THE WITHERING OF INDIVIDUALISM: PROFESSIONAL TEAM SPORTS AND EMPLOYMENT LAW[1]

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I. INTRODUCTION

There was a time when sport and the law barely interacted at all.[2] Aside from happenings such as occasional prosecutions for violent or unruly behaviour among players or spectators,[3] claims for damages for personal injuries[4] and even disputes pertaining to the affairs of the small number of

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2 The time we have principally in mind is the Victorian age in England - a period in which much of modern sport has its foundations. For a broader consideration of the historical relationship between sport and law see GM Kelly "The Sport Revolution and the Legitimation of Sports Law" (1991) 1(1) *ANZSLA Newsletter* 6.

3 For example *R v Moore* (1898) 14 TLR 229 (a soccer player who committed a foul charge on an opponent causing his death was convicted of manslaughter), *R v Billingham, Savage and Skinner* (1825) 2 Car & P 234, 172 ER 106 (spectators at a prize-fight were convicted of rioting when a magistrate tried to prevent the fight taking place).

4 For example *Cleghorn v Oldham* (1927) 43 TLR 465 (a caddy struck by careless swing of golf club), *Gibbs v Barking Corporation* [1936] 1 All ER 115 (negligent failure by instructor to provide assistance

professional athletes,[5] sport seemed reassuringly divorced from the worldly and somewhat grubby realm of commercial and legal dealings.[6] Indeed, in those idyllic days of amateurism recourse by athletes to legal remedies was rarely countenanced. When recourse was taken, such moves were regarded as ungentlemanly and outside the bounds of acceptable conduct. Legal intervention could only sully the purity of sport. Sport was the antithesis of work whereas law was, and still is, inextricably part of the structure of employment and industry.

A microcosm of this divergence of sport and law was found in the ethos of team sports on the one hand and, on the other, the growth of interest in legal circles about promoting free economic competition.

The sports ethos originating in the Victorian era is well-known for ideas of fair play, 'sportsmanship', acceptance of the decisions of umpires, graciousness in defeat, humility in victory and playing the game for its own sake - not for reward. Not as well recognised is the operation of certain strands of this ethos in team sports. Here there is a strong element of subordination of the individual's interests to the collective interests of the team and, sometimes, the sport. This is found in notions that non-selection for the team must be unquestioningly accepted, 'unselfish' play is praiseworthy and a club is entitled indefinitely to unswerving loyalty and service from its players. (The latter notion has provided much of the early philosophical basis for rules allocating players to clubs and controlling their movement between clubs.) Also, not to be overlooked are the notoriously vague disciplinary rules to the effect that players not act 'contrary to the interests of the game or bring it into disrepute'.

Against the background of subordination of individual autonomy and interests in team sports, the law of contract was evolving important and vigorous principles about freedom of contract and the right of the individual to be free from unreasonable restraints on trade. Of course, as long as the law and the world of sport pursued their separate paths, the ethos of subordination and the principle of economic freedom did not collide.

The catalysts for changing this curious stand-off were related to developments in professionalism among athletes and the commercialisation of sport in Australia over the past thirty or so years. Hitherto amateur athletes became professional, or at least semi-professional, and at the same time valuable 'assets' for their teams. Television and advertising revenues permitted, or were required to finance (depending on one's view), payments to the newly professional athletes who were sought by administrators seeking to build

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to a student vaulting over a horse in gymnastics class), *Watson v South Australian Trotting Club Inc* [1938] SASR 94 (the occupier of trotting track was not liable to rider injured in an unusual fall occurring when running railing became dislodged).

5 For example *McLaughlin v Darcy* (1918) 18 SR (NSW) 585.

6 Other instances of interaction between law and sport can be readily identified, eg disputes over sport-related gambling debts and challenges to disciplinary action. See further Kelly note 2 *supra* and H Opie "'See You in Court!' Recent Developments in Marketing, Selection and Disciplinary Disputes" (1990) 7(1) *Sporting Traditions* 75.

successful teams. With substantial financial interests as well as the ambitions of athletes and clubs at stake, the law of contract and related doctrines at last had a basis on which to take a role. After a lag (the reasons for which will be discussed below), a collision ensued. The law was used as a tool to promote the individual interests of players against the collective interests of teams and governing sports associations. It was fundamental in freeing professional athletes and, quite significantly, their clubs from many restrictive employment practices. The beginning of this new era in Anglo-Australian law was the 1963 decision in *Eastham v Newcastle United Football Club Ltd.*[7] We maintain that until very recent times this new individualism had been gaining ascendancy but the law has now begun to give greater weight to the collective interests of team sports.[8] At the same time collective labour relations law is emerging within team sports in Australia. As we will demonstrate, both of these developments are leading to a 'withering' of individualism. Caution restrains us from pronouncing it dead.

Before we examine these developments in greater detail, it is important to reflect upon the process of legal change and note that the law in its interaction with sport has lagged behind its interaction with other commercial aspects of our society. This is apart from the reluctance of the participants themselves to utilise the legal process. One cause of the initial non-interventionist approach of the law in team sports is what we denote as the 'sports mystique'. While in reality professional team sports had become significant commercial enterprises through the 1960s (if not earlier), this reality was not reflected in the social consciousness. Thus, judges and lawyers were reluctant to perceive sport and athletes in commercial terms like working in a factory, building a house, farming wheat, staging a ballet or being a professional entertainer. The other feature of the process of legal change which needs to be emphasised is that when lawyers have viewed an aspect of social intercourse as being essentially private or domestic in nature, there is a tendency to move only very cautiously into that field.[9] In this sense there are distinct similarities between the way in which the law has moved at a snail's pace to govern defacto relationships[10] and to govern sporting relationships. We may call this feature the 'natural caution of the law'.

These two features are particularly striking when we examine specific issues which have arisen in sports law. For instance, lawyers have been loathe to categorise athletes as employees, seeing them instead as amateurs or independent contractors. Sport is not 'work'. Also, comradeship on the field

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7 [1964] 1 Ch 413.

8 See *Buckenara v Hawthorn Football Club Ltd* [1988] VR 39 and *Hawthorn Football Club Ltd v Harding* [1988] VR 49. For reasons which we will explain below, we do not regard the recent decision of the Full Court of the Federal Court of Australia in *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242 (special leave to appeal to the High Court of Australia refused 24 October 1991) as being inconsistent with our overall thesis.

9 For example *Cameron v Hogan* (1934) 51 CLR 358.

10 See *Baumgartner v Baumgartner* [1985] 2 NSWLR 406 at 412-5 per Kirby P.

has not been translated into a collective antipathy by the players towards their employers. This, together with the sports mystique and the natural caution of the law, have kept sport outside the mainstream of the institutional industrial relations system. For instance, in 1956, the Federal Industrial Registrar decided that a predecessor to the Australian Football League Players' Association was ineligible to register as a federal union. His reasons for the decision included a finding that the players could not engage in an 'industrial dispute' because there was no 'industry' of playing Australian Rules football (the existence of an industry being a necessary precondition to registration). That finding seems to have rested in turn on a view that the playing of sport - even for remuneration - was not in itself industrial activity.[11]

It is remarkable how attitudes have changed. Most professional team sports in Australia are now entering the realm of collective labour relations law, just as they entered the realm of individual employment law several decades ago. We have witnessed in recent times a growing professionalism among the various players' associations and even where those associations have not formally entered the collective industrial relations law system, the mere threat that they might do so has been an important inducement to employers to recognise players' associations for the purposes of private collective bargaining.

What is driving this trend? It is almost too trite to say that the growing commercialisation of sport is doing this. Players are increasingly solely engaged in their sport - it is their livelihood - and not unnaturally they wish to maximise the financial returns for their labours. The clubs and the sports associations on the other hand need to contain their largest costs - wage costs. Hence, as in many other areas of commercial life, individual rights and interests must give way to the collective, commercial interests of the players and the clubs. Collective bargaining is accordingly a natural consequence of these developments. The history of industrial relations shows that in market economies, where groups of workers within an organisation perform similar functions, collective organisation and negotiation will inevitably arise. In our society with its entrenched traditions of union organisation and established systems of industrial relations law, it is perhaps surprising that it has taken so long for team sports to be integrated into these systems.

The employment relationship is the springboard to the study of professional team sports law. In examining the withering of individualism in this relationship, our focus will be on the place of the athlete within the framework of legal regulation which exists and on trends towards recognition of collective interests. Our analysis will be divided into three parts. Part one will examine the individual legal rights and interests of athletes. This will mainly be confined to analysis of common law rights.[12] The second part will consider the

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11 Application No 20 of 1955, Taylor (Registrar) 10 February 1956; 84 Commonwealth Arbitration Reports 675.

12 The focus of this analysis in on the *content* of the contract of employment. Issues concerning the *termination* of such contracts in team sports are beyond the scope of this paper, though good general

intervention of statute upon common law rights and, in particular, how these provisions bolster the individual rights of players. Part three will consider the scope and role of collective labour relations law in relation to professional team sports - in particular, whether we are witnessing the end of individual contracting in this field - and the scope for enterprise bargaining.

II. INDIVIDUAL LEGAL RIGHTS AND INTERESTS

An initial philosophical issue is whether there exists an incompatibility between sport and work[13] such that even though an athlete might be remunerated for playing sport, he or she is not 'at work'. One 'plays' sport - the implication being that sport is something one does when not working. In this respect any remuneration from sport is incidental.[14] Such has been the popular view. However, German sociologist, Bero Rigauer, has argued that elite sport has become a form of work - adopting its regimented practices, terminology, organisational structures and aspirations.[15] Competition, specialisation, achievement orientation and quantification, 'scientific' approaches to improving performance and upward social mobility through success are common elements of elite sport and modern forms of work. While not without its critics,[16] Rigauer's work demonstrates that elite sport can no longer be regarded as fundamentally different from work. Often this philosophical question has been linked to the distinctly legal question of whether a person engaged to play sport is capable of being employed under a contract of employment or some other legal arrangement. We said in our introduction that courts have exhibited reluctance to find that paid athletes are engaged as employees. An illustration of this in Australia is the decision of Hardie J in *Elford v Buckley*.[17] His Honour concluded that, having regard to the essentially voluntary nature of the New South Wales Rugby Football League at the time, the rules of the League which bound clubs in the League regarding the transfer of players did "not fall within the category of employment contracts ... appropriate for the application of the doctrine of restraint of trade".[18] In essence, Hardie J held that a professional rugby league footballer was not really an employee.

This case was, however, one which involved an attack upon the collective interests of the sport of rugby league in New South Wales.[19] It is interesting to

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accounts are to be found in J Macken, GJ McCarry and C Sappideen *The Law of Employment* (3rd ed, 1990) Chapters 5 and 6 and WB Creighton and A Stewart *Labour Law - An Introduction* (1990) Chapter 7.

13 In the sense of an occupation or activity from which a person derives a living in whole or part.

14 This receives some support from the part-time nature of most Australian professional team sports.

15 B Rigauer *Sport and Work* (1969, English translation 1981).

16 For example B Stewart "The Nature of Sport Under Capitalism and its Relationship to the Capitalist Labour Process" (1989) 6 *Sporting Traditions* 43.

17 [1969] 2 NSWR 170.

18 *Ibid* at 177-8.

19 In the sense that it was alleged that the retention and transfer rules were in restraint of trade.

speculate on how courts may come to different conclusions in different contexts. Thus, in a 1909 case in England, the Court of Appeal held that an English professional soccer player was an employee.[20] The case concerned the right of the player to claim workers' compensation payments in respect of an injury sustained during a soccer match. The court seemed to have little difficulty in finding that the player was an employee. According to Farwell LJ:

> It may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work. I cannot assent to the proposition that sport and work are mutually exclusive terms, or hold that the man that is employed and paid to assist in something that is known as sport is, therefore, necessarily excluded from the definition of workman within the meaning of the Act. I put during the argument the case of the huntsmen and whips of a pack of hounds. The rest of the field ride for their own amusement, but the three I have mentioned are employed by and obey the orders of the master, and risk their necks, not entirely for their own amusement, but because they are paid to do it.[21]

One wonders whether the Court of Appeal would have come to the same conclusion if the sport concerned had been cricket. Soccer was at that time largely a working class game.[22]

Nevertheless, in a manner consistent with Rigauer's perception of elite sport, *Buckley v Tutty*[23] put the status of professional team athletes beyond doubt. The High Court of Australia expressly overturned the decision of Hardie J in *Elford v Buckley* and stated that "the fact that football is a sport does not mean that a man paid to play football is not engaged in employment".[24] After quoting Farwell LJ in *Walker's case*, the High Court added, "the position of a professional footballer vis-à-vis his club is that of employer and employee".[25]

While *Buckley v Tutty* held that in a general sense professional team athletes are employees, it is useful to consider whether this will always be the case. There may be advantages for both players and clubs in categorising players as independent contractors. It is however, in our view, almost impossible for a professional team athlete to escape categorisation as an employee, at least in respect of sporting activities.[26] The reasons for this are the nature and application of the legal tests distinguishing an employee from an independent contractor.

The approach of the courts in Australia is now to consider the facts of the relationship against a range of indicia. The most important indicium concerns the extent of the employer's right to control the work performed under the contract. Other indicia include the mode of remuneration, the provision and

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20 *Walker v The Crystal Palace Football Club Limited* [1910] 1 KB 87.

