SHOW ME THE MONEY!!! PLAYER AGENTS AND CONFLICTS OF INTEREST

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Professional sport in the 21st century is big business. It is not just athletes who benefit from this; player agents also operate in an increasingly competitive and lucrative industry. This article reviews the development of the player agent industry, focussing on the American and Australian experiences. One of the key features of this industry is consolidation - more and more players are being represented by the same sports agency firm. In light of the consolidation of the player agent industry, it is almost inevitable that conflicts of interest will arise. Australian sport has lagged behind the United States in introducing regulations governing the behaviour of player agents. Although the common law of fiduciary obligations will apply to the player/agent business relationship, it is submitted that the most appropriate method of seeking to maintain and enforce the integrity of the athlete/agent relationship is to introduce and, subsequently, to enforce effective regulations regarding the accreditation and activities of sports agents.

Introduction

> *"I will not rest until I have you holding a Coke, wearing your own shoe, playing a Sega game featuring you, while singing your own song in a new commercial, starring you, broadcast during the Super Bowl, in a game that you are winning. And I will not sleep until that happens."*[2]

The image of a highly successful, fast-talking, oleaginous sports agent named Jerry Maguire is a familiar one. While not as instantaneously recognisable as "show me the money!" the above quote demonstrates the lengths to which player agents are prepared to go in negotiating contracts, endorsements and other deals for their clients. These agents are rarely responsible only for negotiating player contracts. Player agents may also furnish their clients with a variety of other services, including legal advice; obtaining and negotiating endorsement and publishing contracts; financial management and accounting; insurance, investment, tax and estate planning; public relations; coordinating travel arrangements; and resolving any disputes that may arise under the athlete's employment contract.

Player agents operate in a competitive and lucrative industry. It is trite to say that professional sport in the 21st century is big business. In the United States,

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[2] Jerry Maguire (Gracie Films and TriStar Pictures, 1996).

baseball players are regularly traded for sums in excess of one hundred million dollars. In Australia, the two main football codes – the National Rugby League and the Australian Football League – have been reported to have a combined revenue base of substantially more than $500 million.[3]

As revenues in professional sports have increased, so have players' salaries. As salaries have increased, the business of athlete representation has become more profitable for player agents. Inevitably, competition among agents has intensified. It is this cutthroat competition which has led American commentators to describe the player agent business as "one of the most deceptive and unethical aspects of the sports industry'[4] and 'responsible for much of what is wrong with sports today".[5] Nor is the Australian sporting landscape immune from criticism of the increased influence wielded by a relatively small number of well-connected player agents. For example, several years ago it was reported that "player managers are in bad odour these days",[6] particularly following Australian soccer player Harry Kewell's transfer from Leeds to the Liverpool club in the English Premier League. Bernie Mandic, Kewell's agent, received £2 million in commission, almost half what Leeds received in transfer fees from investing a decade of time in Kewell.[7]

As a result of the greater clout wielded by player agents in professional sport today, a minefield of issues are emerging. This article seeks to examine this area by reviewing the following issues:

- The development of the player agent industry and an analysis of the influence exerted by such agents in sport today;
- The potential for conflicts of interest to arise in the player agent industry;
- Examples of circumstances where conflicts of interest have arisen in American and Australian sport, and how those conflicts have been managed;
- The common law of fiduciary duties which applies to the player/agent business relationship;
- A review of the current regulation of player agents in Australian and American professional sport;

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[3] R Masters, 'The Big Money League', *www.smh.com.au*, 26 July 2003.
[4] E Lock, 'The Regulatory Scheme for Player Representatives in the National Football League: The Real Power of Jerry Maguire' (1998) 35 *American Business Law Journal* 319 at 320.
[5] B Couch, 'How Agent Competition and Corruption affects Sports and the Athlete-Agent Relationship and What Can Be Done to Control It' (2000) 10 *Seton Hall Journal of Sport Law* 111 at 111.
[6] R Masters, note 3.
[7] Controversy surrounded this transfer, with Leeds forced to reduce its fee to prevent Kewell simply playing out his last year under contract and then leaving the club on a free transfer, under the Bosman ruling. Mandic was the subject of an official investigation into his role in the transfer.

- Suggestions for reform to seek to ensure that player agents operate in a more transparent and properly regulated system which can be appropriately enforced.

The Development of the Player Agent Industry

One of the earliest and best known player/agent relationships was between Arnold Palmer and Mark McCormack of International Management Group, a deal which was consummated by a handshake in the 1960s. Since the early 1970s, the player agent industry has experienced a vast expansion. Relatively anonymous a few decades ago, agents are now the central figures in contract negotiations for professional athletes.

