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AMERICAN PRECEDENT, AUSTRALIAN LEGISLATION—ARE  
THE RULES OF GOLF IN VIOLATION OF ANTITRUST LAW

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&

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ABSTRACT

Today, the two regulatory bodies for golf, the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews establish the technical specifications for golf equipment. Indeed all major sports have some regulatory body undertaking the same activity. The purpose of this Article is to analyze the extent to which American antitrust principles will influence the application of Australian antitrust (or competition law) canons to the Rules of Golf. In Australia, the rules promulgated by the regulatory bodies are adopted through its national association, Golf Australia, upon a delegation from the Royal and Ancient Golf Club of St. Andrews. The issues specifically raised are whether regulation of golf equipment improperly excludes innovative products from reaching the marketplace (ss45/4D of the *Trade Practices Act 1974* (Aus)—with this provision somewhat equivalent to section 1 of the *Sherman Act 1890* (US)) and second, whether the golf regulators are unfairly exercising market power (s46 *Trade Practices Act 1974* (Aus)—this section broadly parallels section 2 of the *Sherman Act 1890* (US)). With precedential case law emanating from the United States, it is possible (if not probable) that a manufacturer, be they Australian or international, may look to the Australian courts as a medium by which their innovative and groundbreaking product can reach the hands of avid golfers. This Article examines United States litigation and applies it to the aforementioned competition law principles. This has particular relevance to a U.S. audience given that American manufacturers dominate the retail market for golf

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clubs in Australia. A framework will be presented against which sporting equipment regulators can test the validity of their rules regarding equipment restrictions. Whilst golf will be the basis for this Article, the analysis is equally relevant for any sport that contains such limitations.

## I. INTRODUCTION

Sports play an important role in the human psyche. From an Australian perspective it is an inherent part of the Australian persona, developed as part of our culture. Whether it is our wealth, weather, availability of land, or some other reason, many Australians participate in any number of outdoor and indoor recreational pursuits that come within the broad rubric of sports.<sup>1</sup> As one of the most prominent activities, golf occupies a specific niche in the Australian community. With approximately 1.14 million people (or 8% of the population) playing, the related employment of twenty thousand people, club revenues of \$1.1 billion,<sup>2</sup> thirty million rounds played annually,<sup>3</sup> at least twenty male players on the U.S. Professional Tour, and the number nine ranked female player in the world (Karrie Webb),<sup>4</sup> Australia is rightfully positioned as the world's number two golfing nation, behind only the United States.

However, for every golfer frustrated with a short game that begins off the tee, a putter that uncomfortably yips at impact, or a ball that does not respect the modern mantra of mental visualisation, a lingering question remains: to what extent do technological restrictions imposed by the regulators of golf actually protect the fundamental values that lie behind the game? Perhaps more specifically, do the contemporary developments, such as the conformance test for the "spring-like" effect off clubheads,<sup>5</sup> or the limitations on the distance that a ball can travel,<sup>6</sup> serve to protect the skill level of the game, or simply restrict competition amongst

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1. A definition of sports is somewhat arbitrary. One can imagine that it has been since time immemorial that people have run, jumped, and competed against each other.

2. ERNST & YOUNG, AUSTL. GOLF INDUS. REPORT, EXECUTIVE SUMMARY, 3 (2004), available at [http://admin.golfaustralia.org.au/site/\\_content/document/00005776-source.pdf](http://admin.golfaustralia.org.au/site/_content/document/00005776-source.pdf).

3. Golf Australia, *Statistics and Quick Facts*, <http://www.golfaustralia.org.au/default.aspx?s=statisticsandquickfacts> (last visited Apr. 15, 2010).

4. The Ladies' Golf Union, *Women's World Golf Rankings*, <http://www.lgu.org/worldrankings1/> (last visited Apr. 15, 2010).

5. The idea behind the spring-like effect is that as the ball hits the club, the club bends inwards, rather than remaining rigid. By bending inwards, the loss of energy with the ball hitting the clubhead on a rigid face is minimised—the ball then goes farther. See Press Release, U.S. Golf Ass'n, USGA Distributes Details of Proposed Test for "Spring-Like" Effect in Golf Clubs (July 13, 1998).

6. See generally D.E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137, 141–143 (1999).

innovative manufacturers whilst at the same time exasperating the legion of players in the game? Has tradition been preserved at the expense of progress? Development and growth in sporting equipment is about innovation, and on a simplistic level restrictions prevent competition amongst companies who must innovate to sell their product to the consumer.<sup>7</sup> Subject to normal use, golf clubs will last for many years if not decades. To purchase new equipment, the golfer needs to be convinced that the latest contrivance (such as the redirection of the weight in the head of the club, the redesigning of the geometry of the dimples on the golf ball, or the adjustability of the shaft) will see that golfer move closer to the utopian ideal of swing perfection. However, the question remains: how can a conventional competition law analysis allow sporting administrators to engage the game and its participants with its fundamental values, or does sport (as a fundamental part of Australian society) simply need to mend its way to fit within the competition law ideals promulgated and promoted by governments of all persuasions?

This Article will first look at U.S. litigation to acquire the proper perspective. Next, this Article will consider the application of Australian competition (or antitrust) law to the restrictions presently imposed by the regulators within the current Rules of Golf. Are these restrictions hampering competition in the marketplace and serving to dampen the innovative market in golf clubs? Do they prevent ground-breaking products from entering the competitive fray, and will the deference shown to the sporting regulators in the United States (with *Gilder v. PGA Tour* the exception rather than the rule)<sup>8</sup> be followed if Australian litigation were to occur? Specifically, within the Australian context, does ss45/4D (broadly similar to section 1 of the *Sherman Act 1890* (US)) and s46 of the *Trade Practices Act 1974* (equivalent to section 2 of the *Sherman Act 1890* (US)) prevent Golf Australia (the national administrator of Golf in Australia) from endorsing the technology restrictions<sup>9</sup> imposed by the United

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7. An analogous illustration of where arguably unclear restrictions have caused turmoil in a sport is the introduction of the LZR Speedo swimsuit. For a discussion of the controversy surrounding this, see S. Parnell, *Slippery Business*, WEEKEND AUSTRALIAN MAG., May 31–June 1, 2008, at 14, available at <http://www.theaustralian.com.au/news/features/slippery-business/story-e6frg8h6-1111116490096>.

8. J.P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Market Place*, 60 TENN. L. REV. 263, 264 (1993).

9. It should be noted that most, if not all sports will have some sort of technology restrictions. For example, the International Tennis Federation dictates the maximum frame length (737 cm) and the width (31.7 cm) of a racket. INTERNATIONAL TENNIS FEDERATION, RULES OF TENNIS 20 app II, cl. (b) (2010). The Rules of Tennis further state that “[n]o energy source that in any way changes or affects the playing characteristics of a racket may be built into or attached to a racket.” *Id.* At cl (c). The Laws of Cricket also put restrictions on a cricket bat, by mandating that the bat must not exceed 96.5cm in length and can not be any wider than 10.8cm. MARYLEBONE CRICKET CLUB,

States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews (R&A)?<sup>10</sup> Lastly, this Article will discuss a suggested model for the examination of the technical restrictions in golf.

## II. U.S. LITIGATION

The genesis for present day litigation has been the United States. In a golfing context, two cases dramatically highlight the antitrust implications of the Rules of Golf: *Weight-Rite Golf v. United States Golf Association Corp.*<sup>11</sup> and *Gilder v. PGA Tour, Inc.*<sup>12</sup>

### A. Weight-Rite Golf Corp. v. United States Golf Association

*Weight-Rite Golf Corp v. United States Golf Association* concerned an action brought by a manufacturer and distributor of (among other things) a particular golf shoe. The plaintiff had designed a golf shoe to promote stability and appropriate weight transference in the swing. The USGA issued a determination banning the shoe alleging that it did not conform to the USGA's Rules of Golf.<sup>13</sup> However, Weight-Rite argued that the USGA determination amounted to a group boycott or concerted refusal to deal. In the United States, this is per se unlawful under the Sherman Act (in Australia this would be per se illegal under s45 of the *Trade Practices Act 1973*), no lessening of competition need be established. As noted by the Court, these types of practices are "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."<sup>14</sup> In addition, Weight-Rite submitted that even if the per se rule was not applicable, the USGA's action violated the rule of reason, that is, its actions lessened competition.

