

SPORTING LABOUR MARKETS AND THE COURTS

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'...the present system in Australia is... monolithic...because it confers on clubs throughout the country 'title' to every footballer without any reciprocal obligations 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 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 rule'.

Mr. Justice Crockett, *Foschini vs V.F.L. and South Melbourne* (mimeo), p.25.

I

Professional team sports have traditionally been characterised by a series of monopsonistic labour market control which have severely limited the mobility and economic freedom of players. The employment rules instituted by the Victorian Football League (V.F.L.) are illustrative of the controls which pervade sporting labour markets. The organisational lynchpins of the labour market for V.F.L. footballers are zoning, the transfer system and the use of maximum wages.

Each club has been allocated a metropolitan and country zone - the latter introduced in 1968 - which gives them an exclusive right to employ prospective players residing in their zones. A prospective player wishing to play V.F.L. football has the club he may play for determined by the area in which he lives. A prospective player who moves from one zone to another in an effort to play with another club has to wait three years to become eligible to play for it. So far, no player has used this route to change

clubs. Although the V.F.L. has attempted to create zones equal in terms of prospective young men skilled enough and prepared to play V.F.L. football, it readily admits it has had little success in this quest. The value of zones as recruitment areas vary enormously and several clubs have been very critical of the zones allocated to them.

The only exception to zoning has been the recruitment of interstate players. Before 1982 each club was able to recruit two interstate players a year, subject to the satisfactory negotiation of a clearance and/or transfer fee with the player's interstate club. One of the results of this was that interstate recruits were able to bargain with twelve clubs, and, if highly skilled, were able to negotiate attractive contracts; while zoned players, who could only negotiate with one club, were forced to accept less attractive offers from clubs. In 1982 the V.F.L. introduced a drafting system, a procedure widely used in American professional team sports, for interstate players. Interstate players, who have played 100 games with their club, will be drafted by V.F.L. clubs, at a stipulated fee (initially set at \$40,000), with the first choice going to the club that finished at the bottom of the ladder, second choice to the second bottom club, and so on with the premiership team having last choice. Each V.F.L. club was only allowed to draft two players each year; however clubs were not prevented from trading draft choices and drafted players.

Once a player signs with a club the transfer system binds the player to his signing club for life. A player who wishes to be employed with another club - whether it be a V.F.L. club or a club in another league - must first receive permission from his current club and the V.F.L. What this means, in effect, is that if a club wishes to secure the services of a player from another club, they will have to pay the owning club a transfer fee. In recent years the size of transfer fees have grown enormously - in 1983 Collingwood paid Richmond \$185,000 to secure the services of ruckman/forward David Cloke. The V.F.L. and other Australian football leagues, with the exception of the Victorian Football Association (the V.F.L. broke away from the Association in 1897 and the two have shared an open enmity ever since), have entered into a reciprocal arrangement concerning inter-league clearances under the

auspices of the National Football League (N.F.L.). In 1972 the V.F.L. introduced a ten year rule to allow long serving players a free transfer to the club of their choice. The rule was subsequently rescinded in 1974 after a handful of players managed to change clubs and negotiate higher salaries. In 1977 the V.F.L. introduced an appeals board to enable players to appeal against the refusal of their clubs to grant them a transfer to another club. A handful of players managed to change clubs through this mechanism. The appeals system, however, fell into disuse. At the end of 1982 the V.F.L. re-introduced a revamped appeals system.

On top of these mobility restrictions the V.F.L. has also sought to place limits on the income which players can earn. Over the years a series of systems of maximum wages have been adopted. However, in recent years agitation from players, both individually and collectively, with the connivance of the clubs, has resulted in substantial relaxation in the scope of these rules. The V.F.L. has also introduced a 'poaching' rule where a club can be fined a maximum of \$100,000 for negotiating with a player of another club without the permission of the player's club. Clubs have managed to evade this rule by using an intermediary to negotiate with desired players.¹

V.F.L. and club officials, and the officials of other professional team sports, have argued that sporting labour markets need to be controlled to ensure the attainment of sporting equality and the survival of their sport. They argue that in the absence of such controls the rich clubs would secure the most skilled players, and, though their continual domination of the competition, spectators would lose interest in the sport. Subsidiary arguments used to justify controls have been the need to maintain team stability, the minimisation of wages and costs, and a belief that clubs should be compensated for the loss of players.

Players in both the V.F.L. and other professional team sports, individually and collectively,² have sought to roll back the various labour market controls which have limited their economic freedom. This paper is concerned with examining the reaction of the courts³ to the unique employment relationships which occur in professional team sports. This issue has gained prominence with the decision in April 1983 of Mr. Justice Crockett of the Victorian

Supreme Court which, in the case of *Foschini vs V.F.L. and South Melbourne*, found the V.F.L.'s employment rules and regulations to be an unreasonable restraint of trade.

