

CRICKET AND THE LAW: BALL TAMPERING, CONTRACTS AND ENTERPRISE BARGAINING AGREEMENTS

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ABSTRACT

Cricket in Australia has faced two recent crises, the first being the prolonged enterprise bargaining negotiations between Cricket Australia (CA) and the Australian Cricketers Association (ACA) that resulted in a situation where, for a few months, Cricket Australia had no contracted players. This meant that during this period CA had no players to fulfil its contractual broadcasting obligations. When the matter was finally resolved it is very much in favour of the players as CA backed down on its position of not using the revenue sharing model. It is suggested this highlights that it is players who now hold the greater bargaining power when it comes to negotiations. The second crisis involved the ball tampering incident in South Africa, with CA banning three players from playing first-class cricket in Australia for up to twelve months. It is suggested that given the severity of the incident and its late season timing, the penalties were reasonable and therefore legal under the terms of the players' contracts.

I INTRODUCTION

During 2017-18 cricket in Australia faced two significant crises. The first was the drawn out negotiations between Cricket Australia (CA) and the Australian Cricketers' Association (ACA) in what has been described as the most significant pay dispute in Australian cricket history,¹ one that, temporarily at least, brought professional cricket in Australia to a standstill. Eventually, a new Enterprise Bargaining Agreement (EBA) was negotiated in time for the threatened 2017-18 Ashes series against England to go ahead as scheduled.

It was during Australia's next series, away against South Africa in March 2018, that an even greater problem arose when it was revealed the Australia cricket team had resorted to using sandpaper to alter the condition of the ball to assist their bowlers. The two players directly involved, Dave Warner and Cameron Bancroft, as well as captain, Steve Smith, received match bans from the International Cricket Council (ICC). However, the penalties handed down by CA went much further, imposing twelve month domestic bans on Steve Smith and Dave Warner, while Cameron Bancroft received a nine month ban. Whilst none of the three players chose to appeal the suspensions, the severity of the penalties did raise issues as to their legality on the grounds that they may have amounted to a restraint of trade.

Within the context of sport, former International Olympic Committee President, Jacque Rogge, has suggested governance involves clarification between the rules of the games and the economic and commercial dimension related to the management of sport. He also suggests that since sport is based on ethics and fair play, sports governance should

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¹ Mary Gearin, *Cricket pay deal: Here's what you need to know* (3 August 2017) ABC News <<http://www.abc.net.au/news/2017-08-03/cricket-pay-deal-explained/8771988>>.

fulfil the highest standards in terms of transparency, democracy and accountability.² Both the EBA negotiations and the ball tampering incident raised issues in regard to the governance of cricket and there is little doubt the governance of professional sport is implemented by contracts and, therefore, by contract law. This paper will examine the legal and governance issues arising from both the negotiations surrounding cricket's new EBA, and the Cape Town ball tampering incident.

II THE ENTERPRISE BARGAINING AGREEMENT

A The Dispute

CA is the national governing body of cricket and its primary focus has been to commercialise the sport as much as possible and generate new income streams, particularly in relation to TV rights.³ The ACA, on the other hand, represents 230 professional first-class cricketers and operates in a way similar to a trade union.⁴ Since its incorporation in 1997 it has acted as a bargaining agent for its members.⁵

While the dispute between CA and the ACA involved a multitude of issues, the most significant was the proposed change by CA in the way professional cricket players were to be paid. For the previous 20 years players had received a set share of CA's revenue in what is known as revenue-sharing.⁶ Under this model, players received 24.5 per cent of all cricket revenues, 'with the money allocated according to each player's grade and team member ranking.'⁷ The ACA wanted to retain this revenue-sharing model as it reflected the position of players being considered business partners with CA, rather than mere 'employees for hire.'⁸

CA, however, wanted to introduce a different model whereby player payments would be 'an amount unlinked from the revenue'⁹ and just as significantly, would involve individual contracts. Mac suggests this would have inevitably put one player against another and, as a result, would have led to major pay cuts and ensured CA received a greater share of revenue.¹⁰ Another benefit of this model for CA was that the use of individual player contracts would have reduced the players' collective bargaining power. It was therefore no surprise that ACA strongly objected to CA's attempt to 'destroy the revenue-sharing model that lay at the heart of the old contract with the players.'¹¹ Thus, after unsuccessful negotiations, CA allowed the contracts with the players to expire on 30 June 2017, leaving the players as free agents from 1 July 2017. While the players could seek employment overseas, the expiration of the contracts meant they were unemployed in Australia. Perhaps more importantly, CA did not have players to fulfil its future fixture commitments and therefore was in danger of not being

² Jacques Rogge, 'Foreword' *The Rules of the Game Conference Report & Conclusions: Europe's First Conference on the Governance of Sport*, Brussels, 26-27 February 2001, 2. <https://www.fia.com>.

