

The Australian Football League and Alternative Dispute Resolution

Henry Jolson QC¹

Disclaimer

At the outset I must disclose a conflict of interest. On the one hand I have an obligation to honour my commitment to IAMA this afternoon. On the other there is my corporate duty to be present and observe the core business activity of the company of which I am a director. That core activity begins shortly in Canberra.² I thought of displaying my corporate colours but a beanie in red, white and blue does not sit well with a grey two piece suit.

Introduction

Australian Football League and Alternative Dispute Resolution

This is a broad topic. The only clue that I was given was the statement in the Conference brochure-

'Recognizing that the Australian Football League engages mediation and conciliation to resolve disputes, we have organised an exclusive opportunity for delegates to attend the Collingwood v Port Adelaide game at the MCG ...

Now I am not sure whether that has been arranged in the expectation that delegates to the conference will get a live demonstration of how disputes are created and dealt with by the AFL, but I expect I am required to provide examples where the AFL engages in ADR processes, such as mediation and conciliation, to resolve disputes that it is involved in or is AFL related.

Before doing so I should be true to the Conference theme: *Resolution and Resilience: ADR in the Global Recession* and outline where the AFL sees itself in relation to the recession.

It is the biggest game in town.

Mike Fitzpatrick, Chair of the AFL, stated in the 2008 Annual Report, that the global financial crisis will clearly have an impact on all levels of the game in 2009 and saw some evidence towards that at the end of 2008 in areas such as sponsorship, corporate hospitality and retail sales of licensed merchandise.

1 Henry Jolson QC is an IAMA registered Grade 1 Arbitrator. He is an Independent Expert in major government infrastructure contract disputes and has conducted numerous major commercial mediations since 1985. As former Chair of the Law Council of Australia's ADR Committee, Henry was the Principal draftsman of the LCA's Rules for Court Annexed Mediation. As a Judge/Member of the International Court of Arbitration for Sport (CAS) he has arbitrated selection disputes relating to the Sydney and Athens Olympic Games, anti-doping violations and many commercial disputes referred to CAS. He was a member of the International ad hoc CAS Tribunal established for the Commonwealth Games in Melbourne having exclusive jurisdiction in doping matters and the final appeals tribunal for all other issues arising out of the Games. Henry is a Board Member of the AFL team, the Western Bulldogs and the Inaugural Chair of the Victorian Bar Sports Law Committee.

2 The company is the Western Bulldogs Football Club, which played Sydney in Canberra the day of the conference.

He highlighted however the key financial data for the 2008 year which included total AFL revenue increasing by \$17.3 million to a record \$302.1 million, the operating surplus before grants and distributions was \$207.4 million and after grants, distributions and transfers to reserves of \$17.1 million, a net profit of \$2.4 million.

Attendances reached a record level of 6.511 million people, for the eighth successive year AFL Clubs set a membership record of 574,091 members and a Future Fund was established expected to grow to more than \$87 million by 2011.

The AFL employs approximately 160 full time employees and the clubs combined employ approximately 1,700 (excluding hospitality staff). It has contacts and relationships in a number of areas. The average AFL Club employs 102 staff, including players.

Year to date attendances are 2,659,000 which is down approximately 150,000 (5.5%) as at the same time last year. Total TV ratings are down approximately 4.3% year on year.

ADR – Meaning of terms

There is currently in the mediation literature extensive discussion as *to the need for greater consistency in the use of ADR terms and to what extent there is a need to improve the understanding of ADR and its different processes to the general community.*³

For present purposes I adopt the Federal National Alternative Dispute Resolution Advisory Council's (NADRAC) glossary of terms published in 2003 in which Alternative Dispute Resolution (ADR) is described as '*an umbrella term for processes, other than judicial determination, in which an impartial person assists those in dispute to resolve the issues between them*'. It covers therefore mediation, conciliation and arbitration but also extends to other processes which may not commonly be regarded as ADR, such as the investigation and determination of complaints and, according to that definition, includes the investigation and determination of discipline and breach of Player Rules allegations referred to the AFL Tribunal.

For the purposes of processes adopted by the AFL to resolve issues concerning it and its stakeholders, it is convenient to adopt the glossary of terms proposed by NADRAC:

ADR refers to processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for Alternative Dispute Resolution, but can also be used to mean Assisted or Appropriate Dispute Resolution.

Arbitration is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination.

