

TRANSGENDER AND INTERSEX ATHLETES, PROFESSIONAL SPORT AND THE DUTY TO ENSURE WORKER HEALTH AND SAFETY: CHALLENGES AND OPPORTUNITIES

ABSTRACT

The participation of transgender and intersex athletes is one of the most contested issues in professional sport today. Discrimination law is the lens through which the issue most commonly is debated, and gender diversity policies framed. Frequently missing from the debate (as it is from much discussion of sport generally) is the application of work health and safety ('WHS') law. Yet, as this article establishes, WHS law applies to professional sport, and the duties it imposes on sport governing bodies and clubs require them to mitigate proactively the risks to physical and psychological health and safety that are associated with the participation of transgender and intersex athletes, and from the development and implementation of their gender diversity policies. This article's examination reveals that while viewing the participation of transgender and intersex athletes in professional sports through the prism of WHS law is challenging, it presents sport governing bodies, clubs and transgender, intersex and cisgender athletes with a valuable avenue for addressing this complex issue in a more constructive and balanced manner.

I INTRODUCTION

Few institutions maintain a binary male-female segregated structure more rigidly than sporting institutions. This is particularly the case at the elite level where over the past 60 years, sport governing bodies such as the International Olympic Committee ('IOC') and World Athletics (formerly the International

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Association of Athletics Federations (‘IAAF’)) have mandated various forms of sex-testing to maintain their binary sex-segregated structures.¹ These structures define male and female sex by reference to traditional biological (anatomical, chromosomal and hormonal) characteristics. However, developments in both science and societal attitudes are challenging segregated systems organised around a traditional and binary understanding of sex.

Two of the most prominent challenges to sports’ sex-segregated binary come from intersex and transgender persons.² ‘Intersex’ is an umbrella term for persons born with atypical combinations of male and female sex characteristics.³ Some of these combinations are anatomical and visible, such as the presence of both male and female genitals. Others are found in chromosomal and hormonal characteristics and are hidden, including from the persons themselves. One such condition is ‘hyperandrogenism’, where women have high levels of androgens (male sex hormones) such as testosterone.⁴

Whereas intersex conditions generally involve incongruity among biological characteristics, transgender is an incongruity between one’s biological sex characteristics and gender identity, such that their gender identity does not match the sex assigned to them at birth.⁵ In the sporting context, transgender issues generally come to the

¹ For a history of gender testing in sport, see Seema Patel, *Inclusion and Exclusion in Competitive Sport: Socio-Legal and Regulatory Perspectives* (Routledge, 2015) 85–8; Adam Love, ‘Transgender Exclusion and Inclusion in Sport’ in Jennifer Hargreaves and Eric Anderson (eds), *Routledge Handbook of Sport, Gender and Sexuality* (Routledge, 2014) 376–82.

² The language used to describe sex and gender identity can differ across cultures and audiences, and shift over time. The terms and definitions used in this article reflect those in common usage in Australia (and elsewhere) today. See, eg, Victorian Equal Opportunity and Human Rights Commission, *Trans and Gender Diverse Inclusion in Sport: Complying with the Equal Opportunity Act 2010* (Guideline, May 2017) 5–6 (‘VEOHRC’); Erin E Buzuvis, ‘Transsexual and Intersex Athletes’ in Melanie L Sartore-Baldwin (ed), *Sexual Minorities in Sport: Prejudice at Play* (Lynne Reiner Publishers, 2013) 55, 56–9.

³ VEOHRC (n 2) 6; See also Sheila Cavanagh and Heather Sykes who observe that developments in scientific sex-testing have ‘revealed subtle differences between male and female genders, as opposed to clearly delineated “opposite” sexes’: Sheila L Cavanagh and Heather Sykes, ‘Transsexual Bodies at the Olympics: The International Olympic Committee’s Policy on Transsexual Athletes at the 2004 Athens Summer Games’ (2006) 12(3) *Body & Society* 75, 81. That sex is not necessarily binary also has been recognised in legislation that provides for people officially to alter the sex assigned to them on birth to a descriptor other than ‘male’ or ‘female’: see, eg, *Births, Deaths and Marriages Registration Act 1996* (Vic).

⁴ While testosterone is commonly understood to be a male sex hormone, women also produce it naturally. See ‘Testosterone: What It Does and Doesn’t Do’ *Harvard Health Publishing* (Web Page, 29 August 2019) <<https://www.health.harvard.edu/drugs-and-medications/testosterone--what-it-does-and-doesnt-do>>.

⁵ VEOHRC (n 2) 6; Buzuvis (n 2) 56.

fore when a transgender person has undergone a process to transition to the gender with which they identify, and then seeks to compete in competition with the gender with which they identify.

A major issue confronting sports' governing bodies around the world is how to deal with these 'exceptions' to their traditional sex-segregated structures. Policy-makers and sport governing bodies that have sought to tackle this difficult issue have invariably done so primarily through the dual prisms of human rights and competitive fairness — seeking, on the one hand, to provide transgender and intersex athletes with an inclusive environment that provides them with the opportunity to compete free from discrimination and, on the other hand, to provide cisgender⁶ athletes with a fair and equitable competitive environment.⁷ Missing from much of this discussion is the application of work health and safety ('WHS') duties and principles.

The purpose of this article is to examine the application of statutory WHS duties to the risks emanating from the participation of transgender and intersex athletes in their sports. The article begins in Part II by providing an overview of the relevant legislative and policy background before introducing the reader in Part III to the case study through which the application of WHS laws will be examined, namely the Australian Football League's ('AFL') management of transgender athlete Hannah Mouncey's desire to play in its professional women's competition. The situation involving the AFL and Mouncey provides an interesting case study. First, being an inherently dangerous contact sport that places high demands on its athletes, Australian rules football provides fertile ground from which to examine the issue. Further, being the largest and arguably most dominant sporting code in the country, the AFL's management of transgender issues influences community perceptions and the practices of other sporting organisations.⁸ Part IV of this article then explains the application of statutory WHS laws to professional sports and the bodies that govern it, before examining their application to the participation of transgender and intersex athletes in Part V. This examination reveals that the opportunities from viewing the participation of transgender and intersex athletes in professional sports through the prism of WHS law outweigh its challenges. This presents sport governing bodies, clubs and transgender, intersex and cisgender athletes with a potentially valuable avenue for shifting the debate about transgender and intersex participation away from the moralism of competing rights to a more constructive discussion about safety focused on risks and solutions.

⁶ 'Cisgender' refers to persons whose gender identity exclusively aligns with their sex as recorded at birth: VEOHRC (n 2) 6.

⁷ For a discussion and critique of these different perspectives, see Pam R Sailors, 'Transgender and Intersex Athletes and the Women's Category in Sport' [2020] *Sport, Ethics and Philosophy*, 1.

⁸ A study released by business information analysts IBISWorld that found that the AFL is the largest sporting competition in Australia measured by revenue, spectators and attendance rates: Glenda Kwek, 'AFL Leaves Other Codes in the Dust', *The Sydney Morning Herald* (online, 26 March 2013) <<http://www.smh.com.au/data-point/afl-leaves-other-codes-in-the-dust-20130326-2grkp.html>>.

II LEGISLATIVE AND POLICY BACKGROUND

In Australia, the only guidance issued by government authorities addressing the legal issues arising from the participation of transgender and intersex athletes in sport have been issued by agencies responsible for administering anti-discrimination legislation.⁹ Not surprisingly, their guidance adopts the approach and principles enshrined in the legislation they administer. This legislation prohibits discrimination on the ground of sex or gender identity, but allows for a range of exemptions to protect sports' legitimate objectives.¹⁰ These objectives generally are framed in terms of ensuring fair competition; facilitating progression to elite level competition; and facilitating the participation and ability to compete of a particular sex. Australia's major sport governing bodies, in turn, have largely developed their policies governing the participation of transgender and intersex athletes in the context of, and within the framework provided by, these anti-discrimination laws.¹¹

As noted above, the application of WHS law and principals has been missing from this discussion. That this is the case should not come as a surprise. As I have observed in earlier works, the intersection of WHS law and professional sport largely is absent

⁹ See, eg, Australian Human Rights Commission, *Guidelines for the Inclusion of Transgender and Gender Diverse People in Sport* (Guidelines, June 2019); VEOHRC (n 2); Australian Capital Territory Human Rights Commission, *Everyone Can Play: Guidelines for Local Clubs on Best Practice for Inclusion of Transgender and Intersex Participants* (Guidelines, April 2017). Only the AHRC Guidelines acknowledge that sporting organisations also have responsibilities to protect athlete health and safety: at 11.

