

# *Assaults on Soccer's Compensation System: Europe and Australia Compared*

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The practice of buying and selling players is unsportsmanlike and most objectionable in itself, and ought not to be entertained by those who desire to see the game played under proper conditions ... some clubs derived considerable pecuniary advantages from training young players and then selling them to the more prominent clubs. We think the practice in such cases, when applied to human beings, altogether discreditable to any system bearing the name of sport (English Football Association, 1899).<sup>1</sup>

On 9 June 1995 the Australian Industrial Relations Commission handed down a decision which stated that ‘the present compensation fee system [operating in Australian soccer] should be abolished by the end of 1996’.<sup>2</sup> Six months later the Court of Justice of the European Communities (the Court of Justice), following action initiated by player Jean-Marc Bosman, declared invalid rules of the *Union des Associations Europeennes de Football* (UEFA)<sup>3</sup>—and by implication *Federation Internationale de Football Association* (FIFA)<sup>4</sup>—which required the payment of compensation fees, for players at the expiry of their contract, who move from a club of one member state (of the European Community) to a club of another member state. In addition, the Court of Justice declared invalid rules which placed restrictions on the number of nationals from other member states who could play professionally for clubs of a said member state.<sup>5</sup>

The compensation system which has operated in world soccer<sup>6</sup> required clubs, who signed a player whose contract with a previous club had expired, to pay a fee (in ‘compensation’) for the training and development of the player by his previous club. Compensation fees need to be distinguished from transfer fees which are paid to clubs who ‘release’ players to another club during the life of his contract. It should also be noted that the European Court’s decision on compensation fees

applies only to players who switch from a club in one member state to a club in another member state—it has no bearing on players who change clubs at the expiry of their contract *within* a member state.

Other professional team sports have initiated controls, which in essence are similar to soccer's transfer and compensation systems, which have limited the employment rights and income earning potential of players. Such controls have ranged from reserve or option systems,<sup>7</sup> zoning,<sup>8</sup> drafts,<sup>9</sup> assignment rights,<sup>10</sup> rights of first refusal<sup>11</sup> to limitations on players' earnings, whether they be individual wage maxima or team salary caps.<sup>12</sup> The various controls which have characterised the operation of professional team sports in North America and Australia have been subjected to various legal challenges by individual players and/or player associations. At the risk of offering a somewhat rash generalisation it might not be too unfair to say that the courts have struck down various controls which have restricted the economic freedom of players.<sup>13</sup>

What is interesting to note here is that, with the possible exception of the United Kingdom,<sup>14</sup> soccer had hitherto managed to escape or avoid such processes. In a sense these two cases have brought soccer into line with other professional team sports, which found themselves forced to devise employment rules which were not inconsistent with the dictates of different legal systems.

This article will provide a detailed analysis of these two cases. It will examine the background of both and the reasoning developed in the handing down of the respective decisions. Even though the *Bosman* case was handed down later it will be examined first. There are three major reasons for this decision. Firstly, the legal processes involved with this case were initiated several years before the commencement of the hearings before the Australian Industrial Relations Commission. Secondly, examining the relationship between member states of the European Community, UEFA and FIFA will help situate Australia in the context of world soccer. And finally, the reasoning developed in *Bosman* is more extensive than that of the Australian Industrial Relations Commission.

### **Europe The *Bosman* Case**

The employment rules of the *Union Royale des Societes de Football Association ASBL* (the Belgian League) can be summarised as follows.<sup>15</sup> Players and clubs negotiate contracts which specify remuneration and minimum bonuses. The minimum monthly payment in the Belgian League, at the time relevant to the *Bosman* case, was Belgian Francs

(BFR) 30 000 per month. Contracts run for a period of one to five years. Before the expiry of contracts, required to terminate on 30 June, clubs are 'required' to offer a new contract by 26 April. A player not offered a contract is regarded as an amateur for the purpose of transfer rules, which may entail a maximum transfer fee of BFR 1 000 000.

Players who reject such offers are placed on a transfer list. A so-called 'compulsory transfer fee', which under the rules is regarded as compensation for training the player, is determined by a formula which multiplies the player's previous year's gross income, by a factor from fourteen to two, depending on the player's age. A new club can obtain the services of the player by paying the compulsory transfer/compensation fee during the period 1 to 31 May.

Once this period has expired clubs can negotiate a so-called 'free' transfer fee for the player up to 25 June. If no transfer takes place the club is required to offer the player a new contract for one season, on the same terms offered in April. If the player rejects this offer the club, has until 1 August, to take action to suspend him. The player can be suspended for two seasons, during which time he is not entitled to play anywhere, unless a new contract is concluded and/or he is transferred. Thereafter, the player is regarded as an amateur.

UEFA has developed rules which govern the transfer of players between member associations and their respective clubs. The 1990 rules, operative at the time of the *Bosman* action, specified that a player, on the expiry of his contract, was free to enter into a new contract with the club of his choice. The new club is required to inform the previous club of the signing of this new contract. The old club, in turn, is obliged to inform its national association of this development. The latter is required to issue an international clearance certificate for the player to take up employment with his new club.

Under these rules the player's former club is entitled to receive 'compensation for ... training and development' of the player from his new club. If the two clubs cannot agree on a fee, a board of experts, selected by UEFA, will determine a fee in accordance with a formula which multiplies the player's gross income by a factor linked to his age. UEFA's 1990 rules placed an upper limit of 5 000 000 Swiss Francs on such fees—subsequent rules have removed this maxima. Article 16 of the rules stated that 'The business relationship between the two clubs in respect of the compensation fee for training and development shall exert

no influence on the sporting and professional ability of the player. The player shall be free to play for the club with which he has signed a new contract.'

Under FIFA's 1986 Regulations the transfer of a player from one country to another requires the issuing of a clearance certificate by the player's former national association, stating that all commitments of a financial nature, including a transfer fee have been settled. Article 14(1) states that a professional player may not leave his national association while he is bound by his contract and the rules of his club, league and national association however harsh they may be'. In 1994 FIFA developed new regulations which stated that disagreements over transfer fees must not have any influence on a player's professional or sporting activity. While the regulations state that 'an international certificate may not be refused for this reason' a player is still precluded from playing for his new club until such a certificate has been received.

Other member states of the European Community have developed a variety of responses to the transfer of and/or compensation for players changing clubs. In Austria, Germany, Greece, Italy and the Netherlands fees are required for the transfer of players. In Austria and Germany such fees are linked to the costs of training and developing players. In England, players who are offered terms worse than their previous year's contract receive an automatic free transfer. In addition, players who are thirty-three and have five year's service with a club are similarly entitled to a free transfer. Players whose contracts have expired are free to seek employment with a new club, subject to the payment of a fee to the player's former club. If the clubs cannot agree on a fee, it is determined by an Appeals Committee, with an independent person as chair.<sup>16</sup>

Transfer fees are payable for contracted players who move to Danish first division clubs or go abroad. Higher fees are 'charged' for players going abroad. In the latter part of 1995 the Danish League signalled its intention to abolish transfer fees. In Spain there are free transfers for players over twenty-five; although under 'reciprocity' agreements fees are paid and payable for international transfers. In France compensation fees are payable to clubs for training a player following his *first* transfer to a new club. The French rules specifically seek to link the level of compensation to the length and costs of training. According to these rules if a player moves overseas compensation fees are doubled. Players who have already changed clubs once can move to

a new club free of the encumbrance of compensation fees, like Spanish players over twenty-five.

