"THE RIGHTS OF ATHLETES"

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1. FANS AND PLAYERS: PERCEPTION AND REALITY.

A couple of thoughts from professional athletes, and those that represent them.

National Football League linebacker Scott Fujita, also a member of the management committee of the National Football League Players Association:

> *"My three young daughters, like most kids, are curious and ask a lot of questions. My wife and I are as open and honest with them as possible. But there's one question I'm not prepared to answer: "Why aren't Clare and Lesa married?"*
>
> *"I don't know how to explain to them what "inferior" means or why their country treats our friends as such."*
>
> *"…Sometimes, people ask me what any of this has to do with football. Some think football players like me should just keep our mouths shut and focus on the game. But we're people first, and football players a distant second. Football is a big part of what we do, but a very small part of who we are. And historically, sports figures like Jackie Robinson, Billie Jean King and Muhammad Ali have been powerful agents for social change. That's why the messages athletes send — including the way they treat others and the words they use — can influence many people, especially children."*

Marvin Miller, Executive Director of the Major League Baseball Players' Association from 1966 – 1983, once approvingly quoted legendary baseball writer Roger Angell:

> *"…few fans resent a boxer earning $2 million for a single fight (now many times that), and they don't mind actors or rock singers raking in gigantic sums for a few weeks (or a few hours of work). They do, however, resent a baseball player's being paid, say $700,000 over a period of seven months…Many fans think it is only an accident that they are not out on the field playing ball; after all, most people (at least most men) have played some form of ball…in their lifetimes. There's an identification, beginning in childhood, that doesn't have a counterpart in (the ring), music or film."*

The relationship between the fan and the player is as true today in all professional sports as it was when Miller wrote his words in 1991 in his brilliant memoirs *"A Whole Different Ballgame"* on a career which transformed not only baseball but all of professional sports and the representation of professional athletes.

The fan/player relationship, at its best, is what makes the athletic career so special. It is personal, for the fan was often once a player. If he or she wasn't, it is likely he or she had a son, a daughter, a brother, a sister, a friend who also played.

The fan who relates to the player does so as the child who fell in love with a naive dream of being the next Derek Jeter, Gary Ablett, Lionel Messi or Tim Cahill – not as the adult who reached the pinnacle of a short term and precarious profession where millions set out but only a very few succeed.

According to Football Federation Australia, around 1.7 million Australians participate in football.

According to the players' union Professional Footballers Australia, today 387 Australians are pursuing careers as professional footballers:

- 178 Australians in the A-League;
- 145 overseas;
- 34 youth players overseas; and
- 30 Matildas (semi-professional players in the women's national team squad).

Do the percentages – 0.02%.

Globally, FIFPro, the world professional footballers' association, represents 65,000 professional footballers through 63 players' associations in different nations around the world. FIFA estimates 262,982,904 players are registered to participate in football.

0.02%.

The same is true for all of the sports.

Unfortunately, the enormous talent of the athlete is often dismissed by the fan as being down to pure luck or an act of god. That luck can also be associated with a lack of respect on the part of the athlete for his sport.

The fan does not see the hard work that the athlete has put into becoming the player he or she is, nor the intelligence and universally admired values that produce that player – courage, team work, discipline, resilience, sacrifice, respect and love, a deep love of sport.

Yes, the very best players love their sport, at a level that makes the most fanatical fan seem ambivalent. But it is a love that has inspired a dedicated commitment to being a better player, not unlike that of a dedicated artist. The player is a professional.

Having worked with and represented professional athletes and, in particular, footballers for over 20 years, I see great merit in the famous work of Malcolm Gladwell in his 2008 book "*Outliers*", in which he cites research by psychologist K Anders Ericsson on violinists and pianists from Berlin's elite Academy of Music. The difference, Ericsson found, between those who were future teachers at 20 years of age, those who were good students and future professionals and those who were future elite soloists was quite simply the number of hours they had practiced. All elite performers had accumulated 10,000 hours of "purposeful" practice; that is practice undertaken for the purpose of getting better. Future professionals had acquired 8,000 hours and future music teachers 4,000. Strikingly, Ericsson did not find any "naturals" whose gifts put them in a higher group despite less practice, or any "grinders" who found themselves in a higher group because of more practice.

Do the sums:

- 10,000 hours;
- 20 hours a week for 10 years, or three hours per day; and
- from the age of five to ten to be ready anywhere between 15 and 20 years of age.

And having the intelligence at a young age to spend that time often alone not only practicing, but practicing purposefully. Three players I know well come to mind:

- Harry Kewell, an apprentice professional at Leeds United in England at 15 years of age;
- Mark Viduka, who was constantly warned to stop playing the ball against his dormitory wall at the Australian Institute of Sport until the early hours of the morning; and
- most incredibly, Craig Johnston, who designed his own training routines after being rejected at 15 years of age for an apprenticeship at Middlesbrough Football Club. Within a few years, he was Britain's most expensive footballer and a regular in Liverpool's dominant team of the 1980's, winning the European Cup in 1984 and the League/FA Cup double in 1986 before retiring at 27 years of age to care for his ill sister.

FIFPro has research that shows of the players identified by the football industry as having the talent to be professionals at 18, 75% are out of the game by the age of 21. According (somewhat controversially) to FIFA, even the world's best clubs have to train many players from the age of 12 just to produce one professional. The average age of professional footballers in Europe is 25.82 years.

