

A Servant of Many Masters: The Australian Football League Player Agent's Duty of Undivided Loyalty

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PLAYER agents or managers ('agents') are commonplace in the Australian Football League ('AFL'). It is very unusual to find an AFL player who is not managed by an agent. The AFL is big business and the players involved have relatively short careers in which to exploit the obvious economic opportunities available to them while playing in the AFL competition. There are also a select few players who are able to use their AFL status to carve out a number of opportunities after their playing days.¹ The modern professional AFL footballer leads a busy life. On top of playing and other team commitments, there are media and public relations, sponsorship and advertising, and financial management calls on his time. Players will also have to deal from time to time with the negotiation, management and resolution of disputes arising from their playing contracts. Since the handling of these would benefit from legal, commercial and financial expertise, it is not surprising that many players appoint a sports management agent to manage negotiations on their behalf.

Special media interest on agents generally coincides with the negotiation and renewal of 'star' players' contracts. Not surprisingly, more attention is given to the relationship between the player and his club than between the player and his agent. Consequently, one issue that has received little attention is the agent's duty of undivided loyalty to the player himself.

Agents are in a fiduciary relationship with their player clients. As 'fiduciaries', agents owe their clients a duty of undivided loyalty. Subject to some exceptions, an agent must put the interests of his client ahead of other interests. This duty of

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1. The media has been a rich source of work for some former AFL players. Some have moved into the player agency business.

undivided loyalty can create difficulties when agents act on behalf of more than one player, as many of them do. The potential problems become greater the more players an agent represents. The problems become still more acute the greater the number of players at the one club represented by the same agent. This is a major concern for the AFL industry where a few agents have the lions' share of the market.

Approximately two-thirds of current listed players in the AFL are controlled by the six largest agent consortiums. With a playing list of 38 players for each of the 16 AFL teams, not including rookie and veterans lists, this equates to about 400 players being represented by only six agencies. In real terms, 16 teams of 38 players' yields a total of 608 player contracts, some more complex than others, which are being negotiated by any one of 60 AFLPA accredited agents. This ratio of approximately one agent to every ten players is a breeding ground for conflicts of interest.

The potential for breaches of fiduciary obligations is made worse by the number of players at the one club who are managed by the one agent. For example, Flying Start and Paul Connors manage around half or even more of the playing list at the Melbourne Football Club; Flying Start manages at least 12 players at the Fremantle Football Club; Ron Joseph manages at least half the North Melbourne Kangaroos squad (but this has diminished with some of these players being traded to other clubs); and Michael Quinlan manages a sizeable portion of the Essendon Football Club playing list.

This article looks at the duty of undivided loyalty issue surrounding agents in the AFL. This overarching duty, which contains a number of specific duties, is jeopardised where agents act for more than one player, particularly for more than one player at the same club.

PLAYER AGENTS

A player's agent is generally responsible for handling a range of matters related to the player's professional football career. The prime responsibility of the agent lies in representing the player in contract negotiations with the player's football club, thereby affecting the player's relationship with the club. The agent may also be involved in handling the player's public relations and managing sponsorship and promotions within the guidelines laid down in the Collective Bargaining Agreement ('CBA') negotiated between the AFL and the AFL Players Association ('AFLPA'). The agent may also act as a player's representative in less obvious areas such as tax, estate and financial planning and investment counselling, where the agent has been given responsibility. But the crux of the agent's duties or obligations is to negotiate the contract between the player and the football club.

Any person seeking to act as an agent must first gain accreditation from the AFLPA and must indicate which of the above services they seek to provide and their

competence and experience to adequately provide them.² According to the AFLPA Regulations Governing Accredited Agents and clause 26 of the CBA, any player wishing to employ an agent in their contract negotiations must use an AFLPA Accredited Agent or their legal guardian or parent.³ Only individuals may be accredited. However, sports management agencies employ these individuals to handle their AFL clients' negotiations, or, more frequently, agencies are built around an agent's exclusive commitment to handling AFL players. In most cases, there is a written contract of agency between the player and the agent. The contract of agency sets out the parties' rights and obligations and the agent is authorised to do those things necessary or desirable to effect the purposes for which the contract is concluded.

