

*Australian Soccer's Freedom of Association Dispute*¹

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On Friday 25 February 2000, Mr Justice North of the Federal Court of Australia, heard an application for an interlocutory injunction, brought by the Australian Professional Footballers' Association² (PFA), that the Northern Spirit Football Club had breached the Freedom of Association provisions – Part XA– of the *Workplace Relations Act 1996* (Cth.). The PFA maintained that two of its members, Robert Enes and Tony Perinich, had been dismissed by Northern Spirit – a claim rejected by the club - for their part, and involving the PFA, in the pursuit of various monies, allegedly owed to themselves and other players. Enes, at the time, was in the process of becoming, if he had not already done so, the PFA's delegate at Northern Spirit.

The Freedom of Association provisions at the *Workplace Relations Act 1996* (Cth.) protect the right of workers to join, or not join, trade unions.³ Section 298K(1) of the Act⁴ states:

An employer must not, for a prohibited reason, or for reasons that included a prohibited reason, do or threaten to do any of the following:

- a) dismiss an employee;
- b) injure an employee in his or her employment;
- c) alter the positions of an employee to the employee's prejudice

Section 289L(1) defines a prohibited reason to include:

- a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association, or ...⁵
- n) as an officer, delegate or member of an industrial association, has done, or proposes to do, an act or thing for the purpose of furthering or protecting the industrial interests of the industrial association, being an act or thing that is:
 - (i) lawful; and
 - (ii) within the limits of an authority expressly conferred on the employee ... by the industrial association under its rules.

Section 298M states that 'An Employer ... must not (whether by threats or promises or otherwise) induce an employee ... to stop being an officer or member of an industrial association'. Section 298U grants a court, such as the Federal Court, extensive powers to remedy breaches of Part XA of the Act; and Section

298V places the onus of proof against those whom conduct for 'a prohibited reason' is alleged.

The Freedom of Association provisions of the *Workplace Relation Act 1996* (Cth.) came into national prominence in 1998, when Patrick Stevedores dismissed its 1400 strong unionised workforce, the overwhelming majority of whom were members of the Maritime Union of Australia. In interlocutory proceedings, Mr Justice North found there was an arguable case that these dismissals breached Section 298K(1); a decision, which in essentials, was upheld on appeal by both a Full Court of the Federal Court and the High Court of Australia.⁶ On 31 January 2000, a few weeks prior to the PFA's action, Mr Justice Gray of the Federal Court, again in interlocutory proceedings, ruled there was an arguable case that BHP, in offering workers individual contracts, while simultaneously refusing to entertain collective negotiations with the Australian Workers' Union, had breached Section 298K(1).⁷

It is only in the last decade, or so, that player associations in Australian professional team sports have been able to establish a role, of some importance, in representing the individual and collective employment interests of players.⁸ The 1990s have witnessed the formation of player associations in soccer (1993), rugby union, cricket (both in 1995) and netball (1997). Earlier associations, which are still in existence, were formed in Australian rules football (1973), rugby league (1979) and basketball (1989). Collective bargaining (or similar) agreements have been negotiated, at various times, in each of these sports. In 1999 Australian rules football negotiated its fourth such agreement, soccer its second.⁹

The respective player bodies have sought to establish a co-operative relationship, or partnership, with their respective leagues and constituent member clubs. Their general position – and this is especially true of the PFA¹⁰ – is that by acting to aid the growth and commercial success of their respective sports they will be best placed to obtain improved benefits for members. In saying this, however, they have not eschewed the use of proceedings before courts and industrial tribunals, and/or threatened industrial action, where it has been thought appropriate to further members interests and/or the needs of organisation. The PFA's preparedness to initiate action over, what it regarded as freedom of association breaches by Northern Spirit, before the Federal Court, is consistent with this trend.

This article will provide an account of the various machinations and events associated with this dispute. Amongst other things, it will furnish an insight into the nature of industrial relations in a particular soccer club at a particular, albeit strained, moment in time.

Context and Background

On 24 June 1999 Soccer Australia and the PFA signed off on their second collective bargaining agreement, operative for the 1999/2000 and 2000/2001 seasons. Clause 3.9 of Schedule B (Transfer and Compensation Fee System) of that agreement is concerned with clubs in default of payments to players.¹¹ The clause states:

If an Ericsson Cup Club remains in default of any remuneration or entitlement payable to a Player under the Collective Agreement or a Standard Player Contract after the player has given the Ericsson Cup Club seven (7) days notice in writing to remedy the default, the Ericsson Cup Club will not be entitled to register or enter into a Standard Player Contract with any Player until such default has been remedied. The Ericsson Cup Club will have the right to refer any dispute in relation to the Player's notice to the Grievance Procedure and this Clause 3.9 will not become operative until the Grievance Procedure has been exhausted or terminated.¹²

The workings, or effectiveness, of this clause is linked to the operation of the grievance procedure, which constitutes Schedule D of the 1999-2001 collective agreement. The secretary responsible for the management of the grievance procedure is the Ericsson Cup's general manager, or his or her nominee.

The grievance procedure is indeterminant, cumbersome and unwieldy. Both players and clubs are allowed 60 days to resolve a grievance, by discussion, from the date of its (alleged) occurrence. If discussions do not resolve it to the satisfaction of the club, the said club can initiate a written notice to 'initiate' the grievance procedure, within that sixty day period. A player has seven days, after the failure of such discussions, to serve a similar notice. Either party has seven days to respond to such notices; and, if still not satisfied, has fourteen days to request, in writing, mediation. Within 48 hours of receiving such notification, the grievance procedure's secretary must refer the dispute to mediation. The mediator has ten days to resolve the dispute. If mediation fails the secretary has fourteen days to convene a disputes committee. No timetable is specified for the work of such committees. A right of appeal exists against decisions of a disputes committee, which must be lodged within five days. Findings of the appeals committee are final, subject to the absence of a 'manifest error' in its determination!¹³