II

The first case concerns the operation of the employment rules of the New South Wales Rugby League (N.S.W.R.L.). Greg Hawick was a contract player with the Wagga Kangaroos Club, which played in a country league, in 1957. While still on contract with Wagga Kangaroos he signed a contract with North Sydney, a club in the Sydney metropolitan league, to play with them for the 1958, 1959 and 1960 seasons. To be able to play with North Sydney, Hawick, under the then qualification rules, would need to have resided in the North Sydney zone for a period of 28 days and gain a clearance from Wagga Kangaroos. Hawick subsequently received a better offer from Parramatta and unsuccessfully sought a release from his contract with North Sydney. He then signed another contract with Wagga Kangaroos on the understanding that he would need to convince North Sydney that it should release him from his contract. It should be noted that at this stage Hawick had neither sought nor gained a clearance from Wagga Kangaroos to play with North Sydney. Hawick then wrote to both the N.S.W.R.L. and North Sydney requesting to be released from his contract with North Sydney. At meetings on 10 March 1958, at which Hawick was not present, the qualifications committee, and then the general committee of the N.S.W.R.L., ruled that Hawick was bound to North Sydney, had disqualified himself for the 1958 season, and was required to residentially qualify himself to play with North Sydney for seasons 1959 and 1960, unless released by North Sydney.

Subsequently, Hawick, with the backing of Wagga Kangaroos, sought relief in the Equity Court of New South Wales. Mr. Justice McLelland found that the N.S.W.R.L. had been heavy handed in its treatment of Hawick. Mr. Justice McLelland used the N.S.W.R.L.'s clearance rules to protect Hawick from the penalties which had been imposed upon him as a result of his contract with North Sydney. He ruled that Hawick was still a member of the Wagga Kangaroos club,

that Hawick had not satisfied the residential qualifications required to play with North Sydney, and had not been cleared by Wagga Kangaroos to North Sydney. Furthermore, Mr. Justice McLelland was far from impressed that Hawick had not been given a chance to defend himself against his disqualification, and that a one year disqualification from the game imposed too heavy a burden on Hawick's livelihood. With respect to contracts he recommended to the N.S.W.R.L. that 'it would be a wise thing if specific rules were promulgated to deal with situations arising under...contracts instead of trying to deal with such situations under rules in general terms'.⁴

The labour market for British soccer players made use of a retain and transfer system. As the end of each season approached clubs prepared two separate lists regarding players. The first was of those players the club wished to retain; the second, players placed on the transfer list. To retain a player a club was only obliged to offer terms equal to a minimum 'retaining' wage. If a player did not accept the terms offered by his club he was not entitled to any pay. Furthermore, even though the player had no contract and received no income from the club, he was not permitted to seek employment with another club. Transfer listed players were not entitled to receive any wages from their club. Unfortunately for the player it was the club which determined the player's transfer fee, and, despite a right of appeal to the Football League's (F.L.) management committee for a reduction, it could be set at a level so as to discourage potentially interested clubs from purchasing the player. In this situation a player could join a non-league club, but if he wished to return to league football with a new club, that club might now have to pay two transfer fees - one to his former league club and another to the non-league club. Although the player was not receiving any income from the club, not having a contract, he was nonetheless still owned by the club.'

George Eastham was a player with Newcastle United during the 1959/60 season.⁶ In December 1959 Eastham requested Newcastle United to place him on the transfer list. Newcastle United refused this request and subsequently placed Eastham on their retain list for the 1960/61 season. Eastham, in turn, refused to sign a

contract and continued his attempts, via appeals to the F.L. management committee, to be placed on the transfer list. Eventually Newcastle United relented and allowed Eastham to be transferred to Arsenal. Eastham sought a declaratory judgement from the courts that the F.L.'s retain and transfer system was an unreasonable restraint of trade.

Mr. Justice Wilberforce described the retain and transfer system as:

'...an employers' system, set up in an industry where the employers have succeeded in establishing a united monolithic 'front all over the world, and where it is clear that for the purpose of negotiation the employers are vastly more strongly organised 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'.⁷

He found the retain system to operate substantially in restraint of trade. Mr. Justice Wilberforce said:

'There may be players who have shown quite plainly that they are not going to continue with a particular club or to sign with it, and in their case, placing them on the retain list does substantially interfere with their right to seek other employment - and I emphasise this - does so at a time when they are not employees of the retaining club. That seems to me to operate substantially in restraint of trade'.⁸

However, Mr. Justice Wilberforce did not find the operation of the transfer system alone, and by implication the payment of transfer fees, to be overly objectionable. He explained his reasons for this in the following terms:

'...placing a player on the transfer list and asking a fee for him, though it prevents a player from going to another league club unless the fee is paid, leaves the player with the right to have the fee reduced or eliminated (which is often obtained in practice) and leaves him free to seek employment outside the league. There is a restraint here, but it would not require so much to justify it.