Mediation is a process in which the parties to a dispute, with the assistance of a mutual third party (the mediator) identify the disputed issues, develop options, consider alternatives and endeavour to reach agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

3 NADRAC Alternative Dispute Resolution in the Civil Justice System issues paper, March 2009, para 2.5.

Conciliation is a process in which the parties to a dispute, with the assistance of a mutual third party (the conciliator) identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby the resolution is attempted, and may make suggestions for Terms of Settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

In practice there is a subtle difference.

Most of us identify mediation in the AFL with the resolution of issues relating to racial vilification both on the field of play and outside the field of play.

It is often difficult to get information about disputes that are dealt with through the ADR process because of the obligation of confidentiality concerning that process. Often the fact that there is an issue or dispute that is referred to an ADR process, and that is resolved, evidenced by the obligatory apology and expression of remorse, is known, but, more so in recent times, the particulars of the allegation and the nature and quality of the ADR process invoked is not. That was not always so.

Australian Rules Football is a sport, business activity and some say a religion, with so many participants, stakeholders, devotees and observers, with keen and informed football media experts, that it is very difficult to keep matters confidential.

In this presentation I have drawn from what is available in the public domain, from people involved in the world of football, whose assistance I acknowledge at the end of this paper, and added some of my own “war stories” to the extent that my obligation of confidentiality permits.

Some of you will recall the time in April 1993 that Nicky Winmar, then playing for St Kilda against Collingwood at Victoria Park, and after St Kilda “belted” Collingwood by 22 points, lifted his football jumper and pointed to the colour of his skin, after being constantly racially abused by the home crowd,⁴ and in 1995 Michael Long being called a ‘black bastard’ during the 1995 Anzac Day game at the MCG and the public outcry which followed.

The Michael Long incident, and in particular the way it was handled, led to the adoption, in June 1995 by the AFL, of the so-called “Rule 30” of the AFL Player Rules, ‘A Rule to Combat Racial and Religious Vilification’ (as to which see below).

Some of us will remember the “Footy Show” on Channel 9 on 10 April 2002 when Sam Newman came on at the beginning with his face painted black to portray himself as Nicky Winmar, who was invited to be on the show, but had failed to turn up. There was a complaint of racial vilification in relation to Newman’s conduct which went to mediation. The mediation was widely publicised and attracted a lot of comment and discussion. The mediation was by agreement between Player Winmar, Channel Nine and convened by the Western Bulldogs Football Club

The AFL’s initiatives in tackling racial vilification through education, mediation and conciliation have been recognised a number of times. In 1995 the United Nations Association of Australia awarded the AFL the Peace Award in recognition of initiatives to address racism in sport. Again in 1997 the AFL was awarded the *Australian Reconciliation Award in Business & Industry* and in 2001 the *National*

4 The Age Newspaper

Corporate Anti-Racism Award. Its policy is highly regarded in many sporting and non-sporting areas and has been held up as a model for others to follow.

However, the AFL has introduced and continues to develop other ADR processes to minimize and resolve disputes in all areas of its Charter. I will outline some of them and come back to Rule 30 and how it operates with some examples.

Grievance procedure under the Collective Bargaining Agreement (CBA)

The CBA is an agreement between the AFL and the AFLPA which binds them and all Clubs and Players to the terms and conditions contained in it.

A detailed grievance procedure is set out in cl.33 which provides for a stepped process involving initial discussion commencing at various levels depending on who the parties to the dispute are. If the grievance remains unresolved it can be referred to the Grievance Tribunal for determination.

Where an AFL Player has a grievance, the Player must first raise the grievance with the Football Manager of his Club. The Football Manager must meet with the Player within 7 days of the grievance being raised. The Player is entitled to be represented by the Player's Accredited Agent. If the matter is not resolved within 14 days of the Player submitting a grievance to the Football Manager, the grievance is to be referred to the AFLPA and the General Manager of the Club concerned for further discussion. The Player and the Player's Accredited Agent may attend the meeting between the AFLPA and the General Manager.

