R975 RUTHERFORD, D. Employer and employee in professional rugby Union.

DAVID RUTHERFORD

EMPLOYER AND EMPLOYEE IN PROFESSIONAL RUGBY UNION: ONE TEAM OR TWO SIDES

LLM RESEARCH PAPER

EMPLOYMENT LAW LAWS 518

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2003

AW
S741
UW
66
975
03

Victoria
UNIVERSITY OF WELLINGTON
Te Whare Wānanga
o te Ūpoko o te Ika a Māui

LIBRARY

TABLE OF CONTENTS

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

ABSTRACT

This paper outlines how the Employment Relations Act 2000 enabled the New Zealand Rugby Football Union and the professional players' trade union, the New Zealand Rugby Players Collective, to successfully negotiate two collective employment contracts covering all levels of professional rugby union in New Zealand. The paper details the restraints of trade and human rights law issues contained in the rules, regulations and policies of rugby unions governing bodies. It considers whether they are reasonable or not. It suggests any labour market restraints such as transfer rules, salary caps or revenue sharing in New Zealand should be negotiated as part of the collective contracts so as honour the principles of teamwork set out in the contracts; to take advantage of the fact that employment contracts are not captured by the anti-trust laws in the Commerce Act 1986; and to ensure, to the greatest extent possible, those restraints are held to be reasonable restraints of trade if subject to judicial scrutiny. It suggests a number of the current restraints are likely to be held to be unreasonable if challenged by players or others. It suggests that the principles and processes of the Employment Relations Act 2000 sit well with the values of rugby union. They should be adopted by the International Rugby Board, the sports international governing body which should open a dialogue with the players international union , the International Rugby Players Association rather than maintaining the current stance, along with the major national unions who control it, that the each group of national players should negotiate only deal with their national rugby union. In other words the hypocrisy of the employers of professional players allowing themselves an all powerful employers association which they control while insisting the employees equivalent is "redundant" and refusing to deal with it must stop.

Word Count (excluding abstract footnotes and bibliography): 15727 words

I INTRODUCTION

> ".....the rule of law, if it is to mean anything, has to embrace state, corporation and individual alike; that the laws chief concern about the use of power is not who is exercising it but what the power is and whom it affects; and that the control of abuses of power, whether in private or in public hands, is probably the most important of all tasks which will be facing the courts in the twenty-first century democracy. The sea in which, as citizens, we all have to swim in inhabited not only by Leviathan- an alarmingly big but often benign creature- but by Jaws; and the law needs to be on the watch for both."[1]

This is the second paper in a series of papers that have examined aspects of how the legislature and the courts have controlled, or should control, the use and misuse of power by rugby unions governing bodies.[2] "Jaws" in this case is the association of the governing bodies of rugby union and the citizens are the professional rugby players.

This paper is addressed to both the employers of professional rugby players and the employees – the players. In New Zealand it suggests that the Employment Relations Act 2000 provides both employer and employee with the opportunity to work together for the benefit of each other and rugby union as a whole. The policy behind the Act and the processes contained in the Act also provide a very sound model for the international employers association and supreme governing body – the International Rugby Board (IRB) - to interact with the international players

[1] Sir Stephen Sedely *"Public Power and Private Power"* 291-306, 306 in

[2] The other papers have examined the effect of Australasian and European statutory competition laws on rugby union and the issues surrounding the disciplining of rugby union players with particular regard to European, English and New Zealand laws on fair trial rights and the right to natural justice.

association – the International Rugby Players Association (IRPA).[3] To date very much at the behest of some of its most powerful national union members the IRB has refused to deal directly with IRPA.[4]

It outlines the nature of the international and local regulation of rugby union and the nature of the employment relationships in New Zealand to demonstrate that the need for players to organise collectively in the face of an internationally and locally organised group of employers is obvious.

It examines the application of the common law doctrine against restraints of trade to professional rugby union.[5] It suggests incorporating labour market restraints into collective agreements in New Zealand to provide maximum protection against attack as restraints of trade and immunity from the application of competition law.

---

[3] IRPA was only established in September 2001. The players associations representing nearly all of rugby's professional players are members including France, England, South Africa, Australia and New Zealand.

[4] Damien Hopley, CEO of the Professional Rugby Players Association (England) has been quoted saying "In an age where sport has become more enlightened –and employer/employee relationships are harmonious in most rugby countries around the world- the IRB have abdicated responsibility, and are guilty of not showing leadership of an international governing body. Their attitude shows a healthy disregard for the players who will be making them vast sums of money." And referring to the CEO of the Australian Rugby Union and IRB Council member John O'Neill's comments about Rugby World Cup bonuses for players Hopley said "John O'Neill dismissed IRPA as a redundant organisation, saying that the matter should be discussed between players and their National Unions."

[5] This paper is strictly limited to the position of professional rugby union players. It does not focus on the position of clubs or national unions seeking entry to competitions or seeking to block the entry of others or otherwise restrain trade. There is considerable research available on the general application of the common law doctrine of unreasonable restraint of trade to sport, to oval ball team sport and some on the NZRFU's 1996 NPC Transfer Regulations. See Michael Beloff, Tim Kerr Marie Demetriou *"Sports Law"* Hart Publishing Oxford 1999, Warren Pengilley *"Restraint of Trade and Antitrust: A Pigskin Review Post Super League"* 6 Canterbury Law Review 1997, 610; Warren Pengilley *"Sporting Drafts and Restraint of Trade"* 10 Queensland University of Technology Law Journal 91994, 89-121; Adam Lewis and Jonathan Taylor *"Sport: Law and Practice"* Butterworths London 2003 A1.35-A1.58 and E2. 32-E2.36; ; Shelly Duggan *"The New Zealand Rugby Football Union Transfer Arrangements"* Victoria University of Wellington LLM Research Paper 1997;Kierin Deeming *"Restraint of Trade in Professional Sport"* LLB(Hons) Research Paper Auckland University December 1996

The history of how outsiders have attacked the control of sports governing bodies is canvassed. This shows the good sense in governing bodies developing regulations that will withstand challenge. The history also illustrates why working with professional players and maintaining their trust is the sensible option for employers.

In competition law, freedom of movement or restraint of trade cases involving rugby unions the basis of justification of the restraint or restriction is essentially the same. The rugby union, or in the case of restraints in a collective agreement the rugby union and the players union, will have to show that the restriction or restraint is reasonably related to a legitimate objective and goes no further than is necessary to achieve that objective. In other words the restraint is a proportionate response to a legitimate objective.[6]

Competition authorities and the courts recognise the special requirements of sport for competitive balance between teams in a league, and where promotion relegation exists between different competition levels of a sport. They also recognise that the need for the development of talent by foundational levels of any sport.[7]

---

[6] If a rugby union's policy or restriction breaches anti-discrimination provisions of human rights or employment law the rugby union must rely on a statutory justification (such as being a measure to ensure equality) or a statutory exemption. In the absence of any statutory justification or exemption there is no opportunity for the rugby union to argue that the discrimination is designed to meet a legitimate objective.

[7] Commerce Commission Decision No 281 dated 17 December 1996 and *Rugby Union Players' Association Inc v Commerce Commission (No 2)* [1997] 3 NZLR, 301;Warren Pengilley *"Restraint of Trade and Antitrust: A Pigskin Review Post Super League"* 6 Canterbury Law Review 1997, 610

Globally rugby bodies, clubs and players operate within a pyramid structure that has the International Rugby Board (IRB) at the apex of the pyramid. The pyramid is built from the foundational school and club organisational level, through different levels of regional bodies to the national governing bodies that are joined together by the agreement that constitutes the IRB. All lower levels of the pyramid are subordinate to the legislative, regulatory and judicial functions of the bodies above them. The international rugby union pyramid, relative to sports like soccer, is small (in terms of total players)[8], narrow (players are concentrated in less than ten countries) and undemocratic (political power is concentrated in the hands of eight unions). The professional sport is also, relative to sports like soccer, small, new and underdeveloped.

Since rugby union allowed players to be paid for their work in 1996 many new regulations have been introduced which were not deemed necessary to the good governance of the game in the over one hundred years the game was played before then. To the extent they restrict or restrain players a players right to work rugby unions will need to justify them if they are challenged.[9]

---

[8] 3000 professional rugby players against 130,000 professional soccer players

[9] The orthodox rugby pyramid was challenged in the early days of professional rugby in 1996. By World Rugby Corporation which attempted to set up a worldwide league. In Europe the Welsh Rugby Union was clearly surprised to find that two of its most famous clubs Cardiff and Ebbw Vale were able to convince a judge that the had established a serious case that the WRU was imposing unreasonable restraints of trade on them. The courts should not interfere in sport argument did not work see *Williams and Cardiff RFC v WRU (IRB intervening)*[1999] Eu LR 195 and when the English First Division Clubs complained to the European Commission about the anti-competitive conduct of the IRB and its member national unions: *EDFR Complaint to the European Commission against the Rugby Football Union and the International Rugby Board* Case No IV36.994 March 1998 (unreported) see Adam Lewis and Jonathan Taylor above at A3.20, A3.31, A3.166 and B2.119. The respective parties settled the issues and the cases did not proceed. The English and Welsh clubs secured their financial position so it can be assumed there was some strength in their cases.

A considerable amount of this paper is spent illustrating the nature of the monolithic pyramid structure under which the game is organised. If the full picture is not fully understood the extent to which the game of rugby union is controlled by national unions and in particular by eight national unions, including New Zealand's, and the nature of that control will not be understood nor will the importance of the interrelationship of employment contracts and the legislative and regulatory activity of rugby unions governing bodies.[10]

Once the structure of the pyramid is fully exposed it is obvious that the national unions that control the IRB have near monopoly control of the labour market for professional players within their national territory and that acting together they have an international monopoly over the regulation of the employment of professional players.

In New Zealand the Employment Relations Act 2000 changed the distribution of power in the rugby employment relationship in the favour of the players and has had a profound and positive effect on the employment relationships of professional rugby union players in New Zealand. Collective agreements were entered into in 2001 between a trade union representing all of the professional players in New Zealand and a single employer company, which then seconded the players to rugby unions as they were selected by those unions to play in teams.

---

[10] The importance of understanding the complete picture is well illustrated by two recent cases both of which involved the Auckland Rugby Football Union *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* Unreported Employment Court decision (WC46/02; WRC 37/02) Wellington 12 November 2002; 10 December 2002 Judge C M Shaw and *Auckland Rugby Football Union v ACC* unreported District Court decision of March 2003. In both cases the fact that the NZRFU and all twenty seven provincial New Zealand rugby unions had agreed that players were employees and not independent contractors was ignored as the parties put forward arguments, affidavits and Agreed statements of fact about a contract or contracts purporting to be contracts of service.

As a newcomer to the world of professional sport rugby union has the opportunity to differentiate itself in a way that ultimately will prove commercially valuable. It could confound the cynics. The owners[11] and professional players could ensure the grassroots of the sport truly shares the benefit of the professional game.

Professional rugby union is a business where success is dependent on attracting, developing and keeping the most talented workers. Professional rugby union players today are not greedy compared to players in other professional sport.[12] Organised collectively players can and will eventually gain very high shares of the revenues earned by the sport unless they are convinced of the merits of investing in the future of the game. They must be treated as partners and involved in making the fundamental decisions about the split of the sports revenues. Otherwise they will simply take an increasing share of the revenues at the expense of the grassroots of the sport. They could do this within the current structure or they could establish competitions owned by the players associations as has happened in a number of sports. Governing bodies that see professional players as workers to be kept in their

---

[11] The various governing bodies are the "owners" of rugby union unlike the situation in American professional sport where private individuals or companies own teams and leagues.

[12] Professional rugby players cannot be charged with being greedy in relation to the share of the NZRFU's revenue they expect to earn. In its "*Competitions Review 2003"* published on November 24 2003 available at http://www.allblacks.com (last accessed 25 November 2003) the NZRFU states that players salaries accounted for 25% of expenses in 2002. Analysis of the NZRFU's 2002 accounts also available at the same website shows that means 18% of the NZRFU's total revenues are spent on players wages.(the figure is slightly understated because the NZRFU earns the broadcasting rights fees and competition sponsorship for NPC rugby but does not pay NPC players other than by paying NZ$15,000 in each Super 12 contract for players to play in the NPC and topping up unions who do not have Super 12 players in NPC Division One).This can be compared to a maximum salary cap of 39% of English First Division rugby revenues being spent on player payments; In soccer player payments as a percentage of revenue are 70% in FA Premier League, 90% in Portuguese soccer, 69% in Netherlands soccer, 64% in French soccer and 50% in German soccer (source Jonathan Taylor and Mike Newton *"Salary Caps – The Legal Analysis"* available at http://www.hammonds (last accessed 20 October 2003))

place by an outmoded paternalistic control structure are missing the chance to create a better future for the sport they are entrusted to protect.

For those who believe sport is just another business and the way forward is to oppose the greater involvement of professional players in the development of the sport here are three things to think about:

- When professional players have decided to organise and owners or administrators have sought to quash them the players have always won eventually.

- When unionised players have been locked out or gone on strike they have always won compared to the owners and administrators. The sport has a whole has often lost.

- "…..I believed I could apply to professional football the same principles of good business management that had enabled me to succeed in the corporate world. There was also a time when I believed in Santa Claus, the Easter Bunny, and the Tooth fairy."[13]

[13] Gene Klein owner of the San Diego Chargers for nearly twenty years quoted in Leeds M and von Allmen P *"The Economics of Sports"* Addison Wesley Boston, 2002 , 69 footnote 1, Eugene Klein *"First Down and a Billion: The Funny Business of Pro Football"* Morrow New York 1987

II HOW THE LAW PROTECTS PLAYERS RIGHT TO WORK

A The Common Law protections

In the age of human rights treaties, conventions and statutes the role of the common law in the protection of the fundamental rights of individuals from abuse of power by those private or public bodies imbued with it is often forgotten but the ability of the common law to protect them is also sometimes overstated. In *R v East London and the City Mental Health NHS Trust ex p von Brandenburg*[14] Lord Bingham discussing governing or overriding principles held that:[15]

> "First, the common law respects and protects the personal freedom of the individual, which may not be curtailed save for a reason and in circumstances sanctioned by the law of the land. This principle is reflected in, but does not depend upon, article 5(1) of the European Convention of Human Rights. It can be traced back to chapter 29 of Magna Carta 1297 and before that to chapter 39 of Magna Carta 1215."

Some might claim, with some justification, that the common law has not always protected personal freedom of employees in many areas. The common law

---

[14] [2003] UKHL 58 (13 November 2003) available at http://www.bailii.org/uk/cases/UKHL/2003/58.html (last accessed 28 November 2003) The case involved the committal of a mentally ill person in circumstances where he had been recently discharged after being committed and it was alleged there had been no change in circumstances before he was recommitted

[15] above paragraph 6

has though been remarkably consistent through the years in protecting employees from unlawful restraints of trade and curbing the abuse of public or private monopoly power where it affects employees. It has been much less successful in dealing with the imbalance of bargaining power in employment relationships.

B The Statutory protection of professional rugby players fundamental rights

Statutory employment law would fall very broadly into the area of positive rights that may directly or indirectly protect New Zealand professional rugby players.[16] In New Zealand the just distribution of power within relationships is at the heart of the policy underpinning the Employment Relations Act 2000. [17]As shall be seen this Act has contributed to a considerable rebalancing of power between players and rugby unions in New Zealand.

The anti-discrimination provisions of the Employment Relations Act 2000 and the Human Rights Act 1993[18] protect rugby players from discrimination on grounds including race, ethnic or national origins (which includes nationality or citizenship). There are exemptions for some sports activities in the Human Rights Act 1993[19] but there are none in the Employment Relations Act 2000. The potential significance of the fact that this may make the selection of employees to play teams on the basis of national origin or race or nationality based quotas in competition rules in New

---

[16] Sir John Laws *"Public Power and Employment Law: Abuse of Power* [1997] Public Law 455, 457

[17] The New Zealand Bill of Rights Act 1990 and the anti discrimination provisions of the Human Rights Act 1993, the Employment Relations Act 2000, the Human Rights Act 1998 (UK) and the Article 39 of the Treaty of Rome(the European Treaty) all assert positive rights. They are not within the scope of this paper but may have considerable affects on the employment of professional

[18] Sections 104 to 106 Employment Relations Act 2000 and sections 21,22 and 49 Human Rights Act 1993

[19] Section 49 Human Rights Act 1993

Zealand is illustrated by the fact that the equivalent United Kingdom legislation, the Race Relations Act 1976 (UK) section 39 provides:

"Nothing in this Part II to IV shall render unlawful any act whereby a person discriminates against another on the basis of the others nationality or place of birth or length of time for which he has been resident in a particular area or place if the act is done:

(a) in selecting one or more persons to represent , a country place or area or related association in any sport or game; or

(b) in pursuance of any rules of any competition so far as they relate to eligibility to compete in any sport or game."[20]

C Professional rugby union is at the edge of a legal divide

Sport has been said to be at the edge of the divide between public and private law.[21] Employment law has also been described as a field "where the public/private divide is particularly fragile."[22]

---

[20] Section 39 (b) has been rendered meaningless by for citizens of the European Union and citizens of countries including South Africa, the Caribbean, the Pacific Islands and Eastern Europe where appropriate co-operation agreements have been signed by *Case C-13/76 Dona v Mantero (July 14 1976) 1 CMLR 576 (1976)*Case C-415/93 Union Royale Belge des Socities de Football Ass'n v Jean Marc Bosman (December 15 1995) (1996) 1 CMLR 645 ("the Bosman case")Deutscher Handballbund eV v Maros Kolpak [2003] Case C-438/00 ECJ Celex Lexis May 8 2003It would however still appear to be lawful to discriminate against New Zealanders or Australians , not otherwise allowed to work lawfully in the European Union.