The PFA has experienced problems in ensuring that clubs comply with provisions of the collective agreement.¹⁴ On 28 October 1999, its chief executive officer, Brendan Schwab wrote to club managers and coaches, concerning problems members were experiencing with minimum payments (which for a

full-time player is slightly more than \$20,000 a year¹⁵) and hours of work/training schedules. He said, 'it appears that many N[ational] S[occer] L[eague]¹⁶ clubs are not aware of their relevant obligations'.¹⁷

On 28 January 2000 Schwab wrote to National Soccer League (NSL) general manager, Stefan Kamasz, about player grievances and compliance problems. The letter provided a breakdown of alleged individual and collective player grievances. With respect to the former, ten of the sixteen Ericsson Cup clubs had allegedly committed breaches. The latter involved disputes over hours of work; playing, training or travelling over the Christmas break; minimum wages; superannuation payments; injury pay; unauthorised deductions from pay and outstanding player payments. The letter goes on to state that a further sixteen files have not been included because 'the players have sought our advice on a confidential basis ... It remains unfortunate that in many instances players seek our advice on this basis due to concerns they have that raising the matters with their NSL club will prejudice their employment'.¹⁸

In his affidavits in the hearing before Mr. Justice North, Schwab maintained that the grievance procedure has 'not [been] able to produce a speedy resolution of the matters that came before it due to the significant delays that are commonly experienced by the users of the procedure'. In addition, 'Determinations ... have in the past been very difficult to enforce in a timely manner'.¹⁹ George Pashalis, the grievance procedure's secretary, contested Schwab's claims. His affidavit states 'Soccer Australia has used similar Grievance Procedures under the previous Collective Agreement 1996-1999 on approximately 30 occasions and found that there has been no undue delay or complaints of undue delay in relation to the use of the Grievance Procedures'.²⁰

On the basis of Schwab's 28 January 2000 letter to Kamasz, a majority of clubs would be subject to the potential reach of Clause 3.9 of Schedule B. Prior to the dispute being examined here, there are only two examples of where Clause 3.9 has been invoked.

In 1997 Canberra Cosmos had fallen behind in injury payments to a substantial number of players. Canberra wanted to register new players to play in a cup competition. The PFA invoked Clause 3.9.²¹ Canberra paid over the monies owed to players several hours prior to the playing of the game.²²

The Auckland Kingz were in default of payments/match bonuses to players. Under Clause 14.1.2 of Schedule A of the Collective Agreement (Minimum Terms and Conditions of Employment/Standard Player contract), a player can terminate his contract with a club, if it fails to remedy a breach of non-payment within seven days of receiving written notice from the player.²³ Kingz players had sent such a letter in January 2000; a copy of which the PFA had forwarded to Soccer Australia. Prior to Australia Day, Soccer Australia received a request

from the Kingz to register a goalkeeper – their three goalies being injured. Soccer Australia, because of Clause 3.9 of Schedule B, contacted the PFA to ascertain whether the Kingz had rectified its financial obligations to players. It had not. Soccer Australia refused the registration. The outstanding monies were paid in late February 2000.²⁴

Northern Spirit entered the Ericsson Cup in 1998/1999. It enjoyed a successful initial season, qualifying for the finals, and, by the standards of Australian soccer, attracted large crowds. Its home attendance averaged 14,633, compared to a league average of 5,622. Only Perth Glory had higher average home attendance, of 14,725.²⁵ Northern Spirit found the going much tougher in 1999/2000. At the time the dispute erupted it was in the bottom third of the table, and average home crowds had slipped 'to around 9000'.²⁶

The PFA has experienced problems in securing its organisational effectiveness at Northern Spirit. Table One provides details of its membership by club for the 1999/2000 season.²⁷ The PFA has an overall representation rate of 81 per cent. Only 45 per cent of Northern Spirit players are PFA members. Adelaide Force, with 35 per cent, is the only club with a lower rate of representation. Wollongong Wolves have less members than Northern Spirit - twelve compared to thirteen - but a higher level of representation, of 67 per cent.

Table One
PFA Membership by Club: 1999/2000

Club	Size of Squad	Number of Members	Percentage (%)
Adelaide Force	20	7	35
Brisbane Strikers	20	17	85
Canberra Cosmos	17	17	100
Carlton	22	21	95
Gippsland Falcons	17	15	88
Kingz FC	18	18	100
Marconi Stallions	18	17	94
Melbourne Knights	23	19	83
Newcastle Breakers	22	16	73
Northern Spirit	29	13	45
Parramatta Power	25	21	84
Perth Glory	20	16	80
South Melbourne	23	20	87
Sydney Olympic	18	18	100
Sydney United	17	17	100
Wollongong Wolves	18	12	67
Total	327	264	81

Source: PFA Records.

Brendan Schwab's affidavit material provides information on various events which transpired at Northern Spirit.²⁸ On 1 December 1999 Schwab attended a 'training' session at Northern Spirit which was concerned with the *Ericsson Cup Collective Agreement 1999/2001* and the Australian Soccer Equal Opportunity Code. The night prior to this session, PFA delegate Luke Casserly informed Schwab that Northern Spirit had told him not to attend the training session. He also told him that he had not handed out PFA information concerning the collective agreement to other players, as Schwab had requested, 'because he was worried about the impact on the environment and the reaction of the coaching staff and senior management'. Subsequent to this conversation, Schwab asked Robert Enes to be part of 'a committee of ... delegates' at the club; something which he was happy to do.

