however, other jurisdictions to consider that might offer solutions that are less legal and more participatory.

4 *Public Health Partnerships*

In each jurisdiction, there was clear and unequivocal acceptance that SRC was a public health concern. This recognition established the foundations upon which multiple actors unified to develop a public health approach.

Collaborations between state and non-state actors are what Gostin would describe as the formation of a 'public health partnership'; where state actors co-ordinate with non-state actors to achieve collective goals, triggered by adopting the precautionary principle to public health concerns.[82] Gostin identified that public health issues require collaboration between state and non-state actors within a polycentric regulatory environment.[83]

In a sports-specific setting, scholars contend that these 'cross-sector partnerships', particularly between public health agencies and non-profit sport organisations may be an

[82] Gostin, above n 58.
[83] Ibid.

'effective approach to health promotion'.[84] The shared objectives and mutual interests are explained as being reasons why these arrangements can work. The evaluation conducted around the YCLs reinforces the importance of this collaboration as underpinning the success or otherwise of achieving the desired outcomes when undertaking the evaluation process.

B *The Blended Intervention Framework: Situating State Actors*

A six-stage 'Blended Intervention Framework' (BIF) has been developed to more deeply analyse and pinpoint the range of ways in which state regulatory arrangements responded to SRC across these jurisdictional settings. The BIF explains that effective state intervention in SRC should follow several predictable steps to establish the legitimacy and efficacy of the intervention. The analysis below situates the stage of state regulatory intervention in each of the three jurisdictions across the six stages of the framework, starting with public engagement and working through to reform and redesign of the regulatory measures. Diagram 5.1 pinpoints the state regulatory arrangements of SRC in the US, Canada and the UK.

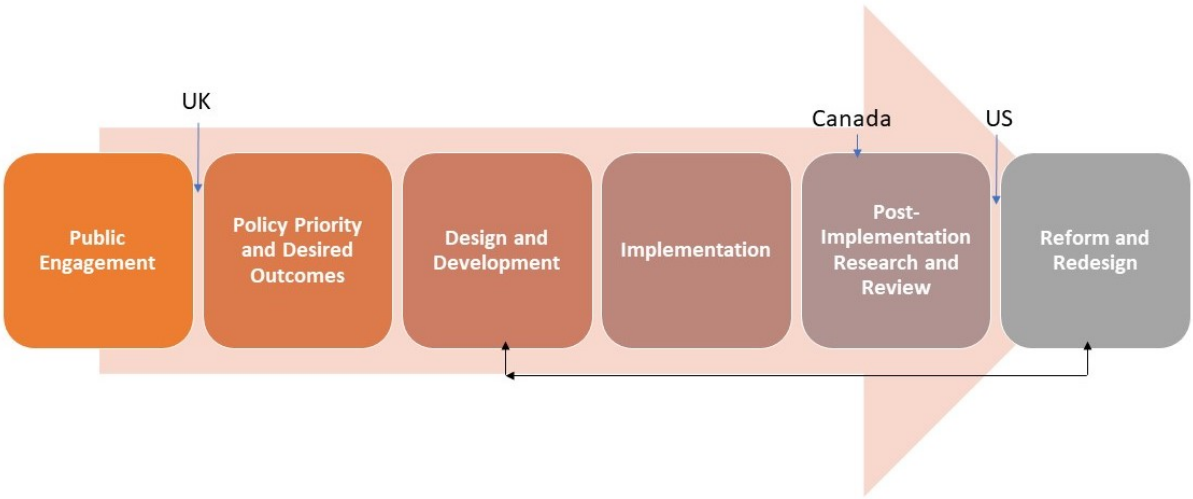

Diagram 5.1: Blended Intervention Framework (BIF)

The development of the BIF was influenced by two existing models; one from regulatory scholarship and the other from public health law.[85] By 'blending' these existing models, a

[84] Laura Misener and Katie E Misener, 'Examining the Integration of Sport and Health Promotion: Partnership or Paradox?' (2016) 8(4) *International Journal of Sport Policy and Politics,* 695.

[85] Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017) ,134. Harvey et al, above n 4, 87.

framework developed to pinpoint the various stages of state intervention. For this model, the notion of 'intervention' includes any coordinated act by a state actor using tools falling within any one of the regulatory tools categories referred to earlier.[86] Intervention, therefore, includes legal and non-legal regulatory tools.

1 *The Importance of Public Engagement and Evidence-Based Decision-Making*

Lowrey and Morain identified the importance of the early involvement of stakeholders in the initial policy development phase when examining the US YCL. Early stakeholder engagement offered advantages that included a working knowledge of key objectives, organisational capabilities and existing resources.[87] The efforts and partnerships with key organisations that pre-existed the legislative enactment of YCLs were identified as essential elements by providing information, expertise and resource sharing which was directly connected to the enhanced effectiveness of the youth concussion laws.

As the US case study is further along the BIF, the analysis in this chapter identified some of the early gaps that came to light in responding to SRC. Several commentators suggest that the legislative response in the US was flawed from the outset due to a lack of evidence base. Instead of undertaking a traditional form of public consultation and engagement, US policymakers jumped ahead to implement legislation without a full appreciation of the nature of the problem under review.[88]

The choice of legal regulation as the regulatory arrangements adopted in each state in the US has subsequently been questioned due to the lack of enforcement mechanism, and an apparent lack of capacity building needed to support these arrangements. While state actors asserted legitimacy over the domain, albeit a domain that had traditionally enjoyed even greater deference to a powerful non-state actor, several commentators have been critical of the 'flurry of activity' by state actors in the first iteration of the YCL, missing the public engagement and evidence base stages in the proper decision-making process.

Currently, the US regulatory arrangements are at the 'Reform and Redesign' stage. One of the main criticisms of the YCLs was that the regulatory arrangements were quickly introduced without first going through public or key stakeholder engagement. Instead,

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86 See above, chapter 3 part IV ('Regulatory Systems and Tools'); Ibid 201.
87 McGowan Lowrey and Morain, above n 31, 296.
88 Harvey et al, above n 4, 87-88.

the YCLs advanced to the design and implementation stages, without first establishing an evidence base upon which to build a cohesive regulatory strategy.

The Canadian model focussed extensively on early engagement with stakeholders, by engaging the SGBs and other key stakeholders, focusing on key stakeholder engagement as a critical part of the strategy. For these reasons, the legitimacy of state actors in Canada, together with the early collaboration with non-state actors, has proven to be a central reason why the Canadian model is working.

At the Provincial level, extensive collaborations between state and non-state actors in the formation of a Gostin-style Public Health Partnership has included multiple state and non-state actors, following the recommendations made by the Stringer coronial inquest. State and non-state actors have developed collective goals and followed a strategy that has been supported by state legislative intervention.

2 *A Broader Approach*

The focus in the UK is not only on SRC but incorporates other areas to provide a safe and inclusive environment in sport. The UK model, if implemented, reflects a co-regulatory system and will require expertise from industry and the legislative sanction from the state.

There has been a strong emphasis in the UK on a public-private partnership between the state and the sports sector. Currently, the UK state arrangements are at the point in between 'Public Engagement' and 'Policy Priority and Desired Outcomes', as the policy priority has not yet even been established.

If the UK Duty of Care Recommendations are implemented, legislative enactment is likely to be required to establish a co-regulatory system to support the collaboration between the Sports Ombudsmen and the Duty of Care Guardian. If Duty of Care guidelines are established, transactional regulatory tools are likely to be required to establish contractual arrangements between the state and SGBs, linking public funding to compliance with the guidelines and any legislative co-regulatory regime.

IV CONCLUSION

In this chapter, the case studies from the US, Canada and the UK illustrate the variety of approaches taken by state actors to respond to SRC. The evidence supports the central

hypothesis that state actors in the US, Canada and the UK are legitimate actors with capacity to play an essential role in regulating SRC.

In the US and the UK, the trigger event involved the deaths or retirements of high profile sportspersons. The widespread public attention drawn to these high-profile cases and views expressed that the deaths or serious injuries were preventable enhanced public scrutiny around the adequacy of pre-existing regulatory systems around SRC.

In each jurisdiction the symbolic effect of state actors participating in the space signified to the sporting organisations and the broader community that SRC was a critical regulatory concern for state actors. The rationales that underpinned state intervention were based on the role of the state as the 'neutral umpire' vested with the responsibility to prevent harm, to minimise risk, to address information asymmetries, and to advance public policies in responding to SRC.

When SRC transformed from a private problem to a public health prism, the legitimacy of state actors engaging with public health partners was reinforced and provided the basis upon which regulatory arrangements were made. This reframing then motivated state actors to actively participate in the development and implementation of public policy responses as guardians of the public health.

In all jurisdictions, however, two conditions are necessary to underspin this legitimacy. First, SRC must be reframed as a public health issue in public awareness for state actors to be motivated to act and to be accepted as legitimate regulators in the space as guardians of public health. Second, state actors need to consult with and work with other non-state actors in recognition of the polycentric regulatory regime of sports regulation, bearing in mind the previously unassailable position that SGBs had in sports management separate from state regulation.

Part I has established the background and context by explaining why SRC is a threat to the physical integrity of sports participants and why it presents as a key challenge for non-state actors to unilaterally regulate. The biomedical construction of SRC explained in chapter 2 identified the potential risk of long-term harm from mismanaging SRC and established why SRC should be reframed as a public health concern. Chapter 3 outlined the regulatory approach. Chapter 4 established the key challenges facing non-state actors,

leading to state engagement in chapter 5 comparing the experiences in different jurisdictional settings.

Part II examines SRC in the Australian context and analyses how regulation has developed in Australia including the role of various actors (state and non-state) who have shaped and influenced the regulatory space of sport and SRC. This Part commences in the next chapter by tracing the origins of customary assumptions and socio-cultural and historical developments of sport. The aim is to explain the influencing factors that underpin the Australian approach in regulating SRC. Illuminating these characteristics provides the foundation upon which consider how SRC is currently regulated in Australia and evaluate the effectiveness of these arrangements.

Part II Regulating Sport-Related Concussion (SRC): The Australian Context

CHAPTER 6: SOCIO-CULTURAL AND HISTORICAL DEVELOPMENTS IN AUSTRALIAN SPORT

INTRODUCTION

To understand how SRC is currently regulated in Australia, it is useful and necessary to reflect on the socio-cultural and historical influence that have impacted the domain. This not only establishes how certain actors have come to dominate the regulatory space, but also explains the cultures that influence society's acceptance and tolerance of harm in sport, and how these, in turn, have influenced present-day regulatory arrangements.

Chapters 7 and 8 will analyse the current approaches to regulating SRC and will also explain a system primarily based on underlying social and cultural norms and customary assumptions, as to the legitimacy of non-state actors in the regulatory space. Identifying these cultural norms and the development of customary assumptions is both relevant and essential to understand how and why certain actors have controlled the allocation of power, and what regulatory arrangements in responding to SRC have been put in place when crises occur.[1] Moreover, whoever dominates the space is more likely to influence the priority or otherwise of SRC as a regulatable concern.[2]

This chapter commences in Part I by explaining sport as a social construct, and draws upon the literature in sports history and sports sociology to explain the socio-cultural dynamics of sport as a form of 'social Darwinism'.[3] This part also explains how evolving socio-cultural dynamics have influenced society's attitude towards the safety of participants on the one hand and the spectacle of the sport, on the other. The transition from prize-fighting to boxing provides a useful illustration of shifting cultural norms. Part II traces the history and development of sport and its regulation in Australia to explain the customary assumptions that underpin the legitimacy of actors and regulatory arrangements within this regulatory domain. Part III explains the transformative events that led to the development of a fully-fledged commercial business of sport, creating a two-tiered market and dual functions of large SGBs in the production and delivery of sport. Part IV

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1 Leigh Hancher and Michael Moran, 'Organising Regulatory Space', in Leigh Hancher and Michael Moran *Capitalism, Culture, and Economic Regulation* (Clarendon Press, 1989) 294.

2 Ibid 278, 283.

3 Wolfgang Decker, *Sports and Games of Ancient Egypt translated by Allen Guttmann* (Yale University Press, 1992) 70; Douglas Booth and Colin Tatz, *One-Eyed: A View of Australian Sport*, (Allen & Unwin 2000), 50.

identifies the various components of the regulatory space in its current form and the ecosystem of Australian sport.

I THE FILTER OF CULTURE IN AUSTRALIAN SPORT

Sport is a mirror of many things. It reflects political, social, economic and legal systems[4]

In Australia, sport has evolved as a living culture, where traditions, practices and skills have significant intergenerational characteristics and evolve in line with changing social and cultural norms.[5] As earlier noted, Hancher and Moran explain the importance of the cultural environment as a key characteristic that determines the capacity of actors to shape and influence a regulatory arena.[6] This 'filter of culture' is particularly relevant in seeking to understand how and why sport is regulated, and why SRC, as a cost of production of sport, has come to be managed in Australia.

Sport has been described as a 'culturally relevant but universally present' phenomenon, and reflective of life in miniature with elements of struggle, triumph, passion and tragedy.[7] Early forms of activities that would now meet modern conceptualisations of sport can be traced to ancient civilisations. Indeed, studies of early forms of Indigenous sport in Australia reveal a rich culture and tradition of more than 100 forms of sporting activity,[8] aligned with archaeological discoveries and technological developments. Since the 1970s, a significant body of scholarship on the history of sport, albeit mainly from ancient Greece, has traced its emergence and interpreted its role in shaping societies.[9]

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4 Sean Gorman 'Sporting Chance: Indigenous Participation in Australian Sports History' (2010) 2(2). *Cosmopolitan Civil Societies Journal,* 12, 21.

5 Aaron Smith and Han Westerbrook, *The Sport Business Future* (Palgrave MacMillan, 2004) 76-88.

6 See above, chapter 3 part II ('Regulatory Space and Collective Capital'); Leigh Hancher and Michael Moran, 'Organising Regulatory Space' in Leigh Hancher and Michael Moran (eds) *Capitalism, Culture and Economic Regulation* (Oxford University Press, 1989).

7 Thomas Scanlon, Contesting Ancient Mediterranean Sport, 149 Thomas, 'Contesting Ancient Mediterranean Sport' (2009) 26(2) *The International Journal of the History of Sport*, 149; Christopher Kremmer, The AFL Grand Final – A Carnival of Struggle, Passion and Tragedy, The Conversation, 25 September 2014 <https://theconversation.com/the-afl-grand-final-a-carnival-of-struggle-passion-and-tragedy-31775>.

8 Recent discoveries suggest a close connection between the Indigenous game of Marngrook as influencing the development of the sport of Australian football. See Jenny Hocking and Nell Reidy, 'Marngrook, Tom Wills and the Continuing Denial of Indigenous History: On the Origins of Australian Football' (2016) 75(2) *Meanji* 83. See also Australian Sports Commission, *Yulunga: Traditional Indigenous Games* (2009).

9 Richard Holt, *Sport and the British: A Modern History* (Clarendon Press, 1989), 36. See also Scanlon, above n 7, 149.

A *A Culture of Competition and the Sanctity of Autonomy*

Sport is built on a culture of competition and the voluntary assumption of necessary risks associated with participation.[10] This culture underpins the domain and exists in a form unknown in many other settings. Weatherill explains that sport is 'special' because competitors need opponents, a relationship described as a form of 'mutual interdependency'.[11]

Unlike non-sporting contexts, mainly financially driven domains, sporting culture thrives on competition and contributes to a 'win at all costs' approach, rendering personal health a secondary consideration and a necessary cost of production. Conduct that would, in any other context, be considered as offending the criminal or civil laws of assault or trespass to the person is tolerated within the field of sport. Such conduct is often attributed to the essence of many combat and contact sports, where the 'element of danger' is part of the attraction and contributes to the enjoyment of the activity.[12] In these sports, players consent to the necessary risks in pursuing the objects of the game, where thumps and bumps are the very essence of a sport.[13]

Other strong cultures that exists in sport are autonomy and freedom of association. Indeed, these principles are so entrenched that sports history is replete with many illustrations of 'fierce contests' to preserve autonomy when state actors have tried to intervene in the regulatory space.[14]

This notion of autonomy is also reflected in the presumption of consent to harm in the context of sport, considered later in chapter 7. Competitors are generally presumed to have consented to harm, and such consent is deemed necessary in pursuing the objects

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10 *Agar v Hyde; Agar v Worsley* (2000) 201 CLR 552 (Gleeson CJ) [90] ('*Agar*').

11 Stephen Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press, 2017), 1.

12 *Agar* (Gleeson CJ) [14]. Law as a form of regulation is examined below in chapter 7, part I ('Law, Sport and SRC').

13 Patrick Smith, 'Fight Against Concussion Held Back by Macho Philosophy, The Australian July 6, 2016 <https://www.theaustralian.com.au/sport/opinion/patrick-smith/fight-against-concussion-held-back-by-macho-philosophy/news-story/8a5bcb14a771f1dd317209aa0119bfae>.

14 IOC Olympic Charter, Article 15, Principles of Olympism ('Olympic Charter'). Recent struggles for power in sport can be found in the public feud between John Coates from the Australian Olympic Committee (AOC) and John Wylie, chair of the ASC. Tracey Holmes, 'Nitro Athletics: John Coates, John Wylie Clash as Insiders Fear Relationship Can Not be Rescued', 13 February 2017, ABC News <http://www.abc.net.au/news/2017-02-12/coates,-wylie-relationship-in-jeopardy-clash-nitro-athletics/8263608>.

of the game.[15] Exceptions arise, however, in cases where special vulnerabilities justify a departure from this presumption.[16]

B *Socio-Cultural Dynamics*

While some commentators portray sport as possessing mystical qualities and carrying a mystique, at its core, sport is a social construct.[17] Koller describes sport as 'made up games … injected with values that are reflected in society at large'.[18] Others have described this socio-cultural phenomenon as 'deep play' games, a socio-cultural theory that explains why sport is reflective of more than the personal exertion of individual participants; that, as a social construct, sport necessarily mirrors the socio-cultural features and characteristics of the societies that invest so much into them.[19]

These socio-cultural perspectives contribute towards understanding the link between sport and society, and to explain the struggle to accept the mismanagement of SRC as more than just an inherent part of the game. The notion of deep-play games also proffers insights into why sport has evolved in line with changing social and cultural norms, and why jurisdictions have responded differently to SRC, based on the differing social and cultural settings.[20]

1 *Social Darwinism, the Machismo Effect and the Culture of Violence*

It's better to win ugly than to lose pretty.[21]

History is replete with examples of inordinately violent sports. The ancient Olympic sport of Pankration, known as an 'all out fight' permitted all contact except eye-gouging, biting and attacking the genitals of an opponent.[22] Today, a modified version of this ancient sport is mixed martial arts, a popular combat sport that allows striking and grappling, both

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15 *Agar* (Gleeson CJ) [14].

16 See below, chapter 7, part I ('Law, Sport and SRC').

17 Hayden Opie and Graham Smith, 'The Withering of Individualism: Professional Team Sports and Employment Law' (1992) 15(2) *University of New South Wales Law Journal* 313, 315-316, 324.

18 Dionne L Koller, 'Putting Public Law into 'Private' Sport' (2016) 43 *Pepperdine Law Review* 681, 728.

19 Kathleen Bachynski and Daniel S Goldberg, 'Youth Sports and Public Health: Framing Risks of Mild Traumatic Brain Injury in American Football and Ice Hockey' 2014(42) *Journal of Law, Medicine and Health* 323.

20 See below, chapter 5.

21 Tim Delaney 'The Functionalist Perspective on Sport' in Richard Giulianotti (ed) *Routledge Handbook of the Sociology of Sport* (Routledge, 2015), 18,19.

22 Donald G Kyle, 'Reviewed Work: Combat Sports in the Ancient World: Competition, Violence and Culture by Michael B Poliakoff' (1989) 94(1) *The American Historical Review* 106.

standing and on the ground.[23] This illustrates how much society is prepared to tolerate when balancing safety with spectacle, and how the filter of culture is contingent upon cultural norms and customary assumptions – two key characteristics that influence the shape of regulatory space.

The 'machismo effect' is another influence in male-dominated team sport. [24] This phenomenon reflects the societal glorification of participants, where the very nature of participation in sport sets the boundaries for appropriate masculine behaviour and hierarchy, relegating personal health and safety to secondary issues.

Consistent with the notion of competition and consent to harm, sport has been described as a form of social Darwinism, with its cultural roots in the early ages of human history when the demonstration of physical prowess was a determinant of social rank or warrior status.[25] Following Darwin's idea of survival of the fittest, Booth and Tatz describe the more superior athlete as the exemplar in sport.[26] Voluntary withdrawal from sport, therefore, signifies weakness and jeopardises rank or status.

Australia's sporting culture has developed along these Darwinian lines. A 1991 report raises concerns about an unacceptable level of violence in sport, stemming from a culture that was perpetuated by an unhealthy 'gang mentality'; a form of peer pressure that forces players to 'stand up for their mates'.[27] In other settings, sport-sanctioned violence has also been classified as 'warrior culture', and the 'dehumanised infliction of pain' as part of sporting culture.[28]

C *Regulatory Rearrangements: Prize-fighting and Boxing*

As a living culture, however, several examples show where regulatory rearrangements have resulted in shifts in society's tolerance and acceptance of harm in sport. The demise of gladiator sports, blood sports and the transformation of prize-fighting to boxing are

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[23] Mixed Martial Arts is a popular spectator sport, broadcast to nearly 800 million people. In 2016, the rights in the promotion company, the United Fighting Championship (UFC) sold for US$4 billion. The UFC describes itself as the 'fastest growing sports organisation in the world'. See the Official UFC Website <http://www.ufc.com/discover/ufc>.

[24] Alexander Hecht, 'Legal and Ethical Aspects of Sports-related Concussion: Merrill Hoge Story' (2002) 12 *Seton Hall Journal of Sport Law* 27, 36.

[25] Decker, above n 3, 70. Muscular Christianity was a defining feature in sport that distinguished amateurs and professionals in the mid-1800s in Australia. Booth and Tatz, above n 3, 48-50.

[26] Peter Craig, *Sport Sociology*, (Sage 3rd ed, 2016) 283.

[27] Australian Sports Commission, 'Sports Violence in Australia: Its Extent and Control' (1991) 23.

[28] Roger I. Abrams, *Sports Justice: The Law and the Business of Sports* (University Press of New England, 2010) 23.

prime examples. In cases where the limits of society's tolerance and acceptance are reached, adjustments are made to regulatory arrangements to meet community expectations, and to reflect the status of prevailing views as to the notion of harm in sport.

1 *Prize-fighting to Boxing*

The transformation from prize-fighting to boxing shows the link between sport and society, pointing up shifting perspectives as to the legitimacy of actors and regulatory arrangements in response to social and cultural norms. Prize-fighting was a sport inherited in Australia upon colonisation and had earlier been self-regulated through the codification of rules in 1743 that permitted any action 'except eye-gouging and hitting a fallen opponent'.[29]

(a) A Popular Colonial Sport

As a form of combat sport, prize-fighting was the original form of boxing, a popular form of entertainment in the post-colonial era, where punters and promoters profited from contests between convicts. An early account in 1814 of a 50-round 90-minute battle between convicts resulted in the 'battering into submission' of the challenger.[30] However, increased police surveillance of prize-fighting led to several prosecutions of participants and spectators alike, and the falling out of favour as a tolerated pastime.[31] This contributed to a decline in popularity from the 1860s, when prize-fighting fell below community standards due to integrity issues such as corruption and unacceptable harm to participants. Following the 1884 death of a prize-fighter, criminal prosecution resulted in the offender being imprisoned for 12 months for manslaughter.

(b) State Intervention

Prize-fighting was eventually banned due to state inventions, representing the legitimacy of state actors in regulating to minimise harm to the health of participants. These regulatory arrangements aligned to reflect society's reduced appetite for prize-fighting,

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[29] Wray Vamplew et al, *The Oxford Companion to Australian Sport* (Oxford University Press, 1992) 64-70.

[30] Wray Vamplew and Brian Stoddart, *Sport in Australia: A Social History* (Cambridge University Press, 1994) 40-57.

[31] In *R v Coney* (1882) 8 QBD 534 the attendance of spectators was evidence of aiding and abetting the assault in a prize-fight.

representing a shift in the tolerance and acceptance of harm, and significantly contributed to the eventual transformation into a more humane form of harm.[32]

2 *Boxing: A Noble Art or Unlawful Barbarism*

Boxing developed as providing a better proposition than the 'coarseness and disorder' of prize-fighting. Boxing is a combat sport and structured so that it produces rewards for the 'deliberate infliction of brain damage'.[33] It is somewhat paradoxical therefore to discuss boxing in the context of this research; where the risk of serious injury associated with the sport is high, with several deaths directly attributable to the sport.[34]

(a) Self-Regulation and the Codification of Rules in Boxing

In 1865, a codified set of modified and standardised rules for boxing were developed, incorporating rules and other measures to minimise harm to combatants.[35] Known as Queensberry Rules, these were based on the requirement for boxers and boxing matches to be conducted in a way to minimise serious harm, to follow a code and only 'win by the rules', rather than the former approach in prize-fighting of 'whatever it takes to win', involving the death or disablement of the opponent.[36] Significantly, boxing was one of the first sports to develop a written code of rules and organise a national championship run by a 'coterie of sporting aristocrats'.[37] The legitimacy of these non-state actors continued to prevail in the sport, and show that the self-regulated actions in those sports involving a high degree of harm need to be underwritten by robust and effective regulatory arrangements.

(b) A Form of Legal Immunity

The injuries sustained by boxers are well-documented, and the long-term health effects

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[32] Vamplew and Stoddart, above n 30, 41.

[33] Jack Anderson, 'The Business of Hurting People: A Historical Social and Legal Analysis of Professional Boxing', (2007) *Oxford University Commonwealth Law Journal* 35.

[34] Greg Stolz, 'Braydon Smith Left the Ring Smiling So Why Did This Young Boxer Die? *The Courier Mail* 17 March 2015 <http://www.couriermail.com.au/news/queensland/braydon-smith-left-the-ring-smiling-so-why-did-this-young-boxer-die/news-story/6209600cf5480e2d0ebfec732432f75f>.

[35] Measures designed to improve safety included the use of boxing gloves, the introduction of three-minute rounds, introduced ten-minute rounds and modified the playing rules to remove wrestling or hugging. See *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331 at 343 (McInerney J) ('*Pallante'*).

[36] Anderson, above n 33.

[37] Holt, above n 9, 20.

of multiple hits from the sport appear uncontentious.[38] Participants, however, appear undeterred and promoters continue to make millions of dollars from sell-out stadia and crowds of spectators watching the spectacle. Politicians are also enthusiastic promoters, calling for more events to support economic development.[39] Depending on individual views, boxing is considered an illustration of a 'noble art' or classified as 'unlawful barbarism'.[40] These two positions symbolise the opposite views across the spectrum of acceptance of harm as an inherent feature of the sport.

Anderson advances several reasons why boxing has been granted a form of legal immunity.[41] First, as an organised sport of boxing was a better proposition than the 'coarseness and disorder' of prize-fighting. Second, boxing held a cathartic purpose in society due to its 'muscular' and physical nature. Third, the state of medical science in the late 19th century was such that the sport was thought not to endanger the health of participants.

(c) A Fine Line

In a non-sporting context, the interference with a person's physical integrity could give rise to either criminal or tortious liability involving unlawful acts, or interference with physical integrity. In Australia, the court was prepared to accept the lawfulness of boxing, as explained by Justice McInerney in the following extract:

> Clearly, if boxing involves an assault or an assault occasioning actual bodily harm… it is criminal and therefore unlawful. But there are two difficulties in applying to boxing the concept of an assault. To be an assault the infliction of force to the person of another must be done: (1) in a hostile or angry manner, and (2) without the consent of that other person… Quite often in a boxing match the contestants will entertain no sentiment of anger or hostility towards the other. Ordinarily this will be so in a boxing exhibition and it will often be so in a match between professional boxers.[42]

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38 See above, chapter 2 part II ('Scientific Debate').

39 In 2017, the Queensland Government celebrated the boxing fight between Jeff Horn and Manny Pacquiao as delivering a 'win-win' and boosting the Queensland economy by $25 million. Joint Statement Queensland Premier Annastacia Palaszczuk and The Hon. Kate Jones 'The Battle of Brisbane Delivers Win-Win for Queensland' (3 July 2017) <http://statements.qld.gov.au/Statement/2017/7/3/the-battle-of-brisbane-delivers-winwin-for-queensland>.

40 Jack Anderson, 'Time for a Mandatory Count: Regulating for the Reform of the Professional Boxing Industry in the UK' (2006) 13(1) *Sport and the Law Journal* 40.

41 Ibid.

42 See *Pallante* 331 at 343.j

Whether the idea of 'no sentiment of anger or hostility' still holds true today is perhaps contestable, but certainly the notion of autonomy and consent to harm, within the rules of the sport, appear to be salient features and to support the maintenance of legal immunity.

(d) Injury Cost and Benefit

Health advocates have recently called for a ban on the sport, arguing that harm from boxing seriously endangers health, particularly from the risk of serious brain damage. The World Medical Association instigated the call for a worldwide ban of the sport, with the Australian Medical Association echoing this call in 2017. [43]

Irrespective of these medical concerns, the prevailing view in support of autonomy and consent considers that society is mature enough to empower citizens to take personal responsibility for decisions to participate in dangerous activities. In the modern era, society appears prepared to tolerate the risks associated with boxing, with the proviso that adequate safety measures are implemented around the sport to ensure the safety of participants.[44]

This is significant in the context of this thesis, as it reflects an expectation that dangerous sports be 'underwritten' by a set of rules or mechanisms that calibrate the balance between the safety of participants with the spectacle of the sport. In boxing, several Australian jurisdictions have enacted combat-sport-style legal regulation through legislation and state-backed sanctions for non-compliance.[45] The willingness and capacity of these regulatory interventions demonstrates a role for the state to play in managing and minimising risks associated with sport. As a 'neutral umpire', the state actors' role is within the remit as guardian of the public health, establishing a basis to later consider a greater role for the state to play in respect of SRC.[46]

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[43] World Medical Association *WMA Statement on Boxing* (2017) <https://www.wma.net/policies-post/wma-statement-on-boxing/>. Australian Medical Association, 'Dr Michael Gannon, 2GB, Boxing and Brain Injuries' 28 August 2017 <https://ama.com.au/tags/boxing>.

[44] Anderson, above n 40; The Economist, 'Laws on Boxing: Bouncing Back *The Economist* (online), 17 January 2015 <https://www.economist.com/node/21639526/all-comments>.

[45] See *Professional Boxing and Combat Sports Act 1985* (Victoria) ss 3,14. See also *Combat Sports Act 2013* (NSW) requiring the registration of combatants (s 9), industry participants and promoters as a participatory condition in the sport (s 20).

[46] See below, chapter 8 and chapter 9.

II ILLUMINATING THE PAST: CUSTOMARY ASSUMPTIONS AND DOMINANT ACTORS

In several fields of enquiry, 'illuminating the past' is an essential first step to help understand what has shaped and influenced present attitudes about an area under review.[47] In regulatory studies, Hancher and Moran recognise the importance of the historical context by explaining that 'understanding regulatory arrangements in the present depend[s] on understanding the historical configuration out of which they developed'.[48] Indeed, they explain this as a 'key analytical point', one fundamental to understanding the terms upon which actors enter regulatory space and defend their positions at the 'moment of crisis'.[49]

A broadly conceptualised view of regulation as a system of social organisation supports the notion that regulation has been a feature of civilisation since organised civil society began.[50] Regulation is not a new phenomenon in Australia, and has been subject to ongoing reorganisation aligned to shifting norms and trends at least since the time of European colonisation in 1788.[51] A historical overview of the development of Australian sport provides the context within which to understand the terms upon which actors currently regulate SRC, and control and influence the regulatory space.

A *Colonial Foundations: Sport and Regulation 1788 to 1900*

The production and delivery of sport was not within the remit of early colonial governments. Instead, their focus was on establishing political and economic stability, perpetuating 'the tight hand of government' wrapped firmly around political and economic development in the new colony.[52] Sport, on the other hand, was considered a private pursuit, underpinned by the notion of amateurism. This transplanted culture viewed sport as the antithesis of work — that profiting from sport was socially repugnant, and only the upper class enjoyed the privilege of leisure time to pursue sporting activities.[53] Sport, therefore, was a private matter beyond the remit of the state, where

47 Hocking and Reddy, above n 8.
48 Hancher and Moran, above n 1, 285.
49 Ibid 278.
50 See above, chapter 3 part II ('Regulation: Actors and Rationales).
51 Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017) 36-37.
52 Ibid 14
53 Daryl Adair and Wray Vamplew, *Sport in Australian History* (Oxford University Press 1997) 40.

participants chose to come together in the pursuit of common interests. State actors adopted a laissez faire approach to sports regulation.

The transplantation of these early sporting cultures into the new colony established the foundation for the development of cultural and customary assumptions about the actors' roles. Sport was not, therefore, considered an economic activity, falling even further beyond the regulatory consciousness of early colonial governments.

1 *Growing from the Grassroots: Establishing the Legitimacy of Non-State Actors*

Non-state actors participated in early forms of unincorporated associations and were motivated not by profit but by promoting the production and delivery of sport within their local communities. This mission orientation established a not-for-profit (NFP) ethos. These originating characteristics fostered the development of many cultural and customary assumptions as to the legitimacy of actors, and the power to voluntarily self-regulate their sporting activities for altruistic purposes.

As unincorporated associations, clubs became further involved in organising competitions and aiding the production and delivery of the sport to members of the public who fell within the appropriate social class at the time. Rules and decisions were made by these early voluntary associations, which exercised complete autonomy and freedom from direct state interference. In the late 1800s, more organised forms of sport developed through the codification of rules, and early iterations of international and national sports administration systems began to emerge.

At every stage in these formative years, non-state actors were instrumental in establishing clubs, organising competitions and setting the rules and standards for sport. The legitimacy of non-state actors was established, and early regulatory arrangements were effective mechanisms that reflected the composition of the regulatory space of Australian sport at the time.

2 *Early State Support of Sport*

While early Australian governors adopted a laissez faire approach to regulating sport and were unlikely to have contemplated a role in directly providing and delivering sport, they were nonetheless prepared to offer their colonial government support in many direct and indirect ways. Climes notes that early colonial governors interpreted their role as

providing support for sport, rather than controlling or directly funding private sport.[54]

The rationale for state support was likely to have been based on advancing public policies in recognising the cohesive social role sport played in bringing people together (albeit retaining the socially segregated system), thereby contributing towards political stability. This laid the foundations for these early customary assumptions as to the role and function of state actors in Australian sport.

B *Sport in Post-Federation Australia*

Towards the late 18th century, a distinctively Australian sporting culture and national sporting identity developed. Earlier-formed cultural and customary assumptions shifted away from British traditions, particularly in respect of social segregation, moving towards more egalitarianism.[55] The legitimacy of non-state actors over the regulatory domain, however, remained intact and was reinforced during this period.

1 *The Withering of Amateurism*[56]

Several sports had relaxed or entirely abandoned the notion of amateurism; they recognised the rights of some sports participants to be paid for participation, where earning a living through sport was considered an acceptable form of work.[57] As evidence of shifting cultures and norms, this period witnessed what Opie and Smith describe as the 'withering of amateurism', on the one hand, and 'creeping professionalism', on the other.[58]

The popularity and development of team sports grew during this period. As these sports expanded, it became necessary to coordinate and organise the competitions in a more streamlined and structured way. Many sports introduced a uniform and codified set of rules, more formally organised competitions and premiership events.