[21]The phrase "at edge of the divide" was used by Lord Woolf in *"Droit Public- English Style"* (1994) PL 57, 64 where he wrote "The controlling bodies of sport .....can exercise monopolistic powers..... How then as a last resort can the courts be justifiably excluded? We are however here at the edge of the divide, trying to clarify a boundary which is indistinct and evolving." The idea of rights such as the right to work and the principles of judicial review or fairness meeting at the divide comes from Cooke J's judgement in *Stininato v Auckland Boxing Association Inc* [1978] 1 NZLR 1 (CA), 24 where he said "in this kind of case there is a meeting of the principles of natural justice and fairness (treating those terms as synonymous) and the principles as to unreasonable restraint of trade."

[22] Sir John Laws *"Public Power and Employment Law: Abuse o f Power* [1997] Public Law 455, 458 where Laws went on to say that "..... the substantive law of employment, though dressed in the garb of the private law of bargains, in some instances exhibits on analysis underlying features that may be said to belong in the public law world."

The courts, particularly the Australasian courts have shown a willingness to examine the misuse of power by governing bodies and competition organisers.[23]The only distinction between the English law and the Australasian law is in the area of judicial review where the English Courts have been reluctant to intervene.[24] How long this will last is the subject of much interest in the United Kingdom.[25]

D Would the New Zealand players have standing to seek declarations against the IRB or NZRFU?

The New Zealand players are in a direct employment contact with NZRPL. It is probable that the courts would look at the substance of the employment relationship and say the relationship extended to include the provincial unions and the NZRFU. Even if the courts did not do so the lack of a contractual relationship does not

---

[23] *Blackler v New Zealand Rugby Football League Inc* [1968] NZLR 547; *Stininato v Auckland Boxing Association Inc* [1978] 1 NZLR 1 (CA), 24; *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159;*Finnigan v New Zealand Rugby Football Union Inc* (No2) [1985] 2 NZLR 181; *Finnigan v New Zealand Rugby Football Union Inc* (No3) [1985] 2 NZLR 190; *Kemp v New Zealand Rugby Football League Inc* [1989] 3 NZLR 463;*Loe v New Zealand Rugby Football Union Inc* unreported High Court Wellington decision 10 August 1993 CP209/93; *Le Roux v New Zealand Rugby Football Union Inc* unreported High Court Wellington decision 14 March 1995 CP346/94;*Adamson v New South Wales Rugby League Ltd (1991) 100 ALR 479; Adamson v New South Wales Rugby League Ltd (1991) 103 ALR 319;Adamson v West Perth Football Club (1979) 27 ALR 475;Buckley v Tutty* (1972) ALR 370;*Foschini v Victorian Football League* (1983) Supreme Court Victoria No 9868/82 15 April 1983 (unreported);*Hall v Victorian Football League* (1997) 58 FLR 180;*Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2000) FCA 823;*Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) FCA 1040;*Hoszowski v Brown (1978)* Supreme Court New South Wales No 1667/78 6 October 1978 (unreported);*News Limited v Australian Rugby Football League Ltd* (1996) 135 ALR 33;*News Limited v Australian Rugby Football League Ltd* (1996) 139 ALR 193;*News Limited & Ors v South Sydney District Rugby League Football Club Limited & Ors* (2000) 177 ALR 611 (appealed to High Court of Australia decision reserved);*News Limited v South Sydney District Rugby League Football Club Ltd* (the *South Sydney* case) Unreported decision of the High Court of Australia [2003] HCA 45 S34/2002 delivered 13 August 2003 Kirby J;*Wayde v New South Wales Rugby League Limited* (1985) 180 CLR 459

[24] *Law v National Greyhound Racing Club Ltd* [1963] 1 WLR 1302; *R v Football Association ex p Football League Ltd* [1993] 2 All ER 833; *R v Jockey Club ex p Massingberd-Mundy* [1993] 2 All ER 207; *R v Jockey Club ex p Aga Khan* [1993] 1 WLR 909

[25] Taylor and Lewis (eds) "*Sport: Law and Practice*" Butterworths London 2003, A3.64-A3.69; Michael Beloff "*Pitch, Pool,Rink ...Court? Judicial Review in the Sporting World*" (1989) Public Law 150; Beloff, Kerr, Demetriou "Sports Law" Hart Publishing Oxford 1999, 8.9-8.28

preclude the players from seeking declarations that the rules and regulations of the IRB, NZRFU or provincial unions constitute an unreasonable restraint of trade.

In *Enderby Town Football Club Ltd v The Football Association Ltd and another*[26] Lord Denning MR made a number of important observations about the nature of the rules of a sports governing body. In that case it was the governing body of English soccer. The observations are just as relevant to the international, national and provincial governing bodies of rugby union in common law jurisdictions.

Lord Denning dismissed the idea that the rules of a sports governing body were a contract between those subject to them and the governing body. He described that idea as a fiction invented by lawyers to give the courts jurisdiction:[27]

> "Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code-a set of regulations laid down by the governing body to be observed by all who are, or become members of the association. Such regulations, although said to be a contract, are subject to the control of the courts. If they are in unreasonable restraint of trade, they are invalid: see *Dickson v Pharmaceutical Society of Great Britain.* If they seek to oust the jurisdiction of the court they are invalid: see *Scott v Avery.* If they unreasonably shut out a man from his right to work, they are invalid: see *Nagle v Feilden* and *Edwards v Society of Graphical and Allied Trades.* If they lay down a procedure which is contrary to the principles of natural justice, they are invalid: see *Faramus v Film Artistes' Association* [1964] 1 All ER 25 at 33....."

---

[26] [1971] 1 All ER 215, 219

[27] *Enderby Town Football Club Ltd v The Football Association Ltd and another* [1971] 1 All ER 215, 219.

Lord Denning continued that the courts could hold a rule that was against public policy invalid even if it was contained in a contract. He cited *St Johnstone Football Club Ltd v Scottish Football Association*[28] as an example of that reality.

This view of the courts jurisdiction has been strongly endorsed by the New Zealand Court of Appeal directly in relation the NZRFU's relationship with players who are club members. The fact that amateur rugby players who are members of rugby clubs are not in a contractual relationship with the NZRFU or the provincial union of which their club is a member was established in *Finnigan v NZRFU.*[29] The Court of Appeal rejected any contractual relationship between the club players and the rugby unions of which their club or provincial rugby union were members. The club members attempted to imply contracts between each of them and the NZRFU. Cooke J held:

> "This is quite untenable. The plaintiffs are stated to be members of their respective clubs, which are also incorporated societies. As such members they have a contractual relationship with their clubs and possibly with their fellow members. In turn the clubs and their delegates (it is not necessary for the present purposes to differentiate) are members of the Auckland Rugby Football Union, likewise incorporated under the Incorporated Societies Act. So there are similar contractual relationships at that level. Then the Auckland Union is one of the 27 affiliated unions which are members of the New Zealand Union: with the consequence again that contracts exist between the New Zealand Union and the affiliated unions. Thus there is a

---

[28] [1965] SLT 171

[29] *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159, 178-179. The Court of Appeal reaffirmed its views in *Finnigan v New Zealand Rugby Football Union (No 3)* [1985] 190, 199-200 when the court dismissed the NZRFU's request for leave to appeal to the Privy Council see the judgement of Richardson J "in our judgement of 21 July 1985 we held in cases where an incorporated association is alleged to have acted against its objects and so outside its jurisdiction as a statutory body, but the plaintiff is not in a direct contractual relationship with the incorporated association, standing to sue may be determined on an assessment of all the circumstances on a case by case or category by category basis."

hierarchy based on a structure of interlocking contracts. It would distort the pattern, without any justification, if the courts were to invent direct contracts between all club members and the parent New Zealand Union."[30]

Four of the categories where the courts would intervene in the application of the rules and regulations of a governing body with monopoly power despite the absence of any contract are outlined in *Enderby Town* they are:

- unreasonable restraint of trade
- ouster of jurisdiction of the courts
- unreasonable shutting out of a persons right to work
- procedure is a breach of natural justice

Finnigan adds a fifth category, so far limited to New Zealand, where the sporting organisation is in a position of major national importance and the organisations decision will affect the nation as a whole.

The courts have therefore asserted a supervisory jurisdiction over bodies with monopoly powers including sports bodies in private pre-contractual and non-contractual situations. In English law the supervisory jurisdiction is not wide because of the English Courts traditional reticence to interfere in the private affairs of sports organisations. In New Zealand and other Commonwealth jurisdictions the courts have

[30] *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159, 178

been willing to interfere more readily. Dawn Oliver has summarised the English position as follows:[31]

> "*Unless bias, unfairness, arbitrariness or capriciousness are established, there will be no interference by the courts in private bodies having no contractual relationship with the plaintiff.*[32] *Even if those grounds are established a court may by it discretion refuse a remedy. But if those grounds are established, and if vital interests*[33] *or the public interest are affected, then a supervisory jurisdiction in private law may be exercisable.*".

Even in England, where the courts, unlike their New Zealand counterparts, have been reluctant to extend the doctrine of judicial review to sporting organisations the courts have recognised duties of legality, rationality and procedural fairness in contract law where an individuals fundamental rights are affected.[34] These duties have also been imposed on employers by statute in the United Kingdom and New Zealand in the provisions in employment statutes[35]

E The Doctrine against restraint of trade and its general application to sport and rugby union

It took the English courts nearly sixty years to apply Lord McNaughten's famous doctrine against the restraint of trade[36] to sport in *Eastham v Newcastle*

---

[31] Dawn Oliver *"Is the Ultra Vires Rule the basis for Judicial Review?* in Christopher Forsyth (ed) *"Judicial Review & the Constitution"* Hart Publishing Oxford 2000, 3-27, 16-17

[32] "*R v Trent Regional Health Authority,* The Times June 19 1986"

[33] "These include "rights to work". They do not, it seems, include mere reputation were no gainful activity is involved: *Currie v Barber,* The Times March 27 1987; cf. *Fisher v Keane*(1878) 11 Ch D 387. See also *Cowley v Heatley* The Times July 24 1986."

[34] Dawn Oliver *"Is the Ultra Vires Rule the basis for Judicial Review?* in Christopher Forsyth (ed) *"Judicial Review & the Constitution"* Hart Publishing Oxford 2000, 3-27, 317

[35] In New Zealand the Employment Relations Act 2000

[36] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition* [1894] 535, 565 where Lord McNaughten held:

United.[37] The case involved the retention and transfer rules of the Football Association and the Football League. The retention system was held to be an unlawful restraint of trade.[38] Justice Wilberforce posed the questions that must be asked today in relation to the rules and regulations of the IRB and NZRFU. He asked:

> *"(1)Are the rules of the Association and the regulations of the League in restraint of trade?(2)If so, are the restraints no more than such as are reasonably necessary for the protection of the Association or the League or of their members?(3) Has the court any jurisdiction to declare that the retention and transfer system is invalid against any and all of the defendants?(4)If so, should the court exercise that jurisdiction?(5) Has the plaintiff a right to damages?"*

In short his honours answers were (1) Yes. (2) No the restraints go too far. (3) Yes. (4) Yes and (5) No but he has the right to a declaration against the association of employers. The onus is on the party alleging the restraint to prove the restraint. If that is proved the party seeking to rely on the restraint must prove it to be reasonable. If that is done it is up to the other party to prove that allowing the restraint is not in the public interest.

The players union, the Professional Footballers Association was after the success in *Eastham* able to negotiate significant changes in the system. These are

---

> "The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and, therefore void. That is the general rule."

Lord McNaughten held there could be exceptions to the general rule if in the special circumstances of the case the restriction is reasonable by reference to the interests of the parties and to the interests of the public. Any restraint must provide adequate protection to the party in whose favour it is imposed but in no way injure the public interest.

[37] [1963] 3 All ER 139

[38] This in turn practically undermined the transfer system but the case did not decide that the transfer system was an unlawful restraint of trade as sometimes thought.

reported to have included freer transfer arrangements, independent tribunals to resolve salary disputes and free agency for senior players.[39]

In relation to the professional rugby players position regarding the IRB it is significant that Justice Wilberforce held:[40]

> "the court has jurisdiction to grant a declaratory judgement, not only against the employer but against the association of employers whose rules and regulations place an unjustifiable restraint on his liberty of employment. A case where the employee is himself contractually bound by the employer's rules (as the employee is here, by virtue of registration and the terms of his contract) is a fortiori to the last case mentioned."

The issue of proof of the need for the restraint is important because the onus is on the proponent of the restraint to prove the need for it. This may involve a very much higher level of scrutiny of the reasoning of the sports body than the standard of *Wednesbury* unreasonableness.[41]

A good example of what the courts demand by way of proof and where a sports governing body failed to prove the damage it claimed the actions it had taken were designed to mitigate is *Greg v Insole.*[42] There it was held after requiring all the relevant national bodies to submit proof of the financial effects of the proposed World Series Cricket that only the Australian governing body was likely to suffer financial loss and that it was beyond the powers of the other national governing bodies

---

[39] Dabscheck, Braham "*Sport, Human Rights and Industrial Relations*" [2000] 7 AJHR 129

[40] 1963] 3 All ER 139, 157

[41] The current position is unsettled on one hand you have *Stevenage Borough Football FC Limited v The Football League Limited* unreported transcript 23 July 1996 Carnwath J suggesting the test is the *Wednesbuury* type test because of the public nature of the sports body (also an argument for judicial review in the United Kingdom). On the other hand you have *Newport AFC Limited v The Football Association* unreported 12 April 1995 Blackburne J rejecting that and preferring to treat the situation as a contractual or quasi contractual case and require significant justification for the restraint see Beloff, Kerr, Demetriou 3.42- 3.44

[42] *Greig v Insole* [1978] 3 All ER 449, 496 , 497, 503

individually or collectively as the unincorporated world governing body to act to protect the Australian governing body.

Eastham was followed in New Zealand in *Blackler v New Zealand Rugby League (Incorporated),*[43] *Stininato v Auckland Boxing Association (Inc),*[44] *Kemp v New Zealand Rugby Football League Inc.*[45] It was also followed in Australia in *Buckley v Tutty.*[46]The Commerce Act 1986 preserves the doctrine in so far as it is not inconsistent with the Commerce Act.[47]

The application of the doctrine to transfer regulations in professional rugby union in New Zealand was considered in *Rugby Union Players Association Inc v Commerce Commission (No2.)*[48]The High Court held in relation to the Commerce Commission's proposed counterfactual and RUPA's contention that it would be struck down as an unreasonable restraint of trade that:[49]

> "the imposition of a transfer fee does automatically lead to a restraint of trade. It all depends on the circumstances and a balancing of the interests of the player and the wider interests of the game and all players."

---

[43] [1968] NZLR 547 ,per North P 554-555
[44] [1977] NZLR 1, per Richmond P 7
[45] [1989] 3 NZLR 463, per Henry J 470
[46] [1971] 125 CLR 353, 381
[47] section 7(1) Commerce Act 1986
[48] [1997] 3 NZLR 301, 314-318. One of the odd aspects of this case was that the players counsel did not argue the restraint of trade point and it was left to the Commission Counsel to inform the court which she did by reference to a presentation made by Warren Pengilley to a conference of sports lawyers. The presentation was later published as an article Warren Pengilley *"Restraint of Trade and Antitrust: A Pigskin Review Post Super League"* 6 Canterbury Law Review 1997, 610. Pengilley's article only briefly mentions *Eastham* and *Bosman* and neither are mentioned in the High Court judgement no doubt because of its anti-trust linkage. The failure to inform the court of the likely impact of *Bosman* in Europe on transfer regulations was odd given the extent of the public debate in Europe. While *Bosman* is not a restraint of trade case the principles that underlie the freedom of movement of worker cases for professional players in Europe are similar and due to the Eurocentric nature of the IRB could have been anticipated to affect, as they did, the IRB's regulations on transfer of players.
[49] Above at 318

The doctrine has not been applied in New Zealand to the imposition of salary caps imposed to control costs and control costs because to date there have been none.[50] The issue was left open in *Adamson v New South Wales Rugby League.*[51]

It is clear that the doctrine will apply to any restraints of trade in the byelaws, rules, regulations, employment contracts or participation agreements of the IRB, the NZRFU, the provincial rugby unions and NZRPL. It is also clear that a player has standing to sue the governing body even if there is no contractual relationship.

III THE DEVELOPMENT OF PROFESSIONAL RUGBY UNION

A The "instant and cataclysmic change"[52]

The world that employers and employees inhabit in professional sport is well illustrated by the events of the creation of professional rugby union in the middle of 1995 in South Africa, New Zealand and Australia. When change comes it comes swiftly.

