

**Globalisation and the Regulation of Professional Baseball: A
Search for Labour Mobility?**

Thesis submitted by

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Table of Contents

THESIS DECLARATION	i
ACKNOWLEDGMENTS	ii
ABSTRACT	iii
ABBREVIATIONS	iv
CHAPTER 1 INTRODUCTION	1
1.1 Overview of professional baseball	1
1.2 Scope of the thesis	3
1.3 Key research questions	4
1.4 The literature	5
1.5 Themes and concepts	7
1.6 Key arguments and findings	9
1.7 Chapter overview	10
CHAPTER 2 OVERVIEW OF PROFESSIONAL BASEBALL	17
2.1 THE INDUSTRY OF PROFESSIONAL BASEBALL	17
(a) The origins of baseball	17
(b) What is the game of baseball?.....	18
(c) The basic structure of professional baseball.....	20
(d) The labour of baseball.....	21
(e) Who are the workers in professional baseball?	22
(f) Valuing the labour of baseball.....	23
(g) Labour controls in professional baseball.....	26
(h) Summary	27
2.2 THE STRUCTURE OF LABOUR IN MAJOR LEAGUE BASEBALL, THE NIPPON PROFESSIONAL BASEBALL LEAGUE AND THE AUSTRALIAN BASEBALL LEAGUE	27
(a) The governance of Major League Baseball and the structure of labour	27
(b) Major League Baseball’s labour supply: the Minor Leagues	34
(c) The governance of Nippon Professional Baseball and the structure of labour	36
(d) The governance of the Australian Baseball League and the structure of labour	41
(e) Summary	47
2.3 THE FINANCE OF PROFESSIONAL BASEBALL AND COMPETITIVE BALANCE	47
(a) The concept of competitive balance	48
(b) The financial divide between rich and poor in professional baseball	49
(c) Payrolls and salaries	50
(d) Regulatory tools designed to achieve financial balance.....	54
(e) Summary	56
2.4 CONCLUSION	56
CHAPTER 3 APPROACHES TO REGULATION	57
3.1 WHAT IS REGULATION?	57
(a) Conceptualising regulation.....	58
(b) What is the purpose of regulation?.....	59
(c) Types of regulation: direct, indirect and non-state.....	60
(d) Decentred regulation and regulatory space	62
(e) Summary	64
3.2 APPROACHES TO REGULATION	64

(a) Traditional approaches to regulation.....	65
(b) New approaches to interpreting regulation	69
(c) Self-regulation.....	74
(d) Autopoietic theories of legal regulation	77
(e) Summary	80
3.3 REGULATORY ACTORS	81
3.4 CONCLUSION.....	83
CHAPTER 4 THE REGULATION OF LABOUR IN THE UNITED STATES, JAPAN AND AUSTRALIA	84
4.1 WHAT IS LABOUR REGULATION?	84
4.2 THE PURPOSES OF LABOUR REGULATION.....	88
4.3 LABOUR REGULATION IN THE UNITED STATES, JAPAN AND AUSTRALIA	91
(a) Overview of the labour law system in the United States of America.....	91
(b) Overview of the labour law system in Japan	94
(c) Overview of the labour law system in Australia	97
(d) Summary	100
4.4 CONCLUSION.....	101
CHAPTER 5 INTERNAL REGULATORY ACTORS AND MECHANISMS IN PROFESSIONAL BASEBALL	102
5.1 OWNERS OF PROFESSIONAL BASEBALL CLUBS.....	102
(a) The enterprise.....	102
(b) The role of collaboration and collusion in professional baseball.....	103
(c) Ownership in Major League Baseball	104
(d) Ownership in Minor League Baseball.....	105
(e) Ownership in Nippon Professional Baseball.....	105
(f) Ownership in the Australian Baseball League.....	107
(g) Summary	108
5.2 THE INSTITUTION OF THE ‘LEAGUE’	108
(a) The league as an employer association	108
(b) The commissioner of the league	109
(c) Regulatory activities of the league	110
(d) The level of collaboration among owners	110
(e) Summary	111
5.3 PROFESSIONAL BASEBALL PLAYERS.....	111
(a) The professional baseball player as a ‘worker’	111
(b) The diversity of professional baseball players	112
(c) The labour market for baseball players	113
(d) The status of players: ‘the haves and have nots’	114
(e) Summary	115
5.4 LABOUR UNIONS IN PROFESSIONAL BASEBALL	115
(a) Collectivism and unions	116
(b) The employment relationship and collective agreements	117
(c) The rise of player unionism in Major League Baseball	118
(d) Membership of the Major League Baseball Players Association.....	119
(e) The non-unionisation of Minor League players and the fight for a ‘living wage’ ..	121
(f) Subjects of collective bargaining in Major League Baseball.....	123
(g) Industrial action by Major League Baseball players	124
(h) Overview of the Japanese Professional Baseball Players Association.....	128
(i) Collective bargaining in Nippon Professional Baseball.....	129
(j) Industrial action by Nippon Professional Baseball players.....	130
(k) The absence of collectivism in the Australian Baseball League	131
(l) Summary	133

5.5 ARBITRATORS	133
(a) The origins of arbitration in Major League Baseball	134
(b) Salary arbitration in Major League Baseball.....	135
(c) Arbitration in Nippon Professional Baseball.....	137
(d) Summary	139
5.6 GLOBAL BASEBALL REGULATORS	139
(a) The globalising world of baseball	139
(b) Regulating the global movement of baseball players.....	140
(c) Global regulators in baseball.....	141
(d) Summary	143
5.7 CONCLUSION.....	143
CHAPTER 6 EXTERNAL REGULATORY ACTORS AND MECHANISMS IN PROFESSIONAL BASEBALL	145
6.1 PROFESSIONAL BASEBALL AND THE COURTS.....	145
(a) The courts and the labour of Major League Baseball.....	146
(b) The courts, Major League Baseball and the powers of the Commissioner	149
(c) The role of the courts in Japan	151
(d) The role of the courts in Japanese professional baseball	153
(e) The role of the courts in Australian sport.....	154
(f) Summary	156
6.2 THE PUBLIC REGULATION OF PROFESSIONAL BASEBALL	157
(a) Congress, Major League Baseball and the reserve system.....	157
(b) Government and professional baseball in Japan	160
(c) The role of the government in professional baseball in Australia.....	161
(d) Statutory authorities and professional baseball.....	162
(e) Summary	164
6.3 PLAYER AGENTS IN PROFESSIONAL BASEBALL	164
(a) The classification of player agents	164
(b) The business of representing professional baseball players.....	165
(d) The regulation of player agents.....	167
(e) Representing players in the current era of sport.....	169
(e) Summary	170
6.4 THE ROLE OF ANTI-DOPING AGENCIES IN PROFESSIONAL BASEBALL	171
(a) The global regulatory framework for performance enhancing drugs.....	171
(b) The World Anti-Doping Code and professional baseball	174
(c) Congress and the regulation of performance enhancing drugs in Major League Baseball	174
(d) Summary	177
6.5 FOREIGN PROFESSIONAL BASEBALL LEAGUES.....	177
(a) Agreements between professional leagues	177
(b) The global labour market and the professional baseball league.....	178
(c) Major League Baseball and Nippon Professional Baseball	180
(d) Summary	182
6.6 THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND PROFESSIONAL BASEBALL	183
6.7 CONCLUSION.....	183
CHAPTER 7 THE LAW AND THE PRINCIPLE OF LABOUR MOBILITY	185
7.1 THE CONCEPT OF LABOUR MOBILITY	185
(a) What is labour mobility?	185
(b) Geographic labour mobility	186
(c) Factors that shape labour mobility	187
(d) The structure of the economy and labour mobility	188

(e) What is the value of labour mobility?	188
(f) Summary	189
7.2 LAW AND LABOUR MOBILITY IN THE UNITED STATES	190
(a) Unionisation, collective bargaining and the <i>National Labour Relations Act</i>	190
(b) Collective bargaining and multi-employer associations	192
(c) Multi-employer associations and Major League Baseball	194
(d) Exclusive contracts of service and labour mobility	195
(e) Labour mobility and non-compete clauses	199
(f) Overview of antitrust law in the United States of America	200
(g) Labour, anticompetitive behaviour and section 1 of the <i>Sherman Antitrust Act</i>	202
(h) Labour, monopolies and section 2 of the <i>Sherman Antitrust Act</i>	206
(i) Labour's exemptions from antitrust laws	207
(j) Antitrust law and the single entity defence	211
(k) Labour and Major League Baseball's antitrust law exemption	213
(l) The impact of the antitrust exemption on the evolution of Major League Baseball's autopoietic system of labour regulation	217
(m) Antitrust law, the <i>Curt Flood Act</i> and the partial repeal of <i>Federal Baseball</i>	218
(n) Summary	221
7.3 LAW AND LABOUR MOBILITY IN JAPAN	221
(a) Lifelong employment in Japan and labour mobility	222
(b) The impact of the bursting of the bubble economy on Japanese employment	224
(c) Work rules and the Japanese employment contract	226
(d) Collective agreements and labour mobility	229
(e) Exclusive contracts of service and labour mobility	231
(f) Labour mobility and non-compete clauses	232
(g) Background to Japanese competition law	233
(h) Features of the <i>Antimonopoly Act</i>	234
(i) Normative barriers to labour mobility in Japan	236
(j) Summary	237
7.4 LAW AND LABOUR MOBILITY IN AUSTRALIA	238
(a) The legal status of player unions in Australian sport	238
(b) Collective bargaining, enterprise and multi-enterprise agreements and the <i>Fair Work Act</i>	241
(c) The status of collective bargaining agreements in Australian sport	243
(d) Employment contracts and the restraint of trade doctrine	248
(e) Labour mobility and non-compete clauses	250
(f) Exclusive contracts of service, the restraint of trade doctrine and labour mobility	250
(g) Exclusive contracts of service and exceptions to the <i>Lumley</i> rule	253
(h) Challenging labour controls in Australian sport	257
(i) Labour controls in Australian sport that have not been challenged in court	264
(j) Labour mobility and the award system	265
(k) Overview of competition law in Australia	268
(l) Australian competition law and sport	270
(m) Summary	272
7.5 CONCLUSION	273

CHAPTER 8 THE SCOPE OF LABOUR MOBILITY IN PROFESSIONAL BASEBALL 274

8.1 THE CONCEPT OF LABOUR MOBILITY IN PROFESSIONAL BASEBALL	274
(a) Baseball's autopoietic labour system	274
(b) What is labour mobility in professional baseball?	275
(c) The value of labour mobility in professional baseball	278
(d) The collective regulation of labour mobility in professional baseball	280
(e) The individual regulation of labour mobility in professional baseball	282

(f) Labour market structure and labour mobility	285
(g) Summary	286
8.2 LABOUR MOBILITY IN MAJOR LEAGUE BASEBALL.....	286
(a) Major League Baseball's autopoietic system of self-regulation	286
(b) Internal enforcement of Major League Baseball's autopoietic system of labour regulation	288
(c) The reflexive nature of labour regulation in Major League Baseball.....	289
(d) Major League Baseball's labour wars and labour mobility	291
(e) The amateur draft and labour mobility.....	293
(f) The modern reserve system and labour mobility	296
(g) Free agency and labour mobility.....	297
(i) Summary	300
8.3 LABOUR MOBILITY IN NIPPON PROFESSIONAL BASEBALL.....	300
(a) Nippon Professional Baseball's autopoietic system of self-regulation	300
(b) Labour mobility and the draft	302
(c) The reserve system and labour mobility.....	303
(d) Free agency, collective bargaining and labour mobility	304
(e) The operation of free agency and the absence of labour mobility.....	305
(f) The old posting system and labour mobility	307
(g) The new posting system and labour mobility.....	310
(h) Normative practice and labour mobility	312
(i) Summary	314
8.4 LABOUR MOBILITY IN THE AUSTRALIAN BASEBALL LEAGUE	315
(a) The Australian Baseball League's autopoietic system of self-regulation	315
(b) Sourcing and allocating professional players.....	315
(c) The salary cap and labour mobility	317
(d) Australian players and labour mobility	318
(e) Foreign players and labour mobility	319
(f) Formal labour controls and the draft.....	320
(g) Summary	321
8.5 CONCLUSION.....	321
CHAPTER 9 THE COMMODIFICATION OF LABOUR IN PROFESSIONAL BASEBALL	323
9.1 THE PRINCIPLE THAT LABOUR IS NOT A COMMODITY	323
(a) What is a commodity?.....	324
(b) What is the principle that labour is not a commodity?.....	324
(c) What is the commodification of labour?	325
(d) Control, autonomy and labour power: the differences between a commodity and labour	327
(e) The transfer of workers and commodities	330
(f) The evolution of the legal principle that 'labour is not a commodity'	330
(g) Summary	332
9.2 TO WHAT EXTENT IS THE LABOUR OF PROFESSIONAL BASEBALL TREATED AS A COMMODITY?.....	333
(a) The draft	333
(b) The reserve and free agent systems.....	335
(c) Compensation for the loss of free agents	337
(d) The assignment of contracts.....	338
(e) The waiver system.....	339
(f) The posting system	340
(g) The treatment of Latin American players	341
(h) Multi-year contracts	342
(i) The extent of commodification	343
(j) Summary	345

9.3 JUSTIFICATIONS FOR PROFESSIONAL BASEBALL'S RESTRICTIVE LABOUR CONTROLS	345
(a) Sport is 'special'	346
(b) Competitive balance.....	348
(c) Economic justifications	350
(d) The representation of players	351
(e) Summary	352
9.4 THE DE-COMMODIFICATION OF LABOUR IN PROFESSIONAL BASEBALL	353
(a) Controlling a player's right to work	353
(b) Player collectivism in Minor League Baseball and the Australian Baseball League	354
(c) Control of assignments and trades.....	356
(d) Summary	356
9.5 CONCLUSION.....	356
CHAPTER 10 GLOBALISATION AND LABOUR MOBILITY IN PROFESSIONAL BASEBALL	358
10.1 REGULATION IN THE ERA OF GLOBALISATION.....	359
(a) Constructs of globalisation.....	359
(b) Global regulatory actors	361
(c) Summary	362
10.2 THE GLOBAL LABOUR MARKET IN PROFESSIONAL BASEBALL	362
(a) The global spread of baseball.....	362
(b) The globalisation of labour in professional baseball.....	363
(c) Foreign baseball players in each of the three leagues	365
(d) Impact of migration law on labour mobility	366
(e) Summary	367
10.3 THE REGULATION OF THE GLOBAL LABOUR MARKET IN BASEBALL	368
(a) Problems in the recruitment of Asian players by Major League clubs	368
(b) Problems in the recruitment of Latin American players	370
(c) Governing professional baseball's global labor market	373
(e) Summary	374
10.4 GLOBAL PLAYER MOVEMENTS AND LESSONS FROM OTHER SPORTS	375
(a) The global governance of player transfers in soccer	375
(b) The cost of player transfers in soccer and third party ownership of players	377
(c) Global player movement in ice hockey	378
(d) The global movement of basketball players.....	378
(e) Summary	379
10.5 CONCLUSION.....	379
CHAPTER 11 THE FRAMEWORK FOR A NEW GLOBAL PLAYER TRANSFER SYSTEM IN BASEBALL.....	381
11.1 THE ISSUE OF A GLOBAL PLAYER TRANSFER SYSTEM	381
(a) Is there a need for a global player transfer system in baseball?	381
(b) Framework for a global player transfer system.....	382
(c) Impact of a global player transfer system on a league's labour system	383
(d) Global transfer rules and domestic laws	384
11.2 PROPOSAL FOR GLOBAL PLAYER TRANSFER SYSTEM IN BASEBALL	385
(a) Signing periods for players.....	385
(b) Player registration system	386
(c) Transfer fee for reserved players.....	386

(d) Player involvement in developing a new player transfer system	389
11.3 GLOBAL PLAYER MOVEMENT AND DISPUTE RESOLUTION	390
(a) Disputes in the global movement of players	390
(b) Current method of dispute resolution.....	391
(c) Disputes, baseball and the Court of Arbitration for Sport.....	393
11.4 THE NEED FOR AN INDEPENDENT GLOBAL REGULATOR IN	
BASEBALL	394
(a) Global regulatory actors in sport	394
(b) Proposal for a global regulator for baseball	395
11.5 ASSESSING THE FEASIBILITY OF THE PROPOSALS.....	396
11.6 CONCLUSION.....	397
CHAPTER 12 CONCLUSION.....	399
CASES.....	407
United States.....	407
Japan	411
Australia (and England)	412
European Union	414
International.....	414
STATUTES AND GOVERNMENT MATERIALS	415
United States.....	415
Japan	417
Australia.....	418
International Law	420
OTHER LEGAL INSTRUMENTS.....	421
Major League Baseball.....	421
Nippon Professional Baseball and Japan.....	422
Australian Baseball League.....	423
International	423
Miscellaneous Sports.....	423
SECONDARY SOURCES	425

THESIS DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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ABSTRACT

The globalisation of labour in professional baseball has seen professional teams expand their labour supply beyond national boundaries. Fuelling this trend is the desire to maintain and strengthen the level of competition in professional leagues and to access cheap labour. In this context, the thesis considers the ways in which globalisation has affected the regulation of player mobility, the role of regulatory actors in the regulation of labour mobility in professional baseball and the extent to which the labour of baseball has been commodified. This thesis explores these issues by examining the regulation of labour in three professional baseball leagues and countries: Major League Baseball in the United States, Nippon Professional Baseball in Japan and the Australian Baseball League. Drawing upon theoretical perspectives concerning the nature and purpose of regulatory systems, the thesis attempts to show that the labour rules and practices of each league can violate the legal principle that labour is not a commodity, that is that a player is not property that can be bought and sold. However the leagues adopt different strategies to deal with the effects of globalisation on labour mobility. In addition, the thesis examines labour mobility in each league and how mobility is regulated by contract law, labour law and competition law in each of the three jurisdictions. The thesis also examines the role of internal and external regulatory actors in the regulation of labour in professional baseball. The thesis concludes by proposing a framework for the global regulation of labour in professional baseball that will facilitate both greater labour mobility and access to labour.

ABBREVIATIONS

Australian Baseball League	ABL
Australian Football League Players Association	AFLPA
Australian Rugby League	ARL
Australian Sports Anti-Doping Authority	ASADA
Australian Workplace Agreement	AWA
Bay Area Laboratory Cooperative	BALCO
Chinese Professional Baseball League	CPBL
Committee of Experts on the Application of Conventions and Recommendations	CEACR
Court of Arbitration for Sport	CAS
Entertainment and Sports Programming Network	ESPN
European Court of Justice	ECJ
European Community	EC
European Union	EU
Fair Labor Standards Act	FLSA
Fédération Internationale de Football Association	FIFA
International Labour Organization	ILO
Japan Amateur Baseball Association	JABA
Japan Anti-Doping Agency	JADA
Japan Professional Baseball Players Association	JPBPA
Japan High School Baseball Federation	JHSBF
Korean Baseball Organization	KBO
Major League Baseball	MLB
Major League Baseball Players Association	MLBPA
Media, Entertainment and Arts Alliance	MEAA
Minor League Baseball	MiLB
National Association of Professional Baseball Leagues	NAPBL
National Basketball Association	NBA
National Collegiate Athletic Association	NCAA
National Employment Standards	NES
National Labor Relations Act	NLRA
National Labor Relations Board	NLRB
National Hockey League	NHL
National Rugby League	NRL
New South Wales Rugby League	NSWRL
Nippon Professional Baseball	NPB
Society for American Baseball Research	SABR
Sports Agent Responsibility and Trust Act	SPARTA
Third Party Ownership	TPO
Union of European Football Associations	UEFA
United States Anti-Doping Agency	USADA
World Anti-Doping Agency	WADA
World Baseball Classic	WBC
World Baseball Softball Confederation	WBSC

CHAPTER 1 INTRODUCTION

1.1 Overview of professional baseball

From the late 1800s until the mid 1900s professional baseball was almost the exclusive domain of the Major and Minor Leagues in the United States. During this period baseball became a uniquely American institution and the ‘national pastime’ and Major League Baseball (‘MLB’)¹ produced iconic figures such as Babe Ruth, Connie Mack, Joe DiMaggio, Jackie Robinson and Hank Aaron. In the decades after World War II not only did MLB expand from the East Coast to the West Coast of the United States but professional baseball began to globalise. Nippon Professional Baseball (‘NPB’)² in Japan solidified its status as a professional baseball league and in Latin America and Asia new professional leagues were established. The increase in player salaries and team revenues in MLB since the mid 1970s has resulted in a significant rise in the movement of professional and amateur players to MLB clubs from around the globe. Current star MLB players represent a globalised workforce and include players such as Clayton Kershaw (United States), Joey Votto (Canada), Albert Pujols (Dominican Republic), Yasiel Puig (Cuba), Adrian Gonzalez (Mexico), Yadier Molina (Puerto Rico), Pablo Sandoval (Venezuela), Hyun-jin Ryu (South Korea) and Tanaka Masahiro (Japan). America’s national pastime has spread around the globe, in turn creating new challenges for professional leagues in the regulation of labour.

This thesis will examine labour regulation in three professional baseball leagues: MLB in the United States, NPB in Japan and the Australian Baseball League (‘ABL’).³ Of the three leagues, MLB is the largest and has 30 teams. In addition, these teams recruit

¹ See Major League Baseball website <<http://mlb.mlb.com/home>>.

² See Nippon Professional Baseball English website <<http://www.npb.or.jp/eng/>>.

³ See Australian Baseball League website <<http://web.theabl.com.au/index.jsp>>.

lower level players who are assigned to one of a team's network of Minor League teams, most of which are owned independently. Minor League Baseball ('MiLB') now consists of over 7,000 players competing on over 240 teams in 19 Minor Leagues. MLB is the highest level of professional baseball, followed by NPB, which has 12 teams. Most NPB teams maintain one minor league team, with only four teams having a third formal minor league team that play games against teams from universities, the industrial leagues and the independent leagues. As a 'winter' development league, the ABL is effectively a minor league and its six teams have a number of players from MiLB and NPB.

Within each league exists a system of labour regulation that is composed of both internal and external regulation. Internal regulation consists of formal and informal rules and practices created by an industry and its member enterprises, while external regulation are the rules and practices from sources outside the industry that regulate its enterprises and workers: for example, contract law, competition law and labour law. These forms of regulation interact to produce a 'regulatory space'. In the case of professional baseball, the regulation of the labour of playing baseball focuses on internal regulation, which is composed of formal and informal labour rules, labour controls, contracting practices and normative conduct. The key labour controls found in these rules are the 'reserve' system, 'free agency' and the right of a team to 'assign' a player's contract to another team (through a trade or moving a player to a minor league team). The reserve system allows a team to contract with a player for a designated number of years of service, and upon completion of this service a player becomes a free agent and can contract with any team. Internal labour regulations can be found in various agreements: agreements between leagues, agreements between leagues and

clubs, agreements between leagues and players and agreements between clubs and players (Nichol 2016, 70). These agreements take the form of a league's constitution, its by-laws and regulations, collective bargaining agreements and uniform player contracts. Operating within these rules are internal regulatory actors such as the league, team owners, players and players' unions. To varying degrees these rules engage and interact with external regulation. External regulatory actors in professional baseball include the government, courts, statutory authorities and anti-doping authorities (Nichol 2016, 79). Importantly, statutory authorities and courts in the United States and Japan have held professional baseball players in MLB and NPB to be employees, while Australian courts have likewise held other types of professional athlete to be employees. Therefore professional baseball players in all three countries are subject to the protections of labour law, which is particularly important in the context of the ability of players to unionise, collectively bargain and take industrial action.

1.2 Scope of the thesis

Several questions arise at this point in relation to this thesis. Why look at professional baseball? Why examine the three leagues? And why look at labour regulation in the United States, Japan and Australia? The regulation of labour in professional baseball will be examined due to the restrictive nature of its labour controls and practices, in turn providing insight into how restrictive labour markets operate and the impact on labour. The focus of this thesis is the labour of *playing* baseball: work such as coaching, umpiring and administering baseball will only be incidentally examined. The three leagues examined in this thesis were selected because MLB is the premier and largest league in professional baseball, followed by NPB. As a new winter league without a player union, the ABL is used as a contrast to the practices in MLB and NPB. Another

reason these three leagues were selected is that their systems of regulating labour engage differently with external regulation within their individual jurisdictions. The internal regulation of labour in MLB, NPB and the ABL interact differently with contract law, competition law and labour law in the United States, Japan and Australia, and the willingness of regulatory actors inside each league to use the law to challenge internal regulation also differs. Thus, while similar internal and external regulatory systems govern the labour in each league, there is significant variation in the operation and outcomes of labour regulation in each system.

Baseball also provides an important example of a global labour market. The globalisation of labour in professional baseball has seen professional teams expand their labour supply beyond national boundaries. Fuelling this trend is the desire to maintain and strengthen the level of competition in professional leagues and to access cheap labour. In this context, the thesis considers the ways in which globalisation has affected the regulation of player mobility and the extent to which the labour of baseball has been commodified. To explore these issues, a comparative approach is adopted to examine the regulation of labour in the three leagues and countries. Drawing upon theoretical perspectives concerning the nature and purpose of regulatory systems, the thesis shows that to varying extents each league treats labour as a commodity but adopts different strategies to deal with globalisation. The thesis proposes a framework for the global regulation of labour in professional baseball that will facilitate both greater labour mobility and access to labour.

1.3 Key research questions

This thesis sets out to answer a number of interrelated research questions. The central

research question is: How is labour and specifically labour mobility regulated in professional baseball? To answer this question the focus is on the regulatory systems in MLB and NPB, the two professional baseball leagues that provide the highest level of competition in baseball and are the largest employer of baseball players. The ABL is chosen to contrast the labour practices of a development league with those of two established professional leagues, and because the ABL is dependent upon foreign labour for its operation as a professional league. This research question also intersects with a broader question: How is labour mobility regulated within each of the three jurisdictions where the leagues are located? These two research questions engage with general regulatory theory. They also require consideration of the interaction between a league's internal system of labour regulation with external regulation through laws such as contract law, labour law and competition law, as enforced by regulatory actors that include the courts and statutory authorities. Thus a third research question is: How the internal autopoietic labour systems of each league evolve over time in response to the actions of internal regulatory actors and external regulation and regulatory actors? In this thesis autopoiesis means an internal regulatory system that develops in response to its own settings and those of other autopoietic systems. Each of the three leagues are examples of an autopoietic system. The final key research question is: How has globalisation shaped labour mobility in professional baseball?

1.4 The literature

This thesis draws upon literature from sports law, labour law and regulatory theory.

The literature on sports law covers a range of topics. For example, sports law has

attracted academic interest in the field of economics and competitive balance⁴ and in the domain of labour law in relation to regulation, labour unions and collective bargaining.⁵ Other research focuses on regulatory issues raised by the regulation of individual sports within specific jurisdictions, such as MLB and antitrust law,⁶ and baseball has generated academic work on a range of legal issues.⁷ Some scholars have even examined the ‘law of baseball’.⁸ There is also extensive research on Australian Rules football,⁹ ice hockey,¹⁰ American football¹¹ and soccer.¹²

The literature on the nature and purpose of labour regulation¹³ and on regulatory theory¹⁴ does not examine in any detail the regulation of professional sport, in particular professional baseball. The story of how labour regulation has evolved in professional baseball involves a mix of law, politics, culture, history and economics and the United States, Japan and Australia illustrate three different approaches. In the United States owners, leagues, players and player unions have engaged with the courts, statutory authorities and the legislature in the regulation of labour through the use of antitrust

⁴ For an American perspective see eg Zimbalist generally and Zimbalist 2010; Sanderson and Siegfried 2003a and 2003b. For an Australian perspective, see eg Dabscheck 2010.

⁵ See eg Hanson 2008; Karcher 2006; Dabscheck and Opie 2003.

⁶ See eg Nathanson 2013; Nathanson 2009; Mann 2012; Grow 2012; Van Roo 2010; Mozes and Glicksman 2010; Goldberg 2008; Criswell 1999; Edmonds 1999; Wolohan 1999; Selig 1994; Edmonds 1994; Pierce 1958; Neville 1947.

⁷ See eg Abrams 2003; Gould 2004; Goldberg 2008; Nathanson 2009; Edmonds 2010; Kawai and Nichol 2015; Kawai and Nichol 2014.

⁸ See eg Schiff and Jarvis 2016.

⁹ See eg Dabscheck and Opie 2003; Davies 2006a; Davies 2006b.

¹⁰ See eg Gleason 2008.

¹¹ For American football and basketball, see eg Powell 2013.

¹² See eg Lembo 2011; Long 2014.

¹³ For general labour law and regulation see eg Stewart et al 2016, Chapter 2; Gahan and Brosnan 2006; Arup et al 2006; McCrystal 2014; McCrystal and Syrpis 2014; Johnstone et al 2012; Howe 2011; Davidov and Langille 2011; Piore 2011; Deakin and Wilkinson 2005.

¹⁴ For general regulatory theory that typically does not explore sport or baseball see eg Baldwin et al 2012; Freiberg 2010; Parker et al 2004; Ayres and Braithwaite 1995; Braithwaite 2000; Braithwaite and Drahos 2000; Deakin and Rogowski 2011; Rogowski and Wilthagen 1994; Coase 1988; Maher 2004; Parker et al 2004.

law, labour law and contract law. While owners, leagues, players and player unions in Japan could theoretically use these three areas of law in the regulation of labour, Japan experiences low rates of litigation compared to other developed countries like the United States and Australia, resulting in litigation rarely occurring in NPB. However, the player union in NPB has used statutory authorities and the courts to gain legal recognition under labour law and engage the protections afforded to mandatory subjects of collective bargaining. In Australia, there has been no legal challenge to the ABL's system of labour controls during its short six-year history but players (and a future union) could turn to case law on the restraint of trade from the main Australian professional sports, where athletes have successfully challenged labour controls that are similar in nature to those used by the ABL.

In addition, comparative research on the regulation of professional baseball is sparse. This thesis intends to fill this gap by examining labour regulation in professional baseball's two largest labour markets: MLB and NPB. Both of these leagues also have the greatest numbers of international players, though as will be seen, MLB far exceeds NPB in terms of foreign players. The ABL is chosen due to its status as a development league and its reliance on foreign players to maintain the standard of a professional league. This league is also chosen to compare the system of labour regulation in a new league that does not have a player union or any form of collective labour relations.

1.5 Themes and concepts

This thesis uses a number of key themes and concepts and its theoretical foundation draws from the literature relating to the nature and functions of labour law, as well as more general theories of regulation. Labour law and approaches to regulating labour

are obvious analytical tools for a thesis on the employment of players in professional baseball. But the academic use of labour law in professional sport is a relatively new phenomenon and this thesis aims to provide new perspectives on labour regulation in baseball through labour law and general regulatory theory, which provides a broader understanding of regulation outside the specific field of labour. As the internal regulation of baseball engages with external regulatory forces, it is necessary to contextualise the regulation of baseball labour within a broader regulatory context.

In addition to the labour regulation and regulation themes, this thesis also explores two other key themes and concepts: the principle that labour is not a commodity and the idea of labour mobility. The first of these has long been an important theme in the labour law literature. To determine whether labour is treated as a commodity in the three professional leagues the thesis examines the extent of commodification of labour in each league and how labour can be treated so it is seen less as a commodity. As for labour mobility in the context of professional baseball it is important in terms of the movement of a player between a club's minor league teams, between different clubs in a league and between leagues. It is also important for players to maximise their earning capacity as a professional athlete in what is typically a short career. Thus, labour controls in professional baseball such as the reserve system and free agency are intertwined with labour mobility.

The theme of labour mobility is interconnected with another theme, that of globalisation. As amateur and professional baseball grows around the world, labour mobility is increasingly taking a global dimension. This thesis will examine the need for a global player transfer system and propose a framework which aims to improve

labour mobility.

A comparative law approach will be used in examining the regulation of baseball labour in the United States, Japan and Australia. While comparative law theory is not examined in the thesis in detail, it is necessary to briefly engage with the basic tenets of this theory in order to provide the context for the comparative analysis that follows. Donahue traces the origins of comparative law as far as the middle ages and, more recently to French scholars in the 16th century and to various scholars in the 19th century (Donahue 2006, 3). Comparative law in the United States has been important since the 1700s and has long influenced the Supreme Court (Clark 2006, 176, 179). In Japan, comparative law was essential in establishing the modern Japanese legal system at the end of the 19th century during the Meiji Restoration. German law was influential during this period, followed by American law during the Occupation years after World War II (Kitagawa 2006, 239-241). Comparative law involves examining the transmission of legal rules, procedures and institutions, and can be viewed in terms of legal convergence (Clark 2006, 179) or divergence. Thus comparative law is essentially a study of the similarities and differences between legal systems. The transplant of law from one country to another is sometimes viewed as a sub-set of comparative law (Kitagawa 2006, 239). Comparative analysis involves looking at law in the country of origin and in the receiving country and encompasses legal pluralism in that traditional elements of law can co-exist and interact with imported legal rules and doctrine (Kitagawa 2006, 245-246).

1.6 Key arguments and findings

A key finding of this thesis is that MLB, NPB and the ABL all have systems of labour

regulation that highly restrict labour mobility. Importantly, restrictive labour controls such as the draft, the reserve system and free agency are practices that are not only uncommon in other industries but would otherwise be illegal if they were not legitimised through labour law and collective bargaining (as is the case in MLB and NPB). Autopoiesis is an important concept in this thesis and involves a regulatory system that reproduces by reference to itself and through interaction with other autopoietic systems. The autopoietic systems of labour regulation in each of the three leagues have similar labour controls and rules that shape labour mobility but the level of actual mobility experienced by players varies from league to league. Labour rules and controls within a league related to mobility are now subject to legal rules governing collective bargaining and can be exposed to external regulation by actors such as courts when players or team owners challenge the legality of such practices. Therefore within each autopoietic system of labour regulation labour mobility is influenced by the activities of both internal and external regulatory actors. In addition, the level of labour mobility within each league is affected by other factors that include normative practice, culture, history and commerce. Another important finding is that self-regulation and not state imposed regulation is the dominant form of regulation within the autopoietic labour systems of MLB, NPB and the ABL. Also, globalisation has had a dramatic impact on labour mobility in professional baseball as it has expanded the number of employment opportunities for players and enhanced the ability of players to move around the globe in search of work.

1.7 Chapter overview

The purpose of Chapter 2 is to introduce the reader to baseball and professional baseball in MLB, NPB and the ABL, in turn laying the foundation for examining labour issues

in the three leagues. The game of baseball will be briefly explained so that the general labour structure of professional baseball can be introduced, allowing key labour issues to be examined in greater detail in subsequent chapters. MLB will be discussed in the context of being the highest level of baseball, as well as the largest and highest paying professional baseball league. In terms of status, level of competition and pay, NPB sits second behind MLB. The function of the ABL differs from MLB and NPB in that it is a winter league, a league that is designed to develop minor league labour in preparation for the major leagues and to foster new talent within Australia.

Chapter 3 aims to identify regulatory theories that will assist in the understanding of labour regulation in professional baseball. This chapter begins by defining what is meant by ‘regulation’, before examining a range of different ways in which regulation can be conceptualised or effected. Traditional methods of regulation such as ‘command and control’ regulation will be contrasted against modern approaches to regulation such as meta-regulation, responsive regulation, really responsive regulation, smart regulation and risk-based regulation. For the purposes of this thesis and the regulation of labour in professional baseball, key approaches to regulation will be examined and include forms of self-regulation and autopoietic theories of law. Another important concept for this thesis that is introduced in Chapter 3 is that of regulatory actors, which will be examined in relation to baseball in Chapters 5 and 6. Baseball has rarely been examined through the lens of regulatory theory, so this chapter aims to set an important foundation for the analysis in latter chapters.

Chapter 4 builds upon the general theories set out in Chapter 3 by introducing themes and concepts specific to the regulation of labour in the United States, Japan and

Australia. This chapter is important in identifying that labour regulation in each jurisdiction applies to professional baseball players as statutory labour authorities and courts have been prepared to class professional athletes as employees and not independent contractors, traditionally an important distinction in labour law. The chapter will begin by examining the nature of labour regulation, followed by its purposes. To set the scene for the discussion of the regulation of labour mobility in Chapters 7 and 8, a brief outline will be provided of the major rules, processes and institutions for regulating labour in the three countries under study.

Chapter 5 will look at how the labour of playing professional baseball is internally regulated. The key internal regulators in professional baseball have been selected to determine how labour is regulated and by whom. These regulators are the owners of clubs in each league, the league, the players and player unions. Arbitrators and global baseball regulators are also examined in Chapter 5. The identification of these internal regulatory actors is important because the internal regulation of baseball engages with external regulation, the subject of Chapter 6.

In this context Chapter 6 looks at the key external regulatory actors that govern baseball in each of the three leagues. The early structure of this chapter focuses on the role of the courts, government, legislatures and statutory authorities in regulating labour and how they can legitimise baseball's internal labour rules and practices. The interaction between internal and external regulation is particularly important in MLB, as the refusal by the courts and the federal legislature to apply antitrust law to MLB has been influential in shaping its system of labour regulation. In contrast, NPB's system of labour is yet to be challenged by clubs or the players' union, reflecting the general

aversion to litigation in Japan. The important regulatory role of player agents will also be examined. For the purpose of this thesis agents are classified as external regulatory actors, in that they represent their own interests in addition to those of their clients. Also, Chapter 6 will analyse the external regulatory function of anti-doping agencies, foreign professional baseball leagues and the National Collegiate Athletic Association ('NCAA').

Chapter 7 is the longest and most detailed chapter of the thesis. It focuses on the regulation of labour by analysing the law and the principle of labour mobility in the United States, Japan and Australia. It constructs a general concept of labour mobility, then describes and analyses the effect of relevant rules in contract law, labour law and competition law on labour mobility in professional baseball law in each of the three jurisdictions. While the section on the United States will examine the role of these three types of law on the regulation of labour mobility, the section on Japan will expand beyond legal analysis to look at the cultural and normative factors which influence the internal and external regulation of labour in NPB. Due to the low status of professional baseball in Australia and the fact that it has generated few court decisions, the section on labour mobility in Australia will be expanded to include cases that examine the legal enforceability of similar labour controls in other professional sports, notably rugby league, Australian Rules football, soccer, cricket and netball. By constructing a legal concept of the regulation of labour mobility in professional baseball, Chapter 7 will allow labour mobility to be explored in Chapter 8 in the more specific context of the internal labour rules of professional baseball.

Chapter 8 begins by adapting the concept of labour mobility that was developed in Chapter 7 to the industry of professional baseball. This section outlines the concept of labour mobility in professional baseball, followed by how labour mobility is collectively and individually regulated, as well as the impact of normative practices. Next, the various ways in which labour mobility is regulated by internal labour rules in each of the three leagues are examined, notably the role of labour controls such as the reserve and free agent systems. This chapter compares the formal regulation of labour mobility in the three leagues so that variations in the operation of these labour systems can be observed.

Chapter 9 applies the principle that labour is not a commodity to professional baseball. As mentioned above, a key question in this thesis is whether the labour of professional baseball in all three leagues is treated as a commodity by leagues, teams, and even to a degree, players. This chapter examines the extent to which labour is commodified by looking at how labour controls in professional baseball tend to treat labour as a commodity, not as the autonomous worker envisioned by philosophers such as Locke. Chapter 9 will explain how the regulatory practices of professional baseball tend to commodify labour and how they are different to those in other industries. This chapter will also suggest how labour can be regulated so that it is not commodified to such an extent and its treatment improved.

Chapter 10 explores how the globalisation of professional baseball has affected labour mobility and its regulation. This chapter begins by introducing the concept of globalisation, thereby providing a theoretical basis for examining labour regulation and mobility in professional baseball in the current era. Globalisation has seen the spread

of baseball and, therefore, the expansion of the labour market for professional baseball players, a new and significant development and a challenge for regulatory actors. Teams in professional leagues can now source labour from around the globe, raising questions as to how the global movement of labour is regulated. Leagues and teams can embrace the increased availability of players flowing from the effects of globalisation, as is the case in MLB, or alternatively, adopt a protectionist approach to domestic labour by securing work for local players, as is done in NPB. As will be seen in Chapters 8 and 10, the ABL adopts a mix of both of these approaches. Chapter 10 will examine how MLB, NPB and the ABL have responded to the effects of the globalisation of labour. The chapter starts by looking at the global labour market in professional baseball, followed by how this market is regulated. To aid in this process, Chapter 10 will conclude by examining how labour is globally regulated in three other sports: soccer, ice hockey and basketball.

Chapters 8 to 10 demonstrate the ad hoc nature of the regulation of labour in professional baseball in the era of globalisation. No global system of labour regulation exists, as is the case in sports such as soccer. Instead, individual leagues deal with the challenges of globalisation in response to the needs of their league and teams. Chapter 11 proposes a system of labour regulation to facilitate the movement of players, a system that will also enhance the access of clubs to player labour. Proposals include a global transfer system with player registration, a dual transfer system for reserved and free agent players, a fee system for the transfer of reserved players and the need for an independent global regulator to operate the player transfer system.

Chapter 12 concludes by reviewing the key findings of the thesis. These are that each

of the three leagues under study operate highly protective internal and autopoietic systems of labour regulation; that the internal system of labour regulation in professional baseball is shaped by the level and nature of its interaction with external regulation; that the labour of professional baseball is commodified, although the extent of commodification in a given league may vary; and that the globalisation of baseball has created a need for a global player transfer system that is governed by an independent global regulator.

CHAPTER 2 OVERVIEW OF PROFESSIONAL BASEBALL

This chapter introduces baseball and professional baseball in MLB, NPB and the ABL and lays the foundation for examining labour issues in the three leagues. The game of baseball is explained briefly so that the labour structure of professional baseball can be introduced, allowing it to be examined in greater detail in later chapters. Chapter 2 concludes by looking at how professional baseball is financed, and subsequently, competitive balance issues that arise.

2.1 THE INDUSTRY OF PROFESSIONAL BASEBALL

(a) The origins of baseball

Despite the myth that Civil War general Abner Doubleday invented baseball in 1838 (see Ryczek 2009, 16-27), baseball is a game that grew from the streets of New York and it evolved over the decades between 1830 and 1870 to be clearly distinguished from sports such as rounders, barn ball, town ball and old cat (Ryczek 2009, 27; Szymanski and Zimbalist 2006, 12). The Knickerbocker Baseball Club of New York wrote the first rules of baseball in 1845 (Weiler et al 2015, v; Rosenblatt 2014, 341; Szymanski and Zimbalist 2006, 16). These provided the basis for uniformity in games for the first time (Ryczek 2009, 34; Szymanski and Zimbalist 2006, 16). The Knickerbocker Baseball Club was also important in transitioning baseball from informal gatherings to formal clubs (Ryczek 2009, 33). Baseball in the 1850s grew to become a game not just for aristocrats and the Civil War saw the rapid expansion of baseball across all states. The emergence of gate money from games and the railroad in the 1860s helped baseball move west. By the 1880s professional baseball had an organisational structure similar

to the one it would have during the 20th century (Szymanski and Zimbalist 2006, 18-20, 33).

During the 20th century, baseball developed into what is now a multi billion-dollar global industry. Although not as much of ‘global game’ as soccer (for an explanation see Szymanski and Zimbalist 2006), baseball is no longer just the national pastime of the United States. Baseball’s popularity as a professional and amateur sport is now established in North America and a number of countries in Latin America and East Asia. Baseball also has a long history in Australia (see Clark 2003), though it is not one of the mainstream sports, and baseball’s popularity is slowly growing in parts of Europe.

(b) What is the game of baseball?

According to the official rules of MLB, which apply equally to NPB and the ABL, ‘baseball is a game between two teams of nine players each, under direction of a manager, played on an enclosed field in accordance with [the] rules, under the jurisdiction of one or more umpires’ (MLB Official Baseball Rules 2016, rule 1.01). An official game is made up of nine innings, consisting of a ‘top’ and ‘bottom’ half innings, where teams rotate between offense and defense. Further, the official rules state that the aim of each team is to win by scoring more runs than the other team (MLB Official Baseball Rules 2016, rule 1.05). The winner of a game is the team who, in accordance with the rules, scores the greater number of runs at the conclusion of an official game (MLB Official Baseball Rules 2016, rule 1.06).

A baseball game involves a team’s nine players taking the field, or what is commonly

known as the 'baseball diamond' (the shape of the three infield bases and the home plate). These players consist of the pitcher, catcher, first baseman, second baseman, third baseman, short-stop, left fielder, centre fielder and right fielder. Unlike many other sports, the defensive team initiates and ends each play. The pitcher takes the mound and starts each play by throwing a baseball to the catcher from a piece of rubber attached to the mound. Trying to hit the baseball is the offensive team's batter, who stands in the batter's box with a cylindrical bat, and either swings at or leaves a pitched delivery. Offensively, each fielder takes their turn as a batter, although some leagues allow a 'designated hitter' to hit for the pitcher. The aim of the pitcher is to record the batter as an out. This may be done by pitching three 'strikes' (deliveries that the batter swings at and misses, that are hit 'foul' outside the field of play, or that pass un-hit through the 'strike zone'); or the batter may hit the baseball into the field and allow the defense to record an out. Conversely, the batter's aim is to reach base by recording a safe hit, forcing an error by a fielder or securing a 'base-on-balls' or 'walk' (four pitched deliveries that are not strikes).

As a global game, the inherent nature of baseball will always be the same, no matter where it is played, but both subtle and major variations affect players. For example, compared to the baseballs used in MLB, NPB baseballs are slightly smaller, the seams are not as high and the surface of the leather is a little different. Also, NPB pitching mounds are slightly lower than MLB mounds. These subtle differences can have a psychological affect on players moving between the two leagues. Major differences also exist between regions in how the game is played. NPB permits drawn games and contemporary American baseball is built on power: a pitcher's maximum velocity and an offensive game built on the home run. In contrast, baseball in Asia, notably Japan,

South Korea and Taiwan, is a game founded on perfect execution of the fundamental skills and contact hitting as opposed to power hitting. These differences, when combined with variations in team culture, language and food, can influence the success of a migrant baseball player (see Whiting 1989).

(c) The basic structure of professional baseball

Professional ‘organised’ baseball can be differentiated from the ranks of amateur baseball (including semi-professional baseball).¹⁵ Various levels of status and prestige attach to professional leagues, with MLB the worlds’ most prestigious and highest paying professional baseball competition, followed by NPB. Inside professional baseball operates a system that classifies a league based on the standard of play, differentiating between ‘major’ and ‘minor’ leagues. In North America, the National and American Leagues are classed as ‘major’ leagues, operating under the governance structure of MLB. The numerous Minor Leagues are vertically integrated into the Major Leagues and MLB clubs control the contracts of Minor League players in affiliated clubs. Within Japan the Pacific and Central Leagues possess the status of ‘major’ leagues or in Japanese *ichi-gun* (Division 1) and are governed by NPB. But in the global world of baseball the National and American Leagues are considered to be the only major leagues. The ABL operates as a single league and as a (northern) winter league¹⁶ is the equivalent of a low level minor league in the United States. Like all professional sports leagues these three baseball leagues share a common structural

¹⁵ Semi-professional baseball involves payment to players to cover their costs, as for example in the industrial league competitions in Japan.

¹⁶ Traditional winter leagues used by MLB teams include the Arizona Fall League, the Dominican Summer League, the Venezuelan Summer League and the Mexican League. Recently the Taiwanese Chinese Professional Baseball League (‘CPBL’) created a winter league called the Asia Winter Baseball League. The league operated in 2012, 2013, 2015 and 2016 and attracted players from the CPBL, the Korean Baseball Organization (‘KBO’) and NPB.

feature in that there is a need for economic cooperation among member teams, rather than economic competition,¹⁷ which includes teams agreeing to league sponsors and participating in the same league.

(d) The labour of baseball

In the world of sport the labour of team sports is distinct from individual sports like athletics and swimming because an individual cannot perform a team sport, nor can one team. A number of teams are needed to attract interest from fans, create broadcasting rights and generate investment from sponsors. The performance of labour in such a workplace is analogous to industries or jobs that involve a collective of workers collaborating to produce a single product or service, for example, a worker in a production line in the manufacture of a vehicle or the supply of components. The labour of baseball requires specialist skills that cannot always be performed in another position. Many professional baseball players frequently play one position for much of their career, sometimes changing position due to injury, team composition, age or career opportunity. A small number of ‘utility’ players can play multiple positions. Naturally, labour mobility is affected as players compete for one position on the field, or in the case of pitchers, a position in the starting rotation or the different positions within relief pitching roles.¹⁸ It should be noted that it is now more common for players to change fielding position during a career and even a season.

¹⁷ See *Smith v Pro Football Inc*, 593 F.2d 1173, 1194-1195 (D.C. Cir. 1978).

¹⁸ Modern baseball now has various types of relief pitchers, including a ‘long’ or ‘short reliever’, a ‘set up man’ to pitch the seventh or eighth innings and ‘closers’ who generally only pitch the ninth innings when his team is winning.

Employment in baseball is dependent upon a worker's athletic abilities, namely, the ability to run, throw, catch and hit a baseball. The equipment of workers, the baseball, baseball bat and glove, has experienced minor changes over time, such as specialised gloves for different positions. Sports science has seen the baseball player evolve to become stronger and fitter, and unfortunately the lure of fame and money saw the explosion of performance enhancing drug use by many MLB and MiLB players from the 1990s until recently.¹⁹ Modern training regimes constitute an important element of the labour of baseball and extend beyond practising the fundamental skills of the game to include strength and conditioning training and recovery work.

Of course, labour in baseball is not confined to the work of players. Coaches teach players in training and games, select players to perform work in a game and are typically responsible to ownership for the performance of the team. 'Front office' staff and 'scouts' recruit both amateur and professional players. Umpires officiate at games of baseball, applying the official rules of baseball to players and coaches. However, this thesis will focus on the workers who play the game of baseball.

(e) Who are the workers in professional baseball?

Labour in professional baseball has been, to date, the exclusive domain of young men, typically in their late teens to mid-30s. The global supply of baseball labour now includes workers from North America, South America, Asia, Europe, Oceania and even Africa. Consequently, baseball's workforce has diversified and includes people from multiple cultural, ethnic and religious backgrounds, all of whom speak a range of languages. Competition to secure the services of workers from these regions exists

¹⁹ See Chapter 6.4.

between leagues from different nations and from competing teams within a league: as noted below, club scouts now play an important role in global labour mobility through the identification and recruitment of foreign amateur and professional players. As will be seen below in Chapter 2.2 and in Chapter 8, each league adopts different labour rules to regulate the supply of global labour.

(f) Valuing the labour of baseball

At its heart, the game of baseball is a contest between the pitcher and the batter. When a batter puts a pitched ball into the field of play, the defensive skills of all nine players may be tested, as well as the ability of the offensive team to score the runner through different strategies. The valuation of workers in baseball reflects the inherent nature of baseball by placing a premium on the skills of a pitcher and a batter and different values are attributed to skills within each group of players. For example, a starting pitcher is valued on his ability to pitch through an entire line-up at least three times, relief pitchers such as left handed pitchers might be assessed on their ability to get out a specific left handed batter and a closer valued at their ability to record the last three outs of a game when their team has a lead. Similarly, different types of hitters are assessed on their ability to hit with power (homeruns and extra base hits), to get on base consistently and to run the bases quickly. These players may also be valued differently according to their defensive skills. The valuation of a player is critical to labour mobility as it influences a club's decision to recruit amateur and professional players, whether to retain or 'release' a player and the value and length of a player's contract.

Conducting the valuation and recruitment of amateur and professional baseball players is a club's baseball operations department. Central to this process are scouts and the

global era of baseball has seen the expansion of a team's scouting department to international operations. Professional teams have a number of scouts operating in a hierarchical structure that is overseen by a team's general manager and more recently, a president/vice president for baseball operations. A team's scouting system involves scouts submitting detailed reports on a prospective player, which are in turn 'cross-checked' by other scouts and supervisors. In this context scouting involves the recruitment of players from lower level leagues with sound development programs, for example, high school, college and other professional leagues (frequently foreign leagues). This system is expensive, time intensive and far from an exact science.

As a starting point, pitchers are assessed on the velocity of their fastball, then the quality of their secondary pitches. Pitchers have at their disposal a number of pitches and may use one pitch (rare) or a combination of pitches, sometimes applying subtle variations to a single pitch. Pitches in baseball include a four-seam fastball, a two-seam fastball, a 'cut' fastball, a split finger fastball or forkball, a screwball, a sinker (fastball), a curveball, a slider, a changeup, a knuckleball and the Japanese *shûto* (shoot ball). In professional baseball the velocity of these pitches typically varies from 80 miles per hour to 100 miles per hour, and the average speed of a major league fastball ranges from 88 miles per hour to 95 miles per hour. A pitcher's value rests on his ability to get a hitter out by using a combination of critical attributes of a pitched baseball: velocity, movement (lateral and downwards) and location. Conversely, a batter's ability is measured by his power and capacity to safely hit the different types of pitches. Scouts grade a position player's ability according to five 'tools': running speed, arm strength, hitting for average, hitting for power and fielding (Nichol 2012, 127).

Statistics also play an important role in valuing workers in professional baseball. Traditional statistical measures of performance reflect both the official method of scoring and the basics of the game. Such statistics for hitters include plate appearances ('PA'), batting average ('AVG'), slugging average ('SLG'), home runs ('HR') and runs-batted-in ('RBI'). The equivalent traditional statistics for pitchers include innings pitched ('IP'), complete games ('CG'), walks ('BB'), strikeouts ('K'), homeruns allowed and earned run average ('ERA') (Nichol 2012, 128). Revolutionising baseball statistics, scouting and even game strategies is the Society for American Baseball Research ('SABR')²⁰ (see Lewis 2003 and Davenport 2014).²¹ The statistical measures created by the SABR and its proponents are typically known as 'sabermetrics' and can now be expanded to incorporate the field of 'sports analytics'. Sabermetric inspired statistics utilise advanced mathematics to value players based on their ability to contribute to winning a game of baseball. Many MLB clubs use sabermetrics as the basis for their recruitment, as was made famous by Billy Beane and the Oakland Athletics in the book and movie Moneyball (see Lewis 2003). Some popular sabermetrics include on base average plus slugging average ('OPS'), walks plus hits per nine innings pitched ('WHIP'), batting average on balls in play ('BABIP') and wins above replacement ('WAR'). Defensive metrics include defensive runs saved ('DFR'), ultimate zone rating ('UZR') and the SABR defensive index (Nichol 2012, 129-130).

²⁰ See Society for American Baseball Research <<http://sabr.org/>>.

²¹ The boom in interest in sports analytics was demonstrated in 2015 at the Massachusetts Institute of Technology's Sloan Sports Analytics Conference, which had over 3,100 participants: Dizikes 2015.

(g) Labour controls in professional baseball

It is necessary to briefly summarise the key labour controls in professional baseball that will be examined throughout this thesis in the context of labour mobility. An important labour control in professional baseball (and other team sports) is the size of a roster. Baseball teams generally have two rosters: a roster for all contracted players and an active roster of players who can participate in a game. As will be seen in Chapter 2.2, the structure of these rosters in each of the three leagues does vary. Rosters are interconnected with a labour control that provides the foundation of labour mobility in professional baseball, the 'reserve' system, and players on a total roster are sometimes called 'reserved' players. Arthur Soden devised the reserve system in 1879 (Edmonds, 2012, 40-47) and in its current form it allows clubs to reserve a designated number of players (the total roster) for a specified number of years. MLB clubs are permitted to reserve 40 players for six years of Major League service and typically reserve over 200 Minor League players for up to seven years. In NPB clubs can reserve a total of 70 players for between seven and nine years of *ichi-gun* service. The ABL operates a flexible reserve system that allows clubs to retain players contracted in the previous season. Players agree to the reserve system in their uniform player contract. The impact of the reserve system is that players cannot change team during the designated period unless they are traded (clubs can 'assign' or transfer a player's contract to a competing team, a right which includes assignment to teams in a network of minor league affiliates) or if a club releases the player from their contract and thereby relinquishes their reserve rights. Upon completion of the designated number of years of service a player qualifies as a 'free agent' and can negotiate a contract with any club.

(h) Summary

The basics of the game of baseball such as the number of players, the positions and the fundamental skills are important in that they are the product of regulation, and, at the same time, they shape labour controls and practices in a league, including labour mobility. This interaction also influences how regulation responds to problems that arise from labour practices.

2.2 THE STRUCTURE OF LABOUR IN MAJOR LEAGUE BASEBALL, THE NIPPON PROFESSIONAL BASEBALL LEAGUE AND THE AUSTRALIAN BASEBALL LEAGUE

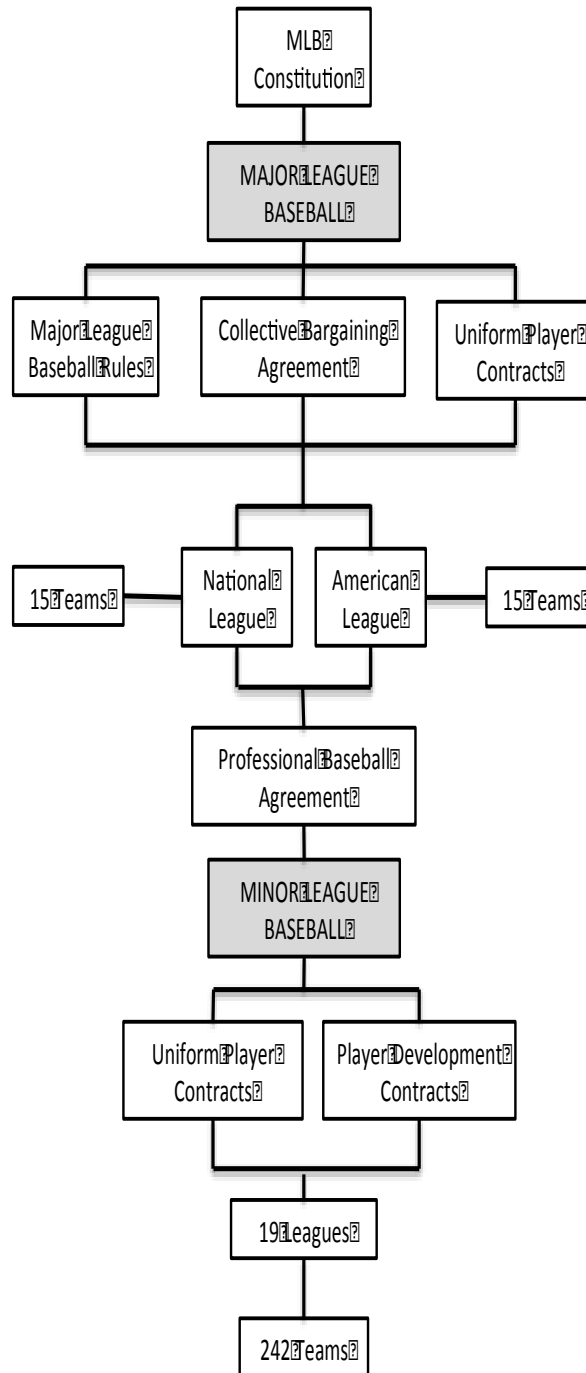
The professional baseball leagues of MLB, NPB and the ABL all share commonalities, most notably in how official games are played as there is general uniformity in the rules of baseball across the globe. However, the aim of this section of Chapter 2 is to identify key features of the structure of each league and the labour of member clubs. A comparative approach is adopted to determine whether there are similarities and differences in the overall regulation of labour across the three professional leagues.

(a) The governance of Major League Baseball and the structure of labour

The 30 major league clubs are located in large cities across the United States (and Toronto in Canada), with 15 member clubs each in the National League and the American League. In their early history these two leagues operated as separate competing entities, with the American League a rival major league to the National League, but with the advent of the World Series Championship in 1903 (between the winners of the two leagues), the two leagues became recognised as the ‘major leagues’. Each league is now separated into three geographic divisions: East, Central and West

(see MLB.com and Major League Constitution, article VIII, sec 1 and Major League Rules, rule 1 and attachment 52). The Major League Rules allocate each club an exclusive geographic territory to base their home stadium and operations (Major League Rules, rule 1 and attachment 52), thereby creating a monopoly for a club in Major League baseball. Spring training commences in February and the 162 game 'regular' season runs between April and September, when the multi-round playoff series starts, culminating with the World Series Championship in October (Major League Constitution, article IX). Therefore a MLB player works as a professional baseball player for up to nine months a year, including spring training.

Diagram 1 – The Structure of Major League Baseball



The Major League Constitution is a binding agreement on the owners of all 30 Major League clubs (Major League Constitution, article I) that is enforceable in the courts as a contract. Even though the Constitution was introduced in 1921 in response to the Chicago White Sox ‘fixing’ to lose the World Series in 1919, the American and

National Leagues continued to formally operate as separate legal entities until their official merger in 2000 (Broshius 2013, 59), when the roles of League presidents were eliminated and the operations of both Leagues came under the control of the Commissioner of Baseball (Pessah 2015, 272). The governance structure of MLB can be viewed as a joint venture between the owners of the league's member teams and is distinct from professional sports leagues that are administered by an independent entity (see Ross and Szymanski 2006). Team owners are now comprised of wealthy individuals, consortiums of wealthy individuals and corporations (Nathanson 2010, 603-609), and as owners of the league, typically act in their own self-interest in setting league policies (Ross 2001, 139).

Under the Major League Constitution, MLB's governance structure consists of the Office of the Commissioner of Baseball and the Executive Council (Major League Constitution, articles II and III). As the chief executive officer, the Commissioner of Baseball is appointed by the clubs (Major League Constitution, article II, section 9) and while the Major League Constitution does not expressly give owners the power to remove a Commissioner, a majority of owners can force a Commissioner to resign by passing a vote of no confidence, as was the case in 1992 with the removal of Commissioner Fay Vincent (Pessah 2012, 21-27). In addition the Commissioner is vested with broad regulatory powers through the requirement to administer the league in 'the best interests of baseball' (Major League Constitution, article II, section 2), and since 2000, to protect the integrity of baseball (Major League Constitution, article II, section 4; Ross 2002, 1675). In addition, the Commissioner has executive responsibility for labour relations (Major League Constitution, article II, section 2) and generally administers the game and the clubs by setting the Major League Regulations

(Major League Constitution, article XI, section 3). Neville observed that the role of the Commissioner and the various agreements entered into by MLB is to ‘maintain law and order within the official family’ and to ‘administer the game as a closed corporation’ (Neville 1947, 209).

The MLB collective bargaining agreement,²² negotiated between MLB and the Major League Baseball Players Association (‘MLBPA’) is the primary source of rules that governs the labour practices of individual teams and the entire league.²³ Notable labour matters governed by the collective agreement include contracting practices (MLB Basic Agreement 2012, articles III, IV, XIX and XXII), salaries and minimum salaries (MLB Basic Agreement 2012, article VI), salary arbitration (MLB Basic Agreement 2012, article VI.E), the reserve system (MLB Basic Agreement 2012, article XX), free agency (MLB Basic Agreement 2012, article XX.B) and revenue sharing (MLB Basic Agreement 2012, article XXIV). The current collective agreement saw the introduction of taxes and penalties for signing bonuses paid to newly drafted players and international amateurs that exceed a predetermined pool.²⁴

The workforce of a Major League club is comprised of players on the 40-man roster and, as will be discussed in Chapters 4, 5 and 7, the National Labor Relations Board (‘NLRB’) has held Major League players to be employees under the *National Labor Relations Act of 1935*.²⁵ Players with less than six years of service are ‘reserved’ by a

²² Major League Baseball, *Major League Baseball Basic Agreement 2012-2016* (effective 12 December 2011). Hereinafter ‘MLB Basic Agreement 2012’.

²³ A new collective agreement was entered into on 1 December 2016. But as this agreement was concluded after the research for this thesis was completed, it will not be examined.

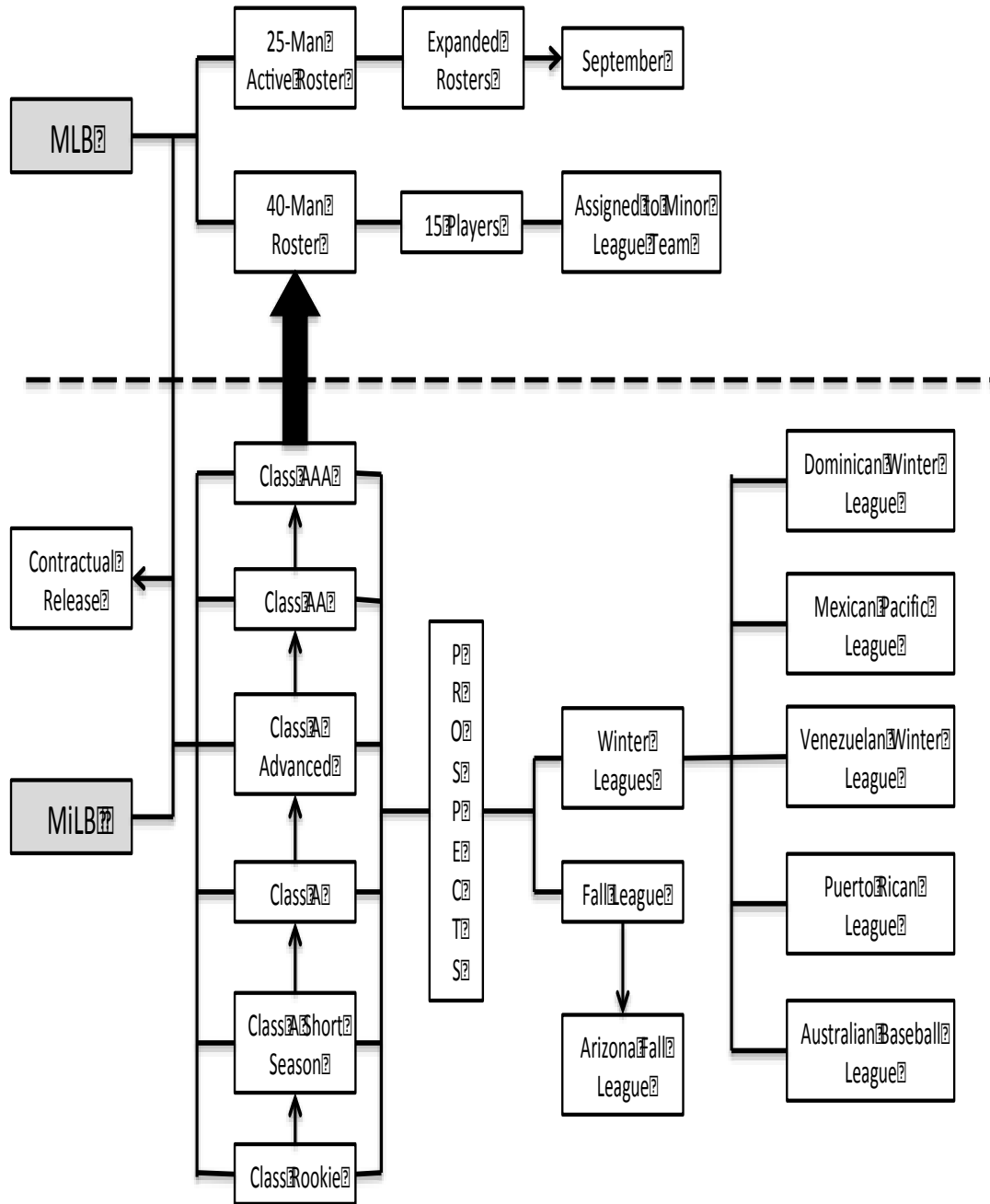
²⁴ Major League Baseball, *Summary of Major League Baseball Players Association-Major League Baseball Labor Agreement 2012-2016*, paragraph III.e.

