

Play On? Business Strategy, Labour Market Regulation and Game Development in Australian Football.

Robert D. Macdonald

University of Melbourne

Great controversy surrounded the Australian Football League's announcement and subsequent withdrawal of a proposal to give the Brisbane Lions and Sydney Swans 'special assistance' in the 2001 AFL national draft. As both the National Sporting Organisation and manager of the national league, the Australian Football League (AFL) is an excellent case study of the complex relationship of between (a) the regulations governing the labour markets of elite professional team sports, (b) sport development, and (c) sport promotion.

While 'sport for all' is an oft-repeated mantra of public policy agents, 'Australian football for all' is clearly the underlying theme of the recently updated AFL strategic priorities (see Figure 1). From an operational perspective, these priorities result in competition for AFL funding between:

- current AFL players (as represented by the AFL Players' Association);
- future AFL players (as represented by funding of junior development programs and non-elite competitions); and
- AFL clubs.

The AFL Players' Association (AFLPA) has a strong voice thanks to the ability of the AFLPA leadership to effectively negotiate employment conditions via a collective bargaining agreement (CBA) with the AFL. The AFL clubs also have considerable formal power as they elect the AFL Commissioners who formulate AFL strategy and oversee management of the league. Conversely, future AFL players and the various non-elite elements of the Australian football industry have little, if any, formal power in the AFL decision-making structure.

The relationship between labour market regulation, sport development & promotion and the competing interests of these three groups must also be understood with reference to the AFL's core operational strategy – the equalisation policy. Designed to enhance the competitive balance (evenness) of sporting competition in the league, the AFL's equalisation policy includes both labour market regulation (the national and pre-season player drafts; total player payments (TPP) cap; restrictions on team list size and no free agency) and fiscal equalisation (pooling and equal distribution of major competition revenue streams) (AFL, 1999; 2001a).

A Game Plan

In late 2001, a working party chaired by AFL Commissioner Colin Carter released a detailed report on the future challenges facing the AFL and Australian football. *Investing in the Future of Australian Football* (the Carter Report) identified 10 strategies (see Figure 2) which are broadly intended to strengthen the infrastructure supporting grass roots football, increase participation and attendances (particularly in New South Wales and Queensland) and improve the efficiency and effectiveness of existing football management systems and structures (Carter et. al., 2001).¹

¹ A copy of the Carter Report is available from the author.

Figure 1.

Australian Football League Strategic Priorities

- A. Manage the national competition:** To effectively manage the national competition to ensure it is the most successful national elite sports competition for the benefit of our key stakeholders – our AFL clubs, the players and the public.
- B. Develop the game to be the number one team participant sport in Australia:** To promote high levels of player participation in well-managed programs at all levels of community football to ensure Australian Football is the pre-eminent national football code.
- C. Build the national AFL brand:** To promote public interest in the brand by building the strongest consumer brand position in Australian sport.
- D. Enhance the financial standing of the game in Australia:** To maximise the economic benefits of Australian Football to our member clubs, our players, the supporters, the football fraternity and community at large.

Source: Australian Football League (2001a) p.12.

The AFL also announced new labour market regulations in Grand Final week 2001, which would entitle the Brisbane Lions and Sydney Swans to special assistance in the 2001 and future AFL national drafts. These regulations represented further deviation from the notion of a 'pure' national draft where clubs would select players in the reverse order of the final ladder standings in the previous AFL season.

In recent years, the major variations on the concept of the pure draft have been the special assistance rule, the father-son rule and the developing markets special assistance rule. The special assistance rule provides any club with a seasonal winning percentage of less than .250 with a draft selection prior to the first round of the draft (i.e. the highly coveted first pick in the national draft). The father-son rule entitles a club to nominate a player prior to the national draft who is the son of a former player with a defined period of long-service as measured by games played with that club, in exchange for a third round national draft selection (i.e. a draft pick which would fall somewhere between selections 33 and 51 in the National Draft). Finally, the developing markets rule allowed the Brisbane and Sydney clubs to nominate one player from within a 50km zone around the two cities before the National Draft in exchange for a second round draft selection (i.e. a draft pick somewhere between selections 17 and 34).²

The proposed new developing markets regulations would have provided both clubs with the opportunity to draft one player from designated major metropolitan leagues around Brisbane and Sydney at the end of the first round of draft selections (i.e. potentially draft pick 17, 18 or 19), and to also forego a third round draft selection for the opportunity to nominate another player from these metropolitan leagues prior to the National Draft (AFL, 2001b). The regulations were defended by AFL General Manager of Football Operations Andrew Demetriou on the basis that it was 'important to

² See Anderson (2002), Booth (1997) and Dabscheck (1996) for further details on the AFL labour market regulation during the 1990s.

increase the local content in the Lions and Swans sides' (Timms, 2001, p.93).

After considerable pressure from the other AFL clubs and even a threat of legal action by Collingwood President Eddie McGuire, the AFL quickly reversed this decision. The issue was instead held over the issue for resolution in 2002, subject to further research and consultation (AFL, 2002a; Coghlan, 2001; Le Grand, 2001a; 2001b; Salvado, 2002; Smith, 2001).