¹⁰ *Sex Discrimination Act 1984* (Cth) s 42; *Discrimination Act 1991* (ACT) s 41; *Anti-Discrimination Act 1977* (NSW) s 38P; *Anti-Discrimination Act 1992* (NT) s 56; *Anti-Discrimination Act 1991* (Qld) s 111; *Equal Opportunity Act 1984* (SA) s 48; *Equal Opportunity Act 1998* (Tas) s 29; *Equal Opportunity Act 2010* (Vic) s 72; *Equal Opportunity Act 1984* (WA) ss 35, 35AP. The Court of Arbitration for Sport ('CAS') also applies the same approach. For example, in *Semenya*, CAS started from the position that discrimination on the grounds of sex or gender identity is prohibited, but that 'differential treatment ... is valid and lawful if it is a necessary, reasonable and proportionate means of attaining a legitimate objective' (in that case, ensuring fair competition in the female category of elite competitive athletics): *Mokgadi Caster Semenya v International Association of Athletics Federations* (Arbitral Award, Court of Arbitration for Sport, CAS 2018/0/5794, 2018) 114 [548] ('*Semenya*').

¹¹ See, eg, the policies of the members of the Coalition of Major Professional and Participation Sports: Australian Football League, *Gender Diversity Policy — Elite Football* (1 October 2020) ('2020 Policy'); Cricket Australia, *CA Inclusion of Transgender & Gender Diverse Players in Elite Cricket Policy* (August 2019); Football Federation Australia, *National Member Protection Policy* (July 2016); National Rugby League, *Member Protection Policy* (July 2015); Netball Australia, *Member Protection Policy* (July 2017); Rugby Australia, *Participation Policy*; Tennis Australia, *Member Protection Policy* (February 2019).

from WHS and sports law texts and other scholarly and practitioner literature.¹² For many, sport is not work and sportspeople are not workers. As Hayden Opie and Graham Smith point out, that one ‘plays’ sport carries with it the implication that it is something one does when not working.¹³ Dennis Hemphill similarly observes that participants are described as ‘players’ not ‘workers’ and the playing field is not described as their workplace.¹⁴ However, as this article will establish, professional athletes are workers to whom those that employ or engage them owe WHS duties.¹⁵ Any suggestions to the contrary were dispelled in Australia with the successful prosecution in 2016 of the Essendon Football Club (a professional club in the AFL) for breaching the *Occupational Health and Safety Act 2004* (Vic) over the club’s undocumented and uncontrolled players’ supplements program.¹⁶

The relevance of WHS law to the participation of transgender and intersex athletes has been brought into stark relief by World Rugby’s new policy banning transgender women on the basis that their physique, muscle mass and strength pose a safety risk to other (cisgender) female athletes.¹⁷ Its relevance also is evidenced by the decisions of the Court of Arbitration for Sport (‘CAS’) which noted the psychological harm caused to intersex athletes by policies governing their inclusion,¹⁸ and by the case of transgender footballer Hannah Mouncey who withdrew from the Australian Football League women’s competition (‘AFLW’) because of the psychological impact that complying with its Diversity Policy was having on her.¹⁹

¹² Eric Windholz, ‘Team-Based Professional Sporting Competitions and Work, Health and Safety Law: Defining the Boundaries of Responsibility’ (2015) 43(4) *Australian Business Law Review* 303, 304–5.

¹³ 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, 317.

¹⁴ Dennis Hemphill, ‘“Think It, Talk It, Work It”: Violence, Injury and Australian Rules Football’ (2002) 19(1) *Sporting Traditions* 17, 18.

¹⁵ See Part IV below.

¹⁶ WorkSafe Victoria, ‘Essendon Football Club’, *Prosecution Result Summaries and Enforceable Undertakings* (Web Page) <<https://www.worksafe.vic.gov.au/prosecution-result-summaries-enforceable-undertakings>>. See also Eric Windholz, ‘In Charging Essendon, WorkSafe Puts All Sport on Notice’, *The Conversation* (online, 10 November 2015) <<https://theconversation.com/in-charging-essendon-worksafe-puts-all-sport-on-notice-50396>>.

¹⁷ World Rugby, *Transgender Guideline* (Guideline, October 2020) <<https://playerwelfare.worldrugby.org/?documentid=231>>.

¹⁸ *Dutee Chand v Athletics Federation of India (AFI) and the International Association of Athletics Federations (IAAF)* (Arbitral Award, Court of Arbitration for Sport, CAS 2014/A/3759, 2015) (‘Chand’); *Semenya* (n 10). See below nn 118–19 and accompanying text.

¹⁹ *2020 Policy* (n 11). See Part III below.

III AUSTRALIAN RULES FOOTBALL AND THE CASE OF HANNAH MOUNCEY

Australian rules football is Australia's indigenous game.²⁰ It is a sport played with great skill, physicality and speed — with the full body contact of American football (absent the padding), the tackling of rugby, and the speed and continuous flow of play of association football (soccer). It also is a sport played by persons of varying sizes and physiques. For example, in the top tier elite women's competition recent players have varied in height from 158–94 cm and in weight from 50–95 kg. Australian rules football also is one of Australia's most dangerous sports, with the second highest number of sports injury hospitalisations, and the fifth highest rate of injury hospitalisation per participant.²¹ Australian rules football has traditionally been a male-dominated sport. The first state-based men's leagues date back to the 1870s, and the sport has been played on a full-time professional basis by men since the early 1980s. One of the state-based leagues — the Victorian Football League — became the AFL in 1990. Women too have played football for over 100 years. However, state-based women's leagues only emerged in the 1980s, and women's football only became national and professional (and only on a part-time basis) in 2017 with the formation of the AFLW.²² The AFLW is administered by the AFL and is contested by a subset of clubs from the men's competition.

In the lead up to the AFLW's inaugural season in 2017, it was decided that a draft would be held to ensure the equitable distribution of available talent among the fledgling clubs. Hannah Mouncey, a (then) 190 cm tall and 100 kg transgender woman, announced her intention to nominate for the draft. At the time, Mouncey was competing in the Australian Capital Territory's AFL women's competition.

On the day before the AFLW draft, the AFL released a statement announcing that Mouncey was ineligible to be drafted.²³ The statement is a curious document because

²⁰ Australian rules football generally is thought to be an amalgam of rugby and possum skin 'ball' games which were played by Australia's indigenous population. The sport in its current form can trace its origins back to the late 1800s when its rules were codified and the first organised leagues formed: Roy Hay, 'A Tale of Two Footballs: The Origins of Australian Football and Association Football Revisited' (2010) 13(6) *Sport in Society* 952.

²¹ Australian Institute of Health and Welfare, *Hospitalised Sports Injury in Australia, 2016–17* (Web Page, February 2020) <<https://www.aihw.gov.au/getmedia/1f7b097d-b486-42f8-a05d-4e29cdcfbcf1/aihw-injcat-211.pdf.aspx?inline=true>>. Cycling has the highest number of sports injury hospitalisations; and wheeled motor sports, roller sports, equestrian activities and rugby have higher rates of injury hospitalisation per participant.

²² For an overview of the history of women in Australian rules football see Brunette Lenkić and Rob Hess, *Play On! The Hidden History of Women's Australian Rules Football* (Echo Publishing, 2016).

²³ 'AFL Releases Statement on Hannah Mouncey Decision', *Triple M* (online, 17 October 2017) <<https://www.triplem.com.au/story/afl-releases-statement-on-hannah-mouncey-decision-63469>> ('*Triple M*').

it did not actually explain the reasons why Mouncey was ruled ineligible. Rather, it explained the process employed in reaching the decision, and the information taken into account. With respect to process, the statement identified the composition of the decision-making body (which was notably devoid of medical or safety experts) and emphasised the steps taken to afford Mouncey procedural fairness. With respect to the information taken into account, the statement said that the decision was guided by the Victorian Equal Opportunity and Human Rights Commission guidelines²⁴ and that the decision-making body ‘carefully considered all the information provided by Hannah, as well as the available data on transgender strength, stamina, physique along with the specific nature of the AFLW competition’, and ‘took into account the stage of maturity of the AFLW competition, its current player cohort and Ms Mouncey’s individual circumstances’.²⁵

Missing from the statement was an explanation of the intellectual process by which the decision was made; one that identified the facts considered material and connected those facts in a logical manner to the decision made. It is clear from the decision though, that Mouncey’s ‘strength, stamina [or] physique’ relative to those of the player cohort at the time was central to the decision. As Catherine Ordway and Allistar Twigg observe, the decision suggested that ‘AFLW players [were] not yet at a sufficient level of “strength, stamina or physique” to be able to play with or against Mouncey’.²⁶

So what was it about Mouncey’s 190 cm tall, 100 kg frame that gave cause for concern? The decision-making body’s reference to ‘strength, stamina [or] physique’ was a reference to one of the exceptions to the prohibition on gender discrimination in the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 2010* (Vic).²⁷ Both statutes allow for persons of one sex, gender identity, or of intersex status, to be excluded from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.²⁸ The provision’s original purpose was to ensure that women were not disadvantaged in competitions that rely on strength, stamina or physique. As the report of the 1992 Inquiry into Equal Opportunity and Equal Status for Women in Australia observed, ‘[a]t the time the legislation was enacted it was felt that if mixed-sexed competitions were to become widespread

²⁴ VEOHRC (n 2).