²⁵ (49 Stat 449) 29 U.S.C. § 151–169.

club (other players are ‘free agents’ and contracted for a specified number of years) and a club can therefore control the contractual rights to players during this service period (Major League Rules, rule 2(a)(b)(1)(A)). The reserve and free agent systems will be examined throughout this thesis. The United States Court of Appeal for the Second Circuit observed in 1995 that all professional sports in the United States now have a version of the reserve system.²⁶ In the context of labour law, the reserve roster also has the effect of establishing the membership of the bargaining unit for the purposes of collective bargaining (MLB Basic Agreement 2012, article II). An ‘active roster’ of 25 players is selected from the 40-man roster and only these players can play in an official game (Major League Rules, rule 2(c)(2)(A)). The remaining 15 players are assigned to an affiliated Minor League club. Thus, 750 players make up the total workforce in MLB, though each season that number can increase to up to 1,200 players when rosters are ‘expanded’ to a maximum of 40 players after 1 September (Major League Rules, rule 2(c)(2)(A)).

²⁶ *Silverman v Major League Baseball Player Relations Committee*, 67 F.3d 1054, 1060 (2d Cir. 1995).

Diagram 2 – The Labour Structure of Major League Clubs



This labour system allows clubs to add and remove players from its active and 40-man rosters. During the course of a 162 game-season, over a period of six months, a Major

League club makes hundreds of roster transactions, producing a labour system across all 30 Major League clubs that annually involves thousands of such transactions. Roster changes may be in response to the immediate or long-term needs of the active roster and can be created by factors like injury, poor performance, personnel requirements, the playoff race or the availability of a player from a rival club. An internal method of meeting such needs is to utilise a club's Minor League labour by 'recalling' a player on the 40-man roster, or 'selecting' the contract of a non-rostered Minor League player. As will be discussed in Chapter 8.2(h) a club has a set number of 'options' that allows a player to be sent to a Minor League team before a player must pass through 'waivers' where any club can obtain the player. Alternatively, a Major League club can obtain labour externally by trading Major or Minor League players to another Major League club in exchange for one or more players.²⁷

(b) Major League Baseball's labour supply: the Minor Leagues

A MLB club's network of Minor League teams is frequently called a 'farm' system. Players signed to a Minor League contract by Major League clubs play in the system of Minor Leagues spread across North America and operate under the umbrella organisation of the National Association of Professional Baseball Leagues ('NAPBL'), now commonly known as Minor League Baseball ('MiLB') (see Major League Rules, attachment 52). Governing the relationship between the NAPBL, MLB, and the respective member clubs is the Professional Baseball Agreement (incorporated into the

²⁷ Ross observes that 'cash sales' for elite players gradually disappeared after World War II, and all but stopped in 1978 after Commissioner Bowie Kuhn used his 'best interest' powers to stop Charles Finley, owner of the Oakland Athletics, from selling three of his best players to the Boston Red Sox and the New York Yankees in the middle of a season, shortly before the introduction of free agency. Kuhn's exercise of this power was upheld by the Seventh Circuit of the Court of Appeals in *Charles O Finley & Co v Kuhn*, 569 F.2d 527 (7th Cir. 1978): Ross 2002, 1693-1695. Cash sales of lower level players do occur, and some MLB teams sell the rights to players to NPB clubs for sums in the hundreds of thousands of dollars.

Major League Rules).²⁸ The general relationship between a Major League club and its Minor League clubs is set out in rule 56 of the Major League Rules, the detail of which can in turn be found in an agreement called a Player Development Contract (Major League Rules, rule 56 and attachment 56).

Most Minor League clubs are independently owned (see Smith 2013) and therefore many Major and Minor league clubs enter a Player Development Contract, resulting in Minor League baseball commonly being referred to as ‘affiliated baseball’ and distinguished from the independent professional baseball leagues. The current Professional Baseball Agreement between MLB and the NAPBL requires MLB clubs to maintain 160 Minor League teams (Hill 2011), slightly above 5 teams per Major League club. The anticompetitive effect of this requirement is that Major League Baseball has a monopoly over professional baseball players. Consequently rival independent leagues with high-level talent are simply not possible.

Under the Major League Rules, Major League clubs must maintain the player lists for all of their Minor League clubs (Major League Rules, rule 56(g)(1)), are responsible for the salaries of players (and coaches) (Major League Rules, rule 56(g)(5)(A)) and must cover the spring training costs of their Minor League clubs (Major League Rules, rule 56(g)(5)(B)). Major League clubs have the power to transfer players through their network of clubs as they possess the right to direct, transfer or assign a player and the player’s contract to any club in its Minor League system or to a Major League club (Major League Rules, rule 56(g)(3)). Players formally consent to this system by signing

²⁸ Please note that references in this thesis are to the 2008 edition of the Major League Rules. While a newer version may exist such a version is not publicly available.

the Minor League uniform player contract (Minor League Uniform Contract, paragraph XVII).

The Minor League network is comprised of around 240 clubs that compete in 19 leagues (see MiLB, 'Teams by classification'). Of the over 7,000 Minor League players, 46 per cent are now born outside the United States, many from countries in Latin America (ESPN 2012, 'Percentage of foreign players'). To obtain a position on a Major League 40-man roster, a Minor League player must progress through his Major League club's 'organisation' of Minor League clubs at the following Classes: Rookie, Rookie-Advanced, Short-Season A, A, A-Advanced, AA and AAA (Major League Rules, rule 51(a)). The reserve lists range from 35 players at Class Rookie to 38 players at Class AAA (Major League Rules, rules 2(b)(1)(B)-(E)). Active rosters are set at between 24 and 35 players (Major League Rules, rules 2(c)(2)(B)-(F)). To reach a Major League 40-man roster, during the offseason, some 'prospects' are asked to play in the prestigious Arizona Fall League or affiliated winter leagues in Latin America and Australia (Major League Rules, rule 18(a)).²⁹

(c) The governance of Nippon Professional Baseball and the structure of labour

Established as a seven-team competition in 1936 called the *Nippon Shokugyô Yakyû Renmei* (Nippon Professional Baseball Association) (Guthrie-Shimizu 2012, 156), there are now 12 clubs in NPB's *ichi-gun* (Division 1 or major league). These clubs are evenly divided into the Pacific and Central Leagues. Teams play a 144 game regular season and multi-round playoff series that is sandwiched between spring and autumn

²⁹ Official winter leagues in the offseason include competitions in Venezuela, the Dominican Republic, Mexico and Australia.

training. Large Japanese corporations own NPB clubs, including their affiliated minor league teams and the baseball club operates as a subsidiary of the parent corporation. Like the governance structure of MLB, NPB is a joint venture comprised of the owners of the member clubs. Indeed NPB has replicated the general framework of MLB: specifically, the central governance of a two-league system; the commissioner system; the general system of internal labour regulation; and internal labour controls such as the reserve system.

However, the formal rules of NPB are structured differently to MLB. While there are rules that regulate specific labour matters, such as the Rule of Free Agent,³⁰ the Rule of NPB Draft³¹ and the Rule on Development Players,³² all other league matters are contained in the Nippon Purofessionaru Yakyû Kyoyaku [Japanese Professional Baseball Agreement] 2016³³, a document that incorporates rules and practices typically found in a league's constitution, by-laws and collective bargaining agreement.

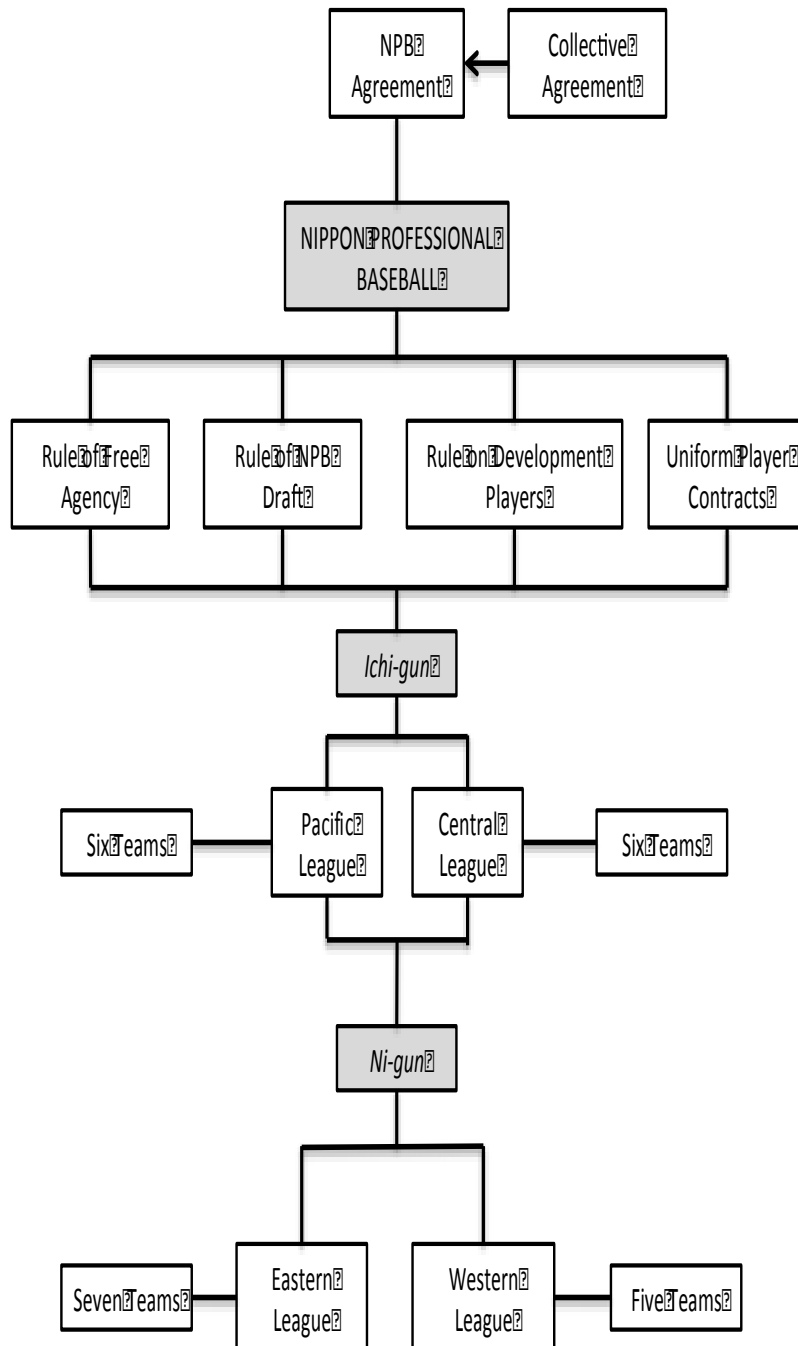
³⁰ Nippon Professional Baseball, *Furiêjento Kiyaku* [Rule of Free Agent] 2009.

³¹ Nippon Professional Baseball, *Shinjin Senshu Sentaku Kaigi Yaku* [Rule of NPB Draft] 2006.

³² Nippon Professional Baseball, *Nippon Puro Yakyû Ikusei Sensyu ni Kansuru Kiyaku* [The Rule on Professional Baseball Development Players] (2006, revised 2013).

³³ Hereinafter the NPB Agreement.

Diagram 3 – Structure of Nippon Professional Baseball



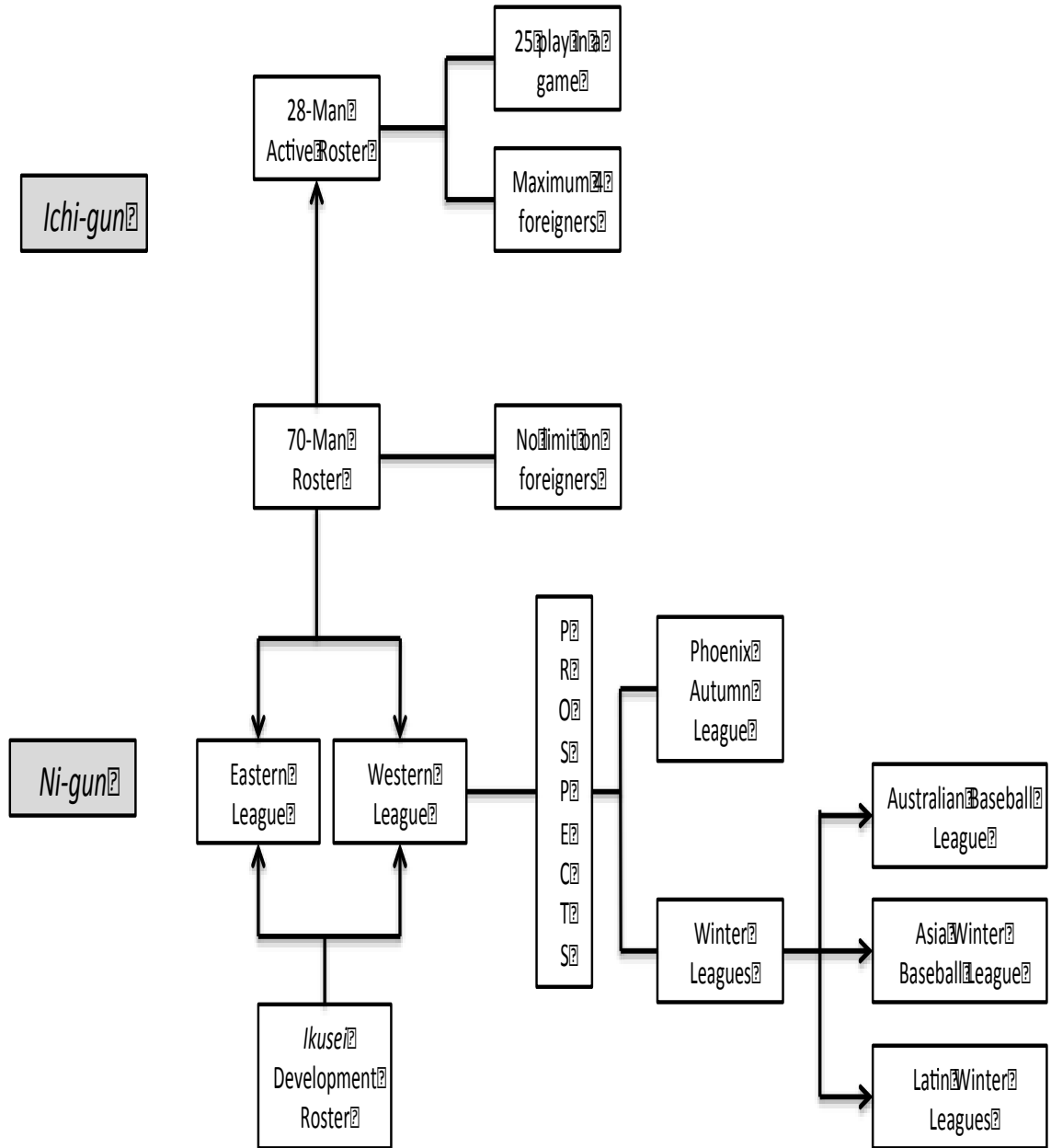
In contrast to the bifurcated labour system of MLB and MiLB, NPB operates a fused labour system, a product of NPB’s small size and the parent company of NPB clubs

owning the *ni-gun* (Division 2) team and (where relevant) *san-gun* (Division 3) team. Clubs have a single 70-man roster, composed of all registered players on the *ichi-gun* and *ni-gun* teams (NPB Agreement 2013, article 81(2)). As will be discussed in Chapters 4, 5 and 7, the Labor Relations Commission and the Tokyo High Court have recognised NPB players as employees under the *Labor Union Act*.³⁴ The active roster of each *ichi-gun* team consists of 28 players (NPB Agreement 2013, article 81(2)). There is no foreign player limit for a 70-man roster but only four foreigners are permitted on a team's active roster for any particular game.³⁵ Foreign players on an active roster are limited to a maximum of three position players or three pitchers (NPB Agreement 2013, article 82(2)). Most clubs maintain an *ikusei* (development) roster and these players cannot be added to the active roster but can be transferred to the 70-man roster (NPB Rule on Professional Baseball Development Players 2013, article 1).

³⁴ Rôdô Kumiai Hô [*Labor Union Act*], [Act No. 174 of 1 June 1949 as amended through Act No. 102 of 21 October 2005].

³⁵ For a historical overview of the number of foreign players permitted on NPB rosters, see Nishizaki 2016. Under NPB rules, non-nationals can qualify as a Japanese national by spending three years at junior high school or high school, or four years at university: NPB Agreement 2013, article 82(1)(2).

Diagram 4 – The Labour Structure of Nippon Professional Baseball Clubs



Normative practice shapes the management of NPB rosters. Throughout a season, all NPB teams have several vacancies on the 70-man roster, giving teams flexibility during the year to recruit a foreign player or transfer an *ikusei* player. During the 2016 season roster sizes varied between 64 and 69 players (see NPB English website; Professional Baseball Perfecto Data 2016). Teams typically have between five and eight foreign players on the 70-man roster (see NPB English website; Professional Baseball Perfecto Data 2016). Differences also exist in *ikusei* roster sizes. In 2016, the Saitama Seibu Lions and Hokkaido Nippon Ham Fighters had no *ikusei* players, most clubs had between two and three such players, while there were 12 at the Tohoku Rakuten Golden Eagles and the Chunichi Dragons, 23 at the Yomiuri Giants and 24 at the Fukuoka Softbank Hawks (see NPB website in English).

Ni-gun teams compete in the Eastern League or the Western League, the only minor leagues in NPB. In 2016 four NPB clubs formally had a *san-gun* (Division 3) team: the Yomiuri Giants, the Fukuoka Softbank Hawks, the Toyo Hiroshima Carp and the Tohoku Rakuten Golden Eagles. However, these teams do not play in the Eastern or Western Leagues but instead play informal games against amateur and independent league teams. In the offseason *ni-gun* players and some *ichi-gun* players participate in the Phoenix League, NPB's autumn league equivalent to the Arizona Fall League. In addition, prospects play in winter leagues in Latin America, Taiwan and Australia.

(d) The governance of the Australian Baseball League and the structure of labour

The Claxton Shield began in 1933 as an amateur tournament involving representative teams from the Australian states and in 1989 was replaced with Australia's first professional baseball league: the Australian Baseball League. Teams were privately

owned and operated under a license issued by the league. The number of teams fluctuated during the league's history. Financial problems saw the league renamed the International Baseball League Australia in 1999, eventually collapsing in 2001. In the same year the Claxton Shield returned as a state-based round robin competition and was the pinnacle of Australian baseball for the next nine years. Despite the absence of an Australian professional league, Australian baseballers continued to sign professional contracts with MLB clubs and a number of these players played in MLB.³⁶

Launched in the Australian summer of 2010, the current ABL is a single league competition with six teams based in Australia's largest cities. At the time of writing the structure of the ABL diverged significantly from both MLB and NPB in that MLB is the controlling owner of the league with a 70 per cent ownership stake, with Baseball Australia, baseball's national governing body, owning the remaining 30 per cent (ABL, 'Media Guide 2013-14'). MLB effectively controls each ABL team as all six teams are owned by the ABL. Few professional sporting leagues in the world have an ownership structure where an entire league and its member teams are owned by another professional league.³⁷ Such an ownership model raises questions as to the integrity of the league and why MLB chose not to sell the rights to the six ABL franchises and provide support in terms of players and finances.

The general governance of the ABL does not include the commissioner system. MLB controls the governance of the league by appointing the league's senior official: the

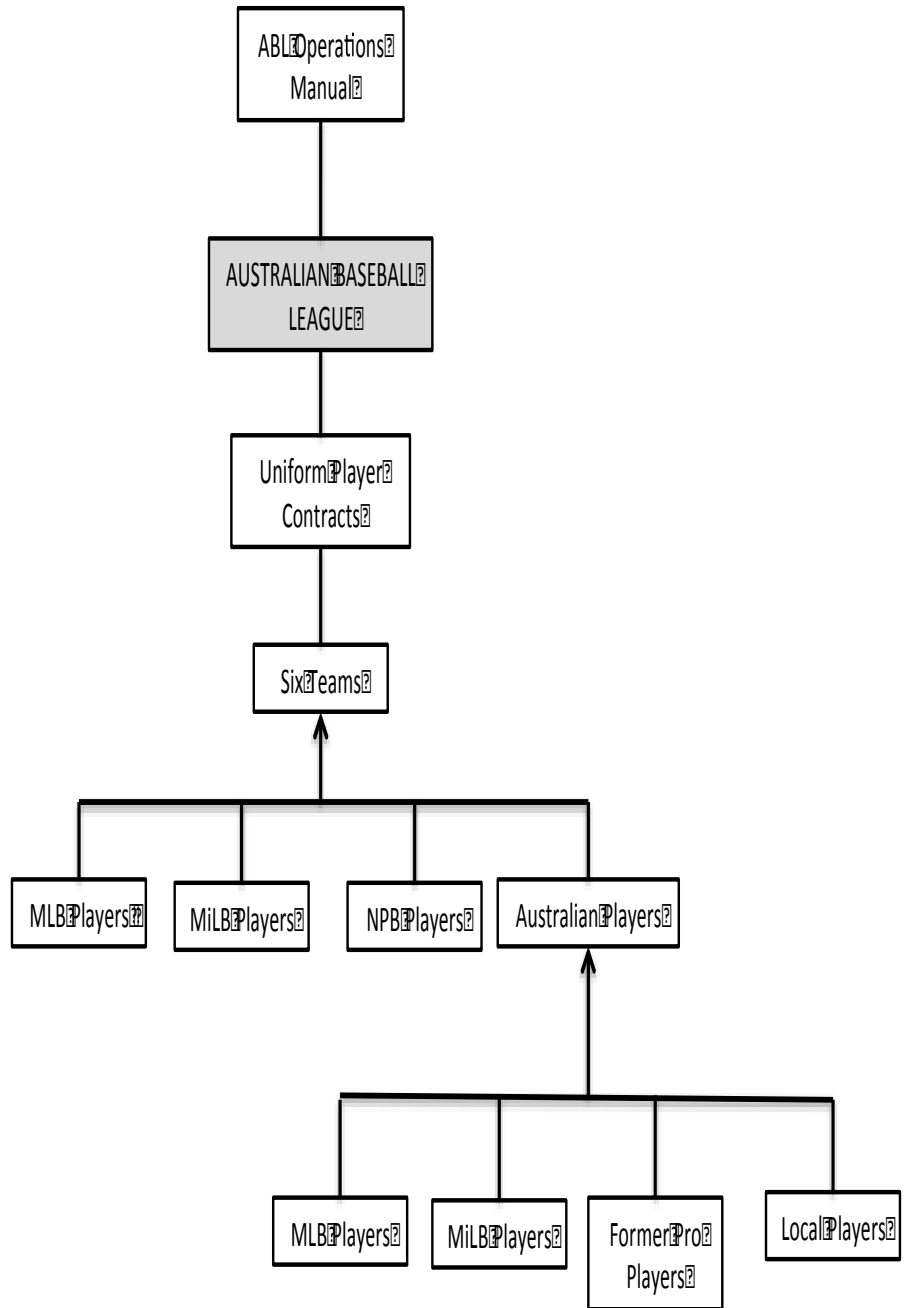
³⁶ Such players include Justin Huber, Shane Lindsay, Brad Harman and Luke Hughes.

³⁷ In the United States the Women's National Basketball Association is controlled by a company that is owned by the owners of the National Basketball Association teams, but individual teams are privately owned: Ross and Szymanski 2006, 248.

general manager. The ABL then appoints each team's general manager, a role that is different from the traditional general manager in baseball and is functionally equivalent to a chief executive officer. MLB makes major decisions on the league, such as the length of the season and the number of teams, as well providing the finances to support the six teams and legal support such as the proscribed format for uniform player contracts. The ABL is left to operate the daily business of the league. There is no ABL constitution or by-laws: instead, the league's general competition rules, playing conditions and labour controls are set out in the Australian Baseball League Operations Manual³⁸ and the league varies these rules from year to year.

³⁸ Note that references in this thesis are to 2013-14 version of the Operations Manual. While there may be newer versions, they are not publicly available.

Diagram 5 – Structure of the Australian Baseball League and Labour of Clubs



The purpose of the ABL is intrinsically linked to MLB's ownership and their dual aims of creating a winter league for Minor League prospects and globally growing baseball and the MLB brand. In providing a pathway into professional baseball for Australian players and for professional players to progress to the highest level in their league, the function of the ABL as a winter development league shapes the length of its season and labour market. Running between November and February, the ABL's short season of 40 regular season games and two-week playoff series is wedged between the end of the MLB and NPB seasons and spring training in the following year.

Due to the short length of the ABL season, the labour size of each ABL team is comparably smaller than teams in the other two leagues. An ABL team can register a maximum of 35 players and maintain a development list of five players for home series (ABL Operations Manual 2013-14, Roster Management Summary, articles 3.1 and 3.2). Management at each team makes personnel and roster decisions and the ABL sometimes assists teams in acquiring foreign players. Active rosters are capped at 22 players and during the regular season home teams can add two development players (ABL Operations Manual 2013-14, Roster Management Summary, article 3.2). Players contract with the ABL, not individual teams and the ABL assigns the player to a team (ABL Standard Player Contract). As will be discussed in Chapters 4, 5 and 7, the High Court of Australia has held professional athletes to be employees³⁹ and the employment of ABL players can therefore be regarded as subject to Australian labour law. A regulatory tool not used in MLB or NPB but adopted in the ABL is a salary cap (ABL Operations Manual 2013-14, Roster Management Summary, article 2). The cap of AUD\$50,000 per team limits the ability of clubs to secure the services of high priced

³⁹ *Buckley v Tutty* (1971) 125 CLR 353, 371-372.

talent and formally attempts to achieve competitive balance, though such a system is interesting in light of the central ownership of all teams. Another feature of the ABL's labour system is the restriction placed on the number of foreign players. A maximum of 10 to 14 foreign players are permitted on a team's 35-man roster, with the smaller cities of Canberra and Adelaide permitted the most foreign players (ABL Operations Manual 2013-14, Roster Management Summary, article 4). Also, a team must have five Australian players in the lineup during a game (ABL Operations Manual 2013-14, Roster Management Summary, article 5) and two of the starting pitchers in a four game series must be Australian.

In addition to providing opportunities for local Australian players, including active MiLB and MLB players, the ABL has quickly evolved to act as a development league for professional players from the MiLB system. It also acts as a regional development league for Asian leagues such as NPB and, to a lesser extent, the Korean Baseball Organization ('KBO') and Taiwan's Chinese Professional Baseball League ('CPBL') (ABL, 'Media Guide 2013-14', 15). The establishment of the Asia Winter League in Taiwan by the CPBL in 2012 saw a decrease in the number of Asian clubs sending players to the ABL, a trend that was reversed with the cancellation of this league in 2014, when three NPB clubs sent players to ABL teams (the numbers decreased again in 2015 and 2016 when the Asia Winter League resumed). Most ABL teams secure a number of 'import' players through informal relationships with foreign clubs or through the ABL.

(e) Summary

The structure of labour and the league competition shows that MLB and NPB are elite professional leagues, where players are able to earn a living as a professional baseball player. In contrast, the ABL functions as a winter league for players from MLB and MiLB clubs, and clubs in Asia's professional leagues, predominantly NPB. The distinction between these two types of leagues influences how professional baseball is regulated, the composition of rosters and the number and function of regulatory actors. It is also important to note that all players are classed as (or in the case of Australia assumed to be) employees under their respective labour law systems.

2.3 THE FINANCE OF PROFESSIONAL BASEBALL AND COMPETITIVE BALANCE

The finance of baseball draws a great deal of scholarly attention.⁴⁰ Increased affluence, demand, and technology have all resulted in an explosion of revenues in recent decades for baseball clubs. When combined with a lessening of anticompetitive restraints on players, the costs of labour and operating a professional baseball club have risen accordingly. Equally, the economic rewards of ownership have increased as clubs and leagues diversify and enhance revenue streams, which can then be used to fund player salaries. Scholars, leagues and owners focus on the relationship between the ability of a club to finance the acquisition of high priced players, and to fund its total player payroll with competitive balance in the league. This section starts by introducing a concept of competitive balance, then provides a brief overview of the finances of

⁴⁰ For work by economists, see eg Zimbalist 2010; Sanderson and Siegfried 2003a and 2003b. For legal analysis, see eg Edmonds 2009.

professional baseball by looking at team payrolls and revenue, and finishes by identifying different labour controls that are used to try to achieve competitive balance.

(a) The concept of competitive balance

Owners in professional sports leagues like MLB have long used competitive balance as the justification for labour controls that would otherwise be illegal restraints of trade in most industries (Ross 2002, 1675). But what is competitive balance? Even though McKeown observes that competitive balance has no precise definition, he broadly describes it as a level of competitiveness and uncertainty that optimises the appeal of a league to fans (McKeown 2011, 525). McKeown's concept of competitive balance can therefore be seen to focus on avoiding prolonged domination by an individual team or athlete. In this context, the unpredictability of the outcome of a sporting contest is seen as a significant factor in creating interest in sport by fans, as well as sponsors and the media, which in turn generates revenue.

Competitive balance can also be measured and in 2000 the authors of a MLB-commissioned report on the economics of MLB developed a metric to do this. Their metric is that every well-run club has a 'regularly recurring reasonable hope of reaching post-season play' ('RRRRPP') (Levin et al 2000, 8). Ross traces the origins of this definition to the competitive balance concept set out by the United States District Court for the Eastern District of Pennsylvania in *Philadelphia World Hockey Club Inc v Philadelphia Hockey Club Inc*.⁴¹ The RRRRPP is underpinned by maintaining fan interest and Ross endorses this as the best metric in MLB to achieve McKeown's

⁴¹ 351 F.Supp 462, 486 (E.D. Pa. 1972), where Higginbotham J stated that competitive balance is when each team has 'the opportunity of becoming a contender over a reasonable cycle of years and a reasonable chance of beating any other team on any given night'.

concept, on the basis that it sets a clear benchmark to assess labour controls that may restrain trade (Ross 2002, 1679). Using the RRRRPP, the level of competitive balance in a league can be measured by analysing a time period and determining the number of teams in a playoff race, the number of teams who win a pennant (in MLB now a division or league championship) and the number of times teams finish with no hope of reaching the playoffs (Ross 1989, 674-675).

(b) The financial divide between rich and poor in professional baseball

The financial resources available to a team influence its ability to retain and acquire players, in turn influencing a team's competitiveness. A team's finances are shaped by its ability to create revenue through game attendance, media deals, sponsorship and merchandise. Such revenues can be eclipsed in leagues where there is revenue sharing, particularly in the case of media rights deals. The inherent financial advantage of teams in larger cities in some leagues has been reduced by revenue sharing. Recent decades have seen MLB teams in large media markets entering joint ventures with cable television companies to create networks that cover a team's games, in turn securing long-term income sources.⁴² The sale of television rights to cable networks provide another lucrative revenue source for some teams. In 2013, the Los Angeles Dodgers sold the exclusive rights to broadcast their games for 25 years to Time Warner Cable for US\$8.35 billion (Plaschke 2015). Such deals give some teams a substantial advantage in possessing a long-term income source that can finance team payrolls. Labour controls that limit total payrolls and require revenue distribution, such as the revenue sharing system in MLB, are often advocated on the basis of reducing the

⁴² For example, the Yankees are part owners of the YES (Yankees Entertainment and Sports) Network and the Boston Red Sox are co-owners of NESN (the New England Sports Network).

financial imbalance between teams, however there is nothing in the current MLB rules that prevents some smaller revenue teams from pocketing revenue sharing cash or maintaining low payrolls.

(c) Payrolls and salaries

Issues of competitive balance and financial equality among teams in professional baseball tend to focus on the total payroll for a team's playing roster. But a caveat is required before examining total payrolls in each of the three leagues. Zimbalist identifies multiple methods for calculating a team's total payroll that can distort the amount of a team's total payroll. According to Zimbalist, the basis for calculating payroll can be manipulated by using the smaller numbers of the active roster, or the larger numbers of total reserved players. These numbers can include or exclude injured players on the 'disabled list'. What is included in the payroll is another relevant variable: player benefits, deferred salary, signing bonuses, guaranteed or non-guaranteed salary, transfer fees and the annual salary secured in long-term contracts. The last relevant consideration is when a payroll is calculated: Opening Day, the middle of the season or the end of the season. This is an important variable in MLB as clubs in the race for the playoffs are likely to acquire players that can significantly increase payroll, while those not in contention may look to decrease payroll by trading high paid players (Zimbalist 2010, 18).

No salary cap exists in MLB and at the start of the 2016 MLB season, the total payroll on opening day for all 30 MLB clubs exceeded \$US3.7 billion.⁴³ The payrolls of the

⁴³ The data obtained on total payrolls is based on MLB data on the rosters of teams on opening day and disabled lists, excluding deferred payments, incentive payments and money received for traded players.

15 MLB clubs with the highest total payrolls ranged between the Baltimore Orioles' and New York Mets' US\$130 million and the Los Angeles Dodgers' \$US253 million. Also exceeding the US\$200 million mark was the New York Yankees and their US\$227 million total payroll. The 15 clubs with the lowest total payrolls had payrolls of between the Chicago White Sox's \$US115 million and the Milwaukee Brewer's US\$62.9 million (Riccobono 2016). The minimum wage for players on a 25 man-roster is now slightly above US\$500,000 (MLB Basic Agreement 2012, article VI.A(1)) while the average salary is US\$4.25 million (Berg 2015). Total payrolls are boosted by the salaries of free agents, who can receive annual salaries in the tens millions of dollars.⁴⁴

However the wages for Minor League players are much lower than those of Major League players. While some drafted Minor League players are fortunate to receive signing bonuses that range between the hundreds of thousands and millions of dollars, all Minor League players are paid notoriously low salaries. Monthly incomes begin at approximately US\$1,100 at Class Rookie and peak at approximately US\$2,150 at Class AAA.⁴⁵ As players are generally only paid during the season, players in the lower leagues can earn as little as US\$3,300 a year.⁴⁶ Players signing their second Major League contract or with one day of Major League service receive a minimum Minor League wage of US\$81,500, and players signing their first Major League Contract are paid a Minor League wage of US\$40,750 (MLB Basic Agreement 2012, article VI(2)(ii)(3)). As will be discussed in Chapters 6 and 7, several retired Minor League

⁴⁴ Notable recent lucrative contracts include Alex Rodriguez's ten-year contract with the New York Yankees for \$US275, Albert Pujols's ten-year contract for US\$240 million with the Los Angeles Angels and Giancarlo Stanton's 13-year deal with the Miami Marlins for US\$325 million.

⁴⁵ *Senne, Liberto, Odle and Others v Office of the Commissioner of Baseball, Major League Baseball and Others*, Case 3:14-cv-00608-JCS (N.D. Cal. 2014 February 7), Complaint, Paragraph 98.

⁴⁶ *Ibid* Paragraph 101.

players are now challenging this wage system in two actions, claiming they were not paid the minimum wage under state and federal labour laws⁴⁷ and that the Minor League wage system violates antitrust law as a conspiracy to suppress Minor League wages.⁴⁸

As in MLB there is no salary cap in NPB. It should be noted that salary data on NPB players and teams is not as easy to access as for MLB, but the following player salary data provides some indication as to total player payrolls. While the salaries for NPB players are significantly lower than in MLB, they still far exceed the salary of the typical Japanese worker. Importantly, the gap between the highest and lowest paid player in NPB is much lower than in MLB. Revenue disparities may contribute to this gap and it is also possible that culture is a factor, as demonstrated by the Japanese expression, '*taru o shiru*', which means 'one already has all one needs'.

By 2012 the average salary of a player on a NPB team 28-man roster was US\$500,000 (Wong and Kawai 2012, 349), and the average salary for a 70-man roster player in 2016 was slightly lower at US\$408,000 (JPBPA, 'Research and Report 2016'; YakyuDB 2016). In 2016, the 30 highest paid players earned between US\$2 million and US\$5.5 million (Hatena Blog, 2016) and there were only 64 players who earned over 100 million yen (the equivalent to \$1 million in the United States) (JPBPA, 'Research and Report 2016'; YakyuDB 2016). Minor league wages in NPB are much higher than in the MiLB. While the minimum wage for a player on the 70-man roster is US\$46,000

⁴⁷ See *Senne, Liberto, Odle and Others*, Case 3:14-cv-00608-JCS (N.D. Cal. 2014 February 7), Complaint.

⁴⁸ *Sergio Miranda et al v Allan Huber Selig et al*, Case No 14-cv-05349-HSG (N.D. Cal. 2015), Order Granting Motion to Dismiss. Available at <<https://docs.justia.com/cases/federal/district-courts/california/candce/3:2014cv05349/282791/58>>.

(NPB Agreement 2016, article 89), the average salary of a *ni-gun* player is US\$218,000 (Kawai and Nichol 2015, 496; Wong and Kawai 2012, 349). A normative first year pay scale exists for foreign players. Players who have been MLB All-Stars can earn in excess of US\$3 million, while elite KBO players and players with several years of MLB experience can earn US\$1 million to US\$3 million. Players who were fringe 40-man roster players or good players in the KBO can earn between US\$500,000 and US\$1 million. Earning less than US\$100,000 are players from Class AA and AAA, American independent leagues, Taiwan and Mexico. Other foreign players earn between US\$25,000 and US\$50,000 as *ikusei* players (NPB Tracker 2013).

As discussed above, the salary cap in the ABL is approximately AUD\$50,000 per team (ABL Operations Manual 2013-14, Roster Management Summary, article 2), thus setting the total payroll for each team. ABL players do not receive signing bonuses and are only paid when they are on the active roster. Therefore ABL player salaries are not guaranteed. MLB and NPB clubs pay the salaries of their players, and while not included in the salary cap, each affiliated Minor League player reduce a team's salary cap by AUD\$750 (ABL Operations Manual 2013-14, Roster Management Summary, article 2.3). There is no minimum wage and players receive payments for being on the roster in a weekly four game series. The amount of this payment depends on an individual player's negotiating ability and typically ranges from AUD\$100 to AUD\$500, though development players receive no payment when they are on the active roster.

(d) Regulatory tools designed to achieve financial balance

A salary cap of the type used in the ABL is a common method of attempting to create a level playing field in the labour market in sport. It is discussed further in that context in Chapter 7.4. Ross describes most salary caps in professional sport as ‘blanket restraints’ in that they affect all teams equally, regardless of previous performance and may therefore undermine the goal of contributing to competitive balance (Ross 1997, 521, 523). Team salary caps can be ‘hard’, meaning there are no exceptions, or ‘soft’, in that payments can be excluded for particular classes of players (for example veterans and the long-term injured) or player payments by third parties (see eg Australian Football League, Collective Bargaining Agreement 2015-2016, articles 10, 11, 14 and 15). Ross also identifies a ‘progressive’ salary cap, whereby a tight cap is applied to the top teams, a more flexible cap to contending teams and no cap on teams whose season effectively ends early before a set time (Ross 2002, 1698). A salary cap can also involve setting a minimum on a team’s total payroll (Ross 2002, 1688; Levin et al 2000, 8; Australian Football League, Collective Bargaining Agreement 2015-2016, article 13). While the ABL uses a salary cap, as mentioned, neither MLB nor NPB use a salary cap, and as will be discussed in Chapter 5.4, the attempt by MLB owners to introduce a salary cap in 1994 saw the MLBPA conduct a 234 day strike, during which time the owners cancelled the season and the World Series.

A weaker form of salary control is MLB’s ‘luxury’ or ‘competitive balance’ tax. This taxation system has now evolved to apply penalties when thresholds are exceeded in relation to total MLB payrolls. Since 2012 similar taxation systems have been applied to bonuses paid to draftees and international amateurs. Luxury taxes are now used to fund the players’ pension fund and MLB’s industry growth fund (MLB Basic

Agreement 2012, article XXIII.H). The effectiveness of a luxury tax depends on where the threshold is set and the size of taxes (Pessah 2015, 108), and if the threshold is low and the tax severe, a luxury tax can be a de facto salary cap. In 2016 the threshold was set at US\$189 million (MLB Basic Agreement 2012, article XXIII.B). Almost all MLB clubs stay below the tax threshold, with the persistent exception being the big spending New York Yankees, who have contributed 92 per cent of all luxury taxes (Pessah 2015, 578). Consequently the luxury tax is sometimes called a ‘Yankee tax’, although the Los Angeles Dodgers have also become big spenders in recent years.

Another mechanism designed to contribute to economic balance is revenue sharing. The underlying principle of revenue sharing is that a percentage of revenues are shifted from the high to the low revenue teams. The intention is that low revenue teams are then able to use this money to fund their payroll by both retaining their players, and competing in the recruitment of high priced elite players. Revenue sharing was introduced in MLB in 1996 through collective bargaining, although there have been some concerns about its effectiveness. Not all recipient teams use the revenue sharing money for player payroll and some teams have used revenue sharing income to pay debt or for their own profit. Underreporting of revenue and manipulation of revenue through related party transactions does exist. Despite such practices, revenue sharing in MLB had grown to \$US400 million in 2015, and since 1996, one of the original targets, the New York Yankees, have paid \$1.5 billion to other clubs (Pessah 2015, 210, 578, 590). No revenue sharing exists in NPB, while in the ABL individual team revenues barely support each team.

(e) Summary

In the regulation of labour in professional baseball, finance plays an influential role in not only shaping the structure of the labour market but also real and perceived inequalities among teams in the recruitment and retention of players. In this context, issues of competitive balance now play an important role in shaping labour controls within a league. Such labour controls are now tools for attempting to achieve competitive balance and can be the subject of negotiations between owners, and between owners and unions.

2.4 CONCLUSION

This chapter has set out a basic overview of the structure and regulation of professional baseball in general, and in addition, provided insight into the operation of MLB, NPB and the ABL. The content of this chapter provides the foundation for the chapters on the regulation of labour. Many of the themes and issues examined in Chapter 2 will be examined in greater detail in Chapters 5, 6, 7, 8, 9 and 10.

CHAPTER 3 APPROACHES TO REGULATION

Regulation is no longer considered to be restricted only to activities by the state, whether direct as when identified as public regulation or indirect where the state is the ultimate authority behind the regulation. Instead, regulatory theories have helped to construct a much broader concept of regulation, one which incorporates numerous forms of control, or regulation, in both public and private spheres. Consequently, the targets of regulation can be affected by several regulatory actors, multiple regulatory mechanisms and more than one regulatory regime. This new regulatory paradigm also involves new methods of conceptualising regulation. The insights gained from general theories of regulation not only help understand the different types of regulation that affect labour in professional baseball, but they also assist in identifying how the regulation of labour in the three leagues has evolved over time. This chapter explores the nature of regulation, followed by a brief description of traditional and contemporary theoretical approaches to regulation. It then examines two ideas that are especially useful in conceptualising the regulation of professional baseball: self-regulation and autopoiesis. The chapter concludes by looking briefly at the role of regulatory actors.

3.1 WHAT IS REGULATION?

The study of regulation has produced a large volume of academic work examining the rich diversity in practical approaches to regulation, in turn leading to the development of different influential theories (see Baldwin et al 2012; Baldwin and Cave 1999; Parker et al 2004). The aim of this section is not to cover all of this literature, but to identify and describe key concepts of regulation that are relevant in the discussion that appears in the later parts of this chapter, the examination of labour regulation in Chapter 4 and the subsequent examination of the regulatory systems in professional baseball.

(a) Conceptualising regulation

The current regulatory environment has been described by Baldwin et al as the ‘age of the regulatory state’, a complex paradigm that has attracted a multi-disciplinary approach from areas such as law, economics, political science, sociology and anthropology (Baldwin et al 2012, 2). As Freiberg highlights, determining what is ‘regulation’ in this advanced regulatory environment is highly contested. It ranges from the narrow concept of regulation as government endorsed rules, to the broad notion of regulation as all mechanisms of social control or influence that affect behaviour (Freiberg 2010, 2-3). Thus, for example, Hancher and Moran also adopt a narrow view of regulation as general rules and the creation of institutions for the implementation, clarification and enforcement of these rules (Hancher and Moran 1989, 271). The definition given to regulation by Parker et al focuses on the purpose of regulation in Freiberg’s construct, describing regulation as any intentional activity aimed at controlling, ordering or influencing the behaviour of other people. It involves three elements: setting standards, monitoring compliance and enforcement (Parker et al 2004, 1).

The definition of regulation to be used in this thesis encompasses both the formal and informal rules that govern the regulation of labour in professional baseball, in particular, the rules on labour mobility. Such a definition includes legal norms, and in the regulation of labour in MLB, NPB and the ABL, these comprise relevant aspects of contract law, competition law and labour law. However, the concept of regulation extends beyond law and includes the rules of the game of baseball and, the labour rules and practices contained in a league’s constitution, by-laws, collective bargaining

agreement and uniform player contracts. Therefore the regulation of baseball can be viewed in terms of internal and external regulation and the interaction between these two forms of regulation.

(b) What is the purpose of regulation?

Central to the success or failure of regulation is its intended purpose. Yet regulation is capable of possessing multiple purposes. For example, roster sizes simultaneously permit a small group of players to participate in authorised games of baseball while at the same time excluding other players and preventing clubs from stockpiling players. Such different purposes are highlighted by Baldwin et al, who differentiate between the purpose of regulation based on two types of function: ‘red light’ regulation restricts or prohibits certain behaviour and ‘green light’ regulation encourages, enables or facilitates types of behaviour (Baldwin et al 2012, 2-3). Labour regulation in professional baseball can be red light or green light and, in some instances, both, as demonstrated by the above example.

The legitimacy of a regulatory regime, and in particular whether regulation achieves its purpose can be assessed according to five criteria set out by Baldwin et al. First, does the regulatory action or regime have legislative (or democratic) authority? Second, is the regulatory scheme accountable? Third, are the regulatory procedures fair and accessible? Fourth, does the regulator have sufficient expertise? Fifth, is the regulatory action or regime efficient (Baldwin et al 2012, 27)?

Applied to baseball, it should be noted that, while the labour regulatory systems in the three leagues do not have legislative authority, in the case of MLB and NPB, there is a

degree of democratic authority in that labour rules are created through consultation with the member clubs and players via the process of collective bargaining. Similarly, labour regulation in professional baseball is accountable to member clubs and, players through their union (except in the MiLB and the ABL), and in some circumstances, the courts and statutory authorities through litigation. As will be seen in Chapters 5 and 7, the fairness of labour regulation is mediated through collective bargaining. As baseball's internal regulatory actors dominate its labour regulation, clubs, leagues and player unions can be seen to have sufficient expertise in baseball labour that is derived from their longstanding involvement with the sport. Baldwin et al describe regulatory efficiency as involving the least amount of inputs or costs to produce efficiency and where regulation leads to results that are efficient (Baldwin et al 2012, 30-31). Baseball's internal regulatory actors would claim that its system of regulation achieves both of these aims because its internal labour regulation is more time and cost efficient than alternative methods of external regulation, for example, government legislation or litigation in the courts.

(c) Types of regulation: direct, indirect and non-state

Regulation can be classified based on who performs the regulatory function. Using this approach, Gahan and Brosnan observe three common types of regulation: direct regulation by the state, indirect regulation by the state and non-state regulation (Gahan and Brosnan 2006, 132). Baldwin et al describe these types of regulation as direct regulation by the state through the use of a specific set of commands, indirect state regulation as deliberate state influence and non-state regulation as all forms of social or economic influence (Baldwin et al 2012, 3). Non-state regulation can be viewed as 'decentred' regulation (Black 2002, 2), as discussed below.

Examples of both direct and indirect regulation by the state can be found in professional baseball. For instance, contract law governs the enforceability of league constitutions and by-laws between member clubs, and contracts between clubs and players. Another example is the role of labour law in regulating the processes of collective bargaining and the rights of parties. As will be seen in Chapters 6 and 7, on occasion stakeholders in baseball's labour system, such as players do challenge aspects of the system of labour regulation in the courts. This can have both a direct and indirect regulatory effect. The assessment of the validity of baseball's labour regulation in terms of relevant laws has a direct regulatory effect on baseball's labour controls and practices. Courts also have an indirect effect in that the threat of litigation and judicial review of baseball's regulatory system can influence the behaviour of internal regulatory actors. These issues will be examined in Chapters 6 and 7. However, the dominant mode of regulation in professional baseball is non-state regulation by the sport's internal regulatory actors: leagues, clubs, players and unions. These regulatory actors and the related forms of regulation form the basis of Chapter 5. Another form of regulation relevant in sport that is difficult to categorise, and may be considered either indirect state regulation or non-state regulation or both, is where the government influences regulation by a sport or league using the vehicle or mechanism of a non-state actor. In Australia an example of this is when the provision of federal government funding is linked to compliance with the World Anti-Doping Authority's ('WADA') code. Similarly, as will be seen in Chapter 6, in the United States Congress has threatened to intervene in MLB if the league and players' union did not introduce a satisfactory anti-doping testing and penalty regime.

(d) Decentred regulation and regulatory space

The movement away from state-centric regulation has led to what Black describes as ‘decentred’ regulation (Black 2002, 2). Black gives decentring different meanings. It can be governments and other social actors sharing the exercise of the regulatory function, changes within government and administration, the removal of the state from regulated society or shifts in the loosely defined roles of regulators and regulated (Black 2001, 103-104). Within decentred regulation authority is dispersed between both public and private organisations and there is no single source of authority (Scott 2001, 330-331). According to Black, when regulation is not seen as the exclusive domain of the state it is difficult to ascertain the boundaries of regulation (Black 2002, 2). As will be demonstrated in Chapters 5, 6, 7 and 8, the regulation of labour in professional baseball is decentred in that the state does not play a prominent role. Regulatory authority is typically given to actors such as the league and player unions, but on occasion, the state through the legislature, statutory authorities and the courts can be involved in baseball’s labour regulation.

Black’s concept of decentred regulation has five key concepts: complexity, fragmentation, interdependencies, ungovernability and no clear distinction between public and private (Black 2001, 106-111; Black 2002, 4-6). Central to the concept is the recognition that the government does not exercise a monopoly over power and control and that due to the breakdown of the public-private dichotomy formal authority should be reconceptualised in terms of governance and regulation (Black 2002, 4-6). Thus Black’s theory involves a shift of regulatory activity from the state to multiple locations and the adoption by the state of different regulatory strategies (Black 2001, 112). Applied to the labour of professional baseball, it is clear the state is generally not

a prominent regulator, though it can influence regulation through the ability of statutory authorities and the courts to assess the legality of baseball's internal regulation. The regulatory paradigm in baseball is complex in that relevant regulations are dispersed through a league's constitution, by-laws, collective bargaining agreements, uniform player contracts and agreements with other leagues, which are the product of interdependent relationships between a league, member clubs, players and (where relevant) a players' union.

Decentred regulation engages with 'regulatory space' theory. This holds that regulatory power and the exercise of regulatory capacities are dispersed or fragmented (Scott 2001, 331; Parker et al 2004, 7). Hancher and Moran describe regulatory space as the dimensions and occupants within a regulatory setting that operate under specific political, legal and cultural factors. As it is a space there can be an unequal divide between actors and a power struggle between them. This situation is demonstrated in professional baseball by the power struggle between owners and players. A general concept of regulatory space can exist in a community along with specific concepts of regulation in individual sectors (Hancher and Moran 1989, 277-278). Factors such as legal culture perform an important function in how regulatory space is conceived as it influences who gains entry, on what terms and how the different rules interact to produce the regulatory framework (Hancher and Moran 1989, 282). Viewed in terms of MLB and NPB, labour law plays an important role in legal culture by determining who is a party to collective bargaining and the respective rights of those parties.

Hancher and Moran also conceptualise decentred regulation or regulatory space in relation to time. Time is important as it influences how regulation is organised. Also,

time shapes the nature of regulation itself through the way in which regulation is structured, its institutional procedures and its crises, the latter being a trigger for regulatory change (Hancher and Moran 1989, 283-284). The type and number of regulatory actors is also influenced by time. Braithwaite observes that history is important in terms of regulation, so that what is sound regulatory policy in one period of history may be unsound in another (Braithwaite 2011, 492). Time is a useful method of analysing the regulation of labour in professional baseball, as the time when unionism and collective bargaining take hold in a professional league marks a key turning point in labour relations and how labour will be regulated in the future.

(e) Summary

This section of Chapter 3 identifies that the modern concept of regulation is capable of broad interpretation, resulting in an understanding of regulation that encompasses numerous forms of activities, not just regulatory activities by the state in the form of legislation. While expansive approaches to constructing regulation are helpful in understanding modern methods of regulation, for the purposes of this thesis and labour regulation in professional baseball, regulation is primarily conceived as the formal and informal rules that regulate the labour of baseball, as derived from the rules of the game, a league's constitution, by-laws, collective agreements and uniform player contracts. Thus the regulatory space in professional baseball is an example of decentred regulation.

3.2 APPROACHES TO REGULATION

This section identifies a number of relevant approaches to regulation, which can be applied to the regulation of labour in professional baseball. It begins by examining

different traditional approaches to regulation, followed by a brief description of contemporary regulatory strategies. Next, self-regulation and autopoietic theories of law, both of which are central to understanding the way regulation works in the three professional baseball leagues, will be examined to provide the context for Chapters 5, 6, 7 and 8.

(a) Traditional approaches to regulation

One of the traditional approaches to regulation is ‘command and control’ regulation. Black describes command and control regulation as ‘centred’ in that it assumes the state to be acting unilaterally as the sole authority capable of regulating (Black 2001, 106; Black 2002, 3). This form of regulation involves the government identifying a social or economic problem that requires regulatory intervention through the development of ‘top down’ rules and enforcement mechanisms (Cooney 2006, 192-193). In this sense command and control regulation is traditionally conceived as the state imposing standards with the support of sanctions, including criminal sanctions, to prohibit specific forms of conduct or to demand positive forms of action. Baldwin noted the symbolic importance of command and control regulation in that it holds some forms of behaviour to be illegal (Baldwin 1997, 65-66). Command and control regulation has not historically featured prominently in the regulation of labour in professional baseball which as will be discussed below and throughout this thesis, has traditionally involved self-regulation. However, as the business of baseball (and professional sport) grew during the 20th century, so did the importance of the role of the state in directly regulating aspects of baseball, for example through taxation.

Weaknesses in command and control regulation include the failure to capture a regulatory target (Baldwin et al 2012, 107-110), unnecessarily complex and inflexible rules, the anti-competitive effects of standard setting, enforcement problems when prosecution is an inferior option to negotiation (Baldwin 1997, 66-67) and failure in relation to instruments, information and knowledge, implementation and motivation (Black 2002, 3). These weaknesses have led to the state expanding its regulatory techniques, for example through incentive based regimes, market harnessing controls, the regulation of disclosure (Baldwin et al 2012, 3; Baldwin 1997, 69-80), enforced self-regulation, direct action, allocating rights and liabilities to promote socially desirable behaviour and public compensation or social insurance schemes (Baldwin 1997, 69-80).

Markets are another traditional form of regulation. Grabosky observes that when ‘the visible hand of the state is absent or weak, the once invisible, but now quite apparent hand of the market may compensate’ (Grabosky 2013, 117). Markets can be used to control the price, cost, supply and demand of a given product, including labour. Shaping how these matters are regulated are the level and nature of competition within a market (Estlund and Wachter 2012, 3). Leagues can manipulate the role of the market in setting the cost of labour in professional baseball through the use of labour controls such as the reserve system, minimum wages, salary caps and free agency. Neo-classical economics focuses on competition in a market, which assesses when demand and supply within a market operate most efficiently and reach equilibrium, and the consequences of a market being at, above or below equilibrium (Wachter 2012, 23-24).

In the context of labour, economic theory distinguishes between external and internal markets. External labour markets essentially involve entry-level workers looking for a new job and employers searching for new employees. In contrast, internal labour markets encompass the rules that govern the relationship between employers and employees, with potentially different markets (at least under some systems of regulation) for unionised and non-unionised workers. Importantly, Wachter identifies that the operation of internal labour markets is influenced by their interaction with the external labour market, for example, in relation to pay and working conditions (Wachter 2012, 31-32). As was discussed in Chapter 2 and as will be shown in Chapters 7 and 8, in professional baseball the regulation of the internal and external labour markets within a league are governed by a league's by-laws and, in the case of MLB and NPB, can be subject to collective bargaining.

There is also extensive debate and literature on how markets operate and their regulatory effect. Coase described markets as 'institutions that exist to facilitate exchange, that is, they exist in order to reduce the cost of carrying out exchange transactions' (Coase 1988, 7). The 'Coase theorem', also called 'invariance theory' (Surdam 2006, 201), is an important economic theory that holds that when there is perfect competition in a market, private and social costs will be equal, and therefore producers will only engage in an activity if the product is greater than the value of alternative uses (Coase 1988, 158). Coase identified the need for rules that govern the rights and duties of parties to a transaction and noted that these rules can be implemented by the market or by the state (Coase 1998, 8-10). Numerous scholars of law and economics have contributed to the understanding of how markets operate, including those who use neo-classical labour economics to examine the impact of

internal labour markets on labour market competition (Estlund and Wachter 2012, 6). But as Stewart et al note, their view has been challenged by neo-institutionalists, who question the assumptions of neo-classical economists, such as actors making rational decisions and employees not being in an inferior bargaining position compared to employers. They argue neo-classical economists underestimate the significance of transaction costs and that markets do not always result in efficiencies in labour relations (Stewart et al 2016, 21).

Regulation can be evaluated on the level of compliance and enforcement. Stewart et al identify that a major aim of a regulatory regime is to ensure compliance with regulatory standards (Stewart et al 2016, 34-35). Effective compliance can be best viewed as an open-ended 'virtuous circle' that is ongoing. In this context compliance involves several factors. It requires the setting of goals and reviewing the performance of regulation against them. The regulatory target must develop the knowledge and skills for self-regulation, including developing management policies and procedures. These features need to be embedded in the institution (Stewart et al 2016, 34-35). The virtuous circle of compliance sees these features of regulation regularly reviewed and adjusted in order to achieve compliance. Enforcement refers to the rules and techniques used by a regulator to ensure regulatory standards are met. It is considered that compliance will be the strongest when it is internalised within the organisation. This factor is a feature of modern enforcement regimes in that regulators rely on and encourage actors to establish their own internal systems for ensuring compliance. External enforcement is activated when these systems fail.

(b) New approaches to interpreting regulation

The identification of command and control regulation working together with other regulatory forms has been described as a modern phenomenon called ‘meta-regulation’. Parker et al describe this regulation as the ‘interaction between public regulation and private law’, a product of the engagement between different types of regulation in the new regulatory state (Parker et al 2004, 6-7). An interesting example of meta-regulation and the operation of different forms of regulation within the one regulatory space is the ‘tuna court’ at the Tsukuji tuna market in Tokyo. This regulatory system involves the state and private actors, formal legal rules, informal rules and normative practice. The Tsukuji tuna market is owned and operated by the Tokyo Metropolitan Government, who established the tuna court by ordinance in 1972 under authority delegated by the Ministry of Agriculture, Forestry and Fisheries. An official from the Tokyo Metropolitan Government oversees the tuna court, which is comprised of five judges who are auctioneers from the five licensed *oroshi* (brokers or wholesalers) companies and annually hears 5,000 disputes related to the quality of tuna purchased at auction. Criticisms of decisions and appeals are rare as buyers’ fear loss of reputation and retribution by judges at auctions who are also auctioneers (Feldman 2006, 334, 338-344, 361). While meta-regulation is an interesting example of decentred regulation, it is not a common form of regulation in professional baseball or sport.

One especially influential approach to understanding modern regulation is ‘responsive regulation’, a theory developed by Ayres and Braithwaite. Responsive regulation concentrates on the triggers for regulatory intervention and the subsequent regulatory response. It holds that regulation needs to be responsive to an industry structure. Different industries will be subject to varying levels of regulations and therefore

regulation needs to be responsive to the diverse objectives of regulated firms, industry associations and the individuals within each (Ayres and Braithwaite 1992, 4). Stewart et al highlight that responsive regulation utilises disciplines such as game theory, criminology, psychology and political science and the concepts of pluralism, dialogue and deliberation (Stewart et al 2016, 36). Responsive regulation encompasses the theme of tripartism in regulatory policy by granting public interest groups access to information available to the state regulator, giving them a role in negotiations in deals between firms and regulators and vesting them with power to prosecute the regulator (Stewart et al 2016, 38).

Responsive regulation is a useful theory for examining labour in professional baseball and Chapters 5 and 7 will examine situations in MLB and NPB that have resulted in highly responsive regulatory conduct by actors. Such responsive regulation is usually an outcome of regulators like the league or players' union attempting to protect its system of self-regulation from external regulation.

Central to Ayres and Braithwaite's idea of responsiveness is the idea that escalating forms of government intervention will be less intrusive through use of an 'enforcement pyramid' (Ayres and Braithwaite 1992, 4-5). Responsiveness is measured in terms of 'tit-for-tat' enforcement through the different levels of the pyramid. At the base of the pyramid is dialogue such as persuasion and warning letters. At the top of the enforcement pyramid are penalties such as license revocation or suspension and criminal and civil penalties. Enforcement pyramids involve movement through the different levels and the aim is compliance through (paradoxically) carrying 'big sticks' but speaking softly. The form and not the content of the penalty is important as this

should be designed to fit the level of non-compliance (Ayres and Braithwaite 1992, 19-20, 35-36). Compliance results in de-escalation down the pyramid (Braithwaite 2011, 483-484). There are three general levels within the pyramid: restorative justice is at the base and affects virtuous actors, deterrence is in the middle and applies to rational actors; and at the top is incapacitation which affects incompetent or irrational actors (Braithwaite 2011, 486). More recently Braithwaite has advanced two enforcement pyramids: a pyramid of supports and a pyramid of sanctions. The underlying assumption for using the pyramid is to start at the base and move to punitive penalties when dialogue fails. Further escalation to punitive approaches only follows the failure of moderate sanctions (Braithwaite 2011, 481). Scott criticises the general enforcement pyramid on the basis that regulators often lack the ability to escalate sanctions, which may be the result of the regulated firm possessing informal authority or due to the fragmentation of formal authority between state organisations (Scott 2001, 346).

Chapter 8 will highlight the different configuration of the enforcement pyramid in professional baseball. The state typically does not occupy a dimension in the pyramid and there are usually fewer levels within the pyramid. Escalation within the pyramid is minimal and sanctions against players for breaching regulation are frequently at the top end of the pyramid: for example, suspension for using performance enhancing drugs or expulsion for breaching the reserve system and transferring leagues.

Baldwin and Black identified a number of general criticisms of ‘responsive regulation’ based on policy, practicalities and principles. On policy grounds they identified that a regulator cannot regulate catastrophic risks by moving up the enforcement pyramid, but nor can a regulator always move down the enforcement pyramid. Various practical

issues can exist, such as there being insufficient interaction between the regulator and the regulated, regulators may be too reliant on compliance issues and there may be a lack of information to make relevant decisions. Baldwin and Black also criticise responsive regulation based on the principles of fairness, proportionality and consistency, and that a lack of formalism may undermine the rule of law (Baldwin and Black 2008, 62-64). Proportionality is an issue in the regulation of labour in professional baseball. As discussed, penalties against players tend to be severe and include suspension or prohibition, thus preventing a player from working as a professional baseball player.

To deal with their perceived defects in responsive regulation Baldwin and Black developed a regulatory approach called 'really responsive regulation'. This approach also uses an enforcement pyramid but responsiveness is measured in terms of a regulated target's attitudinal settings, institutional environments, different regulatory tools and strategies, the regime's own performance and effects and responsiveness to change. Central to really responsive regulation is institutional theory and responsiveness is measured in relation to the operating and cognitive framework of a firm and its own attitudinal settings. Motivation is important and helps understand the broader context for a firm's response to regulation. These attitudinal settings respond to the constraints and opportunities in an institutional environment where the regulators act. Baldwin and Black also increase the analysis of responsiveness by examining how responsive regulation is to its own performance through enforcement tools and strategies and how adaptive the system is to changes in regulatory priorities, circumstances and objectives (Baldwin and Black 2008, 69-74). In this context the regulation of professional baseball in MLB and NPB can be seen as really responsive,

in that the collective bargaining cycle allows regulation to be reprioritised and to respond to new circumstances.