³ Richard Wood, *Cricket pay dispute: The key issues explained* (19 July 2017) *Wide World of Sports* <<https://wwos.nine.com.au/2017/07/19/15/52/whats-at-stake-in-australian-cricket-pay-dispute>>.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ John Quessy, 'Labour Bites' (2017) 37 *Newsmonth* 12, 12.

⁷ Peter Mac, 'Cricket pay dispute: Union busting exercise', *The Guardian* (Sydney), 19 July 2017, 5.

⁸ John Quessy, above n 6, 12.

⁹ *Ibid.*

¹⁰ Peter Mac, above n 7, 5.

¹¹ Robert Angyal, *5 Lessons From Cricket's Pay Dispute If You Want To Lose Big In Commercial Negotiations* (7 August 2017) *Huffington Post* <http://www.huffingtonpost.com.au/robert-angyal/5-lessons-from-cricket-pay-dispute-if-you-want-to-lose-big-in_a_23067968/>.

able to complete its broadcasting obligations. Thus, the two parties still needed to negotiate a new EBA.

B *The Negotiations*

A feature of the negotiations was how united the players were, with senior members of the Australian team turning down what would have been lucrative individual contracts in order to remain a collective group and therefore obtain a better deal for all professional cricketers in Australia. Like all employees in dispute with their employers, one potential option was to remove the availability of their labour. Thus, the united position taken by the players meant the ACA had a strong bargaining power as it could use the threat of boycotting upcoming matches as a tactic against CA. This was not without precedent in international cricket as a West Indies tour of India, for instance, was abandoned after a players' boycott due to an on-going pay dispute with their governing body, the West Indies Cricket board.¹² The strength of ACA's position was shown when an Australia A side tour to South Africa had to be cancelled due to a boycott by the players.¹³ This, in itself, created little immediate concern for CA as the Australian A side was no more than a development squad, rather than a representative team fulfilling CA's contractual obligations. However, it highlighted the ACA was serious about the stance it was taking and that the players it represented were willing to forfeit playing games. CA had to be aware that if such a boycott extended to a scheduled tour of Bangladesh later in 2017, and the home summer Ashes series against England, there would be far more serious consequences. A Bangladesh boycott would have meant that CA would be in breach of its, and the ICC's, broadcasting obligations and, as a consequence, its reputation and worldwide image would have suffered. The consequences of the players boycotting the Ashes series, however, would have had an even greater significance due to loss of income from ticket sales and sponsorships, as well as CA not being able to stage one of international cricket's biggest events.

Despite the strong bargaining position the players had by remaining united, it is clear from the actions taken by CA that it also considered it had a strong bargaining position and that the players would have to back down once they became 'unemployed.' For instance, CA rejected calls for alternative dispute resolution at every possible opportunity during the negotiations, with it being reported that the ACA requested mediation with CA on at least five occasions and that, each time, CA refused.¹⁴ Angyal has suggested CA rejected mediation because it believed it would make it appear tough,¹⁵ but further suggests a willingness to mediate actually shows a sign of strength. This is because it would have indicated CA was unafraid to discuss the situation with the ACA in a calm and professional manner and, instead, its failure to participate in mediation 'bespoke of insecurity and weakness' on its part.¹⁶

CA then sought to use the mainstream media to criticise and undermine the ACA. For instance, during the negotiations, the Chairman of CA, David Peeper, made a statement in *The Australian* accusing the ACA of 'launching a campaign of such sustained

¹² Chris Davies, 'Match and Spot Fixing: Challenges for the International Cricket Council' (2015) 30 *Sports Law eJournal* 1, 7.

¹³ Dean Bilton, Cricket pay dispute: *Australia A players prove commitment to cause with significant sacrifice* (6 July 2017) ABC News <<http://www.abc.net.au/news/2017-07-06/australia-a-south-africa-boycott-proves-commitment-to-cause/8683918>>.