If it remains unresolved at the Club level, the matter is to be expeditiously referred to the AFL General Manager – Football Operations and the Chief Executive Officer of the AFLPA for further discussion. Again, the Player and Player's Accredited Agent may attend the meeting between those two persons. If the matter remains unresolved the grievance may be referred by either the Player or the AFL Club to the Grievance Tribunal for resolution. A meeting of the Grievance Tribunal must be convened as expeditiously as possible but no later than 30 days after the matter has been referred by the parties for resolution. The Player and the AFL Club is entitled to be represented at the Grievance Tribunal.⁵

Where the grievance arises between the AFLPA and an AFL Club, the grievance must be referred to the AFL General Manager – Football Operations who is to confer with the AFLPA and the AFL Club with a view to the grievance being resolved. If the grievance remains unresolved, either party may refer the grievance to the Grievance Tribunal. If the grievance is between the AFLPA and the AFL the parties have to confer with a view to resolving the grievance but if it remains unresolved either party can refer the grievance to the Grievance Tribunal.⁶

If the grievance is between a Player and the AFL, the Player or his authorised representative shall first raise the issue with the AFL General Manager – Football Operations or the AFL General Manager – Commercial Operations whichever is appropriate and if not resolved within 14 days the matter goes to the Grievance Tribunal.⁷

5 CBA Clause 33.3.

6 CBA Clause 33.4.

7 CBA Clause 33.5.

It is a condition precedent to instituting legal proceedings in any court or tribunal of competent jurisdiction that the matter goes to the Grievance Tribunal if it is unresolved in any previous level of discussion.

The Grievance Tribunal is chaired by a barrister who sits with another lawyer with a football background and with a player's representative.

Cases that have been heard by the Tribunal include disputes involving the delisting of players, the playing of players when players are unfit and necessitating pain killing injections, and issues impacting on the playing career of the player, the dropping of umpires from panels, player entitlement to prescribed compensatory payments for injuries suffered in the final year of the player's playing contract with the Club, salary contractual entitlements and other entitlements arising from contractual terminations during the term of a Player's contract.

In 1999 Ilija Grgic obtained an award of \$20,000 from the Tribunal, after retiring due to a back injury suffered in a game in his last year with Essendon.

More recently the grievance procedure has been invoked by the Umpires Association and individual umpires in relation to the AFL not consenting to the use of umpire's images on collector cards and an unfair dismissal grievance of an umpire at the end of the Season. The first grievance was settled prior to the hearing and the second was withdrawn prior to the hearing.

Currently, Mark Johnson, is claiming compensation under the CBA alleging that a shoulder injury he suffered in his last (and only year) with Fremantle prevented him from playing football at any level again. If the claim is not resolved between the parties, it will go before the Grievance Tribunal.

The Tribunal also has a mediation role. Prior to the Tribunal sitting a form of mediation will be offered to the parties.

The Tribunal sits informally, and is not bound by the rules of evidence. Nevertheless in determining issues fundamental principles of the rules of evidence are applied. The Tribunal attempts to deliver its decision with reasons on the day of the sitting of the Tribunal or within a day or two of the hearing.

Arbitration under Rule 7 of the Player Rules

The Collective Bargaining Agreement which is entered into between the AFL players and the clubs contains a number of terms and conditions binding on them. It incorporates the AFL Player Rules. One Rule that requires arbitration is Rule 7 that prescribes the minimum or fixed football payments. In order to avoid a challenge that the fixing of player payments is in restraint of trade, an arbitration process is provided to players who consider that they have not been made a reasonable offer.

The arbitrator to whom a dispute is referred, after considering the material before him and making such other enquiries as he deems necessary and desirable, must determine whether, in his opinion, the club's offer of employment to the player was a reasonable offer, or whether the provisions of the Collective Bargaining Agreement which limit the Football Payments which can be paid to the player, operate to unreasonably restrain the player's trade as a professional footballer.⁸ The arbitrator is required to make his determination within 21 days of receipt of the player's notice or as soon as practicable thereafter.⁹

8 Rule 7.8.

9 Rule 7.9.

For the purposes of making a determination the arbitrator must have regard to the player's age, the player's skill and ability as a footballer, the player's fitness, his potential contribution to the Club, the relative level of payments to players of the club and other clubs, the total player payments, any hardship to the Player and in other matters which the arbitrator considers relevant or necessary to ensure that the player is not unreasonably restrained in his trade as a professional footballer.¹⁰

There have been few references to arbitration. Only three matters have been dealt with. In two of those matters, the player was successful. In both cases, the arbitrator found that the players involved had established exceptional circumstances that warranted a higher base salary than prescribed in the CBA for the relevant category of player.