Another variation on responsive regulation is Gunningham and Grabosky's 'smart' or 'smarter' regulation (Gunningham and Grabosky 1998). This regulatory approach looks beyond the enforcement pyramid to include *ex ante* controls such as screening and non-state controls and aims to be imaginative, flexible and pluralistic (Gunningham and Grabosky 1998, 4). Smart regulation involves three steps intended to enhance regulatory design: designing regulatory processes, designing regulatory principles and determining the optimal combination of regulatory instruments (Gunningham and Grabosky 1998, 376-377). Smart regulation differs from responsive regulation in that the enforcement pyramid is three sided: the state, quasi regulators such as unions and trade associations and the corporation (Gunningham and Grabosky 1998, 398). Stewart et al call this pyramid a 'dynamic instrument pyramid' (Stewart et al 2016, 42). Smart regulation is more holistic than responsive regulation in terms of enforcement but has similar problems as enforcement is based on escalation through the pyramid. More problematic to smart regulation are issues of consistency, fairness and accountability (Baldwin and Black 2008, 65).

Diverging from enforcement pyramid-based regulatory approaches is 'risk-based' regulation, which focuses on controlling relevant risks, rather than securing compliance with a set of rules (Baldwin et al 2012, 281). Based on the level of risk a regulated person or firm poses to the regulator's objectives, this approach targets the deployment of regulatory resources required for inspection and enforcement at the highest risks posed to a regulator. Therefore the highest risks are prioritised and new risks and

regulatory challenges can be addressed. Baldwin and Black identify problems with risk-based regulation, including a focus on individual firms and the need for regulators to establish levels of risk tolerance (Baldwin and Black 2008, 66-67). As will be discussed in Chapter 8, risk-based regulation is relevant to professional baseball as regulatory actors are motivated by perceived risks within the system of self-regulation, most notably the cost and movement of labour.

(c) Self-regulation

Self-regulation is both a traditional and modern form of regulation. It involves a group of firms, individuals or an industry exerting control over itself, including its membership through the setting of rules and standards (Gunningham and Grabosky 1998, 50). Black observes that self-regulation can be difficult to define, but that any concept of self-regulation excludes state regulation and is initiated voluntarily (Black 2001, 113, 115). Baldwin et al note that various institutions can perform a regulatory function, including professional bodies, trade associations, public interest groups, business partners, consumers and corporations. They also observe that justifications for self-regulation focus on issues of expertise and efficiency (Baldwin et al 2012, 137-139). Self-regulation can therefore take two forms. It can, according to Black, exist as a function of private actors who create their own rules and may exist in an area of regulation that the state does not operate within. Alternatively, Ayres and Braithwaite identify that self-regulation can exist within a public system of regulation where the state sub-contracts or delegates the regulatory function to private actors who are generally enterprises or industries (Ayres and Braithwaite 1995, 103). In this form of self-regulation the state remains the underlying authority.

Advantages to self-regulation compared to command and control regulation include speed, flexibility, responsiveness to market circumstances and efficiency (Gunningham and Grabosky 1998, 52). Cooney and Baldwin et al identify major weaknesses of self-regulation as a lack of public oversight, evaluation, fairness and accountability (Cooney 2006, 195; Baldwin et al 2012, 139). Gunningham and Grabosky identify other weaknesses as including weak regulatory standards, ineffective enforcement and punishment that is secret and mild (Gunningham and Grabosky 1998, 53). In some regulatory situations, self-regulation can be both cheaper and more effective than regulation by the state.

Several forms of self-regulation exist. Voluntary self-regulation, co-regulation and enforced self-regulation are all models of self-regulation that as discussed above involve different levels of regulatory participation by the state, an industry, a firm or a third party. In relation to voluntary self-regulation, the system of regulation operates without oversight by the government and the regulated parties voluntarily submit. In contrast, co-regulation and enforced self-regulation involve the state. Stewart et al describe enforced self-regulation as a form of responsive regulation (Stewart et al 2016, 37). Co-regulation consists of self-regulation that has some oversight or ratification by government, while enforced self-regulation sees the state subcontract regulatory functions to regulated firms (Ayres and Braithwaite 1995, 101-102, 128; Baldwin et al 2012, 146). As there is no direct involvement of the state in the regulation of labour in professional baseball, co-regulation and enforced self-regulation are not relevant regulatory approaches in professional baseball.

While the type of regulation most relevant to professional baseball is voluntary self-regulation, where the regulation of an industry involves no direct oversight by the state, there is some state regulation of professional baseball leagues. As will be seen in Chapters 6 and 7, external state regulation of the three leagues can be conducted by the courts and the legislature through statutory authorities and legislative tools such as labour law. However, it is the internal regulatory actors who typically activate such regulation. Several explanations exist for the self-regulation of baseball. In the early days of baseball, the state is unlikely to have had any interest in regulating a localised sport. As baseball grew into big business in both the United States and Japan, the regulation of baseball interacted with a greater array of regulatory matters. As the business and social significance of baseball developed, the regulatory actors within the sport would have been content to regulate themselves with the exclusion of direct influence from the state. Other explanations include that leagues and player unions have specialist knowledge of baseball that is derived from years of involvement with the sport. External state actors such as courts and legislatures are unlikely to have such specialised experience. It should be noted that the level of self-regulation in sports leagues depends on the model of governance. Self-regulation in MLB, NPB and the ABL all involve regulation by owners, whereas other professional sports around the world can have independent boards that exercise a degree of autonomy, for example the Australian Football League or the National Association of Stock Car Racing.

Systems of self-regulation are not immune from external review and individuals can seek relief from the courts when private administrative bodies make decisions that adversely affect them, for example if they infringe their right to work. As will be seen in Chapters 5, 6 and 7, arbitrators, courts, legislatures and statutory labour authorities

have reviewed the internal regulation of professional baseball, at least in the United States and (to a lesser extent) in Japan. Regulatory actors challenging baseball's self-regulation in the courts have used contract law, labour law and competition law, and this will be examined in detail in later chapters.

(d) Autopoietic theories of legal regulation

Autopoietic theory has its origins in biology in the 1970s (Teubner 1984, 292) and also utilises systems theory and sociological theory (see van Twist and Schaap 1991, 31). According to Teubner, autopoiesis is a system which produces and reproduces its own elements by the interaction of those elements. Central to this construct is communication, which includes information, utterance (how, when and who communicates the information) and understanding by the receiver (Teubner 1988a, 3; van Twist and Schaap 1991, 35; Murray 2007, 245). Thus in relation to a legal autopoietic system, Teubner describes the law as a system of communications (Teubner 1988, 3-4). Autopoiesis involves the evolution of a legal regulatory system, through variation, selection and retention (Teubner 1998b, 228, 231). According to Teubner autopoiesis is a limit on that evolution, in that it defines the functional limits for change within the system. Another element of autopoiesis is 'structured coupling' which occurs when a system is linked or 'structurally coupled' to its environment by using events in that environment as perturbations to build its own structure (Teubner 1991, 133). Murray notes that autopoietic theory is a radical departure from mainstream sociological ideas that focus on collective human agency (Murray 2007, 244). Similarly, Teubner recognised that in examining the circularity of law, autopoiesis conflicts with traditional legal doctrine, theory and sociology (Teubner 1988a, 1).

For Teubner, autonomy is a key theme of the theory of autopoiesis: that is, autonomy of the law and its relationship to other autonomous systems (Teubner 1984, 293). Autonomy involves self-referencing and may be given expression through vicious circles, virtuous circles, tautologies, infinite regress and paradoxes. The self-referencing within legal acts, legal rules, legal procedures and legal doctrines is the foundation of legal autonomy (Teubner 1988b, 222). Black also notes that self-regulation is central to autopoiesis in that it allows a system to autonomously self-organise and reproduce in accordance with the system's self-description (Black 2001, 124). According to autopoiesis, a legal system is viewed in a similar light to a political or economic system, that is, as an autonomous, functional order or system in society.

The regulatory systems of MLB, NPB and the ABL can each be viewed as individual autopoietic regulatory systems. In contrast, labour systems that are not autopoietic include the work of a manufacturer, retailer or a hospitality worker, though the work rules that regulate the employment of such people may potentially be autopoietic. The employment of such workers is not regulated within an internal system of rules and practices that evolves over time in response to the activities of actors inside the particular industry. Autopoietic theory is useful in examining labour systems in MLB, NPB and the ABL as it helps to understand the internal regulation of labour, its evolution and how this system interacts with other autopoietic systems, including external regulation.

There are two key features of legal autopoietic systems. They are 'operationally closed' in that the law reproduces itself by referring to its own structures and operations, and they are 'cognitively open' as they evolve in response to external factors and other

autopoietic systems (Teubner 1984, 292-293; Teubner 1988a, 4; Deakin and Rogowski 2011, 230-231). Self-reproduction of law occurs when legal rules produce legal acts and vice versa, and when legal procedure and legal doctrine mutually reproduce one another (Teubner 1988b, 224). Teubner recognises that closure is critical to an open system and that these interconnected principles are the foundation of autopoiesis (Teubner 1988a, 3). Closure is also important in that it allows an autopoietic system to autonomously evolve (Teubner 1988b, 232). Autopoietic closure does not mean that the system is isolated. Instead Luhmann identified that closure is the application of a system's own operations and in being central to a system's reproduction, closure is a key component of autonomy (Luhmann 1988, 336). As will be seen in Chapters 6, 7 and 8, this description of a regulatory system being operationally closed and cognitively open is relevant to professional baseball, where the internal legal rules are operationally closed in that they reproduce through mechanisms such as collective bargaining. Equally, they are cognitively open in that they evolve in response to external factors, such as judicial decisions, laws that regulate contracts and employment and, even the regulatory activities of foreign baseball leagues.

Building upon autopoietic theories of law is Rogowski's theory of reflexive labour law, an interdisciplinary approach to labour regulation (Rogowski 1994, 53). While this theory examines labour regulation, it will be discussed here because it contains observations that are relevant to general approaches to regulation and is based on autopoietic theory. Rogowski's idea of reflexive labour law views labour law as an evolutionary concept that uses modern sociological systems theory and post-structuralist approaches to law. Reflexive labour law involves self-referencing and self-production to create an autopoietic system of labour law that attempts to protect itself

(Deakin and Rogowski 2011, 230; Rogowski 2013, 33). Reflexivity can be both internal and external (Rogowski 2013, 35), which as will be seen in Chapters 7 and 8, is particularly relevant to MLB's autopoietic system of labour regulation. Reflexive labour law views the legal system as an autonomous system that is equivalent to a political system or the economy (Rogowski 2013, 33). Like autopoiesis, Black and Rogowski describe this self-referencing and production in the area of law as operationally 'closed', in that legal systems construct their image of other systems through experiences of their own environment and their relationship to other autopoietic systems (Black 2002, 5; Rogowski 2013, 33). Rogowski also identifies that such systems are cognitively open in that they respond to other external subsystems (Rogowski 2013, 33). Baldwin et al explain self-referencing in similar terms, identifying autopoietic subsystems as being shaped by their own codes and able to react within their environment to self-generate and reproduce (Baldwin et al 2012, 61). Reflexive law also incorporates reflexion, the process at the centre of autopoiesis or self-reproduction where system reference and self-reference coincide (Rogowski 2013, 35). Rogowski's reflexive labour law incorporates various theories identified in this section, in particular self-regulation, resulting in a reflexive system that attempts to protect its own autopoiesis (Rogowski and Wilthagen 1994, 6-7). Chapters 5, 6, 7 and 8 will demonstrate the highly reflexive nature of labour regulation in each of the three leagues under study.

(e) Summary

Approaches to regulation range from traditional forms such as command and control and market regulation, to new forms of regulatory theory that utilise enforcement pyramids, such as responsive regulation, really responsive regulation and smart

regulation. Other approaches to regulation include the concept of meta-regulation, which is concerned with the interaction between public and private forms of law. These theories are useful in understanding the regulation of labour in professional baseball in that they identify different regulatory techniques and actors. However, for the purposes of this thesis, two approaches to regulation are particularly useful in understanding professional baseball's labour regulation. Voluntary self-regulation and autopoietic theories of law are helpful in conceptualising regulation and in understanding the operation and evolution of labour regulation in MLB, NPB and the ABL, and the role of different regulatory actors. The relevance and application of these approaches will be seen in Chapters 5, 6, 7 and 8.

3.3 REGULATORY ACTORS

Braithwaite identified that modern regulation in the new regulatory state is diverse, involving complementary and competing methods of regulation and numerous regulatory actors (Braithwaite 2000, 224). Consequently the literature on regulation reflects this trend by focusing on the shift in the exercise of the 'control' function from the state to the corporation (Baldwin et al 2012, 8). In addition to the state, the control function of regulation is now performed by a range of regulatory actors, participating in a number of regulatory systems that were described above: command and control regulation, self-regulation, co-regulation, enforced self-regulation, meta-regulation, responsive regulation, really responsive regulation, smart regulation and risk-based regulation. The nature of regulation is important in that it influences who is the regulatory actor, whether the regulatory actor operates alone or in association with other regulatory actors and which regulatory mechanisms each actor uses (Braithwaite and Drahos 2000, 16).

Approaches to regulation such as voluntary self-regulation and autopoiesis allow the regulation of professional baseball to be divided into internal and external regulation. Operating within these spheres of regulation are internal and external regulatory actors. Baseball's internal regulatory actors will be discussed in Chapter 5 and now include the owners of clubs, the league (traditionally in baseball a collective of the owners), players, player unions, arbitrators who resolve internal disputes and global baseball regulators. Chapter 6 will examine external regulatory actors, including the courts, the legislature, statutory authorities, player agents, anti-doping agencies, foreign leagues and the National Collegiate Athletic Association. Recent decades have seen a shift in the power relationship between owners and players. No longer are regulatory activities in the domain of labour dominated by the league and the owners of its member clubs, as was the case for much of the early history of MLB and NPB. As will be seen in Chapters 5 and 7, the rise of player unions and collective bargaining in both leagues, and player agents in the case of MLB, have resulted in owners and players sharing the responsibility for developing the system of labour regulation. By contrast, the power relationship between the ABL and its players continues to reflect the pre-union days of MLB and NPB.

The decentred regulatory paradigm has a range of non-state actors who contribute to what Grabosky terms 'regulatory pluralism'. Interactions between institutions in this regulatory space are complex and, as is the case with state regulators, private regulators are susceptible to failure and their actions can be ignored. A shortcoming of decentred regulation is that non-state regulators do not have the accountability required of public officials and have no legal mandate (Grabosky 2013, 115-116, 119). Despite the

failings of decentred regulation stated by Grabosky, Black argues that decentred regulation allows a greater understanding of how the state, market, community, associations and networks achieve public policy goals and also encourages understanding of how regulation occurs where the state cannot function in a centred way, for example in developing countries (Black 2002, 10-11).

Despite the increase in non-state regulatory actors, the state continues to be a central regulatory actor in modern times in relation to baseball and all modern forms of economic and social activity. Government shapes the regulatory landscape through the traditional regulatory tool of legislation. This is true in professional baseball, where labour law plays a central role in shaping collective bargaining in MLB and NPB, thereby setting out the rights of parties and the bargaining process. Also, in the sphere of performance enhancing drugs, as will be seen in Chapter 6, government performs an important regulatory function in NPB and the ABL through its establishment of statutory authorities responsible for enforcing anti-doping rules and policies.

3.4 CONCLUSION

Regulation is not a discipline that is simple to construct, conceptualise or theorise. After all, regulation involves regulating people, legal entities, industries, businesses, economies, markets and society, all of who conduct themselves in many different ways and do not respond to regulation in a single manner. This chapter has identified and examined key concepts and themes relevant to the regulation of professional baseball, in particular, self-regulation, autopoietic theories of law and regulatory actors. These concepts will be built upon in Chapters 4, 5, 6, 7 and 8.

CHAPTER 4 THE REGULATION OF LABOUR IN THE UNITED STATES, JAPAN AND AUSTRALIA

The world of professional sport involves athletes being paid to work to play a game. Thus a critical issue is how this relationship is regulated. Labour laws generally only apply to employees and not independent contractors. Therefore the status of baseball players under the labour laws of each of the three jurisdictions is central in determining whether players are in an employment relationship and subject to labour regulation. The status of baseball players is also important in that labour law in each jurisdiction recognises (and protects) the rights of employees to unionise, collectively bargain and take industrial action. This chapter will identify the relevant cases that recognise baseball players as employees and introduce the concept of labour regulation to determine the broad framework that governs the employment of baseball players. This conceptual framework will set out the nature, purposes and subjects of labour regulation. Then, a comparative law approach will be adopted by taking an overview of the labour law systems in the United States, Japan and Australia to understand how labour is regulated in each country. To set the scene for the discussion on labour mobility in Chapters 7 and 8, a brief outline is provided of the major rules, processes and institutions for regulating labour in the three countries under study.

4.1 WHAT IS LABOUR REGULATION?

For the purposes of this thesis, the question of what is ‘labour regulation’ is one that shapes the content and conclusions of the thesis and it is important in identifying what laws apply to the employment of professional baseball players. The contemplation of this question has generated much debate (see the edited works of Davidov and Langille 2011; Arup et al 2006; Davidov and Langille 2006) and how the concepts of ‘labour’

and 'regulation' are constructed play a critical role in determining what is labour regulation, who are the regulatory actors and who are the subjects of that regulation. These matters will be discussed in the following chapters.

'Labour' as a concept has a number of distinct dimensions in law. It is frequently constructed by reference to the relationship between employers and employees, and in doing so, is narrow and excludes other forms of work, for example, the work of independent contractors (Stewart et al 2016, 3). Roles and Stewart define an employee as a person who performs work in a 'subordinate and dependent capacity' (Roles and Stewart 2012, 258). This definition is not without its problems and can be criticised. Courts have sometimes found independent contractors to be employees under the law. Another feature of labour identified by Stewart et al is that 'work' typically involves paid work, and that unpaid work such as domestic work is excluded from the general concept of 'work' which is the subject of legal regulation (Stewart et al 2016, 3). How labour is performed is another aspect of labour. The International Labour Organization ('ILO') identifies time periods in which work can be performed, for example, full-time, part-time or a limited fixed term, as well as the potential role of third parties in the employment relationship, such as employment agencies (International Labour Organization 2015, 113).

However, labour is not a static concept, it evolves over time, and therefore regulation must keep pace with this changing dynamic in order to remain effective. For example, blue-collar male workers in manufacturing with long-term secure jobs no longer dominate the domain of labour. Instead, labour markets have evolved to include greater numbers of women, flexible and short-term forms of employment and a move from

manufacturing to service based industries (Gahan and Brosnan 2006, 128-129; Johnstone et al 2012, 48-74). New forms of employment also extend to ‘on-demand’ work in the digital economy and the ‘gig’ or ‘on-demand’ economy, where people can earn an income from multiple ‘gigs’ instead of from full-time or part-time jobs. Such jobs (for example those under the Uber ride sharing application) can operate (or at least purport to operate) outside the traditional employer-employee relationship (Stewart et al 2016, 11).

That said, labour in professional baseball is relatively simple to construct and has not undergone many of the changes experienced in non-sports industries. The labour of professional baseball incorporates all work related to and including the playing of a game of baseball. This includes more than just playing a game and extends to work such as conditioning and training (fitness and weight work), pre-game workouts and post-game recovery. Players are subordinate to and dependent upon their team for work, and thus (as discussed later in the chapter) can be clearly classified as employees of the clubs they play for. This has been the position of courts and statutory authorities in relation to professional athletes in the United States, Japan and Australia. While the nature of work has changed in other industries, little variation has occurred in the fundamental nature of work in professional baseball. Most players in MLB, MiLB and NPB continue to be employed on yearly contracts that operate in association with internal labour controls such as the reserve system. Further, the workforce in professional baseball remains the exclusive domain of men. One major change in the labour of professional baseball, however, has been the globalisation of the workforce, as exemplified in MLB, the MiLB and the ABL.

As was seen in Chapter 3, the concept of ‘regulation’ is capable of being understood in several different ways. It can be narrowly interpreted to mean legal rules imposed by the state, by way of command and control. An application of this narrow concept in professional baseball would encompass the rules in collective bargaining agreements, as well as a league’s internal by-laws, regulations and constitution. A broader interpretation of regulation views it as any form of state or non-state rules, norms and processes that govern behaviour. Applied to baseball, this definition of regulation would include cultural norms (particularly common in Japanese baseball) and informal rules that govern conduct within leagues and teams.

For the purposes of this thesis, the concept of ‘labour regulation’ is broader than laws imposed by the state and encompasses the regulation of employment arrangements through both state and non-state regulation. This regulation involves both internal and external regulation. Internal regulation includes the regulatory techniques and actors inside professional baseball, while external regulation covers all forms of labour regulation that come from sources that are outside of professional baseball. Shaping the nature of internal labour regulation in each of the three leagues is the level of its engagement with external regulation. The product is that each league operates an autopoietic system of labour: that is, a system of communications that reproduces through interaction with its own regulatory elements, for example, the reserve system and contracting practices (assignment of contracts and trades). The evolution of these autopoietic systems is also based on the level and nature of engagement with external regulation like labour law and regulatory actors such as the courts, the legislature and statutory authorities.

4.2 THE PURPOSES OF LABOUR REGULATION

Debate over the purpose of labour regulation tends to focus on labour law and the role of the state. The common law can be seen to afford rights to the owners of capital through the protection of property, capital and the enforcement of contracts. Thus creating an unequal bargaining position between workers and owners (see Stewart et al 2016, 8-10). Stemming from this position, the starting point for the role of the state in labour regulation has come to be seen as the ‘traditional’ purpose of labour law: redressing the unequal bargaining position between employer and employee (Kahn-Freund 1977, 6; Stewart et al 2016, 5). In this context, Stewart et al attribute a ‘protective’ function to labour law (Stewart et al 2016, 5-6). However, this does not preclude debates over its scope. For instance, the Australian Government’s Productivity Commission notes that when regulation does intervene in the employment relationship, there will be questions as to whether the regulatory system has ‘over or under shot’ in seeking to remedy imbalances (Productivity Commission August 2015, 6).

The protective purpose of labour regulation can be seen in two mechanisms. First, labour law facilitates the organisation of workers and the use of collective bargaining to set employment conditions. In the United States, for example, section 1 of the *National Labor Relations Act of 1935*⁴⁹ recognises the protective function of the Act and labour law itself. Second, the protective purpose of labour law allows the setting of minimum employment standards by the state on matters such as wages, hours and leave. The Productivity Commission’s 2015 report on the Australian workplace relations framework endorses the protective function of labour law, concluding that

⁴⁹ (49 Stat 449) 29 U.S.C. § 151–169.

without regulation, employees are likely to have much less bargaining power than employers, resulting in adverse outcomes in wages and conditions (Productivity Commission December 2015, 5).

Recent years have seen the protective purpose of labour regulation challenged on a number of distinct grounds, and two that are prominent include recognising that labour regulation is capable of having multiple purposes, and that the state should intervene less in labour regulation, or in different ways. The first criticism sees some commentators agree with the general protective view but argue the purposes of labour regulation should be constructed more broadly. For example, labour regulation and workers' rights can be constructed as human rights through the application of international human rights law, state constitutions and legislation (Novitz and Fenwick 2010, 3; see generally the edited work of Fenwick and Novitz 2010; Owens et al 2011, 25-26), thereby applying to all workers, not just employees. Davidov and Langille argue that labour regulation extends beyond vulnerable workers receiving their 'fair share of the pie' to include the promotion of productivity, efficiency, competitiveness and societal goals such as distributive justice (Davidov and Langille 2006, 2-3, see also Mitchell 2010, 12). Mitchell and Arup take a more dramatic approach to the concept of labour regulation by recasting 'labour law' as the 'law of labour market regulation'. They also expand the traditional concept of the employment relationship by seeking to focus on the 'worker' or 'active labour market participant' rather than just the employee. In addition, they recast the regulatory field, replacing the 'workplace' with the 'world of work' (Mitchell and Arup 2006, 3-4). It can be seen that Mitchell and Arup's concept of labour regulation encompasses a much broader array of regulatory actors and techniques than those concerned with the traditional employer-employee

relationship. For example, workers and active labour market participants include the unemployed and independent contractors. While these approaches to labour regulation are useful when examining the general regulation of labour, for the purposes of this thesis, they are limited in that professional baseball is only concerned with certain aspects of labour regulation, not all forms of regulation. For instance, expanding labour regulation to include taxation law is not important in the context of this thesis, and in terms of the worker, rules regulating labour in professional baseball focus on those people employed by a team.

A second criticism of the protective approach to labour regulation challenges the view that the state should intervene in labour regulation. Such arguments are often based on neo-classical economic theory and the notion that markets effectively regulate themselves. Mitchell and Arup observe the preference for neo-liberal ideas in economics and the regulation for free markets, and individual freedom over controlled markets and collectivism (Mitchell and Arup 2006, 6). Stewart et al note that since the 1970s such economic theories have influenced a decrease in support for the protective view of labour law in many parts of the developed world, resulting in a reduced role for the state in setting labour standards (Stewart et al 2016, 6). The purpose here is not to resolve the debate over the purpose of labour regulation or the intervention by the state in labour regulation, however, it should be recognised that a protective purpose is present in most labour laws. For this thesis, it is worthwhile to note that the principle that labour is not a commodity, to be discussed in Chapter 9, inherently involves a protective purpose.

4.3 LABOUR REGULATION IN THE UNITED STATES, JAPAN AND AUSTRALIA

This chapter has so far examined the purposes and subjects of labour regulation. Next it engages with comparative law by providing an overview of the labour law systems in the United States, Japan and Australia. This sets the foundation for an analysis of the law and labour mobility in each of the three jurisdictions in Chapter 7.

(a) Overview of the labour law system in the United States of America

As a federation, the employment of all workers in the United States is regulated by a number of federal laws (see United States Department of Labor Employment Guide; Baker and McKenzie 2011), notably the *National Labor Relations Act of 1935* ('NLRA'), the *Fair Labor Standards Act of 1938*⁵⁰ and the *Occupational Safety and Health Act of 1970*.⁵¹ Relevant state labour laws also regulate the work of unionised and non-unionised workers.

For non-unionised workers, the 'at-will' employment doctrine is a default rule that, absent any contractual protections, allows an employer to terminate any employee at any time and for any reason: a good reason, a bad reason or a morally unjust reason (Carroll 2012, 656). Therefore, if there is no contractual provision stating otherwise, and subject to anti-discrimination laws such as Title VII of the *Civil Rights Act of 1964*⁵² and the *Americans with Disabilities Act of 1990*,⁵³ non-unionised employees can be dismissed for any reason. This doctrine potentially allows an employer to vary the

⁵⁰ 29 U.S. Code § 201.

⁵¹ 29 U.S. Code Chapter 15.

⁵² Public Law 88-352 (78 Stat. 241).

⁵³ 42 U.S. Code § 12101.

terms of employment as an employer can terminate an employee's employment, only to rehire the employee on new terms. With the exception of Florida, Georgia and Rhode Island, the states have adopted legislation to create narrow exceptions to the at-will doctrine. An at-will employee cannot be dismissed in contravention of anti-discrimination legislation or other legislation, if the dismissal violates public policy, if the dismissal contradicts an implied term of the employment contract, or if the dismissal breaches the standards of good faith (Harcourt et al 2013, 312-316). Summers criticises the at-will doctrine as subordinating employees to the control of an enterprise (Summers 2010, 65, 68, 70-73) and Carroll describes the use of the doctrine as inequitable, immoral and at times shocking (Carroll 2012, 657). Nevertheless, the at-will employment doctrine is firmly entrenched in the labour law and practices of the United States.

Governing unionised workers and the processes of collective bargaining is the NLRA, which was amended in 1947 by the *Taft-Hartley Act*,⁵⁴ also known as the *Labor Management Relations Act* (Powell 2013, 149). The general aims of the NLRA are the creation of industrial peace and addressing the imbalance in bargaining power in the employer-employee relationship.⁵⁵ The NLRA gives workers the right to organise, to join or not join unions and to collectively bargain. In addition, the NLRA requires good faith bargaining. The statutory body responsible for the enforcement of the NLRA is the National Labor Relations Board ('NLRB'), whose jurisdiction in collective bargaining is triggered by the NLRA requiring certification of unions and collective agreements and regulating industrial action, including strikes and lockouts (Wachter

⁵⁴ *Labor Management Relations (Taft- Hartley) Act*, Public Law No. 79-101, 61 Stat. 136 (1947).

⁵⁵ *National Labor Relations Act of 1935*, (49 Stat 449) 29 U.S.C. § 151–169, § 151.

2014, 23). The NLRB also certifies a union as the majority of bargaining unit for employees, unless the employer voluntarily recognises a labour union.⁵⁶ The latter occurred with the MLBPA in the 1960s (Weiler et al 2015, 101-102) and in doing so MLB recognised its players as employees under the NLRA when it entered the first collective bargaining agreement in 1968. The status of players as employees was formally recognised in 1969 by the NLRB in *American League of Professional Baseball Clubs v Association of National Baseball League Umpires*.⁵⁷ As will be discussed in Chapters 5, 6 and 7, subsequent cases have seen the NLRB and courts apply the NLRA to collective bargaining between MLB and MLBPA,⁵⁸ in turn confirming the employment relationship between players and clubs.

However the ability of the NLRA to meet the above objectives is increasingly limited. The inability of the NLRA to achieve its goals is linked to structural changes in the economy. For instance, the mobility of capital, information and workers has resulted in important labour decisions being made outside the collective bargaining process. A related factor is the diminishing level of unionisation (Wachter 2014, 20-24). In 2012 only 13.1 per cent of American workers were covered by a collective agreement and collective agreements applied to a mere 7.7 per cent of private sector workers (Read 2012, 134). The NLRA is also criticised for its exclusion of professionals such as doctors and lawyers, the inability of unions to approach non-unionised workers at the workplace and the limitations placed on unrepresented workers who want to join a

⁵⁶ Ibid § 159.

⁵⁷ 180 NLRB 190 (1969).

⁵⁸ See *Kansas City Royals Baseball Corp v MLBPA*, 532 F.2d 615 (8th Cir. 1976), *Silverman v Major League Baseball Player Relations Committee*, 67 F.3d 1054 (2d Cir. 1995), *Silverman v Major League Baseball Player Relations Committee*, 880 F.Supp 246 (S.D. N.Y. 1995), *Silverman v Major League Baseball Player Relations Committee*, 516 F. Supp 588 (S.D. N.Y. 1981) and MLBPA's claims to the NLRB in during the 1994 player strike in Chapter 5.4.

union (Estlund 2006, 149). Criticism has also been directed at the NLRB for its failure to enforce the core aims of the NLRA (Morris 2012, 7). Despite these limitations, however, the NLRA and the NLRB have played a prominent role in the regulation of labour in MLB and will be discussed in more detail in Chapters 6 and 7.

(b) Overview of the labour law system in Japan

In contrast to the United States and Australia, Japan has a unitary system of government and is not a federation. The Japanese Constitution enshrines the concept of the free and autonomous worker by stating that every person has the right to choose his or her occupation, to the extent that this does not interfere with public policy.⁵⁹ Araki notes that although this constitutional provision has no direct effect on the ability of private parties to enter a contract, under the *Civil Code*,⁶⁰ choosing one's occupation is considered a matter of public policy.⁶¹ Accordingly, a contract that contradicts public policy is void (Araki 1999, 274). The constitutional framework has given rise to a number of statutes that regulate labour and for the purposes of this thesis the key ones are the *Labor Standards Act*,⁶² the *Labor Contract Act*⁶³ and the *Labor Union Act*.⁶⁴ Other relevant laws are the *Equal Employment Opportunity Act*⁶⁵ and the *Industrial Safety and Health Act*.⁶⁶

⁵⁹ Nihonkoku Kenpô [*Japanese Constitution*], article 22.

⁶⁰ Minpô [*Civil Code*] [Act No. 89 of April 27, 1896, amended by Act No. 78 of 2006].

⁶¹ Ibid article 90.

⁶² Rôdô Kijun Hô [*Labor Standards Act*], [Act No. 49 of 7 April 1947 as amended through Act No. 147 of 1 December 2003].

⁶³ Rôdô Keiyaku Hô [*Labor Contract Act*], [Act No. 128 of 5 December 2007].

⁶⁴ Rôdô Kumiai Hô [*Labor Union Act*], [Act No. 174 of 1 June 1949 as amended through Act No. 102 of 21 October 2005]. For the legislative history of the *Labor Union Act*: see Doko 2006, 33-37.

⁶⁵ Koyo no Bun'yo ni Okeru Danjo no Pinto na Kikai oyobi Taigu no Kakuho to Joshi-Rodosha no Fukushi no Zoshin ni Kansuru Horitsu [*Equal Employment Opportunity Act*], [Act No. 113 of 1972, amended by Act No. 45 of 1985, Act No. 92 of 1997, and Act No 82 of 2006].

⁶⁶ Rôdô Anzenisei Hô [*Industrial Safety and Health Act*], [Act No. 57 of 1972, amended by Act No. 25 of 2006].

Araki describes the *Labor Standards Act* as the most important and comprehensive labour protection law because it sets minimum working conditions. These working conditions include the payment of wages,⁶⁷ maximum working hours,⁶⁸ paid leave,⁶⁹ rules of employment⁷⁰ and workers' compensation.⁷¹ The Act applies to all workers except domestic workers, family businesses that only employ family members, seamen and some civil servants.⁷² However, the *Labor Standards Act* allows deviation from its minimum standards when an employer and a majority of its employees enter a 'majority representative agreement' (Finkin et al 2013, 26-27). After the end of the 'bubble' economy in the 1990s, Yamakawa identifies that the *Labor Standards Act* was ineffective in dealing with the increase in individual labour contracts, more diverse employment conditions and an increase in disputes between employees and employers. In response, the *Labor Contracts Act* was introduced in 2007 (Yamakawa 2009, 4-6). It establishes processes for creating and modifying working conditions through individual labour contracts. Unlike the enforcement of the *Labor Standards Act* by the state, private individuals typically enforce the *Labor Contracts Act* in labour tribunals and through litigation (Yamakawa 2009, 8).

Underpinning the legislative framework of collective labour regulation in Japan is article 28 of the Japanese Constitution, which guarantees workers the right to organise and bargain collectively and regulates relations between the state and private citizens and between employers and workers. It should be noted that the regulation of unions

⁶⁷ *Labor Standards Act*, article 24.

⁶⁸ *Ibid* article 32.

⁶⁹ *Ibid* article 39.

⁷⁰ *Ibid* articles 89-93.

⁷¹ *Ibid* articles 75-88.

⁷² *Ibid* article 116.

in Japan differs from the United States and Australia in that approximately 90 per cent of unions are organised at the enterprise level (Finkin et al 2013, 64). Unionism in Japan is in decline and in 2011 only 18.5 per cent of Japanese workers were unionised (Finkin et al 2013, 85). A rare example of an industry union is the Japanese Professional Baseball Players Association ('JPBPA') in NPB: it will be discussed in Chapters 5, 7 and 8.

The key labour laws regulating collective labour relations in Japan are the *Labor Union Act* and the *Labor Relations Adjustment Act*.⁷³ The *Labor Union Act* establishes the requirements to be a registered union, sets out unfair labour practices and establishes central and local *Rôdô Inkai* or Labor Relations Commissions (Sugeno 2015, 5, 7-8; Suwa 2015, 25). Yamakawa notes that a major difference between the NLRA and the *Labor Union Act* is that the NLRA prohibits unfair labour practices by employers and unions, while the *Labor Union Act* only prohibits unfair practices by employers (Yamakawa 2015, 51). If a labour union requests collective bargaining on a mandatory subject of bargaining, employers must negotiate working conditions (Sugeno 2012, 126-150) and refusal by employers to collectively bargain without proper justification constitutes an unfair labour practice.⁷⁴

Labour disputes can be resolved by the courts, labour offices in local governments and the Labor Relations Commissions. The central Labor Relations Commission comes under the jurisdiction of the Ministry of Health, Labour and Welfare and the 47 local Commissions are located in each prefecture. The *Labor Relations Adjustment Act*

⁷³ Rôdô Kenkei Chôsei Hô [*Labor Relations Adjustment Act*], [Act No. 25 of 27 September 1946].

⁷⁴ *Labor Union Act*, article 7(ii).

facilitates the resolution of collective labour disputes by giving the Labor Relations Commissions the power to determine complaints of employers' unfair labour practices through conciliation, mediation and arbitration powers (Finkin et al 2013, 23-24; Sugeno 2015, 6, 8-9). According to Doko, these Commissions have played a key role in protecting trade unions and their activities (Doko 2006, 32). For example, in 1985 the Labor Relations Commission recognised the JPBPA as a union under the *Labor Union Act* (The Asahi Shimbun 1985, 22) and in doing so gave the players rights as employees under this legislation. In 2004 the Tokyo District Court and the Tokyo High Court confirmed the status of NPB players as employees under the *Labor Union Act* in the *Nippon Professional Baseball League Cases*.⁷⁵ The Tokyo High Court held NPB's attempt to contract the number of teams to be a mandatory subject of collective bargaining, a decision implicitly based on players being employees under the *Labor Union Act*.

(c) Overview of the labour law system in Australia

Like the United States, Australia has a federal system of government and responsibility for labour regulation is shared between the federal government, the six states and a number of territories. A mix of legislation and common law governs the employment relationship and, it is generally accepted that there is a single common law of Australia (Stewart and Greene 2010, 306-307). Australian labour law was traditionally based on the system of compulsory conciliation and arbitration of industrial disputes at the state and federal levels, which in turn, produced a system of state and federal awards (Hardy and Howe 2009, 308). Awards are statutory instruments that establish minimum work

⁷⁵ Tokyo District Court, 3 September 2004, 21153 Minji 11 and Tokyo High Court, 8 September 2004, 90 Rôdô Hanrei 879.

conditions for employees in an industry or sector but do not apply to employees who are covered by a collectively negotiated agreement, that is, an enterprise agreement made and registered under Part 2-4 of the *Fair Work Act 2009* (Cth) (Howe and Newman 2013, 279). Legislative reforms since the 1990s have seen a greater emphasis on collective bargaining that has resulted in a reduced role for conciliation and arbitration (Productivity Commission August 2015, 31).

Australia's system of labour regulation has undergone major change in recent years. The *Work Choices* reforms⁷⁶ were introduced by the Howard government in 2005 and were followed by the Rudd government's *Fair Work* regime⁷⁷ in 2009. Both were controversial labour reforms that reshaped Australia's labour system. *Work Choices* shifted the constitutional basis for federal labour regulation⁷⁸ and changed the regulatory landscape in labour law in a number of important ways (Hardy and Howe 2009, 308). The reliance on the corporations power in s 51(xx) of the Constitution expanded federal labour law to cover the employment relations of all trading, financial or foreign corporations. In addition, in 2009 all of the states (except Western Australia) agreed to a reference of powers to the Commonwealth that resulted in the *Fair Work Act* applying to all private sector employers and employees in those states (Stewart et al 2016, 55). The method of regulating the labour relationship was also overhauled, with the role of awards marginalised as collective and individual agreements took precedence over awards (Bray and Stewart 2013, 38-39). While federal legislation now dominates Australia's system of labour regulation, the states still play an important role

⁷⁶ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

⁷⁷ *Fair Work Act 2009* (Cth).

⁷⁸ This change in approach was upheld by the High Court of Australia in *New South Wales v Commonwealth* (2006) 229 CLR 1.

in regulating labour through legislation in a number of employment areas, including occupational health and safety and discrimination, although there are also federal laws on these subjects.⁷⁹

The statutory system of labour regulation in the *Fair Work Act* would appear to apply to ABL players as employees, although there has been no definitive ruling to that effect. In 1971 the High Court of Australia in *Buckley v Tutty*⁸⁰ held that professional athletes (in that case a rugby league player) are employees of their clubs. Federal and state industrial commissions have also held professional athletes to be employees and subject to the award system. In 1993 the Australian Industrial Relations Commission (a precursor to the Fair Work Commission) stated in *Anderson v Adelaide Football Club Ltd*⁸¹ that it had jurisdiction to issue an award to cover Australian Football League players. Then, in 1997 the Industrial Relations Commission of New South Wales made an award to cover professional rugby league players.⁸² If there is any doubt that ABL players are employees a court is likely to classify players as employees and not independent contractors under the multi-factor test set out by the High Court.⁸³

In the landscape of Australian labour regulation registered enterprise agreements override awards. Under the *Fair Work Act*, enterprise agreements that include employees covered by an award must pass the ‘better off overall test’, a requirement that prevents conditions of an award being undercut by an enterprise agreement.⁸⁴ In

⁷⁹ Such federal laws include the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Work Health and Safety Act 2011* (Cth).

⁸⁰ (1971) 125 CLR 353, 371-372.

⁸¹ (1993) 48 IR 440.

⁸² *Australian Rugby League Players Award 1997*, 25 September 1997.

⁸³ See *Stevens v Brodribb Sawmilling Co Pty* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

⁸⁴ *Fair Work Act 2009* (Cth), s 193.

addition the *Fair Work Act* mandates good faith bargaining,⁸⁵ protects taking or threatening to take industrial action in relation to collective bargaining⁸⁶ and requires approval of enterprise agreements by the Fair Work Commission.⁸⁷ For those workers who are not covered by an award or an enterprise agreement, the employment contract plays a more important role in regulating the employment relationship. Contract regulates all workers and the common law of contract governs such agreements. All employees are subject to the statutory minimum standards contained in the National Employment Standards ('NES') in Part 2-2 of the *Fair Work Act*, which include matters such as maximum hours and leave.

A feature of the Australian labour system is the Fair Work Commission, a statutory authority that, among other things, hears unfair dismissal complaints,⁸⁸ determines wages, approves agreements and (in certain circumstances) resolves industrial disputes. Another relevant statutory institution is the Fair Work Ombudsman, a federal statutory authority responsible for enforcing the *Fair Work Act*. The Productivity Commission describes the Ombudsman as providing 'targeted and innovative approaches to compliance and information provision' (Productivity Commission August 2015, 10-12).

(d) Summary

A key structural difference in labour law arises from the political-legal structure of the three countries. As federations, a mix of state and federal labour laws regulate labour

⁸⁵ *Ibid* s 228(1).

⁸⁶ See Part 3-3 of the *Fair Work Act*.

⁸⁷ *Ibid* s 186.

⁸⁸ Unlike the United States, Australia does not have the at-will employment doctrine and unfair dismissal is governed by Part 3-2 of the *Fair Work Act*.

in the United States and Australia. In contrast, Japan has a unitary system of governance and federal law governs labour in the prefectures. Another important difference is the historical presence of arbitration and conciliation in Australia, although Australia has in the past three decades moved away from a system that makes heavy use of delegated regulation to a labour system dominated by individual agreements, collective agreements and legislation (including the NES).

4.4 CONCLUSION

In recent years, theories and approaches to law have expanded the scope and function of labour regulation and our understanding of what constitutes labour regulation. Consequently, labour regulation now encompasses a broader range of regulatory activities and regulatory actors. While debate exists over what is labour regulation, this thesis will not seek to resolve these debates but instead focus on the rules and practices that regulate labour in professional baseball. Baseball players in each of the three leagues are employees for the purposes of labour in each jurisdiction. The labour law systems of the United States, Japan and Australia have similarities but as will be seen in Chapters 5, 6 and 7, how baseball's internal regulatory actors engage with and use labour law differs in each of the three leagues.

CHAPTER 5 INTERNAL REGULATORY ACTORS AND MECHANISMS IN PROFESSIONAL BASEBALL

In the context of labour mobility Chapter 5 is important in that it examines how the labour of playing professional baseball is internally regulated. Internal regulatory actors in baseball profoundly affect what labour mobility is and the level of mobility among players. Internal regulation can be considered the dominant form of regulation in this sport, even though the form and operation of this internal regulation in the United States and Japan has been shaped by the external regulation of the labour laws governing collective bargaining. The key internal regulators in professional baseball have been selected to demonstrate how labour is regulated, and by whom. Autopoietic theories of law, examined in Chapter 3, are used to explain how the interaction of professional baseball's internal regulatory actors has created an autopoietic system of labour regulation that has two broad regulatory aims: controlling the movement and cost of labour. Secondary aims include influencing behaviour, creating a transparent labour system and recording the movement of players. These aims are important factors that shape self-regulation in each league and, subsequently, how the autopoietic labour systems in each league evolve over time. The identification of these internal regulatory actors is important as the internal regulation of baseball engages with external regulation, the subject of Chapter 6.

5.1 OWNERS OF PROFESSIONAL BASEBALL CLUBS

(a) The enterprise

The enterprise performs the dual regulatory roles of being regulated as part of the external market for labour regulation and regulating its own internal labour. Thus, the enterprise is both a target of regulation and a regulator in itself, a notion that, as will be

seen, is particularly true for professional baseball. In the context of professional sport the enterprise can be the league as a group of employing clubs, as is the case in MLB and NPB. Alternatively, the league can be an independent enterprise, for example the National Association of Stock Car Auto Racing or the Australian Football League. Finally the enterprise can be the employing club. As a contemporary legal and economic concept Teubner described the enterprise as a ‘nexus of contracts’ among individual resource owners, a description Riley applied to corporations (Riley 2005a, 23-24). Further, Teubner views the enterprise as an autonomous social system and an economic power centre (Teubner 1994, 21). New institutional economists assert the importance of groups and institutions such as corporations, arguing that they restrict and shape how choices are made. Institutions are also important in regulation as they establish standards, monitor compliance and sanction non-compliance (Stewart et al 2016, 21-22).

(b) The role of collaboration and collusion in professional baseball

As highlighted in Chapter 2, baseball is an industry that necessitates a high degree of collaboration. This is an important feature of autopoiesis in baseball that influences the composition of labour controls on mobility. An individual cannot play the game of baseball. Without nine players standing on a field to form a team, facing an opposing team of nine players, a game of baseball cannot be played. Further, for a competitive league to operate, a number of teams must exist, who collaborate on multiple issues, including roster sizes, the registration and movement of players, the scheduling of games and the use of playing fields. In *Brown v Pro Football Inc*⁸⁹ the United States

⁸⁹ *Brown v Pro Football Inc*, 518 U.S. 231 (1996).

Supreme Court recognised that economic collaboration between competing clubs in a professional sports league is needed for the financial survival of clubs and the league.⁹⁰

(c) Ownership in Major League Baseball

Prior to the 1960s MLB club owners were typically 'baseball men', self-appointed custodians of the game of baseball who presented a unified voice on important issues of baseball and business (Nathanson 2010, 603). However, not all owners were part of the 'club'. Bill Veeck, owner of several Major and Minor League teams from the 1940s to the 1980s, called owners at this time 'fossils' (Veeck and Lin 2001, 25, 171) and thought they were aloof (Veeck and Lin 2001, 34). Owners did not consider Veeck to be part of their millionaires' 'country club' and looked down upon his promotions which they considered denigrated baseball (Heylar 1994, 248). However this dynamic began to change in the 1960s. By 1981, one third of clubs had owners with less than five years experience in baseball (Heylar 1994, 259). Long-term and stable ownership of MLB clubs by a small number of industrialists had transitioned to ownership by consortia and large corporations. Recent examples of corporate owners include Time Warner, the Disney Corporation and the Tribune Company.

While wealthy individuals continue to dominate the ownership of MLB clubs, the legal mechanism for ownership is now the corporate entity, which has had broad ramifications for how professional baseball clubs operate. Corporations are subject to multiple interests, like those of shareholders and creditors, and ownership of a baseball team is more likely to be seen as an investment or a corporate asset whose value can increase or decrease. Owners are in turn increasingly willing to sell their asset based

⁹⁰ Ibid 248.

on the level of return on their investment and the broader portfolio of investments held by the corporation (Nathanson 2010, 607-10). This in turn affects the system of self-regulation in baseball and labour mobility as players are more likely to be seen as investments that produce returns rather than employees.

(d) Ownership in Minor League Baseball

The ownership of the over 240 Minor League clubs is also relevant as the employment of Minor League players is controlled by their MLB club. Historically, Minor League clubs have been privately owned. The rising value of MiLB franchises⁹¹ and the cost of running a MLB club's Minor League system (estimated annually at a minimum of US\$20 million: Zimbalist 2010, 23) have seen a shift in ownership of some Minor League clubs. A growing number of MLB clubs now either wholly or partly own one or more of their Minor League affiliate clubs (Smith 2012 and 2013). For private owners, the business model for owning a Minor League club is a profitable investment option as the MLB club is responsible for the salaries of players, coaches and support staff. Some operational expenses are shared between the Major and Minor League clubs (Major League Rules, rule 56).

(e) Ownership in Nippon Professional Baseball

The ownership of NPB clubs diverges from practices in MLB as large Japanese corporations own all of a club's teams: *ichi-gun*, *ni-gun* and (where applicable) *sangun* (Nichol 2012, 136-137). NPB club ownership during the periods either side of World War II was dominated by newspaper/media companies, railway companies,

⁹¹ The six highest valued minor league teams are worth between US\$30 million and US\$38 million, while the average value of a Class AAA team is US\$20 million and most minor league clubs are valued at a few million dollars: Smith 2013.

department stores and businesses in heavy industry. The early ownership of clubs by these industries was intrinsically linked to their ability to market and sell the product of the parent company via their involvement in professional baseball. Another important difference in the ownership of NPB clubs is that the team is a subsidiary of the parent company. The financial success of the parent company is particularly important for teams that struggle to generate revenue, setting the budget for the player payroll and the ongoing ability of owners to retain control of the team.

Underscoring the relationship between the corporate Japanese owner and its team was the post-World War II economic boom of Japan that resulted in relatively stable ownership of NPB clubs. During this period the transfer of ownership that did occur was in less prestigious teams. However, the financial problems of corporate Japan that began in the early 1990s and morphed into a prolonged downturn in the Japanese economy led to structural change in the ownership of NPB clubs. Supermarket chain Daiei purchased the Fukuoka Hawks from Nankai in 1986 (Carpenter 2014, 110) and then sold the team to mobile phone and tech company Softbank in 2004 (Softbank 2016). In 1989 corporate conglomerate Orix purchased the Braves from Hankyu, an Osaka based rail and supermarket company, and renamed the team the Blue Wave (Russell 2014, 127). As will be discussed in Chapter 7.3, Japan's financial problems in 2004 saw the merger of the Osaka Kintetsu Buffaloes and the Orix Blue Wave to create the Orix Buffaloes. With one less team NPB was forced to expand and added the Tohoku Rakuten Golden Eagles, owned by online shopping company Rakuten (Kawai and Nichol 2015, 513). In 1993 the Nippon Broadcasting System and the Tokyo Broadcasting System acquired the Whales from the Taiyo whaling company. They then sold the team to DeNA in 2011, an online gaming company (Makiuchi 2011).

The acquisition of NPB clubs by Softbank, Rakuten and DeNA is evidence of a gradual shift in the ownership of NPB clubs from traditional Japanese companies to technology companies.

(f) Ownership in the Australian Baseball League

The ownership of the ABL and its teams represents an unusual model of governance in professional baseball. Instead of professional clubs coming together to form a league, as explained in Chapter 2, the ABL is a joint venture between MLB and Baseball Australia. Such an ownership structure increases the internal nature of labour relations and minimises the role of individual teams. This ownership model is in part due to the failure of private ownership in the now defunct Australian Baseball League of the 1990s. As majority owner, MLB's funding of professional baseball in Australia is designed to grow the game of baseball in Australia and at the same time create an English-speaking winter league for Minor League players. MLB's investment in the ABL is significant in light of the cost of running one professional baseball team, let alone six teams and a league. Revenue created by each ABL team is slowly growing and is derived from ticketing, sponsorship, concessions, merchandise and car parking. In six years the only team to create a profit has been the Perth Heat, raising questions as to the long-term viability of the league.

MLB's ownership of the ABL represents a transnational internal regulatory system. Central governance is located in MLB's head office in New York and all major decisions flow from New York to the ABL's headquarters in Sydney. The ABL is responsible for the daily administration of the league, monitors the financial performance of all teams and issues operational directives to each team's front office.

MLB appoints the league's general manager and the ABL appoints the general managers of each team. Some teams have an advisory board, although it is unclear how advisors are appointed (and removed) and whether there are any rules or guidelines that set out their expected role and activities. It appears that both the ownership and governance role of Baseball Australia is marginal.

(g) Summary

Who owns a professional baseball club is an important factor that influences the regulation of labour and the basic structure of a league's autopoietic system of labour. In the world of modern professional sport, where players can earn hundreds of millions of dollars and the lure of big money can attract the world's best baseballers, ownership plays an important role in determining the resources available to recruit, develop and retain players. The collaboration between owners to form a league also allows owners to collectively self-regulate many aspects of the labour of professional baseball.

5.2 THE INSTITUTION OF THE 'LEAGUE'

(a) The league as an employer association

An important example of the collaboration between owners in baseball is the institution of the 'league', the governance of which is based on a league's constitution, internal rules and collective bargaining agreements. As an entity the league can be seen as an employer organisation or industry association. Spooner attributes the historical existence of employer organisations to the threat posed by unions and the state (Spooner 2003, 635). Employer organisations aim to promote and advise affiliated enterprises, thereby strengthening their position in society on labour and social matters (Rynhart 2007, 41). Rynhart identifies the core functions of employer organisations as

promoting business interests; representative functions in the political and industrial relations systems; internal functions like research and member training; advocacy for business; and technical assistance to employer organisations in developing countries (Rynhart 2007, 42-51). While these motivations and functions apply to baseball to varying degrees, as discussed in the previous section, a professional baseball league is a pragmatic response to the need to collaborate on multiple levels and is an example of voluntary self-regulation. It should be noted that team owners in MLB and NPB do act in their own self-interest in setting league policy and regulating labour. Modern labour practices in MLB and NPB also see the league act as a multi-employer bargaining unit in collective bargaining.

(b) The commissioner of the league

The centre of administration of the league in MLB and NPB is the commissioner, who is ultimately responsible for the league's performance, decisions and activities. The commissioner is the chief executive officer of the league. Although there is no commissioner, the general manager of the ABL performs similar functions. The level of independence of a commissioner is influenced by the power of clubs to appoint the commissioner in MLB and NPB, and also the power to remove them, while in the ABL, the general manager is appointed by MLB. The commissioner is appointed to run the business of the league independently and resolve disputes to avoid the cost and uncertainty of litigation. One of the underlying principles of the exercise of commissioner powers is to act in the commercial interests of owners, but this power is restrained by the commissioner's power to make decisions in the 'best interests of baseball'. However the commissioner is ultimately answerable to the owners of the clubs. The broad powers vested in the commissioner have led some critics to label the

MLB commissioner as a ‘czar’ or ‘absolute despot’ (Lentze 1995, 71-76). The ability of MLB Commissioner’s powers to be legally challenged will be discussed in Chapter 6.1.

(c) Regulatory activities of the league

Some of the key regulatory activities of the league are to administer daily operations, conduct decision-making, act as an impartial dispute resolution body and discipline relevant parties (Lentze 1995, 66, 79, 81). The league is also an effective vehicle for collaboration between teams on day-to-day matters, including the number of rostered players, team uniforms, the use of fields for warm up and practice and the scheduling of games. Yet in performing many of these activities the function of sports leagues like MLB and NPB is essentially monopolistic, particularly over matters such as labour, the number and location of teams, merchandise licenses and broadcast rights (Willisch 1994, 1628; see Ross 1989 and 2001). This is particularly true for MLB and NPB as there is no competing major league in baseball in either the United States or Japan.

(d) The level of collaboration among owners

The dynamic of the league is also influenced by the level of collaboration between team owners. Here the ABL can be distinguished from MLB and NPB. All labour rules in the ABL are set by a single owner, the ABL. Therefore there is little conflict between teams on matters such as roster size or foreign player limits. In contrast, MLB as a league must foster consensus between owners on a range of matters where there may be conflicting views. For example, labour matters such as revenue sharing, a salary cap and an international amateur draft all create varying levels of opposition and support.

Therefore the league as an entity needs to encourage consensus on labour matters that draw diverse opinions.

(e) Summary

The league plays a central role in labour relations in professional baseball and the commissioner is provided with broad powers to administer the game. Thus the league and the commissioner are key actors in the autopoiesis of professional baseball. Collaboration between the teams on diverse labour matters is a key role of leagues such as MLB and NPB, in contrast to the ABL which sets labour conditions for teams which it owns. The increase in the number of teams in a league, the growth in player salaries, the rise of unionism, and the globalisation of the supply of labour markets have all combined to create a new set of regulatory challenges for each league.

5.3 PROFESSIONAL BASEBALL PLAYERS

(a) The professional baseball player as a ‘worker’

As noted in Chapter 4, statutory authorities and courts in the United States and Japan have recognised professional baseball players as employees under their respective labour laws. In Australia, courts and industrial tribunals have held professional athletes to be employees according to labour law, decisions which apply to ABL players. Professional baseball players are one of the two central regulatory actors in the employment relationship, the other being the team owner as employer. The extent of the influence of the worker in this dynamic is dependent upon the distribution of power between worker and employer. As discussed in Chapter 4, the natural imbalance in power between worker and employer is the traditional justification for the state regulating labour, now typically through the setting of minimum employment

standards. In the context of professional baseball, player unions attempt to reduce this power imbalance by establishing standards in collective agreements. The level of influence exercised by players over labour matters can be assessed according to the time period in an autopoietic system and the time when players unionise.

(b) The diversity of professional baseball players

The gradual globalisation of baseball is creating a diverse global labour market and professional baseball leagues have responded to globalisation differently. Thus global labour mobility is an important factor shaping labour mobility in each of the three leagues under study.

The globalisation of MLB labour was accelerated in the 1970s and 1980s through the influx of Latin American players, and later by the movement of Japanese players to MLB in the 1990s, resulting in MLB gaining access to other Asian labour markets such as South Korea and Taiwan. Australians have been playing in MLB since the late 1980s and European players are beginning to enter the Minor and Major Leagues. MLB has embraced the globalisation of labour to maintain and enhance the standard of competition, and expand its revenue base beyond the shores of North America.

In contrast to MLB, NPB and its clubs have not fully embraced foreign labour, instead preferring a protectionist approach. Foreign players from the Major and Minor Leagues have been playing in NPB since the 1960s. Even though NPB no longer restricts the number of foreign players on the 70-man roster of a NPB club, as mentioned in Chapter 2, NPB's active roster of 28 players is limited to four foreign players. The marginalised role of foreign players in NPB is demonstrated by their description in Japan as *suketto*

gaijin ('foreign helpers'), but most foreign players are remunerated above what a Japanese player of equivalent skill receives.

The ABL embraces foreign player involvement but for reasons different to MLB. As the local talent is insufficient to maintain a professional standard of baseball, necessity dictates that ABL clubs acquire foreign labour. Further, the involvement of players from MLB, MiLB and Asian professional leagues raises the status of the ABL and the desirability of the league for players wanting to be recruited by an American or Asian professional club. As discussed in Chapter 2.2, like NPB, the ABL does control the number of foreign players on a club's roster, although the permitted number of foreign players on a roster is more liberal than in NPB and there are a minimum number of Australian players that are required to be on the field. In addition, the number of foreign players varies among clubs based on ABL rules. In an effort to create competitive balance, clubs in smaller cities like Canberra are permitted to have a greater number of foreign players than clubs with larger talent bases such as Perth and Melbourne.

(c) The labour market for baseball players

The sports and economics literature also provides insight into the role of players as regulatory actors. Rosen and Sanderson note that the demand for players depends on their marginal contribution to product quality (Rosen and Sanderson 2001, F48). As sports are labour intensive, as demonstrated by the large roster sizes in baseball, Rosen and Sanderson identify that it is the scale of economies that make potential earnings so high. This is because the scarcity of the most talented players makes it necessary for rents to be observed (Rosen and Sanderson 2001, F51). The configuration of the labour market in sports influences player salaries. Free agent players receive salaries

according to their full marginal revenue product, while there is little variation in entry-level wages as there are minor differences in skill. Sitting between these two groups of players in terms of wages are established players who are yet to reach free agency (Rosen and Sanderson 2001, F56).

(d) The status of players: ‘the haves and have nots’

Inside the labour market in professional baseball exists a class divide, a product of the astronomical amounts of money paid to some players and the labour market described by Rosen and Sanderson. A small group of players receive signing bonuses and salaries that range from hundreds of thousands to millions of dollars, compared to those players that receive a few thousand dollars or league minimum salaries and bonuses. This inequity is exemplified in MLB with the recruitment of amateurs through the draft and the description of Minor League players either as ‘penniless players’ or wealthy ‘bonus babies’ (Broshuis 2013, 64). The income gap is much lower in NPB due to the average salary of a *ni-gun* player being US\$218,000, compared to the US\$3 to US\$5 million paid to a small group of elite players. In the ABL there is a fairly narrow gap between the highest and lowest paid players as payments range from approximately \$100 to a few hundred dollars for a four game series. Development roster players receive no remuneration.

The status of players influences their role within a club’s system of labour regulation. Experienced elite professional players possess bargaining power in contract negotiations beyond the ability to demand high wages and can negotiate ‘no trade’ clauses, translators, trainers and other perks. In NPB the status of a player shapes their global labour mobility and ability to transfer to a MLB club, either as a free agent or

via the posting system (see Chapter 8.3). Even though MLB and NPB do not have salary caps, the ability to negotiate high salaries limits the amount of money in a club's total payroll for other players and can hinder high paid players being traded. The other benefit of being an elite player is the ability to secure long-term agreements for guaranteed money, as demonstrated by infielder Dan Uggla's five-year US\$62 million contract with the Atlanta Braves (ESPN 2014, 'Braves release 2B Dan Uggla'). After poor performances in the 2013 season, the Braves were unable to trade Uggla in the offseason. When his substandard performances continued in 2014, the Braves unconditionally released Uggla from his contract that expired at the end of 2015 but were still obligated to pay him over US\$18 million.

(e) Summary

The labour market in professional baseball represents a diverse group of young men from various cultural and ethnic backgrounds. How leagues respond to this diversity varies between MLB, NPB and the ABL. Not only does the growing diversity of players on a roster create challenges for coaches and players, most notably communication and language support, but as will be seen in Chapters 10 and 11, a global workforce presents regulatory challenges for league labour systems in facilitating the transfer of players.

5.4 LABOUR UNIONS IN PROFESSIONAL BASEBALL

This section of Chapter 5 examines player unions in terms of their underlying structure, their relationship to the law and key regulatory activities performed by unions in each league. The rise of labour unions in professional sport is important in that labour law results (at least in the United States and Japan) in owners being unable to refuse to

bargain over subjects of collective bargaining (Lowell 1973, 5). Player unions will be analysed again in Chapter 7, where the focus will be on the role of unions in creating labour mobility in professional baseball.

(a) Collectivism and unions

Traditionally, worker collectives in the form of trade unions have been the primary tool to correct the power imbalance between employees and employers. Thus unions are influential in the internal regulation of labour. Unionism broadly effects labour regulation in several ways. First, as a regulatory actor unions are a rights enforcement agent and therefore expose workers and employers to additional regulation. Second, collectivism can operate at different levels. For example, there are unionised and non-unionised workers in an economy and the level of unionisation can vary from industry to industry and even between enterprises. But in MLB and NPB union membership is nearly 100 per cent. In contrast, Minor League players are excluded from the MLBPA and have no player union, nor is there a player union in the ABL. Third, unionised workers (and sometimes non-union workers) receive rights and benefits through the process of collective bargaining that they may not be able to negotiate as an individual worker, a situation that is applicable to professional baseball.

However, collectivism in most industries has undergone an important transformation in recent decades. Fudge identifies that from the perspective of a labour lawyer, the most significant recent shift in labour law in countries around the globe has been the move from collective bargaining to individual negotiations (Fudge 2011, 124). As part of this process, modern labour markets are experiencing a process of ‘de-collectivisation’ where there has been a movement from unionsation and collective

agreements to individualism and individual labour agreements (Arthurs 2011, 18-21). According to Fudge this process has resulted from a shift to active labour market policies and a proliferation of non-standard forms of employment, resulting in a conceptual and normative crisis in labour law (Fudge 2011, 124). Yet in professional baseball and professional sport in general, the trend has been in the other direction, with unionism playing a pivotal role in labour regulation in MLB and NPB in recent decades.

(b) The employment relationship and collective agreements

Employee collectives are intrinsically connected to an important method of regulating the employment relationship: collective agreements. Collective agreements seek to redress the power imbalance between employee and employer, while also requiring cooperation between parties that have a mutual interest in the operation of an enterprise (Productivity Commission August 2015, 31). In the decades following World War II, Fudge acknowledges the central role of collective bargaining in preventing the commodification of labour with the aim of keeping the common law and ordinary courts out of the labour relationship (Fudge 2011, 123). In this context and for the purposes of this thesis, ‘commodification’ involves treating workers not as autonomous individuals but as property that can be bought and sold. Such treatment may violate the principle that labour is not a commodity (to be examined in Chapter 9). Stone and McCrystal and Syrpis recognise the value of unions in giving employees a ‘voice’ in the workplace and also argue that unions perform an important democratic function in giving ‘voice’ to millions of people who would otherwise not have access to the political process (Stone 2004b, 197; McCrystal and Syrpis 2014, 424). Howe’s description of voice as ‘amplification’ (Howe 2014, 383) is particularly relevant in professional baseball, where prior to the presence of strong player unions the voice of

players was restricted by owners through individual contract negotiations and unilaterally imposed labour controls such as the reserve system.

As discussed in Chapter 4, professional baseball players in each league have the status of employees under the NLRA in the United States, the *Labor Union Act* in Japan and the *Fair Work Act* in Australia. This status is important in that these laws all recognise unions and facilitate collective bargaining, thereby engaging external regulation. These statutes allow employees to make enterprise or multi-employer agreements that collectively govern the workplace and also permit employees to take industrial action. These statutes will be examined in the context of labour mobility in Chapter 7.