The AFLPA accreditation criteria and regulations recognise the existence of fiduciary duties between agents and players and recognise the potential for agents to breach their fiduciary duties to their playing clients. By promoting a benchmark of professional standards⁴ and measures for professional sanction and disciplinary action against errant agents, the AFLPA and AFL have attempted to address these issues. However, what these sanctions and remedies do not account for is the redress players may have against their agents for breaches of the duty of undivided loyalty or how to avoid conflict situations.⁵

FIDUCIARY DUTIES

Fiduciary duties⁶ are duties of good faith and loyalty owed by certain persons ('fiduciaries') to others⁷ because of the trust, confidence or reliance placed in them by those 'other persons' to act in their best interests. What these 'other persons' are referred to depends on the nature of the relationship. There are some categories of relationships, which involve 'relationships of trust and confidence or confidential relations' where fiduciary obligations are usually imposed, such as 'trustee and beneficiary, agent and principal, solicitor and client, employer and employee, director and company, and partners'.⁸

2. See *AFLPA Regulations Governing Accredited Agents* (Melbourne: AFL, 2005) cl 3 'Accreditation'.

3. *Ibid*, cl 2.1, 2.3.

4. See *ibid*, cl 4 ('Standard of Conduct of Accredited Agents').

5. Although the AFLPA's requirement for accredited agents to maintain minimum levels of professional indemnity insurance may account for this if indeed a player does seek legal redress against them for any breach of fiduciary duties and an account for profits, etc.

6. Also referred to in this article as 'fiduciary obligations'.

7. The person to whom the fiduciary owes his or her duty is hereinafter referred to as the 'principal'.

8. *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, Mason J 96-97.

The critical feature of a fiduciary relationship, as Mason J said in *Hospital Products*, is that the fiduciary undertakes to act in the best interests of another person.⁹ The fiduciary has the power to ‘adversely affect the interests of the person to whom the duty is owed’. That person is ‘at the mercy’ of the fiduciary and thus ‘the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom the duty is owed’.¹⁰ The fiduciary has a duty to give undivided loyalty to the principal or the person to whom he or she owes the duty.

Because the agent undertakes to act for the player in his commercial and legal relationships with the AFL club, with sponsors, advertisers and others, the player and his agent will ordinarily be in an agency relationship affected by fiduciary obligations. In other words, as agents at law, agents ordinarily owe fiduciary duties to their player clients.

However, to recognise that a particular relationship usually involves fiduciary obligations is only the beginning. Even in the ‘accepted’ categories, it does not necessarily follow that fiduciary duties are actually owed. Where fiduciary duties are owed, they do not necessarily extend to every aspect of the relationship, but may only affect the conduct of the fiduciary in a limited respect. Whether fiduciary duties exist, and their scope and content, is determined by any subsisting agreement, course of dealing, and particular factual circumstances between the parties to the relationship.¹¹

For example, in an agency relationship, the relationship between agent and principal is often regulated by a contract of agency. The contractual terms and the course of dealing between the agent and principal in the circumstances existing between them will determine whether fiduciary duties are owed. The fact that there is a contract, and the obligations under it, do not necessarily derogate from the existence of fiduciary duties: the duties may themselves arise from the contract. Contractual and fiduciary relationships may co-exist between the parties and the contractual relationship may be the foundation for the fiduciary relationship. But the fiduciary relationship cannot be inconsistent with the contractual relationship.¹² In other words, ‘[t]he 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’.¹³

9. Ibid. The fact that a relationship or arrangement is of a commercial or business character does not prevent the imposition of fiduciary duties. See also *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 538: ‘Business relationships (leaving aside partnerships) clearly can attract fiduciary obligations.’

10. Ibid, 97.

11. *News Ltd v Australian Rugby Football League Ltd* above n 9, Lockhart, von Doussa & Sackville JJ 539.

12. *Hospital Products Ltd v United States Surgical Corporation* above n 8, Mason J 97.