The career of the player is indisputably precarious and, by its very nature, the province of the young. When it ends, players face a difficult transition. They often confront physical and mental health issues. They may not be educated or financially ready for life after football. The most important work of players' associations today centres on ensuing players are protected when injured and compensated if they suffer a career ending injury. It also centres on negotiating for a fair share of sport's wealth to be invested in career education and player wellbeing programs, run independently by players for players.

Sports are not obliged to do this. Indeed, athletes are excluded from workers' compensation legislation throughout Australia. Athletes that do not have access to collective bargaining through a well-resourced and independent players' association are not entitled to any legal protection when injured. Athletes, despite being full-time employees in most instances, are not covered by industrial awards like ordinary workers. The performance of an athletic activity is excluded from protection under the *Copyright Act* despite the billions of dollars generated through the exploitation of sporting performances. In generating that wealth, those that run sport and exploit athletic performances and images are not under any legal obligation – absent a collective bargaining agreement – to return it to the athletes in fair proportions.

In contrast, in the last seven months, the Commonwealth Parliament has enhanced athlete specific legislation in anti-doping that, without the intervention of player advocates, would have even overturned an athlete's right against self-incrimination. Sports are now seeking the right to receive information obtained by police through their statutorily supervised investigations to enforce sporting rules in relation to match fixing. Whilst players' associations are at the forefront of the fight against corruption in sport, clearly serious questions arise regarding civil liberties given that sporting governing bodies are not subject to any of the statutory safeguards that oversee the conduct of police investigations.

Why is the situation so unbalanced?

It all comes down to the mystique of sport and the way it is structured and administered and the increasing political influence of sporting bodies.

Simply put, those that run sport often place the perceived interests of sport above not only the rights of athletes, but fundamental human rights. In the views of many influential administrators, human rights run second to the perceived special interests of sport. These views are backed up by monopolistic and oligopolistic sporting structures that make challenging the status quo a dangerous undertaking, especially for those whose short term and precarious careers can be determined by those very same structures.

Since the early 1960's, a battle has been waged between the rights of athletes and the perceived interests of sport. Fortunately, for those that love sport, the decisive battles have been won by the players, whose leaders have better understood the law and economics of sports. Free agency, for example, has not only legally emancipated the players, but triggered an economic boom for sports. Without the courts and the law being on the side of the athletes, this would not have been possible.

As I will explain tonight, not only can sport accommodate the rights of athletes, it is in the best interests of sport to do so.

I will explore these themes by reference to some of the most important issues facing sport today including the threats of doping and match fixing. I will also touch on some of sport's better examples when athletes have used the power of sport to promote human rights for all.

Before doing so, it is necessary to understand the structure of sport and to reflect on the greatest achievements of the player rights movement:

1. freedom of movement;
2. collective bargaining;
3. independent grievance arbitration; and
4. revenue sharing.

I will introduce you to some of the heroes of the athletes' rights movement. As I do so, I would like you to ask yourself a simple question: *"would you sacrifice your career for a matter of principle and the wellbeing of your fellow professional?"*

2. THE MYSTIQUE OF SPORT.

To describe the mystique of sport, the phrase the Europeans use is "the specificity of sport". The phrase – designed to capture sport's undoubtedly important social and cultural roles – is often abused to justify unlawful violations of the rights of athletes.

One would naturally think that, given the youth and precarious nature of the athletic career path, sport would be in tune to the needs of athletes and take proactive measures to protect them.

Yet, from the beginning of professional sport in the 19th century, administrators have taken steps to regulate and control athletes irrationally fearing that any freedom would be a threat to the very existence of sport. In doing this, they have not only regulated athletes as athletes, but as human beings.

This is because of the unique structure of sport. According to Braham Dabscheck, Australia's leading academic on the industrial relations aspects of sports:

"The major reason why clubs act, or more correctly have acted, collectively is due to 'the peculiar economics of professional team sports' (W.C. Neale,1964). Unlike other areas of economic life, sporting contests require the cooperation of competitors to create a product - namely, a game, or a series of games in a 'regular' competition…

"In addition to this, however, it has been argued that if a league is to generate interest, and enhance its income-earning potential, it needs to maximise the uncertainty of the sporting competition…

"The major way in which clubs traditionally colluded was in the labour market. Various leagues, and their constituent clubs, developed employment rules which tied a player to the club he or she originally signed with and/or placed limits on their income … Economists describe this situation, where a player can only negotiate with a single buyer, as monopsony."

In simple terms, sporting organisations are structured so as to exercise great power in their dealings with athletes.

3. THE MOST IMPORTANT RIGHT: FREEDOM OF MOVEMENT

Martin Luther King famously said, *"Freedom is never given to anybody. Privileged classes never give up their privileges without strong resistance."*

In professional team sports, a wide range of controls over the movement of players have been employed from time to time, including:

- the retain and transfer system;
- the reserve clause;
- player drafts;
- zoning;
- permit rules;
- training compensation;
- home grown player rules;
- points systems, whereby players are nominally allocated points and clubs must not contract above that nominal limit; and
- salary caps.

These rules all place restrictions on the economic and sporting freedom of the players. Accordingly, they may be in conflict with the common law doctrine of restraint of trade. In 1894 in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition* [1894] AC 535, at 565 Lord Macnaughten defined the restraint of trade doctrine as follows:

"The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore, void. But there are exceptions. Restraints of trade and interference with individual liberty of action, may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed, it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests

of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

Interestingly, the test is similar in the major sporting jurisdictions of the United States and Europe. Freedom of movement is a right, but not an absolute one. Restrictions can be justified if they are designed to advance a legitimate interest, and go no further than is reasonably necessary in order to do so.