The case for it is really this, that within the league it provides a means by which the poorer clubs can, on occasions, obtain money, enabling

them to stay in existence and improve their facilities; and, rather more generally, that it provides a means by which clubs can part with a good player in a manner which will enable them to secure a replacement. One player cannot easily be obtained in exchange for another; the transferee club may not - indeed by the nature of things probably will not - have a player to offer in exchange: by giving cash, the transferer club, is able to look all round the league for a replacement. Given the need to circulate players, money is necessarily a more efficient medium of exchange than barter, and the system helps both money and players to circulate. Looked at in this way the system, might be said to be in the interests of players themselves'.

Mr. Justice Wilberforce concludes, however, that the transfer system was objectionable when combined with the retain system. He said:

'When it is so combined - that is, when a man is retained and it is made known that this club is open to offer, or when a man is put on both the transfer and the retain list - he cannot escape outside the league, all he can do is (in the latter case) to apply to have the transfer fee reduced. But even if it is reduced, no club in the league may pay it, and yet he cannot go outside'.

The F.L. mounted a number of arguments in support of the continued operation of the retain and transfer system. Its major arguments were that the system encouraged clubs to invest in the coaching and training of younger players, enabled the attainment of sporting equality, maintained team stability and prevented the poaching of players. With respect to the training argument Mr. Justice Wilberforce found little evidence 'that clubs in general do spend any large sums in training professional players, other than apprentices'. Furthermore, he could not find any evidence that Newcastle United had expended the profit they had made in transfer fees in the buying and selling of Eastham 'in training the plaintiff to his present pitch of excellence'.¹¹

Mr. Justice Wilberforce also concluded that the retain and transfer system had not brought about the attainment of sporting equality. He said:

'Under the existing system the richer clubs - which are to be found in the larger centres of population - already tend. to secure the better players; this is simply because, both from bigger gate-money and from the contributions of local supporters of affluence, the clubs in the larger centres inevitably enjoy greater resources, and because the best, if not the only way to use those resources is to buy players with them. It is not established to my satisfaction that any substantial change in this respect would be brought about if the retention system were abolished'.

And he pointed out that staggered long term contracts could be used by clubs to ensure that their players are not attracted to play with other, richer clubs. He said:

1 it was open to a club which desired to prevent a player from being bought away from it by a richer rival to give the player a longer-term contract, and that by staggering the length of contracts, clubs could ensure that they could always at the end of any season be left with a nucleus'.¹²

Similarly, Mr. Justice Wilberforce advocated the use of staggered long term contracts to help maintain team stability and/ or prevent the poaching of players by other clubs.

The significance of *Eastham* is that it goes to the heart of the labour market controls which have governed the employment of professional team sportsmen. It rejects the F.L.'s arguments justifying controls - in particular, that such controls have helped to achieve sporting equality - and canvasses the notion that the conflicting interests of the league, clubs and players could be more satisfactorily achieved through the use of staggered long term contracts. The major thrust of *Eastham* is its rejection of the controls that are placed on the mobility of players to move to other clubs/employers. A club cannot stop a player who they are not paying and/or do not have on contract from seeking, and ultimately gaining, employment with another club. It was less critical, however, with respect to the issue of compensation/ transfer fees. Mr. Justice Wilberforce was prepared to countenance the existence of transfer fees - he did not consider the question of why a player should forego some of the income which his new club is prepared to pay - in the form of a transfer fee - to acquire

his services from his old club - as long as players were able to seek employment with other clubs once their contract with their previous club had expired.

The next three cases involve challenges to the labour market controls of rugby league. Until the end of the 1960s rugby league in New Zealand was an amateur code. In 1965, player Blackler, who had represented New Zealand at international level, took up residence in Australia and unsuccessfully sought a clearance from the New Zealand Rugby Football League (N.Z.R.F.L.) to play with a professional club of the N.S.W.R.L. While the N.Z.R.F.L. was prepared to clear Blackler to an amateur Australian club, it would not allow him to play professionally because of fears that the best New Zealand players would be attracted to Australian clubs. Blackler sought relief in the Supreme Court of New Zealand.

While Mr. Justice Perry found the decision of the N.Z.R.F.L. to be a restraint of trade, he believed that the restraint was reasonable and in the interests of the parties and the public.¹³ Blackler subsequently had this decision reviewed in the Court of Appeals. The Court quashed the earlier decision of Mr. Justice Perry in a 2/1 split decision. The minority, Mr. Justice Turner, argued that the appeal should be dismissed on the grounds that New Zealand courts had no jurisdiction to restrict restraints of trade which operated *abroad*. The majority, President North and Mr. Justice McCarthy, on the other hand, rejected this narrow approach to the restraint of trade doctrine. They were fearful that if Mr. Justice Perry's decision was upheld, it would be used as a precedent by New Zealand employers to stop their employees from seeking overseas employment. They believed that New Zealanders should not be denied such a right.¹⁴

During the 1966 and 1967 seasons player Elford was a member of the Western Suburbs club. He entered into an oral contract to again play with Wests - though, as will be seen below, the question of the contract's length was in dispute and was crucial to the decision handed down in this case. At the end of 1968 Elford sought a clearance from Wests to play with another club. Wests and, on appeal, the qualifications and permit committee of the N.S.W.R.L., refused to grant this request. Elford took the matter to the

Supreme Court of New South Wales, with his counsel placing great reliance on *Eastham*.