¹⁴ Robert Angyal, above n 11.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

ferocity that anyone could be forgiven of thinking that CA was proposing the reintroduction of slavery.¹⁷ Peever then labelled the ACA's tactics as 'reckless' and that its cause was founded on a myth.¹⁸ Angyal suggests by doing this, CA breached a golden rule of commercial negotiation, which is to be polite and respectful to opponents¹⁹ with CA's conduct also being contrary to its commercial interests since being respectful to the ACA would have made it more likely it would have agreed with CA's requests. Thus, it gave CA a bad image in the public domain and demonstrated that CA was unwilling to come to a mutually beneficial agreement with the ACA.²⁰

It also became apparent as the dispute continued that CA's bargaining position was being reduced since it was letting its 'only income-producing asset walk out the door.'²¹ CA generates much of its revenue from broadcasting rights, but without players, there would be no matches, no broadcasting rights, and thus, no revenue for CA.²² Angyal suggests that with no product for CA to sell to sponsors, its bargaining power was 'instantly reduced.'²³ Thus, it was clear, not only to sponsors, but also to the ACA, that the longer the pay dispute dragged on, the weaker CA's position would become.²⁴ This was further highlighted by the fact that in the later stages of the negotiations CA stated it would demand the dispute be sent to arbitration if it was not finalised within a set time frame. Angyal suggests this not only demonstrated a sign of weakness, but also represented an empty threat since CA could not legally force the ACA to arbitration. However, with the all-important Ashes series fast approaching something had to give and a new EBA was finally agreed on.

C The Final Agreement

The most significant aspect of the new EBA was the retention of the revenue sharing model that had been at the forefront of negotiations. However, the ACA had also been arguing for several additional implementations, and the resulting Memorandum of Understanding also stipulating that:

- there would be one agreement for both male and female players;
- a revenue sharing model ensuring that all players, both male and female, are partners in the game of cricket with CA; and
- a gender equity pay model.²⁵

Thus, as well as preserving rights, including pay for the male state players, the EBA also represented a massive progression to ensuring gender equality within professional cricket with international women's cricketers base rate increasing from \$40,000 to

¹⁷ David Peever, *No joy for cricketers on slippery pitch* (13 July 2017) *The Weekend Australian* <<http://www.theaustralian.com.au/opinion/no-joy-for-cricketers-on-slippery-pitch/news-story/cbf3d38309177fa60fdbd46a9b35c551>>.

¹⁸ *Ibid.*

¹⁹ Robert Angyal, above n 11.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Peter Lalor, *Cricket pay dispute finally resolved* (3 August 2017) *The Australian* <<http://www.theaustralian.com.au/sport/cricket/cricket-pay-dispute-finally-resolved-as-ca-players-reach-agreement/news-story/16309d0a2e333a51e20c1fff435fed4a>>.

\$72,076, a 80.2 per cent pay increase²⁶— the biggest pay rise in the history of Australian women's sport.²⁷

One of the reasons CA wanted to move away from the revenue sharing model was so it could place more funding into grassroots cricket to help ensure local clubs were more likely to be prosperous, and thus help in the development of young cricketers. It has been suggested that grassroots funding has been a big winner in the dispute, receiving a \$25 million boost,²⁸ some of it coming from the players' money and some from administrative cost cutting by CA.

There is little doubt the on-going pay dispute did not create a good image for Australian cricket. However, within months of the new EBA being agreed to, cricket in this country found itself facing a much greater threat to its image when it was revealed Australian players had been involved in ball tampering in South Africa. Before examining this specific case, the paper will look at previous examples of ball tampering in international cricket and why the sport is prone to such controversies.

III THE BALL TAMPERING INCIDENT

A Tampering with the Cricket Ball

Cricket is a game that is centuries old. Its use of the 'stump' may reflect its early days being played in the forest, and indeed the linguistic root of the word cricket is the Anglo-Saxon word 'cricce' meaning 'something which is not quite straight', a reflection on the fact that the early bats were simply broken off tree branches.²⁹ The first preserved cricket score and the earliest code of laws, meanwhile, date back to 1744.³⁰ It was in the nineteenth century that formal competitions developed, the English County Championships being first held in 1864 while inter-colonial, now interstate, matches have been held in Australia since 1856.

As the game of cricket developed these formal competitions, a feature was the use of a red-dyed leather ball, one which was expected to wear over the course of a team's innings. This is unique to cricket, as in all other ball sports the ball is kept in close to pristine condition, at least at the high levels of the game. On the professional tennis circuit, for instance, balls are changed every seven games, while a golfer is entitled to change balls every hole. All the football codes, meanwhile, use multiple balls for matches. In the sport closest in style to cricket, namely baseball, a new ball is used for nearly every pitch at the Major League Baseball (MLB) level. The reason this rule was introduced was player safety as up until the early twentieth century, when only one ball was used, pitchers would deliberately let the white ball get dirty in order to make it darker, and therefore harder for the batter to see, which also made it more dangerous for the batter.