13. Ibid.

The player agent must avoid any potential conflict between his personal interests and his duties to the player and also his duty to one player vis-à-vis another player. The agent does not have to engage in such conduct for a breach to arise; a real or substantial possibility of conflict is sufficient.¹⁴ The fiduciary has an 'overriding duty of undivided loyalty' to the principal.¹⁵

Thus, the difficulties when one agent manages more than one player are obvious. The interests of two or more players will often diverge. The agent's duty to act in the best interest of one player may and generally will conflict with the agent's duty to other players. The fiduciary's duty of undivided loyalty towards one or more principals or players is necessarily compromised: '[The fiduciary] may be unable to discharge adequately the one obligation without conflicting with the requirement for observance of the other obligation'.¹⁶ The biblical injunction of Matthew 6:24 has much relevance here: 'No man can serve two masters.'

The 'overriding duty of undivided loyalty' to the principal carries with it a number of specific duties. For example, as mentioned, the fiduciary has a duty to avoid a conflict of interest between his personal interests and duty to the principal. Also, he has a duty to avoid a conflict between his duty to act in the best interest of one principal vis-à-vis another principal.

A fiduciary also has a duty to account to the principal for any profits made by the fiduciary from his position or from information obtained in that position.¹⁷ Fiduciaries must not obtain any unauthorised benefit nor can their interests conflict with those of their principal. If these obligations are breached the fiduciary must account to the principal for any profits and make good any losses arising from the breach.¹⁸ These duties may be modified by agreement or course of dealing between the parties.¹⁹ This duty to account does not present the same potential problems for player agents as the other duties do. Player agents do benefit personally from their position by receiving commissions or set fees from the players they represent. But as long as these payments are authorised by the player there is no fiduciary breach. Of course, the authorisation or player consent to the payments must be informed and not obtained by unconscionable conduct by the fiduciary or by a third party acting on behalf of the fiduciary.

14. *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, McHugh, Gummow, Kirby, Hayne & Callinan JJ 199.

15. *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, Spigelman CJ, Sheller & Stein JJA 46.

16. *Breen v Williams* (1996) 186 CLR 71, Gummow J 135; *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 392.

17. *Chan v Zacharia* (1984) 154 CLR 178, Deane J 198-199.

18. *Breen v Williams* above n 16, Gaudron and McHugh JJ 113.

19. See eg *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1230-1231.

CONCURRENT DUTIES TO A PLAYER CLIENT AND AN AFL CLUB

Although not a common occurrence, there has been at least one example of an agent acting in a consultative capacity for an AFL club.²⁰ When negotiating playing contracts, acting on behalf of their player clients, the agents must not let their interest in retaining their engagement as consultants with the club affect their handling of the contract negotiation. In particular, they must make sure that they do not let their interest in retaining their consultancy result in a less favourable playing contract for the player client. If the agent is engaged as a consultant with a football club at the time the agent seeks to negotiate a playing contract on behalf of a player with the same club, this would raise a potential conflict of interest and breach the duty of undivided loyalty. Also, another possible conflict situation may arise if the agent 'persuades' one of his players to transfer from one club to the club the agent has a consultative contract with. The transfer may take place for all the right reasons for the player, but the potential for conflict is obvious.

CONCURRENT DUTIES TO MULTIPLE PLAYER CLIENTS: THE NEGOTIATION OF PLAYER CONTRACTS

Arguably, the most important responsibility agents undertake on behalf of their clients is the negotiation of the playing contract. The playing contract is the professional footballer's basic source of income. For AFL players all playing contracts are standard term contracts as dictated by clause 18.1 of the CBA. By and large it is the value, and to a lesser extent, the duration, of the playing contract that varies, not the terms of a player's contract. Additional service agreements and marketing contracts are in addition to, and separate from, payments made to a player for performance of their playing contract.²¹ As the negotiation of a playing contract only directly affects the rights and interests of the football club and the player, there is prima facie no conflict of interest unless the agent seeks to act for both player and club. In such a case, there would be a conflict between the agent's duty to the club to obtain the best possible deal and the agent's duty to the player to do the same. Thus, as stated in *Commonwealth Bank v Smith*, 'the fiduciary may be unable to discharge adequately the one without conflicting with his obligation to the other'.²²

20. In 2000, prominent agent Ron Joseph was engaged by the St Kilda Football Club to advise it on how to structure its administration. It was reported that he also assisted in persuading his long-time friend, Malcolm Blight, to come out of retirement to coach St Kilda. By the end of the 2001 season nearly 10% of Joseph's considerable 'stable' of players had switched to St Kilda. See C Le Grand 'Ron of All Trades Says He's No Saint' *The Australian*, 8 October 2001, 28.

