# Influences of american antitrust principles on golf

## Are the Rules of Golf in violation of Antitrust Law?

**Abstract:**

Today, the two regulatory bodies for golf, the United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews (R&A) establish the technical specifications for golf equipment. Indeed all major sports would have some regulatory body undertaking the same activity. The purpose of this paper is to analyse 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 market place (ss45/4D of the Trade Practices Act 1974 (Aus) – with this provision somewhat equivalent to §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 §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 ground-breaking product can reach the hands of avid golfers. This article examines the United States litigation and applies it to the above-mentioned competition law principles. It has particular relevance to a United States audience given that American manufacturers dominate the retail market for golf 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 background for this critique, the analysis is equally relevant for any sport (if not all), which contain such limitations.

## Introduction

There is no doubting the importance of sport to 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. As one of the most prominent activities, golf occupies a specific niche in the Australian community. With approximately 1. 139ml (or 8% of the population) playing, the related employment of 20, 000 people, club revenues of $1. 1bn, 30ml rounds played annually, at least 20 male players on the United States Professional Tour and the number nine ranked female player in the world (Karrie Webb), Australia is rightfully positioned as the worlds number two golfing nation, behind only the United States of America.

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 doesn't respect the modern mantra of mental visualisation, a lingering question remains, to what extent do the technology 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, or the limitations on the distance that a ball can travel serve to protect the skill level of the game, or simply restrict competition amongst 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, (if not in society), and on a simplistic level restrictions prevent competition amongst companies who must create to sell their product to the consumer. 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 imperceptibly closer to the utopian ideal of swing perfection. But the question remains – how can a conventional competition law analysis allow sporting administrators the opportunity 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.

## United States Litigation

The genesis for present day litigation has been the United States of America. In a golfing context, two cases dramatically highlight the antitrust implications of the Rules of Golf:

## Weight-Rite Golf Corp v United States Golf Association and Gilder v PGA Tour Inc.

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. 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".

However, 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.

Weight Rite was unsuccessful. The USGA had not violated any procedural fairness requirements 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.

## 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′. This club was developed following an amendment in 1984 whereby the United States Golf Association had permitted the manufacture of clubs containing grooves that were in the shape of a U (as opposed to a V) – this rule change coming about because of technical improvements in the way clubs were manufactured, rather than manufacturers seeking to gain an innovative advancement to their clubs. 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.

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. The USGA conducted further tests and whilst 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) and this had the effect of banning the ‘ Ping-Eye 2′ – with this rule applying to all USGA tournaments from 1990.

Gilder and seven other professionals, funded by the manufacturer of the ‘ Ping-Eye 2′ (Karsten Manufacturing Corporation), began proceedings against the PGA (the administrative body for professional golf tournaments in the United States of America) for adopting the rule that led to the banning of the

club. They alleged that the actions of the PGA and its directors violated §1 and §2 of the Sherman Act and Arizona antitrust laws.

To support its case, Karsten presented, in 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.’ This included a quantitative study 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 greater number of players getting their balls to the green in less than regulation.

The evidence of the professionals was as expected – that changing clubs would adversely hurt their game, with this impacting on prize money won and endorsement income. By contrast, the PGA considered that success for Karsten would irreparably damage its 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 favour 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. An injunction was granted preventing the ban of the club going ahead and 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 organisation 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 able to continue to use the ‘ Ping-Eye 2.’

With this background in mind, this paper 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 market place 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), be followed if Australian litigation was to occur? Specifically, within the Australian context, does ss45/4D (broadly similar to §1 of the Sherman Act 1890 (US)) and s46 of the Trade Practices Act 1974 (equivalent to §2 of the Sherman Act 1890 (US)) prevent Golf Australia (the national administrator of Golf in Australia) from endorsing the technology restrictions imposed by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews?

## 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 indicate 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:

**“ 4-1(a):**

The player’s clubs must conform with this Rule and the provisions, specifications and interpretations set forth in Appendix II.”

Appendix II then establishes, over the course of eleven pages, the rules regarding the design of clubs, with, for example, clause 4(c) being of contemporary concern because of its effect in limiting the spring-like effect of golf clubs.

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

have the effect of a spring which exceeds the limit set forth in the Pendulum Test Protocol on file with the R&A; or 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 unduly influence the movement of the ball.”