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LAWS OF CRICKET 20 rule 6.1 (2000 Code 3d Edition 2008).

10. The Royal & Ancient (and its rules body, the Royal & Ancient Rules Ltd.) establishes the rules for 130 affiliated organisations (including Golf Australia) outside of the United States and Mexico. The USGA is the regulatory body for the United States and Mexico. See generally the Royal & Ancient website ([www.randa.org](http://www.randa.org)) or the USGA website ([www.usga.org](http://www.usga.org)).

11. *Weight-Rite Golf Corp. v. U.S. Golf Ass'n*, 1990 WL 145594, at \*2 (M.D. Fla. 1990) (citing *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)).

12. *Gilder v. PGA Tour, Inc.*, 727 F. Supp. 1333 (D. Arizona 1989), *aff'd*, 936 F.2d 417 (1991).

13. Rule 14-3 provides that a "player must not use any artificial device or unusual equipment. . . . [t]hat might assist him in gripping the club." R&A, RULES OF GOLF AND THE RULES OF AMATEUR STATUS 2008-2011 74, rule 14-3 (31st ed. 2008).

14. *Weight-Rite*, 1990 WL 145594, at \*2.

Weight-Rite was unsuccessful. The USGA had not violated any procedural fairness requirements<sup>15</sup> nor had an unreasonable restraint of trade occurred. The Court found that the USGA had an established procedure for the verification of new equipment, whereby golf equipment manufacturers may, prior to marketing a product, obtain a ruling from the USGA as to whether the product conforms to the Rules of Golf. Given that Weight Rite had not availed itself of this procedure, despite notification to do so from the USGA, injunctive relief was not available to the plaintiff.<sup>16</sup>

B. *Gilder v. PGA Tour, Inc.*

*Gilder v. PGA Tour, Inc.* concerned, at the time, the most popular selling golf club in the world, the “Ping Eye 2.”<sup>17</sup> This club was developed following a 1984 amendment to the rules, whereby the USGA had permitted the manufacture of clubs containing grooves that were in the shape of a U (as opposed to a V). This rule change arose because of technical improvements in the way clubs were manufactured rather than manufacturers seeking to gain an innovative advancement to their clubs.<sup>18</sup> This contrasted with earlier clubs where the grooves were all the shape of a V—a diagrammatic representation from Figure XI of the current rules of golf shown below.

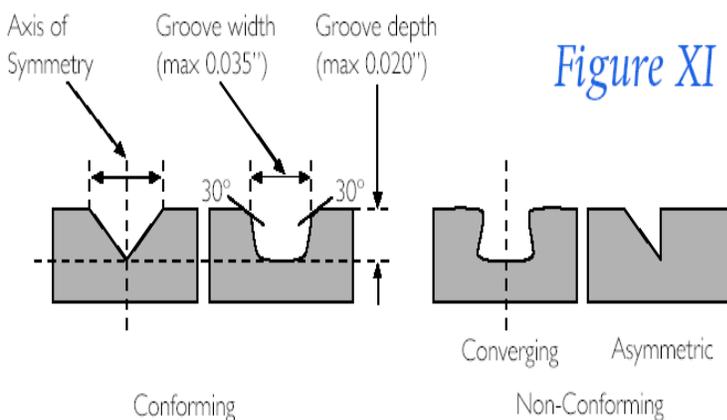


Diagram 1

15. See *Silver v. N.Y. Stock Exch.*, 373 US 341 (1963).  
 16. *Weight-Rite*, 1990 WL 145594, at \*4.  
 17. *Gilder v. PGA Tour, Inc.*, 727 F. Supp. 1333, *aff'd* 936 F.2d 417 (1991).  
 18. J. Diaz, *Has Golf Gotten Too Groovy?*, SPORTS ILLUSTRATED, Aug. 3, 1987, at 52.

In 1985, a number of players complained that the U-grooves had detracted from the skill of the game. The specific allegation was that U-grooves imparted more spin on the golf ball, particularly when hitting from the rough.<sup>19</sup> The USGA conducted further tests and while they considered that more spin was added to the golf ball by the U-grooves, not enough information was available to ban clubs with this type of face pattern. However, the USGA did amend how it would measure the spaces between the grooves (the so-called groove to land ratio), effectively banning the Ping-Eye 2. This rule applied to all USGA tournaments from 1990.<sup>20</sup>

Gilder and seven other professionals, funded by Karsten Manufacturing Corporation (Karsten) as the manufacturer of the Ping-Eye 2, began proceedings against the PGA (the administrative body for professional golf tournaments in the United States) for adopting the rule that led to the banning of the club.<sup>21</sup> They alleged that the actions of the PGA and its directors violated sections 1<sup>22</sup> and 2<sup>23</sup> of the Sherman Act and Arizona antitrust laws.

To support its case, Karsten presented to the United States Court of Appeal, economic evidence that there had been no negative impact for the PGA Tour by professionals using the Ping-Eye 2. Evidence included a quantitative study revealing that the percentage of money won by players using the golf club was less than the percentage of players not using the club. Furthermore, there was no proof that Ping golf clubs led to a

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19. "The grass on the fairways is kept short enough to provide a good lie for the golf ball. The areas of the 'rough' have taller grass which provides for a bad lie for the golf ball. A golfer in the fairway has an advantage over a golfer whose ball lands in the grassy area of the 'rough.' *Gilder*, 936 F.2d at 419 n.1.

20. Karsten was able to improve the edging of the grooves, leading to a slight rounding of the groove. *Diaz*, *supra* note 18, at 52.

21. The *Rules of Golf* contain the present rules regarding grooves in clubs. It is very prescriptive and specifies depth, width, degree of rounding at base as well as specifying that the grooves must be straight and parallel, and that the width, spacing and cross section of the grooves must be consistent throughout the impact area. R&A, RULES OF GOLF AND THE RULES OF AMATEUR STATUS 2008–2011 *supra* note 13, at 160 app II cl. 5(c)(i) (31st ed. 2008).

22. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished. . . ." 15 U.S.C. § 1 (1890).

23. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." *Id.* at § 2.

greater number of players getting their balls to the green in less than regulation.<sup>24</sup>

The evidence of the professionals was as expected—that changing clubs would adversely hurt their game by affecting prize money won and endorsement income.<sup>25</sup> By contrast, the PGA considered that a Karsten victory would irreparably damage the PGA's standing as the governing body. If their reputation were diminished, it would then have difficulty formulating rules for the conduct of tournaments under its control. However, the court, in comparing the harm done to the manufacturer and the player as against the PGA Tour, found in favor of the manufacturer. The damage done to the prestige and reputation of the PGA paled in comparison with the financial harm to the players and Karsten.<sup>26</sup> The court granted an injunction preventing the ban of the club. With this in mind, both the USGA and the PGA settled the outstanding litigation with Karsten. This saw Karsten acknowledging the USGA as the principal rule making body, the PGA as the administrative organization in charge of tournaments with an independent equipment advisory committee established to oversee the introduction of innovations. Both sides claimed victory—the USGA and PGA retained their positions as the authoritative rule-setters for golf and tournament play, the manufacturer and players were able to continue to use the Ping-Eye 2.

### III. THE RULES OF GOLF

The USGA and the R&A have collaborated to issue a joint statement of principles concerning advancements in technology. With a focus on what is perceived as golf's traditions, the rule-makers have indicated a continued preference for a single set of rules and the need for these rules to enhance the skill of the player rather than the quality of the equipment. With this in mind, the Rules of Golf state that “[t]he player's clubs must conform with this Rule and the provisions, specifications and interpreta-

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24. *Gilder*, 936 F.2d at 420. Regulation is the number of strokes that a golfer should take to reach the green on a hole. With two strokes allowed for putting, regulation on a par three is one, par four, two, and three on a par five.

