

## **ABOLISHING TRANSFER FEES: THE VICTORIAN FOOTBALL LEAGUE'S NEW EMPLOYMENT RULES**

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The 1980s have been a turbulent, if not traumatic decade for the Victorian Football League (VFL). Whilst still the most popular team sport in Australia, attendances have declined during the 1980s. In 1981 the VFL attracted more than 3.8 million spectators (a VFL record). By 1985 aggregate attendances had declined to 3.1 million. 1987 saw them recover to 3.4 million though this was mainly due to the inclusion of two new interstate teams - the West Coast Eagles and the Brisbane Bears - into the competition.<sup>1</sup> In addition to these attendance problems many VFL clubs, throughout the decade, have been racked by insolvency problems and have avoided bankruptcy only due to rescue missions mounted by the VFL, and, in the case of St. Kilda, the willingness of creditors to waive their claims.

In an attempt to rectify these and other associated problems the VFL commissioned reports from a number of consultants, and in October 1983 brought into being its own Task Force to inquire into and make recommendations concerning the future direction of the VFL. The Task Force issued reports in August 1984, October 1984 and June 1985. In its first report the Task Force severely criticised, and undoubtedly embarrassed the VFL, by claiming that the VFL's decision making process was 'fundamentally deficient', and declaring that it would not proceed with its charter until the VFL resolved this issue.<sup>2</sup> The VFL

agreed to review its decision making processes and asked the Task Force 'as a matter of urgency' to assist it in doing so.<sup>3</sup> In its second report the Task Force recommended the creation of a five person VFL Commission - one full-time and four part-time Commissioners - 'to manage ... [the] Common interests and operations and the overall conduct of the game'. At the end of 1984 the VFL adopted this recommendation and in February 1985 altered their Articles of Association accordingly. The Task Force's final report offered a wide range of specific recommendations concerning the administration and organisation of the VFL.<sup>5</sup>

One of the major strategies adopted by the VFL in an attempt to resolve its various financial and associated problems has been to develop a national competition so as to enhance the attainment of income from sponsorship and television and broadcasting rights. As a first step in this direction South Melbourne played all of its 'home' games in 1982 in Sydney. At the end of the season the Sydney Swans, as the club is now called, decided to relocate permanently to Sydney. Amongst other things this precipitated a legal challenge by rover Silvio Foschini (who wished to remain in Melbourne) to the VFL's employment rules which Mr. Justice Crockett of the Victorian Supreme Court found to be an unreasonable restraint of trade.

In October 1985 the VFL issued a document entitled 'VFL Football: Establishing The Basis For Future Success'.<sup>6</sup> The document, amongst other things, recommended the establishment of a fourteen team competition with the inclusion of teams from the Western Australian Football League (WAFL) and the South Australian National Football League (SANFL). The West Coast Eagles was formed in Perth by the

WAFL, but no team was formed in Adelaide because of the desire of the SANFL to maintain the integrity of its existing competition. A consortium from the Gold Coast, in concert with the Queensland Australian Football League (QAFL), persuaded the VFL to allow a team called the Brisbane Bears to join the competition.

As already mentioned Mr. Justice Crockett in the *Foschini case* declared the VFL's employment rules to be an unreasonable restraint of trade. As a result of this decision the VFL has been forced to revamp its employment rules. The major concern of this article is to examine these new rules, particularly those introduced by the VFL in July 1988, which have abolished transfer fees for VFL players whose contracts with clubs have expired and who wish to move to new clubs, and the associated development of a draft system for both new and existing VFL players out of contract. The article will be organised into three sections. First, the background to and the *Foschini case* will be examined briefly. The VFL's new employment rules will then be outlined and an evaluation of these rules will be offered.<sup>7</sup>

### **The Foschini Case**

The labour market for VFL footballers has been traditionally characterised by a series of monopsonistic controls which have severely limited the economic freedom of players. The club that a potential player can join initially has been determined by systems of metropolitan and country zoning, introduced in 1896 and 1968 respectively. Only interstate players have been free to choose between potential VFL clubs. However, at the end of the 1981 season this avenue was closed off with the introduction of a draft system whereby VFL clubs could draft or choose

two interstate players each year, with choices being determined in terms of the reverse order in which clubs finished on the VFL premiership ladder. The bottom club had first choice (of one player), the second bottom club second choice and so on, with the premiers having last choice, with the process being conducted twice.<sup>8</sup> Once a player signed with a VFL club, and/or a club had 'title' to a player residing in its zone, that player could transfer to another club only with the permission of his 'owning' or original club. Such transfers, particularly in the case of 'star' players usually necessitated the payment of a transfer fee. For example, Warwick Capper, a Full Forward with the Sydney Swans, transferred to the Brisbane Bears at the beginning of 1988 for a transfer fee rumoured to be in excess of \$400,000. On top of these mobility restrictions the VFL has also used various systems of maximum wages in an attempt to control and limit the earnings of players. The VFL, like the leagues in most other professional team sports, has maintained that labour market controls are necessary to ensure sporting equality and the concomitant financial security and survival of the league.