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[54] Examples of early colonial government support included the granting of Crown land to facilitate the playing of sport, the gazettal of public holidays to enable the playing or watching of sport by more Australians. See Booth and Tatz, above n 3, 25,26. Other examples include the use of convict labour to build sporting infrastructure. See Adair and Vamplew, above n 53, 2. Travel was funded in part by colonial governments for Australian athletes to compete at international events. See Vamplew et al, above n 30, 140.

[55] Adair and Vamplew, above n 53, 1-22.

[56] Booth and Tatz, above n 3, 55.

[57] An example in Australia was the sport of tennis, where Rod Laver was the inaugural Australian to win the tennis Grand Slam as a professional player in the 1960s. See Vamplew et al, above n 17, 11-14.

[58] See Opie and Smith, above n 17.

As sport became more organised, clubs and associations became more formalised. While early corporate law regimes were limited in scope in terms of the permitted activities entitled to enjoy the privileges of using the corporate form, as time progressed, the regime was extended to recognise other forms of incorporated entities. Sporting clubs and associations began to use the corporate form, registering their organisations under the various corporate law regimes at the time.

2 *Constitutional Powers and Sport*

The shift in sporting cultures during this period coincided with colonial governments combining to form the Commonwealth of Australia. Since Federation, the role of state actors is based on the divided nature of government under the Australian Constitution.[59] Specific heads of legislative power, reserved under the Australian Constitution, delineated the legislative powers between the ACG and the states.[60]

'Sport', as a domain or activity, is not referred to in the Constitution as a head of power or as falling within the exclusive power of the Commonwealth.[61] This supports the contention that sport was never contemplated as falling within the remit of the newly formed ACG in 1901, and is consistent with the earlier-described cultural assumptions and the laissez faire approach of early colonial governments. Moreover, no legislative framework directly applied to sport in the former colony, so no state law needed to be preserved at the time of Federation.[62] Instead, each state and territory eventually established separate departments of sport and recreation, relying on the powers vested in the states and territories under the Constitution, and built upon the pre-existing cultural and customary assumption that states would continue to 'lend a helping hand' but not directly intervene in sport.[63]

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59 See *Australia Constitution* ss 51, 52.

60 Ibid ss 51 (i) – (xxxix).

61 Ibid ss 51, 52.

62 Ibid s108.

63 There is one notable exception during this period. The crisis of World War One 'punctuated' the regulatory domain of sport and triggered direct legal regulation through the enactment of the *War Precautions (Control of Sports) Regulations* 1917. This legislation prohibited the 'holding of any race meeting for horses or any competition or contest in boxing, football, foot-racing or other athletic game or sport'. See *War Precautions (Control of Sports) Regulations 1917*, (Cth) r. 2.1.

3 *State Engagement in Sport*

There was greater state engagement in sport during this period, primarily due to the recognition of sport as a vehicle to advance public policies, based on the strong public interest in promoting physical fitness.[64] Western Australia was the first Australian state to establish a state Ministry for Recreation in 1969.[65] At the federal level, a formal ACG sports ministry was created in 1972, influenced by the lobbying efforts of the former Australian Sports Medicine Federation.[66]

A cross-jurisdictional forum for sport and recreation ministers from states and territories and ACG was established, providing a national framework for sport but also recognising the expectation that states and territories match the federal grants to support sport.[67] The objectives of the MSRM were to identify areas of state focus in respect of sport, and develop policy priorities as and when required. The ACG supplemented state and territory activities by funding and administering sports within Australia under the authority of its general spending power.

As state actors took more interest in sport, several policy initiatives were designed to fund sporting facilities, and programs were created to assist sports organisations. State assistance in providing finance to sport illustrates forms of economic regulation. Subsidies and grants are two forms of economic regulation, and sport was the beneficiary of policies developed to fund and encourage sport during this post-Federation period. These forms of economic regulation, however, were based primarily on the earlier-formed assumptions as to the role of state actors.

The investment of public funds represents a critical stage in the evolution of the regulatory space and signifies a turning-point in respect of the balance of actors within the space. Explicitly, the investment of public funds potentially laid the foundations upon which to reorganise the regulatory space and established the legitimacy of state actors in having a more significant role to play in regulatory arrangements. However, the prevailing

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64 For further discussion on the history of state support of Australian sport, see John Bloomfield, *Australia's Sporting Success: The Inside Story* (University of New South Wales Press Ltd, 2003) 109-149.

65 Ibid 35.

66 Ibid 36, Appendix A, 242. The Australian Sports Medicine Federation is now known as Sports Medicine Australia.

67 This group is now called the Meeting of Sport and Recreation Ministers (MSRM) but the first cross-jurisdictional approach was the establishment of the Australia Sports Council in 1974 later going into 'limbo' with the dismissal of the Whitlam Government. See Bloomfield, above n 64, 41.

cultural and customary assumptions were still firmly in favour of voluntary and autonomous self-regulation. Indeed, the role of the state during this period closely followed the earlier colonial governments by 'lending a helping hand', but not directly intervening in sport.[68]

C *Sport in The Commercial (And Global) World*

> *Sport has gone past the childhood realm of 'play'. It will be big commercial business and a powerful force for national and state pride, community well-being and health*.[69]

Consistent with global trends in other industries, a full-blown sports industry developed in Australia from the mid-1980s, built upon the exploitation of commercial opportunities that did not previously exist.[70] This development was influenced by domestic and global conditions and the increased capacity of non-state actors in control of their sports to exploit these opportunities.

Australian sport was also influenced by the interconnectivity associated with globalisation, and the increased coverage of sport contributed to significant growth, both in terms of participation and access to economic markets.[71] Additional layers of regulatory oversight were created through the involvement of international non-state actors who engaged in standard-setting, information-gathering and behaviour modification.[72] These factors influenced the development of a more formalised transnational regulatory system, creating vertically integrated frameworks across jurisdictional boundaries.

Domestically, the granting by state actors of broadcasting licences and the introduction of subscription television in the mid-1990s significantly impacted the development of sport in Australia. The televising of sport led to increased corporate sponsorship and access to a broader market of consumers of goods and services. The development of this commercial division of sport also introduced new actors into the regulatory space.

As new broadcasting technologies emerged, and coverage increased on dedicated sports channels, the value of broadcasting, licensing and sponsorship rights increased and

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68 Jim McKay *No Pain, No Gain? Sport and Australian Culture* (Prentice Hall, 1991) 74-75.

69 Victoria Department of Youth, Sport and Recreation, *Sport the Ultimate Dividend: A Public Discussion Paper* (1982) 4.

70 Opie and Smith, above n 17, 315.

71 Joseph Maguire, *Global Sport: Identities, Societies, Civilisations* (Polity Press, 1999) 3.

72 See below, part III ('Australian Sports System').

became value rights to assign.[73] The higher the market share, the higher the negotiating power of those non-state actors who were considered the legitimate actors over the regulatory space of their sports. Consequently, several sports secured lucrative commercial arrangements, worth billions of dollars in revenue for the sport.[74]

As commercial actors entered the space, they also competed for power with other actors to control and regulate aspects of sport. For example, corporate sponsors and broadcasters are powerful actors who can exert influence through transactional regulatory arrangements and contractual terms, controlling aspects of the sport at the elite level.[75]

1 *Commercialising Sport*

During this period, the 'business' of professional sport in Australia developed but remained centrally rooted in the NFP sector. Many sports engaged experienced corporate directors and executives, drawn from the commercial sector and bringing with them their business acumen and management styles.[76]

Non-state actors continued to voluntarily self-regulate their regulatory space, but instead of the earlier versions of informally organised competitions and governance structures, these organisations developed complex and highly organised structures that modelled the corporate characteristics of commercial entities and adopted complex internal governance regimes. Corporate, marketing and operational departments also developed to expand the brand and the business of the sport.

Administrations, players and members had learnt, from earlier experiences, that organised sport meant recruiting and retaining skilled players to achieve success.[77] The notion of amateurism had been replaced by professionalism, facilitated by the 1986

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[73] Paul Turner, 'Regulation of Professional Sport in a Changing Broadcasting Environment: Australian Club and Sport Broadcaster Perspective, (2012) (15) (1) *Sport Management Review* 43.

[74] Daryl Adair and Wray Vamplew, *Sport in Australian History* (Oxford University Press, 1997) 6; Travis King and Ben Guthrie, AFL signs new six-year, $2.5 billion broadcast rights deal, August 18, 2015, http://www.afl.com.au/news/2015-08-18/afl-on-the-verge-of-signing-new-tv-deal>.

[75] To illustrate, corporate sponsors exclude competing sponsors entering into commercial arrangements with players in the AFL. Broadcasters interests govern the scheduling of televised games in the national competition.

[76] John Stensholt, 'Meet the Boardroom Players' *Australian Financial Review* (Sydney) 7 September 2012, 1.

[77] Booth and Tatz, above n 3, 54.

decision by the International Olympic Committee (IOC) to remove this requirement from Olympic competition.[78]

Increased revenue raised the capacity of clubs to pay higher salaries. Winning led to increased media coverage and spectator support. Success and spectator support then led to increased sponsorship, where professional sporting clubs regularly feature in the financial press and are classified in a 'Top 30' list regarding revenue, profitability and asset value.[79] Indeed, for several decades, many sports have reflected significant retained earnings on their year-end balance sheets.[80]

The development of the 'business' of producing and delivering professional sport by these non-state actors became key priorities. The NFP characteristics of these non-state entities did not hinder their efforts to become influential lobbyists and brand entrepreneurs. State actors and corporate investors were targeted to invest more funds into their sports.

In reconciling the development of the 'business of sport', courts,[81] scholars[82] and, moreover, sports administrators [83], align sport played at the professional level with the entertainment industry; they conclude that at the professional level, sport operates as a commercial business within a market and is engaged in trade and commerce.[84] In this context, professional sport is a significant branch of the entertainment industry, with participants operating to promote a business enterprise, with governing bodies and teams classified as trading corporations,[85] simultaneously pursuing both sporting and commercial interests.

(a) A Two-tiered Market and Competing Priorities

The development of professional sport created a multi-tiered system where SGBs managed the production and delivery of the sport to benefit both its professional and community tiers. Importantly, while professional sport developed during this period,

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78 Olympic Charter, above n 14.

79 Andrew Heathcote, 'Not Just a Game', *Business Review Weekly* (Sydney), August 2 - 8 2012, 18.

80 See below, chapter 7 part II ('Australian football and the AFL') and part III ('Rugby League and the NRL').

81 See *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 142 CLR 190 where issues involving the enforceability of contractual restraints on a football player were held to be unreasonable restraints of trade. See also *Hughes v WA Cricket Association* (1986) 69 ALR 700.

82 Hayden Opie, 'Medico-Legal Issues in Sport: The View from the Grandstand', (2001) 23 *Sydney Law Review* 375, 404. For an economic perspective, see Stefan Szymanski, The Comparative Economics of Sport (Palgrave Macmillan, 2010) 1.

83 NRL Club, Penrith Panthers Chief Executive Warren Wilson sees the club as being part of the entertainment industry. See Heathcote, above n 79, 21.

84 See *Buckley v Tutty* (1971) 125 CLR 353 at 380.

85 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 142 CLR 190.

community clubs continued to organise the delivery of sport to participants at the community level.

Funding, however, was typically provided directly to the SGBs to distribute as they unilaterally determined, across all levels of the sport. Consequently, community levels became even more dependent on the social capital contributions of members, volunteers and associations directly connected with the club. In community sport, financial support mainly comes from membership subscriptions, social clubs, fundraising efforts and some state and private sponsorship, and is a 'closed loop' in the context of access to finance.[86]

Recognition of SGBs over both professional and community sport created a two-tiered market in Australian sport and developed competing organisational priorities for SGBs. This in turn created a duality of functions and roles in organising the production and delivery of sport to the Australian public.

(i) SGBs: Dual Roles

The duality of roles played by the SGBs necessarily involves competing priorities. A review of the annual reports of several SGBs provides evidence of these competing functions and organisational priorities.[87] On the one hand, they develop the professional level in the sport, while on the other, they are responsible for promoting public policies to encourage more participation in community sport — a tier heavily dependent on social capital, volunteer contributions and limited fundraising opportunities.[88] This two-tiered market is relevant to consider in the context of actors who can regulate SRC.

Notwithstanding the two-tiered market, SGBs retained their NFP status. Tensions arose between the social purposes and mission orientation, and the commercial interests of the business side of the sport. As an example, the mission orientation of actors in the NFP sector is to pursue and advance a public purpose rather than to make a profit.[89] These

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86 CCH Commentary *Australian Sports Law* [24-100].

87 For example, the AFL Annual Reports are organised in the order of the elite professional level of Australian football, with reports from the general managers of commercial and corporate departments making up a large part of the content. See AFL Annual Report 2015.

88 Government of Western Australia, Office of Sport and Recreation*, Strategic Directions Report 6 2016 – 2020*, 21.

89 John Farrar and Pamela Hanrahan, *Corporate Governance*, (Lexis Nexis Butterworths, 2016) 463- 471.

'publicly orientated' values are designed to render an NFP entity less susceptible to market pressures than those commercial firms operating in the for-profit sector.[90]

While several sports have achieved significant increases in revenue through commercial arrangements and have improved the sustainability of their sports, state actors continued to adopt a laissez faire approach to regulating sport, adopting a relatively light touch when monitoring performance, or requiring transparency and formalised schemes of accountability within the operation of these sports. To clarify, there are no 'checks and balances' to make sure that the distribution of taxpayer funds within the sport is 'cascading down' for the benefit of all tiers within the sports pyramid. Only minimal reporting is required under the CLG status, and the exclusion of sport as a charity means that no disclosure is required under current regulatory arrangements.[91]

The corporatisation of sport and the creation of a two-tiered market are important developments to consider in understanding the regulation of sport. Non-state actors developed highly complex organisational characteristics within a cultural environment, based on many underlying cultural and customary assumptions. At the same time, they retained legitimacy over the domain and continued to operate within the NFP sector, and mostly free from state interference. Moreover, the many large SGBs capitalised on business opportunities to develop resources, knowledge and other forms of capital.

2 *National State Sports Agencies*

Sport, as a regulatory domain, continued to develop free from state interference, perpetuating the voluntary self-regulation. State actors also recognised the value of sport as a mechanism that could promote state policies and use sport as a public investment vehicle. This triggered a flurry of policy activity in and around sport, including several generous funding and development policies. Successive state actors continued to offer sport a 'helping hand', perpetuating the earlier-formed customary assumptions towards regulating sport. [92]

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[90] Christine Parker Self-Regulation and the NFP Sector Christine Parker Self-Regulation and the Not-For-Profit Sector (State Services Department, Victoria 2007), 15.

[91] See *Australian Charities and Not-for-Profits Commission Act 2012* (Cth), ss 205-5 and 25.55. A sporting entity does not fall within the ambit of sub-type of entities required to be registered under the Act.

[92] McKay, above n 68, 74-76.

The ACG also established several sports agencies to attend to sporting matters. The first was the Australian Institute of Sport (AIS), established in 1981 with the specific sports–science focus on high-performance sport to improve the performance of athletes, and to increase Australia's international success and sporting reputation.[93] The prevailing political views supported the development of a 'top-down' approach to sport funding so that investments in developing elite-level athletes would increase participation at the community level. Moreover, funding SGBs was thought to ultimately 'cascade-down' to community grassroots sport.[94]

Later, in 1985, the *Australian Sports Commission Act 1985* was passed, establishing the ASC as a statutory authority to oversee the governance, management and funding of sport, primarily responsible for the implementation of national policy. The ASC was given a legislative mandate to encourage and provide for participation and achievement by Australians in sport.[95] As the ACG agency responsible for the delivery of services to sport in Australia, first steps were taken towards the development of an Australian sports system.

3 *A Contested Space*

The ASC Act provides early evidence of a more formalised approach by state actors in sport and signified a shift towards greater state engagement. The shift in balance, however, was not unanimously supported.

Parliamentary debates at the Second Reading of the *Australian Sports Commission Bill* in 1985 give insight into the polarised views around the nature and extent to which the ASC should be involved in regulating sport.

The underlying philosophical opposition to the ASC Bill was explained in the following extract,

> Our position is based not on perversity but on our fundamental philosophy and view of the role and responsibility of government. … the rights of the individual Australian and,

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93 The AIS amalgamated with the ASC in 1989 under the *Australian Sports Commission Act 1989* (Cth) ('ASC Act').

94 McKay, above n 68, 77-78.

95 There are six objects under the *ASC Act 1989* (Cth).and all could be described as facilitative or enabling. To illustrate, s6 (1) (a) – (f) are stated 'to encourage; to provide; to improve; to foster'. See *ASC 1989* (Cth) s 6 (1).

> by extension, the right of Australian sport to *self-determination* [emphasis added]. …We believe that government's proper role is to provide a framework within which individuals are free to associate, determine their priorities and objectives, and pursue them as they see fit. [96]

Later, in explaining concerns around the politicisation of sport,

> Australian sport should not be subject to the control, actual or potential, of a quango in turn controlled by the Minister of the day, staffed by public servants and required to operate within the sport policy of the government of the day. …[97]

While the mandate of the ASC was to 'partner' with the Australian sports sector, the above shows the struggles to find the parameters around state and non-state involvement in this regulatory domain.

A modern view on the role of the state in sport is reflected in the views of former Prime Minister Kevin Rudd in 2012, noting,

> The National Sporting Organisations, not governments, run sport in Australia. They perform a vital role in ensuring Australians have access to many different sports. They are responsible for developing athletes, all the way from the youngest child to our Olympic champions. They are the backbone of sport in Australia and *must be nurtured and supported* [emphasis added] to help sport fulfil its enormous potential.[98]

The above discussion illustrates the shifting role of state actors in Australian sport. The shifting balances highlights contests for power and polarised views about the nature and extent of state involvement, and how the space would be shared. With the increased investment of taxpayer funds in sport, state actors were likely to be influenced by additional public and political factors.

These power struggles contribute towards understanding the role of state actors in regulating SRC for two reasons. First, this provides evidence of the legislative mandate on the part of the ASC, a key criterion for determining the legitimacy of regulatory actors. Further, the nature of a partnership approach to the relationship between the ASC and SGBs establishes a collaborative, supportive framework rather than a coercive or

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96 Commonwealth, *Australian Sports Commission Bill Second Reading* 16 May 1985, 2558 (Charles Blunt).
97 Commonwealth, *Parliamentary Debates*, House of Representatives, Thursday 16 May 1985, 2558, 2559.
98 Commonwealth, *Australian Sport: Emerging Challenges, New Directions* (2008) 4.

controlling one. This underpins the regulatory posture of the ASC as a state actor, an essential insight into its motivation to proactively engage in regulating SRC.

III AUSTRALIAN SPORTS SYSTEM: ACTORS, RELATIONSHIPS AND RESOURCES

How is sport regulated in Australia? Who are the actors who possess the key characteristics to dominate the shape and influence of the regulatory space of sport in Australia? This part will identify these key dominant and subsidiary actors.

As earlier noted, the influence of globalisation created a complicated network of actors across multiple levels ranging from international to local. Most Australian sports operate as part of an international sports network, affiliated with an international governing body and classified as Olympic or non-Olympic sports.[99] Other indigenous sports operate through a national organisational body and not part of a global network.

A *The Regulatory Space*

The production and delivery of sport as part of an Australian sports system is, depending on the sport, organised by multiple actors operating within international, national, state and local self-regulated systems. Sports participants are important actors in the regulatory space and are the targets of many regulatory arrangements to alter, influence or change their behaviour. In many cases, transactional forms of regulation through contracts are entered into between ISFs and SGBs; between SGBs and clubs in the national competition; between state actors and SGBs, to name a few.

The 'ecosystem' of Australian sports is illustrated in the diagram 6.1.

[99] Ken Foster, 'Is there a Global Sports Law?' in Robert C.R. Siekmann and Janwillem Soek (eds), *Les Sportiva: What is Sports Law?* (T.M.C. Asser Press, 2012) 35,37.

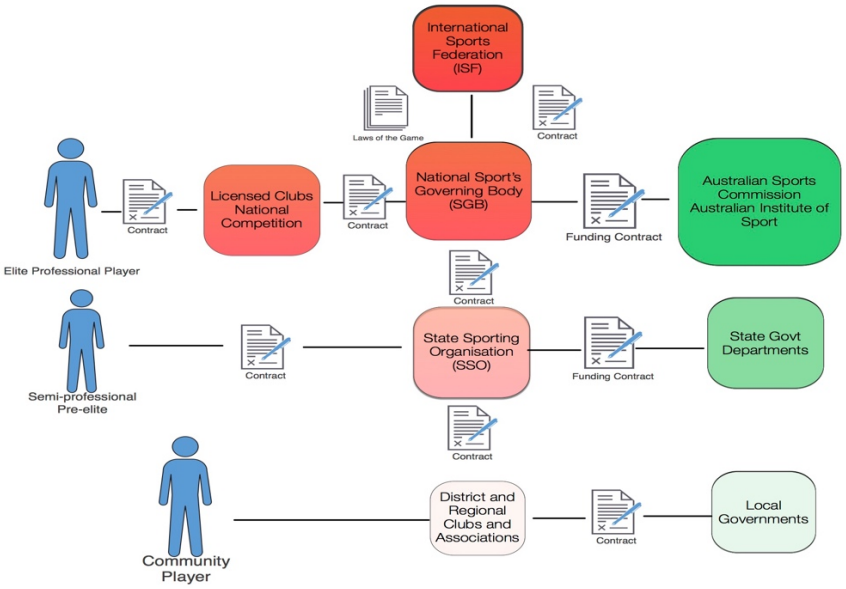

Diagram 6.1 Australian Sports System

B *Private Non-State Actors*

1 *Pyramid Model*

In the self-regulated hierarchy, three tiers within the pyramid model are organised in descending order from elite (professional), pre-elite (semi-professional) to community sport. This structure provides a pathway for those participants aspiring to achieve elite status in the sport. Through a series of interlocking arrangements, a vertical silo is created around each sport.

At the professional level, financial rewards are available to a small number of talented players who embark upon professional careers, with some acquiring celebrity status that can lead to lucrative contracts, sponsorships and product endorsements. Those who participate at this level are focused on turning their 'sporting talent to account for money'.[100] Indeed, the Australian Taxation Office has developed a special guide

[100] See *Spriggs v. Federal Commissioner of Taxation* [2007] FCA 1817 at [52].

'recognising that sporting talent derives income which the ATO is happy to assess'.

Community sport, where most sporting activity occurs, is structured as the lowest tier of this vertically integrated pyramid.[101] This level attracts the highest number of participants, with Australian Bureau of Statistics (ABS) data identifying 4.7 million Australians aged 15 years and over participating at this level.[102] The ASC has also reported that 3.5 million children, aged 5–14, participated in organised sport outside of school hours, and in sports clubs identified as a primary avenue for children to be active.[103]

The education system also delivers sport as an element of school curricula. As part of an administrative system, actors who participate in the education system carry additional layers of responsibility and non-delegable duties. Several national policies in Australia have been designed to develop a nationally coordinated sports-education program and increase participation at this level, based on a shared-responsibility approach among schools, sporting organisations and community groups.[104]

2 *Key Non-State Actors in the Australian Sports System*

Within the Australian sports system, many non-state actors within the regulatory space of sport have varying degrees of influence or control or can collectively alter or influence the behaviour of others. Target groups include players, parents, carers, communities, fans, clubs, teams, agents, players' associations, trainers, referees, medical and allied health professionals, sponsors, commercial partners and insurers, to name a few.

It is beyond the scope of this research to examine the characteristics of all these entities. Instead, the following discussion focuses on establishing the legitimacy of key non-state

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[101] Deborah Healey, 'Governance in Sport: Outside the Box?' (2013) 23(3) *The Economic and Labour Relations Review* 39; James A.R Nafziger, 'A Comparison of the European and North American Models of Sports Organisation' (2008) 3-4 *International Sports Law Journal* 100.

[102] Australian Bureau of Statistics, *Participation in Sport and Physical Recreation, Australia 2013-2014*, Cat No.4177.0 <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4177.0>.

[103] Australian Bureau of Statistics *Children's Participation in Cultural and Leisure Activities in Australia 2000-2012* Cat No. 4901.0 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4901.0Explanatory%20Notes1Apr%202012?OpenDocument>.

[104] The ACG developed the AUSSIE Sports Program in 1986. See Clearinghouse for Sport, *Aussie Sports* <https://www.clearinghouseforsport.gov.au/knowledge_base/sport_participation/program_and_product_development/aussie_sports>. In 2015, the Sporting Schools program allocated $200 million to help schools increase participation. See Australian Sports Commission, *Sporting Schools* <https://www.sportingschools.gov.au/>.

actors who have significant roles to play in regulating sport, and therefore are likely to be key actors when later considering the regulatory space of SRC as the activity under review.

3 *Organisational Characteristics of International Sports Federations (ISFs)*

In Australia, many sports have international or global connections with standard-setting and rule-making organisations based overseas. These transnational relationships are part of a landscape that involves a 'highly dense network of organisations' across multiple levels within the global sports network.[105] Additional layers of complexity are involved if the sport is also recognised as part of the Olympic Movement.[106]

(a) A Transnational System

For those sports operating within of a global sports network, ISFs set the universal global standards through the code of laws and rules applicable to them (the 'playing rules' or 'laws of the game'). They control and govern international sport as voluntary, self-regulated, non-state actors. In most cases, ISFs adopt a corporate form to structure their operations, with many based in Switzerland due to the regulatory exemptions offered to NFP associations.[107]

(b) The Regulatory Influence of ISFs

Foster describes ISFs as 'autonomous organisations and independent of national governments'.[108] The binding nature of this 'constitutive core of the sport' and the agreement to submit to the authority and jurisdiction of ISFs are defining characteristics of the transnational system in sport, and garners legitimacy to ISFs as dominant actors in the transnational sports system.

The ISF for the sport sits at the apex of the sporting pyramid, a hierarchical model establishing a 'chain of interlocking associations responsible for the sport's governance at each level'.[109] ISFs can exercise control over many key functions in the promotion, organisation and regulation of the sport. Moreover, ISFs retain vertical oversight and control of their sport through this network of interlocking organisations across diverse

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[105] Grant Jarvie, *Sport, Culture and Society: An Introduction* (Routledge, 2nd ed, 2012) 196.

[106] Olympic sports are required to comply with the Olympic Charter and governed by the requirements of the IOC and the relevant National Olympic Committee. See Olympic Charter, above n 14.

[107] The Swiss jurisdiction offers lower levels of accountability and regulatory exemptions for not-for-profit associations. For discussion on the governance of ISFs, see Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (Bloomsbury Profession, 3rd ed, 2014) [A3.5]-[A3.8].

[108] Foster, above n 99,36.

[109] Lewis and Taylor, above n 107, [3.11].

geographical locations. These regional and national organisations act as agents of the ISF and participate in delivering and producing sport in a specific jurisdiction.

The nature and extent of this oversight and control will vary across sport but have several common features. First, many intervening layers exist within this complex organisational hierarchy. Second, ISFs are NFP associations, with many adopting the corporate form as limited liability companies.[110]

ISFs control sport by 'cutting across traditional boundaries'.[111] ISFs can influence and alter the behaviour of participants, regardless of where the sport is played. In this way, ISFs perform an essential role in the delivery of sport to the public, albeit through many intervening layers, within the institutional and legal structure of a non-state actor.

(c) Local Resistance and Dominance of ISFs

The nature and extent of ISFs' influence varies across sports, playing levels and jurisdictions. Participants follow the technical rules of the sport, regardless of location. Enforcement and compliance, however, are entirely dependent upon the formality of the competition and the capacity and motivation on the part of the ISF to monitor them. The ISF is unlikely to enforce compliance at the more informal levels of participation, and the exercise of any 'real and practicable' oversight has been recognised as a constraint in the transnational system.[112]

Another factor influencing the dominance of ISFs is the nature and extent of local resistance, in the jurisdiction where the global standards and rules are intended to be implemented and enforced. In some cases, the local resistance is weak. In these cases, the global standards of the ISF will be the dominant feature, with the ISF recognised as a dominant actor. The global sporting standards, therefore, provide the regulatory framework and are 'absorbed by the domestic systems of law and regulation'.[113] In these cases, other actors participate in the regulatory regime, particularly regarding implementation and enforcement of the ISFs' standards.

In cases where the local resistance is strong, power can be disbursed throughout other non-state actors, with the capacity to exert significant influence over the sport. The global

110 Ibid [3.29].
111 Simon Gardiner et al, *Sports Law* (Routledge, 4th ed, 2012) 77-83.
112 *Agar v Hyde; Agar v Worsley* (2000) 201 CLR 552 (Gleeson CJ) [90].
113 Foster, above n 108.

standards are overridden and the role of the ISF relegated to a subordinate regulatory position.

4 *Olympic Sports*

As noted above, additional responsibilities arise for those sports recognised as Olympic sports. The Olympic Charter describes the nature and extent of the responsibilities of ISFs, involving establishing and controlling the rules of sport; determining the structure and governance of their organisations; recognising the rights of elections free from any outside influence; and responsibility for ensuring the principles of good governance are applied.[114] These are essential considerations in determining the nature and shape of the regulatory space of many Olympic sports in Australia, and provide additional layers of oversight from the IOC and the Australian Olympic Committee (AOC).[115]

5 *Organisational Characteristics of SGBs*

In Australia, SGBs are recognised as the peak representative body for their sport. SGBs are often referred to as a national sporting organisation (NSOs), particularly when describing the relationship with state actors.[116] In terms of regulatory oversight, SGBs are powerful actors and capable of exerting significance influence as shown in the following extract on the role of the AFL and NRL in a 2013 Australian Senate Inquiry

> In professional football, the governing body is the dominant actor in the regulatory space and has the capacity to control and influence [the] 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.[117]

As earlier explained, sport can be indigenous to a particular jurisdiction or part of an international network, affiliated with an ISF. In the former case, SGBs independently set

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[114] Olympic Charter, above n 3.

[115] Holmes, above n 14.

[116] For example, the ACG recognises 91 sports organisations and provides significant funding based on their status as peak representative bodies. The ASC refers to these sports organisations as NSOs. See Boston Consulting Group, 'Intergenerational Review of Australian Sport' (Australian Sports Commission, 2017) 39. See also Lisa Gowthorp, Kristine Toohey and James Skinner 'Government Involvement in High Performance Sport: An Australian National Sporting Organisation Perspective' (2016) 9 (1) *International Journal of Sport Policy and Politics*, 153, 154.

[117] Department of Regional Australia, Local Government, Arts and Sport, Rural and Regional Affairs and Transport References Committee, *The Practice of Sports Science in Australia, 2013 Report*, 94 [7.18].

the standards and rules for the sport, with no formal links or controls imposed by international bodies. In the latter case, SGBs act as delegates of ISFs in the relevant jurisdiction and organise and administer the national competition for their sport. SGBs, therefore, are responsible for the national governance, development, discipline and funding of the sport.

In performing this role, SGBs can have sole or shared authority, and be responsible for standard-setting and rule-making to ensure that the sport can be played as safely and skilfully as possible. This rule-making function is of vital importance in establishing a safe sporting system and establishes the legitimacy of non-state actors to regulate the sport.

SGBs have rule-making power, customised to the local conditions of the national competition. Further, SGBs typically implement and enforce the playing rules and other rules set by ISFs that apply to all who participate in the national competition. Usually, any amendments to the playing rules are introduced after consultation, but the ultimate rule-making power rests with ISFs for international sports, or with SGBs for indigenous sports.

The sharing of responsibilities for various parts of the regulatory process—the design and development of regulatory instruments, implementation, administration and enforcement, and post-implementation evaluation—demonstrates the fragmented nature of the regulatory system in sport. This becomes even more complicated when the sport is part of an international network.

When making the rules and setting the standards for a sport, the target group includes the participants who play the sport. Participants at all levels agree to abide by and be bound by the rules and laws of the game, according to the standards set by the SGB. Some arrangements are formalised through legal contracts; others, through social contracts, and evidenced by participation in the sport. The higher the level of the pyramid, the higher the contractual complexities associated with the parties' relationship.

C *Non-State Actors: Relationships and Fragmented Control*

The relationships between ISFs, national associations and sports participants are important ones to consider in determining the nature and extent of control and influence in the regulation of SRC. Several sports with high rates of SRC incidents have both global and Olympic connections within a transnational network of actors.

1 *Interconnecting Relationships*

To clarify the nature of these relationships, the sports of rugby union and soccer are regulated within a complex network involving international and national non-state actors. The ISF for rugby union is World Rugby (WR), an association of member unions, based in Dublin. In soccer, the ISF is Fédération Internationale de Football Association (FIFA), based in Switzerland. Both are also recognised as Olympic sports and therefore required to comply with the Olympic Charter.[118]

These ISFs employ a range of regulatory mechanisms to control, alter or influence others in the sport. To explain, WR, the ISF in the sport of rugby union, employs transactional regulation to bind member unions or associations to 'abide by the Bye-laws, Regulations and Laws of the Game'.[119] The transnational nature of WR's authority imposes an obligation on member unions and associations to 'accept and *enforce* [emphasis added] all the decisions of WR … in respect of the playing and/or administration of the Game throughout the country or countries within the jurisdiction of such union'. [120] The practical limitations on the capacity for WR to control the sport across jurisdictions is reflected in the obligation on the part of member unions agreeing to enforce WR decisions within their domestic or national settings.

WR's regulatory influence is also capable of applying directly to players. For example, WR requires professional rugby union players to be registered with them as a condition of entry to participate in WR-sanctioned events.[121]

The above considerations are relevant in the context of this thesis as the sports of soccer and rugby union, two codes of football named in the NHMRC Report, are both closely connected to ISFs and are both recognised as Olympic sports.[122] In each case, ISFs are considered dominant actors as they set the rules and standards for the sports. The regulatory process is fragmented and involves SGBs at the national level to participate in the implementation and enforcement. Post-implementation evaluation and rule-changes,

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[118] In the case of rugby union, this recognition extends to the Rugby 7's competition. See Olympic Games <https://www.olympic.org/rugby>. The Olympic Charter is the core constituent document within the Olympic Movement, imposing 61 rules and bye-laws as conditions of entry and participatory rights. The Charter establishes principles of Olympism and 'governs the organisation, action and operation of the Olympic Movement'. See Olympic Charter, above n 14.

[119] World Rugby Bye-laws, 14 January 2015. Bye-law 7: Binding Agreement.

[120] Ibid. World Rugby Bye-law 7.

[121] Ibid.

[122] Soccer to FIFA and rugby union to World Rugby.

however, are within the remit of the ISF.

D The Public Role of SGBS: Guardians of the Sport

1 *An Intermediary Role*

Though notionally independent of the state, SGBs in Australia act both as custodians of the sport and as a delegate of the state in promoting and providing sport to those within the Australian public who choose to participate. In this sense, sport is a public good — a commodity or service provided without profit to all members of society who should have equal rights of access and opportunities — and SGBs operate as the conduit through which sport is made available to consumers.[123] Black has recognised this public role, describing SGBs as the 'intermediary' linking parts of society and the vehicle through which health and sports policies are channelled to the wider population.[124]

In the production and delivery of sport, SGBs exercise a public function and are required to act in the public interest.[125] The publicness of this role is considered in the next chapter, but it is important to note at this stage that SGBs are recognised as guardians of their sport and have a monopoly over 'an important field of human activity', and as 'carrying corresponding responsibilities'.[126] If SGBs did not perform this function, then either the state would need to invest in providing this service or the sport would cease to exist.

2 *Funding*

In recognition of this quasi-public role, taxpayer funds are invested in SGBs as the primary recipient. They play a role in delivering a return on the state investment, measured at a community level by the number of participants in the sport and the sustainability of the sport.