Schwab later became aware of a number of employment problems experienced by players at Northern Spirit. Schwab asked Enes to obtain information from fellow players on outstanding injury pay Enes provided such information in a letter²⁹ sent on about 12 January 2000. In the letter Enes said to Schwab, 'I would appreciate no mention of my involvement in correcting these grievances'.³⁰

The PFA maintained that Northern Spirit had defaulted in six areas of payments to players. The first was injury pay, to at least five players, of amounts ranging from \$300 to over \$2,000. Second, Tony Perinich had not been reimbursed for medical expenses, over insurance claims, following a knee reconstruction, of between \$1,200 and \$1,300. Third, Perinich had been fined \$500 for non-attendance at a meeting with a Northern Spirit nominated medical practitioner. The PFA claimed that such a fine breached the *Ericsson Cup Code of Conduct*. An offence of this type will involve, for a first breach, a written caution, and for a second breach, a fine not exceeding \$100. Moreover, Clause 4.4 of Schedule A states a 'Club may only make deductions from the Player's remuneration that are authorised by the Player in writing or by law'.³¹

Fourth, Northern Spirit employed seven full-time players, or so-called apprentices, either on one or two year contracts, on a wage of \$6,750, which was well below the minimum wage of slightly more than \$20,000, as specified in the collective agreement. The collective agreement contained no provision, or was silent on apprentices. Fifth, Peter Blazincic had been loaned by Northern Spirit, in the previous season, to Adelaide Sharks, who subsequently went into liquidation and were dropped from the competition. On 25 January and 9 February 2000 the PFA had contacted Northern Spirit claiming, that given, the terms of his contract, Blazincic was owed slightly less than \$150,000. Sixth, Northern Spirit had not made statutory superannuation payments for players since its formation. Assuming an annual player payroll of \$1,500,000, a superannuation rate of seven per cent, Northern Spirit had a potential

superannuation liability of \$157,000 for the season and a half since its formation. All up its total financial obligations to players appear to be in the order of \$400,000 to \$500,000 - depending on whether the 'apprentices' were employed on one or two year contracts.

On 27 January 2000 a meeting occurred at Northern Spirit between a few players - two of whom were Casserly and Enes - and club officials to discuss outstanding injury pay and superannuation entitlements. According to Enes, the club gave an undertaking that such issues would be 'sorted out'.³² Emmanuel Zammit, a Northern Spirit director and deputy chair, in his affidavit, paints a picture of a cordial meeting, where the players accepted assurances that payments would be made, after due investigation. He stated, 'I believe the understanding of the participants at the meeting was that I was to await receipt ... [from Enes] ... of the list of alleged outstanding injury payments to certain players. I never received such a list'.³³ Earlier in January Enes had provided such information to Schwab.

On 11 February 2000 there were media reports that Northern Spirit intended to sign Italian star Nicola Berti, who had played in World Cup finals in 1990 (a winner) and 1994 (a loser). Northern Spirit hoped that Berti would enhance their success on the park and at the gate.³⁴ Upon becoming aware of Berti's signing, the PFA contacted various Northern Spirit players, who were in dispute with the club over alleged outstanding payments, gaining their endorsement for invoking Clause 3.9 of Schedule B. Only a few weeks earlier it had been utilised to block the Auckland Kingz signing a goalkeeper (see above).

Schwab then sent a fax to Northern Spirit chair Remo Nogaroto. The fax provided a summary of Northern Spirit's various outstanding payments. Schwab said 'There is no doubt that securing a player of Nicola's ability and reputation is a positive move both for Northern Spirit and the NSL'. He then listed various 'contractual obligations' Northern Spirit had failed to comply with, and invoked Clause 3.9 of Schedule B. Schwab went on to say 'we require the contractual defaults listed in this letter to be remedied within 7 days to ensure that Northern Spirit is in a position to contract and register Nicola Berti. We are happy to meet with you to assist in resolving these matters if you would like'.³⁵

'A Volcanic Explosion'

Nogarotto could have responded to Schwab by entering into negotiations concerning the outstanding payments identified in the fax. Or alternatively, matters in dispute could have been submitted to the grievance procedure, which, per the final sentence of Clause 3.9 of Schedule B (see above), could have been potentially employed to forestall attempts to block Berti's registration. Mr Justice North observed that Nogarotto interpreted the substance of Schwab's letter as

putting 'a spoke in the wheel of contracting this Italian superstar'; which, in turn, brought forth 'a volcanic explosion'.³⁶

At approximately 4.10 pm on 11 February 2000 Schwab received a phone call from Nogarotto and Zammit. According to Schwab Nogarotto said to him:

You have lifted the stakes. Some of those blokes will never play in Northern Spirit Colours again ... Perinich and [Mark] Rudan³⁷ will never play again. We will pay but I don't want them anywhere near the Club. I will write to you through our lawyers on Monday You can tell Perinich and Rudan that they are finished with the club.

Schwab told Nogarotto that he 'was not going to tell the players what he had said and that he should settle down and contact me later to discuss it further'. Nogarotto responded 'I don't want to speak to the players, I will only deal with you. If I hear anything about this in the media, I will hit the roof'.

At approximately 4.40pm Schwab received a phone call from Perinich. Perinich told Schwab that he had just received a phone call from Nogarotto and Zammit. Perinich said Zammit asked him, 'Did you speak to the union?' He responded, 'Yes, I did'. Zammit then said 'You're finished. Come into the office on Monday and we'll tell you why'. Twenty minutes later Schwab received a phone call from Rudan. Schwab, in his first affidavit, said that Rudan told him that 'Mr Nogarotto who was in a rage ... told Mr Rudan that he was going to target the players who were named on the list. Mr Rudan told me that Mr Nogarotto had told him he should contact me to withdraw him from the list of names on the fax. Mr Rudan told me that he did not want to be included in the group of names on that list and he requested that I withdraw his claim against [Northern Spirit], which I did'.³⁸

Nogarotto and Zammit, in the late afternoon of this fateful Friday, did not contact Enes. He was to play in an away game that night against Newcastle Breakers. Northern Spirit lost 4-1. After the game Nogarotto and Zammit came into the change rooms. According to Enes they 'were both in a rage'. In front of other team members and club officials they dressed down Enes. Enes said that Nogarotto said to him:

You will never wear my colours again. You're finished with this club. Pack your bags and get the fuck out of my club. As of this afternoon; I have spoken to our lawyers and we are preparing to personally sue you. I will personally make sure your career is over.