²⁵ *Triple M* (n 23).

²⁶ Catherine Ordway and Allistar Twigg, ‘By Excluding Hannah Mouncey, the AFL’s Inclusion Policy Has Failed a Key Test’, *The Conversation* (online, 19 October 2017) <<https://theconversation.com/by-excluding-hannah-mouncey-the-afls-inclusion-policy-has-failed-a-key-test-85900>>.

²⁷ *Sex Discrimination Act 1984* (Cth) s 42; *Equal Opportunity Act 2010* (Vic) s 72.

²⁸ Note there are jurisdictional differences in how this provision is drafted and what it requires. In Queensland and the Northern Territory, the ‘strength, stamina or physique’ exception is cast in terms of reasonableness. For example, the *Anti-Discrimination Act 1991* (Qld) s 111(1) provides: ‘A person may restrict participation in a competitive sporting activity to either males or females, if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity’.

and replace separate sex competitions women may win fewer contests and receive less recognition'.²⁹ Allowing for fair competition also was the cited rationale for extending the provisions to permit discrimination on the grounds of gender identity or intersex status.³⁰ Presumably, the decision-making body considered that Mouncey's strength, stamina and physique provided her with an unfair competitive advantage over her cisgender competitors.³¹

If Mouncey's 'strength, stamina or physique' were a potential source of competitive advantage, might it not also be a potential source of risk to the health and safety of other players? Leading AFLW player Daisy Pearce thought so. She said of Mouncey: 'I think there's some concern about her size and whether that poses mainly a safety risk', a risk that Pearce said would be heightened by Mouncey's limited skill level and the prospect she could be coached to be physical, aggressive and to 'throw [her] weight around'.³² Similarly, leading sports and media lawyer Justin Quill observed: 'In making this decision, the AFL would have been really concerned about the health and safety of the other women in the AFLW competition.'³³ Health and safety within the AFLW competition is an important and growing issue, with data from the AFLW's first two seasons revealing AFLW players are more susceptible to injury than male players.³⁴

²⁹ Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (Report, April 1992) 142–3 [6.7.17].

³⁰ See, eg, Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) [81]; Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 40.

³¹ An anomaly in the AFL's decision is that it allowed Mouncey to continue to compete in the lower level competitions in which she was presently competing without dominating. Why Mouncey's strength, stamina or physique posed a risk to the competitive fairness of the elite competition and not lower level competitions is not immediately clear. Surely, the elite competition has players with the greater strength, fitness and skills required to compete successfully against Mouncey? The contradiction (some argue hypocrisy) inherent in the decision was criticised by many commentators: see, eg, Ordway and Twigg (n 26); David Mark, 'AFLW's Decision on Transgender Footballer Hannah Mouncey for 2018 Draft Full of Contradictions', *ABC News* (online, 19 October 2017) <<https://www.abc.net.au/news/2017-10-18/contradiction-in-the-hannah-mouncey-aflw-decision/9060968>>; Samantha Donovan, 'Hannah Mouncey's Coach Dismisses Critics Who Say Transgender Players Will Have an Unfair Advantage', *ABC News* (online, 14 February 2018) <<https://www.abc.net.au/news/2018-02-14/mounceys-coach-dismisses-calls-about-unfair-advantage/9445400?pfmredir=sm>>.

³² 'Daisy Pearce Says Hannah Mouncey Could be "a Safety Risk" if Allowed to Play in the AFLW', *Sporting News* (online, 8 June 2018) <<https://www.sportingnews.com/au/afl/news/daisy-pearce-says-hannah-mouncey-could-be-a-safety-risk-if-allowed-to-play-in-the-aflw-transgender/d6ad73v27azd14dy03rorhaq3>>.

³³ Mark (n 31).

³⁴ Kate O'Halloran, 'AFLW Players are 9.2 Times More Likely to Injure their Knees than Male Players. Here's Why', *ABC News* (online, 6 March 2019) <<https://www.abc.net.au/news/2019-03-05/rates-of-knee-injury-for-aflw-players-are-way->

When the AFL ruled Mouncey ineligible for the AFLW draft, it did not have a gender diversity policy. It stated at the time that Mouncey's experience would 'substantially inform the development of the AFL's transgender policy and procedure for future players at the elite level'.³⁵ That policy was first released in August 2018 ('*2018 Policy*'), then revised in 2020 ('*2020 Policy*').³⁶ It is to that Policy, which I refer to in general as the *AFL Gender Diversity Policy*, and its application to Mouncey that this article now turns.

A *The AFL Gender Diversity Policy*

The AFL Gender Diversity Policy ('*Policy*') applies to all transgender and non-binary persons seeking to participate in the AFL's elite men's and women's competitions.³⁷ The *Policy* states that its aim is to provide a framework for their safe inclusion and that it seeks to strike 'an appropriate balance ... between the interests of inclusion and ensuring a fair competition for all'.³⁸ The *Policy* is framed through the prism of anti-discrimination legislation. The *Policy* notes that legislation prohibits discrimination in sport, and that it is taking advantage of an exception that permits gender-based discrimination 'where the relative difference in strength, stamina or physique of a trans or non-binary player is significant in the sense that it has an appreciable affect [sic] on their ability to compete'.³⁹ The *Policy* also notes that utilising this exception requires an evidence-based assessment.⁴⁰

above-male-players/10866434>; Sarah Black, 'AFLW: Concussion, ACL Injuries Highlighted', *AFL Media* (online, 26 September 2018) <<https://www.afl.com.au/news/2018-09-26/aflw-concussion-acl-injuries-highlighted>>; Nick Bowen, 'Women "Five Times More Likely" to Tear ACL', *AFL Media* (online, 12 February 2018) <<https://www.afl.com.au/news/2018-02-12/women-five-times-more-likely-to-rupture-acls>>.

³⁵ *Triple M* (n 23).

³⁶ Australian Football League, *Gender Diversity Policy: AFLW and AFL* (August 2018) ('*2018 Policy*'). The *2018 Policy* has since been revised: see *2020 Policy* (n 11). The *2020 Policy* is substantially the same as the *2018 Policy*. The main change is the *2020 Policy* elaborating on the 'exceptional circumstances' that must exist for a trans or non-binary person's participation to be considered an unacceptable safety risk. See below nn 107–109 and accompanying text. Part III.A refers to the *2018 Policy* as it applied to Hannah Mouncey, with corresponding references to the *2020 Policy*.

³⁷ The *2018 Policy* defines 'non-binary' as persons identifying as having no gender, or a gender that is in-between or fluctuates between the categories of 'man' and 'woman': *2018 Policy* (n 36) 11. The *2020 Policy* defines 'non-binary' as persons with 'gender identities that do not sit within, outside of, across or between the spectrum of the male and female binary': *2020 Policy* (n 11) 19. Neither policy applies to intersex persons, whom the Policies state will be addressed in a future policy: *2018 Policy* (n 36) 5; *2020 Policy* (n 11) 7.

³⁸ *2018 Policy* (n 36) 4; *2020 Policy* (n 11) 4.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

In applying the exception, the *Policy* differentiates between, on the one hand, transgender women and non-binary persons seeking to participate in the elite women’s competition and, on the other hand, transgender men and non-binary persons seeking to participate in the elite men’s competition. The eligibility requirements imposed on each differ and are summarised in Table 1.

Table 1: AFL Gender Diversity Policy Eligibility Requirements

Male to female transgender and non-binary persons seeking to participate in the AFL Women’s Competition ⁴¹	Female to male transgender and non-binary persons seeking to participate in the AFL Men’s Competition ⁴²
1. Comply with all AFL rules and regulations 2. No unacceptable safety risks 3. AFL approval in accordance with the <i>AFL Gender Diversity Policy</i>	1. Comply with all AFL rules and regulations 2. No unacceptable safety risks

As can be seen, the first two requirements are the same, namely to comply with all AFL rules and regulations (including the AFL’s anti-doping code and its rules with respect to testosterone), and that no unacceptable safety risks arise out of their (potential) participation. With respect to safety risks, the *Policy* states that risks to the safety of both the gender-diverse player and other players should be assessed in accordance with appropriate risk management procedures where necessary.⁴³

Where the application of the *Policy* differs, however, is that transgender women and non-binary persons seeking to participate in the elite women’s competition need to obtain AFL approval in accordance with the *Policy*. No similar requirement is imposed on transgender men or non-binary people competing in the elite men’s competition, the AFL having concluded they do not possess the potential for relevant competitive advantage over cisgender players.⁴⁴

So what does a transgender woman or non-binary person need to do to obtain AFL approval in accordance with the *Policy*? First, they must maintain a level of testosterone at or below 5 nanomoles per litre for at least two years, and have the medical reports to substantiate this.⁴⁵ Second, they must submit 24 months of physiological data relevant to their strength, stamina and physique. These include data pertaining to height, weight, bench press, squat, vertical jump and 20 m sprint and 2 km run times.⁴⁶ They also need to submit themselves to further physiological testing, if

⁴¹ 2018 *Policy* (n 36) 6; 2020 *Policy* (n 11) 9.