At the end of 1982 when the Sydney Swans decided to relocate to Sydney several players and officials were not prepared to make this move. Silvio Foschini, who was not under contract, wished to continue living with his parents in Melbourne. He signed a four year contract for \$193,500 to play with St. Kilda. The Swans refused to clear Foschini to St. Kilda, though they were prepared to release him to another VFL club. Foschini, with the hacking of St. Kilda, sought relief in the Supreme Court of Victoria.

Mr. Justice Crockett declared the VFL's zoning and clearance rules to be an unreasonable restraint of trade. He found significantly

that these rules had not promoted sporting equality and ‘that there is a real tendency for the same clubs to monopolise the top positions at the conclusion of each season’.<sup>9</sup> Mr. Justice Crockett stated that ‘some “freeing up” of the market could only prove beneficial’, “and advocated’ the use of ‘contracts with players’ as ‘the best prospect for solving the present problem of competition for players operating in conflict with the permit and clearance rules’. Mr. Justice Crockett was critical of the Sydney Swans for refusing to clear Foschini. He also criticised zoning, but was prepared to countenance transfer fees and the use of the draft 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 required 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 debatable. 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.<sup>11</sup>

### The VFL’s New Employment Rules

Since the *Foschini* case the VFL has introduced a series of changes to their employment rules. The first of these was the introduction of a maximum 50-man senior training list for each of the then twelve VFL clubs. Secondly, players who had played out their contracts were free to seek employment with other clubs with the proviso that the club which lost such a player could be compensated by the club obtaining the player.

If the clubs concerned could not agree on an appropriate transfer fee the matter would be resolved by a VFL appointed Appeal Board. The third change was a salary cap introduced for the 1985 season.

This cap places limits on the total income that clubs can pay to senior, reserve and under 19 players. The VFL regards 'the salary cap . . . as the lynchpin of the exercise designed to provide a more even distribution of available talent, increased opportunity for players struggling for regular games, and a reasonable curb on what has been spiralling payments to players'.<sup>12</sup> Clubs which had spent heavily on interstate players prior to 1984 received exemptions for varying periods up to the end of 1987. Table One provides details of the salary cap for each of the fourteen clubs for the 1988 season. Clubs are allowed a 2.5 per cent buffer zone, approximately \$30,000, above the salary cap. For the 1989 season the VFL has decided that clubs will be allowed a salary cap of \$1.3 million, except for the Brisbane Bears and West Coast Eagles who are allowed only \$1.25 million. Neither of these clubs run under 19 teams which presumably means that the annual wage cost of running such a team amounts to \$50,000.

**TABLE ONE**  
**SALARY CAPS FOR VFL CLUBS FOR THE 1988 SEASON**

<u>CLUB</u>	<u>AMOUNT</u> (Scillion)
Brisbane Bears	1.15
Carlton	1.30
Collingwood	1.25
Essendon	1.30
Fitzroy	1.15
Footscray	1.15
Geelong	1.15
Hawthorn	1.30
Melbourne	1.15
North Melbourne	1.15
Richmond	1.25
Sydney Swans	1.30
St. Kilda	1.15
West Coast Eagles	1.15

SOURCE: 1988 VFL Year Book, VFL, Jolimont, 1988, p.65.

The only other professional team sport which operates a salary cap is US basketball which introduced such a scheme for the 1984/85 season following an agreement reached between the National Basketball Association and the National Basketball Players Association.<sup>13</sup> Under that agreement players are entitled to receive 53 per cent of gross revenue earned by clubs with an exemption for the resigning of one of the club's players who has become a free agent (or in terms of the VFL's nomenclature has played out his contract). In saying this it should be noted that basketball teams have eleven man rosters, which compares to the VFL's senior training lists of 50 (or 52, see below) players. The negotiation of a percentage salary cap in US basketball links players'

incomes to the economic well being of their club and the league. To the extent that the VFL has learnt from US basketball they may be well advised to adopt a percentage, rather than a flat salary cap which needs to be (re)determined each year. It is also conceivable that players, via the Victorian Football League Players Association (VFLPA), might wish to have an input into determining the size of the salary cap.