Zammit apparently said to Enes, 'After everything we've done for you, you want to fucking do this to us, fuck you Enes, you fucking arsehole'.³⁹

Nogarotto told Enes, that, together with Perinich, he was responsible for ‘instigating’ the dispute. Enes queried him on the basis of this belief. Nogarotto replied that this had been indicated in the letter from Schwab earlier that day. This, in fact, was incorrect. Given the meeting of 27 January 2000 (see above) Northern Spirit presumably knew that Enes was co-ordinating the pursuit of injury pay claims. Perinich may have also displayed a degree of persistence in his claims for injury pay and, more likely, the recovery of his medical expenses, than the club enjoyed.

Prior to the bus trip back to Sydney, Nogarotto read out a media release to players, which he requested they sign, disassociating them from Schwab’s letter. Sixteen signed the statement, six of whom were members of the PFA, including Enes. Enes subsequently said that Nogarotto’s misstatement of him being named as an instigator in Schwab’s letter made him feel ‘very confused and apprehensive about my future and agreed to sign the media release’.⁴⁰

The Sunday Telegraph of 13 February 2000 reported that Northern Spirit was considering suing the PFA because of its attempt to block the registration of Nicola Berti. It reported that an ‘outraged’ Nogarotto maintained that Schwab was ‘grandstanding’.⁴¹

On the morning of Monday 14 February 2000, Schwab sent a fax to Nogarotto detailing the events of the Friday before, and the manner in which Enes and Perinich had been spoken to. The major import of the letter was that the club had repudiated the contracts of both players, which they accepted. While reserving their right for compensation and damages, the letter requested that Northern Spirit do nothing to block their ability to take up employment with other clubs, and place their names on the club’s free agent list.⁴² Under Clause 5.1.2 of Schedule A of the Collective Agreement a player can move to another club if his contract with the previous club ‘has been validly terminated’. By being placed on the free agent list the players could take up employment with other clubs free of the encumbrance of a transfer fee.⁴³

Later that morning a meeting occurred between Schwab, Enes, Perinich, Nogarotto and Zammit. The latter two refused to agree to the players’ release; maintaining that they were contracted players, who were required to turn up to training. Both players objected to their treatment on the previous Friday. Perinich said, ‘I didn’t want this to happen. How do you think I feel? How can I feel comfortable? All I want to do is play soccer. I can’t sleep. I feel very uncomfortable with this situation. I can’t see how I can perform when my head and heart are not there’. Enes said, ‘I was sacked on Friday night and you know it. You two personally demeaned me. On record you told me my future is over’.⁴⁴

Nogarotto made a number of critical comments directed at the collective agreement. He said, 'I objected to being a signatory to the Collective Agreement ... I don't want to be bound to any collective agreement that bears little relevance' [to Northern Spirit]. Nogarotto said he was looking at ways to extricate Northern Spirit from the agreement. While he acknowledged that his club were "in" the agreement, as Soccer Australia was a respondent to it, 'come hell or high water we're out'.⁴⁵

Following this meeting the PFA issued a press statement supporting Enes and Perinich. The PFA would 'do everything within its powers to protect ... [their] interests at this most difficult time'. Schwab said 'All the players have done is to seek a resolution of monies owed to them and their team mates under the CBA. It was quite natural and reasonable for them to involve the PFA. By contrast the Club has resorted to intimidation, abuse and threats.' *The Daily Telegraph* of 15 February 2000 reproduced Schwab's statement about 'intimidation, abuse and threats'. On the following day, *The Daily Telegraph* quoted Perinich as saying, 'I believe the club have been unprofessional in their dealings with me'.⁴⁶

The PFA had scheduled a meeting of delegates and members for 16 February to discuss a proposal by Soccer Australia to restructure the league, from sixteen to twelve clubs. Besides this issue, the meeting-conducted by video conference - heard a report on developments at Northern Spirit. The approximately 50 members in attendance, with representatives from all clubs,⁴⁷ except Northern Spirit, unanimously supported the PFA in its campaign on behalf of the players.⁴⁸

On the same day Northern Spirit's lawyers wrote to Schwab. The letter drew his attention to the PFA's press release of 14 February 2000. It says 'If you were acting as the agents of Messers Enes and Perinich, we wish to bring to your attention Clause 5.2 of Schedule C' (Ericsson Cup Code of Conduct) of the collective agreement. It states:

5.2 Conduct Prejudicial to the Interests of or Which Will Bring the Game of Soccer or the Ericsson Cup Into Disrepute

... a Player will be deemed to have knowingly acted in a manner which will be prejudicial to the interests of the game of soccer or the Ericsson Cup or which will bring the game of soccer or the Ericsson Cup into disrepute if the Player:

5.2.3 Knowingly makes any statement or appearance in public including, without limitation, any contribution to press, television, radio or other media which is disparaging of any Major Sponsor of SA, the Ericsson Cup or his Ericsson Cup Club.⁴⁹

The letter then states that the press release, as reported in *The Daily Telegraph* on 15 February 2000, and the statements made by Perinich in the same paper, the following day, constituted such breaches. Northern Spirit will refer these matters to Soccer Australia. The letter concluded, 'Further the statements you have made whether you were acting as agent or not, are clearly defamatory and we are currently considering our client's position in relation to commencing proceedings against you personally in the Supreme Court of NSW'.⁵⁰

The PFA engaged Maurice Blackburn Cashman, the solicitors who had represented unions in the Patrick Stevedores and BHP freedom of association disputes (see above). The PFA wanted Northern Spirit to place Enes and Perinich on the club's free agent list. Both had received approaches from other clubs - Sydney Olympic and Marconi respectively. Various discussions occurred on a possible settlement; but all to no avail. On 21 February 2000 the PFA announced it would initiate proceedings before the Federal Court.⁵¹ Further negotiations, prior to this hearing, were again unsuccessful.⁵²

A Day In Court

The PFA maintained that Northern Spirit's dismissals of Enes and Perinich, and the pressure applied to Mark Rudan and players prior to the bus trip after the Newcastle game on 11 February 2000, constituted breaches of Section 298K(1), 298L(1)(a), 298L(1)(n) and 298M of the *Workplace Relations Act 1996* (Cth.) (see above).⁵³ The PFA asked for damages to be awarded against Northern Spirit, and for an order whereby Enes and Perinich would be placed on the club's free agent list. This was a matter of some urgency for the players. They feared that if they were prevented from training and playing with another club, their careers as professional soccer players would be at risk.