21. See CBA cl 16.1.

22. *Commonwealth Bank v Smith* above n 16, 392.

The fact that the agent is not also acting on behalf of the football club in negotiating a playing contract does not preclude the possibility of a conflict of duties.²³ A conflict of duties can still arise where the agent has conflicting duties between two players. The general position is that unless an agent has first obtained their player client's consent, the agent cannot act for two or more players where their interests may conflict.

The prohibition does not mean that agents cannot have more than one player in their portfolio. However, what this prohibition does mean is that the agent cannot act on behalf of more than one client where the interests of the players on whose behalf the fiduciary is intending to act conflict – that is, where the interests of one player conflict with the interests of another.

This will occur, for example, where two players authorise one agent to discuss or negotiate with the same football club for a position into which only one of the two players can be contracted. Until the circumstance involving the conflicting duties arises, there is no actual or potential conflict and the player agent is free to act for both players within the agent's designated area of responsibility. It is sometimes possible for the agent to act for two or more players in the same transaction where the players have a commonality of interests which do not conflict with each other. This would be the case when an agent negotiates on behalf of all the agent's players to appear in an advertisement. This scenario becomes more convoluted when players competing for contracts at the same club are represented by the same agency but not necessarily the same agent. The larger agency consortiums employ a number of accredited agents. For example, three of the larger consortiums, Elite Sports Properties, Flying Start and IMG, are currently listed by the AFLPA as employing seven, five and two accredited agents respectively.²⁴ With a combination of informed consent, the strategic division of labour and the implementation of 'Chinese walls' within the agency itself, it may be possible for agencies representing competing players to avoid such conflicts of duty where an individual agent may struggle to reconcile his competing fiduciary obligations. However, when the conflict does arise, the agent must decline to act in breach of the fiduciary duty:

He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say – which would be much better – 'I cannot accept this business'.²⁵

23. There will be a conflict situation, or potential conflict situation, in the case where the player agent, while not representing the club in the player's contract negotiation, is an employee of the club – such as a club coach or any other employee of the club. This is because an employee has a duty of fidelity or loyalty to his or her employer. It may be difficult or impossible to reconcile that duty with the agent's duty of loyalty to the player. That is, obtaining the 'best result' for the player in relation to the value of the playing contract may not be the 'best result' for the club.

24. <http://www.aflpa.com.au/index.cfm>

25. *Moody v Cox and Hatt* [1917] 2 Ch 71, Lord Cozens-Hardy MR 81. This is reinforced by

If, despite the conflict, the agent continues to act without the prior agreement or informed consent of the principals whose interests are in conflict, the agent will be in breach of fiduciary duty. It does not matter that the fiduciary did not have fraudulent intent.²⁶

Conflicts between duties owed to player clients may also arise in the negotiation of playing contracts where the agent is negotiating only on behalf of one player with a football club – that is, where there is only one player directly interested in the outcome of the contractual process.

Because the AFL imposes a salary cap on football clubs,²⁷ the agent, when negotiating the best possible player contract for one player, automatically reduces the available salary pool for every other player contracted, or hoping to be contracted, to the same football team, including players for whom the agent also acts. In other words, the more the player agent obtains for one player, the less there is to share among the remainder of the club's players and among any new players seeking playing contracts. This is arguably a conflict of duties because in obtaining the best possible deal for one client (as the player agent is invariably required to do pursuant to his fiduciary duty and the contract of agency) the player agent derogates from the interests of the agent's other clients who are seeking a new or renewed playing contract with the same team.