In July 2002, the AFL announced that the developing markets special assistance rules would be abolished and that the eligibility requirements for players to be selected under the father-son rule, would be raised from 50 to 100 games played by the father of the prospective AFL player (Smith, 2002; Timms, 2002). These changes bring the AFL national draft closer to the ideal of an uncompromised draft and represent a good decision on both legal and strategic grounds. Brisbane and Sydney were nevertheless vocal in expressing their disappointment, while many commentators saw the decision as the AFL caving in to the Victorian-based AFL clubs (see Ramsey & McAsey, 2002; Sheahan, 2002; cf McGuire, 2002).

As will be shown, the proposed rule changes announced in September 2001 were legally suspect and a potential destabilising force in the context of future collective bargaining with the AFLPA.

Law, Collective Bargaining & Strategy

In *Hall v Victorian Football League*,³ the Victorian Supreme Court applied the common law principles established in *Buckley v Tutty*,⁴ to rule the Victorian Football League (VFL) residential zoning and transfer rules to be null and void as an unreasonable restraint of trade. Subsequent Australian decisions including the *Foschini*⁵ and *Adamson*⁶ cases have subsequently struck down the VFL retain and transfer system and the New South Wales Rugby League (NSWRL) internal draft as unreasonable restraints of trade.

The AFL has long recognised the potential legal threats to their system of labour market regulation. Individuals nominating for the AFL draft are required to sign a draft nomination form which include a clause where the individual agrees to abide by the AFL's labour market regulations. Similarly, the AFL Standard Playing Contract includes clause 10.2:

10.2 Reasonable Restrictions

The Player and the AFL Club agree with the AFL that the AFL Rules are necessary and reasonable for the proper protection of the legitimate interests of the AFL and the AFL Competition and that any restriction contained in the AFL Rules and particular without limitation the AFL Player Rules, including restrictions on the freedom of Players to transfer from one club to another club and the restrictions on the total payments a club may give or apply for the benefit of a player or associate of a player, are necessary and reasonable.

The critical issue in any legal challenge to the AFL draft and/or TPP cap is the reasonableness of the restraints being imposed. As such, the language in clause 10.2 directly reflects the language of the courts in the restraint of trade

cases cited above. The AFL believes the form of the current regulations would withstand a legal challenge of the kind in the *Adamson* case.

In *Adamson*, the Rugby League Players Union successfully challenged the NSWRL's 'internal draft'. The internal draft was similar to the AFL's pre-season draft whereby players who are out of contract with their existing clubs enter a pool of players from which clubs may draft players. Neither a player drafting system such as the AFL national draft nor a total player payments / maximum team salary cap have been legally challenged in an Australian jurisdiction. However, it is likely the *Adamson* precedent would be extended to see the AFL national draft voided as an unreasonable restraint of trade if challenged in court, irrespective of clause 10.2 in the AFL standard playing contract and a similar clause in the AFL-AFLPA CBA.⁷ Furthermore, Buti (1999) argues that sufficient jurisprudence exists in the various common law jurisdictions to also find a maximum team salary cap (as used in the AFL, the National Basketball League and the National Rugby League) to be an unreasonable restraint of trade. Importantly, *Hall* clearly suggests any residential zoning regulations which further restraint the opportunities of potential AFL draftees would be an unreasonable restraint of trade. The addition of unreasonable zoning regulations to the AFL labour market regulations may be the catalyst for a legal action which could destroy the entire regulatory structure of the AFL labour market.

In itself, this issue is of minor concern, for a legal challenge requires either a player willing to sacrifice their career, a club willing to destroy the fabric of the league (both of which are unlikely), or a sufficiently aggrieved player association. As such, changes to the AFL's labour market regulations should be considered in the strategic context of collective bargaining.

The AFL and the AFLPA first agreed to a standard playing contract in 1988 and have successfully negotiated some form of standard playing contract and CBA throughout the 1990s. The AFL clubs do not have a role in collective bargaining negotiations. However, it is feasible that club concerns with the terms of a CBA would be sufficient to ultimately result in the replacement of AFL Commissioners.

The current AFL-AFLPA CBA saw the AFL make considerable concessions to the Players' Association in terms the level of the TPP cap and the number of promotional appearances required to be made by AFL players. The TPP cap has risen by 81% from \$3.275 million per club in 1998 (the season prior to the current CBA) to \$5.937 million per club in 2003 (AFL, 2002b), while players are only required to undertake a maximum of 17 promotional activities (12 for his club and 5 for the AFL) each year (AFL-AFLPA, 1999).

These concessions were made in return for industrial peace and AFLPA acceptance of the need for the national draft, TPP and other labour market regulations. However, the next CBA is due to be negotiated in 2003. The AFL labour market regulations announced in July 2002 have avoided the creation of a bargaining environment even more unfavourable to the AFL. The league does not want to provide the AFLPA with additional leverage with which to secure further high growth in total player payments. AFL clubs already face considerable

³ [1982] VR 64.