Decades ago, agents were not even welcome during a contract negotiation, as team general managers would often refuse to deal with players who were represented by agents. For example, the legendary coach of the Green Bay Packers professional football team, Vince Lombardi, had a crude but certainly effective method of frustrating the fledgling attempts of sports agents to seek to exert influence in American football in the early 1960s. When informed that an agent had come to negotiate player Jim Ringo's contract, Lombardi walked into his personal office and closed the door. Upon his return a few minutes later he told the would-be negotiator: "You are negotiating with the wrong team. Mr Ringo has just been traded to Philadelphia."[8]

An American commentator argues that there are several factors that contributed to the growth and acceptability of player agents.[9] First, the increased media coverage of sport has led to escalating revenues for professional teams. Athletes have subsequently demanded a larger piece of the revenue pie. Second, the formation of alternative leagues in American football, basketball and hockey during the 1970s and 1980s enabled them to compete with the established leagues, causing players' salaries to increase. This factor was certainly mirrored in Australia, with the formation of World Series Cricket in the 1970s, Super League in the 1990s and Rupert Murdoch's foray into the ranks of Rugby Union with massive financial backing for the Super 12 and TriNations format. Third, Brown focuses on the role of the players' associations which have been transformed from powerless, loosely organised groups into true labour unions with the power to bargain collectively and call strikes in order to obtain their demands.[10] Again, this is a pertinent factor in Australian sport. For example, the Rugby Union Players Association threatened to boycott the 2003 Rugby

[8] M Weiss, 'The Regulation of Sports Agents: Fact or Fiction?' (1994) 1 *Sports Law Journal* 329 at 330.
[9] J.E.Brown, 'The Battle the Fans Never See: Conflicts of Interest for Sports Lawyers' (1994) 7 *Georgetown Journal of Legal Ethics* 813 at 815.
[10] Ibid.

World Cup unless its demands about remuneration and conditions were satisfied.[11] Finally, as the sports industry has expanded to become a part of the general entertainment industry, athletes have greater opportunity to earn additional income through the endorsement of various goods and services.

As a result of these factors, it is generally accepted by athletes and teams alike that a player should not negotiate his or her own contract, since most players lack knowledge of contract and labour laws and have not developed the negotiation skills necessary to protect their interests. In theory:

> *"an effective player agent can be considered a great equaliser of the bargaining power between an athlete and a professional sports franchise, serving to bridge the gap of unequal access to information in a situation where a well-established corporate entity with vast resources sits across the bargaining table from an often young and naïve athlete."*[12]

Unfortunately, the reality of the sports agent business is often similar to the fast-talking, morally compromised world of the fictional Jerry Maguire. Weiss states that "the number of problems resulting from athlete-agent interactions have swelled almost as fast as the ranks of the agents themselves".[13] Particularly in the United States, these problems have been caused by the incompetence and abuse by several unscrupulous agents. The "shady perception of the sports agent is … reflected in their negotiation tactics and negative effect on young players."[14] It has even been suggested that athletes who were once thought to have been protected by their agents are now perceived as in fact needing protection from those agents.[15]

Rosner points out that one of the major features of the sports agent industry in America has been the consolidation of sports agencies into large, full service agencies such as SFX Sports, Octagon Athlete Representation, Assante Corporation and International Management Group.[16] The American experience has shown that it is more and more difficult for small firms and independent agents to attract and keep clients because they do not have the resources and/or the expertise to offer the same range of services as large agencies. As a result of this consolidation, more and more athletes are being represented by the same

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[11] RUPA commenced litigation against the Australian Rugby Union which was ultimately settled after RUPA failed to gain an interlocutory injunction restraining the ARU from enforcing a deadline for the signing of Rugby World Cup player contracts.
[12] Brown, note 9, at 816.
[13] Weiss, note 8, at 330.
[14] Couch, note 5, at 119.
[15] A Narayanan, 'Criminal Liability of Sports Agents: It is Time to Reline the Playing Field' (1990) 24 *Loyola Law Review* 273 at 274.
[16] S R Rosner, 'Conflicts of Interest in the Sports Agent Industry' (Working Paper dated 16 July 2002 – see *www.wharton.upenn.edu/srosner/output-WO.htm*) at 6.

sports agency firm. For instance, SFX Sports represents a staggering one-sixth of all players in the NBA and in the hockey, baseball and football leagues.[17]