⁴² 2018 *Policy* (n 36) 9; 2020 *Policy* (n 11) 15.

⁴³ 2018 *Policy* (n 36) (transgender women: at 6; transgender men: at 9); 2020 *Policy* (n 11) (transgender women: at 9; for transgender men: at 15).

⁴⁴ 2018 *Policy* (n 36) 9; 2020 *Policy* (n 11) 16.

⁴⁵ 2018 *Policy* (n 36) 6; 2020 *Policy* (n 11) 10.

⁴⁶ Ibid.

requested by the AFL.⁴⁷ This aspect of the *Policy* has been criticised for failing to provide transgender athletes sufficient certainty, as their eligibility is subject to review at any time.⁴⁸

The information provided by the athlete is then considered by an AFL sub-committee, together with any other information considered relevant by the sub-committee. This other information could include information relevant to player safety, any third-party data about the transgender woman or non-binary person's participation in other competitive sports, data obtained from cisgender players in the preceding two seasons, and any other research, evidence or information about the inclusion of gender-diverse people in competitive sport.⁴⁹ The *Policy* directs the sub-committee to refuse approval 'if there is a relevant, and significant, disparity in [the person's] strength, stamina or physique ... which may reasonably be regarded to give rise to an unreasonable competitive advantage'.⁵⁰ Should such an assessment be made, there then follows a process designed to provide the gender-diverse person with an opportunity to respond with additional information before a final decision is made. There also is an opportunity for the gender-diverse person to seek a review of the final decision by the AFL's General Counsel.⁵¹ Importantly, the *Policy* directs that a final decision not to approve a gender-diverse person should not be disclosed to third parties without the person's consent, and that all personal and health information provided by the gender-diverse person should be treated in strict confidence.⁵²

B *Hannah Mouncey's Experience of the AFL Gender Diversity Policy*

Having been ruled ineligible for the AFLW's inaugural 2018 draft, Mouncey again nominated for the 2019 draft. This time, however, Mouncey withdrew from the draft a few weeks before it was conducted.⁵³ Mouncey stated that her decision to withdraw was not based on a failure to meet the AFL's medical and physiological conditions, and posted documents online showing she had maintained the requisite testosterone level for two years.⁵⁴ Rather, Mouncey attributed the decision to the psychological impact the process was having on her, in particular the blood testing requirements.

⁴⁷ Ibid.

⁴⁸ Daryl Adair, 'The AFL's Gender Diversity Policy Remains an Apprehensive Work in Progress', *The Conversation* (online, 19 September 2018) <<http://theconversation.com/the-afls-gender-diversity-policy-remains-an-apprehensive-work-in-progress-102904>>.

⁴⁹ *2018 Policy* (n 36) 7; *2020 Policy* (n 11) 11.

⁵⁰ *2018 Policy* (n 36) 7. The *2020 Policy* also fills a gap in the *2018 Policy* by making clear that the sub-committee also may refuse approval if the person's (potential) participation gives rise to an unacceptable safety risk: *2020 Policy* (n 11) 12.

⁵¹ *2018 Policy* (n 36) 8; *2020 Policy* (n 11) 13. Third parties do not have the right to request a review of the decision.

⁵² *2018 Policy* (n 36) 9; *2020 Policy* (n 11) 17.

⁵³ Dan Harrison, 'Transgender Footballer Hannah Mouncey Withdraws from AFLW Draft', *ABC News* (online, 10 September 2018) <<https://www.abc.net.au/news/2018-09-10/transgender-footballer-hannah-mouncey-withdraws-from-aflw-draft/10221730>>.

⁵⁴ Ibid.

Mouncey described ‘the toll of doing this’ as ‘being far too great’ and ‘enormous’.⁵⁵ She also attributed *mala fides* to the AFL in its application of the *Policy*, stating: ‘The AFL has treated me like shit, with every effort made to wear me down to a point where I couldn’t continue’ and that it ‘cares only for its corporate image above all else’.⁵⁶ The AFL, for its part, made no comment with respect to Mouncey’s decision to withdraw, or in response to her criticism of its conduct.⁵⁷

For a number of commentators, Mouncey’s withdrawal was not a surprise.⁵⁸ The AFL *Policy* was criticised for subjecting transgender women athletes to onerous, invasive and potentially never-ending testing. As Liam Elphick observed:

The physical testing and stringent requirements under this policy are likely to either turn trans female and non-binary footballers away from the AFLW, force them into hiding their gender history, or keep them at lower state league levels.⁵⁹

Hannah Mouncey’s experience reveals two health and safety risks that can arise from the participation of transgender and intersex athletes in professional sport. The first and most obvious is the risk of physical harm from larger and stronger transgender women athletes competing against comparatively smaller and weaker cisgender athletes.⁶⁰ The second is the risk of psychological harm that can arise from the manner in which gender diversity policies are implemented. This was a risk to which the CAS was alert in its decision in *Semenya*, upholding the then IAAF’s *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)* (‘DSD Regulations’).⁶¹ The CAS Panel expressed ‘grave concerns as to the future practical application of the DSD Regulations’, and strongly encouraged the IAAF to address the difficulties associated with complying with the DSD Regulations, including the possibility that affected athletes may inadvertently, and through no fault of their own, be unable consistently to maintain natural testosterone levels below the specified threshold.⁶²

There also is a potential third risk, namely, of psychological harm from the process of developing a gender diversity policy in the first place. Pam Sailors refers to the

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ ‘Transgender Player Withdraws from AFLW Draft’, *AFL Media* (online, 10 September 2018) <<https://www.afl.com.au/news/124278/transgender-player-withdraws-from-aflw-draft>>.

⁵⁸ See, eg, Christiane Barro, ‘Experts Slam AFL’s Transgender Policy’, *The New Daily* (online, 23 September 2018) <<https://thenewdaily.com.au/sport/afl/2018/09/23/afl-gender-diversity-policy/>>.

⁵⁹ Ibid.

⁶⁰ On this logic, transgender male players also face physical safety risks from participating with larger and stronger cisgender male players.

⁶¹ *Semenya* (n 10).

⁶² Ibid 159–60 [620]–[624].

debate about transgender and intersex athlete participation as ‘vigorous, sometimes vicious’.⁶³ For transgender athletes, the mere fact there is a need for a separate policy that differentiates them from other athletes challenges their identity and sense of self-worth. Some have reported feeling uncomfortable and fearful expressing their views on policies related to their inclusion.⁶⁴ It also can be challenging for cisgender athletes. Absent policies that address the safety risks associated with the participation of transgender and intersex athletes, cisgender athletes may feel their concerns (and by extension, themselves) are devalued by the process.⁶⁵ Some cisgender athletes also report feeling silenced out of fear of appearing intolerant or politically incorrect.⁶⁶ As Belinda Smith, Melanie Schleiger and Liam Elphick observe, there is an ‘entrenched moralism’ in anti-discrimination debates with even those seeking a deeper understanding of the nature and causes of the issue sometimes being characterised as ‘morally culpable and “guilty” of racism, sexism or other ‘ism’s’.⁶⁷

So how should sport governing bodies address these risks? This question is the focus of the next two Parts.

IV WHS LAWS AND SPORT GOVERNING BODIES

International law recognises a right to ‘safe and healthy working conditions’.⁶⁸ This right has been enshrined in domestic law in nearly all countries.⁶⁹ In Australia, it is enshrined in legislation at both the federal and state and territory levels. The following analysis is based on the national *Work Health and Safety Act 2011* (Cth) (‘*WHS Act*’).⁷⁰

⁶³ Sailors (n 7).

⁶⁴ Sarah Teetzel, ‘Athletes’ Perceptions of Transgender Eligibility Policies Applied in High-Performance Sport in Canada’ in Eric Anderson and Ann Travers (eds), *Transgender Athletes in Competitive Sport* (Routledge, 2017) 68–79.

⁶⁵ See above nn 32–3 and accompanying text. I thank one of the reviewers for raising this point.

⁶⁶ Teetzel (n 64).

⁶⁷ Belinda Smith, Melanie Schleiger and Liam Elphick, ‘Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws’ (2019) 32(2) *Australian Journal of Labour Law* 219, 230.

⁶⁸ See, eg, *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 7(b). See also *International Labour Organisation Convention Relating to Occupational Health and Safety No 155*, C155 (entered into force June 1981).

⁶⁹ See International Labour Organisation, ‘Country Profiles on Occupational Health and Safety’ (Web Page) <<https://www.ilo.org/safework/countries/lang--en/index.htm>>.

⁷⁰ In Australia, regulation of WHS is primarily a state responsibility. Each State has its own WHS regulatory regime, as does the Commonwealth. Recent efforts to harmonise these regimes have produced near identical Work Health and Safety Acts and Regulations at the Commonwealth level, and in Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia and Tasmania.