(c) The rise of player unionism in Major League Baseball

Lowell describes the unionisation in American professional sport as a gradual process of ‘creep’ (Lowell 1973, 3), as evidenced by the experiences in MLB. Major League players formed a number of short-lived labour unions in 1885, 1900, 1912, 1922 and 1946 (Schiff and Jarvis 2016, 665; for a history of unionism in MLB see Davies 2013).⁹² But unionism did not take root until after the MLBPA was formed in 1953. The trajectory of unionism and labour relations in American professional sport was forever changed in 1966 when the MLBPA transitioned under the law from a fraternal organisation to a labour union (Schiff and Jarvis 2016, 665). At the same time the MLBPA appointed as chief executive officer Marvin Miller, a former American steel industry union economist and negotiator. This marks a significant period in time in the

⁹² These unions were the Brotherhood of Professional Baseball Players in 1885, the Players’ Protective Association in 1900, the Fraternity of Professional Baseball Players of America in 1912, the National Baseball Players Association of the United States in 1922 and the American Baseball Guild in 1946.

evolution of MLB's autopoietic system of labour. Miller began educating players about their legal rights under labour law and their right to a fair share of the revenues created by the provision of their services. Most importantly, the MLBPA led by Miller implemented a clear strategy to realign the balance between players and owners by challenging the authority of the owners and the reserve system, the backbone of the labour system in baseball. Miller's strategy relied upon the engagement of the practices and protections of American labour law and specifically, the NLRA (Goldberg 2008, 40-43) and will be examined in Chapter 7.2 in terms of labour mobility.

Strengthening the legitimacy of the MLBPA was the NLRB's decision in 1969 in *American League of Professional Baseball Clubs v Association of National Baseball League Umpires*.⁹³ This case held that baseball's exemption from antitrust laws (to be explained in Chapter 7.2) did not extend to labour law because Congress intended the NLRA to apply to the labour of MLB. As players (and umpires) are employees under the NLRA they could unionise and be protected by the NLRA (Mitten 2011, 105; Weiler et al 2015, 102-104). The importance of this decision is highlighted by Abrams' observation that the NLRA underwrites the legal legitimacy of the MLBPA (Abrams 2003, 295).

(d) Membership of the Major League Baseball Players Association

Under the MLB Basic Agreement, MLB and its 30 clubs recognise the MLBPA as the 'sole and exclusive bargaining unit' for all current and future Major League players (MLB Basic Agreement 2012, article I.II). This terminology and practical role of the MLBPA is mandated by section 9(a) of the NLRA upon a majority of employees voting

⁹³ 180 NLRB 190 (1969).

to be represented by a union. The exclusive nature of MLBPA membership, combined with the management of the union by lawyers, led Wollett to criticise the MLBPA for being an unrepresentative elitist union (Wollett 2008, xiv-xv). Former MLBPA chief executive Michael Weiner disputed such claims, stating that since Miller the underlying principle of the MLBPA is that the players on all 40-man rosters make major decisions of the union (Weiner 2013, 381-382). The MLBPA may also be criticised in terms of the traditional structure and operation of labour unions in that the decisions of player associations can be unrepresentative of the majority of players. However, the willingness of the MLBPA over a number of decades to represent aggressively the interests of its members (and future members) cannot be denied.

While membership of the MLBPA is reserved for Major League players, Minor League players are free to form their own union as the right to organise is guaranteed by the NLRA.⁹⁴ However, the prospects of the creation of a Minor League player union are impeded by the players' concerns that disrupting the status quo will jeopardise their prospects of playing in the Major Leagues.⁹⁵ The absence of a Minor League player union is also unsurprising given the high annual turnover rate of players at each Minor League classification, the high number of Minor League players annually released by their club and the view held by many players that they will progress quickly through the Minor Leagues to MLB. The result is that over 7,000 Minor League players do not have union negotiated working conditions and pay or the general protections afforded by a labour union.

⁹⁴ *National Labor Relations Act of 1935*, (49 Stat. 449) 29 U.S.C. §151-169, §151, 157 and 158.

⁹⁵ *Major League Baseball Antitrust Reform, Hearing on S. 53 Before the Senate Committee on the Judiciary*, 105th Cong. 13–15 1997) (testimony of Dan Peltier, former baseball player).

(e) The non-unionisation of Minor League players and the fight for a ‘living wage’

The low wages of Minor League players intersects with the ‘living wage’ movement. Proponents of the living wage argue that an adequate wage allows affected workers and their families to lead a life in a material sense and does not impose excessive costs on businesses (Pollin 2008a, 8-9). In its broader sense the living wage movement highlights the issues of income distribution and economic justice in the United States (Pollin 2008b, 21). Disgruntled retired Minor League players have recently turned to litigation in order to attain a living wage and challenge the Minor League labour system. Two current examples involve the use of civil procedure, class actions, labour law and antitrust law.

In 2014 litigants in the *Senne* class action claim they were paid by MLB clubs below the minimum wages required by the laws of the states where the players reside and the federal *Fair Labor Standards Act*. Currently the federal minimum wage is US\$7.25 per hour and it has not increased in nearly a decade.⁹⁶ The MLB and its clubs deny all allegations.⁹⁷ Several clubs have delayed proceedings by seeking motions to dismiss the claims against them or transfer the matter to Florida. Motions to transfer have been denied and a number of clubs had the actions against them dismissed on jurisdictional grounds on the basis of not conducting business in California.⁹⁸ In October 2015 Spero J of the United States District Court for the Northern District of California granted

⁹⁶ The minimum wage under the *Federal Labor Standards Act* was last changed on 24 July 2009: United States Department of Labor, ‘Minimum Wage’, undated <<https://www.dol.gov/general/topic/wages/minimumwage>>.

⁹⁷ *Senne, Liberto, Odle and Others v Office of the Commissioner of Baseball, Major League Baseball, Allan Huber ‘Bud’ Selig, Kansas City Royals Baseball Corp., Miami Marlins L.P. and San Francisco Baseball Associates LLC*, Case 3:14-cv-00608-JCS (N.D. Cal. 2014 February 7), Defence.

⁹⁸ *Senne v Kansas City Royals Baseball Corp*, U.S. Dist LEXIS 66170 (N.D. Cal. 2015) and *Senne v Kansas City Royals Baseball Corp*, U.S. Dist LEXIS 1119 (N.D. Cal. 2015).

conditional certification of the class action.⁹⁹ However, in July 2016 Spero J reversed this decision and decertified the class action on the basis that there were too many variations in the employment of the class of plaintiffs and that they were ‘not similarly situated’.¹⁰⁰ At the time of writing the matter was still before the United States District Court for the Northern District of California¹⁰¹ and it is anticipated that the trial will begin in February 2017 (McPherson 2016). The financial threat posed by *Senne* saw MiLB and its owners begin to lobby Congress in 2014 for a statutory exemption from the *Fair Labor Standards Act* for Minor League clubs (Leventhal 2014). In June 2016 two members of the House of Representatives introduced a bill titled *Save America’s Pastime Act*¹⁰² to exclude Minor League players from the *Fair Labor Standards Act* and at the time of writing the bill was before the House Education and Workforce Committee.¹⁰³

Also in 2014, former Minor League player Sergio Miranda initiated a class action against MLB and its 30 clubs, alleging the Minor League pay system violates antitrust law by being a conspiracy to restrict Minor League wages. However the United States District Court for the Northern District of California in *Sergio Miranda* in 2015 dismissed the claim on the basis of MLB’s exemption from antitrust law by the

⁹⁹ *Aaron Senne et al v Kansas City Royals Baseball Corp et al*, Case No. 14-cv-00608-JCS (N.D. Cal. 2015 October 20), Order Granting Motion for Conditional Certification Pursuant to the Fair Labor Standards Act.

¹⁰⁰ *Aaron Senne et al v Kansas City Royals Baseball Corp et al*, Case No. 14-cv-00608-JCS, Consolidated with C-14-3289 JCS (N.D. Cal. 2016 July 21), Order re: 1) Motion for Class Certification; 2) Motion to Decertify the Fair Labor Standards Act Collective Action; and 3) Motion to Exclude Plaintiffs’ Expert Declaration and Testimony, 95.

¹⁰¹ For the latest orders made by Spero J in this matter see Justia, Dockets and Filings, *Senne et al v Office of the Commissioner of Baseball et al*, available court documents <<https://dockets.justia.com/docket/california/candce/3:2014cv00608/274347>>.

¹⁰² H.R. 5580, 114th Congress (2015-2016).

¹⁰³ Congress, Legislation, 114th Congress, H.R. 5580 – Save America’s Pastime’, <<https://www.congress.gov/bill/114th-congress/house-bill/5580/committees>>.

Supreme Court and the exemption of Minor League labour from antitrust law by the *Curt Flood Act of 1998*.¹⁰⁴ The plaintiffs appealed the District Court's decision and at the time of writing the case was before the United States Court of Appeals for the Ninth Circuit.¹⁰⁵

(f) Subjects of collective bargaining in Major League Baseball

A feature of the NLRA is that it prohibits employees and employers from engaging in unfair labour practices,¹⁰⁶ a key protection in the context of professional baseball, where a longstanding mutual distrust underpins the relationship between players and owners. American courts provide guidance as to what can be bargained during negotiations and have held that the NLRA requires collective bargaining on 'mandatory subjects',¹⁰⁷ for example wages and hours. The United States Court of Appeal for the Second Circuit held in 1995 that baseball's reserve and free agent systems are mandatory subjects of collective bargaining.¹⁰⁸ Collective bargaining also extends to 'permissive subjects' of bargaining on matters such as individual bargaining rights.¹⁰⁹

Miller and the MLBPA negotiated professional baseball's first collective bargaining agreement in 1968, an agreement that included minimum salaries, pension payments and arbitration for grievances (Heylar 1994, 27, 29). These issues remain relevant to collective bargaining today, as does free agency and compensation for losing designated classes of free agents. Other matters that are subjects of collective

¹⁰⁴ Pub L 105-297 (105th Cong 1998). *Sergio Miranda et al*, Case No 14-cv-05349-HSG (N.D. Cal. 2015 September 14), Order Granting Motion to Dismiss, 3-4.

¹⁰⁵ *Sergio Miranda et al v Office of the Commissioner of Baseball*, Case No 14-cv-05349-HSG (9th Cir. 2016).

¹⁰⁶ *National Labor Relations Act of 1935*, (49 Stat. 449) 29 U.S.C. § 151–169, section 8.

¹⁰⁷ *Labor Board v Borg-Warner Corp.*, 356 U.S. 342 (1958).

¹⁰⁸ *Silverman*, 67 F.3d 1054, 1060-1062 (2d Cir.1995).

¹⁰⁹ *Ibid*.

bargaining have evolved over time, and include issues such as signing bonuses paid to draftees and international amateurs (even though these players are not MLBPA members),¹¹⁰ revenue sharing, play off bonuses and travel expenses. The Basic Agreement also recognises a player's right to individually negotiate with a club and players may appoint a MLBPA accredited agent to negotiate salary or special covenants in his uniform player contract (Basic Agreement 2012, article IV). This will be examined in Chapter 6.3.

(g) Industrial action by Major League Baseball players

From 1968 to 1994 the labour battle between MLB and MLBPA played out in collective bargaining and prolonged periods of industrial action were governed by the NLRA. This time period is important in the evolution of MLB's internal labour system and has had a profound impact on labour mobility. In 1972 the MLBPA called its first strike and the recognition of free agency in 1975 marked the official beginning of a labour war that lasted nearly three decades, encompassing six strikes, three lockouts and the cancellation of the World Series in 1994 (Staudohar 2002, 61). The refusal of all owners to negotiate with free agents from 1986 to 1988 saw MLBPA lodge three grievances for breach of the collective agreement. The owners eventually settled the dispute with a US\$280 million payment to the MLBPA (Goldberg 2008, 45-46).

The events of 1994 and 1995 are evidence of the at times decentred nature of labour regulation in MLB. The ongoing labour dispute climaxed in collective bargaining

¹¹⁰ It was reported that the inclusion of amateur signing bonuses in the 2012-16 collective agreement was the result of a bargaining trade-off by the MLBPA. It should be noted that draft selections can be a mandatory subject of collective bargaining. For example compensation for some free agents is in the form a draft selection and can therefore affect the salary of relevant free agents. In this context draft selections can be governed as a mandatory subject of collective bargaining: see Ross and James 2015.

negotiations in 1994 when the owners attempted to reduce wage growth by eliminating salary arbitration, introducing a salary cap and reducing the eligibility of free agency from six to four years of service. This would have negatively affected player wages by increasing supply and decreasing demand. Although the public and the media viewed the dispute as a fight between millionaires and billionaires (Burns 2010, *The 10th Inning*), the outcome of this dispute would have long-term ramifications on labour regulation in MLB. By mid-August 1994 collective negotiations had broken down and neither the owners nor the players were willing to give any ground on the reconfiguration of labour controls that would dramatically affect the future financial interests of both parties. MLB players went on strike, and in response, the owners cancelled the season and World Series in September. Then, the owners unilaterally eliminated salary arbitration and free agency and agreed not to sign contracts with free agents. Owners terminated the collective agreement prior to Christmas 1994.

The White House was involved in mediating the dispute between players and owners. In October 1994 President Clinton appointed a mediator, W J Usery, a former Labor Secretary. Usery was unsuccessful in several rounds of negotiations over a prolonged period and President Clinton also failed in his attempt to mediate the dispute at the White House in February 1995. Despite President Clinton's request for Congress to introduce legislation to mandate arbitration (Pessah 2015, 117, 124), the Republican controlled Congress refused to intervene directly, while some members of Congress reviewed baseball's antitrust exemption (Gould, 2007, 990-991).

External regulation again featured prominently with the NLRB playing a central role in resolving the labour dispute. In late 1994 the MLBPA filed several unfair labour

practices complaints against owners and the league with the NLRB.¹¹¹ The owners' refusal to make payments to the players' pension fund in August 1994 saw the MLBPA lodge a claim with the NLRB. Legal counsel for the NLRB issued an unfair labour practice complaint against owners and this matter was resolved when owners agreed to make the US\$7.8 million pension payment in February 1995. The MLBPA filed another claim with the NLRB in late December 1994, arguing that the owners' actions represented a refusal to bargain in good faith and that impasse had not been reached. After the NLRB's legal counsel notified the owners that an unfair labour practice complaint was going to be lodged against owners unless they reinstated the bargaining agreement and recommenced negotiations, the owners complied, only to terminate arbitration and make MLB's player relations committee their bargaining unit. This resulted in MLBPA filing another unfair labour practices complaint with the NLRB. The NLRB's legal counsel then sought permission from the NLRB to seek an injunction against owners in federal court (Pessah 2015, 118-122).

In March 1995 the NLRB determined that the owners had not followed the procedures of the NLRA and voted to seek an injunction against MLB and club owners. The resulting case saw the United States District Court for the Southern District of New York determine that impasse had not occurred and therefore the owners' changes to salary arbitration and free agency were unlawful unilateral changes in work rules.¹¹² The injunction was granted and the decision upheld by the United States Court of

¹¹¹ MLBPA's first application to the NLRB claiming unfair labour practices was in 1981. The United States District Court for the Southern District of New York refused to issue an injunction against Major League owners: *Silverman v Major League Baseball Player Relations Committee*, 516 F.Supp. 588, 598 (S.D. N.Y. 1981).

¹¹² *Silverman v Major League Baseball Player Relations Committee*, 880 F.Supp 246 (S.D. N.Y. 1995).

Appeals for the Second Circuit (Gould 2007, 988, 993-994).¹¹³ Owners were forced to reinstate the expired collective agreement, players and owners returned to the negotiation table and the end of the 234 day strike (the longest in American sports history) delayed the start of the 1995 season.

Negotiations over a new bargaining agreement would last over a year and a five-year deal was agreed to in late 1996. Instead of a salary cap the compromise was a luxury tax, which penalised teams who exceeded a designated total payroll. This was the first control on player salaries the MLBPA had agreed to since the introduction of free agency in 1976. Revenue sharing was also introduced. The minimum salary more than tripled to US\$190,000. The deal was a significant win for the MLBPA, who negotiated a deal that did not include a salary cap and retained free agency and arbitration without any modification (Pessah 2015, 193, 200-201).

In the decades since the 234-day strike there has been no industrial action in MLB. A player strike was narrowly averted in 2002 and in subsequent years negotiations have been amicable and without major controversy. Recurring matters include the adjustment of competitive balance tax rates and the thresholds in revenue sharing and the competitive balance tax (Pessah 2015, 490). Peaceful labour relations have resulted from both the owners and players sharing from the economic prosperity of baseball. Revenues have risen from US\$1.2 billion in 1994 to US\$9 billion in 2014 (Pessah 2015, 590). Players have benefitted from the increase in revenues: the current minimum wage

¹¹³ *Silverman*, 67 F.3d 1054 (2d Cir. 1995). The owners unsuccessfully challenged the anti-collusion provisions in the Basic Agreement on the basis that they undermined their right as a multi-employer group to bargain through a collective representative: *Silverman*, 67 F.3d 1054, 1060 (2d Cir. 1995).

is US\$500,000 (MLB Basic Agreement 2012, article VI.A(1)) and the average salary is US\$4.25 million (Berg 2015).

(h) Overview of the Japanese Professional Baseball Players Association

As noted in Chapter 4, industry based unions like the JPBPA are uncommon in Japanese labour relations, with 90 per cent of labour unions in Japan organised at the enterprise level (Finkin et al 2013, 64). As was the case with MLB, NPB and its owners resisted unionism and the JPBPA did not have legal status as a union until Japan's Labor Relations Commission recognised it under the *Labor Union Act* in 1985 (The Asahi Shimbun 1985, 22). In doing so players were held to be employees according to the *Labor Union Act*, a decision confirmed by the Tokyo District Court and the Tokyo High Court in the *Nippon Professional Baseball League Cases*.¹¹⁴ Ownership's recalcitrant attitude to the union, combined with a matrix of factors that include Japanese culture and custom, corporate practices and a reluctance to resolve disputes through litigation, all conspired to see the JPBPA develop as a labour union that actively represents its members' interests in a much less aggressive manner than the MLBPA. As will be demonstrated below, however, the JPBPA and its members are increasingly willing to take a stand on matters involving labour mobility.

Membership of the JPBPA is more expansive than the MLBPA with both *ichi-gun* and *ni-gun* players eligible to join. But some classes of players have either limited or no membership rights. *Ikusei* (development) players are associate members and do not have voting rights, while foreign players generally do not obtain membership preferring

¹¹⁴ *Japan Professional Baseball League Case*, Tokyo District Court, 3 September 2004, 21153 Minji 11 and *Nippon Professional Baseball League Case*, Tokyo High Court, 8 September 2004, 90 Rôdô Hanrei 879.

individual bargaining and representation by player agents. This is interesting in that it differs from the MLBPA where all Major League players are members of the union by operation of the NLRA.

(i) Collective bargaining in Nippon Professional Baseball

Labour mobility for NPB players has been a key subject of collective bargaining. Free agency and the posting (transfer) of reserved players to MLB will be discussed in Chapter 8.3 but will be briefly examined here. Since free agency was introduced in 1993, the JPBPA has played an active role in collectively bargaining the length of free agency (NPB Agreement 1993, article 197; *The Asahi Shimbun* 1993, 22). Due to the difficulty of meeting the initial requirement of ten years of playing service, the JPBPA renegotiated qualification to nine years of service in 1997 (*Nihon Keizai Shimbun* 1997). However, ten years of playing service was retained for players drafted through the *gyaku-shimei* ('reverse-designation') draft pick system.¹¹⁵ Further collective bargaining in 2003 saw the reverse-designation system abolished and all players qualified for free agency after nine years of service (NPB Agreement 2004, article 197). Then in 2008 a dual system of domestic and international free agency was implemented. International free agent qualification remained at nine years of service (Rule of Free Agent 2009, article 2(2)), while the qualification period for domestic free agency became dependent on when and from where a player was drafted. Players drafted before 2006 or from high school after 2007 require eight years of service to qualify as a domestic free agent. By contrast, players drafted after 2007 from college or industrial

¹¹⁵ This system allowed university and industrial league players to negotiate to be selected by their preferred club during the first two rounds of NPB draft: *The Japan Times* 2000. Clubs that utilised the reverse-designation system were permitted to negotiate directly and freely with up to two non-high school players in the draft. Such clubs forfeited their first and second high school draft selections.

teams only require seven years of service (Rule of Free Agent 2009, article 2(1)). The length of time required to qualify as a free agent remains an ongoing issue for NPB players wanting to play in MLB as the Posting Agreement 2013, an agreement between MLB and NPB on player transfers between the leagues that is discussed in later chapters, allows players to transfer to a MLB club through the posting system (if they are reserved), or as an international free agent.¹¹⁶ As will be seen in Chapter 8.3, a club's decision to post a player is typically connected to the number of years left until a player is an international free agent.

(j) Industrial action by Nippon Professional Baseball players

As mentioned in Chapter 5.1, the events surrounding the merger of the Osaka Kintetsu Buffaloes and the Orix Blue Wave in 2004 resulted in the first and only industrial action in the history of NPB. When these two clubs encountered financial problems the NPB attempted to consolidate the number of clubs to ten teams. Consequently the JPBPA held a two-day strike, the only labour strike in NPB history and the union sought judicial relief in the Tokyo District Court. In the *Nippon Professional Baseball League Case* the Tokyo High Court used the *Labor Union Act* to conclude that NPB's attempt to consolidate the number of clubs pertained to a working condition and was therefore a mandatory subject of collective bargaining.¹¹⁷ This decision was based on the assumption that players are employees under the *Labor Union Act* and the Courts chose not to apply the standards of the *Labor Standards Act* (an Act historically used to

¹¹⁶ The current posting agreement is the Major League Baseball and Nippon Professional Baseball, *Agreement between the Office of the Commission of Baseball and the Office of the Commissioner of Nippon Professional Baseball 2013*, which replaced the Major League Baseball and Nippon Professional Baseball, *United States-Japanese Player Contract Agreement 2000*. The first player agreement between MLB and NPB was Major League Baseball and Nippon Professional Baseball, *United States-Japanese Player Contract Agreement*, 17 October 1967.

¹¹⁷ Tokyo High Court, 8 September 2004, 90 Rôdô Hanrei 879.

determine conditions for factory workers). The dispute was resolved when Osaka and Orix merged and the number of teams remained at 12 through a rare instance of expansion when the Tohoku Rakuten Golden Eagles were added to NPB.

The evolution of the JPBPA as a union that is willing to resort to industrial action to further the rights of its members was demonstrated in the lead up to the 2013 World Baseball Classic ('WBC'). Due to Japan's significant contribution to WBC income through sponsorship, gate receipts of sold out games in Japan and television rights, both NPB and the JPBPA lobbied to obtain a greater share of the WBC revenues. The NPB and the JPBPA were involved in protracted disputes with MLB in 2012 and NPB delayed committing to participating in the tournament (ESPN 2012, 'Japan agrees to play in 2013 WBC'). NPB eventually agreed to send a team to the WBC¹¹⁸ but the JPBPA were still unhappy with the level of payment to be received by members of Team Japan and refused to allow NPB players to participate. The standoff was resolved when NPB agreed to create and share new revenue streams associated with playing regular exhibition games outside of the NPB season with members of Team Japan.

(k) The absence of collectivism in the Australian Baseball League

As will be reviewed in Chapter 7, players in the ABL have not formed a player union and no negotiations on labour conditions occur between players and clubs, a situation that is in part shaped by the structure and function of the league. This influences the ABL's autopoietic system of labour and puts players in a similar position to MLB and

¹¹⁸ It was reported that for the 2013 WBC, 47 per cent of profits were distributed among teams as prize money. The remaining 53 per cent of profits were distributed among members of the steering committee: MLB 17.5 per cent, MLBPA 17.5 per cent, NPB 7 per cent, KBO 5 per cent and the WBSC 5 per cent: Yoshiaki 2009, 34.

NPB players prior to unionism. Yet on the assumption (as discussed in Chapter 4) that they are employees, there is no legal barrier to players unionising and collectively bargaining under Part 2-4 of the *Fair Work Act*. However a number of impediments exist to the formation of an ABL player union. The ABL has a small group of Australian players that play in the ABL from year to year. International players sent by MLB and NPB clubs change annually, as do most unaffiliated international players. Player turnover also exists with Australian players, as some professional affiliated Australian players rest during some or all of the offseason and others (typically young pitchers) may not be permitted by their MLB club to play in the ABL. Local Australian players also change each season in response to work and family commitments, whether they play for a Minor League affiliate and player needs based on the composition of affiliated players on a roster. These factors contribute to the absence of collectivism in the ABL.

Now entering its seventh season in 2016 there is arguably a need for collaboration among players to deal with some labour issues that exist and to ensure equality in working conditions across all six ABL clubs. One area is the need for a minimum wage as some players are paid as little as \$100 (or nothing for development players) for a four game series (and training), although on the face of it the players are entitled as employees to the minimum wage (currently set at \$17.70 per hour) under Part 2-6 of the *Fair Work Act*. Forming a union will likely encounter similar problems confronting the unionisation of Minor League players (and the issues identified above), although a previous attempt at unionisation in the ABL of the 1990s saw the Australian Baseball Players' Association briefly operate from 1994 to 1996 (Dabscheck and Opie 2003, 10). The history of labour unions in Australian sport will be reviewed in detail in

Chapter 7 and will identify the future options available to ABL players who may wish to unionise.

(I) Summary

Unionism in professional baseball plays a central role in shaping the internal regulation of labour. Unlike the general trend of decreasing unionism in recent decades, unionism in MLB and NPB has tracked in the opposite direction. Membership of the MLBPA and the JPBPA is optional but in effect all eligible players join the union to receive access to the services provided by these unions and to long-term benefits like pension funds. The level of activism of labour unions in both leagues and their willingness to conduct industrial action are also important in influencing the type and form of labour controls through collective bargaining and in creating a power sharing arrangement between owners and workers.

5.5 ARBITRATORS

Arbitrators can be nominated by players, owners or independently appointed and in baseball are particularly important in resolving salary disputes. The different role of salary arbitration in MLB and NPB provides insight into the role of culture and normative practice in shaping the substance of formal rights in each autopoietic system. It should be noted that the Court of Arbitration for Sport does not feature as part of the arbitral systems in MLB and NPB but will be discussed in Chapter 11.

(a) The origins of arbitration in Major League Baseball

Federal arbitration legislation was introduced in the United States in 1925 (Gould 2006, 610)¹¹⁹ and arbitration involving the Commissioner of Baseball dates back to the 1920s. Grievance arbitration was introduced through collective bargaining in 1968 (Heylar 1994, 83). Although the initial system lacked independence due to the presence of the Commissioner as an arbitrator, further bargaining in 1970 produced an independent arbitral system (Heylar 1994, 114). Independent arbitrators quickly had an historic effect on professional baseball's labour relations and the evolution of its autopoiesis.

In 1975 arbitrator Peter Seitz dismissed the owners' claim that the reserve clause in uniform player contracts (and the Major League Rules) acted in perpetuity and held for two players (Andy Messersmith and Dave McNally) who had lodged grievances to be free agents. Seitz found that the reserve clause in player contracts was an option that could be exercised for one year if the player did not sign a contract.¹²⁰ The owners appealed the decision in *Kansas City Royals Baseball Corporation v MLBPA*¹²¹ and the United States Court of Appeal for the Eighth Circuit held that the reserve system was reviewable by an arbitrator as part of a grievance procedure in a collective bargaining agreement. The Seitz decision led to collective bargaining in 1976 and negotiations between owners and players saw the creation of a free agent system (Gould 2004, 68-70). It will be discussed in detail in Chapter 8.

¹¹⁹ *Federal Arbitration Act of 1925*, Pub L No 68-401, 43 Stat 883.

¹²⁰ *National and American League of Professional Baseball Clubs v MLBPA*, 66 Labor Arbitration Report (BNA) 101 (1976) (Seitz, Arb).

¹²¹ 532 F.2d 615 (8th Cir. 1976).

Salary arbitration, free agency and the reserve system now operate together to set player wages. In 1995 the United States Court of Appeal for the Second Circuit acknowledged the pivotal role of arbitrators in MLB labour relations,¹²² which include reviewing the reserve system, the draft,¹²³ the commissioner's powers¹²⁴ and disputes involving player salaries.

(b) Salary arbitration in Major League Baseball

Arbitration in the United States is typically conducted by either a sole arbitrator or a panel of three arbitrators (Chetwynd 2009, 115). Originally involving a single arbitrator, arbitration in MLB has evolved to include a panel of three arbitrators (Monhait 2013, 115-118), two of whom are appointed by the Labor Relations Department of MLB and the MLBPA, with the remaining arbitrator being independent. If there is no agreement on the panel then the American Arbitration Association provides a list of prominent arbitrators and names are arbitrarily struck off until a panel is created (MLB Basic Agreement 2012, article VI.E(5)).

One of the key roles of arbitration in MLB is the resolution of salary disputes between players and clubs. Of the over 100 salary arbitration matters filed on average with MLB each year (MLBPA, 'Salary Arbitration Historical Data 1974-2016') almost all are

¹²² *Silverman*, 67 F.3d 1054, 1056-1057 (2d Cir. 1995).

¹²³ Arbitrators have held that the language in the basic agreement requires the draft to be changed through collective bargaining, not due to the NLRA's requirement to bargain on mandatory subjects: see *In re Major League Baseball Players Association and the 28 Major League Clubs*, Grievance 92-3; Amateur Draft (Aug. 19, 1992) and *In re the Major League Baseball Player's Association and the Thirty Major League Clubs*, Grievance 97-21 (May 18, 1998) in Ross and James 2015, 142-143.

¹²⁴ The use of arbitrators to resolve disputes over the exercise of MLB Commissioner's powers can be a popular course of action when available, because arbitrators tend to place greater restraints on the exercise of commissioner powers than courts (see Ch 6.1). The general approach of arbitrators in disciplinary cases is to require a penalty to be proportionate with the offence: Parlow 2010, 194-196.

settled. Of the 3,284 filings for salary arbitration between 1974 and 2016 there have only been 526 hearings. Yearly hearings are low. For example, in 2015 171 of 185 salary arbitration matters were settled. The number was even lower in 2016, when 152 of 156 matters were settled. Typically there are less than ten hearings on salary arbitration per year (MLBPA, 'Salary Arbitration Historical Data 1974-2016').

The right of clubs and players to obtain salary arbitration is now guaranteed by article VI.E of the MLB Basic Agreement 2012 and proceedings are limited to salary disputes and one-year contracts. Arbitration eligible players have between three and six years of MLB service and may submit to arbitration without the consent of their club. 'Super Two' players are eligible if they have between two and three years of service, accumulated 86 days of service in the preceding season and are ranked in the top 22 per cent in total service for eligible Super Two players (MLB Basic Agreement 2012, article VI.E(1)(a)(b)).

The arbitral system in MLB uses a system of 'final offer' arbitration: the player and the club each submit a salary for the player and the arbitrators choose one of the offers. This system has been variously described as 'either-or', 'last-best-offer', 'one-or-the-other', 'flip-flop', 'straight offer', 'pendulum' arbitration and 'baseball arbitration'. Final offer arbitration differs from conventional arbitration in that arbitrators lack the flexibility to make an award that compromises between the parties or splits the difference between their claims. Therefore final offer arbitration encourages negotiated settlements by creating uncertainty in the outcome of arbitral hearings. When settlement is not possible Chetwynd states that final offer arbitration encourages parties to make a reasonable offer, otherwise the arbitrator may select the other offer

(Chetwynd 2009, 110-111). In determining whether to award the salary nominated by the player or club under the ‘final offer’ arbitration system, the arbitration panel is provided with a list of salaries of all MLB players from the previous year (MLB Basic Agreement 2012, article VI.E(11)) and the criteria set out in the Basic Agreement requires the arbitration panel to make a retrospective decision.¹²⁵

Salary arbitration gives eligible players some degree of bargaining power as they can make salary demands based on comparing their performance to free agents and other players. One of the effects of this system has been to force lower revenue clubs to match the salaries paid by clubs with large revenues. Some emerging young players also benefit by being offered long-term lucrative contracts prior to arbitration eligibility. In such cases the player receives the benefit of job and financial security, while the club is able to avoid the likely outcome of paying a higher salary if the player continues to perform at a high level (Monhait 2013, 111-115, 122).

(c) Arbitration in Nippon Professional Baseball

Japan also has a national framework for arbitration¹²⁶ that includes a hybrid system of arbitration and mediation called ‘arb-med’ in civil cases (Nottage 2004, 55-57). In addition to Japanese commercial arbitration organisations, the Japan Sports Arbitration Agency was established in 2003 to deal exclusively with arbitral matters in sports (see Japan Sports Arbitration Agency Home Page 2014). Despite the existence of these

¹²⁵ Admissible evidence includes overall performance, leadership, public appeal, the length and consistency of career contributions, physical or mental injury, past compensation and comparative player salaries. Inadmissible evidence includes the financial positions of the player and club, public comments on the player’s performance, salary offers made prior to arbitration and salaries in other sports and professions: MLB Basic Agreement 2012, article VI.E(10)(a)(b).

¹²⁶ Chûsaiho [*Arbitration Act*] [Act No. 138 of 2003].

arbitral systems NPB operates its own arbitration system. Factors like the composition of arbitrators and culture result in arbitration in NPB's system of self-regulation producing significantly different outcomes to MLB arbitration.

Between 1974 and 2016, MLB clubs and players were involved in 526 arbitral hearings on salary (MLBPA, 'Salary Arbitration Historical Data 1974-2016'), an average of 13.15 hearings per year. In comparison, over the same period NPB had just seven salary arbitration hearings involving five Japanese players and two foreign players (Snyder 2009, 89). The last case of salary arbitration in NPB was in 2011 and saw Wakui Hideaki become only the second NPB player to succeed in arbitration (The Japan Times 2011). Even accounting for the smaller labour size of NPB there is still a remarkable difference in the rate of salary arbitration in MLB and NPB.

Structurally, NPB's system of arbitration is distinct from MLB's and affects the willingness of players to seek salary arbitration. No formal system of arbitration exists in the NPB Agreement and as most players negotiate their contract annually, players can request arbitration each year, a request that NPB can deny. A key factor that historically shaped the low rate of arbitration in NPB was the absence of independence. The arbitration panel was made up of the NPB president, who acted as the chairman and two club owners nominated by the clubs. Owners paid all arbitrators (Snyder 2009, 87). Past practices saw arbitrators asking players to continue to negotiate with their club, a reflection of a preference for resolving disputes internally through consensus in Japan. Pressure within a team to resolve salary matters also limits the decision of players to proceed to arbitration (Snyder 2009, 86-88). However, lobbying by the JPBPA in 2011 saw reforms to arbitration. An arbitration panel now consists of two

lawyers and a former player. It was this new panel that ruled in favour of Wakui in 2011 (Nikkan Sports 2011).

(d) Summary

Two distinct models of salary arbitration exist in the autopoietic labour systems in MLB and NPB and each system produce different outcomes. Who are arbitrators and how they are appointed are directly connected to the level of independence in the regulatory role performed by arbitrators. The different normative function of arbitration in the two leagues influences contracting practices, player salaries and the cost of labour. While salary arbitration does not currently operate in the ABL, if the league and its clubs are able to develop their revenues, potential increases in player salaries may one day lead to the need for arbitration to resolve salary disputes.

5.6 GLOBAL BASEBALL REGULATORS

(a) The globalising world of baseball

The increased global movement of baseball players is a trend that is largely driven by MLB's policy of globalisation, a policy aimed at the international expansion of MLB's talent pool and revenues and implemented by MLB International (Gould 2000, 86-88; Klein 2008, 159). Highlighting the globalisation of baseball's workforce is the diversity of Major and Minor League players: 26.5 per cent of Major League players (Schiff and Jarvis 2016, 647) and 46 per cent of Minor League players are now born outside the United States (ESPN 2012, 'Percentage of foreign players rises'). Minor and Major League players contracted by MLB clubs are now recruited from a diverse range of countries that includes the Dominican Republic, Venezuela, Puerto Rico,

Cuba, Mexico, Aruba, Canada, Japan, South Korea, Taiwan, Germany, Italy, Curacao, South Africa and Australia. Many players from these nations also play in NPB.

Promoting the globalisation of the baseball workforce are televised MLB games and MLB initiatives like the establishment of the WBC (discussed below),¹²⁷ foreign countries hosting MLB season opening series,¹²⁸ the establishment and financial support of foreign baseball academies,¹²⁹ formal agreements with foreign leagues to govern player transfers¹³⁰ and the creation of the ABL. International championships held at junior and senior levels also promote the development of baseball as a profession. The global labour market of professional baseball players now extends beyond MLB and NPB to the Mexican Pacific Baseball League, the Dominican Winter League, the Venezuelan Winter League, the KBO, the CPBL, the Chinese Baseball League and the ABL.

(b) Regulating the global movement of baseball players

Amid the gradual growth of baseball as a global game operates a decentred ad hoc system of regulation. Central to this paradigm is a fragmented global player transfer system that consists of a mix of formal and informal arrangements: agreements between professional leagues, agreements between professional clubs from different countries and agreements between professional leagues and national baseball federations. This fragmented system is largely the result of the absence of an independent global

¹²⁷ The World Baseball Classic Inc. is a joint venture equally owned by MLB and MLBPA.

¹²⁸ MLB has had its season opening series in Mexico, Puerto Rico, Japan and Australia.

¹²⁹ MLB operates development academies in Latin America and Australia, Italy and China: Baseball Australia.

¹³⁰ These agreements are with the Mexican League, NPB, the Korean Baseball Organization, NPB and the Chinese Professional Baseball League: MLB Basic Agreement 2012, attachment 46, section I. E., 1, 2.

regulator, a regulatory gap filled by a number of actors who perform specialised elements of what would otherwise be the functions of a global regulator.

Instead of a system of transparent universal rules and principles, the global regulation of baseball labour involves formal agreements between professional leagues like MLB and NPB.¹³¹ These agreements establish a formal framework for the transfer of players between the leagues. The Posting Agreement 2013 (and its 1967 and 2000 predecessors) will be examined in Chapter 8.3 in the context of labour mobility in NPB. Also, informal rules like ‘gentlemen’s agreements’ govern the recruitment of amateurs by MLB clubs from NPB, KBO and other leagues. This system will be examined in Chapter 10. Countries with weak or no professional leagues or with underdeveloped legal and economic systems may have no clear formal rules in place for the movement of their players to foreign leagues. Simply, in the case of the global movement of labour in baseball, an ad hoc web of formal and informal rules and practices exists.

(c) Global regulators in baseball

A major reason for the fragmented nature of the regulation of player movement in baseball is that the global governance of baseball lacks a regulator with the political and economic status of an organisation like the Fédération Internationale de Football Association (‘FIFA’).¹³² Instead, a number of different organisations perform aspects of the role of a global regulator. The International Baseball Federation was formed during the 1936 Berlin Olympics and until recently was baseball’s official global regulator. Its responsibilities focused on international tournaments and the

¹³¹ Similar bilateral agreements exist between MLB and the KBO, the Chinese Professional Baseball League (‘CPBL’) and the Mexican League.

¹³² See Fédération Internationale de Football Association <<http://www.fifa.com/>>.

development of grass roots baseball. Baseball lost its status as an Olympic sport at the conclusion of the 2008 Beijing Olympics and subsequently the International Olympic Committee currently had no direct regulatory role in baseball. However this changed in 2016 when the executive board of the International Olympic Committee voted in June to reinstate baseball for the Tokyo 2020 Olympics (International Olympic Committee, June 2016), a move that was later ratified by the International Olympic Committee in August (International Olympic Committee, August 2016). Replacing the Olympics as baseball's premier international event since 2006 has been the WBC,¹³³ a tournament owned by MLB and MLBPA. In operating the WBC its steering committee¹³⁴ and MLB also exercise some powers of a global governing body.¹³⁵

In 2013, in an effort to have baseball reinstated as an Olympic sport, baseball and softball merged their efforts into a single bid under a new global regulator: the World Baseball Softball Confederation ('WBSC').¹³⁶ The WBSC resulted from a merger between the International Baseball Federation and the International Softball Federation but has no role in the governance of professional baseball. Other global regulators include professional leagues such as MLB, who perform a central regulatory function in the recruitment of amateur players. Leagues that possess the economic and political

¹³³ World Baseball Classic <<http://web.worldbaseballclassic.com/index.jsp>>.

¹³⁴ The steering committee for the 2013 WBC included two representatives from MLB, two representatives from MLBPA, one representative from NPB and the JPBPA, one representative from the Korean Baseball Organisation ('KBO') and the respective player union, two representatives from the WBSC and three representatives at-large (one member was from the Yomiuri Shimbun).

¹³⁵ Global governance powers include determining the championship format, eligibility for the qualification tournament, locations for hosting the qualification tournaments and the preliminary rounds and finals of the WBC and the quantum and distribution of revenues and prize money.

¹³⁶ World Baseball Softball Confederation <<http://playball2020.com/our-bid/>>.

power of the NPB are able to negotiate formal agreements that govern the movement of professional players to and from MLB.

(d) Summary

The global growth of baseball has created a decentred system of regulation where various regulatory actors perform regulatory functions without the oversight of a strong global regulator. As will be examined in detail in Chapters 10 and 11, this system creates problems in the context of labour as a growing number of baseball workers move around the globe in search of employment and employment opportunities. There is also competition among global actors in the regulatory space of labour relations in global baseball.

5.7 CONCLUSION

Internal regulatory actors in the labour of professional baseball adopt a division between owners and worker as seen in other industries. Regulatory actors like players and owners perform a regulatory function not only as individuals but also as collectives. This regulatory dynamic is central to the creation and evolution of internal regulations that control labour and shapes how the autopoietic system of labour evolves. The form and function of internal regulatory actors vary between the three leagues and influence how labour is regulated. Collectivism has played a central role in labour regulation in MLB since the 1970s. In NPB collectivism has gradually evolved since the 1990s and the JPBPA has generally been less combative than MLBPA, conducting one strike for four days in 2004. In contrast, player collectivism is yet to occur in the ABL's six-year history. In the global context, baseball does not at this point have a strong global regulator that oversees both amateur and professional baseball. The growth in the

number of internal regulatory actors demonstrates the decentred nature of regulation in the labour of professional baseball and an increase in competition between regulatory actors.

CHAPTER 6 EXTERNAL REGULATORY ACTORS AND MECHANISMS IN PROFESSIONAL BASEBALL

The decentred regulation of labour in professional baseball sees internal regulation interact with its external regulation. Chapter 6 will look at the key external regulatory actors that govern baseball in each of the three leagues. Even though the role of external regulators like the government, statutory authorities and courts is the greatest in MLB, this chapter will also examine the more limited role of these regulators in NPB and the ABL. This will provide insight into how different autopoietic systems evolve in response to varying levels of engagement with external regulation. Other external regulatory actors in the labour of professional baseball will also be examined, including player agents, anti-doping organisations, foreign baseball leagues and the National Collegiate Athletic Association.

6.1 PROFESSIONAL BASEBALL AND THE COURTS

As has been discussed, labour controls in professional team sports such as baseball are contained in an autopoietic system that is based on agreements between owners, agreements between owners and players and individual agreements between an owner and a player. The level of engagement of autopoietic labour systems with external regulators such as courts is important in influencing how the system of regulation is configured. Courts play a pivotal role in assessing the legality of such agreements, typically through the application of contract law, labour law or competition law. The function of courts encompasses both the enforcement of these agreements and the effect of the threat of parties to the agreement seeking judicial review of a sport's labour controls and practices. Both of these forms of regulation influence the labour controls

within baseball's internal system of labour regulation and how both those controls and the extent of labour mobility evolve over time.

(a) The courts and the labour of Major League Baseball

Throughout the long history of professional baseball in the United States, litigation involving the labour of players in the Major Leagues has been initiated in various state and federal courts. Holding a prominent position in the case law of professional baseball is the Supreme Court, the United States Court of Appeals, the United States District Court and courts in numerous states. Cases typically examine the enforceability of MLB's labour controls in the context of contract law, labour law and antitrust law. As will be discussed in Chapter 7, the Supreme Court's decision to grant an exemption to the labour of MLB from antitrust law has played a central role in the evolution of MLB's autopoietic system of labour regulation. The significance of the Supreme Court is underscored not only as the highest court in the United States' legal system but also by it being the only court that selects its own cases. Of the small percentage of cases the Supreme Court chooses to review, most cases generally involve constitutional law and the interpretation of federal legislation (Ameringer 2008, 17).

The antitrust cases will now be briefly reviewed prior to being discussed in more detail in Chapter 7.2 in the context of labour mobility. The 1914 decision in *American League Baseball Club of Chicago v Chase*¹³⁷ involved a player who attempted to transfer from the American League to the Federal League. Even though the Supreme Court of New York ruled that the *Sherman Antitrust Act*¹³⁸ did not apply to MLB because the business

¹³⁷ 149 N.Y.S. 6 (N.Y.S. 1914).

¹³⁸ 15 U.S.C. §§ 1-7.

of baseball did not involve interstate trade or commerce, the Court held in favour of the player by finding that baseball's regulatory system promoted a monopoly that contravened the common law and impeded personal liberty.¹³⁹ Then, in 1922, the owner of the Federal League's Baltimore club, unhappy with being excluded from the merger with the American and National Leagues, alleged these Leagues conspired to monopolise major league baseball. This led to the Supreme Court's now famous decision to exempt MLB from antitrust law in *Federal Baseball Club of Baltimore Inc v National League of Professional Baseball Clubs*, on the basis baseball did not constitute commerce, nor did it involve interstate trade or commerce.¹⁴⁰ In 1953 in *Toolson v New York Yankees*,¹⁴¹ the Supreme Court affirmed *Federal Baseball* on the basis that Congressional intervention was required to reverse the antitrust exemption that applied to the business of MLB.¹⁴² The most recent Supreme Court antitrust case involving the reserve clause was *Flood v Kuhn*¹⁴³ in 1972 in which the Court once again upheld *Federal Baseball* on the basis of *stare decisis* and that Congress needed to remedy any problem.¹⁴⁴ These cases dramatically affected the evolution of MLB's autopoietic system of labour regulation as they insulated MLB's labour practices from the external scrutiny of antitrust rules and standards.

Based on a fear that the inflexible application of a statute from 1890 would harm the American institution of baseball, Ross argues baseball's antitrust cases demonstrate a general unwillingness by the Supreme Court to assess the legality of labour controls in

¹³⁹ 149 N.Y.S. 6, 16 (N.Y.S. 1914).

¹⁴⁰ 259 U.S. 200, 208-209 (1922).

¹⁴¹ 346 U.S. 356 (1953).

¹⁴² *Ibid* 357.

¹⁴³ 407 U.S. 258 (1972).

¹⁴⁴ *Ibid* 283-284.

MLB (Ross 1995, 172).¹⁴⁵ Ross highlights that legislative acquiescence should not be used by the Supreme Court when Congressional inaction is the product of a powerful, well organised and wealthy special interest group (MLB owners) lobbying Congress to benefit from a particular interpretation of the legislative record (Ross 1995, 185). In refusing to review MLB's reserve (and labour) system under antitrust law, the Supreme Court allowed MLB's autopoietic system of labour regulation to develop without the legality of its central labour control being assessed according to the rules of antitrust law. Instead, the MLBPA would engage labour law and the process of collective bargaining to challenge the reserve system and regulate its labour practices.

However, the application of MLB's antitrust exemption by lower courts has not been without difficulty. In its three decisions the Supreme Court did not define the 'business of baseball' and therefore the scope of the exemption is not clear. The result has been inconsistency in the application of the antitrust exemption by lower courts. A small number of courts have adopted a 'narrow' view of the business of baseball. The United States District Court for the Southern District of Texas in *Henderson Broadcasting Corp v Houston Sports Association*¹⁴⁶ held the exemption only covered matters involving leagues, clubs and players that were integral to the sport and did not apply to radio contracts for broadcasting baseball games.¹⁴⁷ The United States District Court for the Eastern District of Pennsylvania in *Piazza v Major League Baseball*¹⁴⁸ decided that the exemption only applied to the reserve clause and that antitrust law governed

¹⁴⁵ Ross notes that this fear is no longer valid as the courts now apply antitrust law more flexibly: Ross 1995, 181.

¹⁴⁶ 541 F.Supp 263 (S.D. Tex. 1982).

¹⁴⁷ Ibid 264-265.

¹⁴⁸ 831 F.Supp 420, 438 (E.D. Pa. 1993).

franchise relocation. Soon after this case the Florida Supreme Court applied the logic of *Piazza* in *Butterworth v National League of Professional Baseball Clubs*.¹⁴⁹

Despite these judgments, lower courts have typically adopted a ‘broad’ view of MLB’s antitrust exemption. The United States Court of Appeals for the Seventh Circuit in *Charles O Finley & Co v Kuhn* held the antitrust exemption applied to the attempted sale by the Oakland Athletics of three players’ contracts and that the Supreme Court had not attempted to exclude any particular facet of the business of baseball from the exemption.¹⁵⁰ Several courts have also applied the antitrust exemption to matters involving Minor League clubs¹⁵¹ and the United States District Court for the Western District of Washington in *McCoy v Major League Baseball*¹⁵² took the view that the courts in *Piazza* and *Butterworth* had incorrectly applied *Flood*.¹⁵³ The Minnesota Supreme Court in *Minnesota Twins Partnership v State ex rel Hatch*¹⁵⁴ also adopted a broad view of the exemption in holding the sale and relocation of a franchise to be integral to the business of baseball and within the scope of the exemption.¹⁵⁵

(b) The courts, Major League Baseball and the powers of the Commissioner

When the office of the Commissioner of MLB was created in 1920, MLB clubs gave the Commissioner’s office and the first Commissioner, Judge Kenesaw Mountain Landis, almost unfettered powers to govern baseball and eradicate undesirable elements

¹⁴⁹ 644 So.2d 1021, 1025 (Fla. 1994).

¹⁵⁰ *Charles O Finley & Co*, 569 F.2d 527, 530 (7th Cir. 1978).

¹⁵¹ See *Professional Baseball Schools & Clubs Inc v Kuhn*, 693 F.2d 1085 (11th Cir. 1982) and *New Orleans Pelicans Baseball Inc v National Association of Professional Baseball Leagues Inc*, Civ. A No. 93-253, 1994 WL 631144 (E.D. La. March 1 1994).

¹⁵² 911 F. Supp 454 (W.D. Wash. 1995).

¹⁵³ *Ibid* 455.

¹⁵⁴ 592 N.W.2d 847 (Minn. 1999).

¹⁵⁵ *Ibid* 856.

of the game such as gambling and match fixing. Over time this power became known as the power to govern in the ‘best interests of baseball’ and MLB clubs have since expanded and contracted its scope. But it is unquestionable that the Commissioner retains broad power in the regulation of MLB (Parlow 2010, 183-185) and exercises considerable power over the operation of baseball’s autopoietic labour system. The exercise of these powers, on occasion, has seen disgruntled players and owners seek judicial relief. In contrast to the reserve system and antitrust law, American courts have been prepared to review the exercise of the commissioner’s powers.

The first legal challenge to the Commissioner’s powers arose in 1931 in *Milwaukee American Association v Landis*¹⁵⁶ when the St Louis Cardinals attempted to circumvent the waiver rules (a system explained in Chapter 9.2) and retain control over a player named Fred Bennett. Commissioner Landis used the best interests powers to rule the movement of Bennett to Minor League teams controlled by Phil Ball, owner of the Cardinals, in violation of the spirit of the waiver system. Landis ruled that the player return to the roster of the Cardinals for a minimum of one year, be transferred to a club not controlled by Ball or unconditionally released. Ball challenged the commissioner’s authority in the United States District Court for the Northern District of Illinois, which ruled in favour of the Commissioner. The Court held that the Commissioner had been given unlimited discretion in determining whether particular situations were detrimental to the game of baseball.¹⁵⁷

¹⁵⁶ 49 F.2d 298 (N.D. Ill. 1931).

¹⁵⁷ *Milwaukee American Association*, 49 F 2d 298, 303 (ND Ill. 1931).

Subsequent federal and state courts followed *Milwaukee American Association's* broad interpretation of the commissioner's best interests powers.¹⁵⁸ From time to time, however, courts do refuse to enforce the actions of commissioners. In *Rose v Giamatti*¹⁵⁹ the United States District Court for the Southern District of Ohio granted Pete Rose's request to grant an injunction against Commissioner Bart Giamatti on the basis that the Commissioner had prejudged Rose's guilt in relation to gambling offences. Courts have also ruled against commissioners when they exceed the authority vested in them by the Major League Constitution. For instance, in *Chicago National League Ball Club v Vincent*¹⁶⁰ the United States District Court for the Northern District of Illinois held that Commissioner Fay Vincent's decision to use the best interest power to force the Chicago Cubs to change from the Eastern to Western Division in the National League was invalid because the Cubs had used their MLB constitutional right to veto such a move (Parlow 2010, 190-194).

(c) The role of the courts in Japan

Chapter 4 identified that the political system of Japan is not a federation. The hierarchical system of Japanese courts is not dissimilar to that found in other jurisdictions, with the Supreme Court sitting at the apex. The High Court is an intermediate appellate court, District Courts have general jurisdictions and Summary Courts sit at the base of the pyramid. Before examining the role of the courts in Japan in relation to the regulation of professional baseball, however, it is necessary to point

¹⁵⁸ See *Charles O. Finley & Co. v Kuhn*, 569 F.2d 527 (7th Cir. 1978) and *Atlanta National League Baseball Club, Inc. v Kuhn*, 432 F.Supp 1213 (N.D. Ga. 1977).

¹⁵⁹ 721 F. Supp. 906 (S.D. Ohio. 1989).

¹⁶⁰ No. 92-C-4398, 1992 U.S. Dist LEXIS 11033 (N.D. Ill. July 23, 1992).

out important differences in litigation in Japan when compared to other developed countries like the United States and Australia.

Post World War II litigation rates in Japan have generally been very low compared to other developed economies (see Ginsburg and Hoetker 2006; Ramseyer and Rasmusen 2010). This external regulatory framework influences the willingness of internal actors within NPB's autopoietic labour system to challenge restrictive labour controls. Increases in litigation after the oil crisis in the 1970s were attributed to debt recovery, while more recent increases in per capita litigation rates have resulted from rises in general tort litigation and traffic cases. Scholars like Tanase attribute these rises to a modernisation of the Japanese legal conscience, the role of social structures and more diffuse cultural norms (Tanase translated in Nottage 2005, 2-5). In addition, Ginsburg and Hoetker explain that the increase in litigation since the 1990s is due to growth in the number of lawyers, reforms to several areas of substantive law and procedural changes that enhance litigation (Ginsburg and Hoetker 2006, 32). However, even after these increases litigation rates are still comparably low to other developed economies.

Japanese legal scholars have developed a number of explanations to describe the country's low litigation levels. One of the earliest explanations was the 'culturalist' paradigm, a theory developed by Kawashima in the 1960s and 1970s and furthered more recently by his former student, Tanase (see Tanase 2010). The culturalist paradigm holds that 'Japanese don't like the law' and uses sociology to explain Japan's low litigation rates as a product of a cultural aversion to confrontation and disputes. Haley challenges Kawashima's theory on the basis that 'Japanese cannot like law', even if they wanted to, because institutional barriers prevent Japanese from using the law.

The ‘institutional’ paradigm explains Japan’s low litigation rates as a product of the small number of lawyers and a failure to remedy problems in Japanese civil procedure (see Haley 1991). A third theory in turn arose from Haley’s institutional paradigm, the ‘social management’ paradigm, which holds that ‘Japanese are made to not like the law’. Upham advocates this position and argues that social elites in Japan maintain institutional barriers to litigation in order to have disputes resolved outside the courts, thereby reducing the uncertainty associated with litigation (see Upham 1987). Ramseyer is a key proponent of the ‘economic rationalist’ paradigm, which holds that ‘Japanese do like law’ but make a self-interested, rational decision to use alternative means of dispute resolution (see Ramseyer and Nakazato 1989; Nottage 2005, 4-7). These paradigms do not need to be mutually exclusive of the other and the ‘hybrid paradigm’ promotes using all of these insights to understand the diversity inherent in litigation (Nottage 2008, 8). Whatever the explanation of Japanese litigation, the history of Japanese professional baseball reflects the low level of litigation in Japan.

(d) The role of the courts in Japanese professional baseball

Compared to the active and at times controversial role of American courts in the regulation of labour in MLB, Japanese courts have rarely been involved in reviewing NPB’s labour system. Players, the players’ union, owners and NPB seldom use the courts to settle disputes, reflecting general practices in Japan. This normative practice has had ramifications that are equal to the impact of the Supreme Court antitrust cases in MLB. The NPB’s autopoietic labour system has been able to operate and evolve with little external review (or even threat) by the courts. Internal disputes in NPB do, however, occasionally spill into the courts.

As discussed in Chapter 5.6, the *Nippon Professional Baseball League* Cases in 2004 are a rare example of players seeking relief from the courts.¹⁶¹ In 2011 a public slanging match between Watanabe Tsuneo, owner of the Yomiuri Giants and Kiyotake Hidetoshi,¹⁶² the Giants' former general manager who was fired by Watanabe, resulted in both parties filing defamation suits against the other in the Tokyo District Court (Nichol 2012, 120). Threats of litigation also sometimes occur. In December 1996 Irapu Hideki threatened to sue the Chiba Lotte Marines and NPB in order to have his trade to the San Diego Padres overturned. Instead of pursuing legal action in Japan, Irapu threatened to use American courts to challenge NPB's labour system so that he could play for his club of choice, the New York Yankees. San Diego ended the controversy by trading Irapu to New York. At about the same time, after the dust settled on the controversial transfer of Alfonso Soriano (recruited from the Dominican Republic) from the Toyo Hiroshima Carp to the New York Yankees in 1997, the Carp lodged a number of 'nuisance' law suits against Soriano in Japan (Whiting 2004, 131, 134, 145).

(e) The role of the courts in Australian sport

Various courts in the Australian federal politico-legal system have reviewed labour practices in Australian professional sport. The High Court heard the famous 1971 case of *Buckley v Tutty*. Buckley, a rugby league player in the New South Wales Rugby League ('NSWRL') (the precursor to the National Rugby League ('NRL')) successfully argued the player retention and transfer system in the league's by-laws was

¹⁶¹ No other sport in Japan has seen litigation. There is a player union in soccer's J League and professional basketball has no union.

¹⁶² When using Japanese names this thesis adopts the Japanese custom of stating the last name followed by the first name.

an unreasonable restraint of trade. Not only was this case important in the context of labour mobility for professional athletes, it also allowed professional athletes the right to unionise and collectively bargain as the High Court held that paid professional athletes are employees.¹⁶³ *Buckley* will be examined further in Chapter 7.4. However, the most common venues for disputes involving sport are the Federal Court of Australia and the Supreme Courts of the states and territories.

A number of decisions by Australian courts in relation to other sports that will be analysed in Chapter 7.4 are relevant to the labour practices of the ABL. Cases in rugby, Australian Rules football and netball involving retention and transfer systems, residential zoning, player transfers and drafts were all decided in favour of the players. This is interesting in that Australian sports continue to use labour restraints held to be illegal in other sports until such restraints are successfully challenged in their own league. The relevant labour controls each had similarities to those in the ABL, were not the product of collective bargaining and, as in *Buckley v Tutty*, were held to be unreasonable restraints of trade at common law.¹⁶⁴ The centralised administration of the ABL through MLB does reduce the likelihood of a challenge to its labour practices by clubs. Yet labour control mechanisms in the ABL such as the draft, residential zoning and the ability of the ABL to assign a player's contract to any ABL club at any time, do open the door to potential legal action by players.

¹⁶³ *Buckley* (1971) 125 CLR 353, 371-372.

¹⁶⁴ See *Adamson v New South Wales Rugby League Ltd* (1991) 103 ALR 319, *Hall v Victorian Football League and Clarke* [1982] VR 64, *Foschini v Victorian Football League* (Unreported, Supreme Court of Victoria, BC8300014, 1983) and *Avellino v All Australia Netball Association Ltd* (Unreported, Supreme Court of South Australia, BC200400613, 2004).

Even though the courts have had no direct role in reviewing the labour practices in the current ABL, they did review the contracting practices in the now defunct Australian Baseball League in the 1990s. A dispute over the existence of a contract between pitcher Earl Byrne and the Canberra Bushrangers proceeded to trial in the Supreme Court of the Australian Capital Territory in 1994.¹⁶⁵ But the Bushrangers did not challenge the labour system, instead arguing they had a contract with Byrne (the product of an option in a previous contract) that prevented him from playing for the Melbourne Monarchs. As will be explained in Chapter 7, since the team was not obligated to pay or play Byrne but could prevent him from playing for another side, the Bushrangers were unsuccessful, on the basis that the contract constituted an unreasonable restraint of trade.¹⁶⁶

(f) Summary

The courts in the United States, Japan and Australia have had different levels of involvement in the direct regulation of labour in professional baseball. Use of the courts in the United States by players, owners and leagues has had a profound impact on the internal regulation of baseball labour and, as will be seen in the next section of this chapter, is connected to the external regulation of MLB by Congress. Australian courts have demonstrated a willingness to regulate the internal labour practices of a number of sports, while in Japan, the Tokyo High Court played an important role in enforcing collective bargaining processes in the *Nippon Professional Baseball League* Case, one of the few disputes in Japanese professional baseball involving the courts. The different role of the courts in each jurisdiction in reviewing baseball's labour

¹⁶⁵ *Canberra Bushrangers Baseball Team Pty Ltd v Byrne* (Unreported, Supreme of the Australian Capital Territory, No SC707 of 1994).

¹⁶⁶ *Ibid* 1-6.

practices all affect a league's autopoietic labour system, and in the case of the United States and Japan, baseball's autopoiesis has been able to operate with limited review by courts.

6.2 THE PUBLIC REGULATION OF PROFESSIONAL BASEBALL

Chapter 3 identified that government regulation can be direct, for example laws that specifically target a sport, or indirect via laws related to income tax and occupational health and safety. The focus of this section of Chapter 6 will be direct state regulation of professional baseball by the legislature and statutory authorities in the United States, Japan and Australia. Thus two further forms of external state regulation of the internal labour regulation in professional baseball will be examined.

(a) Congress, Major League Baseball and the reserve system

The regulatory activities of Congress in relation to the reserve system, labour and antitrust law is intertwined with the antitrust decisions of the Supreme Court.¹⁶⁷ After the establishment of the Mexican League in 1946 resulted in the loss of a number of Major League players, there were two simultaneous antitrust cases in 1948: *Gardella v Chandler*¹⁶⁸ and *Martin v National League Baseball Club*.¹⁶⁹ These cases were eventually settled, and will be analysed in Chapter 7. Afterwards Congress investigated the baseball antitrust exemption in 1951 and 1952. Some committee members used the inquiries to push MLB to expand west and add new franchises (Surdam 2015, 43, 47). Despite both the Senate and the House of Representatives introducing four bills to

¹⁶⁷ For a review of Congressional hearings into the monopolistic practices of professional baseball, basketball, football and ice hockey between 1951 and 1989, see Surdam 2015.

¹⁶⁸ 172 F.2d 402 (2d Cir. 1949).

¹⁶⁹ 174 F.2d 917 (2d Cir. 1949).

regulate baseball via antitrust law,¹⁷⁰ the House of Representatives subcommittee voted down all proposed laws (Pierce 1958, 573).¹⁷¹ The decision was influenced by the desire of Congress to see whether the courts would hold the reserve clause to be a reasonable restraint of trade (Broshius 2013, 68). An opportunity to do so arose in 1953 in *Toolson v New York Yankees*¹⁷² but as will be discussed in Chapter 7.2, the Supreme Court refused to review the enforceability of the reserve system on the basis that Congress needed to overturn *Federal Baseball*. More Senate hearings followed in 1954. Although various reforms to apply antitrust law to baseball were proposed, Congress took no action (Edmonds 1994, 637-638).¹⁷³

The *Toolson* decision appeared to be a green light to other American professional sports to deny the applicability of antitrust law to their restrictive labour systems, but unfortunately for those sports the Supreme Court refused to extend the exemption beyond baseball. This is evidence of subsystems operating within the autopoiesis of professional sport. In *Radovich v NFL* in 1957 the Supreme Court held that antitrust law does apply to American football, sparking an outbreak of Congressional activity that proposed various methods of regulating professional sport and baseball through antitrust law between 1957 and 1961, and again in 1964 and 1965. Individual Senators and Congressmen introduced several bills related to antitrust law and professional sport that were reviewed by the House Judiciary Committee and the Senate Subcommittee

¹⁷⁰ H.R. 4229, H.R. 4230, H.R. 4231, 82d Cong., 1st Sess. (1951), S. 1526, 82d Cong., 1st Sess. (1951).

¹⁷¹ *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary*, H.R. REP. No. 2002, 82d Cong., 2d Sess. 50-57 (1952).

¹⁷² 346 U.S. 356 (1953).

¹⁷³ *Hearings on S.J. Res. 133 Subjecting Professional Baseball Clubs to Antitrust Laws before the Committee on the Judiciary*, 83d Cong., 2d Sess. (1954).

on Antitrust and Monopoly. During this period 14 bills were proposed but no laws were passed (Edmonds 1994, 638-644).

The *Flood* decision resulted in further Congressional inquiries in 1975.¹⁷⁴ The 1980s saw the intensification of the labour dispute in MLB and, in response, Congress held a number of inquiries,¹⁷⁵ introduced several bills to repeal baseball's antitrust exemption¹⁷⁶ and conducted hearings and debate on these bills. There were further hearings into MLB's antitrust exemption in the Senate in 1992¹⁷⁷ and the House of Representatives in 1993.¹⁷⁸ Then in 1994, a House Judiciary Committee report criticised baseball's antitrust exemption (Ross 1995, 187-187).¹⁷⁹ Antitrust law remained unchanged, however, with the result that Congressional review of the MLB antitrust exemption had little direct impact over this period on the internal regulation of MLB labour. However the indirect effect was to insulate baseball's autopoiesis from antitrust law and allow it to evolve without meeting the standards of antitrust law. It would take a monumental event to change this paradigm.

¹⁷⁴ *Hearings on the Rights of Professional Athletes and H.R. 2355 and H.R. 694 before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, 94th Cong., 1st Sess. (1975).*

¹⁷⁵ *Hearings on Antitrust Policy and Professional Sports before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, 97th Cong., 1st & 2d Sess. (1982), Hearings on the Professional Sports Team Community Protection Act before the Senate Judiciary Committee, 98th Cong., 2d Sess. (1984) and Hearings on Professional Sports Team Community Protection Act before the Subcommittee on Commerce, Transportation, and Tourism of the House Energy and Commerce Committee, 98th Cong., 2d Sess. (1984).*

¹⁷⁶ The bills included the *Sports Franchise Relocation Act*, H.R. 823, 97th Cong., 1st Sess. (1981) and the *Professional Sports Stabilization Act of 1982*, H.R. 6467, 97th Cong., 1st Sess. (1981).