The PFA's case was based on the proposition that Northern Spirit had breached the Act by acting in a way which induced, or would have the effect, of stopping individual union members from being active in furthering the (legitimate) objects of their union. The PFA drew on three precedents.

Sutherland v Hills Industries involved a situation where a worker, who had been active on behalf of his union in recruiting new members, was dismissed; ostensibly, according to his employers, because of a downturn in trade. Mr Justice Keely concluded that he had been dismissed because, his employer, perceived him as someone who would stir up trouble. Mr Justice Keely said that his employer 'In deciding to dismiss him - instead of another employee - ... [was] motivated to a large extent by the fact that, as a member of the union, he was likely to continue to enrol fellow employees as members with the resultant danger ... that a majority of the employees in the division would soon become members of the union'.⁵⁴

In *Davids Distribution v National Union of Workers* the Federal Court was asked to consider whether the dismissal of 52 union members, who were on a picket line, constituted a breach of Section 298K(1) of the *Workplace Relations Act 1996* (Cth.). By a majority of the Full Court of the Federal Court, Justices Wilcox and Cooper concluded that it did. They said:

The objective of S298K is to ensure the threat of dismissal or discriminatory treatment cannot be used by an employer to destroy or frustrate an employee's right to join an industrial association and take an active role in that association to promote the industrial interests of both the employee and association ... That which is protected by such legislation is more than the right to be a member. It is the right to participate in protected union activities, including ... action against an employer to seek to obtain better industrial conditions.⁵⁵

Reference has already been made to Mr Justice Gray's interlocutory ruling, that there was an arguable case that BHP had breached Section 298K, in offering individual contracts to workers and refusing to collectively bargain with the Australian Workers' Union. In that decision he said 'conduct having the effect of causing members of a union to stop being members of a union induces them to do so, even if this is not the intention of the employer concerned'.⁵⁶

In his affidavit Zammit admitted that he and Nogarotto had used 'harsh words' to Enes and Perinich, which 'were spoken in the heat of the moment'.⁵⁷ Northern Spirit maintained that Enes and Perinich had not been dismissed; they were required players at the club. To the extent that there were various issues in dispute, including that of the employment status of the two players, they should be resolved by soccer's grievance procedure. In the proceedings before Mr. Justice North they provided a counter to the PFA's objections concerning the lengthy and unwieldy nature of the grievance procedure. Northern Spirit gave Mr. Justice North an undertaking that it would abide by any determination of the disputes committee, 'whether it be in its favour or not'. In so doing, it did not seek a similar undertaking from the PFA.⁵⁸ Northern Spirit (and Soccer Australia) also gave an undertaking that the procedure would operate quickly.

Northern Spirit sought to deflect the PFA's freedom of association claims by embracing the grievance procedure contained in the collective agreement. Less than two weeks earlier, its chair, Remo Nogarotto had indicated to Schwab that he was looking for ways for Northern Spirit to escape coverage of the collective agreement (see above). Irrespective of whatever Mr. Justice North would decide on the substantive claims concerning the two players, this day in court constituted a tactical victory for the PFA.

On 21 February 2000 the PFA had issued a press release announcing that it would initiate Federal Court proceedings (see above). It said that the PFA had engaged the services of Maurice Blackburn Cashman, the same firm which had represented unions in the Patrick Stevedores and BHP freedom of association disputes. The press release quotes solicitor John Bornstein as saying, 'we'll be relying on the same principles as those used in the waterfront dispute, but this will be the first time they've been treated in Australian professional sport.'⁵⁹

Mr Justice North, who had been the judge at first instance in the waterfront dispute, took umbrage at this press release. He said, 'To compare this to Patrick's and BHP is just- it really borders on the ridiculous.'⁶⁰ In examining Schwab's letter of 11 February 2000 to Nogarotto, Mr Justice North said that the core of the dispute seemed to be over an amount of less than \$20,000.⁶¹ While reference is also made to outstanding superannuation payments, of an undisclosed amount, Mr Justice North was not aware; or alternatively, was not made aware, of the total amount of income for which Northern Spirit were potentially liable – above, it was estimated at somewhere between \$400,000 and \$500,000.

While Mr Justice North acknowledged that the club had used 'harsh words,' in its dealings with Enes and Perinich, he observed that 'people say lots of things in the heat of the moment and don't end up as finally rupturing relationships.' He also said that the feelings of the two players could 'be assuaged ... [to] return to play for Northern Spirit for a while.' Mr. Justice North saw the dispute in terms of whether the players' contracts had been 'validly terminated', per soccer's collective bargaining agreement. He believed that this was a matter best suited for determination, at least initially, by 'soccer blokes', per the grievance procedure, than the courts. He said 'that there will be matters of general soccer folklore and organisation that need to be addressed in order to determine what the way forward should be'.⁶² In response to the PFA's objection that the players would be left in employment limbo for another week, Mr. Justice North saw this as 'a very small price to pay for a potential resolution'.⁶³

Mr Justice North was critical of both parties for their overreaction, of what he believed to be, a dispute over a relatively small sum of money. He adjourned proceedings to Thursday 2 March 2000 to give soccer's grievance procedure a chance to resolve the dispute. In so doing he made two observations. First, on the basis of the affidavit material, which had not been tested, it appeared that the contracts of Enes and Perinich had been terminated on 11 February 2000. Second, he criticised the PFA over its decision to seek resolution of the dispute by recourse to the courts, and its media release of 21 February 2000 and the comparison made with the Patrick Stevedore and BHP disputes.⁶⁴

