Fair play: NFL class action alleges discrimination in hiring processes

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A class action lawsuit filed in the US District Court for the Southern District of New York by former Miami Dolphins head coach Brian Flores against the sport's governing body, the National Football League (NFL), and initially, three teams participating in the national competition, the Miami Dolphins, the New York Giants and the Denver Broncos, brought into sharp focus questions of institutionalised discrimination in the sport's hiring practices.[1]

In the process, the lawsuit captured the attention of the national media and precipitated an impromptu and, at times, uncomfortable conversation about the implications of alleged racist attitudes and practices. Moreover, this all took place in the fortnight leading up to Super Bowl LVI, a period where the US sports media is typically preoccupied with dissecting the match-up, the participating teams and the play calling strategies, as opposed to forensically examining the legitimacy of the NFL's diversity initiatives (initiatives that the lawsuit pleads are "*not working*").[2]

Closer to home, the Australian sporting landscape has been characterised by several high-profile claims which allege that relevant governing bodies, their constituent clubs, administrators and staff are not adequately dealing with issues that stem from understanding and appropriately engaging with participants from culturally and racially diverse backgrounds.[3] This invites the broader question: how soon will it be before we see a claim, against a governing body, on behalf of professional coaches in Australia?

Background

On 1 February 2022, the first day of Black History Month in the United States, former Miami Dolphins head coach Brian Flores filed a landmark class action lawsuit against the NFL and the Dolphins, the Giants and the Broncos, with a proposed defendant class that included the remaining 29 teams, the extent of whose involvement will depend on the emergence of further evidence in the discovery phase.

Subsequently, on 7 April 2022, Flores' complaint was amended to add long-time coaches Steve Wilks and Ray Horton to the plaintiff class while adding Arizona Cardinals (who terminated Wilks after one season in 2018), the Tennessee Titans (where Horton unsuccessfully interviewed for a head coaching vacancy in 2016 in a process the lawsuit now alleges was a "sham"), and the Houston Texans (that Flores alleges removed him from consideration for its head coaching vacancy in retaliation to his filing of the original complaint) as named defendants.

The lawsuit and the allegations contained within it are complex and wide-ranging, incorporating allegations from unlawful discrimination, condonation and concealment of racist attitudes and attempted match-fixing. At the heart of the lawsuit are allegations made by Flores, an African-American, of systematic racism in his treatment (and the treatment of a proposed class of Black coaches, coordinators, general managers and Black candidates for those positions) by NFL head office and the teams mentioned.

The complaint

Flores' lawsuit continues an important, and invariably contested, dialogue around the impact of conscious or unconscious racial bias on hiring practices in sport and the need for diversity in leadership positions at the top of sporting organisations and more broadly, in the corporate environment.

The preliminary statement to the original complaint highlighted that, although 70% of players in the NFL are Black, at the time of filing only one of the NFL's 32 teams employed a Black head coach. In the period since filing, this number increased with the Houston Texans appointing Lovie Smith to their head coaching vacancy 6 days after the complaint was filed (before they fired and replaced him with another Black head coach, DeMeco Ryans, following the 2022 season), the Tampa Bay Buccaneers appointing Todd Bowles in late-March 2022, and the Carolina Panthers appointing Steve Wilks, one of the plaintiffs, on an interim basis after terminating head coach Matt Rhule in early October (although Wilks was ultimately unsuccessful in his quest for a permanent appointment at the end of the season despite promising on-field results and his popularity with the Panthers' locker room). In any event, these

numbers are still remarkably low when you consider that the NFL implemented the Rooney Rule in 2003, which in its current iteration requires NFL teams to interview at last two minority candidates for a vacant head coach position, one external minority candidate for a coordinator role and one minority and/or female candidate for senior level positions (such as general manager).

The complaint alleges that the defendant class has violated an assortment of legislative provisions that prohibit discrimination on the grounds of race and/or colour.

It is alleged that the violations arise out of conduct by the defendant class toward Flores and the proposed class of Black coaches, coordinators and front office staff (and candidates for these positions) to which he belongs, with conduct including:

- discriminatorily denying the proposed class jobs as head coaches, offensive and defensive coordinators, quarterback coaches and general managers;
- discriminatorily subjecting members of the proposed class to "sham" and illegitimate interviews;
- subjecting members of the proposed class to discriminatory retention practices and/or termination decisions;
- subjecting the proposed class to disparate terms and conditions of employment, including lack of opportunity and harm to professional reputation; and
- subjecting black coaches to unequal compensation relative to their white peers.