21 *Ibid* at 93-4.

22 See also *Seymour v Reed* [1927] AC 554 and *Corbett v Duff* [1941] 1 KB 730.

23 (1971) 125 CLR 353.

24 *Ibid* at 372.

25 *Ibid.* The Court relied for this proposition on *Commissioner of Taxation (Cth) v Maddalena* (1971) 45 ALJR 426.

26 It is of course possible for an athlete to be an employee for certain purposes and an independent contractor for other purposes. For instance, the athlete may be employed to play football, but be engaged as an independent contractor to perform promotional activities for the club.

maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction or otherwise of income tax and the scope for delegation of work by the putative employee.[27] However, the most important indicium is clearly the first one mentioned - the right to control. The greater the right to control the work, the more likely it is that the relationship is one of employer and employee. The emphasis on the *right* to control rather than the mere exercise of it, derives from a decision of the High Court of considerable relevance to the sporting arena. The decision, *Zuijs v Wirth Bros Pty Ltd*,[28] concerned whether skilled acrobats, engaged by an itinerant circus for an indefinite period at an agreed weekly sum to give an acrobatic display on the trapeze at each performance, were employees. An affirmative answer meant they were entitled to workers' compensation. The putative employers argued that since they did not exercise any control over the manner of performance of the acrobatic display, the control test was not satisfied. However, in a joint judgment, Dixon CJ, Williams, Webb and Taylor JJ held that the acrobats were engaged under contracts of employment because "what matters is [that there is] lawful authority to command so far as there is scope for it".[29] The Court recognised that in the case of skilled employment, employers will rarely direct workers in the actual performance of those skills. Indeed, it may be impossible to do so. Nevertheless, if there is ultimately a right to control the manner of performance, this will be indicative of a contract of employment rather than a contract for services.

The express terms of professional team athletes' contracts usually include promises to play the sport whenever and wherever directed by the club, attend training sessions and carry out instructions of the coach. These terms put the issue of employment beyond doubt. Even if such things are not reflected in express terms, it is impossible to envisage professional team sports being played without them. They would clearly be implied terms in the contract.

Categorisation as an employee cannot be avoided simply by expressing the contract to be one between principal and independent contractor. In *Cam and Sons Pty Ltd v Sargent*,[30] the High Court of Australia looked behind such an express term and decided that in substance the relationship was one of employer and employee.[31]

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27 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24 per Mason J with whom Brennan and Deane JJ agreed.

28 (1955) 93 CLR 561.

29 *Ibid* at 571.

30 (1940) 14 ALJR 162.

31 See further *Narich v Commissioner of Payroll Tax (NSW)* (1983) 50 ALR 417.

Accordingly, other than in exceptional circumstances,[32] professional team athletes will be employees rather than independent contractors.[33]

The categorisation of the professional team athlete as an employee, employed pursuant to a contract of employment, has a number of implications for athlete and sports club. Some are advantageous to one or other of them, some are not.

A. IMPLICATIONS OF CATEGORISATION AS CONTRACT OF EMPLOYMENT

(i) Vicarious liability

The employer is vicariously liable for the negligent acts of the employee performed in the course of employment. Vicarious liability can even extend to intentional torts such as battery. By contrast, a person engaging an independent contractor is not usually exposed to vicarious liability for the contractor's tortious behaviour.[34]

The most likely kind of harm for which an employer sports team might be exposed to vicarious liability is physical injury inflicted on a fellow participant, or perhaps a spectator,[35] by the employee athlete in connection with playing the sport. It is well established that a player can incur personal liability for battery arising from deliberate fouls happening not only behind the course of play[36] but closely connected with it.[37] Of considerable interest are recent cases that have taken the tort of negligence into new fields by applying it to the contact or fast-action sports played at close quarters.[38] Australian professional team sports fall within this description - even cricket and baseball, at least in regard to some

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32 In *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, Toohey J held the relationship between Perth district cricket club, Subiaco Floreat, and former Australian cricket captain, Kim Hughes, to be one of principal and independent contractor. Under his contract with the club, Hughes was not obliged to play in any particular match and he was paid on the basis of $1.00 per run scored and $50.00 per win.

33 See further *Commissioner of Taxation (Cth) v Maddalena* note 25 *supra*, *Adamson v West Perth Football Club (Inc)* (1979) 27 ALR 475, *Bartlett v Indian Pacific Ltd* (1988) 68 WAIG 2508 at 2514 and *Adamson v New South Wales Rugby League Ltd* note 8 *supra* at 260. However, arguments to the contrary arise occasionally: *Walsh v Victorian Football League* (1983) ATPR para 40-422 at 44,896 and *Barnard v Australian Soccer Federation* (1988) 81 ALR 51 at 56. This demonstrates the factual nature of the issue.

It is arguable that athletes from the 'amateur' or 'Olympic' team sports who are reliant on government financial support through, for example, Australian Institute of Sport scholarships or Sports Talent Encouragement Plan grants, can be characterised as employees of the Commonwealth according to the tests applied in the authorities discussed above. If so, their conditions of 'employment' fall far short of acceptable community standards. For an investigation at length of this argument in the Canadian context, see R Beamish and JQ Borowy *Q. What do you do for a Living? A. I'm an Athlete* (1988).

34 Though it has been argued they should be. See E McKendrick "Vicarious Liability and Independent Contractors - A Re-examination" (1990) 53 *Modern Law Review* 770.

35 *Payne v Maple Leaf Gardens Ltd* [1949] 1 DLR 369.

36 For example *Watherston v Woolven* (1987) 139 LSJS 366.

37 For example *McNamara v Duncan* (1979) 26 ALR 584; *Giumelli v Johnston* (1991) Aust Torts Reports para 81-085.

38 *Condon v Basi* [1985] 2 All ER 453; *Johnston v Frazer* (1990) 21 NSWLR 89 (special leave to appeal to the High Court of Australia refused).

aspects of their play. In brief, players owe fellow players a duty to take reasonable care for their safety while playing. Hence, in the football codes there is a duty to tackle carefully. This is not as outrageous as it first seems. The level of care required will usually be very attenuated because it must first be acknowledged that force and physical contact are permitted by the rules or are necessarily incidental to the play. Also, play is fast with little or no time for reflection. What is reasonable is judged in accordance with the circumstances of the sport. Most injuries will therefore continue to be inflicted without legal liability arising. Nevertheless, an athlete will be answerable for objectively foolhardy conduct.

Whenever the athlete is liable for battery or for negligence, his or her employer will be vicariously liable if the athlete's wrongful conduct has been committed in the course of employment. This is defined by reference to what is expressly or impliedly authorised or, even, what is within the ostensible authority of the employee. The courts have given a wide meaning to the notion of 'authority' (and, hence, a wide scope to vicarious liability) by declining to characterise much wrongful conduct as unauthorised, preferring instead to describe it as merely unauthorised modes of performing authorised acts.[39] This can extend to cases where express instructions are disobeyed.[40] For instance, a rugby league player told by his coach not to make any head-high tackles will nevertheless render his employer club vicariously liable by negligently injuring an opponent with such a tackle. Even a deliberate foul tackle may incur vicarious liability[41] in much the same way as bar staff or bouncers may make hoteliers or nightclub proprietors responsible for injuries deliberately inflicted on patrons.[42] If the battery is motivated by personal spite or private dispute there will not be vicarious liability. However, a battery originating from some misguided attempt to advance or protect an employer's interests will have the opposite effect.[43] An example might well be a deliberate foul tackle intended to disable a leading opposition player in the hope of improving the chances of victory for the tackler's team.

The employee remains responsible despite vicarious liability falling on the employer - their liability is joint and several. At common law the employer is not obliged to indemnify or insure the employee against liability for torts committed against third parties in the course of employment. Indeed, an employer held vicariously liable may recover from an employee. Two grounds have been advanced for this right of recovery: an implied contractual right of

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39 Hence, an employer cannot effectively guard against vicarious liability by stating that an employee is only authorised to perform functions without, say, negligence.

40 *Bugge v Brown* (1919) 26 CLR 110.

41 *Rogers v Bugden* (unreported, Supreme Court of New South Wales, Lee CJ, 14 December 1990; appeal pending); D Boucher "Club Liable for Player's Actions" (1991) 1(1) *ANZSLA Newsletter* 5.

42 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370.

43 *Poland v John Parr & Sons* [1927] 1 KB 236.

indemnity and the contribution legislation.[44] Some Australian jurisdictions have legislated to reverse the common law rule with the result that an employer is not entitled to contribution or indemnity from an employee in respect of torts committed in the course of employment[45] and must indemnify the employee against personal liability.[46] Even in those jurisdictions where the common law rule remains, its impact has been significantly nullified by Commonwealth insurance legislation.[47] An insurer is not entitled to be subrogated to a claim an insured employer may have against an employee for indemnity or contribution. The operation of the Commonwealth and the local legislation cannot be modified even by express agreement between team and athlete. However, the legislation does contain an important exception. That is where the athlete is guilty of "serious or wilful misconduct" or "serious and wilful misconduct"[48] in the commission of the tort for which the employer is vicariously liable. These expressions are not defined in the legislation. They have been explored to some degree in the caselaw[49] but largely involve issues of fact. Presumably they extend beyond instances where a player lands a blow behind play, because vicarious liability for an employer would be unlikely in those circumstances. Taking drugs which caused a player to behave carelessly or aggressively towards other players such that the likelihood or gravity of injury was substantially increased could constitute serious misconduct. Failure to follow instructions concerning safe training or playing practices might qualify. Conduct which constituted a criminal offence or warranted instant dismissal is often referred to as falling within the scope of the exception. However, courts

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44 *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555. However, in *McGrath v Fairfield Municipal Council* (1985) 156 CLR 672 at 675 the High Court of Australia noted that *Lister's* case, while applied in lower courts in Australia, had "... never been the subject of critical examination in this court".

45 *Employees Liability Act* 1991 (NSW) s 3(1)(a), *Wrongs Act* 1936 (SA) s 27C and *Law Reform (Miscellaneous Provisions) Act* 1956 (NT) s 22A.

46 *Employees Liability Act* 1991 (NSW) s 3(1)(b), *Wrongs Act* 1936 (SA) s 27C(1)(b) and *Law Reform (Miscellaneous Provisions) Act* 1956 (NT) s 22A(1)(b).

Legislation in Tasmania requires an employer to insure an employee against liability to fellow workers, but not strangers: *Workers Compensation Act* 1988 (Tas) s 97(1). However, the benefit of this requirement only applies to situations where the employer would have been obliged to pay workers' compensation to the injured employee, which is often not the case for professional team athletes: ss 7, 25 and 97. Hence, a professional footballer who, while running onto a ground, negligently knocks over and injures a member of his team as well as an employee trainer is insured against personal liability to the trainer but not the team mate. This compounds the incongruity constituted by professional athletes' exclusion from workers' compensation schemes.

47 *Insurance Contracts Act* 1984 (Cth) s 66. Of course, an *uninsured* employer might be motivated to seek contribution or indemnity in those jurisdictions where that remains permitted.

48 *Insurance Contracts Act* 1984 (Cth) s 66 uses the former term and among the local legislation the closest to s 66 is *Law Reform (Miscellaneous Provisions) Act* 1956 (NT) s 22A(3) which refers to "serious and wilful, or gross, misconduct". *Employees Liability Act* 1991 (NSW) s 5 and *Wrongs Act* 1936 (SA) s27C(3) refer only to "serious and wilful misconduct" and therefore will be less likely to be invoked against an employee.

49 *Boral Resources (Queensland) Pty Ltd v Pyke* (1989) 93 ALR 89. See also *North v Television Corp Ltd* (1976) 11 ALR 599 at 608-9; Macken, McCarry and Sappideen note 12 *supra* pp 206-7; R McCallum, M Pittard and G Smith *Australian Labour Law: Cases and Materials* (2nd ed, 1990) pp 136-43.

ought to be careful to confine the scope of the exception to especially serious transgressions otherwise the exception will overtake the rule. Indeed, merely the fact that a tribunal has imposed a suspension will not invoke the exception. A court must make its own assessment of the nature of the misconduct[50] and it is our view that many of the offences which come before sports disciplinary tribunals will not qualify.

(ii) Restraint of trade

As an employee engaged in a 'trade', a professional athlete will be able to rely upon the restraint of trade doctrine (see below).

(iii) Access to the formal industrial relations system

Employees and their representative bodies will have access to the formal industrial relations system. Generally industrial awards are only binding in respect of employees - not independent contractors.[51] Moreover, in most States, and under federal industrial relations legislation, only associations of employees may register as industrial unions (see below).

(iv) Entitlement to workers' compensation

Given the foregoing characterisation of professional team athletes as employees, it comes as something of a surprise to learn that they do not as a general rule have access to the workers' compensation system. After all, the essence of workers' compensation schemes throughout the world is to provide no-fault compensation to people injured in the course of their employment. Yet, in Australia, many people participating in sporting activities are specifically excluded from the scope of the workers' compensation schemes[52] notwithstanding that they might be employees under the usual tests and derive the whole or the predominant part of their livelihood from playing sport.

Notwithstanding the moderately long history of workers' compensation legislation in Australia, the exclusion of professional athletes from the legislation is a relatively recent development. The changes concerning commercialism and professionalism to which we have referred caught up with sport in the workers' compensation arena in the mid-1970s. At that time a number of decisions of courts and tribunals in Victoria and New South Wales highlighted the fact that a large number of people participating in sport did so as

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50 *Hollington v Hewthorn & Co Ltd* [1943] KB 587.