If it can be assumed that the annual average wage cost of running an under 19 team amounts to \$50,000, that clubs do not make use of the 2.5 per cent buffer zone, and that clubs and players have not developed means to avoid the salary cap<sup>14</sup> then the total income paid to players in the 1988 season would have been between \$16 and \$17 million. If the combined income of the VFL and its fourteen clubs was equal to \$60 million in 1988, the players' share of football income would be approximately 28 per cent. Compared to most other professional team sports this is a relatively low figure. In the 1980s English soccer players received between 43 and 49 per cent of soccer income<sup>15</sup> and, as mentioned, US basketball players have negotiated a 53 per cent share.

By dividing the total salary cap for players by the total number of players on the various clubs' senior training lists we can derive the average salary for VFL players, given the above caveats. Average salaries for senior listed VFL players in the 1987,<sup>17</sup> 1988 and 1989 seasons are approximately \$21,800, \$24,100 and \$24,000 respectively, figures which are somewhat less than average annual male earnings. The marginal decline in average income between 1988 and 1989 is explained mainly in terms of an increase in the size of senior training lists for the 1989 season.

When the West Coast Eagles were admitted to the VFL in 1987 they were allowed a senior training list of 35 players, the majority of whom were recruited from WAFL clubs, with a small number of VFL players who had been originally recruited from Western Australia. A moratorium was also placed on the recruitment of Western Australian players by other VFL clubs for the 1987 and 1988 seasons. The Brisbane Bears, for their part, were allowed a senior training list of 40 players most of whom were recruited from VFL clubs, plus a small number from South Australia and Tasmania.<sup>18</sup> Both clubs fielded only senior teams for the 1987 and 1988 seasons. The Brisbane Bears were given a higher senior training list than the West Coast Eagles because Queensland is a 'less developed' Australian rules football state compared to Western Australia, and there were fears that they would find it difficult to achieve on- field success.

In November 1986 the VFL inaugurated a national player draft which was modelled on the interstate player draft introduced by the VFL at the end of the 1981 season. Under the national player draft, for both the 1987 and 1988 seasons, each club, with the exception of the West Coast Eagles, was allowed to draft five players from Victorian country or interstate leagues. Positions on the draft were determined in terms of the reverse order of how teams finished on the VFL ladder in the previous year. The club which finished last had first choice, the second last team second choice and so on, with the premiers having last choice, and the process being repeated five times.<sup>19</sup> Clubs were also able to trade draft choices for existing senior list players, and a club which drafted a player had a 'hold' on his services for a period of three years.

In July 1988 the VFL announced further changes to its rules governing the recruitment and movement of players between clubs.<sup>20</sup> The rules specify a timetable concerning the implementation of various changes which are summarised in Table Two. From 16 September 1988 Victorian based clubs and the Sydney Swans were allocated zones from which they 'shall be entitled to initially recruit local players' as determined by the VFL's Independent District Commissioners, the Brisbane Bears from all of Queensland, and the West Coast Eagles from registered WAFL players. On 26 October 1988 Victorian based clubs and the Sydney Swans were obliged to nominate a senior training list of 50 players, and the Brisbane Bears and West Cost Eagles 40 players.

**TABLE TWO**  
**Number of Players Allowed on Senior Training Lists**  
**Per VFL's July 1988 National and VFL Club Player Draft Rules**

DATE	PROCEDURE	SIDNEYSWANS & VICTORIAN CLUBS	BRISBINE BEARS & WEST COAST EAGLES
26 Oct 1988	Registration of Lists	50	40
9 NOV 1988	National Player Draft	58	48 (36)
Early March 1989	Reduce Training Lists	48	58 (36)
Mid March 1989	VFL Player and Second Round Draft	52	52 (40)

(Figure in brackets if the Brisbane Bears and West Cost Eagles do not field a reserve team.)

SOURCE: Victorian Football League, Procedure and Timetable - Introduction of National and VFL Club Player Draft Rules, 11 July 1988.