Consolidation is also becoming more prevalent in the Australian player agent industry, particularly in the football codes. For example, George Mimis, Managing Director of the Australian arm of SFX Sports, acts for many of the game's superstars and is regarded as a powerful rugby league player agent.[18] Ron Joseph, a high profile AFL agent, also has a very large stable of players. The bad publicity and negative perception of sports agents in America has, in recent times, been mirrored in Australia. For example, the Chief Executive of the National Rugby League, David Gallop has been quoted as stating:

> *"This certainly highlights the need for some regulatory safeguards where young men, sometimes with a lot of money, are allowing third parties to manage their affairs. I can also see the implications of one manager having so much influence at a club and the club's exposure to this"*.[19]

The Potential for Conflicts of Interest

It has been suggested that conflict of interest is "one of the predominant ethical dilemmas in sports representation."[20] It is unquestionable that there are numerous situations unique to the player agent industry which could give rise to at least the appearance of conflicts of interest. Some of those situations are referred to below.

Representing Players from the Same Team

Primarily due to the consolidation of the sports agency business, it is relatively common for a player agent to represent more than one player from the same team. In such cases, those athletes will be seeking contracts from the same team management, with the same agent representing them in those negotiations. It is not difficult to imagine situations where the agent is placed in a position to compromise the demands of one client in order to seek a more favourable contract for the other; to consciously or unconsciously favour the interests of one client over the other; or to use the bargaining power of one client to improve the negotiating position of the other client.

The conflict is further exacerbated in sports where a salary cap is in force and the players are dividing a fixed amount of money. In Australia, it is difficult to understand how a handful of powerful player agents can properly and

[17] M Fainaru-Wada & R Kroichick, 'Agents Of Influence' *San Francisco Chronicle*, 11 March 2001.
[18] R Masters, 'NRL to Crack down on Agents as Players question Mimis', *www.smh.com.au*, 10 September 2006.
[19] Ibid.
[20] Brown, note 9, at 816.

appropriately represent the majority of players in the NRL and the AFL, sports where a strict salary cap is enforced. Rugby league and AFL players are seeking the largest amount of possible compensation from a limited amount of resources.

It is submitted that player agents who act for more than one player on the same NRL or AFL team (who are each negotiating new contracts at the same time) are automatically in a potential position of conflict of interest, since an increased salary for one client would have the effect of reducing the amount of compensation available to be obtained by the other client. Whether that potential conflict materialises into an actual conflict of interest depends upon the circumstances of each case and in particular, whether the players consented to their agent representing more than one player on the same team. This issue will be addressed in more detail below.

Most sports agents would no doubt argue that the risk of conflicts of interest emerging has been overstated. This is because as an agent represents more and more players (whether of the same team or not) that agent's power increases and so does his or her ability to negotiate the best possible terms for his or her clients. In that way, market forces will drive the process, to ensure that the agent is able to negotiate the best deal for the athlete.

Certainly, agents who represent several players on the one team can exercise considerable leverage over that team. Player agents can influence team management and owners by steering superstar clients to certain teams if the owners agree to sign athletes of lesser stature who happen to also be represented by that agent. Many agents appear to have developed a sense that they are a part of a team's management and in some instances, feel empowered enough to complain to teams about their clients' selection in the team.[21]

Representing Players and Coaches/Management

A conflict of interest may also arise when an agent represents both players and coaches (or other representatives of team management) in the same league. Most coaches take an active role in the personnel decisions made by the team, including the acquisition of playing talent. Typically, coaches and players have adverse interests in negotiations, with players demanding the highest possible salary and coaches aligning themselves with management and seeking to pay a lesser amount.

In America, the potential for conflict arises quite starkly as more high profile athletes become involved in the management and ownership of professional

[21] This occurred during the 2003 Rugby World Cup, when player agent John Fordham was so upset that his star client Matthew Burke had been dropped from the Australian team that he publicly castigated the coach Eddie Jones and wrote him a letter, demanding to know the reasons for Burke's axing.

sports teams after completion of their playing careers. Magic Johnson, Michael Jordan, Wayne Gretsky and Mario Lemieux have all become owners of professional sports franchises after finishing brilliant athletic careers. As today's professional athletes often retain their popularity as endorsers well into retirement, their agents continue to negotiate lucrative new marketing and sponsorship deals. Rosner correctly points out that if the agent also represents active players, this creates a potential conflict of interest; if a team owner and player share the same agent and enter into negotiations for a playing contract, the conflict will be manifested.[22]

A similar situation occurred while Michael Jordan served as president of basketball operations and part owner of the Washington Wizards during the 1999-2000 and 2000-01 seasons. David Falk of SFX Sports –"unquestionably the NBA's top powerbroker"[23] - represented both Jordan and at least two members of the Wizards team, as well as numerous potential Wizards players. While Falk, Jordan and the NBA argued that no conflict of interest existed, the arrangement was subject to widespread criticism.[24]