The public expects that SGBs, as publicly funded and supported non-state actors, will allocate and utilise resources to promote policies that enhance a safe sporting system. This includes an obligation to establish and maintain such a system and to respond appropriately to hazards that arise within their sport, acting in the interests of all

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123 In the United Kingdom, the notion of sport as a public good is expressed in the UK parliament by classifying certain sporting events as 'public assets' legislating to ensure free televised access through anti-siphoning legislation. Lewis and Taylor, above n 107 [A1.88].

124 Julia Black, 'Constitutionalising Self-Regulation' [1996] 59(1) *The Modern Law Review* 24, 28.

125 See *Watson v British Boxing Board of Control* [2001] QB 1134, 1137, 1138 ('*Watson*').

126 See *Russell v Duke of Norfolk* [1949] 1 All ER 109 (Denning LJ), 119. See also Simon Boyes, 'Sport in Court: Assessing Judicial Scrutiny of Sports Governing Bodies' (2017) (3) *Public Law* 363, 364.

participants. This is important to consider in the context of this thesis, as it seeks to establish a more significant role for non-state actors to play, particularly over the community levels in their sport.

3 A Helping Hand: Building SGB Capacity

In 2009, an independent panel was appointed by the ACG to review the Australian sports system. The Crawford Report, produced by this panel, made several recommendations designed to prepare sport for future challenges at both the community and professional levels. It not only recognised the need for state support but also the obligation on the part of SGBs to invest some of their funds in the grassroots level of sport.[127]

SGBs were identified as playing a critical role in this reform process, and recommendations were made that affected both the amateur and professional levels within their sporting hierarchy. An important recommendation was that SGB boards and management make the engagement of *recreational* participants a *key priority,* and that SGBs have primary responsibility for the development of their own 'high-performance' elite programs.[128]

The underlying basis upon which these recommendations were made was the expectation that SGBs would build capacities and capabilities to fund and operate their sports independently; that SGBs would devote sufficient resources to ensure the delivery of benefits; and that SGBs would enhance, promote and develop their sport for all Australians both at the professional and amateur levels. Whether this happens in practice is difficult to measure, due the current arrangements that do not require disclosure of this information.

E *State Actors — Guardians of the Public's Health*

For a sector built on principles of autonomy and a laissez faire approach by state actors, the current regulatory space of sport comprises multiple actors involved in the production and delivery of sport as part of the Australian sports system across multiple levels. To demonstrate, Diagram 6.2 below is the System Governance Map produced by the ACG, identifying the many different government entities having a role to play.[129]

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127 Independent Sports Panel, *The Future of Sport in Australia* (2009) ('Crawford Report') 22.
128 Ibid 26. Recommendation 4.1 and 4.3.
129 Commonwealth, *National Sport and Recreation Framework Policy* (2011) 9, System Governance Map.

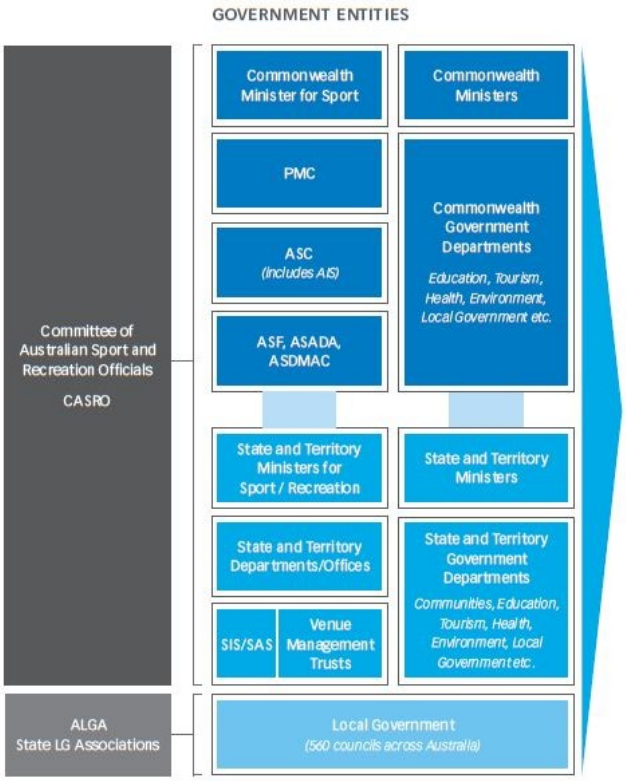

Diagram 6.2: State Actors

This is a vastly different landscape to what was contemplated by early colonial governors and explains how the regulation of sport has evolved. In 2009, the Crawford Report described the Australian sports system as 'very complex, inefficient and cumbersome'. Other reports have described the system as 'highly fragmented with multiple different types of players involved at multiple levels'.[130]The main actor at the CG level is the ASC.[131]

Governments across all levels are also involved in sport. Commonwealth, state and territory governments and local governments all participate in various ways in sport.[132] As noted above, the ACG established the ASC to support high performance sport, assist SGBs and co-ordinate national policies and programs designed to increase participation, improve governance and enhance integrity in Australian sport. The main actor at the ACG level is the ASC.[133]

[130] Boston Consulting Group, above n 116, 17.
[131] Crawford Report, above n 127, 12.
[132] The total funding sources for sport and recreation in Australia from all levels of government was around $60million in 2000. See Bloomfield, above n 64, 216, Table 8.1.
[133] See above chapter 5 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors). See Crawford Report, above n 127, 12.

1 *Organisational Characteristics of State Actors: The ASC*

The dominant state actor is the Australian sports system is the ASC as the agent of the ACG. A review of the characteristics of the ASC is necessary to understand the capacity, resources and capital of the ASC as a regulatory actor in responding to SRC.

(a) A Legislative Mandate

The legislative mandate of the ASC was explained early when the ASC Act was passed in 1985.[134] The ASC is responsible for overseeing the governance, management and funding of SGBs and the implementation of a national policy on sport. This role has recently been described as 'a central leadership role in the Australian sports system, administering and funding innovative sports programs and providing leadership, coordination and support for the sector.'[135]

The ASC is subject to high levels of accountability and is governed by a board of commissioners appointed and supervised by the Minister for Sport.[136] In recognising the polycentric system of the Australian sports system, the ASC recognises that a 'shared approach brings together expertise to deliver greater results than any single agency working alone'.[137]

The ASC's organisational structure is complicated and comprises four divisions and 20 branches covering the AIS, Sport Business, Corporate and Marketing and Customer Insights & Analytics. Over the years, the ASC has had several chief executive officers and senior management changes. In 2016, the ASC employed 514 full-time equivalent staff.[138]

Consistent with the 'helping hand' of the state, the ASC have invested over AUD $357 million to boost sport and recreation facilities in 2017.[139] A significant portion of these funds has been directed to support more than 90 NSOs and funding to 62 NSOs under the ASC Act.[140] The legitimacy of the ASC as a funder of sport is uncontentious, and this role has created a close working relationship with NSOs. The nature of this relationship is

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134 *ASC Act 1989 (Cth)* ss 6,7.

135 Evidence of Simon Hollingsworth to Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse (9 March 2016) Case Study 39 ('Hollingsworth') [8].

136 Hollingsworth, above n 135, [7].

137 Ibid [8].

138 Ibid [11].

139 The funding of sport is expressed as a specific function and power of the ASC under the *ASC Act*. See *ASC Act 1989,* above n 93, ss 7 (1) (n) and 8 (1) (d). See also Australian Sports Commission, *National Sports Plan* <https://www.sportaus.gov.au/nationalsportplan/about>.

140 Hollingsworth, above n 135, [32], [35].

important in establishing the legitimacy of actors and proffering insights into the regulation of sport.

2 *Relationships*

To ensure accountability for the use and expenditure of taxpayer funds to SGBs, the ASC has developed several measures to establish conditions of recognition for SGBs and eligibility criteria to access ASC for funding support. Several commentators suggest, however, that these are more administrative 'checks and balances' rather than active monitoring and enforcement by the ASC.[141]

(a) ASC Governance Principles

In return for funding provided to sport, the ASC introduced a set of best-practice governance principles ('ASC Governance Principles') in 2004, designed to assist sporting organisations in developing good governance systems operating within the self-regulated environment.[142] The ASC Governance Principles were amended in 2007, and again in 2012, and are now referred to as the Sports Governance Principles.[143] This is relevant to the thesis as it explains a current tool adopted by the ASC in regulating sport.

For most of the sports, compliance with the governance principles is voluntary with the intention to build capacity in the organisation and work towards good governance. This appears consistent with the regulatory trend during this period of state actors 'steering' rather than rowing.

As described earlier, the larger and more organised sports had developed their own complex internal governance system as they expanded, to include professional competitions as part of their remit. The likely target of the ASC Governance Principles were those sports that had not engaged in corporate governance models within their organisation.

Community sport, however, was not the target of the ASC; these groups tended to rely on the states, territories and local governments for funding and support. Indeed, the ASC

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[141] See Gowthorp, Toohey and Skinner, above n 116,153, 155.

[142] Lloyd Freeburn, 'National Sporting Organisations and the Good Governance Principles of the Australian Sports Commission' (2010) 5(1) *Australian and New Zealand Sports Law Journal* 43.

[143] Australian Sports Commission *Sports Governance Principles of Best Practice*. (2012). <https://secure.ausport.gov.au/__data/assets/pdf_file/0003/482070/ASC_Governance_Principles.pdf>. 2.

does not deal directly with community sport as this is a role left to SGBs. This is relevant to consider in the context of this thesis as it explains the nature of the relationships in the regulatory space of sport and determines whether community sports organisations have the capacity and access to financial and non-financial resources to regulate SRC.

(b) Transactional Regulation by the ASC

Several transactional forms of regulation are employed by the ASC, which requires SGBs to enter a recognition agreement (RA) with the ASC outlining a range of conditions of recognition.[144] To qualify for ASC funding, SGBs must satisfy several conditions and meet several targets relating to the sport's international success, participation numbers and cultural significance.

A sports investment agreement (SIA) is required to be entered, which outlines further conditions of funding. For present purposes, it is important to note that the ASC, as the primary funding body of sport in Australia, has the capacity as a regulator to apply conditions and eligibility requirements to those sports that seek funding and support from the ASC. This is also important for this thesis, because it goes towards establishing the capacity of state actors and the regulatory mechanisms and tools they have at their disposal.

(c) A Toothless Tiger?

In the context of the capacity to exercise legal, regulatory power, the former CEO of the ASC described the ASC as having 'no legislative power to compel any actions', nor is it recognised as a 'regulatory body'. [145] This description reflects the limitations on the ASC in exercising formal legal control through legal regulation. It does not, however, consider the range of other regulatory tools available to the ASC. This is important to consider in this thesis as it relates to the regulatory capacity and legitimacy of state actors when considering the regulation of SRC.

IV OBSERVATIONS AND CONCLUSION

This chapter has explained sport as a social construct, and the evolving socio-cultural dynamics that have influenced society's attitude towards the safety of participants, on

[144] Hollingsworth, above n 135 [33]- [35].

[145] The view of the former CEO, Simon Hollingsworth, demonstrates a narrow view of how regulation is conceptualised. See Hollingsworth, above n 135, [13].

the one hand, and the spectacle of the sport, on the other. The origins of the cultural assumptions in sport proffer insight into why there has been a struggle to recognise the harm of SRC as something more significant than a necessary incidence of participating in dangerous sport.

The history and development of sport and regulation in Australia, traced since European colonisation in 1788, explains the basis upon which customary assumptions underpin the legitimacy of actors and regulatory arrangements within this regulatory domain. The traditional roles and responsibilities aligned with the shifting attitudes towards the regulatory role of the state.

From 1980 to the present day, many factors have influenced Australian sport and have created a two-tiered market with the one non-state actor, the SGB, performing multiple roles and functions. State actors have shifted from championing sport to an enhanced role of investing in sport through significant funding, particularly from the mid-1980s. What has happened, however, is that state actors have not shifted to participate in the regulatory space in any greater or more significant way to reflect this investment. Instead, SGBs are entrusted with the role as guardians of a sport and are expected to invest in it to ensure it is sustainable for participation across community and professional sports.

The next chapter focuses on the regulatory space of SRC in Australia to identify the actors, relationships and resources within the space, including the role of law as regulation in responding to SRC. Two case studies show how two large SGBs as non-state actors have organised regulatory arrangements regarding SRC.

CHAPTER 7: REGULATING SRC: LAW AND NON-STATE ACTORS

INTRODUCTION

Having established how sport is regulated in Australia, including the dominance of non-state actors, namely SGBs, the next question to consider is how SRC is regulated in Australia. This chapter commences in Part I by examining the role of the private and public law as a form of regulating SRC. To investigate how SRC, as a phenomenon, has been regulated in a real and practical sense by non-state actors, Part II presents the Australian case study of the sport of Australian football. Part III presents the second Australian case study in the sport of rugby league. These sports were mentioned in the 1994 NHMRC Report. They are high-profile sports, attracting a wide range of participants and spectators across all participation levels. Both sports have high incidences of SRC and illustrate how SGBs have managed concussion.

I LAW, SPORT AND SRC

A flexible and pluralistic view of regulation identifies law as one form, albeit a significant one, of regulatory arrangement, rather than the single strand.[1] There are many functions of law in regulation as a tool to control, order or influence behaviour to 'accomplish particular social objectives' and the flexibility of law as a legal mechanism can shape, create, enforce and have an expressive or symbolic function.[2] This part examines whether the general law is an effective regulatory tool that offers solutions to control, order or influence behaviour in a way that achieves the goal of managing or minimising the harm associated with SRC.

Sport does not operate in a law-free zone, nor is there anything 'new or mysterious about sport, being older than the common law itself.'[3] Instead, a more accurate assessment is that the special characteristics of this domain are salient features to be considered in

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1 Christine Parker et al, 'Regulating Law' in Parker et al, (eds) *Regulating Law* (Oxford University Press, 2004), 1.

2 Ibid 5. See above, chapter 3 part IV ('Regulatory Systems and Tools').

3 See *Rootes v Sheldon* (1967) 116 CLR 383 (Kitto J) 387. See Kirby J in *Woods v Multi-Sport Holdings* (2002) 186 ALR 145 at [101]-[104] ('*Woods'*).

understanding why sport is 'unusually resistant to control by litigation',[4] limiting, but not eliminating, law as a form of regulation in sport.

A *A Question of Consent to Harm in Sport*

One important characteristic of sport that might not otherwise exist in non-sporting domains is the question of consent to harm. Many contact sports are inherently violent and dangerous: boxing, rugby, Australian Rules, wrestling and judo, to name a few. These sports carry inherent risks and, as Opie contends, 'sport can be a risky business'.[5]

The nature and extent of contact between participant and opponent are relevant considerations when determining whether the law will intervene to regulate sport. In such cases, consent, whether actual or implied, and acceptance of risks are based on whether the sport is classified as a combat sport, contact sport, collision sport or non-contact sport.[6]

1 *Contact and Consent*

The sports with high-incidence rates of SRC are typically classified as either combat or contact sports and are the focus of this discussion.[7] Body contact sports necessarily involve contact, and in many cases, the techniques developed in pursuit of the objects of the game inflict harm, as the following observation shows:[8]

> Players at elite levels of Rugby League will ordinarily endeavour… and are personally taught and encouraged by their coaches … to make significant impact at the initial collision stage of a tackle by using timing, footwork and weight transference to accelerate into the tackle with optimum force. They are also taught … when they have caught an attacking player to put him onto the ground forcefully to cause hard and bruising impact with the ground which will hurt and discourage the attacker.

A participant in these sports is expected to assume responsibility for obvious or inherent risks. For example, consent is a defence to trespass against the person for injuries arising

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4 Stephen Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press, 2017) 2.

5 Hayden Opie, 'The Sport Administrator's Charter: Agar v Hyde' (2002) 9 *Torts Law Journal* 131.

6 The focus in this thesis is on the four sports identified in the NHMRC Report. For discussion on the classification of sport, see Roger S. Magnusson and Hayden Opie, 'HIV and Hepatitis in Sport: A Legal Framework for Resolving Hard Cases' (1994) 20(2) *Monash University Law Review* 214, 222-223.

7 See above, chapter 2 part III ('Scientific Debate').

8 *McCracken v Melbourne Storm Rugby League Club & Ors* [2005] NSWSC 107 at 21.

from a boxing match.[9] Participants expect to be subjected to fierce, deliberate and harmful contact in these sports but within a controlled environment where rules and policies are designed, implemented and enforced to manage the harm. This creates an obligation on the rule-makers and standard setters to devise appropriate rules and on umpires and referees to apply the technical rules of the game to calibrate contact within a dangerous setting. The standards expected of SGBs, therefore, in formulating rules and policies to minimise harm, are critical.

2 *Regulating Violence in Sport*

Violence in sport is not a new phenomenon, but within a self-regulated domain, there are legal issues that can arise when the boundaries of tolerance in the name of sport are reached.[10] The involvement of law as a regulatory mechanism involving violence as an inherent aspect of the game has been the subject of early sports law scholarship.[11]

In the mid-1970s, Edward Grayson, one of the early sports law scholars, identified the legal issues associated with allowing or condoning dangerous, reckless, violent, foul play in sporting combat and potential exposure to civil and criminal legal liabilities.[12] Grayson identified the risk that the glorification of violence and tough play would overshadow the harm caused to those who participated and were injured as a result. Grayson contended that the [private] law's involvement was as a last resort, but that if sporting organisers failed to take adequate measures, the [private] law would intervene to protect the rights of participants, and if that failed, state regulatory arrangements could ensue.

The law affords protection to a person whose physical integrity has been wrongfully interfered with, regardless of whether this arises in a sporting or non-sporting context, with possible redress to private law remedies or public law sanctions. The protected legal interest in the context of SRC can be defined as the fundamental right to not be subjected to increased exposure to harm caused by acts or omissions of others.

As noted earlier, legal regulation and litigation are both powerful mechanisms that can alter, influence or change behaviour.[13] There are five forms of legal liability to consider.

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9 *Bain v Altoft* [1967] Qld R 32; See also *McNamara v Duncan* (1971) 26 ALR 584.

10 See above, chapter 6 part I ('The Filter of Culture').

11 Whether there is a discrete area of law known as sports law is still subject to debate. See for instance Michael Beloff, 'Is There a *Lex Sportiva*?' (2005) 3 *International Sports Law Review* 49. This thesis proceeds on the basis that sports law is refers to the law intervening to regulate sport.

12 Edward Grayson, Medicine, Sport and the Law (1990) 140 *New Law Journal* 528, 529.

13 See above, chapter 3 part IV (Regulatory Systems and Tools).

Most of this discussion will focus, however, on the tort of negligence, the role of SGBs and the relationship with participants as the central themes considered below.

B *Torts Law and SRC*

1 *Private Torts Law*

A tort is a private wrong or injury suffered by a person as a result of the action or inaction of another person (the tortfeasor).[14] Tortious liability arises when a tortfeasor's harmful act or omission interferes either directly or indirectly with another's interest and causes damage, giving rise to a right to commence litigation and recover compensation by apportioning or shifting the loss to the tortfeasor. Gostin et al explain that torts litigation can be an 'effective tool to reduce the burden of injury'.[15]

Torts law is an indirect form of regulation using state-provided court systems. An award of damages and obligations to pay compensation can act as a 'potent method of governing conduct and controlling policy'.[16] The regulatory intent of torts law is to hold to account those responsible for, amongst other things, health and safety risks and to deter socially undesirable behaviour, demonstrating the function of law as a form of private regulation. Tortious liability is different from other forms of legal liability, and operates independently of contract, trust or other fiduciary duty.

(a) The Application of Torts Law in Sport

Sport is not immune to the application of torts law, and the standard of care that arises in torts is not solely determined or defined by the rules of the sport.[17] However, special characteristics that arise in the domain are worth considering: factors such as the nature and extent of contact within the sport,[18] the rules that govern the on-field activity, the motivation for participation and the organisation of the competition are all relevant

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[14] Various theories exist as to the role of torts and commentators suggest that there is disagreement amongst theorists as to the aim of torts law. See Harold Luntz et al, *Torts: Cases and Commentary* (Lexis Nexis Butterworths, 6th ed, 2009), 78-79, [1.4.30] to [1.4.34].

[15] Lawrence O Gostin, Lindsay F Wiley and Thomas R Frieden, *Public Health Law: Power, Duty, Restraint,* (University of California Press 3rd ed, 2016) 228.

[16] Ibid 227.

[17] Barwick CJ in *Rootes v Shelton* (1967) 116 CLR 383 at 385, considered that the rules have some value but are not definitive in setting the standard of care at law. Kirby J in his minority judgment in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 186 ALR 145 at [101] – [104] considered that the law does not accept that the rules in sport establish the law's standard of reasonable care.

[18] For discussion on the classification of sports, see Magnusson and Opie, above n 7.

considerations.[19]

Torts law has been applied in many cases where interference has arisen in sport. Courts have considered claims for personal injuries brought by professional, semi-professional and amateur football players involving claims of negligence and trespass to the person (battery).[20] If torts law, however, were liberally applied in sport, the courts would be overburdened with cases. Indeed, the high social utility of a sporting activity is a salient feature considered by the courts in determining tortious liability, specifically in applying the calculus of negligence.[21]

(b) Negligence and Sport

Negligence can be described as a legal wrong arising where a person is injured by the act or omission of another in failing to take reasonable care to prevent foreseeable harm. Unlike trespass to the person, there is no requirement to prove an intention to commit the act or to harm the other party. What is required is a failure to exercise reasonable care, where the law expects a duty owed to another. The tort of negligence deals with omissions to act and wrongful positive acts. Liability only arises when the risk of harm is a foreseeable consequence of the act or omission and arises despite the absence of a contractual relationship between the injured party and the wrongdoer.

(i) Three Elements of Negligence

A party seeking to bring an action in negligence bears the onus of proving the issue of liability and the issue of quantum (being the proper measure of damages). If liability is not proven, the case will fail.

To prove negligence, three elements need to be established: duty, breach and damages. The first element requires that a duty of care is owed by the tortfeasor to the injured party. The 'neighbour' principle from *Donoghue v Stevenson*[22] identifies that reasonable care must be taken to avoid acts or omissions that are reasonably foreseeable and would

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19 Kirby J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 186 ALR 145 considered commercial elements were of importance in determining the duty of care.

20 Claims in negligence were brought in *Agar v Hyde; Agar v Worsley* (2000) 201 CLR 552 ('*Agar')*. For claims involving trespass to the person, see *McNamara v Duncan* (1971) 26 ALR 584, *Canterbury Bankstown Rugby League Football Club Ltd v Rogers; Rogers v Bugden* (1993) Aust Torts Reports 81–246; *McCracken v Melbourne Storm Rugby League Football Club Inc* [2005] NSWSC 107.

21 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-8. See also *Civil Liability Act 2003* (Qld) s 9(2) (d).

22 [1932] AC 562.

be likely to injure another.

The duty of care can be classified as either falling under an established category or, where no category exists, as a novel case. Since *Donoghue v Stevenson*, commentators have explained that courts are in an 'expansionist' mode, willing to take account of public sentiment of moral wrongdoing and shifting the loss to the tortfeasor.[23]

If a duty of care arises, the second element is to establish whether there has been a breach of that duty, falling below a reasonable standard of care in the circumstances, establishing that the defendant has been careless or negligent. The third element requires that the plaintiff must have suffered damage caused by the negligence of the defendant (the principle of causation) and that such damage is within the scope of, and not too remote, from the defendant's liability (the principle of remoteness).

(ii) Torts Law Reform

The general law of negligence was modified by the introduction of civil liability legislative reforms across Australian states and territories from 2002.[24] The legislative regime does not operate as a code. Instead, the common law of negligence still applies, but is modified by the statutory enactments in each jurisdiction.[25] Courts are now strongly influenced by values of individual responsibilities, self-reliance, self-responsibility and risk choice, particularly by adult volunteers, moving away from the 'paternalistic high-point' reached in the early 1990s. [26]

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[23] In circumstances where the relationship between the parties does not fit within an established category and considered to be a novel case, the courts have been prepared to examine the salient features and have developed a 'salient features test'. See *Sullivan v Moody* (2001) 207 CLR 562 ('*Sullivan*') expanded by Allsop J in *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258 [100]- [106], by formulating a non-exhaustive list of 17 factors for consideration.

[24] Commonwealth, *Review of the Law of Negligence Report*, Canberra, 2002. <http://revofneg.treasury.gov.au/content/review.asp>. ('Ipp Report'). The legislative regime involves different state and territory enactments. See *Civil Liability Act 2003* (Qld); *Civil Liability Act 2002* (NSW); *Civil Law (Wrongs) Act 2002* (ACT); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (Tas); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (WA); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT).

[25] Joachim Dietrich, 'Duty of Care Under the Civil Liabilities Act' (2005) *Torts Law Journal*, 2.

[26] Community standards also influence the court's decision when determining what is considered reasonable in the circumstances. See Peter Underwood, 'Is Ms Donoghue's Snail in Mortal Peril?' (2004) 12 *Torts Law Journal* 39, 50 citing Wilson and Dawson JJ in *Bankstown Foundry Pty Ltd v Braistina* (1986) CLR 301 at 309: Kylie Burns, 'It's Just Not Cricket: The High Court, Sport and Legislative Facts', 2002 (1) *Torts Law Journal* 234, 244.

A relevant and significant statutory modification in the context of harm arising from SRC is the 'dangerous recreational activities' (DRA) exemption in some jurisdictions. [27] The inclusion of this 'liability-defeating rule'[28] means that litigants are disqualified from seeking damages in negligence resulting from the materialisation of an obvious risks associated with DRAs.[29] Claimants engaged in DRAs are disqualified from issuing proceedings for negligence in such circumstances.[30]

(c) Establishing a Duty of Care in SRC

Fifty years ago, the High Court of Australia in *Rootes v Sheldon* found that a duty of care arises in a recreational setting.[31] It is now well-established that many actors owe a duty of care in a sporting context and, as earlier noted, sport does not operate in a law-free zone. The duty is imposed to make sport as safe as reasonably possible, modified however by the nature of the sport, the notion of consent to harm and the assumption of risk.

Courts have established a duty of care owed by players to other players;[32] owed by players to spectators; owed by owners, occupiers and event organisers to players and spectators;[33] and owed by coaches to players.[34] The doctrine of vicarious liability also applies in sport where employer clubs have been held liable for the tortious conduct of employees during the course of employment.[35]

Allegations such as those in the NFL Concussion Litigation are novel claims, for which no precedent currently exists in Australia.[36] The tort of negligence has been applied in several

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27 The DRA exceptions apply in Queensland under *Civil Liability Act 2003* (Qld) s 19, in New South Wales under the *Civil Liability Act 2002* (NSW), s 5L, South Australia under *Civil Liability Act 2002* (Tas) s 20 and in Western Australia under *Civil Liability Act 2002* (WA) s 5H. There are no equivalent provisions in Victoria, South Australia, Australian Capital Territory or Northern Territory ('DRA Provisions').

28 See *Goode v Angland* (2017) NSWCA 311 (7 December 2017), Leeming JA at [180]-[211].

29 DRA provisions, see above n 27.

30 Ibid.

31 The case involved an injured water skiing who successfully sued the driver of the speed boat for excessive speed. See *Rootes v Shelton* (1967) 116 CLR 383 at 385.

32 In *Ollier v Magnetic Island Country Club* [2004] Australian Torts Reports 81 743, the court held a golfer owed a duty of care to other golfers and was liable for damages for injuries sustained to another golfer struck by a golf ball. See also *Sibley v Milutinovic [1990] ACTSC 6 (February 1990)* No 1228 of 1987.

33 See *Nowak v Waverley Council (1984) Aust Torts Reports* 80-200 where a player sued the council after tripping over a protruding water sprinkler of a council sports field.

34 In *Foscolos v Footscray Youth Club* [2002] VSC 148 found a coach owed a duty of care and held liable for damages when an experienced wrestler injured an inexperienced wrestler and used a type of throw only permitted when bouts were between experienced wrestlers.

35 In *McCracken v Melbourne Storm Rugby League Club & Ors* [2005] NSWCA 107, the employer club was held liable for injuries arising from an illegal tackle on an opposing player during a professional rugby league football match.

36 See above, chapter 4 part III ('A Call to Action').

international cases involving SRC where complaints have arisen regarding the interference with the physical integrity of players based on the mismanagement of SRC.[37] To explain, college associations, schools, school boards, clubs, doctors, coaches, treating hospitals, and equipment manufacturers, to name a few, have been sued for negligence in SRC-related issues. These cases, however, are not binding on Australian courts and are dependent upon the legal systems and jurisdictional settings relevant in each case.

In Australia, several actions have been either threatened or initiated, but no decision has yet been delivered nor any precedent established. Further details are considered in the case studies of the AFL and NRL later in this chapter. For present purposes, it is useful to consider the elements of negligence and the impact of statutory civil liability in possible SRC negligence claims.

(i) Is There a Duty of Care Owed by SGBs to Sports Participants?

The threshold element to prove in negligence is establishing whether a duty of care exists in the relevant case. In sport, the relationship between players, teams and governing bodies and the salient features that might exist are important and relevant considerations in establishing whether the law of negligence is an effective regulatory mechanism in respect of SRC.[38]

A review of past Australian authorities, however, suggests a general reluctance to hold governing bodies liable to amateur participants in negligence claims arising from inherently dangerous contact sports like football.[39] The prevailing view is that all players are vulnerable when playing high-contact sports; that adults who voluntarily participate in inherently risky sports are taken to be aware of the risks and rule-makers generally owe no duty to participants.[40]

Prior to the civil liability reforms, the High Court in *Agar* analysed the relationship between the International Rugby Football Board (IRFB), an unincorporated association based in Ireland, and two semi-professional players who suffered seriously injuries in the New South Wales rugby union

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[37] In the United States, Pachman and Lamba trace the origins of several high-profile cases involving SRC litigation. See Steven Pachman and Adria Lamba 'Legal Aspects of Concussion: The Ever-Evolving Standard of Care' (2017) 52 (3) *Journal of Athletic Training* 186.

[38] The salient features test establishes that a multitude of factors are relevant to consider in circumstances where a case falls outside an established category. See above n 23.

[39] See for example, *Agar*; *Haylen v New South Wales Rugby Union* [2002] NSWSC 114; *Green v Country Rugby Football League of New South Wales* [2008] NSWSC 2; *Malo v South Sydney District Junior Rugby Football League* [2008] NSWSC 552. The shift towards self-reliance and self-responsibility started in 1998 following the High Court decision in *Romeo v Conservation Commission of the Northern Territory* (1998) CLR 431. See Peter Underwood, 'Is Ms Donoghue's snail in mortal peril?' (2004) 12 *Torts Law Journal* 39,51.

[40] Opie, above n 5, 131.

competition. [41] The case involved a consideration of the organisational structure of the IRFB and the degree of practical control it asserted to monitor the operations of the rules at all levels of the game. The High Court concluded that there were no legal or practical connections between the IRFB and the players and consequently no duty of care owed by the IRFB to the players.[42] One of the reasons advanced for this decision was the existence of many intervening layers in the decision-making process between the promulgation by the IRFB of the laws of the game and the conduct of the individual matches in which the players were injured.[43]

Similar questions were later considered in *Haylen v New South Wales Rugby Union Ltd* [44] but on that occasion the Court was required to consider the nature of the closer relationship between the New South Wales Rugby Union (NSWRU) and the player, based upon allegations that the NSWRU had failed to control and regulate rugby and eliminate unnecessary risk of injury. The Court held the NSWRU did not owe a duty to the player to make rule changes to eliminate injuries.[45] There was no evidence indicating that the NSWRU had the capacity to control the match in which the player was injured.

In *Green v Country Rugby Football League of NSW*,[46] the Court was prepared to find the existence of a duty of care involving a state football administrator of rugby league in the country New South Wales competition where a young reserve grade rugby league player was severely injured. However, after establishing a duty of care, the player was unable to satisfy the next common law element in negligence — a breach of the standard of care.

The above cases establish the prevailing view that no duty of care is owed between a 'remote' SGB and a voluntary adult participant. The capacity of the SGB as the rule-making authority to exercise control in a real and practical sense appears to underpin the current reasoning. Exceptions, however, might arise in cases involving children and professional sportspeople under employment relationships. [47] Moreover, commentators suggest a limited duty of care could arise in circumstances where there is special knowledge of risks.[48] These points are relevant to consider further to establish any relevant application

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41 *Agar* [3]. Other defendants were included in the claims but on appeal to the High Court, the issue for consideration was whether a duty of care was owed by the IRUB to the players. The proximity of the SGB based overseas was a key consideration for the court, including principles of autonomy and responsibility of adult volunteer participants. See Luntz et al, above n 14, 143-146.

42 Gleeson CJ [13]; Gaudron, McHugh, Gummow, Hayne JJ [82]; Callinan J [127].

43 Gaudron, McHugh, Gummow, Hayne JJ [81].

44 [2002] NSWSC 114.

45 Ibid. Einstein J at [55].

46 [2008] NSWSC 26.

47 See Opie, above n 5, 146-149.

48 In an Australian context, Opie notes that the existence of special knowledge on the part of SGBs gives rise to a possible duty of care, albeit a limited one. This point, however, remains untested. See Opie, above n 5, 142,144-145.

to SRC in the present context.

(ii) A Duty Owed to School-aged Children

Whether an SGB owes a duty of care to school age children was a matter noted by the court in *Agar* as being left open to further consideration.[49] Opie suggests that the reference to school-aged children, as opposed to 'children at school' has the potential to make any such exception 'very substantial in scope', by virtue of extending to participants beyond the school setting and into community sport competitions.[50]

The absence of control over decision-making about participating in sport appears to be the reason why school-aged children might fall within a special class as potentially giving rise to a duty of care. The matter, however, has not been fully determined by the courts in Australia. In several jurisdictions, however, proceedings have been issued in cases involving SRC mismanagement and child or adolescent participants.[51]

In school sport settings, the non-delegable duty owed to school students participating in sport was highlighted in the 1987 decision of *Watson v Haines.*[52] While the case did not involve SRC, it does provide insight to consider the importance of injury prevention in the school setting. The case involved a 15-year-old school boy with a physique unsuitable for playing a certain position in a school rugby league match. The teachers were unaware of this risk and the student was left a paraplegic after playing a game of school rugby league and being injured when a scrum collapsed. The teacher was not held liable as he was found to be unaware of the risks. The Department of Education, however, was held liable for breaching the non-delegable duty of care it owed to students.[53] A key finding in the case was the failure by the Department to disseminate important safety information that had been prepared by a public interest group, concerned about serious injuries of the

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49 Gleeson CJ in *Agar's Case,* 668-669

50 Opie, above n 5, 146-149.

51 Student athletes in the NCAA issued proceedings for SRC-related injuries in the class action. See Pachman and Lamba, above n 37.

52 In *Watson v Haines* (1987) *Aust Torts Report* ¶80-094, a school was liable for injuries sustained in organised school activities when a student with a long and thin neck was paralysed when a scrum collapsed in a school rugby league match.

53 A significant reason for this finding was based on evidence that the Department of Education had been given information in the form of an informational kit warning of the exact danger that subsequently ensued. Instead of circulating the informational kit to schools, the Department has filed the material away, rendering its value almost useless. Allen J in *Watson*, finding that 'what the state did was manifestly inadequate to discharge its duty …' (¶80-094).

exact nature of the kind that was suffered by the young player.