Interference with liberty of action in trading is, of course, contrary to public policy not only because it restricts the personal freedoms we regard so highly but because our economic system depends on them.

It should not therefore come as a surprise that the economics of sports have improved upon athletes being granted their freedoms. Yet, every major legal victory by players was preceded by a passionate call by administrators that the freedom of the player would be the death of the very sport itself.

To put this in the words of some athletes.

St Louis Cardinals baseball player, Curt Flood, in a letter to Major League Baseball Commissioner Bowie Kuhn:

"Dear Mr Kuhn,

After 12 years in the major leagues I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system that produces that result violates my rights as a citizen and is inconsistent with the laws of the United States and the several states.

"It is my desire to play baseball in 1970 and I am capable of playing. I have received a contract from the Philadelphia club, but I believe I have the right to consider offers from other clubs before making any decisions. I, therefore, request that you make known to all the major league clubs my feelings in this matter, and advise them of my availability for the 1970 season."

In reply, Mr Kuhn:

"Dear Curt,

"…

"You have entered into a current playing contract with the St. Louis club, which has the same assignment provision as those in your annual major league contracts since 1956.

"I do not see what action I can take and I cannot comply with the request contained in…your letter…"

Kuhn's rejection of Flood, expected as it was, begat a genuine battle for freedom.

https://www.youtube.com/watch?v=3D_8-BKlgy8

At the same time, the first President of the National Football League Players Association, John Mackey:

> *"My name has long been associated with the cause of free agency in the N.F.L.. What most people don't know is that my commitment stemmed mostly from one incident in the N.F.L. in which I was handed a piece of paper, a contract, and was told to sign it. Of course I didn't, and from that moment of youthful pique evolved the fight by N.F.L. players to choose for whom they work."*

Curt Flood and John Mackey are two examples of a legendary group of players who affirmatively answered my earlier question, *"would you sacrifice your career for a matter of principle and the wellbeing of your fellow professional?"* The personal and professional impact of their decisions were profound and, in almost all instances, career ending or limiting. The legacies they have left for the players that followed are immense, as they have had greater legal and economic freedoms within much better run and commercially stronger sports.

The first major legal victory for free agency came 50 years ago – in 1963 – when England international George Eastham and the Professional Footballers' Association challenged football's retain and transfer system as being an unreasonable restraint of trade. Eastham wanted to move from Newcastle United to Arsenal, and was out of contract. He refused to sign a new contract with Newcastle, but was "retained" by the club. In the words of Newcastle team manager Charles Mitten:

> *"As far as I am concerned, Eastham won't be transferred…If he wants to play football, it will be at Newcastle."*

Eastham learned this officially on 30 June 1960, the last day of his contract. He was not a playing, contracted or paid member of Newcastle United. But he was ineligible to play for anyone else. On 13 October 1960, he, with the backing of the PFA, began legal proceedings. Some five weeks later, his requested transfer was granted, for a fee of £47,000 (players could then earn a maximum of £20/week). By this stage, the whole affair had grown into a test case involving the basic rights of all professional footballers. Eastham allowed his case to be pressed to its conclusion.

Counsel for Eastham at the case said it was curious that players did not appear as assets on the balance sheets of clubs. The judge, Mr Justice Wilberforce, commented dryly, *"Livestock at valuation – it would look a little insulting."*

"No more insulting to an individual than being brought and sold as cattle," Eastham's counsel replied.

Mr Alan Hardaker, The Secretary of the Football League, insisted that the loss of the retain and transfer system would mean complete anarchy. *"People in many parts of the country would very quickly find themselves without a football club."*

Wilberforce J ultimately delivered a legendary judgment, declaring the retain and transfer system as an unreasonable restraint of trade and therefore not binding on Eastham. He referred to the administrators as *"reasonable men whose attitude to their players was as much paternal as proprietary"*. He said the retain and transfer system was:

"…an employers' system, set up in an industry where the employers have succeeded in establishing a monolithic front all over the world, and where it is clear that for the purpose of negotiation the employers are vastly more strongly organized than the employees. No doubt the employers all over the world consider the system a good system, but this does not prevent the court from considering whether it goes further than is reasonably necessary to protect their legitimate interests."

Sadly, the clarity of thinking of Wilberforce J was absent from the Supreme Court of the United States when it came time to decide Curt Flood's anti-trust suit against Major League Baseball.

The *Sherman Antitrust Act 1890* provides:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal…

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanour."

If ever there is a case which shows the power of the mystique of sport, it is *Flood*. I quote Part I of the judgment of the Supreme Court of the United States, delivered by Blackmun J:

"…there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson, Henry Chadwick, Eddie Collins, Lou Gehrig, Grover Cleveland Alexander, Rogers Hornsby, Harry Hooper, Goose Goslin, Jackie Robinson…The list seems endless…"

Yes, it is endless, so His Honour only had time to name 88 players. He continued:

"And one recalls the appropriate reference to the 'World Serious,' attributed to Ring Lardner, Sr.; Ernest L. Thayer's 'Casey at the Bat'; the ring of 'Tinker to Evers to Chance'; and all the other happenings, habits, and superstitions about and around baseball that made it the 'national pastime' or, depending upon the point of view, 'the great American tragedy.'"

Needless to point out that as soon as the judge began to read the judgment of the Court, Miller and Flood knew they were beat. Part I of the judgment was so ridiculous that two of the five justices expressly excluded it from their joint judgments.