---

[50] for a comprehensive view on the legality of salary caps see Jonathan Taylor and Mike Newton *"Salary Caps – The Legal Analysis"* available at http://www.hammonds (last accessed 20 October 2003)) The NZRFU is now proposing to introduce salary caps in the NPC by 2006. It has not had to introduce them at higher levels of the sport in New Zealand because the NZRPL centrally contracts all Super 12 and All Black players and therefore controls the salaries itself. There is a salary cap in place in English rugby union that was negotiated between the clubs players and national union.

[51] [1991] 100 ALR479, [1991] 103 ALR 319

[52] IRFU Strategic Planning Group 2003 *"Taking Irish Rugby Forward"* IRFU Consultative Document available from the Irish Rugby Football Union

World rugby is still at the very early stages of its professional development. At the start of 1995 players were not paid to play and broadcasting rights contracts were for modest amounts with free to air broadcasters. By the end of 1995 players were paid to play and massive increases in broadcasting rights fees were achieved from subscription television broadcasters. In the meantime the national bodies almost lost control of the sport.[53] The change was sudden and the players and national unions had all faced pressures and choices they had not expected to face. The players had for example been heavily involved in the rugby war between the SANZAR national rugby unions and World Rugby Corporation. Many had signed contracts with the WRC.

The most accurate account of what happened in 1995 is that:[54]

> " After the code had lived on a diet of fresh air and love for well over a century, it was the year that the three major national Rugby Unions in the southern hemisphere signed a deal with a massive media corporation guaranteeing them over half a billion American dollars in return for a decade's worth of television rights.
>
> In reply, an organisation called the World Rugby Corporation launched a stunning counter-coup, contracting most of the planet's best players from all the major Unions to an alternative competition set up on a global basis.
>
> It was, as a consequence the year of the Rugby War...

---

[53] France was an exception in so far as national bodies losing control was concerned because the Loi du Sport (Act no. 84-610, July 16 1984, JO of 17 July 1984 , Article 1, paragraph 4) recognises the development of sport including national sport as duty of the state. In France the national rugby union is recognised as the governing body of rugby union by the state and is has the exclusive licence to licence participation in the sport in France and to authorise events. See Adam Lewis and Jonathan Taylor *"Sport: Law and Practice"* Butterworths London 2003 ,A1.11-A1.112. There is much to commend in the French approach because it recognises the public nature of a national sports bodies function and makes it clearly subject to the public law in the exercise of its controlling powers.

[54] Peter Fitzsimons *"The Rugby War"* Harper Sports 1996,vii

> When the war was over , the International Rugby Football Board, even if Missing In Action throughout – formalised the already apparent. They announced that the code would henceforth abandon its famous amateur ethos and instead embrace outright professionalism."

WRC began as a suggested response by Kerry Packers interests to News Corporation's (News) attack, with the Superleague rugby league, on the Australian rugby leagues governing bodies' national championship, for which Packers interests owned the broadcasting rights. WRC set out to establish a world rugby competition in which the world's top players would compete in international nation against nation rugby and in a league composed of teams based around the world. WRC wanted rugby unions governing bodies involved. They would own 50% of the teams. WRC did not expect the rugby unions to come of their own free will. WRC saw getting the players contracted to WRC as the key to getting the unions on their side. It was to be a player driven revolution.[55]WRC's strategy was similar to the strategy News had adopted with rugby league a year earlier in Australia.

It is always accepted by the attacker that working with the governing body is economically preferable but contracting the players is essential. Governing bodies are not renowned for embracing outsiders so the key strategy adopted by attackers is to contract as many of the elite players as possible preferably before the governing body knows of the attacker's plans. Having secured the players the attacker will try and gain the co-operation of the governing body.

The strategy of News and the response of the Australian Rugby league and its allies are well documented in *News Limited &Ors v Australian Rugby Football*

---

[55] Peter Fitzsimons *"The Rugby War"* Harper Sports 1996,14

League Limited & Ors.[56] What happened when the crickets governing bodies control was attacked in 1977 by a combination of a broadcaster and elite players is documented in *Greig and others v Insole and others.*[57] The most recent example of a similar battle, this time between a players association that controlled the professional sport worldwide and a breakaway group of elite players and commercial interests is *Hendry and Others v The World Professional Billiards and Snooker Association Ltd.*[58]. What happens when attacker and defending governing body reach a peace deal is outlined in the *South Sydney* [59]case. The cases involving rugby league in Australia are all the more relevant in the context of rugby union because of the very significant involvement of News in the ownership of rugby union broadcasting rights.

In all cases the key was control of the best players and a broadcasting contract. The governing bodies attempted to keep control through regulation and contract. The attackers used competition law and the doctrine against unreasonable restraints of trade to attack the governing bodies. It is therefore wise for governing bodies to have the players on their team and to ensure that rules and regulations that govern the sport cannot be attacked as unreasonable restraints of trade.

---

[56] *News Limited &Ors v Australian Rugby Football League Limited & Ors* (1996) 18 ATPR 41-521, 42-579,42-582, 42-590 contains detailed references to the News Limited strategy which outlines the three options open to anyone trying to gain a place in a professional sport with or without the support of the governing bodies of that sport.

[57] [1978] 3 All ER 449, 463-483

[58] [2002] UKCLR 5

[59] *News Limited & Ors v South Sydney District Rugby League Football Club Limited & Ors* (2000) 177 ALR 611 and *News Limited v South Sydney District Rugby League Football Club Ltd* (the *South Sydney* case) Unreported decision of the High Court of Australia [2003] HCA 45 S34/2002 delivered 13 August 2003 Kirby J

B Relations between professional players and rugby unions in New Zealand

Since the end of the "rugby war" the relationship between the professional players and the national and provincial rugby unions in New Zealand has been relatively non confrontational.[60] There were significant confrontations in relation to the introduction of the NZRFU's NPC Transfer Regulations[61] and the 2003 Rugby World Cup bonus payments.[62]

In the early years of professional rugby in New Zealand the rugby unions, the players association and the players all preferred to characterise the players as independent contractors. The primary reason for this was likely the perceived (but not necessarily real other than in exceptional cases) tax advantages for players and the minimisation of some statutory levies or avoidance of responsibilities such as employee safety legislation or holiday's legislation. There was also no encouragement for collective bargaining in the Employment Contracts Act 1991.

---

[60] In that time the Australian Rugby Union has been involved in litigation with the players union twice, once over a failure to implement the Ferrier Agreement and once over the Rugby World Cup participation agreement and bonuses. The Welsh Rugby Unions international players have gone on strike twice. The English rugby union players have taken strike action once and threatened it on another. The English and Australian players have achieved a far greater stake in the governance of the game than the New Zealand players. It is inevitable that some player representation at board level will be demanded and won in the future in New Zealand. Concerns that the NZRFU Board had no All Black player representation have abated with the election in 2002, of Jock Hobbs and Graham Mourie(both ex All Black captains) to the NZRFU Board. Current NZRFU President (Tane Norton) and vice-President (John Graham) are past All Black captains. Graham has also been a manager of professional cricket and rugby teams and Mourie has coached in the modern era. However there is still no formal player representative nor anyone who has played in the professional era on the Board.

[61] See Application by the NZRFU (23 September 1996) Submissions of the NZRFU and the Rugby Union Players Association to the Commerce Commission in relation to the NZRFU's application for authorisation of a restrictive trade practice and Commerce Commission Decision No 281 dated 17 December 1996 and *Rugby Union Players' Association Inc v Commerce Commission (No 2)* [1997] 3 NZLR, 301. For discussion on the implications of this case see Warren Pengilley *"Restraint of Trade and Antitrust: A Pigskin Review Post Super League"* 6 Canterbury Law Review 1997, 610, 650-656 note that this article is based on the conference paper by Pengilley that Smellie J refers to in *Rugby Union Players' Association Inc v Commerce Commission (No 2)* [1997] 3 NZLR, 301, 314

[62] This was eventually settled after reference to mediation under the Employment Relations Act 2000. Both the NZRFU and the players union praised the mediation process and the mediators.

By the end of 1999 there was a considerable level of dissatisfaction amongst players and their representatives about a number of aspects of their relationship with the NZRFU and the provincial rugby unions. In many respects this was because of a lack of transparency about who was being paid what[63] and a concern about whether the terms of all contracts were fair and consistent.

There was a concern that was evident as far back as the players association's evidence before the Commerce Commission and the High Court in 1996[64] that the NZRFU did not properly consult with the players on important issues that affected them. At that time one of the key issues was the length of the season and the number of matches players were expected to play. The New Zealand players were also aware of what the Australian rugby union players had achieved by acting collectively under the leadership of Tony Dempsey.[65]

---

[63] The NZRFU's position has been that it would be happy to publish details of players salaries if that is what the players wanted. The disadvantage to the NZRFU is that it could be the basis of competitive disadvantage as off shore employers would understand what they had to pay. The disadvantage for the players would be that players who chose to play overseas would be offered less than they are currently offered if off shore interests understood the pay structure -the feeling being that people overestimate the amounts being paid to players in New Zealand. The advantages would be an improved and objective basis for salary discussions and potentially the basis for the introduction of a salary arbitrations system. Clearly the NZRFU is in no position to impose such a system because of the players privacy rights.

[64] Commerce Commission Decision no 281 Application by the NZRFU for authorisation of a restrictive practice and *Rugby Union Players Association v Commerce Commission (No2)* [1997] 3 NZLR 301

[65] Unlike the New Zealand players (and possibly because there were a smaller group of Australian players at that time and greater legislative encouragement of collective bargaining) the Australian players negotiated collectively with the ARU from the outset. The initial result was extraordinary but probably unsustainable in terms of revenue share but clearly demonstrates the potential power of elite sports players negotiating collectively with their employers. By agreement with the ARU and New South Wales, ACT and Queensland rugby unions (the "Ferrier Agreement") the players were to earn 95% of the News Agreement revenues and have representation on the boards of the rugby unions. The rugby unions were to support and fund the establishment of a players union for senior and age grade players and not discriminate in any way against players who had signed for WRC. The Ferrier Agreement was later replaced by a collective contract which left the players with a significant percentage of total revenues and Board representation. The Ferrier Agreement is still proudly displayed on the Australian Rugby Union Players Association (ARUPA) website at http://www.rupa.com.au/images/Ferrier-Agreement.gif (last accessed 11 November 2003. Braham Dabscheck reports, in *'Sport, Human Rights and Industrial Relations"* (2000) AJHR 23 footnote 87 available at http://www.worldlii.org/cgi-worldlii/disp.pl/au/journals/AJHR/2000/23.html (last accessed 22 August 2003, that once WRC had been seen off the players union had to take court action to

IV THE CURRENT EMPLOYMENT RELATIONSHIPS OF NEW ZEALAND RUGBY PLAYERS

A The Players Union– the Collective and RUPA

The Rugby Players Collective Incorporated (the "players union") is an incorporated society registered under the Incorporated Societies Act 1908 and registered trade union under the provisions of the Employment Relations Act 2000.[66]

The players union is not the same body as the Rugby Union Players Association Incorporated (RUPA) that opposed the NZRFU's NPC Transfer Regulations before the Commerce Commission and appealed the Commissions decision to the High Court in 1997.[67] RUPA continued to function after losing the 1997 case but was rejuvenated by the Employment Relations Act 2000 (or in fact the reality that it was to become law). RUPA functions alongside the Players Collective with similar membership and management. The NZRFU funds RUPA but does not fund the Players Collective.[68]

B The Collective Contracts

---

preserve its position and that after an initial procedural victory for the players union a collective agreement was negotiated. The ARU/ARUPA Collective Bargaining Agreement (CBA) provides that players covered by it (Super 12 and International players) a minimum wage of A$47,500, few to no restrictions on sponsorship arrangements, requires players to have medical insurance with the ARU topping up the shortfall between what the players private fund pays and the actual cost and a death benefit of A$1 million. While there is no guarantee against state rugby unions insolvency the ARU has been willing to bail out state unions, such as New South Wales, in the past – Brent Reed *"RL:Rugby Union players chief can understand RLPA frustration"* AAP Newsfeed September 5 2003 https://www.nexis (last accessed 9 September 2003).

[66] Section 15 Employment Relations Act 2000

[67] *Rugby Union Players' Association Inc v Commerce Commission (No 2)* [1997] 3 NZLR 301

[68] Section 14 (1) (d) Employment Relations Act 2000 requires that in order to be registered a society must be " independent of , and is constituted and operates at arm's length from, any employer."

All the players that play professional rugby in New Zealand today are meant to be employed to play rugby union under one of two collective employment contracts negotiated between the players union and New Zealand Rugby Promotions Limited (NZRPL), the NZRFU and representatives of the New Zealand provincial rugby unions in 2001.[69] The agreements came into force on January 1 2002 and expire on 31 December 2004.

The NZRFU decided in 2000 that it was in its interests to support the players desire to reinvigorate their players association and provided significant funding to enable the association to better establish itself and obtain legal and other advice independent of the NZRFU.[70] What were to become the objects of the Employment Relations Act 2000 stated in Section 3(a)[71] sat well with the professional rugby union

---

[69] RUPA's contention that eventually "the NZRFU and RUPA would follow the trend evident overseas whereby the players association and the governing body agree a uniform collective contract, which itself regulates all aspects of the sport, including the transfer of players" in *Rugby Union Players Association Inc v Commerce Commission (No2)* [1997] 3 NZLR 301, 318 has so far proved right in relation to the collective contract but the inclusion of the transfer of players and other regulations is yet to be achieved. Two cases involving the Auckland Rugby Football Union (ARFU) suggest that the ARFU, in breach of its obligations under the Participation Agreements, is continuing to offer players contracts framed as contracts of service. See *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* Unreported Employment Court decision (WC46/02; WRC 37/02) Wellington 12 November 2002; 10 December 2002 Judge C M Shaw and *Auckland Rugby Football Union v ACC* unreported District Court decision of March 2003

[70] While the funding link obviously brings with it the possibility of the appearance of a lack of independence the context suggests otherwise. There was no rival association or trade union seeking to establish itself. The players association had already elected its Board and employed its management before the NZRFU was approached for funding. The association and the NZRFU began work together on a major area of concern to the players and the NZRFU namely the lack of any preparation, guidance or advice for professional player's life outside the game. This resulted in the appointment of five professional development mangers who oversee the professional development program for all New Zealand's professional players. The New Zealand Rugby Union Players Association which is funded by the NZRFU is not the body the players have registered as their union the New Zealand Rugby Union Players Collective. This body receives no funding form the NZRFU.

[71] "to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship---

(i) by recognising that employment relationships must be built on good faith behaviour; and

(ii) by acknowledging and addressing the inherent inequality of bargaining power in employment relationships; and

(iii) by promoting collective bargaining; and

(iv) by protecting the integrity of individual choice; and

environment that the NZRFU and the players union wanted in New Zealand. The negotiations began before the law was passed.

The NZRFU's objective was to agree a single form of collective agreement that would cover all players at all levels at which players were paid to play. It was not the initial intention that there be a single employer but the need for one became apparent as the parties struggled with the need to deal with the nature of the game where overlapping international and national competition windows meant a player could be in one team one week under the control of one union playing in a competition controlled by another governing body and the next week be in a new team under a different union in a competition controlled by another governing body.[72]

(v) by promoting mediation as the primary problem solving mechanism; and by reducing the need for judicial intervention; ....."

[72] In the course of 2003 the same professional rugby player employed by NZRPL might have been employed to play rugby union in the following competitions, places and teams:

- In the IRB International Sevens Series tournament in Wellington and around the world under the IRB's disciplinary rules, for the sevens series, in New Zealand administered by the NZRFU and elsewhere by other national unions on behalf of the IRB, as a member of the New Zealand Sevens team managed by the NZRFU.
- In the Super 12 played in New Zealand, South Africa and Australia under the SANZAR disciplinary rules, relating to the Super 12, administered by the national union in whose jurisdiction the match is played, as a member of a New Zealand Super 12 franchises team managed by the provincial union holding the Super 12 management agreement for the Super 12 franchise.
- In the inbound (Tri-Nations and other matches) tests played in New Zealand and in tests in South Africa and Australia, under the IRB's disciplinary rules, administered by the Host Union on behalf of the IRB, as an All Black managed by the NZRFU.
- In club rugby matches under the disciplinary rules of the provincial rugby union as a member of the senior men's club team managed by his club
- In the NPC played in New Zealand under the NZRFU's disciplinary rules as a member of a provincial team managed by the provincial rugby union.
- In the Rugby World Cup in Australia under the IRB's Rugby World Cup Disciplinary rules as an All Black managed by the NZRFU.
- In an international age grade representative competition under the IRB's disciplinary rules as a member of a New Zealand national representative team managed by the NZRFU

In any other year the player could also have toured Europe as an All Black or as a member of another national team and would be subject to disciplinary procedures of IRB conducted by the national rugby union of the place in which the match took place.

The parties also wanted a single form of contract to cover all levels of professional play to minimise confusion for players and administrators alike. It was eventually decided that two contracts with a single employer, NZRPL, were preferable in order to keep the contract for players playing below national sevens and Super 12 level as simple as possible while maintaining a relationship with the other collective contract. The NZRFU would put NZRPL in funds to pay the national team and Super 12 payments and the provinces would put NZRPL in funds to pay the provincial team payments. Neither the provinces nor the NZRFU would be privy to the others payments.[73]

The process was lengthy because many of the issues were being addressed for the first time but also because the NZRFU had to negotiate at the same time new participation agreements with all twenty seven provincial rugby unions as a result of the changes being proposed in the collective contracts.[74] Provincial union representatives made up part of the employers negotiating team.