Accredited Agents

The AFL has recently approved a '*Standard Representation Agreement*' for use by Accredited Player's Agents. It contains a mediation and arbitration procedure pursuant to which either party to a dispute can seek to resolve that dispute by invoking mediation and arbitration procedures set out in the Regulations.

The Regulations provide a two-step process commencing with mediation. If mediation is not successful the matter can then proceed to arbitration.

The Regulations do not say that the arbitrator's decision is final and binding. It provides that an arbitrator's decision and Award '*shall be published and available for use as persuasive (rather than binding) precedents*'.¹¹

AFL Tribunal Reforms

In 2005 a number of significant reforms were made to the AFL's 'Tribunal System' designed to improve the efficiency of the Tribunal process by introducing a system of fixed penalties whereby players can accept penalties without having to appear before the Tribunal; and to promote transparency and certainty and to, inter alia, lessen the financial barriers for appeal. It set up a Match Review Panel consisting of experienced and retired players and umpires and appointed a retired County Court Judge, David Jones, as Chairman of the Tribunal.

In broad outline, the system involves the Match Review Panel assessing reports and referrals made by umpires and officials and to consider whether a reportable offence has occurred and to determine the level of the offence taking into account the player's conduct (whether intention, reckless or intentional) impact (whether the impact was severe, high, medium or low), initial location (whether the location was in play or behind play) and contact (whether the contact was high or to the body). The Level of Offence was then determined and according to the Table of Offences, the sanctions would be identified. The player had the option of accepting the Match Review Panel's findings by taking an early plea of guilty in which case they would be handed a 25% reduction in the demerit points which might affect the sanction or alternatively the player could contest the charge or plead guilty to a lesser charge. Significantly the player was for the first time allowed to have legal representation.

Since its inception, there have been some changes designed to clarify and assist in the early resolution of the conflict.

10 Rule 7.10.

11 Regulation 12.6(j).and

In its most recent review of the Tribunal's activities¹² it reported the lowest number of Tribunal hearings ever, the lowest number of cases not sustained at the Tribunal (6), the highest percentage of players accepting the Match Review Panel classification (83%), the lowest financial sanction of the players and a dramatic reduction in charges for head and neck contact with head over the ball.

Trade Week

As has become the custom, the deadline for concluding trade discussions led to farcical scenes of agents and managers running down corridors trying to conclude deals before the deadline. The AFL had mediators on standby during the last trade week but none were used.

Litigation

You will recall that the Seven Network sued 22 media, telecommunication and sporting entities claiming that their individual and combined conduct drove its C7 out of business. Channel 7 mediated its differences with the AFL. The action ultimately settled.

Rule 30 AFL Players Rules

Under Rule 30 a complaint of racial vilification can be brought by an umpire, a player or a club. Initially the matter is dealt with through a confidential conciliation between the persons involved and if it cannot be resolved in that way it is referred to the AFL Tribunal or the AFL Commission for determination.

Rule 30.1 prohibits any person in his capacity as an employee of a club, or in the course of carrying out his duties or functions as or incidental to being an employee of a club (being a person entitled to enter the arena during the course of or prior to or during any break in any play in any Match) acting towards or speaking to any other person in a manner, or engaging in any other conduct which threatens, disparages, vilifies or insults another person ('the person vilified') on the basis of that person's race, religion, colour, dissent or national or ethnic origin.'

The complaint must be made by 5pm on the first working day after the alleged contravention. The complaint is to the AFL's Complaints Officer. The Complaints Officer is required to inform the person against whom the complaint is made of the complaint and provide that person with an opportunity to respond to it in writing and to arrange for the complaint to be conciliated and take all steps necessary for the complaint to be conciliated.

Particulars of the complaint and conciliation are to remain confidential at all times and no person is permitted to publicly comment on or disseminate to any person any information concerning a complaint at any time prior to, during or after the conciliation. There are financial penalties for breach of that obligation.

A conciliation is to be conducted by a suitably independent person appointed by the Commission upon agreement between the parties.

A first offender who attends a conciliation upon a complaint which is resolved at the conciliation is required to attend an education program in relation to racial and religious vilification approved by the

12 Tribunal Year 2008.

AFL. The Club employing the person who engaged in the offending conduct must pay the costs of that person's attendance at an education program.

The only information that can be published concerning the conciliation is a statement that is agreed upon by the parties.