The *WHS Act* has the objectives of ensuring the health and safety of workers and workplaces. To achieve this purpose, the *WHS Act* imposes a series of duties on persons and entities whose acts or omissions are capable of affecting the health, safety and welfare of persons at work. Those who owe duties include: persons (or entities) conducting a business or undertaking; officers of those entities; workers; persons with management or control of workplaces; designers, manufacturers, suppliers and importers of plant and substances used at the workplace; and other persons at the workplace.⁷¹ Of these, the primary duty is owed by persons conducting a business or undertaking ('PCBUs'). It is instructive to set out the primary duty in full:

19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

- (a) workers engaged, or caused to be engaged by the person; and
- (b) workers whose activities in carrying out work are influenced or directed by the person;

while the workers are at work in the business or undertaking

(2) A person conducting a business or undertaking must ensure, so 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.⁷²

The analysis in this article is done by reference to the *Work Health and Safety Act 2011* (Cth) ('*WHS Act*') that applies to businesses licensed to self-insure under the Comcare scheme and workers for the Commonwealth government. The Commonwealth Act is representative of Australian jurisdictions that have adopted the model WHS laws. Victoria and Western Australia are the only jurisdictions not to have implemented the harmonised laws, although Western Australia is currently consulting on implementing elements of the harmonised laws. In most areas, the Victorian and Western Australian laws lead to similar outcomes as the harmonised laws. For a discussion of the harmonisation process and major outputs, see Eric Windholz, 'The Harmonisation of Australia's Occupational Health and Safety Laws: Much Ado About Nothing?' (2013) 26(2) *Australian Journal of Labour Law* 185.

⁷¹ WHS duties are concurrent and overlapping. Each duty-holder must comply with its duties to the extent it has the capacity to control and influence the matter even if another duty-holder has the same duty: *WHS Act* (n 70) s 16.

⁷² *Ibid* s 19. In addition, the *WHS Act* also imposes a series of other, more specific duties on PCBUs for the benefit of workers. These include duties to ensure, so far as is reasonably practicable: the provision of a work environment that is without risk to health and safety, the safety of plant, structures and systems of work; the safe use of substances; the provision of adequate welfare facilities; provision of adequate information, instruction, training and supervision to enable work to be performed safely and without risk to health; to monitor the health of workers and conditions at the workplace: at s 19(3). Additionally, there is a duty to engage and consult workers on health and safety issues, again to the extent reasonably practicable: at s 47.

A number of questions arise in determining the application of this provision to the participation of transgender and intersex athletes in professional sport generally, and in the AFL in particular. First, is sport ‘work’? Second, are sport governing bodies and clubs ‘PCBUs’? Third, are professional sportspersons — and aspiring professional sportspersons — persons to whom WHS duties are owed? And fourth, if the above questions are all answered in the affirmative, what do these duties require of sport governing bodies (as PCBUs)? Let us address each question in turn.

A *Is Sport ‘Work’?*

Somewhat surprisingly, ‘work’ is not defined in the *WHS Act*. Nor have courts had cause to consider its meaning in this context.⁷³ The word, therefore, needs to be given its ordinary meaning. ‘Work’ is ordinarily defined to mean the ‘application of mental or physical effort to a purpose’⁷⁴ or ‘exertion directed to produce or accomplish something’.⁷⁵ Professional athletes’ training and preparation for, and participation in, the sporting contest — undertaken for the purpose of winning the contest — fall within these definitions of ‘work’. Their activities also satisfy the criteria identified by Safe Work Australia (the national work health and safety regulator) for determining if an activity is work for the purposes of the *WHS Act*, namely: (1) their activities involve physical and mental effort and the application of particular skills for the benefit of another person (ie, their club, supporters and sponsors); (2) they are paid for the activities;⁷⁶ (3) the activities form part of an ongoing process or project (ie, their and their club’s quest to win the sporting competition); (4) their activities

⁷³ In other contexts, courts have recognised that professional sport is work, and being a professional sportsperson is a trade. As much is evident in cases where professional sportspersons have argued successfully that competition imposed labour market controls (eg, drafts) can constitute a common law restraint of trade. See, eg, *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242; *Hall v Victorian Football League* [1982] VR 64; *Buckley v Tutty* (1971) 125 CLR 353. See also *Walker v Crystal Palace Football Club Ltd* [1910] 1 KB 87, 93 in which Farwell LJ stated that ‘[i]t may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work’; and *Re Adamson; Ex parte West Australian National Football League* (1979) 143 CLR 190, 211 in which Barwick CJ said his Honour could ‘see little difference between the presentation of a theatrical spectacle and the presentation for reward of the spectacle of a football match played by professionals as a major source of their income and of the income of the promoter’.

⁷⁴ *Australian Oxford Dictionary* (2nd ed, 2004) ‘work’.

⁷⁵ *Macquarie Dictionary* (4th ed, 2005) ‘work’. This definition was quoted with approval by Martin CJ in *Barlow v Heli-Muster Pty Ltd* (Supreme Court of the Northern Territory, Martin CJ, 5 February 1997) [14].

⁷⁶ It is not necessary for the purposes of this article to consider whether sportspeople who are not paid for their labour are engaged in ‘work’ for the purposes of WHS laws. Suffice to observe that first, volunteers are included in the definition of ‘worker’: *WHS Act* (n 70) s 7(1)(h). Second, in other contexts, courts have held that monetary reward is a strong indicator, but not a necessary component, of work: *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472; *Minister for Immigration, Local Government and Ethnic Affairs v Montero* (1991) 31 FCR 50, 58.

are controlled by another person (ie, coaching, medical, fitness and other staff); and (5) all this occurs as part of a formal and structured arrangement (ie, their participation in the competition).⁷⁷

B *Are Sport Governing Bodies and Clubs ‘PCBUs’?*

PCBU is defined broadly to mean a person conducting a business or undertaking whether alone or with others, and whether or not for profit or gain.⁷⁸ While neither ‘business’ nor ‘undertaking’ is defined in the legislation, ‘business’ is generally understood to be an activity undertaken for the purpose of making a profit or gain, and an ‘undertaking’ is generally understood to be an activity that is non-commercial in nature.⁷⁹ It also is implicit in both terms that they have a degree of organisation, system and possibly continuity.⁸⁰

The definition of PCBU is broad enough to cover both the sporting clubs that employ or otherwise engage the athletes, and the sport governing bodies that administer the competitions in which they compete and influence and direct the activities of participating clubs and their athletes. While many clubs and sport governing bodies are not-for-profit organisations (including the AFL), they nevertheless operate for gain (which is reinvested into the club and/or sport) and according to commercial principles. They also operate with great sophistication. Sport governing bodies in particular control every important aspect of the competitions they administer. The AFL, for example, determines which clubs and athletes play in their competitions; when and under what circumstances; the rules of those competitions; as well as the rules and policies according to which individual clubs and athletes compete and conduct themselves. These rules cover a broad range of topics including doping, illicit drugs, gambling, respect and responsibility, vilification and discrimination and, most relevantly, gender diversity.⁸¹ Thus, while a club owes WHS duties with respect to its athletes’ health and safety and may develop policies to govern the participation of transgender and intersex athletes at their club, in most professional sports they (and their athletes) are guided and bound by the diversity policies of their sport’s governing body. Therefore, it is the approach and policies of sport governing bodies on which the rest of this article focuses.

⁷⁷ Safe Work Australia, *The Meaning of ‘Person Conducting a Business or Undertaking’* (Interpretive Guideline, 2011) <<https://www.safeworkaustralia.gov.au/collection/interpretive-guidelines-model-work-health-and-safety-act>>.

⁷⁸ *WHS Act* (n 70) s 5. Person ‘includes a body politic or corporation as well as an individual’: *Acts Interpretation Act 1901* (Cth) s 2C.

⁷⁹ Safe Work Australia (n 77).

⁸⁰ *Ibid.*

⁸¹ The AFL’s rules and policies can be found on its website: ‘Policies’ *Australian Football League* (Web Page) <www.afl.com.au/clubhelp/policies>.

*C Do Sport Governing Bodies Owe WHS Duties to
(Aspiring) Professional Athletes?*

PCBUs owe duties to two types of persons: ‘workers’ (s 19(1)) and ‘other persons’ (s 19(2)). Looking first at workers, PCBUs owe duties to workers who they engage or cause to be engaged, and workers whose activities they influence or direct.⁸² This latter category of workers whose activities they influence or direct makes it unnecessary for the sport governing body to be the employer of athletes for duties to attach. It suffices that they influence or direct the athlete’s activities. And as has been observed, the AFL (and most other sport governing bodies) does this to a high level of prescription. It is thus clear that the AFL owes duties to athletes competing in its competitions.

But what about aspiring athletes — those nominating to be drafted — such as Hannah Mouncey? This is where the duty to ‘other persons’ is relevant. Sport governing bodies owe a duty to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from the manner with which it conducts its competitions. This would include aspiring athletes who have nominated for the AFL draft. The AFL draft is part of the AFL’s business or undertaking. Persons nominating for the draft submit to the rules and policies of the AFL draft, where rules and policies are designed specifically for them. This would include the *AFL Gender Diversity Policy*.⁸³ In this situation, WHS laws apply to impose on the AFL a duty to ensure those rules and policies do not put the health and safety of persons nominating for the draft at risk.