The establishment at the outset of seven guiding principles together with the good faith bargaining principles set out in the Employment Relations Act 2003 materially assisted the negotiation process.[75]

---

[73] The NZRFU does not insist as IRB regulations require it to that a copy of every players contract is filed with it because it wants to be free from any suggestion that it provides one province with information about what another province is paying a player.

[74] At the same time the NZRFU was putting in place new generally accepted rugby union financial accounting practices and standards (GARAP) and a requirement for performance agreements to be executed by the NZRFU and each provinces setting out clear performance targets for teams, competitions, development and governance and finance. By gaining clarity and accountability for national and provincial union performance it was hoped that players, clubs and other stakeholders would be able to see how money was flowing from the professional game to the foundational levels of the sport.

[75] The seven guiding principles are that the players and the employer will:

> "....work as a TEAM to ensure that Rugby in New Zealand:

The agreements set out all key terms of employment except length of term and compensation, which are individually negotiated. There are minimum levels of salary set for players who agree to three or more year term contracts.[76] NZRPL is agreed to be the only employer of players employed to play rugby for the NZRFU or it provinces.[77] Players are seconded by NZRPL to the NZRFU or the player's provincial union or Super 12 franchise during the course of the rugby season as the player moves from team to team.

There is no requirement that players must be members of the collective to be employed by NZRPL but the form of offer that must be used ensures players are informed of the Collective Agreement; of the existence of the players union; given a copy of the Players Handbook (which contains all player union contact details); advised that if they are members of the union the contract will cover them upon acceptance and if they are not they are covered for thirty days to decide whether to

---

1. exceeds the expectations of fans by providing them with the highest quality players, competitions and entertainment;
2. regognises the important role of Broadcasters and the mutual value we create in bringing the game to the fans, by providing Broadcasters with exciting Rugby and related content which enhances the value of Rugby;
3. regognises the importance of Sponsors who support our game(because their customers are our fans) by working with Sponsors to ensure our fans value the support Sponsors give rugby;
4. creates an environment in which all players, at all levels, have the opportunity to reach their potential and, for those who excel, the opportunity to develop a successful and rewarding career by developing sound competition structures and appropriate coaching and development programs;
5. respects, supports and encourages Rugby's volunteers by recognising their contribution to the game of Rugby and actively supporting their efforts in clubs and schools throughout New Zealand;
6. achieves long term financial stability and success through the effective development, promotion and delivery of Rugby; and
7. recognises the need for a safe Rugby environment by taking a proactive and through approach to health and safety at all levels of the game."

[76] Schedule B # 1 Collective Contract sets the minimum Super 12 (including NPC availability) at $65,000 and the minimum All Black payment at $85,000.
[77] Clause 4.1 of both Collective Agreements

join the players union; are encouraged to contact the union. If they then join the union they are covered. If they don't they need to meet with the employer to discuss an employment contract.

C The Players Acceptance of IRB rules and regulation

The New Zealand professional rugby player has a direct contractual relationship with NZRPL by virtue of the Collective Contracts and with his club by virtue of registration and membership. The player has agreed to "comply with all applicable IRB rules and regulations in force from time to time, summaries of which are contained in the Players Handbook." [78]

D The anti-trust exemption for restraints agreed in employment contracts

The Commerce Commission has no jurisdiction to consider the anti competitive effects of employment contracts as employment contracts are explicitly excluded from the definition of services in the Commerce Act 1986.[79]

This provides the employers and the employees in New Zealand rugby the opportunity to agree labour market restraints that are exempt from the Commerce Act. There is no need for the NZRFU to go through the authorisation process as it did in 1996. This exemption is similar to the ant-trust exemption the National Football League and the National Football League Players Association and a number of other professional sports organisers and player unions have in the United States albeit on a

[78] The Players Handbook simply refers the player to the IRB website for a list of the Bye-laws and regulations so it can be assumed that the players have accepted they are bound by all the IRB Bye-laws and regulations.
[79] Section 2(1) and 3 (1A) Commerce Act 1986

different basis. The basis of the exemption is statutory one in New Zealand and a common law one in the United States.[80]

Any restraints agreed in the context of a collective agreement would still be subject to the common law doctrine of restraint of trade but is likely that the fact that such restrictions were freely negotiated in a statutory collective bargaining process will give such restraints greater likelihood of withstanding judicial scrutiny if attacked as an unreasonable restraint compared to restraints imposed unilaterally by regulation. The very fact they negotiated will help ensure that they are more reasonable.

Given the stated intentions of the Employment Relations Act 2000 regarding employment relationships and collective bargaining and given the fact that it will be the Employment Court that will be determining the reasonableness of any restraint the chances of a collectively bargained restraint being allowed are high.[81] The court will need to make a determination as to whether it is possible for a player to be anything other than an employee in New Zealand rugby in order to gain exclusive jurisdiction on the issue of restraints of trade.[82] If the Authority or Court decided that the only

---

[80] Similar statutory exemptions exist in the Trade Practices Act in Australia but there is no similar exemption in Europe.

[81] The Employment Authority and the Employment Court would certainly have exclusive jurisdiction to determine the reasonableness of any collectively negotiated restraint pursuant to sections 161 and 187 Employment Relations Act 2000. The Court and the Authority have the exclusive jurisdiction to determine whether a person is an "employee" or not under Section 6 Employment Relations Act 2000 pursuant to Sections 161 (1) (c) and 187 (f) of the Act. The Authority and Courts jurisdiction is not limited to the employment contract but to make determinations about "employment relations generally" including pursuant to Section 161 (1) (r) any other action arising from or related to an employment relationship. See *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* Unreported Employment Court decision (WC46/02; WRC 37/02) Wellington 12 November 2002; 10 December 2002 Judge C M Shaw

[82] It is beyond the scope of this paper to enter the debate about whether any particular player could make a case that his relationship with the rugby union he played for was not an employment relationship. It is the author's view that the player would have to have negotiated exceptional levels of personal control rugby unions are unlikely to want to relinquish in order to have any case at all. The fact that the sole employers of players, the national and provincial unions have all agreed the

possible arrangement was an employment relationship and that the collective bargaining agreement had been fairly and freely negotiated it would be entitled to assume for example that the employees covered by the agreement (currently all players playing in New Zealand) agreed that the restraints were in the best interests of the game and the players. This would add weight to the employer's case for the restraint. It would not prohibit a player who was not a member of the union claiming a restraint was unreasonable but the court in considering whether that was the case would be entitled to take notice of the fact that the players in the union believed it was reasonable.

For this reason it is very much in the interests of the employer and the employee to agree any labour market restraints in the collective contract. Such restraints could reasonably include transfer restraints, salary caps and revenue sharing agreements (including specification of a fixed percentage of revenue required to be spent the development of the game).

V THE RUGBY MONOLITH- A.K.A. JAWS

A The monolithic rugby union employers system

relationship is usually an employment relationship also means that player would need to demonstrate something very different about the nature of his arrangement from that of his team mates. In any event it now only requires a simple request for a determination on application (under section 6 Employment Relations Act 2000) of status by the Employment Authority to decide the issue.

In *Eastham v Newcastle United Football Club Ltd.*[83] Justice Wilberforce (as he then was) described soccer's then international and national system of governance as follows[84]:

> "The system is an employers' system, set up in an industry where the employers have succeeded in setting up a monolithic front all over the world, and where it is clear for the purpose of negotiation the employers are vastly more strongly organised than the employees. No doubt the employers all over the world consider the system a good system, but this does not prevent the court from considering whether it goes further than is reasonably necessary to protect their legitimate interests."

Rugby unions system today is perhaps even more monolithic than the system Justice Wilberforce confronted in 1966. In each of the countries in which it is played rugby unions governing bodies have established regulatory, disciplinary and commercial monopolies over the governance of the sport in their nation.

Ninety four unions are joined together by contract as members of the International Rugby Board (IRB). Only twelve[85] of those national unions have any direct control over the governance of the IRB. Eight[86] of those unions voting together can change the rules and regulations of the IRB and any three unions of those eight unions, voting together, can block any change to the IRB's regulations and rules.[87]

---

[83] [1964] Ch 413
[84] Eastham 438
[85] Australia, New Zealand, South Africa, England, Scotland, Wales, France, Ireland, Argentina, Japan, Italy and Canada

[86] Australia, New Zealand, South Africa, England, Scotland, Wales, France and Ireland
[87] From an economic and playing performance perspective five national unions (England, France, Australia, South Africa and New Zealand) could control the game but the three Celtic unions have been skilful at using their position a foundation IRB unions with six votes to entrench and consolidate their economically privileged position often aided and abetted by New Zealand and France.

Ten[88] of those unions control all of the professional rugby union competitions in the world.

The depth of the rugby monopoly is deeper than the professional American sports leagues because collectively the rugby bodies control every aspect of the sport not simply a single level of competition. The monopoly is both horizontal like the American sports and vertical like soccer except enhanced because of the concentration of political and economic power in the eight controlling unions.

An understanding of the full nature and extent of the monolith is essential to understanding the strength and power of the employers compared to the employee in international rugby. The professional players – the employees –find themselves dealing with an international and national cartel – a cartel that sincerely believes that it is a benevolent cartel- but a cartel nonetheless. It is a cartel of national unions each of which is able to play the players off like some sort of chameleon which blames the IRB for restrictions the players object to while always in fact actually being the IRB. Its rules and regulations equally restrict the ability of anyone, including one of the national unions, to organise an alternative competition or match without the permission of the IRB.

The primacy of the IRB's tournaments and the international rugby matches organised between national rugby unions over other levels of rugby union such as English club or New Zealand provincial rugby is guaranteed by the IRB's Bye-laws

[88] Australia, New Zealand, South Africa, England, Scotland, Wales, France, Ireland, Italy and Japan

and regulations. This was explained in the English context, referring to the attempts of the English professional clubs to control their own economic destiny, as follows:[89]

> "Perhaps the main feature that has made the birth of club rugby more difficult is that the regulations of the IRB specifically guarantee the primacy of the international game. IRB regulations effectively grant Unions a monopoly over commercialisation of all levels of the sport. What is more , the Unions can call on players for international matches and training as often as they wish with the consequent disruption to the club playing season.
>
> These IRB regulations (which allow unions to combine regulatory and commercial functions) enabled the Rugby Football Union to "bundle" the sale of broadcasting rights for club and international games in England in the well known agreement with Sky. The agreement basically provided that in return for a quarter of the revenues , clubs would release their players for international games.
>
> EFDR is very concerned with regard to the expansionist policy of the IRB. New IRB regulations now have encroached into the governance and commercial affairs of clubs. Governance of clubs has always been and should continue to be the jurisdiction of the national union.
>
> The IRB continue to practice and expand international regulations which are flagrantly in breach of European law."

These regulations which are made without any consultation or negotiation with professional players can both limit the ability of players to earn their living from the game and make them subject to sanction if they are in breach of the regulations.

---

[89] *"Memorandum submitted by English First Division Rugby"* to House of Commons Select Committee on Culture, Media and Sport Minutes of Evidence paragraphs 1.14 and 1.15 and 6.5 and 6.6 available at http://www.publications.parliament (last accessed 4 September 2003)

The potential supply side monopoly of an international rugby union in relation to international rugby union matches was recognised in *Australian Rugby Union Ltd v Hospitality Group*[90] where Gyles J ruled:

> "There is no suggestion that anyone else apart from the ARU can produce international rugby test matches in Australia in the foreseeable future. It also effectively controls the provincial unions." And:
>
> "..it is perfectly obvious that the ARU has dominant market power in any market limited to international rugby test matches. It controls event admission and the event."

The ARU and other national rugby unions also have demand side monopsony power in the employment of players to play international rugby. In New Zealand the NZRFU, via NZRPL, centrally contracts all Super 12 players as well as international players. A separate New Zealand market "for the provision and acquisition of premier rugby union player services" was defined by the Commerce Commission in 1996.[91] While NZRPL contracts players to play in provincial unions to play at NPC level the NZRFU contributes significant funding to enable players to pay NPC rugby.[92]

---

[90] [2000] FCA 823 per Gyles J para 84 and 89. The situation in New Zealand is the same with the NZRFU controlling the international team and the international competitions and Super 12 competition and franchises. It is also true at international level every where else the professional game is played that the national union has monopoly control of the international matches played in its market and of selection of players for national teams. In New Zealand, Ireland and Scotland players are contracted by the national union to play in the Super 12, Celtic League or European Cup. Gyles J's comments related the supply of international rugby hospitality where the supply side of the relevant market was bigger than rugby union matches. In England the professional clubs receive significant funding from the English Rugby Union.

[91] New Zealand Commerce Commission Decision 281 17 December 1996 ,16, para 72 "Premier players" are defined as players playing or nominated as All Blacks, Super 12, NPC, NPC Development players, New Zealand under 21 or under 19 or New Zealand Secondary schools (see para 71). This would equate to around 1330 players (1.1% of the players registered to play in New Zealand in 2003) in any year only 150 (0.13%)of whom would be full time professional players.

[92] $15,000 of a players Super 12 contract is paid to make himself available for NPC rugby for his province. In addition the NZRFU pays significant extra funding to NPC division one provinces to enable them to contract players and coaches.

B The International Rugby Board (IRB)

1 The IRB's constitutional structure and membership

The IRB is an unincorporated body resident in Ireland. Its Bye-laws constitute a contract between the members to be bound by its Bye-laws and Regulations.[93] Its Bye-laws provide that English law will govern the IRB's Bye-laws and regulations and any disputes are subject to the jurisdiction of the English courts.[94]

The IRB is the supreme regulator of the game (although by virtue of its membership of the Olympic Movement it is subject to the Olympic Charter). It determines the laws of the game and the regulations that govern the management of the sport.

While it has 94 members most of its members have no voting rights at the IRB Council which is the key decision making body. Nor is there any process for the democratic election of the IRB Council by the wider membership. On the IRB Council the larger unions have disproportionately high voting rights. Only England, Scotland, Ireland, Wales, South Africa , France , Australia, New Zealand, Japan, Canada, Argentina, Italy and the European regional rugby federation (AER) have voting rights. The English, Welsh, Irish, Scottish, French, New Zealand, Australian and South African unions have two votes each. The others have a single vote each. European unions, directly or indirectly, have 12 of 21 votes and the two vote unions have 16 of 21 votes. Changes in the IRB Bye-laws or regulations require 16 votes so the two vote unions can make any change they like if they vote together and any three

[93] IRB Bye-law 7
[94] IRB Bye-law 10

of them voting together can block any change. In New Zealand rugby terms it is equivalent to the NPC first division unions having all the votes with total disenfranchisement of the rest of New Zealand rugby.

There is no logic, except the protection of financial privilege and political power, for either the continued exclusion of nations such as Fiji, Western Samoa, Tonga and the United States whose playing strength is at least as strong as some the nations that have IRB Council votes or in the inclusion of the European federation and not Asia, Oceania, Africa and the Americas.

2 IRB Tournaments and other commercial activity

Since 1987 the IRB has involved itself (via a number of subsidiaries or special purpose entities) in major commercial activity. The most significant commercial activity of the IRB is the Rugby World Cup. It also organises the Sevens World Cup and Series, the Women's World Cup and age grade tournaments.

3 IRB's direct contractual relationships with professional players

The only direct contractual relationship that arises between the IRB and New Zealand professional players is when the IRB organises the international age grade and Seven a side tournaments or at the Rugby World Cup. On those occasions the IRB insists that the players (professional or otherwise) sign participation agreements in relation to the IRB tournament submitting to the rules of the tournament, the disciplinary and anti doping rules and assigning various player image rights to the

IRB. Professional players are paid to play in these tournaments by their national unions under their employment or service contracts.

The recent controversy between players associations and national rugby unions in relation the IRB demand that players sign the RWC 2003 participation agreement was founded, among other things, on the fact that the IRB was seeking significantly greater rights for the use of a players personal image than the unions had negotiated with the players unions. The IRB and the national unions refused to allow the IRB to get directly involved with the players insisting that it was a matter between employer and employee and not between the IRB and the players. The players understandably wanted to engage the IRB as the party they were being expected to contract with. Alternatively they might have expected to have been fully consulted before their national unions signed participation agreements committing the players to sign a form of participation agreement.

4 IRB Bye-laws and Regulations

(a) IRB Bye-laws

The IRB Bye-laws are the fundamental constitutional document of the IRB, subject only to the submission to the Olympic Charter through the IRB's membership on the Olympic Movement. The Bye-laws contain the powers and objectives of the IRB. They place all the IRB's powers in the hands of the IRB Council.[95]The objectives of the IRB are[96] to promote, foster, develop and extend rugby; to make the

[95] IRB Bye-law 2

[96] IRB Bye-law 3 In the judgement of Justice Casey in *Finnigan v New Zealand Rugby Football Union Inc (No2)* [1985] 2 NZLR 181,184 the equivalent provision in the then NZRFU constitution to the IRB objective of "promoting, fostering, developing, extending and governing the Game" was held to be "the fundamental reason for the Union's existence , and all the other objects relate to ways in which rugby

Bye-laws, regulations and laws of rugby union; to settle disputes between national unions; to regulate the schedule of matches between the senior representative sides of Council Member unions to ensure there is a fair and equitable schedule;[97] and preventing discrimination on the basis of sex, race, religion or political affiliations.