Following the Court of Justice's 14 July 1976 decision in *Dona v Mantero*,<sup>17</sup> UEFA changed its rules concerning the number of players from other member states who could play with a club. In 1978 clubs could play two such players in a match, with no restrictions applying to non-nationals who had been resident for five years. From 1 July 1992 UEFA has operated under the so-called 'three plus two' rule. Clubs can name three non-nationals players on team sheets, plus two players who have played in the country for five years uninterruptedly, including three years as juniors.

In 1986 Jean-Marc Bosman signed a professional contract with first division club Standard Liege. In 1988 he transferred to local rival Liege for a fee of BFR 3 000 000. His contract, which ran for two years, guaranteed him a base salary of BFR 75 000 per month. With bonuses and other entitlements his earnings were approximately BFR 120 000 per month. In 1990 Liege offered Bosman a new contract for one season where his base wage was reduced to BFR 30 000 a month; the minimum under the Belgian League's rules (see above). Bosman declined that contract and was placed on Liege's transfer list. Under the league's 'compulsory transfer fee' (see above) his fee was set at BFR 11 743 000.

No club expressed interest in Bosman at this fee. He made contact with French second division club Dunkerque who signed him on a base monthly salary of BFR 90 000. The clubs, however, would need to 'freely' agree on a fee before Bosman could take up employment with Dunkerque. They apparently agreed on a fee of BFR 1 200 000 for one season; and an option for an additional BFR 4 800 000 for a permanent transfer. Because of Liege's fears that Dunkerque would be unable to pay the fee(s) agreed, Bosman's transfer fell through. In accordance with the Belgian League's rules (see above) Liege suspended Bosman, thereby preventing him from playing in the new season.

Bosman initiated a series of actions before the Courts of the European Community established by the 1957 Treaty of Rome, and subsequent agreements. The European Community operates a two-tiered court system.<sup>18</sup> A Court of First Instance, which commenced operation in September 1989, is empowered to hear 'certain classes of action or proceedings brought by natural or legal persons'. It is not 'competent to hear and determine actions brought by Member States or

by Community institutions or questions referred for a preliminary ruling under Article 177'.<sup>19</sup> The Court of First Instance was formed to streamline and ease pressure on the Court of Justice.

Article 164 of the Treaty of Rome states that The Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty'. The work of the Court of Justice (and that of the Court of First Instance) is assisted by advocates general. Article 166 states that The duty of the advocate general shall be to present publicly, with complete impartiality and independence, reasoned conclusions on cases submitted to the Court of Justice, with a view to assisting the latter in the performance of its duties as laid down in Article 164'. Steiner, in commenting on the role of advocates general, has commented that 'although [their] recommendations are not always followed, where they are they are useful as a means of ascertaining the reasons behind the Court's decision'. She has also suggested that 'the judgement [of the Court of Justice] itself, which is a single collegiate decision, is ... terse, cryptic, with little indication of the reasoning on which it is based'.<sup>20</sup>

Bosman initially sought an interim order, which amongst other things restrained Liege and the Belgian League from damaging his chances of finding alternative employment-including the payment of transfer fees. In November 1990 the court of First Instance granted this request. This enabled Bosman to search for employment, and he secured a series of short-term contracts with low- level clubs. Advocate General Lenz subsequently concluded that 'there are clear grounds for suspicion that despite the freedom of manoeuvre given him by the interim order, Mr Bosman was boycotted by all the European clubs which could have taken him on'.<sup>21</sup>

The major claim initiated by Bosman was the compensation fee system, and restrictions on the number of foreign nationals that could play for a team of a member state, contravened Article 48 of the Treaty of Rome. Article 48 specified that:

- 1 The free movement of workers shall be ensured within the community...
- 2 This shall involve the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other working conditions.
- 3 It shall include the right, subject to limitations justified by reasons of public order, public safety and public health:

- a to accept offers of employment actually made;
- b to move about freely for this purpose within the territory of Member States;
- c to stay in any Member State in order to carry on an employment in conformity with the legislative and administrative provisions governing the employment of the workers of that State ...<sup>22</sup>

On 20 September 1995 Advocate General Lenz handed down his Opinion concerning Bosman's claims. The following discussion will focus on his Opinion rather than the decision of the Court of Justice.

The first issue considered by the Advocate General was whether or not professional sport was covered by the Treaty of Rome, and justiciable before the Court of Justice. He concluded that if the Court declined to answer the questions raised by Bosman's actions 'regulation of the field will continue to be left to the whims of sporting associations. I regard that as scarcely tolerable.'<sup>23</sup>

In reaching his conclusion on this jurisdictional issue the Advocate General referred to two sports cases which had previously been brought before the Court of Justice. *Walrave* in 1974 involved issues associated with motor-paced bicycle races, and *Dona* in 1976 was concerned with professional soccer.<sup>2</sup> In both cases the Court of Justice had 'expressed the view that rules which prescribe that only players who possess the nationality of a State can play in that country's national team are consistent with Community law'.<sup>25</sup> On the basis of these two cases Advocate General Lenz concluded that:

- 1 The rules of private sports associations are ... subject to Community law.
- 2 The field of sport is subject to Community law in so far as it constitutes an economic activity.
- 3 The activities of professional football players are in the nature of gainful employment and are therefore subject to Community law.
- 4 ... Article 48 ... applies to those activities ...
- 5 The Court allows certain exceptions to the prohibitions contained in those provisions ... In [ *Walrave* and *Dona* ] the exceptions are linked with non-economic grounds which relate exclusively to sport.<sup>26</sup>

Two other sports cases were examined by the Advocate General. The first involved an action before the European Commission of Human

Rights, brought by a Dutch player concerning the payment of a compensation fee to his former club. The player claimed that compensation fees were inconsistent with Article 4.2 of the European Convention on Human Rights. Article 4.2 states that 'No one shall be required to perform forced or compulsory labour'.<sup>27</sup>

The European Commission of Human Rights rejected the application. It maintained Article 4.2 contained two elements which needed to be considered. They were, firstly, that the labour or service must be performed against the person's will; and, secondly, the obligation to perform such labour or service 'must be either unjust or oppressive or ... constitute an avoidable hardship'. With respect to the first element the European Commission of Human Rights suggested 'that prior consent is a decisive factor whether the work concerned should or should not be considered as being "forced or compulsory" ... the applicant freely chose to become a professional football player knowing that he would in entering the profession be affected by the rules governing the relationship between his future employers'. On the second element the Commission found that even if the compensation fee system 'produce[s] certain inconveniences ... it cannot be considered as being oppressive or constituting avoidable hardship'. Moreover, such a system did not directly affect the player's contractual freedom.<sup>28</sup>

Advocate General Lenz found this decision to be of 'no significance' in the Bosman action. He agreed that transfer rules did not 'directly' force players to perform 'forced or compulsory labour'. He pointed out that the Treaty of Rome, and Article 48, were concerned with achieving other goals-namely the right to trans-frontier freedom of movement in the European Community -than that of the European Commission of Human Rights. Moreover, he criticised the Commission's reasoning that a person, in choosing an occupation, accepted restrictions involved with its operation. He referred to a 1979 decision by a German court which found 'transfer rules restricted the free choice of place and employment', and 'it was not permissible even for private agreements to conflict with that provision, with the result that any acceptance of those rules by the player was irrelevant'.<sup>29</sup>

The second case, heard by the Court of Justice in 1979, involved Georges Heylens, a Belgian national and holder of a Belgian football trainer's diploma, who was employed as a trainer with the French club Lille. According to French law it is illegal for someone to act as a football

trainer, unless he or she holds a French football trainer's diploma or a foreign diploma, recognised by competent authorities, as equivalent, to work as a trainer. Such recognition was refused to Heylens without any reasons being furnished for the decision so made.