¹⁷⁷ *Baseball Antitrust Immunity: Hearing Before the Subcommittee on Antitrust, Monopolies and Business Rights*, Senate Committee on the Judiciary, 102d Cong., 2d Sess. 33 (Serial No. J-102-90) (1992).

¹⁷⁸ *Baseball's Antitrust Exemption: Hearing Before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary*, 103d Cong., 1st Sess. 163-89 (1993).

¹⁷⁹ H.R. Rep. No. 871, 103d Cong., 2d Sess. (1994).

As discussed in Chapters 2 and 5, the owners cancelled the World Series in 1994 in response to what would be a prolonged player strike. Subsequent collective bargaining in 1995 and 1996 saw MLB and MLBPA agree to lobby Congress to repeal the antitrust exemption for the employment of MLB players. Congress passed the proposed bill as the *Curt Flood Act of 1998*, evidence of the measures MLB, owners and the MLBPA were prepared to take in order to protect their autopoietic system of labour regulation. This was an example of a highly reflexive response in terms of Rogowski's reflexive labour law, as discussed in Chapter 3.2(d). Underlying the value they place on the need to insulate their autopoiesis from external interference, the legislation only applied American antitrust law to the employment of Major League players.¹⁸⁰ Even there, the application of antitrust law to Major League player labour was of limited practical significance, as collective agreements are excluded by statutory and non-statutory labour exemptions to antitrust law, to be discussed in Chapter 7.2. It is labour law, rather than competition law, that dominates the external regulation of Major League labour.

(b) Government and professional baseball in Japan

In contrast to MLB, the Japanese legislature has rarely featured in the regulation of labour in NPB. The general absence of regulatory oversight by the Japanese government may in part be explained by the nature of ownership of NPB clubs. Large Japanese corporations (including influential media conglomerates such as Yomiuri and Chunichi) own all 12 NPB clubs and may be able to use their economic power and access to politicians to influence legislators. Another possible explanation is that

¹⁸⁰ *Curt Flood Act of 1998*, Pub L 105-297 (105th Cong 1998), sections 2 and 3.

legislatures may be reluctant to be seen to publicly interfere in the regulation of labour in 'Japan's national pastime'. A further explanation may be public policy. It is possible that the Japanese government may not intervene in the labour of NPB due to the perception that specific legislation leading to poor policy and the inability of legislators and courts to apply specialised laws. Whatever the reason, NPB's autopoietic system of labour has been able to evolve with little oversight by the Japanese legislature.

(c) The role of the government in professional baseball in Australia

The role of government in professional baseball in Australia is subtle, yet important, and provides a variation to the experiences in the United States and MLB. In Australia, baseball's status as a minor sport means that amateur and professional baseball are heavily reliant on funding from local, state and federal governments. Such funding is particularly important for developing baseball's infrastructure, notably baseball fields and associated amenities. This is especially true in the ABL, as all six teams must maintain facilities that meet the professional standards set by MLB. Another important area of government funding is 'high performance' or 'elite development'. In 2016-17 the Australian Sports Commission provided baseball with \$415,000 for high performance and \$460,000 for participation (Australian Sports Commission, 'Investment allocation 2016-17'). When baseball lost its status as an Olympic sport after the 2008 Beijing Olympics, baseball in Australia failed to receive considerable government funding that, among other things, had previously been used to provide scholarships in states and territories for elite junior baseball players to attend their local institute of sport. These programs were replaced with 'user pay' programs that do not provide free (and ongoing) access to the resources of state sports institutes and supplemented existing user pay programs for club, regional, state and national teams.

As will be discussed in Chapter 8.2(e) the cost of similar programs in the United States, called ‘travelling teams’, has seen many children from African American and other economically disadvantaged groups excluded from baseball. No such research exists in Australian baseball but it is not uncommon for some children not to participate in state and national representative youth teams when participation costs exceed several thousand dollars. Many of the local players in ABL teams are the product of this system.

(d) Statutory authorities and professional baseball

The government can also regulate professional baseball’s internal labour system – and hence in autopsies – through the statutory authorities that are responsible for enforcing relevant legislation, most notably labour law. The visibility of statutory authorities in the ABL is much less than in MLB and NPB, although it is possible in the future that the Fair Work Commission may play a prominent role in the ABL’s labour relations in determining whether players are employees, which as noted earlier in this section is highly likely given the High Court’s ruling in *Buckley v Tutty*.¹⁸¹ This may be particularly important in determining whether players are paid the minimum wage. In NPB, Japan’s Labor Relations Commission has played an important role in the application of union laws to professional baseball. Like the NLRB’s decision to recognise the application of the NLRA to MLB in 1969, and as noted in Chapter 5.4, Japan’s Labor Relations Commission in 1985 held the JPBPA to be a labour union under the *Labor Union Act* (The Asahi Shimbun 1985). This decision activated the rights and protections in the *Labour Union Act* for NPB players.

¹⁸¹ *Buckley* (1971) 125 CLR 353, 371-372.

The importance of the NLRB in the evolution of MLB's autopoietic labour system cannot be understated. Despite MLB antitrust exemption cases, as discussed in Chapter 5.5, the NLRB held in 1969 that Congress intended the NLRA to apply to the business conducted by MLB,¹⁸² in turn establishing the NLRB's jurisdiction over professional sports leagues in matters related to unionism and collective bargaining (Parlow 2010, 197). In 1981, the NLRB was unsuccessful in its application to the United States District Court for the Southern District of New York to obtain an injunction against Major League owners in relation to allegations of bad faith negotiations for failing to disclose financial information.¹⁸³ The players subsequently went on strike in June 1981 (Gould, 2004, 70). Further, Chapter 5.6 identified the central role of the NLRB in ending the strike of 1994-95. The decision by the owners to argue negotiations were at an impasse, unilaterally end arbitration, introduce a salary cap and terminate the collective agreement, saw the NLRB successfully obtain an injunction against MLB and the owners in the United States District Court for the Southern District of New York.¹⁸⁴ The United States Court of Appeals for the Second Circuit upheld this decision.¹⁸⁵ Consequently, owners were required to reinstate the existing collective bargaining agreement (Wollett 2008, 62-64) and the NLRB's intervention was in effect the circuit breaker that allowed the commencement of the 1995 season and forced owners to return to the bargaining table. The role of these various regulatory actors is evidence of the decentred regulation that at times can be present in MLB.

¹⁸² *American League of Professional Baseball Clubs v Association of National Baseball League Umpires*, 180, 191 NLRB 190 (1969).

¹⁸³ *Silverman*, 516 F. Supp. 588, 598 (S.D. N.Y. 1981).

¹⁸⁴ *Silverman*, 880 F.Supp 246 (S.D. N.Y. 1995).

¹⁸⁵ *Silverman*, 67 F.3d 1054 (2d Cir. 1995).

(e) Summary

The state, as represented by the legislature and statutory authorities, is an important regulatory actor in the self-regulatory systems of labour in professional baseball. The regulatory activities of these organs of the state can be direct, such as a statutory authority determining whether labour law applies to a player union. Alternatively, indirect regulation exists in the form of the government reviewing the application of law to professional baseball, as was the case with Congressional committee inquiries into MLB's antitrust exemption over a number of decades. Such regulatory activity involved the threat of state intervention but had little impact on MLB and owners. In the United States, the state has nevertheless played a much greater role in the regulation of the labour of professional baseball than in comparison to Japan and Australia, especially through the role of the NLRB. This is evidence of autopoietic systems of regulation having different levels of engagement with external regulation based on the activities of regulatory actors.

6.3 PLAYER AGENTS IN PROFESSIONAL BASEBALL

(a) The classification of player agents

The status of player agents as an internal or external regulatory actor is not a simple exercise and arguments exist for either classification. Even though player agents represent the interests of players, they are also self-interested actors who do not necessarily represent the internal interests of a sport. It is for that reason player agents are classed as external regulatory actors for the purposes of this thesis. This classification is important in that it helps to understand how an autopoietic system evolves and operates. As external regulatory actors, player agents do not attempt to protect the autopoiesis of the labour system. Player agents are essentially concerned

with maximising their client's income (and their own payment), a goal that may conflict with the other objectives of the self-referencing system of labour within baseball's autopoiesis.

(b) The business of representing professional baseball players

No longer is the norm in professional sport for players to self-represent or be represented by a parent, although these practices do still exist. Factors like the complexities of the labour system in baseball, the huge sums of money that are on offer to professional athletes and the need for commercial and legal expertise have seen most modern professional players employ a player agent at some time in their careers. Agents come from a variety of backgrounds and include lawyers, former athletes and coaches, people from the finance industry and a growing number of university graduates with qualifications in relevant disciplines (Geisel 2007, 228). Competition among agents is fierce for the signatures of the best baseball players and starts early in the career of a player. In the United States larger player agencies are able to scout amateur competitions and the Minor Leagues for potential clients.

In MLB, player agents emerged in the late 1970s after Miller and the MLBPA collectively bargained for players to have representation in the negotiation of contracts (Neiman 2007, 125-126). Player agents became necessary in light of contractual negotiations brought about by salary arbitration and free agency. By contrast, player agents in NPB were prohibited until 2001. Although permitted now, they must be registered attorneys (Japanese Professional Baseball Players Association website, undated). In fact, the owner of the Yomiuri Giants, Watanabe Tsuneo, stated several years ago that he would cut the salary of any player who uses an agent (Whiting 2004,

94). Yet the role of agents in Japan is important for foreign players in NPB, and conversely for Japanese players wishing to move to a MLB club. Player agents do not feature prominently in the ABL as players directly negotiate a contract with a team or their affiliated MLB or NPB club conducts negotiations on their behalf.

(c) The services provided by player agents

The primary role of a player agent is to negotiate a player's employment contract and in turn, enter agreements that create financial and employment security. These aims must be achieved by considering the implications of arbitration, free agency and in Japan, the prospect of transferring to a MLB club. Agents may also represent their client in arbitration. Therefore agents play an important role in the operation of the labour rules contained in baseball's autopoietic system. To maximise a player's earning capacity an agent must be aware of the demand in the labour market for a particular type of player, for example, a left handed starting pitcher, and also be able to use statistics and comparisons to similar players in order to maximise salary (Neiman 2007, 126-127). Another vital function of an agent is to find a player a job and to create interest among clubs in clients, an important function in the MLB-MiLB system when a player can be released at any time.

Agents create additional income streams for players through endorsements and sponsorships. While lucrative deals are generally reserved for elite players, good agents can arrange small fees for sponsorships and appearances, something that can be important to subsidise the low income received by players early in their career, particularly in the Minor Leagues. Many agents also provide a range of services related to taxation, finance and investment, career advice, health and coaching. But the rapid

emergence of player representation as a 'sexy' industry has seen the number of agents quickly grow and agents can range from very bad to very good. While agents provide many services their fundamental purpose is to ensure their client is paid to play baseball. In professional baseball, a key consideration for players is 'if your agent calls a general manager, will the general manager take the call?'

(d) The regulation of player agents

The internal regulation of player agents engages with external regulation by law. Even though there are differences across all three leagues in how player agents are governed, a number of commonalities exist in how the law governs such agents. At the heart of the legal concept of agency is a fiduciary relationship that mandates that the agent act in the best interests of their principal, the player. At common law in the United States and Australia, the fiduciary nature of the agency relationship gives rise to a number of duties owed by the agent to the principal, including the duty of loyalty and the duty to avoid conflicts. Also regulating the player-agent relationship is the law of contract. In addition, in all three jurisdictions the activities of player agents who are lawyers are governed by the ethics and standards of the legal profession and relevant legislation, as enforced by the courts and various legal associations.

The size of the professional sports labour market in the United States, combined with exploitative business practices by some unethical player agents, has seen the regulation of player agents by state and federal legislatures. At the state level, by 2014 42 states and the District of Columbia had adopted the *Uniform Athletes Agent Act* (Wiler et al

2015, 740),¹⁸⁶ which was amended in 2015.¹⁸⁷ At federal level the *Sports Agent Responsibility and Trust Act*¹⁸⁸ ('SPARTA') was introduced in 2005.

In MLB, the NLRA and MLB Basic Agreement interact to give MLBPA the function of regulating player agents (MLB Basic Agreement 2012, article IV), a role MLBPA has performed since 1988. According to article II of the MLB Basic Agreement 2012, the source of MLBPA's power to regulate player agents is derived from its status as the sole and exclusive bargaining unit for Major League players under the NLRA. Also, s 9(a) of the NLRA allows labour organisations to adopt and enforce reasonable rules and regulations that further their legitimate interests.¹⁸⁹ The regulation of player agents falls within the scope of this rule. The NLRA allows individual bargaining to set salaries above the minimum requirements of a collective agreement and unions such as MLBPA can delegate their exclusive authority to the players and their agents (Weiler et 2014, 743). Any person engaging in or attempting to engage in conduct related to the contracts of MLB players, or the recruitment or maintenance of players as clients, must be a MLBPA-certified player agent (MLBPA Player Agent Regulations 2010, sections 1, 3). MLBPA must provide to MLB lists of certified agents and agents designated by players (MLB Basic Agreement 2012, article IV). MLBPA places a number of duties on accredited player agents and there is some overlap with common law duties like the duty of loyalty (MLBPA Player Agent Regulations 2010 section 5(A)(B)). Also, Player Agent Representation Agreements are limited to one year in duration (MLBPA Player Agent Regulations 2010, section 6(G)). In NPB, agent

¹⁸⁶ National Conference of Commissioners on Uniform State Laws, Annual Conference, St Augustine Florida, 28 July - 4 August 2000.

¹⁸⁷ *Revised Uniform Athlete Agents Act*, National Conference of Commissioners on Uniform State Laws, Annual Conference, Williamsburg Virginia, 10-16 July 2015.

¹⁸⁸ 15 U.S.C. § 7801-7807 (2005).

¹⁸⁹ *National Labor Relations Act of 1935*, (49 Stat. 449) 29 U.S.C. § 151-169, § 157.

regulations are set by the JPBPA but NPB sets the limit of one player per agent (JPBPA website, Player Agents). As the ABL does not have a players union, player agents who represent ABL players must comply with Australian law and general ABL protocols.

(e) Representing players in the current era of sport

The rapid rise of the millionaire athlete has led to the player agent business quickly growing, as individuals attempt to obtain their slice of the pie created by the skill of athletes and become a part of professional sport. The industry is transitioning from player ‘agents’ to ‘agencies’ and as more players travel the globe in search of a career in elite sport, national agencies are expanding to become global agencies or forging relationships with agencies in the country where their client works. Large global player agencies in the United States include giants like IMG, Octagon and SFX, who acquired small boutique sports agencies in the 1990s and now offer a ‘one-stop shop’ of services for athletes (Geisel 2007, 230). These agencies have their own scouts and statisticians who search for talent in the Minor Leagues and the amateur school leagues of North America. Large agencies like IMG even have a baseball academy (IMG website, undated). Consequently, small sports agencies and individual agents face an increasingly competitive business environment.

A handful of agents have dramatically influenced modern labour relations and mobility in baseball and, in the context of this thesis, two player agents require identification. Scott Boras, a former Minor League player and a lawyer, has combined his understanding of professional baseball and his legal training to drive up the value and length of contracts for the game’s best players. He is responsible for many of the recent multi-year deals that exceed US\$100 million and, consequently, is a player agent that

is highly sought after by players. It is interesting that as a former player, Boras has not used his skills to reduce the income gap among players but to reinforce the pay gap between elite and average players. Nomura Don, another former professional player but in NPB turned to entrepreneurship after his playing days ended and has had a profound impact on the evolution of the global labour market in professional baseball. Nomura is the agent who represented many of the Japanese MLB players in the 1990s and, with the assistance of an American agent called Arn Tellem, helped players like Nomo Hideo, Irabu Hideki and Alfonso Soriano identify transfer methods to circumvent NPB's internal labour system (Kawai and Nichol 2014, 184), in turn opening the door for NPB players to transfer to MLB.

(e) Summary

The complex regulation of labour in professional baseball, combined with the huge sums of money that are the subject of contractual negotiations, has seen a proliferation in the number of player agents in the past 30 years. Player agents are now a permanent feature of baseball's regulatory landscape, as they are in most other elite sports and play an important role in facilitating labour mobility. Importantly, they influence and shape the operation of the rules within baseball's autopoietic labour system. Even though legislation is not directly used to govern the majority of activities conducted by agents in the United States, Japan and Australia, agents still perform their regulatory function under a myriad of internal and external rules.

6.4 THE ROLE OF ANTI-DOPING AGENCIES IN PROFESSIONAL BASEBALL

(a) The global regulatory framework for performance enhancing drugs

The problem of performance enhancing drugs saw the creation of the World Anti-Doping Authority ('WADA') in February 1999 at the World Conference on Doping in Sport in Lausanne. This led to the transfer of global anti-doping responsibility from the International Olympic Committee to WADA. Central to WADA's World Anti-Doping Program is the WADA Code,¹⁹⁰ as adopted by the World Conference on Doping in March 2003 (see WADA website), and amended in 2007, 2009 and 2013. The WADA Code is designed to harmonise rules, disciplinary procedures and sanctions in relation to the use of performance enhancing drugs in amateur and professional sport. Importantly, governments and national sporting organisations cannot be signatories to the WADA Code, rather international sporting federations and national anti-doping agencies do so, thereby binding national sporting organisations and their athletes. Thus, the WADA Code operates at a transnational level, is independent of state law and currently has over 600 signatories.¹⁹¹ However, governments can commit to anti-doping in sport by signing the United Nations Educational, Scientific and Cultural Organization's ('UNESCO') International Convention Against Doping in Sport,¹⁹² a convention that has been ratified by 75 per cent of countries and covers 92 per cent of the global population (David 2013, 1-6). In addition, many national governments establish anti-doping agencies under national legislation to implement and enforce the

¹⁹⁰ World Anti-Doping Agency, *World Anti-Doping Code*, 1 January 2015.

¹⁹¹ For a full list of current Olympic movement, government funded organisations and outside the Olympic movement signatories, see WADA Code Signatories at <<http://www.wada-ama.org/en/what-we-do/the-code/code-signatories>>.

¹⁹² United Nations Educational, Scientific and Cultural Organization, *International Convention Against Doping in Sport*, adopted by the General Conference at its Thirty-Third Session, Paris, 19 October 2005.

WADA Code. These include the United States Anti-Doping Agency ('USADA'), the Japan Anti-Doping Agency ('JADA') and the Australian Anti-Doping Agency ('ASADA').

WADA's 'toolkit' of regulatory mechanisms involves a mix of rules that support the operation of the WADA Code. The Prohibited List is the cornerstone of the WADA Code and works with the five international standards in an attempt to harmonise technical anti-doping practices and procedures: the Prohibited List of Substances and Methods 2014, the International Standard for Testing 2012, the International Standard for Laboratories 2012, the Therapeutic Use Exemptions 2011 and the Protection of Privacy and Information 2009. In addition to these standards, the WADA also produces model rules (the revised 2009 rules took effect from 1 January 2015), protocols and guidelines. The relevant anti-doping authority or signatory to the Code investigates athletes and support staff who violate the WADA Code (WADA Code 2009, article 23). Violations are heard by a sport's tribunal, a national or international tribunal, the Court of Arbitration for Sport ('CAS') or, in the case of an appeal by an athlete or national anti-doping body, a mix of all of these organisations.

To understand the resistance by MLB to the WADA system, it is necessary to briefly outline some of the key aspects of the WADA Code 2009. There are various anti-doping offences under article 2 of the Code. The three key offences are a positive test of a prohibited substance or its metabolites or markers, use or attempted use by an athlete of a prohibited substance or method and refusing to submit to a test without justification. Other offences include possession of prohibited substances or method and trafficking in a prohibited substance or method. The anti-doping organisation bears the

burden of proof and the standard of proof is the 'comfortable satisfaction' that a doping rule violation has occurred (WADA Code 2009, article 3.1). This burden sits between beyond reasonable doubt and the balance of probabilities. Under the Code a prohibited list is annually published by WADA. The prohibited list contains all substances and methods that athletes cannot use (WADA Code 2009, article 4.2) and such prohibitions are based on medical, scientific or pharmacological evidence (WADA Code 2009, article 4.3). Exemptions can be made on the grounds of therapeutic use (WADA Code 2009, article 4.4). In and out of competition testing is conducted by a country's national anti-doping organisation (WADA Code 2009, article 5) and collected samples must be tested in approved laboratories (WADA Code 2009, article 6.1).

The rights of individuals are addressed in the WADA Code and include natural justice. Any person accused of committing an anti-doping violation has several rights under the Code, including the right to a timely hearing, a fair and impartial hearing, the right to counsel, the right to be informed in a fair and timely manner of an anti-doping violation and the right to respond to anti-doping rule violations (WADA Code 2009, article 8.1). Penalties for violations include disqualification in an event during which the violation occurs (WADA Code 2009, article 10.1) and suspension for two years for a first violation for the presence, use or attempted use or possession of a prohibited substance or method. Other offences, such as refusing to submit to a test and trafficking in prohibited substances or methods carry penalties ranging between two years and life (WADA Code 2009, articles 10.2, 10.3). Limited defences exist under the Code. Two defences are where the athlete demonstrates no fault or negligence or no significant fault or negligence (WADA Code 2009, articles 10.5.1, 10.5.2).

(b) The World Anti-Doping Code and professional baseball

The regulation of performance enhancing drugs in NPB and the ABL represents a divergent model from the internal regulation used in MLB. Both NPB and the ABL are governed by the performance enhancing drug policies of WADA, as enforced respectively by JADA and ASADA. USADA is a signatory to the WADA Code, as is the WBSC, the international baseball body recognised by the International Olympic Committee. However, as will be discussed in the next section, MLB created its own internal performance enhancing drugs policy and regime with the intention of excluding external regulation by USADA and WADA. The ownership of the ABL by MLB adds a further level of regulation as ABL players affiliated to a MLB club are subjected to the anti-doping regime of MiLB (and MLB Joint Drug Prevention and Treatment Program¹⁹³ if a Major League player) and the WADA Code when playing in Australia.

(c) Congress and the regulation of performance enhancing drugs in Major League Baseball

The external regulation of performance enhancing drugs policy in MLB by Congress presents a stark contrast to its regulatory role in relation to antitrust law and the labour practices of MLB. There was widespread use of steroids and other performance enhancing drugs by players in the 1990s and the 2000s, in large part due to the absence of testing for performance enhancing drugs for much of this time. In 2002 Senators John McCain and Byron Dorgan, Chairman and Ranking Minority Member of the consumer affairs, foreign commerce and tourism subcommittee of the Senate Commerce Committee, led a Congressional inquiry into steroid use in MLB. The

¹⁹³ Major League Baseball and Major League Baseball Players Association, *Major League Baseball's Joint Drug Prevention and Treatment Program*, 2014.

inquiry saw MLB being asked to implement a drug testing policy and regime (Bloom 2002).

Performance enhancing drug testing was introduced through the MLB Basic Agreement 2002 and a mandatory testing and penalty regime for 2004: education and more testing for a first positive test, public identification and a 15-day suspension or a \$10,000 fine for a second offence, escalating to a one year suspension or a \$10,000 fine for a fifth positive test (Peisah 2015, 396-397). However, the lenient penalties and the impact of the investigation by the Internal Revenue Service into a San Francisco based supplements company called the Bay Area Laboratory Co-Operative ('Balco')¹⁹⁴ ignited further intervention by Washington.

President George W Bush (a former owner of the Texas Rangers) used his State of the Union speech in 2004 to ask MLB and MLBPA to 'get rid of steroids' (Bush 2004). Then, Senator McCain led more inquiries into baseball's steroid problem and in December 2004 threatened to examine harsher legislative measures if MLB did not take appropriate action by January 2005. The penalties proposed by MLB and MLBPA did not satisfy Congress, who in 2005 held another round of hearings into baseball's steroid problem and introduced a raft of legislation to regulate steroid use in professional baseball. During this period the House of Representatives and the Senate introduced six bills aimed at introducing stricter testing and penalties for performance enhancing drug use in professional American sport,¹⁹⁵ modeled on the harsher list of banned

¹⁹⁴ The company's distribution of steroids and other performance enhancing drugs to athletes involved several high profile MLB players, including home run king Barry Bonds.

¹⁹⁵ *Drug Free Sports Act*, H.R. 3084, 109th Cong. (2005), *Clean Sports Act of 2005*, H.R. 2565, 109th Cong. (2005), *Clean Sports Act of 2005*, S. 1114, 109th Cong. (2005), *Professional Sports Integrity Act of 2005*, H.R. 2516, 109th Cong. (2005), *Professional Sports Integrity and Accountability Act*, S. 1334, 109th Cong. (2005) and *Integrity in Professional Sports Act*,

substances and penalties in the WADA Code (Showalter 2007, 661, 664; Pessah 2015, 455). These activities had the intended effect and in November 2005 MLBPA and MLB agreed to a revised Joint Drug Policy. Penalties became a 50 game suspension for a first positive test for banned performance enhancing drugs, a 100 game suspension for a second positive test and a lifetime ban for a third positive test (Showalter 2007, 651, 660-665; Pessah 2015, 462). Both the House Committee on Oversight and Government Reform and Senator McCain endorsed the new policy (Pessah 2015, 462).

Further revelations in early 2006 about steroid use in baseball by high profile player Barry Bonds continued the ongoing shadow cast by performance enhancing drugs on baseball, leading Congress to pressure the Commissioner of Baseball, Bud Selig, to take additional action. In response, MLB appointed former senator George Mitchell in March 2006 to conduct an independent inquiry into the use of performance enhancing drugs in MLB (Pessah 2015, 464-469). The ‘Mitchell Report’ was released in 2007 (see Mitchell 2007), naming 89 players who had used a range of prohibited performance enhancing drugs (Mitchell 2007, 149-230) and was also the catalyst for another round of Congressional hearings on performance enhancing drugs in baseball.¹⁹⁶ Further Congressional oversight of performance enhancing drug use in MLB saw the Committee on Energy and Commerce in 2011 request MLB and MLBPA testing for human growth hormone in their joint drug policy.¹⁹⁷

S.1960, 109th Cong. (2005).

¹⁹⁶ Committee on Oversight and Government Reform, *Committee Holds Second Day of Hearings on the Mitchell Report and Steroids in Baseball*, 110th Congress, 13 February 2008 at <<http://oversight-archive.waxman.house.gov/story.asp?ID=1743>>.

¹⁹⁷ Letter from Henry A. Waxman and Frank Pallone Jr, Committee on Energy and Commerce, to Allen H. (Bud) Selig, Commissioner, Major League Baseball, and Michael Weiner, Executive Director, Major League Baseball Players Association, 2 November 2011.

(d) Summary

Despite MLB adopting its own anti-doping policy, WADA remains an important regulatory actor in baseball's autopoiesis as the WADA Code applies to players in NPB and the ABL, and international tournaments sanctioned by the WBSC. Some MLB affiliated players will be required to meet the anti-doping rules of WADA if they play in the ABL or WBSC sanctioned tournaments, while prospective MLB players in Japan and Australia must comply with the WADA anti-doping regime prior to signing a contract with a MLB club. Japanese and Australian nationals contracted by a MLB club are subject to the WADA Code if they represent Japan or Australia in any international tournament except the WBC. The regulation of performance enhancing drugs also demonstrates that it is sometimes possible for sports leagues to opt out of external regulation and instead develop a system of self-regulation.

6.5 FOREIGN PROFESSIONAL BASEBALL LEAGUES

(a) Agreements between professional leagues

Agreements between professional leagues allow the movement of players between leagues and can be formalised by contract or involve informal rules and practices, both of which are shaped by the normative practices of regulatory actors. These agreements shape labour mobility in other autopoietic systems and within a league's autopoiesis. Relationships between professional baseball leagues are commonly evidenced by contracts and their formalisation enhances the ability of inter-league commitments to be enforced in court against owners who breach the rules or attempt to do so. Further, contracts between leagues establish a transparent system of rules and practices that regulate labour mobility between the leagues and are increasingly important as the number of professional baseball leagues around the world grows.

Agreements between leagues exist at the national level, although it was not until 1921 that the agreement between the National and American Leagues was formalised in the MLB Constitution, a contract between MLB clubs. As the Major and Minor Leagues competed against one another as professional leagues in the early days of baseball, the relationship between MLB and MiLB clubs dates back to the National Agreement of 1883, a contract that expanded to become the Professional Baseball Agreement (Goldberg 2008, 22-23). This agreement governs the modern relationships or ‘affiliations’ between Major and Minor League clubs. The relevant rules that regulate this relationship are now set out in the Major League Rules and the Player Development Contract (Major League Rules, rule 56 and attachment 56).

(b) The global labour market and the professional baseball league

The global movement of baseball players in search of paid work to play baseball has meant that the professional leagues of North America, Latin America and Asia now compete with one another for amateur and professional baseball players inside the national boundaries of a league. The internal rules and regulations imposed by a professional league on the recruitment of amateurs and the labour controls on professional players influence the mobility of labour in a country and importantly, the ability of players to play in foreign leagues.

The increase in the number of professional leagues around the world has seen the need for agreements between foreign leagues to govern the movement of professional players. MLB now has a number of agreements with professional leagues that administer the transfer of players between those leagues, including contracts with the

Mexican Pacific Baseball League, NPB, KBO and CPBL (Major League Baseball Basic Agreement 2011, attachment 46, I. D. 10, 11). Also, the ABL has a mix of formal and informal agreements with MLB, NPB and clubs from each league. In addition, some international tournaments at senior and youth levels involve contracted players in professional leagues and informal agreements between leagues, national baseball bodies and global baseball organisations influence the availability of these players.

The movement of professional players to the growing number of winter leagues also raises labour control issues. In addition to the uniform player contract signed by affiliated players from MLB clubs (NPB clubs enter agreements with the ABL), formal agreements between the ABL and the respective league and foreign club shape the rights of ABL clubs in relation to these players. Affiliated players in the ABL remain reserved by their foreign club and if a player is required to return to the United States or Japan, the ABL club is unable to prevent the loss of such a player. In addition, the affiliated club directs the ABL club as to how the player can be used, for example, if a pitcher has a pitch or innings limit or whether a position player is required to play a specific defensive position. Generally, ABL clubs are expected to play any affiliated player before an uncontracted player, although this is not always the case for young Australian affiliated players early in their career.

The ABL is an interesting example of how the external regulatory function of foreign leagues can determine the labour supply of the league. As Australia produces a small number of baseball players with the requisite skills, combined with the role of the league as a 'winter' development league, the ABL is largely dependent upon the labour of affiliated Minor League players contracted by MLB clubs to ensure that the level of

competition meets professional standards. Thus, MLB has the dual function of internal regulator as controlling owner of the ABL and its clubs, and as external regulator in its ability to request MLB clubs to make Minor League players available to the ABL. In turn, MLB clubs perform the important regulatory functions of allowing their Minor League players to participate in the ABL and determining which players will be available.

In the first three years of the ABL, from 2010 to 2012, five of the 12 NPB clubs sent players to four of the six ABL clubs. However in the 2013-14 ABL season only one club, the Saitama Seibu Lions continued its relationship with the ABL and the Melbourne Aces. Meanwhile, one KBO team, the Lotte Giants sent players to the Canberra Cavalry in the ABL's inaugural 2010-11 season.¹⁹⁸ Part of the reason for this decrease is likely to be the operation of the Asia Winter Baseball League by the CPBL in Taiwan in 2012 and 2013, a league that hosted teams from the CPBL, the KBO and NPB. As this league did not operate in 2014, the ABL saw an increase in the number of players from NPB, KBO and CPBL for the 2014-15 season, although the number once again decreased with the resumption of the Asia Winter League in 2015, and again in 2016.

(c) Major League Baseball and Nippon Professional Baseball

There is a long history of MLB involvement in the regulation of labour in NPB, and vice versa, dating back to 1964 when the Nankai Hawks sent *ni-gun* pitcher Murakami

¹⁹⁸ The Tohoku Rakuten Golden Eagles sent players to the Adelaide Bite in 2011, the Fukuoka Softbank Hawks sent players to the Brisbane Bandits from 2010 to 2012, the Canberra Cavalry received players from the Lotte Giants in 2010 and the Hanshin Tigers in 2011, and the Melbourne Aces received players from the Yomiuri Giants in 2010, and Seibu in 2011, 2012 and 2013: ABL, 'Import Alumni'.

Masanori to the United States to train with a Minor League affiliate of the San Francisco Giants. Murakami's dominant performances triggered a clause in his contract that saw the Giants try to purchase Murakami from Nankai for US\$10,000 (Whiting 2004, 72-95). The resulting controversy saw both the Hawks and the Giants argue they held the reserve rights to Murakami. MLB and NPB resolved the matter by allowing Murakami to play for San Francisco in 1965 and 1966 before returning to NPB for the remainder of his career. The controversy created an international problem and resulted in MLB and NPB entering the United States-Japanese Players Contract Agreement 1967 ('1967 Agreement'). This Agreement required clubs to honour the other league's reserve system and other internal labour rules and to obtain permission of the commissioner of the other league to contact a reserved player (1967 Agreement, articles 1-4). What followed was the absence of a Japanese player in MLB for nearly 30 years, during which time a number of former Minor and Major League players would play in NPB.

As noted earlier, the ability of Japanese professional players to play in MLB was created by Nomo Hideo and his agent Nomura Don in 1995. Through Arn Tellem, a player agent in the United States, they identified a loophole in the NPB's by-laws that allowed a NPB player to voluntarily retire from the league and continue his career in a foreign league. Nomo then retired voluntarily from the Osaka Kintetsu Buffaloes and joined the Los Angeles Dodgers in 1995, a transfer that did not violate the 1967 Agreement.¹⁹⁹ Subsequently a number of NPB players negotiated transfers to MLB clubs with their NPB club, including Irabu Hideki, Kashiwada Takashi, Hasegawa Shigetoshi and Ohka Tomokazu (Kawai and Nichol 2015, 501).

¹⁹⁹ Gould observes that the recruitment of Nomo was not coincidental in light of MLB's labour problems, culminating with the 1994-1995 labour strike and cancelled World Series: Gould 2013, 14-15.

In this regulatory environment the ineffectiveness of the 1967 Agreement led MLB and NPB to replace it with the United States-Japanese Player Contract Agreement 2000 (Posting Agreement 2000). The new agreement continued to allow NPB players who were free agents or unconditionally released to transfer to a MLB club (Posting Agreement 2000, articles 5-6) and in a historical shift in the regulation of labour in NPB, reserved players could transfer to a MLB club through the posting system (Posting Agreement 2000, articles 8-12). Amendments to this bilateral agreement were made in 2013 when the leagues entered the Agreement between the Office of the Commission of MLB and the Office of the Commissioner of NPB 2013 (Posting Agreement 2013). The Posting Agreements 2000 and 2013 will be examined in Chapter 8.3 in terms of their effect on labour mobility in NPB.

(d) Summary

As the number of professional baseball leagues increases and the standard of competition in these leagues also improve, the external regulatory function of professional leagues will only rise. The world's two best professional baseball leagues, MLB and NPB, not only conduct regulatory activities relevant to the labour of the other league but due to their status and economic and political influence, they also perform critical regulatory activities in professional leagues in North America, Latin America, Asia, and Australia. The regulatory impact of globalisation on labour in professional baseball is twofold. First, individual autopoietic systems of labour are subject to other autopoietic systems, as evidenced by the interaction of MLB and NPB. Second, the autopoietic labour systems of leagues now operate within a broader global system of labour regulation.

6.6 THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND PROFESSIONAL BASEBALL

Another external regulator is the National Collegiate Athletic Association ('NCAA'), which regulates amateur athletics in Division 1, 2 and 3 competitions in the United States, including baseball. The NCAA can be seen to have the regulatory effect of a professional league in the number of athletes it governs and the fact that college sport annually generates US\$12 billion in revenues (Porto 2016, 308). The NCAA regulates professional baseball through its eligibility rules that requires athletes to be 'amateur' (that is, unpaid) and through the enforcement of rules and regulations that are aimed at providing a level playing field between competing schools in the recruitment and retention of student athletes (Smith 2000, 9-10). Aspiring college baseball players may bypass a professional career (at least until they have completed college) to obtain an education and develop their baseball skills. Potential college players (and their families) must ensure that they do not accept payments in violation of NCAA rules, participate in games with professional athletes nor engage agents (see NCAA, 'Eligibility Center'; Porto 2016, 301).

6.7 CONCLUSION

The self-regulatory autopoietic labour system of professional baseball does not operate in a regulatory vacuum. Through legislatures, statutory authorities and the courts, the state can play varying regulatory roles in the public regulation of professional baseball in all three leagues, with the most prominent role of the state being in MLB. The threat of public regulation has had a significant effect on MLB, and to a lesser extent, NPB and the ABL. In extreme cases MLB has lobbied the federal legislature to maintain its

exclusion from antitrust laws. Also, the external regulatory function of the NCAA affects the ability of amateur players to pursue a college or professional career. The mix of external regulatory actors is not static and the role of the different external regulatory actors does change over time and the influence of these actors does vary between leagues. How baseball's autopoietic system of labour evolves in each of the three leagues is subject to different levels of engagement with external regulatory actors, in turn shaping the rules and practices within that system.

CHAPTER 7 THE LAW AND THE PRINCIPLE OF LABOUR MOBILITY

The purpose of Chapter 7 is to establish how the law regulates labour mobility in the United States, Japan and Australia and it therefore adopts a comparative approach. Labour mobility plays a central role in professional baseball in terms of movement between a club's minor league teams, movement between minor and major league clubs and movement between major league clubs. Also, an increasingly globalised labour market is seeing more players move between foreign leagues. The purpose of this chapter will be achieved by describing and analysing the relevant rules in labour law, contract law and competition law in each of the three jurisdictions that govern labour mobility in professional baseball. By constructing a legal concept of how labour mobility is regulated in professional baseball (and professional sport in general), Chapter 7 will allow labour mobility to be explored in Chapter 8 in relation to the relevant rules in each of the three leagues under study.

7.1 THE CONCEPT OF LABOUR MOBILITY

Before looking at how labour mobility is regulated in the United States, Japan and Australia, it is necessary to explore what labour mobility is. This section will examine general concepts of labour mobility and look at factors that shape labour mobility.

(a) What is labour mobility?

Labour mobility is the movement of workers from one employer to another and is seen by orthodox economic theorists as the 'fluid' that allows labour markets to operate efficiently (see Mitchell 2008, 6). Labour mobility involves workers moving to a similar job in the same industry, a different job in the same industry or a new occupation

and industry (Atkinson and Hargreaves 2014, 6, 9), as well as movement within an organisation (Sweet 2011, 12). Mobility can be driven by structural changes to the economy, for example, the decline or growth of an industry or a geographic region. Labour mobility is also influenced by personal reasons that may include career development, improved wages and conditions and lifestyle. Job separations may be involuntary or voluntary, the latter accounting for a higher percentage of workers who change jobs (Atkinson and Hargreaves 2014, 9). Skill and education shape a worker's mobility in the job market. Workers with low levels of skills and education have limited labour mobility and are particularly vulnerable during times of economic downturn (Atkinson and Hargreaves 2014, 12).

(b) Geographic labour mobility

Concepts of labour mobility now include 'geographic labour mobility': the ability to move jobs within a city, a region, a country or to a different country. Two examples are workers who migrate and the 'fly in, fly out' workers in Australian mining towns. Technology and transportation have played a role in creating such mobility, an important element in producing a flexible labour market and economic efficiency (Productivity Commission 2014, 3). Cooperation between nation states is also an important factor that shapes geographic labour mobility. The ability to obtain work visas, permanent residency or citizenship all affect a worker's ability to work in another country. In trade and economic zones such as the European Community, geographic labour mobility is linked to individual rights such as the freedom of movement and the freedom of member citizens to provide services.²⁰⁰

²⁰⁰ *BNO Walrave, L.J.N. Koch v Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federacion Espanola Ciclismo* (C-36/74) [1974] ECR 1406, 1412.

(c) Factors that shape labour mobility

Skill and education are part of a broad range of factors that determine an individual's labour mobility. Gender and age are also important factors. As noted in Chapter 4, not only has the feminisation of the workforce in recent decades reshaped the basic structure of many labour markets, it has also allowed women to enjoy greater levels of labour mobility. However, the labour mobility of women can be limited by parenthood, particularly young children and the Productivity Commission notes that this restricted labour mobility can extend to fathers (Productivity Commission 2014, 10-11). The feminisation of the workforce is also linked to geographic labour mobility in dual income households, as decisions on where to live and work must take into account both parties. Age is another relevant factor contributing to geographic labour mobility and younger people are generally more likely to move for work (Productivity Commission 2014, 10-11). The impact of age on labour mobility is likely to have a greater effect in coming years as the generation of 'baby boomers' accounts for a large ageing population and in response countries such as Australia have extended the retirement age. Also, in Japan low birth rates and longevity have combined to create an ageing population that has seen a decrease in the Japanese population each year since 2011 (Boren 2015) and a working population aged over 65 years of 7.3 million people in 2015 (Ujikane et al 2016). Many Japanese workers retire at 60 years of age, the mandatory retirement age in many companies (Ujikane et al 2016), and then transition into a second career.

(d) The structure of the economy and labour mobility

A nation's economy is an important factor shaping modern labour mobility. The strength of an economy influences the level of labour mobility and involuntary job separations tend to rise during periods of economic downturn or stagnation. Globalisation and access to cheap labour markets are important factors contributing to multi-national companies moving their manufacturing bases from developed to developing economies, resulting in a greater reliance in affected economies on service based industries. This has subsequently influenced the ability of many people to change jobs. Jobs in the service industry place a priority on mental skills as opposed to the physical ability to produce something. In the context of information technology workers, Hyde recognised the importance of mental skills when he stated that the most important knowledge is 'the knowledge inside the heads of [its] employees' (Hyde 1998, 32). It should be noted that information technology is only one part of the services industry and that Hyde's comment may or may not apply to other parts of the service industry. The form of the employment relationship inside a labour market has also had a dramatic effect on labour mobility, specifically, the rise in non-standard forms of employment. Flexible forms of employment like casual work, contracting, part-time work and consulting encourage mobility of workers.

(e) What is the value of labour mobility?

Literature on labour mobility generally constructs value in terms of knowledge transfer and much of the American literature in this area is dominated by analysis of the 'high velocity' labour market for skilled workers in California's technology district of the Silicon Valley (Hyde 1998, 28). Highly mobile labour markets such as Silicon Valley are praised for the economic and social benefits created by the rapid transfer of

knowledge resulting from ‘knowledge spillover’ (Gilson 1999, 584), a consequence of ‘job hopping’ and ‘spinoff activity’ (Valletta 2002, 1). Employees and workers in general also benefit from high velocity labour markets in that they are able to develop their skills and employability through working for different enterprises, as well as potentially securing higher wages and better employment conditions. High velocity labour markets are contrasted to restrictive labour markets, where employers rigorously enforce trade secret laws and restrictive employment covenants. These markets are criticised on the basis of causing economic inefficiency through duplication and the failure to share solutions to common problems (Hyde 1998, 33). While restrictive labour practices are not traditionally associated with Silicon Valley, in 2013 and 2014, a number of American tech companies, including Apple, Google, Intel, Adobe, Pixar and Lucas Film were involved in disputes with technology workers over an ‘anti-poaching’ agreement between these enterprises that deflated the workers’ salaries. The two disputes were reportedly settled for over US\$330 million (Lieff et al, undated).

Theories on the value of labour mobility that focus on knowledge transfer and diffusion have limited application to the labour of playing baseball. After all, the labour of baseball involves the ability to execute the different skills involved in playing baseball, not the knowledge required to create a product or deal with a set of commercial problems. This will be examined in more detail in Chapter 8.

(f) Summary

Labour mobility is advanced by the ability of workers to choose their employer. Facilitating modern labour mobility are flexible forms of employment that permit workers to have multiple jobs at the same time or to easily change employers. The

level of labour mobility enjoyed by workers is influenced by an individual's personal circumstances, the occupation, the industry and the nature of an economy. Thus the level of labour mobility enjoyed by workers in professional baseball is likely to vary in each of the three leagues and the regulation of labour mobility by the law in the three countries under study will now be examined.

7.2 LAW AND LABOUR MOBILITY IN THE UNITED STATES

Labour mobility can be formally restricted during the employment relationship or after the termination of the employment relationship. Employers and employees in the United States enter various contractual relationships that may limit an employee's ability to change employers. Agreements between employers are common in the United States and also erect barriers to labour mobility. This section will now examine how contract law, labour law and antitrust law regulate labour mobility in the United States, not only providing external regulation of MLB but also influencing the rules and processes in the internal autopoiesis of the league.

(a) Unionisation, collective bargaining and the *National Labour Relations Act*

In the United States a majority of workers can form a collective bargaining unit that becomes the exclusive representative of all workers in collective bargaining,²⁰¹ thereby activating the protections of the NLRA. Unions have a duty to fair representation of all members but an agreement binds all members of the bargaining unit, not just union members. The NLRA attempts to achieve its aims by permitting collective negotiations, governing the negotiation of bargaining agreements and treating as unfair labour practices any attempts by an employer to interfere with the right of employees

²⁰¹ *National Labor Relations Act of 1935*, (49 Stat. 449) 29 U.S.C. § 151–169, § 159.

to form and join a union.²⁰² Unfair labour practices extend to an employer refusing to bargain with the certified representative of employees.²⁰³ In addition, the NLRA requires parties to bargaining to conduct negotiations in good faith (Read 2012, 133-134).²⁰⁴ But as Wollett observes, this duty does not require agreement on a subject of bargaining, only that the process give a good faith opportunity to create an agreement (Wollett 2008, 65). Unfair labour practices and good faith negotiations govern collective bargaining between MLB and MLBPA, the subjects of which can include labour controls that affect labour mobility.

Bargaining negotiations are at an 'impasse' when good faith negotiations are exhausted and there is no prospect of reaching an agreement. In *Powell v National Football League*²⁰⁵ the United States Court of Appeals for the Eighth Circuit stated that an impasse is reached when an employer and employees have exhausted all economic and legal tools available under labour law, including strikes by the labour union, lockouts by employers and claims to the NLRB.²⁰⁶ The Supreme Court has described impasse as a 'temporary deadlock or hiatus in negotiations' and is usually broken by a change of mind or the use of economic force.²⁰⁷ When the parties cannot move beyond the impasse, an employer has the right to make unilateral changes to working conditions by implementing their 'last, best offer'.²⁰⁸ Employees can challenge such changes on the basis of the employer's conduct constituting unfair labour practices (Feldman 2012, 1224, 1240-1241). As was discussed in Chapter 6.1 and 6.2, this occurred in the 1994

²⁰² Ibid § 158(a)(1).

²⁰³ Ibid § 158(a)(5).

²⁰⁴ Ibid § 158(d).

²⁰⁵ 930 F.2d 1293 (8th Cir 1989).

²⁰⁶ Ibid 1302-1303.

²⁰⁷ *Charles D. Bonanno Linen Service Inc v NLRB*, 454 U.S. 404, 411 (1982).

²⁰⁸ *TruServ Corp v NLRB*, 254 F.3d 1105, 1114 (D.D.C. 2001).

player strike when the MLBPA lodged an unfair labour practice claim with the NLRB, who then lodged an application for an injunction against owners in the United States District Court for the Southern District of New York. Justice Sotomayor granted the injunction, holding that impasse had not occurred and therefore the owners' changes to salary arbitration and free agency were unlawful as unilateral changes in work rules.²⁰⁹ The United States Court of Appeals for the Second District upheld this decision.²¹⁰

American courts have held that collective bargaining under the NLRA involves mandatory subjects of collective bargaining,²¹¹ such as wages and hours. Parties to collective bargaining can also negotiate over permissive subjects of bargaining, for example, individual bargaining rights and salary arbitration, but parties are not obligated under the NLRA to negotiate on such matters.²¹² Wollett questions the practical need for the distinction between mandatory and permissive subjects of bargaining, arguing that genuine problems between the bargaining parties should be negotiated and that management always has the right to say no, and after impasse, act unilaterally (Wollett 2008, 67).

(b) Collective bargaining and multi-employer associations

The long history of multi-employer associations in the United States pre-dates the 1930s and existed in industries like long shoring, transportation, hotels, construction and professional baseball. A multi-employer association involves small, large and one-person employers who collaborate to set wages, benefits and working conditions. In

²⁰⁹ *Silverman*, 880 F.Supp 246 (S.D. N.Y. 1995).

²¹⁰ *Silverman*, 67 F.3d 1054 (2d Cir. 1995).

²¹¹ *Labor Board v Borg-Warner Corp*, 356 U.S. 342 (1958).

²¹² *Silverman*, 67 F.3d 1054 (2d Cir. 1995).

the context of sports leagues, multi-employer associations also set labour controls that affect labour mobility. This cooperation represents a departure from the usual practice of firms competing against one another. Unions generally like multi-employer associations as they result in equal wages and conditions across an industry, allow unions to conserve resources and centralises employers into funding and administering employee benefit plans. Sanders observes that while private sector unionism has declined since the 1930s, the percentage of unionised workers under multi-employer agreements has remained constant at around 50 per cent (Sanders 2011, 339, 342, 346).

The Supreme Court in *NLRB v Truck Drivers Local 449*²¹³ summarised the role of multi-employer associations and bargaining as an attempt to neutralise the strength of unions.²¹⁴ Since 1938 the NLRB has claimed the power to certify these associations. The basis of the NLRB's policy is the assumption that as national labour policy in the United States prefers individual bargaining,²¹⁵ the NLRB will certify multi-employer associations if the member employers and the relevant union possess an unequivocal intention to be bound by collective rather than individual negotiations.²¹⁶ It should be noted that the NLRB is yet to determine whether a single club in a sports league can be a bargaining unit. But it has ruled that a league can be a bargaining unit for all member clubs, a decision upheld by the United States Court of Appeals for the Fifth Circuit.²¹⁷ The Supreme Court in *Brown v Pro Football Inc*²¹⁸ held that once multi-employer bargaining begins the unit must remain intact and employers cannot withdraw until a

²¹³ 353 U.S. 87 (1957).

²¹⁴ *Ibid* 94.

²¹⁵ *John Breuner Co*, 129 NLRB 394, 396 (1960).

²¹⁶ *Joseph McDaniel*, 226 NLRB 851, 852 (1976).

²¹⁷ *North American Soccer League v National Labor Relations Board*, 613 F.2d 1379, 1382-1383 (5th Cir. 1980).

²¹⁸ 518 U.S. 231 (1996).

bargaining cycle is complete.²¹⁹ However, the NLRA does not explicitly address multi-employer associations and the diverging opinions of Congress in 1947 resulted in no mention of multi-employer associations in the *Taft-Hartley Act*.²²⁰ The legislative inaction by Congress was interpreted by the Supreme Court as an endorsement of the NLRB's policy of certifying multi-employer associations.²²¹ Sanders argues that this paradigm has led courts to encourage multi-employer bargaining (Sanders 2011, 343).

The endorsement of multi-employer associations by the implicit actions of Congress and explicit acts of the courts is based on the broad aim of strengthening industrial peace and the benefits received by employers, employees and unions. In relation to unions, employers benefit from the leverage and strategy gained from a 'united front', an important advantage for small employers who face strong unions. Also, economies of scale allow multi-employer associations to decrease transaction costs attached to the need to negotiate similar agreements across an industry (Anon 1982, 692-694, 700), a benefit that applies to the 30 member clubs of MLB.

(c) Multi-employer associations and Major League Baseball

The league in professional baseball is a multi-employer association, a position endorsed by the Supreme Court in *Brown v Pro Football Inc.*²²² The MLB constitution and rules represent the formal agreements entered into by the 30 employer clubs of MLB. These agreements have been shaped by collective bargaining since the first Basic Agreement was entered into in 1968. All three sets of rules interact to contain labour controls that

²¹⁹ Ibid 244.

²²⁰ *Labor Management Relations (Taft-Hartley) Act*, Public Law No. 79-101, 61 Stat. 136 (1947).

²²¹ *NLRB v Truck Drivers Local 449*, 353 U.S. 87 (1957).

²²² 518 U.S. 231, 239-240 (1996).

affect labour mobility. Such controls include the reserve system, free agency and the right of a club to assign a player's contract. Ross and Szymanski identify that collective bargaining for joint venture sports leagues such as MLB face some problems, including the conflicting interests among team owners (for example teams with different revenue bases), the different impact of labour controls on teams and the need to obtain a 'super majority' of owners to agree to a collective agreement (Ross and Szymanski 2006, 234). Also, Gould contrasts professional sports leagues to regular multi-employer associations in that the regulation of the labour market by leagues involves controlling employee mobility and interrelated issues (Gould 2013, 36-37).

While the permitted subjects of collective bargaining remain the same regardless of the involvement of a multi-employer association, multi-employer bargaining agreements in professional sport in North America are different to standard agreements in that they may include uniform player contracts (see MLB Basic Agreement 2012, Schedule A – Uniform Player's Contract). This allows the labour controls (and general terms of employment) negotiated in collective bargaining between a league and the player union to be incorporated into the contracts of all players, leaving the majority of players unable to individually negotiate contractual terms that relate to labour mobility and central elements of employment. At the same time collective bargaining over uniform player contracts ensures consistency in employment conditions for all players.

(d) Exclusive contracts of service and labour mobility

When employees breach the term of a contract with an employer by going to work for another enterprise, the general position of courts in the United States is not to issue an order of specific performance against the employee. The development of American

common law in this area is influenced by British common law and the statement of Fry LJ in *De Francesco v Barnum*²²³ that courts are not prepared to compel a person to maintain a personal relationship with another when that person does not desire to maintain such a relationship. This position was based on the fact that contracts of service are not contracts of slavery and therefore specific performance is not a suitable remedy.²²⁴ However, British courts have created what is, in effect, an exception to this rule, a practice followed by American courts.

In limited circumstances, instead of issuing an order of specific performance, courts may grant an injunction to prevent a breach of contract. During the period from the late 1800s to the early 1900s, American courts recognised the principles adopted in the famous British case of *Lumley v Wagner*,²²⁵ a case that involved an opera singer entering a contract to exclusively provide her services to a theatre for a designated period of time.²²⁶ The *Lumley* decision restricts labour mobility for workers who perform ‘unique’ or ‘special’ services through the remedies available to employers. Because courts regard the work provided under a ‘special contract of services’ as so unique that no other person can perform them, courts insist that they cannot quantify damages for breach of such a contract. The High Court of Chancery did not grant an order of specific performance to require Wagner to work for the plaintiff. But it was willing instead to issue an injunction to restrain her from singing for any other employer during the exclusive period of her contract.²²⁷

²²³ (1890) 45 Ch D 430.

²²⁴ *De Francesco v Barnum* (1890) 45 Ch D 430, 438.

²²⁵ [1852] De G.M. and G. 687.

²²⁶ *Ibid* 867-688. For a discussion of *Lumley* in the context of sport in the United States, see Rapp 2006.

²²⁷ *Lumley* [1852] De G.M. and G. 687, 693.

Although American courts first applied the principles of *Lumley* in 1865,²²⁸ there was a delay before the principles were held to encompass the contracts of professional baseballers. Arthur Soden created the reserve system in 1879 (Edmonds, 2012, 40-47). With the support of the National Brotherhood of Professional Base Ball Players, professional baseball's first union, players successfully challenged the reserve system using contract law in several cases in 1890.²²⁹ A number of courts accepted the players' arguments that the reserve clause lacked fairness, mutuality and certainty and that the agreements were the product of a power imbalance between player and club.²³⁰ However, in 1902, the Supreme Court of Pennsylvania in *Philadelphia Ball Club v Lajoie*²³¹ applied the principles from *Lumley* to hold that the contract of a professional baseball player was a 'special contract of service' for an exclusive period of time. Instead of requiring specific performance or awarding damages for breach of contract,²³² the Court found Nap Lajoie's skills to be so unique that his loss would cause irreparable harm and issued an injunction to prevent him from changing teams.²³³ Weiler et al note that most courts after *Lajoie* refused to grant negative injunctions against baseball players, but the decision was important in that it prevented a star player from transferring from the National League to the rival American League (the two leagues shortly after agreed to form the Major Leagues in 1903). By the 1950s

²²⁸ *Ford v Jermon*, 6 Phila. 6 (Dist. Ct. 1865).

²²⁹ *Metro Exhibition Co. v Ward*, 9 NYS 779 (Sup. Ct. 1890), *Philadelphia Ball Club v Hallman*, 8 Pa. C. 57 (C.P. 1890) and *Metropolitan Exhibition Company v Ewing*, 42 F. 198 (C.C.S.D. N.Y. 1890).

²³⁰ *Metropolitan Exhibition Company*, 9 N.Y.S. 779, 785 (Sup. Ct. 1890), *Philadelphia Ball Club*, 8 Pa. C. 57, 58 (C.P. 1890) and *Metropolitan Exhibition Company*, 42 F.198 (C.C.S.D. N.Y. 1890). In the one exception the Pennsylvania County Court ruled against the player the *American Association Base-Ball Club v Pickett*, 8 Pa. C. 232 (C.P. 1890).

²³¹ 202 Pa. 210 (Pa. 1902).

²³² There are no cases in American sports where a club has received an award of damages against a player in a *Lumley* situation: Rapp 2006, 270.

²³³ *Lajoie*, 202 Pa. 210, 217-221 (Pa. 1902).

American courts were commonly issuing negative injunctions against athletes (Weiler et 2015, 158-161).²³⁴

While the early use of *Lumley* by American courts was initially limited to workers in theatre, professional baseball and specialised retail sales, its application quickly expanded to cover workers in a range of professions, including actors, artists, musicians, boxers, jockeys, inventors and managers (VanderVelde 1992, 776). VanderVelde argues the key labour issue raised by the use of injunctions to in affect prevent an employee from quitting and working for another employer is its violation of the American tradition of free labour and the right to quit a job (VanderVelde 1992, 775, 777, 782). Further, Riley argues the use of equity in employment matters promotes the old bias of the law that favours employers and is inappropriate for employment matters as it focuses on the strong bargaining position of employers, instead of protecting the vulnerable party in the employment relationship (Riley 2005b, 177). However, courts in the United States have determined that the use of *Lumley* style injunctions does not impinge upon an individual's right to work or other personal liberties. It only prevents the worker from performing similar work for another employer during the exclusive term of the contract.²³⁵ Similarly, British courts historically justified the use of a *Lumley* injunction on the basis that workers can seek employment in a different profession and have even acknowledged the negative financial impact on such workers in *Warner Brothers Pictures Inc v Nelson*.²³⁶ However the Court of Appeal rejected the negative financial impact in *Warner* in 1989

²³⁴ See eg *Central NY Basketball Inc v Barnett*, 181 N.E. 2d 506 (Ohio Ct. Comm. Pleas, 1961).

²³⁵ See *American Association Base-Ball Club*, 8 Pa. C. 232, 233 (C.P. 1890).

²³⁶ [1936] 3 All ER 160, 167.

in *Warren v Mendy*,²³⁷ a case that also held an injunction cannot be issued against the third party that initiates the breach of contract.²³⁸

Not only is the ability of professional baseball players to challenge labour controls in American courts using contract law extremely limited, players now agree to a *Lumley* style injunction in their uniform player contract. Players represent that they have ‘exceptional and unique skill’ as a baseball player and that their services are of a ‘special, unusual and unique character’ which cannot be adequately compensated for in damages. Therefore Major and Minor League players agree that their club is entitled to an injunction and other equitable relief to prevent them from playing baseball for another team during the term of the contract (Major League Uniform Player Contract, paragraph 4(a); Minor League Uniform Player Contract, paragraph XV.C).

(e) Labour mobility and non-compete clauses

Contracting practices and labour controls in MLB generally do not involve the use and enforcement of post-employment restrictive covenants. However, it is useful to note briefly some key features of the treatment of post-employment restrictive covenants, as the applicable practices form part of the broader restraint of trade doctrine and feature prominently in labour mobility literature. Therefore the treatment of post-employment restraints of trade provides some insight into how American law makers, courts, workers and employers approach labour mobility.

²³⁷ [1989] 3 All ER 103.

²³⁸ *Ibid* 116-117.

Post-employment non-compete clauses in employment contracts in the United States are not regulated by federal labour law but by contract law in each state. Only one state, California, prohibits the enforcement of restrictive covenants in employment contracts.²³⁹ The majority of states use the common law to regulate post-employment restrictive covenants in preference to statutory frameworks and a few states use a mix of common law and statute (Bishara 2006, 319). Most states that use legislation to govern restrictive covenants have codified the test contained in the *Restatement (Second) of Contracts*²⁴⁰ to determine whether a post-employment restraint is reasonable. The central elements of this test require that the non-compete clause be ancillary to a valid contract, the employee receive consideration, the restraint be necessary to protect an employer's legitimate business interest and the restraint be reasonable in terms of its scope, duration and geographic area.²⁴¹ The broader policy considerations of this test include determining whether the restriction is necessary to protect the employer's business and goodwill, whether the need to protect the employer is greater than the economic hardship imposed on the worker and whether the restriction is in the public interest.²⁴² Bishara notes that the diverse and at times divergent approaches to the enforcement of non-compete clauses adopted by state legislatures and courts can create uncertainty for employers, employees and industry (Bishara 2011, 756-757).

(f) Overview of antitrust law in the United States of America

Labour mobility and, in particular, collaborative labour control by employers are

²³⁹ CAL BUS & PROF CODE § 16600 (West 2002).

²⁴⁰ The American Law Institute, *Restatement of the Law Second - Contracts 2d*, as adopted and promulgated 17 May 1979.

²⁴¹ *Ibid* § 187.

²⁴² *Ibid* § 188.

subject to antitrust law. In the United States the key antitrust laws are the *Sherman Antitrust Act*,²⁴³ the *Clayton Antitrust Act*²⁴⁴ and the *Federal Trade Commission Act*.²⁴⁵ In general terms the purpose of these laws is to protect consumers from anticompetitive business practices that constrain competition and decrease wealth (Cooch 2013, 508). Specifically, an agreement which raises price, lowers output or makes output unresponsive to consumer demand will violate antitrust laws (Ross 2001, 133). The Supreme Court in *United States v Topco Associates Inc*²⁴⁶ described antitrust laws and in particular the *Sherman Antitrust Act* as the ‘Magna Carta of free enterprise’, in that they preserve economic freedom and the American system of free enterprise.²⁴⁷ Ameringer views the importance of the *Sherman Antitrust Act* in similar terms, describing the statute as the ‘gospel of free enterprise’ and the second constitution of the United States (Ameringer 2008, 196). Similarly, Ross argues the *Sherman Antitrust Act* has a democratic function in that voters in 1890 and today are concerned about the affects of a restraint on them as workers and consumers (Ross 1997, 530). Bauer notes that antitrust law represents the only area of federal law in the United States where enforcement is conducted by both a branch of the executive government, the Antitrust Division of the Department of Justice and an administrative agency, the Federal Trade Commission. Yet it is private actors who initiate 90 to 95 per cent of antitrust lawsuits and companies and individuals also use class actions to enforce antitrust law (Bauer 2004, 306-308).

²⁴³ 15 U.S.C. §§ 1-7.

²⁴⁴ 15 U.S.C. §§ 8-11.

²⁴⁵ 15 U.S.C. §§ 41-58.

²⁴⁶ 405 U.S. 596 (1972).

²⁴⁷ *Topco Associates*, 405 U.S. 596, 610 (1972).

The *Sherman Antitrust Act* attaches criminal sanctions to unreasonable restraints of trade and monopolies, while the *Clayton Antitrust Act* involves civil penalties and prohibits mergers and acquisitions that are anticompetitive. Criminal prosecutions are infrequent and are reserved for bid-rigging and other forms of price fixing. Penalties for such offences are fines of up to US\$10 million for corporations or US\$350,000 for individuals, a maximum term of imprisonment of three years, or both.²⁴⁸ Criminal fines extend to pecuniary losses or gains resulting from anticompetitive conduct and the fine cannot exceed more than twice the loss or gain.²⁴⁹ Civil remedies also include monetary relief in the form of the plaintiff receiving treble damages, costs and lawyer's fees,²⁵⁰ injunctive relief²⁵¹ and a judicial declaration that the defendant's conduct violates antitrust laws (Bauer 2014, 306-309).²⁵²

(g) Labour, anticompetitive behaviour and section 1 of the *Sherman Antitrust Act*

Labour arrangements are regulated by antitrust law in the United States through the prohibition in section 1 of the *Sherman Antitrust Act* on contracts, combination and conspiracies that unreasonably restrain interstate and foreign trade. The meaning of section 1 is open to judicial interpretation (Ameringer 2008, 196) and the Supreme Court has held that it does not prohibit all 'unreasonable' restraints, only restraints affected by a contract, combination or conspiracy.²⁵³ Further, the Supreme Court has held that no agreement need exist for there to be a conspiracy²⁵⁴ and the United States Court of Appeals for the Eighth Circuit ruled that conspiracy can be proved by inference

²⁴⁸ *Sherman Antitrust Act*, 15 U.S.C. §§ 1-2.

²⁴⁹ *Criminal Fines Improvements Act of 1987*, Pub. L No 100-185, 18 U.S.C. § 3571 (2004).

²⁵⁰ *Sherman Antitrust Act*, 15 U.S.C. § 15.

²⁵¹ *Ibid* § 26 (2004).

²⁵² *Declaratory Judgment Act*, 15 U.S.C. § 2201 (2004).

²⁵³ See *Chicago Board of Trade v United States*, 246 U.S. 231 (1918) and *Copperweld Corp v Independence Tube Corp.*, 467 U.S. 752 (1984).

²⁵⁴ *American Tobacco v United States*, 328 U.S. 781, 809 (1946).

from the actions of the alleged conspirators.²⁵⁵ Section 1 of the *Sherman Antitrust Act* is subject, however, to the exceptions discussed in the following sections.

