SPORT AND THE LAW
A common law paradox

BRAHAM DABSCHECK examines how common law judges have aided player associations and served the cause of collectivism in professional team sports.

A paradox of the common law is how legal precepts which abhor combinations and/or champion competition have provided a fillip for collective organisations that act on behalf of the players of professional team sports. Such a statement is applicable to the fortunes of player associations, and the internal workings, or governance, of professional team sports in a number of different legal jurisdictions.

The common law doctrine of restraint of trade operative in Australia, anti-trust legislation in the United States of America and the European Treaty's championing of the free movement of workers in the European Economic Community have all enhanced the growth and development of player associations. What is more extraordinary is that such legal encouragement has occurred at a time when unions, in the western world, have been in free fall. In Australia, for example, at the beginning of the 1980s more than 50% of the workforce was unionised. By August 2003 this figure had fallen to 23%.

To understand how the law has encouraged the growth of player associations we need to devote some time to examining the peculiar economics of professional team sports. Unlike other areas of economic life, sporting contests require the cooperation of competitors to create a product — namely, a game or, more correctly, a series of games — such as a league competition. If a league is to generate interest, and enhance its income-earning potential, it needs to maximise the uncertainty of any game or contest. Uncertainty excites fans, sponsors and broadcasters; predictability turns them away.

The object of a league is to create teams of equal sporting ability. How can this be achieved? Teams have different financial strengths and market appeal. Richer teams will be in a better position to obtain the best players and dominate a league. Traditionally, leagues and clubs introduced rules to regulate the labour market, or employment of players. Such rules have limited the economic freedom and income-earning ability of players. Leagues have imposed rules which restrict the original, or first, club that a player can join, the movement of a player between clubs, and the income that can be earned.

Leagues have operated zoning (in tandem with residential requirements) and a draft system, where clubs take it in turn to choose new players, in determining the original club with whom a player will take up employment. Imagine what would happen if drafting was used to allocate graduating law students to law firms? Forms of regulating the movement of players between clubs include:

- the transfer system, where players are bought and sold by clubs — even when a player is out of contract with their former club
- the option where a club has a one-way right to renew a player's contract after the contract has expired
- assignment, where the league or club can relocate a player to another club
- the drafting of out of contract players to other clubs
- rules enabling clubs to have sole employment rights over players to a certain age or period of service/employment.

Restrictions have also been placed on the income that an individual player can earn, or on club or league payrolls, known as salary capping.

Generally speaking, when such rules have been challenged in the courts, judges have found against them as unreasonable restraints of trade or transgressing competitive legal norms. Such rules, especially those that restrict the ability of a player without, or out of, contract to obtain employment have been struck down. Moreover, leagues have found it difficult to demonstrate that such labour market rules enhance sporting equality. For example, you could conduct your own analysis of the Victorian/Australian Football League by ascertaining how many times each club has won the premiership, qualified for the finals, average position on the ladder at the end of the home and away season, and percentage of games won.

The way in which leagues have attempted to counter or overcome legal challenges to their employment rules is to 'embrace' player associations and negotiate collective bargaining agreements 'enshrining' such rules. If leagues can persuade players, through the collective organisations that represent them, to agree to such rules, even to the extent of the collective bargaining agreement, 'saying' that they are important and necessary to enable the league to pursue its 'legitimate' objects, such rules may be protected from legal attack.

The courts in championing restraint of trade and competitive legal norms have provided player associations with leverage in their bargaining relationship with leagues and clubs. The actual playing out of such negotiations will be a function of the bargaining skill and determination of the parties. In Australia, collective bargaining agreements have become increasingly complex and sophisticated. Not only do they include provisions on wages and working conditions and other items standard to most traditional collective agreements, but they also contain arrangements unique to sport, such as rules for the distribution of intellectual property rights, and player welfare and second career training schemes.

In this manner common law judges have aided the fortunes of player associations and collectivism in professional team sports.

BRAHAM DABSCHECK of the University of New South Wales has been researching in the area of professional team sports for more years than he is prepared to admit. A long suffering St Kilda supporter, during the Saints' remarkable ten-game winning streak at the beginning of the 2004 season, he was heard to say, more than once, 'It can't last'. For more on this area see Braham Dabscheck and Hayden Opie, 'Legal Regulation of Sporting Labour Markets' (2003) 16 *Australian Journal of Labour Law* 259.