25. *Id.* at 420–21.

26. *Id.* at 424. “The PGA asserts that it will be damaged due to its ability to promulgate rules which bind its members ...the failure of the district court fully to evaluate the ban of the U-groove under the rule of reason before granting an injunction will unduly damage the prestige and operation of the PGA. The harm to the PGA's prestige and operation may be substantial. Nonetheless, Karsten and the professional player plaintiffs have demonstrated severe financial and reputational injury; by contrast the PGA has demonstrated injury only to its reputation. On this record, we cannot say that the district court abused its discretion in determining that the balance of hardships tips sharply in favour of the Karsten and the professional player plaintiffs.” *Id.*

tions set forth in Appendix II.”<sup>27</sup> Appendix II then establishes, over the course of eleven pages, the rules regarding club design. Limitations are even placed on the spring-like effect of golf clubs. The Rules of Golf state:

The design, material and/or construction of, or any treatment to, the clubhead (which includes the club face) must not:

- (a) have the effect of a spring which exceeds the limit set forth in the Pendulum Test Protocol on file with the R&A; or
- (b) incorporates features or technology including, but not limited to, separate springs or spring features, that have the intent of, or the effect of, unduly influencing the clubhead’s spring effect; or
- (c) unduly influence the movement of the ball.<sup>28</sup>

The Pendulum Test Protocol sets out that a driving club is to be impacted several times by a small steel pendulum (see diagram 2).<sup>29</sup> The time between the impacts of the clubhead on the pendulum is then recorded, with this time directly related to the flexibility of the clubhead.<sup>30</sup> The time cannot exceed certain parameters.<sup>31</sup>

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27. R&A, RULES OF GOLF AND THE RULES OF AMATEUR STATUS 2008–2011 49, rule 4-1 (31st ed. 2008).

28. *Id.* at 159 app. II, cl. 4(c).

29. R&A RULES LTD. AND U.S. GOLF ASS’N, PROCEDURE FOR MEASURING THE FLEXIBILITY OF A DRIVING CLUB 2 cl. 3.1 (Revision 1.1 2004), available at <http://randa.org/system/files/Equipment/protocols/Pendulum%20Protocol.pdf>.

30. *Id.*

31. The time (known as the characteristic time) cannot be greater than 239 $\mu$ s with a tolerance of 18 $\mu$ s for each test. *Id.*



Diagram 2: Pendulum Test Protocol Mechanism

The length golf balls can travel is also restricted. Appendix III, clause 5 provides that the “[t]he initial velocity of the ball must not exceed the limit specified (test on file) when measured on apparatus approved by the [the regulator].”<sup>32</sup> These rules apply in Australia’s R&A, by virtue of the club’s rule-making entity (the R&A Rules Limited) delegating the role of administering the rules to Golf Australia.<sup>33</sup>

#### IV. CURRENT TECHNOLOGY DEBATES

There are several debates over recent technological advances. Section discusses three such debates. First, the debate over the spring like effect of club faces. Second, the debate over the relationship between clubface markings and the impact of the ball on the club face. The third debate addresses the degree to which the club should be able to twist upon impact.

As noted, the most recent debate over technological advances between manufacturers and the regulatory bodies concerns the so-called spring-like effect of club faces. The creation and fusion of new materials in the manufacturing process has reduced the distortion that occurs to a golf ball on impact. By reducing this (through the club-face giving

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32. R&A, RULES OF GOLF AND THE RULES OF AMATEUR STATUS 2008–2011 162 app. III, cl. 5(c)(i) (31st ed. 2008) (the initial velocity permitted for a ball leaving the clubhead is 76.2 meters per second. U.S. GOLF ASS’N AND R&A RULES LTD., INITIAL VELOCITY TEST PROCEDURE 1 (1999)).

33. The Constitution of Golf Australia provides that “[Golf Australia will] act as the delegate of R&A Rules Limited (R&A) as the governing body of Golf in Australia in the administration, interpretation and enforcement of the Rules of Golf. . . .” GOLF AUSTRALIAN LTD. CONST. cl. 2(c).

slightly and then rebounding), an overall increase in distance was able to be achieved. Until recently, there had been no adequate measure to test this effect, but with the introduction of the Pendulum Test Protocol, the USGA and the R&A now have the opportunity to measure this accurately. However, the introduction of these measures led to a sharp decline in the share price of golf club manufacturers, and “[a]s one investment analyst commented, ‘if a governing body tells a leading-edge technology company that they can’t improve technology, it puts them out of business.’”<sup>34</sup> This debate stands at the fore of golf, with the industry view provided by the President of Karsten: “If the USGA restricts innovation, it will artificially restrict competition. Golfers will no longer receive the best possible equipment and will incorrectly perceive that all golf drivers are the same and there is nothing new or improved. The lack of excitement from the game will decrease interest in golf. . . .”<sup>35</sup>

A second issue concerns the relationship between club face markings and the impact of the ball on the clubhead and the effects of this relationship on accuracy. Accuracy is inexorably connected to driving distance.<sup>36</sup> However, recent studies from regulators highlight that correlation between driving accuracy and success on the professional tours was no longer high, with further evidence illustrating the combination of current golf balls with a thin urethane cover had significantly increased the spin of the golf ball.<sup>37</sup> This led to the rules being tightened from January 1, 2008 (by limiting the width, depth, and spacing between grooves).<sup>38</sup> However, non-conforming clubs can be used by non-elite golfers until 2024, with the professional golfers to adopt the rule in 2010.<sup>39</sup>

One final contemporary topic concerns the degree to which the club should be able to twist upon impact (the so-called “moment of inertia;” see diagram 3—this machine is able to test how much a club twists upon

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34. Shlomi Feiner, *Regulation of Playing Equipment by Sports Associations the Antitrust Implications*, 10 U. MIAMI BUS. L. REV. 585, 592–93 (2002) (quoting S. Eubanks, *Market Economics; USGA Action Could Affect More Than Just Golf Companies*, GOLF WORLD, June 5, 1998).

35. *Id.* at 593–94 (quoting Submission of John Solheim, President of Karsten Manufacturing, Open forum on Spring-Like Effect Test Protocol, available at [http://www.usga.org/test\\_center/transcript/karsten.html](http://www.usga.org/test_center/transcript/karsten.html)).

36. FRANCIS OUIMET, GOLF FACTS FOR YOUNG PEOPLE 169 (The Century Co. 1921) (1914).

37. Letter from David Rickman, Director of Equipment and Rules Standards, Royal & Ancient, To all Golf Manufacturers, *Club Face Markings and Spin Generation* (Feb. 27, 2007), available at <http://randa.org/system/files/sites/randa.openside.co.uk/files/notices/SPIN%20GENERATION%20NOTICE1.doc>.

38. See R&A, RULES OF GOLF AND THE RULES OF AMATEUR STATUS 2008–2011 160–61 app. II, cl. 5(c)(i) (31st ed. 2008).

39. E. Michael Johnson, *Players Look to Get into the Groove*, AUSTL. GOLF DIGEST, Oct. 2009, at 58; see also GOLF AUSTRALIAN LTD. CONST. cl. 2(c), *supra* note 33.

impact). Regulators suggest that technology which limits the clubhead and shaft twisting will reduce the skill component of the game.<sup>40</sup> The rules now provide that the “moment of inertia component around the vertical axis through the clubhead’s center of gravity must not exceed 5900 g cm<sup>2</sup> (32.230 oz in<sup>2</sup>), plus a test tolerance of 100 g cm<sup>2</sup> (0.547 oz in<sup>2</sup>).”<sup>41</sup> As noted by the R&A, the purpose is to provide for protection “against unknown future developments . . . whilst allowing some technological evolution.”<sup>42</sup> The evolution of technology may be cut short by the mechanisms of antitrust regulation.