The perceived conflict of an agent representing both a player and a coach was played out in the Sydney media very recently, when Sydney Roosters rugby league coach, Ricky Stuart was sacked. John Fordham was the manager of one of the Roosters' players, Ryan Cross, as well as the manager of the coach, Ricky Stuart. The Chief Executive of the club, Nick Politis was reported as being 'always troubled by Fordham managing a coach and a player at the same club, branding it a blatant conflict of interest'.[25] To add to the intrigue, Ryan Cross had earlier this season signed a new contract with the Western Force Rugby Union Club. John Fordham manages the Western Force coach, John Mitchell and several players at the Perth club.

Endorsements

One can readily imagine a situation occurring whereby a player agent is confronted with one advertising or sponsorship offer for two or more clients. The agent is likely to be forced to choose which client to propose for the offer. Also, the agent's duty of confidentiality[26] may be jeopardised when the agent negotiates an endorsement contract and represents two or more players in the same sport. Fraley and Harwell make the valid point that such players are likely to inquire what other similarly situated players receive from those types of

[22] Rosner, note 16, at 31.
[23] Fainaru-Wada & Kroichick, note 17.
[24] R Sandomir, 'Jordan-Falk Relationship Poses Conflict of Interests' *New York Times*, 30 January 2000, at 15.
[25] R Masters, *'Stuart's agent in one last hit-up at Roosters', www.smh.com.au* 2 September 2006.
[26] The duty of confidentiality invariably arises due to the fiduciary nature of the relationship between player and agent. This is discussed further below.

endorsement agreements.[27] Disclosing this information to an inquiring player may breach the duty owed to the player with the endorsement contract.

A conflict of interest could also arise when the agent bills his or her clients based upon a percentage of endorsements. A sponsorship contract may not be advisable, for example, as it may dilute the client's future marketability. Nevertheless, an agent may (consciously or unconsciously) disregard this important consideration and advise the player to accept the deal. This could "possibly hinder the [agent's] judgment and loyalty to the client's interests, since the [agent] has a personal interest in the transaction."[28]

Examples of Conflicts of Interest

The United States case of *Sims v Argovitz*[29] involved a "particularly egregious conflict".[30] The agent, Jerry Argovitz, was held to have breached his fiduciary duty to running back Billy Sims of the Detroit Lions while negotiating his client's new contract with the Houston Gamblers of the United States Football League. Argovitz happened to be the president and part owner of the Gamblers and therefore had a disabling conflict of interest in the representation of Sims that could not continue without the client's consent upon the agent's full disclosure of both the conflict of interest and "every material fact known to the agent which might affect the principal".[31] Argovitz had sought to vitiate the conflict of interest by having Sims sign a waiver four months after the original contract was signed, without suggesting that Sims seek independent advice. However, the Court noted that Sims was an unsophisticated young man and so the waiver did not avoid the conflict.

The Court held that Argovitz could have properly continued to represent Sims, provided that he:

- provided the player with full knowledge of his interest in the transaction;
- disclosed every material fact known to him which might affect the player; and
- having received such information, the player freely consented to the transaction.

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[27] R E Fraley & F R Harwell, 'The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation' (1989) 11 *Hastings Communications and Entertainment Law Journal* 165 at 186.
[28] Brown, note 9 at 819.
[29] 580 F Supp 542 (E D Mich.1984).
[30] Fraley & Harwell, note 27, at 180.
[31] Note 29 at 548.

Thus, the American courts have held that a player agent may continue to represent an athlete in situations of potential conflict, provided that fully informed disclosure is made to the player. Merely telling the athlete of the general conflicting interest is insufficient. Rather, the agent must inform the player of all facts that may be material or which might affect the player's interests. The level of disclosure required has been variously described as a "demanding requirement"[32] and "so exacting that it is difficult to imagine a reasonable person consenting to continued representation by the agent with the conflict after the [agent] has made such a disclosure."[33]

The test propounded in *Sims v Argovitz* is an appropriate way of determining whether an actual conflict of interest has arisen, such that the player agent should no longer represent the athlete. Whilst there is no Australian case law on this issue, it is submitted that in situations where a sports agent is alleged to have breached his or her fiduciary duty owed to the player, the Australian courts should adopt the American test.

Another case concerning conflicts of interest in the player agent industry was *Lendl v ProServ Inc*[34] in which tennis star Ivan Lendl sued his former sports representative company, ProServ for breach of fiduciary duty based on a conflict of interest. Lendl alleged that ProServ had engaged in a practice of 'packaging' his talents with other clients. That is, ProServ had committed Lendl to merchandising arrangements, appearances and exhibitions, at less than favourable terms, as a means of diverting income to its other tennis player clients.