The Pendulum Test Protocol then sets out that a driving club is to be impacted several times by a small steel pendulum (see diagram 2). The time between the impact of the clubhead on the pendulum is then recorded, with this time directed related to the flexibility of the clubhead. The time cannot exceed certain parameters.

**Pendulum Test Protocol Mechanism**

The length golf balls can travel is also restricted. Appendix III, clause 5 provides that the “ The initial velocity of the ball must not exceed the limit specified (test on file) when measured on apparatus approved by the [the regulator].”

These rules apply in Australia with the Royal and Ancient Golf Club of St. Andrews, through its rules making entity (the R&A Rules Limited) delegating to Golf Australia the role of administering the Rules of Golf within Australia.

## Current Technology Debates

As noted the most recent debate 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 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.' This debate stands at the fore of golf, with the industry view provided by the President of Karsten Manufacturing:

" 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..."

A second issue concerns the relationship between club face markings and the impact of the ball on the clubhead. As every golfer knows, inexorably connected to driving distance is accuracy. However, recent studies from the regulators highlighted 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. This led to the Rules being tightened from January 1, 2008 (with this limiting the width, depth and spacing between grooves). However, non-conforming clubs can be used by non-elite golfers until 2024, with the professional golfers to adopt the rule from 2010.

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 able to test how much a club twists upon impact)), the regulators suggesting that technology which limits the clubhead and shaft twisting will reduce the skill component of the game. The rules now provide that when the “…moment of inertia component around the vertical axis through the clubhead’s centre of gravity must not exceed 5900 g $cm^2$ (32. 230 oz $in^2$), plus a test tolerance of 100 g $cm^2$ (0. 547 oz $in^2$).” As noted by the R&A the purpose is to provide for protection “ against unknown future developments…whilst allowing some technological evolution.”

## Moment of Inertia Test Machine

## Australian Antitrust Law

Australian antitrust (or, as it is known, competition law) derives from, though with substantially different wording than, the 1890 United States Sherman

Act. Because of this, the previously mentioned litigation from the United States will be of distinct precedential value when the matters are litigated in Australia. In this section an examination is given of the applicability of ss45/4D and s46 of the Trade Practices Act 1974 to the scenario detailed above. Is Golf Australia, through its adoption of the Rules of Golf on a delegation from the regulators in breach of either of these provisions.?

The application of ss45/4D of the Trade Practices Act 1974

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

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; 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..

The latter part of this legislation can quickly be dismissed. In Australia, golf will not be seen as a discrete market of the purposes of antitrust analysis. For this reason an argument that there is a substantial lessening of competition (s45(2)(a)(ii)) by the imposition of technical restrictions for a particular sport is unsustainable.

The per se exclusionary provision prohibition established by section 45(2)(a)(i) is somewhat equivalent to §1 of the Sherman Act 1890 (US) – however, one important difference can be noted. As Weight-Rite and Gilder highlight, the jurisdictional applicability of §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 United States section is that in the former nation, s45(3) of the Trade Practices Act 1974 requires a competitive market or that the cartel parties be in competition with each other. Whilst 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 s45 litigation is absent. The definition of exclusionary provision in s4D 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.

A further reason for the unavailability of s45 is that sporting organisations will often be seen as single economic units, rather than distinct entities. The importance of this if the two bodies are not viewed as separate, collusion is not possible. United States authority supports this reasoning. For example, in Seabury Management Inc v Professional Golfers' Association of America Inc., a trade show promoter (Seabury), brought an action against the Professional Golfers' Association (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. 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.

The case proceeded to trial with Seabury alleging, among other things, that both the PGA and MAPGA had colluded in violation of §§1 and 2 of the

Sherman Act and of Maryland's antitrust laws. 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. However, this was overturned on appeal. 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 favour was appropriate. 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. 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. 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. 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.

## The Application of s46 of the Trade Practices Act 1974

Another basis for possible antitrust breach by Golf Australia (through its unquestioning adoption of the Rules of Golf) is s 46:

"(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;

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."

The purpose of this section is clear. It is about protecting economic aims, promoting the competitive process and through that the consumer. Therefore does the regulatory control of golf equipment by Golf Australia depress competitive outcomes and reduce consumer (golfer) welfare? Have the Rules operated to depress the capacity of existing firms to innovate, and new firms to enter the market?