Diagram 3: Moment of Inertia Test Machine

## V. AUSTRALIAN ANTITRUST LAW

Australian antitrust law (known in Australia as competition law) derives from, though with substantially different wording than, the 1890 U.S. *Sherman Act*. Because of this, the aforementioned litigation from the United States will be of distinct precedential value when the matters are litigated in Australia. This Section examines the applicability of sections 45/4D and 46 of the *Trade Practices Act 1974* to the scenario de-

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40. Letter from David Rickman, Director of Equipment and Rules Standards, Royal & Ancient, To all Golf Manufacturers, *Clubhead Moment of Inertia* (Apr. 12, 2006) available at <http://randa.org/system/files/sites/randa.openside.co.uk/files/notices/MOI%20Decision%20Notice%20-%2012%20April%202006.doc>.

41. *Id.*

42. *Id.*

tailed above. Is Golf Australia, through its adoption of the Rules of Golf delegated by regulators, in breach of either of these provisions?

*A. The Application of Sections 45/4D of the Trade Practices Act  
1974*

Section 45(2) of the Trade Practices Act states:

A corporation shall not:

- (a) make a contract or arrangement, or arrive at an understanding, if:
  - i. the proposed contract, arrangement or understanding contains an exclusionary provision;<sup>43</sup> or
  - ii. a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition . . . .<sup>44</sup>

The last subsection of this legislation can quickly be dismissed. In Australia, golf will not be seen as a discrete market for the purposes of antitrust analysis.<sup>45</sup> For this reason, an argument that there is a substantial lessening of competition (section 45(2)(a)(ii)) by the imposition of technical restrictions for a particular sport is unsustainable.<sup>46</sup>

The per se exclusionary provision prohibition established by section 45(2)(a)(i) is somewhat equivalent to section 1 of the *Sherman Act 1890* (US)<sup>47</sup>—however, one important difference can be noted. As *Weight-*

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43. Trade Practices Act, 1974, § 4D (Austl.). The salient parts of that definition are as follows: “(a) [That the] contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and  
(b) the provision has the purpose of preventing, restricting or limiting;  
(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or  
(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions. . . .”

44. Trade Practices Act, 1974, § 45(2) (Austl.).

45. See *Australian Rugby Union Ltd. v. Hospitality Group Pty. Ltd.* 173 A.L.R. 702, 714–32 (2000), *aff’d*, *Hospitality Grp Pty. Ltd. v. Austl. Rugby Union Ltd.* (2001) 110 F.C.R. 157.

46. See the discussion surrounding sport as a separate market in *Hospitality Grp Pty. Ltd.* (2001) 110 F.C.R. 157, ¶¶ 28–31.

47. “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be pu-

*Rite* and *Gilder* highlight, the jurisdictional applicability of section 1 of the *Sherman Act 1890* cannot be argued. By contrast, it is suggested that this would not be the position in Australia. The critical difference between the Australian legislation and the U.S. is that in the former nation, section 45(3)<sup>48</sup> of Australia's *Trade Practices Act 1974* requires a competitive market or that the cartel parties be in competition with each other. Although this does not require all parties to be competitors, with golf regulators not retailing or manufacturing golf clubs, the underlying sense of collusion so critical to section 45 litigation is absent.<sup>49</sup> The definition of exclusionary provision in section 4D is even more explicit. This requires that the arrangement must be between people who are competitive with each other—thus mandating a horizontal component to the understanding.<sup>50</sup>

A further reason for the unavailability of section 45 is that sporting organizations will often be seen as single economic units, rather than distinct entities; if the two bodies are not viewed as separate, then collusion is not possible. U.S. authority supports this reasoning. For example, in *Seabury Mgmt. Inc. v. Professional Golfers' Association of America Inc.*, a trade show promoter (Seabury) brought an action against the PGA and a member section, the Middle Atlantic Section Professional Golfers' Association of America (MAPGA), alleging that a five year contract between Seabury and MAPGA gave Seabury the right to use MAPGA's name and logo to conduct and promote a golf trade show anywhere in the United States.<sup>51</sup> MAPGA claimed, on the other hand, that the contract limited any MAPGA-sponsored golf trade show to an area within the MAPGA's territorial boundaries.<sup>52</sup>

The case proceeded to trial with Seabury alleging, among other things, that both the PGA and MAPGA had colluded in violation of sec-

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nished. . . ." 15 U.S.C § 1 (1890).

48. "For the purposes of this section and section 45A, *competition*, in relation to a provision of a contract, arrangement or understanding or a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services." Trade Practices Act, 1974, § 45(3) (Austl.) (emphasis added).

49. See generally Trade Practices Comm'n v. Nicholas Enters. Pty. Ltd. (No 2) (1979) 40 F.L.R. 83; E. Express Pty. Ltd. v. Gen. Newspapers Pty. Ltd. (1991) 30 F.C.R. 385.

50. S. CORONES, COMPETITION LAW IN AUSTRALIA 255 (4th ed., Thomson Lawbook Co., 2007).

51. *Seabury Mgmt., Inc. v. Prof. Golf Ass'n of Am., Inc.*, 878 F. Supp. 771, 777 (1994), *aff'd in part* 52 F.3d 322 (1995).

52. *Id.* at 775.

tions 1 and 2 of the Sherman Act and of Maryland's antitrust laws.<sup>53</sup> Initially the jury returned a verdict for Seabury, finding that the PGA and MAPGA were not part of a single economic unit and that the PGA had conspired with MAPGA (and also with the Golf Manufacturers and Distributors Association) to illegally restrain trade.<sup>54</sup> However, this was overturned on appeal.<sup>55</sup> The Appellate Court concluded that the PGA and MAPGA were incapable of conspiring and that on this issue, judgment as a matter of law in their favor was appropriate.<sup>56</sup> The court said that "while the MAPGA is not a wholly-owned subsidiary of the PGA and these entities are separately incorporated, the evidence at trial established that . . . the PGA and its member sections function as a single economic unit with the PGA possessing ultimate control over the actions of individual sections."<sup>57</sup> The court found it "significant that the sections are governed by the PGA Constitution, by policies adopted either at PGA annual meetings or by the PGA Board of Directors, and by other pertinent policy documents, such as trademark licensing agreements."<sup>58</sup> In addition, "the sections' actions . . . must be approved by the PGA to ensure that they are in the best interests of the organisation as a whole."<sup>59</sup> For example, "when the MAPGA sought to enter into the Contract and its amendments with Seabury, the PGA had to approve these actions[.]" and in this instance the PGA did approve the contract.<sup>60</sup>

*B. The Application of Section 46 of the Trade Practices Act 1974*

Further grounds for a possible antitrust breach by Golf Australia (through its unquestioning adoption of the Rules of Golf) can be found in section 46:

A corporation that has a substantial degree of *power in a market* shall not *take advantage* of that power for the *purpose* of:

- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

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53. *Id.* at 777.

54. *Id.* at 775.

55. *Id.* at 788.

56. *Id.* at 776.

57. *Id.*

58. *Id.*

59. *Id.* at 778.

60. *Id.*

- (b) preventing the entry of a person in that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.<sup>61</sup>

The purpose of this section is clear: it protects economic aims and promotes the competitive process.<sup>62</sup> Does this mean that the regulatory control of golf equipment by Golf Australia depresses competitive outcomes and reduces consumer (golfer) welfare? Have the Rules operated to depress the capacity of existing firms to innovate and of new firms to enter the market?

Three elements must be met before section 46 can be successfully invoked: (1) a corporation must have market power, (2) the corporation must take advantage of that market power, and (3) the taking advantage must be for a proscribed purpose.<sup>63</sup> This Article will examine each of these requirements in turn.