Thus, a unique feature of cricket is its use of a deteriorating ball in order to obtain the right competitive balance between batsman and bowler. However, this also means there is an incentive to further deteriorate a semi-old ball in order to help make it move more

²⁶ Ibid.

²⁷ Mary Gearin, above n 1

²⁸ Ibid.

²⁹ Richard Brasch, *How Did Sports Begin: A Look into the Origins of Man at Play*. Melbourne: Longman, 1971, 56.

³⁰ Ibid, 54.

in the air and therefore be harder to hit. Traditionally, this has been achieved by players' polishing one side of the ball and leaving the other side rougher, thus creating an aerodynamic difference that affects its movement through the air. Polishing a ball on a player's clothing has always been allowed, though some ball tampering incidents have involved using other substances to help with this polishing. Other ball tampering incidents, meanwhile, have involved doing things to increase the uneven surface on the rough side of the ball.

Previous incidents of tampering with the ball in Test match cricket that have led to the ICC imposing sanctions include England's captain, Mike Atherton, for drying the ball with dirt he had kept in his pocket, and South African bowler, Vernon Philander, using his thumb and fingers to scratch a ball. South African captain, Faf du Plessis has meanwhile been sanctioned twice, once in 2013 for rubbing the ball on the zipper of his cricket pants, and again in 2016 for using a mint to help shine the ball. Pakistani's Shahid Afridi was sanctioned after biting on the ball during a One Day International.³¹ The Pakistan team, meanwhile, abandoned the test at Lords against England in 2006 after it was accused of ball tampering.³² What is interesting about all these incidents is the nature of the punishments that were handed out by the ICC, as they usually consisted of no more than fines, except for Afridi who was suspended for two T20 internationals.³³ It is also suggested that none of these incidents were as serious as the use of sandpaper by the Australians at the Newlands Ground in Cape Town.

B The Incident in South Africa

After the results of the first two tests of the four match 2018 series against South Africa were shared, the two teams started the Third Test at Cape Town tied 1-1. It was during the lunchbreak on the third day, with South Africa starting to gain an ascendancy in the match, that David Warner approached Cameron Bancroft to implement his idea to tamper with the ball.³⁴ It appears Bancroft was selected because he just happened to be in the vicinity at the time, and as 'a fairly low-profile player,' he would not 'attract too much attention' in the field.³⁵ The actual plan was initially reported as involving taking some adhesive tape out onto the field and attaching granules of dirt in order to rough up the ball.³⁶ However, CA later stated the players used a piece of sandpaper, not tape.³⁷

With 18 television cameras focused on the Cape Town ground, it was all but inevitable that Bancroft's actions would be caught, and when it was, Australian coach, Darren Lehman, sent twelfth man, Peter Handscomb, onto the field to inform Bancroft his actions had been captured on television. Bancroft then hid the offending piece of sandpaper in his underpants, an action that was also captured by the cameras.³⁸

At a subsequent press conference at the end of the day's play, Smith and Bancroft admitted to the ball tampering, appearing to give the impression that nothing more

³¹ Wayne Smith, 'To us it is cheating, to the ICC it's a misdemeanour', *The Australian*, 27 March 2018, 32.

³² 'A cheats gallery,' *The Australian*, 26 March 2018, 32.

³³ Wayne Smith, above n 31.

³⁴ 'Not what it seems: How the plan to tamper with the ball was hatched', *The Sydney Morning Herald*, 26 March 2018, 46.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Peter Lalor, 'Banned players ready for a fight,' *The Australian*, 29 March 2018, 32.

³⁸ 'The big cheat', *The Australian*, 26 March 2018, 1.

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would come of it other than, for them, a small fine from the ICC. Reality, however, would prove to be very different.