Three elements must be met before s46 can be successfully invoked.

i) Market power by a corporation;

ii) The corporation must take advantage of that market power;

iii) And, the taking advantage must be for a proscribed purpose.

## Market Power

It is suggested that Golf Australia has market power. As the monopolist regulatory agency for Australia (its authority derived from one of the two Leviathans of world golf (the R&A in this instance), Golf Australia can act by adopting rules free from the constraints of competition. Market power can also be established by contracts, arrangements or understandings that the corporation has with another party – in the case the agreement between Golf Australia and the R&A. This is supported by the significant barriers to entry

that any new regulatory agency would have to establish – most notably affiliation with the Royal and Ancient Golf Club of St. Andrews or the United States Golf Association. One suspects that it simply would not be " rational or possible for new entrants to enter the market," – golf also not interchangeable with other sports.

## Has there been a Taking Advantage

Assuming that market power has been established, the next query becomes whether there has been a taking advantage of that market power. In Pacific National (ACT) Limited v Queensland Rail, the Federal Court enunciated 10 principles as a guide to the construction of the phrase " take advantage" in s46 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.
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 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 s46 is the promotion of competition — it is concerned with the protection of competition, not competitors.

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.

In other words s 46 is not directed at size or at competitive behaviour, as such. What is prohibited, rather, is the misuse by a corporation of its market power. In addition, s46(4)(a) provides that the reference to power in s 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.

A corporation which satisfies the threshold test by reason of its market power is not permitted by s. 46(1) to take advantage of that power for the purpose of one or other of the objectives set out in paras. (a), (b) and (c).

The term take advantage in this context indicates:

that the corporation 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);

it is better able, by reason of its market power, to engage in that conduct; 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.

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

i) In determining whether there has been an objective 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 to be no ‘ indefinite moral qualification’ to the phrase ‘ taking advantage’. Section 46 is not dealing with social policy.

ii) To answer the question 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. Conduct that may not normally be of concern, can “ take on exclusionary connotations when practiced by a monopolist.”

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 this is to flaw the analysis. It is not possible to conclude that because one has the proscribed purpose of eliminating a competitor, that they have 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 s46 is designed to foster.”

With these principles in mind, would (or could) 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 level 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 our relative success on the world stage, to develop or go it alone in terms of equipment and rule regulation would not exist. With major American companies dominating world golf club manufacture, the presence of a second regulatory body, competing with Golf Australia would not alter the fact that sporting equipment regulation 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 than that dictated by the USGA and the R&A.

## For a Proscribed Purpose

Assuming that market power and the taking advantage of this was established, the third element is that Golf Australia would have had to have acted for a proscribed purpose. Can it be said that Golf Australia (a non-profit entity) has objectively acted to eliminate, hinder or somehow prevent competition in a market. This requirement is arguably more easily met in the context of ‘ for profit’ organisations. In Monroe Topple & Associates v Institute of Chartered Accountants the non-profit nature of the Institute did not necessarily lead to a finding of an improper purpose, but “[did] tend to

point against such a finding." It is suggested that it would be difficult to establish the purpose element. Golf Australia gains nothing by putting golf equipment manufacturers out of business – indeed it would seem to be in the interests of the regulator to promote healthy innovative competition amongst the manufacturers, with this leading to reduced prices for clubs and growth in the number of players. In a different context, a similar conclusion was reached by the Full Federal Court in Australasian Performing Rights Association Ltd (APRA) v Ceridale Pty Ltd. APRA refused to provide a licence 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 licence system. By analogy, the role of Golf Australia in endorsing the rules of the USGA and the R&A is not about putting golf equipment manufacturers out of business, but about preserving what it perceived to be the traditions of the game.

## An Objective Business Justification

Given what has been previously outlined, a breach of s46 appears unlikely. Whilst Golf Australia would have 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. However, it is suggested that there is an even stronger 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. If this justification is accepted, then the

conclusion is that there has been no taking advantage of market power – the business was simply doing what would normally be done in a competitive market. In essence, it is the flipside of the counterfactual test, but in this context appeals to the reason why sporting administrators and regulators are needed – that is to establish and run fair competitive competitions and to encourage participation in the sport by all, with results determined on skill and not on luck. It seeks to connect the conduct of the market participants to