ProServ was also involved in event management. Lendl alleged that since his appearance fees were consistently less than his actual market value, ProServ had exploited him to maximise its own financial returns. The thrust of Lendl's complaint was that event management combined with player representation amounted to a conflict of interest on ProServ's part. The case was ultimately settled out of court, with the irony being that Lendl had left ProServ to in fact set up his own player agent company!

While there is no known Australian case law dealing with situations of conflict of interest on the part of player agents, there are numerous examples of such conflicts appearing to arise, albeit without the matter resulting in litigation. The AFL is a fertile environment for rumour and innuendo and this also applies to its player agents. Several years ago, a rising star named Gavin Wanganeen (then playing in the South Australian domestic league) signed a lucrative deal to play in the AFL with Port Adelaide, after a bidding war for his services. Perhaps not surprisingly, it was later reported that Wanganeen's agent was employed as a

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32 Rosner, note 16 at 48.
33 Brown, note 9 at 826.
34 No B-88-254 (D Conn, 1988).

consultant in the recruiting section of an AFL club – Port Adelaide. In rugby league, the close ties between leading agent George Mimis and NRL major sponsor Crazy John's (which also happens to have individual sponsorship deals with several Mimis clients) have been the subject of media comment.[35]

The Law of Fiduciary Duties

An agreement between a sports agent and an athlete (that is, agent and principal) gives rise to a fiduciary relationship. Such an arrangement involves the necessary trust and confidence between agent and athlete, with the agent acting for and on behalf of the player in negotiating contracts, sponsorships and the like. The High Court has characterised fiduciary relationships as:

> *"…relationships of trust and confidence or confidential relations viz trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."*[36]

If a person occupying a fiduciary position wishes to enter into an arrangement which would otherwise amount to a breach of duty (for example, where a conflict of interest existed) that person must, in order to avoid liability, make full disclosure to who the duty is owed of all relevant facts known to the fiduciary, and that person must consent to the fiduciary's proposal.[37] What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases whether fully informed consent has been given.

Meagher, Gummow and Lehane suggest that "the degree of sophistication of the client is also relevant in assessing whether consent has been given".[38] This would be particularly apposite in cases involving professional sportspeople, as most agents are in a position of significant bargaining advantage in dealing with their predominantly young, often uneducated, commercially inexperienced clients. In those situations, a strict test should be applied to determine whether

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[35] R Masters, note 3.
[36] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96-7 per Mason J.
[37] *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443.
[38] R Meagher, D Heydon & M Leeming, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies* (4th edn, Butterworths, 2002) at 179.

the player agent has fully discharged his or her onus to disclose all material facts concerning any possible conflict of interest to the athlete.

In some circumstances, a fiduciary will not be permitted to carry on a business which competes with that of the principal. *Re Thomson*[39] establishes that a trustee or executor will not be permitted to undertake a business which directly competes with a business carried on by the trust or estate. However, it is not the law that an agent is prohibited from acting for two principals engaged in similar businesses. Thus, under the common law, there is no *per se* prohibition on a player agent (in his or her capacity as a fiduciary) acting for two or more athletes in the same team.

The duties owed by a sports agent acting as a fiduciary will also be determined by reference to the agreement in force between athlete and agent. A fiduciary relationship can co-exist with a contract. According to the High Court in *Hospital Products*:

> *"In these situations, it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."*[40]

However, the reality is that most agreements between players and their agents are brief, pro-forma contracts which contain very few (if any) covenants or obligations to be observed by the agent. This is no doubt at least partly because the agent is in a position of strong bargaining power *vis a vis* his or her young, often uneducated, commercially inexperienced players. Given that contracts between players and agents are unlikely to include terms requiring the agent to act in good faith, or to avoid conflicts of interest, the common law of fiduciary obligations will generally prevail.

Regulation of Player Agents

The scope of this article only warrants a review of the rules in force to regulate the player agent industry in the United States and in Australia. The regulation of sports agents in the USA has been characterised by "ineffective, overlapping and disjointed regulatory schemes from various sources."[41] In America, over

[39] [1930] 1 Ch 203.
[40] Note 36, at 97 per Mason J.
[41] Lock, note 4 at 328.

half of the sports agents are lawyers.[42] As such, they are bound by the American Bar Association 'Model Rules of Professional Conduct'. Despite the fact that attorney-agents often attempt to avoid the ethical requirements of the legal profession by claiming that they act as agents and not attorneys in representing professional athletes, they remain bound by the laws governing lawyers.[43] In relation to conflicts of interest, the Model Rules recognise that such conflicts are unavoidable and so focus on an analysis of the risk of material, adverse harm to either the quality of the attorney's representation of the client or the attorney-client relationship itself.