### C. Market Power

It is suggested that Golf Australia has sufficient power in the market to establish the first required element of section 46. As the monopolist regulatory agency for Australia (whose authority is derived from the R&A), Golf Australia can act unilaterally by adopting rules free from the constraints of competition.<sup>64</sup> Market power can also be established by contracts, arrangements, or understandings that the corporation has with another party—such as the agreement between Golf Australia and the R&A.<sup>65</sup> The private ordering between Golf Australia and the R&A cre-

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61. Trade Practices Act, 1974, § 46(1) (Austl.) (emphasis added).

62. See *Queensl. Wire Indus. Pty. Ltd. v. Broken Hill Pty. Co.* (1989) 167 C.L.R. 177; *NT Power Generation Pty. Ltd. v. Power and Water Auth.* (2004) 210 A.L.R. 312; *Melway Publ'g Pty. Ltd. v. Robert Hicks Pty. Ltd.* (2001) 205 C.L.R. (“Section 46 aims to promote competition, not the private interests of particular persons or corporations.”).

63. Trade Practices Act § 46(1).

64. A possible alternative argument is that the R&A and the USGA have colluded in the establishment of equipment specifications and it is this collusion (to which Golf Australia is a party) that constitutes the market power. The definition of market power was considered in *Melway Publ'g.*, 205 C.L.R. 1 at ¶ 67 (“... [M]arket power means capacity to behave in a certain way (which might include setting prices, granting or refusing supply, arranging systems of distribution), persistently, free from the constraints of competition.”). Similarly, in *Queensl. Wire Indus.*, 167 C.L.R. at 200, Dawson J. suggested that market power “may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing, or refusing to deal.”

65. Trade Practices Act, 1974, § 46(3A). In determining market power, the court can also have regard to the number and size of the competitors of the corporation in the market. *Id.* at § 46(1AB).

ates significant barriers to entry<sup>66</sup> for any new regulatory agency—most notably establishing affiliation with the R&A or the USGA. It is doubtful that it would be “rational or possible for new entrants to enter the market.”<sup>67</sup> Because golf is not interchangeable with other sports, it is of no consequence that the governing bodies of other sports have market power independent of Golf Australia.<sup>68</sup>

#### *D. Taking Advantage*

Assuming that market power is established, the next query becomes whether that market power has been taken advantage of. In *Pacific Nat'l (ACT) Ltd. v. Queensland Rail*,<sup>69</sup> the Federal Court enunciated ten principles as a guide in constructing the phrase “take advantage” in section 46 of the *Trade Practices Act 1974*:

- (1) There must be a sufficiency of the connection, or a causal connection, between the market power and the conduct complained of;
- (2) If the impugned conduct has an objective business justification, this will go against the existence of a relevant connection between the market power and the conduct;
- (3) The words “take advantage” do not encompass conduct that has the purpose of protecting market power but no other connection;
- (4) In deciding whether a firm has taken advantage, one must ask how it would have behaved if it

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66. See generally *Dowling v. Dalgety Austl. Ltd.* (1992) 34 F.C.R. 109; *Queens. Wire Indus.*, 167 C.L.R. 177.

67. *E. Express Pty. Ltd. v. Gen. Newspapers Pty. Ltd.* (1992) 35 F.C.R. 43, 63.

68. In *Australian Rugby Union v. Hospitality Group Pty. Ltd.*, Gyles J. considered whether rugby union matches were substitutable for other sporting events in the context of a company providing corporate hospitality. (2000) A.L.R. 702, [60]. His honour comments: Are the differentiating characteristics of international rugby union hospitality packages such as to deny interchangeability of function with packages involving other sports or entertainment? I have little difficulty in concluding, as a matter of fact, that, generally speaking, there is no relevant interchangeability between different recognised sports. Each is distinct with a recognised identity precisely because it has its own special characteristics, appealing to its own audience of players and fans...The fact that some players and some fans may, on occasion, play or follow other sports is beside the point. *Id.*; see also the views of Shlomi Feiner, *Regulation of Playing Equipment by Sports Associations: The Antitrust Implications*, 10 U. MIAMI BUS. L. REV. 585, 607 (2002) (“With respect to the product market, it is asserted that sports leagues’ treatment by consumers and advertisers merits this narrower, submarket approach. The narrow relevant market definition is supported by the minimal available evidence, which suggests relatively inelastic cross-elasticity of demand between one sport and another or between sports and other entertainment products.”)

69. *Pacific Nat'l (ACT) Ltd. v. Queensland Rail* [2006] FCA 91.

- lacked power and whether it could have behaved in the same way in a competitive market;
- (5) It may be proper to conclude that a firm is taking advantage of market power where it does something that is materially facilitated by the existence of the power;
- (6) The conduct must have given the firm an advantage it would not have had in the absence of market power;
- (7) The test may be whether the conduct was necessarily an exercise of market power;
- (8) One of the difficulties in determining what constitutes taking advantage stems from the need to distinguish between monopolistic practices and vigorous competition;
- (9) The purpose of section 46 is the promotion of competition—it is concerned with the protection of competition, not competitors; and,
- (10) It is dangerous to proceed from a finding of proscribed purpose to a conclusion of the existence of a substantial degree of market power that can be taken advantage of—to do so will ordinarily be to invert the reasoning process.<sup>70</sup>

In other words, section 46 is not directed at size or competitive behaviour. Rather, it is the misuse of a corporation's market power that is prohibited. In addition, section 46(4)(a) provides that the reference to power in section 46(1) is a reference to market power—the power to be taken advantage of must be market power and not some other type of power.<sup>71</sup>

A corporation that satisfies the threshold test by reason of its market power is not permitted by section 46(1) *to take advantage of that power for the purpose* of any of the objectives set out in paragraphs (a), (b), and (c). The term “take advantage” in this context indicates: (1) that the cor-

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70. (2006) A.T.P.R. (Digest) ¶46-268.

71. See *Warman Int'l & Ors v. Envirotech Austl. Pty. Ltd. & Ors* (1986) A.T.P.R. ¶40714; *Top Performance Motors Pty. Ltd. v. Ira Berk (Qld) Pty. Ltd.* (1975) A.T.P.R. ¶40004; *J Ah Toy Pty. Ltd. v. Thiess Toyota Pty. Ltd.* (1980) A.T.P.R. ¶40-155; *Williams & Anor v. Papersave Pty. Ltd.* (1987) ATPR ¶40-781 (*affirmed on appeal* (1987) ATPR ¶40-818); *Queensl. Wire Indus. Pty. Ltd. v. Broken Hill Preparatory Co.* (1989) A.T.P.R. ¶40-925; *Rural Press Ltd. v. ACCC* (2003) A.T.P.R. ¶41-965; *Boral Besser Masonry Ltd. v. ACCC* (2003) A.T.P.R. ¶41-915; *Plume v. Fed. Airports Corp.*; *Habib v. Plume & Anor* (1997) A.T.P.R. ¶41-589.

poration is able, by reason of its market power, to engage more readily or effectively in conduct directed to one or other of the objectives in paragraphs (a), (b), and (c); (2) it is better able, by reason of its market power, to engage in that conduct; and (3) its market power gives it leverage which it is able to exploit and this power is deployed so as to ‘take advantage of’ the relative weakness of other participants or potential participants in the market.<sup>72</sup>

Whether this is so in a particular case is a matter to be determined from all the circumstances. In so doing, three critical points must be made:

- i. In determining whether there has been an objective<sup>73</sup> taking advantage of market power, the phrase is not meant to imply that there must be a hostile or malicious intent to the use of the market power. There is no ‘indefinite moral qualification’ to the phrase ‘taking advantage.’ Section 46 is not dealing with social policy;<sup>74</sup>
- ii. To answer the question of whether there has been a taking advantage, the counterfactual is explored—that is, would the regulatory authorities have acted in the same way in competitive conditions.<sup>75</sup> Conduct that may not normally be of concern, can “take on exclusionary connotations when practiced by a monopolist;” and<sup>76</sup>
- iii. The final critical point is that it is not permissible to establish a proscribed purpose and then to reverse engineer from this to find that there has been a taking advantage of market power. Taking advantage is a separate element that must be proven exclusively of any proscribed purpose. To do something other than

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72. Explanatory Memorandum to the Trade Practices Revision Bill 1986, at paras. 47–49.