The amended complaint also alleges that the Texans and Dolphins unlawfully retaliated against Flores in breach of civil rights legislation due to making the original complaint, and that the Dolphins breached Florida whistleblower protection law because it fired Flores for refusing to deliberately lose games while head coach.[4]

The amended complaint seeks a range of compensatory and injunctive relief, such as:

- the appointment of an independent monitor with oversight and authority to ensure compliance with the mechanisms proposed by the lawsuit;
- increased transparency in hiring and termination decisions, including the requirement for NFL teams to consider and apply objective criteria and to provide written reasons for recruitment and termination decisions;
- the funding of a committee to source black investment to take majority ownership in teams;
- incentivising the hiring and retention of black candidates through monetary, compensation and/or further draft picks;
- uniform contracts in terms of language and non-monetary term uniformity; and
- a ban on forced arbitration for claims of discrimination or retaliation brought against the NFL or its teams by coaches or executives and a ban on provisions that would require a coach or executive to waive claims of discrimination or retaliation in order to receive his or her severance.

This final dot point was a recent addition to the prayer for relief added in response to Flores' allegations that the Dolphins have sought to claw back compensation paid to him on the basis the lawsuit is a breach of his ongoing contractual obligations to the team. It is also responsive to an issue that has stalled the progress of the lawsuit more broadly, being the NFL's insistence that the matter should be arbitrated by the Commissioner Roger Goodell (or his designee) in accordance with the terms of Flores' previous employment contracts, and not determined by a court.

Understandably, Flores is vehemently opposed to the NFL's position that the claim should be forced to arbitration where the NFL itself will then determine the matter on its merits given the obvious conflict of interest.

At the time of writing, this stalemate remains unresolved.

The Australian context

The operative legislative provisions that apply to the Flores complaint are substantively similar to the prohibitions on racial discrimination that exist in Australia, including those contained in the Commonwealth Racial Discrimination Act 1975. It is noteworthy that the remedies sought in the Flores complaint would likely qualify as "special measures" (also commonly referred to as "affirmative action") under Australian legislation. Special measures are generally authorised by Australian anti-discrimination legislation where they are designed to mitigate entrenched discrimination and promote equal opportunities for a disadvantaged or underrepresented subgroup. Put differently, it is possible that several of the remedies sought by Flores' complaint could be adapted by Australian organisations to promote the involvement of underrepresented cohorts like First Nations Australians and women amongst their own coaching ranks and front office staff.

This raises the question of whether similar litigation against some of Australia's most popular sporting competitions is foreseeable in this jurisdiction. In recent years, we have seen complaints of unlawful discrimination in the Australian sporting context, such as Israel Folau's claim against Rugby Australia and NSW Rugby alleging that the termination of his contract (in response

to homophobic comments posted to social media) was unlawful because the comments represented his genuinely-held religious beliefs (although this matter was ultimately settled prior to hearing).[5] Moreover, it is foreseeable that we could see one or more claims of unlawful discrimination emerge out of recent reports alleging racist behaviour by former members of the coaching staff at the Hawthorn Football Club. However, when it comes to a class action against a governing body and other respondents alleging institutionalised discrimination in its hiring practices, for now, the short answer appears to be that this is still some time away — and indeed, far from an inevitability.

First, class actions are typically more appropriate to product liability, consumer protection and investors/shareholder claims, which tend to involve a common substratum of facts and a similar or identical basis for members of the class to claim relief (for example, a group of consumers who fall ill after consuming chocolate bars from one manufacturer's contaminated batch). In this jurisdiction, class actions are generally unsuited to cases that may require a more careful examination of the varied hiring practices of multiple employers of the type alleged by the Flores lawsuit. Indeed, this may well be a limitation on Flores' own prospects of success moving forward.

Second, as there are many First Nations Australians who compete at the elite level of domestic competitions, and with the focus on expanding professional women's competitions, there will be an increase of diversity in former players looking to forge a post-playing career in coaching and sports administration. In this respect, our major codes would do well to be ahead of the curve by actively considering the issues raised in Flores' claim.

In due course, this could include quotas to increase diversity on staff, draft concessions (the NFL currently awards teams who lose a minority coach or executive to another club compensatory picks at the end of the third round of the draft), scholarships, defined pathways and, in the case of the AFL at least, an exemption from the cap on football department spending when it comes to the appointment of minority hires.

As the NFL can attest, the cost of inaction, real or perceived, can be significant. Australia's governing bodies and associated teams can benefit from reviewing existing policies to prevent a systemic issue such as the claim by Flores.

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Footnotes

1. *Flores v The National Football League et al, No. 1:2022cv00871 — Document 1 (S.D.N.Y. 2022).*
2. Ibid, [13].
3. See, for example, recent allegations of institutionalised racism levelled against the Hawthorn Football Club which are now the subject of an AFL investigation. The allegations have been strongly denied by the coaches implicated in the alleged conduct.
4. *Flores v The National Football League et al, No. 1:2022cv00871 — Document 22 (S.D.N.Y. 2022),* [16]–[17], [27], [427]–[434].
5. *Folau v Rugby Australia Ltd and Waratahs Rugby Pty Ltd* (MLG2486/2019).