51 See *Building Workers' Industrial Union v ODCO Pty Ltd* (1991) 99 ALR 735; special leave to appeal to the High Court of Australia refused 7 June 1991.

52 See *Workers Compensation Act* 1987 (NSW) s 3(1) definition of "worker" and clauses 9, 11 and 15 of schedule 1; *Accident Compensation Act* 1985 (Vic) s16; *Workers' Compensation Act* 1916 (Qld) s 3(1) definition of "worker" and s 3(3A); *Workers Rehabilitation and Compensation Act* 1986 (SA) s 58; *Workers' Compensation and Assistance Act* 1981 (WA) ss 11 and 11A; *Workers Compensation Act* 1988 (Tas) s 7; *Workers' Compensation Act* 1957 (ACT) ss 6(4A)-(4E); *Work Health Act* 1986 (NT) ss 3(9)-(10).

employees and were entitled to workers' compensation when injured.[53] Not surprisingly, sports administrators had been oblivious to this entitlement and had not effected the required insurance in many cases. Indicative of the sports mystique, the community's response was not one of ensuring that workers' compensation cover was put in place for employee athletes, but to rush through amendments to remove them from the scheme of the legislation! However, the result is not uniform. Each jurisdiction has its own exceptions to the exclusion and these need to be watched carefully. This is not the place to describe them in detail. It is sufficient to illustrate the complexities by noting that, among other things, in South Australia an athlete is not excluded if he or she derives an entire livelihood from playing sport or the income derived exceeds an indexed amount,[54] in Victoria there is no exclusion if the athlete is employed to do things in addition to playing sport[55] and New South Wales provides a specialised sporting injuries insurance scheme.[56]

The growth of national leagues and the changed circumstances surrounding modern professional team sports indicate it is important to remove present anachronistic arrangements and achieve uniformity of entitlements among athletes working in the same leagues.

(v) Terms implied into a contract of employment

The most obvious benefit to the clubs, as employers, of categorising the relationship as one of employer and employee is that the relationship will be governed by a host of wide and flexible obligations known as implied terms. Of course all contracts contain implied terms, but contracts of employment contain more (and more which benefit the employer) than do other forms of contract. We will outline the nature and the content of terms commonly implied into contracts of employment below.

(vi) Restrictive trade practices provisions of the Trade Practices Act

Another advantage of the categorisation as employees rather than independent contractors is that relations between players and clubs are less likely to be regulated by the pro-competitive provisions of the *Trade Practices Act*.[57] Although the Act outlaws a wide range of anti-competitive practices affecting, *inter alia*, the supply of goods and services, the definition of 'services' does not include the performance of work under a contract of service,[58] that is, an employment contract. So far this has been the major stumbling block to Act-

53 For example *Bailey v Victorian Soccer Federation* [1976] VR 13, *Smith v Dandenong Football Club* (1977) 5 WCBD (Vic) 98 and *Peckham v Moore* [1975] 1 NSWLR 353.

54 In 1991, this amount was $35,800: *Workers Rehabilitation and Compensation Act* 1986 (SA) s 58(2).

55 *Accident Compensation Act* 1985 (Vic) s16(1). Thus, a professional footballer who is also employed by the club as its public relations officer would be entitled to WorkCare for on-field as well as off-field injuries.

56 *Sporting Injuries Insurance Act* 1978 (NSW).

57 *Trade Practices Act* 1974 (Cth) Part IV - Restrictive Trade Practices.

58 *Ibid* s 4(1).

based challenges to league rules[59] concerning transfers[60] and the draft.[61] The significance of this factor is highlighted by *Hughes v Western Australian Cricket Association (Inc)*[62] where unusual circumstances meant the relationship between club and athlete was one of principal and independent contractor - not employer and employee - with the ultimate result that the Act was successfully invoked by the player. It has been recognised as arguable that the contract of employment is capable of division into component parts, viz, performance of work by the employee on one hand and the "... club's performing its functions to enable ... [the player] to receive the benefits he would get from playing..." on the other,[63] and that it is only the former which has been excluded from the definition of services in the Act.[64] However, a slightly different but related argument was rejected in *Adamson v West Perth Football Club (Inc)*[65] and elsewhere it has been held that "... the only services supplied under a ... [contract of service] are the performance of work by the employee for the employer."[66] The position now seems settled by the decision of the Full Court of the Federal Court of Australia in *Adamson v New South Wales Rugby League*[67] which has blown these straws away in the wind.[68]

(vii) Assignment

Finally, although the employer's right to receive the benefit of the contract of employment is not assignable in the way that many other legal interests are assignable,[69] it is possible to include in a written contract of employment an express term permitting assignment.[70] Such a term may be of critical importance to a club wishing to trade players, or to a club owner seeking to sell the club. The players may be the major asset. Even so, substantial difficulties could be expected in enforcing performance under the assigned contract.[71]

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59 However, there may be other possibilities for the challenger to invoke the Act. See, *Walsh v Victorian Football League* note 33 *supra* and *Carfino v The Australian Basketball Federation Inc* (1988) ATPR para 40-895.

60 *Adamson v West Perth Football Club (Inc)* note 33 *supra*.

61 *Adamson v New South Wales Rugby League Ltd* note 8 *supra*.

62 Note 32 *supra*.

63 *Barnard v Australian Soccer Federation* (1988) 81 ALR 51 at 56 per Pincus J.

64 *Ibid*.

65 (1979) 27 ALR 475 at 506. Here an argument that the "... right or privilege to enter into a contract of service did not come within the exclusive provision of the definition" was rejected by Northrop J.

66 *Wright v TNT Australia Pty Ltd* (1988) 15 NSWLR 662 at 674 per Lee J.

67 Note 8 *supra*.

68 *Ibid* at 259-63 per Wilcox J, Sheppard and Gummow JJ agreeing.

69 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014; *Denham v Midland Employers' Mutual Ltd* [1955] 2 QB 437.

70 *Denham v Midland Employers' Mutual Ltd ibid* at 443; *Bartlett v Indian Pacific Ltd* note 33 *supra* at 2515-6.

71 See the discussion of the enforcement of positive and negative covenants below.

B. RIGHTS AND DUTIES ARISING UNDER THE CONTRACT OF EMPLOYMENT

Terms may be implied into a contract in two different ways. One of these ways is commonly called 'implication by law' which means that the terms are implied into the contract regardless of the actual intention of the parties. The second is the implication of a term which is necessary, in the circumstances of a particular case, to give business efficacy to the contract.[72] Both types of implied term may be excluded by an express term in the contract to the contrary although it is arguably more difficult to exclude, in this manner, a term implied by law. The terms implied by law into a contract of employment are more extensive than are terms implied into most other forms of contract.[73] Moreover, these terms provide to the employer a powerful tool with which to control the conduct of employees. This is enhanced in the case of professional athletes by the vague nature of their duties, the public role inherent in the duties and the widespread view that a strict disciplinary regime is necessary for successful performance of the duties.

While there are numerous duties which the law will automatically imply into contracts of employment,[74] we will confine discussion to those few which have particular relevance to professional team sports.

(i) Obedience of orders

The most important is the duty to obey lawful and reasonable orders. In essence, this requires employees to obey orders which fall within the scope of their contracts of employment and which are reasonable. In the case of athletes it may often be difficult to determine the scope of the contract and reasonableness may have to be judged against the expectations of the community about what is reasonable in the context of the sport itself.

One way in which the scope of the contract may be defined is by reference to professional obligations. There is authority for the proposition that professional obligations are to be implied into contracts of employment of professionals and that therefore they have a *contractual* duty to obey directions to do things which come within those professional obligations. The standards contained in these professional obligations are those set by the profession itself and by public expectation.[75] The sense in which we are referring to 'professionals' is not confined to the traditional notion of 'the professions' such as the medical and legal professions. In occupations which have unwritten but well established

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72 *Castlemaine Tooheys Ltd v Carlton and United Breweries Ltd* (1987) 10 NSWLR 468 at 486-7 per Hope JA, *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 345-6 per Mason J, and McCallum, Pittard and Smith note 49 *supra* pp 52-3.

73 Although there is some debate about this, see A Brooks "Myth and Muddle - An Examination of Contracts for the Performance of Work" (1988) 11 *UNSWLJ* 48.

74 See generally Creighton and Stewart note 12 *supra* chapter 6, McCallum, Pittard and Smith note 49 *supra* chapter 3, and Macken, McCarry and Sappideen note 12 *supra* chapter 4.

75 See generally *Sim v Rotherham Metropolitan Borough Council* [1986] 3 WLR 851 at 870-7. In this case school teachers were held to be "professionals" in that sense.

expectations of conduct and performance - and surely this has come to include elite athletes - these expectations constitute professional obligations which fall within the scope of the athlete's contract of employment. These obligations may be both positive and negative. For instance, an order by a coach than an athlete either refrain from behaviour which will interfere with on-field performance or do things which will enhance such performance will generally be valid under this duty. This may include directions to maintain a particular diet, to not have sex the night before the game (provided it could be proved that having sex may adversely affect on-field performance),[76] to wear certain types of clothing or footwear and to play games at particular venues and times. Directions to take prohibited or potentially dangerous performance-enhancing drugs could be lawfully refused,[77] as could a direction to do something illegal.[78]

(ii) Co-operation

It may also be that there is a duty to co-operate in the sense that an athlete has a positive duty to help or co-operate in the functioning of the club and in promoting its success.[79] In the context of team sports it would require active co-operation in the implementation of team plans, perhaps even to suggest better ones. The duty could also extend to ensuring smooth and efficient transportation arrangements to and from games.

(iii) Good faith

Analogous to the duty of co-operation is the duty of fidelity or good faith. The term 'duty of fidelity or good faith' is a convenient term which covers a range of obligations owed by an employee intended to ensure that honest and faithful service is rendered to the employer. Among the range of obligations are the implied duties of loyalty, honesty, confidentiality and mutual trust. An employee will breach the duty by engaging in conduct which is in opposition or conflict with the employer's interests[80] or which is destructive of the necessary confidence between employer and employee. In the context of sport, active disruption of team planning or encouraging defiance of the coach would infringe the duty. Moreover, it would seem that the duty requires an employee to tell the truth, perhaps even to a disciplinary tribunal![81] It may also be a breach of the duty if an athlete discloses, for instance to the media, a secret team plan or strategy or, even, that there is dissension within the club about some

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76 For a light-hearted examination of this issue, see B Crosswell "Sex Before the Game" in R Fitzgerald and K Spillman (ed) *The Greatest Game* (1988) 55.

77 See *The Ottoman Bank v Chakarian* [1930] AC 277.

78 For example, to assault an opponent. See further *Kelly v Alford* [1988] 1 Qd R 404.

79 See generally McCallum, Pittard and Smith note 49 *supra* pp 61-5.

80 See for instance *Orr v University of Tasmania* [1956] Tas SR 155 and *Re Transfield Pty Ltd* [1974] AR (NSW) 596.

81 Especially if the disciplinary rules of the league are incorporated into the contract of employment (see below).

action taken or proposed. Clearly, industrial action by team athletes would infringe the duty.[82]

(iv) Care and competence

An employee also owes a duty of care and competence. This duty is sometimes divided into two separate duties, namely, a duty to exercise skill and a duty to exercise reasonable care. The duty or duties have their origins in the 19th century case of *Harmer v Cornelius*.[83]

The duty of skill, in the context of professional team sports, is an implied warranty that the player has the skills which he represents to the Club he or she has and that the player will exercise those skills with reasonable competence. In other words, if an Australian Rules football player says he can kick a football equally well with his left or right foot but in fact cannot really kick with the left foot at all, there will be a clear breach of the duty.[84] In such a case the breach will probably be sufficiently serious to permit the employer to terminate the contract. The obligation to exercise reasonable care would require a player to be careful not to injure other players during training or a game - including opposition players - and, perhaps, even to break up a fight between players or to assist injured players.[85]

(v) Employer's duty to act reasonably or in good faith

The common law contract of employment also automatically imposes a number of obligations upon employers. One such obligation is particularly important in the context of the degree of discipline (and often punishment) which coaches seek to impose upon players. This obligation is the employer's duty to act reasonably or in good faith. It is analogous to the employee's duty of fidelity. The duty requires that an employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee.[86] Thus, if a coach without reasonable cause humiliates a player in front of the other players there is a prima facie breach of contract. Berating players, exhorting them to greater efforts and pointing out their failings - even vehemently - is permissible. Degrading them or constant criticism (if unjustified), such that the

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82 See *Miles v Wakefield Metropolitan District Council* [1987] AC 539, though see McCallum, Pittard and Smith note 49 *supra* pp 139-40.

83 (1858) 141 ER 94.

84 The duty usually extends to requiring the player to disclose any injury which inhibits relevant athletic performance. In combination with the duty of honesty, this produces a continuing obligation of disclosure, although as a practical matter, the club will usually monitor such matters and thereby be independently informed.

85 See *Sim v Rotherham Metropolitan Borough Council* note 75 *supra* at 873. See also *Occupational Health and Safety Act* 1985 (Vic) s 25.