73. CORONES, *supra* note 50, at 384.

74. (1989) 167 C.L.R.177, 194. As Deane J. noted in *Queensl. Wire Indus. Pty. Ltd. v. Broken Hill Pty. Ltd.* (1989) 167 C.L.R. 177

“Read in context, the words ‘take advantage of . . . power’ are simply inadequate to superimpose upon the economic notions and objectives which s46(1) reflects some indefinite moral or public purpose qualification requiring circumstances where the active or passive use of the relevant market power for one or other of the designated anti-competitive purposes is morally or socially undesirable.”

75. *Melway Publ’g Pty. Ltd. v. Robert Hicks Pty. Ltd.* (2001) 205 C.L.R. 1; 75 A.L.J.R. 600.

76. *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 US 451, 488 (1992).

this is to flaw the analysis.<sup>77</sup> It is not possible to conclude that because one has the proscribed purpose of eliminating a competitor, that he has taken advantage of market power. “Competitors almost always try to ‘injure’ each other . . . . This competition has never been a tort . . . and these injuries are the inevitable consequence of the competition section 46 is designed to foster.”<sup>78</sup>

With these principles in mind, would (or could)<sup>79</sup> Golf Australia have acted in a different way if the market conditions were competitive? Arguably, the answer is no. Golf is a global sport at both professional and amateur levels and with the control, financial influence, and contemporary dominance of the USGA and the R&A, Golf Australia would have to act the same way in a competitive market. The potential for Australia (despite its relative success on the world stage) to develop or go it alone in terms of equipment and rule regulation does not exist. With major American companies dominating world golf club manufacturers,<sup>80</sup> the presence of a second regulatory body competing with Golf Australia<sup>81</sup> would not alter the fact that sporting equipment regulations would still be mandated by overseas entities. A new entity (as with Golf Australia), simply would not have the political or financial strength to act differently from the manner dictated by the USGA and the R&A.

#### *E. Proscribed Purpose*

Assuming that market power and the taking advantage thereof were established, the third element is that Golf Australia must have acted for a proscribed purpose. Can we say that Golf Australia (a non-profit entity) has objectively<sup>82</sup> acted to eliminate, hinder or somehow prevent competition in a market? This requirement is arguably more easily met in the context of ‘for profit’ organizations. In *Monroe Topple & Associates v.*

77. *Boral Besser Masonry Ltd v ACCC* (2003) 195 A.L.R. 609; 77 A.L.J.R. 623.

78. *Queensl. Wire Indus.*, 167 C.L.R. at 191.

79. For discussion on whether the test under section 46 is one of “would” or “could” the firm have acted in a different way in a competitive market, see Daniel Clough, *Misuse of Market Power—“Would” or “Could” in a Competitive Market?*, 29 AUSTL. BUS. L. REV. 311 (2009); F. Zumbo, *The High Court’s Rural Press Decision: The End of Section 46 as a Deterrent Against Abuses of Market Power*, 12 T.P.L.J. 126 (2004).

80. For example, TaylorMade, Callaway, Ping, and Spalding.

81. For many years, men’s and women’s games were regulated by different bodies.

82. *Gen. Newspapers Pty. Ltd. v. Telstra Corp.* (1993) 45 F.C.R. 164.

*Institute of Chartered Accountants*<sup>83</sup> the non-profit nature of the Institute, rather than leading to a finding of an improper purpose, “tend[ed] to point against such a finding.”<sup>84</sup> Thus, it would be difficult to establish the “purpose” element. Golf Australia gains nothing by putting golf equipment manufacturers out of business; indeed, it is in the interests of the regulator to promote healthy, innovative competition amongst the manufacturers. This, in turn, leads to reduced prices for clubs and more players. In a different context, the Full Federal Court reached a similar conclusion in *Australasian Performing Rights Ass’n Ltd. (APRA) v. Ceridale Pty. Ltd.*<sup>85</sup> APRA refused to provide a license for a nightclub unless unpaid fees by Ceridale were paid. While its actions may have led to a nightclub closing, its purpose was not to put the company out of business, but simply to preserve the integrity of its license system.<sup>86</sup> By analogy, the role of Golf Australia in endorsing the rules of the USGA and the R&A is not to put golf equipment manufacturers out of business, but to preserve what it perceives to be the traditions of the game.

#### VI. AN OBJECTIVE BUSINESS JUSTIFICATION

Given the foregoing discussion, finding a breach of section 46 appears unlikely. While Golf Australia has market power, it could not be shown that it would have acted differently in a competitive market (hence no taking advantage of that power). Nor could it be demonstrated that it acted for a proscribed purpose. Also, there is an additional basis by which Golf Australia would be able to defeat any allegation that it had taken advantage of its market power. This relies on Golf Australia establishing an objective legitimate business justification as to why it has accepted and promulgated these technical rules as the basis for regulation of golf equipment in this country.<sup>87</sup> If this justification is accepted, the conclusion is that there has been no taking advantage of market power—

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83. (2002) 122 F.C.R. 110.

84. *Id.* at 66. The proscribed purpose can relate to any market and purpose may be inferred from conduct. Trade Practices Act, 1974, § 46(7) (Austl.).

85. (1990) 96 A.L.R. 432.

86. *Id.* at 437.

87. Of course, it is also relevant to note that golf equipment is increasingly purchased from internet sites, and with that in mind it might be argued that the geographic market for a consumer to purchase golf clubs includes both domestic retailers and international retailers. In *Austl. Meat Holdings Pty. Ltd. v. TPC* (1989) A.T.P.R. 40-932, 50-011, the geographic market was defined as follows: “Any geographic market . . . must be one that both corresponds to the commercial realities of the industry and represents an economically significant trade area. Because a geographic market determination looks to actual trade patterns, it is not required that geographical boundaries be drawn with exactitude . . . .”

the business was simply doing what would normally be done in a competitive market. This justification appeals to the reason why sporting administrators and regulators are needed—to establish and run fair competitions and to encourage participation in the sport by all, with results determined on skill and not on luck. It also seeks to connect the conduct of the market participants to the market power and “to ask whether [the regulator] had a rational or objective business justification for the conduct at issue.”<sup>88</sup> An examination of this nature arguably leads to a broader, more fluid and more dynamic inquiry.<sup>89</sup>

Accordingly, what are the justifications for such prescriptive and restrictive technical rules, and do they harm or hinder golfer welfare by dampening competition?<sup>90</sup> Sporting equipment regulators do not (and should not) have unlimited freedom to adopt any restriction perceived to be in the best interests of the game. The traditions of any sport should not be placed on a pedestal to preserve the values of bygone eras which results in excluding a contemporary audience from fully participating in its benefits. Such a tenet would exempt authorities such as Golf Australia, or its equivalents (the USGA and the R&A), from complying with the principles of competition law. The procedure adopted for consideration of new, innovative equipment must be both procedurally fair and substantively supportable. However, the manufacturers of golf equipment must also recognize the interdependence existing between themselves and the competition and rules’ organizers. The relationship is symbiotic, not parasitic. Where manufacturers may seek to destroy or injure their competitive rivals,<sup>91</sup> such a solution sought against a regulator may well be counterproductive to the manufacturer’s interests. In this sense, the balance of consumer welfare and consumer interests is promoted, not by quickly moving to conclude that rules and standards stifle innovation, but by careful consideration of the extent to which the rules unjustifiably or unreasonably hinder development. In blunt terms, restraints are necessary for the product to exist, with each sport holding dear to its own unique

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88. CORONES, *supra* note 50, at 390.

89. See generally B. Marshall, *The Relevance of a Legitimate Business Rationale Under Section 46 of the Trade Practices Act*, 8 DEAKIN L. REV. 49 (2003).