Model Rule 1.7 is especially important in addressing the conflicts of interest confronted by attorney-agents representing more than one player from the same team. Under this rule, an attorney-agent must identify any competing interests that may impact upon his or her judgment or capacity to be diligent and loyal to the athlete, decide whether it is appropriate to continue the representation in light of these competing interests and, if so, then seek the client's consent prior to continuing the representation. It can be seen that this is very similar to the test that is applicable to fiduciaries under the Australian common law.[44]

In America, all major professional sports have adopted at least some form of regulations governing sports agents, although the efficacy of those regulations has been questioned.[45] In 1983, the National Football League Players Association became the first professional sports players association to promulgate rules regulating a sports agent's activities. The NFL Code of Conduct includes a prohibition on player agents "engaging in any other activity which creates an actual or potential conflict of interest with the effective representation of NFL players."[46] There are also regulations governing sports agencies in the baseball, basketball and hockey leagues, although there is no specific reference to conflicts of interest in the regulations governing those sports. Rather, the regulations provide for a registration or certification process which is designed to set out a code for ethical behaviour, prevent excessive agent fees and promote individual accountability.

How then, does Australian professional sport seek to gain some control over the activities of player agents, so as to protect its two most valuable commodities, the athletes themselves and the support of the Australian public? Whilst the Australian sports agent industry is in its infancy compared to the USA, there are parallels between the American and the Australian experience. Similarities have

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[42] C Lipscomb & P Titlebaum, 'Selecting a Sports Agent: The Inside for Athletes and Parents' (2001) 3 *Vand Journal of Entertainment Law and Practice* 95 at 99.

[43] *In re Dwight* 573 P.2d 481 is the key case involving lawyer discipline in this area. The Arizona Supreme Court held that attorneys are bound by the ethical code governing lawyers even when they work in another profession.

[44] See text at notes 36 and 37 above.

[45] See eg Weiss, note 8 at 339-348.

[46] Ibid at 341.

been shown to exist in the rapid development and consolidation of the player agent industry, as well as the almost routine existence of potential and actual conflicts of interest on the part of sports agents. However, in its efforts to regulate its sports agent industry, American professional sports were well ahead of their Australian counterparts.

In Australia, it was the Australian Football League which led the way in seeking to regulate the behaviour of player agents. Several years ago, the Australian Football League Players' Association instituted regulations that govern player agents.[47] The goal of the regulations is said to be:

- to provide player agents with a certification mechanism by which they can be officially recognised as being appropriately qualified to carry on the business of a player agent;

- to improve and maintain the quality, competence and professionalism of player agents through an accreditation scheme; and

- to benefit players and the AFL competition generally by allowing the players to have access to the list of accredited agents.

The AFLPA regulations specifically refer to the standard of conduct required of accredited agents, in relation to avoiding conflicts of interest. Clause 4(d) provides that player agents must:

> *"disclose to a Player prior to the Accredited Agent entering into any Representation Agreement with him and while such Representation Agreement is on foot, any conflict of interest or potential conflict of interest the Accredited Agent may have or might reasonably be suspected of having in any matter or thing (including without limitation where the Accredited Agent directly or indirectly solicits or accepts money or anything of value from an AFL club or an entity with which the Player has an arrangement arising from the Representation Agreement or where the Accredited Agent directly or indirectly holds a financial interest in an AFL Club or in an entity with which the Player has an arrangement arising from the Representation Agreement) and to declare that conflict or potential conflict to the AFL Player as soon as practicable after the relevant facts have come to the knowledge of the Accredited Agent."*[48]

There are similar provisions set out in the AFL Accredited Agents' Code of Conduct. Whilst the requirement for disclosure is a worthwhile one, the practical impact of the regulation remains in question. Young AFL players who

[47] See *www.aflpa.com.au/agents/regulations.*
[48] Ibid.

may be informed by their agent of a potential conflict are unlikely to walk away from their agency agreement. However, the existence of the regulations may at least provide some kind of deterrent benefit to discourage the unscrupulous activities of some agents.

In the past two years, other major Australian professional sporting codes such as the National Rugby League, the Australian Rugby Union and the Football Federation of Australia have followed suit and instituted (or are in the process of instituting) similar provisions relating to the accreditation and regulation of the conduct of player agents.