D What Does the WHS Act Require of Sport Governing Bodies?

WHS duties require PCBUs (in our case, sport governing bodies) to ensure the health and safety of workers (in our case, athletes) and other persons (in our case, aspiring athletes submitting themselves to a draft) by doing what is reasonably practicable in the circumstances. The guidance and case law on the duties is extensive. It is not possible in an article of this size — nor is it necessary — to explain the duties’ many intricacies. It suffices for our purposes to focus on its key features.

The first key feature is the duties’ beneficial (as opposed to punitive) nature. Courts have emphasised that duty-holders should approach their obligations cognisant that WHS law is a ‘remedial measure passed for the protection of the worker ... [and] should not be construed so strictly as to deprive the worker of the protection which

⁸² ‘Worker’ is defined broadly to mean a person who carries out work in any capacity for a PCBU: *WHS Act* (n 70) s 7.

⁸³ *2018 Policy* (n 36) states that it applies to persons nominating for the AFLW draft and the AFL (men’s) draft: at 6, 9. The *2020 Policy* (n 11) states that trans women and non-binary persons can only apply for approval in accordance with the Policy during the time period AFLW draft nominations are open: at 9.

Parliament intended that he should have'.⁸⁴ This is reinforced by s 17 of the *WHS Act* which provides that workers and other persons should be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances, and that a duty imposed on a person to ensure health and safety requires the person: (a) to eliminate risks to health and safety so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate those risks, to minimise them so far as is reasonably practicable.

The second key feature is the breadth of the duties. It has already been discussed that they are owed by PCBUs (and not just employers) and apply to workers and other persons (not just employees). The duties also apply to all work carried out as part of the PCBU's business or undertaking. In the case of professional athletes, this would include, in addition to participating in (and training and preparing for) the contest, ancillary activities such as attending public relations, community and charitable events. The duties also are inchoate in the sense that for a breach to have occurred, it is not necessary for there to have been an incident or injury. Exposing persons to risks to their safety or health can give rise to a breach, even if the persons are not subsequently injured or become ill.⁸⁵ And nor can PCBUs avoid responsibility by arguing that the person to whom the duty is owed consented to the risk and associated dangers. Statutory WHS duties cannot be contractually excluded.⁸⁶ On the contrary, the more dangerous the activity being undertaken, the greater should be the level of diligence and vigilance exercised to ensure a safe working environment is provided.⁸⁷ Further, and importantly in the context of our discussion, the duty extends to ensuring both the physical and psychological health of workers and other persons.⁸⁸ The inclusion of psychological health is important. A sport governing body's responsibility extends to risks that affect the physical and/or psychological health of current athletes, and aspiring athletes who have nominated for the draft.

⁸⁴ *Waugh v Kippen* (1986) 160 CLR 156, 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ). See also *Stratton v Van Driel Ltd* (1997) 87 IR 151, 155 (Byrne J); *R v Irvine* (2009) 25 VR 75, 91–2 [90] (Neave JA).

⁸⁵ The Essendon Football Club was successfully prosecuted under the *Occupational Health and Safety Act 1984* (Vic) without the prosecution having to establish that a particular player was injured as a result of its supplements program: Windholz (n 16). See also *Haynes v CI & D Manufacturing Pty Ltd* (1994) 60 IR 149, 158–9; *WorkCover Authority (NSW) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182, 201 [68] (Walton J); *Abigroup Contractors Pty Ltd v WorkCover Authority (NSW)* (2004) 135 IR 317, 336–7 [57]–[58].

⁸⁶ *WHS Act* (n 70) ss 14, 272. See also *Kondis v State Transport Authority* (1984) 154 CLR 672; *Chaston v Sacco Builders Pty Ltd* [2008] NSWIRComm 152, [37]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 552 [10].

⁸⁷ *WorkCover Authority (NSW) v Manildra Park Pty Ltd* [2007] NSWIRComm 35 [12]. See also *WorkCover Authority (NSW) v Police Service (NSW) [No 2]* (2001) 104 IR 268.

⁸⁸ *WHS Act* (n 70) s 4.

The third key feature is that duty-holders are required to do what is ‘reasonably practicable’ in the circumstances.⁸⁹ Risk management is central to the ‘reasonably practicable’ calculus (and thus complying with WHS duties).⁹⁰ Section 18 of the *WHS Act* provides when determining what is ‘reasonably practicable’, duty-holders must take into account and weigh up all relevant matters including: the likelihood of the hazard or risk occurring; the degree of harm that might result from the hazard or risk; the availability and suitability of ways to eliminate or minimise the risk; and the costs associated with doing so. Courts also consistently have held that duty-holders are required to undertake the key steps of a risk management process, namely: hazard identification, risk assessment, identification and implementation of control measures to eliminate or minimise those risks, and monitoring and enforcement of those control measures.⁹¹

The fourth key feature is the duty to consult with workers. WHS duties enliven a number of consultation and representation provisions designed to give the persons for whose benefit the duties are owed — in this case, the athletes — a meaningful voice on health and safety matters.⁹² These include obligations to consult on health and safety issues,⁹³ to establish Health and Safety Committees with athlete representation,⁹⁴ and the right of athletes to elect Health and Safety Representatives (‘HSRs’) to represent them on health and safety matters.⁹⁵ It also should be pointed out that the PCBU’s obligation to ensure a safe workplace extends to ensuring the safety of the consultation processes themselves, and that those consultation processes do not put workers health and safety at risk.

It was observed earlier that there are a number of potential health and safety risks emanating from the inclusion of transgender and intersex athletes in professional sport. These include risks to physical safety arising from their participation, risks to psychological health from the process of developing policies to govern their participation, and risks to the psychological health of transgender and intersex athletes in particular from having to satisfy those special policies. It is to the challenges and

⁸⁹ ‘Reasonably practicable’ is the feature most often in dispute in WHS prosecutions, and about which most has been written. For a comprehensive examination of how courts interpret ‘reasonably practicable’, see Richard Johnstone, Elizabeth Bluff and Alan Clayton, *Work Health and Safety Law and Policy* (Lawbook, 3rd ed, 2012) 263–312.

⁹⁰ Elizabeth Bluff and Richard Johnstone, ‘The Relationship Between “Reasonably Practicable” and Risk Management Regulation’ (2005) 18(3) *Australian Journal of Labour Law* 197.

⁹¹ Johnstone, Bluff and Clayton (n 89) 295 [4.435] and the cases cited therein.

⁹² These provisions impose duties on PCBUs, which in the case of professional sports we have seen include both the clubs that engage the players and the sport governing bodies: see above nn 78–81 and accompanying text. Importantly, the *WHS Act* (n 70) requires that they co-operate in the discharge of their consultation obligations: at s 46.

⁹³ *WHS Act* (n 70) s 49.

⁹⁴ *Ibid* s 75.

⁹⁵ *Ibid* ss 50–69.

opportunities that arise from managing these risks in accordance with WHS law that the article now turns.

V WHS LAWS AND GENDER-DIVERSE ATHLETES: CHALLENGES AND OPPORTUNITIES

The preceding analysis has established that WHS laws impose on the bodies that govern professional sporting competitions statutory duties to ensure the health and safety of both athletes competing in those competitions, and aspiring athletes nominating to be drafted into them. Professional sport enjoys no special exemptions or privileges when it comes to WHS law. What WHS law requires of persons involved in professional sporting competitions is determined by reference to the same legal principles that apply to other industries and work. This is in contrast to anti-discrimination laws that create sporting exemptions from the general law within which discriminatory behaviour is acceptable.

Of course, what the law requires and how it is practised and enforced are not always the same. It has been observed that the application of WHS law to sport largely is absent from the scholarly literature.⁹⁶ It also is an area where WHS regulators are reluctant to involve themselves.⁹⁷ WorkSafe Victoria's successful 2016 prosecution of the Essendon Football Club over its undocumented and uncontrolled supplements program is the exception, not the rule.⁹⁸ This general reluctance is likely to be heightened in the sensitive area of transgender and intersex participation.⁹⁹ Overcoming this reluctance and lack of recognition is the first (and arguably largest) challenge in applying WHS laws to the participation of transgender and intersex athletes in professional sport. This article aims to meet that challenge.

The second challenge is managing the health and safety risks associated with their participation in accordance with WHS law. In examining this challenge, this article differentiates between three types of risks: (1) risks to physical safety; (2) risks to psychological health generally; and (3) risks to psychological health specific to the development and implementation of policies governing transgender and intersex athletes' participation.

⁹⁶ See above n 12 and accompanying text.

⁹⁷ Eric Windholz, 'Professional Sport, Work Health and Safety Law and Reluctant Regulators' (2015) 11(1) *Sports Law eJournal* 1–25.

⁹⁸ See above n 16 and accompanying text.

