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The NFL Concussion Settlement and Injury Compensation Funds

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The NFL Concussion Settlement and Injury Compensation Fund: Implications for the Custodians of Football in Australia

The US$765m NFL Concussion Settlement announced on Thursday, two years since the initial claim was filed against the National Football League in the United States, should motivate Australian football administrators to reassess their concussion and compensation policies and consider the implications for their codes at all playing levels. The NFL Concussion Settlement comes after two months of intense court-ordered mediation and, subject to receiving court approval, closes one chapter of the very long concussion saga. However, the NFL concussion litigation casts a critical shadow over the self-regulatory regime and the operation of football codes in this country.

The NFL concussion litigation has been well documented in the past — with allegations that the NFL failed to protect players, with ‘Big Tobacco’ analogies in US Congressional Hearings, and the filing of the first claim in July 2011 involving 75 retired NFL players, growing to over 4500 claimants in a relatively short time. The allegation against the NFL is that it owed, and failed to discharge, a duty of care to protect players from the hazards of head knocks and multiple concussions. Allegations of fraudulent concealment of information with inherent conflicts of interest made their way into many hundreds of pages of pleadings. The initial response from the NFL was to vehemently deny any link and allege a lack of scientific certainty. It argued that the Collective Bargaining Agreements governed players during their playing careers, subsuming all rights to compensation. Despite the denials, the final result reveals possible weaknesses in the NFL arguments and the growing scientific evidence about the harm caused by concussion injuries in sport.

The major part of the NFL Concussion Settlement is a US$675m Injury Compensation Fund to pay monetary awards to retired NFL players who showed symptoms of severe cognitive impairment, dementia, Alzheimer’s or Amyotrophic lateral sclerosis (ALS). In assessing the amount of compensation, factors such as age, NFL playing seasons, and other relevant medical conditions will be taken into account. Determinations are to be made by independent doctors working with settlement administrators appointed by the Court. The independence of doctors is an important element to the settlement and demonstrates the level of openness and transparency required to implement the compensatory regime.

The settlement is monumental, both in terms of quantum and significance, despite being wrapped in the usual ‘no admission of liability’ packaging and justified on a basis of corporate social responsibility and the desire to avoid protracted and expensive litigation. Because the settlement was mediated, rather than litigated, the allegations were not proven in court on the balance of probability. Therefore, the question of whether it was more probable than not that the NFL’s actions caused or contributed to the injuries of retired players remains moot. Nonetheless, it would be prudent for Australian football administrators to look carefully at their own policies on concussion management, prevention, research and education to ensure that they too are not subject to similar litigation.

Australian sporting bodies and commentators have argued that NFL-type legislation is unlikely to succeed here. The reasons include differences in the biomechanical aspects of the game (head and helmet use as weapons), differences in attitudes and compensation cultures, and possible civil liability barriers. But the media spotlight has turned on our sporting codes. A Four Corners program aired in May 2012, and subsequent reports of players from a number of football codes complaining of cognitive issues arising from their professional playing days means that football administrators need to address these issues by bringing together all those with an interest in concussion in sport, to recognise the growing community concern and to respond proactively to concussion issues. The management of player health and welfare, and a commitment to concussion education and research must be high priorities.
It is clear that the commencement of proceedings against the NFL in July 2011, involving over 4500 claimants in the final consolidated action, was the catalyst for the NFL Concussion Settlement. Australian football administrators need not wait for litigation but should act quickly to take the necessary steps to protect players from the risks posed by this serious and long-lasting harm.