90. Authorities have not yet articulated who has the burden of proof if an objective business justification is raised as a basis for what occurred. Does the plaintiff have to deny this, or is there some form of evidentiary burden on the defendant? Corones suggests that “the objective business justification contemplates a shared burden of proof with the respondent having to justify its conduct as ‘normal’ or consistent with industry practice.” CORONES, *supra* note 50, at 392.

91. As noted in *Queensl. Wire Indus. Pty. Ltd. v. Broken Hill Pty. Ltd.*, “Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to ‘injure’ each other in this way.” 167 C.L.R. 177, 191 (1989).

characteristics and values.<sup>92</sup>

## VII. THE SUGGESTED MODEL FOR EXAMINATION OF TECHNICAL RESTRICTIONS IN GOLF (AND SPORTS GENERALLY)

With this background in mind, I suggest that the framework for examining the technical restrictions in Golf contains three core elements: (1) whether the actions of the sporting equipment regulator is consistent with the game's aims and values; (2) if the action taken was the minimum necessary and was done after a fully informed investigation of all possible options; and (3) the extent to which all stakeholders were given the opportunity to participate in the decision-making process and to have some ownership in the final outcome. These three elements derive from the American rule of reason analysis, but are modified to take account of the "non-commercial or non-economic motives that drive sports associations' regulations."<sup>93</sup> This framework is adapted from the U.S. District Court in *Gunter Harz Sports, Inc. v. U.S. Tennis Association*.<sup>94</sup>

### A. Are the Actions Consistent with the Game's Aims?

What are the aims and values of golf with which regulators must maintain consistency? The joint statement of principles provided by the USGA and the R&A provides some elucidation:

The purpose of the Rules is to protect golf's best traditions, *to prevent an over-reliance on technological advances rather than skill, and to ensure that skill is the dominant element of success throughout the game....* The R&A and the USGA believe, however, that any further significant increases in hitting distances at the highest level are undesirable. Whether these increases in distance emanate from advancing equipment technology, greater athleticism of players, improved player coaching, golf course conditioning or a combination of these and other factors, they will have the impact of seriously re-

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92. "This unique feature of organized sports militates against a rigid application of per se anti-trust principles. Although it does not suggest that the business of sports should enjoy complete immunity from antitrust scrutiny, the unusual nature of sports does support the idea that more thorough judicial inquiry will normally be required to determine whether a particular practice unreasonably restrains trade to the detriment of the consuming public." Lazaroff, *supra* note 6, at 151.

93. Feiner, *supra* note 34, at 609.

94. 511 F. Supp. 1103 (D. Neb. 1981), *aff'd*, 665 F.2d 222 (8th Cir. 1981).

ducing the challenge of the game. The consequential lengthening or toughening of courses would be costly or impossible and would have a negative effect on increasingly important environment and ecological issues. Pace of play would be slowed and playing costs would increase.<sup>95</sup>

Beyond this, there is no widely accepted written definition of the essential character of the game, though this is unlikely to cause difficulty for any court. For example, in *Gunter Harz Sports Inc.*, a manufacturer of double-strung tennis racquets brought an action against the USTA alleging that the tennis association had engaged in anti-competitive conduct by banning the use of such racquets.<sup>96</sup> The manufacturer argued that the absence of any widely accepted definition of the principles of the game meant the application of the standards was nothing more than arbitrary.<sup>97</sup> The court's response was blunt (and we suggest equally applicable to the game of golf): "The Court finds it immaterial that no written definition of the 'character of the game' exists, since the evidence clearly establishes that it is widely understood merely as referring to the way the game has traditionally been played over scores of years."<sup>98</sup> The Association was simply trying to preserve the legitimate goal of having tennis played in the same way that it has always been played.<sup>99</sup>

With golf being played on all populated continents and its professional and senior amateur ranks competing across borders, the need for uniformity and maintenance of a traditional view of what the game involves is critical. While there may be differences of opinion as to the role of innovation in a sport, and how sport may fundamentally alter with change, the Court will be reluctant to substitute its own judgment for that of the rulemaking authority. Challenging a decision of a rulemaking authority can only succeed if the decision-making power was exercised in a malicious or arbitrary fashion. For example, in *STP Corp. v. U.S. Auto*

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95. R&A & USGA, R&A/USGA JOINT STATEMENT OF PRINCIPLES—MAY 2002 (2002), available at <http://www.usga.org/equipment/overview/Joint-Statement-of-Principles/> (emphasis added).

96. 511 F.Supp at 1116 (adopting a four stage framework to determine the legitimacy of equipment regulations: (1) whether the collection action is intended to accomplish an end consistent with the policy justifying self-regulation; (2) whether that action is reasonably related to that goal; (3) whether such action is no more extensive than necessary; and (4) whether the association provides procedural safeguards which assure that the restraint is not arbitrary and which furnish a basis for judicial review).

97. *Id.* at 1119.

98. *Id.*

99. *Id.* at 1117.

*Club, Inc.* the court held that the defendant, United States Auto Club, Inc. (USAC), acted in a reasonable and prudent manner with due consideration in amending technical specifications which resulted in the plaintiff's turbine engine racer being excluded from automotive racing competition.<sup>100</sup> The court concluded that as a purely voluntary association, the USAC was free to fix qualifications for membership and to provide for termination of membership of those who did not meet its standards.<sup>101</sup> The USAC's constitution, by-laws, and rules of government set out the rights and duties of members. As such, the USAC could impose conditions on membership or deny membership as long as due process procedures were followed and suspensions or exclusions from membership were reasonable, done in good faith, and not discriminatory.<sup>102</sup> The court found that the USAC's actions were not arbitrary, capricious, malicious, wilful, nor intended to injure or damage the plaintiffs.<sup>103</sup>

Provided that the USGA and the R&A (and through their delegation, national bodies such as Golf Australia) take account of the evidence of the players, manufacturers, and other stakeholders (such as long serving and respected officials),<sup>104</sup> their decision to act in what they perceive to be the traditions of the game will be unassailable. Consumer welfare is not being harmed, but enhanced by the standards set. Such regulatory decisions will preserve the skill of the game by preventing technology from overcoming the human element. Any constraint on their actions could not only jeopardize the rulemaking authority's governance, but may ultimately threaten the sport itself. For these reasons, courts give sporting associations considerable latitude in passing regulations. It will, nevertheless, be important for the golf associations to establish their reasons ex-ante—the danger being, if this is not done, arguments presented may simply be seen as some form of ex-post rationalisation for what has occurred.

### *B. Was the Action Taken the Minimum Necessary?*

Two broad rule-setting approaches could be adopted: first, the implementation of broad performance benchmarks; and second, the establishment of specific standards. Golfing associations have chosen to follow the first approach. If the club or piece of equipment operates within

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100. 286 F.Supp 146, 151 (S.D. Ind. 1968).

101. *Id.*

102. *Id.*

103. *Id.*

104. See *Gilder v. PGA Tour*, 936 F.2d 417 (9th Cir. 1991); *Gunter Harz Sports Inc., v. U.S. Tennis Ass'n*, 511 F.Supp 1103 (D. Neb. 1981).

the limits set by those benchmarks, then the item can legitimately be used. In many respects, these types of parameters may well encourage competition as golf manufacturers alter shapes, move weight distribution, or provide customization for clubs to meet the personalised needs of an individual golfer.<sup>105</sup> The alternative approach is to set specification standards,<sup>106</sup> which are prescriptive by nature and may actually stifle design far more than benchmark limits.<sup>107</sup> For example, the rules of tennis provide that “No energy source that in any way changes or affects the playing characteristics of a racket may be built into or attached to a racket.”<sup>108</sup> This is far more likely to conflict with anti-competition provisions than the benchmarks standards associated with golf. It is quite conceivable that a manufacturer could design a tennis racquet that would have an energy source attached, but which did not affect, in any way, how tennis has traditionally been played.