The player agent derogates from the interests of the agent's other clients who are seeking a new or renewed playing contract with the same team, when the agent negotiates for one of his clients from another club to be traded to the club where he or she has other clients playing. The greater the value of the contract negotiated for the traded player, the greater the derogation from the interest of the agent's other clients at the traded player's new club. Conversely, the interests of the agent's other clients at the former club of the traded player may be better served by the trade since there may be more money available for them when negotiating their new contracts. However, that may not be the case if the traded player is replaced by an incoming player who obtains a playing contract to a value greater than that which the traded player enjoyed. If the incoming player to replace the traded player is managed by the same agent as the traded player the conflict issues and permutations are obvious. However, the trading of players between clubs is largely done between the clubs

the operation of cl 4d of the AFLPA *Regulations Governing Accredited Agents* above n 2, which essentially restates this position of an obligation to disclose any conflict of interest or potential conflict of interest as soon as is practicable.

26. *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC 957.

27. For 2004, the AFL-imposed salary cap per club for total player payments was \$6 115 000. For 2005 and 2006 it increased to \$6 300 000. AFL clubs must spend a minimum of 92.5% of the cap on total player payments ('TPP'). Any shortfall below this 92.5% is equitably distributed between all listed players at the AFL club. Total player payments are subject to a range of calculations relative to a player's listed status at the AFL club to which he is contracted. It can be affected by additional services agreements.

and not the agents. Of course, the player has to agree to the trade and the terms of the contract with the new club, so the agent has a role to play. And of course the contract negotiations conducted by agents with clubs for existing players at one club may lead to a trade situation arising due to the agent seeking a contract that will lead to a salary cap breach.²⁸

The effect of playing contracts and salary cap restrictions in the AFL should not be underestimated. Each year, players seeking contract renewals are forced to move from one club to another, or worse from one state to another, because their team's salary cap has been reached.²⁹ The trading of Essendon players Damian Hardwick, Blake Caracella, Justin Blumfield and Chris Heffernan to other clubs in the last few years demonstrated this.³⁰ The effect of salary restrictions is exacerbated by the consideration that because AFL football clubs are keen to secure the services of 'star' players, those players' contracts are often negotiated earlier in the season than contracts of other players when there is more flexibility under the salary cap.³¹ Thus, once a player agent maximises a contract for a star player, there is less left for the rest of the players on the player agent's portfolio in the same, or hoping to be in the same, team. While it may be suggested that the 'average' player or 'journeyman' is unaffected because a club will only ever agree to a particular amount, irrespective of external considerations, such as what is left under the salary cap, this is unlikely in reality and is only possible when there is a sufficient surplus of the available salary pool for the team to pay the supposedly fixed, standard amount. Recent salary cap breaches, player de-listings and inter-team trades suggest otherwise.³²

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28. The Jade Rawlings' contract negotiations with the Hawthorn Football Club in 2003 led to Rawlings leaving the club and being picked up by the Western Bulldogs in the end of season draft. Thus, to remain at Hawthorn for the salary being requested would have resulted in a salary cap breach by Hawthorn.
 29. Although in certain circumstances such as recruitment and delisting of first year draft choices, relocation expenses are to be borne by the AFL club and will not be included in the TPP calculations. See CBA cl 8 ('Allowances').
 30. J Niall 'Two Top Dons Take Pay Cuts' *The Age* 4 December 2002, 1; J Niall 'At the Business End of the Season, Expect to See More Big Players in the Market' *Sunday Age* 8 June 2003, 14. Although, there may have been other reasons that also played a role in the trading of some of these players, such as making a trade in order to obtain a certain player from another club or a higher draft selection (in the annual AFL draft for footballers seeking to enter the AFL system or delisted players seeking to re-enter the system). It should also be noted that Caracella who went to the Brisbane Lions from Essendon was traded at the end of the 2005 season to Collingwood. Brisbane was unable to retain him and remain under its salary cap.
 31. For example, in 2002, all negotiations between the Fremantle Football Club and its players were placed on hold until the contract with Matthew Pavlich was concluded. At least 12 players at the Fremantle Football Club were managed by the consortium of which Pavlich's agent was a part. See C O'Donoghue 'Pavlich Deal Under Review' *The West Australian* 25 July 2002.
 32. The obvious exception to this has been the voluntary salary sacrifice made by the Brisbane Lions players in order to maintain and improve their playing register in order to pursue further premiership success with a largely undisturbed line up: see G Denham 'Premiers Expect to Keep the Same Unit' *The Australian*, 29 September 2003.