The Court of Justice found the actions by the French football and trainer authorities to be inconsistent with Article 48 of the Treaty of Rome. In this decision it affirmed that 'freedom of movement for workers is one of the fundamental objectives of the Treaty'.<sup>30</sup>

Advocate General Lenz found that restriction on the number of foreign players from other member states that can play for a club, and the payment of compensation fees for such players, contravened Article 48. With respect to the former he stated that:

No deep cogitation is required to reach the conclusion that the rules on foreign players are of a discriminatory nature. They represent an absolutely classic case of discrimination on the ground of nationality. Those rules limit the number of players from other Member States whom a club in a particular Member State can play in a match. Those players are thereby placed at a disadvantage with access to employment, compared with players who are nationals of that Member State.<sup>31</sup>

Three major arguments were advanced by the Belgian League and UEFA in support of restrictions on foreign players. Firstly, 'identification of ... spectators with ... various teams is guaranteed only if those teams consist ... [of] a majority of [national] players ... of the Member State'. In addition, the successful teams of a national league represent their nation in international club competitions. Secondly, the rules ensure that enough players are available for national sides. Without such rules restricting the employment of foreigners the development of young players would be adversely affected. Thirdly, limitations on employing foreigners restrain big clubs from securing the best players, which is conducive to the attainment of sporting balance or equality.

The Advocate General found no evidence to support the supposed link between spectator interest and the 'national character' of teams. He considered that such a proposition did not 'correspond to the facts ... The vast majority of clubs ... [particularly] the most successful [ones] of recent years ... nearly all of them have several foreign players in their ranks'. He also concluded that 'the great majority of a club's supporters

are ... more interested in the success of their club than in the composition of the team'. He also noted that clubs with regional names (which is the norm in European leagues) did not require that the 'club's players should come from the place in question'. The Advocate General stated that 'if nationals who come from other parts of the relevant State are accepted without question, one cannot see why that should not also be the case for nationals of other Member States'. He also rejected 'national identity arguments concerning clubs playing in international/European competitions. The current rules, he pointed out, allow clubs to play up to five ('three plus two') foreign players. Moreover, the national identity of players is not integral to such competitions, if the clubs competing, are regarded as the best ones of their respective national leagues.<sup>32</sup>

With respect to the second line of argument, the Advocate General stated that 'nothing has demonstrated that the development of young players in a Member State would be adversely affected if the rules on foreign players were dropped. Only a few top teams set store on promoting their own young players.' He also concluded 'that the participation of top foreign players promotes the development of football. Early contact with foreign stars can only be of advantage to a young player.' Advocate General Lenz also maintained that the success of a national team helped promote spectator interest in the said country. 'It is therefore in a country's clubs' very own interest to contribute to the success of the national team by developing suitable players and making them available.' Finally, he noted that most Member States had national players who played abroad 'without ... causing particular disadvantages.<sup>33</sup>

Advocate General Lenz found that restriction on foreign players had not helped achieve competitive balance between clubs. He stated that 'the richest clubs are still in a position to afford the best—and thus as a rule the most expensive—foreign stars'. Furthermore, 'such clubs have the opportunity to engage the best native players, without any comparable rules setting them limits'. He indicated 'that there are other means of attaining ... [competitive balance] without affecting the right of freedom of movement'<sup>34</sup> (see below).

Compensation fees were seen as a breach of Article 48 for two major reasons. The first concerned the situation where a national association's rules, alone or in conjunction with those of UEFA and FIFA, treated players transferring abroad less favourably than players

transferring within a national association. The employment rules of Denmark, France and Spain required/imposed higher fees for international over national transfers (see above). The Advocate General found 'that by such differential treatment a player can be deterred from exercising his right to freedom of movement under Article 48. Such discrimination is thus in breach of Article 48, whose purpose is precisely to give workers the possibility of moving to another Member State without having to reckon with such disadvantages as a result.'<sup>35</sup>

Secondly, players moving from one league to another required a clearance certificate from their previous national association, before being free to take up their new employment (see above). Such a certificate was not required for players changing clubs within a league. Advocate General Lenz found that because of these international clearance certificates 'transfers abroad are ... subject to less favourable rules than transfers within one and the same association. That difference in treatment may lead to players being deterred from exercising their right to freedom of movement. That ... can be regarded ... as a breach of the prohibition of discrimination in Article 48.'<sup>36</sup>

The Advocate General considered three major arguments advanced by the Belgian League and UEFA in defence of transfer rules/compensation fees. The first was that such rules were essential to achieving sporting equality. He concluded that 'the interested associations ... produced little convincing, specific material to support their argument'. The current rules, he said, 'probably very often force the smaller clubs to sell players in order to ensure their survival'. Since such players transferred to bigger clubs are undoubtedly the smaller clubs' best players, such clubs are 'thereby weakened from a sporting point of view'. Even though smaller clubs have higher incomes following the selling of such players they will be unlikely to employ similarly skilled players. Given that transfer/compensation fees are generally linked to players' earnings (see above), smaller clubs will be unable to acquire players from bigger clubs, who usually pay higher wages. The Advocate General concluded that 'in that respect the rules on transfers strengthen even further the imbalance which exists in any case between wealthy and less wealthy clubs'. Moreover, the transfer/compensation rules have not prevented 'rich clubs from engaging the best players'.

The Advocate General proposed an alternative solution for promoting sporting equality, consistent with Article 48 of the Treaty of

Rome. That solution was revenue sharing between clubs—‘part of the income obtained by a club from the sale of tickets for its home matches is distributed to ... other clubs. Similarly ... income received from awarding ... television [rights] ... could be divided ... between ... clubs.’ The Advocate General pointed to the material interdependence that existed between competing teams. ‘Each club’, he suggested, ‘needs the other ... in order to be successful. For that reason each club has an interest in the health of the other clubs<sup>37</sup> ... If the league is dominated by one overmighty club, experience shows that lack of interest will spread.’<sup>38</sup>

He pointed to examples of revenue sharing already in existence in various national and UEFA competitions, advocating their further use. Finally, he noted that redistributed income would provide clubs with greater financial certainty and predictability than the current transfer/compensation fee system. ‘If a club can reckon with a certain basic amount which it will receive in any case, then solidarity between clubs is better served than by the possibility of receiving a large sum of money for one of the club’s own player.’<sup>39</sup>

The second defence considered by the Advocate General was that transfer fees are merely compensation for the costs incurred in training and developing players. He found this view ‘unconvincing’. He stated that:

Transfer fees cannot be regarded as compensation for possible costs of training, if only for the single reason that their amount is linked not to those costs but to the player’s earnings. Nor can it seriously be argued that a player, for example, who is transferred for a fee of one million ECU caused his previous club to incur training costs amounting to that vast sum.

He also noted that such fees ‘are demanded even when experienced professional players change clubs. Here there can no longer be any question of “training” and reimbursement of the expense of such training. The Advocate General also stated that ‘any reasonable club will certainly provide its players with all the development necessary’. This ‘is expenditure which is in the club’s own interest and which the player recompenses with his performance’. Moreover, it was not clear ‘why such a club should be entitled to claim a transfer fee on that basis’. He pointed to situations in France and Spain where fees were eschewed for players after ‘a specified moment in time’ (see above).