86 See *Bliss v South East Thames Regional Health Authority* [1987] ICR 700 at 714; *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378 at 383; *Lock v Westpac Banking Corporation* (unreported, Supreme Court of New South Wales, Waddell CJ in Eq, 26 August 1991 at 31).

destruction of their own self-confidence results, is outside the bounds of acceptable conduct.

(vi) Remuneration

Another duty which is imposed upon employers is the duty to pay reasonable remuneration. In the absence of an express term as to the rate of remuneration, a reasonable rate could usually be determined by reference to prevailing rates of pay for that type of work in the industry.[87] Since an express term in a player's service contract will override an implied term, the rate of pay actually agreed in the service contract will prevail. But difficulties arise where either a player is injured or ill and where a player is suspended by the employer for disciplinary reasons. If there is no express term as to the remuneration of a player while unable to play due to injury or illness, the likely result is that the player will be entitled to be paid the normal rate of remuneration indefinitely or at least until the contract can be lawfully terminated.[88] There is also no implied right for an employer to suspend an employee for disciplinary reasons connected with the manner of performance of the player's contract. For example, late arrival at training or failure to wear the club uniform at official functions. The employer's remedy, if in fact there has been a breach of contract, is to sue for damages for such breach. If a player refuses to play or impedes the performance of his or her side of the contract, the club may be entitled to set off from any wages payable an amount equal to the damage it has suffered.[89] A player who is wrongly suspended by a club may sue for damages for breach of contract.[90] It is therefore imperative that clubs wishing to be able to impose disciplinary suspension upon players should include express terms to that effect in the service contracts with the players.

If they do so, they should take particular care in relation to the disciplinary penalties. A common law rule - the rule against penalties - provides that pre-agreed contractual damages must be a genuine pre-estimate of the damage likely to flow from the breach of contract.[91] Thus, if a club has a rule providing

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87 See McCallum, Pittard and Smith note 49 *supra* p 76.

88 *Ibid* pp 84-6, *Paff v Speed* (1961) 105 CLR 549 at 566 and *Graham v Baker* (1961) 106 CLR 340 at 344-6.

89 See *Sim v Rotherham Metropolitan Borough Council* note 75 *supra*, *Australian Bank Employees' Union v National Australia Bank Ltd* [1989] 31 IR 436 and *Zamperoni Decorators Pty Ltd v Lo Presti* [1983] VR 338.

90 *Hanley v Pease and Partners Ltd* [1915] 1 KB 698 at 705, *Devonald v Rosser and Sons* [1906] 2 KB 728, 742 and *Re Application by Building Workers' Industrial Union of Australia* (1979) 41 FLR 192 at 194.

If a league tribunal wrongly suspends a player and the club acts on the suspension by not paying wages for the suspension's duration, an action for breach of contract against the club could be a useful way of collaterally attacking the suspension. Normally, though, direct proceedings against the league to restrain the enforcement of the suspension will be more appropriate except where a court would refuse jurisdiction because the suspension had already been served.

91 *Pigram v Attorney-General for New South Wales* (1975) 132 CLR 216, *Amos v Commissioner for Main Roads* (1984) 6 IR 293 and *Arleshiem Ltd v Werner* [1958] SASR 136 at 140-1.

that a player who is late for training will automatically have deducted a set amount of money from wages by way of a fine, this will probably infringe the rule against penalties. On its face the penalty will be the same regardless of whether the player is five minutes late or one hour late. The effect of the rule is that the fine is null and void and the player could respond by suing the club for any amount wrongly deducted. In order to avoid infringing the rule, there must be an element of discretion in the determination of the penalty to be imposed and the discretion should be phrased in a way which suggests that the amount of the penalty will be referrable to the seriousness of the breach. It is possible that wider sporting association disciplinary provisions could also infringe this rule where those rules are incorporated into the individual contracts of employment of the players.[92]

(vii) Contractual duty of care

An employer owes his or her employees an implied *contractual* duty of care and this duty will also usually be enforceable as a wider statutory duty under occupational health and safety legislation.[93] In *Cotter v Huddart Parker Ltd*, Jordan CJ described the employer's duty of care as follows:

> The special duties which are owed to an employee ... arise by virtue of implications in the contract of employment. They comprise the duties to ensure, so far as is possible to do so by the exercise of reasonable care, (1) that the persons selected to work with him as his fellow employees are competent, (2) that the premises at which he is to work, and the appliances in use there, are safe, and (3) that the general system of working which is in use is also safe.[94]

Thus, a club may be under a duty to its employees to prevent a player who is known to be unduly violent, or even reckless or routinely negligent in his or her play, from training or playing.[95] Subject to the medical evidence, the duty will oblige a club to remove players from a game or training if they are concussed or bleeding.[96] Ensuring that the premises are safe may include providing appropriate padding on goal posts, eliminating dangerous objects around the boundary of the field and (depending on the circumstances) keeping spectators off the playing surface until the athletes have departed. The duty to provide a safe system of work would include an obligation to ensure that safe practices

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92 As to incorporation see below.

93 See for instance *Occupational Health and Safety Act* 1985 (Vic) s21 and *Occupational Health and Safety Act* 1983 (NSW) s 15.

94 (1941) 41 SR (NSW) 33 at 37-8.

95 This may extend to the club being obliged to refuse to play against sides with players with known violent or dangerous propensities, or at least to pressure the league or opposing club to take action against such players.

96 To prevent the possible transmission of human immunodeficiency virus (HIV) and other infectious diseases. There is at least one reported incident of HIV being transmitted through a collision in soccer, (1990) 335 *The Lancet* 1105; see also, A Sullivan *The Legal Liability of the Player and of His Club*, at 6, paper presented on 19 May 1991 to The Law of Professional Team Sports Conference conducted by the Australian and New Zealand Sports Law Association Inc and The University of Melbourne Law School Continuing Education Program.

are followed during training - in particular, that training periods are not excessive in duration or intensity so as to endanger a player's health.[97]

There is no reason of principle why the system of 'work' ought not to include the playing rules of the sport. Thus, the club has an obligation to ensure that those rules are as 'safe' as is reasonable. Often the power to fix the playing rules rests with the sports association, not the club individually, and a fair concern is that the club ought not be held to account for matters over which it lacks real control. The likely response of the law is to impose an obligation to refuse to field a team if the rules constitute an unsafe system. No doubt this is an unenviable dilemma for the club to risk legal liability for injury to the player or incur the fury of the league if there is resistance within the league to rule change. Such an approach from the law is unhelpful and less likely to achieve the objective of improving safety because there will arise some cases where employer clubs will prefer to avoid the league's fury. One possible solution lies in the imposition of responsibility on the league. This would have to be a general duty under the tort of negligence at common law because the league will not usually be the employer of the players. In any event, the sports associations risk severe criminal penalties under occupational health and safety legislation in respect of playing rules that are not as 'safe' as is 'practicable' regardless of whether they employ any of the players.[98] An example of this problem is to be found in the interchange rules of the football codes. There have been a number of reported incidents of injured players being returned to the play because a team had exhausted its interchange bench. By amending the rules to allow for more interchange players to take the field in the event of injury the pressing practical temptation to continue with injured players will be removed. While primary responsibility must rest with the club for endangering its already injured players,[99] we suggest that sports associations cannot afford to turn a 'Nelsonian eye' at least for reasons of the legislation.[100]

The employer's duty of care is a non-delegable duty. If an employer engages an independent contractor (such as a chiropractor or physiotherapist), the employer will be liable to the player for any injury negligently caused or aggravated by the independent contractor. This liability is not a vicarious liability as commonly understood. Rather, the independent contractor's wrongful conduct amounts to a direct breach of the employer's non-delegable duty to the employee.[101] Thus, the employer's duty is one not only of taking reasonable care itself and through its employees but of being responsible for the negligence of independent contractors as well.

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97 *Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293.

98 For example *Occupational Health and Safety Act* 1985 (Vic) s 22.

99 This responsibility could even extend to liability for exemplary damages. For an extraordinary example from Canada, see *Robitaille v Vancouver Hockey Club Ltd* (1981) 124 DLR (3d) 228.

100 See further R Carter "Legal Threat to AFL on Injuries", *The Age* (Melbourne), 14 May 1991 p 14.

101 *Kondis v State Transport Authority* (1984) 154 CLR 672.

(viii) Duty to indemnify

An employer also has a contractual duty to indemnify an employee in respect of expenses properly incurred by the latter in and about carrying out his or her duties.[102] Unless there is an express term to the contrary in the service contract, a club may be liable to pay the costs of an operation or medical treatment which the employee requires in order to continue playing sport. This would not necessarily be confined to operations and medical treatments related to injuries and conditions arising from the sport. For instance, a 'constitutional' health problem may not normally impede other forms of working lifestyle but might restrict sporting performance. Medical costs incurred to rectify the problem would be recoverable by virtue of the implied term because they would be unnecessary apart from the demands of the sport employment.

(ix) Duty to provide work

The final duty to which we will refer is the employer's duty to provide work. In most areas of employment an employer's duty in this respect extends no further than an obligation to provide remuneration. There is no duty to actually provide work.[103] However, there are exceptions to this principle. Some employees whose remuneration is in the form of a commission and some employees in the entertainment industry can demand under their contracts of employment to be given work of a particular kind to perform. The reason for the latter exception is that implicit in entertainers' contracts of employment is a term that the entertainers be given an opportunity to exercise and display their talents.[104] If not put to use before the public's eye, talent and reputation quickly fade. It is our view that since professional team athletes have similarly ephemeral careers, they will generally come within this exception. Unless there is an express term in the contract to the contrary, a player who is ready, willing and able to perform at the agreed level has a contractual right to do so. Accordingly, in *Bartlett v The Indian Pacific Ltd*, Fielding C said:

> It is very much the part of a professional footballer's lot that he have playing exposure in order to enhance his reputation and so presumably further his career. A footballer who sits in the audience ceases to be a footballer.[105]

In that case, Fielding C found that a footballer who was contracted to play with the West Coast Eagles (which traded as Indian Pacific Ltd and was entered in the Victorian Football League) had been entitled to treat himself as having been dismissed from his employment when he was left off the Club's player list

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102 See McCallum, Pittard and Smith note 49 *supra* p 108.

103 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 260-1, *Hughes v Western Australian Cricket Association (Inc)* note 32 *supra* at 52 and, see generally McCallum, Pittard and Smith note 49 *supra* pp 102-5.

104 *Marbe v George Edwardes (Daly's Theatre) Ltd* [1928] 1 KB 269; *White v Australian and New Zealand Theatres Ltd* (1943) 67 CLR 266.

105 Note 33 *supra* at 2517.

- even though the club continued to pay for his services. According to the Commissioner:

> ... being on the list of players afforded him exposure in his trade which would not otherwise be available. He no longer had an opportunity to display his talents in the VFL competition, an opportunity to which it seems most professional footballers aspire.[106]

The Commissioner accordingly awarded the footballer $8,500 by way of compensation for denied contractual benefits.[107] By being left off the player list the player was 'constructively dismissed' from the West Coast Eagles and the $8,500 represented the difference between what he could have received if he had been able to continue playing in the VFL competition and what he would receive for playing in the Western Australian Football League for the duration of his contract (as he was otherwise obliged to do).

C. INCORPORATION OF TERMS

Apart from terms such as those described above which are automatically implied into the contract by operation of law,[108] often other terms will be incorporated into the contract 'by reference'. These may be either expressly or impliedly incorporated.[109] A typical example of express incorporation is to be found in the following clauses of the standard Australian Football League (AFL) Playing Contract -

> 2. The Player shall for the term of this Contract:
>
> ...
>
> 2.6 Obey all Rules and Regulations, Resolutions and Determinations of the Club and abide by the Memorandum and Articles of Association of the Club.
>
> 7. The Player and the Club agree with the AFL to comply with and observe the Rules and Regulations of the AFL, the Player Rules, the Memorandum and Articles of Association of the AFL and any Determinations or Resolutions of the AFL Commission which may be made or passed prior to or at any time after the execution of this Contract ...

By this device the contract incorporates the contents of all of the rules and documents referred to as varied from time to time. Thus, for instance, the Rules and Regulations of the AFL which empower the imposition of discipline for certain breaches of the Rules of the Game, become terms of the contract of employment. Accordingly, if a player breaches these Rules of the Game on the

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106 *Id.*

107 Under s 29(b) of the *Industrial Relations Act* 1979 (WA), the Western Australian Industrial Relations Commission is able to decide whether an employee has not been allowed by his employer a benefit to which he is entitled under his contract of service.

108 Subject to any contrary intention of the parties.

109 For example *Marley v Forward Trust Group Ltd* [1986] ICR 891, *Gregory v Philip Morris Ltd* (1988) 80 ALR 455 at 479, *Camden Exhibition & Display Ltd v Lynott* [1966] 1 QB 555 and *Alexander v Standard Telephones & Cables Ltd (No 2)* [1991] IRLR 286 at 291-2.

field, he is not only responsible under them but also usually breaches the contract of employment as well.[110]

Another issue concerning implied terms arises from contractual provisions such as Clause 18 of the AFL Playing Contract which provides:

> This Contract embodies all of the terms of the Agreement between the parties save for the Rules and Regulations, Player Rules, Memorandum and Articles of Association of the AFL, the Determinations or Resolutions of the AFL Commission, and the Memorandum and Articles of Association and Rules of the Club by which the Player has agreed to be bound. Each party acknowledges that no representation has been relied upon in entering into this Contract which has not been referred to herein and the terms hereof shall not be varied except by an instrument in writing signed by each of the parties hereto.