In contrast to *Eastham* Mr. Justice Hardie adopted a narrow approach to this case. He noted, as distinct from *Eastham*, that Elford was 'suing...on his own behalf. He does not seek relief in a representative capacity'. Mr. Justice Hardie decided that he would:

'...confine any declaratory relief that may be granted... to the precise position of the plaintiff vis-a-vis the Club and the League. Putting it another way it is important to define and confine the issue for determination as being whether the plaintiff has established that the rules challenged (or alternatively those rules and action taken under them) have operated upon him so as to constitute an unreasonable and invalid restriction upon his right to earn or supplement his income by the use of his skill as a professional footballer, i.e., in unreasonable restraint of trade?

Mr. Justice Hardie distinguished the set of circumstances surrounding Elford's employment from *Eastham*. Western Suburbs claimed that the oral contract they had entered into with Elford not only covered 1968 but also extended to 1969 and 1970. After hearing testimony from both Elford and Western Suburbs Mr. Justice Hardie concurred with the evidence supplied by the club.¹⁶ Furthermore, he declared, notwithstanding the fact that players had to secure the consent of their present club to play with a new club, that the N.S.W.R.L.'s constitution and rules were necessary for the effective functioning of rugby league, were in the interests of players themselves, and that the restraint of trade doctrine was not applicable to the N.S.W.R.L.¹⁷

Dennis Tutty played for Balmain in 1965, 1966 and 1967. At the end of the 1967 season Balmain placed Tutty on their retain list. Tutty appealed to Balmain and the N.S.W.R.L. to be taken off the list, but withdrew his appeal following an oral agreement to play with Balmain again in 1968. At the end of the 1968 season, Balmain, for the second time, placed Tutty on their retain list. Tutty did not appeal against this decision; rather, he decided to sit out of the 1969 season. Balmain, for the third time, placed Tutty on their retain list at the end of the 1969 season. Instead

of appealing to the N.S.W.R.L., Tutty took the issue of Balmain's refusal to take him off the retain list to the courts. The case was heard by the Supreme Court of New South Wales in equity, and, following an appeal by the N.S.W.R.L., the High Court of Australia. Both decisions will be examined.

The facts of this case are closer to *Eastham* than they are to *Elford* - there is not the complicating factor of an oral agreement between club and player. Tutty, like *Eastham*, was unable to seek employment with other clubs because of Balmain's refusal to take his name off the retain list. Chief Justice McLelland, and Justices Jacob and Street of the Supreme Court of New South Wales overruled *Elford* and found the labour market controls of the N.S.W.R.L. to be an unreasonable restraint of trade.

Their decision rejected the N.S.W.R.L.'s zoning, retain and transfer and appeals systems. Following *Hawick* the N.S.W.R.L., in 1959, replaced the 28 day residential qualification rule with a zoning system to reduce the ability of players to switch to clubs which made them attractive pecuniary offers. The Supreme Court found that zoning had a detrimental effect on the earnings of players:

'The effect of changing the Rules was that the material lure was largely removed by restricting the free competition between the employing Clubs for the available players. We don't think that this helps the defendants. It seems to us to mean that the effect of their having grouped together is that the attractions which were previously offered to the players are no longer so offered'.

The Supreme Court acknowledged that the N.S.W.R.L. and the respective clubs had legitimate interests to protect, and 'therefore the existence of some retention system whether it be based on residence or on a necessity for permission in certain circumstances to change Clubs could be reasonable'. However, it maintained, that the rules of the N.S.W.R.L. did not satisfy 'the legitimate interests of all concerned'. It declared that:

'...the present retention system both by itself and especially when it is coupled with the present transfer system, goes far beyond such a need for regulation. It appears to us that by the present system it is ensured that the value of a player -

his intrinsic worth in money as a player - goes not to him but to his previous or potential employers, the Club with which he happens to have registered. This sought to be achieved not by giving to the... Club to which he belongs an option to continue employing him season after season but the right to hold him, not only whether they employ him or not but whether they let him earn by playing in competition games or not. A player may be retained and yet not get any employment or match remuneration'.¹⁹

Furthermore, the Supreme Court rejected the proposition that the existence of an appeals system reduced the unreasonableness of the restraints imposed on players. It said:

'...it is to be noted that very few appeals against retention have been allowed...Many more appeals on the amounts fixed as Transfer Fee have been allowed, but we cannot see how a system which we hold to be in restraint of trade... can be shown to be a reasonable restraint because the amount of the Transfer Fee may thus be reduced on appeal. This factor does not substantially touch upon the vice which we find in this system.