The regulation of Australian Rugby Union player agents was the subject of legal action in the Supreme Court of New South Wales, in *AMI Sport and Entertainment Pty Limited & Anor v Rugby Union Players Association Inc & Ors*.'[49] AMI's principal, Mr Greg Keenan, was a well known player agent, who represented several Wallabies. In August 2005, the Rugby Union Players' Association (RUPA) introduced a Player Agent Accreditation Scheme. The scheme was designed to ensure that rugby union players negotiating playing contracts with the ARU and the various state unions were represented by agents who conformed to certain standards of professional conduct. The accreditation scheme was compulsory and it provided that the ARU and the unions could refuse to negotiate with any sports agent purporting to represent a player in negotiations, unless the agent was an 'Accredited Agent' under the scheme. Evidence given during the hearing indicated that all professional agents representing elite rugby union players in Australia had subscribed to the scheme, except the Plaintiff. AMI had decided that it did not wish to subject its business to the restrictions imposed by the scheme.

AMI therefore commenced proceedings, seeking urgent interlocutory relief including a declaration that the scheme, or at least the requirement that it be compulsory, was void for illegality as an unreasonable restraint of trade.

Ultimately, the question of whether this scheme was an illegal restraint of trade was not finally determined. Rather, Justice Palmer decided the case on the issue of the balance of convenience. AMI's application for an injunction was refused on the basis that it had been "guilty of inordinate and prejudicial delay in commencing these proceedings".[50]

Evidence given during the hearing indicated that the accreditation scheme had been the subject of discussion since 2003 within the rugby union community and AMI had been put on notice of the key features of the scheme in January 2005, some nine months before it commenced the proceedings.

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[49][2005] NSWSC 950.
[50]Ibid, at paragraph 17.

Having lost the interlocutory stoush, AMI did not seek to proceed to a final hearing. It was reported in November 2005 that AMI withdrew the legal proceedings against RUPA, the ARU and the various state rugby unions and at the same time agreed to pay $50,000 towards their legal costs.[51]

Features of the RUPA Player Agent Accreditation Scheme include the following:

- Completion of a detailed Application;
- Compulsory attendance at an annual workshop;
- Requirement by Player Agents to comply with a Code of Ethics;
- Compulsory use of a Standard Management Agreement by Agents;
- Payment by Agents of an annual fee to remain accredited;
- Formal mediation process to resolve any complaints by players or disputes between the parties.[52]

Recommendations for Reform: Australian Player Agent Industry

Professional sport and sports agency is today an extremely lucrative, competitive and high profile industry. As such, it is incumbent upon those responsible for administering those sports to seek to protect the athletes from the potential harm that can be caused by player agents. Administrators must also seek to uphold the confidence of the Australian sporting public that professional sport is not being tarnished by the self-interest of such agents. With this in mind, set out below are some suggestions for how these goals may be achieved.

Regulations governing the accreditation and activities of player agents

It is pleasing to see that in the past two years, sports such as rugby union, rugby league and soccer have followed the AFL's lead and brought into existence a set of regulations overseeing the player agent industry.

Such regulations can also be expected to benefit the agents themselves, particularly those who operate with the best interests of their clients in mind. An accreditation process would grant agents a degree of legitimacy and most likely encourage increased standards of professionalism.

[51] www.rupa.com.au, November 2005.
[52] www.rupa.com.au/administration/emailtemplates/newsletter.aspx? Page id=1105.

It would be important to include an appropriate dispute resolution clause in any such regulations, to preserve the integrity of the process. The AFL seeks to deal with this issue by stating that any disputes are referred to a 'Grievance Tribunal' which has the same meaning as that referred to in the AFL/AFLPA Collective Bargaining Agreement. The decision of the Grievance Tribunal is said to be final and binding upon the parties. The Rugby Union Accredited Player Agents Scheme has a similar provision which sets up an 'Independent Appeals Tribunal' from which agents may appeal decisions of the RUPA Accreditation Board. The Football Federation Australia Code of Conduct also has a similar provision, which provides for appeals to be made pursuant to 'Grievance Resolution Regulations'.

Any such regulations should also seek to define what type of consent is required to be given by the athlete, upon disclosure by an agent of an actual or potential conflict of interest.

A stricter, formalised and informed consent to be given by the athlete

It would be impractical to institute a blanket prohibition against agents representing conflicting interests.[53] As has been shown, the sports agency industry will automatically give rise to the potential for conflicts of interest to occur. Any agent who represents two or more players on the same team (particularly in a league where a salary cap is in force) is, prima facie, in a position of conflict. However, an automatic ban on such representation is unwarranted, as it is commercially unfair to restrict agents from representing more than one player on a team and it would also represent an unreasonable fetter on the principles of freedom of contract.