Does the statement that the contract embodies "all of the terms of the Agreement between the parties" exclude the various implied terms to which we have referred? The answer is probably 'no'. This is because such implied terms would usually have to be expressly excluded or an inconsistent provision made. It could also be argued that the clause excludes terms implied to give business efficacy to the contract, but this is unlikely to succeed.[111] The clause is probably only intended to prevent any two parties[112] from amending the contract without the consent of the third party, and this is why it goes on to provide that "the terms hereof shall not be varied except by an instrument in writing signed by each of the parties hereto".[113]

D. EXPRESS TERMS

An express service contract between a player and club serves two purposes. Firstly, it adds certainty to the contract in the sense that it defines the terms of the relationship more clearly than if reliance were placed solely on the terms implied by the common law. Secondly, a service contract creates and specifies obligations and duties which would not otherwsie exist at common law.

The express terms contained in a service contract will usually impose both positive and negative obligations, that is, the player agrees to do some things and not to do other things. We will deal shortly with the question of how and to what extent these terms are enforceable. But before doing so it is necessary to consider the changing nature of such contracts and their importance in sport.

Until the 1960s express service contracts were rare. Where they did exist they tended to be individualised and negotiated between the club and its more outstanding professional players. Terms were few and related primarily to remuneration. The remaining legal obligations between the player and the club derived from two separate sources. Firstly, common law implied terms (which

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110 See generally RW Rideout with J Dyson *Rideout's Principles of Labour Law* (4th ed, 1983) pp 32-4.

111 See generally *Castlemaine Tooheys Ltd v Carlton and United Breweries Ltd* note 72 *supra* at 490-2.

112 The AFL Playing Contract usually has three parties: the AFL, the Club and the Player.

113 Clause 18 is strengthened by an administrative requirement of the AFL that an officer of the Club and the Player each complete a statutory declaration that there have been no amendments to the Playing Contract.

we have discussed above) were relied on to some extent. Secondly, and more importantly, the rules of the sporting association governed, among other things, the allocation of players among clubs. These rules have taken various forms. They have included geographic zoning rules whereby a player was allocated to a club by place of birth or place of residence at a specified age, and rules which prohibited the transfer of players between clubs without permission of the last club to which the player was allocated or only on payment of a transfer fee to that club. Sometimes these rules were incorporated into the player contracts by reference, often they were made between clubs and the league only - but with significant effect on players.

Challenge to restrictive player allocation practices began in earnest with the decision of Wilberforce J in *Eastham v Newcastle United Football Club Ltd*[114] where it was held that a professional soccer player was engaged in a trade and that the 'retain and transfer' rules of the English professional soccer leagues infringed the restraint of trade doctrine. *Eastham's* case was first applied in Australia by the decision of the High Court of Australia in *Buckley v Tutty*.[115] Other cases have followed,[116] but for present purposes the most significant of these cases was *Foschini v Victorian Football League*.[117] In that case Crockett J made it clear that he thought that the best solution for sports clubs if they were to seek some form of security of tenure over their players was to move towards a contract system. He said:

> Fundamentally, why the present system in Australia is the monolithic system that it is, is because it confers on clubs throughout the country 'title' to every footballer without any reciprocal obligation's [sic] being placed upon a club. The club is not obliged to transfer the player even though it is unprepared to play him or pay him or to enter into a contract with him. Contracts with players are becoming increasingly common. They appear generally to be honoured by both sides. To introduce their general use would seem to present the best prospect of solving the present problem of competition for players operating in conflict with the permit and clearance rules.[118]

The era from *Eastham's* case to *Foschini's* case was one during which the law clearly favoured the legal individualism of players over the perceived collective interests of professional leagues. It was indeed a golden era of individualism. A free agent could hold out for the highest bidder. Any attempt by his previous club to enforce the restrictive league rules on player movements could be despatched with the threat of legal action alleging restraint of trade. Club managements obsessed with 'buying premierships' engaged in 'cheque book warfare' with their opposite numbers. Even so, only the more highly skilled free agents could take full advantage of this open market philosophy. Also, it took a brave player to risk the wrath of management and the prospect of legal costs.

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114 Note 7 *supra*.

115 Note 23 *supra*.

116 For example *Adamson v West Perth Football Club (Inc)* note 33 *supra*, *Carfino v Australian Basketball Federation Inc* note 59 *supra* and *Hall v Victorian Football League* [1982] VR 64.

117 Unreported, Supreme Court of Victoria, Crockett J, 15 April 1983.

118 *Ibid* at 25.

However, because of the fear held by sporting associations that a court would declare their rules to be unlawful as in restraint of trade most such actions or even threats of actions were settled in favour of the players.

E. THE SHIFT TOWARD COLLECTIVISIM

Foschini's case represented a high-water mark for this legal individualism. Although the move to individual contracting recognised by Crockett J was strengthened by his decision, within the past few years there has been a reversal in the balance of interests between individualism and collectivism. We have identified this occurring in four principal ways.

1. The recent successful legal challenge in *Adamson v New South Wales Rugby League Ltd*[119] to the League's internal player draft was a product of unprecedented *collective* action initiated by the Rugby League Players' Union.[120]

   The internal player draft in that case, as well as the current draft system in the AFL, owe much of their origins to the judgment of Crockett J in *Foschini's* case. His Honour favoured the proposition that one means of ensuring that the less financially successful clubs in a competition had better access to talented players was to expand and institutionalise the then limited draft of interstate players in the Victorian Football League.[121] A draft can take various forms, but its guiding principle is that the pool of players not contracted to clubs ('free agents') are available to clubs in reverse order to each club's place in the previous year's competition. Hence, the last placed team has the first selection and so forth. Over time the best players and the 'could've beens' are evenly spread across the teams in a competition, or so the theory holds.[122] The ultimate objective is an even competition in which outcomes of matches are unpredictable. This is said to maximise spectator interest with flow-on effects to revenues. Hence, the economic welfare of the league, clubs and players is maximised.[123]

   In *Adamson v New South Wales Rugby League Ltd*, a large number of players from the sixteen clubs in the New South Wales Rugby League (NSWRL) challenged the internal draft which allocated between clubs those players whose contracts had expired but failed to reach a fresh arrangement with their respective employing clubs. After losing at the

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119 Note 8 *supra*.

120 See below for an outline of the Union's background.

121 Note 117 *supra* at 25.

122 However, the theory can be doubted at least for the reason that it assumes teams have equal access to information concerning the best draft picks.

123 For an example of a fuller statement of this theory of professional team sports economics see O Covick "Sporting Equality in Professional Team Sports Leagues and Labour Market Controls: What is the Relationship?" (1986) 2(2) *Sporting Traditions* 54 at 55.

trial of the action, the plaintiff players obtained a unanimous verdict from the Full Court of the Federal Court of Australia that the internal draft was an unreasonable restraint of trade and, therefore, void.

In our view, this case will come to be recognised as the beginning of a new era in the organisation of professional team sports in Australia. While from one perspective it merely continues the success which players had experienced in challenging rules restricting player independence to select employers,[124] it is the first determined collective legal challenge by players to the authority which team and league management purport to exercise over them. Past challenges were individual affairs, although often promoted by disaffected clubs. On this occasion the Union was of crucial significance to the processes of stimulating and managing the court action. An individual player would have experienced great difficulty in funding the litigation and assembling the evidence[125] for a successful challenge.[126] It is also highly likely that an individual player would have been deterred by the unfavourable decision of the trial judge, namely, that although the draft acted as a restraint of trade of professional rugby league players, it was reasonable and therefore lawful. Indeed, a union is more likely to take a broader and longer term perspective when pursuing a claim whereas an individual's decision about litigation will be much more governed by personal and immediate considerations.

The intervention and success of the Union will no doubt strengthen and embolden its dealings with the NSWRL in the future. Also, the case serves as a precedent for other player associations. The AFL Players' Association is negotiating a new collective agreement with the AFL. The prospect that the Association might challenge the AFL's draft system (which is similar to the NSWRL's void system in many significant respects) has no doubt encouraged the AFL to enter into genuine negotiations on a wide range of player grievances previously left unaddressed.

Indeed, to the extent that future restraints may become collectively bargained between management and players rather than imposed unilaterally by management, the courts may come to take a different approach to deciding the restraints' validity. We will return to this aspect towards the end of this paper.

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124 See also *Nobes v Australian Cricket Board* [1992] ACL Rep 175 Vic 2 and S Wright "Nobes Hits Australian Cricket Board for Six" (1991) 1(4) *ANZSLA Newsletter* 1.

125 In this case, that involved, among other things, showing the court how a variety of players were affected by the draft rules.

126 This may be one reason why an individual challenge to the AFL's draft wilted shortly after it was commenced in December 1991. See "Challenge to AFL Draft Abandoned" (1991) 1(4) *ANZSLA Newsletter* 3.

2. The second way in which legal individualism has declined since *Foschini* has been through the increasing standardisation of player contracts. During the 1980s most major professional team sports evolved standard form contracts which are required to be signed by every player. The impact of this development on individualism can be better assessed by comparison with the major professional leagues of the United States. The use of standard form contracts in those leagues has been widespread for many years. However, the standard form is regarded as a core set of minimum terms designed to avoid exploitative labour practices. Usually a minimum salary is specified. Players therefore use the standard as a starting point from which to negotiate their individual contracts. By contrast, the limited experience of standard forms in this country has been almost as a code of terms not to be varied. All that is open for negotiation are remuneration and duration.[127] Given that in, say, the AFL the overwhelming majority of players have contracts of one year's duration with an option for a further year, there is no minimum salary and each club has a league-imposed salary cap within which the player's remuneration must be accommodated, there is quite limited scope for individual bargaining.
3. The salary cap, used by the AFL, NSWRL and the National Basketball League, is another mechanism aimed at evening the competition through eliminating 'cheque book warfare'. By limiting the total sum which individual clubs can spend on the remuneration of players, wealthier clubs are precluded from buying or retaining disproportionate numbers of the best players. While this measure is a further instance of collectivism asserting itself over individualism, it is not wholeheartedly supported. A number of the AFL clubs, usually the more successful ones, have publicly and privately criticised this 'football socialism'. Interestingly, the salary cap was not challenged in *Adamson v. New South Wales Rugby League Ltd.* While the cap received prominent mention in the case, the Court was careful not to pronounce upon its validity.[128]
4. In two cases decided in the late 1980s, the Victorian courts exhibited a quite vigorous approach toward the enforcement of negative covenants in player service contracts. Traditionally, the courts have allowed great scope to individual liberty by refusing to take action which might directly or indirectly compel the performance of service contracts. Thus, a player could refuse to fulfil his or her obligation to play for a club, commence with another club and leave the original club only with its remedy of suing for damages. However, by giving new scope to

127 We make this comparison to highlight the nature of the Australian experience. The explanation for the difference seems to rest in a complex mix of social and economic factors.

128 Note 8 *supra* at 249 per Sheppard J.

indirectly compelling the performance of contracts, these Victorian cases favoured employers over employees in a way which can be viewed as somewhat surprising. This development will be discussed at some length in the next section. While it is clearly a movement away from individualism, it is not necessarily one toward collectivism. Although it does substantially underpin the collectivist approach to player contracting which now prevails in the leagues (which approach has been fuelled by the clubs' desires to achieve the control over player movements which the restraint of trade doctrine has denied them).

We believe that these developments have made inevitable the growth of collective bargaining within professional team sports. That may ultimately lead to the entry of sporting industrial relations into the mainstream industrial relations system. There is already evidence of this with the recent registration of the former New South Wales Rugby Players' Association as a union under the *Industrial Arbitration Act* 1940 (NSW).[129]

F. THE ENFORCEMENT OF POSITIVE AND NEGATIVE COVENANTS[130]

(i) Positive covenants

Positive covenants or positive obligations include all of the promises of a player to do particular things. For instance, to obey all reasonable directions of the coach or to play in all football matches and so on. Not infrequently disputes will arise between a player and a club over either the performance of obligations within the club (for example, to attend training) or over a desire on the part of the player to play for another club. In what circumstances will a court order the player to carry out his or her positive obligations?[131]

It can be said with some confidence that in general a court will not enforce such positive obligations. Contracts of employment are personal contracts and the courts have long been loathe to specifically enforce them because to do so would turn them into 'contracts of slavery' and often place unduly onerous, if not impossible, responsibilities on the courts in regard to the contracts' supervision.[132] Indeed, until recently, there was a rule against specific performance of contracts of employment.[133] However, in Australia there is no longer any such rule and the courts will consider as a matter of discretion

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129 This development is investigated further below.

130 See generally G Furness "Injunctions and the Contract of Employment" (1989) 2 *Australian Journal of Labour Law* 234.

131 Our emphasis on orders for compliance with positive and negative covenants should not be taken as suggesting that advisers overlook damages as a possible remedy.

132 This concern about supervisory responsibilities has ben criticised in *Turner v Australasian Coal and Shale Employees' Federation* (1984) 55 ALR 635.