The agent is therefore placed in a difficult position. It is not open to the fiduciary to prefer one player client, by maximising the playing contract, to the detriment of another, since this would be a conflict of duties. Further, because player agents are usually remunerated by commission, doing so would also raise a conflict of interest and duty question. Also, it is not open to the player agent to avoid the conflict of duties and attempt to discharge his or her fiduciary obligations by maximising the playing contract of the 'other' player clients through organising a trade or a position for the player with another club with whom the player would not have otherwise contracted, even where the player would prefer the new arrangement to a less than optimal playing contract with the existing club.³³ This is not because the player should never be forced to choose between the two options, since it is a mere result of competition for a limited salary pool, but because the player should not be placed in that less than optimal situation (the optimal situation being a maximised playing contract with the club with which he wishes to play) by the conduct of a fiduciary who owes him a duty of undivided loyalty.³⁴

If the fiduciary wishes to continue acting for both principals he or she must do one of two things. The first option is to make full disclosure of the conflict and obtain the relevant parties' consent to continue acting for them despite the conflict:

A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting.³⁵

This disclosure and consent must occur before the fiduciary engages in conduct that would constitute a breach of duty. This is usually when the second competing instruction is given. However, it may be argued that sometimes the conflict is not obvious, such as where the conflict arises because of the salary cap considerations discussed above. However, such an argument is not convincing as it would be

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33. In 2003, a situation developed where the agent of Jade Rawlings of the Hawthorn Football Club was placed in a difficult position. Rawlings' agent also managed another player who played with Hawthorn. The Club disclosed that if it agreed to the contract value being demanded by Rawlings and his agent, it would need to delist the other player managed by Rawlings' agent. This is a demonstrable example of what this article is examining. In the end Rawlings transferred to play with the Western Bulldogs with the other player remaining at Hawthorn. It was reported that if Rawlings was to leave Hawthorn (if they would not agree to his financial demands) he wanted to be traded to the North Melbourne Kangaroos. However, due to the particular trading and drafting rules of the AFL, Rawlings' wish could not be achieved. See C Lines 'Koops Claim Cruels Deal' *Geelong Advertiser* 21 October 2003, 44.
 34. While the conflict issue is present whenever the contract negotiations take place – even when the playing contract for the 'star' player in the agent's client pool is negotiated earlier in the year – the conflict of duties is not as obvious as at the end of the year when there are more players competing for less money.
 35. *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, Richardson J 90.

surprising for an agent not to realise the possible effect the amount secured for one player may have on the money left within the salary cap limit for other players at the same club. Full disclosure to all affected players (ie, all the agent's players at the one club) would probably be required on each occasion that the player agent intended to begin a new negotiation process for a player at that club.

The second, more practical option would be to modify the general position by agreement (ie, to remove the duty to avoid the conflict of duties – at least in that particular situation – in the first place).³⁶

A provision in the contract of agency could be inserted acknowledging that the player agent is not obligated to avoid a conflict of duties where the duty that conflicts with that which would otherwise be owed to the contracting player is a duty owed to another player by the player agent in the negotiation of a playing contract.³⁷ Even so, it must be questioned why a player not yet of star status, even with full disclosure and being aware that his agent is acting for other players, would continue with the agent, knowing that the agent would most likely give preference to the interests of any superstar clients rather than the interests of the agents' lesser light clients.³⁸ Why would a client accept this? One answer would be that the rookie player believes that in the long term his agent will be able to obtain the best contracts for him, including a future period where the rookie is an established AFL player and is in a stronger bargaining position. Conversely, it is unlikely that most players would accept being treated less favourably than other players on the agent's list.

A contract clause which removes the duty to avoid the conflict of duties will obviously protect the agent from any abrogation of his fiduciary duties but does little to instil any confidence in the agent's ability or desire to represent the player to the best of their ability. There does not seem to be any easy solution to this problem. The agent is at risk and liable to account for the very real possibility that there will be a potential for conflict between clients they represent, which makes the position of the agent precarious. Alternatively, the agents are excused from their common

36. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, Lord Browne-Wilkinson 206.

37. Another way of putting it would be to say that the agent is not obligated to avoid a conflict of duties where the conduct that would otherwise constitute a conflict of duties is the negotiation of a playing contract on behalf of another football player in respect of whom the player agent is a fiduciary.