The necessity for judges to interpret the ambiguous language in section 1 of the *Sherman Antitrust Act* has seen courts in the United States develop three tests to determine whether conduct violates this section: the *per se* rule, the rule of reason and the ‘quick look’ approach. Parties to a dispute involving section 1 do not always agree on which test should apply, leaving the court to make a decision based on case law and the facts of a case.²⁵⁶ The fundamental antitrust law issue to be determined that is common to all three tests is whether the exclusive agreement intended to or did in fact harm competition in the relevant market.²⁵⁷ These three tests will now be briefly examined.

Conduct that is clearly anti-competitive and lacks any pro-competitive features is said to be illegal *per se* (Anderson 2002, 126-131),²⁵⁸ a concept described by the United States Court of Appeals for the District of Columbia Circuit in *Smith v Pro Football Inc*²⁵⁹ as a ‘judicial shortcut’.²⁶⁰ According to this test, a court must weigh all circumstances in deciding whether a practice should be prohibited on the basis that it imposes an unreasonable restraint,²⁶¹ and that there is no need for a detailed inquiry into the harm caused by the conduct or the rationale of the business for engaging in the

²⁵⁵ *ES Development v RWM Enterprises*, 939 F.2d 547, 553-554 (8th Cir. 1991).

²⁵⁶ *Prime Healthcare Services Inc v Service Employees International Union*, Civil Action No. 11-cv-2652-GPC-RBB (S.D. Cal), Order, 17.

²⁵⁷ *Rutman Wine Co v E & J Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987).

²⁵⁸ *Northern Pacific Railway Co v United States*, 356 U.S. 1 (1958) and *Broadcast Music Inc v Columbia Broadcast Systems Inc*, 441 U.S. 1 (1979).

²⁵⁹ 593 F.2d 1173 (D.C. Cir. 1978).

²⁶⁰ *Ibid* 1181.

²⁶¹ *Leegin Creative Leather Products Inc v PSKS Inc*, 551 U.S. 547 (2007).

conduct.²⁶² A *per se* inquiry is possible due to the courts' experience in dealing with antitrust disputes²⁶³ and allows specific types of arrangements to be deemed to be violations of section 1 if they are fundamentally illegal. The effect is that no examination of the facts is needed to determine the reasonableness of the restraint regarding the operation of market forces.²⁶⁴ Examples of such agreements include horizontal price fixing, division of markets and group boycotts.²⁶⁵ But quick assessments of the anti-competitive effects of an arrangement are not always possible and the functionality of this test is influenced by the complexity of the economy (Cooch 2013, 509-510).

Due to the inherent limitations of the *per se* rule, American courts use the rule of reason as a default test in more complex antitrust situations.²⁶⁶ The rule of reason is used to determine whether an agreement's anticompetitive effects outweigh its competitive benefits.²⁶⁷ This test usually involves a court examining the degree of collusion pertaining to the restraint, the history of the restraint, its rationale and its effect on the market (McCann 2010, 736-737). Importantly, the Supreme Court in *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma*²⁶⁸ ruled that the rule of reason is the appropriate test for industries where horizontal restraints on competition are essential in making the product available.²⁶⁹ While this ruling was in relation to a television agreement of the NCAA, as Ross identifies, the

²⁶² *Northern Pacific Railway Co v United States*, 356 U.S. 1 (1958).

²⁶³ *Pro Football Inc*, 593 F.2d 1173, 1178 (D.C. Cir. 1978).

²⁶⁴ *Business Electronics Corp v Sharp Electronics Corp*, 485 U.S. 717, 723 (1988).

²⁶⁵ *American Ad Management Inc v GTE Corp*, 92 F.3d 781, 784 (9th Cir. 1996).

²⁶⁶ *Texaco v Dagher*, 547 U.S. 1, 5 (2006).

²⁶⁷ *Chicago Board of Trade v United States*, 246 U.S. 231 (1918).

²⁶⁸ 68 U.S. 85 (1984).

²⁶⁹ *Ibid* 100.

rationale applies to agreements between owners in professional sport, including baseball (Ross 1995, 178).

There are four elements of the rule of reason test. First, a plaintiff must prove there was a contract, combination or competition among two or more persons or distinct business entities. Second, this arrangement must be intended to harm or restrain trade or commerce among the States or with foreign nations. Third, the harm must injure competition. Finally, the harm suffered by the plaintiff must flow from an anti-competitive aspect of the conduct in question.²⁷⁰ To be unreasonable under this test a restraint must have the ‘net effect’ of substantially lessening competition.²⁷¹

In applying the rule of reason test to restraints of trade in sports leagues, Ross observed that the Supreme Court in *National Collegiate Athletic Association* used a ‘structured rule of reason’ (Ross 1995, 178). In this case the Supreme Court recognised that sports leagues must cooperate on a range of issues for a product to exist.²⁷² A structured rule of reason involves an assessment of the nature of the agreements in question and whether they were designed to restrain trade.²⁷³ For example, in *National Collegiate Athletic Association* the Court held that the rules employed by the NCAA to regulate the structure and nature of competition in college football can be justified on the basis of marketing the ‘brand’ of college football, protecting the integrity of this brand and differentiating the amateur sport of college football from competing products like Minor League baseball.²⁷⁴ Further, Ross noted that the *Sherman Antitrust Act* permits

²⁷⁰ *Brantley v NBC Universal Inc*, 675 F.3d 1192, 1197 (9th Cir. 2012) cert. denied, 133 S. Ct. 573, 184 L. Ed..2d 374 (U.S. 2012).

²⁷¹ *Pro Football Inc*, 593 F.2d 1173, 1183 (1978).

²⁷² *National Collegiate Athletic Association*, 68 U.S. 85, 101 (1984).

²⁷³ *Ibid* 103.

²⁷⁴ *Ibid* 101.

agreements that limit competition for the services of players if they are needed to maintain competitive balance²⁷⁵ or preserve the game's integrity (Ross 1995, 179).²⁷⁶ The Supreme Court stated that the 'essential inquiry' is whether the challenged restraint enhances competition.²⁷⁷ If individual competitors lose their ability to compete and price is not responsive to consumer demands, the defendant must demonstrate that the restraint is justified on the basis of competition.²⁷⁸

Recently courts have adopted a modified version of the rule of reason through the 'quick look' approach. This is used when the *per se* rule does not automatically apply but the anticompetitive effects of the conduct can be determined quickly. A lower threshold is imposed than the rule of reason and once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to prove competitive justifications for the restraint (Anderson 2002, 126-131).²⁷⁹

(h) Labour, monopolies and section 2 of the *Sherman Antitrust Act*

Antitrust laws can also be used to challenge labour arrangements under section 2 of the *Sherman Antitrust Act*, which prohibits agreements that monopolise interstate commerce or represent a conspiracy to monopolise interstate commerce. To prove a monopoly a plaintiff must demonstrate a specific intent to control prices or destroy competition and predatory or anticompetitive conduct aimed at achieving that purpose. There must be a high probability of the defendant succeeding and causing antitrust

²⁷⁵ *McNeil v National Football League*, 790 F.Supp 871,982 (D. Minn. 1992).

²⁷⁶ *Molinas v National Basketball Association*, 190 F. Supp. 241 (S.D. N.Y. 1961).

²⁷⁷ *National Collegiate Athletic Association*, 68 U.S. 85, 104 (1984).

²⁷⁸ *Ibid* 107-113.

²⁷⁹ *National Society of Professional Engineers v United States*, 435 U.S. 679 (1978) and *FTC v Indiana Federation of Dentists*, 476 U.S. 447 (1986).

injury.²⁸⁰ Similarly, to prove there is a conspiracy to monopolise, a plaintiff must demonstrate the existence of a combination or conspiracy to monopolise, that there was an overt act in furtherance of the conspiracy and the specific intent to monopolise will result in antitrust injury.²⁸¹

(i) Labour's exemptions from antitrust laws

The potential for the activities of labour, in particular unions and collective agreements, to violate the basic principles of antitrust law has led to the development of both statutory and non-statutory exemptions for labour arrangements. In 1908, the Supreme Court found in the *Danbury Hat* case that a union's group boycott of non-union goods was a conspiracy that violated section 1 of the *Sherman Antitrust Act* and awarded damages of US\$240,000.²⁸² One of the key aims of the *Clayton Antitrust Act of 1914* was to prevent courts from applying antitrust law in a similar manner to the court in the *Danbury Hat* case. Section 6 of the *Clayton Antitrust Act* states that the labour of a human is not a commodity or article of commerce and in addition it excludes labour unions from the antitrust law definition of illegal combinations or conspiracies that restrain trade. Also, section 20 of the *Clayton Antitrust Act* prohibits the granting of restraining orders or injunctions in relation to disputes that arise between an employer and employee regarding the terms of employment or in relation to activities related to terminating any relation of employment or ceasing to perform work by peaceful means. However, Tyras observed that despite the introduction of the *Clayton Antitrust Act*, unions continued to lose antitrust cases due to the courts' interpretation of ambiguous language in antitrust legislation (Tyras 1998, 315-316).

²⁸⁰ *Rebel Oil Company Inc v Atlantic Richfield Co*, 51 F.3d 1421, 1433 (9th Cir. 1995).

²⁸¹ *Paladin Associates Inc v Montana Power Co*, 328 F.3d 1145, 1158 (9th Cir. 2003).

²⁸² *Loewe v Lawlor*, 208 U.S. 274 (1908).

The ongoing tension between labour law and antitrust law created by courts enforcing antitrust laws against unions led to the passing of the *Norris-LaGuardia Act*²⁸³ in 1932. Congress attempted to limit the ability of courts to apply antitrust law to union activities by setting out a number of matters related to labour disputes that protect unions from antitrust law.²⁸⁴ These measures were supported by the passage of the NLRA in 1935, which as was seen in Chapter 4, among other things, protects the right of employees to form unions and collectively bargain.²⁸⁵ Yet the statutory exemption from antitrust laws for unions is limited to specific situations, leading the courts to develop a non-statutory exemption for unions (Tyras 1998, 316-318).

The non-statutory labour exemption is particularly important for professional sport as the exemption applies to restrictive labour practices. The elements of the non-statutory labour exemption expressed in *National Football League v Mackey*²⁸⁶ were that the restrictive practice only affect the parties to the collective agreement, relate to a mandatory subject of collective bargaining and be the product of good faith bargaining (Tyras 1998, 298, 318-319 and Powell 2013, 152).²⁸⁷ McCann identifies the basis of the labour exemption as the belief that working conditions are enhanced when employees negotiate collectively, not individually, and that collective bargaining is likely to give employees better leverage to improve working conditions. Hence, employers can impose restraints through collective negotiation, rather than negotiate

²⁸³ *Norris-LaGuardia Act of 1932*, ch. 90, § 1, 47 Stat. 70 (1932).

²⁸⁴ *Ibid* § 4, 47 Stat. 70 (1932).

²⁸⁵ *National Labor Relations Act of 1935*, (49 Stat. 449) 29 U.S.C. § 151–169, § 151.

²⁸⁶ 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

²⁸⁷ *National Football League v Mackey*, 543 F.2d 606, 615 (8th Cir. 1976).

individually and risk breaching section 1 of the *Sherman Antitrust Act* (McCann 2010, 741).

The Supreme Court expanded the non-statutory labour exemption to antitrust law in 1996 in *Brown v Pro Football Inc*,²⁸⁸ by applying the exemption to agreements between employers in a multi-employer bargaining unit. It was held that when an impasse occurs during collective bargaining, management has the right to unilaterally impose its last offer to the union without being subject to antitrust law.²⁸⁹ In these circumstances, the Court ruled that the non-statutory exemption continues until there is distance in time and circumstances from the collective bargaining process.²⁹⁰

The decision in *Brown* supports the earlier decision by the Court of Appeals for the Eighth Circuit in *Powell v National Football League*²⁹¹ that impasse does not bring to an end the non-statutory exemption, as the parties can still resolve their differences through strikes, lockouts and an application to the NLRB (Powell 2013, 152-153). The non-statutory exemption applies both to the completed agreement and the bargaining process. The Supreme Court in *Brown* emphasised the need to place some restraints on competition to ensure there is effective collective bargaining (Cooch 2013, 515).²⁹² Importantly, the majority of the Supreme Court also rejected the players' argument, supported by the dissenting judgment of Stevens J,²⁹³ that due to the 'special' status of professional sport, the non-statutory labour exemption should not be applied to an impasse involving a players' union and the league as a multi-employer bargaining

²⁸⁸ 116 U.S. 231 (1996).

²⁸⁹ *Ibid* 238.

²⁹⁰ *Ibid* 250.

²⁹¹ 930 F.2d 1293 (8th Cir. 1989).

²⁹² *Brown* 116 U.S. 231, 248-250 (1996).

²⁹³ *Ibid* 255-257.

unit.²⁹⁴ The decision represents a rejection of the ‘specificity of sport’, an influential principle in Europe that requires the special treatment of sport under the law due to its ‘uniqueness’ (Colucci 2011, 35-36), and which will be examined in Chapter 9 as a justification for baseball’s labour system.

The decisions in *Brown* and *Powell* recently saw players in the National Football League and the National Basketball Association dissolve and decertify their unions with the NLRB in response to lockouts from their respective leagues (see Powell 2013; Feldman 2012). Such an extreme course of action allowed players to individually challenge the validity of labour restraints under section 1 of the *Sherman Antitrust Act* as the collective bargaining relationship was over. The player unions in both the National Football League²⁹⁵ and the National Basketball Association²⁹⁶ adopted this course of action in 2011 after owners in each league locked out players at the conclusion of their respective collective bargaining agreements.²⁹⁷ The decertification of the player unions and subsequent antitrust claims against the leagues’ restrictive labour practices assisted both player unions to negotiate what were considered to be favourable collective agreements (Grow 2013, 476-477). Powell notes that the decertification of unions and even the prospect of decertification, and the use of antitrust law, now

²⁹⁴ Ibid 248-249.

²⁹⁵ *Brady v National Football League*, 644 F.3d 661 (8th Cir. 2011). At trial the District of Minnesota ruled that the collective bargaining relationship had ended and granted the players’ injunction against the lockout. But the 8th Circuit overturned the decision on the basis that the *Norris-LaGuardia Act* limits the ability of federal courts to issue injunctions in labour disputes: Powell 2013, 156-157.

²⁹⁶ *Anthony v National Basketball Association*, No. 11-5525 (N.D. Cal. 2011). The players attempted to circumvent the decision in *Brady* by suing for damages that resulted from the lockout. However, the litigation was settled: Powell 2013, 157-158.

²⁹⁷ In 2012, players in the National Hockey League voted to decertify their union, only for the league to seek declaratory relief that their lockout was legal: Powell 2013, 148.

represent a powerful bargaining tool during collective negotiations in American professional sport (Powell 2013, 148).

(j) Antitrust law and the single entity defence

In the context of the labour practices of professional sporting leagues, an important defence raised by some owners to the prohibition of anti-competitive practices is the ‘single entity’ defence. The argument is that as a single entity, a professional sports league cannot enter an agreement that is a contract, combination or conspiracy under section 1 of the *Sherman Antitrust Act*. The logic of the defence is simple: a single entity cannot compete with itself. In applying the defence to a corporation and its wholly owned subsidiaries, the Supreme Court in *Copperweld* held that the single entity defence is available to entities that have a shared corporate consciousness and therefore their collaboration does not deprive the market of economic competition (see McKeown 2011).²⁹⁸

In assessing player restraints, American courts have typically rejected arguments by professional sporting leagues that they are single entities.²⁹⁹ Instead leagues have been held to be joint ventures and the rule of reason has been used to determine the legality of their arrangements. Jacobs argues that professional sports leagues fail the *Copperweld* test because the individual teams are financially, legally and managerially distinct from the other joint venturers (Jacobs 1991, 40). Expanding upon this is Ross, who notes that the courts have held sports leagues to be separately owned

²⁹⁸ *Copperweld Corp*, 467 U.S. 752 (1984).

²⁹⁹ See eg *McNeil v National Football League*; *Los Angeles Memorial Coliseum Commission v National Football League*, 726 F.2d 1381 (9th Cir. 1984); *Chicago Professional Sports Ltd Partnership v National Basketball Association*, 874 F.Supp 844, (N.D. Ill. 1995), *vacated*, 95 F.3d 593 (7th Cir. 1996).

unincorporated associations which do not share profits, have independent management for recruiting players and actively compete against each other to recruit players (Ross 1997, 550).

The *American Needle* cases provide insight into the operation of *Copperweld* in professional sport. This case involved the promotions company of the National Football League granting an exclusive license to Reebok for the use of its team names and logos on headwear. In response, apparel maker American Needle, which had a non-exclusive license under the previous regime, initiated antitrust proceedings (McKeown 2011, 518-519). The District Court granted summary judgment for the National Football League and the United States Court of Appeals for the Seventh Circuit held the National Football League to be a single entity and exempt from antitrust laws in relation to its licensing of intellectual property for merchandising (McCann 2010, 741-742).³⁰⁰ However, the Supreme Court unanimously reversed the decision of the Seventh Circuit and under section 1 of the *Sherman Antitrust Act* held that the National Football League and its teams cannot be a single entity because the teams are independently owned, their decision making is not unitary, nor is it the aggregate of economic power.³⁰¹ Also, the Supreme Court found that the National Football League teams are separate profit maximising entities whose intellectual property interests do not necessarily align, resulting in different levels of intellectual property rights and competition as to their exploitation.³⁰²

³⁰⁰ *American Needle Inc v National Football League*, 538 F.3d 736 (7th Cir. 2008).

³⁰¹ *American Needle Inc v National Football League*, 130 Supreme Court 2201 (2010).

³⁰² *Ibid* 2213.

(k) Labour and Major League Baseball's antitrust law exemption

During the 20th century players and owners of clubs in rival leagues to MLB used the *Sherman Antitrust Act* to challenge the legality of the foundation of the Major League labour system: the reserve system. These stakeholders claimed that MLB's labour system breached section 2 of the *Sherman Antitrust Act* as an illegal combination, conspiracy or monopoly or an attempt to monopolise professional baseball in the United States and was an unreasonable restraint of trade under section 1.³⁰³ The antitrust cases involving the reserve system and MLB resulted in professional baseball holding a special position under American antitrust law and the antitrust cases that were briefly discussed in Chapter 6 will now be examined in the context of labour mobility.

The establishment in the early 1900s of a short-lived major league, the Federal League, which competed with the American and National Leagues for players and fans, led to the first two antitrust cases that established baseball's antitrust exemption. The new player friendly league offered multi-year contracts without a reserve clause, leading to the defection to it of over 200 players from the American and National Leagues (Romano 2013, 37). In 1914 the Chicago White Sox of the American League attempted to obtain an injunction to prevent Harold Chase from transferring to the Buffalo Fub-Feds in the Federal League. In *American League Baseball Club of Chicago v Chase* the Supreme Court of New York ruled that the *Sherman Antitrust Act* did not apply to MLB because the business of baseball did not involve interstate trade or commerce, a threshold requirement in the *Sherman Antitrust Act*.³⁰⁴ However, the Court held that baseball's regulatory system promoted a monopoly that contravened the common law

³⁰³ *Toolson v New York Yankees*, 346 U.S. 356, 362-364 (1953).

³⁰⁴ 149 N.Y.S. 6, 16 (N.Y.S. 1914).

and impeded personal liberty. Therefore the Court overturned a lower court's decision to issue an injunction that prevented Chase from changing leagues.³⁰⁵

The first Supreme Court antitrust case involving baseball was in 1922, when the owner of the Federal League's Baltimore club, unhappy with the compromise for the league to be absorbed by the American and National Leagues that excluded his club alleged a conspiracy to monopolise major league baseball in *Federal Baseball Club of Baltimore Inc v National League of Professional Baseball Clubs*.³⁰⁶ The Court unanimously applied the logic of *Chase* and held that baseball was not interstate trade or commerce and, that the exhibition of baseball games did not constitute commerce,³⁰⁷ thereby establishing MLB's judicial exemption from antitrust law.

Later, in 1948, as discussed in Chapter 6, Danny Gardella and Fred Martin, two former Major League players blacklisted by MLB after their brief time in the Mexican League (another league that failed in an attempt to compete with MLB), simultaneously lodged the first antitrust cases initiated by players against MLB. The cases of *Gardella v Chandler*³⁰⁸ and *Martin v National League Baseball Club*³⁰⁹ saw the United States Court of Appeals for the Second Circuit reinstate the complaint dismissed by the District Court³¹⁰ and Frank J refer to *Federal Baseball* as 'an impotent zombie'.³¹¹ MLB chose not to appeal to the Supreme Court and resolved the dispute by settling

³⁰⁵ Ibid 16-17.

³⁰⁶ 259 U.S. 200 (1922).

³⁰⁷ Ibid 208-209.

³⁰⁸ 172 F.2d 402 (2d Cir. 1949).

³⁰⁹ 174 F.2d 917 (2d Cir. 1949).

³¹⁰ *Gardella v Chandler*, 79 F. Supp. 260 (S.D.N.Y. 1948).

³¹¹ *Gardella*, 172 F.2d 402, 409 (2d Cir. 1949).

with Gardella and Martin and reinstating all blacklisted players (Schiff and Jarvis 2016, 57, 644; Irwin 1991, 294; Blackwell 1971, 862-863; Pierce 1958, 573).

In the early 1950s a Minor League player called George Toolson alleged the New York Yankees breached antitrust law by using the reserve system to prevent him from reaching the Major Leagues. Both the United States District Court for the Southern District of California and the United States Court of Appeal for the Ninth Circuit denied their jurisdiction on the basis of *Federal Baseball*.³¹² Toolson appealed to the Supreme Court³¹³ and in 1953 *Toolson v New York Yankees*³¹⁴ affirmed *Federal Baseball* and ruled that it had no jurisdiction to apply antitrust law to MLB. They extended the precedent by requiring legislative intervention by Congress.³¹⁵ Mann is critical of the logic in *Toolson* as previous cases on the commerce clause in the *Sherman Antitrust Act* had overturned earlier cases in the relevant industry and because the legislative history of the *Sherman Antitrust Act* did not indicate Congress had intended to exclude MLB (Mann 2012, 593). Neville supported this position as early as 1947 when he stated that the meaning of ‘commerce’ for the purpose of antitrust law was not static but dependent on relevant factors at a given time (Neville 1947, 215). However the rationale underlying *Toolson* may have been from a judicial fear that competition in

³¹² *Toolson v New York Yankees*, 101 F. Supp. 93 (S.D. Cal. 1951) affirmed, 200 F.2d 198 (9th Cir. 1952).

³¹³ In hearing *Toolson* the Supreme Court granted *certiorari* to hear appeals in two other related cases. Walter Kowalski was a Minor League player who like Toolson argued his path to the Major Leagues was being blocked by the Brooklyn Dodgers’ use of the reserve clause. His case was dismissed on the basis of *Federal Baseball* in *Kowalski v Chandler*, 202 F.2d 413 (6th Cir. 1953). Corbett owned a Minor League team that was prevented by MLB from signing players returning from the Mexican League. On the basis of *Kowalski* Corbett lost his case in *Corbett v Chandler*, 202 F.2d 428 (6th Cir. 1953).

³¹⁴ 346 U.S. 356 (1953).

³¹⁵ *Ibid* 356-357 (1953).

sports labour markets was unprecedented and could ruin baseball. Therefore any application of antitrust law required special legislation.

By the time the Supreme Court heard *Flood v Kuhn*³¹⁶ in 1972, the most recent Supreme Court case on baseball's antitrust exemption, the Supreme Court and other courts had ruled that antitrust laws applied to American football,³¹⁷ legitimate theatre,³¹⁸ boxing,³¹⁹ ice hockey,³²⁰ basketball³²¹ and golf.³²² This time Curt Flood used antitrust law to challenge his trade from the St Louis Cardinals to the Philadelphia Phillies. A 5-3 majority of the Supreme Court in *Flood* acknowledged that *Federal Baseball* was incorrect and that professional baseball is a business engaged in interstate commerce. Interestingly, Justice Marshall's dissent stated that collective bargaining agreements allow parties to 'restrain' trade to a greater degree than management could do unilaterally and that it is necessary to resolve some cases by 'striking a balance' between the purposes and competing interests of labour and antitrust statutes.³²³ However, the majority judgment by Blackmun J held baseball's reserve system and exemption from federal antitrust law to be 'an exception and an anomaly' and that *Federal Baseball* and *Toolson* are 'an aberration confined to baseball'.³²⁴ This position

³¹⁶ 407 U.S. 258 (1972).

³¹⁷ *Radovich v National Football League*, 352 U.S. 445 (1957) overturned *Radovich v National Football League*, 231 F.2d 620 (9th Cir. 1956). However, Ross notes that the National Football League achieved some protection from antitrust laws in 1966 when Congress passed legislation that allowed the league to merge with a rival, the American Football League, thereby giving it the status of a monopoly. See Act of Nov. 8, 1966, Pub. L. No. 89-800, 80 Stat. 1515 (1966) (codified as amended at 15 U.S.C. §§ 1291-1293 (1982)); Ross 1989, 645.

³¹⁸ *United States v Shubert*, 348 U.S. 22 (1956).

³¹⁹ *United States v International Boxing Club*, 348 U.S. 236 (1955).

³²⁰ *Peto v Madison Square Garden Corp*, 1958 Trade Cases, 69,106 (S.D. N.Y. 1958).

³²¹ *Haywood v National Basketball Association*, 401 U.S. 1204 (1971).

³²² *Deesen v Professional Golfers' Association*, 358 F.2d 165 (9th Cir. 1966). cert. denied, 385 U.S. 846 (1966).

³²³ *Flood*, 407 U.S. 258, 294 (1972).

³²⁴ *Ibid* 282. Ross argues that Justice Blackmun's use of the words 'anomaly' and 'aberration' hides the Court's policy grounds for the decision, which was that the reserve system was needed

under antitrust law was justified by Blackmun J on the basis of baseball's unique characteristics and needs.³²⁵ The Supreme Court supported this position by the finding of a 1952 House of Representative's sub-committee hearing on baseball's antitrust exemption that there was no other 'feasible' substitute to the reserve clause to protect the integrity of the game and ensure there was competitive balance.³²⁶ Therefore the Supreme Court once again preserved baseball's antitrust exemption by denying its own jurisdiction on the basis of precedent and *stare decisis* (Ross 1995, 284).³²⁷ Also, the Court found that Congress had refused to overturn *Federal Baseball* despite introducing over 50 bills since *Toolson* on antitrust law and baseball,³²⁸ and that Congress should remedy any 'inconsistency or illogic'.³²⁹ This basis for inaction has been criticised on the grounds that the Supreme Court created MLB's antitrust exemption and therefore it, not Congress, should remove the exemption (see eg Ganin 2014, 1169).

(I) The impact of the antitrust exemption on the evolution of Major League Baseball's autopoietic system of labour regulation

MLB's exemption from antitrust law has had a profound impact on MLB's autopoietic system of regulation. For the 50 years between the *Federal Baseball* decision in 1922 and *Flood* in 1972, the Supreme Court and Congress refused to intervene in the regulation of labour in MLB. Thus baseball's reserve system, the cornerstone of

to preserve the integrity of the game and that the reserve system would have violated antitrust doctrines at the time: Ross 1995, 173.

³²⁵ *Flood*, 407 U.S. 258, 282 (1972).

³²⁶ *Ibid* 272, referring to *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary*, H.R. REP. No. 2002, 82d Cong., 2d Sess. 50-57 (1952).

³²⁷ *Flood*, 407 U.S. 258, 284 (1972).

³²⁸ *Ibid* 281. Ross notes that *Flood* has been attacked for its overreliance on Congressional inaction to support previous antitrust cases and argues that the Supreme Court will apply precedent when 'reliance interests' (MLB owners) are strong and the public interest is served by upholding the precedent: Ross 1995, 171, 172.

³²⁹ *Flood*, 407 U.S. 258, 284 (1972).

MLB's labour system and the general monopolistic practices of MLB and its owners, was not subjected to the external scrutiny of antitrust laws. The effect on MLB's labour system was profound. The autopoietic system of labour evolved to be dominated by a single internal regulatory actor, the owners, resulting in a regulatory system where players had little control over their labour and their wages were suppressed by the reserve system.

The appointment of Marvin Miller as chief executive officer of MLBPA in 1966 marks an important period in the evolution of this autopoietic system as the union turned to labour law and the protections afforded by collective bargaining in the NLRA to rectify the imbalance between owners and players. As discussed in Chapter 5.4, the first MLB collective bargaining agreement was agreed to in 1968. When Flood lost his antitrust challenge to the reserve system, in 1975 MLBPA used the grievance procedures in the collective agreement to successfully challenge the owners' argument that the reserve system operated in perpetuity, and to recongise the concept of free agency. Importantly, labour relations in MLB became subject to the external regulation of the NLRA and numerous rounds of collective bargaining would force owners to shift some power to players and negotiate key features of MLB's autopoietic system of labour regulation.

(m) Antitrust law, the *Curt Flood Act* and the partial repeal of *Federal Baseball*

As was the preferred option by the Supreme Court, Congress eventually intervened in the antitrust regulation of Major League labour. As discussed in Chapter 5, the catalyst for change was the 1994 player strike and cancellation by owners of the season and the World Series. Subsequent collective bargaining in 1995 and 1996 saw MLB and MLBPA agree to lobby Congress to repeal the antitrust exemption (MLB Basic

Agreement 1997, article XXVIII). In an effort to protect its autopoietic system of labour regulation and (ironically) to prevent unwanted external regulation from Congress, the two parties proposed a bill to Congress that was passed with some modification by Congress as the *Curt Flood Act of 1998* (Staudohar 2002, 16; Dryer 2008, 271; Roberts 1999, 415-416; Edmonds 1999, 318; Hyde 1998). Notably, Congressional intervention took place decades after the Supreme Court requested such action in *Toolson* and *Flood*.

The *Curt Flood Act* only partially amended MLB's judicial antitrust exemption, which applied to all of the business of baseball,³³⁰ not just the reserve system. Sections 2 and 3 of the *Curt Flood Act* apply American antitrust law to the employment of Major League players only. But by 1998 American labour law and the NLRA were firmly entrenched as the key external government regulations that governed labour relations in MLB. Therefore, when combined with the statutory and non-statutory exemptions collective agreements enjoy from antitrust law, the *Curt Flood Act* has had little real effect on the regulation of Major League labour. Further, Nathanson notes the *Curt Flood Act* reinforces the antitrust exemption through the activities excluded from the legislation (Nathanson 2013, 49). It has been argued that section 3 of the *Curt Flood Act* expressly excludes from antitrust laws umpires, the labour of Minor League players, the Professional Baseball Agreement between Major and Minor League Baseball and the activities of the MiLB. This outcome was in part the product of Minor League team owners lobbying their local Congressmen not to apply antitrust law to Minor League players (Edmonds 1999, 319). Section 3 also potentially excludes from antitrust law issues related to MLB franchises.

³³⁰ *Toolson*, 346 U.S. 356, 357 (1953).

The *Curt Flood Act* sat dormant for nearly 20 years and its purported exclusion of franchises and Minor League players from antitrust law was only tested in court recently. In January 2015 the United States Court of Appeals for the Ninth Circuit in *City of San Jose* affirmed the decision of the United States District of the Northern District of California³³¹ that MLB's decision to prevent the Oakland Athletics relocating to San Jose could not be challenged using state and federal antitrust law.³³² The Court of Appeal's decision was based on the MLB antitrust exemption in *Federal Baseball* and *Toolson* applying to the entire business of MLB,³³³ the *Curt Flood Act* excluding franchises from federal antitrust law and the need for consistency between state and federal antitrust laws identified in *Flood*.³³⁴ The Supreme Court denied the City of San Jose's petition to review the Court of Appeals' decision on the basis of *stare decisis* and that the Court has held Congress must abolish the exemption.³³⁵ Later in 2015 the United States District Court for the Northern District of California in *Miranda* applied *City of San Jose* to dismiss an antitrust challenge by Minor League players to the Minor League labour and remuneration system,³³⁶ a decision currently being appealed before the United States Court of Appeal. Until Congress abolishes or amends MLB's antitrust exemption, or repeals the exemption for Minor League labour

³³¹ *City of San Jose v Office of the Commissioner of Baseball*, Case No C-13-02787-RMW (N.D. Cal. 2013), Order Granting-in-Part and Denying-in-Part Defendants' Motion to Dismiss Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(6).

³³² For a discussion on the implications of this case prior to the decisions of the Court of Appeals and the Supreme Court see Ganin 2014, 1159-1162 and for a critique of the Court of Appeals' decision see Carr 2014, 182-184.

³³³ *City of San Jose v Office of the Commissioner of Baseball*, Case No 14-15139 D.C. No. 5:13-cv-02787-RMW (9th Cir. 2015), Opinion, 6.

³³⁴ *Ibid* 10-11.

³³⁵ *City of San Jose v Office of the Commissioner of Baseball*, No. 14-1252 Supreme Court of the United States, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (2015), 17-22.

³³⁶ *Sergio Miranda et al*, Case No 14-cv-05349-HSG (N.D. Cal. 2015), Order Granting Motion to Dismiss, 2-4.

in the *Curt Flood Act*, the employment of over 7,000 Minor League players by Major League clubs and the business activities of over 240 Minor League clubs will continue to be excluded from the standards of antitrust law. In this context the outcome of the *Senne* litigation by recently retired Minor League players and its use of labour law to challenge the legality of the Minor League wage and labour system is significant, as discussed in Chapter 5, may have significant implications.³³⁷

(n) Summary

Since the 1800s players and owners in MLB have demonstrated a willingness to challenge labour controls using contract law, antitrust law and labour law. The unwillingness of some courts to apply contract law and antitrust law to professional baseball affected MLB's autopoiesis as it led players and their union to engage the NLRA to successfully challenge baseball's labour system and, over an extended period of time, restore the power imbalance between players and owners. Thus the decisions of internal and external regulatory actors have significantly influenced MLB's autopoietic system of labour regulation, which as described in Chapter 3.2, involves a regulatory system which produces and reproduces its own elements by the interaction of its elements.

7.3 LAW AND LABOUR MOBILITY IN JAPAN

Japan provides a different perspective on labour mobility to the United States and Australia. Contracting practices do not feature as prominently in regulating labour mobility in Japan. While the use of post-employment contractual restraints have

³³⁷ *Senne, Liberto, Odle and Others v Office of the Commissioner of Baseball, Major League Baseball and Others*, Case 3:14-cv-00608-JCS (N.D. Cal. 2014 February 7), Complaint.

increased since the 1990s saw the end of Japan's rapid post-war period of economic growth known as the 'bubble' economy, the normative practices of large Japanese corporations continue to shape labour mobility. This section of Chapter 7 will begin by examining non-legal impediments to labour mobility in Japan, followed by an analysis of the role of contract law, labour law and competition law on labour mobility.

(a) Lifelong employment in Japan and labour mobility

Much of the academic discussion in English on the Japanese economy pays little attention to small and medium enterprises, instead focusing on Japan's large corporations, interconnected entities commonly known as *keiretsu* (see eg Matsui 2008, 108-110). Despite the reconfiguration of many large Japanese companies that resulted from the bursting of the bubble economy in the early 1990s, the institutional structure of *keiretsu* corporations remains a central feature of employment practices in Japan and influential in shaping labour mobility. These corporations typically involve insider boards of executive directors, shareholdings by related entities and a main bank, and 'lifelong' employment. The result is insider corporate governance that represents the interests of these internal stakeholders, although the end of the bubble economy initiated a gradual shift towards a shareholder model of governance and external monitoring (see Nottage et al 2008).

Lifelong employment is a practice that grew from the years after World War II (see Gilson and Roe 1999, 520-524). It rests on an implicit promise by an employer to an employee to provide a job for the majority of one's working life, a practice at odds in the United States with what Stone described as the 'new psychological contract' (Stone 2004a, 568, Stone 2001, 553). Gilson and Roe state that lifelong employment is central

to Japanese corporate governance and labour relations (Gilson and Roe 1999, 509). The institution of lifelong employment creates what Shishido called the 'company community', a concept that differentiates between 'insiders' and 'outsiders'. Insiders are usually dominated by *sararîman* ('salary men'), who are typically male, white-collar employees with full-time employment. They are directly recruited from university (see Yano 2013) and spend the majority of their working life at the one firm. Membership of the company community mandates loyalty, while structural features of lifelong employment discourage and effectively prevent employees from changing jobs (Shishido 2000, 202-204). Such practices include internal promotion and training, transfer to remote locations, long work hours and firm specific training. As a result, women historically have not prominently featured in the lifelong employment system (Inagami 2010, 777).

The *nenko* wage system is a seniority based wage system that is not only an important element of lifelong employment but also a barrier to labour mobility. This system provides incremental increases in wages throughout an employee's working life. As a result, wages tend to be comparable for workers of a similar age and education (Inagami 2010, 781). As Pejovic points out, the *nenko* wage system has been modified in recent years to allow performance-based pay after ten to 15 years of employment (Pejovic 2014, 61). Despite this change, the *nenko* wage system continues to restrict labour mobility because it is difficult for an employee to change employment and retain their previous wage level (Yamakawa 2001, 646).

Related share holdings are another important factor that underpins lifelong employment. Yamakawa noted that the purpose of related shareholdings is not to create

profit but to maintain stable ownership and management of a company, thereby contributing to a limited market for corporate control in Japan. Lenders who invest in a client are not always primarily motivated by profit and may invest to obtain information quickly from firm insiders. Accordingly, Japan lacks a robust market for the corporate control of large firms. The resulting corporate environment is favourable to employees and supports stable employment (Yamakawa 2001, 647). Therefore the institutional structure of Japanese corporations plays a key role in shaping labour mobility in Japan.

The operation of lifelong employment engages with the concept of 'human capital'. Gilson and Roe classify human capital based on its value. 'General human capital' is valuable to many employers, 'firm specific human capital' has value to one employer and 'industry specific human capital' can be used throughout a specific industry (Gilson and Roe 1999, 510, 515). Ogawa states that Japanese employers tend to invest heavily in employees' firm specific human capital through job rotations and training and generally avoid investing in skills and knowledge that are transferrable to other employers. Ogawa notes the result is a system where few employees voluntarily leave an employer (Ogawa 1999, 361), thus handicapping labour mobility. Also, Gilson and Roe argue that Japanese employers invest in employees' general and industry specific skills because of a 'dark' reason: an external labour market that is deliberately weak so that it is difficult to change jobs (Gilson and Roe 1999, 513).

(b) The impact of the bursting of the bubble economy on Japanese employment

The lifelong employment system was credited with much of Japan's economic success in the decades after World War II. However, the end of Japan's prolonged economic

growth in the 1990s and the subsequent two decades of economic downturn³³⁸ saw lifelong employment viewed as inefficient and a barrier to labour mobility. One of the outcomes of Japan's economic problems was a reconfiguration of its labour system and an increase in non-standard employment, although lifelong employment still accounts for approximately 20 per cent of employment in Japan (Wolff 2008, 57, 59).

One third of employees in Japan now have non-standard employment and this number increases to 50 per cent for women. Non-standard forms of employment are similar to those in the United States and Australia and include part-time work, fixed term contracts and agency work (Inagami 2010, 788). Such workers are called *pato* ('part-time'), *arubaito* ('part-time' or 'side job'), *shokutaku* ('part-time employee'), *keiyaku* ('contractor') (Shikata 2012, 59) and *furîtâ* ('freelance'). Not only has lifelong employment been diluted due to the increase in non-standard forms of employment but combined with an increase in individual employment practices, the change has resulted in enhanced labour mobility for workers in new forms of employment (Ogawa 1999, 342). Japan has also seen an increase in solitary non-employed persons, who are defined as non-employed persons aged between 20 and 60, who are not married or studying and are either completely alone or only spend time with their family (Genda 2013, 6). Pejovic points out various labour law reforms that were needed not only to facilitate the operation of these new forms of employment but also to preserve the principle of lifelong employment in Japan (Pejovic 2014, 62-65).

³³⁸ The years covering Japan's economic downturn from the 1990s to present have been described as the 'lost two decades'. However others have described it as the 'Heisei renewal', crediting Japan's economic problems with social, legal and economic change.

(c) Work rules and the Japanese employment contract

Unlike employment relationships in the United States and Australia, where the terms of the employment contract directly influence a worker's labour mobility, it is an employer's unilateral work rules or *shugyou kisoku* that tend to regulate labour mobility in Japan. An example of *shugyou kisoku* is the NPB Agreement, which contains all of the league's working conditions for players (as well as other matters related to the league and its governance). *Shugyou kisoku* are a firm's set of regulations that establish uniform rules and conditions for an entire workplace (Araki 1999, 269-270) or, in the case of the NPB Agreement, the workplace of all NPB clubs and labour practices within the league. The *Labor Standards Act* governs *shugyou kisoku* and mandates that these rules apply to all workers in a workplace and cannot violate laws or applicable collective agreements.³³⁹

Shugyou kisoku also apply to individual employment relations and override any inferior conditions in an employment contract.³⁴⁰ Work rules must be in writing for employers who continuously employ ten or more workers.³⁴¹ Under the *Labor Standards Act* examples of mandatory matters that must be addressed in work rules include leave, work hours, rest days and similar matters such as wages, retirement and termination. There must also be provisions for new rules that the employer wishes to introduce. Examples include work expenses, health and safety and training (Araki 2013, 28). Underpinning many firms' work rules for regular employees is the concept of lifelong employment and therefore for many employees work rules may not contemplate labour mobility.

³³⁹ *Labor Standards Act*, article 92(1).

³⁴⁰ *Ibid* article 93.

³⁴¹ *Labor Standards Act*, article 89.

The *Labor Standards Act* and the *Labor Contract Act* both regulate changes to *shugyou kisoku*. Working conditions that form part of a labour contract or the rules of employment can only be changed if a worker and employer reach agreement³⁴² and such changes cannot disadvantage the worker.³⁴³ The impasse doctrine does not apply in Japan as the *Labor Standards Act* permits an employer to change a work rule if the opinion of a majority of employees is obtained.³⁴⁴ There is no requirement that employees consent to the change, just that they are consulted. For such changes to be enforceable the Supreme Court held in the *Shuhoku Bus Case*³⁴⁵ in 1968 that ‘reasonable modifications’ to work rules bind all workers. The Supreme Court has supported this ruling on several occasions³⁴⁶ and it is now the accepted case law (Japan Institute for Labour Policy and Training 2004, 9). This requirement was codified in 2007 and the *Labor Contract Act* now allows employers to unilaterally change general working conditions that are reasonable.³⁴⁷

The relevant judicial (and statutory) test for ‘reasonableness’ focuses on whether the process to create the work rule and its content is unenforceable on the basis that it denies

³⁴² *Labor Contract Act*, article 8.

³⁴³ *Ibid* article 9. Changes cannot be made to any employment rules a worker and employer had agreed would not be changed. There will be no disadvantage to a worker if the employer informs the worker of the changed employment rules and the change is reasonable in light of the extent of the disadvantage to the worker, the appropriateness of the changes and other circumstances relevant to the changed employment rule: *ibid* article 10.

³⁴⁴ *Labor Standards Act*, article 90.

³⁴⁵ Supreme Court, 25 December 1968, 22 Minshû 3459.

³⁴⁶ See the *Takeda System Case*, Supreme Court, 25 November 1983, 1101 Hanrei Jiho 114, *Omagari-shi Nokyo Case*, Supreme Court, 16 February 1988, 42 Minshû 60, *Asahi Kasai Kaijo Hoken Case*, Supreme Court, 26 March 1996, 50 Minshû 1008, *Daishi Bank Case*, Supreme Court, 28 February 1997, 51 Minshû 705 and *Michinku Ginko Case*, Supreme Court, 7 September 2000, 25 Minshû 2075.

³⁴⁷ *Labor Contract Act*, article 10.

an individual their freedom.³⁴⁸ This judicial concept of reasonableness identifies whether the employer unilaterally created the new work rule, or whether the explicit consent of employees or their labor union was obtained.³⁴⁹ The content of the amendment is assessed based on the level of disadvantage created for employees, the ability of the amendment to protect the employer's interests, the existence of good cause to make the amendment, the process of negotiation between management and workers and any other relevant considerations.³⁵⁰ These factors now form the basis of reasonableness in article 10 of the *Labor Contract Act*.

However Japanese courts have chosen not to apply the *Labor Standards Act* and the judicial standard of reasonableness for changing *shugyou kisoku* to the employment of players in NPB. In 2004 the Tokyo District Court and the Tokyo High Court did not address the *Labor Standards Act* nor *shugyou kisoku* in the *Nippon Professional Baseball League Cases*. Instead, both courts viewed NPB's attempt to reduce the number of teams as a mandatory subject of collective bargaining under the *Labor Union Act* (Kawai and Nichol 2015, 512-513). This may be an outcome of the facts of the case involving a matter of collective bargaining and not a work rule in a *shugyou kisoku*. Likewise, the only other matter involving NPB players resulted in the Labor Relations Commission finding in 1985 that the JPBPA was a labor union under the *Labor Union Act*. Despite these decisions Kawai and Nichol argue that a Japanese court is likely to use cases that apply the *Labor Standards Act* and the *Labor Contract Act* to a case involving NPB and a change to the *shugyou kisoku* as issues raised in general labor

³⁴⁸ *Daishi Bank Case*, Supreme Court, 28 February 1997, 51 Minshû 705.

³⁴⁹ *Dai-ichi Kogata Haiya Case*, Supreme Court, 13 July 1992, Hanrei Jiho No. 1434, 133 and *Daishi Bank Case*, 51 Minshû 705, 705.

³⁵⁰ *Tokyo Legal Mind Case*, Tokyo District Court, 16 October 1995, 690 Rôdô Hanðei 75.

disputes involve analogous issues to those involving any changes to the NPB Agreement (Kawai and Nichol 2015, 516).

(d) Collective agreements and labour mobility

Collective bargaining in NPB involves several different practices compared to non-sports industries in Japan. Multi-employer bargaining is uncommon in Japan and collective bargaining in professional Japanese sports leagues like NPB is the exception. In addition, as was mentioned in Chapter 4.3, unions generally organise at the enterprise not industry level. As the contents of the *rôdô kyoyaku* (collective agreement) between NPB and the JPBPA is brief and, is typically one to two pages in length, matters related to collective bargaining form part of the NPB Agreement, the Rule of the Free Agency, the Rule of the NPB Draft and the Rule on Professional Baseball Development Players. As discussed in the previous section, unilateral changes to the NPB Agreement as a *shugyou kisoku* are subject to the standards in the *Labor Standards Act*, the *Labor Contract Act* and the test of reasonableness, which includes the role of the union in any changes.

Article 17 of the *Labor Union Act* gives effect to collective agreements where three quarters of an enterprise's employees come under an agreement.³⁵¹ Similarly, article 18(1) permits collective agreements where a majority of workers in an industry and locality are covered by an agreement.³⁵² The *Labor Union Act* holds working conditions in an individual employment contract that contravene standards in a collective agreement are void and replaced by the relevant standards in the collective

³⁵¹ *Labor Union Act*, article 17.

³⁵² *Ibid* article 18.

agreement.³⁵³ Employers must negotiate working conditions if a labor union requests collective bargaining on a mandatory subject of bargaining (Sugeno 2012, 126-150; Finkin et al 2013, 84). Refusal by employers to collectively bargain without proper justification in such circumstances constitutes an unfair labour practice.³⁵⁴ The Labor Relations Commission can issue remedial orders against employers who refuse to bargain in good faith.³⁵⁵

Mandatory subjects of collective bargaining under the *Labor Union Act* include matters within an employer's control that effect the terms of an employee's employment, the treatment of union members and the management of collective labor relations (Finkin et al 2013, 84). As discussed above and in Chapters 4 and 5, the Tokyo District Court and Tokyo High Court in the *Nippon Professional Baseball League Cases* held NPB's attempt to reduce the number of teams to be a mandatory subject of collective bargaining. Although the Courts did not explicitly state that players are employees rather than independent contractors under the *Labor Union Act*, its decision was based on that premise and, as a consequence, fundamentally shapes the legal rights of NPB players under Japanese labour laws. However if collective negotiations between an employer and union reach an impasse, the previous section identified that an employer can unilaterally change the working condition by modifying the work rule in the *shugyou kisoku*. The judicial test of 'reasonableness' in regards to modifying work rules has therefore been described as one of the most important rules in Japanese labour law (Japan Institute for Labour Policy and Training 2004, 11). In this context the rules

³⁵³ *Labor Union Act*, article 16.

³⁵⁴ *Ibid* article 7(ii).

³⁵⁵ *Ibid* article 27-12.

and principles of the *Labor Union Act* interconnect with the *Labor Standards Act* and the *Labor Contract Act*.

(e) Exclusive contracts of service and labour mobility

Japanese courts are yet to deal with the specific issues raised by *Lumley v Wagner*. Courts have not recognised the concept of special contracts of service, nor have they specifically dealt with the issues related to exclusive contracts of service. If faced with similar facts to *Lumley*, it is unknown whether Japanese courts would issue an injunction to restrain a NPB player from transferring to another professional baseball club.

In cases involving an application for an injunction or an award of damages for breach of an employment contract, the remedy granted by Japanese courts depends on the nature of the dispute. This provides some insight into how Japanese courts would handle a *Lumley* style contract. For example, former employees who breach a non-compete clause usually face an award of damages,³⁵⁶ but courts have issued negative injunctions against those who breach contractual clauses related to trade secrets.³⁵⁷ This latter right is supported by the *Unfair Competition Prevention Act*,³⁵⁸ which allows employers to obtain an injunction against employees who disclose trade secrets³⁵⁹ and, in effect imposes a duty of loyalty on employees (Araki 1999, 271).

³⁵⁶ *Tokyo Gakusyū Kyouryokukai* Case, Tokyo District Court, 17 April 1990, 112 Hanrei Jiho 1369.

³⁵⁷ *Foseco Japan* Case, Nara District Court, 23 October 1970, 78 Hanrei Jiho 624.

³⁵⁸ Fusei Kyōsō Bōshi Hō [*Unfair Competition Prevention Act*], [Act No. 47 of 19 May 1993, as amended up to Act No. 54 of July 10, 2015].

³⁵⁹ *Unfair Competition Prevention Act*, articles 2(iv)-(ix), 3.

(f) Labour mobility and non-compete clauses

As is the case in MLB, labour controls in NPB's uniform player contracts do not focus on post-employment restraints of trade. Like their American counterparts, NPB clubs are focused on controlling the contractual rights of their players during their term of employment. However, it is helpful to briefly examine Japanese law related to post-employment restraints so as to gain an understanding of the broader approach of Japanese courts to the restraint of trade doctrine and how such an approach may influence the willingness of courts to enforce exclusive service contracts.

To enforce non-compete clauses in employment contracts in Japan, the clause must protect a legitimate business interest and be reasonable in its scope, duration and activities.³⁶⁰ Japanese courts also consider whether the employee received compensation for agreeing to the restraint, the public interest and any disadvantage suffered by an employee in enforcing the restrictive covenant. The legal standard for enforcing a post-employment restraint is built on the practice of lifelong employment and a collective construct of human resources (Ogawa 1999, 354, 361). In the absence of the *Lumley* doctrine in Japan, the elements of the standard for enforcing post-employment restraints of trade, as shaped by the underlying concepts of lifelong employment and collective bargaining, could be used as the basis for developing a judicial test for determining the enforceability of exclusive contract provisions in the NPB's uniform player contracts.

³⁶⁰ *Foseco Japan Case*, 78 Hanrei Jiho 624.

(g) Background to Japanese competition law

The introduction of competition law in Japan was not in response to anticompetitive practices in the economy, as was the case in the United States with the *Sherman Antitrust Act*, but a result of the American led Occupation in 1947. The *Antimonopoly Act*³⁶¹ was part of the American law reform agenda aimed at democratising Japan and Japanese corporations (Iyori 1995, 65-67).³⁶² Iyori noted that while similarities existed between the *Antimonopoly Act* and the American antitrust law, significant differences between the laws evolved (Iyori 1995, 61). Contributing to these differences were reforms to the *Antimonopoly Act* and policy changes that were introduced in the 1950s and in 1977 (Iyori 1995, 68-69). Except for brief periods of use in the late 1940s, 1960s and the 1970s, the ensuing decades of the bubble economy saw Japanese consumers, businesses and the government rarely use the *Antimonopoly Act* (Marquis and Shiraishi 2014, 5).

The status of competition law in the Japanese legal system changed with the end of the bubble economy. The resulting economic problems changed the commercial and legal paradigm in Japan, sparking a broad social and corporate legislative reform agenda that started in the 1990s and that would last for nearly 20 years (Nichol 2013, 264). Part of the reform agenda included a shift in competition policy by the Japanese government in 1991,³⁶³ resulting in greater enforcement of the *Antimonopoly Act* by the Japan Fair

³⁶¹ Shiteki-dokusen no Kinshi oyobi Kôseitorihiki no Kakuho ni Kansuru Hôritsu [*Act on Prohibition of Private Monopolization and Maintenance of Fair Trade*] [Act No. 54 of 1947, amended by Act No. 51 of 2009].

³⁶² These efforts culminated in 1946 with the *Japanese Constitution* and revisions by Illinois lawyers to Japan's corporate law, the Shôhō [*Commercial Code*] [Act No. 48 of 1899, amended by Act No. 167, 1950].

³⁶³ From 1989 to the early 1990s the Japanese government also experienced external reform pressure from the United States government, who wanted the *Antimonopoly Act* enforced so that American corporations could enter Japan and help correct the trade imbalance: Marquis and Shiraishi 2014, 6-9.

Trade Commission.³⁶⁴ The increase in enforcement was supported by amendments to the *Antimonopoly Act* in 2005 and 2009. These reforms increased the surcharge obtained from breaching the legislation, expanded the types of behaviour to which the surcharge applies and introduced a leniency program for enterprises that provide information about the anticompetitive practices of other firms (Marquis and Shiraishi 2014, 11-12).

(h) Features of the *Antimonopoly Act*

The general purpose of the *Antimonopoly Act* is to promote the democratic development of the economy and the interests of consumers by prohibiting private monopolisation, unreasonable restraints of trade and unfair trade practices. The Act also attempts to prevent excessive concentration of economic power and eliminate unreasonable restraints and restrictions on business activity.³⁶⁵ One of the primary methods of achieving these aims, and an important law in the context of labour mobility, is the *Antimonopoly Act's* prohibition on entrepreneurs effecting private monopolisation and unreasonable restraints of trade.³⁶⁶ This prohibition extends to international agreements or contracts that create an unreasonable restraint of trade.³⁶⁷ Marquis and Shiraishi observe that the private enforcement of the *Antimonopoly Act* is generally increasing (Marquis and Shiraishi 2014, 15-17). In contrast to the United States, professional baseball has not enjoyed a judicial exemption from this prohibition on

³⁶⁴ General enforcement measures that are now used include cease and desist orders, fines, injunctions and awards of damages. Disputes can be heard by a panel of the Fair Trade Commission panel and can proceed to the Tokyo High Court. See Japan Fair Trade Commission website <<http://www.jftc.go.jp/en/>>.

³⁶⁵ *Antimonopoly Act*, article 1.

³⁶⁶ *Ibid* article 3.

³⁶⁷ *Ibid* article 6.

anticompetitive behaviour, although the regulation of labour in NPB has never been challenged under competition law (or labour law).

As mentioned above, the 2005 reforms to the *Antimonopoly Act* introduced a leniency program for self-reported violations of competition law. Such enterprises can receive an exemption from prosecution and penalties. Subsequently, enterprises who are part of anti-competitive behaviour can receive surcharge discounts ranging between 30 and 50 per cent. The number of firms receiving discounts is capped at five.³⁶⁸ The leniency program does not prevent the issuing of cease and desist orders or criminal prosecutions. However, as at 2014 the Japan Fair Trade Commission had not pursued these enforcement options for enterprises who self-report under the leniency provisions (Marquis and Shiraishi 2014, 14-15).

A number of measures are available to the Japan Fair Trade Commission in enforcing the *Antimonopoly Act*. Engaging in unreasonable restraints of trade can involve criminal penalties, which typically comprise suspended prison sentences.³⁶⁹ Depending on the status of the offending enterprise, surcharge rates range from 2 per cent to 10 per cent³⁷⁰ and these rates increase for repeat offenders and cartel ‘ringmasters’.³⁷¹ Generally, cease and desist orders are issued against enterprises and appeals of the issue of an order are heard by a quasi-judicial hearing of the Japan Fair

³⁶⁸ Ibid article 7-2.

³⁶⁹ Ibid article 96.

³⁷⁰ The standard surcharge is 10 per cent of the revenue affected by the activity. Exceptions are created for small to medium sized firms and the surcharge rate is 3 per cent for retailers, 2 per cent for wholesalers and 4 per cent for small companies. The surcharge is calculated from retrospectively from three years when the anticompetitive behaviour ceases: *Antimonopoly Act*, article 7-2.

³⁷¹ Ringmasters and repeat offenders are penalised an additional half of their initial surcharge rate.

Trade Commission. Decisions can be appealed to the Tokyo High Court.³⁷² However significant procedural reforms to the *Antimonopoly Act* were introduced in 2013.³⁷³ The new law abolished the power of the Japan Fair Trade Commission to hear matters at first instance and the Tokyo High Court to hear appeals. Any appeals of administrative decisions are now the exclusive jurisdiction of the Tokyo District Court and are heard by a panel of three to five judges.

(i) Normative barriers to labour mobility in Japan

This section has already identified lifelong employment as one of the most important normative barriers to general labour mobility in Japan. Although the percentage of Japanese employees who enjoy lifelong employment and move to a new employer remains low, the recent growth across the Japanese economy in non-standard forms of employment, combined with Japan's economic woes, has seen a general rise in the ability and willingness of Japanese workers to change jobs. The experiences of players in NPB is analogous to *sarariman* in large Japanese corporations in that the shape of lifelong employment has changed for a small number of players who can change NPB clubs via free agency or a trade, or move to Major League clubs via the posting system or free agency. Like the *sarariman*, most Japanese professional baseball players will work their career for the one employer and in some cases, upon retiring as a player may continue to work for their club as a scout, coach or in some other capacity. Most Japanese players are recruited from the amateur ranks of high school and university and

³⁷² *Antimonopoly Act*, articles 52 and 85.

³⁷³ See Japan Fair Trade Commission, Enactment of the Bill to Amend the Antimonopoly Act, Press Release, 9 December 2013 <<http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.html>>.

the NPB draft is akin to the graduate examinations and recruitment processes of corporate Japan.

Other important normative barriers to working in Japan that equally apply to professional baseball players stem from nationality and family background, factors that play a significant role in the recruitment of lawyers, police officers and bureaucrats. Chapman highlights the importance in Japan of public information in an individual's *koseki* (family registration system), a document that traditionally identifies a person as Japanese and provides details of their family lineage, birth, marriage, divorce and death. The *koseki* also connects a person to outcast (and discriminated) communities such as the *burakumin* (Chapman 2011, 5). Such sensitive and publicly available personal information does impact upon an employer's recruitment practices. Nationality in particular is extremely important to labour mobility for baseball players. NPB clubs are limited to a maximum of four foreign players on their active roster (NPB Agreement 2013, article 82(2)). With Japanese citizenship comes the ability to speak and read Japanese, skills that are important in communicating with coaches and teammates and understanding Japanese culture. Language skills are also important for players wanting to pursue a Major League career as not all Major League clubs contractually agree to provide an interpreter to Japanese players (this is the case for players with lower status) and interpreters can have the negative effect of inhibiting players from learning language and culture (see Nagatsuka 2014).

(j) Summary

The regulation of labour in NPB represents a stark contrast to MLB in that the system of labour is yet to be challenged. Antitrust law lies dormant, while labour law has been

used for the legal recognition of the JPBPA and to prevent the reduction in the number of NPB teams. This paradigm is reflective of low levels of litigation in Japan, the broader trend of lifelong employment and the activities of NPB's internal regulators. The result is a highly insular system of autopoiesis in NPB.

7.4 LAW AND LABOUR MOBILITY IN AUSTRALIA

This section of Chapter 7 will use a similar structure to the previous two sections to analyse the law and labour mobility in Australia. Contract law, labour law and competition law will once again be used to examine the regulation of labour mobility in Australia. However it should be noted that labour mobility in the ABL raises different issues under these laws to MLB and NPB, because the ABL owns all six teams. As players are contracted by the league and then allocated to a specific team, contract law, labour law and competition law operate in a unique regulatory setting in that labour mobility may be affected by the actions of both the league and each team. Due to the limited case law on professional baseball in Australia, the scope of this section will be expanded to look at the regulation of professional sport in Australia.

(a) The legal status of player unions in Australian sport

As has been discussed throughout this chapter, the evolution of unionism and collective bargaining in professional sport and professional baseball has had a dramatic effect on labour controls and labour mobility (for a list of unions in Australian sport see Dabscheck 2012, 63). No consistency exists across the form and legal status of player labour unions in Australia's major sports and such differences can be explained to some degree by the willingness of a union to challenge the labour controls of a league. Central to this issue is the level of cooperation between a league and union in relation

to external regulation by the *Fair Work Act* and regulatory actors like the Fair Work Commission, the Fair Work Ombudsman and Australian unions. A player union in sport can respond to this key issue by choosing one of three options in relation to its structure: be a registered union, be a players' association affiliated to a registered union, or operate as an an unregistered union.

Unions wanting to engage external regulation and regulators can choose to register under the *Fair Work (Registered Organisations) Act 2009* (Cth), which permits the registration of both employee and employer associations.³⁷⁴ Membership of employee associations is restricted to employees and independent contractors are generally excluded from such associations.³⁷⁵ Therefore only professional athletes found to be employees, as per the High Court's decision in *Buckley v Tutty*, can form employee associations and register under the *Fair Work (Registered Organisations) Act*. According to the Fair Work Commission's online register, the only registered sporting organisation is the Australian Trainers' Association,³⁷⁶ an employer association representing horse trainers.³⁷⁷

Starting a new union in any industry is difficult, let alone in sport, where there is a high turnover of players and generally an unwillingness of leagues and other governing bodies in Australian sport to initially deal with player unions. These challenges to unionism in sport have seen all player unions in Australia's eight major professional

³⁷⁴ *Fair Work (Registered Organisations) Act 2009* (Cth), s 18.

³⁷⁵ *Ibid* s 18B.

³⁷⁶ Fair Work Ombudsman, 'Registered Organisations', undated <<http://www.fairwork.gov.au/website-information/related-sites/registered-organisations#sport>>.

³⁷⁷ See Australian Trainers' Association <<http://www.austrainers.com.au/page/1/home.html>>.

sports³⁷⁸ register with the Australian Athletes' Alliance,³⁷⁹ an industry body for Australia's key sports unions that lobbies government and government agencies. This organisation has a combined membership of over 3,500 athletes.³⁸⁰ Australian sporting unions also join international athlete confederations for their sport and more recently these federations have joined the supra national union, Uni World Athletes (Uni Global Union 2014), a section of Uni Global Union (Dabscheck 2012, 64-65).

The difficulties in establishing player unions in Australian sport have seen fledgling player associations become affiliated with an established trade union. While the Australian Netball Players' Association had an alliance with the Australian Workers' Union between 2005 (Australian Workers' Union 2005) and 2015 (Colman 2015), the preferred option for several sports is membership of the Media, Entertainment and Arts Alliance ('MEAA'). This union has a broad membership base of over 20,000 members in the media, arts, sports and entertainment industries (MEAA, 'Alliance Online'). Benefits of membership of the MEAA for player associations include immediate access to experienced union officials, strategic advice, legal advice and recognition by a league. In basketball, both the Australian Basketballers' Association (and formerly its precursor, the National Basketball League Players' Association) and the National Basketball League's referees association are members of the MEAA (National Basketball League Players' Association, 'Links'). Several player unions were

³⁷⁸ These sports are Australian Rules football, rugby league, rugby union, soccer, cricket, netball, basketball and horse racing.

³⁷⁹ The member unions are the Australian Football League Players Association (Australian football), the Australian Cricketers' Association, the Australian Jockeys' Association (horse racing), the Australian Netball Players Association, the National Basketball League Players Association, the Professional Footballers Association, the Rugby League Players Association and the Rugby Union Players' Association: Australian Athletes' Alliance, 'Member Associations', undated <<http://www.ausathletesall.com.au/member-associations>>.

³⁸⁰ Australian Athletes' Alliance <<http://www.ausathletesall.com.au/>>.

members of the MEAA in the 1990s, including soccer's Professional Footballers Australia (Professional Footballers Australia, 2014), the Rugby Union Players' Union and the Rugby League Players Association. In the case of the Rugby League Players Association, it lost its status as a registered trade union in August 2001 and shortly after the MEAA lost its status as the body representing rugby league players under New South Wales' industrial law (Khoshaba 2005, 290). As there is no player union in the ABL and work conditions and labour controls in the ABL uniform player contract are subject to limited negotiation by players, membership of the MEAA for a prospective ABL players' union is one possible direction for future labour relations in the ABL.

The third option for player unions in Australian sport is to exclude any interaction with external regulatory actors and to operate as an unregistered union. Two of the most powerful sports unions in Australia, the Australian Football League Players Association ('AFLPA') and the Australian Cricketers Association are unregistered independent unions. Compared to smaller sports like basketball, an affiliation with the MEAA for these two sports is not as necessary as their bargaining position is supported by the large revenues they create (particularly television revenues) and the popularity of both sports, though both unions are dependent on their respective leagues for funding. In addition to the player unions in the two rugby codes, the Australia Netball Players' Association is now also an unaffiliated player union.