133 *Ridge v Baldwin* [1964] AC 40 at 65; *JC Williamson v Lukey and Mulholland* (1931) 45 CLR 282 at 297-8.

whether such an order should be granted.[134] Even so, it is clear that such an order will be exceptional and is likely only to be granted where the employment relationship is somewhat impersonal. Thus, such an order may be granted where the employer is a large organisation or large corporation and the employee who is ordered to perform his or her contract will not necessarily be required to work with persons with whom they cannot get on. In other words, there may be other parts of the organisation or corporation in which the employee can work.

In the case of a small organisation, like a sports club, in which good personal relations and discipline are paramount, it is difficult to see a court making an order which requires continued personal service.[135]

It may be possible for a club to indirectly enforce a positive obligation by obtaining an injunction against a third party (for instance, another club) which is seeking to persuade the player to break a contract of employment with the club. However, the recent decision of the English Court of Appeal in *Warren v Mendy*[136] seems to have largely closed this legal option. In that decision the Court said:

> We are all of the opinion that the court ought usually to refuse the grant of an injunction against a third party who induces a breach of the contract if on the evidence its effect would be to compel performance of the contract. If that were not so, the master could ... obtain by the back door relief which he could not obtain through the front.[137]

The enforcement of positive obligations thus presents particular difficulties for sports administrators. As the scope of such obligations is expanded by

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134 *Turner v Australasian Coal and Shale Employees Federation* note 132 *supra* at 648-9; *Gregory v Philip Morris Ltd* (1988) 80 ALR at 481-2; *Reily v State of Victoria* (unreported, Supreme Court of Victoria, Smith J, 20 November 1991).

135 It is interesting to note that industrial tribunals may adopt a similar approach to the question of reinstatement of unfairly dismissed athletes. Thus, Fielding C said in *Bartlett v Indian Pacific Ltd* note 33 *supra* at 2518:

> Even if the dismissal was unfair, as the Applicant claims, I would not be minded to exercise the discretion vested in the Commission to order that he be reinstated into the Respondent's list of players. It might well be in the best interests of the Applicant to reinstate him but football is a team game. The team does not train solely for the benefit of individual players. Rather, the players who make up, or have the potential to make up, the team practise together so as to improve their skills in order that they might be better utilised in combination with those of the others in the team and the team thereby prosper. In those circumstances to insist that a player be retained in the training squad in the face of objections from the coach and team selectors and where there is no prospect of him playing for the team seems to me to have an air of unreality about it. It undermines the basic concept of a team game and, I suspect, has the potential to undermine the team's performance if nothing else. There needs to be some degree of reality about the enforcement of industrial laws of this kind; not a blind adherence to academic principles.

136 [1989] 3 All ER 103.

137 *Ibid* at 539. Compare the quite different facts of *World Series Cricket Pty Ltd v Insole* [1978] 3 All E.R. 449 where the players wished to stay with the first employer (World Series Cricket) and a declaration was obtained by the employer against the third party declaring unlawful its interference with that relationship. As a practical matter such declarations are obeyed and it becomes unnecessary to seek an injunction. See also *TCN Channel Nine Pty Ltd v Northern Star Holdings Ltd* (1990) Vol 32 No 17 AILR.

express terms in player contracts[138] their enforcement will present even greater difficulties. We will no doubt see more litigation on this topic.

(ii) Negative covenants

Most modern day standard form player contracts include express negative covenants. Typically they oblige the player, at the very least, not to play professionally in the relevant sport for another club in the same association or league. For instance, the NSWRL Playing Contract provides that the player will "not play in any Rugby League Football match other than for the Club or in a representative match sanctioned or approved by the League or the Australian Rugby League (except with the express prior written consent of the Club)".[139] The AFL Playing Contract is even more explicit and detailed. Clause 2 provides:

> The Player shall for the term of this Contract:
>
> ...
>
> 2.7 Not play or train for Australian Rules football with any other club, company, person or entity fielding a team or teams in the AFL Competition or any other Australian Rules football competition or any exhibition or promotional match.
>
> 2.8 Not enter into any contract, agreement, arrangement, understanding or option to play football for any other club, company, person or entity without first obtaining the written consent of the Club.
>
> 2.9 Not enter into any discussions, negotiations, contract, agreement, arrangement, understanding or option which would prevent the Player or which gives the Player or any other club, company, person or entity the right to prevent the Player from complying with any of the provisions of this Contract. Nothing in this sub-clause 2.9 shall prevent the Player from engaging in commensurate secular employment or business.

Other clauses in the AFL Playing Contract oblige the player not to engage in any dangerous or hazardous activity which may affect the ability of the player to perform his obligations under the contract.[140] Further clauses require the player not to commercialise his identity, presumably so that the Club and the

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138 For instance, by clauses such as the New South Wales Rugby League's Player Contract Clause 3(1)(e) to "undergo drug testing if and when requested to do so by the Club". See also R Johnstone "Pre-employment Health Screening: The Legal Framework" (1988) 1 *Australian Journal of Labour Law* 115.

139 Clause 3(1)(h).

140 Clause 2.12 provides that the Player shall:

> Not engage in any dangerous or hazardous activity which in the reasonable opinion of the Club may affect the Player's ability to perform his obligations under this Contract without first obtaining the consent of the Club, which consent shall not be unreasonably withheld.

AFL can maintain some global control over commercial marketing of the sport.[141]

Such negative covenants are generally expressed to operate only during the life of the contract. In other words, they are not post-employment restraints on the employee's ability to trade[142] and should be distinguished from the cases discussed above relating to restrictions - such as transfer rules - on a player's freedom to choose an employer. Accordingly, it is difficult to argue that they infringe the restraint of trade doctrine.[143]

Nevertheless, it has been rare for courts to enforce such negative covenants in contracts for personal services.[144] The reason is a fear that enforcement will result in specific performance of the contract by the 'back door'. The classic statement of principle as to the limited circumstances in which a court will restrain a breach of a negative covenant is the *dictum* of Branson J in *Warner Bros Pictures Inc v Nelson*:

> The conclusion to be drawn from the authorities is that, where a contract of personal service contains negative covenants the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the court will enforce those negative covenants; but this is subject to a further consideration. An injunction is a discretionary remedy, and the court in granting it may limit it to what the court considers reasonable in all the circumstances of the case.[145]

These principles give a court some latitude to restrain a breach of a negative covenant. There is considerable subjectivity in determining whether, in respect of particular facts, an order will or will not amount to specific performance, or whether the defendant will remain idle or pursue some other occupation.

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141 The Player shall:

> 2.14 Not enter into any contract, arrangement or understanding to promote the Player's name, photograph, reputation, likeness and identity as an Australian Rules football player or endorse any product or service in trade or commerce by means of advertising the fact that the Player is an AFL footballer or a player of the Club, without first obtaining the consent of the Club which consent shall not be unreasonably withheld.
>
> 2.15 Not to permit or allow the name, photograph, likeness, reputation, and identity of the Player to be used in any way in connection with or in relation to any goods or services without first obtaining the consent of the Club which consent shall not be unreasonably withheld.

142 As to post-employment restraints, see MJ Trebilcock *The Common Law of Restraint of Trade* (1986) chapter 2; P Sales "Covenants Restricting Recruitment of Employees and the Doctrine of Restraint of Trade" (1988) 104 *Law Quarterly Review* 600; *Howard F Hudson Pty Ltd v Ronayne* (1972) 126 CLR 449.

143 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 294; *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451 at 455. However, there is growing recognition that there exists a limited range of circumstances where the restraint of trade doctrine may be applied to strike down unreasonably restrictive contractual terms notwithstanding that the employment contract is current: see *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] All ER 616; *Watson v Prager* [1991] 1 WLR 726; MI Yanover and HG Kotler "Artist/Management Agreements and the English Music Trilogy: Another British Invasion?" (1989) 9 *Loyola Entertainment Law Journal* 211.

144 For recent judicial analysis of the cases concerning this issue see *Warren v Mendy* [1989] 3 All ER 103.

145 [1937] 1 KB 209 at 217. See also *Lumley v Wagner* (1852) 42 ER 687.

In the context of Australian professional team sports where standard contracts contain negative covenants such as those outlined above, the scope of these principles assumes considerable importance. Will a court restrain a player from contracting with and/or playing with another team? This question was answered rather emphatically by the Supreme Court of Victoria in two decisions in 1987.[146] In *Buckenara v Hawthorn Football Club Ltd*,[147] Crockett J (whom it will be remembered was the judge in *Foschini's* case) ordered that the Hawthorn footballer, Gary Buckenara, be restrained for a two year period from playing football with any football team in the then Victorian Football League, other than Hawthorn. The judge found that Hawthorn had a contractual right to the player's services for those two years and that it could thus rely upon negative covenants in his contract which were similar to those quoted above in the AFL standard contract. However, the judge decided to restrain Buckenara only from playing with other teams in the VFL for the duration of his contract with Hawthorn. Crockett J reasoned that Buckenara would not be forced to remain idle because he could, if he wished, play in other professional football leagues, such as the Western Australian Football League. In that respect, only part of the negative covenant was enforced. Of considerable significance is the judge's recognition of the "legitimate commercial interests" of the Club and of his desire to uphold the contract system.[148] The case thus marks a weakening of the bargaining position of the individual player and a corresponding strengthening of the collective and commercial interests of the club and sports association.

The day before Crockett J handed down his decision in *Buckenara's* case, Tadgell J gave an equally important judgment in *Hawthorn Football Club Ltd v Harding*.[149] Harding, like Buckenara, was intent on avoiding a contractual obligation to play for Hawthorn. However, the order made by Tadgell J went further than the order in *Buckenara's* case in that Harding was restrained for three seasons "... from playing or agreeing with any person to play football for reward in Victoria or elsewhere for any football club other than..." Hawthorn. The only obvious significant factual difference between Harding and Buckenara was that Harding had another profession (that of a dental technician) to which he could have turned if he chose not to continue to play football with Hawthorn. Buckenara, on the other hand, had no particular employment skills other than football. Thus, Buckenara could have been idle if the full force of the negative covenant had been applied to him whereas Harding had the possibility of other pursuits even if prevented from playing professional football at all. Tadgell J, like Crockett J, was also concerned to protect the commercial interests of the Hawthorn Football Club - in particular the $25,000 signing-on fee paid to

146 See also *North Adelaide Football Club v Riley* (unreported, Supreme Court of South Australia, Mill J, No 724 of 1984) discussed in G Griffin "Life in the AFL 'Days of Swine and Roses'" (1990) 12 *Law Society Bulletin* 132 at 134.

147 Note 8 *supra*.

148 *Ibid* at 62.

149 Note 8 *supra*.

Harding by Hawthorn which Tadgell J likened to an investment in the defendant.

> If the defendant were to be free, in breach of his contract with the plaintiff, to play football with a football club anywhere in Australia without the plaintiff's permission, the plaintiff's investment would be likely to be unprotected. It is, in my opinion, an investment which the plaintiff is entitled to attempt to protect ...[150]

We consider that these decisions go much further than would have been thought possible from many of the earlier cases and in so doing have strengthened the movement away from individualism to collectivism. Indeed recent English decisions have been very much more conservative.[151] For instance, in *Evening Standard Ltd v Henderson*,[152] the Court of Appeal restrained a breach of a negative covenant for one year, but only on the basis that the employer was prepared to continue to pay the employee without insisting that the employee perform any services under the contract.

The remarkable aspect of *Buckenara's* and *Harding's* cases is not so much that the courts were willing to grant injunctions, but the length of time for which the restraints were to operate. The overwhelming number of English cases has resulted in restraining orders (if any) of very short duration.[153] The notable exception is *Warner Bros Pictures Inc v Nelson* where the restraint could have lasted for up to three years - comparable to the duration of orders in *Buckenara's* and *Harding's* cases. However, *Nelson's* case concerned the great actress Bette Davis at the height of her career. Her 'value' to Warner Bros Pictures Inc measured in terms of her uniqueness as an international 'star' and the substantial damage the corporation might suffer if she could provide her talents to a competitor perhaps justified a lengthy restraint. By that stage of her career she was probably a person of substantial wealth and quite capable of enduring the effect of an injunction for a short period since she could look forward to a relatively long career. The balance of hardship was very much in favour of Bette Davis. By contrast, neither Buckenara nor Harding were 'superstars' of their sport. They were two of many good players. Indeed, Harding was yet to play in the AFL.[154] Buckenara was nearing the end of his career and less able to endure the effect of an injunction.[155] Each player appears not to have had substantial independent wealth. While Hawthorn may have had some difficulty in finding comparable substitute players in the short-term, it is hard to maintain that it would have been irreparably damaged if either

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150 *Ibid* at 62.

151 These are conveniently collected in *Warren v Mendy* note 144 *supra*.

152 [1987] ICR 588.

153 See note 144 *supra*.

154 Harding was described by Tadgell J as a "potential star attraction" but Harding's career has proved only moderately successful. Given that predictions about the prospects of 'new recruits' in team sports are notoriously unreliable, it may be wiser for courts to avoid having to weigh the merits of the (self-justifying) predictions of sports administrators by declining to grant restraining injunctions.

155 Although this factor contributed to his not being restrained from playing Australian Rules football in other competitions.

injunction were not granted and that the balance of hardship was clearly against the club.