On 9 November 1988 all VFL clubs, including the West Coast Eagles, were entitled to participate in a national player draft of players

from the Victorian country, the Australian Capital Territory, the Northern Territory, South Australia, Tasmania and from Overseas (i.e. Gaelic footballers from Ireland). Each club was allowed to draft eight players, an increase from the five allowed in previous drafts, with positions in the draft determined by the reverse order of how teams finished on the premiership ladder in the previous season. Draft players are 'bound' to the club that chooses them for a period of three years. Each club, including the West Coast Eagles is allowed to draft only one player from the WAFL. Small transfer fees are to be paid to clubs whose players are drafted by VFL clubs, with the amount increasing (prospectively) with the number of senior games played in the VFL up to a total of \$27,500 for a 100 game player. Prior to this limit VFL clubs have paid transfer fees in the vicinity of \$100,000 to \$200,000 to secure the services of such players. This limit on transfer fees Will not only substantially reduce the cost structure of VFL clubs but will also limit the extent to which VFL supporters have, hitherto, been forced to subsidise the existence of country and interstate clubs. The July 1988 rules allow clubs to trade positions on the national player draft for senior listed players, but forbid the exchange of draft positions for cash. In notifying the VFL of such trades clubs are required 'to sign statutory declarations that no monies or any other benefit have changed hands and that the exchange involves solely the player involved with both clubs'. The VFL is also empowered to impose penalties on clubs and players who prejudice the 'natural operation of the draft'. Clubs are forbidden from offering players 'benefits in cash or kind' prior to the draft which cannot be accommodated in its salary cap or any offer which 'would have the effect of or which would otherwise prevent the player from accepting

employment with another club if drafted by another club'.<sup>21</sup>

Nationally drafted (and residentially bound) players who cannot settle on terms of employment with their allotted clubs can apply to a VFL Appeal Board for permission to be included in the next draft. This provision in effect means that nationally drafted players who cannot reach agreements with clubs would be unable to play in the VFL during the season of their dispute. Moreover, before being entitled to apply to the Appeal Board the players concerned have to first attend a conciliation conference with the VFL Arbitrator in an attempt to assist the players and clubs concerned reach agreements. If no agreement can be reached the VFL Arbitrator will prepare a report for consideration by the Appeal Board in determining whether the player should be included in the next year's draft. In reaching its decision the Appeal Board is required to consider:

- a. The best interests of the competition, the player and the club;
- b. Whether the player and/or the club have made a bona-fide attempt to reach agreement in reasonable terms;
- c. Any hardship to the player if he were not included in the draft;
- d. Any other matters it considers relevant.<sup>22</sup>

As of 9 November 1988 Victorian based clubs and the Sydney Swans will have 58 players, and the West Coast Eagles and Brisbane Bears 48 players (assuming they field a reserves side) on their senior training lists. By early March 1988 Victorian clubs and the Sydney Swans are required to reduce their senior training lists to 48 players.

Possibly the most interesting aspect of the July 1988 rules are the provisions concerning uncontracted senior list VFL players. Uncontracted

players can lodge applications to have their names included on what is called a VFL club player draft list. The July 1988 rules require such players to provide details concerning their financial requirements.

These VFL club player draftees, plus those players who have been culled from club senior training lists in October and early March are eligible to be drafted in mid March. Each club is entitled to four choices (though the figure could conceivably be increased if there were a large number of uncontracted senior list players) with the order of selection again being determined in terms of the reverse order of club's positions on the VFL ladder in the previous season. Clubs are not required to pay transfer fees to each other for players obtained under the VFL club player draft. The only obligation is that the financial requirements specified by players fit within the club's salary cap. At the end of the processes outlined in the July 1988 rules all clubs will have senior training lists of 52 players, or 40 players if the West Coast Eagles and Brisbane Bears decide against fielding a reserves team. The July 1988 rules do not allow clubs to change their senior training lists during the season.

### **An Evaluation**

The most dramatic aspect of the VFL's July 1988 rules is the abolition of transfer fees, or compensation, for players who change clubs following the expiration of their contracts, and the virtual abolition of transfer fees for recruits. Accordingly clubs will no longer have an incentive to sell players as a means to overcome or reduce their financial problems. These rules will have the effect of substantially reducing the cost structure of clubs. The abolition, or virtual abolition, of compensation to clubs whose players find alternative football employment

with other clubs constitutes, by the standards of professional team sports, something of a revolution. The players of English soccer and US baseball, basketball, football and ice- hockey, via their respective player associations have, over the years, sought to abolish such compensation rules with varying degrees of success.<sup>23</sup>

In eschewing transfer fees the VFL has not abandoned the use of labour market controls in seeking to achieve sporting equality. The July 1988 rules still rigorously control or regulate the labour market for VFL players. The VFL has simply 'interchanged' the draft for transfer fees. Players are still denied the ability to choose prospective employers. The club they can play for is determined either by zoning or the draft; whether it be the national player draft when they enter the VFL, or the VFL club player draft when their contract with their club expires.

Nevertheless there are several problems associated with the VFL's new drafting rules. Not only do they have technical and legal problems, but also they will be ineffective and they are unnecessary. The July 1988 rules cannot be examined in isolation. They need to be considered in the context of other labour market controls introduced by the VFL in the post Foschini era. The most significant of these are the salary cap, a common senior training list for clubs, and the binding of players allocated to clubs by either zoning or the draft for a period of three years.