Bye-law 4 was inserted to make clear that players could be paid to play and it provides that the IRB may make regulations which are binding on all unions and their constituent bodies. In the New Zealand context this means that the IRB Regulations are binding on the NZRFU, the provincial rugby unions and Whakapumautanga. They do not directly bind clubs or players[98]. National Unions can make more restrictive regulations provided they do not conflict with the IRB regulations. Bye-law 5 provides that the Laws of the Game will be binding and uniform and will be observed in all matches.

Bye-law 7 states:

> "Membership of the Board by a Union or Association shall be effective as an agreement binding such Union or Association (which agreement requires such Union or Association to similarly by agreement bind its affiliated membership which such Union or Association undertakes to do) to abide by the Bye-Laws, Regulations and Laws of the Game and to accept and enforce all the Board's decisions (unless and until revoked or set aside by the Council)

---

can be controlled, promoted, fostered or developed as appropriate to the circumstances involved." The objects of the NZRFU were to be read as a whole. The NZRFU tried to rely on the object in its then constitution relating to the organisation of international matches but this was rejected as that object was held to be read with reference to the others. The NZRFU constitution was altered after the decision so that it was clear that each object and power was independent of the others.

[97] The reference to "Council member unions" makes manifest the entrenchment of the privilege attached to Council membership. The IRB have also not themselves regarded the requirement of fairness and equity to take into account anything other than fairness and equity in the sense of reciprocity of matches - that if we play you then you will play us. Issues such as the burden this imposes on some nations (Fiji for example) and the financial benefit gained by other nations(England for example) are simply ignored as not relevant to a fair and equitable schedule. Rugby union was organised for most of its existence without the IRB needing this power. This power was first asserted in the years immediately after professionalism and in particular after England and the English clubs had threatened the structure of European rugby by seeking extra matches against the SANZAR nations and seeking to make its own broadcasting arrangements in relation to the Six Nations.

[98] Unless they are otherwise accepted by players by contract as they are in the case of New Zealand's professional players

> in respect of the playing and/or administration of the Game throughout the country or countries within the jurisdiction of such Union or Association. Any breach of this agreement or any conduct which may be prejudicial to the interests of the Board or of the Game shall render such Union or Association liable to disciplinary action in accordance with Regulation 18 of the Regulations Relating to the Game."

By its membership of the IRB the NZRFU agrees to abide by the IRB Bye-laws, Regulations and Laws of the Game. All other IRB members are similarly bound thereby making the IRB rugby unions' supreme governing body.[99]

IRB Bye-law 10 (b) provides:

> "These Bye-Laws and any Regulations Relating to the Game, General Regulations or Laws of the Game made pursuant thereto shall in all respects be governed by and construed in accordance with English Law, and any dispute arising there under shall be subject to the exclusive jurisdiction of the English Courts."

As the common law doctrine of restraint of trade is the same in New Zealand and England this governing law clause does not improve or diminish a New Zealand players rights. It is also very clear that the NZRFU has submitted to the jurisdiction of the English courts in relation to disputes arising under the IRB Bye-laws or regulations. There is an issue as to whether the players by agreeing to comply with "applicable IRB rules and regulations" have submitted to the jurisdiction of the

[99] see discussion of NZRFU constitution for the constitutional links between the NZRFU and its members (the provincial unions and Whakapumautanga) and the IRB.

English courts. In relation to a dispute between NZRPL as employer and a player or the players union the New Zealand Employment Court has exclusive jurisdiction. *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* [100] shows that the Employment Court is prepared to assert its jurisdiction to include the participation agreements which relate to the employment relationship. It is not a big step to assert jurisdiction over the bye-laws and regulations that equally affect the employment relationship.

The most sensible approach would be for a player to seek a declaration in the English courts, if it is the IRB bye law or regulation the player is seeking to attack because the IRB will be unable to ignore the declaration of the English court or dispute jurisdiction as it might be tempted to do otherwise.

The appeal to the English courts may have the potentially added benefit of bringing the European Convention on Human Rights and the provisions of the European Treaty on freedom of movement of workers into play in determining how the IRB's Bye-laws and regulations are to be governed and construed. The court might be forced to acknowledge that the rule or regulation in so far as it applied to movement of workers in Europe or the rights guaranteed under the European Convention was unlawful. In much the same way as the *Bosman* decision caused the IRB to amend its transfer rules to comply with European law the IRB would be forced to similarly amend any offending Bye-law or regulation with a vicarious benefit for New Zealand players.

---

[100] unreported Employment Court Wellington (WC46/02; WRC37/02) 12 November 2002; 10 December 2002 Judge C M Shaw

(b) IRB Regulations Relating to the Game (the IRB Regulations)

These regulations directly affect the employment environment for players primarily because they do not generally relate to the game so much as the commercial aspects of the game. Most of the commercially oriented regulations were not promulgated until after players were paid to play. Others were a direct response to the possibility of competition for national unions particularly from the professional English clubs. The regulations restrict the ability of players to be employed to play and also restrict the establishment of alternative matches or competitions by players, players' organisations or anyone else not sanctioned by the IRB or the relevant national union.

The IRB Regulations continue the process begun in the bye-laws of connecting the whole rugby union pyramid under the ultimate control of the IRB. National unions must comply with the IRB Regulations and are compelled to ensure that their members are similarly bound.[101] Provincial rugby unions are, as members of the NZRFU, said to be bound by the IRB bye laws and regulations[102]and can only be affiliated to one national and only have one home ground. They must affiliate to the national union in whose territory the home ground is.[103] The effect of this is to divide the rugby world up into exclusive territories. Before the game went professional in 1996 the reason for this was largely to do with orderly administration and disciplinary process but after professionalism regulations have been added which effectively stop

---

[101] IRB Regulation 2.1.1

[102] see comments following on the NZRFU and provincial union structure to see how the NZRFU constitution, Provincial Union constitution, participation agreements, club constitutions and the player registration process link both players and rugby bodies into the pyramid

[103] IRB Regulation 2.1.2

any one within the rugby structure from exploiting commercial rights without the permission of the IRB and/or their national union.

(c) IRB Regulations of Player Movement, Contracts and Status

The IRB regulations on player movement were substantially altered in an attempt to avoid the consequences of the *Bosman*[104] decision which held UEFA's transfer regulations to breach the provisions of the European Treaty protecting the freedom of movement of workers within the European Union. The IRB regulations were, up until they were changed, very similar to the soccer regulations that fell foul of the decision of the European Court of Justice in *Bosman*. The fact that the regulations were changed is indicative of the sensitivity of the regulation of rugby union to European law because of the Eurocentric nature of the sport. The IRB is unusual among international governing bodies in basing its headquarters within the European Union and is also unusual in that the IRB Council is dominated by European rugby unions and associations.[105] The effect of this is that New Zealand players benefit from the vicarious application of European law as the NZRFU must follow the IRB's lead. They do not obtain the rights to freedom of movement of workers within the European Union that nearly all of their international player

---

[104] *Case C-415/93 Union Royale Belge des Socities de Football Ass'n v Jean Marc Bosman (December 15 1995) (1996)* 1 CMLR 645 ("the Bosman case")

[105] The IOC and FIFA are based in Switzerland. The IAAF is based in Monaco. European national rugby unions and the European rugby federation have 12 of the 21 IRB Council votes and the IRB is based within the European Union in Dublin and by agreement of the members who constitute it subject to English law and the jurisdiction of the English courts.

counterparts have[106] but they do gain a much less restrictive international and domestic transfer scheme than might otherwise have been the case.

The IRB regulations are stated to apply to movement of players between national unions.[107] In fact the effect of the IRB Regulations may be that they apply to player movement at all levels of rugby union. Each national union is required to provide its own system for movement of players within its jurisdiction, by regulation, which is to be registered with the IRB. [108] The national union regulations must include the IRB Regulations and must observe the general principles of the IRB regulation.[109] Further IRB Regulation 4.7 which relates to compensation for development of players rather than movement or status of players appears on its face to apply to movement at all levels of rugby union.

Professional players must have a written agreement in a form approved by the national union.[110] The contract must be agreed not imposed and be for a fixed period.[111]A copy of that agreement is to be provided to the national union and to the IRB if demanded by the IRB.[112]Only players that are registered with a national union can play in competitions organised or sanctioned by that union.[113]Players can only be registered with one national union.[114] Registration is important because only a registered professional player is a "contract player" for the purposes of the

---

[106] Players who are European Union citizens or whose country (such as South Africa and the Pacific Island nations) has entered into an agreement with the European Union providing its citizens with similar rights to European workers if working in Europe gain the benefit of the European Treaty protection of the freedom of movement of workers and anti-discrimination provisions.
[107] IRB Regulation 4.2
[108] IRB Regulation 4.3
[109] IRB Regulation 4.4
[110] IRB Regulation 4.5.1 (c) In New Zealand the Collective Contract meets this requirement.
[111] IRB Regulation 4.5.2
[112] IRB Regulation 4.5.2
[113] IRB Regulation 4.4.3 "registered' means directly or indirectly via province or club.
[114] IRB Regulation4.5.4

regulation.[115] All other players including unregistered professional players are defined as non-contract players. Each national union is required to maintain a register of "contract players". If a professional player leaves a national union's jurisdiction he or she will not be regarded as a "contract player" unless registered.[116] A player who is a contract player retains that status for twelve months after their last match.[117]

The IRB Regulations on player movement between national unions[118] prohibit the registration of a player unless that player is first cleared by the national union where he or she is currently registered. The effect of the process is to deregister the player in his or her previous national union so that the player can be registered in the new national union. The clearance form must be signed by both the union with whom a player is registered and by "the union for whom the player is entitled to play in international matches."[119] The players current union must clear the player unless the player is subject to suspension (unless the suspension is for less than five weeks and the new union has agreed to enforce it) or has not met contractual obligations to the players current union.[120]The effect of the regulations is to provide few grounds for the restraint of movement of players. The regulations are silent on the grounds on which

---

[115] IRB Regulation 4.5.4

[116] The NZRFU maintains a database of all registered players. The registration system is school and club based. The constitution and regulations of each of the provincial unions mandates that all players be registered. The NZRFU also maintains a register of all contract players contracted by it and NZRPL pays all contracted players in New Zealand. In order to fully comply with this regulation the NZRFU needs to establish a register of players contracted by provincial unions and require copies of the contracts to be provided to the NZRFU pursuant to IRB Regulation 4.5.2. The incentive for provincial unions is that players are not "Contract Players" for the purposes of the IRB Regulations unless registered with the national union.

[117] IRB Regulation 4.8.1

[118] IRB Regulation 4.6

[119] see definition of "clearance" in the IRB Regulation. In practice unless a player has played for a third party national union the IRB's eligibility regulations mean that this definition could require multiple unions to sign a clearance. With eligibility coming from birth and ancestry it is entirely possible for a player to be eligible to play for five different rugby nations. The intent of the regulation is probably to require the clearance of a national union a player has actually played for rather than all those unions a player might play for.

[120] IRB Regulations 4.6.3, 4.6.4 and 4.6.5

the union for which the player is entitled to play international matches could object to clearance of a player Such a union would find it difficult to justify a refusal to sign a clearance other than on grounds similar to those on which the players current union was able to refuse.

IRB Regulation 4.7 provides a comprehensive code for compensation for player development for New Zealand players who are professional on or out of contract and amateur players who leave New Zealand to take up a contract outside New Zealand. It is heavily influenced by the factors that the European Court of Justice stated could reasonably be included in a "transfer fee" in *Bosman* and by the soccer transfer regulations that followed that decision.

The NZRFU's internal transfer system is at odds with the IRB external transfer system. The NZRFU system provides for a series of payment levels or transfer bands based on the level of team the player has played in rather than the costs incurred in developing the player. Given the NZRFU's agreement, by membership of the IRB, to conform to the IRB's regulations it is clear that to the extent that the NZRFU's transfer regulations are inconsistent with the IRB Regulation the IRB regulation governs. The Provincial Unions that are members of the NZRFU are also bound to comply with the IRB Regulations by virtue of their participation agreements with the NZRFU and any rule or regulation of such provinces which conflicts with the IRB regulations is deemed to be inoperative by Rule 5.3 of the NZRFU Constitution. The calculation of "development compensation" in the IRB Regulation is likely to lead to payment of sums considerably smaller than the payments made under the

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

NZRFU transfer regulations. This will mean there is an incentive for New Zealand players to move offshore rather than transfer within New Zealand.

Professional players who are still contracted by a club, province or national union cannot move during the term of their contract unless the player, his or her existing employer and the proposed employer all consent.[121] This means a player's contract cannot be transferred without the consent of the player as if the player were the property of his employer. Compensation in this situation is a matter of agreement between the parties. The NZRFU transfer regulations do not comply with this IRB Regulation. The NZRFU regulations specify bands of compensation whereas the IRB Regulation requires this to be agreed by agreement. As the NZRFU regulations were imposed by the NZRFU on the players the level of compensation payable has not been agreed by the relevant parties as required by the IRB Regulations. This could be rectified by revoking the current NZRFU regulations and replacing them with a player movement system agreed in the collective contract which the NZRFU could implement after agreement by regulation.

Professional players off contract with their previous employer intending to move internationally and non-professional players who sign a professional contract with a club, province or national union for the first time outside their home union are subject to the IRB's regulations providing for compensation for training and development. These regulations are designed to compensate the union or club losing the players services for the cost of developing the player. The amount of any compensation payable diminishes after the 'formative development' of the player

[121] IRB Regulation 4.7.1

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

each year the player stays with a union or club as a developed player. This mitigates against large or even any "transfer" fees for long serving players. A dispute about the compensation payable cannot delay the transfer of the player which must take place.[122]This moderate level of restraint is an attempt to minimise the possibility of challenge either under the doctrine against restraints of trade or under the freedom of movement of workers provisions of the European Treaty. There is still restraint on the players freedom to work caused by the fact that a fee is payable and even though a player may move if there is a dispute the receiving club will not lightly take the risk of extra and uncertain cost. This however is likely to be mitigated by the relatively small sums likely to be involved in most cases.[123] The approach taken by the High Court in *Rugby Union Players Association v Commerce Commission (No2)*[124] and the acceptance by the European Court of Justice in *Bosman* of the validity of the concept of compensating clubs for the real cost of the development of players suggests the IRB's regulation would be held to be a reasonable restraint by both English and New Zealand courts. The fact that this has been accepted by the NZRFU as the international standard does leave it with a difficult hurdle to overcome if it is forced to have to convince a New Zealand court that the domestic regulation is reasonable.[125]

IRB Regulation 4.9 also contains an element of possible restraint of trade in that no potential employer can approach a player who is contracted without the prior written consent of the current employing union. The justification for the rule is to prevent disruption to the player's performance and to keep good relations between

---

[122] IRB Regulation 4.7.6 Regulation 4.7.5 provides that if within 28 days of clearance there is a dispute about the quantum of any fee the matter shall be referred to the IRB CEO who in turn shall refer it to the IRB judicial process. Unfortunately there is no time limit on the IRB's consideration of the matter.

[123] To date the NZRFU has been unable to justify payments of much more than NZ$10,000 under the IRB's Regulations.

[124]

[125] See later discussion of New Zealand regulation

unions. The English rugby union has amended this regulation domestically to allow approaches (without notice) in the last six months of a players contractual term.

(d) IRB Regulations on appearances, communications, advertising and sponsorship

IRB Regulation 7.1 and 7.2 provide:

> "**7.1** A Person may not, without the prior written consent of his Union or Association (such consent to be at the discretion of the Union or Association), receive directly or indirectly any Material Benefit for appearing in, assisting with or communicating any advertisement, endorsement or promotion of any product, service or item which by virtue of content and/or presentation relates or refers wholly or partly to the Game, which relation or reference shall include, without limitation, the wearing, use or appearance with any rugby clothing, rugby articles or rugby related equipment of any nature whatsoever. For the purposes of this Regulation, Person shall mean a Player, trainer, referee, touch judge, coach, selector, medical officer who is currently involved in the Game, or in the organisation, administration or promotion of the Game.
>
> **7.2** The rights of a Person under this Regulation may be further limited or restricted by any agreement, understanding or contractual obligations between him and his Union, Association, Rugby Body or Club."

This regulation would on its face be a considerable restraint on player's ability to trade on their image rights. It is largely ignored by the major rugby unions that as members of the IRB Council passed it.[126] Certainly the New Zealand players' collective agreement limits the unions' rights to use the player's image and the

[126] The NZRFU, Australian Rugby Union and Rugby Football Union (England) have all recognised the players ownership of their own image.

player's right to use NZRFU, Super 12 or NPC or provincial union imagery.[127] The Collective Agreements do not further limit the players rights they broaden them in clear breach of IRB Regulation 7.2.

In light of the fact that many of the major unions have ignored the regulation it is unlikely that any player will have reason to challenge this Regulation. If the IRB seek to invoke the regulation they can reasonably expect to be unable to justify it. It is difficult to understand what the objective of the regulation is other than to attempt to control every commercial aspect of the game. If it is to somehow control activity that might bring the game into disrepute the IRB has a wide power in this regard in its disciplinary regulations.