The N.S.W.R.L. and Balmain appealed this decision to the High Court of Australia. The High Court rejected the appeal. It found that:

'The rules...prevent professional players from making the most of the fact that there are clubs prepared to bid for their services. If valid, the rules prevent a professional player who is a member of one club, even if he is not contractually bound to play for it, from becoming employed as a professional footballer by another club, except with the concurrence of the former club or the Qualification and Permit Committee. This is plainly a fetter on the right of a player to seek and engage in employment'.²¹

The High Court, acknowledged, as had the Supreme Court, that the promotion of sporting equality and the maintenance of team stability were legitimate aims of the league and the clubs. However, it found the controls used by the N.S.W.R.L. to be an unreasonable restraint of trade, and, as in *Eastham*, suggested that the use of staggered long term contracts would more satisfactorily reconcile the competing interests of the league, clubs and players. The High Court expressed three objections to the N.S.W.R.L.'s labour market rules. First, it was concerned that the rules

restricted the ability of players to move between clubs and that this entailed the denial of economic freedom. It said:

'...the rules [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. There is no time limited for the exercise of this power; a club may retain a former player no matter how short the period of his employment with it may have been or how much time has elapsed since his engagement expired. A member may be retained even by a club which refuses to employ him, or, if he is employed, to select him to play in any team.'

Second, the High Court attacked the existence of transfer fees and rejected the notion that a club should be compensated when a player moved to another club. It said:

'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 or association with the club. If a man has proved himself to be a valuable player his club can fix a substantial fee which may adversely affect his chance of obtaining a new engagement and may also affect the amount he is likely to be offered by another club as a joining fee. The transfer fee not only may prevent a player from reaping the financial rewards of his own skill but it may impede him in obtaining new employment. 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 skillful, 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.'

And third, the restraints were not made reasonable by the operation of a league-controlled appeals system. The High Court stated that:

'...a player is completely in the hands of the committee; he has no right to require it to decide in a particular way, or in accordance with any suggested principle and it cannot be assumed that the decisions of the committee will always and necessarily ensure that the restraint imposed by the rules is no more than a court would consider reasonable.'²²

Tutty, like *Eastham*, rejects labour market arrangements which restrict the movement of players between clubs. A club cannot stop a player who they are not playing, paying, or do not have on contract from seeking employment with a new club. In significant ways, however, Tutty is a stronger defence of players' freedom than *Eastham*. It attacks zoning, transfer fees, the issue of compensation and downgrades the role of a league-controlled appeals system.

Peter Hall wished to play Australian football with South Melbourne, a club he had supported since he was five or six years of age. However, under the V.F.L.'s zoning rules he was residentially bound to Collingwood. Hall unsuccessfully sought a clearance from Collingwood to South Melbourne. He then took action in the Supreme Court of Victoria, focusing his suit on the V.F.L.'s zoning rules. Mr. Justice Murray declared the V.F.L.'s zoning scheme to be an unreasonable restraint of trade. He said:

'...I think it is impossible to hold that a system of Regulations which prevents an intending player from joining any club but one and puts him thereafter, subject only to a right of appeal to a Board, at the whim of the committee of that club, does not operate as a restraint of trade. This seems to be particularly so when one remembers that the residential encumbrance which binds him to the club may arise by a freak of chance and represent no real connection of any description between him and the club in question. Indeed to have to play with the club in question may involve real hardship in terms of travelling time between his team or his place of work and the club grounds for training purposes'.²³

From 1974 to 1977 Hoszowski was a goalkeeper with the Auburn Soccer Club, which fielded a team in the Sydney metropolitan soccer league. In 1978 a National League was formed in Australia. Hoszowski asked Auburn to place him on the transfer list so as to be able to move to a club in the National League. Auburn agreed to this request and, in consultation with Hoszowski, determined a transfer fee for his release. On three occasions Auburn was prepared to transfer Hoszowski to another club - i.e. the new club had agreed to pay a transfer fee. However, on each occasion Hoszowski refused to move, objecting to the fact that his new club would have to pay Auburn a transfer fee. Hoszowski decided to

take action in the courts, maintaining that the employment rules of the New South Wales Soccer Federation (N.S.W.S.F.) were an unreasonable restraint of trade.

Chief Justice Helsham in the Equity Division of the Supreme Court of New South Wales distinguished Hoszowski's situation from *Eastham* and *Tutty*. He followed *Elford* in deciding 'the inquiry that the Court must undertake is one into the effect in practice of the restrictions imposed by the constitution and rules and contract, and to see whether they operate in restraint of a player in his trade to such an extent that they run foul of the law'.²⁴ While he acknowledged that the transfer fee acted as a restraint of trade he did not believe that the restraint was unreasonable. He concluded that Hoszowski had not gained employment with a new club because of his own stubbornness, rather than the operation of the system.²⁵ The difference in this case from *Eastham* and *Tutty* was that the issue of the movement of a player between clubs was separated from the question of compensation.