C The Reaction and Sanctions

News of the ball tampering began to dominate Australian television news the following Sunday morning, Australian time. Even then it was clear this was a major sporting scandal and news story, with James Sutherland, Chief Executive Officer of CA, being forced to conduct a live press conference later that day. By the morning of the fourth day's play the seriousness of the situation was becoming evident to the Australian players, with Smith and Warner being forced to stand down as captain and vice-captain, with wicketkeeper, Tim Paine, taking over moments before the start of day's play.³⁹ Sanctions were then imposed by the ICC with Smith and Warner receiving a one match ban and fined their match fees, while Bancroft was fined 75 per cent of his match fee.⁴⁰

The Monday morning newspapers in Australia were dominated, both front and back pages, by headlines and stories about the scandal.⁴¹ With such a strong public backlash, it was inevitable that CA would impose harsher sanctions than the meek ones handed down by the ICC. A few days later it announced twelve months bans for both Smith and Warner, and nine for Bancroft.⁴² With such severe penalties, it was inevitable that the players would consider appealing the decision.

D The Legal Ramifications

The legal basis for all internally imposed sporting penalties is a contractual one, based on express terms in the contract itself, or a clause binding them to a code of behaviour or conduct. In the case of the three Australian players they had a week to accept the code of behaviour charge brought against them, or challenge the suspensions at a hearing.⁴³ One basis of such a challenge would be restraint of trade for, while contracts within professional team sports undoubtedly provide a legal basis for the imposition of sanctions, any penalty that is out of proportion to the actual conduct may represent a restraint of trade. There were further legal ramifications for Smith and Warner, with both losing their Indian Premier League (IPL) contracts, worth \$2.4m each, with Rajasthan and Hyderabad respectively.⁴⁴ Personal sponsorship agreements with various parties, such as the Commonwealth Bank in Smith's case, were also terminated.

For CA, too, there were other potential ramifications, it being suggested the scandal could not have come at the worst time as CA was in the process of negotiating a new broadcasting rights deal.⁴⁵ However, CA was still able to negotiate a new \$1billion broadcasting deal, despite the fallout from the ball tampering scandal.

³⁹ Chris Barrett, 'Smith, Warner stood down amid cheating revelations', *The Sydney Morning Herald*, 26 March 2018, 4.

⁴⁰ Peter Lalor, 'Smith's Shame', *The Australian*, 26 March 2018, 1.

⁴¹ Ibid; Peter Lalor and Andrew Faulkner, 'Push to abandon tainted third test,' *The Australian*, 26 March 2018, 32; 'Shame: Smith stood down' *The Sydney Morning Herald*, 26 March 2018, 1; 'Disgrace that stopped a nation', *The Sydney Morning Herald*, 26 March 2018, 48.

⁴² Peter Lalor, above n 37.

⁴³ Chris Barrett, 'Ball in the other court as banished trio consider legal options', *The Sydney Morning Herald*, 1 April 2018, 50.

⁴⁴ Robert Craddock and Ben Horne, '\$2.4m IPL deals to be ripped up', *The Australian*, 27 March 2018, 31.

⁴⁵ Jennifer Duke, 'Cheating scandal crushes \$1b TV gambit', *The Sydney Morning Herald*, 26 March 2018, 6.

IV DISCUSSION

The dispute over a new EBA between CA and ACA indicates the importance of both parties being willing to negotiate in order to reach a suitable agreement. It is suggested CA was the party less willing to negotiate, to its eventual cost, as the result of the dispute has been described as a 'humiliating defeat' for CA.⁴⁶ One feature of CA's approach was that it did not send its Chief Executive, James Sutherland, to the early negotiations, and Angyal suggests its failure to send its best and most influential negotiator contributed to its defeat in the dispute.⁴⁷ Angyal also suggests this failure to do so implied to the ACA that CA was not serious about the resolution of the dispute, and that CA was not trying to reach an agreement of any sort. Additionally, it was not clear to the ACA that the negotiator sent by CA actually represented and spoke on behalf of CA's Board.⁴⁸ Consequently, this only frustrated the ACA and brought the negotiations to a standstill.

The Memorandum of Understanding that was finally reached clearly favoured the ACA, as not only was the revenue-sharing model retained, but the players also received a larger share of the revenue.⁴⁹ It is suggested the benefits of the revenue-sharing model are exemplified by the fact that Australian Football League (AFL) players have amicably entered into a revenue sharing agreement with the AFL⁵⁰ while rugby union has used the model for decades. Thus, the fact other professional sports have adopted this scheme indicates that it is a mutually beneficial and effective model.