(e) IRB Regulations on Eligibility to play for national representative teams

Eligibility to play for the international teams of the larger unions is of considerable economic value for players. Playing for the developing unions is less economically attractive other than as a means of attracting a European club or a Super 12 contract. Once selected the players from developing nations face the dilemma of giving up income and insurance at the sub international for the glory and not much else of representing their nation. Eligibility requirements can be a significant restraint on the ability of players maximise their income. In New Zealand the Collective Agreement provides a minimum wage for an All Black player of $85,000 in addition

[127] Section 8 Collective Contract "Property Rights" where the agreement starts from the proposition that the rugby unions own their intellectual property and the players own their own identity. The employee is entitled to use the own identity for personal promotions but cannot use the employers imagery without consent. There are detailed processes and protections in Section 7 of the contract detailing the terms on which players can conduct personal promotions and what the reasonable grounds are for the employer to refuse consent.

to the minimum Super 12/NPC payment of $65,000. The All Blacks will play a maximum of eight matches in a season while Super 12 and NPC involve up to twenty three matches in a season.

IRB Regulation 8.1 provides:

> **"8.1** Subject to Regulation 8.2, a Player may only play for the senior fifteen-aside National Representative Team, the next senior fifteen-a-side National Representative Team and the senior National Representative Sevens Team of the Union of the country in which:
>
> a) he was born; or
>
> b) one parent or grandparent was born; or
>
> c) he has completed thirty six consecutive months of Residence immediately preceding the time of playing."

IRB Regulation 8.2 implements a "one country" rule which prevents players who have played for the senior national team, the national "A" team or the national sevens team from playing for another country.[128] This regulation was not deemed necessary until 1 January 2000. It appears to be a heavy handed over reaction to the "grannygate" affair where Scotland and Wales fielded players that were not eligible under the grandparent rule. Given the IRB's contemporaneous desire for rugby union to be an Olympic sport the more considered reaction may have been to adopt the Olympic eligibility requirements.

---

[128] The IRB's rationale for these regulations is that players in these teams should have "a genuine, close, credible and established national link with the country of the Union for which they have been selected Such a national link is essential to maintain the unique characteristics and culture of elite international sporting competition between Unions. The integrity of International Matches between Unions depends upon strict adherence to the eligibility criteria set out in the Regulations." The problem with the justification is that the criteria specifies place of birth, ancestry or residence not nationality. Under this criteria for example the author has a genuine close, credible and established national link with New Zealand by birth and Wales and Ireland by ancestry.

Rugby union aspires to be an Olympic Games sport. To be eligible to participate in the Olympic Games rugby player will have to be a national of the country of the National Olympic Committee (NOC) which is entering him.

Rule 46 of the Olympic Charter provides that if a player is a national of two or more countries he may elect to represent one of them. Once a player has represented a country and has changed his nationality he cannot represent his new country for three years since he last represented his previous country. The three year period can be reduced by agreement between the IOC, NOC and the IRB. The IOC's regulations seem to be a legitimate response to the desire to protect the national character of a national team. In the context of freedom of movement of workers the criteria based around nationality have been accepted to be an essential and reasonable part of the creation of national teams and international competitions between national teams. They are not acceptable in relation to teams and competitions below national teams.[129]The IRB is under pressure from a number of fronts to amend its eligibility requirements. Given its Olympic aspirations it would be appropriate to adopt the IOC standard with allowances for determining the nationality of the Irish, Welsh, Scottish and English players.[130]

[129]*Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405; *Dona v Mantero* [1976];*Lehtonen v Federation Royale Belge des Societies de Basketball* [2000] ECR I-2681; and *Deutscher Handballbund eV v Maros Kolpak* [2003] Case C-438/00 ECJ Celex Lexis May 8 2003

[130] Note that the United Kingdom and Ireland are the only two countries that could represent the four home unions at the Olympic Games.

As it stands the IRB eligibility requirements are some way away from being nationality based and the further they are away the harder they are to justify as a reasonable restraint of trade. [131]

(f) IRB Regulations on player availability for international rugby

IRB Regulation 9 gained some notoriety during the 2003 Rugby World Cup when some nations complained that they were not able to get players released to play in their national teams because they preferred or were being forced to play in the English premiership or the New Zealand NPC.

The regulation provides that national unions have first and last call on players required to play international rugby; [132]that no national or provincial union or club can in any way prevent the release of a player to a national union for national team duty[133] or impose payment or other conditions on the player's release.[134] If a player is unwilling or unable to play the regulation states the player will be unable to play rugby for the period while the national team plays and ten days thereafter. National unions are required to "rigorously enforce" the regulation and the employing club or union cannot insist on the player being insured by the national union.[135]There is no obligation to continue to pay the player while on international duty. Accordingly from

---

[131] The eligibility regulations may also breach relevant human rights, freedom of movement and anti discrimination law. The authors view is that the regulations are in breach of New Zealand's anti – discrimination laws.
[132] IRB Regulation 9.1
[133] IRB Regulation 9.2
[134] IRB Regulation 9.3
[135] Guideline 1 to IRB Regulation 9

the players perspective the regulation either forces him to make himself available to an international union that is not obliged to pay him or insure him against injury or renders him liable to sanction by being banned from playing for his employer club or union for a period ten days longer than the period he would have been assembled with the national team.

This regulation is a clear restraint of trade, a likely breach of the freedom of movement of workers provision of the European Treaty and a breach of the Article 4 of the European Convention which prohibits the performance of forced and compulsory labour. It is impossible to see how any court would accept as reasonable a situation where a player who refused to work for another employer ,is master the right word, who would not necessarily pay him or insure him against injury and subsequent loss of income would be subject to sanction by his employer.

(g) IRB Regulation on Broadcasting Rights

Having defined what broadcasting rights are IRB Regulation 13 goes on to provide:

> "**13.2** No Rugby Body, Club or Person or any combination thereof may negotiate or enter into or benefit from any contract for the grant of any Broadcasting Rights in respect of any Match or Matches except with the express written consent of the Union within whose territorial jurisdiction such Match is or Matches are to be played, such consent to be in the absolute discretion of the Union.
>
> **13.3** No Rugby Body, Club (or Person with knowledge of such breach) may take part in any Match to which Broadcasting Rights have been granted in breach of the provisions of Regulation 13.2."

The regulation prohibits even the negotiation of broadcasting rights by players or anyone else without the consent of the relevant national union. This is one of the new regulations that the English clubs complained of being in flagrant breach of European competition law. The justification of the regulation is unclear other than to avoid clashes between matches. If that is its purpose it can be achieved by much narrower regulation of the type used in UEFA's broadcasting regulations which were approved by the European Commission after confining themselves to very narrow windows around actual matches.[136] The fact that the Commission has approved the rules does not mean someone will not take the restraint of trade point but it does prove there is a basis on which amended regulations might be justified. It can also be achieved by reasonable match scheduling regulations.

The fact that this regulation came into force after 1996 suggests a commercial rather than a sporting motivation. As it stands the regulation stops players or their union from negotiating broadcasting rights for a match they may wish to organise without the permission of the relevant national union. It also stops players playing in a match organised by a third party where that match was organised without the permission of the national union. It would be legitimate if the only purpose of this regulation were to ensure the laws of the game were properly enforced and the disciplinary rules applied but again that could be covered by a much more specific regulation.

(h) IRB Regulations on the scheduling of matches

[136] European Commission Decision of 109 April 2001, Case 37.576 *UEFA Broadcasting Regulations* OJ L171

IRB Regulation 16 requires IRB Council consent before international matches can take place. The consent cannot be unreasonably withheld. The justification of the regulation is twofold – to stop unions like England from organising a schedule of matches so they played the SANZAR nations more often than Scotland, Ireland or Wales and to promote development of the game by mandating tests of major nations against developing nations such as Fiji and Samoa. Without meaningful revenue sharing, even of broadcasting revenues, the current schedule actually impoverishes the developing nations. The position of the major unions on revenue sharing is completely hypocritical because both the Six Nations and Tri Nations tournaments involve considerable revenue sharing.

The regulation also gives either the IRB or the relevant national union complete control over all levels of rugby played within their national boundaries. In regard to the administration of the sports aspects of rugby union such regulation is sensible but if used to stop alternative competitions from being organised it is likely to be anti-competitive behaviour and it will limit the employment opportunities for players.

C The South African, Australian and New Zealand Rugby Union unincorporated joint venture (SANZAR)

SANZAR is an unincorporated joint venture of the three national rugby unions of South Africa, Australia and New Zealand.

Each of the SANZAR unions refuses to employ players for their national teams if the players are not playing in each union's respective national competition or

in the Super 12. They also have policies which restrict the employment of players who are not eligible to play in their national team.[137]

Such a policy would be unlawful within in Europe in regard to the European Cup as both a restraint on freedom of movement of workers and also as a restrictive practice under European competition law where there is no antitrust exemption for labour markets. There is also a question of the legality of the restriction in the free labour market that exists between New Zealand and Australia.[138]

There is no doubt, in the Australasian context the policy restrains the ability of a player to work where he would otherwise be able to work. The unions' justification of the policy would be based on their view that there was a need to control entry to the level of competition below their national teams in order to keep their national teams strong. They would have to distinguish the reasons why this is not the case for other similar codes such as rugby league and why there are different needs in Australasia to those in Europe. It is difficult to see how the policy would not be held to be an unreasonable restraint of trade if challenged.

---

[137] There is no formal agreement between the unions. Each has separately come to its own selection policy. South Africa does allow players from Zimbabwe, Namibia and Kenya to play Super 12 rugby. New Zealand does make exceptions for players from Pacific Island nations in the Super 12 and there is a special immigration status enabling these players to get work permits. Australia makes no exceptions.

[138] Whether the combination of CER and the agreement between New Zealand and Australia that citizens of either country can freely enter the other and work without a permit when combined with New Zealand and Australian anti-discrimination legislation creates a right of the freedom of movement of workers similar to the European right is beyond the scope of this paper. On the face of it New Zealand and Australian rugby union players should be free to play in rugby teams in each others countries in exactly the same ways that rugby league players can. There is certainly no statutory exemption of the kind found in the UK legislation that allows an exceptio for sport for the selection of national teams and limits on who may play in national competitions

D The New Zealand rugby pyramid

1 The NZRFU

The NZRFU is an incorporated society[139], incorporated under the Incorporated Societies Act 1908, and is the governing body for the sport of rugby union in New Zealand.

The NZRFU's voting members are twenty seven provincial rugby unions who are all similarly incorporated and Whakapumautanga, also an incorporated society. All these members have voting rights with the number of votes of the provinces being determined by the number of teams in a province. The distribution of votes is not totally proportionate. Unions with smaller team numbers have disproportionably high voting rights. Whakapumautanga has two votes.[140]

The members of the provincial rugby unions are the rugby clubs and other rugby bodies within provincial boundaries of each provincial rugby union. The boundaries of each provincial rugby union have been set over time by the NZRFU. Some boundaries are more certain than others. In the past boundaries were more important as players were subject to zoning regulations that restricted who they could

---

[139] A copy of its constitution and annual accounts is available on line at the New Zealand companies office as are copies of the constitutions and financial accounts of the 27 provincial unions, Whakapumautanga and the five Super 12 franchises.

[140] There are also a number of Associate Members including the New Zealand Combined Services Sports Council, New Zealand Marist Rugby Federation, New Zealand Universities Rugby Football Council, New Zealand Schools Rugby Council and New Zealand Deaf Rugby Football Union. These members have no voting rights.

play for. These regulations no longer exist and a player can play club rugby wherever the player wishes.[141]

The NZRFU is the organiser of competitions and games at inter-provincial level and above. There are no separate league organisations such as Premier Rugby in the United Kingdom or National League in France. The NZRFU directly controls all domestic provincial representative professional rugby and organises international and Super 12 rugby in New Zealand.

The NZRFU organises the national teams (All Blacks, Black Ferns, New Zealand Maori, Sevens and national age grade teams). It is the national regulatory body for the game and recognised by the International Rugby Board as New Zealand's representative on the IRB.

2 The NZRFU Constitution

The NZRFU is directly linked to the IRB by its constitution. Rule 3.1.3 provides that one of the objects of the NZRFU will be to represent the NZRFU on the IRB. Rule 3.1.4 of the NZRFU Constitution provides one of the NZRFU's objects is to:

> "**Meet IRB Requirements:** subject to domestic safety law variations adopted by the Union, comply with the Laws of the Game and the bye-laws, regulations and resolutions of the IRB and to require members to similarly comply."

[141] There are usually restrictions on where clubs can play contained in their constitutions and usually clubs can only play in competitions within the boundary of the union to which they are affiliated. Players on the other hand are free to travel to and play for clubs across provincial boundaries.

The NZRFU is empowered to carry out all or any of its objects.[142] Acting outside the IRB's bye-laws, regulations and resolutions would be ultra vires the power of the NZRFU. As an incorporated society the NZRFU does not have the advantages of the wide powers accorded companies under New Zealand law. It is clear that the NZRFU is bound by the IRB Bye-laws and regulations and could not validly make a regulation at odds with an IRB bye-law or regulation.

The NZRFU constitution binds the rest of New Zealand into the pyramid by Rule 5.2. which provides:

> **"Binding** Each Member
>
> **5 2 1** **Is Itself Bound** is bound by the Rules and Regulations,
>
> **5 2 2** **It Members are Bound** must ensure that its members are bound by the Rules and Regulations, and
>
> **5 2 3** **Its Members Members are Bound** must require in its own rules that its members ensure that their respective members agree to be bound by the Rules and Regulations,
>
> to the intent that all sub-unions and clubs and all other bodies and persons connected with the playing or administration of rugby within New Zealand who are directly or indirectly affiliated to any Member shall agree to be bound by these Regulations.

Rule 5.3 of the NZRFU Constitution in relation to members of the NZRFU but not the NZRFU itself[143] provides:

> "**Conflict of Rules:** Any rule or regulation of a member or other Rugby playing organisation bound by this Constitution which is in conflict with this Constitution, or with the Laws of the Game or domestic variations or the bye-laws, regulations and resolutions of the IRB, shall be deemed to be inoperative."

---

[142] Rule 3.2.23 NZRFU Constitution.
[143] The NZRFU itself being captured by its objects clause discussed above

Members of the NZRFU who breach the NZRFU's rules or regulations can be suspended or expelled from the NZRFU or fined by it.[144]

The NZRFU constitution prohibits a member union from sanctioning a match (other than a club match in an ordinary club competition, provincial or national representative match) involving a player resident outside the member union's boundaries without the written consent of the NZRFU board of directors.[145]

Clubs and players are prohibited from playing with players or clubs that have been suspended or expelled from rugby.[146]

3 NZRFU Regulations and Policies

(a) NZRFU Regulations for eligibility for selection to Provincial Union NPC and Ranfurly Shield teams

Eligibility to play for the lowest level of professional team an NPC team in New Zealand is governed by the NZRFU "Regulations for eligibility for selection to affiliated union senior representative teams for the National Provincial Championship and Ranfurly Shield"[147]These regulations were amended in 2002 to remove some restrictions on the number of players not eligible for New Zealand who could play in an NPC team for a province. The 2001 NZRFU regulation defined an "overseas player" as:

> "a player who:

---

[144] Rule 10 NZRFU Constitution
[145] Rule 31 3 NZRFU Constitution
[146] Rule 31 3 NZRFU Constitution
[147] available from the NZRFU.

a) does not hold a current New Zealand passport; and

b) is not eligible for the All Blacks; and

c) has not had his principal place of residence in New Zealand for the immediate past three consecutive years."

The regulation then limited the number of such players that could play in the NPC.

The 2002 decision of the NZRFU Board to remove the restrictions may have reflected a concern that players who were not eligible to play for the All Blacks (because they had chosen to play for another national side) but were in all other respects New Zealanders were being denied the opportunity to play professional rugby at NPC level. If this was the justification for the change it has ramifications for continuing justification of the All Black and Super 12 eligibility criteria which just as much deny New Zealanders the right to work and play for these teams.[148]

The existing NPC eligibility regulations[149] contain no limit on the eligibility of players who play their club rugby in a province before 1 May to play for that province.[150] If a player is registered with a club before 1 May he or she is eligible to play. If a player is not an overseas player and is returning to his or her previous province they can play provided they return before 1 June. The maximum number of players who can play who were not registered with the province who wants those players to represent them is set at six (up to two of which can be overseas players). An overseas player is now effectively simply someone who has not registered with a

---

[148] See later discussion

[149] Attached as Appendix A

[150] May 1 is up to two months after the club season will have commenced and three months before the NPC usually starts so the intent is obviously to create a connection with the province and a contribution to rugby within it before representing it. A three month connection is clearly felt to be long enough for anyone to represent a province.

club anywhere in New Zealand before 1 May. The definition has nothing to do with national origin as it did previously.