Subsequent Developments

Mr Justice North's observation that harsh words, said in the heat of the moment, do not necessarily rupture relationships proved correct. A nine hour mediation conference occurred on Sunday 27 February 2000. It appears that Northern Spirit used this conference as a means to build bridges with, and (re-) establish a relationship based on trust with the two players. If Northern Spirit could convince Enes and Perinich to continue their careers with it, the PFA's freedom of association claim would simply disappear. Perinich was persuaded to stay with Northern Spirit, receiving a one year extension on his contract, to the 2001/2002 season. Two days later Enes similarly agreed to continue his career with Northern Spirit, signing a new contract for the next two seasons.

Resolution of the dispute was held up by Northern Spirit wanting to pursue the PFA for legal costs. In addition, there was the issue of alleged defamatory statements of the PFA and Brendan Schwab, contained in various press releases and/or reports in the media (see above). Section 347 of the *Workplace Relations Act 1996* (Cth.) does not allow the recovery of costs unless a party initiated proceedings 'vexatiously or without reasonable cause.' On 2 March 2000 Mr. Justice North heard a brief progress report on developments; of how the parties were close to settlement. He stood matters over to 3 April 2000. A brief hearing occurred on that date, with matters being stood over for a further two weeks.

On 13 April 2000 a meeting occurred where all matters were settled. Enes and Perinich re-signed with the club on extended contracts.

Summary and Conclusion

Northern Spirit experienced success in its initial season in the Ericsson Cup; something which was not repeated in its second season. The team did not perform as well on the park, attendances fell and the club experienced financial problems. It fell behind in its obligations to players. Some of these were relatively minor in amount; others more substantial. Two players, Robert Enes and Tony Perinich, had been active in pursuing their entitlements, and those of other players.

Northern Spirit believed that the signing of Nicola Berti would help them out of the mire they found themselves in. On 11 February 2000 the club received a letter from the PFA, pointing to the issue of outstanding player payments and raised the spectre of Clause 3.9 of Schedule B. Rather than considering ways to resolve the financial issues at the heart of the dispute, Northern Spirit 'raised the stakes' by making, in the words of Mr. Justice North, 'strong statements that the relationship between the players and the club was over for all time'.⁶⁵

The PFA felt that it had little choice to defend two of its members who were not only in dispute with their club – which was a major reason for its formation in the first place – but also had been active in working on its behalf. To not do so would have been a powerful negative signal to other clubs about how they could react, if and when, they experienced similar demands from players. At a minimum, the PFA, by its actions, provided moral support to Enes and Perinich; and was instrumental in ensuring the continuance of their careers as professional soccer players. In addition, the PFA was most concerned about Nogarotto's comments concerning his desire to extricate Northern Spirit from the collective agreement. This together, with Northern Spirit's treatment of, and attitude to, players had the potential to undermine the various benefits and rights the PFA had obtained for all its members and players in the NSL.

The PFA's championing of the cause of Enes and Perinich, and its freedom of association action under Part XA of the *Workplace Relations Act 1996* (Cth.), placed Northern Spirit on the defensive. To deflect the potential reach of Part XA Northern Spirit found itself embracing the grievance procedure of the collective agreement and adopting a more conciliatory tone with Enes and Perinich. The PFA achieved an important victory in its Part XA application against Northern Spirit. It not only managed to protect the careers of two of its members, but also found a hitherto reluctant club committing itself to the collective bargaining agreement. This dispute between the PFA and Northern Spirit has demonstrated the important role assumed by collective bargaining, the law, and legal processes, to the governance of Australian soccer, in particular, and professional team sport, more generally.

Notes

- 1 The author appeared as an expert witness on behalf of the Australian Professional Footballers' Association (PFA) – though it then had a different name – in 1995 in a case before the Australian Industrial Relations Commission, which challenged soccer's transfer and compensation system. He is also a member of the PFA's Advisory Board. Thanks are expressed to Brendan Schwab, the PFA's Chief Executive Officer, for providing access to various documents associated with this dispute.
- 2 When this soccer players' organisation was first formed, in April 1993, it was called the Australian Soccer Players' Association. For a period it was called the Australian Unity Soccer Players' Association. It changed its name to the PFA in 1999.
- 3 Freedom of association is also championed in various international human rights' instruments, such as the Universal Declaration of Human Rights (Article 23, Clause 4), the International Covenant on Economic, Social and Cultural Rights (Clause 8), the International Covenant on Civil and Political Rights (Clause 23) and by the International Labour Organization (Conventions Number 87 and Number 98); all of which Australia is a signatory. For copies of these instruments see Ian Brownlie (ed), *Basic Documents on Human Rights* (Second Edition),

Clarendon, Oxford, 1981.