(iii) A Duty Owed to Employees

It is well established that a professional sportsperson can be classified as an employee, giving rise to rights and duties based on the employment relationship.[54] In *Agar*, the injured players were recreational amateur participants who voluntarily participated in the sport. Opie observed that the High Court in *Agar* left open the question of whether the case would be differently decided in circumstances involving employment of professional players.[55]

Professional players are motivated, at least in part, by economic factors. This can have an impact on whether the player's choice is compromised when considering the issue of voluntarily assuming the risk and whether any special vulnerability should be considered in such cases.[56] The existence of this relationship includes a duty to provide a safe system of work. In team sport, this would include an obligation to remove a player from a game or from training when suspected of sustaining a concussion.[57]

(iv) Other Salient Features — Special Knowledge, Vulnerabilities and SRC

Novel or new cases can lead to the creation of new categories, subject to satisfying the salient features test.[58] Relevant 'salient' features in the context of SRC could involve consideration of the degree and nature of control able to be exercised by the SGB to avoid harm, the degree of vulnerability of the players, the degree of reliance by the players upon the SGB and any assumption of responsibility by the SGB. None of these features have been tested in Australian courts in respect of the relationship between SGBs and players. An argument might arise, however, when considering whether a special vulnerability exists for players, on the one hand, and special knowledge of SGBs, on the other.

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[54] The High Court decision in *Buckley v Tutty* is the leading Australian case establishing that professional footballers can be engaged in an employment relationship with their employer clubs. The case involved the application of the doctrine of restraint of trade to sport but equally applies to establish the nature of the underlying relationship between the parties. See *Buckley v Tutty* (1971) 125 CLR 353. See also, Braham Dabscheck, 'Righting a Wrong: Dennis Tutty and his Struggle Against the New South Wales Rugby League' (2009) 4(1) *Australian and New Zealand Sports Law Journal* 145.

[55] Opie, above n 5.

[56] Jeremy Kirk and Anton Trichardt, 'Sports, Policy and Liability of Sporting Administrators' (2001) 75 *Australian Law Journal* 504,717.

[57] Hayden Opie and Graham Smith, 'The Withering of Individualism: Professional Team Sports and Employment Law' (1992) (15) (2) *UNSW Law Journal* 313, 330.

[58] Above n 23.

In critiquing the High Court decision in *Agar v Hyde*, Opie argued that the SGBs held 'special knowledge' about the vulnerabilities associated with the susceptibility for neck injury in the circumstances of that case, noting 'it was clearly arguable that the foreign defendants possessed special knowledge of a serious danger to rugby players … that required them to take positive action to protect those players'.[59]

The special vulnerability of the players within a professional sports environment was emphasised in the following extract:

> 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 … 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.[60]

In applying this to SGBs and SRC, it is arguable that SGBs hold special knowledge about SRC. In this context, SGBs have the resources and capacity to 'monitor the sport to assess developments in knowledge of its risks and to take reasonable safety measures' and to 'investigate and…take precautionary measures'.[61] If this view is accepted, the 1994 NHMRC Report is likely to become a critical document in establishing what was known or should have been known, whether SGBs in those Australian sports had special knowledge, and whether there was a duty to actively monitor and investigate SRC and take precautionary measures.

(v) United Kingdom Cases

The English courts have shown a willingness to establish a duty of care was owed by an SGB regarding sport-related injuries in the professional arena. In *British Boxing Board of Control v Watson*[62] the court held the board owed a duty of care to Watson, a professional

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[59] Opie above n 5, 143, citing *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 176 ALR 41 at 420 where Gaudron J held 'There are situations in which there is a duty of care to warn or take other positive steps to protect another against harm ... Usually, a duty of care of that kind arises because of special vulnerability, on the one hand, and on the other, special knowledge, the assumption of a responsibility or a combination of both'.

[60] Department of Regional Australia, Local Government, Arts and Sport, Rural and Regional Affairs and Transport References Committee, *The Practice of Sports Science in Australia, 2013 Report*, 94 [2.17].

[61] Opie, above n 5, 143.

[62] [2001] 2 WLR 1256 (*Watson).*

boxer. The duty of care was held akin to the duty found in a hospital/doctor/patient relationship.[63] The Court held that the injuries in boxing were foreseeable and as the promoter of the sport, the Board sponsored, encouraged and controlled it and assumed the duty of care.[64]

In *Watson*, the Court found that the SGB possessed special knowledge with respect to risk and was held to owe a duty of care towards the participants as a defined class of person, with knowledge of the participant's reliance on that advice in a defined situation. In formulating these principles, the Court had regard for several distinctive features including the nature of the sport itself, the structure of the governing body, the involvement of the governing body in safety and the reliance by the participants.

The board was held to have breached its duty to participants by failing to ensure that adequate medical attention was immediately available at the ringside. In finding the existence of a duty of care, the Court found that the board exercised control over professional boxing and had placed itself in a position where it undertook responsibility to exercise reasonable care for Mr Watson's safety. Interestingly, the Court found that had the board simply given *advice* as to appropriate medical precautions, as opposed to promulgating mandatory and enforceable medical rules, the outcome might have been different.

(d) Obstacles to Overcome in SRC and Negligence

The US case study in chapter 4 above explained that the NFL Concussion Litigation was vigorously defended by the NFL. Several challenges are likely to arise in the Australian context if SRC litigation is commenced.

(i) Dangerous Recreational Activities (DRA) and SRC

The DRA provisions under the civil liability legislative regime in several Australian states could present a challenge for claimants in qualifying to bring SRC negligence claims. As noted earlier, the DRA exemption is a 'liability-defeating rule' that disqualifies claimants from seeking damages in negligence resulting from the materialisation of an obvious risk associated with DRAs.[65] A careful analysis of the risk is essential, therefore, to determine whether the DRA provision applies.

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63 Ibid 1150.
64 Ibid 1160.
65 *Goode v Angland* (2017) NSWCA 311 (7 December 2017), Leeming JA at [180]-[211].

An obvious risk involves an objective assessment, and whether the 'circumstances would have been obvious to a reasonable person in the position of that person'.[66] Based on the Australian authorities examined above, it is uncontentious that a player accepts the obvious risks associated with participation in sports that involve physical contact. Injuries arising from tackles in football or body-checking in ice hockey, for example, are obvious risks.

Is the *mismanagement* of SRC an obvious risk? The answer to this question is analytically dependent on articulating the nature and extent of the risk arising from participation in the DRA. Chapter 2 explained biomedical perspectives and the primary and secondary injury phases associated with SRC. The mismanagement of the primary injury creates the risk of greater harm causing 'downstream' effects and complications, leading to potentially serious and long-term harm.[67]

A key challenge in establishing the application of the DRA exception is to establish whether the damages from the mismanagement of SRC were 'obvious to a reasonable person in the position of that person'.[68] The CISG 5th Consensus Statement and SCAT5 diagnostic tool explain that the management of SRCs require qualified medical assessment.[69] A reasonable person 'in the position of that person' therefore would need to be medically qualified. As this assessment involves clinical judgment, it is submitted that a player is not qualified to make such an assessment and therefore unlikely to be taken to have the capacity to consent to the *mismanagement*, unless he or she is also a qualified medical professional. On this basis, therefore, it is submitted that the risks associated with the mismanagement of SRC are not likely to be considered obvious ones. Consequently, the DRA provisions under the relevant civil liability provisions may not apply.

(ii) Other Challenges

In addition to the challenge of establishing a duty of care and overcoming the DRA exemption, several legal issues are likely to be contested including substantive issues such as establishing causation and the state of medical and scientific understanding in

66 *Civil Liability Act 2002* (NSW), section 5F (1).
67 See above, chapter 2 part I ('Evolving Definitions').
68 *Civil Liability Act 2002* (NSW), ss 5L and 5K.
69 See above, chapter 2 part I ('Evolving Definitions').

establishing the standard of care.[70] Apart from these substantive matters, other procedural matters such as questions of jurisdiction and relevant limitation periods are likely to arise.[71]

Causation is a critical feature in establishing negligence. Proving this element is likely to be problematic for players. Unless players have kept detailed records of their entire sporting history, including details of SRC-related injuries, the likelihood of proving causation is likely to be a challenge.

While there is currently no single diagnostic tool available for SRC, the evolution, development and technological advances in evaluative tools in detecting and recognising SRC have enabled researchers and clinicians to access more comprehensive data around the detection, management and prevention of SRC. Research has evolved since early diagnostic tools exclusively used animal subjects to study the effects of SRC and its sequelae. Such advances establish the importance of context and what was known about SRC at the relevant point in time.

Lord Justice Denning, in *Roe v Minister of Health,* cautioned that '[W]e must not look at the 1947 incidence with 1954 spectacles when evaluating foreseeability given the prevailing scientific knowledge of the time.'[72] Lord Denning's cautionary wisdom was designed to draw attention to the importance of fully appreciating the prevailing scientific knowledge when evaluating foreseeability of the harm, a highly relevant factor to consider in the context of negligence-based SRC claims.

C *Contract Law*

Contract law is a behaviour-shaping regulatory technique and a method that controls, influences and alters behaviour by standard-setting, monitoring and enforcement.[73] Professional participants typically enter many contracts as part of their employment or engagement in the sport. For example, several contractual arrangements, as transactional

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[70] See Annette Greenhow, 'A Knock to the Head' (2018) *Law Institute of Victoria.*

[71] The state and territory limitation legislation in Australia provides for extensions of the limitation periods but in a variety of ways. In Queensland, for example, s. 31 *Limitations of Actions Act 1974* allows an extension if a material fact of a decisive nature comes to the plaintiff's attention to establish a cause of action. A material fact can include the fact that the negligence or breach of duty has caused the personal injury: s 30(1)(a), *Limitations of Actions Act 1974* (Qld). See Frances McGlone and Amanda Strickley, *Australian Torts Law* (Lexis Nexis Butterworths 2nd ed, 2009) 326.

[72] [1954] EWCA Civ 7 (08 April 1954).

[73] Hugh Collins 'Regulating Contracts' in Parker et al, (eds) *Regulating Law* (Oxford University Press, 2004) 13, 16.

forms of regulation, underpin relationships between players and clubs, players and sponsors, and players and their agents, to name a few. These arrangements are more common in elite and professional sport, so the discussion is confined to that level of the sport.

The nature of contract law in a sporting context has been subject to close judicial scrutiny. Sporting contracts are significantly different to contracts in non-sporting contexts. To illustrate, Lord Justice Denning described sporting contracts akin to a legislative code rather than 'negotiated consensus'.[74] This is significant to consider in the context of SRC, as it distinguishes a contract of adhesion, common forms in sport, from the flexibility and autonomy associated with contract negotiations in other non-sporting contexts.

In many professional sports, private contractual arrangements underpin the CBA process. Players are therefore dependent upon these private formal arrangements to establish their entitlement to compensation for sporting injuries such as SRC.

Another important aspect of these arrangements relates to dispute resolution processes. Typically, players contractually agree to abrogate rights to pursue legal rights in a traditional court. This means that players rely on internal dispute resolution mechanisms within their sport with appeal rights in some instances to the Court of Arbitration for Sport.[75] It is beyond the scope of this thesis to expand the discussion about the evolution, development and effectiveness of these regulatory arrangements. For present purposes, however, it is important to note that a professional player could be contractually bound to first exhaust internal dispute resolution procedures, falling within the ambit of arbitration rather than litigation.

Finally, a player is under a contractual duty to maintain peak physical performance to carry out the work required in the sport.[76] If a player knowingly under-reports SRC-related symptoms, this potentially creates a breach of contract. Moreover, such a breach could

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[74] In *Enderby Town Football Club v Football Association Ltd* [1971] Ch 591 at 606, LJ Denning found that the rules of the SGB (in that case, the Football Association) operated as a 'legislative code'. For further discussion, see Julia Black 'Constitutionalising Self-Regulation' (1996) 59 *The Modern Law Review* 24, 39.

[75] See Court of Arbitration for Sport <http://www.tas-cas.org/en/index.html>.

[76] See AFL Standard Player Contract (on file). Clauses 4.7 requires the player to do everything reasonably necessary to obtain and maintain the best physical condition to render the most efficient service to the club. Further, clause 4.9 provides that the player acknowledges and agrees that a failure to achieve a reasonable level of physical fitness shall operate to suspend payments to the player.

also give rise to a complete or partial defence in the form of contributory negligence; that by underreporting, the player contributes to the damages suffered.

D *Criminal Law*

Given the earlier described characteristics of sport and the various classifications according to the nature and extent of harm in sport, a strict application of the criminal law of assault would apply in all cases of combat, contact and collision sports. The social utility of sport would be negatively impacted should the criminal law punctuate the conduct of sport for all on-field assaults. For these reasons, it is important to establish distinctions between legitimate and illegitimate violence in sport.

Hartley explains Smith's typology of violence as a tool to assess whether the acts offend the criminal law. This typology classifies the lawfulness or otherwise of acts in a sporting context as ranging in severity from legitimate forms of violence such as 'brutal bodily conduct' to illegitimate forms of 'criminal violence, so seriously and obviously outside the rules of the game that it is handled as criminal from the outset by the law'.[77]

The criminal law of assault and grievous bodily harm has been applied in sport but only in a few rare and exceptional circumstances.[78] These cases involved situations where the sport itself is illegal[79] or where the conduct meets the threshold in Smith's typology.[80] The same considerations as to consent need to be considered in the context of criminal law and sport but modified to take into account that consent to harm is does not abrogate the culpability of the offender.

There have been no actions brought under the criminal law in respect of the harm associated with SRC. The difficulty of establishing the criminal standard of proof beyond reasonable doubt is likely to be a key factor influencing decisions of criminal law prosecutors in framing the charge sheet. The sheer intensity of the activity on the field of play is also likely to constrain the gathering of evidence to mount a successful prosecution.

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77 Hazel Hartley, *Sport, Physical Recreation and the Law*, (Routledge, 2009) 94.

78 In *R v Barnes* [2004] EWCA Crim 3426, six factors were developed to consider whether the elements of grievous bodily harm were met. These factors are the type of sport, the level at which it is played, the nature of the act and the surrounding circumstances, the degree of force used, the extent of the injury and the state of mind of the defendant. In Australia, see David Thorpe, Antonio Buti, Chris Davies and Paul Jonson, *Sports Law* (Oxford University Press, 3rd edition, 2017) 166.

79 See *Boxing and Wrestling Control Act 1986* (NSW) (repealed) ss 8(1) and 15.

80 Hartley, above n 76.

For these reasons, it is highly unlikely and improbable that the criminal law would be applied to SRC on the field of play. The regulatory posture of state actors in policing sport was illustrated in the earlier discussion as a contributing factor that led to the demise of prize-fighting and the transition to boxing. However, given modern society's tolerance and acceptance of harm in many sports, it is unlikely that the authorities would again engage in such targeted regulatory arrangements.

E *Workplace Considerations*

1 *Workers Compensation and Sport*

The role of workers' compensation regimes is to provide a compensation system to workers injured while performing services within or connected to their employment. This method of regulation is based on legal arrangements through the enactment of legislation across Commonwealth, states and territories.[81]

There currently exists a legislative gap in Australia, in that professional athletes generally are excluded from workers' compensation regimes and consequently entirely dependent upon privately negotiated terms under the terms of the relevant CBA.[82] This exclusion from workers' compensation is likely to be based on customary assumptions that sport was originally the antitheses of work under the earlier notion of amateurism. A further reason was that high social utility of sport prevailed over the anticipated cost of compensating injuries.

The AFL case study discussed below illustrates several cases involving players who were paid compensation for the career-ending effects of SRC. The absence of state-provided workers compensation has meant that professional athletes have been required to follow the private process under their sport's CBA in previous cases involved compensating for the cost of SRC. The adequacy of this regime is very much dependent, therefore, on the

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[81] *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Workplace Injury Management and Workers Compensation Act 1998* (NSW); *Workers Compensation and Rehabilitation Act 2003* (Qld); *Workers Compensation and Injury Management Act 1981* (WA); *Workers Rehabilitation and Compensation Act 1986* (SA); *Workers Rehabilitation and Compensation Act 1988* (Tas); *Workers Rehabilitation and Compensation Act 2008* (NT); *Workers Compensation Act 1951* (ACT).

[82] In each jurisdiction, aside from NT, professional athletes are excluded from obtaining workers' compensation, unless their work and remuneration is unrelated to the actual playing of the sport. For example, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) Sch 1, cl 17 excludes professional athletes except jockeys. For further discussion in the context of team sport, see Eric Windholz, 'Team-Based Professional Sporting Competitions and Work, Health and Safety Law: Defining the Boundaries of Responsibility' (2015) 43 *Australian Business Law Review* 303, 304.

capacity of actors to have initially foreshadowed the cost of SRC as a sporting injury and to quantify an amount that is sufficient to compensate the player.

2 *Occupational Health and Safety and Sport*

The occupational health and safety (OH&S)[83] system of legal regulation is designed to set standards expected of persons conducting a business or undertaking (PCBUs)[84]; to carry the burden of ensuring, among other things, a safe workplace for employees and, in some jurisdictions, independent contractors.[85] These obligations extend to ensure, as far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. [86]

The legislative framework imposes primary duties on PCBUs, defined to include a person conducting a business or undertaking whether alone or with others, and whether for profit or gain.[87] Duties are also imposed on workers to take reasonable care for their own health and safety and that of other persons.[88]

Whether this regulatory regime applies in full or in part to sport and SGBs is unclear, with Windholz noting that 'the application of WHS law to professional sport is almost absent from practitioner and academic discourse'.[89] The regulatory burden of the OH&S regime on the not-for-profit sector was considered in a 2010 Productivity Commission Report, finding that OH&S regulation 'created disproportional costs on NFPs in the context of volunteer labour.[90] As noted earlier, SGBs and most clubs in Australia are CLG or incorporated associations operating in the not-for-profit sector.[91] Volunteerism is a large

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83 Also referred to as workplace health and safety (WH&S).

84 Foster explains this typically applies to persons with management or control of a workplace. See Neil Foster *Workplace Health and Safety Law in Australia* (LexisNexis Butterworths, 2012) 354.

85 *Work Health and Safety Act 2011* (Qld) s 19(1). The WHS Act applies to employees, contractors, sub-contractors and their employees, and volunteers. s 7. In Victoria, the duty is imposed under the *Occupational Health and Safety Act 2004* (Vic) ss 21 (1) and (3). Under the Victorian Act, 'employees' are defined as persons under a contract of employment or training Act, s 5.

86 *Workplace Health and Safety Act* (Qld) 2011 s 19(2)*; Occupational Health and Safety Act 2004* (Vic) s 21 (1).

87 *Work Health and Safety Act 2011 (Qld)* s 5; Victorian OHS Act frames the equivalent duties by reference to an 'employer', which is defined to mean a person who employs one or more persons under a contract of employment or training. See *Occupational Health and Safety Act 2004* (Vic) s 5.

88 *Work Health and Safety Act 2011 (Qld)* 2011 s29; *Occupational Health and Safety Act 2004* (Vic) s32.

89 See Eric Windholz 'Professional Sport, Workplace Health and Safety Law and Reluctant Regulators' (2015) *Bond University Sports Law eJournal*, 1.

90 This report examined the regulatory impact and burden on the sector. See Foster, above n 83, xxxii.

91 See above, chapter 6 part III ('The Australian Sports System').

part of the workforce in the sports sector. There are, however, other relationships to consider.

More complex and sophisticated contractual arrangements exist at the elite levels. For example, the AFL case study discussed below identifies the relationships between the AFL, the clubs and the players. Within this structure, the players are employed by the clubs but enter into a tripartite agreement with the AFL. While the AFL is not considered the employer, there is an argument that the AFL is a 'person conducting a business or undertaking' by the extended definition in OH&S legislative provisions'.

Given the nature of the field of play in sport as a workplace, sport has been traditionally considered a domain that warrants special consideration from OH&S regulation. Windholz offers several reasons why this is the case and why there has been a general reluctance on the part of state actors to engage mechanisms under the various WH&S or OH&S regimes across Australia.[92] Indeed, the regulatory posture of state actors appears to be deferential to the sports, delegating to some extent the responsibility to regulate and manage these considerations within voluntary self-regulated systems.

For example, the 2012 'supplements 'scandal' involving several actors in Australian football and the Essendon Football Club (the Club) came to light after the Club self-reported a breach of the anti-doping regime.[93] The case involved 32 Club players accused of injecting banned substances designed to enhance sporting performance after following the directions of a club-engaged sports scientist. Only when several third- party complaints were made under the OH&S Act did the Victorian WorkSafe Authority, the OH&S state regulator, commence an investigation, leading to the imposition of a $200,000 penalty imposed on the Club for breaching the OH&S Act.[94]

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[92] See Windholz, above n 89. 1. These reasons include a perception that sport is not work and that sportspeople are not workers; that there exists a culture of risk; that sports self-regulate and that there are more appropriate investigative bodies.

[93] For discussion on the ability of the AFL to assert dominance over its social field in the case, see Lisa Gowthorp, Annette Greenhow and Danny O'Brien, 'An Interdisciplinary Approach in Identifying the Legitimate Regulator of Anti-doping in Sport: The Case of the Australian Football League' (2016) 19 *Sport Management Review,* 48-60.

[94] Section 131 of the *Occupational Health and Safety Act 2004* (Vic) provides a procedure if prosecution by the Victorian WorkCover Authority is not brought. This section enables third parties to lodge a written request to bring a prosecution if the authority has not acted against an employer within six months of alleged breach. The WorkSafe Annual Report 2016 discloses a fine imposed of $200,000 on the Essendon Football Club. See WorkSafe Victoria Annual Report 2016, October 2016, 107.

The struggle to engage traditional state regulators in exercising their functions over sport as a workplace in the Essendon case is likely to have been based on the cultural and customary assumptions that underpin the role of actors in the regulatory space. In this instance, the WorkSafe Authority recognised the legitimacy of the AFL as the non-state regulator to first conduct investigations, noting that 'more appropriate bodies' were recognised as legitimate actors.[95]

SRC therefore, is likely to travel the same path. The absence of any state engagement from an OH&S perspective to date suggests that traditional state regulators are unlikely to include SRC as falling within their remit and unlikely therefore to willingly and proactively engage in establishing regulatory arrangements to address the harm. The reasons in support of this regulatory posture include ambiguity around the nature of sport as being considered 'work', the application of a 'filter of culture' as to the tolerance and acceptance of SRC as a risk in many sports and a view that SGBs are more 'appropriate' regulators operating within a self-regulated system.

F *Public Health Law*

An area that is underdeveloped in Australia in responding to SRC is the application of public health law. As earlier noted, each Australian state and territory has a statutory framework to address public health concerns. In several cases, these regimes also incorporate the precautionary principle as a mechanism to address public health risks where there exists incomplete knowledge or scientific uncertainty.

An environmental scan of the regulatory arrangements in place in Australia to respond to SRC does not identify any engagement from state actors that utilise public health law in responding to SRC. Apart from the informational regulation of state actors, SRC appears not to have been framed as a public health concern, nor triggered the policy process to escalate a public health response.

The use of public health law as a regulatory arrangement to address SRC has been applied in several jurisdictions. These cases are considered below. For present purposes, the framing of SRC as a public health concern is a legitimate claim and the basis upon which

[95] See also Windholz, above n 89, 2; Richard Baker and Nick McKenzie 'Victorian WorkCover Authority investigating Essendon over supplements program' The Sydney Morning Herald, 15 May 2014 <*http://www.smh.com.au/afl/afl-news/victorian-workcover-authority-investigating-essendon-over-supplements- program-20140514-zrcqk.html*>.

several state actors in Australia have initiated, albeit somewhat limited, regulatory interventions.

In summary, the above discussion highlights several limitations in the application of both private and public law as a mechanism to regulate SRC. A further evaluation later in chapter 9 explains why the law in its current form does not provide an effective form of regulation to achieve the objective of managing and minimising the harm associated with SRC.

II CASE STUDY ONE: AUSTRALIAN FOOTBALL AND THE AFL

Regulation is practised in time as well as in space. Timing is therefore a critical element in regulation and SRC.[96] In understanding the regulation of SRC, there are two critical times to consider: the first was in 1994 when the NHMRC Report was released[97] and the second was from 2011 when the US discoveries and NFL concussion litigation received widespread attention in Australia.[98]

The AFL case study reveals how non-state actors were early actors who dominated the regulatory space when SRC first arose in the sport. A wide range of material about SRC in Australian football is publicly available.

A *Australian Football*

Australian football, while originating from 'humble beginnings' as a Victorian based game developed in the mid 1800's, is Australia's most profitable NFP Australian sport today.[99] The role that it plays in producing and delivering the sport of Australian football is said to contribute significantly to the national economy and the Australian lifestyle.[100] The sport is popular across all participation levels. Australian football is a full contact sport with and high incidence rates of concussive injuries.

1 *The AFL: A Dominant Self-Regulated Association*

In Australian football, a league of clubs was established to collectively coordinate the

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96 Leigh Hancher and Michael Moran, 'Organising Regulatory Space', in Leigh Hancher and Michael Moran *Capitalism, Culture, and Economic Regulation* (Clarendon Press, 1989) 284,286.

97 See above, chapter 2 part IV ('Scientific Uncertainty: Wait and See or Active Social Foresight?').

98 See above, chapter 4 part III ('A Call to Action').

99 AFL, *Australian Football League Annual Report 2017* (2018).

100 Wray Vamplew and Brian Stoddart, *Sport in Australia: A Social History* (Cambridge University Press, 1994) 20.

competition between the clubs participating in the sport. The Victorian Football League (VFL) was incorporated in 1929 as a CLG whose members were appointed as representatives of the 12 clubs participating in the competition at that time. By centralising the organisational structures in this way, the clubs relinquished a significant degree of control to the league to centralise negotiations over key activities but retained the ability to control certain aspects of the VFL's governance through constitutional arrangements.[101] In return, a revenue-sharing arrangement developed whereby the league would collect gate takings, and later emerging media and marketing revenues and share these among the clubs.

(a) Governance, Rulemaking and Standard Setting

In 1990 the VFL changed its name to the Australian Football League (AFL) to reflect the shift towards a more national competition. The two constituent documents, comprising the Memorandum of Association and the Articles of the Association (the Constitution)[102], remained unchanged. The Constitution provides the objectives of the entity to 'promote and encourage the Australian National Game of Football'.[103]

The AFL is the rule-maker and principal controller in the promotion, organisation and regulation of Australian football. As the guardian of the sport of Australian football, the AFL is recognised as the promoter, organiser and regulator of the national competition of Australian football. As a self-regulated association, the AFL carries responsibility for designing, implementing, interpreting and enforcing rules and standards and operating its sport in Australia. The Constitution provides express purposes in support of these rule-making and standard-setting functions.[104] Significantly, the league is recognised as having the power to 'frame and administer laws relating to football and to take such action as may be necessary to achieve uniformity in such laws'.[105]

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[101] For example, the VFL club members appointed the senior management group and the directors of the VFL were often the club's nominee. See James Paterson, 'Community Interest and Stakeholders Aplenty, but to Whom are the Duties Owed?' (2012) *Company Law and Securities Journal* 420, 423 and 435.

[102] As the entity was incorporated before 1998, the Memorandum and the Articles of the Association form the constitution of the AFL. See *Corporations Act 2001* (Cth) ss 1415 and 1362CC.

[103] See Australian Football League, *Memorandum of Association,* Art 2 (a).

[104] Significant power is embodied in the recognised in the Memorandum of Association the provides the AFL the power to define the territories allocated to a football club (Art. 2 (d) (i); to determine the terms and conditions upon which persons may play for football clubs (Art. 2 (d) (ii); determine the terms and conditions upon which football matches may be played by football cubs (Art. 2 (d) (iii).

[105] Australian Football League, *Memorandum of Association,* Art 2 (d) (iv).

As a company limited by guarantee, the AFL operates as a NFP organisation and is required to comply with the *Corporations Act*. The organisational characteristics of the sport have evolved from a loosely structured amateur community system into a highly organised and profitable organisation involved in the encouragement of Australian football. Today, the AFL supports seven state and territory sporting organisations and employs more than 700 staff.[106]

(i) The AFL Commission

In the mid-1980s, the league underwent significant structural and organisational changes responding to an urgent need to reform the financial model in the sport due to the impecuniosity of many of the clubs in the competition at the time and the conflicting 'parochial club interests' that affected decision-making.[107] The Commission was first established on a trial basis in 1984 when the VFL board of directors voted to appoint an independent commission to administer the football competition and advance the collective interests. The VFL board of directors permanently ceded authority to the new Commission in December 1985.[108]

Member clubs are entitled to nominate a person to act as a voting member of the AFL Commission.[109] Currently, the AFL Commission has a chairperson and nine members including the chief executive officer.[110] There are other members of the senior management group and general managers in respect of eight separate operational divisions.[111] The Commission is recognised as the authority to act on behalf of the AFL and has constitutional power to 'exercise all powers of the League in respect to any matter whatsoever, including the power to make rules, regulation and by-laws'.[112]

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[106] AFL Respect and Responsibility Policy, 6 <https://s.afl.com.au/staticfile/AFL%20Tenant/AFL/Files/AFL-Respect-and-Responsibility-Policy.pdf>.

[107] The Victorian Corporate Affairs Commission investigated several clubs in the former VFL concerned about trading whilst insolvent. Paterson identifies the fierce competition between the clubs engaging in a 'tit for tat' recruiting war for the best players, leading to significant debt and litigation from former players and coaches seeking reinstatement of contracts. James Paterson, above n 101, 422-423.

[108] Report of Independent Sports Panel, *The Future of Sport in* Australia (2009) ('Crawford Review'), 4.

[109] See Australian Football League, *Articles of Association,* Art 5.

[110] See Australian Football League, *Articles of Association* Art. 37.

[111] The AFL Annual Reports describe the activities within these eight divisions and provide insight into the organisational priorities and areas of focus. See for example, Australian Football League, *Annual Report 2016*.

[112] See Australian Football League, *Articles of Association* Art. 53.

(b) Cultural Environment and Customary Assumptions – the AFL's Influence

In addition to organising the national competition and the formal regulatory arrangements to produce and deliver the sport at the national level, the AFL performs several quasi-public roles as recognised by the former CEO, Andrew Demetriou:

> Some see the AFL as simply a sport. Others see it as simply a big business. The reality is that we are, and need to be, more than just a sporting organisation or a business. We are also a not-for-profit, community and cultural organisation that must take a leadership role in the community.[113]

The AFL influences the behaviour of others outside its direct regulatory arena and recognises its broader constituency as including supporters, club members, media and commercial partners and 'various levels of government.[114] While there are altruistic motives that underpin the value of these relationships, the AFL is a strategic actor and has been able to capitalise on its unique position to advance its own interests within the Australian sports ecosystem.

The scope of the AFL's 2017 Respect and Responsibility Policy reflects this broader social function and 'role model' influence by explaining 'we recognise the role of our game in the broader community, including our ability to influence attitudes and behaviour and we therefore have a responsibility to play our part'.[115]

As guardian of the sport, the AFL is recognised as the actor responsible for promoting and enabling the sport to be provided across all levels, performing quasi-public functions.[116] This includes being responsible for the development of the sport of Australian football across all levels of the pyramid model of sport.[117] In this role, however, there are many intermediate levels between the AFL and the community levels of the sport. As guardian

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[113] See Andrew Demetriou, National Press Club, 25 May 2011 <http://websites.sportstg.com/assoc_page.cgi?client=1-3484-0-0 0&sID=210995&& news_task=DETAIL&articleID=15846287>.

[114] AFL, *Australian Football League Annual Report 2011* (2012).

[115] While the terms of the policy were directed at gender equality, the position is broader social influence of the AFL is undeniable. See AFL *Respect and Responsibility Policy,* above n 106, 7.

[116] See AFL Memorandum of Association, Clause 2 objects. See above, chapter 6 part III (Australian Sports System).

[117] Ibid Clause 2 (b) and (c).

of the sport, there exists a reasonable expectation to assume that the AFL would design appropriate responses to protect the safety of its players across all levels of the sport.

(c) AFL Resources and Capital

As earlier noted, the transformative era in the evaluation and development of Australian sport occurred from the mid-1980s.[118] The transformation meant the AFL grew significantly in terms of revenue, developing to what is now considered to be the most valuable sporting brand in the Australian market.[119]

Due to the changes in the organisational characteristics explained earlier, the AFL organised its business operations to take advantage of the commercial opportunities presented by the creation of enhanced broadcasting and licensing rights. In 2012, the AFL negotiated a six-year arrangement worth $1.25 billion, a significant increase from the previous rights sale of $780 million.[120] Consequently, the AFL expanded its football and commercial operations.

In the annual reports of the AFL published since 2012, the AFL has increased all aspects of its football operations with participation rates and financial returns growing.[121] The total revenue received by the AFL in 2016 was $517million.[122] Suffice to say, the AFL is financially independent of the state and operates a highly successful business of producing and delivering its sport, particularly through the organisation of a national professional competition.

Since incorporation as a CLG, state actors have formally recognised the AFL as the peak representative body for the sport, and have invested significant public funds across all levels of government.[123] The AFL enjoys high degrees of public trust; for example, the

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[118] See above, chapter 6 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors').

[119] Tommy Wu, 'Sport in Australia' *IBIS World Report X00028*, 6.

[120] The earlier rights were for the period 2007 to 2011 was $780 million. See Travis King and Ben Guthrie, 'AFL signs new six-year, $2.5 billion broadcast rights deal' 18 August 2015, *AFL website <http://www.afl.com.au/news/2015-08-18/afl-on-the-verge-of-signing-new-tv-deal>.*

[121] AFL, *Australian Football League Annual Report 2012* (2013); AFL, *Australian Football League Annual Report 2013* (2014); AFL, *Australian Football League Annual Report 2014* (2015); AFL, *Australian Football League Annual Report 2015* (2016); AFL, *Australian Football League Annual Report 2016* (2017).

[122] AFL, *Australian Football League Annual Report 2016* (2017) 25.

[123] See Grant Funding Report, ASC. In 2016/2017, the ASC allocated $962500 and $450,000. <https://www.sportaus.gov.au/grants_and_funding/grant_funding_report?sq_content_src=%252BdXJsPWh0dHAlM0ElMkYlMkZtYXRyaXhzc2lmcmVwb3J0LmF1c3BvcnQuZ292LmF1JTJGR3JhbnRzJmFsbD0x&recipientName=Australian+Football+League&recipientCategory=NSO&recipientType=&recipientState=&recipientYear=2017&pageSize=20&sortOrder=name_asc>.

state investment of public funds is entrusted to the AFL to enhance, promote and develop its sport from grassroots to the national levels. This guardianship role is recognised and publicly acknowledged through the AFL's membership of the COMPPS.[124] In return, the AFL has received significant state support and enjoys income tax exemption[125] and other significant 'green' light regulatory exemptions.[126]

Based on the above discussion, the AFL possesses the key characteristics of a dominant actor—an actor capable of controlling whether a matter is classified as a priority or regulatable concern and asserting power to control and direct the regulatory agenda. As a large firm, the AFL has acquired the status of a governing institution in the Australian sports ecosystem and carries out functions that are of an essentially public nature.[127] Further, the AFL possesses the various guises of capital, holding economic, cultural, symbolic and social capital to assert dominance over its social field.[128]

2 *AFL Clubs and Players*

As noted earlier, the AFL was formed as a league of clubs, so there is a significant history to the relationship between the founding clubs and the AFL league. This history is essential in understanding the nature of the relationship between the clubs and the AFL, establishing the cultural assumptions that underpin this mutually interdependent relationship.

Currently, 18 clubs play in the AFL national men's competition and a newly formed women's competition started in 2016 with eight clubs. These clubs are incorporated as CLG, and typically have two organisational divisions – football and commercial.

Within the football division, on-field activities include the recruitment, engagement, payment and training of players, coaches and training personnel, and the engagement of team doctors and health professionals. Team doctors are in a tripartite relationship with

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[124] The AFL is a member of the Coalition for Major Professional and Participation Sports ('COMPPS'). See the Coalition for Major Professional and Participation Sports (COMPPS) <https://www.compps.com.au/>.