A majority of the court concluded that *"Professional baseball is a business and it is engaged in interstate commerce"*. They also found that *"its reserve system [in] enjoying exemption from the federal antitrust laws, … is, in a very distinct sense, an exception and an anomaly"* but refused to overturn precedent from the 1920's holding baseball to be exempt from anti-trust laws on the basis, believe it or not, that it was not interstate trade or commerce.

The prescient comment came in a dissenting judgement. Mr Justice Marshall indicated an alternative legal path for resolving employment issues in baseball and sport. He suggested exploration of federal labour law (the *National Labor Relations Act 1935*) as an alternative to antitrust actions.

Balmain and Australian rugby league international Dennis Tutty challenged the New South Wales Rugby League's equivalent of football's retain and transfer system in *Buckley v Tutty [1971] HCA 71; (1971) 125 CLR 353 (13 December 1971).* Dabscheck describes Tutty as an *"Australian hero".* Like Eastham, his contract with Balmain had expired and he could not play anywhere else unless Balmain gave him permission to do so. The effect of this in restraining player salaries and conditions is plain.

Dabscheck provides an insight into Tutty the man:

> *"Two extraordinary things are associated with his legal action, which was initially heard by the Supreme Court of New South Wales and, on appeal, the High Court of Australia. First, other than for three other players from Balmain – Peter Jones, Laurie Moraschi and Arthur Beetson – who stood out with him for a period in 1969, he did not receive any financial or moral support from any other players from other clubs. Second, he financed the case himself, from income he earnt as an unskilled worker."*

The judgment of the High Court was helpful in at least three respects: (1) it provided guidance in defining the legitimate interests of a sport; (2) it made it clear that it is not for the courts to advise in advance what restraints would be reasonable; and (3) it extended the *Eastham* decision by looking beyond the retention aspect of the system and at the impact of transfer fees.

To quote the judgment of the Court:

> *"It is a legitimate object of the League and of the district clubs to ensure that the teams fielded in the competitions are as strong and well matched as possible, for in that way the support of the public will be attracted and maintained, and players will be afforded the best opportunity of developing and displaying their skill. It is therefore legitimate to aim to provide a system that will ensure sufficient stability of membership to permit those who play for a club to be trained as a team and to develop a team spirit, and that will prevent the stronger clubs obtaining all the best players, thus leaving the weaker clubs with teams that are unable effectively to compete with their stronger opponents…"*
>
> *"In our opinion the rules now under consideration go beyond what is reasonable in two main respects. In the first place, they enable a club to prevent any professional who has played in one of its teams from playing with another club, notwithstanding that he has ceased to play for the club which retains him and no longer receives any remuneration from that club.*
>
> *"…A second objection to the rules in their present form is in relation to the question of transfer fees. Although a club does not wish to retain a player, and is prepared to see him go to another club, it may fix a transfer fee, most of which goes to the club itself, although it may be quite unrelated to any benefit which the player has received from his membership of or association with the club…It is no answer to say*

that the transfer fee may be fixed by reference to what it would cost the club to obtain another player equally skilful, for this is only another way of saying that an employer may restrain an employee from working elsewhere unless he is compensated for the loss of his services. In this respect also the restraint imposed by the rules goes further than is necessary to protect the reasonable interests of the League and its members."

The case that revolutionised Australian rules football involved South Melbourne player Silvio Foschini, who refused to move to Sydney with the relocation of the club. Despite the advice of the High Court in *Buckley*, Crockett J, in an unreported judgment of the Victorian Supreme Court in 1983, could not resist giving some advice to the Victorian Football League in finding for Foschini:

"If the desire is, as claimed to assist the less successful sides by a better access to talented players I should have thought that the "draft" system … would … be a preferable system to zoning in Victoria…"

Foschini's action was bankrolled by St. Kilda. The then Victorian Football League Players' Association – it changed its name in 1989 – played no part in the proceedings of this case. *Foschini* appears to have completely passed the Association by. There is no evidence that it attempted to use *Foschini* as a bargaining lever to enhance players' employment rights, as had occurred in North America and the United Kingdom, following similarly favourable court decisions. Moreover, the Victorian Football League Players' Association hardly had any input into the new employment rules developed by the Victorian Football League in the mid to late 1980s – the salary cap and two player drafts (one, external; the other, internal).

Subsequent collective bargaining agreements in Australian rules football have contained clauses whereby the Australian Football League Players' Association agrees that the league's rules

"including and without limitation, restrictions on the freedom of players to transfer from one Club to another, restrictions on the total payment an AFL Club may give or apply for the benefit of a player … are necessary and reasonable for the purpose of protecting the legitimate interests of the AFL."

The relationship between players' legal victories for freedom and collective bargaining is an issue of fundamental importance to player rights and something I will came back to.

Sport's employment rules returned to the High Court of Australia again in the early 1990's, again because of a labour dispute in the New South Wales Rugby League. Unlike *Tutty* and *Foschini*, *Adamson's case* was a class action coordinated by the Association of Rugby League Professionals and its former player and barrister President, Kevin Ryan. At question, rugby league's newly introduced internal draft. A matter dispensed with on appeal, with Hill J at first instance finding the restraint to be reasonable. The Full Court of the Federal Court dealt with the matter succinctly. In the words of Wilcox J:

"…the right to choose between prospective employers is a fundamental element of a free society. It is the existence of this right which separates the free person from the serf."