If the conciliation does not resolve the complaint the Complaints Officer is required to refer the complaint to the Tribunal to be dealt with as a reportable offence (in the case of a player) and in the case of any other person refer the complaint to the Commission to be dealt with under the AFL Players Rules. No evidence of anything done or said in any conciliation can be given before the Tribunal or Commission. If the matter goes before the Tribunal or to the Commission, legal representation is allowed.

If a complaint is upheld either before the Tribunal or the Commission the Club employing, engaging or otherwise associated with the person at the time of the misconduct is deemed to be vicariously liable for the conduct of that person and is required to pay to the AFL a penalty determined by the Commission which is not more than \$50,000. The penalty will not apply if in the opinion of the Commission the Club took all reasonable steps to prevent persons employed, engaged or otherwise associated with the Club from engaging in the conduct which contravened the vilification regulations.

There is an overriding and continuing obligation on each club in the competition to arrange and conduct annually an education program in relation to racial and religious vilification and to ensure that all of its players, coaches, officials and other employees attend the education program at its own cost.

How confidential is it? Peter Everitt and Mike Sheahan

In 1999, after the round 2 Melbourne v St Kilda game, the *Herald-Sun* reported that the St Kilda Football Club and Peter Everitt were given until 4pm that day to respond to Umpire Matthew James' letter of complaint to the AFL's Complaints Officer accusing Everitt of racially vilifying Melbourne's Scott Chisholm. It was believed that a comment about 'petrol sniffing' and the use of the word "black" as an adjective triggered complaint. Everitt's manager claimed that Everitt did not use the word 'black' and that Everitt merely asked Chisholm about a tattoo on his shoulder saying '*Where did you get that tattoo? At the back of a petrol station?*' Mike Sheahan, of the *Herald Sun* wrote that there was no need whatsoever to enlist the services of a lip reader to discover what Everitt actually said. "*Louise Braille would have needed just one look.*" Everitt appeared to mouth the expression "*black c ...*". Sheehan went on to say "*Everitt is, of course, innocent until found guilty.*"

The issue was settled at mediation that involved a self imposed 4 week suspension, a \$20,000 fine, volunteering to undergo racial awareness training program and forfeit of match payments. There was a public apology to Chisholm, his family, and to the Aboriginal community

Another example of the public interest or is it public curiosity?

The Newman apology to Nicky Winmar, Sam Newman and Channel 9

On 10 April 2002 Mr Sam Newman appeared at the beginning of the *Footy Show* on Channel 9 with his face painted black. He blacked up to portray himself as Nicky Winmar, a Western Bulldogs footballer who had failed to show up as promised. Newman simply said '*Hello, I'm Nicky Winmar*' to

the feigned expressed embarrassment of Eddie Maguire, the host of the *Footy Show*. That stunt produced a great deal of media discussion about whether or not what Newman did was racist. *Channel 9* and Newman defended their actions saying that what Newman did was not racist. Despite strong suggestions that he should apologise, he refused to do so.

I was asked if I would mediate the controversy.

The parties entered into my standard Mediation Agreement which contained the usual obligation of confidentiality. A secret venue was arranged for the mediation to take place. When I arrived at the secret venue there was an outside television broadcast van with a number of journalists there to greet me.

Without comment, of course, I went into the venue and turned on the radio to see if I could pick up some of the dynamics that might be useful for me. I heard Maguire and Newman being interviewed as they were entering the mediation venue. Newman was asked whether he was going to apologise to Winmar. His comment was “No”. He said he had nothing to apologise for.

All this of course is on the public record¹³ so I am not breaching any obligation of confidence. All the stakeholders were there, including the player Winmar, his Manager, a person described as ‘*his Minder*’, the President of the Western Bulldogs, Newman, Maguire, the Executive Producer of the *Footy Show*, and I.

Two and a half hours later the matter was resolved with both sides holding a live media conference at which it was announced that the parties had agreed to an amicable settlement and an apology by *Channel 9* and Newman was read out. The *Herald-Sun* reported that Newman and Winmar were clearly uncomfortable as they were asked to shake hands for photographers. The apology was the subject of subsequent criticism and comment as to whether it was a true apology and that occupied some media space for sometime thereafter.

Adam Goodes Chapter in *The Australian Game*

Sydney Swans star Adam Goodes revealed that he was racially vilified in 2002 during a game in Sydney. His revelation came in a chapter that he wrote for the book *The Australian Game of Football* which was created to celebrate the 150th Anniversary of Australian football. Incidentally, it is wonderful reading because it tracks the history of the involvement of indigenous players in the game since 1885 and the difficulties and challenges that indigenous footballers have had to face.