[125] Non-profit sporting organisations are eligible for income tax exemption subject to three conditions. *Income Tax Assessment Act 1997* (Cth), ss50-1, 50-45. Table 9.1.

[126] Richard Pomfret and John K. Wilson 'The Peculiar Economics of Government Policy Towards Sport (2011) 18 (1) *Agenda: A Journal of Policy Analysis and Reform* 85,93.

[127] Hancher and Moran, above n 96, 275.

[128] Pierre Bourdieu 'The Forms of Capital' in John G Richardson (ed) *Handbook of Theory and Research for the Sociology of Education*, (Greenwood Press, 1986) 243.

clubs and players, owing primary duties to players based on the doctor/patient relationship but engaged by clubs to ensure players are in peak physical and mental condition to undertake their work.[129]

The commercial division in AFL clubs is engaged in activities involving the securing and negotiating of third party commercial arrangements. Many clubs have achieved financial success as part of their commercial activities. As earlier noted, increased revenue boosts the capacity of clubs to pay higher salaries.[130] Winning leads to increased media coverage and spectator support. Success and spectator support then led to increased sponsorship. Many AFL clubs regularly feature in the financial press and are classified in a 'Top 30' list regarding revenue, profitability and asset value. [131]

Each club is a member of the AFL carrying one vote exercisable at the AFL general meetings. Significantly, the constitution of the AFL reserves the right of the clubs to overrule the AFL Commission by a two-thirds majority of clubs in respect of decisions to grant an entity the status of a club or the merger of any clubs.[132] This voting power ensures that clubs have the final say on what is included and excluded from the AFL national competition.

The AFL clubs are also financially dependent upon the AFL for revenue sharing. In 2017, the AFL paid the clubs $255.87 million from the total revenue it had received.[133] Each AFL club is itself highly organised and has complex operational characteristics. The competition between the clubs is fierce both on and off the field of play as clubs compete for sponsors, players and fans. Indeed, Windholz describes 'on-field success as the only 'key performance indicator' for clubs.[134] This motivation is relevant to understand the capacity and motivation of clubs to ensure that SRC is a high-profile area of concern.

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129 Mitten describes this relationship as having the potential to create tensions vis a vis the priorities of the club in winning and the obligation owed to players. See Matthew Matthew 'Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries' (1993-1994) *University of Pittsburgh Law Review* 129.

130 See below, chapter 6 part II Illuminating the Past: Customary Assumptions and Dominant Actors').

131 Andrew Heathcote, 'Not Just a Game', *Business Review Weekly* (Sydney), August 2 - 8 2012, 18.

132 Australian Football League, *Articles of Association,* Art 15 (a).

133 AFL Annual Report 2017.

134 See Eric Windholz, 'Team-Based Professional Sporting Competitions and Work, Health and Safety Law: Defining the Boundaries of Responsibility' (2015) 43 *Australian Business Law Review* 303.

3 *The Regulatory Power of the AFL*

Significant regulatory power is derived from the recognition of the AFL as the peak representative body for the sport. In carrying out the AFL's functions, the AFL employs a range of regulatory tools to regulate the sport. These involve transactional regulation through the granting of contracts and authorisation as regulation through licensing arrangements that permit certain activities.[135] In all cases, parties are bound to comply with the rules and policies (the AFL Rules) as a condition of entry and to maintain the right to participate in the competition.[136]

As noted earlier, the AFL and the clubs enter into a licensing agreement which establishes the entitlement to participate in the national competition.

In addition to the regulatory power of the AFL, the capacity to establish and promulgate these rules is based on the cultural and customary assumptions as to the legitimacy of the AFL as a regulatory actor, albeit constrained by the voting power of the AFL clubs as earlier noted. Several regulatory arrangements are relevant to discuss for present purposes.

(a) Club Licensing Agreements

The first regulatory arrangement involves the licensing by the AFL and the status afforded to be a club within the AFL competition. Clubs enter licence agreements that give them a licence to 'field teams in the competitions conducted by the League'. [137] These agreements permit the clubs to participate in the national competition. The terms of these licensing arrangements require clubs to follow the rules and policies of the AFL and have complex arrangements involving the broadcasting and revenue sharing relationships between the parties that govern the nature of the relationship between the AFL and the clubs. If clubs breach the AFL rules and policies, sanctions and fines can be imposed by the AFL.

Several influential control mechanisms are embodied in the licence agreement. First, any change to the club's constitution is not effective unless the AFL has first approved the

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[135] See above, chapter 3 part IV ('Regulatory Systems and Tools').

[136] The AFL Rules comprise 50 rules governing the relationship between the AFL, Clubs and Players. See AFL Laws of Australian Football 2017 <http://www.aflcommunityclub.com.au/fileadmin/user_upload/Coach_AFL/2017_Laws_of_Australian_Football.pdf>.

[137] *Articles of Association*, above n 132, 'Licence Agreement' Art. 1.

amendment.[138] Second, because of the insolvency crisis in the mid-1980s as noted earlier, a financial solvency requirement is imposed on clubs as a licensing condition to remain in the national competition. [139] These are transactional forms of regulation by the AFL over the clubs.

(b) Labour Market Controls

In the AFL, these labour market controls include player draft and transfer systems, salary caps restricting wages expenditure by clubs all of which are designed to impose restrictions and control over the AFL system. The AFL explains that the rationale underpinning these labour market controls is to ensure the survival of the sport through the equal distribution of playing talent and to maintain competitive balance between competing teams within the sport.[140] It is beyond the scope of this thesis to examine these controls and the notion of competitive balance. For present purposes, the existence of these mechanisms illustrates powerful transactional regulation and labour market controls vesting significant control in the AFL.

(c) Standard Player Contracts

Another form of transactional regulation exists between the AFL, the clubs and the players. At the elite level of the sport, AFL players are recognised as professionals and are employed by their club. As noted above, formal contractual mechanisms are in place that brings the AFL, the player and the club into a tripartite relationship and negotiated between the AFL and the AFL Players' Association (AFLPA).

The relationships between the AFL, clubs and players is governed by standard playing contracts that incorporate the AFL Rules, regulations, codes and policies.[141] Standard playing contracts are transactional regulatory mechanisms imposed by the AFL to equalise competition and enhance competitive balance between clubs. These regulatory controls have been described as 'fundamental to the ongoing success of the competition' and based on two rationales. First, to regulate the amount teams expend on players. Second, to redistribute players between the clubs.[142] Other mechanisms are employed by the AFL

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138 Australian Football League, *Memorandum of Association,* Art 2(d).

139 See Paterson, above n 101, 424.

140 Ibid 132.

141 AFL Standard Playing Contract, cl 8.1.

142 See Robert MacDonald, 'Above the Grounds: A Comparative Analysis of Football in Australia' in Bob Stewart (ed) *The Games are not the Same: The Political Economy of Football in Australia* (Melbourne University Press, 2007) 236.

to control the competition including labour market controls that regulate player salary payments to players.

(d) Collective Bargaining Agreements

Traditionally, the AFL and the AFLPA negotiate a Collective Bargaining Agreements (CBA), usually on a five-yearly rotation, coinciding with the negotiating of the AFL's broadcasting renewals. The bargaining power of the AFLPA, therefore, is critical in establishing a balance between the parties and fair terms for players. Indeed, Dabscheck explains that the content of the CBA, vis a vis 'the extent of freedoms afforded and benefits to players' is dependent upon the strength and negotiating skills of representatives. The last round of negotiations, however, were protracted and, after several years of negotiation, the AFL and the AFLPA finally agreed to a new CBA in June 2017.

Dabscheck contends that collective action by players under the CBA process is necessary to balance labour market controls and rules imposed by the league that have 'substantially curtailed their economic freedom and human rights'.[143] Typically, CBAs include clauses containing basic salary conditions for all players, and terms that regulate the player's engagement as participants in the AFL competition.

While the employment relationship is primarily between the player and the club, the AFL exerts a significant degree of control and direction over players. For example, the standard player agreement and CBAs include tightly controlled conditions around the image rights of players and promotional rights of the AFL. To illustrate, the AFL is given an automatic licence to the AFL to use a player's image for promotional purposes and copyright is assigned to the AFL. Further, the control over the image of the AFL also extends to provisions that require players to act in a way that is not prejudicial to Australian Football.

The above contractual arrangements as forms of transactional regulation are relevant in the context of SRC for several reasons. First, the tripartite nature of the relationship creates a formal legal relationship between the AFL, clubs and players. While the legal employment relationship is between the clubs and players, the tripartite nature of the

[143] Braham Dabscheck, 'Sport, Human Rights and Industrial Relations' (2000) 6 (2) *Australian Journal of Human Rights* 129, 130.

relationship brings the AFL and the players into closer proximity and creates a nexus that supports the AFL exerting control and influence over players.

(e) Internal Disciplinary Mechanisms

The third regulatory arrangement that is important for present purposes is the internal governance regime that empowers the AFL to exercise control over all disciplinary matters about the sport at the national level. This regulatory power enables the AFL to establish disciplinary and grievance procedures, compelling clubs and players at the elite level to submit to the jurisdiction of this alternative dispute resolution system.[144]

To undertake the internal monitoring and enforcement steps in the regulatory process, the AFL has established a Match Review Panel (MRP) and the AFL Tribunal. The AFL Tribunal consists of a chair and a three-member jury. The Tribunal was established in 2005 to self-regulate matters that fell within the remit of the AFL professional competition.[145]

Sanctions are financial in the form of fines or matches of suspension and are imposed on the player, not the club. The AFL is entirely in control of the substantive and procedural aspects of the MRP and tribunal process. Through its internal governance processes and administrative hierarchy, the AFL decides all matters relevant to this process of monitoring and enforcement of its regulatory processes for on-field matters. Players and clubs submit to these processes through the contractual and licensing arrangements that exist. These formal contractual mechanisms provide the basis upon which the AFL is the dominant regulator of this area.

4 *Concussion as a Challenging Problem in the AFL*

(a) SRC Concerns

Concerns about multiple concussive injuries in the AFL were published on the AFL's website in 2010.[146] Based on internally produced material and non-academic commentary, the AFL states that it has been researching SRC in the sport of Australian football for decades. According to the AFL, significant funds are invested towards scientific

[144] Australian Football League, *Tribunal 2015*.

[145] Ibid 3.

[146] Annette Greenhow, *'Concussion Policies of the National Football League: Revisiting the 'Sport Administrator's Charter and the Role of the Australian Football League and National Rugby League in Concussion Management'* (2011) 13 Sports Law eJournal 1, 14.

research into understanding the impact of concussion in its sport and concussion has been on the agenda of the AFL for decades.[147] While the AFL is not noted as making a submission in response to the NHMRC Report, the AFL was represented on the Medical Consultant Panel by Dr Paul McCrory, a sports physician and medical officer.[148] Several researchers who made submissions to the NHMRC Committee also had relationships with the AFL either as team doctors engaged by the clubs or as researchers involved in research projects involving AFL players.[149]

(b) The AFL's Internal Concussion Response

Based on this research, the AFL first publicly acknowledged the problem of concussion as a sporting injury through the production of injury surveillance reports. The AFL has collected injury data across the elite level of its competition since 1992, and from 1996, this data was made publicly available annually.[150]

The injury surveillance reports have traditionally described concussion as an instance where a player has missed a game. The authors of the AFL injury surveillance reports acknowledge that the actual incidence of what was originally described as 'minor concussions' was underestimated by the injury survey in that there are several clinical cases of concussion that occur but do not result in games being missed which therefore does not satisfy the injury survey definition.[151] Consequently, the definition of concussion in the past necessarily limited what constituted a concussion for injury surveillance purposes.

The AFL has published the incidence rates of concussion in Australian football at the elite level as 6–8 per 1,000 player hours (one approximately every three matches).[152] Concussion is recognised by the AFL as a 'relatively common injury' and the 2016 injury

[147] See Matt Thompson, AFL TV 14 May 2014, Interview with Dr Peter Harcourt <https://www.youtube.com/watch?v=ogXDEEgpkgE&feature=youtu.be>.

[148] National Health and Medical Research Council, 'Football Injuries of the Head and Neck' (Report, National Health and Medical Research Council, 1994) ('NHMRC Report').

[149] David Maddocks, 1984 PhD Research; Dr Paul McCrory, former Team Doctor for Melbourne FC.

[150] See John Orchard and Hugh Seward, *2011 AFL Injury Report* (2011), 1.

[151] See John Orchard and Hugh Seward, *2003 Injury Report* (2004) 20.

[152] Gavin Davis, et al, *The Management of Concussion in Australian Football: With Specific Provisions for Children aged 5-17 years* (2017), 5.

surveillance data suggest that the incidence rate of games lost due to concussion had risen significantly.[153]

Annual reports are produced by the AFL and published on the website. Based on those reviewed for this research, the issue of concussion was given some recognition in the AFL's 2008 Annual Report and later from 2013, reflective of the increase and greater awareness as an organisational concern.[154] It is unclear from the materials examined whether SRC was mentioned in the period following the 1994 NHMRC Report and the 2008 Annual Report.

Table 7.1 identifies a range of concussion responses of the AFL in the areas of concussion prevention, concussion management, concussion education and concussion research.

Action	**Area:**
1984-1996 – Maddocks Neuropsych recovery study	Research
1991 – Commences Injury Surveillance and produces AFL Injury Survey	Management Prevention Research
1992-2000 – McCrory Acute Clinical Manifestations Study	Research
2000-2006 – Makdissi Concussion AFL Study	Research
2000 – Rule change charging	Rule Change Prevention
2003– Rule change – player on the ground	Rule Change Prevention
2007 – Rule change – bumping/forceful contact; policing of dangerous tackles	Rule Change Prevention
2008- AFL identifies concussion	Management
2008 – Concussion guidelines introduced; rule changes to interchange law and procedures	Management Prevention
2009 – Rule change – high contact	Rule Change Prevention
2010 – Rule change –rough conduct; dangerous tackles guide	Rule Change Prevention
2010 – AFL Research Board funs concussion in the AFL project	Research
2011 – Revised Concussion Management Guidelines	Management Prevention
2011 – Rule Change – Interchange substitute rule	Rule Change

[153] Ibid 5. See Peter Ryan, Injury Survey: Games lost to concussion on the rise, 6 June 2017 <http://www.afl.com.au/news/2017-06-06/injury-survey-concussions-on-the-rise>.

[154] AFL, *Australian Football League Annual Report 2008* (2009); AFL, *Australian Football League Annual Report 2012* (2013).

	Prevention
2012 – Rule change – dangerous tackle; increased penalty for striking behind play	Rule Change Prevention
2011 – Revised Concussion Management Guidelines	Rule Change Prevention
2012 Rule change – dangerous tackle; increased penalty for striking behind play	Rule Change Prevention
2013– Rule Change – Concussion substitute	Rule Change Prevention
2013 – Hosts Concussion in Football Conference	Education Research
2014 – AFL offers free brain scans for retired professional players	Research
2014 – Rule change – ducking into tackle or diving; head clashes from bumps are reportable	Rule Change Prevention
2016 – Fines imposed on Port Adelaide for Hamish Hartlett concussion	Management (Sanction imposed)
2017 - Develops Head Trauma Assessment	Management Prevention
2017 – Hosts Concussion Conference	Education Research
2017 – Allocated $250,000 towards concussion research	Research

Table 7.1: Sample of AFL Concussion Responses

(i) Concussion Prevention

At the end of the 2010 season, the AFL amended the interchange rule. [155] One of the objectives of the amended rule was to reduce congestion on the field and minimise the risk of injury. In March 2011, the AFL announced rule changes to prohibit players from returning to play when the player was thought to have sustained a concussion.[156] The AFL has made several rules changes over the years designed to mitigate the risk associated with SRC in the sport.

[155] Australian Football League *New Interchange Law and Procedures 2008* cl. 7.2. The rule was passed in 2008 and amended prior to the 2011 season.

[156] AFL Research Board, *The Management of Concussion in Australian Football*, AFL Medical Officers' Association, April 2011.

(ii) Concussion Management

In 2008, the AFL introduced Concussion Guidelines in the sport. This was 13 years after the NHMRC Report was issued. These guidelines have been revised several times in line with developments in medical management and scientific understandings.

The AFL advocates a conservative approach to concussion management. Several policies have been developed and updated to address the medical management of concussion.[157] The involvement of the AFL Doctors Association has enabled the collective input of team doctors into the medical management. The AFL Medical Officers' Association has developed guidelines on the management of concussion, based upon research undertaken by Dr Michael Makdissi and Associate Professor Paul McCrory.[158]

In 2015, the AFL developed a 'rapid sideline head injury assessment form' as a mechanism as a diagnostic tool to assess elite level AFL players injured while participating in the national competition.[159] A recent initiative to assist in the medical management is using the video audit tool known as 'Hawkeye' to enable medical staff to replay incidents from several angles and have complete information about head knocks to players as part of the match-day concussion management process.[160]

In exercising its regulatory oversight, the AFL has been involved in issuing fines to several clubs who have failed to follow the concussion return-to-play protocols.[161] The revenue generated from these fines is then reinvested into the research activities of the AFL. This information has been released in the public domain and receives widespread coverage in the media.

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[157] The AFL has published several versions of Concussion Guidelines. AFL <http://www.afl.com.au/afleducation/concussion>.

[158] Both researchers have extensive research experience in concussion in professional football. Dr Makdissi (University of Melbourne) was the recipient of the AFL Research Funding Program and is team doctor for the Hawthorn FC. Professor Paul McCrory is a member of the Centre for Health, Exercise and Sports Medicine (University of Melbourne) and co-authored the three Consensus Statements following the 1st, 2nd and 3rd Concussion Conferences held in Vienna (2001), Prague (2004) and Zurich (2008). Both presented at the 3rd IOC World Conference on Prevention of Injury and Illness in Sport.

[159] See Patrick Clifton et al, 'An Investigation of the Role of a Rapid Sideline Head Injury Assessment Form (HIAF) in the Clinical Diagnosis of Concussion in Elite Australian Football British Journal of Sports Medicine, 2017

[160] Ryan, above n 153.

[161] Larissa Nicholson, 'Port Adelaide fined $20,000 by AFL for mismanaging Hamish Hartlett's concussion', 15 July 2016, The Age <https://www.theage.com.au/sport/afl/port-adelaide-fined-20000-by-afl-for-mismanaging-hamish-hartletts-concussion-20160715-gq6cyj.html>.

In or around 2014, the AFL established an internal Concussion working party to advise on matters relating to concussion management. The AFL determined who is appointed to this working party, with several of the members having experience as AFL team doctors and AFL-funded researchers who have had a long association with the league. As a sign of the public relations aspect of the concussion issue in the AFL, the recent appointment of the General Manager of Communication with experience in crisis communication proffers insights into how the AFL presently views the issue of concussion.

(iii) Concussion Education

The AFL has convened several concussion workshops and conferences. According to internally produced information, the AFL explains its role as being instrumental in collaborating with other sports to advance concussion education. Within the sport, the AFL has worked with the AFLPA to develop educational tools to assist players understand the importance and significance of SRC.

At the community level, the AFL has invested in developing a range of tools designed to improve education and awareness in the sport. Through the AFL Concussion Working Group Scientific Committee, the AFL has developed a position statement for community sport. It has also established a website with information about concussion and produced a series of videos available on the website.[162]

(iv) Concussion Research

The AFL has convened a Research Board to fund projects that study injuries that are common or trending in AFL players. Several projects have been funded to advance scientific understanding of concussion in the sport. According to the AFL, several hundreds of thousands of dollars have been invested in concussion research, and in 2017, the AFL announced that $250,000 would be invested into concussion-related research projects. Further, the AFL had close affiliations with several members of the CISG[163] and presented the findings of several AFL-funded research projects at the 5th International Concussion Symposium in Berlin in 2016.[164]

[162] See AFL Community Club website <http://www.aflcommunityclub.com.au/index.php?id=66>.
[163] Concussion in Sport Group. See above, chapter 2 part I ('Evolving Definitions').
[164] See Clifton, above n 159.

Under the AFL's rule-making and standard-setting functions, several rule changes have been made intending to reduce the risks associated with SRC and policies have been created to guide decision-making around the management of SRC. Penalties and sanctions have been imposed on players who have caused the injury.

An increasing number of professional players are retiring from the AFL, and some have sought compensation from the AFL because of career-ending injuries caused by concussion and head injuries. The quantum of many of these claims was negotiated between the AFL and the player, whereas others were contested by the AFL. These arrangements are usually kept confidential, but due to the high-profile nature of concussion in the public domain, the media reported widely on the final awards made to players by the AFL's internal grievance tribunal.[165]

(c) SRC Litigation and Australian Football

Class action litigation has been threatened against the AFL involving several claims from retired professional players. Litigation is a form of regulation both in terms of the use of the court-funded system and access to private law as a mechanism to alter and influence behaviour.[166]

There has been widespread media speculation that a class action claim against the AFL by retired players is likely to be filed in the Federal Court. Critics have complained about the inequity caused by the absence of an adequate and appropriate compensation regime to assist former players, so the enforcement of private law rights are being investigated as avenues of recourse.[167]

Media reports suggest that the class action proceedings are likely to be filed in the Melbourne Registry of the Federal Court and the procedural mechanisms associated with class action litigation will need to be followed.[168] Lawyers representing the proposed

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[165] Samantha Lane, 'Head Injury Payouts Revealed', 1 April 2011, The Age <https://www.theage.com.au/sport/afl/head-injury-payouts-revealed-20110331-1cngm.html >. See also Jonno Nash and Charlie Happell, Front and Centre: Concussion in AFL remains a critical issue, 11 May 2017 <http://www.espn.com.au/afl/story/_/id/19355678/front-centre-head-concussion-remains-critical-issue-afl>.

[166] See above, chapter 3 part VI ('Regulatory Systems and Tools').

[167] See Justin Talent, 'It's a Denial of their Human Rights', 23 November 2017, www.sen.com.au/news/2017/11/23/it's-a-denial-of-their-human-rights/.

[168] See Michael Legg, 'National Football League Players' Concussion Injury Class Action Settlement' (2015) (10 (1) *Australian and New Zealand Sports Law Journal,* 47, 64-65.

plaintiff group have suggested that the 'VFL/AFL have known for 40 years about the dangers associated with allowing concussed players to continue to play play'—a claim that is likely to involve questions around workplace matters involving players and the AFL.[169]

At this stage, there are no torts-based proceedings filed in the state courts alleging negligence against the AFL or any clubs in the AFL competition arising from SRC-related injuries. As earlier noted, there is no DRA-style exception in the Victorian *Wrongs Act 1958* (Vic). This creates a peculiar situation where players in Victoria will not face the same limitations as players from other jurisdictions where DRA-style provisions apply.

5 *Observations*

The AFL is a large governing institution that has the organisational capabilities, internal governance regimes, and cultural and customary assumptions to be the dominant actor that shapes and influences the regulatory space of SRC. It also has the resources and collective capital to claim legitimacy over its social field.

In 1994, the AFL had the key characteristics to control the regulatory space when the issue of SRC concerns was raised. Due to the absence of participation from the AFL directly in the consultation phase of the NHMRC Report, it might be assumed that the AFL did not consider SRC a regulatable concern at the time. The AFL did not adopt the NHMRC recommendations. Instead, the period following 1994 was a time when the AFL went through rapid and significant expansions and exploited many commercial opportunities that arose at the time.

The AFL sustained its position of power and control when the US case received widespread attention in Australia from around 2011. Since then, further steps have been taken by the AFL towards concussion management, prevention, education and research. In recent years, efforts have been made to collaborate with other sports around the medical management of SRC.

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[169] See Greenhow, above n 70; See also Stuart Honeysett, 'Former Hawthorn premiership winner and Brownlow medalist John Platten joins AFL concussion lawsuit', *Nine Wide World of Sports*, 28 November 2017 https://wwos.nine.com.au/2017/11/29/07/19/former-hawthorn-browlow-medallist-john-platten-joins-afl-concussion-lawsuit.

The AFL has focused its efforts primarily on the elite players as the tripartite contractual agreement with the players enables the AFL to exert control over this level.[170] There have been some initiatives, however, in efforts to reach the other levels within its sport, and how concussion affects the emerging women's league.

In the context of concussion management, the AFL has formulated medical guidelines, co-ordinated concussion research, promulgated the rules and laws of the game, determined return-to-play rules and implemented concussion protocols, and exercised its regulatory power by enforcing breaches of the rules and guidelines. The AFL has made publicly available a significant amount of information that relates to the way it has approached concussion management, prevention, education and research.

The AFL was an early actor to investigate SRC concerns, particularly following the US events. While proactive steps have been taken, much of the focus relates to the elite professional level of the sport with some education and knowledge dissemination to the community levels of the sport. Further, several questions are still unanswered regarding the information that informs the public about the issue of SRC more generally. A key challenge in addressing these information asymmetries by the AFL is how to simultaneously balance private operational and reputational interests on the one hand, with the public interest, on the other.

III CASE STUDY TWO: RUGBY LEAGUE AND NRL

Rugby league is a full contact team sport with high incidence rates of concussion. The administrators of the sport describe rugby league as 'Australia's most entertaining and popular sport'.[171] The game was the last of the four codes of football to be established in Australia, when a group of players followed the actions of their English counterparts and broke away from the New South Wales Rugby Union.[172] Following disagreements between players and administrator's over payments to injured players and the absence of injury compensation for 'working- and lower-middle-class men', rugby league was

[170] An illustration of the AFL's control can be found in the issue of Essendon and the doping scandal in 2013. For further discussion, see Lisa Gowthorp, Kristine Toohey and James Skinner 'Government Involvement in High Performance Sport: An Australian National Sporting Organisation Perspective' (2016) 9 (1) International *Journal of Sport Policy and Politics*, 153-171.

[171] See NRL website <https://www.nrl.com/about-us/>.

[172] See Justice Burchett in News Ltd v …. (1996) 1435 ALR 33 at 38.

established in 1907.[173]

These events are significant for several reasons and are relevant to consider in the context of SRC as a sporting injury. First, these events signify the origins of cultural assumptions and attitudes towards the value of players' health for injuries sustained in sport. The reluctance on the part of the NSW Rugby Union to compensate injured players provided insight into the tolerance and acceptance of harm because of participation. These costs were shifted to the player and externalised as a cost of production.

Second, these events reflected the prevailing sporting norms and tensions arising in balancing the traditional notions of amateurism on the one hand, with the emergence of professionalism on the other.[174] Maintaining the principles of amateurism prevailed over the notion of compensating injured players by payment of medical costs.

1 *The ARLC and the NRL as Private Self-Regulated Associations*

Following the breakaway described above, the Australian Rugby League Board of Control was formed in 1924. Today, the peak representative body for the sport of rugby league is the Australian Rugby League Commission (ARLC), formerly the Australian Rugby League Ltd, established as a CLG in 1986. In addition to the ARLC, the NRL Ltd is another CLG responsible for organising the elite professional national rugby league competition in Australia (the NRL Competition).[175] The NRL Ltd registered as a CLG on 25 March 1998. Both the ARLC Ltd and the NRL Ltd are self-regulated associations and operate free from state interference.

The ARLC sets the rules and standards for the sport.[176] While the NRL has oversight primarily in respect of the NRL Competition at the elite professional level, the ARLC and the NRL are both significant influencers in the sport beyond the elite professional level. As the SGB of the sport of rugby league, the ARLC and the NRL perform dual functions and acknowledges the broader constituency of its sport, recognised by the former Chair of the Australian Rugby League Commission, John Grant:

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[173] Wray Vamplew et al, *The Oxford Companion to Australian Sport* (Oxford University Press, 1992) 296.

[174] Daryl Adair and Wray Vamplew, *Sport in Australian History* (Oxford University Press 1997)18, 19. See also Vamplew et al, above n 173, 304.

[175] See NRL Limited Memorandum of Association Clause 2 Objects.

[176] See Rugby League Laws of the Game, 2017.

> The business of sport is everyone's business—unlike the corporate world, absolutely everyone is a shareholder.[177]

As guardian of the sport, the ARLC is expected to promote and provide the sport across all levels, performing quasi-public functions.[178] This includes being responsible for the development of the sport of rugby league across all levels of the pyramid model of sport. In this role, however, there are many intermediate levels between the ARLC and the community levels of the sport. Like the AFL, the ARLC does not have direct control over what happens on the field of play at the community level and delegates certain functions to state and territory sporting organisations. As guardian of the sport, the ARLC is expected to design appropriate rules and standards based on its dominant position, to protect the safety of its players across all levels of the sport.

2 *Key Characteristics of the NRL as a Dominant Actor*

The administration of the sport underwent a restructure in 2012 to establish the ARLC as the governing body. The ARLC is now recognised as the sole administrator that sets the strategic direction for the sport across all levels of the game including responsibility for 'fostering, developing and funding the game from the junior to the elite levels'.[179]

The ARLC appoints the NRL's Chief Executive Officer who has overall management responsibility for rugby league in Australia. The CEO reports to the ARLC, but unlike the AFL, the CEO is not a member of the ARLC board. A senior management team consists of the CEO and ten other managers representing five divisions.

The NRL produces annual reports reporting on the activities of the sport. In 2017, the NRL entered into a new broadcasting arrangement worth more than $1.8 billion for a four-year period. The 2017 revenue was $354 million, and over half ($206.2 million) derived from third-party broadcaster's revenue.[180] Tensions, however, have arisen between clubs and the ARLC in respect of funding allocation and distribution of the revenue from these lucrative arrangements.[181]

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[177] NRL, *National Rugby League Annual Report 2017*, 23.
[178] See above, chapter 6 part III (Australian Sports System).
[179] See NRL website <https://www.nrl.com/about-us/arl-commission/how-the-commission-works/>.
[180] NRL *Annual Report 2017*, above n 177, 6, 14, 112.
[181] Ibid.

Like the AFL, the ARLC is formally recognised as the peak representative body for the sport and has received significant public funds from all levels of government.[182] As guardian of the sport, the ARLC enjoys high degrees of public trust. The state investment of public funds is entrusted to the ARLC to enhance, promote and develop their sport from grassroots to the national levels, a role that it recognises and publicly acknowledges through its membership of the Coalition for Major Professional and Participation Sports.[183] Like the AFL, the ARLC enjoys the benefits of operating in the NFP sector and has received income tax exemption[184] and other significant 'green' light regulatory exemptions.[185]

3 *NRL Clubs and Players*

At the national level of the competition, the NRL is the entity that is vested with the responsibility to run the NRL Competition. There are 16 clubs in the NRL Competition, and each of the NRL Clubs are members of the Commission. The national structure means state leagues in place across Queensland, NSW, Country League and affiliated states. These bodies represent the 'grassroots' levels of the sport and the NSW and Queensland state leagues are members of the ARLC.

Several of the NRL clubs are private companies. This differs from the AFL, where the clubs are all CLG in the NFP sector. Each NRL club receives an average of $13 million a year and is free to enter into commercial arrangements with third-party supporters and sponsors, subject to the terms of the participation agreement.[186] Like the AFL clubs, the NRL clubs compete for sponsors, players and fans.

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[182] See ASC Grant Funding Report, ASC. In the 2016/207 years, the ASC granted $987500 and $450 000 respectively to the Australian Rugby League. See Grant Funding Report. <https://www.sportaus.gov.au/grants_and_funding/grant_funding_report?sq_content_src=%252BdXJsPWh0dHAlM0ElMkYlMkZtYXRyaXhzc2lmcmVwb3J0LmF1c3BvcnQuZ292LmF1JTJGR3JhbnRzJmFsbD0x&recipientName=Australian+Rugby+League&recipientCategory=NSO&recipientType=&recipientState=&recipientYear=2017&pageSize=20&sortOrder=name_asc>.

[183] The NRL is a member of the Coalition for Major Professional and Participation Sports ('COMPPS'). See the Coalition for Major Professional and Participation Sports (COMPPS) <https://www.compps.com.au/>.

[184] Section 50.1 entities who ordinary income and statutory income is exempt. Section 50.45, Table 9.1.

[185] Richard Pomfret and John K. Wilson 'The Peculiar Economics of Government Policy Towards Sport (2011) 18 (1) *Agenda: A Journal of Policy Analysis and Reform* 85, 93-96.

[186] *National Rugby League Annual Report 2017*, above n 177, 27.

4 *The Regulatory Power of the NRL*

(a) Club Licensing Agreements

The NRL clubs sign participation agreements as transactional and authorisational forms of regulation that set out the terms of participation. These licensing agreements enable the clubs to participate in the NRL Competition. Currently, the licences are in place until 2023 with a commitment to work towards a permanent licence agreement.[187]

(b) Standard Player Contracts

In the NRL, the employment contract is entered between the club, the player and the player's agent and registered with the NRL. The NRL is not a party to the contract. In *Bulldogs Rugby League Club Ltd v Williams*[188] the Court considered the NRL had a 'substantial commercial interest' to protect and was in a position where it exerted control and influence over the club and player's contractual relationship. While the NRL is not in a direct contractual relationship with the player, it continues to influence and control the player's behaviour by setting out the rules and policies associated with conditions of entry and retaining registration as a player in the sport at the national level.

(c) Internal Disciplinary Mechanisms

The NRL has an internal dispute resolution mechanism and has a judiciary appointed to determine sanctions arising from breaching the rules and policies of the NRL. A scan of the NRL website reveals pages of examples where the judiciary has sanctioned players for illegal play outside the rules.[189]

5 *Concussion as a Challenging Problem in the NRL*

(a) SRC Concerns

Doctor Nathan Gibbs, an NRL team doctor, is listed as a panellist on the NHRMC Medical Committee who participated in the deliberation process. Notwithstanding the NRL's

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187 Ibid 18.

188 [2008] NSWSC 822, [9], referring to the terms of the player's contract requiring the consent of both the NRL and the club should a player wish to engage in any other sporting or leisure activities.

189 See NRL Judiciary <https://www.nrl.com/news/topic/judiciary/?sessionPage=8>.

representation at the time, it is difficult, however, to establish any direct evidence that the NRL implemented any of the NHMRC recommendations in the following years. Instead, the first notation of concussion in the NRL can be found in 2011 with the adoption of mandatory concussion guidelines[190]—17 years following the NHMRC Report in 1994.

From the annual reports examined from 2014 to 2017, the issue of concussion was referred to in the 2014 Annual Report in the following terms:

> We made it clear to our Clubs that they would be held accountable for identifying and assessing players that may have suffered a concussive injury and we insisted player be removed from the field as soon as they displayed signs of a possible concussion.[191]

The 2017 Annual Report, recognised the need to change the 'culture of acceptance' of head knocks as part of the game.[192]

(i) Concussion Prevention

It is impossible to eliminate the risk of concussive injury in rugby league as a contact sport, so preventative steps have been designed by the NRL to reduce or minimise the risk of injury. In 2011, and most recently in 2016, the NRL has introduced amended the laws of the game. Rule changes have also been made intending to minimise the risk of concussive injury. Such changes, however, have often been heavily contested; for example, the 'shoulder charge', a dangerous technique that often resulted in concussive or sub-concussive injury, was only banned in 2013. The media commentary around the issue highlighted the deep divisions between traditionalists who saw the move as weakening the essence of the sport and those who were advocating player safety as the paramount concern.[193]

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[190] The major policy shift in 2011 was the introduction of the return-to-play guidelines which prohibit a player from returning to play in the event of concussion. See NRL, 'NRL Mailbox: The truth about injuries' *NRL.com* (online), 30 March 2011, <http://www.nrl.com/NewsViews/LatestNews/NewsArticle/tabid/10874/newsId/62020/Default.aspx>.

[191] *National Rugby League Annual Report 2014*, 9.

[192] *National Rugby League Annual Report 2017*, above n 177, 9.