There are a number of technical problems associated with the July 1988 rules, especially in the context of being consistent with the salary cap. As already discussed above, (and putting to one side complications associated with the Brisbane Bears and West Coast Eagles), the July 1988 rules specify a timetable for additions and deletions to the senior training lists of clubs. On 26 October 1988, clubs were required to determine a

list of 50 players, draft eight players on 9 November 1988, reduce their lists to 48 players in early March 1989, and draft an additional four players in mid March 1989, ending up with a final list of 52 players.

The major problem confronting both clubs and players alike is fitting the two rounds of drafted players into clubs' salary caps. It is conceivable that in determining their 50 player senior training lists in October that several, or most, clubs will fill up most of their salary cap. Clubs may have limited scope within their salary caps to convince November draftees to sign with their assigned clubs. This will be a particular problem for draftees who are required to move interstate. Players who are required to move interstate may need the attraction of 'generous' inducements to convince them of the wisdom of leaving their families, friends and homes to move interstate (*Foschini* revisited!). Of the 130 players drafted for the 1987 and 1988 seasons 87, or 67 per cent, involved the interstate movement of players.<sup>24</sup>

in this context it is interesting to note that the SANFL has introduced a Player Retention Scheme in an effort to induce their players not to join VFL clubs. The scheme involves setting aside retirement funds for long serving players (six seasons and at least 120 games at \$500 per game) plus extra bonuses for achieving certain performance indicators (state selection, state captain, All-Australian selection and winning the Magarey Medal) on top of the normal payments paid by clubs during the regular season. It has been estimated that Glenelg star Chris McDermott, who incidentally was the Brisbane Bears' first draft choice for the 1988 season but decided to remain in South Australia, could expect to receive a payment in excess of \$200,000 when he retires.<sup>25</sup>

Problems may also be experienced in finding room within the salary caps of clubs for VFL club player draftees in mid March. This will reduce the ability of such players to find employment with new clubs after their contracts have expired, and both clubs and players alike may place pressure on the VFL to increase salary caps. More generally, the VFL may need to build some flexibility into salary caps in the pre-season training lists which result from the drafting and culling processes involved in its July 1988 rules. Or conceivably, the VFL will simply turn a blind-eye to salary cap problems until the 52 man senior training list has been established. At a minimum, salary caps would need to include scope for those players who are allocated to train with clubs in the November to March period, but fail to be included in the club's final 52 man senior training list.

The VFL club player draft in mid March requires the players concerned to lodge details of their financial requirements. Under the VFL's rules a player is bound to the club that drafts him for a period of three years. Given this the rational player, and he may or may not receive such advice from an agent, should ask for a three year contract (and the same would presumably be true of a nationally drafted player). The specification of terms for three years could come into conflict with the salary cap which is determined on an annual basis. To minimise such problems, the VFL may be well advised to convert its salary cap into percentage terms, rather than a flat amount, with the qualification that at an appropriate time each year the percentage could be translated into a money amount.

A second problem associated with players specifying their financial requirements can be identified. VFL players can be paid in

terms of a guaranteed income and/or in terms of performance indicators. It is conceivable that clubs and players could have differing views concerning the manner in which VFL players should be paid. Players, for example, may prefer to receive most of their salary in the form of guaranteed income, with a relatively small proportion for performance indicators. Clubs, on the other hand, may prefer a greater proportion for performance indicators rather than guaranteed income to take account of the fickle nature of player quality or form and the problems associated with the ever present risk of injuries to players.<sup>26</sup> It is quite conceivable that the form in which a player specifies his financial requirements could differ quite markedly from the salary remuneration systems developed by different clubs. In deciding to choose players in the VFL club player draft clubs Will need to consider three factors. They are; whether or not the player concerned is consistent with their playing needs; do his financial requirements fit into their salary cap; and whether or not the player's financial requirements are compatible with the club's salary remuneration system.

In announcing the VFL's July 1988 rules, Mr. Alan Schwab, the VFL's Executive Commissioner, said that he had received legal advice that the rules did not constitute a restraint of trade and that the VFL did not anticipate any legal challenges.<sup>27</sup> On the surface the VFL's rules do appear to be consistent with Mr. Justice Crockett's suggestions concerning drafting quoted above in the *Foschini* case. It should be noted, however, that Mr. Justice Crockett saw the draft as a 'preferable system to zoning', or as a method concerned with the recruitment of new players. He did not advocate the use of the draft as a mechanism to (re)allocate established VFL players who wished to change clubs, once

their contracts had expired. He in fact advocated a 'freeing up' of the market and the use of contracts.