In 1995, I had my first opportunity to tackle such a case. A school friend of mine, Kimon Taliadoros, then a Socceroo and the National Soccer League's leading goal scorer, sought to transfer from South Melbourne to Marconi when out of contract. The regulations stipulated that South Melbourne was entitled to a compensation fee for the training and development of Taliadoros. Without the funds to launch Supreme Court action, we innovatively took a number of steps.

First, we campaigned hard through the media and within the game. A *Four Corners* program into player related transfer corruption in Australian soccer prompted the then Australian Soccer Federation to call an independent inquiry to be chaired by the Hon Donald Stewart, a former NSW Supreme Court judge and head of the National Crime Authority. His report famously quoted Shakespeare's *The Tempest* and that only a *"sea change"* could save Australian soccer. He found that the culture of corruption within the game started with the view that players were the property of clubs, to be bought and sold accordingly. He recommended that soccer's compensation fee system be abolished within two years.

Second, our legal action involved a Full Bench of the Australian Industrial Relations Commission, where we could meet our own costs and not be responsible for those of the Federation and the clubs. We applied for an industrial award to abolish the compensation system. On 9 June 1995, the Commission found that the system should be abolished by the end of 1996 and ordered the parties to negotiate on all terms and conditions of employment. In so finding, the Commission acknowledged the objectives behind the system (competitive balance and encouraging the training and development of young players) were objectives shared by the players. However, the system:

> *"operates in many instances unfairly towards players, has little or anything to do with the training and development of a player…treats players as if they were the property of their club …(and impinges) on the freedom to choose one's employer…The system in its present form should be abolished…"*

Third, we organised the players. By being willing to negotiate, we secured a comprehensive collective bargaining agreement for all NSL players that addressed all aspects of their employment.

Fourth, we campaigned hard politically. A Senate Committee had stronger reservations about the compensation fee system than even Stewart and the Australian Industrial Relations Commission, and recommended the system's immediate abolition.

Six months later came arguably the most important sports law decision of all time. The *Bosman* ruling has revolutionised football.

The case, funded by FIFPro, challenged football's training compensation and transfer system and the imposition of quotas on foreign players within European professional leagues. The legal case was based on the then Article 39 of the *Treaty Establishing the European Community*:

> *"1. Freedom of movement for workers shall be secured within the Community.*
>
> *"2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*

"3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission."

Advocate General Lenz, on the quota system:

"No deep cogitation is required to reach the conclusion that the rules on foreign players are of a discriminatory nature. They represent an absolutely classic case of discrimination on the ground of nationality. Those rules limit the number of players from other Member States whom a club in a particular Member State can play in a match. Those players are thereby placed at a disadvantage with access to employment, compared with players who are nationals of that Member State."

On the compensation system:

"…that presupposes precisely that a player can be regarded as a sort of merchandise for which a price is to be paid. Such an attitude may correspond to today's reality, as characterized by the transfer rules, in which the 'buying' and 'selling' of players is indeed spoken of. That reality must not blind us to the fact that this is an attitude which has no legal basis and is not compatible with the right to freedom of movement … I also have considerable doubt as to whether a system which ultimately amounts to treating players as merchandise is liable to promote the sporting ethos…"

According to Dabscheck, the Advocate General envisaged two requirements which could potentially sustain a system of *"reasonable"* transfer fees. Firstly, such fees would be linked to amounts actually expended by clubs in training players. Secondly, a fee could only be *"charged"* for the first change of club where the previous club had trained the player. The Advocate General proposed an alternative solution for promoting sporting equality, consistent with Article 48 of the Treaty of Rome. That solution was revenue sharing between clubs – *"part of the income obtained by a club from the sale of tickets for its home matches is distributed to … other clubs. Similarly … income received from awarding … television [rights] … could be divided … between … clubs."* The Advocate General pointed to the material interdependence that existed between competing teams. *"Each club"*, he suggested, *"needs the other … in order to be successful. For that reason each club has an interest in the health of the other clubs … If the league is dominated by one overmighty club, experience shows that lack of interest will spread."*

4. COLLECTIVE BARGAINING, GRIEVANCE ARBITRATION AND REVENUE SHARING

There has been less litigation through the Courts in professional team sports in Australia and football since the *Foschini, Adamson*, *Taliadoros* and *Bosman* rulings. The reason has been the emergence of the players' associations, the advent of collective bargaining and, with that, independent grievance arbitration and revenue sharing, which have enabled the legal and economic rights of players to be preserved and some modified restraints of freedom of movement retained.

We have to go back to Major League Baseball. Marvin Miller, in negotiating the first collective bargaining agreement (CBA) for the Major League Baseball Players Association insisted on grievance arbitration. Miller, being from the United Steelworkers Union, knew this was a standard condition in US labour relations. It simply meant that disputes would be resolved by independent arbitration through a panel or by an arbitrator equally appointed by management and the union. Management ultimately agreed to this, provided the Commissioner retained the power to rule on matters related to *"the integrity of the game"*.

To quote Miller:

> *"At the time (management) agreed to grievance arbitration, (they) didn't see the eventual cost to them of this 'non-economic' issue. But this victory was as important as any we would win. Any collective bargaining agreement which can't be enforced by binding, impartial arbitration (or by a strike) isn't worth the paper it is written on."*

In addition to ensuring enforcement, grievance arbitration can lead to the development of a sport's own *"jurisprudence"*. This is how Miller won free agency for MLB players.