Adam spoke of an unnamed opponent calling him a ‘*f..... monkey-looking c ...*’. Pursuant to Rule 30 he reported the incident and a mediation was conducted. Goodes said that the player admitted his actions and called him to apologise. Goodes described his anger and inability to speak to the opponent for a while but it might be worth quoting what he said: ‘*I reported the incident; it took a while for it to sink in and by the time the player – who admitted his actions – called me to apologise, as per the first part of the mediation, I was so angry I could barely speak to him. Actually, I blasted him for 15 minutes. He explained that as I was playing well, and he was having a poor game, his frustrations got the better of him. But it’s under pressure that people expose their true selves, and I was keen to make him understand precisely how his comments made me feel.*’

13 *Herald-Sun*, 31 March 1999

In an interview that Goodes gave to Mike Sheahan, published in the *Herald-Sun* on 5 March 2008, Sheahan reported that Goodes endorsed the AFL's groundbreaking vilification code and mediation process, which enabled him to deal with the 2002 issue and move on. Quoting Goodes, *'I honestly believe that the person was very sorry for what they said to me. ... That person was very clear about how he made me feel and how it might make someone else feel. I would be very surprised if that player would say anything like that again. What really happened is a good story of someone saying something in the heat of the moment, which happens, me reporting it, mediation, and a good, positive result. I can move on because I was satisfied he was remorseful and that he would not say anything like that again. I believe I have helped educate that player. The mediation system is very good. I think the best thing the AFL and the Players' Association have done is create a process where this can be handled without people's names being thrown up in the media.'*

Contrast

Rex Hunt and Greg Numa mediation

In 2000 Rex Hunt was in litigation with his former Manager, Greg Numa, in a very bitter Supreme Court dispute after the two had parted ways. The matter was referred to mediation by the Supreme Court. In his book *'Rex'*, Hunt describes his experience at the mediation as follows:¹⁴

'Lynne and I met the mediator, Henry Jolson QC. More expense! Henry was very professional and made it clear that he would work hard at seeing both parties reached [sic] a settlement.

The mediation process commenced and Lynne and I sat along a table with our lawyers and QCs. On the other side of the table was Numa with his legal team. I looked Numa right in the eye. His eyes dropped. I got the feeling straight away that we would not be making any deals and that initial feeling was right.

Despite the fact that Henry thought we were close to settling, I can say we were a long way away. The fact that Hayes (QC) and Wilson (QC) dined in Chinatown that night, finally woke me up to the fact that this legal business is nothing but a game. As soon as one party cannot meet the financial arrangements, settle. And that is what happened to us. But the mediation process went on and off for 19 hours and I felt all the time that we would not strike a deal. I had lost all interest.

The next morning one of my producers rang me to congratulate me that the whole case was over. I asked him what he was talking about and he reported that Numa had rung him to say that we had settled at 3 o'clock that morning.'

Settlement was announced later in the day. Hunt described his feelings after that as *'I was free again and floating on air with the excitement of once again controlling my own destiny. ... I was free and it was an amazing feeling.'*

Other examples

Fraser Gehrig – The Western Bulldogs

On 4 May 2000 *The Age* carried a story under the heading '*Apologies follow vilification*'. Fraser Gehrig, who then played for West Coast Eagles, threatened defamation proceedings against Western Bulldog players, Tony Liberatore and Nathan Brown. Fraser Gehrig was charged with "decking" Field Umpire Brian Sheehan in a scuffle which erupted at half time. In his defence, Gehrig alleged that he was provoked and taunted by Liberatore and Brown questioning whether Gehrig was one of the rapists who was being investigated by Western Australian Police on sexual assault allegations in the West. Liberatore was fined \$2000 and, I think from memory, Brown was fined \$1500 and Gehrig was acquitted. Gehrig had either issued or threatened to issue defamation proceedings against the Western Bulldog players. The Age noted '*Now it appears that racial vilification is not the only verbal abuse that refuses to remain hidden on the football field*'.

Adelaide Football Club – McLeod and Edwards

An independent third party was used to mediate an incident to resolve a '*domestic*' issue.