Under both the national player and VFL club player draft players are denied the ability to choose a potential employer. Nationally drafted players are able to negotiate with only one club in determining the terms and conditions of their employment, though the VFL's rules countenance the use of the VFL Arbitrator to help resolve disputes and a VFL Appeal Board can allow a player who has been unable to reach an agreement with his club on terms to be included in the next draft. VFL club draft players, in specifying their financial requirements, have fourteen, or rather 56 chances, to gain employment with a VFL club. It is conceivable, however, that they may not wish to play with the club which drafts them. The financial demands of both national and VFL club draft players also have to be consistent with clubs' salary caps.

In previous sports cases, where zoning and transfer systems have been examined, Australian courts have taken a fairly dim view of labour market controls which have been loaded in favour of clubs and place restrictions on the economic freedom of players. For example, Mr. Justice Crockett in the *Foschini* case said, 'I am not satisfied . . . that a unilateral system of control . . . does not go beyond what is reasonably necessary for the protection of the VFL's interests'. And in rejecting the VFL's transfer rules he said 'Certainly it does not justify destruction of a Victorian footballer's freedom of choice of a VFL club with which to play.'<sup>28</sup> The national player draft would seem to constitute 'a unilateral system of control' and both the national player and VFL club player draft deny players any 'freedom of choice' in seeking employment with VFL clubs.

In the *Hall* case, where the VFL's zoning rules were declared to be an unreasonable restraint of trade, Mr. Justice Murray said:

I think it is impossible to hold that a system of Regulations which prevents an intending player from joining any club but one . . . does not operate as a restraint of his 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 represents 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 home or his place of work and the club grounds for training purposes . . . The [player's] trade as a would-be professional footballer is restrained because he is not permitted to choose, for whatever reason, the club with which he desires to be associated.<sup>29</sup>

It would be interesting to see whether or not the courts regarded the VFL's drafting arrangements (both the national player and VFL club player draft) as 'a freak of chance' and whether or not forcing a drafted player to move interstate to ply his trade as involving any 'real hardship' for the player concerned.

Finally, the High Court in the *Tutty* case, where the transfer rules of the New South Wales Rugby League were found to be an unreasonable restraint of trade, stated that 'the rules . . . prevent professional players from making most of the fact that there are clubs prepared to bid for their services ... This is plainly a fetter on the right of a player to seek and engage in employment.'<sup>30</sup> Is it conceivable that the courts would view the national player draft in similar terms?

The draft is also a feature of the employment rules used in US professional team sports. On a number of occasions the legality of the

draft has been tested in US courts. In acknowledging the obvious problems associated with transposing the decisions of different legal systems across national boundaries such cases may provide an indication of how Australian courts would react to the draft, if and when subjected to legal challenges. In both the *Smith*<sup>31</sup>(football) and *Robertson*<sup>32</sup> (basketball) cases the courts regarded the draft as being a violation of the Sherman Anti-Trust Act in that it reduced the ability of players to negotiate with clubs in seeking employment.<sup>33</sup>

The responses of the league's and player associations in both football and basketball was to negotiate protections to safeguard the rights of drafted players. For example, in football, a player who cannot agree on terms with his club is eligible for a subsequent draft. If the player and the second club which drafts him cannot agree on terms the player becomes a free agent and is entitled to seek employment with any club in the league.<sup>34</sup> And in basketball, a player who does not sign with his drafting club is eligible to be signed by any club in the following season.<sup>35</sup> The ability of a player to seek alternative employment elsewhere, at a later date, provides players with a degree of bargaining power which enhances their ability to negotiate satisfactory terms with the club that drafts them. The VFL could consider providing similar protections to players subject to drafting. Or, at a minimum, the VFL could enable players to indicate a number of clubs they would rather not be drafted by. Under the VFL club player draft rules there is nothing to stop an uncontracted player from being drafted by the club he wishes to move from.

Before leaving these legal issues it should be pointed out that Australian courts have taken a critical view of the various appeal systems

developed by different leagues for being one-sided and involving little or no input from players or their representatives.<sup>36</sup>The salary cap, the VFL Arbitrator, the VFL Appeal Board and the draft are all part of a system of controls devised and administered by the VFL. To the extent that there is a need for persons to make apparently independent decisions to resolve disputes/problems, such persons should be jointly appointed by the VFL and VFLPA.