Rather, what is needed is a more consistent adherence to the requirements of informed, actual consent when an athlete purports to waive a conflict of interest. If the player is comfortable with the agent's declared affiliations, or with the fact that the agent represents others in a similar position, he or she can consent to the agent's dealings. Whilst this may "work well in theory, or in a corporate environment where the parties have the business acumen to understand the facts, clients of sports agents may not be sophisticated enough to fully comprehend the ramifications of the conflicts presented."[54] The athlete may be unable to make an informed determination as to the implications of the conflict and the possible diminution of their interests. Conflict issues are, quite simply, too complex for many players to understand.

[53] Brown, note 9 at 835.
[54] Rosner, note 16 at 56.

Accordingly, any regulations relating to the degree of consent required ought to include a reference to the strict test espoused in the *Sims v Argovitz* case,[55] a test which arguably already applies under the Australian law of fiduciary relationships.[56] That is, the agent must disclose every material fact known to him or her that might affect the player's interests. This applies particularly to the agent/athlete relationship, given that many athletes are at a disadvantage in entering into the bargain, due to their legal and commercial inexperience and youth. In this writer's view, the regulations should go so far as providing that the consent by obtained in writing, and after the disclosure of the apparent conflict was also made to the athlete in writing.

Greater athlete education

It is essential to bear in mind the somewhat "precarious position"[57] of the athlete-client who may be thrust at a young age into an industry where his or her talents and marketability are often earning him or her vast amounts of money per year. The typical professional athlete is in their early twenties or younger and has left school without any postgraduate qualifications in order to pursue a professional athletic career. That athlete is then almost immediately confronted with an array of decisions that need to be made – the choice of an agent; the terms and incentives of a contract with the team; long range financial planning; and the negotiation of possible sponsorship deals.

Those decisions place tremendous pressure on the young athlete who invariably lacks the requisite legal or business skills to ensure career security. Therefore, apart from seeking to regulate the activities of the agents on who these young athletes so heavily rely, it would also be worthwhile to introduce educational programs for young professional athletes, or to bolster programs that are already in existence. Players associations can play an important role in protecting the interests of their members and these associations have become more effective and vocal in recent years.[58]

A uniform regulatory scheme?

From the American perspective, Rosner maintains that conflicts of interest would be more appropriately addressed at a "macro level".[59] He suggests that the most effective means of regulating the sports agent industry would be the institution of a uniform set of guidelines for all sports agents, perhaps originating from a professional trade group such as the Sport Lawyers Association. Rosner concedes that while such guidelines may not in all

[55] See text at notes 29, 30.
[56] See text at note 36.
[57] Brown, note 9 at 837.
[58] See text at notes 10, 11.
[59] Note 16 at 57.

circumstances be successful in weeding out undesirable activities, they will at least "serve as a moral compass for sports agents."[60]

Any attempt to centralise the regulation of player agents in professional sport in Australia will require a substantial overhaul and corresponding centralisation of the organisation of those sports - a perhaps unlikely scenario. However, one measure that ought to at least be considered is to include in any ad hoc regulations governing a particular sport's player agents a requirement that any disputes be referred to the Court of Arbitration for Sport. This may result in a greater degree of consistency in approach and purpose and, optimistically, may prove a factor in moving towards uniformity amongst the different sports.

Conclusion

The increased power wielded by player agents in modern professional sports and the plethora of legal issues that necessarily arise, should be regarded as the sleeping giant of Australian sport. In the United States, that giant has been awoken. In America, the activities of sports agents have been the subject of widespread academic, judicial and public criticism. As a result, certain measures have been put in place to regulate the activities of those agents.

Yet in Australia, where the enormous economic potential of professional sport has really only been recognised in the past decade, the rapid growth of the sports agent industry has, until very recent times, gone largely unchecked. The common law of fiduciary obligations will apply, due to the relationship of trust and confidence that is in place between an agent and an athlete. As such, sports agents owe duties of good faith, loyalty, confidentiality and also an obligation to avoid conflicts of interest. However, the reality is that sports agents are unlikely to have regard to the concept of fiduciary obligations, given the improbability that a dispute with a player will result in court action. Therefore, the most appropriate and practical method of seeking to maintain and enforce the integrity of the agent-athlete relationship is to introduce and, subsequently, to enforce effective regulations regarding the accreditation and activities of those agents. Only then is it likely that the oleaginous image of the sports agent as Jerry Maguire will gradually disappear.

[60] Note 16 at 58.