Clause 10A of the MLB Uniform Players' Contract provided:

> *"... the Club may tender to the Player a contract for the term of that year by mailing the same to the Player. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, <u>the Club shall have the right ... to renew this contract for the period of one year on the same terms</u>, except that the amount payable to the Player shall be such as the club shall fix in said notice provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year."* (emphasis added)

In this clause, lay baseball's reserve system. The owners had long believed that by exercising the option and renewing the contract for a year, the option clause itself was renewed, enabling the club to effectively renew the contract for the entirety of a player's career. When two players, Andy Messersmith and Dave McNally, had played out their option years, the MLBPA filed a grievance seeking a declaration that the option could be renewed only once and, accordingly, both players were free agents.

Arbitrator Peter Seitz, whilst stating that this was a matter best resolved through collective bargaining, found for the Players Association, pointing out that the option could

only be exercised once. His construction of the surrounding rules concluded that players could only be reserved if contracted.

And so, the reserve system died. And the players became free agents.

Miller, ever the economist, quickly compromised. Concerned about an oversupply of free agents on the labour market which would drive down wages, Miller agreed that clubs could reserve players for up to the first six years of their careers. Players' salaries soared, but so too did the economics and profits of baseball and its owners. And so did competitive balance:

http://www.youtube.com/watch?v=B1NY5HfZg1I&feature=youtu.be

At the global level, FIFA and FIFPro reached a settlement agreement in 2001, six years after the *Bosman* ruling. Not unlike Miller's compromise with baseball's billionaires, FIFPro's agreement contains three key provisions.

First, training compensation, based on actual training cost, is payable only up the season in which a player turns 23.

Second, a player is free to move whenever his contract has expired. He is also free to sign a new contract with another club in the last six months of his current contract, so that he may plan his career.

Third, any employment related dispute of an international dimension can be referred to a local labour court or to the FIFA Dispute Resolution Chamber (DRC). The FIFA DRC will then make an award to resolve the dispute, which will be enforced within the football framework. For instance, a club that refuses to comply with an award will face a caution, then the deduction of premiership points and, if needed, relegation.

The jurisprudence of the FIFA DRC has developed to provide vital protections for players. For instance, despite contractual provisions to the contrary, the FIFA DRC jurisprudence clearly provides that:

- clubs cannot exercise unilateral options;
- clubs cannot terminate the contracts of players because of injury;
- clubs cannot terminate a player's contract because they decide he is "no longer good enough"; and
- a player can terminate a contract and move freely with compensation if he is not paid on time and has given notice to the club. If no time is stated in the contract, the time is three months.

In 2012, FIFA opened 3,027 cases, and handed down 2,379 decisions. Each month around 183 cases were waiting to be dealt with. Players now experience serious delays of a number of years (the Australian PFA recently received a judgment in favour of a player for a matter frilled in 2009). This is now being addressed.

A second great breakthrough under collective bargaining has been revenue sharing. This started in basketball in 1984/85, when the National Basketball Association under Commissioner David Stern reached agreement with the National Basketball Players' Association to cap player earnings to promote competitive balance and the economic

viability of the competition and its teams. Vitally, the cap is calculated as a percentage of the "Basketball Related Income ("BRI")" of the league and its teams.

The National Football League (from 1993) and the National Hockey League (from the resolution of the 2004/05 lock out) have followed suit.

In Australia, player earnings in cricket and rugby are determined by a defined share of revenue stated in the CBA. In the Australian Football League, the National Rugby League and the A-League, salary caps are employed which are informed by the principles of revenue sharing. Accordingly, a share of cricket's massive new broadcast deals will automatically flow through to the players. In the other sports, the CBAs and the broadcast deals are aligned to ensure players payments and benefits are renegotiated with each new broadcast agreement.

However, the salary cap and the share of revenue which should be shared with players is now the most contentious issue in professional sports in the United States, as the following table shows:

	Salary Cap/ Revenue Sharing with Players	**Industrial Tactics in Most Recent CBA Negotiation**
NFL	Yes/ Yes	Lock out (i.e. employer instigated work stoppage) to reduce the players' share of revenue.
NBA	Yes / Yes	Lock out to reduce the players' share of revenue.
MLB	No/ No	CBA without strike or lockout date set – management and union committed to revenue sharing, luxury tax and strategic engagement for 3rd consecutive CBA
NHL	Yes/ Yes	3rd straight lock out to reduce the players' share of revenue.
MLS	Yes/ No	Strike/lock out narrowly avoided – management holds the cards under single entity structure devised to protect restraints.

In the midst of the recent major lock-outs in the National Football League and the National Basketball Association, Major League Baseball and the MLB Players Association signed a new Collective Bargaining Agreement through to 2016, guaranteeing 21 years of labour peace in the sport that has a history of the most bitter player relations affected by industrial action by both sides. On 26 November 2011, Jon Pessah writing in *"The New York Times"* commented on how three key players in American baseball – MLB Commissioner Bud Selig, former MLBPA Executive Director Don Fehr and Yankees owner the late George Steinbrenner – forged two decades of labour peace:

"Sometime early in Bud Selig's celebration of baseball's new collective bargaining agreement on Wednesday, he wondered if the two sides had needed to go through the pain of 1994 in order to achieve the peaceful — and very profitable — coexistence they enjoy today. It was almost certainly meant as a rhetorical question. Selig answered with a casual "perhaps." But there is nothing rhetorical about the question. And the answer to it is a most emphatic yes…"

"Selig, whose single greatest achievement as baseball's commissioner is unifying the owners under the revenue-sharing banner, learned to stop treating Fehr, the leader of the players union, as an existential threat. Make no mistake, Selig's decision in 1994 to end one of the game's extraordinary seasons and shutter a World Series was all about driving Fehr from the game and breaking the union."