[193] Brad Walter, 'NRL Shoulder Charge Ban: Why the Rule Should Stay in Place' *The Sydney Morning Herald* 4 August 2015 <https://www.smh.com.au/sport/nrl/nrl-shoulder-charge-ban-why-the-rule-should-stay-in-place-20150804-girhpp.html>.

(ii) Concussion Management

In 2011, the NRL mandated the use of the CogState Sports System by all clubs funded by the NRL for baseline measure of player cognition and adopted the CISG diagnostic tool for determining whether a player has suffered a concussion.[194]

The NRL has adopted several iterations of a concussion policy and in 2015 developed the Management of Concussion in Rugby League Guidelines and the Return to Play Policy.[195] The Guidelines provide steps for management of concussion including game day and follow up management. The NRL also introduced a set of policies including Sideline Concussion Assessment and Head Injury Guidelines.[196] In July 2011, the NRL announced that new rules were being implemented to empower the Chief Medical Officer to investigate and fine clubs where players likely to have suffered concussion are being permitted to return to play.[197]

While steps have been taken towards recognising the importance of concussion in the sport, palpable tensions still arise in the sport when rule changes are proposed or when concussion protocols appear not to be followed in elite level competition.[198] The following examples highlight the key challenges associated with the proximity of self-regulated actors managing high profile concerns.

As a sign of the regulatory responsibility of the NRL over the NRL Competition, the NRL issued several fines in 2014 to some clubs for breaching concussion guidelines.[199] Many of these fines were around $20,000 and were often partially suspended. Later, in 2016, several clubs flagrantly breached the concussion policy of the NRL and allowed players to return to play in the same game. This time the NRL issued breach notices and imposed harsher monetary penalties than had previously been imposed. After the backlash against

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[194] See *ABC Four Corners*, Brain Explosion, 19 May 2011 <http://www.abc.net.au/4corners/content/2011/s3225219.htm>.

[195] The latest version of the guidelines was produced in 2017. See National Rugby League, 'The Management of Concussion in Rugby League: For Trainers, First-Aid Providers, Coaches and Parents', (2017).

[196] NRL *Operations Manual* (2014), clause 1.33.13, 81.

[197] Brent Read, 'NRL to tighten rules on concussion', The Australian (online), 14 July 2011 <http://www.theaustralian.com.au/news/sport/nrl-to-tighten-rules-on-concussion/story-e6frg7mf-1226094192943>.

[198] In the 2012 NRL State of Origin, Robbie Farah was concussed but was returned to play in the same game. See Josh Massoud, 'NRL to investigate whether new concussion laws are being ignored in Origin', *The Daily Telegraph*, 6 July 2012. <http://www.news.com.au/sport/nrl/nrl-to-investigate-whether-new-concussion-laws-are-being-ignored-in-origin/story-fndv2twz-1226418311952>.

[199] See ABC News, 'North Queensland Cowboys Fined $20,000 by NRL for Breaking Concussion Rules' *ABC* News(online) 29 August 2014 <https://www.abc.net.au/news/2014-08-29/nrl-fines-cowboys-for-concussion-violation/5707470>.

the NRL from players, clubs and fans, the NRL reversed its decisions and substantially reduced the fines, suspending a significant proportion.

The reversal of the NRL's approach to concussion breaches in the sport have two significant consequences. First, the reversal signals a form of regulatory capture; that the NRL is captured by the clubs and its proximity as being centrally rooted in the sport is a weakness of the self-regulated system. The second important consequence of the NRL's approach is that an opportunity was missed to send a critical message to those within the sport and the broader public about the importance of conservative SRC as a serious and potentially long-lasting harm.

(iii) Concussion Education

At the elite level, it appears from the information available on the NRL's website that there are some resources developed to educate players, coaches and trainers about SRC.[200] These include videos and trainer resources. It is difficult to establish, however, what steps the NRL has taken regarding concussion education across the state and community levels of the sport.

(iv) Concussion Research

In 2011, the NRL commissioned Dr Richard Parkinson, an Australian neurosurgeon, to conduct a two-year research project in the United States on concussion.[201] The NRL only recently included concussion as a priority area in the newly convened NRL Research Committee. In 2017, a call for expressions of interest was made where concussion was included as an area of focus.[202] The amount of funding allocated to concussion was $60,000.

For the first time, in 2015, the NRL produced an Injury Surveillance Report on the sporting injuries across the 16 clubs in the national competition season. The report is not made publicly available, with the NRL's Chief Executive Officer explaining that the decision to keep the report confidential was to 'respect the interests of each of the 16 teams'.[203]

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[200] See NRL website <https://playnrl.com/trainer/concussion/>.

[201] *ABC Four Corners*, above n 194.

[202] See Rugby League Research Committee, *Expression of Interest* (2017) (on file).

[203] The NRL decided to keep the report confidential 'to respect the interests of each of the 16 teams'. See NRL Clubs to receive injury rankings report, February 18, 2015, <https://www.nrl.com/news/2015/02/18/clubs-to-receive-injury-rankings-report/>.

Further, the NRL's CEO has indicated that it will not be making public the details when clubs are issued fines for breaching the concussion protocols unless the NRL determines that it is in the public's interest to do so.[204]

Based on the NRL's approach to the non-disclosure of information in the public domain, there is limited evidence about which clubs are breaching the rules, limited surveillance data, and a paucity of information about how many players are retiring from the sport due to SRC-related issues. There is also ambiguity in terms of the public interest in SRC in general and the wider social implication of decisions made by the NRL.

(b) SRC Litigation and Rugby League

Several cases have been filed in Australian courts involving the sport of rugby league by professional players.[205] The first was filed by James McManus (McManus) in the Supreme Court of New South Wales claiming damages for negligence against his former employer club, the Newcastle Knights (Knights).[206] McManus alleges that concussive injuries were sustained during his professional career and alleged the Knights are to blame for permitting or requiring him to continue to be exposed to traumatic brain injury. He further alleges the Knights knew the cumulative effect of concussive injuries could cause permanent impairment.

The pleadings outline the history of concussive injuries from 2012 to 2015. McManus alleges that during this time he suffered multiple head knocks and concussions, causing him to suffer cognitive and memory impairment, mood swings, headaches, anxiety, depression, lethargy and sleep disturbance. McManus contends that the Knights were negligent by allowing him to keep playing, encouraging him to continue playing, not keeping him away from the game for more extended periods between concussions and having unqualified people making on-field decisions.

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[204] See Adam Pengilly, 'NRL to Treat Disclosure of Concussion Breaches on 'Case-by-Case' Basis' *The Sydney Morning Herald* 9 May 2018 <https://www.smh.com.au/sport/nrl/nrl-to-treat-disclosure-of-concussion-breaches-on-case-by-case-basis-20180509-p4zeaq.html>.

[205] See Adrian Proszenko, 'Former Parramatta Eels Forward Brett Horsnell in Landmark Legal Case Against Club' *Sydney Morning Herald*, 3 May 2017, <www.smh.com.au/rugby-league/league-news/former-Parramatta-Eels-forward-brett-horsnell-in-landmark-legal-case-against-club-20170502-gvxj9m.html>.

[206] See *James McManus v Knights Rugby League Pty Ltd* [2017] NSWSC 1101. See Mazoe Ford and Louise Hall, 'Knights should have retired winger McManus following head knocks, court hears' *ABC* (online), 21 June 2017,<www.abc.net.au/news/2017-06-21/james-mcmanus-suing-newcastle-knights-nrl-over-concussions/8638682>.

As the case is pending, McManus will need to satisfy the following common law elements of the tort of negligence:

- that a duty of care was owed by the Knights to McManus and that the scope of the particular duty extends to the kind of activity that led to McManus' injury
- that the Knights breached that duty, in that the conduct of the Knights was inconsistent with what a reasonable person would do by way of response to the foreseeable risk
- that McManus' injuries were caused by the Knights' carelessness.

Further, McManus will need to overcome the legislative barriers explained above in Part I under the *Civil Liability Act 2002* (NSW), particularly around the obviousness of the risk and whether professional rugby league qualifies as a DRA.[207] The NSW Court of Appeal in *Goode v England* upheld an earlier judgment that a professional athlete was engaged in a DRA, providing an example of a 'liability-defeating rule' and disqualifying the claimant from seeking damages in negligence resulting from the materialisation of an obvious risk.[208]

The DRA exception will only apply to *obvious* risks that materialise from participation in the activity. Based on the Australian authorities examined above, it is uncontentious that a player accepts the obvious risks associated with participation in sports that involve physical contact. Injuries from tackles, including concussive injuries are obvious risks.

As noted earlier in this chapter, the relevant focus, however, needs to be placed on the *mismanagement* of the primary injury, not the SRC itself. A key challenge in establishing the application of the DRA exception is to establish that the player accepted the risks vis a vis the mismanagement of SRC. As this involves a clinical diagnosis and qualified medical assessment, it is submitted that a player does not consent nor can be taken to accept the risks. On this basis, therefore, the risks associated with the mismanagement of SRC are not likely to be considered obvious ones.

[207] See *Civil Liability Act 2002* (NSW), ss 5L and 5K.
[208] See *Goode v Angland* (2017) NSWCA 311.

IV OBSERVATIONS AND CONCLUSION

This chapter examined the role of the private and public law as a form of regulating SRC and to ascertain whether law offers solutions to control, order or influence behaviour in a way that achieves the goal of managing or minimising the harm associated with SRC. While sport does not operate in a 'law-free zone' and courts have been prepared to recognise a duty of care owed to participants, the above analysis established that sport is 'unusually resistant to control by litigation'. In other areas such as occupational health and safety and workers compensation, professional sport has enjoyed a degree of freedom from interference to self-regulate matters arising 'on the field of play'.

An NFL-style concussion action has not been filed in Australia. However, several cases are threatened or pending. Many obstacles and challenges are likely to arise before an assessment is made as to the effectiveness of litigation as a form of regulation in an Australian context. The US case study in chapter 4 illustrated the power of litigation as a regulatory tool in controlling, ordering or influencing behaviour and contributed to a change in responding to SRC in that jurisdiction. Whether the same will happen in the Australian context remains to be seen.

At the historical moment in time when SRC concerns arose in Australia, the AFL and NRL case studies illustrate that SGBs possessed the key characteristics of actors to exert dominance and control over the regulatory space. Specifically, SGBs determined whether SRC was a regulatable concern and later determined what regulatory arrangements would be developed to address the issue. Given the blueprint of history and regulatory posture of state actors explained in chapter 6, it was unsurprising that the status quo would remain when the issue of SRC first arose in Australian sport. Non-state actors continued to assert control over the regulatory space and unilaterally determine how SRC was dealt with. This involved consideration of both the private interests of the SGBs and the public interest, creating a collision of interests where the proximity of self-regulated actors would necessarily interconnect.

The NHMRC recommendations were not adopted. Instead, the period from 1994 is characterised by voluntary self-regulation by SGBs who were embarking upon growth

strategies to develop the professional levels of their sports and to exploit the commercial opportunities presented by global and domestic developments.[209]

In 1994, the state of scientific uncertainty appeared to be a reason why SRC was not escalated to be a priority area of concern, nor considered serious enough to amount to a crisis that 'punctuated the organisation of institutionalised procedures'.[210] Instead, the mandate to grow the business of sport appeared to be the driving force behind the SGBs' strategies at this time and continued to be a central focus for the four codes for the next several decades. To use a sporting metaphor, SGBs had taken their 'eyes were off the ball' when it came to concerns around SRC.

The AFL and the NRL have, through their respective medical committees, developed guidelines for the management of concussion. Unlike the NFL case study in chapter 4, there are no suggestions that the AFL and NRL guidelines are based on flawed research or any allegations that these SGBs have fraudulently concealed important information from players or the public.

The actions by the AFL and the NRL recognise the duty to protect the players' health and safety and to implement risk management strategies. However, as noted earlier, a call was made in 2011 urging these actors to 'work to ensure the implementation, compliance, and enforcement of the guidelines, as well as consistent application of penalties and sanctions'.[211] To maintain the highest degree of transparency, an independent review of implementation, compliance, and enforcement of the guidelines would be of benefit in the future to repel suggestions of impropriety.

Unlike the AFL, the NRL has not been as transparent in respect of injury surveillance and the public release of how SRC is managed within the sport. Another example of weakness in the self-regulated system involves the decision by the NRL to limiting disclosure of information in the public domain about teams who are breaching the concussion policies. This decision signals that the NRL appears not to appreciate that the issue of SRC is not a private matter, suggesting ambiguity as to ownership and responsibility vis a vis the public interest in SRC.

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[209] See above, chapter 6 part I ('Illuminating the Past: Customary Assumptions and Dominant Actors').
[210] Hancher and Moran, above n 96, 284.
[211] Greenhow, above n 146.

The next chapter turns to examine how to conceptualise the public interest in sport and SRC. Establishing the public interest provides the foundations upon which to advance the argument that there is a greater role of the state as a regulatory actor in responding to SRC in Australia.

CHAPTER 8: REGULATING SRC: THE ROLE OF THE STATE

Having explained the role of law in regulating SRC and the way non-state actors in two case studies have regulated SRC, this chapter now turns to the role of the state in further and more direct regulatory action of sport and SRC in the public interest. This chapter establishes that SRC has broader social implications extending beyond the private interests of individual participants or non-state actors with dual responsibilities and competing priorities. The public interest in respect of SRC gives state actors the legitimacy to play a more significant role in the regulatory space. SRC is not merely a private matter nor a necessary risk associated with engaging in a private activity for one's enjoyment.

Part I commences by identifying the constitutive elements of the Australian public's interest in sport in a general sense. This rationale for considering the domain of sport in the first instance is to establish the characteristics that illustrate the social utility of sport. As SRC as a regulatory concern has distinctive characteristics, Part II identifies the Australian public's interest in SRC with a central focus on SRC as a public health concern and the role of the state as guardian of the public's health. Part III then explains how state actors have responded to SRC in Australia. Additional reasons to justify state involvement are suggested in Part IV.

I THE PUBLICNESS OF SPORT

Sport offers many physical, psychological, social and health benefits to individual participants. At a macro level, sport and recreation are recognised as valuable contributors to Australia's social, economic and cultural wellbeing.[1] Millions of Australians participate in sport; many more millions watch sport.[2] Chapter 6 explained that state actors have developed and implemented public policies designed to encourage participation by Australians in all forms of sport, recognising the population-wide benefits and public interest in sport.[3]

1 Report of Independent Sports Panel, *The Future of Sport in* Australia (2009) ('Crawford Review') 91.
2 See above, chapter 6 part III ('Australian Sports System: Actors, Relationships, Resources').
3 See above, chapter 6 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors').

Conceptualising the public interest, however, is constrained by the absence of a universally accepted consensus as to what constitutive elements must exist to support such a finding. Instead, the application of this 'exceptionally indeterminate and amorphous' concept is likely to depend heavily upon the context and the substance of the problem or activity under review.[4]

A *Defining the Public Interest*

The High Court has explained that the public interest is a question of fact and degree and involves a 'balancing of interests, including competing public interests'.[5] It is, however, of vital importance to distinguish private and public interests to help determine who should act to protect participants (or supervise their protection) when a matter arises that threatens or prejudices the public interest.

Chapter 6 described how sport in Australia has developed since colonisation and expanded into new markets aligned with changes in political, economic and social conditions. SGBs as non-state actors play a critical role in linking civil society with the state, a relationship described by Julia Black as establishing linkages through a 'heterarchy of different spheres of society'.[6] As earlier noted, SGBs can exercise significant power as an intermediary and perform a quasi-public function in the production and delivery of sport.[7] A reasonable assumption, therefore, is that SGBs are expected to exercise that power in the public interest — a public function in producing and delivering sport.[8]

For present purposes, the 'public interest' is taken to mean the 'common, collective and public good, featuring a public or national benefit'.[9] Applying this in the current context, sport is a public good,[10] provided without profit to all members of society who have equal rights to access a safe sporting system; a system that ensures that their physical integrity will be protected from preventable harm. The private interests, on the other hand, include preserving the autonomy of individual decision-making; the 'fiercely guarded' autonomy

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4 Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017),44.

5 *Re Queensland Electricity Commission and Others; Ex parte Electrical Trade Union of Australia* (1987) 72 ALR 1 at 5.

6 Julia Black, 'Constitionalising Self-Regulation' [1996] 59(1) *Modern Law Review* 24, 28.

7 See above, chapter 6 part III ('Australian Sports System: Actors, Relationships and Resources').

8 *Watson v British Boxing Board* [2001] QB 1134, 1137.

9 Graeme Hodge 'Evaluating What Will Work in Nanotechnology Regulation: In Pursuit of the Public Interest in Graeme Hodge, Diana Bowman and Karinne Ludlow *New Global Frontiers in Regulation: The Age of Nanotechnology* (Edward Elgar, 2007)113.

10 To illustrate the recognition of sport as a public good, the UK parliament has described certain sporting events as 'public assets' legislating to ensure free televised access through anti-siphoning legislation. Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (Bloomsbury Profession, 3rd ed, 2014) [A1.88].

of sports self-regulation and the financial sustainability of SGBs through the protection of the 'brand' of the sport they produce and deliver to the public.

1 *A Neutral Umpire or a Public-Private Partnership?*

As champions of the public's interest, state actors are expected to act as a 'neutral umpire' in safeguarding or advancing these interests; where the state is expected to be unaffected by the interests of specific groups and solely focused on advancing the private interests of all sports participants. This neutral role advances the public interest and can lead to the development of regulatory arrangements to calibrate competing interests and values. In the context of SRC, this can also involve balancing the safety of participants, on the one hand, with the spectacle and commercial interests of the sport, on the other.

In other jurisdictional settings, the relationship between the state and sport is described as analogous to a public-private partnership (PPP).[11] Whether this best describes the relationship between state and private actors in an Australian setting is a point considered later in this chapter. For present purposes, Australian courts have recognised a public and private interests in sport arising through the investment of taxpayer funds in sport, in funding sporting infrastructure and facilities and the funding and support of sporting organisations. Gleeson CJ in *Agar v Hyde* noted that:

> A great deal of public and private effort and funding is devoted to providing facilities for people to engage in individual or team sport. This reflects a view, not merely of the importance of individual autonomy, but also of the public benefit of sport.[12]

The public interest in sport is revealed by examining its special characteristics, a large part being the social utility, value and usefulness of sport.[13] More broadly, the public interest and social utility of sport is the basis upon which state actors have typically used sport as a vehicle through which to promulgate and promote public policies for the benefit of its citizenry.

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[11] This analogy used by Lewis and Taylor in describing the relationship between state actors in the UK and sport. See above, chapter 5 part II ('A Softer Approach: Canada and the UK'); Lewis and Taylor, above n 10, [A1.13]; [A1.18]

[12] *Agar v Hyde; Agar v Worsley* (2000) 201 CLR 552 ('*Agar*'). Gleeson CJ [15].

[13] Stephen Weatherill *Principles and Practice in EU Sports Law* (Oxford University Press, 2017) 1-7; Jack, Anderson, 'Personal Injury Liability in Sport: Emerging Trends' (2008) 16 *Tort Law Review* 95-96,109.

B *Public Benefits of Sport*

Four broad categories of benefits arise in sport: health, social, developmental and economic. Some of these benefits are measurable.[14] Others are more difficult to quantify, described as being based on 'warm-glow externalities' an emotional type of positive externality that continues to influence public policies around sport, and drive significant public investment in it. [15]

1 *Public Health Benefits*

Sport contributes to society by improving the physical and mental health, fitness and mobility of citizens, derived from participation in sport.[16] Global health policies are built on the health benefits of physical activity, where physical inactivity is identified as the fourth leading risk-factor for global mortality accounting for 60% of all deaths and 43% of the global burden of disease.[17] The high burden has a direct impact on the provision of health services and stretches the financial resources of a state health system. In Australia, more than 13,000 deaths per annum are attributed to physical inactivity.[18]

Participation in sport is considered a preventative health measure and an effective way of ensuring that individuals achieve the recommended level of activity to reduce the risk of non-communicable diseases (NCD). The benefits to society include lower health-care costs and reductions in productivity losses from illness.[19] When measured against the possible losses associated with participation—absenteeism and health costs associated with sporting injuries—the benefits for society are thought to outweigh the losses, with the net result that participation in sport generates a net gain for society.[20] In 2009, the

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[14] For example, the ABS measure the value of sport across various categories including employment volunteers, spectator attendance and contributions in terms of developing industries and products. Australian Bureau of Statistics, *Value of Sport, Australia 2013*, Cat No.4156.0.55.002, ABS, Canberra 8-9; Frontier Economics, *The Economic Contribution of Sport to Australia* (2010) 1-8.

[15] Richard Pomfret and John K. Wilson 'The Peculiar Economics of Government Policy Towards Sport (2011) 18 (1) *Agenda: A Journal of Policy Analysis and Reform* 85, 86-87.

[16] Commonwealth, *Backing Australia's Sporting Ability – A More Active Australia, Federal Government Policy Statement,* (2001) Section 2.0, 6-7.

[17] World Health Organisation (WHO), *Global Recommendations on Physical Activity for Health* (2011) 7.

[18] Australian Sports Commission, *Play Sport Australia: The Australian Sports Commission's Participation Game Plan*, March (2015) 3.

[19] The World Health Organisation identifies physical activity as the fourth leading risk factor in global mortality with 6% of deaths globally. WHO, above n 17,10.

[20] The social utility of sport is the value people place on sport. Frontier Economics, *The Economic Contribution of Sport* (2010), 1,2.

gross health cost savings of community sport participation were estimated at $1.49 billion per annum.[21]

2 *Social Capital in Sport*

'Sport is the glue that binds communities'[22]

Participation in sport is recognised as teaching critical Australian values including leadership, teamwork, co-operation and the pursuit of excellence. These values are recognised as essential ingredients in personal and social development.[23] Sport provides opportunities for social interaction and the development of relationships, fostering personal achievement and fulfilment, individual character-development and teamwork skills.[24] Sport produces significant degrees of social capital, contributing to social cohesion and overall benefits delivered to the broader community.[25]

Participation in sport helps builds social capital which is a resource created when people work, play and/or socialise together, building trust, reciprocity and shared values in the group and the broader community. The strength of a community is measured by the accumulation of social capital; where the essential feature is that social networks have value. [26]

Sport enables connections and relationships to be fostered between people organisations, volunteers, participants, parents and officials. As part of the NFP sector, sporting organisations in community sport rely heavily on the availability and support of volunteers. In 2010, the social capital generated in Australia through volunteerism in sport resulted in more than 2.2 million Australians (13.5% of the population) engaging in voluntary work in the sports sector, with the labour input calculated as contributing

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21 Ibid 3-4.

22 John Evans et al, 'Indigenous Participation in Australian Sport: The Perils of the 'Panacea' Proposition' (2015) 7(1) *Cosmopolitan Civil Societies: An Interdisciplinary Journal,* 53,54.

23 See <http://www.regional.gov.au/sport/programs/participation.aspx>.

24 See Nico Schulenkorf, 'An Ex-Ante Framework for the Strategic Study of The Social Utility of Sport Events' (2009) 9(2) *Tourism and Hospitality Research* 120- 131.

25 The World Health Organisation describes social capital as representing 'the degree of social cohesion which exists in communities'. Dwight Zakus, James Skinner and Allan Edwards, 'Social Capital in Australian Sport' (2009) 12(7) *Sport in Society* 986,987.

26 Katie Misener and Alison Doherty, 'A Case Study of Organisational Capacity in Non-profit Community Sport' (2009 23(4) *Journal of Sport Management* 457,473.

AUD$4 billion annually into the Australian economy.[27]

3 *Economic Benefits*

In 2015, economists estimated that sport contributes around two per cent of Australia's GDP and $26.9 billion to the Australian economy.[28] The segments involved in the production and delivery of sport represented 25% of the sector, calculated as sports organisation and administration (13.1%) and sports clubs (11.9%). Sports administration has been responsible for providing the primary source of revenue since 2012. due to the new broadcasting rights. In 2015, more than 100,000 people were employed in the sports sector.[29] In addition to those directly employed, the production and delivery of sport are heavily dependent upon volunteers and social-capital contributions.

4 *Education Benefits*

A recurring theme, in respect of the public benefits, is that sport also fulfils an educational function both in terms of 'improving education both at schools and through lifelong learning…'.[30] In Australia, investment has been focused on the school sector to increase participation in sport and reduce barriers that might exist.[31]

C *The Public's Interest and State Engagement in Sport*

An analysis of ACG interventions in sport since the sports portfolio was first established in 1973 identifies the ACG has intervened in sport either directly or indirectly, using a range of regulatory tools. Consistent with the laissez faire approach to regulating sport, most of these interventions have been based facilitating or enabling sports through various forms on economic regulation such as grants and subsidies and transactional regulation through contractual arrangements enabling or facilitating sport to support high performance sport or increase participation in sport.

Consistent with the customary assumptions as to the role of state actors in sport, there is no nationally consistent policy or national sports plan, although recent efforts have been

[27] Australian Bureau of Statistics, *Volunteers in Sport, Australia*. Cat No. 4440.0.55.001 (2010) ABS, Canberra.

[28] Frontier Economics, above n 14; Phil Ruthven, Chairman IBISWorld Sport in Australia The Australian July 2014.

[29] ABS, above n 27.

[30] Lewis and Taylor, above n 10, [A.1.16].

[31] Australian Sports Commission and La Trobe University, 'Addressing the Decline in Sports Participation in Secondary Schools' (2017), *ASC Report.*

made to develop one.[32] Instead—and possibly hindered by the fact that since the portfolio was first established—there have been 25 sports ministers holding the portfolio.[33]

The collective benefits of sport contribute to its high social utility. The expectation is that the benefits associated with sport will always outweigh any negative externalities. There are, however, several examples where state actors have recognised the public interest at a national level to justify intervention, reflecting a departure from the traditional laissez faire approach to regulating sport. These examples are relevant as they give insights in establishing what has motivated state actors to take a more significant role in regulating sport, contributing to an understanding of what might motivate or justify a more significant role in regulating SRC.

1 *Doping in Sport*

Because of widespread concerns around the self-regulation of doping in sport, a Senate inquiry was commissioned in 1989 and 1990 to investigate the problem in Australia. Later, the ACG established the Anti-Doping Agency in 1990. Since then, the ACG has been an active participant in the regulation of anti-doping in Australian sport and has investigated significant public resources in efforts to combat the problem. A rationale for state engagement in the anti-doping regime is based on the adverse health effects of performance-enhancing substances and the threat to the integrity of sport.

The anti-doping regime in Australia is an illustration of the co-regulatory role of state actors' sport. This hybrid model also involves the World Anti-Doping Agency (WADA) as the non-state actor responsible for the design and development of the global anti-doping rules in sport. The role of state actors is to provide the legislative mechanisms including the implementation and enforcement of the WADA-designed anti-doping scheme. Individual sports are responsible for the internal management of the anti-doping regime and 'partner' with the state agency involved in reporting anti-doping rule violations.[34]

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[32] Following the release of the Intergenerational Report into Sport predicting a decline in participation by 15% by 2036, the ACG called for submissions to develop a national sports plan in 2017. Boston Consulting Group, 'Intergenerational Review of Australian Sport' (Australian Sports Commission, 2017), 4, 18-19.

[33] ACG Sport and Recreation Ministers, AGC Summary. A summary has been prepared by the author and held on file.

[34] Annette Greenhow, 'Regulating Risks in Sport-Related Concussion: Regulatory and Legal Considerations in Balancing Safety and Spectacle' in Simon Gardiner and John Wolohan (eds) *Handbook of Global Sports Law* (Routledge, forthcoming).

2 *Sports Injury Prevention*

In recognition of injury prevention and control as a KHPA and the public interest in identifying, preventing and ameliorating risks arising from sporting injuries, the ACG ministers for health and sport established the Australian Sports Injury Prevention Taskforce (ASIPT) in 1995.[35] This policy priority was recognised to promote a national perspective on sports injury prevention.

The goal of the task force was to decrease the frequency and severity of injury associated with sport and recreational activities while promoting healthy participation in sport.[36] The ASIPT prepared a National Sports Safety Framework in 1997, recommending specific measures targeted at sporting clubs and organisers, and seeking collaboration across state actors to, inter alia, coordinate and direct national sports injury prevention strategies, develop policy in conjunction with relevant agencies, coordinate and facilitate sports injury surveillance and develop sports-specific injury prevention programs.[37]

Notwithstanding the essential goals of this state initiative, it is widely accepted that there has been limited state investment in sports injury prevention in Australia and the 'SportSafe' initiative did not proceed to realise these critical public health goals.[38] The 'revolving door' of ACG ministers might shed some light as to why this policy priority has become less urgent.

3 *National Regulatory Framework - the ASC and Child Safety*

The most recent state initiative involving sport relates to the safety of children. The ASC first developed a child safety policy in 2011 and has been directly involved in regulating Australian sports in respect of early child protection concerns.

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35 Australian Sports Commission, *SportSafe Australia, A National Sports Safety Framework* (1997).

36 Ibid.

37 Other goals included facilitating sport injury prevention research and funding and the development and distribution of resources.

38 Caroline Finch et al, 'The Evolution of Multiagency Partnerships for Safety Over the Course of Research Engagement: Experiences from the NoGAPS Project' (2016) 22(6) *Injury Prevention* 386, 388.

In 2016, the Royal Commission into the Institutional Responses to Child Sexual Abuse (Royal Commission) investigated instances of child sexual abuse within several Australian sports.[39] Following the inquiry, the Royal Commission found that

> National leadership, coordination and capacity building can support the implementation of initiatives to better protect children. The broader sport and recreation sector does not have a representative committee or body to guide and advise on child safety. No single entity brings together the wide range of government and non-government institutions that provide sport, recreation… services for children.[40]

In recognising the polycentric nature of the Australian sports system, the Royal Commission recommended that a 'child safety advisory committee for the sport and recreation sector with membership from government and non-government peak bodies to advise the national office on sector-specific child safety issues'.[41]

Before the Royal Commission had released its final report, the ASC acted quickly to coordinate a national child safety initiative and developed a national child safe sport framework to enhance consistency to child protection measures across all sporting organisations including state and territory sporting associations.[42] This was done in collaboration and cooperation with state and territory governments and necessarily involved partnerships with stakeholders in the Australian sports system. The collective goal was to protect child participants in sport and provide a safe sporting environment. The ASC's adopted a leadership role and supported non-state actors to build capacity to, amongst other things, make sports safer.

4 *A Whole-of-Government Approach*

The above initiatives adopt a whole-of-government approach and follow the national policy-making framework established through the MSRM.[43] A recent example of cross-

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39 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 39 The Response of Certain Football (Soccer), Cricket and Tennis Organisations to Allegations of Child Sexual Abuse* (2016) 1-92.

40 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Preface and Executive Summary* (2017) vol 1, 88,89.

41 Ibid.

42 Australian Sports Commission, 'ASC Designing Child Safeguarding Framework for Sport, 8 September 2017. <https://www.ausport.gov.au/supporting/news/story_664004_asc_designing_child_safeguarding_framework_for_sport>.

43 See above, chapter 6 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors).

jurisdictional collaboration in sport illustrates the priority of the ACG as outlined in the Department of Health Annual Report.[44] This report identified that to increase participation in sport, the ACG would 'implement strategies policies and projects in consultation with relevant ACG agencies, the ASC, the States and Territories and other relevant stakeholders'[45] The type of action contemplated included the development of 'strategies, policies and projects supporting increased participation, encompassed health outcomes and delivered whole of government objectives'.

Each of the above examples involves aspects of the public's health and safety, either to prevent undesirable behaviour or to promote active participation in sport. The national approach demonstrates the adoption of a cross-jurisdictional policy framework underpinning these regulatory interventions and shows that state actors have the capacity to coordinate and develop regulatory measures at a national level. Within each of these initiatives, the public interest underpinned the state's involvement. The question then turns to consider the public interest in SRC to support the central hypothesis that state actors have capacity to play a greater role in the regulatory space.

II THE PUBLIC INTEREST IN SRC

Identifying the Australian public's interest in SRC does not, of itself, trigger a state response or guarantee state engagement. Something further is required, particularly in respect of contemporary views that self-regulation is the preferable option, with state actors involved in 'steering' rather than 'rowing'.[46]

Gostin explains that the theory of democracy as 'governments are formed primarily to achieve health, safety, and welfare for the population'.[47] Intervention, however, necessarily fetters individual freedom and autonomy, and the state treads carefully to establish parameters around when, and under what conditions, the state will intervene.

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44 Commonwealth, *Department of Health Annual Report, 2015-2016*, Outcome 10 Sport and Recreation of the Annual Performance Statements.

45 Ibid.

46 See above, chapter 3 part IV ('Regulatory Systems and Tools').

47 The theory of democracy underpins governments primary responsibility for the public's health and the population as a whole has the legitimate expectation of benefiting; Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press, 1st ed, 2008)35; See also Lawrence O Gostin, Lindsay F Wiley and Thomas R Frieden, *Public Health Law: Power, Duty, Restraint,* (University of California Press 3rd ed, 2016) 1, 6, 8-9.

It is the role of the state to protect its citizens from harm, so it is, therefore, necessary to consider why SRC is a concern to the state and why the state must be proactive in managing and minimising the harm.

A *Conceptualising the Public Interest in SRC*

Chapter 5 explained that state actors in several jurisdictions justified their regulatory approaches based on SRC being a public health concern, not just a private one and the recognition of the collective benefit in having a healthy community.[48] Public health involves something more significant than individual health and well-being. There are two factors to consider. The first involves a consideration of the entity which assumes responsibility for the public's health. The second involves consideration from the perspective of those who stand to benefit and their legitimate expectations that the public will benefit from public health interventions.[49]

1 *Guardian of Health and SRC*

As many millions of Australians play sport, one can assume that a significant proportion of the Australian population is exposed to the risk of SRC. If everyone benefits from living in an active society, then regulating the risk is a social responsibility. The question then is; who should safeguard the public's health? Usually, the citizenry looks to state actors to take steps to protect the public and advance public policies to minimise possible harm. Gostin argues that this involves the state engaging with its public health partners to develop a collective response.[50] Multiple parties are needed to engage in Gostin's partnership model, involving both state and non-state actors, to collectively act to address the public concern.

As the guardian of the public's health, the primary responsibility vests with the state to safeguard the health of its citizenry by developing policy responses that recognise and mitigate risks when threats arise.[51] In recognition of this role, each state and territory in Australia has public health legislation already enacted, and several jurisdictions embody the precautionary principle within their legislative frameworks.[52] Through this collaboration, collective action is designed to achieve the goal of identifying, preventing

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48 See above, chapter 5 part II ('A Softer Collaborative Approach: Canada and the UK').

49 Gostin, above n 47.

50 Ibid 40-44.

51 Gostin et al, above n 47, 125.

52 In recognition of this role, each State and Territory in Australia has enacted public health legislation already enacted, and several jurisdictions embody the precautionary principle within their legislative frameworks.

and ameliorating risks to health in the population with sufficient resources invested to achieve those ends.

2 *Expectation of Benefit*

Millions of Australians who participate in organised sport, whether at school, university, at a local club, or at the elite level, have a legitimate expectation that all participants have the right to a safe sporting system, and that if a threat arises, there is a state actor willing to intervene to mitigate the risk or manage the harm. Participants, families, communities and the state place trust and confidence in those bodies tasked with promoting, organising and delivering sport that the health and well-being of participants will be protected, with expectations of technically competent practices and adherence to high standards of safety. This is not to suggest that the obvious or inherent risks associated with sport are eliminated, nor that the essence of sport is altered to detract from the rough and tumble of the game. Instead, the contention is that a balance must be achieved between safety and spectacle that results from a collaborative approach between the state and its partners, underwritten by principles of good governance, transparency and accountability, in recognition of a duty owed to participants.