Jason Akermanis – Braun

On 1 August 2007 Jason Akermanis of the Western Bulldogs Football Club wrote an article which touched upon the issue of drugs in the AFL. Akermanis referred to the performance of one of his opponents some years earlier which was construed as inferring that that player had the benefit of performance enhancing drugs. Akermanis did not name the player but, on the Sunday following the publication in the newspaper, *Channel 7* named the player allegedly referred to by Akermanis.

The player took offence and threatened proceedings against Akermanis, *Channel 7*, radio station *3AW* which broadcast an interview in which it was alleged that the publication was re-published. There was a flurry of activity by lawyers including the preparation and service of a draft Statement of Claim. The matter ultimately resolved at a subsequent mediation

Victoria Park – Collingwood Delaware mediation

An example of the flexibility and use of mediation to resolve disputes centered around a Supreme Court action between an AFL Club and its contracted caterer when, during the term of that contract, the AFL Club left the ground at which the catering services were provided to relocate. It was alleged by the caterer that the Club was in breach of its contract to take its catering requirements from the caterer. The issue was before the Courts, however, it settled at what could be described as a mediation in the following circumstances. I happened to be at a charity event. The President of the Football Club was there as well and in the course of a conversation we had, he mentioned the dispute and then asked whether he thought there might be some sense in him getting together with the Chairman of the catering company in my presence to try and sort it out. We arranged for both President of the Club and the Chairman of the catering company to come to my rooms the next afternoon. We took about an hour and a half to resolve the dispute.

Post Winmar – Newman mediation

At about 6.30am on the morning after the Winmar Newman mediation I was telephoned by *3AW* and asked if I would be interviewed on air about the mediation. I declined but ultimately was persuaded on condition that I would speak about mediation generally but not about the details of the previous night.

It was agreed that I would be called shortly after 7am. I had not heard any of the program before I was interviewed. Unbeknown to me the very clever Ross Stevenson and John Byrnes were repeatedly bemusing the fact that a person with the name Jolson, who went on stage and painted his face black, was asked to mediate a complaint against a person who went on stage and painted his face black. The first question put to me, without notice, “*Did this occur to you, that you were being asked to mediate in a dispute involving Sam’s blackface act and your name is Jolson?*”

A short time after the live interview I tuned in to hear Ross Stevenson saying ‘*We bring you one more word from the mediator.*’ there was a short pause and then Al Jolson came on singing *Mammy*.

To conclude.

Lessons to be learned

Darren Godwell’s Opinion Piece in *The Age*, April 1999

The AFL is to be applauded in its attempts to deal with racial and religious vilification through the process of conciliation and education. However, it is worth noting the views of Darren Godwell who wrote an article in *The Age* newspaper on 2 April 1999 under the heading “*A Handshake Will Not Defeat Racism*”¹⁵ –

‘Most AFL proceedings about racial vilification had ended with the implicated players shaking hands and saying those things had been sorted out. .. Such proceedings provide a comforting public image. The matter appears to be resolved. Players admit they have acted ‘racially’ in the heat of the contest. Yet these qualifiers create the first scent of suspicion. There will come a time when unscrupulous players will go through the motions – mouth a written statement, shake hands in front of the cameras and walk away after jumping through the hoops of political correctness.

The mediation process, popular in dispute resolution, fosters personal understanding between individuals. But this isn’t necessarily enough to change attitudes.

The mediation process appears to operate as a system of exemption. Individuals exempt each other from dominant stereotypes without confronting the source of these stereotypes.

On the surface, handshakes and photo opportunities give a good impression. But unless individuals are prepared to learn how and where racism contorts our thinking and influences how we see each other, then we are missing the point.’

15 Darren Godwell was at the time a Research Fellow at the Centre for Indigenous, Natural & Cultural Resource Management at the Northern Territory University.

Acknowledgements

I am grateful to a number of people who have provided information for this paper on short notice. They include, Rod Austin, Football Operations Manager AFL, Bernie Shidders, AFL Players Association, John Reid, General Manager Football Operations, Adelaide Football Club, Ross Monaghan, Football Operations Manager, Richmond Football Club, Geoff Walsh, Collingwood Football Club, Peter Rohde, Football Operations Manager, Port Adelaide Football Club, Donald McDonald, General Manager, Football Operations, North Melbourne Football Club and Andrew Ireland, Sydney Swans Football Club.

This address was delivered at the IAMA Annual Conference: *Resolution and Resilience: ADR in the Global Recession*, Hotel Sofitel, Melbourne 29 - 31 May 2009