The Advocate General envisaged two requirements which could potentially sustain a system of 'reasonable' transfer fees. Firstly, such fees would be linked to amounts actually expended by clubs in training players. Secondly, a fee could only be 'charged' for the first change of club where the previous club had trained the player; as in the French system, where fees are proportionately reduced for every year the player spends with the club after being trained-the club having had the opportunity to benefit from its training/investment in the player. In stating this, however, the Advocate General said such objectives could be achieved by redistributing income between clubs, without restrictions being placed on the freedom of movement of players.<sup>40</sup>

The third defence considered was that fees compensate clubs for the losses they incur because of the departure of players." In sentiments which echo the quotation which heads this article, from the English Football Association almost a century ago, the Advocate General stated:

that presupposes precisely that a player can be regarded as a sort of merchandise for which a price is to be paid. Such an attitude may correspond to today's reality, as characterised by the transfer rules, in which the 'buying' and 'selling' of players is indeed spoken of. That reality must not blind us to the fact that this is an attitude which has no legal basis and is not compatible with the right to freedom of movement ... I also have considerable doubt as to whether a system which ultimately amounts to treating players as merchandise is liable to promote the sporting ethos.<sup>42</sup>

### **Australia: The Industrial Relations Commission's Decision**

In contrast to Europe, attacks on the compensation system have been more circuitous, in what has been described as the Byzantine world of Australian soccer.<sup>43</sup> During 1993 and 1994 Australian soccer was wracked by continuing rumours concerning wrongdoing by coaches and administrators. On 2 April 1993 a program on SBS-TV *World Sport* expressed concern about the action of an English agent who had received 'kick-backs', in breach of FIFA and English Football Association regulations, for his part in the transfer of Australian players to English clubs. In October 1993 an article appeared in *Inside Sport* criticising Australian soccer's transfer and compensation rules, and the one-sided nature of standard contracts offered to players.<sup>44</sup>

A second article in the June 1994 issue of *Inside Sport* (published in May) criticised the role of national coach Eddie Thomson, acting as an agent, in facilitating the transfer of Australian players to European clubs.<sup>45</sup> The ABC-Radio *Grandstand* program aired these and other allegations on 28 May 1994, in a panel discussion including Neville Wran, President of the Australian Soccer Federation, and Kimon Taliadoros, Chief Executive of the Australian Soccer Players' Association. On 6 June 1994 the ABC-TV *Four Corners* program 'Kick Back' detailed claims of maladministration, if not malfeasance, by officials, coaches and overseas agents in the transfer and selection of players-coaches demanding payment from players to be selected, secret commissions and significant proportions of transfer fees from overseas clubs being redirected to other parties. Throughout this period, sports journalist Michael Cockerill wrote a series of articles in the *Sydney Morning Herald* concerning the administration of Australian soccer.

Three days before the *Four Corners*' program, the Australian Soccer Federation announced the appointment of the Honourable Donald Gerard Stewart, a former judge of the Supreme Court of New South Wales and former head of the National Crime Authority, to conduct an inquiry into Australian soccer. His terms of reference were to

Inquire into the practices and procedures of the transfer of players from one club to another.

Investigate practices and procedures relating to the payment of commissions, compensation or other rewards or inducements (if any) to any club, agent, representative, official, coach, player or other person relating to the transfer of players from one club to another.

Investigate practices and procedures applied in the selection of players to the national team squads and to the national team, and to inquire into any acts of impropriety in such selection process.

Draft a code of conduct to become rules, regulations and by-laws of the Federation to regulate practices and procedures associated with the transfer of players from one club to another and the selection of players in the national squads and the national team.

Make recommendations to the Federation which in the light of [the inquiry's] findings it considers appropriate.<sup>46</sup>

Most of the Stewart Report's 240 plus pages is devoted to examining

particular events and specific allegations concerning various individuals, and tracking down the missing monies, associated with big-ticket transfers of Australian players to European clubs, in the late 1980s and early 1990s. While this makes interesting, if not extraordinary, reading, casting a disturbing light on the administration of Australian soccer, these issues will not be examined here.<sup>47</sup> The discussion will focus on Mr Stewart's conclusions concerning the impact of transfer and compensation systems on players and his recommendations concerning reform.

With respect to the former he found the level of, and delays associated with processing appeals against, compensation fees adversely affected players. High compensation fees precluded players from obtaining employment with alternative clubs. Mr Stewart pointed to examples of players being forced out of the game because of the restrictive effect of compensation fees. One player was unable to continue his career, with a lower division club, following increased commitments associated with his regular, non-soccer employment, which reduced his ability to attend training. Alternatively, players were forced to play with clubs with whom they were disenchanted.<sup>48</sup>

More generally Mr Stewart observed that:

It is apparent that the traditional views of players from a young age as being property of a particular club, to be traded in accordance with the needs and requirements of the individual club, is still ... prominent ... It is an attitude which is clearly out of step with contemporary Australian society and which calls out for responsible action by the ASF... the ... attitude ... that players are property ... establish[es] in the minds of players and their parents and friends the perception that if an individual is to advance his playing career, either here or overseas, he must rely on the favour and support of key officials who are in positions of power and patronage.<sup>49</sup>

In his report Mr Stewart noted the action of Jean-Marc Bosman—whom he described as 'a rather courageous player'—before the European Court of Justice. He surmised, on the basis of previous case law,<sup>50</sup> that Australian courts would find soccer's transfer and compensation systems to be in breach of the *Trade Practices Act 1977* (Commonwealth), an unreasonable restraint of trade under the common law, and would fall foul of Section 275 of the *Industrial Arbitration Act 1991* (New South Wales).<sup>51</sup>

Mr Stewart advocated the use of an industrial relations model to bring about changes to soccer's employment rules. Joint negotiations should occur between the various leagues/clubs and the Australian Soccer Players' Association; and/or such negotiations should be conducted under the auspices of the Australian Industrial Relations Commission. He stated that 'the ASF should aim to ensure that the domestic transfer fee system is abolished before the end of 1996'.<sup>52</sup>

The Stewart Report was never published by the Australian Soccer Federation, because of fears that persons named would initiate legal proceedings to defend their reputations. The report was subsequently published by the Senate Environment, Recreation, Communications and the Arts References Committee, under parliamentary privilege on 10 January 1995. This committee decided to initiate its own inquiry into Australian soccer and produced two brief reports—the first in June 1995, the second in November 1995.<sup>53</sup>

Both reports contained majority (Coalition and Democrat senators) and minority (Labor party or government senators) positions. Without going into the details of the two respective reports, the minority attacked the majority (and the Stewart Report) on civil libertarian grounds. The minority also maintained that Australian soccer should put its own house in order. The majority reached a number of conclusions in 'reviewing' the Stewart Report and offered various recommendations concerning individuals and other issues. These will not be examined here.<sup>54</sup>

The following discussion will focus on the inconsistent positions adopted by the majority in the June and November 1995 reports. In doing so, it will be necessary to repeat the distinction between compensation and transfer fees. The former are for players who change clubs at the end of their contract; the latter during contracts. The majority, like many in the soccer world, tend to conflate the two. In the June 1995 report the majority contended that domestic transfer fees 'should be abolished immediately—in this they took a stronger line than the Stewart Report (see above)—and that the dropping of such fees 'will not disadvantage clubs overall in Australia'.<sup>55</sup>