- 4 Section 3(f) – Principal Object of the Act – is concerned with ‘ensuring freedom of association, including the rights of employees and employers to join an organization or association of their choice, or not to join an organization or association’.
- 5 Section 298L(1)(h) says ‘is entitled to the benefit of an industrial instrument or an order of an industrial body’. This prohibited reason was not potentially available to the PFA. The *Ericsson Cup Collective Agreement 1999-2001* is a common law agreement which falls outside the definition of ‘industrial instrument’ contained in Section 298B of the *Workplace Relations Act 1996* (Cth.) It defines an industrial instrument as ‘an award or agreement ... that a) is made under or recognised by an industrial law’.
- 6 See *Maritime Union of Australia v Patrick Stevedores No 1* [(1998) 79 IR 281]; *Patrick Stevedores Operations No 2 v Maritime Union of Australia* [(1998) 79 IR 305]; and *Patrick Stevedores Operations No 2 v Maritime Union of Australia* [(1998) 79 IR 339]. For commentaries on this dispute see Ronald C. McCallum, ‘A Priority of Rights: Freedom of Association and the Waterfront Dispute’, *Australian Bulletin of Labour*, September 1998; and Braham Dabscheck, ‘The Waterfront Dispute: Of Vendetta and the Australian Way’, *The Economic and Labour Relations Review*, December 1998.
- 7 *Australian Workers’ Union v BHP Iron Ore* [2000] FCA 39. Also see *Davids Distribution v National Union of Workers* [1999] 165 ALR 550.
- 8 This has been against the trend of a general decline in Australian unions. In 1990 40.5 per cent of the workforce was unionised. In 1999 this figure had declined to 25.7 per cent. See Australian Bureau of Statistics, Cat. No. 6325.0 and Cat. No. 6310.0.
- 9 For information on the operation of Australian player associations see Braham Dabscheck, ‘Playing the Team Game: Unions in Australian Professional Team Sports’, *The Journal of Industrial Relations*, December 1996; Braham Dabscheck, ‘A Safety Net for Netballers’, *ANZSLA Newsletter*, Vo. 8, No. 2, 1998; Braham Dabscheck, ‘Trying Times: Collective Bargaining in Australian Rugby Union’, *Sporting Traditions*, November 1998; and Braham Dabscheck, ‘Running to the Same End: The Australian Cricket Pay Dispute’, *A Q Journal of Contemporary Analysis*, January – February 1999. For more specific information pertaining to Australian soccer see Braham Dabscheck, ‘Early Attempts at Forming Soccer Player Unions in Australia’, *Sporting Traditions* May 1994; Roy Hay, ‘Another Abortive Soccer Players’ Union’, *Australian Society for Sports History Bulletin*, June 1996; and Braham Dabscheck, ‘Assaults on Soccer’s Compensation System: Europe and Australia Compared’, *Sporting Traditions*, November 1996.
- 10 For example see Brendan Schwab, ‘Collective Bargaining in Australian Professional Team Sports’, *Australian Society for Sports History Bulletin*, December 1998. Point 4 of the PFA’s *5 Year Strategic Plan 1997-2001*, determined in July 1997, is to ‘promote and advance the well being of the game’. Its rules have as one of their objects (2e) ‘to promote and encourage the game or sport of soccer’.
- 11 A similar clause (Clause 3.4) appeared in Schedule B (Terms and Conditions for Ericsson Cup Players) of the *Ericsson Cup Collective Agreement 1996-1999*.
- 12 *Ericsson Cup Collective Agreement 1999-2001*, p. 48.
- 13 *Ibid.*, pp. 73-82.

- 14 It has also experienced compliance problems with Soccer Australia. Under both the 1996-1999 and 1999-2001 collective agreements the PFA is entitled to receive five per cent of transfer and compensation fees paid for players who change clubs within the Ericsson Cup and move to overseas leagues. In the 1999-2001 agreement it also receives a share of broadcasting rights. At various times Soccer Australia has been late with such payments.
- 15 Which is equal to the minimum adult wage determined by the Australian Industrial Relations Commission in the April 1999 *Safety Net Review*, Dec 384/99 V Print R1999.
- 16 The terms Soccer Australia; National Soccer League and Ericsson Cup are interchangeable.
- 17 Letter, Brendan Schwab to General Manager/Coach, 28 October 1999.
- 18 Letter, Brendan Schwab to Stefan Kamasz, 28 January 2000.
- 19 *Affidavit of Brendan Andrew Schwab*, re Australian Professional Footballers' Association v Northern Spirit Football Club, Federal Court of Australia, 21 February 2000, p. 18; and *Second Affidavit of Brendan Andrew Schwab*, re Australian Professional Footballers' Association v Northern Spirit Football Club, Federal Court of Australia, 24 February 2000
- 20 *Affidavit of George Pashalis*, re Australian Professional Footballers' Association v Northern Spirit Football Club, Federal Court of Australia, 25 February 2000 (no pages are stated, but it would be p. 3).
- 21 See footnote 11.
- 22 Australian Soccer Players' Association, Chief Executive's Report, 1997 Annual General Meeting, 18 December 1997, p. 14.
- 23 *Ericsson Cup Collective Agreement 1999-2001*, p. 35. Clause 14.2 enables a club to refer such a dispute to the grievance procedure.
- 24 Interview Shannon Beck, administrative officer, PFA 1 March 2000.
- 25 *Soccer Australia 1999 Annual Report* (pages are not numbered).
- 26 ABC News Online, 11 February 2000.
- 27 These figures need to be treated with a degree of caution. Clubs' squads can change during the season with players, under the transfer system, moving between clubs and into and out of the league. Clubs may also be slow on providing information concerning changes in registrations. Clause 4.3 of Schedule B (Transfer and Compensation Fee System), *Ericsson Cup Collective Agreement 1999-2001*, p. 49, requires clubs to have senior lists of not less than eighteen players.
- 28 The factual information provided by Schwab was not contested by Northern Spirit. See *Affidavit of Emmanuel Zammit*, re Australian Professional Footballers' Association v Northern Spirit Football Club, Federal Court of Australia, 24 February 2000.
- 29 Letter is used in a generic sense here to include facsimile.
- 30 Schwab's (first) affidavit, pp. 8 + 9. Enes' letter is BAS 4 of that affidavit.
- 31 See Clause 6.2 and Clause 10.4, Schedule C, *Ericsson Cup Code of Conduct*, and Clause 4.4 Schedule A, *Minimum Terms and Conditions of Employment/ Standard Player Contract*, *Ericsson Cup Collective Agreement 1999-2001*, pp. 62, 71 + 22.
- 32 *Affidavit of Robert Enes*, re Australian Professional Footballers' Association v Northern Spirit Football Club, Federal Court of Australia, 22 February 2000.
- 33 Zammit's affidavit, p. 3.