The VFL maintains that the draft will help struggling clubs to obtain quality players and enhance the realisation of its goal of promoting sporting equality. It is unlikely, however, that the draft will help to achieve this goal. Using the national player draft as an example the last placed team on the ladder chooses players 1, 15, 29, 43, 57, 71, 85 and 99, while the premiers choose players 14, 28, 42, 56, 70, 84, 98 and 112. Assuming that the quality differences between players 14 and 15, 28 and 29, and so on are marginal, the last placed team derives an advantage of only one player compared to the premiers via the national player draft. Given that the VFL has two drafts some five months apart, the last placed club will have an advantage in obtaining two players. Two players out of a senior training list of 52 seems to provide a somewhat minimal benefit. Other factors, such as injuries to key or star players, the suspension of players for rough play, and changes in the form of players, would, in all probability, have more of an impact on a club's playing performance than the VFL's new drafting rules. If the VFL was really serious about enhancing the ability of struggling clubs to acquire players, it should alter its drafting rules to allow clubs to Select all of their draft choices in one hit, rather than one at a time round by round!

The available empirical evidence does not support the proposition

that labour market controls enhance sporting equality. Cairns, Jennett and Sloane in their 1986 survey of 'The Economies of Professional Team Sports' concluded 'that it is relatively uncontroversial that labour market controls have not given equality of performance'.<sup>37</sup> More specifically studies by Canes, Daymont, Jones and Davies, and Lock and Gratz<sup>38</sup> have concluded that different drafting schemes used by professional team sports have not enhanced sporting equality. Only Daly and Moore's<sup>39</sup> study of baseball in the period 1965 to 1976 has found the introduction of a draft being associated with an increase in the closeness of sporting equality. It should be pointed out, however, that of all the US sports, baseball is the one in which the draft has probably been least important. Baseball clubs have always been able to acquire players from other parts of America and Overseas (such as Mexico and Central America), whereas new entrants to both basketball and football have traditionally been funnelled through college drafts.

Finally, given the existence of the salary cap and the Common (52 man) senior training list for clubs, the draft is simply unnecessary. Both the salary cap, which, from 1989 at least, provides a Common financial constraint, and the 52 man senior training list, which provides a Common (number of) personnel constraint, should provide VFL clubs with enough discipline to ensure that they have an equal chance of success on the football field (putting to one side the strength of club's current personnel). The senior training list constraint precludes clubs from hoarding players and the salary cap places a limitation on the income that clubs can pay players. Enforcement of the salary cap, to the extent that it is a problem, would seem to be common with or without the draft.

Even without the draft, the VFL could still make use of its senior

training list rules concerning the number of players that clubs can employ at various stages between seasons (see Table Two above), including the provision of allowing clubs to choose only one player each from the WAFL. By abolishing the draft, and allowing market mechanisms to operate, both clubs and players would be more able to realise their mutual goals and objectives. Clubs would be more able to choose players suited to their playing needs. Players would be able to negotiate with all clubs in seeking employment, and to the extent that they moved interstate it would result from their own choice rather than the compulsion of the draft.

*In the Foschini* case Mr. Justice Crockett advocated a ‘freeing up’ of the market for VFL footballers. Whilst the VFL’s July 1988 rules have abolished, or virtually abolished, transfer fees the introduction of the draft, nonetheless, severely restricts and controls the operation of the labour market. The VFL should reconsider this decision and drop the draft from its employment rules. As presently constituted, the draft suffers technical and legal problems, will be ineffective, and is unnecessary .

## NOTES

1. Attendance figures are derived from 1988 VFL Year Book (Jolimont: VFL, 1988), p. 157.
2. VFL Task Force Interim Renort (1 August 1984), p. 4.
3. A cow of the VFL’s request is reproduced in VFL Task Force, The VFL Decision Making Processes (1 October 1984), p. 2.
4. ibid., p. 23.
5. See VFL Task Force Final Report (June 1985).
6. VFL, Victorian Football: Establishing The Basis For Future Success (Jolimont: VFL, October 1985).