In November 1995 the majority again, apparently, declared their support for the immediate abolition of transfer fees. However, three paragraphs later they fundamentally contradicted themselves by arguing that 'players should ... be able to sign contracts with individual clubs

and “compensation” payments should be permitted’.<sup>56</sup> As far as Australian Institute of Sport trained players were concerned, the majority expressed support for a proposal requiring ‘a three year bond’ for ‘players to remain in Australia after training, subject to such a bond being bought out at a realistic price’. Moreover, the majority suggested that the Australian Institute of Sport and the Australian Soccer Federation enter into an agreement stopping players playing ‘as professionals overseas unless an agreed recompense is made to the AIS’.<sup>57</sup>

The Australian Soccer Players’ Association formed on 27 March 1993.<sup>58</sup> It was established in reaction to problems experienced by players under the transfer/compensation system, the harsh treatment of club administrators, and as a force to lift the profile of the sport, in the context of an atmosphere heavily laced with rumour and innuendo.<sup>59</sup> According to the Stewart Report, the Australian Soccer Players’ Association ‘has received strong support from players, gather[ing] a very high proportion of players as members.’<sup>60</sup> In March 1994 the association had 116 members; by October 1994 70 per cent of National Soccer League players—approximately 180 players were members; and in April 1995 there were 200 members, 170 of whom were senior players in the National Soccer League.<sup>61</sup>

On 13 September 1993 the Players’ Association merged with the Media, Entertainment and Arts Alliance, as an autonomous section within its newly formed Sports’ Branch. The Alliance was created in May 1992 following a three-way merger between Actors Equity of Australia, the Australian Journalists Association and the Australian Theatrical and Amusement Employees Association. The Alliance has approximately 35 000 members.<sup>62</sup> The significance of the Alliance for the Players’ Association is the provision of logistical and other support in pursuit of its various objectives.

During 1993 and 1994 the Players’ Association sought to negotiate improvements to the employment rights of players with the National Soccer League and Australian Soccer Federation. In so doing, the Players’ Association sought to have disputes over such issues resolved by the Australian Industrial Relations Commission. On 25 August 1994 Senior Deputy President Polites found that a dispute existed between the parties—or more significantly, that the Commission had jurisdiction to resolve various issues in dispute.<sup>63</sup> In subsequent proceedings before Commissioner McDonald, the Players’ Association sought to have an

interim award application for the abolition of compensation fees, referred to a Full Bench of the Commission.<sup>64</sup> On 16 December 1994 this request was acceded to by Commission President Justice Deirdre O'Connor.<sup>65</sup>

The League and Federation initially challenged the interim award application under Section 111 (1) (g) (iii) of the *Industrial Relations Act* 1988 (Commonwealth). It stated that:

111 (1) Subject to this Act, the Commission may, in relation to an individual dispute ... (g) dismiss a matter or part of a matter, or refrain from further hearing or from determining the industrial dispute, if it appears ... (iii) that further proceedings are not necessary or desirable in the public interest.

The essence of the League/Federation's submission was, notwithstanding revelations of the Stewart Report, the issues raised by the Players' Association should be left to the Federation, and there was no evidence that players had been harmed by the compensation system. Without hearing submissions from the Players' Association the Full Bench (Vice-President McIntyre, Deputy President Harrison and Commissioner McDonald) dismissed the League/Federation's submission on 15 February 1995, saying it would present its reasons for doing so later. In a decision, handed down on 24 March 1995, the Full Bench said 'while many of [the League/Federation's] submissions carry considerable weight, they do not tip the scales significantly for us to uphold [their] application'.<sup>66</sup>

During April and May 1995 the Full Bench heard submissions concerning the substance of the Players' Association's interim award application. The Full Bench handed down its decision on 9 June 1995. The style of the decision is significantly different from the Opinion of Advocate General Lenz in the *Bosman* case. Lenz provided a detailed commentary, analysis and reasons concerning the Belgian League's, and UEFA's, compensation systems. The Full Bench's decision, on the other hand, provided limited analysis or explanation of the reasons why it reached the conclusions that it did. Most of the Full Bench's 80 page decision is devoted to presenting the League/Federation's rules and detailed summaries of the respective positions of the parties and the witnesses they called.

In its decision the Full Bench basically followed the findings of the Stewart Report. Three major parts of its decision will be highlighted: its

conclusions concerning the compensation system, the interim award application and its proposals for the future.

The Full Bench found that the compensation system 'operates in many instances unfairly towards players', has little or anything to do with the training and development of a player', 'treats players as if they were the property of their club', and impinges 'on the freedom to choose one's employer'. Moreover, it concluded that the system may not operate 'to the [overall] advantage of ... clubs ... [and] the sport of soccer in Australia', and 'if abolished may lead to an increase in the remuneration of some players'. Finally, after reviewing leading sports' restraint of trade cases— *Eastham v Newcastle United Football Club*, *Buckley v Tutty*, *Hoszowski v Brown* and *Adamson v New South Wales Rugby League*<sup>67</sup>—it concluded that the compensation system may be an unreasonable restraint of trade.<sup>68</sup> In doing so, however, it noted that the Players' Association's application was for an interim award, not a complaint about restraint of trade.<sup>69</sup>

The Players' Association's application for an interim award was dismissed by the Full Bench. Three factors influenced this decision. Firstly, interim awards have traditionally been utilised to preserve existing, or pre-existing, rates and conditions. The Full Bench stated that 'nothing of this nature arises in the present case. The compensation fee system is not a change to pre-existing rates and conditions. It is something that has been in existence for a long time.'<sup>70</sup> Secondly, under the Wage Fixing Principles established in August 1994, the Commission contended that the parties agreed 'in the making of a first award proper the main consideration should be that the award meets the needs of the particular industry or enterprise whilst ensuring that the employee interests are also properly taken into account'.<sup>71</sup> While this passage was referred to in its decision,<sup>72</sup> the Full Bench, notwithstanding its reading of the Stewart Report and its own conclusions concerning the compensation system's 'unfair' impact on players (see above), eschewed an interim award.

The third factor relates to the Full Bench's interpretation of Mr Stewart's recommendation that Australian soccer's 'domestic transfer fee system [should be] abolished before the end of 1996' (see above). The Full Bench adopted a very particular, or narrow, interpretation of this phrase insisting that such changes should occur at the end of 1996 rather than more generally before the end of 1996. Quite obviously, a decision made on compensation fees on 9 June 1995 was consistent with the

'timing, contained in the Stewart Report. Moreover, Mr Stewart produced an in-house report, notwithstanding the controversial nature of his findings and recommendations, for the Australian Soccer Federation; in contrast to the Australian Industrial Relations Commission which is a public body. The Full Bench pointed to what it regarded as an inconsistency in the Players' Association's position, in relying on Mr Stewart, except for his alleged timetable for abolishing the compensation system. It said that 'it does not appear to us that [the Players' Association] can, in effect, pick the eyes of the Stewart Report'.<sup>73</sup>

The Full Bench made it clear that 'the compensation fee system in its present form should be abolished'. However, it maintained that its abolition should occur, according to its interpretation of the so-called time frame contained in the Stewart Report. It also said the compensation fee system should not 'be abolished until consideration has been given to whether something else be put in its place', or whether the system 'could be modified so as to remove its unsatisfactory features'.<sup>74</sup>

The decision went on to advocate that negotiations should occur between the parties under the auspices of Commissioner McDonald. Such negotiations should consider whether the compensation system should be replaced by an alternative system, modified in a way which is acceptable to both sides, its operation in Australian soccer other than National Soccer League clubs, and finally 'all the terms of an agreement or award to cover the remuneration and conditions of employment of professional soccer players'. The decision also stated that 'to the extent that agreement cannot be reached arbitration may be necessary'. The final sentence of the decision stated that 'Without pre-empting what the Commission might do at any time in the future, we reiterate our view that, on the evidence and material before us, the present compensation fee system should be abolished by the end of 1996'.<sup>75</sup> At the time of writing (April 1996) the parties, under the umbrella of the Australian Industrial Relations Commission, have been involved in negotiations over a new set of employment rules for Australian soccer players.