- 34 This hope was not realised. Berti, aged 32, arrived in Australia overweight and lacking fitness. Berti was substituted in the sixty second minute against Brisbane, the fifty second minute against Sydney Olympic, and did not travel across the Tasman to play against Auckland because of poor health. In a home game against Gippsland Falcons on 24 March 2000 less than 3500 spectators were in attendance. See *The Australian*, 19 February, 28 February, 25 March and 27 March 2000; and *The Sydney Morning Herald* 21 March and 23 March 2000.
- 35 Letter, Brendan Schwab to Remo Nogarotto, 11 February 2000. BAS7 of Schwab's (first) affidavit. Later in the day Schwab sent a second letter to Nogarotto saying that Abbas Saad had instructed him that he had received outstanding injury payments.
- 36 Transcript of proceedings, Federal Court of Australia, Victoria District Registry, North J, Directions, No V 68 of 2000, Australian Professional Footballers' Association v Northern Spirit Football Club, 25 February 2000, pp. 14 and 19.
- 37 One of the players Schwab's fax said had not received injury pay.
- 38 Schwab's (first) affidavit, pp. 12 + 13. This is drawn from BASS, Letter, Schwab to Nogarotto, 14 February 2000; *Affidavit of Tony Perinich*, re Australian Professional Footballers' Association v Northern Spirit Football Club, Federal Court of Australia, 22 February 2000; and Letter, Schwab to Nogarotto, 16 February 2000. re Rudan's instruction to withdraw his injury pay claim.
- 39 Enes affidavit, p. 3. *The Age* 28 February 2000 describes an incident, which occurred at Carlton, after a 2-1 home defeat to Adelaide City, on 26 February 2000, as an 'ugly dressing room confrontation with outgoing general manager Lou Sticca, who branded some [players] ... cheats and called on them to quit'. For a more general discussion of workplace harassment see Max Spry, *Workplace Harassment: What is it, and what should the Law do about it?*, *The Journal of Industrial Relations*, June 1998.
- 40 Enes affidavit, pp. 2 + 4. The media release is in Zammit affidavit, annexure B.
- 41 *The Sunday Telegraph*, 13 February 2000.
- 42 Letter, Schwab to Nogarotto, 14 February 2000. BAS9 of Schwab's (first) affidavit.
- 43 *Ericsson Cup Collective Agreement, 1999-2001*, pp. 48-50.
- 44 A transcript of this meeting was made, by agreement, by Kathryn Levi of Gadens Lawyers, Sydney. The PFA's office is located in Gadens Lawyers, Melbourne, for whom Schwab has been employed. The transcript is BAS10 of Schwab's (first) affidavit. At the meeting Perinich received a cheque for 'around \$1300'.
- 45 BAS10 of Schwab's (first) affidavit. *The Daily Telegraph*, 15 February 2000, reported that 'Nogarotto wants out of the CBA'.
- 46 PFA Media Release, Monday 14 February 2000. *The Daily Telegraph*, 15 February and 16 February 2000.
- 47 This is part of a five year strategic plan, known as Soccer 21. For details see *Soccer Australia 1999 Annual Report*. In mid March 2000 Soccer Australia deferred consideration of the restructuring to 2001/2002, apparently because of threatened legal action by clubs, cut from the competition, close to the Olympic Games. See *The Sunday Telegraph*, 18 March 2000.
- 48 PFA Media Release, 16 February 2000.
- 49 *Ericsson Cup Collective Agreement, 1999-2001*, p. 61.
- 50 Letter, Lou De Biasi (Northern Spirit lawyer) to Schwab, 16 February 2000. Northern Spirit and/or its lawyers appear to have misread the Code of Conduct. There is nothing in the record where the PFA made critical or 'disparaging'

- comments concerning any sponsors, let alone Major Sponsors, of Soccer Australia, the Ericsson Cup or Northern Spirit.
- 51 PFA Media Alert, 21 February 2000.
- 52 Soccer Australia was mainly a spectator in this dispute. The PFA criticised Soccer Australia over its inactivity in attending to its complaint under Clause 3.9 of Schedule B; in comparison to its stance with the Auckland Kingz. Soccer Australia supported the use of the grievance procedure to resolve matters. Schwab and Kamasz exchanged a series of letters, especially after the PFA decided to proceed before the Federal Court. They are reproduced as exhibits to both of Schwab's affidavits.
- 53 See footnote 5.
- 54 *Sutherland v Hills Industries* [1982] 2 IR 287, at 292. Also see *Cuevas v Freeman Motors* [1975] 25 FLR 67, at 78-79 where Smithers and Evatt JJ make a similar statement concerning the activities of a shop steward.
- 55 165 ALR 550, at 583.
- 56 [2000] FCA 39, at 19.
- 57 Zammit affidavit, p. 5.
- 58 Transcript of Proceedings, p. 20.
- 59 PFA Media Alert, 21 February 2000
- 60 Transcript of Proceedings, p. 12.
- 61 Transcript of Proceedings, p. 9.
- 62 Transcript of Proceedings, p. 19, 26, 39 and 38. H. Opie and G. Smith, 'The Withering of Individualism: Professional Team Sports and Employment Law', *University of New South Wales Law Journal*, 1992, at p. 315 have said 'that the law in its interaction with sport has lagged behind its interaction with other commercial aspects of our society'; of what they refer to as the 'sports mystique'. Continuing, they state, 'when lawyers have viewed an aspect of social intercourse as being essentially private or domestic in nature, there is a tendency to move only very cautiously into the field'.
- 63 Transcript of Proceedings, p. 39.
- 64 Transcript of Proceedings, Federal Court of Australia, Victoria District Registry, North J, Extract of Proceedings, Interlocutory Judgment, No V68 of 2000, *Australian Professional Footballers' Association v Northern Spirit Football Club*, 25 February 2000, pp. 2 and 3. He incorrectly dates the PFA's media release on 22 February 2000.
- 65 Transcript of Proceedings, Interlocutory Judgment, p. 3.