It is also suggested that the eventual back down by CA indicates it was the players who had the greater bargaining power. One contributing factor was that CA failed to keep the players under contract during negotiations, instead allowing the contracts to lapse on 30 June. The authors' opinion is that CA should instead have extended all existing contracts with the players for twelve months, or at least six, to allow both parties to continue working under the old EBA until a new one was negotiated. It is further suggested the back down highlighted the fact CA needed the players more than the players needed it, the main reason being the emergence of the Twenty20 domestic competitions around the world. Thus, unlike previous generations of cricketers, present day players have opportunities to make money from the sport other than through being employed by CA, or its predecessor, the Australian Cricket Board (ACB).

Perhaps the most closely similar situation in Australian cricket occurred in the late 1970s with the emergence of World Series Cricket (WSC).⁵¹ While the central reason for WSC was Kerry Packer's failure to secure the test match broadcasting rights for Channel Nine, another key factor was that the Australian players had been in an ongoing pay dispute with the ACB. When another opportunity to earn money from cricket became available, nearly all of Australia's top cricketers signed up for WSC. In this present dispute, the players likewise had other cricket opportunities, and their united front meant CA was facing the real possibility of having to use players from below first-class level if it was to fulfil its contractual obligations.

⁴⁶ Robert Angyal, above n 11.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Peter Mac, above n 7, 5.

⁵¹ For further discussion on World Series Cricket see Chris Davies, 'News Ltd v ARL, South Sydney v News Ltd – and the Question of Authorisation Under s 88 of the Trade Practices Act' (2002) 10 *Trade Practices Law Journal* 215, 216.

This then raises the question as to whether CA had the option of not entering into an EBA that was not on its term, and instead, selecting its best available team and promoting it as a development team. It should be noted that CA does have a development team, Australia A, that regularly plays matches against development teams from other countries. It is suggested, however, that playing a development team as your number one team would have had a significant impact on the spectators in attendance at games, as well as the television audience. During WSC, the then ACB was effectively selecting a third XI due to the top twenty or so players all having signed with WSC. It created a significant drop in revenue which was one of the driving forces for a reconciliation after just two years, and very much on Kerry Packer's terms. It is suggested, too, that around a 100 players would have been unavailable due to the EBA stalemate, meaning CA would have fielding the equivalent of an eleventh XI, financially unsustainable in the opinion of the authors. Thus, a crucial element of the players' approach to the EBA negotiations was the united front taken by all first-class cricketers in Australia.

Another feature of the dispute was the fact that at various times mediation and arbitration were mentioned as possible circuit breakers. The question that then arises is whether the use of a mediator would have helped. It is suggested the answer is probably 'no' due to the fact that the underlining problem was the two very different, and effectively mutually exclusive, pay models that were being proposed. Mediation, therefore, was not likely to provide a compromise since it was only going to be resolved by one of the parties backing down. That party was always going to be CA as it had the weaker bargaining power as the players had taken a stand that effectively involved all Australian first-class cricketers taking strike action. Such a measure has proven successful in a number of other sports when the players have been in dispute with a governing body, or owners. English football players, for instance, threatened strike action in 1961 if the Football Association (FA) did not drop its maximum wage restraint, which the FA agreed to do. Actual strike action by players in Major League Baseball (MLB) and the National Hockey League (NHL) meanwhile prevented the introduction of salary cap in both of these leagues.

However, strike action by contracted players does raise the question whether CA could have made a damages claim against the players for any loss of income resulting from the players' refusal to fulfil their contractual obligations. As has been previously mentioned, the players' contracts concluded on 30 June. Thus, the only tour that had to be cancelled was an Australia A development tour to South Africa which, rather than being a revenue raising event, actually costs a significant amount of money as it receives no television coverage and little spectator interest. It is suggested therefore that another crucial aspect of the EBA negotiations was that, at the time of the tours, when CA could have claimed damages from players for any losses, the players were out of contract, and therefore not liable to CA.

The call by CA for the process to go to arbitration would have meant a decision being made by someone external to the dispute. However, it was clear the players were not willing to be involved in such a process. What was also evident during the drawn out process was that public opinion was on the side of the players. However, during the ball tampering scandal it was clear it was not, and it could be argued that public opinion impacted on the severity of the penalties imposed by CA. It is suggested that even if it did, in this particular situation it was a relevant consideration, given that CA relies on revenue from gate receipts and broadcasting rights. A further important revenue stream

is sponsorship, and Davies, for instance, has suggested that the view of sponsors has impacted on penalties given to National Rugby League (NRL) players for off-field behaviour that have harmed the image of the sport.⁵²