In 2003, and for reasons that are not explained in the comprehensive document making the case for change, the NZRFU Board appears to have changed its mind again.[151] The NZRFU has announced that:[152]

> "(a) Players will be eligible for selection for Super 12 squads only if they have been part of a Premier or Modified Division 1 senior team squad during the most recent domestic season and have played a specified number of games.
>
> (b) The existing regulation allowing outside players to be eligible for inclusion in playing squads of senior representative teams will be repealed.
>
> (c) The existing regulations governing the transfer of players will be amended. New regulations governing the transfer of players to Premier 1 teams will be developed. These regulations recognise that player transfers will be an outcome of the processes being put in place to manage the Premier competition.
>
> (d) Overseas players wanting to play in the Premier Competition will need to apply to the NZRU.
>
> (e) Loan players and overseas players will not be eligible for inclusion in Modified Division 1 teams."

A key issue from a restraint of trade perspective will be whether the NZRFU retains the current definition of overseas player or reverts to the more restrictive 2001 definition. On what basis is the NZRFU's decision to allow an "overseas player" to play or not play in the Premier competition going to be based? If it retains the current

---

[151] The NZRFU *"Competitions Review"* 24 November 2003 (available at http://www.allblacks.com last accessed 25 November 2003)

[152] above at 96-97 the reasons for the change in policy and the decision are not explained at all in the document. There is extensive comment on every other aspect of the section headed "Managing Competitions" but no justification of the change of mind or the reasons for the new policy.

definition it will for example be entirely possible for Australian players who do not need a work permit to enter New Zealand to play club rugby before 1 May in New Zealand and thus be eligible to play in the NPC. There will be no restraint on players who have chosen to play for countries other that New Zealand and who already play club rugby in New Zealand before 1 May. Players who enter New Zealand from the Pacific Islands on the special permits that allow them to play professional rugby will not be overseas players provided they play club rugby before 1 May.

(b) NZRFU Regulations Relating to Transfer System

These are the regulations that were subject to the successful authorisation of a restrictive practice by the New Zealand Commerce Commission[153] which was challenged in *Commerce Commission v Rugby Union Players Association (No2.)*[154]The issues surrounding whether or not these regulations constitute an unreasonable restraint of trade had been subject to comment.[155] There are only three things that can be added.

The regulations have not achieved their stated objective of achieving competitive balance and that has been made clear in the NZRFU's recent review of its domestic competitions.[156]The NZRFU has also favoured salary caps and revenue sharing as the means to achieve competitive balance and financial sustainability for

---

[153] Commerce Commission Decision 281 17 December 1996

[154] [1997] 3 NZLR 301

[155] *"Restraint of Trade and Antitrust: A Pigskin Review Post Super League"* 6 Canterbury Law Review 1997; Shelly Duggan *"The New Zealand Rugby Football Union Transfer Arrangements"* Victoria University of Wellington LLM Research Paper 1997

[156] NZRFU *"Competitions Review"* November 24 2003 available at http://www.allblacks.com

the NPC and the teams that compete in it. If those were implemented the argument for the current transfer regulations would be weakened.

Any suggestion, such as that made by the Commission, that an independent contractors market for players services exists should, given the coverage clause, not survive the Collective Contracts coming into force on 1 January 2002.[157]

Finally and perhaps most significantly the NZRFU Transfer Regulations where also justified on the basis of compensating unions or clubs for player development costs. This is exactly the same justification for the IRB Regulation 4.7 yet the IRB process is a much more targeted measure where the actual development costs are calculated. The NZRFU would face some difficulty justifying its internal transfer systems inconsistency with the external transfer system applying internationally. The external system does not provide the NZRFU, provinces or clubs with anything near the money provided by the internal system. There simply is no justification for the different approaches.

(c) NZRFU Policy on Super 12 team selection

New Zealand Super 12 teams are selected under an NZRFU Board policy that players eligible to play for the All Blacks are to be selected first for any position. If such a player is not available then players eligible to play for the Pacific Island nations will be selected. The Super 12 coach has the discretion to decide on selection

[157] It is acknowledged that the Auckland Rugby Football Unions activities in apparently continuing to offer independent contractor contracts to its NPC players does not help this argument but it is submitted that an application by the players union to the Employment Court under section 6 (5) Employment Relations Act 2000 to declare whether the Auckland players are contractors or employees would soon settle that matter in favour of the players being employees.

up to this point. If the coach believes that no All Black or Pacific Island nation eligible player is suitable for the position and he has an alternative player eligible to play for another nation the decision on whether that player may be employed is a matter for the NZRFU Board. It is not clear what the NZRFU's recent Competition Review intends for the future. It may be the future policy is simply going to be if a player plays NPC he can play Super 12. If that is the case the issue will be the reasonableness of the new NPC policy. [158]

The current policy is on the face of it in breach of the Human Rights Act 1993 and the Employment Relations Act 2000 neither of which contain a provision similar to the section 39 (b) of the equivalent United Kingdom Act in relation to participation in sporting competitions. It is doubtful that the New Zealand Parliament would be prepared to legislate an exemption as wide as the United Kingdom exemption in light of the Closer Economic Relations Agreement and the understanding between Australia and New Zealand on the freedom of movement of residents between the two countries. Also there are special immigration arrangements open to Pacific Island nationals to enter New Zealand to play professional sport that suggests the government would be unwilling to upset the Pacific Island nations either. Perhaps the best option for the NZRFU is to investigate whether the Australian legal position is similar and that therefore the Australian Rugby Union Super 12 selection policy is unlawful as well.

(d) NZRFU policy on All Blacks eligibility

[158] The issue of unreasonable restraint of trade is discussed earlier in this paper under section relating to the SANZAR joint venture

The All Blacks selection process and eligibility for selection is determined by a combination of the IRB regulation on who is eligible to play for a national team and NZRFU Board policy. IRB Regulations 8.1 and 8.2 are outlined above. The NZRFU Board policy is that you must meet that criteria and be playing in New Zealand. To be playing in New Zealand you must by definition be employed by NZRPL.[159]

The first issue is whether, having agreed to comply with IRB Regulations and having obtained the agreement of the professional players to comply the NZRFU can adopt a more restrictive policy than the IRB in relation to eligibility for national teams. The short answer is yes. IRB Bye-law 4(b) allows a national union to adopt a more restrictive policy.

The NZRFU would justify the policy on the basis that it needed to keep as many players as possible in the New Zealand domestic competitions as possible and this selection policy meant that players who wanted to play for the All Blacks had to stay and play in those competitions. The counter would be that if the NZRFU has decided to allow any overseas player registered with a club in New Zealand before 1 May to play in the NPC its NPC policy is inconsistent with its national team selection policy. It is difficult to judge exactly how a court would view this policy but it is a policy that restrains the trade of players and the NZRFU needs to recognise that it will have to justify it if challenged. In doing so it will face the twin difficulties of

[159] Of the eight nations with the voting control of the IRB France, England, Scotland, Wales and Ireland will all select players from outside their own competitions or outside teams affiliated to them New Zealand, Australia and South Africa all adopt the you must play in our country policy. Other nations simply do not have a choice as most of their best players will have to play outside their jurisdiction to earn a living. The concern of the SANZAR unions is that if they do not restrict eligibility in this way many players will choose to play for the more lucrative clubs in Europe and Japan and the SANZAR Super 12 and domestic competitions will be diminished as a result.

explaining why New Zealand is different to the European nations that have no such restraints and why players of any nationality are free to play in the NPC.[160]

The current policy is on the face of it in breach of the Human Rights Act 1993 and the Employment Relations Act 2000 neither of which contain a provision similar to the section 39 of the equivalent United Kingdom Act in relation to nationals. The absurdity of the situation in relation to "national team" selection is acknowledged but it nonetheless remains a fact that the New Zealand law at the moment precludes the selection of employees who play in national teams on the basis of national origin, which is the basis on which national teams are selected. It would be a very useful amendment to the Employment Relations Act 2000 and the Human Rights Act 1993 if a provision similar to section 39 (a) of the United Kingdom Act where inserted into the New Zealand legislation.

(e) Provincial Rugby Union and Rugby Club Constitutions

Provincial rugby unions and clubs have generally altered their constitutions to comply with the requirements of NZRFU membership.[161] Professional players

---

[160] The justification of the exclusion or limitation of players not eligible for national teams in subsidiary competitions is based on the rugby idea that a strong national pyramid leads to a strong national team. This is not a model accepted by many other sports such as soccer or rugby league. The opinion is strongly held by unions such as New Zealand, Australia, South Africa, Scotland, Wales and Ireland but faces a huge practical challenge in Europe in light of the ruling in the *Kolpak* case that hold such rules to be a breach of the freedom of movement of workers. If teams (other than national teams) in Europe can be filled with citizens of countries of almost any region except Asia, Australasia or the Americas what is the objective and is the regulation the most proportionate way to achieve that end

[161] The Wellington Rugby Football Union constitution provides that the WRU is bound by the rules and bye laws of the NZRFU (WRU Rule 2 5); that it has the power to suspend club members, officials and spectators found guilty of a breach of any NZRFU laws(WRU Rule 10 7);the rules of Clubs must provide that every member of the club shall be deemed to have subscribed to the NZRFU constitution and rules and laws of the game and the WRU constitution and rules(WRU Rule 13.1);Schools are similarly captured by WRU rule 14 2. At the club level the level of constitutional compliance with the dictated of the governing bodies is patchy. For example while the Poneke Football Club was one of the WRU members that signed the authorisation of the current WRU rules Poneke's own rules do not bind

playing for those unions are already bound to comply with the IRB and NZRFU rules and regulations in the collective.

(f) Participation Agreements between the NZRFU and the Provincial Unions

Participation agreements are the final part of the rugby pyramid. As part of the "big bang" which occurred in 1996 it was necessary for the NZRFU and its member unions to document the relationship between the NZRFU and the provincial unions in relation to the competitions and matches that were captured by the agreement the NZRFU, along with its SANZAR partners, had signed with News. These competitions and matches included international, Super 12, NPC and Ranfurly Shield matches.

The participation agreement is prefaced on the understanding that the NZRFU controls and is the organiser of all of the professional competitions played in New Zealand and owns all commercial rights to them.[162] The NZRFU agreed to allocate internationals, Super 12 and NPC matches to provincial unions, allow them to participate in the competitions and provide them funding in consideration of them entering into the participation agreement. The agreements are for a ten-year term.[163]

Poneke or its members to comply in the manner envisaged by those rules. In the case of professional players the point is not important because the unions they play for are bound by their constitutions and by the participation agreement with the NZRFU to comply with NZRFU and IRB rules and regulations.

[162] There seems to have been no doubt about the NZRFU's ownership of the competition and the rights or perhaps no desire by the provincial unions to take the point. There has been considerable debate in Europe over who owns the commercial rights that has in most cases been held to be the club on whose ground the game is played. The provincial unions did reserve the right to enter broadcasting arrangements for matches outside those contracted to News which suggests the provinces were not giving up on the idea that they might own the rights but rather accepting the News arrangement was the best deal open for them. The NZRFU's consent is required but cannot be unreasonably withheld. But note this is at odds with the IRB regulation, which suggests consent could be unreasonably withheld.

[163] For commentary on what happened in England and Wales see Lewis and Taylor above A3.20;3.29;3.30;3.31;3.70;3.74;3.117;3.118;3.138;3.153;3.156;3.166;3.168;3.175;3.179;3.223;3.224;B

The provincial unions agreed to remain affiliated to the NZRFU, to abide by its rules and regulations and by the rules, regulations and bye-laws of the IRB. [164]The IRB requirement that the affiliated membership of the NZRFU is similarly bound to the IRB as the NZRFU is bound is thereby achieved.

The provincial unions also agreed to supply teams to the competitions they qualified for. There is an acknowledgement that the NZRFU would determine which teams played in the Super 12 and that the provinces would help ensure the Super 12 was a success.

In 2001 the agreements were amended by the addition of mutual obligations relating to the collective employment contract[165] and the funding and accounting requirements of the agreements about generally accepted rugby accounting practice and annual NZRFU and provincial union performance agreements. Otherwise the agreements remained unchanged.

(g) The New Zealand Super 12 franchise structure

The structure and existence of the New Zealand Super 12 teams are a result of the decision by the NZRFU not to allow direct entry of New Zealand provincial union teams into the Super 12 competition. The Super 12 had been conceived as an

---

2.119. It may be possible for someone to attack these agreements as an unreasonable restraint of trade because of their length or because they are anti-competitive. That issue is beyond the scope of this paper but those interested should see *News Limited v Australian Rugby Football League Ltd* (1996) 139 ALR 193;*News Limited & Ors v South Sydney District Rugby League Football Club Limited & Ors* (2000) 177 ALR 611 (appealed to High Court of Australia decision reserved); *News Limited v South Sydney District Rugby League Football Club Ltd* (the *South Sydney* case) Unreported decision of the High Court of Australia [2003] HCA 45 S34/2002 delivered 13 August 2003 Kirby J

[164] See comment above about the NZRFU constitutional requirement that complements the contractual provisions of the participation agreements.

[165] The relevant clauses of the participation agreements and related agreements are set out in full in *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* Unreported Employment Court decision (WC46/02; WRC 37/02) Wellington 12 November 2002; 10 December 2002 Judge C M Shaw

international provincial championship played between existing provincial and state teams from the SANZAR nations. The NZRFU could have simply allowed the top five finishers from NPC in 1995 to represent New Zealand in 1996, and allowed that selection process to continue into the future, but instead chose to establish five Super 12 franchises. There is no need to go into the rugby pros and cons of that decision in this paper. All that it is necessary to understand is that the Super 12 structure despite the use of terms like franchises is very much part of the traditional rugby pyramid. The franchises are groups of provinces grouped into franchise companies with directors appointed by the provinces and by the NZRFU. A provincial union appointed by the Board of the franchise company manages each Super 12 franchise.

The key point from a player's perspective is that the NZRFU retains ultimate control over all the intellectual property associated with the Super 12 team, it can change the location of a franchise and NZRPL is the only employer of Super 12 players. In addition the NZRFU with its SANZAR partners controls all aspects of the competition itself. The New Zealand Super 12 structure has strengthened the control of rugby in New Zealand by the NZRFU relative to the provinces that are its members. In this sense the powers of the NZRFU are stronger[166] that those found in England or France where the professional leagues are run by the clubs themselves or by companies owned by a combination of leagues and national unions.

[166] The situation in Australia is similar to the New Zealand situation although the Super 12 sides are based on the three Australian State unions who directly contract players but are paid an equal amount by the ARU to do so.

VI CONCLUSIONS

The extent of the control of professional rugby union by rugby union's governing bodies in all countries in which it is played requires professional players to organise collectively not only domestically but internationally.

The nature and extent of the control by the national unions that control the IRB means that freedom of professional rugby players to work is significantly restrained. The players could attack many of the rules and regulations as unreasonable restraints of trade and breaches of human rights legislation.

It is in the interests of the national unions to work at international and national levels with players unions because it diminishes the possibility of parties who may not have the interests of the whole game at heart from entering the sport.

The principles and processes underlying the Employment Relations Act 2000 provide a very good model for rugby union administrators and players unions to follow. Teamwork, respect for each other and for the opposition is at the heart of the rugby union and it will be all the more commercially valuable if all involved remember that in everything they do.