(b) Collective bargaining, enterprise and multi-enterprise agreements and the *Fair Work Act*

The status of players in the ABL as employees under Australian labour law is important, as the *Fair Work Act* allows enterprise agreements to be made between an employer

and employees, either of whom may appoint a bargaining representative or represent themselves.³⁸¹ In facilitating collective bargaining the aims of Part 2-4 of the Act are to create a simple and flexible framework that promotes good faith bargaining and results in enterprise agreements that yield productivity benefits.³⁸² The duty to bargain in good faith³⁸³ is a standard that is not met if a party's conduct is 'capricious or unfair' and undermines either collective bargaining or freedom of association. The duty to bargain in good faith includes recognising and bargaining with other bargaining representatives.³⁸⁴

Collective bargaining by multi-employer associations is recognised by the *Fair Work Act* through what are called 'multi-enterprise agreements'.³⁸⁵ In the world of sport a club may enter a multi-employer agreement that covers players and single-enterprise agreements with other groups of employees working in the various areas that make up the business of a modern professional sporting club, for example hospitality and gaming workers. The *Fair Work Act* imposes a number of minimum requirements for single-enterprise and multi-enterprise agreements to be enforceable and as part of the pre-approval process, s 180 requires employees to be given a copy of the agreement and employers must take reasonable steps to explain the terms of the enterprise agreement to relevant employees. The pre-approval process also obliges employers to request employees to approve a proposed enterprise agreement.³⁸⁶

³⁸¹ *Fair Work Act 2009* (Cth), ss 172, 176.

³⁸² *Ibid* s 171.

³⁸³ *Ibid* s 176.

³⁸⁴ *Ibid* s 228(1)(e)(f).

³⁸⁵ *Ibid* s 172(3).

³⁸⁶ *Ibid* s 181.

According to the *Fair Work Act* a single-enterprise agreement is entered when the employer and a majority of employees vote to approve the agreement. In the case of a multi-enterprise agreement the employees of each employer must be asked to vote on the agreement, and a majority of employees of at least one employer must approve the agreement.³⁸⁷ Multi-employer enterprise agreements only cover employers whose employees voted to approve the agreement.³⁸⁸

(c) The status of collective bargaining agreements in Australian sport

Prior to the rise of unionism and collective bargaining in Australian professional sport in the 1990s, labour controls and restrictions on labour mobility were agreed to by clubs through the multi-employer association of the league. Collective bargaining has seen clubs and players in sports such as Australian Rules football and rugby league negotiate over issues like free agency, a set percentage of revenues for players, minimum wages, leave entitlements and retirement funds. Notably, the reserve system is not a labour control used in Australian sport. Therefore collective agreements are important instruments that set work conditions that are commonly adopted into uniform player contracts and allow issues related to labour mobility to be reviewed and negotiated at the expiry of each agreement.

It is important to start by noting that, with one exception, no major Australian sports have registered their current collective bargaining agreements with the Fair Work Commission.³⁸⁹ The exception is basketball, which is a likely product of the National

³⁸⁷ *Ibid* ss 182(1) and s 182(2).

³⁸⁸ *Ibid* s 184.

³⁸⁹ The register of collective bargaining agreements was searched using various terms related to major Australian sports. Basketball is the only current collective agreement for an Australian sport that was registered: Fair Work Commission, 'Awards and Agreements', Find an Agreement at <<https://www.fwc.gov.au/search/document/agreement>> at 24 July 2016.

Basketball League Players Association being a member of the MEAA. The National Basketball League registered collective agreements with players in 2003, 2005 and 2010.³⁹⁰ Importantly, the National Basketball League Players' Association and the Women's National Basketball League Players' Association merged in 2015 to become the Australian Basketballers' Association, which is an affiliated player association of the MEAA (MEAA, 'Australian Basketballers' Association'). In June 2016 the new player association and the National Basketball League agreed to and registered a new collective agreement for the men's league.³⁹¹ Previously the National Rugby League registered collective bargaining agreements in 2004 and 2006.³⁹² Also, a dispute over statutory entitlements to long-service leave in 2002 saw all Australian Football League clubs enter a collective agreement to offset the practical inability for players to take long-service leave as mandated by statute (Dabscheck and Opie 2003, 16). The collective agreements for each team were registered with the Australian Industrial Relations Commission (a precursor to the Fair Work Commission)³⁹³ but the contents

³⁹⁰ Fair Work Commission, 'Awards and Agreements', Find an Agreement, 'Basketball' search at

<https://www.fwc.gov.au/search/document/agreement?search_api_views_fulltext=basketball&display_switcher=%2Fsearch%2Fdocument%2Fagreement&created%5Bdate%5D=&created_1%5Bdate%5D=&matter_number=&field_fwc_doc_agreement_print_members=All&reference=&field_fwc_doc_agreement_AGR_AGMT_ID=&title=&old_pub_code=&state=All&industry=All&abn=&search_api_aggregation_1=&sort_bef_combine=search_api_relevance+DESC> at 24 July 2016.

³⁹¹ Media, Entertainment and Arts Alliance, *National Basketball League Players Agreement 2016-2019*, AG2016/3173, 24 June 2016.

³⁹² Fair Work Commission, 'Awards and Agreements', Find an Agreement, 'Rugby' search at <https://www.fwc.gov.au/search/document/agreement?search_api_views_fulltext=rugby&display_switcher=%2Fsearch%2Fdocument%2Fagreement&created%5Bdate%5D=&created_1%5Bdate%5D=&matter_number=&field_fwc_doc_agreement_print_members=All&reference=&field_fwc_doc_agreement_AGR_AGMT_ID=&title=&old_pub_code=&state=All&industry=All&abn=&search_api_aggregation_1=&sort_bef_combine=search_api_relevance+DESC> at 24 July 2016.

³⁹³ Fair Work Commission, 'Awards and Agreements', Find an Agreement, 'Football' search at

<https://www.fwc.gov.au/search/document/agreement?search_api_views_fulltext=football&display_switcher=%2Fsearch%2Fdocument%2Fagreement&created%5Bdate%5D=&created_1%5Bdate%5D=&matter_number=&field_fwc_doc_agreement_print_members=All&reference=&field_fwc_doc_agreement_AGR_AGMT_ID=&title=&old_pub_code=&state=All&ind>

of the agreements were later absorbed into the league collective bargaining agreement³⁹⁴ after the three-year term of the agreements ‘expired’.³⁹⁵ It is possible that these agreements are still valid if they were not terminated by agreement between the Australian Football League and the AFLPA (see Stewart et al 2016, 408-409).

Variation in the nature and governance of sports also results in different collective bargaining processes and agreements. Illustrating this situation are the parties to the collective agreements. The collective bargaining agreement in Australian Rules football is between the Australian Football League and the AFLPA.³⁹⁶ In contrast, the rugby union collective agreement is between the Australian Rugby Union, the Rugby Union Players’ Association³⁹⁷ and the regional governing bodies in states and territories. Soccer provides yet another variation in collective bargaining in Australian sport as the Memorandum of Understanding between Football Federation Australia and Professional Footballers Australia³⁹⁸ creates a collective framework that gives rise to three collective bargaining agreements: the A-League,³⁹⁹ the Socceroos (men’s national

ustry=All&abn=&search_api_aggregation_1=&sort_bef_combine=search_api_relevance+DESC> at 24 July 2016.

³⁹⁴ See Australian Football League and Australian Football League Players Association Incorporated, *Collective Bargaining Agreement 2012-2016*, clause 10(d).

³⁹⁵ See for example the *AFL Players Long Service Leave Agreement [Adelaide Football Club Ltd]* [2002], certified 6 December 2002 and available at <http://www.fwc.gov.au/awards-and-agreements/agreements/find-agreement/results?AGREEMENT_TITLE=football&STATE=All&INDUSTRY_1=All&sqlsv_combine=&ABN=&ODN=&AGREEMENT_ID=&OLD_PUB_CODE=&PRINT_ID=>>.

³⁹⁶ Australian Football League and Australian Football League Players Association Incorporated, *Collective Bargaining Agreement 2015-2016*.

³⁹⁷ Rugby Union Players’ Association membership is very broad and is available to players in the National Wallabies team, an Australian Super Rugby team, a member of the code’s National Academy, men’s and women’s Sevens players and past players: Rugby Union Players’ Association, ‘Who is a Member?’, undated <<http://www.rupa.com.au/member-services/who-is-a-member>>. At the time of submission, only the 2011 collective bargaining agreement was available on the union’s website.

³⁹⁸ Football Federation Australia and the Australian Professional Footballers’ Association, *Memorandum of Understanding*, 6 July 2007.

³⁹⁹ Football Federation Australia and the Australian Professional Footballers’ Association, *A-League Collective Bargaining Agreement 2008/9-2012/13* and Football Federation Australia

team)⁴⁰⁰ and the Matildas (women's national team).⁴⁰¹ In 2015 Professional Footballers Australia renegotiated these agreements, and both the Socceroos and Matildas took industrial action against the Football Federation Australia,⁴⁰² a rare case of industrial action in Australian sport. A new four-year agreement for all three groups of players was entered into in November 2015 (Football Federation Australia 2015), but at the time of writing these agreements were not publicly available.

The nature of enterprise agreements in Australia helps explain why most professional sports do not register their agreements with the Fair Work Commission. The *Fair Work Act* provides employers with the right to enter an enterprise agreement or a multi-employer agreement with employees. Generally, professional sporting leagues do not employ players or enter into employment contracts with players. Instead, players contract with member clubs, although players and leagues do enter agreements on matters such as anti-doping. It should be noted that in Australian sport players sometimes contract with governing bodies, for example, players representing Australia contract with the national governing body. The situation is complex in cricket as players enter into contracts with state and national governing bodies and, with the growth of 'twenty-twenty' cricket, with professional clubs in Australia and India. However, there is nothing within the legislation preventing leagues and unions entering

and the Australian Professional Footballers' Association, *Variation of A-League Collective Bargaining Agreement 2008/09-2012/13 – Binding Term Sheet*, 4 August 2011.

⁴⁰⁰ Football Federation Australia and the Australian Professional Footballers' Association, *Socceroos Collective Bargaining Agreement 2011-2015: 2014 FIFA World Cup Brazil & 2015 AFC Asian Cup Australia*.

⁴⁰¹ Football Federation Australia and the Australian Professional Footballers' Association, *Matildas Collective Bargaining Agreement 2010-2013*.

⁴⁰² In 2015 the Socceroos refused to take part in commercial activities organised by Football Federation Australia: *The Australian*, 1 September 2015. In September 2015 the players in the Matildas went on strike and refused to take part in a tour of the United States: *Gatt 2015*.

collective agreements and such agreements would need to be approved by the member clubs and players.

Furthermore, a number of interrelated explanations exist as to why most Australian professional sports fail to register enterprise agreements, in turn highlighting that sports do not fit the work paradigm assumed by these regulatory systems. An obvious starting point is the desire of governing bodies and player unions to avoid any external interference in the internal regulation of labour. When an enterprise or multi-enterprise agreement is made, the *Fair Work Act* mandates that a bargaining representative for the agreement apply to the Fair Work Commission for approval,⁴⁰³ thus exposing the collective bargaining process and the fruits of this process to external scrutiny by a statutory authority. For an agreement to be approved the Fair Work Commission must be satisfied that the employees genuinely consented to the agreement⁴⁰⁴ and that the agreement meets the requirements of sections 186 and 187 of the *Fair Work Act*. These sections require that the agreement passes the ‘better off overall’ test,⁴⁰⁵ that there are no unlawful terms⁴⁰⁶ and that a process for dispute resolution exists.⁴⁰⁷ Not only does failing to register a collective agreement with the Fair Work Commission avoid external regulation, it also avoids public scrutiny as such agreements are only publicly available if the league, the governing body or the players’ union release the relevant documents. Of the sports discussed above, the only current collective agreements that are publicly

⁴⁰³ *Fair Work Act 2009* (Cth), s 185.

⁴⁰⁴ *Ibid* s 188.

⁴⁰⁵ *Ibid* s 186(2)(d). The better off overall test requires a non-greenfields agreement to leave current and prospective employees covered by an award better off overall than if the relevant award applied to the employee: *ibid* s 193(1).

⁴⁰⁶ *Ibid* s 186(4).

⁴⁰⁷ *Ibid* s 186(6).

available are those of the Australian Football League and the National Basketball League.

(d) Employment contracts and the restraint of trade doctrine

The enforceability of contracts in Australia that restrict a worker's ability to sell his or her services in the labour market is regulated by the common law restraint of trade doctrine and, as will be discussed below, competition law. The origins of the common law doctrine can be traced to at least as early as the 15th century. In 1602 the principle was recognised by Coke CJ in *Darcy v Allen (The Case of Monopolies)*⁴⁰⁸ (Thorpe 2012a, 210). The House of Lords in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*⁴⁰⁹ established the common law's foundation for determining whether a restraint of trade is enforceable in a case which involved a non-compete clause in a contract for the sale of a business. The House of Lords held that a restrictive covenant is legally enforceable if it is reasonable in protecting the covenantee's interests and does not interfere with the interests of the public.⁴¹⁰ Australian courts have adopted the *Nordenfelt* test⁴¹¹ and this test is now the orthodox approach of courts (Riley 2012, 619). Barwick CJ in *Forbes v New South Wales Trotting Club Ltd*⁴¹² stated that the public interest is a key factor influencing the development of the common law doctrine of restraint of trade in employment contracts.⁴¹³ Also, Arup notes that Australian courts now require an enforceable restrictive covenant to protect a legitimate business interest (Arup 2012, 374).

⁴⁰⁸ (1602) Moore KB 671, 1219.

⁴⁰⁹ [1894] AC 535.

⁴¹⁰ *Ibid* 548.

⁴¹¹ See *Buckley* (1971) 125 CLR 353, 376.

⁴¹² (1979) 25 ALR 1.

⁴¹³ *Ibid* 17.

Stewart et al observe that there has been debate in Australia as to whether or not the restraint of trade doctrine applies during the employment relationship. Although the restraint of trade doctrine has evolved to focus on post-employment restraints, Stewart et al note that there are circumstances when courts have recognised that the doctrine operates during the employment relationship (Stewart et al 2016, 508). In *Tullet Prebon (Australia) Pty Ltd v Purcell*⁴¹⁴ Brereton J in the Supreme Court of New South Wales concluded that in Australia and Britain the restraint of trade doctrine had been held to apply during the employment relationship.⁴¹⁵

Furthermore, case law also demonstrates that the restraint of trade doctrine applies to sport. The Chancery Division of the High Court held in the British case of *Eastham v Newcastle United Football Club Ltd*⁴¹⁶ in 1964 that the retention and transfer system in professional soccer that restricted a player from freely moving clubs was an unreasonable restraint of trade.⁴¹⁷ Shortly after this decision in 1971, the High Court of Australia applied *Eastham* in *Buckley v Tutty* by holding rugby league's retention and transfer system to be an unreasonable restraint of trade and professional rugby players (and professional athletes) to be employees of their clubs.⁴¹⁸ As will be seen below, Australian courts have since applied the restraint of trade doctrine to a range of restraints adopted by several sports.

⁴¹⁴ (2008) 175 IR 414.

⁴¹⁵ Ibid paragraphs 33-46.

⁴¹⁶ [1964] Ch 413.

⁴¹⁷ *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, 438, 440-441, 448.

⁴¹⁸ *Buckley* (1971) 125 CLR 353, 371-372, 381-382.

(e) Labour mobility and non-compete clauses

As is the case in the United States and Japan, non-compete clauses attract much of the attention of academics and courts in Australia in relation to restraints on labour mobility. Post-employment restrictive covenants may be incorporated into an employment contract or included in a deed or other formal document, the enforceability of which is generally governed by Australian common law (Stewart and Greene 2010, 305-307).⁴¹⁹ Providing the underlying basis of the test to determine whether a contractual post-employment restraint of trade is enforceable is the *Nordenfelt* test of reasonableness and whether the restraint is in the public interest and protects a legitimate business interest. The reasonableness of the restraint is assessed according to its duration, area of coverage and the activities it restrains. Based on these criteria, the restraint cannot exceed what is reasonable to protect a legitimate business interest.⁴²⁰ As discussed in the previous two sections, although post-employment restraints are not the preferred tool of professional baseball clubs in controlling labour, the approach of the courts does provide some insight into relevant factors Australian courts are likely to consider in applying the restraint of trade doctrine to potential disputes involving labour controls in the ABL.

(f) Exclusive contracts of service, the restraint of trade doctrine and labour mobility

Like the courts in the United States, Australian courts have also adopted the position of *Lumley v Wagner* when there is an employment contract that requires the exclusive

⁴¹⁹ The only Australian state or territory that legislatively regulates restrictive covenants is New South Wales: see the *Restraints of Trade Act 1976* (NSW).

⁴²⁰ For a recent judicial summary and application of the reasonableness test and the entire test for determining the enforceability of a post employment restraint, see *AGA Assistance Australia Pty Ltd v Tokody* [2012] QSC 176, 25-38.

provision of special services. Courts have refused to order specific performance or an award of damages, while being prepared to issue an injunction to prevent the worker from breaching the term of the contract.⁴²¹ To obtain such an injunction, an applicant must prove there is a serious question to be tried, damages are inadequate and therefore the applicant would suffer irreparable harm.⁴²² The principles of *Lumley* have been applied in Australia and to professional sport,⁴²³ as evidenced by Santow J in *St George District Rugby League Football Club Ltd v Tallis and Ors*⁴²⁴ describing the services of rugby league player Gordon Tallis as ‘special’ in that his services could not be easily replaced.⁴²⁵ In this case the Supreme Court of New South Wales issued an injunction preventing Tallis from playing for another club during the exclusive term of his contract, on the basis that damages were inadequate in compensating for the loss of his ‘special’ skills.⁴²⁶

As is the case with uniform player contracts in MLB and MiLB, the *Lumley* style injunction has been incorporated into the ABL’s uniform player contracts. ABL players contractually represent to have ‘extraordinary and unique ability as a baseball player’ and that such services cannot be replaced or adequately compensated for by an award of damages. Players who breach their contract by playing or attempting to play in another competition without the written consent of the ABL agree to allow the ABL to obtain from a court or arbitrator equitable relief, including an injunction to prevent the player from breaching their contract (ABL Standard Player Contract, clause 22(a)(b)).

⁴²¹ See *Buckenara v Hawthorn Football Club Ltd* [1988] VR 39, 40 and *Hawthorn Football Club Ltd v Harding* [1988] VR 49, 60.

⁴²² *Bulldogs Rugby League Club Ltd v Williams* [2008] NSWSC 822, paragraph 36.

⁴²³ *Ibid* para 53.

⁴²⁴ (Unreported Supreme Court of New South Wales, BC9602844, 1996).

⁴²⁵ *Ibid* 15.

⁴²⁶ *Ibid* 19.

But for many ABL players the legal enforceability of these provisions is highly questionable. Most ABL players are either low-level MiLB players or local Australian players with no professional experience. Compared to MLB players and even NPB players these players do not possess ‘extraordinary and unique ability as a baseball player’. These clauses may be the product of the MLB lawyers replicating the Minor League uniform player contract in the ABL and the only real effect of the clause may be to discourage players (most of whom who are likely to possess little or no understanding of the law) from potentially breaching their exclusive contract.

The issuing of an injunction instead of awarding damages for breach of contract requires identification of some of the arguments used by Australian courts to support their approach to exclusive contracts of service. Australian courts have defended issuing an injunction rather than awarding damages because an individual’s right to work is not impinged as non-specialised forms of work can be pursued. They even acknowledge that this may cause financial hardship.⁴²⁷ Courts correctly identify the unique and special skills of professional athletes, entertainers and other relevant workers but it is this specialisation that limits the ability of these workers to obtain other employment of equivalent remuneration. The counter argument used by Australian courts to justify granting injunctions is that any financial hardship is self-inflicted and the worker, at least in the sporting context, is permitted to return to their employer, complete the contract and receive their high salary.⁴²⁸

⁴²⁷ *Buckenara* [1988] VR 39, 46.

⁴²⁸ *Bulldogs Rugby League Club Ltd* [2008] NSWSC 822, paragraphs 62, 66.

(g) Exclusive contracts of service and exceptions to the *Lumley* rule

The enforcement of exclusive contracts of service in Australia is not unfettered and in some situations courts have refused to enforce unreasonable exclusive contracts of service that represent unconscionable agreements. Chapter 6 identified *Canberra Bushrangers v Byrne*,⁴²⁹ a rare Australian case involving professional baseball where the player's former team attempted to enforce an option clause in the employment contract of Byrne, a professional pitcher who in the 1990s played in MiLB and returned to Australia to play in the offseason in the first incarnation of the Australian Baseball League. The contract did not guarantee payment nor require the team to play the player. The Supreme Court of the Australian Capital Territory refused to enforce the contract purported to exist by way of operation of the option and ruled the option clause to be an unreasonable restraint of trade.⁴³⁰

Exclusive contracts of service also raise issues in relation to the enforcement of 'garden leave'. This practice involves an employer requiring an employee to stay at home and metaphorically 'work on the garden' instead of performing the functions of an employee. During a period of garden leave the employment relationship is preserved and the employee still owes the employer obligations such as the duty of confidentiality. Garden leave is frequently used after an employee gives notice to terminate the employment contract. Modern employment practices may see a 'garden leave clause' inserted in an employment contract or involve normative practices, for example, requiring an employee to take garden leave during a notice period. In *Tullet Prebon* the Supreme Court of New South Wales stated that garden leave clauses, like post-

⁴²⁹ (Unreported, Supreme of the Australian Capital Territory, No SC707 of 1994).

⁴³⁰ *Ibid* 23.

employment restraints, need to be justified on the basis that they are reasonable.⁴³¹ Despite the general absence of garden leave practices in professional baseball, *Byrne* demonstrates that some professional baseball teams may contract a player and threaten not to provide the player work (or pay).

The British case of *A Schroeder Music Publishing Co Ltd v Macaulay*⁴³² examined the enforceability of exclusive contracts of service that are the product of an imbalance in bargaining power in standard form contracts. In 1966 Macaulay was an unknown songwriter, who at 21 years of age agreed for a period of five years to exclusively write music for A Schroeder Music Publishing. During the five year term of the contract, if songs produced by Macaulay created royalties that exceeded £5,000, the exclusive services contract would automatically be renewed for a further five years. In the contract Macaulay gave Schroeder the worldwide rights to anything he created, composed or conceived, alone or in collaboration, for a period of five years, or ten years if the contract was extended. Further, Macaulay agreed that Schroeder could assign his contract to another person, while Macaulay required the publisher's written consent to assign any rights under the contract. If Macaulay's work was not published he could not terminate the contract nor have the rights to his music reassigned.⁴³³

The House of Lords ruled that Macaulay's exclusive contract of service was not enforceable as it was an unconscionable contract that resulted from an unequal relationship. Even when standard form contracts are used to contract, the House of Lords held that negotiations are still required and that despite Macaulay wanting to

⁴³¹ *Tullet Prebon (Australia) Pty Ltd* (2008) 175 IR 414, paragraphs 56, 58, 59.

⁴³² [1974] 3 All ER 616.

⁴³³ *Ibid* 621-622.

enter a different kind of contract, his opportunity to enter the music industry was based on accepting the terms of a contract presented to him on a ‘take it or leave it’ basis. In such a situation Lord Diplock stated the courts must be vigilant to ensure that the imbalance in bargaining power is not used to produce unconscionable contracts and that the restrictions are no more than necessary to protect a legitimate interest.⁴³⁴ The contract was found to be unconscionable as Macaulay was obligated to write music but there was no obligation on Schroeder to publish it. Also, the publisher owned all rights to the songwriter’s works, something that was held to be against the public’s interest in being able to enjoy the fruits of Macaulay’s talents. Several Australian courts have accepted the principle from *A Schroeder Music Publishing*.⁴³⁵ The decision is relevant to the bargaining situation in MiLB and the ABL, as young men sign uniform player contracts that cannot be fundamentally altered, permit little negotiation for most players, and see the player give the team most of his valuable rights.

In the 1990s the creation of ‘Super League’ by Rupert Murdoch’s News Corporation as a rival professional league to the ARL not only caused disunity and mistrust in professional rugby league in Australia, it gave rise to a plethora of legal actions involving the leagues, clubs and players. Subsequent legal action saw the courts identify another exception to enforcing *Lumley* style contracts in *Penrith District Rugby League Football Club v Fittler and Sing*.⁴³⁶ Brad Fittler and Matt Sing entered uniform player contracts with the Penrith Panthers and under the contracts agreed to play rugby exclusively for Penrith for a specified time period. Afterwards, in response to the threat

⁴³⁴ Ibid 621-624.

⁴³⁵ See *Tullet Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414 and *AGA Assistance Australia Pty Ltd v Tokody* [2012] QSC 176.

⁴³⁶ (Unreported, Supreme Court of New South Wales, BC9600163, 1995).

posed by Super League, the ARL entered into 'loyalty agreements' with member clubs, including Penrith and also with a number of high profile players such as Fittler and Sing. In addition to their contract with Penrith, Fittler and Sing in April 1995 agreed to play in the ARL for eight years and in exchange received consideration of AUD\$300,000 and AUD\$50,000 respectively. When Penrith defected to Super League in May 1995 both players advised Penrith that the club had repudiated their contracts, that they accepted the repudiation and subsequently signed lucrative contracts with the Eastern Suburbs District Rugby League Football Club, a club committed to the ARL. Penrith responded by initiating legal action to block the transfer by requesting the Supreme Court of New South Wales issue an injunction.⁴³⁷

Justice Santow refused to enforce the players' exclusive contracts of service and grant the injunction on the basis that Penrith had committed an anticipatory breach of implied and express terms of the players' uniform contracts.⁴³⁸ The implied term was that Penrith would be in a position to field its own teams in rugby league football, therefore allowing players to be employees of the club and to have an opportunity to play in the best team the club could field.⁴³⁹ Penrith breached this term as it assigned the player contracts to Super League, a holding company that controlled Super League, who then entered contracts with players to play in a league that did not exist beyond the concept. The express term in the uniform player contract was that playing for Penrith would not interfere with the usual occupation of the player, a requirement that was breached by a

⁴³⁷ Ibid 2-22.

⁴³⁸ Ibid 58-59.

⁴³⁹ Ibid 52.

term of the Super League uniform player contracts that required players to be full-time employees.⁴⁴⁰

(h) Challenging labour controls in Australian sport

Prior to the days of collective bargaining in Australian sport, multi-employer agreements were the internal regulatory instrument used to restrain trade and limit labour mobility. Early litigation involving labour restraints in Australian sport focused on residence and zoning requirements that allocated entry-level labour to professional teams and player ‘retention and transfer’ systems. Other litigation has involved the player draft and the ‘blacklisting’ of players. Salary caps and external player drafts are yet to be challenged in court but will be discussed in this section (for analysis on how these restraints are integrated in many Australian sports, see Thorpe 2012b). Depending on the nature of the restraint and impact on a player’s ability to work as a professional athlete, challenges to these labour controls frequently involve claims based on the common law restraint of trade doctrine and also competition law, in the form of the *Competition and Consumer Act 2010* (Cth) (previously the *Trade Practices Act 1974* (Cth)).⁴⁴¹

It is important to note that with the exception of *Avellino*, the cases that will now be examined were litigated between the 1970s and 1990s, a reflection of the rise in unionism and collective bargaining in Australian sport and the more recent willingness

⁴⁴⁰ Ibid 11-20.

⁴⁴¹ Litigants adopt this position strategically as meeting the Act’s definitions of anticompetitive agreements can be difficult to prove in the sporting context: see *Adamson v West Perth Football Club Incorporated and Others* (1979) ALR 475 and *Hughes v Western Australia Cricket Association (Inc) and Others* [1986] 69 ALR 660.

of some player labour unions to collaborate closely with clubs and the league.⁴⁴² Also contributing to this trend is the governance of professional sports leagues in Australia and the relationship between leagues and member clubs. In the context of the Australian Football League, Smith and Moore observe that the willingness of clubs to challenge labour controls is limited by the reliance of many clubs on the league for financial assistance and the distribution of revenues, particularly in relation to lucrative television deals (Smith and Moore 2014, 9-10). This argument can be extended to the player unions themselves who are typically dependent on their respective league for funds to finance their operations. In addition, the Australian Football League's growing use of discretionary powers is a powerful disincentive for clubs or disgruntled players in that sport to challenge labour controls.⁴⁴³

Prior to the introduction of player drafts in Australian sport, the interrelated tools of residential requirements and zoning operated to limit the movement of players, shape a team's labour supply and achieve competitive balance. These labour controls involve allocating geographic zones to individual teams and requiring players residing in a team's zone to play for their 'zoned' team. Alternatively, a league may require a player to live in a zone to be eligible to play for a team. Residence and zoning formed the basis of many sport's internal transfer systems and shaped a player's ability to change

⁴⁴² An example of this close collaboration is the Australian Football League collective bargaining agreement, where the Australian Football League and the AFLPA expressly agree to not make any claims against the other, except as permitted by the agreement and the grievance procedure: Australian Football League and Australian Football League Players Association Incorporated, *Collective Bargaining Agreement 2012-2016*, clauses G, 6 and 43.

⁴⁴³ For example the league exercises discretion in relation to providing clubs compensation for losing a free agent, or additional draft selections for struggling clubs. In October 2014, the league imposed a ban on the Sydney Swans from trading for new players while the club is permitted to retain a 'cost of living allowance' until the end of 2016.

teams. However, a number of cases in Australian sport have held residency and zoning requirements to be an unlawful restraint of trade.

In Australian Rules football, Victoria's regions and Melbourne's suburbs were divided into zones until the Victorian Football League (the predecessor to the Australian Football League) adopted the national draft in 1986. Players in a team's zone were invited to attend training and progressed through a club's development system of the Under 19 team and 'reserve' team prior to being selected to play in the 'senior' team.⁴⁴⁴ A player was eligible for his zoned team if he resided in the relevant geographic zone for a minimum of 36 consecutive months. In 1982 the Supreme Court of Victoria held this restraint of trade to be unreasonable in *Hall v Victorian Football League and Clarke*⁴⁴⁵ as it prevented a player from choosing the team he wished to be employed by.⁴⁴⁶ Yet the practice continued in other sports. In 1991, the Supreme Court of Victoria in *Nobes v Australian Cricket Board*⁴⁴⁷ held cricket's residential requirement of living in a state three months prior to the commencement of the state cricket season to be an unreasonable restraint of trade.⁴⁴⁸ Then, in 2004, the Supreme Court of South Australia in *Avellino v All Australia Netball Association Ltd*⁴⁴⁹ also held the residential requirement to live in a team's state or territory for four weeks prior to the national netball league's season to be an unreasonable restraint of trade. The unreasonableness of the restraint was also based on Avellino's inability to secure a position in a team in

⁴⁴⁴ In 1992, the Under 19 competition was replaced with the Under 18 competition, a Melbourne based league whose teams operate independently of the Australian Football League. Then, in 1999, the reserves competition ended and players not selected in the senior team played in affiliated clubs in the rebranded the Victorian Football League.

⁴⁴⁵ [1982] VR 64, 70.

⁴⁴⁶ *Ibid* 71.

⁴⁴⁷ (Unreported, Supreme Court of Victoria, BC9102902, 1991).

⁴⁴⁸ *Ibid* 24-25.

⁴⁴⁹ [2004] SASC 56, BC200400613.

her home state of New South Wales and that the number of paid positions in a geographic area is naturally linked to the number of competing teams in a capital city.⁴⁵⁰

Courts also examine the enforceability of labour controls in terms of the broader labour system of a professional league, a relevant test when players challenge a restraint that prohibits movement to another team in the same league or changing leagues. As mentioned in Chapter 6 and above, in 1971 the High Court of Australia addressed this issue in *Buckley v Tutty* when it reviewed the transfer system in the NSWRL (a precursor to the National Rugby League ‘NRL’). This ‘retention and transfer system’ was fundamentally the same as the British soccer system that was contested in *Eastham* and the Australian Rules football system that was later disputed in *Hall*. Under this system, upon a player registering with a club in accordance with the league’s rules, the club controlled the contractual rights to the player in the league, and the player could only transfer to another team if permitted by his club. In leagues such as the Victorian Football League a transfer fee was required. Limited rights of appeal existed and relevant appeals bodies generally lacked independent members external to the league. When viewed in the context of residency and zoning requirements, retention and transfer systems were found to be an unreasonable restraint of trade in *Buckley*, *Hall* and another Australian football case called *Foschini v Victorian Football League*.⁴⁵¹ By contrast, the Supreme Court of New South Wales in *Hoszowski v Brown*⁴⁵² held the retention and transfer system in soccer reasonably protected the interests of the league

⁴⁵⁰ Ibid 44-46 and 111-115.

⁴⁵¹ (Unreported, Supreme Court of Victoria, BC8300014, 1983).

⁴⁵² (Unreported, Supreme Court of New South Wales, BC7800149, 1978).

on the basis that the transfer fee system allowed the player to appeal the transfer fee and that the fee set by the club was a ceiling that could be negotiated.⁴⁵³

Labour controls that restrain labour mobility between different leagues have also been held by courts to be unreasonable restraints of trade in Australia. Prior to the rebranding of the Victorian Football League as the Australian Football League and its expansion to a national competition during the 1980s and 1990s, teams in the Victorian Football League recruited players from the other two premier state based leagues: the South Australian National Football League and the Western Australian Football League. Governing transfers between the three leagues was the National Football League of Australia, a regulatory body composed of member football leagues and associations that set regulations for the transfer of players between states. The transfer system was essentially a 'retention and transfer' system and a player's club was required to approve his clearance application to change leagues. Appeal via an internal body was permitted. When Brian Adamson moved from Perth to Adelaide to play for Norwood in the South Australian National Football League, his repeated requests for a transfer from West Perth were denied. The Federal Court of Australia in *Adamson v West Perth Football Club*⁴⁵⁴ held the transfer system to be an unreasonable restraint of trade as it effectively allowed a player to work for only one club.⁴⁵⁵

Eligibility and player transfer issues also exist in sports where different forms of the game exist. Several cases are illustrative of the broad application of the restraint of

⁴⁵³ Ibid 16-17.

⁴⁵⁴ (1979) 27 ALR 475.

⁴⁵⁵ Ibid 507.

trade doctrine in sport. In *Barnard v Australian Soccer Federation*⁴⁵⁶ the Federal Court of Australia held the prohibition by the Fédération Internationale de Football Association ('FIFA') on players participating in both affiliated indoor and outdoor soccer competitions, as implemented by the Australian Soccer Federation, to be an unreasonable restraint of trade that had no justification.⁴⁵⁷ Similarly, after Kim Hughes was banned from playing cricket at club, district, state and national level for participation in tours of apartheid South Africa in 1985, 1986 and 1987, the Federal Court of Australia in *Hughes v Western Australian Cricket Association (Inc) and Others*⁴⁵⁸ found the ban imposed by the relevant cricket governing bodies to be an unreasonable restraint of trade. The Court held the bans were not in the public interest as the public was denied the ability to watch 'first class' cricketers.⁴⁵⁹ These decisions follow the rationale and logic of the British case of *Greig v Insole*.⁴⁶⁰ In the wake of the creation of World Series Cricket by Kerry Packer in 1978, the Chancery Division of the British High Court ruled that the prohibition from English county cricket and international test matches imposed on Tony Greig by the International Cricket Conference and the United Kingdom's Test and County Cricket Board was an unreasonable restraint of trade that had no reasonable justification.⁴⁶¹ The Industrial Court of New South Wales applied the logic of *Hughes* and *Greig* in *Daley and Others v New South Wales Rugby League and Others*⁴⁶² when it held the banning of several players from representative duties that resulted from the players agreeing to play in the rival Super League was an unreasonable restraint of trade. The Court found the

⁴⁵⁶ (1988) 81 ALR 51.

⁴⁵⁷ *Ibid* 58.

⁴⁵⁸ (1986) 69 ALR 660.

⁴⁵⁹ *Hughes v Western Australian Cricket Association (Inc) and Others* (1986) 69 ALR 660, 703.

⁴⁶⁰ *Greig and Others v Insole and Others; World Series Cricket Pty Ltd v Insole and Others* [1978] 3 All ER 449.

⁴⁶¹ *Ibid* 502.

⁴⁶² (1995) 78 IR 247.

prohibition was not in the public interest as the public was denied the ability to watch the best rugby players.⁴⁶³

Player drafts are a key labour control in many professional sports leagues around the world. Drafts can be internal or external: internal drafts consist of players already in the competition while external drafts are for players entering the competition (Davies 2006b, 81). In Australia, the NSWRL attempted to introduce internal and external drafts in 1990. In response Phillip Adamson challenged the internal draft in the Federal Court of Australia in *Adamson v New South Wales Rugby League Ltd.*⁴⁶⁴ Justice Wilcox held that the internal player draft violated a worker's common law right to choose his employer and imposed a new post-contractual restraint as the restriction operated at the end of a player's contract. The Court also held the draft to be unreasonable as it affected all players equally, regardless of a player's skill or salary (see Davies 2006b, 83-87).⁴⁶⁵ *Adamson* is important in the context of the Australian sporting landscape, especially given that the Australian Football League's draft (internal and external) has never faced judicial scrutiny (see Davies 2006b, 91-98). The decision in *Adamson* may also call into question the ABL's use of an international player draft in 2013 and what amounted to an internal draft for Australian players in 2014 and 2015.

⁴⁶³ Ibid 284-285.

⁴⁶⁴ (1991) 103 ALR 319.

⁴⁶⁵ Ibid 342, 355-356.

(i) Labour controls in Australian sport that have not been challenged in court

The salary cap emerged in Australian sport in the 1990s and the legality of this labour control is yet to be tested in court.⁴⁶⁶ A salary cap is one method of restricting the team's total wages paid to players and is used by a number of professional sporting leagues in Australia, including the Australian Football League, the ARL and the ABL. Such caps are frequently justified on the basis of creating competitive balance. If the matter is ever tested in court, one of the key issues a court will need to resolve is whether a salary cap is an unlawful restraint of trade. Relevant considerations include that the operation of a salary cap restrains trade as the cap may lead to a club trading or releasing players in order to stay under the cap. This has occurred in the Australian Football League, particularly after the market value of players' increases after premiership success. Teams have responded by requesting players to take pay cuts to maintain a club's list and prolong the 'premiership window'.⁴⁶⁷ In addition, salary caps typically limit the earning capacity of lower skilled players (Davies 2006a, 256) and prevent teams from competing for players once they meet their cap on the total payroll (Ross 2005, 49).

Free agency was formally introduced to Australian sport in 2012 when the Australian Football League and the AFLPA agreed to commence a free agent system (see Smith and Moore 2014, 17-18). But as there is no reserve system in the Australian Football

⁴⁶⁶ The only British Commonwealth on the salary controls in sport and the restraint of trade doctrine is the Northern Ireland case of *Johnston v Cliftonville Football and Athletic Club* [1984] 1 NI 9. This case found limits on the amount of signing bonuses paid to players to be an unlawful restraint of trade: Buti 1999, 140.

⁴⁶⁷ In response to salary cap pressure after consecutive grand final appearances in 2000 and 2001, the Essendon Football Club lost a number of high profile players to other clubs to avoid breaching the salary cap. Since then, clubs in similar situations like the Geelong Football Club have encouraged players to take less money than on offer from other clubs in order to be or remain at a successful club.

League, informal methods of becoming a free agent exist, for example, the ability of ‘out of contract’ players to change clubs. This was the mechanism used by expansion teams the Gold Coast Suns and Greater Western Sydney Giants in the early 2010s to acquire uncontracted professional players. At the time this was a ‘de facto’ form of free agency. As explained above, the close relationship between the Australian Football League and the AFLPA, combined with the league’s exercise of discretionary powers and reliance on the league by clubs that experience financial hardship, is likely to decrease the chances of the Australian Football League’s free agency system being challenged in the courts. Player agents are also likely to discourage their clients from challenging the labour system now that they maximise the income of pending free agents by contacting interested clubs in the immediate period preceding their qualification as a free agent (Australian sports leagues do not have an anti-tampering prohibition).

(j) Labour mobility and the award system

Australia’s industrial relations system and collective regulation of labour mobility has a unique feature not present in the United States or Japan: awards. Limited empirical research exists on the relationship between Australian awards and labour mobility, although Howe and Newman’s 2013 research provides some insight into this relationship. They examined 35 awards in knowledge industries such as engineering, information technology, the arts, entertainment and science. As is the case in much of the literature on labour mobility, their research focused on the relationship between labour mobility and the ownership of knowledge. Howe and Newman argue that the benefits of collective regulation of employee creation include greater clarity and consistency in a workplace, the promotion of dialogue, the ‘voice’ of workers on

important issues and the creation of a level playing field across an industry through the public registration of instruments (Howe and Newman 2013, 278). Yet these insights have limited application to labour mobility in professional baseball. The broader question is whether Australian awards do or do not govern sport at all.

The function of awards as a form of labour regulation in Australian sport is interconnected with the rise of unionism in two key football codes: Australian Rules football and rugby league. When the Australian Football League refused to enter a collective bargaining agreement with the AFLPA in 1992, the AFLPA sought an award from the Australian Industrial Relations Commission (precursor to the Fair Work Commission). In 1993 the Commission found that there was a dispute between the parties and that it had jurisdiction to issue an award.⁴⁶⁸ The Full Bench of the Commission refused the application of the Australian Football League for a stay of proceedings and despite its reported willingness to appeal to the High Court of Australia, the Australian Football League entered into a collective agreement with the AFLPA for the 1994 and 1995 seasons. No award was ever made (Dabscheck and Opie 2005, 15).

Amid the various legal actions involving the enforceability of player contracts during the ARL-Super League war, the Industrial Relations Commission of New South Wales issued a statement on 25 September 1997 that rugby league players would be governed by the Rugby League Players' Award (Khoshaba 2005, 289).⁴⁶⁹ This award was

⁴⁶⁸ *Anderson v Adelaide Football Club Ltd* (1993) 48 IR 440.

⁴⁶⁹ *Australian Rugby League Players Award 1997*, 25 September 1997.

amended by the Australian Industrial Relations Commission in 1999⁴⁷⁰ and terminated by Fair Work Australia (as the Fair Work Commission used to be known) in 2011 as part of a review of ‘transitional’ (old) instruments.⁴⁷¹

The award system now plays an important role for some employees in sports that do not have a collective bargaining agreement. Introduced in January 2010, the main Commonwealth award governing sport is the *Sporting Organisations Award 2010*,⁴⁷² although it only covers administrators and coaches of national, state and territory sporting organisations.⁴⁷³ Therefore the *Sporting Organisations Award* is limited to coaches and administrators at the six ABL clubs and the ABL. However the *Miscellaneous Award 2010*⁴⁷⁴ may cover ABL players. This award applies to employees who are not covered by another award or enterprise agreement under the *Fair Work Act*.⁴⁷⁵ The issue for ABL players is that the *Miscellaneous Award* excludes employees in any industry covered by an award and who are not within a classification in that award.⁴⁷⁶ If industry is broadly interpreted to mean sport, then since ABL players as professional athletes are excluded from the *Sporting Organisations Award*, the *Miscellaneous Award* does not extend to ABL players.

⁴⁷⁰ *Australian Rugby League Players Award 1997*, Review of award pursuant to Item 51 of Part 2 of schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* (C No. 00168 of 1999), available at <https://www.fwc.gov.au/documents/consolidated_awards/ap/ap767363/asframe.html>.

⁴⁷¹ Fair Work Australia, Order PR512463, 29 July 2011, available at <<https://www.fwc.gov.au/documents/alldocuments/pr512463.htm>>.

⁴⁷² *Sporting Organisations Award 2010*, MA000082, 30 June 2010, available at the Fair Work Commission at <https://www.fwc.gov.au/documents/documents/modern_awards/pdf/ma000082.pdf>.

⁴⁷³ *Sporting Organisations Award 2010*, MA000082, 30 June 2010, clause 4.1 and schedule B.

⁴⁷⁴ *Miscellaneous Award 2010*, MA000104, 1 January 2010, available at the Fair Work Commission at <https://www.fwc.gov.au/documents/documents/modern_awards/pdf/ma000104.pdf>.

⁴⁷⁵ *Miscellaneous Award 2010*, MA000104, 1 January 2010, clauses 4.1 and 4.5.

⁴⁷⁶ *Ibid* clause 4.3(a).

(k) Overview of competition law in Australia

Australia's competition law is contained in Part IV of the *Competition and Consumer Act 2010* (Cth), previously the *Trade Practices Act 1974* (Cth). Part IV prohibits a range of anti-competitive behaviour, most notably cartel conduct, anti-competitive agreements, exclusionary provisions or boycotts, misuse of market power and exclusive dealing. Mergers that substantially lessen competition or that are likely to substantially lessen competition in a market are also prohibited.⁴⁷⁷ The broad objects of the legislation are to enhance the welfare of Australians by promoting competition and fair trade and protecting consumers.⁴⁷⁸ The Australian Competition and Consumer Commission is the statutory authority responsible for enforcing the *Competition and Consumer Act*.

Breaching Part IV of the *Competition and Consumer Act* can result in civil and criminal penalties. Civil penalties include pecuniary penalties, damages, injunctions and divestiture in relation to mergers.⁴⁷⁹ Section 76(1)(A) permits fines of up to \$10 million for each act or omission under the Act. In addition, civil penalties can include non-punitive orders like community service and punitive orders that involve adverse publicity and disqualification from being a director.⁴⁸⁰ Some offences involving cartels are categorised by the *Competition and Consumer Act* as criminal offences.⁴⁸¹

⁴⁷⁷ Australian Competition Law, Australian Competition Law Overview, at <http://www.australiancompetitionlaw.org/overview.html>.

⁴⁷⁸ *Competition and Consumer Act 2010* (Cth), s 2.

⁴⁷⁹ *Ibid* ss 76, 82, 80 and 81.

⁴⁸⁰ *Ibid* ss 86C, 86D and 86E.

⁴⁸¹ *Competition and Consumer Act 2010* (Cth), ss 79, 79A and 79B.

Section 45 of the *Competition and Consumer Act* is relevant to labour mobility as it prohibits contracts, arrangements and understandings that have the purpose, effect, or likely effect of lessening competition.⁴⁸² Collective bargaining agreements are a notable exemption from the prohibitions in Part IV and s 51(2) excludes any contract or arrangement that relates to remuneration and working conditions of employees. As previously mentioned, it is likely that ABL players would be classed as employees according to the High Court in *Buckley v Tutty* holding professional athletes to be employees, including those who do not work full-time,⁴⁸³ as is the case with some ABL players. Also excluded from Part IV are contracts of service that restrict work during or after the contractual relationship.⁴⁸⁴ While restraints contained in an employee's contract of service are excluded, contracts for services are not excluded and therefore independent contractors can utilise Part IV. These exclusions were considered as part of the Australian Government's review into Australian competition law that was released in March 2015, which concluded that the only employment-related conduct that should be governed by the *Competition and Consumer Act* are those related to secondary boycotts and trading restrictions in industrial agreements, as is the current situation.⁴⁸⁵

⁴⁸² *Ibid* s 45.

⁴⁸³ *Buckley* (1971) 125 CLR 353, 371-372.

⁴⁸⁴ *Ibid* s 51(2)(b).

⁴⁸⁵ See Ian Harper et al, *Competition Policy Review Final Report*, 31 March 2015, recommendations 36 and 37 <<http://www.australiancompetitionlaw.org/reports/2015harper-report.html>> and Commonwealth of Australia, Treasury, *Competition Policy Review*, Issues Paper 14 April 2014, available at <http://competitionpolicyreview.gov.au/files/2014/04/Competition_Policy_Review_Issues_Paper.pdf>.

(I) Australian competition law and sport

Actions by Australian athletes against sports teams or leagues under the predecessor to s 45 of the *Competition and Consumer Act* have generally been unsuccessful. As discussed above, in *Adamson v West Perth Football Club Incorporated and Others*, Adamson played Australian Rules football in Perth and was refused a transfer to an Adelaide club under the interstate transfer rules administered by the National Football League of Australia. The Federal Court of Australia held that Adamson was an employee for the purposes of the legislation and therefore the football club did not acquire services as required under the *Trade Practices Act*. However, Adamson was successful in proving a common law restraint of trade.⁴⁸⁶

As discussed above, in *Hughes v Western Australian Cricket Association (Inc) and Others* cricketer Kim Hughes was banned from all forms of cricket in Australia for participating in tours of apartheid South Africa in the 1980s. Like Adamson, Hughes failed to prove a breach of s 45, as the Federal Court found that his prohibition did not substantially lessen competition but the arrangement did constitute a common law restraint of trade.⁴⁸⁷ Similarly, in *Carfino v Australian Basketball Federation*⁴⁸⁸ Steve Carfino was unable to prove his failure to obtain a clearance in the National Basketball League constituted a breach of the *Trade Practices Act* but the Federal Court did determine this restraint to be a common law unreasonable restraint of trade.⁴⁸⁹

⁴⁸⁶ *Adamson* (1979) ALR 475, 506-507.

⁴⁸⁷ *Hughes* (1986) 69 ALR 660, 697, 700-703.

⁴⁸⁸ [1988] 10 ATPR 40-895.

⁴⁸⁹ *Ibid* 49659-49,660.

McCarthy, a rodeo rider, was able to prove to the Federal Court in *McCarthy & Ors v Australian Rough Riders Association Inc & Ors*⁴⁹⁰ that a prohibition by the Rough Riders Association on riders participating in non-sanctioned rodeos was both a breach of s 45 of the *Trade Practices Act* and an unreasonable restraint of trade at common law.⁴⁹¹ Spender J of the Federal Court found that the arrangement between members of the Rough Riders Association had the effects of reducing and lessening competition.⁴⁹² Nevertheless, due to the difficulty of meeting the requirements of Australian competition law, Australian athletes who successfully challenge a league's labour controls have typically done so on the basis of the common law doctrine of unreasonable restraint of trade.⁴⁹³

Unlike the majority of cases involving athletes, leagues and clubs in Australian sport have had more success in using s 45 of what is now the *Competition and Consumer Act* to challenge agreements that restrain labour. In its efforts to create Super League in the 1990s, News Corporation was able to prove in the Federal Court of Australia that the 'commitment' and 'loyalty' agreements that existing ARL clubs were required to sign by the ARL contained exclusionary provisions and therefore breached s 45.⁴⁹⁴ However, in 1997, the Supreme Court of New South Wales in *Australian Rugby Ltd v Cross and Another*⁴⁹⁵ and the Industrial Relations Commission of New South Wales in *Carter v New South Wales Rugby League Ltd*⁴⁹⁶ took the opposing view in relation to 'loyalty' agreements signed by players with the ARL. These agreements were held to

⁴⁹⁰ [1988] 10 ATPR 40-836.

⁴⁹¹ *Ibid* 49,028-49,030.

⁴⁹² *Ibid* 49,027, 49,029.

⁴⁹³ See *Hall v Victorian Football League and Clarke, Foschini v Victorian Football League* and *Avellino v All Australian Netball Association Ltd*.

⁴⁹⁴ *News Ltd v Australian Rugby Football League Ltd* (1996) 139 ALR 193.

⁴⁹⁵ (1997) 39 IPR 111.

⁴⁹⁶ (1997) 78 IR 368.

be reasonable restraints of trade as they protected the legitimate business interest of maintaining the integrity of the league. But the player loyalty agreements were nevertheless found to be unfair contracts⁴⁹⁷ on the basis the players were not advised to obtain independent legal advice and nor were they aware of the impact of key contractual clauses.⁴⁹⁸

Super League and the ARL merged for the 2000 season and the merger agreement and memorandum of understanding between the two leagues saw the number of teams reduced from 22 to 14. The South Sydney Rabbitohs, a founding club of the ARL, were not offered a place in the new league. The Rabbitohs were successful in the Federal Court in demonstrating that their exclusion from the new ARL by both agreements breached s 45 of the *Trade Practices Act*.⁴⁹⁹ These cases have implications for labour mobility as the creation of a rival professional league generates additional employment opportunities for players, while the exclusion of a club from a professional league has the opposite effect.

(m) Summary

The regulation of sport in Australia presents a variation on both the practices in the United States and Japan, in that unions selectively choose when to engage the courts. Even among player unions there are divergent practices in relation to the registration of the union and collective agreements. Players who challenge labour controls are frequently successful using the common law restraint of trade doctrine, while teams

⁴⁹⁷ The unfair contracts provisions in the *Industrial Relations Act 1996* (NSW) no longer apply to national system employers, due to the operation of s 26 of the *Fair Work Act 2009*.

⁴⁹⁸ *Australian Rugby Ltd* (1997) 39 IPR 111, 123 and *Carter* (1997) IR 368, 428-429. The Industrial Relations Court of New South Wales also came to the same conclusion in *Pay and Others v Canterbury-Bankstown Rugby League Club Limited* (1995) 72 IR 358, 405.

⁴⁹⁹ *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 181 ALR 188.

have been successful in litigation against leagues using competition law. The general absence of litigation in professional sport since the start of the 2000s indicates the close relationship between leagues and unions that has recently emerged.

7.5 CONCLUSION

Similar legal systems regulate labour mobility in the United States, Japan and Australia but the regulation of labour mobility in all three leagues sees fundamental differences in the role of regulatory actors and the use of the law. Thus regulatory actors play an important role in how an autopoietic labour system operates. Law can be used in Japan to challenge NPB's labour controls but in practice this is unlikely. Not only have players, unions and clubs utilised the law in the United States to challenge MLB's labour controls, collective bargaining and labour law has been used to validate labour practices. Athletes from various sporting codes in Australia have contested the labour systems of mainstream Australian sport from the 1970s to the 1990s, although the recent absence of litigation indicates the collaborative approach currently being adopted in many sports. The use of external regulation in the autopoiesis of all three leagues is linked to the behaviour of internal regulatory actors. In a globalised world where sport has developed greater transnational ties, the regulatory consequences of the differences between the regulation of labour mobility by law in different jurisdictions becomes more amplified and potentially more problematic.

CHAPTER 8 THE SCOPE OF LABOUR MOBILITY IN PROFESSIONAL BASEBALL

The general features of labour mobility and how it is legally regulated in professional baseball (and in sport in general in Australia) were examined in Chapter 7. This chapter will now examine the rules that govern labour mobility in professional baseball by using regulatory theory and autopoietic theories of law, and like Chapter 7, involves a comparative law approach. Chapter 8 will begin by constructing a concept of labour mobility in professional baseball, followed by an analysis of how the autopoietic systems of labour in MLB, NPB and the ABL regulate labour mobility.

8.1 THE CONCEPT OF LABOUR MOBILITY IN PROFESSIONAL BASEBALL

(a) Baseball's autopoietic labour system

Teubner's use of autopoietic theories of law to view a legal system as a self-constructed internal order was discussed in Chapter 3 and has been identified in subsequent chapters. It is helpful in constructing a concept of labour regulation in professional baseball. This is because regulation in the three leagues can be viewed as independent legal systems that evolve through their own internal operation and through interaction with external regulation. Labour practices such as the reserve system, free agency and the right of a club to assign a contract are key features of baseball's autopoietic system of labour and were outlined in Chapter 2. Such labour controls are embedded in agreements between teams and leagues, between different teams, and between teams and players. This system is operationally closed in that the reproduction of labour rules occurs by reference to the practices within the autopoietic system. For example, regular periods of collective bargaining generally use the existing legal framework of labour

rules as the starting point for negotiations, shaping the evolution of MLB's and NPB's autopoietic labour systems.

By adopting autopoietic theories of law, Deakin and Wilkinson's evolutionary approach to labour markets (Deakin and Wilkinson 2005, 3) can be used to assess current and historical levels of labour mobility in the three baseball leagues. The introduction of free agency in MLB in 1976 through collective bargaining and then in 1993 in NPB (Kawai and Nichol 2015, 497) mark important moments in the evolution of labour mobility in both leagues. In 1994 the United States Court of Appeals for the Second Circuit observed that a mix of free agency, the reserve clause and other provisions is how leagues and player unions in American professional sports set individual player salaries.⁵⁰⁰ In MLB, collective bargaining since 1994 has seen the introduction of a luxury tax on total player payroll and more recently in 2012 a taxation system on the amount of signing bonuses given to draftees and international amateurs. In Japan, free agency, as will be seen below, gives players the formal right to move to NPB clubs, albeit a right that is infrequently exercised. International free agency also sets the basis for when reserved players can transfer to MLB clubs through the posting system.

(b) What is labour mobility in professional baseball?

The autopoietic systems of labour in the three baseball leagues produce analogous forms of labour mobility. The general concepts of labour mobility can be applied to professional baseball but due to the sport's nature it is necessary to develop a construct of labour mobility specific to baseball. A fundamental element of being a free worker,

⁵⁰⁰ *Silverman*, 67 F.3d 1054, 1061–62 (2d Cir. 1995).

as described by Locke (and examined in Chapter 9),⁵⁰¹ is the right to reject and/or leave employment. This right is severely limited in all three leagues by labour controls such as the reserve system. Even though players can change teams through trades and the operation of baseball's contracting system, such movements are decided by ownership and only players who qualify for free agency can decide to leave their current employer and choose their employer, a right that few players achieve.

Counterbalancing Locke's construct of the free worker is the common law's recognition that if you freely agree to a term of a contract it is no denial of freedom to insist on this term. Such a position was evidenced in *Herd v Weardale Steel, Coal and Company Limited*⁵⁰² when the House of Lords held a mine worker was not denied liberty and falsely imprisoned when, in accordance with his employment contract and statute, his employer denied him the use of a cage to return to the surface of the mine during his shift.⁵⁰³ The Court held that the worker could not alter the terms of his employment once he had agreed to them. A similar rationale could be applied to the inability of players to choose their employer through the reserve system and draft. Players agree to the requirements of the draft and when they sign a uniform player contract the terms of the reserve system (and the ability to have the contract terminated or assigned at any time) are set out. Such a position is strengthened when labour controls that restrict mobility are the subject of collective bargaining.

In addition to the regulatory theories relevant to professional baseball that were discussed in Chapters 3, two labour law theories are also useful in the context of this

⁵⁰¹ See eg Locke 1689.

⁵⁰² [1914] AC 67.

⁵⁰³ Ibid 71-73.

thesis: the transitional labour market approach and the capabilities approach. The transitional labour market approach focuses on creating labour flexibility by successful transitions through the stages of a worker's life and career. To achieve these aims, the transitional labour market approach places a premium on job quality and the creation of employment opportunities through the acquisition of professional qualifications (Rogowski and Wilthagen 1994, 4). Sen describes a capability as the 'combinations of things a person is able to do or be – the various 'functionings' he or she can achieve'. According to Sen, the capabilities approach involves evaluating a person's actual ability to achieve valuable functionings as a part of living (Sen 2008, 270-271). Central concepts in the construction of capabilities identified by Fudge are personal characteristics, societal characteristics, public policies and environmental characteristics (Fudge 2011, 126-127).

The transitional labour market approach and the capabilities approach aid in the development of a framework for understanding labour mobility in professional baseball. A baseball player's career involves a series of transitions, beginning with the transition from amateur to professional player, usually through the player draft. Players then transition through a minor league system based on performance and skill development, with a small percentage of players transitioning to the major league level. For most players the length of time to transition to retirement (usually forced) is short. The transition of players is interrelated to their capabilities. For example, players are initially assessed on their capability (potential) to play at the major league level and major league players assessed on their capacity to perform at that level of competition.

Labour mobility in sport reflects the general literature in relation to the effect of globalisation on geographic labour mobility. The competition for talented workers in professional baseball is no longer limited to national boundaries and rival clubs or leagues. Globalisation, technologically enhanced methods of communication and rapid air transportation have given rise to the growth in global scouting by professional baseball clubs and has enhanced the mobility of workers. Globalisation has expanded the number of options for baseball players seeking work and, as the standard of professional leagues in Asia and Australia continues to improve, the labour mobility of workers in professional baseball will also grow. At the same time, the gradual globalisation of the workforce in professional baseball adds another layer of complexity to the regulation of labour, as foreign players must be eligible to obtain an appropriate working visa under another nation's immigration laws. The immigration laws of the United States, Japan and Australia will influence the type of visa a player must obtain and the conditions of his residence in the foreign country.

(c) The value of labour mobility in professional baseball

As discussed in Chapter 7.1, the labour mobility literature that examines value in terms of knowledge transfer is not applicable to the work of playing baseball. It is however applicable to other workers in professional baseball. Knowledge is critical to the work of managers, coaches, support staff such as doctors and trainers, scouts, front office staff like the general manager and the growing number of staff employed by clubs who work in the burgeoning field of sports analytics. While the movement of these knowledge workers throughout professional baseball minimises inefficiencies and enhances coaching and recruiting practices, the loss of such knowledge workers, as is the case in industry in general, represents a considerable risk to the worker's employer

through the dual effect of losing the worker's valuable knowledge, which is then gained by a competitor. Paradoxically, however, these workers are frequently employed on one-year contracts. Even when employed on a multi-year contract, they can be released from their contractual obligations to pursue a higher position (for example moving from assistant general manager to general manager).

The more relevant question for the purposes of this thesis is the value of player labour mobility in professional baseball. An illustrative example is the value to players and clubs of high velocity labour markets in leagues like MLB. In moving clubs through free agency, trades or the waiver system, many players enjoy enhanced employment opportunities (greater playing time) and the prospect of playing for a club that is in contention to make the play offs. Alternatively, mobility can allow players to extend their career as a professional baseball player. The tradeoff for these benefits is that the majority of baseball players have little control over when they are transferred to another MLB club or an affiliated Minor League team. For clubs, the benefits include flexibility in the configuration of their labour supply, the ability to acquire highly skilled players from other clubs and controlling the cost and uncertainty of developing a Major League player from within its Minor League system.

In contrast, despite the existence of formal transfer mechanisms such as free agency, trades and waivers, NPB can be characterised as a restrictive labour market where the movement of players between clubs is relatively uncommon. This has interesting implications for competitive balance, on which there is little literature in English and which operates differently to MLB as there are only two leagues with six teams each. A degree of competitive balance may be easier to achieve in NPB as three of the six

teams in each league qualify for playoffs. The competition has tended in recent years to be dominated by regular playoff appearances by the Yomiuri Giants in the Central League and the Fukuoka Softbank Hawks in the Pacific League. These two clubs aggressively pursue top players from other clubs through free agency and trades. Clubs such as the Saitama Seibu Lions and the Orix Buffaloes have not featured prominently in recent playoff history. In terms of labour mobility, the ABL is not easily categorised as the status of the league as a winter league sees its clubs have a high turnover of labour, but low numbers of players move clubs *within* the ABL.

(d) The collective regulation of labour mobility in professional baseball

Collective regulation of controls that effect labour mobility is now a feature of the internal labour regulation of professional baseball in the United States and Japan. As discussed, relevant labour controls include the player draft, the reserve system and free agency, and are located in various agreements involving leagues, owners, player unions and individual players. Typical examples of these agreements are a league's constitution, internal rules or regulations, a collective bargaining agreement and uniform player contracts. The movement of labour from league to league is now commonly regulated by formal agreements. For example, the Professional Baseball Agreement governs the relationship between MLB and the NAPBL (Minor League Baseball), while the Posting Agreement 2013 regulates the movement of players between MLB and NPB.

Agreements between owners form the regulatory basis of a professional sporting league and the backbone for the governance of a professional baseball league. Multi-employer agreements are typically used by owners to prevent unions from gaining supra

competitive wages for employees and to unilaterally impose restraints on the ability of individual workers to freely negotiate (Harper 1997, 1667). This latter objective is now influenced in MLB and NPB by the emergence of player unionism and the use of collective bargaining by MLBPA and JPBPA to negotiate the nature of labour controls such as free agency. However, the absence of player unions in MiLB and the ABL allows those leagues and their respective clubs to unilaterally impose working conditions and labour controls on players. Further, multi-employer agreements set minimum standards of uniformity in employment practices for all teams, for example, the length of a season and roster size (Doyle 1995, 409). The implication for workers is that individual players are unable to negotiate pay and conditions with teams that violate the system of labour rules and practices agreed to by owners and the league.

The unionisation of players in professional baseball in the United States and Japan has had a profound impact on how labour is internally regulated and on a league's autopoiesis. Prior to unionism and the representation of players by agents, not only were labour controls unilaterally imposed on professional baseball players, owners (as is the case in other industries) exploited the traditional power imbalance inherent in the employment relationship to create a system of labour regulation that gave few rights to players. Player unions in baseball have used collective bargaining to negotiate the type and nature of labour controls related to labour mobility, in turn changing the trajectory of the evolution of the autopoietic systems of labour in MLB and NPB. Collective bargaining agreements produce mutual benefits for employees and employers in that the costs associated with duplication are avoided. Owners can provide a common front against union activity, an aim enhanced by a league having a commissioner who is able to unite owners and avoid the problems that come with disunity. Multi-employer

collective bargaining agreements also benefit individual owners as they are not disadvantaged by agreeing to more generous employment terms than a union might negotiate with other employers. Players benefit in that unions can guarantee that the granting of employment entitlements does not create competitive disadvantages for employers and benefits are securely funded and transferable within the league (Harper 1997, 1680-1684).

(e) The individual regulation of labour mobility in professional baseball

In addition to collective regulation of labour in sport, labour mobility is also regulated through contract negotiations between individual players and teams. Underpinning the regulation of modern labour between many employees and employers is what Stone describes as the ‘new psychological contract’ (Stone 2001, 553). This paradigm sees employers give ‘employability security’ and not ‘employment security’ by providing training and opportunities to the employee that can be used elsewhere in the labour market. The result is a ‘boundary less career’ (Stone 2001, 569-571). Stone’s new psychological contract resonates with the current labour practices in professional baseball, particularly in MLB and the ABL. While the psychological contract between employer and employee is important in understanding the broad employment relationship in professional baseball, the employment contract continues to perform a central regulatory function in determining the labour mobility of an individual worker in baseball and in a particular league. Specific labour control mechanisms in contracts that effect labour mobility will now be examined.

An important legal requirement governing labour mobility in baseball is the legal capacity to enter a contract. Baseball players are now recruited from around the globe

and therefore the ability of a player to enter a contract will be influenced by the laws on capacity in the country in which a player signs a contract. A league's internal governance rules generally set minimum ages for players to sign professional contracts; but when this age limit is below that recognised by the law of a country for a person to have capacity, relevant legal tests and the consent of parents may be required for a contract to be enforceable. Meeting the age requirements set by MLB has seen some Latin American players involved in identity theft and fraud related to proof of age (Kawai and Nichol 2015, 525). Furthermore, while the law plays an important role in determining when a person can enter an employment contract, the value of parental consent can be questionable in light of the money now paid to amateur players to sign professional sporting contracts and the desire of some parents for their son to pursue a career in professional sport.