7. For an economic analysis of the VFL in the period 1960 to 1984 see R.K Stewart, 'The Economic Development of the Victorian Football League 1960-1984', Sporting Traditions Vol.1 No.2. (May 1985).
8. Clubs were allowed to trade draft choices for other players or money.
9. Foschini vs VFL and South Melbourne (Supreme Court of Victoria, 1982) No. 9868, at p. 27.
10. ibid., at pp. 27-28.
11. ibid., at p. 25. For a further discussion of the VFL's labour market controls and the Foschini case see Braham Dabscheck, 'Sporting Equality: Labour Market vs Product Market Control', The Journal of Industrial Relations (June 1975); Braham Dabscheck, 'Silvio Foschini and the Sydney Swans', The Australian Quarterly (Autumn 1984); and Braham Dabscheck 'Sporting Labour Markets and the Courts', Sporting Traditions Vol1.2 No.1,(November 198.5).
12. Football Record (8 April 1988) p. 3.
13. For details concerning the negotiation and operation of the salary cap in basketball see Robert C. Berry and Glen M. Wang, Law and Business of the Sports Industries Vol. I, Professional Sports Leagues, (Dover, Mass: Auburn House, 1986), pp. 1651 169 and 391-402; Robert C. Berry, William B. Gould and Paul D. Staudohar, Labour Relations in Professional Sports (Dover, Mass: Auburn House, 1986), pp. 181-188; and Paul D. Staudohar, The Sports Industry and Collective Bargaining (Ithaca : ILR Press, 1986) pp. 109-113.
14. In 1987 two clubs 'incurred substantial fines' for breaching the salary cap. See Football Records, op.cit.
15. See Braham Dabscheck, 'Beating the off-side trap: the case of the Professional Footballers' Association', Industrial Relations Journal (Winter 1986), p. 357.
16. For details of the percentage of gross receipts derived by players in various US professional team sports see Berry and Wong, op.cit., p. 45.
17. For details concerning the 1987 salary cap see 1987 VFL Year Book, (Jolimont: VFL, 1987) p. 69.
18. For details concerning how the Brisbane Bears and West Coast Eagles established their teams see ibid., pp. 14-15 and 64-65.
19. For details concerning the operation of the 1987 and 1988 drafts see ibid., p. 68; and 1988 VFL, op.cit., p.64.
20. VFL, Procedures and Timetable - Introduction of National + VFL Club Player Draft Rules, 11 July 1988.
21. ibids., p. 8.
22. ibid., p. 15.

23. For details see Dabscheck, 'Beating ...', op.cit.; Berry, Gould and Staudohar, op.cit.; Staudohar, op.cit., and James B. Dworkin, Owners versus Players: Baseball and Collective Bargaining, (Boston: Auburn House), 1981. Following a decision by the High Court in the Tutty case in 1971(125 CLR 353) the New South Wales Rugby League abolished transfer fees. They reintroduced transfer fees in 1983 and increased them in 1988. See The Australian, 16 April 1988.
24. For details concerning the 1987 and 1988 VFL drafts see 1987 VFL, op.cit., p. 68, and 1988 VFL, op.cit., p. 64.
25. For details see The Australian, 20 August 1988.
26. For further discussion of these issues see Braham Dabscheck, 'The Wage Determination Process for Sportsmen', The Economic Record (March 1975).
27. See The Australian, 12 July 1988.
28. Foschini case, at pp. 23 and 26.
29. 1982 VR 64, at pp. 70 and 71.
30. 12.5 CLR 353, at p. 373.
31. 420 F. Supp. 738 (D.D.C. 1976), modified, 593 F. 26 1173, (D.C. Circ. 1978).
32. 389 F. Supp 867 (S.D.N.Y. 1975).
33. For commentary on these cases see Dworkin, op.cit., pp. 237-239; Beny and Wong, op.cit., pp. 129-130 and 393-401; Berry, Gould and Staudohar, op.cit., 102-105 and 168-169; and Staudohar, op.cit., pp. 104-108. Also see Lionel S. Sobel, professiona Sports and the Law, (New York: Law-Arts, 1977), Ch. 3.
34. See 1982 Football Collective Bargaining Agreement (mimeo), Article XIII.
35. See 1980 Basketball Collective Bargaining Agreement (mimeo), Article XXII.
36. See Foschini, pp. 21-34 for a review of such decisions.
37. J. Cairns, N. Jennett and P.J. Sloane, 'The Economies of Professional Team Sports: A Survey of Theory and Evidence', Journal of Economic Studies, 13, (1986), p. 33.
38. Michael E. Canes, 'The Social Benefits of Restrictions on Team Quality', in Roger G. Noll (ed.), Government and the Sports Business, (Washington: Brookings, 1974); T.N. Daymont, 'The Effects of Monopsonistic Procedures on Equality of Competition in Professional Sports Leagues', International Review of Sport Sociology, 10 (1975); J.C.H. Jones and D.K. Davies, 'Not Even Semitough: Professional Sport and Canadian Antitrust', Antitrust Bulletin, 23 (1978); and Ethan Lock and J. Michael Gratz, 'The National Football League Player Draft: Does it Equalize Team Strengths?', Journal of Sport and Social Issues 7 (1983).
39. George Daly and William J. Moore, 'Externalities, Property Rights and the Allocation of Resources in Major League Baseball', Economic Inquiry (January 1981).