BIBLIOGRAPHY

Reported and Unreported Cases

1 New Zealand

Blackler v New Zealand Rugby Football League (Inc) [1968] NZLR 547 (CA)

Finnigan v New Zealand Rugby Football Union Inc [1985] 2 NZLR 159

Finnigan v New Zealand Rugby Football Union Inc (No2) [1985] 2 NZLR 181,

Kemp v New Zealand Rugby Football League (Inc) [1989] 3 NZLR 463

Rugby Union Players' Association v Commerce Commission (No 2) [1997] 3 NZLR 301

Stininato v Auckland Boxing Association Inc [1978] 1 NZLR 1 (CA), 24

Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc) unreported Employment Court Wellington (WC46/02; WRC37/02) 12 November 2002; 10 December 2002 Judge C M Shaw

2 Australia

Adamson v New South Wales Rugby League Ltd (1991) 100 ALR 479

Adamson v New South Wales Rugby League Ltd (1991) 103 ALR 319

Adamson v West Perth Football Club (1979) 27 ALR 475

Buckley v Tutty (1972) ALR 370

Foschini v Victorian Football League (1983) Supreme Court Victoria No 9868/82 15 April 1983 (unreported)

Hall v Victorian Football League (1997) 58 FLR 180

Hospitality Group Pty Ltd v Australian Rugby Union Ltd (2000) FCA 823

Hospitality Group Pty Ltd v Australian Rugby Union Ltd (2001) FCA 1040

Hoszowski v Brown (1978) Supreme Court New South Wales No 1667/78 6 October 1978 (unreported)

News Limited v Australian Rugby Football League Ltd (1996) 135 ALR 33

News Limited v Australian Rugby Football League Ltd (1996) 139 ALR 193

News Limited & Ors v South Sydney District Rugby League Football Club Limited & Ors (2000) 177 ALR 611

News Limited v South Sydney District Rugby League Football Club Ltd (the *South Sydney* case) Unreported decision of the High Court of Australia [2003] HCA 45 S34/2002 delivered 13 August 2003 Kirby J

Wayde v New South Wales Rugby League Limited (1985) 180 CLR 459

3 Europe (European and National Courts)

Case 36/74 Walrave and Koch v UCI (December 12 1974) 1 CMLR 320 (1974)

Case C-13/76 Dona v Mantero (July 14 1976) 1 CMLR 576 (1976)

Case C-415/93 Union Royale Belge des Socities de Football Ass'n v Jean Marc Bosman (December 15 1995) (1996) 1 CMLR 645 ("the Bosman case")

Deutscher Handballbund eV v Maros Kolpak [2003] Case C-438/00 ECJ Celex Lexis May 8 2003

Case C-176/96 Lehtonen and another v Federation Royale Belge des Socities de Basketball (April 13 2000) 3 CMLR 409

Eastham v Newcastle United Football Club Ltd (1963) 3 All ER 139

Greig v Insole [1978] 3 All ER 449

Enderby Town Football Club Ltd v The Football Association Ltd and another [1971] 1 All ER 215

European Commission Decision (2001/478/EC) relating to Article 47 of UEFA's statutes (2000)

Greg v Insole (1978) 3 All ER 449

Joined Cases C-51/96 and 1291/97 Christelle Deliege v Ligue Francophone de judo et disciplines associess and others (April 11 2000) (2000) ECR I-2549

Newport Association Football Club v Football Association of Wales (1985) 2 All ER 87

Nordenfelt v *Maxim Nordenfelt Guns and Ammunition* [1894] 535

R v Trent Regional Health Authority, The Times June 19 1986

Law v National Greyhound Racing Club Ltd [1963] 1 WLR 1302

R v Football Association ex p Football League Ltd [1993] 2 All ER 833

R v Jockey Club ex p Massingberd-Mundy [1993] 2 All ER 207

R v Jockey Club ex p Aga Khan [1993] 1 WLR 909

Scottish Football Association v Commission (1994) ECR II-1039

Williams v Pugh and Others: Russell v Pugh and others Queens Bench Division 23 July 1997 decision of Popperwell J unreported, *Russell(for and on behalf of Ebbw Vale Rugby Football Club) v Pugh QC and others (for and on behalf of the Welsh Rugby Union); Williams (for and on behalf of Cardiff Athletic Club) and another v Same* Court of Appeal (Civil Division) 1 August 1997 decision of Bedlam available at http://www.courtservice.gov.uk/judgementsfiles (last accessed 27 August 2003)

B Quasi-judicial Reports

Commerce Commission Decision No 281 New Zealand Rugby Football Union Incorporated

Commission Decision of 19 April 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case 37.576- UEFA's broadcasting regulations) EU: Decision 2001/478/EC

II LEGISLATION

A STATUTES

1 New Zealand

Commerce Act 1986 (as amended)

Employment Contracts Act 1991 (repealed)

Employment Relations Act 2000

New Zealand Bill of Rights Act 1990

Human Rights Act 1993

2 Australia

Trade Practices Act 1974 (Commonwealth)

3 European (European Union and National)

Treaty on European Union (the European Treaty)

Human Rights Act 1998 (UK)

Race Relations Act 1976 (UK)

III OTHER PRIMARY SOURCES

Application for Authorisation of a Restrictive Trade Practice Pursuant to Section 58 of the Commerce Act 1986 by the New Zealand Rugby Union Inc 23 September 1995 (the 1995 NZRFU Application)

Australian Rugby Union Players Association (ARUPA) website at http://www.rupa.com.au/images/Ferrier-Agreement.gif (last accessed 11 November 2003)

Commerce Commission Draft Determination on the 1995 NZRFU Application

Brent Reed *"RL:Rugby Union players chief can understand RLPA frustration"* AAP Newsfeed September 5 2003 https://www.nexis (last accessed 9 September 2003).

Documents Received at Commerce Commission conference on the 1995 NZRFU application

Jonathan Taylor and Mike Newton *"Salary Caps – The Legal Analysis"* available at http://www.hammonds (last accessed 20 October 2003))

Submissions made on the Commerce Commission Draft Determination on the 1995 NZRFU Application

NZRFU *"Competitions Review"* November 24 2003 available at http://www.allblacks.com

NZRFU Constitution on file at New Zealand Companies Office available at http://www.companies.govt.nz/search

NZRFU NPC Regulations available from NZRFU email contact info@nzrugby.co.nz will be available at http://www.allblacks.com from 2004

"*SANZAR's Strategic Vision for International Rugby & Structure of the Season*" distributed publicly October 2001(copy on file with the author or available from the NZRFU)

"*Submission of EFDR to the House of Commons Select Committee on Culture, Media and Sport Appendices to the Minutes of Evidence*" available at http://www.publications.parliament.uk/cgi-bin/ukparl_hl?DB=ukparl&STEMMER=en&WORDS=rugby (last accessed 4 September 2003

"*Submission of the Welsh Rugby Union to the United Kingdom Parliament Select Committee on Culture, Media and Sport Appendices to the Minutes of Evidence*" available at http://www.publications.parliament.uk/cgi-bin/ukparl (last accessed 29 September 2003)

Wellington Rugby Football Union Constitution on file at New Zealand Companies Office available at http://www.companies.govt.nz/search

IV SECONDARY MATERIALS

A Texts

Michael J Beloff, Tim Kerr and Marie Demetriou, *"Sports Law"*, Hart Publishing, Oxford and Portland Oregon, 1999

Andrew Caiger and Simon Gardiner (editors) "*Professional Sport in the EU: Regulation and Re-regulation"* TMC Asser Press The Hague 2000, 292

Leeds M and von Allmen P *"The Economics of Sports"* Addison Wesley Boston, 2002 , 69 footnote 1, Eugene Klein *"First Down and a Billion: The Funny Business of Pro Football"* Morrow New York 1987

Max du Preez, "*Louis Luyt: unauthorised"* 1st edition, Cape Town, Zebra Press 2001

Peter Fitzsimons *"The Rugby War"* Harper Sports 1996

Christopher Forsyth *"Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review"* 55 (1996) CLJ 122 and Ch. 2 Christopher Forsyth (ed) *"Judicial Review & the Constitution"* Hart Publishing Oxford 2000,29-46

Jerry Gorman and Kirk Calhoun, *"The Name of the Game The Business of Sports"* John Wiley & Sons, Inc, New York, 1994

Dawn Oliver *"Is the Ultra Vires Rule the basis for Judicial Review?* in Christopher Forsyth (ed) *"Judicial Review & the Constitution"* Hart Publishing Oxford 2000, 3-27

James Quirk and Rodney Fort, *"Hard Ball: The Abuse of Power in Pro Team Sports"* Princeton University Press, Princeton 1999 NCAA *v Board of Regents of the University of Oklahoma 468 U.S.85,*104 S.Ct. 2948, 82Led2d 70 (1984)

P M Roth and Graham D Child *"European Community Law of Competition"* Sweet & Maxwell London 2001 Fifth edition

Taylor and Lewis (eds) *"Sport: Law and Practice"* Butterworths London 2003

Gerald Scully, *"The Market Structure of Sports"*, The University of Chicago Press, Chicago and London, 1995.

Weiler, *"Levelling the Playing Field"*, Harvard University Press, Cambridge, Massachusetts, 2000.

Paul Weiler and Gary Roberts, *"Sports and the Law Cases, Materials and Problems"* American Casebook Series, West Publishing Co, St Paul Minn, 1993.

Paul Weiler and Gary Roberts, *"2001 Supplement to Sports and the Law Cases, Materials and Problems"* American Casebook Series, West Publishing Co, St Paul Minn, 2001

Hans Westerbeek and Aaron Smith *"Sport Business in the Global Market Place"* Palgrave Macmillan 2003, Houndmills Basingstoke,

B Journals

Caron Beaton-Wells and David K Round *"Australian Rugby Union Ltd v Hospitality Group Pty Ltd: A Salient Reminder of the Perils Facing Parties in Proving the Market under the Trade Practices Act 1974 (Cth)"* Australian Business Law Review 29 June 2001 211-230

Michael Beloff *"Pitch, Pool,Rink ...Court? Judicial Review in the Sporting World"* (1989) Public Law 150

S Corones *"Super League: A Victory for Competition and Free Markets" 25 Aust Bus Law Review 1997 150-6*

Dabscheck, Braham "*Sport, Human Rights and Industrial Relations"* [2000] 7 AJHR 129

G A Edwards *"From Super-League to Super-Market – the appropriate emphasis in market definition"* 4 Competition and Consumer Law Journal 1997 220-224

Saul Fridman, *"Before the High Court: Sport and the Law: The South Sydney Case" 24 Sydney l Review 558*

Sir John Laws *"Public Power and Employment Law: Abuse o f Power* [1997] Public Law 455,

Dawn Oliver *"Is the Ultra Vires Rule the basis for Judicial Review?* in Christopher Forsyth (ed) *"Judicial Review & the Constitution"* Hart Publishing Oxford 2000, 3-27

P. Dorian Owen and Clayton R Weatherston, *"Professionalization of New Zealand Rugby Union: Historical Background, Structural Changes and Competitive Balance"* Economics Discussion Papers No 214, Department of Economics Otago University

Warren Pengilley, *"ARL v Super League: What does it mean for Sporting Organisations?"* Competition and Consumer Law Journal, Volume 5, (1997) 77

Warren Pengilley, *"Restraint of Trade and Antitrust: A pigskin review post super league"* (1997) 6 Canterbury Law Review 631

Warren Pengilley *"Sporting Drafts and Restraint of Trade"* 10 Queensland University of Technology Law Journal 91994, 89-121

Gary Roberts, *"Sports Leagues and the Sherman Act: The Use and Abuse of section 1 to regulate restraints on intraleague rivalry"* 32 UCLA Law Review, 219

Stephen F Ross, *"Anti-competitive aspects of Sports"*, 7 Competition & Consumer Law Journal, (1999)

Charles Sweeny, *"Professional Sporting Leagues and the Competition Laws"* 4 Competition and Consumer Law Journal, (1997) 173

Cento G. Veljanovski, *"Markets in Professional Sports: Hendry v WPBSA and the importance of functional markets"*, 2002 23(6) ECLR 273-280

Stephen Weatherill, *"'Fair Play Please!': Recent Developments in the Application of EC law to Sport" Common Market Law Review 40, 51-93 2003*

C Unpublished Theses and Research Papers

Kierin Deeming *"Restraint of Trade in Professional Sport"* LLB(Hons) Research Paper Auckland University December 1996

Shelly Duggan *"The New Zealand Rugby Football Union Transfer Arrangements"* Victoria University of Wellington LLM Research Paper 1997

APPENDIX ONE

REGULATIONS FOR ELIGIBILITY FOR SELECTION TO AFFILIATED UNION SENIOR REPRESENTATIVE TEAMS FOR THE NATIONAL PROVINCIAL CHAMPIONSHIP AND RANFURLY SHIELD

1. Subject to the Regulations Relating to Transfer System and Regulations 5, 7, 10 and 11 of these Regulations the team playing squad, consisting of the fifteen selected players plus seven reserves ("**team playing squad**"), for the senior representative team of any Affiliated Union for the National Provincial Competition and the Ranfurly Shield shall consist only of players who:

   a) are registered with a club competing in a club competition conducted under the control and jurisdiction of that Affiliated Union; and

   b) have not:

      (i) except as provided for under Regulation 3 of these Regulations, at or after I May of the current calendar year been registered with a club competing in a club competition conducted under the control and jurisdiction of another Affiliated Union; or

      (ii) except as provided for under Regulation 2 of these Regulations, at or after 1 May of the current calendar year been registered as a member of a club or other Rugby organisation in an overseas country.

2. In the case of a player returning to New Zealand after playing rugby in an overseas country as a member of a club or other Rugby organisation in that overseas country and who:

      (i) was in the immediately preceding calendar year, registered with a club playing in the club competition of the Affiliated Union he wishes to represent in the National Provincial Championship; or

      (ii) was the subject of registered transfer to that Affiliated Union under the Regulations relating to Transfer System during the immediately preceding transfer period (as defined in the Regulations relating to Transfer System); and

      (iii)was not classified as an Overseas Player for the purposes of the National Provincial Championship in the immediately preceding calendar year; then

   the date referred to in Regulation 1 b) ii) of these Regulations shall be 1 June.

3. A player registered with a club competing in a club competition under the joint control and jurisdiction of two or more Affiliated Unions shall be eligible for the team playing squad for the senior representative team of the Affiliated Union within whose boundaries the club the player is registered with is located.

4. Any player transferring his club registration from a club ("initial club") located within the boundaries and under control and jurisdiction of one Affiliated Union to a club ("new club") located within the boundaries and under the control and jurisdiction of another Affiliated Union ("new Affiliated Union") shall not be eligible to play for the new club or the team playing squad for the senior representative team of the new Affiliated Union until the player produces a clearance from the initial club. Such clearances must not be arbitrarily withheld by the initial club.

OUTSIDE PLAYERS

5. Subject to Regulation 9 of these Regulations the team playing squad for the senior representative team of an Affiliated Union for a National Provincial Championship round robin competition or Ranfurly Shield match may include up to six players who do not satisfy the requirements of Regulation a) and b) (i) of these Regulations (each an "Outside Player") provided that:

   a) the outside player has not been selected as a member of the team player squad for the Senior Representative team of another affiliated union in the current National Provincial Championship round robin competition except where, for the 2002 season, the outside player has played for an Affiliated union in the place of an All Black absent on Tri Nations duty and has become superfluous to that Affiliated unions requirement on the return of the All Blacks.

   b) where the Outside Player has been registered with a club competing in a club competition conducted under the control and jurisdiction of another Affiliated Union, the Affiliated Union has obtained the prior written consent of that other Affiliated Union. Such consent must be unconditional except that the Affiliated Union granting the consent may require the Outside Player to return if he will be selected in the team playing squad for its senior representative team's next match as a result of an injury to another player;

   c) the Outside Player has not been the subject of a registered transfer under the Regulations Relating to Transfer System during the Transfer Period (as defined in the Regulations Relating to Transfer System) immediately preceding the current calendar year; and

   d) subject to Regulation 6, the Outside Player becomes a member of the team playing squad for the senior representative team of the Affiliated Union before the conclusion of the that team's fourth game of the current National Provincial Championship round robin competition ("Cut-off-Date").

6. An Outside Player injured after the Cut-off-Date may be replaced by another Outside Player, provided such replacement player has not been a member of the team playing squad for the senior representative team of another Affiliated Union in the current National Provincial Championship round robin competition.

OVERSEAS PLAYERS

7. **Subject to Regulation 9 of these Regulations, the team playing squad for the senior representative team of an Affiliated Union for a National Provincial Championship round robin competition or Ranfurly Shield match may include up to two players who do not satisfy the requirements of Regulation 1 b) (ii) of these Regulations (each an "Overseas Player") provided that:**

a) the Overseas Player has complied with the IRB Regulations Relating to Player Status, Player Contracts and Player Movement and is validly registered with a club competing in a club competition conducted under the control and jurisdiction of that Affiliated Union;

b) the Overseas Player has not been selected as a member of the team playing squad for the senior representative team of another Affiliated Union in the current National Provincial Championship round robin competition; and

c) the Overseas Player becomes a member of the team playing squad for the senior representative team of the Affiliated Union by the Cut-off-Date.

8. No Overseas Player who is injured may be replaced by another Overseas Player after the Cut-off Date for that Affiliated Union's team.

9. The combined number of Outside Players and Overseas Players in the team playing squad for the senior representative team of an Affiliated Union for any one match must not exceed six.

TRANSITION PROVISION

10. Players who were the subject of a registered transfer under the Regulations Relating to Transfer System during the 2001 Transfer Period (as defined in the Regulations Relating to Transfer System) or who fell within one of the Transfer

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

Bands (recorded in Schedule 1 of the Regulations Relating to Transfer System) will not be required to meet the requirements of Regulation 1(a) and (b) of these Regulations in 2002.

PLAYERS RETURNING FROM OVERSEAS

11. Subject to Regulation 12 of these Regulations, when a player returns to New Zealand after playing Rugby in an overseas country as a member of a club or other Rugby organisation in that overseas country, then he is not eligible to represent an Affiliated Union as a member of the team playing squad for that Affiliated Union's senior representative team in the National Provincial Championship or the Ranfurly Shield until he has been registered with a club which competes in the club competition conducted under the control and jurisdiction of that Affiliated Union for a period of not less than three weeks after arriving back in New Zealand.

12. The three week registration period in Regulation 11 of these Regulations will not apply where a player returns to New Zealand after playing Rugby in an overseas country as a member of a club or other Rugby organisation in that overseas country to the club with which he was last registered before leaving New Zealand.

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY
3 7212 00719889 6

LAW LIBRARY
A Fine According to Library Regulations is charged on Overdue Books.
VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY

9/4/04

to Transfer System)

1(a) and (b) of these

PLAYERS RETURNING FROM OVERSEAS

11 Subject to Regulation 12 of these Regulations, when a player returns to New Zealand after playing Rugby in an overseas country as a member of a club or other Rugby organisation in that overseas country, then he is not eligible to represent an Affiliated Union as a member of the team playing squad for that Affiliated Union's senior representative team in the National Provincial Championship or the Ranfurly Shield until he has been registered with a club which competes in the club competition conducted under the control and jurisdiction of that Affiliated Union for a period of not less than three weeks after arriving back in New Zealand.

12 The three week registration period in Regulation 11 of these Regulations will not apply where a player returns to New Zealand after playing Rugby in an overseas country as a member of a club or other Rugby organisation in that overseas country to the club with which he was last registered before leaving New Zealand.

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY
3 7212 00719889 6

AS741
VUW
A66
R975
2003