3 *Public Interest Questions*

Several questions, likely to be of interest to the Australian public in respect of SRC, reflect the wider public interest in SRC. For example, the public is likely to be interested in answers to questions that relate to the incidence rates and retirements associated with SRC in the various Australian sports, and the approach taken to concussion management by the sport. For example, which sports have high rates of SRC? How many players retire due to SRC-related concerns? How many SRC events are too many? When should a participant retire or discontinue play?

As the medical consensus recognises children as a vulnerable group, should certain sports with a high incidence of SRC be avoided by children? And at what age is it safe to begin to engage in tackling or full body contact techniques that carry a risk of SRC? And when is it safe to return to learn, return to play or return to practice after an SRC?

Where information asymmetries exist, what mechanism ensures the dissemination of SRC-related information between sport school and other systems? In several jurisdictions,

state actors have been required to act to answer some of these questions.[53] What steps have state actors taken in Australia to address these questions?

III STATE ACTORS AND SRC

There has been limited state involvement in sport generally; less state involvement in regulating sporting injuries; and minimal state involvement in regulating SRC. It appears that no further action was taken by state actors following the release of the 1995 NHMRC Report until around 2011.

A further complicating factor regarding SRC is the state of scientific knowledge that currently exists. As earlier noted, the incomplete knowledge around SRC has influenced how actors have approached the task of regulating SRC. In some cases, scientific uncertainty has been the basis for lack of action or limited involvement.

A *Commonwealth State Responses*

A review of the ACG policies reveals that several sports policies and initiatives have been instigated by the many ACG ministers for sport or health since 1973. In respect of SRC, however, neither department has developed a national strategy or policy framework for the regulation of SRC. Instead, both departments have developed a patchy and inconsistent range of initiatives, under the auspices of promoting participation in sport under the National Sport and Active Recreation Policy Framework (NSARF).

1 *The Department of Sport*

In 2015, the MSRM Communique referred to SRC in the following statement:

> Australia's Sport and Recreation Ministers today took the steps to further strengthen the *integrity* of Australian sport, *enhance* sport and recreation participation and *protect* sporting participants from the dangers of concussion. [emphasis added] Sport Ministers confirmed their commitment to ensuring Australians are *safe* when participating in sport by endorsing a Concussion in Sport Position Statement. The Federal Government will now finalise the guidelines for official release.…[54] [emphasis added]

The above statement recognises several of the earlier rationales identified as triggering state regulation. First, the reference to 'further strengthen the integrity in Australian

[53] See above, chapter 5.

[54] Sport and Recreation Ministers' Meeting Communique, Melbourne 1 October 2015 <http://www.health.gov.au/internet/main/publishing.nsf/Content/MSRM-Communique>.

sport', reflects the rationales that enhance public trust and promote policies that support the integrity of sport. In that regard, this statement recognises SRC as an integrity issue. Next, the reference to 'enhance sport' reflects the rationale to promote and advance policies that increase participation in sport (and to remove barriers to participation). Further, the reference to 'protect sporting participants from the dangers of concussion', recognises that SRC is a public health concern and the rationale to safeguard the public's health and to prevent and minimise the harm associated with SRC.

2 *The Department of Health*

The Department of Health recognises its role in sport through 'the development of participation strategies, policies and projects' and notes that this reflects 'whole-of-government and broader health objectives'.[55] In 2016, an allocation of $70,000 was made to 'support a joint initiative between the AIS and the AMA on SRC' and described this as part of a performance target to increase participation in sport, and 'improve safety and health outcomes for people involved in sport'.[56] This initiative involved the establishment of a website and the development of a joint concussion position statement between the AIS and the Australian Medical Association.[57] The slogan 'If in doubt, sit them out' became the key message in education and public awareness campaigns.

The 2016 Concussion in Sport website is explained by the ACG as:

> The Concussion in Sport website brings together contemporary evidence-based information for athletes, parents, teachers, coaches and medical practitioners and seeks to ensure that all members of the public have rapid access to information to increase their understanding of sport-related concussion and to assist in the delivery of best practice medical care.

This collaboration between the AIS and the AMA is essential as it provides compelling evidence of SRC as a public health concern and collaboration with a significant public health partner. There is limited evidence available to ascertain whether the ACG engaged

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55 Department of Health Annual Report 2015-2016, above n 44, 186.

56 Ibid 186 - 187.

57 Australian Institute of Sport and Australian Medical Association, 'Concussion in Sport Position Statement' (2016) ('AIS/AMA Concussion in Sport 2016'); Lisa Elkington et al, 'Australian Institute of Sport and Australian Medical Association Concussion in Sport Position Statement' (Australian Institute of Sport Australian Medical Association, 2017) ('AIS/AMA Concussion in Sport Position Statement 2017').

with other public health partners such as academia, the media, business or the community.

The likely rationale for state engagement in this form of informational regulation was to prevent or minimise harm, manage risk and address information asymmetries. Based on the material examined in this research, there is no evidence of post-implementation evaluation as to whether this regulatory tool is achieving its desired result. Indeed, in the absence of a national strategy or policy, it is difficult to ascertain what the regulatory goals were designed to achieve.

3 *The ASC*

As noted earlier, the ASC is the leading ACG agency in the Australian sports system. There is no evidence of the ASC having identified SRC as a key priority area nor is there any national policy or strategy regarding SRC. Indeed, the ASC's corporate plan does not mention SRC at all, nor identify SRC as a key target area.[58] Instead, other high-profile concerns such as setting a 'high bar' on governance, integrity in sport and child safety in sport are noted.

The absence of the issue of SRC by the ASC can be interpreted in several ways. First, the ASC does not consider SRC is a matter that falls within its remit. This, however, is surprising, given the evidence presented earlier that the ASC was recognised as having a role to play in national sport injury prevention as early as 1996.[59] The second reason why the ASC might not have considered SRC as a high-priority area could be based on the lack of evidence of a problem to trigger ASC involvement. Again, this would be highly unlikely given the recognition that SRC is the most common hospitalised sport-related injury, with high incidence and prevalence rates in the codes of football.[60] The third reason could be the reliance upon the customary assumptions that the ASC entrusts the regulation of SRC to non-state actors, namely the SGBs to regulate their sports. These propositions will be evaluated later in this thesis. For now, it is worth noting what state actors have done to respond to SRC, albeit in a limited and patchy approach.

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58 Australian Sports Commission, 'Corporate Plan 2017-2021' (Australian Sports Commission 2017) 1.

59 Commonwealth Department of Health and Family Services and Australian Institute of Health and Welfare, *National Health Priority Areas Report: Injury Prevention and Control* (1997) 67, 72.

60 See above, chapter 2 part II ('Patchy Data: Challenges in Measuring the Significance of SRC').

Apart from the AIS/AMA website and two versions of a Concussion in Sport Position Statement, very little there has been done by the ASC in respect of SRC. As at 31 December 2017, no further funding allocation to the ASC or AIS could be identified and a keyword search for 'concussion in sport' and 'sport-related concussion' returned four results on the ASC website and no results on the Sporting Schools ASC website.[61]

B *State-Initiatives*

1 *Western Australia*

The first Australian state to actively engage with the issue of SRC was Western Australia. In 2015, the WA Department of Sport and Recreation partnered with Sports Medicine Australia (WA Branch), a peak representative body in the state of Western Australia. A grant of $35,000 was allocated to enable the partnership to develop a set of initiatives.[62]

The rationale for the state to engage in regulating SRC was based on the role of the state as guardian of the WA public's health. Significantly, the WA Department of Sport recognised that concussion presented 'a danger to the health of athletes'.[63] The objective was to develop a suite of resources aimed at the state sporting organisations (SSOs). These included the preparation of a Concussion in Sport position statement, guidelines for concussion policy development, a concussion management template policy and a website that specifically related to the problem of SRC.

To secure state government funding, SSOs are required to have in place a concussion management policy. To assist SSOs, the WA government provided a template policy drafted 'to meet their obligations concerning the identification, treatment and management of concussion.'[64] The basis upon which the WA government has intervened is expressly based on the duty of care owed to participants and reflects the general law principles in that regard. The underlying legal basis for the policy is stated in the following terms:

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[61] The Australian Sports Commission Annual Report 2015-2016 notes as a 'highlight' the AIS and AMA collaboration to establish the joint position statement and website. See Australian Sports Commission, *Annual Report 2015-2016* 23, 58.

[62] Department of Local Government, Sport and Cultural Industries, 'Concussion in Sport' <https://www.dsr.wa.gov.au/support-and-advice/safety-and-integrity-in-sport/concussion>.

[63] WA Concussion in Sport Position Statement, Endorsed June 2015. <http://www.dsr.wa.gov.au/support-and-advice/research-and-policies/policies/concussion-in-sport>.

[64] Ibid WA Concussion Management Policy Template 14 December 2015.

> This policy is based on a common law duty of care… A concussion is a reasonably foreseeable consequence particularly of contact sport…Accordingly, this policy ensures the player's welfare is protected by removing the player from the field/court/training exercise and having that player medically assessed.

The recognition of the duty of care in the WA template policy explains the function of law as a regulatory tool. The duty of care, and the consequences that can follow a breach, illustrate the role of law as a form of bringing about a change of behaviour or advancing public policies designed to manage and minimise harm. As noted earlier, the UK approach to concussion relies on the duty of care owed to participants to support the proposed co-regulatory arrangements.[65]

Further, the 2016–2020 Strategic Plan issued by the Department of Sport and Recreation expressly recognised SRC as an integrity issue, noting concussion as'…increasing prevalence that threatens the positive reputation and image of sport'.[66] While these initiatives in WA provide compelling evidence of the strong public interest in SRC as a high profile public health concern, it is difficult to ascertain whether there has been any post-implementation evaluation or any review regarding enforcement and compliance in respect of the policy.[67]

2 *New South Wales*

In 2015, the NSW Minister for Sport announced the allocation of $78,350 to enable the New South Wales Office of Sport to partner with Sports Medicine Australia (New South Wales) to develop two initiatives. The first involved an awareness campaign 'Protect What Matters', across the state. The next involved the development in late 2017 of draft Concussion in Sport guidelines.[68] Compliance with these guidelines is voluntary, and the focus of the Office of Sport is based upon building capacity within the SSOs in New South Wales.

The guidelines provide a mechanism for the development of a concussion policy and implementation for state sporting organisations. Interestingly, the guidelines also provide

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65 See above, chapter 5 part II ('A Softer Collaborative Approach: Canada and the UK').

66 WA Strategic Plan 2016-2020, 14.

67 Since the development of these SRC initiatives, there has been a change of government in WA. Informal discussions with key personnel indicate that there has not been active engagement in a post-implementation evaluation.

68 The author was invited as a guest to participate in the review of the draft guidelines in December 2017. Later, in February 2018, the Concussion in Sport Guidelines were launched at the Office of Sport in NSW. <https://sport.nsw.gov.au/sectordevelopment/concussion>.

for the appointment of a concussion coordinator, recognising the need to have a central point of contact to manage the process. There is no evidence at this stage to indicate whether a post-implementation review process is planned.

3 *Other States*

The states of Queensland, Victoria, South Australia and Tasmania, and the territories of ACT and NT, have either no information or minimal information publicly available through their offices of sport.[69] The actions by states of WA and NSW are based on the common law duty of care rather than any direct or express legislative power.

IV ADDITIONAL REASONS FOR STATE INVOLVEMENT IN REGULATING SRC

Having identified the role of law in regulating SRC is necessary to consider in further detail some more reasons why the state may have a more significant part to play in regulating SRC.

A *A Case for Greater State Involvement*

1 *To Prevent or Minimise Harm*

Preventing or minimising harm is a rationale that supports state regulation and recognises its role in protecting citizens from harm. As to what constitutes harm will depend on the circumstances and can take a variety of forms, but involves some form of damage, injury or adverse effect that may be latent or patent, immediate or delayed.[70]

There is now medical consensus that SRC has the potential to cause serious harm to participants. What is unknown, however, and where the current debate sits, is an understanding of the true nature and extent of the harm. As noted earlier, there are many concerns about potential long-term harm including potential susceptibility to other medical conditions such as binge-drinking, epilepsy, increased risks of depression and

[69] As of 31 December 2017. Since this time, there have been some updates to the websites to include some additional information on SRC but no action plans or strategies available to explain the state policy.

[70] In several fields of social and economic regulation, state actors have regulated to prevent or minimise harm, responding to a range of factors that have identified the issue or concern as a regulatable one. See Freiberg, above n 4, 49- 50.

Alzheimer's disease.[71] Scientific and medical knowledge have significantly developed around SRC, but there is still much more to be learned about SRC and its long-term effects.

Clearly, evidence-based policy should underpin state intervention, but the precautionary principle should be invoked to help determine the point at which the intervention threshold has been met. Based on the evidence presented in this thesis a case can be made in support of the state acting in a more proactive and direct manner, recognising the precautionary principle as a guide for decision-makers under conditions of scientific uncertainty in respect of SRC.

2 *To Manage Potential Risks*

Identifying, assessing and managing risks has often formed the basis for state regulation.[72] A need for state regulation arises when the risk presented is so significant intervention is required to calibrate the risk, and impose regulatory constraints to mitigate and manage the risk. Challenges arise in determining what risks are regulatable by state actors, necessarily balancing the allocation of risk and responsibility so as not to create a risk-averse society. Risk-based state regulation, however, has been the dominant approach to state-based regulation in Australia and several other jurisdictions.[73]

All sporting activities involve an aspect or element of risk, and as noted earlier, 'sport can be a risky business'.[74] While it is not possible to eradicate or remove the risk of SRC from the many sports where risk exposure is high, the goal is to adopt a 'common-sense' approach to regulating the potential risk of mismanaging SRC, and to develop a policy framework that recognises the consistent application of the precautionary principle by advancing measures that reflect 'active social foresight' by state actors rather than 'passivity' or regulatory inaction.[75]

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[71] See above, chapter part I ('Evolving Definitions'); Kylie Sait, 'Football, Head Injuries and the Risk of Dementia', 17 March 2013 ('Alzheimer's NSW Report') 7 <https://nsw.fightdementia.org.au/sites/default/files/AlzNSW_Football_head_injuries__the_risk_of_dementia_final_130313_web.pdf>.

[72] Baldwin et al contend that certain risks should not be imposed on individuals or interfere with fundamental human rights, irrespective of the price, compensation or wealth gain. Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2nd ed, 2011) 25-39.

[73] Freiberg, above n 4, 51.

[74] See above, chapter 7 part I ('Law, Sport and SRC').

[75] Gostin, above n 47; Freiberg, above n 4, 142-143.

3 *To Address Information Asymmetries*

Consumers need to be able to make fully informed decisions when evaluating competing products or services. Information asymmetries arise when the producer of the goods or provider of the service knows disproportionately more than the consumer and fails to make such information available to the levels expected. In such cases, state regulation might be required to make information more readily available, accessible and accurate. The rationale for state regulation to address information asymmetries is also based on the vulnerability that exists because of the imbalance in access to relevant and reliable information.

(a) Information in the Public Domain

Participants know significantly less about the risks or consequences of SRC than SGBs, particularly at the community level of sport. These information asymmetries raise the question: can participants ever make a fully informed decision about their health, the choice of sport and decisions around participation, when the information is unavailable to them? SGBs control what information is in the public domain and how that information is constructed. Managing the brand and the reputation of the sport are likely factors that influence decision-making.

(b) Access to Resources

SGBs have more significant resources at their disposal to invest in understanding the risks associated with SRC than do participants. The decision about research agendas and investments is entirely at the discretion of the SGB, and whether that information is available in the public domain is a matter entirely up to the individual sport. Chapter 2 explained the importance of injury surveillance data as a necessary step in determining the magnitude of the problem of SRC. The approaches to injury surveillance reporting by SGBs have been haphazard and ad-hoc across sport, making it difficult to ascertain the incidence and prevalence of SRC within sports.

(c) Unequal Bargaining Positions

In the case of professional players, information asymmetries potentially exist in respect of the negotiation of collectively bargained agreements about compensatory wages and necessary safety requirements, or importantly, the short- and long-term injury benefits paid to professional participants. Furthermore, as noted earlier, the occupational health and safety regulation over the field of play has been left to the SGBs to manage, with traditional state regulators reluctant to be involved in the workplace of professional

sport.[76] Even if the players' association is fully informed about the risks, their bargaining position may be constrained by limited information. The collective bargaining agreements usually run for several years and have expiry dates for benefits to players who retire through injury. There is no trust account or compensation fund established to provide for the future health-care costs associated with players. This unequal bargaining power also affects decisions about safety frameworks reflective of the level of risk involved.

(d) Knowledge Translation

At even the most basic level of defining concussion and attempting to gather participants' accounts of self-reported concussions, Robbins et al observed a significant disconnect between players' understanding of the definition of concussion and the current medical definition, leading researchers to question the integrity of the true incidence rates and accuracy of historical data collected.[77] Suffice to say, information asymmetries abound in respect of SRC understandings.

4 *To Manage Externalities and Reduce Consumption Costs*

Where a public good delivers shared benefits to the community, the cost or moral hazard associated with production might be unreasonably high, and the cost is paid by third parties.[78] Another rationale for state regulation is to calibrate these costs associated with the production of public goods and impose regulatory constraints. A relevant example is where the medical costs associated with production are not met by the patient but are externalised and covered by the state or an insurer, so state regulation may be required to meet the excessive consumption costs.[79]

Injuries present a negative externality or cost associated with sport participation, with an estimated one million Australians suffering some form of sports injury every year.[80] The burden of sporting injuries has been estimated to directly cost the Australian taxpayers

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[76] See above, chapter 7 part I ('Law, Sport and SRC'); Eric Windholz 'Professional Sport, Work Health and Safety Law and Reluctant Regulators' *Bond University Sports Law eJournal*, 1-14.

[77] Clifford A. Robbins et al, 'Self-Reported Concussion History: Impact of Defining Concussion' (2014) 5 *Open Access Journal of Sports Medicine* 99, 101-102.

[78] Baldwin et al, above n 72, 20.

[79] Managing consumption costs are like externalities. An externality is a positive or negative impact generated from the economic activity of an actor. Unlike the consumption costs of producing public goods as explained above, an externality can result from the actions of state or non-state actors. Baldwin et al explain this as a 'spillover' or polluter pays where the price of the product does not reflect the actual costs imposed on society. Ibid 18.

[80] ASC, above n 35, 1.

between $1billion and $1.65 billion per annum.[81] This estimate does not account for the indirect social costs associated with sporting injuries, which also contribute to the overall burden associated with this 'most disabling' sports injury.[82]

Baldwin et al explain that when public goods are produced and result in excessive production costs, state actors need to calibrate to minimise the production costs that are externalised and borne by society. If sport is considered a public good, then the excessive consumption costs could include sporting injuries. Medical costs of sporting injuries are typically carried either wholly or partially by the public health system. If excessive consumption of medical services arises, then state regulation can intervene and balance this to share the costs as well as the benefits.

(a) Direct (and Immediate) Costs

Despite the patchy and inconsistent approach to data collection around incidence and prevalence rates, SRC is a common injury in sport. In 2004–05, the direct treatment costs charged to the Australian taxpayer for hospital admissions involving traumatic brain injury (TBI) (where SRC is a mild form of TBI) were calculated at $184 million.[83] In the US, TBIs are estimated to cause medical and work-loss costs of $141 billion annually.[84] The cumulative direct lifetime costs associated with TBI, including medical costs and lost productivity, are estimated to be around US$60 billion annually in the US.[85]

In addition to the medical costs of treatment and ongoing care, the cumulative effects of sports injuries include the amount of time away from sport or work while rehabilitating, the permanent physical damage and disability, reduced quality of life and other monetary costs.[86]

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81 Australian Sports Commission, 'Sports Violence in Australia: Its Extent and Control' (1991)1,38; John Orchard and Caroline Finch 'Australian Needs to Follow New Zealand's Lead on Sports Injuries' (2002) 177 *Medical Journal of Australia*, 38-39. For recent estimates, The Boston Consulting Group, 'Intergenerational Review of Australian Sport' (Australian Sports Commission, 2017) 44.

82 Jean A Langlois, Wesley Rutland-Brown and Marlena Wald, 'The Epidemiology and Impact of Traumatic Brain Injury: A Brief Overview.' (2006) 21 *Journal of Head Trauma Rehabilitation* 375, 376.

83 Australian Institute of Health and Welfare, 'Hospital Separations Due to Traumatic Brain Injury, Australia, 2004-05' (45, 2004-05). Concussions make up a total of 28.5% of hospitalised sport-related head injury and the most common among children and young people. See also Australian Institute of Health and Welfare, Renate Kreisfel, James Harrison and Amanda Tovell, 'Hospital Care for Australian Sports Injury, 2012-13' Injury Research and Statistics series no 105, Cat no INJCAT 181, Canberra 18 -21.

84 US Congressional RoundTable Meeting March 14, 2016, at 24.45. <https://www.c-span.org/video/?406450-1/hearing-concussions&start=1354 >.

85 Langlois et al, above n 82, 376.

86 Caroline Finch, Joan Ozanne-Smith and Fiona Williams, *The Feasibility of Improved Data Collection Methodologies for Sports Injuries*, (1995) 1, 5.

For those professional players injured because of SRC, private rights to compensation might be available through the CBA or insurance. However, the private system of compensating professional players for the injuries they sustain does not adequately consider the direct costs to the community of having to carry the health-care burden of SRC. These are workplace injuries, and they impose costs on those not involved in the workplace bargain – the player's family, and the community using social security or state-provided health-care. The cost of sports injury is direct and indirect, immediate and long-term.

According to Finch et al, the cost of SRC over a nine-year period, was around $20 million annually.[87] In New Zealand, where the no-fault injury compensation regime captures the incidence and costs of SRC, King observed that the cost to the New Zealand Government was more than AUD$15.3 million paid in compensation claims over a 10-year period.[88]

(b) Long-term Costs

In addition to health-care costs, there is a cost associated with the impact of concussions and the effect on reduced or lost productivity. Although difficult to quantify and measure, the ASC identifies that these costs arise from time lost to employment, education and home activities, and time lost to future sporting activities and the cost of long-term physical, psychological or emotional damage.[89]

According to the Victorian Government's Sports Injury Taskforce, 30 to 40% of participants who have sustained a significant sport-related injury will discontinue playing sport or will significantly reduce their physical activity levels.[90] These costs are measured as time lost to future sporting activities.

While there is little research from Australia about the true extent of these costs, Langlois et al observed that in the US concussion as a form of mild TBI, affected a person's ability to perform daily activities, describing it as 'one of the most disabling injuries'. The

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87 Caroline Finch et al, 'Increasing Incidence of Hospitalisation for Sport-Related Concussion in Victoria, Australia' (2013) 198(8) *Medical Journal of Australia* 1,4.

88 Doug King et al, 'Sport-Related Concussions in New Zealand: A Review of 10 Years of Accident Compensation Corporation Moderate to Severe Claims and Costs' (2014) 17 *Journal of Science and Medicine in Sport* 250.

89 Finch et al, above n 86; Langlois et al, above n 82, 376.

90 State Government of Victoria, 'Sports Injury Prevention Taskforce: Final Report' (2013) 16.

percentage of injury-related productivity loss attributed to TBI was estimated to be 15.7%.[91]

The long-term physical, psychological and emotional damage because of the mismanagement of SRC is another cost to be considered. Due to the evidence suggesting that these symptoms are likely to arise long after the initial injury, these costs are underestimated and absorbed by the community after the participant has retired or no longer plays sport.

5 *To Enhance Public Trust*

Trust relationships feature in all aspect of society. Indeed, Freiberg argues that 'without trust, a community would be paralysed'.[92] State regulation might respond to address a breakdown in, or absence of, trust between parties. For example, trust is the basis upon which self-regulation is entrusted to non-state actors. If trust in the self-regulated system breaks down or is inadequate to the task, a reorganisation of the regulatory arrangements might result.[93]

Chapter 4 explained that state intervention was triggered by the breakdown of trust in the NFL due primarily to the initial strategy to deny and then manufacture doubt around the problem of SRC in American football. The authenticity of the NFL's assurances of the priority of player safety was seriously questioned, and state intervention proved to be a significant and contributing factor that led to restoring trust in the self-regulated system.

The public has entrusted the production and delivery of sport to SGBs as its custodians. This responsibility carries the obligation to ensure that a safe system is available to those who enter the sport. State actors play a vital role in enhancing the public's trust in a system by indicating a willingness to calibrate the system when matters arise that threaten the integrity of sport.

6 *To Address Market Failure*[94]

Optimal market efficiency involves competitive market forces efficiently delivering goods and services to consumers, increasing choice and innovation and achieving maximum

91 Langlois et al, above n 82, 376.
92 Freiberg, above n 4, 56.
93 Ibid 55.
94 Baldwin et al, above n 72, 15-22.

economic welfare.[95] Conversely, market failure arises when the market fails to deliver these outcomes, and a range of negative consequences arises leading to higher prices, fewer choices, barriers to entry and inferior quality. For example, where monopolies or oligopolies fetter consumer choices or where collusion manipulates competition.[96]

SGBs operate a state-sanctioned monopoly in the production and delivery of their sport to the public. Unlike non-sporting industries, sport relies on competitors to exist and is one reason why the domain has unique characteristics.[97] As earlier noted, state actors have engaged in regulating sport when self-regulation has failed, or when the industry has been unable to devise adequate solutions to achieve the desired outcomes.

Fears over sports safety already present as a barrier to participation.[98] The impact of this perception of fear is that it might reduce participation in those sports with high incidence of SRC. There is some evidence that reduced participation rates in the US resulted from the perception of fear, particularly influencing the decision-making by parents in selecting the sport for their children.[99]

7 *To Promote and Advance Public Policies*

An overarching rationale for regulating is to advance and promote public policy. Fundamentally, the state's role in promoting public policy objectives essentially involves the state calibrating the values of the community and acting on behalf of citizens for the collective good, or to advance a public purpose. It would be naïve, however, to suggest that these altruistic purposes prevail on all occasions. Instead, state actors from all political persuasions have been known to be susceptible to advancing policies that favour the interests of specific groups and organised sectors of society, rather than acting as a 'neutral umpire' in safeguarding or advancing the public interest.[100]

Providing an optimally safe sporting system requires calibration between private operational interests and the delivery of sport to a standard and at a cost that meets

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95 Freiberg, above n 4, 48.

96 State measures can calibrate market failure and state actors have a range of economic regulatory tools to achieve that outcome. Freiberg, above n 4, 275.

97 Weatherill, above n 13.

98 ASC Report, above n 31, 7.

99 See above, chapter 4 part III ('A Call to Action').

100 See Freiberg, above n 4, 45. See Jim McKay, *No Pain, No Gain? Sport and Australian Culture* (Prentice Hall, 1991) 87.

community expectations. State actors can act as a 'neutral umpire' in safeguarding or advancing the public interest, with the aspirational goal of being unaffected or avoiding falling 'prey to the influence of pressure groups' or developing programs that favour 'specific privileged and organised sectors'.[101]

Matters relevant to the integrity of sport involve fairness, access and equality. Policies that advance and promote participation in sport need to consider the nature and extent of threats to integrity or barriers to participation. SRC is a potential barrier to participation and, therefore, has the potential to undermine policies that seek to promote participation.

V OBSERVATIONS AND CONCLUSION

This chapter has explained *why the brain matters* to the Australian public to make clear why there exists a strong public interest in support of SRC being framed as something more significant than a private matter. Seven justifications were advanced for a greater role for state actors in managing and minimising the harm associated with SRC as guardians of the public's health.

There was no evidence of any subsequent initiative by the ACG on the issue of SRC following the NHMRC recommendations, until around 2012. State actors were also distracted at the time with a change in leadership of the ACG and new policy priorities established across the 25 sports ministers holding office.[102] To restate the sporting metaphor, ACG and other state actors had their 'eyes off the ball' from 1994 until around 2012, waiting instead for scientific understandings to develop.

This chapter posited that the role of the state is as a neutral umpire and state actors can calibrate interests and be guided by the objective of engaging with other actors to achieve the collective goal of managing and minimising the harm associated with SRC. However, identifying these reasons does not, of itself, warrant greater intervention, and there has been a general reluctance on the part of state actors to intervene to regulate SRC. While state actors have taken some steps in responding to SRC, this chapter has presented several reasons to underpin further action. The next step is to evaluate whether the

[101] Ibid.

[102] ACG Sport and Recreation Ministers, AGC Summary. A summary has been prepared by the author and held on file.

current arrangements are effective. To that end, the following chapter evaluates these arrangements, presents keys finding and identifies areas for improvement and future directions.

CHAPTER 9: EVALUATION, FINDINGS AND FUTURE DIRECTIONS

Having established the identity of dominant and subsidiary actors, relationships and resources in the regulatory space of SRC in the previous three chapters, this concluding chapter now critically evaluates the current approaches, develops and presents key findings based on the evidence presented and identifies areas of improvement, including suggestions for future directions and further research considerations.

Part I evaluates the effectiveness of current regulatory arrangements in Australia in managing and minimising the risks of SRC to all participants against five criteria. This evaluation identifies any gaps or weaknesses in the current approaches. Part II presents key findings based on the evaluation and answers the central research questions identified earlier in chapter 1. Part III identifies areas for improvement. Part IV concludes by suggesting future research directions and opportunities for Australian policy-makers to further engage in regulating SRC.

I EVALUATING THE LEGITIMACY OF SRC REGULATION IN AUSTRALIA

Five benchmarks are used to evaluate both the legitimacy of regulatory actors and the effectiveness of regulatory arrangements: principles of legislative mandate (including collective capital), accountability, due process and transparency, expertise and efficiency. [1] This method considers the adequacy and effectiveness of measures taken by the AFL and NRL, as non-state actors and the ACG, WA and NSW state governments as state actors. The objective of this evaluation is to establish any limitations, constraints or gaps that might exist and to establish foundations upon which to consider whether future reconfigurations might be warranted.

[1] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2nd ed, 2011), 26-31.

A *Legislative Mandate*[2]

1 *The AFL and NRL*

The 'legislative' in this criterion is based on the premise that 'regulatory action deserves support when it is authorised by Parliament, the foundation of democratic authority'.[3] The AFL and NRL are non-state actors and therefore unable to assert formal legislative mandate for the obvious reason that they lack the status of a state actor. Therefore, this criterion is adapted to evaluate their claims to legitimacy as regulators of their sports in the public interest.

Chapter 7 described the AFL and NRL as the governing institutions of their respective sports, recognised as playing an intermediary role and performing a quasi-public function as 'guardians of the sport'.[4] The absence of a legislative mandate has not undermined the legitimacy of these actors to dominate the regulatory space. Instead, they each possess the key characteristics to overcome the absence of a legislative mandate. Their legitimacy is underpinned by the cultural environment within which they operate; by the customary assumptions as to the nature of sport as a private pursuit left to non-state actors to self-regulate; by the organisational capacities and governance regimes to self-regulate; and by the resources and capital to support their claim to legitimacy.

The application of Bourdieu's social capital theory suggests that the dominance of the AFL and NRL also enabled each to influence their social fields and advance their vested interests, despite the absence of formal legislative authority. To illustrate, these organisations each possess high levels of social, cultural and symbolic capital. In the case of the AFL, this also involves high levels of economic capital. The collective capital has also enabled the AFL and NRL to exert influence over other actors in the regulatory space, and command control in developing, setting and controlling the regulatory agenda in responding to SRC.[5]

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2 Ibid 27. The 'legislative' in this criterion is based on the premise that 'regulatory action deserves support when it is authorised by Parliament, the foundation of democratic authority'. This contends that public actors, as authorised by the constituency, are instructed to achieve a specific result. Upon achieving that result, public actors can expect public support based on the achievement and fulfilment of the mandate.

3 Ibid.

4 See above, chapter 6 part III ('Australian Sports System: Actors, Relationships and Resources).

5 See above, chapter 7 part II ('Australian Football and the AFL').

2 *The ACG, State and Territory Actors*

The legislative mandate of state actors engaged in regulating SRC is apparent and founded on democratic authority. As guardians of the public's health, state actors are expected to engage in protecting and advancing the public's health. The several rationales for state actors engaging in a more direct way in regulating SRC are based on the underlying role of the state: to protect its citizens from harm.

Chapter 8 explained that state actors have had limited involvement in directly regulating SRC. Unlike the Ministerial Mandate that underpinned the Canadian approach, [6] the ACG and state and territory actors appear to have acted on the authority of the MSRM Communique to endorse the Concussion in Sport Position Statement as a mechanism designed to 'protect sporting participants from the dangers of concussion'.[7] It has been difficult to determine the nature and scope of this policy commitment, due to the absence of a publicly available national policy framework or strategy.

Notwithstanding the absence of a clear legislative mandate or policy strategy, these state actors have high levels of legitimacy as providers of the legal, economic and political frameworks for Australian society. These actors, however, do not possess the levels of cultural or symbolic capital held by the AFL and the NRL to dominate the specific regulatory space for sport and SRC.

On closer analysis, there are quite significant differences in how each of these state actors have approached their task. To demonstrate, the ACG approach in funding the development of resources through the AIS/AMA initiatives was organised at the national level and through the AIS as the sports medicine branch of the ASC. Collaborating with the AMA, as the peak industry representative of the Australian medical profession, the ACG approach is very much based on a medical model, falling within a sports medicine framework.

In contrast, the initiatives of the WA and NSW state governments have been executed through their departments responsible for sport and recreation. This suggests that at the

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6 Mandate Letters from the Prime Minister to Ministers on Expectations and Deliverables, November 13, 2015 <http://sportmatters.ca/news/minister-sport-and-persons-disabilities-mandate-letter-published>. See above, chapter 5 part II ('A Softer Collaborative Approach: Canada and the UK').

7 See above, chapter 8 part III ('State Actors and SRC').

state level, the issue of SRC and its management is considered a sporting matter, rather than a health matter.

The absence of a cohesive national approach, or at least some policy-making consistency in addressing the issue of SRC by state actors, is contributing to the development of a fragmented and ad-hoc regulatory approach. A possible reason for this could be the high number of ministers who have held the sports portfolio, at least at the national level.

In summary, non-state actors have not been constrained by the absence of a legislative mandate. Instead, the capital— mainly symbolic capital as guardians of their sport— established their legitimacy under this criterion. On the other hand, state actors who have the legislative mandate have strong claims to legitimacy but have approached the task in a protracted and haphazard way.

The various approaches adopted by both state and non-state actors towards SRC within the current regulatory space in Australia contribute to the argument that the current regulatory arrangements are fragmented in approach, adding to the confusion and diluting the effectiveness of the current regulatory arrangements based on this criterion.

B *Accountability*

In cases where a regulatory actor lacks a legislative mandate, Baldwin et al explain that a claim for legitimacy can nevertheless be supported if there exists a mechanism of proper accountability.[8] A scheme of accountability incorporates a form of 'checks and balances' to establish an obligation of accountability, and applies to non-state actors.[9] It is argued that the criterion of accountability is a highly relevant consideration in the present case, because most of the regulatory activity in responding to SRC has been by non-state actors who lack legislative mandates.

1 *The AFL and NRL*

The AFL and NRL, as private non-state actors within a voluntary self-regulated system, have no formal 'checks and balances' or schemes of accountability imposed upon them by external third parties that relate to the problem of SRC. In the absence of formal

[8] Depending on whether the regulator is a state or non-state actor, internal and external mechanisms can hold regulators to account in the form of internal governance or bureaucratic regimes, or external legal, professional and political mechanisms. Baldwin, above n 1, 28.