⁹⁹ If, as Smith, Schleiger and Elphick observe, WHS regulators are reluctant to recognise workplace sexual harassment as a WHS issue, they are even less likely to recognise transgender participation in professional sport as one: Smith, Schleiger and Elphick (n 67).

A *Risks to Physical Safety*

It has been argued that cisgender women athletes could be at greater risk of physical harm and injury if they compete in sports with larger and stronger transgender and intersex athletes.¹⁰⁰ This is the basis of World Rugby's ban on transgender women. According to a report prepared for World Rugby, transgender women who transition after male puberty retain 'significant' physical advantages over cisgender women — even after they take steps to lower their testosterone levels. These advantages include being 30–40% stronger and more powerful and 10–15% faster.¹⁰¹ Importantly, the report concludes these advantages create at least a 20–30% greater risk of injury for cisgender female rugby players competing against transgender female players.¹⁰²

The science underpinning the report is heavily contested, not least because the report's conclusions are based on comparing cisgender men with cisgender women, cisgender men being used as a proxy for transgender women.¹⁰³ However, even if one were to accept the science at face value, a decision to ban all transgender women based on it raises many questions from a WHS perspective.

The gender status or identity of an individual does not create any inherent danger or risk to safety. Rather, disparities in strength and/or physique may do so, depending on the sport.¹⁰⁴ A strength and/or physique disparity is likely to create or exacerbate safety risks in sports that involve physical contact between competitors. In combat sports such as boxing, wrestling and karate — where the object is to physically suppress the opponent — the risks posed by strength and/or physique disparities arguably are more significant and may warrant some mitigation. However, risks emanating from disparities in strength and physique also exist between cisgender athletes competing in these sports. Combat sports mitigate these risks — not by excluding athletes of certain strengths and physiques — but through the creation of weight divisions that seek to match athletes based on size and strength.

Risks from disparities in strength and physique also arise in contact and collision sports such as Australian rules football and rugby where aggressive physical contact is permitted under the rules and occurs continuously throughout the game. It is

¹⁰⁰ See above nn 33–4 and accompanying text.

¹⁰¹ World Rugby (n 17) 2.

¹⁰² *Ibid* 2–3.

¹⁰³ Sean Ingle, 'Trans Women Face Potential Women's Rugby Ban Over Safety Concerns', *The Guardian* (online, 20 July 2020) <<https://www.theguardian.com/sport/2020/jul/19/transwomen-face-potential-womens-rugby-ban-over-safety-concerns>>.

¹⁰⁴ The terms 'strength and/or physique' are used here borrowing from the exemption in discrimination legislation. Physique captures size (including height and weight). Of course, strength and physique are not the only determinants of physical risk in sport. Also important is an athlete's skill level that determines their ability to control how they deploy their physique and strength. It will be recalled that part of the concern with Mouncey's participation related to her size combined with her limited skill level: see above n 32 and accompanying text.

possible that a larger and stronger transgender or intersex athlete could pose a safety risk to smaller cisgender athletes (and vice-versa), especially if the larger athlete sought to use their size as a tactical weapon, something that was suggested could occur in the case of Hannah Mouncey.¹⁰⁵ However, these sports attract persons of different strengths and physiques, and a team's success often can depend upon a skilful blending of these differences. To exclude bigger and stronger transgender and intersex athletes from these sports on safety grounds would create a precedent that would argue for the exclusion of equally big and strong cisgender athletes — remembering that, from a safety perspective, it is the disparity in size and strength that is relevant, not the source of the disparity.¹⁰⁶ In these sports, the risks from disparity in strength and physique are mitigated and managed through the rules of the sport. This was made clear in the AFL's *2018 Policy* which stated that the rules of the sport (including those dealing with rough conduct, unsafe play and other on-field disciplinary matters) are designed to ensure the safety of all AFLW and AFL (men's) players, including gender-diverse and cisgender players.¹⁰⁷ It is also clear in the *2020 Policy* that while a trans or non-binary person may be excluded on the basis that their participation poses an unacceptable safety risk, such an exclusion would only arise in 'exceptional circumstances' involving a significant disparity in physique that cannot be managed safely within the rules of the sport.¹⁰⁸ Importantly, the *2020 Policy* states it 'will not arise simply from the proposed participation of a gender diverse person'.¹⁰⁹ The AFL's 'exceptional circumstances' approach stands in stark contrast to World Rugby's blanket ban.

And finally, there are non-contact sports where direct physical contact between athletes is rare, but in which athletes propel projectiles at one another. Cricket and hockey are examples of such sports. Here too, any risk from such activities also exists between cisgender athletes of different strengths and physiques, and is managed through the rules of the sport, the use of protective equipment and the discretion of officials.¹¹⁰

So far this article has been talking about the risks posed by transgender women competing against cisgender women. On the same logic, there also is risk to smaller, less strong transgender men competing against larger and stronger cisgender men. The *AFL Gender Diversity Policy* correctly requires safety risks from the participation of

¹⁰⁵ See above n 32 and accompanying text.

¹⁰⁶ Transitioning gender is not the only source of strength and physique disparities. Most are genetic. They also can arise from training, the use of supplements (legal and illegal), and even surgery.

¹⁰⁷ *2018 Policy* (n 36) 9.

¹⁰⁸ *2020 Policy* (n 11) 12.

¹⁰⁹ *Ibid.*

¹¹⁰ See, eg, Cricket Australia (n 11) cl 10 that states: 'Umpire adjudication (such as the application of dangerous and unfair bowling laws) and the use of protective equipment are long standing and effective means of ensuring the health, safety and wellbeing of players'.

both transgender women and men in their competitions to be assessed.¹¹¹ However, World Rugby's ban does not apply to transgender men competing against other cisgender men. Transgender men will be allowed to play provided they pass a physical assessment and sign a 'written acknowledgement and acceptance ... of the associated risks of playing contact rugby with males who are statistically likely to be stronger, faster and heavier than them'.¹¹² While such acknowledgements may be effective to exclude or limit civil liability, they are problematic from a WHS law perspective. As has been observed, WHS law does not permit duty-holders to contract out of their statutory obligations in this manner, nor is a worker's acceptance of risk a defence.¹¹³ WHS law is unlikely to countenance a policy that allows transgender men to choose to accept the higher safety risks that the sport governing body feels compelled to remove from women's sport.

This analysis reveals that blanket exclusions and special entry requirements are not warranted or necessitated by on-field risks that may emanate from any disparity in strength or physique that may arise from the participation of transgender or intersex athletes. Rather, the inclusion of larger and/or stronger transgender women athletes, in particular, should serve as a proxy for all larger and stronger outliers. To the extent that larger and stronger athletes (transgender or cisgender) may pose a physical safety risk, it is best to address that risk within the general policies and rules of the sport — not through blanket bans.

B *Risks to Psychological Health*

This article has observed that sport governing bodies' WHS duties extend to ensuring (so far as is reasonably practicable) that athletes are not exposed to risks to their psychological health arising from the conduct of their competitions. Athlete psychological health is an issue that has gained recent prominence with a number of high profile Australian athletes taking leaves of absence to deal with mental health issues.¹¹⁴ Research demonstrates that elite athletes are vulnerable to a range of mental health problems related to, among other things, injury, overtraining, burnout and performance expectations and anxieties.¹¹⁵ Risks to an athlete's psychological health also can arise from the inappropriate behaviour of other persons with whom they interact while at work. As Richard Johnstone observes:

This primary duty of care clearly requires a PCBU to ensure, as far as is reasonably practicable, that all workers carrying out work for the business or

¹¹¹ See above n 43 and accompanying text.

¹¹² World Rugby (n 17) 21.

¹¹³ See above n 86 and accompanying text.

¹¹⁴ For an overview of the issue in the AFL: see Brent Hedley, 'Mental Health: Q&A' *AFL Players Association* (Web Page, 27 July 2018) <<http://www.aflplayers.com.au/article/common-mental-health-qas/>>.

¹¹⁵ Simon M Rice et al, 'The Mental Health of Elite Athletes: A Narrative Systematic Review' (2006) 46(9) *Sports Medicine* 1333.

undertaking are not exposed to the risk of bullying or harassment by the PCBU, by fellow workers, or by third parties such as customers or clients.¹¹⁶

Racism (in the AFL men's competition) and sexism (in the AFLW competition) are forms of inappropriate behaviour that have recently blighted the competitions, and adversely affected the psychological health of players.¹¹⁷ The AFL, like many sport governing bodies, has taken a strong stance against such behaviours, including by exposing and sanctioning perpetrators and, where appropriate, referring them to the police for investigation.¹¹⁸ A similar approach would need to be adopted with respect to sexist or transphobic behaviours directed at transgender or intersex players entering its ranks.