Mr. Justice Helsham, following *Eastham*, but in distinction from *Tutty*, saw a positive role for transfer fees and endorsed the principle that clubs should receive compensation for a player who moves to another club. He said:

'There is the matter of the club's revenue, including the costs of coaching, providing gear and other running costs...and the desirability of being able to replace a player, the importance of having and retaining a team capable of drawing spectators, the undesirability of losing a player without recompense for the cost of building him up, the dangers inherent in poaching if there was no restriction on transfer...I do not think that the only restriction on transfer, the amount of the fee, could be said in practice to impose an unreasonable restraint. It seems to me that if this is not so then there could not be a system of transfer fees at all that imposed a reasonable restraint. The alternative is a completely free transfer system, and the cases have not indicated that this must be so or that every system of transfer fees must be in unreasonable restraint of trade. In my view the system here does not go beyond what is reasonable to protect the interests that are legitimate objects for protection'.²⁶

Brian Adamson played with West Perth, of the Western Australian National Football League (W.A.N.F.L.), for the period 1975 to

1977. At the end of 1977 Adamson signed a contract with Norwood, of the South Australian Football League (S.A.F.L.), for the 1978, 1979 and 1980 seasons. To be able to play with Norwood, under the interstate clearance regulations of the N.F.L., Adamson had to first obtain a clearance from West Perth and the W.A.N.F.L. In April 1978, after playing two matches in West Perth, Adamson moved with his wife to Adelaide, where they both gained employment. On two occasions Adamson unsuccessfully sought a clearance from the permit committee of the W.A.N.F.L. He then sought relief in the Federal Court of Australia claiming that the interstate clearance regulations of the N.F.L. were in breach of the *Trade Practices Act* (1974) and were an unreasonable restraint of trade (Adamson was initially enabled to play with Norwood following an interim order of a Full Court of the Federal Court on 30 June 1978).

Mr. Justice Northrup found that the *Trade Practices Act* did not apply to football clubs and professional footballers.²⁷ However, he did find that the Federal Court could exercise jurisdiction with respect to the restraint of trade claim, notwithstanding that this was a matter which would normally be heard by a State Supreme Court. Most of his decision is concerned with resolving this jurisdictional issue, which will not be examined here.²⁸ Mr. Justice Northrup found the clearance rules of the N.F.L., W.A.N.F.L., and S.A.F.L. to be an unreasonable restraint of trade. He attacked the three year residential rule of Australian football in the following terms:

'...the effective professional life of a footballer is limited and... a period of 3 years during which he is not able to play competition matches in a football league can affect adversely his skills as a football player. Likewise during that period he is excluded from engaging in his trade, business or occupation as a footballer for a significant period of his professional life thereby depriving him of his ability to receive payment for his services as a footballer'.

Further, Mr. Justice Northrup noted, as *Eastham* had before, that, notwithstanding the existence of labour market controls, sporting equality had not been achieved in Australian football. He stated that 'there is a tendency for certain clubs to be high on the competition ladder regularly each season while correspondingly other clubs tend to remain on the lower part of that

III

The V.F.L. is desirous of establishing Australian football as a national sport with a national premier league. The first step in this direction was to have a Sydney based team play in the V.F.L. competition.³⁰ At one stage it was contemplated that a thirteenth team would be established in Sydney. Then it was mooted that Fitzroy would move to Sydney; but following a successful year on the field they decided to remain in Melbourne. In July 1981, South Melbourne, a club which as traditionally performed poorly on the field proposed to the V.F.L. that they would play their eleven home games at the Sydney Cricket Ground. This precipitated a major split within the club, and, at one stage, involved a strike by players against moves to keep the club in Melbourne. Eventually, after a highly emotional struggle, the matter was resolved with South Melbourne, or the Sydney Swans as they are now called, moving to Sydney³¹ - i.e. they were still based in Melbourne, but played their 'home' games in Sydney. In 1982 the Sydney Swans had a relatively successful season - even though they did not qualify for the finals they won twelve of their 22 games, drawing average crowds in Sydney of 16,000. At the end of 1982 it was decided to move the club permanently to Sydney; both club officials and players would be required to take up residence in Sydney.

A number of players (and officials) were not prepared to make this move. Silvio Foschini, a non-contract player, who had played with the club in 1981 and 1982, wished to continue living with his parents in Melbourne. The Sydney Swans were unable to persuade Foschini to change his mind about moving to Sydney.³² Foschini then signed a four (initially three) year contract, with a Mr. Tucker, a St. Kilda intermediary, for \$193,500 (\$145,000). To be able to play with St. Kilda, Foschini, under the V.F.L.'s clearance rules, would first have to be cleared by the Sydney Swans. Negotiations on a transfer fee commenced - at one stage the difference between the two clubs was \$5,000; St. Kilda offering \$105,000 and the Sydney Swans demanding \$110,000 - but

came to nothing, with the Sydney Swans refusing to clear Foschini to St. Kilda (though, they were prepared to release him to another club). Foschini, with St. Kilda's backing, sought relief in the Supreme Court of Victoria.