38. This is not to say that an agent will automatically seek to give the superstar priority in relation to obtaining the 'best' contract. Most agents would most likely say they seek the best deal for all their players and that they do not give preference or priority to one player over another. But the problem is that they cannot do the best for all their clients at the one club. The reason that the agent may seek to do that 'bit more' for the 'star' client vis-à-vis the 'average player' or rookie is because the star client most likely offers the best possible return to the agent. This is because most agents work on a commission basis – that is, the greater the value of the playing contract the greater the agent's commission. Of course, sometimes the agent may want to give preference to a rookie as the young player may potentially be the star in waiting that all agents want to have.

law obligations by variation of the contract which potentially exposes the majority of players to being undervalued in favour of those players on which agents can make the most commission.

Although these fiduciary duties in regards to the AFL only affect a minute cross-section of employees and agents when compared to wider society, the high profile nature of the competition has led to the imposition of some measure of internal self-regulation. The AFL, representing the clubs, and the AFLPA, which regulates the agents and represents the players, have between them agreed on a regulatory role and disciplinary procedures, which to some degree at least maintains the balance between players' interests and the unenviable fiduciary position agents find themselves in. By enforcing accreditation and imposing external standards on agents to 'act in a professional manner and with honesty and integrity towards each player',³⁹ these bodies seek to balance these competing interests.

CONCURRENT DUTIES TO MULTIPLE PLAYER CLIENTS: CONFIDENCE AND DISCLOSURE

Another conflict which an agent has to consider is that of the duty of confidence owed to one principal with the duty of disclosure owed to another. The duty of disclosure requires that the agent disclose to the principal all information relevant to the transaction or subject matter in respect of which the fiduciary is acting on behalf of the principal. At the same time, an agent is also required to maintain the confidence of the principal.

However, the agent cannot properly discharge both the duty of disclosure and the duty of confidence where the fiduciary has information confidential to one principal which is relevant, and ought to be disclosed, to another principal. For example, how much a player is asking for, or has obtained, in salary negotiations may be extremely relevant to another player at the same or different team, but such information is confidential to the first player. The agent's duty of confidence to one principal therefore conflicts with the duty of disclosure to the other and the fiduciary is thus in a position where concurrent observance of duties is impossible. Again, this conflict may be avoided by consent or prior agreement and is indeed varied to some extent by the AFLPA Regulations Governing Accredited Agents, which allow for certain disclosure to the governing bodies of the sport and where required by law.⁴⁰ It is relatively easy to insert in the agency contract a clause that the agent has no duty to disclose information to the principal where the agent obtains that information in the course of duties as an agent for another person and which is confidential to that other person.

39. AFLPA, above n 2, cl 4c.

40. *Ibid*, cl 4e.

In the absence of a provision of this kind in an agency contract, the law may imply a similar term where the factual circumstances indicate that it would have been clear to both parties that the agent would also be acting for other players and in so doing would obtain confidential information from those other players.⁴¹ It would be much safer, of course, to incorporate the provision into the agency contract.

CONCLUSION

AFL football is a serious business and for many players football is their primary source of income. Football players should be assured that the persons in whom they place their trust and confidence, and from whom they should expect undivided loyalty, in fact do so act with the player's interest in mind as the primary objective.

Players should be aware of, and demand adherence to, the duties that their agents owe them. Mere reliance upon the accreditation of the agent does not completely remove the risk that an agent may be breaching the obligations they owe that player, deliberately or inadvertently. At the very least, players should receive full disclosure of what activities the agent is engaging in that could undermine their own interests and derogate from the duty of undivided loyalty that their agents owe generally at law. In relation to this last point, there are requirements of disclosure imposed by the AFLPA, but one has to wonder to what degree the AFLPA scrutinises adherence to these requirements. Of course, the ultimate question is the remedy available to a player when his agent breaches his fiduciary duty of undivided loyalty to the player. The court process and various equitable remedies are one possibility. There is also the possibility of the AFLPA using its power to revoke the accreditation of the agent. Such possibilities may have serious ramifications for the AFL industry and deserve further examination.

41. *Kelly v Cooper* [1993] AC 205, 215.