## Conclusions

The Australian Industrial Relations Commission and the European Court of Justice handed down decisions in 1995 which fundamentally attacked soccer's compensation system, and/or the rules which have hitherto governed the employment of players. The Court of Justice's decision—

in particular the Opinion of Advocate General Lenz—is more thorough in its analysis and rejection of propositions developed by soccer authorities in support of the compensation system, than the decision of the Industrial Relations Commission. This is due to the different jurisprudential traditions of the two bodies. Whereas the Industrial Relations Commission was searching for a solution to an industrial relations problem—which incidentally has strengthened the hand of the Players' Association in subsequent negotiations with the National Soccer League and Australian Soccer Federation—the Court of Justice was charged with finding a 'just, or legal solution.

Gordon Taylor, the Chief Executive of English soccer's Professional Footballers' Association and President of the *Federation Internationale des Footballeurs Professionnels* (FIFPRO) —a confederation of professional player associations—has suggested that European clubs may attempt to bypass the *Bosman* case by signing players on long term contracts, obtaining transfer fees by selling players mid-contract.<sup>76</sup> Against this, clubs will have an incentive to search for players out of, rather than on, contract.

European clubs will find it cheaper to acquire players out of contract from other member states, than from within their own, domestic competitions. Players out of contract from other member states, can be employed without the encumbrance of a compensation fee, in comparison to out of contract domestic players. Such 'discriminatory' treatment between players from other member states and local players may result in legal actions to abolish compensation fees for domestic players. As a result of the *Bosman* case, individual leagues in the European community, and UEFA, may find themselves forced to change their rules on *domestic* compensation fees.

In addition, European clubs will discover that players from other member states in the European community will be cheaper to acquire, *ceteris paribus*, than players from other parts of the world, such as South America, Africa and Australia. A possible implication of this for Australia, for example, is that the sale of Australian players to Europe will dry up, with attendant falls in incomes received by Australian clubs. A fall in the demand for 'quality' Australian players by European clubs, may translate into such players having a greater incentive to play out their careers in Australia, which would appear to be a bonus for the Australian game.

Alternatively, European clubs may develop a taste for acquiring

players without the added financial burden of compensation fees. If and when their scouting systems inform them of a quality non-European Community player they would like to employ, they may simply offer him a contract to play, once his contract with his existing club has expired, and simply refuse to pay the said club a compensation fee. Buoyed by the *Bosman* case such clubs may feel that any pending legal actions mounted by other clubs, national leagues and FIFA, would be unsuccessful. The *Bosman* case may have a ripple effect on soccer's employment rules worldwide.

For over twenty-five years economists have argued that competitive balance and the legitimate goals of sports/leagues could be more efficiently achieved through revenue sharing than labour market controls.<sup>77</sup> Such views were endorsed by Advocate General Lenz in his Opinion to the Court of Justice. Moreover, revenue sharing is consistent with the free movement of workers contained in Article 48 of the Treaty of Rome.

The *Bosman* case and, to a lesser extent, the decision of the Australian Industrial Relations Commission—subject to results from ongoing negotiations under its auspices between the Australian Soccer Players' Association and the National Soccer League and Australian Soccer Federation—have afforded soccer players the same rights as workers in other occupations.

#### NOTES:

- 1 English Football Association memorandum, 1899, quoted in Geoffrey Green, *The History of the Football Association*, Naldreet Press, London, 1953, p. 407.
- 2 *Media, Entertainment and Arts Alliance v Marconi Fairfield Soccer Club and Others* [and] Australian Soccer Federation, Australian Industrial Relations Commission, Dec 1285/95 S Print M2565, Sydney, 9 June 1995, p. 80.
- 3 The controlling body of European soccer.
- 4 The controlling body of world soccer.
- 5 *Union Royale Beige des Societes de Football Association ASBL and Royal Club Liegeois SA v Jean-Marc Bosman*, Court of Justice of the European Communities, Case C-415/93, Luxembourg, 15 Dec. 1995, p. 21.
- 6 As will be pointed out below, some soccer nations do not operate, or have qualifications to, these rules.
- 7 Players sign contracts which include a one-way one year option, or reserve, clause which can be exercised by the club. In this way clubs can perpetually maintain a hold on the services of players.
- 8 The dub for whom a player can play is determined by the zone, or geographic area, in which they reside.
- 9 Players have no choice concerning the club they can play with. Players are notionally placed into a common pool and players are chosen, or drafted, by clubs in turn—usually with bottom clubs having first choice and the champion side last

- choice.
- 10 Players can be assigned by clubs or the league to other clubs or other leagues.
  - 11 A player can negotiate terms and conditions of employment with a new club. However, the taking up of such employment with this new club can be negated if the player's previous club matches the terms offered by the new club.
  - 12 A limit on the total amount of income (and/or entitlements) that can be paid to all the players employed by the club.
  - 13 For details concerning developments in North America see James B Dworkin, *Owners versus Players: Baseball and Collective Bargaining*, Auburn House, Boston, 1981; Robert C Berry and William B Gould, 'A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes', *Case Western Law Review*, Summer 1981, pp. 685-813; Robert C Berry, William B Gould and Paul D Staudohar, *Labor Relations in Professional Team Sports*, Auburn House, Dover, Massachusetts, 1986; Paul D Staudohar, *The Sports Industry and Collective Bargaining*, 2nd ed., ILR Press, Ithaca, New York, 1989; Lee Lowenfish, *The Imperfect Diamond: A History of Baseball's Labor Wars*, rev. ed., De Capo Press, New York, 1991; Marvin Miller, *A Whole Different Ball Game: The Sport and Business of Baseball*, Birch Lane Press, New York, 1992; Jack Sands and Peter Gammons, *Coming Apart At The Seams: How Baseball Owners, Players and Television Executives Have Led Our National Pastime to the Brink of Disaster*, Macmillan, New York, 1993; and John Helyar, *Lords of the Realm: The Real History of Baseball*, Ballantine, New York, 1995. For general books on North American sport and the law see Lionel S Sobel, *Professional Sports and the Law*, Law-Arts Publishers, New York, 1977; and Robert C Berry and Glenn M Wong, *Law and Business of the Sports Industries*, vol. 1, *Professional Sports Leagues*, Auburn House, Dover Massachusetts, 1986. Australian case law includes *Tutty v Buckley*, (1970) 3 NSW 463 and *Buckley v Tutty*, (1971) 125 CLR 353; *Hosowski v Brown and Anor*, Supreme Court of New South Wales, No. 1667 of 1978 (unreported); *Adamson v West Perth Football Club*, (1979) 27 ALR 475; *Hail v Victorian Football League*, (1982) VR 64; *Foschini v Victorian Football League*, Supreme Court of Victoria, 1982, No. 9868 (unreported); *Walsh v Victorian Football League*, (1983) 74 FLR 207; *Hughes v western Australian Cricket Association*, (1986) ATPR 40-676; *McCarthy v Australian Rough Riders Association*, (1988) ATPR 40-836; *Barnard v Australian Soccer Federation*, ATPR 40-862; *Carfino v Australian Basketball Federation*, (1988) ATPR 40-895; *Buckenara v Hawthorn Football Club*, (1988) VR 39; *Hawthorn Football Club v Harding*, (1988) VR 49; *Nobes v Australian Cricket Board*, Supreme Court of Victoria, No. 13613 of 1991 (unreported); and *Adamson v New South Wales Rugby League*, (1990) 27 FCR 535 and *Adamson v New South Wales Rugby League*, (1991) 31 FCR 242. For commentaries on these various cases see Neal Bicker and Paul von Nessen, 'Sport and Restraint of Trade: Playing the Game the Court's Way', *Australian Business Law Review*, Aug. 1995, pp. 180-97; Braham Dabscheck, 'Sporting Labour Markets and the Courts', *Sporting Traditions*, Nov. 1985, pp. 2-24; G M Kelly, *Sport and the Law: An Australian Perspective*, Law Book Company, Sydney, 1987, pp. 267-95; Stephen and Linda Owen-Conway, 'Sport and Restraint of Trade', *Australian Bar Review*, 1989, pp. 208-24; Maeve McDonagh, 'Restrictive Provisions in Player Agreements', *Australian Journal of Labour Law*, Aug. 1991, pp. 126-50; K E Lindgren, 'Sports and the Law: the Player's Contract', *Journal of Contract Law*, Sept. 1991, pp. 135-45; Jeffrey Browne, 'Playing Contracts', in Business Law Education Centre, *Sports and the Law*, South Melbourne, 1991, pp. 41-177; and Hayden Opie and Graham Smith, 'The Withering of Individualism: Professional Team Sports and Employment Law', *University of New South Wales Law Journal*, 1992, pp. 313-55.
  - 14 In 1963 English soccer's retain and transfer system was declared to be an