### *C. Were All Stakeholders Given the Opportunity to Comment?*

The attitude of the USGA and the R&A is clearly delineated in their Statement of Principles. As innovation occurs, they will continue to consult with interested parties,<sup>109</sup> including use of their notice and comment procedures, involving the publication of proposed changes, and discussions with stakeholders. An example of this procedure working to the benefit of all parties is illustrated by the new rules for the adjustability in irons and woods that commenced January 1, 2008.<sup>110</sup> Manufacturer input indicated this technology would create new opportunities for golfers as well as innovators, without diminishing in any way the challenge of the game. Developers are also encouraged to submit clubs to regulators

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105. For example, a recent trend in golf has been to provide moveable weights within clubs with this allowing the player to hit a preferred draw/fade or high/low ball. Substitutable shafts and heads, are the most recent development. See, e.g., Rob Sauerhaft, *Drivers with Moveable Weights*, GOLF MAGAZINE, available at <http://www.golf.com/golf/equipment/article/0,28136,1566832,00.html>

106. See generally Sean P. Gates, *Standards, Innovations, and Antitrust: Integrating Innovation Concerns into the Analysis of Collaborative Standard Setting*, 47 EMERY L.J. 583 (1998).

107. *Id.* at 651.

108. INTERNATIONAL TENNIS FEDERATION, RULES OF TENNIS 20 app II, cl. (c) (2010).

109. R&A/USGA, *supra* note 97.

110. R&A, RULES OF GOLF AND THE RULES OF AMATEUR STATUS 2008–2011 151 app. II, cl. 1(b) (31st ed. 2008) (“All clubs may incorporate mechanisms for weight adjustment. Other forms of adjustability may also be permitted upon evaluation by the R&A. The following requirements apply to all permissible methods of adjustment: (i) the adjustment cannot be readily made; (ii) all adjustable parts are firmly fixed and there is no reasonable likelihood of them working loose during a round; and (iii) all configurations of adjustment conform with the *Rules*. During a stipulated round, the playing characteristics of a club must not be purposely changed by adjustment or by any other means.”).

prior to their release on the market. The importance of procedural fairness was recognized in *Gunter* where the court commented:

The [International Tennis Federation's (ITF)] notice and comment procedure concerning the proposed rule was sufficient to inform those potentially affected by the rule of the ITF's concern about rackets which imparted excessive topspin to the ball, as well as to allow interested parties to be heard regarding the proposed rule. In view of the [United States Tennis Association's (USTA)] relationship to the ITF and its decision to delegate its rule making authority to that body, the USTA assumed vicarious responsibility for any failure of the ITF to provide procedural safeguards, but, on the other hand, escapes liability under [the Antitrust] legislation when the ITF's procedures are found sufficient under the [legislation].<sup>111</sup>

#### VIII. CONCLUSION

Golf has always been surrounded by innovation. In the early days of golf in the 15<sup>th</sup> century balls were made of wood, in the 17<sup>th</sup> century they were feathery,<sup>112</sup> evolving to gutta percha<sup>113</sup> in 1850, and then to balls made of rubber before the modern three/four piece ball with a urethane cover was developed. Such development and progress of the golf ball has continued, hindered only by regulatory restrictions. Today we see the same development occurring with clubs as the understanding and knowledge of physics combined with the technical advances in production improve. The original hickory shafts spliced with the heads made from the beech tree have long been overtaken by persimmon and laminated woods (this largely in response to the harder balls that were being made). This has now been supplanted by the metal woods<sup>114</sup> of today, accompanied

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111. *Gunter Harz Sports Inc.*, 511 F.Supp at 1122.

112. Boiled feathers were compressed through a hole in the stitched leather. GolfEurope.com, A History of the Golf Ball, [http://www.golfeurope.com/almanac/history/golf\\_ball.htm](http://www.golfeurope.com/almanac/history/golf_ball.htm) (last visited Feb. 8, 2010).

113. Gutta-percha is the latex of South American and South Pacific Island Trees. It is soft at boiling temperature, but then becomes hard when cooled. *Id.*

114. It is appreciated that the phrase 'metal woods' to a non-golfer may seem an oxymoron. This phrase reflects the history of clubs being made out of wood, with the terms being modified only slightly when metal became the material of choice. GolfEurope.com, A History of the Golf Club, [http://www.golfeurope.com/almanac/history/golf\\_club3.htm](http://www.golfeurope.com/almanac/history/golf_club3.htm) (last visited Feb. 8, 2010).

by shafts of graphite, lightweight steel boron or titanium. As each development occurred, the R&A and the USGA (alongside their national affiliates) were required to make a critical judgement: has the game been so altered that it is no longer the same—are its traditions being trashed on the altar of modernism? Those traditions give golf its enduring quality—yet it retains the capacity to tease each one of us with the belief that the marriage between competence and desire will somehow be consummated. In that respect, golf is a lot like life.<sup>115</sup> The imprecision of the result, the vagaries of the bounce, the internal conflict that each golfer can only uniquely feel must be respected—and can only be respected if the authorities are permitted to rule in what they objectively perceive to be the best interests of the game. Nevertheless, it must also be acknowledged that the reflective struggle that comes with the loneliest game<sup>116</sup> is also enriched by innovation and the promises that tomorrow can bring. Deference must be balanced with consumer welfare. Rules restricting innovation in sporting equipment must be closely examined and cautionary consideration given to whether there has been a breach of the legislation. After all, the introduction of the long putter, the rubber golf ball, and the metal wood have all been challenged as an attack on the underlying traditions of the game—yet, with the science of hindsight this has not been proven to be the case. With golf handicaps largely unchanging,<sup>117</sup> improvements in technology<sup>118</sup> do not appear to be bringing immeasurable benefits to the average golfer. Despite this fact, golf regulators (and other sporting administrators) appear to be favoured by traditional competition law analysis. It is suggested that section 45 of the *Trade Practices Act* of 1974 does not apply to Golf Australia, nor would section 46 likely to be breached. The regulator has a legitimate business justification for what it is seeking to achieve and, absent any motive of malice (not that this is required by the legislation), the administrators appear reasonably immune. Furthermore, the safeguards provided through the procedural protection given to the manufacturers, the setting of performance benchmarks rather than prescriptive specifications, and the deference to the

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115. C. Brown, *Golf and the Law: More Than Errant Golf Balls*, 9 OTAGO L. REV. 373, 373 (1998). For an earlier article on this issue, see G.M. Kelly, *The Errant Golf Ball: A Legal Hazard*, NZLJ 301 (1968).

116. PETER DOBEREINER, *THE GLORIOUS WORLD OF GOLF* 19 (Ridge Press, 1973).

117. The average Australian male handicap in 2004 was 18, with this largely unchanged from earlier surveys. The average female handicap in 2004 was 29.1, which was 1.6 higher than the average in 2002. Ernst & Young, *supra* note 2, at 13.

118. If professional golfers and amateur golfers were seen to be in two different markets, different equipment rules should arguably be endorsed. The R&A and the USGA believe that a single set of rules, irrespective of ability is one of the games greatest strengths. R&A/USGA, *supra* note 97.

views of the game's regulators all support this conclusion.

Golf is the least precise game in the world. More often than not, golfers are at a loss to explain exactly why they start playing well or playing poorly. And, almost without fail, it is a lot easier to lose your rhythm and your confidence than it is to find them. When you are in the so-called zone, you know it isn't going to last; when you fall out of the zone and can't find a fairway, you worry that it may last forever.<sup>119</sup>

Golf must resist the advancements that could make it a game of chance—it is much more than that, and deserves to remain so. The difficulty is that no advancement has yet come close to that—and equipment manufacturers must wonder if the so-called traditions entrenched and preserved by the keepers of the faith are merely an illusion, a nebulous ideal on which past memories are far more appealing than present realities. However, for the present it appears as though the legislature and case law stands resolutely as a bulwark against designer challenge. With innovation continuing, the war of the future between manufacturer and regulator may only be matched by the internal battle faced by each golfer struggling to match ambition with ability.

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119. JOHN FEINSTEIN, *A GOOD WALK SPOILED* xv (1995).