Nevertheless, an argument might be made for professional team athletes such as Buckenara and Harding to be restrained for a maximum of one season. We foresee at least two difficulties with that argument. Firstly, the strong view espoused by the courts has been an unwillingness to in effect compel an employee to specifically perform a personal service contract by means of the court enforcing a negative covenant that the employee not work for others. Hence, in *Buckenara's* and *Harding's* cases the courts were preoccupied with determining whether the professional footballer would have had other employment opportunities and thereby avoid being idle if restrained from playing football for other clubs. This approach by the courts is quite blinkered. It ignores completely the nature of the elite athlete. That nature contains an extremely powerful desire to compete and achieve at the highest level. Within days of the judgments, both Buckenara and Harding had compromised their differences with Hawthorn and played in the 1987 VFL season for that club. There is no doubt that the judges' orders were tantamount to directions to play for Hawthorn and this will almost inevitably be so in similar cases.

Secondly, the injunction is an equitable remedy and, as such, it is discretionary. A factor indicating against the exercise of the discretion is the availability and adequacy of alternative remedies. Damages is one alternative.[156] The contract measure of damages which aims to put the innocent party in the same position as if performance had been rendered is the governing rule. It can be argued that any such calculation is speculative in that it is exceedingly difficult to assess the worth to a sports team of a key position player in terms of the effect of the players' absence on spectatorship and sponsorship.[157] In some respects, the elite athlete may be considered unique. However, Australian courts have not been deterred from endeavouring to calculate damages in comparable circumstances in other contexts or at least from stating that a measure of damages can be calculated.[158] The fact that damages may be difficult to calculate is not a justification for stating that damages are an inadequate remedy or for favouring the exercise of the discretion. Drawing an analogy from the *prima facie* measure of damages for non-delivery of goods, we suggest that an adequate *prima facie* measure for the innocent club is the difference between the amount which the innocent club would have paid and the amount which the player is to receive from his or her

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156 For a recent decision applying *Buckenara v Hawthorn Football Club Ltd* note 8 *supra* but refusing to grant an injunction because, among other things, damages were an adequate remedy, see *Film House Pty Ltd v Silverstein* [1991] ACL Rep 165 Vic 1.

157 For example *Hawthorn Football Club Ltd v Harding* note 8 *supra* at 60, where Tadgell J was swayed by this argument.

158 For example *Howe v Teefy* (1927) 27 SR (NSW) 301 at 307; *Fink v Fink* (1946) 74 CLR 127 at 143; *Oldcastle v Guinea Airways Ltd* [1956] SASR 325; *Callaghan v Wm C Lynch Pty Ltd* [1962] NSWR 871 at 877.

new club.[159] Indeed, this is the player's 'market value'.[160] Hence, an injunction to restrain a breach of a negative covenant ought not to be granted. In this approach we foresee further advantages. The policy of protecting contractual bargains is advanced because the player will not be financially advantaged by breaching his or her bargain. On the other hand, the player is not at risk of being indirectly forced to continue to play with a club against his or her will (by virtue of the injunction enforcing the negative covenant) and can play elsewhere to satisfy the myriad of reasons which might prompt a bona fide desire to change clubs, for example, geographical proximity to family, compatibility with coach and team mates and career advancement.

III. STATUTORY RESTRAINTS ON THE CONTRACTUAL RIGHTS AND DUTIES OF THE PARTIES

It has long been recognised that the law of contract wrongly presupposes equality of bargaining power between the contracting parties. Accordingly, significant statutory modifications have been made to the common law in a variety of forms. As well the courts have developed common law doctrines which recognise potential inequality, for instance through principles which will allow contracts to be avoided due to duress or unconscionability in their formation.[161]

Statutory provisions which might provide a player relief from unfair or unconscionable behaviour by an employer may be divided into two categories. Firstly, statutes concerning industrial relations. Secondly, there have been suggestions from time to time that general provisions aimed at unconscionable conduct in connection with the supply of goods and services in trade or commerce[162] might be relevant to employment contracts. Such an application now seems unlikely due to the exclusion of employment contracts from the definition of 'services' in such legislation (see above).[163] Accordingly, we will focus on the industrial relations legislation.

In some States, legislation permits employees to claim that they have been unfairly dismissed and an appropriate industrial tribunal, if it finds that the dismissal was unfair, may either reinstate the dismissed employee or award compensation. In most States, virtually any employee may make such a

159 Additional amounts could be included, for example the cost of engaging a replacement player.

160 See discussion of this notion in a slightly different context in *Miles v Wakefield Metropolitan District Council* [1987] AC 539 at 560 per Lord Templeman.

161 See for instance P Hall *Unconscionable Contracts and Economic Duress* (1985).

162 For example *Trade Practices Act* 1974 (Cth) s 52A and *Fair Trading Act* 1985 (Vic) s 11A.

163 There may also be difficulties in satisfying the requirement that the conduct occurred "in trade or commerce": see *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 92 ALR 193; *cf Barto v GPR Management Services Pty Ltd* (1992) ATPR para 41-162.

claim[164] whereas in others the employee must be either a member of a union or have his or her claim brought by a union.[165] The latter is also essentially the position under the Commonwealth's *Industrial Relations Act* 1988. The provisions and the jurisdictional issues surrounding them are complex and it is not the occasion to discuss them here.[166] However, an illustrative example is *Bartlett v Indian Pacific Ltd.*[167]

Glen Bartlett entered into a contract with the Western Australian Football League (Inc) (WAFL) in February 1987 to perform services as a professional Australian Rules footballer for a period of three years. Under the contract, his services could be contracted to what was designated 'the New Club' (which was subsequently named the West Coast Eagles (the 'Eagles')) or to any WAFL club. Upon the formation of the Eagles (which was incorporated as Indian Pacific Ltd), Bartlett's services were assigned to that club which included him on its player list. Such inclusion was a pre-condition to him being selected to play. He played some games for the Eagles in the 1987 Victorian Football League competition but the following year was dropped from the player list without being given any warnings that his playing performance was regarded as unsatisfactory.

Bartlett applied to the Western Australian Industrial Relations Commission alleging that he had been unfairly dismissed and sought, among other things, a remedy of reinstatement. In a decision rich in analysis of wide-ranging issues affecting sports law, Commissioner Fielding found that Bartlett had not been unfairly dismissed. Importantly, his decision reflects the astuteness of industrial tribunals to the realities, customs and practices applying in industries over which they exercise jurisdiction. The Commissioner stated that in considering the fairness or otherwise of the dismissal of a professional team athlete, it has to be accepted that the future of their employment has a degree of uncertainty which other vocations do not possess. Public support for a club, and therefore the commercial revenue which can be attracted to the club, depends on success in competition. Difficult selection decisions therefore must be made and it is

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164 See *Industrial Relations Act* 1991 (NSW) ss 245-55; *Industrial Relations Act* 1990 (Qld) s 11.11; *Industrial Relations Act* 1972 (SA) s 31 and A Stewart *Unfair Dismissal in South Australia* (1988); *Industrial Relations Act* 1979 (WA) ss 23(1) and 29(b) and MV Brown "The Demise of Compensation as a Remedy for Unfair Dismissal in Western Australia: A Casualty of the Robe River Dispute" (1989) 19 *University of Western Australia Law Review* 29. Between 1983 and 1990, Victoria was essentially an 'individual rights' jurisdiction by virtue of *Industrial Relations Act* 1979 (Vic) s 34 (see J Benson, G Griffin and K Soares "The Impact of Unfair Dismissal Legislation in the Victorian Jurisdiction" (1989) 2 *Australian Journal of Labour Law* 141), but the decision of the High Court of Australia in *Downey v Trans Waste Pty Ltd* (1991) 99 ALR 402 has restricted the right to claim unfair dismissal to employees covered by Victorian industrial awards only.

165 See *Industrial Relations Act* 1984 (Tas) s 29 together with the definition of "industrial dispute" in s 3(1). See generally AP Davidson "Reinstatement of Employees by State Industrial Tribunals" (1980) 54 *Australian Law Journal* 706.

166 See further McCallum, Pittard and Smith note 49 *supra* chapter 11 and Creighton and Stewart note 12 *supra* pp 159-70.

167 Note 33 *supra*.

"... very much the part of a professional sportsman's lot to be subject to the vagaries of team coaches and selectors".[168] Thus, the Commissioner concluded:

> In this case the evidence is that the decision to dismiss the Applicant was made after a review of his playing performances and after undergoing various trials. The decision was based on performance, or perceived lack of it, by those who one would ordinarily expect to make such decisions for the West Coast Eagles and I cannot think that this was either an unreasonable or irrational approach. ... it is not the Commission's function in claims of unfair dismissal to put itself in the position of the manager of the business and to determine the fairness or otherwise of a dismissal on the basis of what it would have done had it been the manager or team selector. Rather, its function is to determine fairness on the basis of an objective standard of reasonableness. It would be intolerable if every time a footballer was not selected in a team, or for inclusion in a playing squad, he could come to the Industrial Relations Commission to overcome the vagaries of the particular coach or selection committee. The Commission is simply not qualified to act as a selector in that way. I have been unable to find any instances of industrial laws relating to unfair dismissals having extended into the area of sporting team selections to the extent that the Applicant suggests it should on this occasion and I would be surprised if it did. It may be that different considerations might apply in cases involving dismissals unrelated to player performances ...[169]

In New South Wales, professional athletes can also rely upon section 88F of the *Industrial Arbitration Act* 1940 (NSW). Section 88F provides:

> 88F (1) The Commission may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry on the grounds that the contract or arrangement or any condition or collateral arrangement relating thereto -
>
> (a) is unfair, or
>
> (b) is harsh or unconscionable, or
>
> (c) is against the public interest. Without limiting the generality of the words 'public interest' regard shall be had in considering the question of public interest to the effect such a contract or a series of such contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or ....

In *Sulkowicz v Paramatta District Rugby League Club Ltd*,[170] Sweeney J held that a professional rugby league player came within the New South Wales Industrial Commission's jurisdiction under this section. He held further that the player's contract with the Club was unfair and "very one-sided in favour of the Club and against the player".[171] The Club was entitled under the contract to in effect terminate it at any time by not 'grading' Sulkowicz. That, together with the circumstance that Sulkowicz had not been given notice of this entitlement during particular negotiations, prompted Sweeney J to declare the contract void

168 *Ibid* at 2517.
169 *Ibid* at 2157-8.
170 [1983] 4 IR 272.
171 *Ibid* at 278.

and to order the Club to pay compensation to the player in the sum of $13,000. Although not expressly mentioned, it is perhaps significant that Sulkowicz would have otherwise undertaken a substantial amount of pre-season training without payment.

In *Adamson v New South Wales Rugby League Ltd*,[172] the relationship between section 88F and the common law doctrine of restraint of trade was considered briefly. The trial judge, Hill J, concluded that as a general proposition if the player draft did not contravene the common law doctrine because it was a *reasonable* restraint, it would not run foul of section 88F on the basis of it being unfair.[173] But as the Full Court of the Federal Court pointed out,[174] section 88F could not in any event apply to the draft rules because they affected a player only at the expiration of his contract. It is only the terms of the player contract during its subsistence which attract the operation of the section. Since evidence on that aspect had not been adduced in regard to the actual effect on individual players no conclusion could be reached in relation to the section's application.

IV. COLLECTIVE LABOUR RELATIONS AND SPORTS LAW

In our introduction we remarked upon the trend towards collective organisation and collective bargaining in professional team sports in Australia. We have also made reference to the introduction, in recent years, of standard form player contracts and how this has tended to provide a focus for the common industrial interests of team athletes. What is surprising, however, is that professional team sports have taken so long to enter the mainstream industrial relations system, especially when Australia has a comparatively high rate of unionism and a high-profile industrial relations systems.[175]

In Australia, sports unionism is a comparatively recent phenomenon.[176] Indeed, in most sports representative associations are not formally registered under industrial relations legislation. Industrial award coverage of sports

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172 Note 8 *supra*.

173 He regarded 'unfairness' as a wider concept than 'harshness' or 'unconscionability': *ibid* at 553.

174 Note 8 *supra* at 264 per Wilcox J, Sheppard and Gummow JJ agreeing.

175 As to some of the reasons why not, see B Dabscheck *Standard Player Contracts and Collective Bargaining*, paper presented on 18 May 1991 to The Law of Professional Team Sports Conference conducted by the Australian and New Zealand Sports Law Association Inc and The University of Melbourne Law School Continuing Education Program, subsequently published as "Unions and Sport: Australian Professional Players' Associations" (1991) 2 *The Economic and Labour Relations Review* 114. There is however, little doubt that the union movement has now discovered professional team sports as area for industrial organisation: K Halfpenny "When Good Sports Flex Industrial Muscle" Winter (1991) *Workplace, The ACTU Magazine* 6.

For a good general treatment of the regulation of trade unions in Australia, see Creighton and Stewart note 12 *supra* Chapter 8.