The penalties imposed by CA highlight that, as with other sports, contract law provides the legal basis for their imposition. Clauses contained within standard playing contracts can expressly state that a player is in breach for both on-field and off-field behaviour. In *Carlton Football Club and Williams v Australian Football League*,⁵³ AFL player, Greg Williams, was suspended by the AFL tribunal for nine matches after pushing an umpire during a game.⁵⁴ The matter was then taken to the Supreme Court where the trial judge held that the tribunal's decision was 'of no force or effect.'⁵⁵ The Court of Appeal, however, overturned Justice Hedigan's decision, Justice Tadgell, noting that the 'fundamental issue' was 'whether the league is entitled to maintain the decision of the tribunal.' However, his Honour also noted that 'although it might have been possible' no 'reliance was placed on the doctrine of restraint of trade.'⁵⁶ Justice Tadgell then held that the player's contract contained a provision 'which binds the player to comply with the AFL Rules and Regulations, which in turn requires him to submit to the jurisdiction of the AFL Tribunal.'⁵⁷

It is suggested that CA was entitled to impose penalties on the players because of similar contractual provisions. Natural justice, however, must be complied with and, while CA received some media criticism for taking too long to react, it meant that it carried out a proper investigation to find out who was involved. Another requirement of natural justice is that the players also needed time to present their case, and the fact that the players had three weeks in which to appeal the decision indicated that this requirement had been fulfilled. It is suggested, however, that the above mentioned obiter in *Carlton Football Club and Williams v Australian Football League* indicates that restraint of trade can be argued when challenging tribunal decisions, particularly as regards their severity. The restraint of trade doctrine requires the application of the *Nordenfjelt*⁵⁸ test, namely (1) is the contract or regulations reasonably necessary to protect the interests of the party in whose favour the contract or regulations are made; (2) is the contract or regulations unreasonable in its impact on the party who is affected by the restraint; and (3) is it unreasonably injurious to the public.⁵⁹

In regards to CA, the penalties were necessary to protect its interests as its credibility with sponsors, broadcasters and the general public would have been diminished had it not imposed them. Most cases involving restraint of trade in sport have involved the issue of whether it was unreasonable in its impact on the players, and, given the huge discrepancy between the penalties handed down by the ICC and CA, it was definitely arguable that the duration of the CA penalties was excessive and that they, therefore, restrained the players' ability to ply their trade. Smith, Warner and Bancroft, however, all decided not to challenge the suspensions, Smith stating they had been 'imposed by

⁵² Chris Davies, 'The International World of Sport and the Liability for Off-field Indiscretions' (2011) 23 *Bond Law Review* 41, 59, 65.

⁵³ [1998] 2 VR 546.

⁵⁴ *Ibid.*, 547-8.

⁵⁵ *Ibid.*, 548.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 553. Justice Hayne also allowed the appeal, while Justice Ashley dissented.

⁵⁸ *Nordenfjelt v Maxim Nordenfjelt Guns and Ammunition Company* [1893] AC 535.

⁵⁹ *Ibid.*, 565.

CA to send a strong message and I have accepted them.⁶⁰ It is also the view of the authors that, given the circumstances, the penalties handed down by CA were reasonable. While twelve months may seem a heavy penalty, it has to be remembered that they were handed down at the end of the Australian cricket season. Thus, they only came into practical effect at the beginning of the next cricket season, in September 2018. This also highlights that a shorter, six month ban would have been all but meaningless since it would have only covered the off-season. The bans were also only for Australia which meant the players were free to play overseas, with both Smith and Warner playing in, for instance, the Canadian domestic Twenty20 competition.

While the third aspect of the *Nordenfelt* test, namely it cannot be injurious to the public has rarely been an issue in sport cases, the public interest is an interesting consideration in this case. On one hand, it is arguable it was not in the public interest to suspend three of Australia's best players, but on the other it is suggested it was the public outcry at what had happened that forced CA to take such a strong hand. It is also arguable that it was this public outcry that effectively forced the players not to appeal the severity of the penalties as it was important for Smith, Warner and Bancroft to regain public support if they were to continue their cricket careers in Australia.