[9] Accountability is described as the obligation to account for regulatory (or any other type of activities) to another person or body. Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017) 167.

requirements, accountability is a mechanism that individual actors determine, based upon principles of self-determination and organisational priorities.

The AFL and NRL case studies, however, explained that these 'leagues of clubs' have internal mechanisms of accountability in the form of governance regimes and other informal mechanisms that influence decisions. For example, upsetting the member clubs, the threat of reputational damage, reduced participation rates in sport, spectator dissatisfaction or sponsorship withdrawal might influence decisions about adopting a voluntary scheme of accountability to measure performance.

The constitutions and contractual arrangements within the AFL and NRL establish formal schemes of accountability in terms of the objectives, functions and purpose of the leagues. The AFL and the NRL are accountable to their respective member clubs which exert influence over the governance of the leagues, based on both the formal mechanism and informal relationships. The introduction of independent commissions, with governance oversight in both codes, has reduced the level of influence to some extent. However, it is possible to identify cases where tensions have arisen between the leagues and the clubs, particularly regarding financial and structural aspects of the national competition.[10]

Based on the views expressed by senior management in the leagues, accountability might also extend to the fans, sponsors and government. However, no formal mechanisms hold the AFL or NRL accountable in respect of their approach to regulating SRC. Sponsors and third-party commercial partners are influential actors, capable of asserting control over the AFL and NRL, through contractual mechanisms. No evidence, however, shows that the problem of SRC has been recognised as a concern of sponsors or third-party partners.

Several arrangements employed by the AFL and NRL show the absence of an external scheme of accountability. For example, each code developed, designed and implemented their own approaches to rule changes and concussion guidelines. The internal governance mechanisms meant that these initiatives needed approval through the organisational processes. Once these mechanisms were implemented, both the AFL and NRL were free to self-determine whether to employ a post-implementation review mechanism, or whether to evaluate the effectiveness of these initiatives at all. Moreover, decisions

[10] See above, chapter 7 part II ('Australian Football and the AFL') and part III ('Rugby League and the NRL').

around enforcement and sanctions for non-compliance were entirely at the discretion of these self-regulated entities.

The case study of the NRL demonstrates the missed opportunity to influence non-complying clubs by withdrawing from the public domain any discussion on SRC management within the sport. As noted in chapter 7, even where there had been a clear breach of SRC protocols, the NRL decided to reduce the fines issued to non-complying clubs in the 2016 season.[11] By adopting this approach, the NRL failed to appreciate the critical role it plays in contributing to understanding around the incidence and prevalence of SRC. The absence of external schemes of accountability or a system of 'checks and balances' has made this approach possible. It is submitted that the actions of the NRL are detrimental to the public interest.

In the case study of the AFL, another SRC initiative explains the criterion of accountability. The AFL's Concussion Working Group is subject to internal schemes of accountability that govern the function and purpose of their activities. However, no external accountability mechanisms exist. The AFL group, while likely to be genuinely motivated to establish a framework to manage and minimise the risks of SRC in the sport of Australian football, is free to establish the priority or otherwise of SRC, and still determines the direction of the SRC strategy and, significantly, manage the reputational risks that might present from the information disseminated in the public domain. Corporate communication is likely to be a key concern, with the recent appointment of the AFL's General Manager for Corporate Communications as a member of the AFL's Concussion Working Group.

2 *The ACG, State and Territory Actors*

The theory of democracy underpins the legitimacy of the ACG and of the WA and NSW state actors, concerning the accountability expected as guardians of health. This reflects the enduring obligation and duty of state actors to protect against hazards, including human-made hazards.[12] For these reasons, state actors are expected to submit to high

[11] See above, chapter 7 part III (Rugby League and the NRL).

[12] Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press 2nd ed, 2008) 37; See also Lawrence O Gostin, Lindsay F Wiley and Thomas R Frieden, *Public Health Law: Power, Duty, Restraint,* (University of California Press 3rd ed, 2016) 8.

levels of accountability, and are answerable to the constituency and open to public scrutiny.

The socio-cultural and historical developments explained in chapter 6 have influenced the laissez faire posture of state actors. This establishes why state actors do not see themselves as directly regulating sport, preferring to lend a helping hand rather than directly regulate the activities of the AFL and NRL.[13] In this regard, no formal scheme of accountability imposed is on the AFL or NRL, nor any mandate, sanction or coercion on the part of the state to control the actions of these self-regulated entities. No schemes of accountability are employed by these state actors in respect of SRC. Moreover, the transactional mechanisms of the ASC, discussed in chapter 8, do not apply to SRC-related matters.[14]

C *Transparency*

This criterion incorporates principles of fairness, accessibility and transparency in evaluating the regulatory mechanism, and involves both procedural and substantive elements. Transparency is a critical feature and a measure of the effectiveness of the regulatory measure.[15] The level of participation or participatory rights are aspects of this criterion. Deciding who participates in the regulatory process (and who is excluded) is a feature of a dominant actor in Hancher and Moran's regulatory space metaphor.[16]

1 *The AFL and NRL*

Both the AFL and NRL have unilaterally decided who participates in decision-making around SRC. Based on the autonomy under a voluntary self-regulated system, they determine the levels of participation of actors regarding the regulatory decision and policy-making processes.

The AFL is one of the few sports where information about its approach to SRC is visible. It does, however, exert dominance over information released in the public domain and, as noted above, the appointment of the General Manager for Corporate Communications to the AFL's Concussion Working Group suggests that it wants to manage the dissemination

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13 See above, chapter 6 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors').

14 The SIA and Governance Principles are silent on SRC or any SRC-related matters. See above, chapter 8 part I ('The Publicness of Sport').

15 Transparency necessarily involves consideration of the processes involved in implementing the regulatory mechanism but also that implementation is built on principles of equality, fairness and consistency of treatment. Baldwin et al, above n 1, 29.

16 Leigh Hancher and Michael Moran, 'Organising Regulatory Space', in Leigh Hancher and Michael Moran *Capitalism, Culture, and Economic Regulation* (Clarendon Press, 1989), 278.

of concussion-related strategies carefully. As noted above, the lack of transparency of the NRL around the decisions to disclose the sanctioning of non-complying clubs has compromised its legitimacy under this criterion.

In terms of participation rights, the AFL determines who joins its working party, with several of the members having experience as AFL team doctors and recipients of AFL research funding over the years. This is not to suggest that these members are necessarily compromised, but it does point to proximity as both a strength and a possible weakness of self-regulation. In respect of this criterion, it also establishes that the AFL controls who is included (and excluded) from SRC-related decision-making.

D *Expertise*

The exercise of expert judgment (expertise) is highly valued in several situations and contributes to establishing a strong claim of legitimacy. Baldwin et al describe the importance of expertise, especially in situations where decision-makers are faced with competing options or where the information is incomplete or shifting.[17] Legitimacy is galvanised by the decision-maker claiming expertise and therefore worthy of trust (and legitimacy) that appropriate decisions will be made that achieve the best results.

The scientific and medical environment has all the features explained by Baldwin: decision-makers are faced with competing options, and information is incomplete or shifting. Chapter 2 explained that expert opinions and clinical judgments are essential in understanding the biomedical aspects of SRC and devising appropriate medical management tools. This chapter also referenced the work of the CISG. The medical construction of SRC, particularly regarding the potential long-term effects, have polarised views in the scientific community. Scientific uncertainty and incomplete knowledge have existed since the 1994 NHMRC Report was released.

1 *The AFL and NRL*

This criterion is critically important in a self-regulated regime and therefore is relevant in terms of the expertise of the AFL and NRL. As earlier noted, both the AFL and the NRL are recognised as having the expertise to self-regulate their sports' on-field activities.[18]

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[17] Baldwin et al, above n 1, 29.

[18] The existence and legitimacy of internal dispute and grievance mechanisms is one example. See above, chapter 7 part II ('Australian Football and the AFL') and part III ('Rugby League and the NRL').

In respect of the medical and scientific understandings, several members of the CISG are also engaged by the AFL. Internally appointed doctors and scientific researchers were early actors involved in decision-making around SRC, both as part of the AFL as team doctors, and later as researchers with high levels of expertise belonging to the CISG. This has not only perpetuated the dominance of the AFL in shaping and influencing the space, but also reinforcing legitimacy over SRC, due to the medical expertise held by the sport.

2 *The ACG, State and Territory Actors*

The expertise of state actors, within the domain of sport, typically defers to non-state actors within the sport. Expertise is largely internally self-appointed by the SGBs because of the nature of sport as a regulatory domain and the cultural and customary assumptions that have underpinned its development. Non-state actors in sport are considered as having high levels of expertise to determine matters that fall within their field of play.

Thus, internally appointed doctors and scientific researchers have been early actors involved in decision making around SRC. Team doctors appointed by the sports are expected to possess the expertise to know the players and treat their medical concerns. Indeed, an area of contention has been around the use of independent doctors to assist in managing SRC. This has perpetuated the dominance of non-state actors in shaping and influencing the space, and to also reinforce their legitimacy over SRC due to the medical expertise held by the sports.

As noted above, the AFL working group is likely to have sufficient expertise but has self-determined who is selected to participate in the group. Significantly, this also means that participatory rights are self-determined by the AFL, so certain individuals are excluded from the group.

E *Efficiency*

There are two aspects of efficiency: productive and results-based. Productive efficiency relates to the capacity of the actor to produce a result with the least possible level of costs. Results-based concerns the competence of the regulatory arrangements and assesses performance based upon whether the arrangements have achieved the desired results.

This final criterion is important as it helps answer the question of whether the current actors produce the best results for the least cost, and whether the regulatory measures

have been effective in reducing the harm of SRC. A key challenge presented in chapter 2 is how to overcome the paucity of reliable data on incidence and prevalence rates of SRC in Australian sports, and therefore how, to establish a baseline upon which to measure whether the arrangements are working.

1 *The AFL and NRL*

The AFL and NRL have typically focused their efforts at the elite professional levels of their sport, although the AFL has engaged in some initiatives to reach the lower tiers within its sport. Because of the individual approach to SRC, based on the nuances of the sport and the operational objectives, vertically integrated silos are created. In this regard, inefficiencies exist both concerning the internal, vertically integrated structures, as well as the external absence of horizontal oversight across sports to ensure consistency and efficiency. These features undermine the legitimacy and contribute to gaps and fragmentation within the current system.

Another structural feature that creates inefficiencies is the way the sports are currently organised through the two-tiered market; where much of the revenue is expended at the elite professional level. This creates inefficiencies in that the lower tiers of the sport are not able to access the same resources as the elite professional levels within the pyramid model.

Further, a lack of consistency exists across the sports concerning the regulatory arrangements deployed to address the harm. For example, the AFL has adopted a transparent approach in terms of advising when clubs are breaching the concussion policies. The NRL, on the other hand, self-determines whether it is in the public's interest to know about the breaches that occur at the club level. The NRL's decision to keep confidential the internal processes regarding those clubs and doctors breaching the concussion protocol provides compelling evidence that the NRL prioritises its private interests over the public's interest and the right to know about the safety of — one that happens to have high rates of SRC incidents.[19] By not having regard for the public interest in SRC, the NRLs approach withholds from the public domain information that informs the public discussion on SRC.

[19] See above, chapter 7 part III ('Rugby League and the NRL').

2 *The ACG, State and Territory Actors*

State actors have only recently entered the space in a more engaged way. It is too early therefore to determine whether their actions are productive and results-based. Further, it has been difficult to ascertain with any clarity what the stated regulatory objectives were that underpinned the state arrangements. For example, there has been little or no evaluation of the state interventions.

II KEY FINDINGS

The results discussed above identify that while non-state actors have an important and legitimate role to play in the SRC regulatory space, gaps and weaknesses exist in the current regulatory approach. This evaluation contributes to the development of the following four key findings that address the research questions.

Finding 1: SRC is a Public Health Concern and is therefore a regulatable concern for the state

The evidence supports the view that SRC is a public health concern and not simply a private matter. Participants have died or suffered significant health problems from the mismanagement of concussive injuries sustained in sport, making it a serious and potentially life-threatening concern. This reason alone makes it so important that elevates it above other common and accidental sporting injuries, where limb but not life, is threatened.

In addition to the personal costs, the burden of SRC is borne by the populace both in the short and long term. Sporting injuries present a negative externality associated with sport participation with the burden of sporting injuries having been estimated to directly cost between $1billion and $1.65 billion per annum.[20] The Commonwealth Government, together with state and territory health ministers, endorsed injury prevention and control as a key National Health Priority Area in 1996.[21] This publicly-stated commitment includes efforts towards the reduction of sporting injuries.

The ambiguity of the public nature of SRC as a matter beyond the remit of SGBs, and a lack of clarity over who 'owns' the problem, have led to confusion over roles and

[20] See above, chapter 8 part IV ('Additional Reasons for State Involvement in Regulating SRC').

[21] See above, chapter 1 part I ('The Problem of SRC'); See above, chapter 2 part IV ('Scientific Uncertainty: Wait and See or Active Social Foresight').

responsibilities in the regulation of SRC. What triggers or motivates a regulatory response is necessarily based on a sound understanding of the fundamental constitutive elements of the problem under review as provides the centre-piece around which the elements of the regulatory process are based.[22] The lack of clarity around the problem is reflected in the protracted, haphazard and fragmented responses by those actors who have so far dominated the regulatory space.

State actors have an enduring obligation to act as the guardian of the public's health. This obligation includes protecting the public from harm arising from human-made hazards.[23] SRCs falls into such a category. No rational justification exists as to why state actors should engage in the process of selective filtering when it comes to public health concerns. Therefore, whether a public health concern arises in sport or another context, the enduring obligation of state actors prevails.

This status underpins the justification for greater involvement by state actors to prevent or minimise harm, manage risk, and address information asymmetries. More particularly, the seven rationales, identified earlier, establish the reasons why state's role is to prevent or minimise harm. State actors have recognised the inherently public nature of SRC through the regulatory arrangements adopted in Australia to address the harm. While the publicness of SRC appears undeniable, ambiguity still exists as to the legitimacy of actors within the regulatory space and the nature and extent of regulatory arrangements in response.

The cultural and customary assumptions about sport being a private pursuit, and the self-regulatory responsibility of private non-state actors, have acted as barriers to identifying the public nature of SRC as a matter of public concern. These assumptions are critical characteristics as to why non-state actors have dominated the regulatory space of SRC. This, in turn, has influenced determining the priority or otherwise of SRC as a regulatable concern, and who should be included and excluded from participating in the space.

This ambiguity, as to roles and responsibilities in responding to SRC, is understandable in the light of cultural and customary assumptions. Non-state actors may have voluntarily self-regulated SRC, but that does not mean that the current approach is the most effective

[22] Christel Koop and Martin Lodge, 'What is Regulation? An Interdisciplinary Concept Analysis' (2015) *Regulation & Governance* 1, 2.

[23] Gostin et al, above n 12.

way to protect all participants from harm. Instead, the approaches by the SGBs are very much based upon their perception and self-determination of the importance of SRC, and how much they are prepared to invest in finding out what might ultimately be a disruptive and inconvenient finding. The tendency by SGBs to focus on the elite professional levels of the sport, and the lack of transparency in some areas, provide evidence of a collision between private interests and public responsibility.[24]

Finding 2: SGBs dominate the regulatory space of SRC

In Australia, the regulation of SRC has been entrusted primarily to SGBs, as the guardians of sport, to self-regulate with limited involvement from state actors as guardians of the public's health. This thesis questions whether this is the most effective approach in minimising exposure to the harm to the many millions of Australian sports participants. Sport has never been a service delivered by the state, so the production and delivery of sport has never fallen within the remit of Australian governments. Indeed, since colonisation, state actors have focused on establishing political and economic stability, rather than being directly involved in sport.[25] The transplantation of British sporting cultures laid the foundations that continue to prevail today: that sport is considered a private pursuit, and most often beyond the remit of the state.

These cultural and customary assumptions established the legitimacy of non-state actors, that sport belonged to private non-state actors to voluntarily self-regulate the domain without direct state interference. A review of other concerns in sport demonstrates that tradition, culture and practicalities feature heavily, in the interplay between sport and regulation, as reasons justifying limited state interventions.

Another factor contributing to this view was that early notions of amateurism meant that sport was considered the antithesis of work.[26] While attitudes have shifted and professionalism in sport has flourished, state actors are generally reluctant to interfere in sport.[27]

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24 See above, chapter 7 part III ('Rugby League and the NRL').
25 See above, chapter 6 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors').
26 Ibid.
27 Ibid. See also, chapter 7, part I ('Law, Sport and SRC').

The 1994 NHMRC Report raised concerns about the mismanagement of SRC, directed to the SGBs of the four codes of football.[28] The ACG, by commissioning this Report, showed it was concerned about the increasing prevalence and severity of SRC. Promoting and protecting the health of sports participants was likely to be the motivation for the state action and central focus of these NHMRC precautionary-based recommendations.[29] However, while the ACG was an early actor, it did not possess the key characteristics to dominate and control the space. Instead, the power rested with the SGBs, which held public status as governing institutions and carried out quasi-public functions.

SGBs, however, emerge as dominant actors, centrally positioned within the space. The relationships and interconnections involve direct, indirect, formal and informal connections and mechanisms. Furthermore, SGBs have access to resources including knowledge, expertise, organisational capacity and high levels of capital, used to establish supremacy and domination over other actors in the regulatory space.[30] Efforts have been made by SGBs in a vertically integrated way to manage the problem of SRC. Focus has primarily been placed on the elite levels of sport, with limited emphasis on grassroots community levels.

Consistent with the foundations laid by cultural and customary assumptions as to the legitimate roles of actors, state actors have primarily adopted a non-interventionist approach to the problem of SRC in Australia and have entrusted the task to the SGB to set, drive and control the regulatory agenda. This non-interventionist approach is consistent with the prevailing view as to the role of state actors and that sport has never been a service delivered by the state. Rather, sport is a form of recreation, or developed out of a recreational pursuit, with high social utility and warranting a laissez faire approach. [31]

There is no evidence that the 1994 Recommendations by the NHMRC were adopted by the SGBs. This signalled to both the sporting community and the wider community that the problem of SRC, at that time, was not a significant concern. On reflection, however, concerns around SRC in these contact and collision sports were likely to be viewed as 'inconvenient' and potentially disruptive to the core elements of the sports and the

[28] See above, chapter 2 part IV ('Scientific Uncertainty: Wait and See or Active Social Foresight').
[29] Ibid.
[30] See above, chapter 6 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors'); chapter 7, part II ('Australian Football and the AFL') and part III ('Rugby League and the NRL').
[31] See above, chapter 6 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors').

business-development pursuits; that taking the contact out of these sports would dilute the essence of the game, which would in turn detract from the value of the business of these sports.

Little happened in respect of SRC in the years between 1994 and 2012, when SRC would gain widespread attention following the US events around 2012. In Australia, SGBs continued to grow and develop the business operations in producing and delivering their sports and adopted modern governance systems to respond to the increasing complexities associated with professionalism and commercialism. Broadcasting and licensing rights were growing in value, and increased revenues were flowing to those sports that were organised to exploit these opportunities.

Finding 3: Inherent weaknesses in the current approach

The current regulatory arrangements in addressing SRC have been developed by the SGBs as non-state actors centrally rooted in the regulatory space of sport and enjoying the autonomy of a self-regulated system built on customary and cultural assumptions. Because non-state actors dominated the regulatory space, they self-determined the priority or otherwise of SRC as a regulatable concern.

The evidence presented in this thesis clearly shows a protracted and haphazard approach to responding to SRC. Instead of adopting the 1994 NMHRC recommendations, SGBs invested their energies in seeking to establish greater scientific certainty around the nature of the harm. The precautionary principle did not appear to guide the SGBs decision-making process — at least until around 2012, when the NFL matters received widespread public attention.

Proximity is both a strength and weakness of the current self-regulatory approach, as demonstrated in the NFL case. Here, the NFL attempted to regulate SRC while managing a range of competing interests. The NFL case study presents compelling evidence that voluntary self-regulation by non-state actors is less than ideal for handling issues that give rise to public health considerations. A retrospective review of that approach has identified the limitations and constraints that hindered efforts to reduce or minimise the harm to participants. Mitigating reputational risk and managing competing interests meant that participants in the sport continued to be exposed to further harm until the regulatory space was reconfigured towards a more precautionary-based approach.

The inherent weaknesses in the current approach considered earlier in this chapter, contributes to undermining the effectiveness and efficiency of the current approaches to SRC in the Australian context, and lends support to consider reconfigured options. Furthermore, the application of the evaluative criteria, as benchmarks for regulation, reveal a lack of clarity around roles and outcomes, inconsistencies in approaches, a lack of accountability and transparency, and information asymmetries and gaps (both vertical and horizontal) in the current regulatory systems. These factors undermine the effectiveness and efficiency of the current approaches to SRC in the Australian context and lend support to considering reconfigured options.

The absence of a coordinated approach has resulted in several weaknesses within the current regulatory arrangements. These weaknesses are all interrelated, and stem from the absence of leadership at a national level in the absence of clarity as to collective goals and action.

Finding 4: Rethinking the role of state actors: The case for reform

Chapter 5 examined the responses by state actors in the US, Canada and the UK, identifying a range of regulatory approaches. Comparing experiences of state actors in different jurisdictional settings identified common features of regulation and challenges in implementation. The cross-jurisdictional analysis explained that, notwithstanding the different jurisdictional approaches, common themes emerged that are useful to consider in the Australian context. It was critical, however, to reframe SRC as a public health concern.

The cross-jurisdictional analysis in chapter 5 demonstrated that state actors can play a participatory, coordinated and facilitative role within the regulatory space of SRC. They have access to a wide range of regulatory tools that can complement the current system and bridge gaps in the current approach. Recommendations made in the UK proposed a collaborative and co-regulatory approach to the problem of SRC to achieve the collective goal of promoting public policies to minimise harm to participants.[32] Canada adopted a more inclusive cross-sector, cross-department, cross-jurisdictional partnership model. The US legislative approach has been criticised as being introduced too quickly, without proper consultation and a solid evidence-base in support. These legislative enactments

[32] See above, chapter 5 part II ('A Softer Collaborative Approach: Canada and the UK').

are now all undergoing review and reform in each of the 50 states and the District of Columbia.[33]

No nationally coordinated agency sets and drives the national SRC agenda in Australia. The absence of such an approach to SRC has been a significant contributing factor in the current ad-hoc, inconsistent and fragmented approach. Based on the evidence, the absence of a national approach to SRC creates an opportunity to rethink the role of state actors in respect of SRC.

State actors are entrusted and appointed through the democratic process with the primary responsibility for safeguarding the public's health and, importantly, being held to account to the public. An expectation exists that the state will collaborate with partners in the public health system to direct, guide and support public health initiatives.[34] Through this collaboration, collective action is designed to achieve the goal of identifying, preventing and ameliorating risks to health in the population, with sufficient resources invested to achieve those ends.[35]

There already exists infrastructure where state actors coordinate in response to sport-related matters. The sports ministers' forum was established for such a purpose, and where state actors have developed a national framework and strategy to tackle sport-related concerns. For example, the issue of doping in sport and, more recently, child protection in sport, are both problems where a nationally coordinated approach was adopted. Therefore, the state can act and fill the regulatory gaps identified in this chapter. For these reasons, this finding supports the underlying hypothesis that state actors can play a more significant role in regulating SRC.

III AREAS FOR IMPROVEMENT

While various actors have taken steps towards engaging with SRC in Australia, the inconsistent approaches and absence of a national framework have constrained the effectiveness of current regulatory arrangements. This fragmented and haphazard approach has led to confusion and contributed to information asymmetries around the seriousness of SRC.

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33 See above, chapter 5 part I ('US Governments' Responses').
34 Gostin, above n 12, 40-44.
35 Ibid.

A *Horizontal Leadership and a Public Voice*

The Canadian case study in chapter 5 explained the importance of the Ministerial Mandate in establishing the legitimacy of state actors and laid the foundation for state actors at the federal level to take a leadership role in responding to SRC. No legislative or ministerial mandate currently exists in Australia. Moreover, no nationally coordinated strategy currently exists.

While each of the sports has individually established regulatory arrangements in responding to SRC, horizontal oversight and leadership remains absent in directing the SRC agenda as representative of the public. This has resulted in there being no single or dominant identifiable actor to champion the public interest and take leadership in designing the regulatory arrangements with that interest in mind. A further deficiency in the current approach is the lack of quality analysis of injury data based on the patchy and inconsistent approaches to SRC data collection and injury surveillance discussed earlier in this thesis.[36]

In Australia, several public interest groups have engaged in SRC advocacy, but due to the diverse nature of actors who fit this role, there is a lack of coordination or consistency in the approach taken. The absence of a coordinated approach amongst the public interest groups has resulted in a fragmented, patchy and inconsistent approach. For example, Alzheimer's Australia NSW was an early actor complaining about the management and regulatory approaches to SRC, but its mandate and remit are limited to the state of NSW. Moreover, its charitable purpose relates to Alzheimer's disease, so consequently, other concerns are likely to fall outside its remit.

Public interest groups can be influential and effective regulatory actors to control, alter or influence behaviour. Coordination and consistency in addressing the area or problem under review are critical attributes in achieving overall objectives.

B *Leadership and SRC Research*

The absence of a central repository or system for collecting and analysing data resulting from SRC has acted as a barrier to the development of greater scientific understanding around SRC. This gap was identified in the 1994 NHMRC Report. Had the NHMRC Report

[36] See above, chapter 2 part II ('Patchy Data: Challenges in Measuring the Significance of SRC').

and the recommendations been followed, at least in the case of the four football codes, current knowledge might be further advanced.

Currently, in Australia, two separate brain banks have been established with a focus on understanding SRC. While this is a positive step regarding individual research groups seeking to understand the phenomenon, there is the potential that there will be further polarisation in the research and potential duplication of areas that could be consolidated in advancing knowledge around SRC to the benefit of the public.

Going forward, leadership is essential to the coordination and development of a system to capture the necessary information around SRC and leadership regarding the quality analysis of SRC injury data. This will also lead to access to quality data and analysis available to researchers in the future. The coordination and integration of research efforts can also lead to the closing of research gaps and minimise duplication while maximising potential.

C *Fragmented Surveillance and Inconsistent Enforcement*

The lack of clarity around the public nature of SRC is reflected in the protracted, haphazard and fragmented responses by those non-state actors. These inconsistent approaches have led to confusion around understanding the seriousness of the problem. Overall, coordination and integration are lacking in responding to SRC. This has resulted in a patchy and inconsistent approach to regulatory arrangements. To illustrate, the absence of a consistent approach to injury surveillance and data collection has led to an ad-hoc and patchy approach to understanding the significance of the problem.

On many reported occasions, professional players, particularly in the codes of football, who appear to have sustained concussive injuries, are then able to return to play within a relatively short time. Earlier in this thesis, the medical management recommendations were discussed, including the need for a conservative and graduated return to play protocol of between seven to 10 days. The evidence shows many high-profile cases of players returning to play earlier than one would have expected had, the full protocol been followed. This mainly occurs around football finals season and is consistent with the performance-driven motivations that underpinned players, coaches and teams aiming to win the finals competition.

The key message from this approach is to undermine the importance of SRC and the seriousness of potential consequences. Instead, by having high-profile players return to play without following the protocols, the critical message to younger, more vulnerable players is that conservative concussion management somehow does not apply at the elite level of the sport.

D *Greater Consistency and Co-Ordination in State Actor Responses*

Without diminishing the value of the work undertaken by state actors, a lack of coordination currently exists across Federal-State/Territory levels. A fragmented approach to regulating SRC by state actors has the potential to undermine the value of the initiatives and detract from providing a supportive environment that can ultimately lead to behaviour change. The cross-jurisdictional ministerial forum through the MSRM provides a structure to engage more collaboratively and consistently by elevating SRC to a policy priority, thus providing the basis upon which supportive legislation and policy can be developed in a nationally consistent manner. [37]

E *Balancing Inequality of Access*

Another inconsistency that arises in the current regulatory arrangements relates to the inequality that exists regarding injury outcomes. To illustrate, SGBs have invested significant resources over the past few years in managing SRC, but most of these resources have been directed to the professional level of the sport. This means that only elite professional players are getting better access and, therefore, better outcomes. Conversely, community sports participants cannot currently access the same or similar care, so consequently, a higher risk arises of injury and poorer outcomes.

In the current regulatory arrangements, the failure of a consistent approach across sports and all levels within them is a significant weakness. This weakness is symptomatic of the lack of clarity around the public interest in SRC and how the problem and its management does not solely belong to non-state actors but has broader social implications.

F *A Need for Greater Accountability and Transparency*

Information asymmetries and knowledge gaps exist in the understanding of SRC. A similar but slightly different inconsistency arising between professional and community sport relates to the equity of access to information. Within sport, SGBs and those who

[37] See above, chapter 6 part II ('Illuminating the Past: Customary Assumptions and Dominant Actors'); chapter 8 part III ('State Actors and SRC').

participate at the professional levels are likely to have higher levels of knowledge and greater access to information than those outside the sport or who participate at other levels of the sport, where many children participate. Based on the earlier medical evidence, children have high risks of injury and potentially longer-term consequences if their injury is mismanaged. Such information asymmetries and knowledge gaps create the potential for a higher risk of injury in these vulnerable population groups.

Another barrier to reducing information asymmetries involves the research funding agreement terms required by private actors. Funding controls often require written consent from SGBs before disclosure of research findings. This creates a potential collision between private interests of SGBs and public interests in respect of the benefit of the potential research findings.

An alternative perspective as to concussion research is drawn from a public interest and health framework. State actors are unlikely to be constrained by similar conditions as the AFL or other SGBs that fund research. A goal, albeit an aspirational one, is to establish a mechanism that enables the free access and release of information into the public domain to help address information asymmetries. Without state engagement, such a goal is unlikely to be voluntarily achieved under the current self-regulated system.

G *A Need for Post-Implementation Evaluation*

It is difficult to find any evidence of ongoing monitoring and evaluation of regulatory arrangements. This applies to both state and non-state regulatory arrangements. The absence of a system to evaluate and monitor regulatory arrangements, post-implementation, can negatively impact the reform or review process, and therefore create blunt instruments that fail to have any meaningful effect.

In summary, several inherent weaknesses exist in the current approaches to regulating SRC. One of the primary reasons for this is due to the dominance of non-state actors in the regulatory space, and their ability to control the regulatory arrangements. This has also created vertically integrated silos so that each sport independently addresses SRC without any guidance or consistency regarding approach.

IV FUTURE DIRECTIONS

SRC in Australia is a public health concern and non-state actors are ill-equipped to regulate SRC within a private and voluntary self-regulatory system. Instead, a collaborative approach is required involving the capacities and resources of state and non-state actors to achieve the common goal of promoting public policies designed to minimise the harm associated with SRC to all participants in all forms of sport.

Several common themes emerge that might contribute towards designing future regulatory measures in Australia. While state actors have started to take some steps towards addressing SRC in an Australian context, more can be done. Future research directions, including the framing of a collaborative approach that draws upon the collective capacities and resources of state and non-state actors and the interdisciplinary nature of SRC.

The challenge for Australian state actors is not to find new or novel approaches to regulating SRC. Instead, the challenge facing state actors in Australia is to be solely focussed on advancing the interests of all sports participants and to adhere to the role of 'neutral umpire' when faced with possible resistance from non-state actors. This can be supported by further research in two directions.

First further research should adopt an interdisciplinary approach to SRC in Australia. Responses to the harm caused by SRC constitute a new, interdisciplinary field of research, and as the research literature reveals, SRC does not fit within neat disciplinary lines.[38] An interdisciplinary research project can address SRC as a common problem, with a common definition and a common solution.[39]

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[38] A review of the literature on SRC and matters covered within this thesis identifies the topic as being, inter alia, a medical issue, a legal issue, a regulatory and governance issue, a public health issue, a sports management issue, an ethical issue, and a social and cultural issue. This rich tapestry of perspectives is a reason why scholars suggest the topic is one perfectly suited for research collaboration across disciplines. Concussion in sport was an example selected by Professor Alison Doherty to illustrate how interdisciplinary collaboration involving complex problems enables alternative interpretations of findings and assist in reframing research questions. Alison Doherty, 'It Takes a Village: Interdisciplinary Research for Sport Management' (2012) 26 *Journal of Sport Management* 1,4.

[39] The author has been invited by Professor Alison Doherty to participate in a research project Youth Sport Concussion: Framing an Interdisciplinary Research Program involving collaboration between Canadian and Australian researchers from sport management, sports medicine, sports law and regulation, allied health, sports ethics, integrated knowledge transfer and risk management and injury prevention. Further disciplines will be included in the project once research proposals and funding has been finalised.

Second further research could help develop proposals for a national regulatory framework involving state actors working in coordination with the sporting industry and public health partners.[40] However, based on tradition and culture in sport, coupled with the regulatory posture of state involvement in sport, this is likely to be a highly contested process. This presents a challenge for policy makers in finding the balance in providing a system that promotes the health and safety of sports participants, maintaining the high social utility of sport and participation rates while preserving the essential characteristics associated with the rough and tumble of sport. This is not an insurmountable task; rather, the findings of this thesis demonstrate that adopting 'active social foresight', as part of the precautionary principle, can be a useful basis upon which to develop a plan towards a safer sporting system for all participants in Australian sport.[41]

V CONCLUSION

This thesis applied Hancher and Moran's regulatory space metaphor, complemented by Bourdieu's social capital theory to the problem of SRC in Australian sport. This regulatory studies approach showed that regulating sport and SRC is necessary in the public interest, but that the regulatory space of SRC is currently dominated by non-state actors. The thesis showed that various rationales support state actors to play a more significant role; and that an extensive range of tools and regulatory measures are available to achieve the collective goal of managing and minimising SRC in Australia.

When the US discoveries first arose, both the AFL and NRL dominated the regulatory space, possessing all the key characteristics to enable these self-regulated actors to shape and influence responses in dealing with SRC. Only in recent times has the problem of SRC been elevated to a key concern.

Each of the sports is organised and vertically integrated. Consequently, while the SGB is the peak representative body for the sport and responsible for promoting and encouraging the sport across all levels, it appears that a lack of capacity exists to access and reach the community levels of the sport. Addressing information asymmetries and developing knowledge translation strategies, in a real and practical sense to reach the community levels, are key priority areas.

[40] Gostin, above n 12, 40-44.

The paucity of evidence regarding the implementation of the NHMRC recommendations shows that SRC was elevated to a regulatory concern only after the NFL problems arose in the US from 2011. Since then, however, a patchy and fragmented approach towards managing SRC as a regulatable concern has arisen. The nature of the problem is also ambiguous, as it has broader social implications than just the private interests of the professional players at the elite level of the sport.

The existence of a mixed result concerning the legitimacy of actors supports the fact that SRC is the type of regulatory problem that requires multiple actors to participate collectively in the space. Further, the evaluation of the efficiency and effectiveness of the regulatory arrangements instigated by non-state actors identified that there are many limitations in the way private non-state actors in regulating public health concerns, which undermine legitimacy in achieving good regulation.

State actors, therefore, must be proactive in managing and minimising the risks associated with SRC because this problem is a public health concern. The evidence presented in this thesis supports the view that SGBs are ill-equipped to unilaterally and voluntarily regulate SRC as a public health concern within a private and voluntarily self-regulated system.

While state actors have started to take some steps towards addressing SRC, the challenge facing state actors in Australia is to be solely focussed on advancing the interests of all sports participants and to adhere to the role of 'neutral umpire' when faced with the possible resistance from non-state actors. Multiple actors, collective action and the recognition of the polycentric features of the regulatory system will best achieve the balance between the spectacle of the sport, on the one hand, with player safety on the other. Moreover, this balance must be achieved across all sports, across all levels, for all Australian sports participants.

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