⁴ (1971) 125 CLR 353.

⁵ *Foschini v Victorian Football League* Unreported judgement, Supreme Court of Victoria (Crockett J) 15 April 1983.

⁶ *Adamson v New South Wales Rugby League* (1991) 31 FCR 242.

⁷ Several arbitrated and judicial decisions in the United States have precluded a player association from challenging otherwise unreasonable labour market regulations, where those regulations were agreed to in earlier CBA's between the league and player association (see Weiler, 2000, Ch.10). However, the history of collective bargaining in the US major leagues (as shaped by the US antitrust and labour laws) is quite different to that in Australia.

financial pressure, with 10 of 16 AFL clubs likely to be unprofitable this year, on top of 7 of 16 clubs recording a mean operating loss between 1996 and 2000 (Macdonald, 2002). In addition to wage restraint, the AFL needs players to be more available for genuine promotional and development activities (Carter, et. al. 2001).

In strategic, legal and financial terms, the July 2002 decision of the AFL Commission was sound. As will be shown in the next SMAANZ Newsletter, the decision was also justifiable in terms of the economics of welfare, but has important implications for direct AFL investment in game development and further AFL regulation to encourage club investment in game development and promotion.

References

- Anderson, J. (2002, 16 August). Son rise clouded: AFL at odds with fans over father-son rule change. *Herald Sun*: Melbourne, p.105.
- Booth, R. (1997). History of player recruitment, transfer and payment rules in the Victorian and Australian Football League. *ASSH Bulletin*, 26, 13-33.
- Australian Football League. (1999). *Competitiveness on the Field and Uncertainty of Outcomes: Equalisation Strategies at the AFL*, Author: Melbourne.
- Australian Football League. (2001a). *AFL Strategic Plan 2001-2003*, Author: Melbourne.
- Australian Football League. (2001b, 26 September). AFL player rules - draft changes. Media Release <afl.com.au>.
- Australian Football League. (2002a, 4 April). Pies legal threat on draft. AFL News <afl.com.au>.
- Australian Football League. (2002b). *105th Annual Report 2001*, Author: Melbourne.
- Australian Football League & AFL Players' Association. (1999). *AFL Standard Playing Contract*.
- Australian Football League & AFL Players' Association. (1999). *Collective Bargaining Agreement 1998-2003*.
- Buti, A. (1999). Salary caps in professional team sports: An unreasonable restraint of trade. *Journal of Contract Law*, 5(1), 59-84.
- Carter, C., Alexander, R., MacKinlay, P., Polites, G., Parkin, D., Payze, R., Sinclair, J. & Smith, R. (2001). *Investing in the Future of Australian Football*, Australian Football League: Melbourne.
- Coghlan, S. (2001, 28 September). Angry Eddie ready to fight. *The Australian*: Melbourne, p.39.
- Dabscheck, B. (1996). Playing the team game: Unions in Australian professional team sports. *Journal of Industrial Relations*, 38(4), 600-628.
- Le Grand, C. (2001a, 3 October). Pathetic: Swans' swipe at football. *The Australian*: Melbourne, p.22.
- Le Grand, C. (2001b, 9 October). Swans chief slams coach. *The Australian*: Melbourne, p.18.
- Macdonald, R. (2002, 31 August). Lies & statistics. *Australian Financial Review*: Sydney, p.51.
- McGuire, E. (2002, 27 July). AFL gets it right. *Herald Sun*: Melbourne, p.106.
- Ramsey, A. & McAsey, J. (2002, 26 July). Sydney, Brisbane lose their draft concessions. *The Australian*: Melbourne, p.34.
- Salvado, J. (2002, 16 April). Development and draft concessions are separate: McMahon. AFL News <afl.com.au>.
- Sheahan, M. (2002, 26 July). North's benefits go west. *Herald Sun*: Melbourne, p.108.
- Smith, P. (2001, 03 October). Draft concession protocol blows hot and cold in south. *The Australian*: Melbourne, p.22.
- Smith, P. (2002, 26 July). Winds of change blow in - Draft in its purest form to accelerate growth. *The Australian*: Melbourne, p.34.
- Timms, D. (2001, 27 September). Anger at draft changes. *Herald Sun*: Melbourne, p.93.
- Timms, D. (2002, 26 July). Farther to go, son. Clubs' family ties rule upped to 100 games. *Herald Sun*: Melbourne, p.108.
- Weiler, P.C. (2000). *Leveling the Playing Field: How the Law Can Make Sports Better for Fans*, Harvard University Press: Cambridge, MA.
- Adamson v New South Wales Rugby League* (1991) 31 FCR 242.
- Buckley v Tutty* (1971) 125 CLR 353.
- Foschini v Victorian Football League*, Unreported judgement, Supreme Court of Victoria (Crockett J) 14 April 1983.
- Hall v Victorian Football League* [1982] VR 64.