However, the WHS duties go further than just addressing specific behaviours. They extend to providing a system of work that is safe, both physically and psychologically.¹¹⁹ Creating a supportive and inclusive workplace environment fosters psychological safety,¹²⁰ and a psychologically safe workplace is particularly important in the context of transgender and intersex participation in sport. Research establishes that psychologically safe workplaces can strengthen gender identity and people's concept of self and self-image, whereas psychologically unsafe workplaces can result in athletes suffering psychological withdrawal, stress, anxiety and depression.¹²¹

For this reason, most professional sports have developed a series of policies that seek to create a safe and inclusive environment in which transgender and other gender-diverse persons are treated fairly and with dignity and respect, and in which discrimination, harassment and abuse on the basis of gender identity are not tolerated.¹²² However, the test of whether such an environment exists is not determined by words on the pages of carefully drafted and lawyer-settled policies. The courts

¹¹⁶ Richard Johnstone, 'The Australian Regulatory Framework for Preventing Harassment and Bullying' in L Lerouge (ed), *Psychosocial Risks in Labour and Social Security Law: A Comparative Legal Overview from Europe, North America, Australia and Japan* (Springer, 2017) 253, 256.

¹¹⁷ See the player comments in Eric Windholz, 'The AFL and Its Clubs Must Continue To Expose and Sanction Online Trolls, It's the Law', *The Conversation* (online, 29 March 2019) <<https://theconversation.com/the-afl-and-its-clubs-must-continue-to-expose-and-sanction-online-trolls-its-the-law-114293>>.

¹¹⁸ *Ibid.*

¹¹⁹ This is one of the more specific duties imposed on PCBUs: see above n 72.

¹²⁰ 'Preventing Work-Related Stress: For Employers in the Private Sector' *WorkSafe Victoria* (Web Page, June 2009) <<https://www.worksafe.vic.gov.au/resources/preventing-work-related-stress-employees-private-sector>>.

¹²¹ George B Cunningham et al, 'Psychological Safety and the Expression of Sexual Orientation and Personal Identity' in Jennifer Hargreaves and Eric Anderson (eds), *Routledge Handbook of Sport, Gender and Sexuality* (Routledge, 2014) 406.

¹²² See above n 11.

have made clear that ‘paper systems are not enough’.¹²³ It is the lived experience that counts. The manner in which policies are developed and implemented determines WHS compliance. This brings us to gender diversity policies specifically.

C Gender Diversity Policy Risks

Gender diversity policies are one of the policies sports have developed to create a safe, fair and inclusive environment. It will be recalled this was the express intention of the *AFL Gender Diversity Policy*. Yet, as observed in the case of Hannah Mouncey, her lived experience is that the AFL excluded her, and imposed a toll on her psychological health in the process.¹²⁴ This also has been the lived experience of numerous other athletes, with *Chand* and *Semenya* offering two of the most prominent examples.¹²⁵ The CAS decisions ruling on their challenges to the IAAF’s hyperandrogenism regulations contain several references to the ‘psychological harm’ and ‘serious psychological consequences’ athletes can suffer when investigated in accordance with the regulations. In *Chand*, the decision noted the existence of such psychological impacts, stating that Chand ‘often breaks down because of the way her sexual identity, honesty and ability to procreate have been questioned’.¹²⁶ Further, in *Semenya*, the CAS Panel acknowledged the psychological distress that can arise from the implementation of the regulations, even when conducted with due care and sensitivity.¹²⁷

This article has observed that a sport governing body’s WHS duties extend to risks to psychological health. This includes risks to psychological health emanating from the process of developing and implementing a gender diversity policy.¹²⁸ This means that when developing such a policy, sport administrators are required to consider the psychological health of transgender, intersex and other gender-diverse athletes whose sporting futures — and gender identities — they are adjudicating upon, as well as the psychological health of those with and against whom they will compete.

How safely to develop and implement a gender diversity policy will vary according to the nature of the sport, its organisation and circumstances. There is no one-size-fits-all approach. However, a number of principles can be gleaned from WHS law and practice to inform the process. First, WHS law directs sport governing bodies to eliminate or mitigate risks emanating from their activities to the extent reasonably practicable. So the first question is whether the policy (and its attendant risks) can be eliminated. This article has discussed how the gender status or identity of an

¹²³ *Sydney County Council v Coulson* (1987) 21 IR 477, 480. See also *Inspector Kumar v Ritchie* [2006] NSWIRComm 323; *WorkCover Authority (NSW) v Daly Smith Corporation (Aust) Pty Ltd* [2004] NSWIRComm 349; *WorkCover Authority (NSW) v Coster* [1997] NSWIRComm 154.

¹²⁴ See above nn 53–9 and accompanying text.

¹²⁵ *Chand* (n 18); *Semenya* (n 10).

¹²⁶ *Chand* (n 18) 78 [387].

¹²⁷ *Semenya* (n 10) 154 [600]–[601].

¹²⁸ See above nn 63–6 and accompanying text.

individual does not create any inherent danger or risk to safety. Rather, it is disparities in strength and/or physique that may, depending on the sport. To the extent that larger and stronger athletes (transgender, intersex or cisgender) may pose a health and safety risk, it is best to address that risk by amending the rules of the sport to engineer out (or at least minimise) the risks at their source (to employ more mainstream WHS parlance).¹²⁹ A separate gender diversity policy is not necessary to address physical safety risks.

But if the need for a gender diversity policy cannot be eliminated because, for example, considerations of competitive fairness necessitate it — which is an assumption being made, not a conclusion being accepted, as the contested debate on this issue is beyond the scope of this article — then the obligation upon sport governing bodies is to minimise the risks emanating from the policy to the extent reasonably practicable. It has been established that the *AFL's Gender Diversity Policy* is very prescriptive and onerous in its requirements. The data required to be provided is extensive, the testing required to produce it is invasive, and the length of time over which it must be provided is long.¹³⁰ In Hannah Mouncey's case, it proved to be too stressful. This raises the question of whether the *Policy* is a case of over-regulation. Does ensuring competitive fairness require the sport to put transgender and intersex athletes through such a rigorous and potentially psychologically damaging process, especially when there already may exist large disparities in strength, stamina or physique amongst cisgender athletes who are not required to undergo similar testing?¹³¹ The assessment of competitive risks drives and informs the development of policies to address those risks. An over-estimation of, or over-reaction to, those risks can lead to an overly prescriptive and strict diversity policy that, in turn, generates its own health and safety risks. The WHS duty to mitigate risk operates to suggest that such policies should err on the side of under-regulation, not over-regulation, and for the softening (if not removal) of some of the policy's more onerous requirements.

The psychological risks of a gender diversity policy also can be mitigated by effective consultation. This article has established that WHS duties enliven a series of consultation and representation provisions.¹³² These offer the opportunity to address issues concerning the participation of transgender and intersex athletes through a lens less tainted with the moralism that Smith, Schleiger and Elphick suggest attach when the issue is debated through the prism of anti-discrimination law, and which they argue 'operate[s] to stifle open and constructive inquiries about workplace cultures and practices, which are the types of inquiries needed to develop deeper understandings of the natures and causes of discrimination and harassment'.¹³³ Conducted well, health and safety consultation provides a framework through which both gender-diverse and

¹²⁹ See above nn 107–110 and accompanying text.

¹³⁰ See above n 45–7 and accompanying text.

¹³¹ See Buzuvis (n 2) 69. It should be noted that while most sports' policies are invasive (eg, requiring monitoring and maintenance of testosterone levels), not all are as onerous as the AFL's policy with respect to physiological testing.

¹³² See nn 92–5 and accompanying text.

¹³³ Smith, Schleiger and Elphick (n 67) 230.

cisgender athletes can give voice to their concerns in a psychologically safe environment, without fear of negative consequences to self-image, status or career.¹³⁴ It also enables the discussion to be transitioned away from issues specific to transgender and intersex athletes, to a broader discussion about athlete health and safety and the risks associated with outliers — be they transgender, cisgender or intersex. This, in turn, provides an opportunity to deal with the participation of transgender and intersex athletes in a non-discriminatory manner.

VI CONCLUSION

This article has examined the vexed and often divisive matter of transgender and intersex athlete participation in professional sport through the lens of WHS laws. This examination revealed a number of potential health and safety risks emanating from the inclusion of transgender and intersex athletes in professional sport. These include risks to physical safety arising from their participation, risks to their psychological health from a sexist or transphobic environment, and risks to psychological health from the development and implementation of gender diversity policies. The examination also revealed that sport governing bodies (and clubs) have statutory WHS duties that oblige them to eliminate or minimise these risks to the extent reasonably practicable.

Applying these duties to sports that are inherently risky is a complex and challenging task. Applying them to the participation of transgender and intersex athletes in sport is even more challenging and complex. At the same time, however, WHS law presents sport governing bodies, clubs and athletes — transgender, cisgender and intersex — with a valuable avenue to pivot the discussion away from the moralism of a debate grounded in competing rights to a focus on risks and solutions grounded in a debate about safety. This, it is submitted, can only be a good thing.

¹³⁴ WA Kahn, 'Psychological Conditions of Personal Engagement and Disengagement at Work' (1990) 33(4) *Academy of Management Journal* 692, 708, cited in Cunningham (n 121) 406–15.