"Not only did management adopt an idea developed by the players, it gave the union the credit it deserved. Gone is the acrimony that held back the game for so long…"

"The experience taught Fehr that to forgive and forget was not only noble, but necessary if he truly wanted the game to grow. It's doubtful that Fehr and the union staff — including his former assistant Michael Weiner, the union's current executive director — ever learned to respect Selig… But Fehr did learn how to keep his personal feelings from getting in the way of making a sensible deal."

The key features of Major League Baseball's "new deal" centre on:

- innovation, mutual respect, trust and growth;
- revenue sharing between the league and the clubs (not players);
- a luxury tax, whereby high payroll clubs must contribute to the other clubs;
- an industry growth fund; and
- no salary cap, with the retention of free agency and salary arbitration rights.

But baseball's partnership between sport and its players needs to be placed in context. The National Football League, for example, locked its players out from 12 March until 25 July 2011 and, was so advanced in its planning for the cancellation of the 2011 season, it had negotiated its broadcast rights agreements accordingly. The 2011 NBA lockout lasted for 161 days and reduced the season from 82 to 66 games. The 2004/05 National Hockey League lockout cancelled the entirety of what would have been the 88th season of the NHL, and the lockout of 2012/13 reduced the season from 82 to 48 games.

In a 2011 interview with *Sports Illustrated*, Marvin Miller said:

"I'm proudest of the fact that I've been retired for almost 29 years at this point, and there are knowledgeable observers who say that this might still be the strongest union in the country…Succeeding generations of players know so much more about trade unionism, solidarity and what it can produce than did their predecessors."

Unfortunately, for the athlete who is not so represented, he or she still faces, alone, the *"united monolithic front"* Wilberforce J wrote of 50 years ago.

5. THE CHALLENGES OF CORRUPTION AND CHEATING

(a) Anti-Doping

The fight against doping in sport is lead globally by WADA, the World Anti-Doping Authority. WADA, which is responsible for the implementation of the World Anti-Doping Code, which was first adopted in 2003 and became effective in 2004. The Australian Anti-Doping Authority (ASADA) is responsible for the implementation of the WADA Code within Australia. In short, it is a condition of government funding that Australian sports each adopt an anti-doping code which is compliant with the requirements of the WADA Code.

It is not the purpose of my presentation to go into detail about the WADA Code. However, it has a number of concerning elements from an athletes' perspective:

- strict liability;
- mandatory penalties;
- a broad definition of doping (for example, the prohibited substance list includes drugs that are not performance enhancing); and
- an invasion of privacy, with athletes having to advise authorities of their whereabouts and to be available for urine or blood testing at any time.

For example, Clause 2.1 makes it an offence for an athlete to have a prohibited substance in his or her body. According to the commentary in the Code:

> *"Under the strict liability principle, an Athlete is responsible and an anti-doping rule violation occurs, whenever a Prohibited Substance is found in an Athlete's sample. The violation occurs whether or not the Athlete intentionally or unintentionally Used a Prohibited Substance or was negligent or otherwise at fault."*

Under Clause 10.2, a first violation is a penalty of two years ineligibility. WADA is pressing for this to be increased to four. Defences are available not to avoid conviction but to reduce penalty. The circumstances must be *"truly exceptional"* and even being administered with a prohibited substance by a medical practitioner without the athlete's knowledge would not suffice, as *"Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given Prohibited Substances"*. Similarly, *"sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates"* as *"Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink"*.

Of course, this is an absurd concept in professional team sports. It is suggesting that the employer must obey the reasonable directions of the employee. The normal result for an inadvertent doper is a reduction of a two year ban to one. For many, this will be career ending.

These invasions of the rights of athletes could be justified if the system was effective. Unfortunately, it is not.

WADA Director General David Howman told Jacquelin Magnay in *The Telegraph* on 18 August 2011 in the lead up to the 2012 London Olympics:

"Statistically the numbers of people being caught is between one to two per cent, that's the numbers of positives against the number of tests. But the number of people doping are in the double digits."

Double digits? Mr Howman has told me that the first digit is not a one? The authority for this statement is not known. It would suggest, however, that over 13,000 professional footballers are presently doping. This is preposterous.

WADA is a powerful global body. Organisations such as FIFA and the IOC both endorse it. WADA is not accountable, and its anti-doping measures are sadly ineffective.

Comprehensive statistical analysis of the effectiveness of WADA's anti-doping policies is not available. UNI Sport Pro, the fledging world athletes' union representing 100,000 athletes across all sports, has undertaken its own research. Its analysis of the incompletely available statistics reveals:

- of 277,928 tests conducted in 2009, 758 were positive (0.27%);
- of 258,267 tests in 2010, 1,393 were positive (0.53%); and
- 3 out of 2,216 out of competition tests were positive (0.13%).

Maciej Hennenberg of Adelaide University earlier this year released research that shows that an annual random test of a doping athlete had a 3% chance of returning a positive result. If the test was conducted monthly, the chances would rise to 33%. 50 tests a year would be needed at a cost of cost $50,000 per athlete. Indeed, already, the anti-doping effort is spending $500,000,000 completing 250,000 tests each year.

WADA itself is now reviewing its own ineffectiveness. Accordingly to former WADA President Dick Pound, the problem is not one of science and it is profound:

"…despite the significant increase in testing and the ability to detect more sophisticated substances, there has been no apparent statistical improvement in the number of positive results…(L)ess than 1% of the tests produce adverse analytical findings. There has not been any statistical improvement since about 1985."