- unreasonable restraint of trade—*Eastham v Newcastle United Football Club*, (1 964) Ch. 413. Following a series of negotiations between the Football League and the Professional Footballers' Association changes were negotiated to this system. For example, players who are offered terms worse than their previous contract are offered an automatic free transfer. For details concerning transfer or compensation systems in English soccer see Braham Dabscheck, 'Defensive Manchester: A History of the Professional Footballers' Association', in Richard Cashman and Michael McKernan, eds, *Sport in History: The Making of Modern Sporting History*, UQP, St Lucia, 1979, pp. 227-57; and Braham Dabscheck, 'Beating the Off-Side Trap: the Case of the Professional Footballers Association', *Industrial Relations Journal*, Winter 1986, pp. 350-61. For an Irish case which found wage maxima to be an unreasonable restraint of trade see *Johnston v Cliftonville Football and Athletic Club and Anor*, (1984) N1 9.
- 15 Unless otherwise stated the following information is derived from the Opinion Of Advocate General Lenz, 20 Sept. 1995, Case C—415/93, *ASBL Union Royale Belge des Societes de Football Association v Jean-Marc Bosman*.
  - 16 For further details concerning the operation of this system see Dabscheck, 'Beating the Off-side Trap'.
  - 17 Case 13/76 (1976) ECR 1333. For an earlier sporting case see Case 36/47 *Walrave v Union Cycliste International* (1974) ECR 1405. Both of these decisions are in French.
  - 18 For details concerning the operation of European Community Courts see Josephine Steiner, *Textbook on EEC Law*, 2nd ed., Blackstone, London, 1990, pp. 14-16; Timothy Millett, *The Court of First Instance of the European Communities*, Butterworths, London, 1990, pp. 1-19; and P S R F Mathijsen, *A Guide to European Law*, 6th ed., Sweet and Maxwell, London, 1995, pp. 83-113.
  - 19 Article 177 states that 'The Court of Justice shall be competent to make a preliminary decision concerning: a) the interpretation of this Treaty; b) the validity and interpretation of acts of the institutions of the Community; and c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide. Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal, if it considers that its judgement depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.' A copy of the Treaty of Rome can be found in United Nations Treaty Service, vol. 298, 1958, pp. 11-94.
  - 20 Steiner, *Textbook on EEC Law*, p. 15. Also see the comment by Mathijsen, *Guide to European Law*, pp. 85-6.
  - 21 Opinion Of Advocate General Lenz, p. 15.
  - 22 He also mounted actions under Articles 85 and 86. Article 85 states that 'The following shall be deemed to be incompatible within the Common Market and shall hereby be prohibited: any agreement between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market ...' Article 86 states that 'To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited ...' The Court of Justice decided not to rule on the interpretation of these Articles (p. 19); the following discussion will exclude these issues. See

- Opinion Of Advocate General Lenz, pp. 79-90.
- 23 Opinion of Advocate General Lenz, p. 33. His examination of this jurisdictional issue is more complex than indicated here. See pp. 20-34.
  - 24 See note 17.
  - 25 Opinion Of Advocate General Lenz, p. 40.
  - 26 Opinion Of Advocate General Lenz, pp. 36-7.
  - 27 The European Convention on Human Rights is reproduced in Edward Lawson, ed., *Encyclopedia of Human Rights, Taylor and Francis, New York, 1991*, pp. 500-5.
  - 28 Application No. 9322/81, X v the Netherlands, *European Commission of Human Rights Decisions and Reports*, 3 May 1983, vol. 33, p. 180, at pp. 182-3. It appears that soccer's compensation fee system would fall within the definitions of slavery laid down by the League of Nations 1926 Slavery Convention, as Amended by Protocol by the United Nations in 1953; and the United Nations' 1956 Supplementary Convention On The Abolition Of Slavery, The Slave Trade, And Institutions And Practices Similar To Slavery. The 1926 Convention, which was followed in the 1956 Supplementary Convention, defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,., and the slave trade 'includes ... all acts involved in ... acquisition ... with a view to selling or exchanging ... all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged,., Presumably such actions would need to be mounted before the International Court of Justice. The two Conventions are reproduced in Ian Brownlie, ed., *Basic Documents On Human Rights*, 3rd ed., Clarendon Press, Oxford, 1992, pp. 52-63.
  - 29 Opinion Of Advocate General Lenz, p. 68. The reference he supplied to the German case is *Neue Juristische Wochenschrift* 1979, p. 2582.
  - 30 Case 222/86 *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football v Georges Heylens and Others*, 1987 ECR 4097, at p. 4116. In his Opinion Advocate General Lenz refers to this case on pp. 42, 53 and 64.
  - 31 Opinion Of Advocate General Lenz, p. 39.
  - 32 Opinion Of Advocate General Lenz, pp. 42-3.
  - 33 Opinion Of Advocate General Lenz, pp. 43-4.
  - 34 Opinion Of Advocate General Lenz, p. 45.
  - 35 Opinion Of Advocate General Lenz, p. 47.
  - 36 Opinion Of Advocate General Lenz, p. 50.
  - 37 In a classic article on sports economics Neale said 'receipts depend upon competition among the ... teams, not upon business competition among the firms running the contenders, for the greater the economic collusion and the more the sporting competition, the greater the profits,., Walter C Neale, 'The Peculiar Economics of Professional Sports', *Quarterly Journal of Economics*, Feb. 1964, p. 2.
  - 38 The Advocate General quoted two articles by economists which supported revenue sharing. They were Stefan Kesenne, 'De Economie van de Sport: Een Overzichtsbijdrage', *Economisch en Sociaal Tijdschrift*, 1993, p. 359; and J Cairns, N Jennett and P J Sloane, 'The Economics of Professional Team Sports: A Survey of Theory and Evidence', *Journal of Economic Studies*, vol. 13, 1986, pp. 3-80. See also note 77.
  - 39 Opinion Of Advocate General Lenz, pp. 71-5.
  - 40 Opinion Of Advocate General Lenz, pp. 75-6.
  - 41 In *Buckley v Tutty*, (1971) 125 CLR 353, at p. 378 the High Court stated that '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'.