Foschini's counsel maintained that the labour market controls of the V.F.L. were an unreasonable restraint of trade and that the objects of the V.F.L., clubs and players could be more satisfactorily achieved through the use of staggered long term contracts. Furthermore, evidence was submitted which challenged the V.F.L.'s claims that its labour market controls have helped to achieve sporting equality.

The facts surrounding Foschini's desire to play with St. Kilda are similar to *Eastham* and *Tutty*, with the added geographic dimensions of *Blackler* and *Adamson*. After reviewing previous decisions of the courts Mr. Justice Crocket concluded that 'of all the rules governing a footballer's mobility to which my attention has been directed those of the V.F.L. would seem beyond question the most comprehensively and rigidly restrictive'.³³ He found the V.F.L.'s clearance rules to be a unreasonable restraint of trade; and, as in *Tutty*, the existence of a league dominated appeals system did little to overcome the unreasonableness of the restraint. Furthermore, the revamped appeals system introduced by the V.F.L. at the end of 1982 conflicted with the poaching rules: for a player to appear before the appeals board he had to include the name of an alternative club prepared to employ him. In addition, Mr. Justice Crockett found that the professed intent with which the Board was set up was, not as part of a system of regulations designed to protect the V.F.L.'s legitimate objects, but to 'stop star players from going to court'.³⁴

Mr. Justice Crocket was critical of the Sydney Swans for refusing to clear Foschini. He also expressed misgivings about zoning, but was prepared to countenance transfer fees and the use of drafting as a method of recruitment. He said:

'It is difficult to understand why a club, which is unprepared to enter into a contract with a player upon whose services it has, by virtue of the zoning system, first option, should not be requested to release that player for a transfer fee either to be agreed or fixed by arbitrators.

Even the merits claimed for the zoning system seem to be debateable. 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 presently operating for interstate players would also be a preferable system to zoning in Victoria. I am not satisfied that the argument that money and effort spent by clubs on young players in their zones in order to develop skills to the ultimate advantage of those clubs is of sufficient weight to justify the retention of the system'.³⁵

In addition, Mr. Justice Crockett found that the V.F.L. competition was most unequal. He expressed himself as follows:

- a) The V.F.L. is divided into rich and poor clubs.
- b) The rich clubs are growing more affluent whilst the poorer clubs are experiencing increasingly greater financial difficulties so that at least one or two are close to insolvency.
- c) The competition has remained unequal in the sense that there is a real tendency for the same clubs to monopolise the top positions at the conclusion of each season.
- d) Player payments have escalated to a degree that the V.F.L. - and doubtless the clubs too - consider alarming. To some extent at least this would appear to be the result of an artificially distorted labour market?

Mr. Justice Crockett suggested that the V.F.L. should relax its labour market controls, and, as indicated in the quotation at the start of this paper, advocated the use of contracts between clubs and players.

IV

The courts have consistently attacked the labour market restrictions which respective professional team sporting competitions have imposed on players. The only exceptions to this have been *Eford*, where there was the complication of an oral contract, and *Hoszowski*, where the player was able to transfer to another club but pursued action in the courts against the imposition of a transfer fee. With respect to Australian football the courts have struck down zoning, and interstate inter-league and intra-league clearances.

In *Eastham*, *Tutty* and *Foschini* the courts have advocated the use of staggered long term contracts to reconcile the legitimate interests of the respective leagues, clubs and players. The courts have indicated that they would countenance labour market controls if it could be shown that they helped to achieve the legitimate interests of the respective codes. The draft, for example, is viewed with some favour in *Foschini*, though it is interesting to note that the V.F.L. has discontinued the draft for inter-state players. The courts have not developed a consistent position on the question of transfer fees/compensation. In *Eastham*, *Hoszowski* and *Foschini* transfer fees are acceptable as long as the issue of compensation is separate and distinct from the ability of a player to switch clubs following the expiration of his contract with the previous club. *Tutty*, however, which significantly is the only case which found its way into the High Court is opposed to transfer fees and the principle of compensation. More generally, the courts have taken a dim view of rules which enable clubs to place restrictions on the movement, and hence income, of players whom they do not have on contract and/or are not prepared to pay or play.