176 Though perhaps more extensive than has been believed, see Dabscheck *ibid*. See also, B Dabscheck "The Professional Cricketers Association of Australia" (1991) 8 *Sporting Traditions* 2.

players is also largely unknown. But it is interesting to note that somewhat similar professions such as actors and musicians have been unionised and have had award coverage for many years. Why is it that sport has remained outside the institutional industrial relations system? Part of the answer may be found in decisions of the High Court of Australia about which kinds of occupations can be unionised and thus participate in the federal industrial relations system. Until its repeal in 1988, the *Conciliation and Arbitration Act* 1904 (Cth)[177] provided in section 132 that only associations of employees whose members were either employed "in or in connection with any industry" or who were "engaged in an industrial pursuit" could register as federal trade unions. The concept of an "industry" or an "industrial pursuit" derived in part from the High Court's interpretation of section 51(xxxv) of the Australian Constitution. Section 51(xxxv) provides that the Commonwealth Parliament may make laws with respect to:

> Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

The High Court held in a long series of decisions[178] that this constitutional power with respect to industrial disputes was confined to disputes about industrial matters in an *industry*. Thus, unless either the employee's occupation was inherently industrial or the employer's business was industrial in nature, a representative association of employees could not register as a federal union and consequently obtain industrial award protection for its members. In 1955, a group of Australian Rules footballers in Victoria formed a union called the "Australian Football Players' Union" and applied for registration as a federal trade union under the predecessor to section 132 of the *Conciliation and Arbitration Act* 1904 (Cth). The Union met all of the formal requirements of federal registration in that it consisted of an association of more than 100 persons and its members had agreed upon an appropriate set of rules. However, the application for registration was refused by the Federal Industrial Registrar[179] on two grounds. In the first place, the Registrar found that a significant number of the Union's members might not be employees in an industry. He accepted arguments put on behalf of the VFL, the Victorian Football Association and Essendon Football Club that many of the Union's members could be amateurs, perhaps in the sense that although they were paid to play football games this was really a hobby or an aside from their main employment elsewhere.[180] Once again we see the sports mystique rearing its head. The other ground for the Registrar's refusal of registration was his finding that VFL football was not an 'industry' and his implied acceptance of an argument "that the mere playing of a sport, whether for remuneration or otherwise, is not in itself an industrial

177 In 1988 this Act was replaced by the *Industrial Relations Act* 1988 (Cth).

178 See McCallum, Pittard and Smith note 49 *supra* Chapter 5.

179 Note 11 *supra*.

180 It is also likely that some of the members were not paid at all, but it is not possible to ascertain whether this was so from the report of the decision.

activity." This is perhaps a less surprising finding given that the commercialisation of VFL football was at that stage embryonic.

The result of this decision was that the Australian Football Players' Union remained an unincorporated association without any industrial status. It was unable to achieve any award protection for its members and it disbanded in 1956. It was not until 1973 that the VFL Players' Association was formed (now named the AFL Players' Association) and only in the past year or so has it considered the possibility of a renewed attempt to become a federal trade union.[181]

Apart from the option of federal registration as a trade union, it is also possible for employee associations to achieve industrial registration under State industrial legislation. Since State legislation is not constrained by the limitations of section 51(xxxv) of the Constitution, it is surprising that associations of sports persons have not followed this course until very recently. However, change has begun. In 1980, the Association of Rugby League Professionals in New South Wales registered as a trade union under the *Trade Union Act* 1881 (NSW) and in 1984 it registered under section 8 of the *Industrial Arbitration Act* 1940 (NSW). The Association changed its name to the Rugby League Players Union in 1991 and has also affiliated with the Labour Council of New South Wales.[182]

Despite the 1956 decision of the Federal Industrial Registrar concerning an Australian Rules players' union registration application previously mentioned, it is now almost certain that an association of professional sports players could, apart from some practical considerations (see below) gain federal registration as a trade union. This is largely as a result of the landmark *Social Welfare Union* case in 1983[183] where the High Court adopted a very wide view as to what constitutes an "industrial dispute" within the meaning of section 51(xxxv) of the Constitution, and of the capacity of associations of employees to register.[184] There are now, however, a number of practical difficulties which stand in the way of the registration of a players' union in its own right. In the first place, amendments to the *Industrial Relations Act* 1988 (Cth) in early 1991 impose a requirement that an association of employees seeking registration have 10,000 or more members. It seems unlikely that a team sports union could achieve this figure, even if it was an amalgamation of players from all major professional team sports. The other difficulty is that paragraph 189(1)(j) of the *Industrial Relations Act* requires the designated Presidential Member (who has replaced the Federal Industrial Registrar as the relevant decision-maker regarding registration) to grant an application for registration *only* if "there is no

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181 It might have been able to have gained recognition under Victorian industrial relations legislation, but seems not to have pursued that path.

182 Dabscheck note 175 *supra* at 120-1.

183 *R v Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

184 In this respect see also *R v Lee; ex parte Harper* (1986) 160 CLR 430.

organisation to which the members of the association might conveniently belong".

In order to understand the operation of this provision, it is necessary to explain the registration mechanism. A registered union must have among its rules (which are rather like a club constitution) a rule known as an eligibility rule. This rule will prescribe the occupations and industries in which the union can legitimately recruit members. Thus, if a registered union has an eligibility rule which might cover members of an association seeking registration, it can object to the latter's application for registration. The grounds for objection would be that the members of the applying association could more conveniently belong to the union which is registered. It is also important to appreciate that principles developed by the High Court of Australia ensure that eligibility rules are interpreted broadly and in a non-technical manner.[185]

As far as professional team sports are concerned, two existing federally registered unions appear to have coverage of their players. The Theatrical and Amusement Employees' Association has a registered eligibility rule which provides that the following employees are eligible to join it:

> Employees employed in or in connection with, including selling tickets by any means in connection therewith, or in or about, any kind of amusements, whether indoor or outdoor, including:
>
> (a) cultural complexes, theatres, cinemas, halls, racecourses, sports, exhibitions ...[186]

The other union which has coverage is Actors' Equity. Its eligibility rule provides that it has coverage of persons employed:

> ... for the purpose of commercial display in ... the entertainment industry or in any other place which could reasonably be construed to be a place of entertainment ...

A professional team sports association could seek to form a sub-branch of one of these two unions rather than attempt the arduous and doubtful course of seeking registration in its own right. The rules of either of the above registered unions could quite easily be changed to accommodate a largely autonomous sub-branch of professional sports players, perhaps with its own organiser and management committee. It is quite common for trade unions to create this kind of arrangement to satisfy the special interests of particular classes of their membership.

What would be the benefits to players and their associations of being a registered trade union or a member of such a union? They would include the following:

1. Terms and conditions of employment presently contained in player contracts could be included in a binding industrial award which could

185 See for example *R v Cohen; ex parte Motor Accidents Board (Tasmania)* (1979) 141 CLR 577 at 587 per Mason J.

186 See *Neil v Australian Theatrical and Amusement Employees' Association* (1976) 50 ALJR 499 which seems to indicate that sports players directly employed in 'an amusement' would come within this eligibility rule.

then be enforceable under the enforcement provisions in the *Industrial Relations Act* 1988 (Cth)[187] or State industrial relations legislation.

2. In some States (see above) and in the federal industrial relations jurisdiction, registration would give members the right to seek remedies for unfair dismissal. It should be emphasised that the unfair dismissal jurisdiction of the industrial tribunals is wider and less expensive (to the parties) than comparable remedies and proceedings in the courts (for instance for actions for wrongful dismissal).
3. In the event that sports administrators refuse to negotiate with players' associations, grievances and claims can be taken to conciliation and arbitration. The industrial tribunals can call compulsory conferences between the parties and ultimately can arbitrate on their differences. An arbitral award will bind the employer(s).
4. Victimisation of players on the grounds of their union membership or activities is an offence.[188] Moreover, most awards give unions, and union officials, access to workplaces for the purposes of recruitment - even though there may be no union members present - or to hold union meetings.

However, not all the benefits flow to the players and their associations. Employers, too, stand to gain by securing access to formal dispute resolution procedures. Registration of one player union would also prevent 'potentially' disruptive splinter groups having any legal or industrial relations status. Finally, there is the possibility that the instability experienced through the restraint of trade doctrine could be resolved once and for all by the inclusion of restrictive practices, such as player draft and salary cap provisions, in registered industrial agreements (see below).

A. ENTERPRISE BARGAINING

As sports industrial relations moves closer to the mainstream institutional industrial relations system, it will inevitably become entangled in the shift towards enterprise bargaining . It is difficult to be precise about what is meant by the term 'enterprise bargaining' - after all, the Australian Council of Trade Unions, employer bodies, Government and the Industrial Relations Commission cannot agree on what it means - but it is possible to paint the following tentative picture.

It is likely that existing industrial tribunals will continue to set minimum terms and conditions of employment on an industry-wide basis through what are known as 'industry awards' and they will retain their unfair dismissal jurisdictions. However, enterprises will be able to negotiate with enterprise bargaining units (which may or may not be part of existing industry or

187 Creighton and Stewart note 12 *supra* pp 87-8.
188 *Ibid* pp 212-4.

occupational unions), about wages and conditions applying in the enterprise. The enterprise agreements reached might include arrangements at variance with the industry award.[189] In some scenarios, enterprise agreements may contain terms inferior to the industry award.[190] Enterprise agreements will, in any event, be accorded the same legal status as an award. That is, they will be a form of 'quasi-legislation'. They will derive their legal force from the relevant industrial relations legislation even though they may at the same time be contracts between the parties to them.

The implications for sports industrial relations are monumental. It is likely that the enterprise for the purposes of sports enterprise bargaining will be the sporting association rather than the individual club. As the Business Council of Australia has argued in its influential study, *Enterprise-Based Bargaining Units - A Better Way of Working*,[191] "enterprises are defined by customers and markets". Clearly sporting associations such as the AFL, NSWRL, National Basketball League, Australian Cricket Board and National Soccer League are competing with each other in a 'sports market' for audiences, sponsorships, advertising and television and radio coverage. While undoubtedly there is competition among clubs within these sports, the centralisation of administration and planning, gate and television receipts equalisation schemes, the growth of national leagues and control devices such as player drafts and salary caps point to the leagues and not the individual clubs as the enterprises. Clubs in many respects are operating divisions of the leagues.

Thus, the enterprise bargaining will be between the leagues or sports associations on one hand and player associations on the other. The legal status likely to be accorded to enterprise 'bargaining-units' also offers opportunities to player associations. It may become unnecessary to form, or become part of, a federally registered union. On the other hand, even if they become sub-branches of federal unions the status as an enterprise bargaining unit may offer guarantees of autonomy.

The final, and perhaps more speculative, implication we see arising from enterprise bargaining is the possibility of including arrangements such as salary caps and player drafts in enterprise agreements. We should also point out for completeness that this possibility may already exist under the certified agreements provisions of the *Industrial Relations Act* 1988 (Cth).[192] The High Court of Australia has held that an employer's recruitment and staffing practices may be the subject of an industrial award or agreement[193] and, by analogy,

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189 This is now the case under the Industrial Relations Commission's 'enterprise bargaining principle'. See National Wage Case, 30 October 1991, Print K0300.

190 As seems to be the case under the enterprise agreement provisions of the recent *Industrial Relations Act* 1991 (NSW). See Part 3 Division 2.

191 Business Council of Australia, (1989).

192 See s115. For analysis of this section see R McCallum "Collective Bargaining Australian Style: the Making of Section 115 Agreements Under the Industrial Relations Act 1988 (Cth)" (1990) 3 *Australian Journal of Labour Law* 211.

193 *Re Cram; ex parte NSW Colliery Proprietors Association Ltd* (1987) 163 CLR 117.

player drafts and salary caps may be able to be included in enterprise agreements or certified agreements. The advantages for sports administrators would be considerable. The legislative status accorded to enterprise or certified agreements would put restrictive arrangements such as player drafts and salary caps beyond the reach of the common law restraint of trade doctrine - a doctrine blamed for creating instability in the administration of professional team sports for the past 30 years. Further, such arrangements would, in our view, be more clearly beyond the reach of section 45 of the *Trade Practices Act* (Cth).

V. CONCLUSION

In the sense described in this paper, individualism in professional team sports is withering. If not completely dead, the individual autonomy of clubs and players has been severely eroded. In its place is the new collectivism. Perhaps the managements of sports leagues have been quicker to grasp its possibilities than the players, but there are growing indications that players' associations are looking to the processes of collective bargaining. None of this is necessarily a bad thing. It reflects the maturing of elite team sport as a form of commercial activity, distinctive in its culture and in the emotional responses it evokes in society - but, nevertheless, part of the mainstream of the world of commerce and industry. As such, it is now merely attracting the legal responses applying to the broader community. In that sense, elite team sport has grown up, but is it still 'sport'?[194]

194 Further reading: (1) J Adam "Representing Player Interests in Professional Team Sports" in *Proceedings of Sport and the Law Workshop, Launceston, 16-18 June 1989* (1989, Centre for Commercial Law and Applied Legal Research, Monash University, Clayton, Victoria). (2) JM Browne "Recent Developments in Player Contracts" in *Sport and the Law* (1985, Centre for Commercial Law and Applied Legal Research, Monash University, Clayton, Victoria). (3) JM Browne "Playing Contracts and Pitfalls" in *Sports and the Law* (1991, Business Law Education Centre, Melbourne). (4) A Golberg and B Ward "Players' Contracts and Collective Bargaining" in *Sports and the Law* (1980, Faculty of Law, Monash University, Clayton, Victoria). (5) G Griffin "Life in the AFL 'Days of Swine and Roses'" (1990) 12 *Law Society Bulletin* 132. (6) KE Lindgren "Sport and the Law, The Player's Contract" (1991) 4 *Journal of Contract Law* 135. (7) M McDonagh "Restrictive Provisions in Player Agreements" (1991) 4 *Australian Journal of Labour Law* 126. (8) B Ward "Player Service Contracts" in *Sporting Law* (BLEC Books, 1989, Melbourne).