There were other contractual repercussions from the ball tampering incident as a number of sponsors terminated contracts with the players. The legal basis for such action can be a term in the contract allowing the sponsor to terminate the contract for behaviour by the player which is detrimental to its brand. Davies has also suggested that, if no such clause is expressly contained in the contract, it is arguable it exists as an implied term.⁶¹

It is also suggested that the incident also highlighted the inadequacies of the present penalties for ball tampering that are imposed by the ICC and that the discrepancies between the penalties handed down by it and by CA indicate that the ICC must increase its penalties. ICC President, Dave Richardson, has acknowledged that, firstly, ball tampering needs to be more closely monitored by the umpires, and, secondly, penalties need to be increased. Richardson, however, has also stated that one of the present problems is the reliance on local broadcasters to uncover ball tampering,⁶² with the incident in Cape Town being a good example. There have also been suggestions by former players such as former New Zealand fast bowler, Richard Hadlee, and South African fast bowler, Allan Donald, that the laws should actually 'be relaxed to allow for a better contest between bat and ball.'⁶³ This does not mean allowing the use of a tool, such as a sandpaper, but allowing the bowler to use his fingers to, for example, adjust the seam of the ball. Even if this is not officially approved by the ICC, it is still at the lower end of incidents involving ball tampering, and therefore should attract a minimum penalty. This was what South African fast bowler, Vernon Philander, was sanctioned for and for which he received a fine. It is suggested, however, if this is considered ball tampering by the ICC, it should attract at least a one match penalty. The incident involving the Australians at Cape Town is clearly at the top end of the scale as it involved taking what amounts to a tool onto the ground. It is suggested that the use of a tool to alter the ball should attract a minimum penalty of six matches. It is further

⁶⁰ Peter Lalor, 'Smith won't fight against year in exile', *The Australian*, 5 April 2018, 32.

⁶¹ Chris Davies, above n 52, 62.

⁶² Peter Lalor, above n 60.

⁶³ Andrew Faulkner, 'What Bancroft and his skipper hoped to achieve', *The Australian*, 26 March 2018, 32.

suggested that as all the other known incidents of ball tampering fall somewhere in between these two situations, the sanctions imposed should reflect this. However, all penalties should include a suspension, rather than just a fine.

The final consideration from the ball tampering incident was the report CA commissioned from The Ethics Centre. Its 147 page report, entitled 'Australian Cricket: A Matter of Balance'⁶⁴, was released in October 2018. The report raised the issue of winning at all costs, concluding that 'CA had made the fateful mistake of enacting a program that would lead to winning without counting the costs.'⁶⁵ It also stated that the 'broad consensus amongst the stakeholders is that CA does not consistently live its values and principles' and 'is perceived to say one thing and do another.'⁶⁶ Thus, the report has raised serious issues as to how CA governs the sport, and indicates that part of the reason why the ball tampering issue arose was the inherent culture of how the game was being played in Australia. One recommendation from the report is the establishment of a three person Ethics Commission 'to hold all participants in Australian Cricket accountable to the ethical foundation of the game.'⁶⁷ Hopefully, the formation of such a Commission would help to prevent a repeat of the Cape Town ball tampering incident.

V CONCLUSION

Mac has suggested that the future of Australian cricket was jeopardised by CA's 'insatiable greed' during the prolonged enterprise agreement negotiations.⁶⁸ However, the dispute was finally resolved and the indications are that the ACA and CA have been working together to heal the strained relations for the good of the game.⁶⁹ It is suggested that the dispute has highlighted the nature of enterprise bargaining agreements in professional sport, as well as the ever-increasing commercialisation of sport, and the need for governing bodies, such as CA, to be amicable and conduct their negotiations effectively in order to strike an equitable bargain with a player representative body. The consequences of failing to do so were exemplified by CA having to back down on its demands which, it is suggested, highlights that, in such a dispute, it is now the players who hold the bargaining power. It is suggested that CA made a crucial mistake in allowing the players' contracts to expire before any new agreement had been reached. Once that had occurred, CA had no power over the players, nor were the players going to be liable for any breach of CA contractual obligations with sponsors and broadcasters.

One of the underlying issues in CA's dispute with the ACA was what type of contract would be utilised under the new EBA. Contract law was again a central aspect of the ball tampering incident in South Africa, for while it initially represented a breach of the laws of cricket, it was contract law that formed the legal basis for the penalties that CA imposed and for the termination of sponsorship deals. It is suggested that while these penalties were, *prima facie*, harsh, given the severity of the incident and the late season timing, they were reasonable, and therefore not a restraint of trade.

⁶⁴ The Ethics Centre, 'Australian Cricket: A Matter of Balance,'

⁶⁵ *Ibid.*, 8.

⁶⁶ *Ibid.*, 11.

⁶⁷ *Ibid.*, 119.

⁶⁸ Peter Mac, above n 7, 5.

⁶⁹ Mary Gearin, above n 1.