- 42 Opinion Of Advocate General Lenz, pp. 77.
- 43 In a report to the Australian Soccer Federation Mr D G Stewart referred to 'the web of power and patronage which characterises the administration of soccer in Australia. A complex network of almost Byzantine proportions exists, most especially in the individual soccer clubs, very much reflecting the nature of the development of the game in this country.' Report by the Hon. D G Stewart, Published by the Senate Environment, Recreation, Communications and the Arts References Committee, 10 Jan. 1995, Canberra, p. 19. For historical accounts of soccer in Australia see Phil Mosely, 'Soccer', in Wray Vamplew et al, eds, *The Oxford Companion to Australian Sport*, 2nd ed., OUP, Melbourne, 1994, pp. 385-8; and Philip Mosely and Bill Murray, 'Soccer', in Wray Vamplew and Brian Stoddart, eds, *Sport in Australia: A Social History*, CUP, 1994, pp. 213-30.
- 44 Robert Galvin, 'Soccer's Slave Trade', *Inside Sport*, Oct. 1993, pp. 16-24, 140.
- 45 Robert Galvin, 'Eddie Thomson's Wrong Moves', *Inside Sport*, June 1994, pp. 16-24.
- 46 Stewart Report, p. 8.
- 47 For an overview of the Stewart Report see Braham Dabscheck, 'The Stewart Report—Australian Soccer's Spectacular Own Goal', *Australian and New Zealand Sports Law Association Newsletter*, vol. 4, no. 4, 1994, pp. 1, 7-8.
- 48 See Stewart Report, pp. 35-46.
- 49 Stewart Report, pp. 22-3.
- 50 See note 13 for details and commentaries concerning major Australian cases.
- 51 Stewart Report, p. 25. Section 275 of the Industrial Relations Act 1991 (NW) states that '(1) The Industrial Court may make an order declaring wholly or partly void, or varying, either from its commencement or from some other time, any contract or arrangement or any related condition or collateral arrangement under which a person performs work in any industry if the Industrial Court finds that the contract or arrangement or any related condition or collateral arrangement: a) is unfair; or b) is harsh or unconscionable; or c) is against the public interest ...'
- 52 Stewart Report, p. 29.
- 53 *Soccer*, Senate Environment, Recreation, Communications and the Arts References Committee, First Report, June 1995, Parliament House, Canberra; and Soccer, Senate Environment, Recreation, Communications and the Arts References Committee, Second Report, Nov. 1995, Parliament House, Canberra.
- 54 For a critique of the majority's June 1995 findings concerning the national coach see Graem Sims, 'Why Eddie Thomson Has To Go', *Inside Sport*, Sept. 1995, pp. 20-9.
- 55 Senate Report, June 1995, p. 7.
- 56 Senate Report, Nov. 1995, pp. 12-13. The latter statement is made notwithstanding the majority noting the European Court of Justice's decision in the *Bosman* case!
- 57 Senate Report, Nov. 1995, pp. 18-19. On this issue the minority said 'while it is regrettable that players choose to go overseas the solution is not to impose an impediment, which would probably be an illegal restraint of trade, but to improve the standing and attractiveness of the National League.. See p. 42.
- 58 For details of previous failed efforts by Australian soccer players to form player associations/unions see Braham Dabscheck, 'Early Attempts at Forming Soccer Player Unions in Australia', *Sporting Traditions*, May 1994, pp. 25-40; and Roy Hay, 'Another Abortive Soccer Players, Union?', *ASSH Bulletin* (forthcoming).
- 59 Interview, Brendan Schwab, Public Officer, Australian Soccer Players, Association, 19 May 1993; Interview, Kimon Taliadoros, Chief Executive, Australian Soccer Players' Association, 9 Dec. 1994.
- 60 Stewart Report, p. 22.
- 61 Australian Industrial Relations Commission decision, 9 June 1995, pp. 38-9;

- Transcript, Australian Industrial Relations Commission, Commissioner McDonald, *Media, Entertainment and Arts Alliance v Australian Soccer Federation and Others*, C 22992 of 1994/C 22510 of 1994, 6 October 1994, p.19. In the 1993/94 season the National Soccer League comprised fourteen teams; in 1994/95 thirteen teams with Newcastle dropping out; and in 1995/96 twelve teams with Brunswick, Heidelberg and Parramatta not being invited to continue in the league, and Canberra and Newcastle being included.
- 62 Communication with Media, Entertainment and Arts Alliance, 19 Apr. 1996.
- 63 Transcript, Australian Industrial Relations Commission, Senior Deputy President Polites, Media, *Entertainment and Arts Alliance v Australian Soccer Federation and Others*, C 22510 of 1994, 25 Aug. 1995, p. 6.
- 64 See Transcript Commissioner McDonald, 20 Sept., 6 Oct. and 29 Nov. 1994. Full Benches have 'responsibility' for handling more significant or more sensitive matters than matters heard by individual commissioners.
- 65 Memorandum, President D F O'Connor, *Media, Entertainment and Arts Alliance v Australian Soccer Federation*, C 22992 of 1994, 16 Dec. 1994.
- 66 *Media, Entertainment and Arts Alliance v. Marconi Fairfield Soccer Club and Others [and] Australian Soccer Federation*, Australian Industrial Relations Commission, Dec 663/95 S Print M 0258, Sydney, 24 Mar. 1995, p. 17.
- 67 See notes 13 and 14.
- 68 Australian Industrial Relations Commission decision, 9 June 1995, p. 68.
- 69 Australian Industrial Relations Commission decision, 9 June 1995, p. 51.
- 70 Australian Industrial Relations Commission decision, 9 June 1995, p. 67.
- 71 *Review Of Wage Fixing Principles*, August 1994, Australian Industrial Relations Commission, Dec. 14088/94 S Print L4700.
- 72 Australian Industrial Relations Commission decision, 9 June 1995, pp. 66-7.
- 73 Australian Industrial Relations Commission decision, 9 June 1995, p. 73.
- 74 Australian Industrial Relations Commission decision, 9 June 1995, pp. 69,73.
- 75 Australian Industrial Relations Commission decision, 9 June 1995, pp. 79-80.
- 76 Gordon Taylor, 'Viewpoints on Bosman', *Football Management*, Aug. 1995, p. 14.
- 77 For discussions concerning revenue sharing see David S Davenport, 'Collusive Competition in Major League Baseball its Theory and Institutional Development', *American Economist*, Fall 1969, pp. 6-30; Roger G Noll, ed., *Government and the Sports Industry*, Brookings Institution, Washington, 1974; Braham Dabscheck, 'Sporting Equality: Labour Market vs Product Market Control', *Journal of Industrial Relations*, June 1975, pp. 174-90; Cairns, Jennett and Sloane, 'Economics of Professional Team Sports'; Scott E Atkinson, Linda R Stanley and John Tschirhart, 'Revenue Sharing as an Incentive in an Agency Problem: An Example from the National Football League', *Rand Journal of Economics*, Spring 1988, pp. 27-43; Andrew Zimbalist, *Baseball and Billions: A Probing Look Inside the Big Business of Our National Pastime*, Basic Books, New York, 1992; Rodney Fort and James Quirk, 'Cross-Subsidization, Incentives, and Outcomes in Professional Team Sports Leagues', *Journal of Economic Literature*, Sept. 1995, pp. 1265-99.