NOTES:

- 1 For a survey of the various types of labour market controls employed in professional team sports see B. Dabscheck, 'Player Associations and Professional Team Sports', *Labour and Society*, July 1979, pp. 227-229.
2. This paper will not examine the collective efforts of players. For details concerning this see *ibid.*, B. Dabscheck, 'Industrial Relations and Professional Team Sports in Australia', *The Journal of Industrial Relations*, March 1976; B. Dabscheck, '"Defensive Manchester": A History of the Professional Footballers Association', in R. Cashman and M. McKernan (ed.), *Sport in History: The Making of Modern Sporting History*, University Of Queensland Press, St. Lucia, 1979; B. Stewart, *The Australian Football Business: A Spectator's Guide to the V.F.L.*, Kangaroo Press, Kenthurst, 1983, Ch. 12; T. Mason, *Association Football and English Society 1863-1915*, Harvester Press, Sussex, 1980, pp. 69-137; Department of Education and Science, *Report of the*

Committee on Football (Chester Report, H.M.S.O., London, 1968, Ch. 4; Commission on Industrial Relations, Professional Football, H.M.S.O., London, 1974; E.K. Krasnow and H.M. Levy, 'Unionization and Professional Sports', *Georgetown Law Journal*, Winter 1963; M.S. Jacobs and R.K. Winter, 'Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage. *Yale Law Journal*; November 1971; C.H. Lowell, 'Collective Bargaining and the Professional Team Sports Industry', *Law and Contemporary Problems*, Winter-Spring 1973; J.G. Scoville, 'Labour Relations in Sports', in R.G. Noll (ed.), *Government and the Sports Business*, Brookings, Washington, 1974; A.R. Sloane 'Collective Bargaining in Major League Baseball: A New Ball Game and its Genesis ', *Labor Law Journal*, April 1977; T.P. Gilroy and P.J. Madden, 'Labour Relations in Professional Sports', *Professional Sports and the Law*, Law-Arts, New York, 1977, Ch. 4; and R.C. Berry and W.B. Gould, 'A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes', *Case Western Reserve Law Review*, Summer 1981.

3. The approach of U.S. courts will not be examined. For details see Sobel, *op.cit.*, and Berry and Gould, *op.cit.*
4. 75 W.N. (N.S.W.) 255, at p. 260.
5. For further information on the retain and transfer system, and changes which have been introduced in British soccer see Dabscheck, 'Defensive Manchester ', *op.cit.*; P.J. Sloane, 'Labour Market in Professional Football', *British Journal of Industrial Relations*, June 1969; and P.J. Sloane, 'Restriction of Competition in Professional Team Sports', *Bulletin of Economic Research*, May 1976.
6. There is an earlier British soccer case involving player Kingaby and Aston Villa in 1912. For details see Dabscheck, *op.cit.*, pp. 242-243.
7. (1964) Chancery Division 413, at p. 438.
8. *ibid.*, pp. 430-431.
9. *ibid.*, pp. 437-438.
10. *ibid.*, pp. 438.
11. *ibid.*, p. 436.

12. *ibid.*, p. 433. For further information on the inequality of competition in British soccer see Dabscheck, 'Sporting Equality: Labour Market v Product Market Control', *Journal of Industrial Relations* 17 (1975) pp. 185-187.
13. (1967) N.Z.L.R. 705; at p. 714.
14. (1968) N.Z.L.R. 547.
15. (1969) 2 N.S.W.R. 170, at p. 175.
16. *ibid.*, p. 176.
17. *ibid.*, p. 177.
18. (1970) 3 N.S.W.R. 463, at p. 474.
19. *ibid.*, pp. 474-475.
20. *ibid.*, p. 475.
21. 125 C.R. 353, at p. 373.
22. *ibid.*, pp. 378-379.
23. (1982) V.R. 64, at p. 70.
24. No. 1667 of 1978, p. 3.
25. *ibid.*, p. 18.
26. *ibid.*, pp. 15-17.
27. V6 No. 18 of 1978, pp. 33-39.
28. *ibid.*, pp. 16-33. Also see the appeal to the High Court 143 C.L.R. 190.
29. *ibid.*, pp. 13-14.
30. An alternative method of establishing a national league would be to absorb existing interstate clubs. Major U.S. professional sports have a league with two divisions with the winner of each division playing off for the championship. This proposal would necessitate existing V.F.L. clubs being separated and allocated to each of the divisions with clubs from interstate. Inter-division play could be achieved by a cup competition, and All-Star games between the two divisions would generate much interest. A major problem for the V.F.L. of expanding into new areas (e.g. Brisbane), as distinct from absorbing established teams, will be the capital costs

30 (cont.)

associated with establishing appropriate stadiums.

31. For further details see Stewart, *op.cit.*, Ch. 15.

32. It is conceivable that the Sydney Swans could have allowed him to reside in Melbourne and fly him up to Sydney for home games - a practice that they seemingly adopted with players who have transferred to them mid-season from other V.F.L. clubs.

33. (1982) No. 9869, p. 18.

34. *ibid.*, P. 31.

35. *ibid.*, p. 25.

36. *ibid.*, p. 27.