Either the system is failing, or those responsible for administering the system are overstating the problem.

Athletes and their unions are committed to doping free sport. No sporting stakeholder is as affected and disadvantaged by cheating more than the athletes. Surely, engaging with the athletes must be part of the solution.

In response to moves to establish a world athletes' association, it is reported that WADA Chairman John Fahey is concerned that, *"giving such associations credibility and recognition would only encourage them to develop into a more prominent position than he believed they should"*, that he *"in no way saw their role as being representative of sportsmen and women"* and that he has *"urged all members not to give them any oxygen"*. Similarly, Mr Pound, a member of the WADA Foundation Board with Mr Fahey, is adamantly of the view that the world players' federation, to be elected through democratically elected and player driven associations, *"was not the body that spoke for them (WADA) or their athletes"* as other bodies such as athletes' commissions had been elected by *"people who had a say in what was going on"*, namely, WADA and its affiliates.

It is remarkable that such a position is taken without the opening of dialogue when a potential partner speaking for 100,000 athletes emerges that has the same goal as WADA – namely, to ensure that sport is not corrupted by doping. Of course, we would like that objective to be advanced in a balanced way.

(b) Match Fixing

Match fixing is the biggest threat to sport today and, in my view, a much greater concern than doping.

FIFPro's extensive work in Eastern Europe culminated last year in the release of the FIFPro Black Book, so named because its findings reflect sadly on football. While some of the problems the players face are very basic including a lack of written contracts, of greater concern is that some of the players' most serious problems are widespread. These include:

- 41.1% are not paid on time, and around 5% have to wait more than six months for their salaries;
- almost 93% of non-payment issues are due to the financial circumstances of the clubs;
- every ninth player has been the victim of a violent act, mainly cause by fans (55.8%), but with over 22% of acts being committed by the club's management or coach;
- more than 10% of players are subjected to bullying and harassment, mainly by club management (64%) or the coach (24%);
- almost one in ten report examples of racism and discrimination, mainly by club supporters; and
- alarmingly, 11.9% stated they have been approached to consider fixing the result of a match and more than double that number – 23.6% - are aware that match fixing has taken place in their league.

FIFPro's experience is that corruption does not start with the athletes. Match fixing starts with a relationship between organised crime and betting and crosses borders. International cooperation between policing authorities underpinned by national legislation that makes match fixing a crime is essential. Information sharing is important, both between policing authorities and between sports and betting agencies. Sports must report unusual betting patterns to policing authorities.

The Australian Athletes' Alliance (AAA) believes any effective policy response must see the players, the players' associations and the AAA as part of the solution, not the problem. Athlete buy-in and ownership is simply essential. In particular, individual player engagement and the development of a sense within the athlete that he or she is a person first and an athlete second is essential. This responsibility must sit independently with the players' associations due to the unique relationship of trust the athlete has with his or her players' association. It is healthy, as we have seen, for athletes to question their environment and the controls that are placed upon them.

The AAA is strongly encouraging government to partner the AAA to deliver the necessary education and empowerment programs so that the athletes, whilst the end point of corruption, are the starting point for the fight against it.

6. WHEN ATHLETES' RIGHTS TRANSFORM SPORT

In closing, I would like to reflect on when a stand taken for human rights by athletes transforms sport.

Players' associations are, at their heart, human rights organisations, and they are inspired by the athletes who have gone before and the marks that have left on their profession, their sport and society.

For example, the National Hockey League Players' Association on the rights of LGTB athletes:

http://www.youtube.com/watch?v=SXoTRTAw6Dc

NFL player Scott Fujita mentioned Jackie Robinson, the first African American to play Major League baseball, Billie Jean King, who established equal pay in women's tennis and fought for the rights of gay and lesbian athletes, and Muhammad Ali, who fought for his race and his religion, and gave up his world title in order to do so. The genuineness of his stance was upheld unanimously by the Supreme Court of the United States who found him to be a conscientious objector in refusing to be drafted into the US army.

The stands taken by these athletes required incredible courage. In recalling the 20th anniversary of the famous "battle of the sexes" match between Bobby Riggs and Billie Jean King which was only last Friday, *The Washington Post* suggested that *"often the participants in culture-tilting moments look back later and say they never realized at the time how big it would be."*

In the worlds of Billie Jean King:

"I knew how important it was. I did know. I felt it. I knew it the moment I said yes to Bobby. (I remember saying then). It's going to touch the emotions of our preconceived ideas about gender and the culture we live in...(And) I thought it would set us back 50 years if I did not win that match. It would ruin the women's tour and affect all women's self esteem."

She won.

King established a players' union, which became the WTA, established equal pay for women in tennis, became the first woman athlete to earn $100,000 in a year, founded WomenSports magazine, founded the Women Sport Foundation and, after admitting her bisexuality in 1981, lost millions in endorsements. She believes she was born with a destiny to work for gender equity in sports.

Life magazine voted her one of the 100 most important Americans of the 20th century. Not American athletes. Americans. Only four athletes made the list, including Jackie Robinson and Muhammad Ali.

We have our heroes at home here in Australia.

Catherine Freeman, Michael Long and Nicky Winmar. I put Dennis Tutty and Kimon Taliadoros into that category. Individuals willing to sacrifice a career for a principle.

And let's not forget the late Peter Norman, Australia's fastest man:

http://www.youtube.com/watch?v=qUrxBwa4Mfo

Thank you