As was seen in Chapter 7, the contractual regulation of labour mobility in professional baseball focuses on the enforcement of contractual provisions during the course of employment. The central contractual mechanism that regulates labour mobility is the duration of employment, as set out in the contract of employment. The term of employment restricts a player's ability to change employer and also regulates labour mobility through other relevant contractual clauses, for example, provisions governing the termination of the employment relationship. The duration of a contract can provide further impediments to mobility and nullify notice provisions by requiring an employee to provide services exclusively during the term of the contract, as is the case with uniform player contracts used in MLB, MiLB and the ABL. As will be seen below, the aim of contracts of exclusive services in professional sport not only is to control the movement of labour but also to preserve a team's competitive advantage over rival

teams by preventing the loss of talent. Such aims are reinforced by a league's internal rules that govern labour and as was discussed in Chapter 7, the willingness of many American and Australian courts to issue a *Lumley* style injunction against 'special' workers who attempt to breach an exclusive services contract and work for another employer.

Post-employment restrictive covenants in contracts, also known as non-compete clauses or covenants, are not common labour control mechanisms in professional baseball that regulate labour mobility. By restricting the post-employment activities of former employees, post-employment restrictive covenants are typically intended to protect a firm's knowledge, customers or employees. Common restrictive covenants relate to general non-competition, customer non-solicitation, employee non-solicitation and non-disclosure of confidential information and trade secrets (Vanko 2002, 3). Such contractual clauses have limited practical value in professional baseball, as clubs either trade a player by assigning their contract to another club, assign a player's contract to a lower level affiliated team within their organisation, or relinquish (called 'release' in baseball) their contractual rights to the player via a league's internal rules on contracting processes. The post-employment activities of a player will only be of interest to MLB clubs who send a rostered player to a Minor League affiliate, as they may want to preserve their right to recall the player. But in practice MLB clubs focus on their 25-man and 40-man rosters and take the risk that players 'designated' to the Minor Leagues may be claimed from 'waivers' by a rival club.

(f) Labour market structure and labour mobility

As is the case in other industries, there are important barriers to labour mobility that are derived from the structure of the professional baseball labour market at the enterprise level. The game of baseball is limited to nine players and labour is usually distinguished by the basic classification of pitchers and non-pitchers. Competition for positions exists in both groups. Non-pitchers compete for one of the eight positions on a field (nine if there is designated hitter), while pitchers compete for a position on the starting rotation, in 'middle' relief or as the 'closer'. The mix of pitchers and non-pitchers is shaped by the size of the active and reserve rosters: average active rosters have 25 players in MLB, NPB and the ABL. To make the roster of a team in one of these leagues and to maintain his roster position, a player must be able to perform the skills of playing their position as per the standards of the respective league. Thus, like other industries, labour mobility in team sports such as professional baseball is intrinsically linked to the nature of the sport: but also, unlike non-sports industries, it depends on the total number of players permitted by a league to participate in an official game.

Limits on labour mobility also operate at the league level. The number of teams in a league establishes the overall size of the internal labour market in a particular league. In this regard there is diversity in the three leagues: six teams in the ABL, 12 teams in NPB and 30 teams in MLB. As discussed in Chapter 2, in addition to Major League labour, MLB clubs also employ workers in their network of affiliated Minor League teams. In contrast, most NPB clubs only have one official minor league team each. The ability to obtain work is also influenced by the status of the league. For example,

as the ABL is a 'winter' development league its teams have a high turnover of affiliated players from season to season.

(g) Summary

Labour mobility within professional baseball's autopoiesis is constrained by internal labour controls such as the player draft, the reserve system and free agency. These labour controls, in combination with the structure of the labour market, operate to limit labour mobility for most professional baseball players. However, in leagues such as MLB and NPB, labour controls are the subject of collective bargaining and are shaped by the external rules of labour law. All of these internal factors combine to create an autopoietic system of regulation that is distinct from other industries in that labour mobility is strictly controlled and restricted.

8.2 LABOUR MOBILITY IN MAJOR LEAGUE BASEBALL

This section of Chapter 8 will begin by applying regulatory theory to MLB's internal system of labour regulation. It will be followed by an examination of the impact on labour mobility of the labour wars, the draft, the modern reserve system and free agency.

(a) Major League Baseball's autopoietic system of self-regulation

MLB's autopoietic system of labour regulation can be categorised as an internal system of non-state regulation that involves voluntary self-regulation by an industry. At times this autopoietic system interacts with law, for example, age limits related to capacity to enter contracts, visas for foreign players and labour laws on collective bargaining. Over time this system has been implicitly and explicitly endorsed by the regulatory actions

of the federal government, statutory authorities and the courts, providing an example of what Ogus argues is the lack of a clear dichotomy between public regulation and self-regulation. Ogus conceptualises regulation on a spectrum based on a system's legislative constraints, the role of insiders and outsiders in performing the regulatory function, rules that may be voluntary, binding or codes of practice and external accountability (Ogus 1995, 98-100). It is also an example of the concept of decentred regulation that was discussed in Chapter 3 and of the interplay between internal and external regulation.

Ogus's construct of a regulatory system would locate the labour system in place at the end of the 1960s in MLB at an extreme end of the regulatory spectrum. Over a number of decades, as discussed in Chapter 5, 6 and 7, regulatory inaction by the legislature and courts gave rise to a system of autopoiesis that empowered baseball's owners and the league with a high degree of autonomy and monopolistic power. However unionisation and prolonged periods of collective bargaining have seen MLB's labour system move more towards the centre of Ogus's construct, as evidenced by a willingness of statutory authorities such as the NLRB to intervene in baseball's labour system (see Chapter 6.2(d)). This has in turn influenced the evolution of the modern system of labour regulation in MLB. The minimal role of external regulation encouraged and promoted the development of baseball's internal labour system as players (and eventually owners) used collective bargaining and the protections of labour law to gradually realign the distribution of regulatory power between owners and players. The modern mix of regulations in the Major League Rules, the Basic Agreement and uniform player contracts attempt to exclude or limit the ability of players and clubs to seek external regulatory intervention. In the event there is a

challenge to the system, internal regulatory actors attempt to use labour law to validate baseball's labour practices.

(b) Internal enforcement of Major League Baseball's autopoietic system of labour regulation

As discussed in Chapter 3, an important modern approach to regulation is Ayres and Braithwaite's concept of responsive regulation. Responsive regulation concentrates on the triggers for regulatory intervention and the subsequent regulatory response. Responsiveness is measured in terms of the structure of an industry, the motivations of regulated actors, and the objectives of regulated enterprises and unions. As discussed in Chapter 3, responsiveness is conceptualised in terms of an 'enforcement pyramid', which assumes a 'tit-for-tat' approach to regulation whereby non-compliance results in the escalation of the regulator's response through the levels of the enforcement pyramid (Ayres and Braithwaite 1995, 4-5, 19).⁵⁰⁴ An enforcement pyramid can be two-dimensional or three-dimensional if quasi-regulators such as unions operate alongside the state and the corporation (Baldwin and Black 2008, 65). Other approaches to regulation that utilise an enforcement pyramid and that were discussed in Chapter 3 include really responsive regulation and smart regulation.

The structure of the enforcement pyramid in MLB differs from the pyramids in the above theories in several ways. Notably, labour is regulated through a number of contracts that create a decentred system of voluntary self-regulation and there exists a multi-faceted enforcement pyramid. Occupying the dimensions of this pyramid are

⁵⁰⁴ As discussed in Chapter 3, persuasion is at the base of the pyramid and regulatory responses can escalate to warnings, civil penalties and criminal penalties: Ayres and Braithwaite 1995, 35-36.

MLB, Major League clubs, MiLB, Minor League clubs and MLBPA. The regulatory activities of the courts, legislature and statutory authorities occupy a minor facet of the pyramid or even around the outside of the pyramid.

Perhaps the operation and enforcement of regulation in MLB more closely resembles 'risk-based' regulation, an approach discussed in Chapter 3.2. Risk-based regulation focuses on controlling relevant risks, rather than securing compliance with a set of rules (Baldwin et al 2012, 281). Based on the level of risk a regulated person or firm poses to the regulator's objectives, this approach prioritises the deployment of regulatory resources required for inspection and enforcement at the highest risks posed to a regulator. This regulatory approach assesses the level of risk posed by a regulated person or firm to the regulator's objectives. In the case of professional baseball, the key labour risks from the point of view of owners and a league are the free movement of labour and the unregulated price of labour. The reserve system, arbitration and free agency are the key tools used to target these risks. In risk-based regulation resources target the highest risks, requiring ongoing evaluation of new regulatory risks and challenges (Baldwin and Black 2008, 66-67). Collective bargaining in MLB allows risks to be identified during the term of the agreement and targeted at the expiry of the bargaining agreement.

(c) The reflexive nature of labour regulation in Major League Baseball

As discussed throughout this thesis, the formal regulation of labour in MLB has evolved to incorporate a mix of agreements. Owners, MLB, the players and MLBPA attempt to protect this autopoietic labour system through the creation of what Tham describes as a 'regulatory pivot' (Tham, 2007, 123-125). This regulatory paradigm sees labour

law insulate, validate and protect baseball's autopoietic labour system and its privileged Major League players and clubs. Reinforcing this regulatory pivot is the *Curt Flood Act*, the antitrust exemption cases in the Supreme Court and the exclusion of Minor League players from MLBPA (Nichol 2016, 92-93).

The evolution of MLB's regulation of labour has created a highly reflexive and autopoietic system, as evidenced by the introduction and content of the *Curt Flood Act*. As illustrated in Chapters 5, 6 and 7, in the aftermath of the cancelled World Series in 1994 it was not Congress but MLB and MLBPA who drafted what Congress would pass as the *Curt Flood Act* in 1998. While this law partially repealed baseball's antitrust exemption by applying American antitrust law to the labour of MLB players, it has been interpreted by the United States Court of Appeals for the Ninth Circuit to mean that Major League franchises in the legislation are otherwise excluded from antitrust law.⁵⁰⁵ This could in turn mean the exclusion of Minor League players, Minor League agreements and clubs, as well as agreements with umpires and broadcasters. However it can be argued that such an interpretation disregards section 3(b) of the *Curt Flood Act*, which states that no court will rely on the application of antitrust law to Major League players as a basis for changing the application of antitrust laws to the other agreements. In any event, even if the decision in *Federal Baseball* were to be fully repealed, American antitrust law would have a negligible regulatory impact on the labour of MLB, as collective bargaining is excluded from antitrust law through the

⁵⁰⁵ *City of San Jose v Office of the Commissioner of Baseball*, Case No 14-15139 D.C. No. 5:13-cv-02787-RMW (9th Cir. 2015), Opinion, 9.

statutory⁵⁰⁶ and non-statutory⁵⁰⁷ exemptions discussed in Chapter 7. Therefore labour law and not competition law dominates the external regulation of Major League player labour.

(d) Major League Baseball's labour wars and labour mobility

As was discussed in Chapters 5 and 7, collective bargaining and industrial action were the labour law mechanisms used by the MLBPA that would forever change labour mobility and the regulation of labour in MLB. Not long after MLB's first collective agreement in 1968 a series of ugly and ongoing labour disputes over the cost and control of labour began in 1972 and would only end 22 years later. During this period there were six strikes, three lockouts and (as discussed) the cancellation of the season and the World Series in the middle of 1994 (see eg Gould 2004, 67-78), not to mention a number of cases involving the NLRB and federal courts and intervention by the White House in the 1994 strike. This mix of regulators is evidence of the at times decentred regulation in MLB, where the regulatory space can be occupied by a range of internal and external actors. Without collective bargaining (and the influence of the NLRA) the current autopoietic system of labour regulation in MLB would not exist in its present form, nor be as reflexive as it now is.

Collective bargaining in 1972 saw the addition of an independent arbitrator to the grievance process in the Basic Agreement. Independent arbitration had an immediate

⁵⁰⁶ *Clayton Act* 1915, sections 6 and 20; *Norris-LaGuardia Act* 1932, section 4; *National Labor Relations Act of 1935*, § 151-169. Where labour controls are the product of collective bargaining, the only option available to Major League players is to dissolve and decertify the union. Individual players could then initiate legal action under antitrust law. As discussed in Chapter 7.2, the player unions in the National Basketball Association and the National Football League recently adopted this course of action.

⁵⁰⁷ *Mackey*, 543 F.2d 606, 615 (8th Cir. 1976) and *Brown*, 116 S. Ct. 2116, 2121 (1996).

impact on labour mobility in NPB when arbitrator Peter Seitz ruled in 1975 that the reserve system did not operate in perpetuity and was effectively an option clause the team could exercise once. As noted in Chapter 5, Seitz recognised the two players as free agents and subsequent collective bargaining in 1976 saw free agency introduced for players with six years of Major League service. During this period collective bargaining established the foundation for labour mobility in MLB by permitting arbitration, modifying the reserve system and introducing free agency. The labour battles over the following years focused on the owners' attempts to remove salary arbitration and limit free agency, and culminated in collective bargaining in 1994. As discussed in Chapter 5.4, MLB owners attempted to terminate arbitration and reduce player wages by introducing a salary cap to decrease demand for labour, while increasing the labour supply by reducing free agent eligibility from six to four years (Pessah 2015, 98). None of these reforms were introduced and compromise between the owners and MLBPA saw the implementation of a luxury tax and increased revenue sharing.

At the heart of the labour wars were the control and cost of player labour, both of which are interconnected to labour mobility. Labour mobility and player wages in MLB can now be viewed in terms of three pillars of labour control: the reserve system, arbitration and free agency. Reserve players have little Major League experience, are in their first three years of Major League service, and typically earn the collectively bargained minimum wage: slightly over US\$500,000 per year in 2016 (MLB Basic Agreement, 2012, article VI.A.). This minimum wage is a product of the bargaining power of the MLBPA and is likely to be significantly higher than what individual players could negotiate on the market. These players are subject to movement to Minor League

affiliates, club control over their labour for at least six years and some clubs provide incremental wage increases to players in their second and third years in the Major Leagues. Arbitration eligible players use the uncertainty of salary arbitration and the salaries of comparable players to negotiate salaries closer to market value. As discussed in Chapter 5.7, the Basic Agreement governs eligibility for salary disputes and arbitration eligible players generally require between three and six years of Major League service. Some players qualify after two years as ‘super two’ players if they meet specific active roster service requirements (Basic Agreement, 2012, article VI.E(1)(a)(b)). Finally, free agent players can negotiate their salary on the market (in the millions and even hundreds of millions of dollars) and most of these players choose their employer for the first time in their professional baseball career. However, these players represent a small percentage of the MLB workforce. As observed in Chapter 2, of the over 7,000 contracted Minor League players only one in ten players will make a 40-man roster and one in 50 players will play more than six years in the Major Leagues (Szuchman 1996, 281).

(e) The amateur draft and labour mobility

Issues of labour mobility in MLB’s system of labour regulation begin with labour controls imposed upon entry-level players from the amateur ranks. Unlike most other professions, amateur players are not free to sign an employment contract with any Major League club (Major League Rules, rule 3(a)). To sign a professional contract, high school and college players in the United States, Canada and Puerto Rico must be selected by a club in the amateur draft, also known as the ‘first-year player draft’ and the ‘Rule 4 draft’ (Major League Rules, rule 4; see MLB, ‘First-Year Player Draft

History’).⁵⁰⁸ MLB introduced the amateur draft in 1965 in an effort to control the amount of signing bonuses paid to players and give all MLB clubs equal access to elite amateur players (Shepherd Bailey and Shepherd 2011, 203-204).⁵⁰⁹ However signing bonuses for draftees spiraled and to combat the issue the MLB Basic Agreement 2012 introduced a signing bonus taxation system. Since 2013 signing bonuses for draftees in the first ten rounds have been regulated by teams receiving bonus pools and selections given a nominated signing bonus.⁵¹⁰ Based on the amount by which they exceed their pool, teams incur incremental taxes that include monetary penalties and the loss of future first and second round draft selections.⁵¹¹

There are now approximately 40 rounds in the draft and to promote competitive balance draft selections are in the reverse order of winning percentage from the previous season (Major League Rules, rule 4(c)). Eligibility for the draft is restricted to amateur players who are residents (including foreigners) of the United States (and its territories), Canada or Puerto Rico who are high school, junior college or college students (Major League Rules, rule 4(a)). To be eligible players must be 18 years old and have completed high school, be in junior college or (for college players) be 21 years old or have completed junior or senior year (Major League Rules, rule 3(a)(2)(3)(4)). Labour mobility is restricted as an eligible player must sign a contract with the selecting team

⁵⁰⁸ For a history of MLB draft, see Shepherd Bailey and Shepherd 2011, 203-207.

⁵⁰⁹ At the end of a season there is now a draft for reserved Minor League players called the ‘Rule 5 Draft’ and selecting clubs must pay compensation to the player’s former club based on whether the selected player is added to a Major League reserve list, Class AAA reserve list or Class AA reserve list: see Major League Rules, rule 5.

⁵¹⁰ Major League Baseball, *Summary of Major League Baseball Players Association-Major League Baseball Labor Agreement 2012-2016*, paragraph III.e. In the 2016 amateur draft team signing pools range between US\$13.9 million and US\$2.2 million. The first overall selection has a signing bonus value of US\$9 million and the signing bonuses decrease each round to US\$156,600 in the tenth round: Callis 2016.

⁵¹¹ Major League Baseball, *Summary of Major League Baseball Players Association-Major League Baseball Labor Agreement 2012-2016*, paragraph III.e.3.

(Major League Rules, rule 4(d)) or not play professionally for one year and enter the next draft (Major League Rules, rule 4(h)). The latter option is not available to college seniors.

Minor League uniform player contracts further restrict mobility through the reserve system requiring the player to play seven years to become a Minor League free agent (Minor League Uniform Contract, paragraph VI). Players who complete their contract cannot change teams until the end of the reserve period. Furthermore, clubs frequently trade experienced MLB players for Minor League players who they can control for a number of years through the Minor and Major League reserve systems. Players not selected in the draft may sign a contract with a Major League club (Major League Rules, rules 4(a)(i) and 4(i)), as can international amateur players who are at least 16 years old and are not eligible for the draft (Major League Rules, rule 3(a)(1)(B)).

The operation of MLB's autopoiesis through the amateur draft has also had an impact on the composition of the labour supply in the Major and Minor Leagues. Foreign players now comprise 46 per cent of Minor League players (ESPN 2012, 'Percentage of foreign players rises') and 26.5 per cent of Major League players (Schiff and Jarvis 2016, 647). Many of these players come from Latin America. Shepherd Bailey and Shepherd argue this increase in foreign labour is an unintended consequence of the MLB draft, with many MLB clubs shifting significant scouting and development resources to Latin America. MLB clubs now annually spend a total of US\$60 million in Latin America, much of which funds club academies. Clubs can identify, develop and sign amateur players as young as 16 years of age and have a greater chance of recovering their investment costs than similar investments in the United States where

players can be drafted by a competing club (Shepherd Bailey and Shepherd 2011, 205, 207-210, 215, 219; Ross and James 2015, 128-129). Shepherd Bailey and Shepherd argue that Latin American players have replaced African American players (Shepherd Bailey and Shepherd 2011, 198), who now total just 8.05 per cent of Major League players (Ross and James 2015, 128). The dramatic decrease in the number of African American players in MLB is also a product of teenage MLB recruits now having to pay the cost of training and development through expensive training teams known as ‘travelling’ teams, thereby excluding many people from low socio-economic backgrounds, in particular, African Americans (Shepherd Bailey and Shepherd 2011, 231-235; Ross and James 2015, 134).

(f) The modern reserve system and labour mobility

As discussed, the reserve system is the cornerstone of Major League Baseball’s labour regulation (see Edmonds 2012) and is contained in the regulatory matrix of the Major League Rules, the Basic Agreement 2012 and uniform player contracts. The modern reserve system operates to give Major League clubs control over the labour of players both in the Major and Minor Leagues. Players on a club’s reserve list cannot transfer to another club unless they are traded, claimed by another club through Major League Baseball’s internal contracting system, unconditionally released from their contract, or become a free agent.⁵¹²

The rules and procedures of the modern reserve system are now located in article XX.A of the MLB Basic Agreement 2012 and individual players agree to this system in the

⁵¹² During each offseason Major League clubs acquire a small number of eligible major and minor league players through the Rule 5 Selection Meeting: Major League Rules, rules 5 and 6.

'renewal' clause in paragraph 10(a) of the Major League uniform player contract. Unless a contracted player qualifies as a free agent on or before 2 December each year, a club retains the reservation rights to a player by tendering a contract to a player for the following year. If the parties do not agree to a contract before 2 March, the club can renew the contract for one year on the same terms as the previous contract, except in regards to salary. Thus, until the player becomes a free agent after six years of service on the active roster, the Major League club can renew a player's contract from year to year (MLB Basic Agreement 2012, article XX.A; Major League Uniform Contract, paragraph 10(a)). Labour controls such as the reserve system and free agency now influence how baseball's revenues are divided between owners and players (Brown 2013)⁵¹³ and fundamentally shape the mobility of players.

(g) Free agency and labour mobility

As discussed in the preceding section, free agency is now interconnected to the reserve system and is a status given to players under the collective bargaining agreement (MLB Basic Agreement 2012, article XX.A(1)(2)). Under these rules, two general categories of free agency exist. The first class of free agent are players who are not contracted for the next season and have six or more years of Major League service (MLB Basic Agreement 2012, article XX.B(1)). These players can contract with any club, a freedom which has resulted in players being able to negotiate contracts for millions, and sometimes tens of millions, of dollars. In some circumstances, a free agent's new club must provide compensation to the player's former club in the form of a draft

⁵¹³ The distribution of revenue between owners and players has become more equal in recent years, and the player share of revenue peaked at 67 per cent in 2002 and by 2007 had fallen to 51 per cent: Zimbalist 2010, 23.

selection,⁵¹⁴ a feature of modern free agency that can inhibit a club's willingness to contract a free agent and therefore impede labour mobility.

The second class of free agent involves the operation of MLB's internal system of contracting. A player who is assigned outright to a Minor League club after at least three years of Major League service, or who is assigned outright to a Minor League club for the second (or subsequent time) in his career, can refuse such an assignment and elect to become a free agent (MLB Basic Agreement 2012, article XX.D(1)(2)). Failure to tender a contract to a reserved player a contract for the following season also results in a player becoming a free agent (MLB Basic Agreement 2012, article XX.A(2)(d)). The loss of such players does not result in the player's previous club receiving compensation. However, these two categories of free agents may not necessarily enhance labour mobility as outrighted and non-tendered players are not likely to have the market value and bargaining power that is associated with qualifying as a free agent through service.

The calculation of service is critical in determining how restrictive the reserve system is on labour mobility, and conversely the level of labour mobility created by free agency. Eligibility for Major League free agency is not calculated by the number of years employed by the club, but the number of years served on the active roster. Thus, for the many players who bounce between the Major and Minor Leagues in the early years of their career, six years of active roster service may take a significantly longer

⁵¹⁴ Clubs that lose a free agent in MLB are only entitled to a draft pick if they have made a 'qualifying offer' to the free agent, which is a one year salary offer that is equal to the average salary of the highest 125 paid players each year. Clubs who acquire a qualifying free agent relinquish their highest draft pick in the next amateur draft: MLB Basic Agreement 2012, article XX.B.

period than six years to accrue. Then there are the players who will never spend six years of service in the Major Leagues. These players account for a large percentage of Major League players. A further restriction on labour mobility is the operation of independent systems of Major and Minor League free agency. The Minor League free agency system allows players to be reserved for seven years. One year of service constitutes one month on the active roster or disabled list (Minor League Uniform Contract, paragraph VI). Once a Minor League player signs a Major League contract the clock for free agency is reset. Therefore Major league labour mobility must be viewed in the context of a club controlling a player in his Minor League career for up to seven years.

(h) The waiver system and labour mobility

The waiver system in MLB promotes labour mobility (and competitive balance) by preventing Major League clubs from stockpiling their players in the Minor Leagues. An active roster player can be ‘optioned’ to a Minor League team over three seasons and the Major League club retains the right to ‘recall’ the player. Major League players who are sent to the Minor Leagues after this period, removed from the 40-man roster and designated for assignment, sent outright to a Minor League team or unconditionally released must clear the waiver system. During the waiver period other Major League clubs have a set period of time to obtain the player before he is released or sent to a Minor League team (Major League Rules, rule 10; MLB Basic Agreement 2012, article XIX). Not only does this system facilitate the movement of players between Major and Minor League clubs, labour mobility is enhanced as players sent to the Minor Leagues without an option can be ‘claimed’ by another Major League club and added to its 40-man roster.

(i) Summary

Labour mobility in MLB is the product of the interaction between internal and external regulation and in particular, the implicit endorsement of baseball's regulatory system by the courts and Congress refusing to directly regulate baseball's player labour. The level of labour mobility has varied over time in MLB's autopoietic system. The insular nature of baseball's restrictive labour system resulted in the use of labour law by MLBPA to challenge the legality of baseball's reserve system. Labour law has legitimised labour controls such as the reserve and free agent systems through collective bargaining. Labour mobility in the resulting autopoietic labour system is regulated by several labour controls: the amateur draft, reserve system, free agency, the assignment of contracts and the waiver system.

8.3 LABOUR MOBILITY IN NIPPON PROFESSIONAL BASEBALL

Labour mobility in NPB operates in a different autopoietic system to MLB, a system where the effect of formal rights on labour mobility are constrained by culture, informal factors and normative practice. This section will begin by examining NPB's autopoietic system of labour regulation and then labour mobility will be explored in the context of three labour controls: the draft, free agency and the posting system.

(a) Nippon Professional Baseball's autopoietic system of self-regulation

As is the case with MLB, labour regulation in NPB encompasses an internal system of non-state regulation that involves voluntary self-regulation by an industry. The enforcement pyramid has few levels, is two-dimensional and is dominated by NPB and its clubs. The second dimension is occupied by the JPBPA, a regulator that is gradually

exerting more influence in the regulation of labour in NPB. Tit-for-tat enforcement is not a feature of this regulatory system. Culture, normative practice and informal rules result in an insular autopoietic labour system, the legality of which has never been challenged in court by players, the JPBPA or other stakeholders. However, as noted in earlier chapters, the role of the *Labor Union Act* on player labour in NPB was supported by the Labor Relations Commission's decision in 1985 to recognise the JPBPA as a union and, in 2004 when the Tokyo High Court in the *Nippon Professional Baseball Case* held that the contraction of NPB clubs was a mandatory subject of collective bargaining. As will be seen, occasionally NPB's autopoiesis experiences pressure from other external regulatory actors such as MLB and its clubs.

Shaping the evolution of the concept of labour mobility in Japanese professional baseball was the interaction of NPB, MLB and two of their respective clubs in the 1960s. As discussed in Chapter 6.5, the dispute between the Nankai Hawks and the San Francisco Giants in 1965 saw Murakami Masanori eventually return to play in NPB, after which MLB and NPB entered into the United States-Japanese Players Contract Agreement 1967 ('1967 Agreement'). This agreement required the clubs from each league to honour the other league's internal contracting procedures (1967 Agreement, articles 1-4), notably the reserve system. This obligation, together with cultural factors, resulted in no Japanese player moving to MLB for nearly 30 years (Kawai and Nichol 2014, 182). Thus NPB's autopoietic labour system evolved during this period without external influence by MLB or its clubs.

The 1990s marked a pivotal time in the development of NPB's autopoietic system of labour regulation and the emergence of the concept of labour mobility. Labour controls

in NPB prevented Japanese players from choosing their employer until the reserve system was modified in 1993 to allow free agency. But the NPB's model of free agency allowed limited labour mobility as free agency required ten years of service (NPB Agreement 1993, article 197). Free agency was not the product of collective bargaining but the result of lobbying by the powerful Yomiuri Giants, who wanted to use free agency to acquire the best players from other NPB clubs while limiting the movement of their own players (Kawai and Nichol 2015, 497). Then in 1995 NPB's autopoietic labour system of regulation was forever changed when pitcher Nomo Hideo circumvented the 1967 Agreement by 'voluntarily retiring' from NPB so that he could sign a contract with the Los Angeles Dodgers in MLB (Kawai and Nichol 2014, 184). To control the loss of players to MLB, NPB and MLB entered the United States-Japanese Players Contract Agreement 2000 (Posting Agreement 2000). This reconfigured the concept of labour mobility in NPB by permitting reserved players (in addition to free agents) to move to a Major League club. Several players quickly followed Nomo. The evolution of labour mobility through free agency and the posting system will be analysed below.

(b) Labour mobility and the draft

As is the case in MLB, labour mobility in NPB begins with the recruitment of entry-level players and the NPB draft is also limited to players who are Japanese residents (Rule of NPB Draft 2004, articles 1-2). But unlike the MLB amateur draft, the NPB draft includes amateur players and professional players from leagues other than NPB. Eligible players for the NPB draft are amateur players in junior high school, high school, university (Rule of NPB Draft 2004, article 1) and professional players from Japan's independent and industrial leagues (Rule of NPB Draft 2004, article 3).

The draft is divided into two meetings: high school players and non-high school players (Rule of NPB Draft 2004, article 4). In 2015 there were 11 rounds in the draft and most clubs stopped selecting players after the sixth round, resulting in the annual recruitment of a low number of draftees. A similar trend occurs in the nine rounds of the *ikusei* (development) player draft (Yakyubaka 2015, ‘Live blogging of NPB Draft 2015’). Team selections in each round of the draft are random and a lottery determines the selecting club when multiple clubs select the same player (Rule of NPB Draft 2004, article 9). In both drafts a maximum of 120 players can be drafted (Rule of NPB Draft 2004, article 8). As will be discussed in the following sections, drafted players agree to the reserve system in their uniform player contract that only permits free agency for *ichi-gun* service (NPB Agreement 2011, articles 66-74; NPB Uniform Player Contract 2011, clause 31).

(c) The reserve system and labour mobility

A significant difference between the reserve system in MLB and NPB that impacts upon labour mobility is that the reserve system in NPB applies to both *ichi-gun* and *ni-gun* players: that is, all players on the 70-man roster. As discussed above, NPB’s reserve system prevented a player from choosing to change clubs until free agency was introduced in 1993. NPB’s reserve system allows clubs to control a player’s labour for between seven and nine years of *ichi-gun* service (NPB Agreement 2011, articles 66-74; NPB Uniform Player Contract 2011, clause 31)⁵¹⁵ and therefore there is no limit on the length of time for which a *ni-gun* player can be reserved. Also, the NPB’s contract

⁵¹⁵ Service is calculated by the number of days on an *ichi-gun* roster: Rule of Free Agent 2009, article 2. Seven years of service is calculated as 1,015 days, eight years of service is 1,160 days and nine years is 1,305 days.

system allows players who are unconditionally released through a process called *senryokugai* to sign with any club as a *jiyū keiyaku sensyu* (free agent) (NPB Agreement 2013, article 58). The restrictive nature of the reserve system is exacerbated by NPB only having 12 clubs that have total rosters of 70 players. The evolution of the reserve period and free agency will be examined in the next section.

(d) Free agency, collective bargaining and labour mobility

Free agency and therefore labour mobility have been major issues for reform inside the NPB system of labour regulation for over 20 years. The level of formal labour mobility permitted through free agency and the reserve system has been the subject of several rounds of collective bargaining. Due to the highly restrictive nature of the 1993 version of free agency (NPB Agreement, article 197; *The Asahi Shimbun* 1993, 22), collective bargaining in 1997 saw the JPBPA negotiate a small reduction in qualification to nine years of service (*Nihon Keizai Shimbun* 1997). But ten years of service was retained for players drafted through the *gyaku-shimei* system ('reverse-designation' draft pick).⁵¹⁶ Further collective bargaining in 2003 saw the reverse-designation system abolished and all players qualified for free agency after nine years of service (NPB Agreement 2004, article 197). The difficulty in changing clubs as a free agent was highlighted by research conducted by the JPBPA that found that nine years of service took the average NPB player 11.5 years to complete. Eligible free agents took anywhere between ten and 17 years to qualify (Nakazato and Ramseyer 2008, 94). This

⁵¹⁶ This system allowed college and industrial league players to negotiate to be selected by their preferred club during the first two rounds of NPB draft: *The Japan Times* 2000. Clubs that utilised the reverse-designation system were permitted to negotiate directly and freely with up to two non-high school players in the draft. Such clubs forfeited their first and second high school draft selections.

data would be used by the JPBPA to negotiate major changes to the reserve and free agent systems.

Labour mobility in NPB underwent dramatic transformation through collective bargaining in 2008 when the JPBPA and NPB agreed to create two categories of free agents: domestic and international free agents. This reform recognised a significant change in labour mobility in NPB: the facilitation of player transfers to MLB through the Posting Agreement 2000. International free agent qualification remained at nine years of service (and also allows a player to change clubs within NPB), but the time required to become a domestic free agent was reduced depending on when and from where a player was drafted. Players drafted before 2006 or from high school after 2007 now require eight years of service to qualify as a domestic free agent. The qualification period is reduced to seven years of service for players drafted from college or industrial teams after 2007 (Rule of Free Agent 2009, article 2(2)). The reduction in domestic free agent qualification from ten to seven or eight years has been significant in improving the formal rights of NPB players to labour mobility. However the absence of *ni-gun* free agency and the difficulty of achieving between seven and nine years of *ichi-gun* service demonstrates that the granting of free agency by NPB may be an attempt to preserve the low levels of labour mobility in NPB.

(e) The operation of free agency and the absence of labour mobility

Despite the formal rights of NPB players to change clubs as a free agent, few players use this mechanism to transfer to a NPB or MLB club. Not only do most players not change clubs using free agency, the overwhelming majority of players do not even elect to become a free agent. Evidence of these trends is supported by transfer data. Between

1993 and 2012 only 29 NPB players used free agency to change clubs (Nikkan Sports 2013). However, the numbers have increased in recent years. Between 2013 and 2016 22 free agents changed clubs within NPB (YakyuDB 2016, ‘NPB players that filed for free agency’; Yakyubaka 2015, ‘Free Agents’). These numbers are underscored by practices within clubs. During this same period only 28 players at the Hanshin Tigers exercised their right to become a free agent. Of these players only nine changed club: six transferred to NPB clubs and three to MLB clubs (Sanspo 2013; Yakyubaka 2015, ‘Free Agents’).

Several factors explain the absence of a vigorous free agent market in NPB. A major cause of this outcome is the difficulty of qualification. An obvious explanation is the difficulty in accruing between seven and nine years of *ichi-gun* service as most players spend the early part of their career in the *ni-gun* team. Also, a free agent’s right to negotiate with other clubs is frequently counterbalanced by the ability of the player’s club to match or exceed offers received by the player from the market. Another relevant factor is that the first year salary of a free agent who transfers to a new club cannot exceed the salary paid by his current club (Rule of Free Agent 2009, article 7), representing a major difference between NPB and MLB free agent systems. Then there are the clubs who refuse to participate in the free agent market, such as the Toyo Hiroshima Carp, who have never signed a NPB free agent (Daily Sports Online 2013). From the perspective of clubs like the Carp, the loss of a player as compensation for acquiring a free agent can be a deterrent to acquiring domestic free agents.⁵¹⁷ An

⁵¹⁷ Article 10 of the Rule of Free Agent governs compensation for the loss of domestic free agents and is based on a player’s rank in team salary for the player’s last season. Compensation can be money or a player, but teams are permitted to protect 28 players from compensation. ‘A rank’ players were in a team’s top three players for salary and compensation is either money (80 per cent of the player’s last salary) or money (50 per cent of player’s salary) and one unprotected player. ‘B rank’ players were in a teams top four to ten salary earners and

important factor for players interested in pursuing a MLB career is that domestic free agents who change clubs must complete a further four years of service to become an international free agent (Rule of Free Agent 2009, article 5). Another relevant factor is that the income gap between players is comparably low. By 2012 the average salary of a player on a NPB team 28-man roster was US\$500,000 (Wong and Kawai 2012, 349), and the average salary for a 70-man roster player in 2016 was slightly lower at US\$408,000 (JPBPA, 'Research and Report 2016'; YakyuDB 2016). The average salary of a *ni-gun* player is US\$218,000 (Kawai and Nichol 2015, 496; Wong and Kawai 2012, 349). In contrast, the 30 highest paid players in 2016 earned between US\$2 million and US\$5.5 million (Hatena Blog, 2016). Thus free agency in NPB does not generate the same financial gains as in MLB.

(f) The old posting system and labour mobility

The Posting Agreement 2000 can be seen as a reflexive regulatory response by NPB to control the movement of its players to MLB and to protect its system of labour regulation. In addition to transferring to a MLB club through free agency, labour mobility was facilitated in the Posting Agreement 2000 by permitting NPB reserved players to transfer to a MLB club through the 'posting' system (Posting Agreement 2000, articles 5-6, 8-12). The posting system was an important development in labour mobility in NPB as elite reserved players could attract a transfer fee from MLB clubs for a player's NPB club, while the loss of international free agents resulted in no compensation. Thus NPB clubs now had a financial incentive to allow players to transfer to MLB clubs.

compensation is either money (60 per cent of the player's last salary) or money (40 per cent of player's salary) and one unprotected player. 'C rank' players are all other players and teams receive no compensation for these players.

The procedures of the 2000 posting system were activated when a player requested to be posted by his club during the posting period between 1 November and 1 March of the following year (Posting Agreement 2000, article 9). Labour mobility was triggered when a player obtained his club's consent which, if granted, resulted in the player's details being 'posted' by the Commissioner of NPB to the Commissioner of MLB, who then forwarded the player details to all MLB clubs (Posting Agreement 2000, article 8). Any MLB club wanting to recruit the player had four days to submit a monetary bid known as a 'posting fee' to the Commissioner of MLB (Posting Agreement 2000, article 10) in what was a 'blind auction'. For a period of 30 days, the club with the highest bid received the 'sole, exclusive, and non-assignable right to negotiate with and sign the Japanese player' (Posting Agreement 2000, articles 9 and 11). If the player and MLB club agreed to a contract, the MLB club was required to pay the posting fee to the player's NPB club within five days of reporting the terms of the contract to the Commissioner of MLB (Posting Agreement 2000, article 11).

Under the posting system both NPB clubs and MLB clubs control labour mobility. A reserved player must receive consent from his NPB club to be posted, a major impediment to labour mobility. Clubs such as the Yomiuri Giants have never posted a player, resulting in players like Matsui Hideki moving to the New York Yankees as a free agent. Other clubs like the Hanshin Tigers refused several posting requests by pitcher Fujikawa Kyuji, who subsequently transferred as an international free agent to the Chicago Cubs. The posting system formally permits NPB players to seek to be posted at anytime but NPB players are typically posted one year before becoming an international free agent and have completed a minimum of eight years of service.

Gould analogises this practice to MLB clubs trading players just prior to the player becoming a free agent so as to receive compensation beyond the provisions of the collective bargaining agreement (Gould 2013, 25). Also, the ability of a posted player to transfer is based on a MLB club making a bid and in the early years of the posting system some players received no bids. A further impediment to labour mobility was the inability of a few posted players to agree to a contract with the successful bidder, as was the case with Iwakuma Hisashi and the Oakland Athletics in 2010 and Nakajima Hiroyuki and the New York Yankees in 2011. Most posted players have been veterans on the verge of free agency eligibility. The posting system has not enhanced mobility for younger players. Possible explanations for this include a high transfer fee being placed on younger players to protect the standard of NPB, lower demand for developing NPB players and the role cultural requirements such as *ongaeshi* that require juniors (*kohai*) to repay their obligations to seniors (*senpai*).

Despite the limitations of the normative operation of the posting system, several transfers under the Posting Agreement 2000 have dramatically affected labour mobility in NPB. The transfer of NPB superstars Suzuki Ichirô to the Seattle Mariners (posting) and Matsui to the New York Yankees (free agency), in 2000 and 2001 respectively, not only overcame cultural barriers to moving to a MLB club at the time. The subsequent success of both players legitimised a career in MLB for Japanese position players. Until Ichirô and Matsui dominated Major League pitching there were doubts as to whether Japanese hitters could succeed in the Major Leagues, resulting in little demand for Japanese position players in MLB. A similar effect was created in 2006 when the pitcher Matsuzaka Daisuke was posted to the Boston Red Sox for a transfer fee of US\$51,111,111.11 and a long-term contract of US\$50 million. Then, in 2011, Darvish

Yu was posted to the Texas Rangers for a fee of US\$51,703,411 and a US\$60 million multi-year contract (Kawai and Nichol 2014, 189). The transfers of Matsuzaka and Darvish highlight the significant financial gains that elite NPB pitchers (and their clubs) can obtain from labour mobility and the posting system.

(g) The new posting system and labour mobility

Problems arising from the posting procedures such as the failure of posted players to contract with MLB clubs and the inability of MLB clubs with low revenues to pay exorbitant posting fees for star pitchers led some MLB clubs to pressure MLB to reform the posting system (Kawai and Nichol 2015, 506-507). A new Agreement between the Office of the Commissioner of MLB and the Office of the Commissioner of NPB was finalised in November 2013 ('Posting Agreement 2013'). The features of the new posting system include:

1. the posting period now operates from 1 November until 1 February of the following year and the 30 day posting period remains (Posting Agreement 2013, article 8);
2. prior to posting a player the player's NPB club sets the 'release' fee (formerly the posting fee) and once this amount is set it cannot be changed (Posting Agreement 2013, article 7);
3. the release fee is capped at US\$20 million (Posting Agreement 2013, article 7);
4. any MLB club willing to pay the release fee may negotiate a contract with the posted player (Posting Agreement 2013, article 9);
5. MLB clubs now have 12 months to pay the release fee (Posting Agreement, article 10(b)).

The new protocols mark the end of the auction system and transfer the role of setting a Japanese player's transfer fee from MLB clubs to the player's NPB club. Importantly, release fees are now capped at US\$20 million.⁵¹⁸ By setting the release fee, NPB clubs now exert even greater influence on the posting process, as they can set the transfer fee at a number that makes the transfer too expensive for MLB clubs. Restructuring the posting fee as a release fee has allowed the JPBPA to achieve its aim of allowing posted players to improve their mobility and bargaining position by negotiating with multiple clubs, a right that is conditional on more than one MLB club agreeing to pay the release fee. While these reforms enhance the ability of posted players to sign a contract with a MLB club, it is worth noting that few NPB players will benefit from the new posting system. The posting system does not operate every year and only labour mobility for elite NPB players is enhanced. Peripheral *ichi-gun* and *ni-gun* players might well benefit from playing in the MiLB system, but will never qualify as an international free agent or be posted by their club.

The operation of the new posting system indicates little has changed. In 2013 the Tohoku Rakuten Golden Eagles posted pitcher Tanaka Masahiro, who agreed to a seven-year contract for US\$155 million with the New York Yankees. Then in 2015 another pitcher, Maeda Kenta, was posted by the Toyo Hiroshima Carp and signed a seven-year contract with the Los Angeles Dodgers. Maeda is guaranteed \$US25 million and can earn as much as US\$100 million with incentives (Dilbeck 2016). Both clubs paid the maximum release fee of US\$20 million. By capping the release fee the new system was designed to allow lower revenue clubs a realistic opportunity to recruit

⁵¹⁸ It should be noted that only one NPB club, the Tohoku Rakuten Golden Eagles, was reported to have voted against the introduction of the new posting system: Yomiuri Shimbun 2013, 25.

talent like Tanaka and Maeda (Kawai and Nichol 2015, 510-511). But while Tanaka and Maeda enjoyed the benefits of the right to negotiate with multiple MLB clubs, the outcome suggests that little has changed. It was the MLB clubs with the two highest payrolls in recent years that acquired Tanaka and Maeda. Both the Yankees and the Dodgers were able to use the tens of millions dollars saved from the cap on the release fee to boost the value of the players' contracts, money that otherwise would have been paid to their NPB clubs.

(h) Normative practice and labour mobility

Normative factors within NPB's autopoiesis also shape the level of labour mobility enjoyed by players. This section has demonstrated that players in NPB are subjected to similar labour controls to MLB players and also possess formal rights to labour mobility such as free agency. But due to the structure of such rights (the length of free agency eligibility and the absence of *ni-gun* free agency), the normative operation of the labour system and cultural factors, low levels of labour mobility exist in NPB when compared to MLB. One possible explanation may be that NPB players are prepared to trade labour mobility for the benefits of job and financial security provided by NPB clubs.

The treatment by NPB clubs of their minor league labour is in stark contrast to MLB clubs. *Ni-gun* players enjoy job security and developing Japanese players are not subjected to the ever-present threat of being released that their Minor League counterparts face. Instead, Japanese players are typically given time to develop in the *ni-gun* team and are not forced to progress through a competitive hierarchical structure of minor leagues. Many players spend years in *ni-gun* and either never make the *ichi-*

gun roster or spend little time on it. Players released from the 70-man roster are sometimes transferred to the *ikusei* roster. Consequently there is far less turnover of players on the 70-man roster of a NPB club than on a MLB 40-man roster and in a MLB club's Minor League system.

Related to job security is the financial security of players on a NPB 70-man roster. Players not on the *ichi-gun* active roster of a NPB club earn a good wage that greatly exceeds the low incomes of Minor League players. As identified in Chapter 2, the average salary of a player on a 70-man roster in 2016 was US\$408,000 (JPBPA, 'Research and Report 2016'; YakyuDB 2016, 'JPBPA: average NPB salaries'), slightly lower than the average salary of a player on a NPB team 28-man roster of US\$500,000 (Wong and Kawai 2012, 349). For *ni-gun* players the average salary was US\$218,000 (Kawai and Nichol 2015, 496; Wong and Kawai 2012, 349). In comparison, the 30 highest paid NPB players in 2016 earned between US\$2 million and US\$5.5 million (Hatena Blog, 2016) and only 64 players earned over 100 million yen (the equivalent to US\$1 million) (JPBPA, 'Research and Report 2016'; YakyuDB 2016). Influencing this relatively low income gap between players is the Japanese expression '*taru o shiru*', which means 'one already has all one needs'. The small gap between wages may reduce the level of labour mobility for most players as the financial incentive to seek employment in another club is likely to be reduced by any pay increase being minimal. Also, *ni-gun* players enjoy relatively high salaries and job security, so there may be little practical need to move to one of the other 11 NPB clubs.

Labour mobility in NPB is also influenced by normative practice and cultural factors like loyalty, group decision-making and deference to the team. An important cultural

factor influencing relationships among *taikukai* (sports-minded people) is *ongaeshi*, the duty to repay one's obligations (Kawai 2008, 1110). Traditionally, this concept was important in the context of professional baseball as it influenced player relationships between *senpai* (seniors) and *kohai* (juniors), playing a central role in when a player could change clubs. *Ongaeshi* and the above cultural factors influence a player's decision to seek to be posted and to elect to become a free agent. However, since the turn of the 21st century, as clubhouse relationships are no longer defined by human relations but by contract based relations, Kawai and Nichol identify that the past 17 years have seen a decline in the role of *ongaeshi* in Japanese professional baseball (Kawai and Nichol 2015, 499-500).

(i) Summary

A comparison of labour mobility in NPB and MLB demonstrates that the labour rules underpinning the two autopoietic systems can be very similar but produce contrasting levels of labour mobility. Formal rights to labour mobility in NPB have gradually evolved since free agency was introduced in 1993. Regulatory actors within NPB's autopoietic system of labour have negotiated the period of eligibility for free agency over several rounds of collective bargaining, while the ability of reserved players to transfer to MLB clubs was negotiated by NPB and MLB in 2000, and again in 2013. Despite these formal rights to labour mobility the number of players who change clubs remains low. Cultural factors, the structure of free agent and posting rules, and job and financial security for players on the 70-man roster all interact to preserve the low levels of actual labour mobility in NPB's autopoietic system of labour regulation.

8.4 LABOUR MOBILITY IN THE AUSTRALIAN BASEBALL LEAGUE

As a relatively new professional league, the ABL represents a different labour model from the systems in MLB and NPB as it and all six teams are owned by MLB and Baseball Australia. The ABL is in the early stages of its evolution and has fewer formal labour controls than MLB and NPB. These controls involve more discretion than the other two leagues. Key features of the regulation of labour mobility in the ABL will now be examined.

(a) The Australian Baseball League's autopoietic system of self-regulation

Like MLB and NPB, labour regulation in the ABL involves an internal system of non-state regulation that encompasses voluntary self-regulation. But in contrast to those two leagues, the ABL's autopoietic system of labour regulation is in its early stages of evolution, given that the league has only completed six seasons. The regulatory enforcement pyramid also takes a different form to the other two leagues. There is no player union or collectivism in the ABL and the two dimensions of the pyramid are occupied by the ABL and MLB as majority owner of the league and all teams. Both the ownership of the league and its status as a winter development league are significant factors that shape the ABL's autopoietic system of labour regulation. Also diverging is the configuration of the enforcement pyramid as the league owns all teams.

(b) Sourcing and allocating professional players

The labour structure of the ABL is interconnected to its status as a winter league and the regulation of player labour is relatively informal compared to the highly regulated practices in MLB and NPB. As the ABL is a single entity that controls all six teams there is little need (at least on the basis of competition) for its labour system to use

labour controls such as the reserve system and free agency. In addition, the ABL does not appear to strictly enforce its reserve system for players contracted by a team in the previous season. As a winter league a large percentage of an ABL team's labour supply fluctuates from year to year and two broad classes of players exist: affiliated and non-affiliated players.

To maintain the status of a professional league the ABL is heavily reliant on affiliated players from foreign professional teams; and as MLB or NPB clubs retain their reserve rights to the players, they are effectively on 'loan' to the ABL team. Therefore there is little practical need for a reserve system in the ABL and an ABL team must register a player for him to be on the active roster (ABL Operations Manual 2013-14, Roster Management Summary, article 9). The ABL's contracting processes also negate the need for a reserve system. All players (except those from the NPB) contract with the league itself and are then assigned to a team, with the ABL able to reassign a player's contract to another team (ABL Standard Player Contract, clause 21). ABL teams are generally limited to approximately four to six affiliated Minor League players (plus NPB players). The priority of the ABL in allocating affiliated players is ensuring competitive balance through developing rules on the number of affiliated players per team and providing teams with access to affiliated players through its relationship with MLB and NPB. The mix of affiliated players influences a team's needs for additional players, who are recruited from the independent professional leagues in the United States and local teams in Australia.

The majority of affiliated professional players are Minor League players from MLB clubs. As majority owner of the ABL MLB is able to request its member clubs send

Minor League players to the ABL, including Australians. Over the six years of the ABL over 20 Major League clubs have sent players to ABL teams and some informal relationships have developed where MLB clubs send players to the same ABL team each year. Several ABL alumni have reached the Major Leagues and a small number of Minor League players with some experience in the Major Leagues have played in the ABL.

In the early years of the ABL teams also recruited affiliated players from Asian professional clubs in NPB, KBO and CPBL. However, as explained previously, the operation of the Asian Winter Baseball League by the CPBL in 2012, 2013, 2015 and 2016 established a rival winter league to which many NPB, KBO and CPBL clubs send their players. Despite this trend the Saitama Seibu Lions continue to send a contingent of players, coaches and a translator to the Melbourne Aces. NPB clubs such as Seibu typically send developing *ni-gun* players to the ABL and some of these players have *ichi-gun* experience. In the case of NPB players, the club enters a contract with the ABL to send their players to an ABL team and the players do not enter standard player contracts with the ABL. There are two important restrictions on the availability of NPB players: the JPBPA must approve a player's participation in the ABL and players are not permitted by the JPBPA to officially train or play in January. Therefore NPB players typically return to Japan in the middle of the season after the last series before Christmas.

(c) The salary cap and labour mobility

Of the three leagues under study the ABL is the only league that uses a salary cap. This is somewhat unusual as all teams are wholly owned subsidiaries of the ABL and

therefore the teams do not compete with each other in the labour market for players. Each team has a salary cap of approximately AUD\$50,000 and deductions are made for players affiliated to a MLB club (ABL Operations Manual 2013-14, Roster Management Summary, article 2). The ABL's salary cap represents a 'soft' cap in that Minor League players are paid by their MLB club, as are NPB players and third party payments to 'import' players and some Australians are at the discretion of the league (ABL Rules and Regulations 2013-14 Season, rule 2(o)) and do occur.

The salary cap may not substantially reduce labour mobility as access to players from MLB and NPB clubs are underpinned by agreements with the ABL and these players are paid by their affiliate club and generally only play in Australia for one season. In terms of local players, the salary cap does not influence labour mobility as much as the inability of many Australian players to move interstate due to family, work and study commitments. In addition, MLB would justify the imposition of a salary cap because it provides the funds to operate each team and the league, and because increases in player payments need to be supported by revenue growth and the financial profitability of each team.

(d) Australian players and labour mobility

The ABL's formal rules promote employment and labour mobility for Australians by requiring approximately five Australian players to be in a team's lineup at any time. In addition, two of the four starting pitchers in any series must be Australian. Such practices may breach various laws, including the *Racial Discrimination Act 1975* (Cth) and equal opportunity laws in the States and Territories. Yet labour mobility is also restricted for Australian players, as only one team plays in each of the major capital

cities. Thus there is strong competition among local club players for a roster position. While players 'choose' their ABL team it is difficult for many players to change team as there would be repercussions on employment and family. Nevertheless, the league appears to be flexible in permitting Australian players to transfer teams. A number of local players have done this and, as will be discussed below, the draft for Australian players in 2014 and 2015 facilitated the movement of a small number of players who were not guaranteed a roster position by their local ABL team.

Local affiliated players face a mix of informal and normative restrictions on playing in the ABL. The priority for these players is progressing through the Minor Leagues and playing in the Major Leagues. Young pitchers are typically not permitted to play in the ABL and when they do play it is only for part of the season and they have restrictions on the number of pitches and innings they can throw. Like pitchers, some position players choose to rest for all or part of the ABL season. Also, when Minor League players reach Class AA, Class AAA or the Major Leagues, they may choose to play winter baseball in the higher-level leagues in Latin America.

(e) Foreign players and labour mobility

As already mentioned, the majority of affiliated foreign or import players come from MiLB and a small number from NPB. These players are usually asked to play in the ABL by their club, while some players choose to play in the ABL and find their own team. The latter type of situation is most common for players from the independent leagues in the United States, many of whom play in Australia with the hope of being recruited by an Australian scout for a MLB club. Labour mobility within the ABL is not necessarily a concern for foreign affiliated players as they generally only play in

the ABL for one season. The greatest restriction on labour mobility for foreign players entering the ABL is that ABL teams are limited in the number of foreign players on an active roster (the number is between ten and 14 and is based on the level of talent in each team's city). However the additional playing time in the ABL can enhance an affiliated player's labour mobility in terms of progressing through the Minor Leagues and making the Major League team. The draft for international players in 2013 was not widely used by ABL teams and will be discussed in the next section.

(f) Formal labour controls and the draft

Recent seasons has seen the ABL experiment with the formal labour allocation mechanism of the draft. The first attempt at a draft in the ABL was for international players in 2013. Eligible players were limited to affiliated and unaffiliated players from the United States whose club did not place the player at an ABL club. Few players were allocated to an ABL club in this system and the international draft has not been used since. In 2014 and 2015 the ABL operated a draft for Australian players not contracted by an ABL club (ABL, 'ABL announces first Australian draft'). The aim of this draft was to redistribute the young talent of players in the larger baseball cities to smaller market teams such as Canberra and Adelaide. At the same time the draft was introduced, the ABL introduced a new rule that requires all clubs to provide a list of 'protected players'. These players cannot be drafted and must be on the active roster for all series during the upcoming season, unless if the player is injured or not available to play in the case of a player affiliated with a MLB club (Maun 2014). The draft was not widely used by clubs and in 2015 the only team to select players was Canberra, who drafted four players (ABL 2015, 'Cavalry boost roster'). Consequently the ABL did not use a draft in 2016.

(g) Summary

Of all three leagues, the ability to choose one's employer is greatest in the ABL. This choice can, however, be curtailed by the decision of an affiliated player's club or the limit of one team per capital city. Australian and foreign players have moved teams and the ABL appears generally willing to facilitate such transfers. The autopoietic labour system in the ABL can be distinguished from the systems in MLB and NPB in that the ABL has no reserve or free agent systems, though it does have a salary cap. In general the ABL operates a much more flexible labour system where it exercises discretion in relation to player transfers than compared to MLB or NPB.

8.5 CONCLUSION

Labour mobility in each league is a product of its own autopoietic system of rules, practices and the activities of regulatory actors. The nature and speed of the evolution of each internal labour system varies from league to league and is influenced by regulatory actors in each. The time in an autopoietic system's evolution is important in assessing the level of labour mobility within a labour system. Further, the engagement of the league's autopoietic system of labour regulation with external regulations and actors such as the legislature, statutory authorities, courts and foreign leagues also shapes how a league's labour system is regulated. Labour mobility in MLB is intrinsically linked to the reserve system and free agent eligibility, although clubs do move players among its Minor League system and to other teams. In contrast, free agency in NPB has not generally led to enhanced labour mobility, while international transfers to MLB have had a dramatic impact on how labour mobility is constructed in NPB. This shows that the role of regulatory actors, culture and

normative practice within an autopoietic system shape the level of labour mobility that results from formal labour controls. The ABL represents another model of labour mobility. Local players generally play for the team in their home state but there have been instances where these players have changed teams. Some foreign players are able to select their ABL team, an outcome that is dependent on whether the player is affiliated with a MLB or NPB club. The regulation of labour mobility in professional baseball is still arranged from the internal perspective of the league and such an approach continues to be tested by the globalisation of labour in professional baseball.

CHAPTER 9 THE COMMODIFICATION OF LABOUR IN PROFESSIONAL BASEBALL

Underpinning modern labour law is the principle that labour is not a commodity. This principle influences both international labour law and labour law in the United States and Australia. The labour controls imposed on professional baseball players tend to ‘commodify’ their labour, rather than treating them as the autonomous workers envisioned by writers such as Locke. This commodification can be seen as a product of the autopoietic labour systems of each league and the systems of self-regulation which have typically been insulated from external review by law. Chapter 9 will explore issues related to the three professional baseball leagues and explain the extent of the commodification in these leagues. Next, justifications for the treatment of labour in professional baseball will be analysed. This chapter will conclude by suggesting how labour can be treated so that it is not commodified, or at least not to the extent that it is at present.

9.1 THE PRINCIPLE THAT LABOUR IS NOT A COMMODITY

The principle that labour is not a commodity is an influential principle that has shaped the operation of labour markets since the early 20th century. Fudge states that resolving the commodity status of labour is a challenge faced by every liberal democracy (Fudge 2004, 446). This section begins by creating a construct of the principle that labour is not a commodity and then examines key aspects of what constitutes commodification of labour. It concludes by examining the development of the principle that labour is not a commodity, including by reference to theories that view labour as a commodity.

(a) What is a commodity?

Before examining the principle that labour is not a commodity it is necessary to explain what a commodity is. Typical examples of commodities include gold, oil and sugar and such commodities are traded on commodities markets. Anything that is capable of ownership can be described as a commodity. Thus a commodity can be bought and sold and legal ownership transferred from one owner to another.

Labour is generally not considered to be a commodity. Markets for the purchase and sale of workers themselves do not exist – or at least not lawfully in countries that prohibit slavery. Instead people hire out their services in labour markets for specified or unspecified periods of time. Unlike a commodity which is owned by someone, a worker can terminate their employment and choose to work for someone else or sit idle and not sell their labour. A commodity can only change ownership when its legal title is transferred between owners. Thus transferability is a key factor that differentiates a commodity from labour.

(b) What is the principle that labour is not a commodity?

The principle that labour is not a commodity is a normative statement that sets out an ideal to be aspired to. It is not a descriptive statement and should not be interpreted literally. After all, people do enter into contracts to ‘sell’ their labour. Fudge and Collins identified this difference when they described labour as a ‘fictive commodity’ in that it is the object of exchange for money in the marketplace. They differentiate labour from an actual commodity on the basis that labour cannot be separated from the person (Fudge 2004, 446; Collins 2003, 3).

The question that arises then is what does the principle mean? In differentiating labour and commodities O'Higgins attributed three key meanings to the principle that labour is not a commodity. First, the pricing of labour is not the sole domain of the labour market, as wages must be able to provide a reasonable standard of living. Second, a worker cannot be transferred between employers without consent. Third, the ILO uses the principle to justify the prohibition of trafficking in migrant labour (O'Higgins 1997, 230). The last two meanings are interconnected and are important in identifying when labour is treated as a commodity. Transferring employees without their consent implies that people are capable of ownership and can be exchanged between employers in the same way as any other commodity. Thus *control* of one's own labour is important in labour not being treated as a commodity.

A free worker controls his labour and can choose who to work for and for how long. A worker can quit and decide to work for someone else, to work for multiple people or even decide not to work. Thus control over one's labour and freedom of choice are critical to the principle that labour is not a commodity. Yet this construct of the principle is not without practical difficulties. Employers attempt to limit the ability of workers to control their labour through exclusive contracts of service and post-employment non-compete contractual clauses. While such practices reduce the level of control a worker has over their labour, they fall short of the ownership and control that is exercised over a commodity.

(c) What is the commodification of labour?

One of the important functions of the principle that labour is not a commodity is that it allows the recognition of when labour *is* being treated as a commodity. The

commodification of labour is an important concept for this thesis and needs explanation. Commodification of labour involves treatment of labour that reduces the control a person has over their labour and their ability to exercise freedom of choice in who they work for to the point where such treatment resembles that of a commodity.

An example of commodification can be the transfer of an employee from one employer to another. In some circumstances such treatment in effect treats labour as a commodity. While a worker may consent to an actual transfer it is more difficult to consent to a labour system that involves the transfer of workers on a regular basis. As will be discussed below, consent interacts with the level of consent, for example where consent is the product of disproportionate bargaining power. Another example of commodification is where a person is unable to choose who they work for. While this is uncommon in most industries, it is particularly common in professional sports leagues where players are selected in a draft. The ability of an employer to unilaterally choose their employee with the worker having no choice in who they work for tends to commodify labour.

The identification of labour or labour markets that are commodified is important in the context of human rights. People should have the basic rights to control their labour and determine who they will work for and for how long. Identifying the commodification of labour allows the relevant regulatory system to be analysed in relation to labour controls and practices that lead to the commodification of labour, and how these regulatory systems evolve over time. It can then be determined how to treat affected labour in a manner that is not commodified, or at least that reduces the degree of commodification.

(d) Control, autonomy and labour power: the differences between a commodity and labour

Lord Chancellor Viscount Simon stated in *Nokes v Doncaster Amalgamated Collieries Limited*⁵¹⁹ that a person's contract of service is not a company asset and nor can it be bought, sold or gifted.⁵²⁰ The operation of labour markets nevertheless raises the question as to whether labour is capable of ownership and control, as is the case with a commodity. After all, employers enter contracts with workers to purchase the service of labour for specified or unspecified time periods. This reality of the employment relationship raises a paradox identified by Collins in that the idea that labour is not a commodity 'asserts as a truth what seems to be false' (Collins 2003, 3). Collins attempts to resolve this paradox by observing that unlike a commodity a person is the basis of a labour contract and that workers are people, not things (Collins 2003, 3). Also, as Marx noted, labour is distinct from a commodity, in that a contract for labour involves 'labour power', that is, the mental and physical capabilities in a human (Marx 1867, 117). In contrast to a commodity, labour cannot sit idly in a warehouse but requires income to be transformed into labour (Paton 2010, 82). Also, a worker is capable of owning commodities.

Insight into who owns labour is provided by the work of John Locke, a 17th century English philosopher and theorist, who influenced thinking about the role of government and the rights of the individual. Among Locke's influential writing was his 1689 work, *Two Treatises of Government* (Locke 1689). According to Locke, the labour of the

⁵¹⁹ [1940] AC 1014.

⁵²⁰ Ibid 1024. The High Court of Australia affirmed this position in *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2002) 214 ALR 24, [48].

body and the work of the hands are natural to the person and result in citizenship of civil society (Owens 1997, 121; Collins 2003, 3). As Owens noted, Locke's theory identified the intrinsic connection of labour and property to the person, conceiving the natural right of work as the property of the person (Owens 1997, 120-121). Central to Locke's construct of work is that the owner of labour is the autonomous person, who is free to control their body and mind. Locke's theory provides a theoretical and practical construct that clearly differentiates labour from commodities, forming the basis for the liberal political economy and significantly contributing to the labour theory of value (Theocarakis 2010, 11). Owens builds upon Locke's work by describing the free worker as involving the self-ownership of labour of the body and labour itself, resulting in freedom in work in the market (Owens 1997, 124).

The importance of freedom of choice in distinguishing labour from a commodity attributed by Locke has been recognised in British and Australian case law. Viscount Simon LC in *Nokes* identified as a fundamental principle of the common law the right of a free citizen to choose his or her employer.⁵²¹ Also in *Nokes* Lord Atkin described this right as the difference between an employee and a serf.⁵²² This position was affirmed in the Federal Court of Australia in *Adamson v New South Wales Rugby League Ltd* when Wilcox J stated that the right to choose between prospective employers is fundamental in a free society, a right that distinguishes serfs from free persons.⁵²³

⁵²¹ *Nokes* [1940] AC 1014, 1020.

⁵²² *Ibid* 1026.

⁵²³ *Adamson* [1991] 103 FCA 319, 342.

Control is another element of the concept of labour articulated by Locke. In *R v Tang*⁵²⁴ in the High Court of Australia, Gleeson CJ constructed the legal concept of slavery in terms of an individual's autonomy and freedom. Chief Justice Gleeson described slavery as the deprivation of one's freedom to the point a person is a slave and a person can exercise the powers of ownership over another.⁵²⁵ Further, Gleeson CJ stated that the prohibition of slavery extends to chattel slavery: that is, the 'legal capacity of an owner to treat a slave as an article of possession, subject to the qualification that the owner was not allowed to kill the slave; power over 'the slave's person, property, and limbs, life only excepted''.⁵²⁶ In differentiating between the *de jure* status of slavery and the *de facto* condition of slavery, Gleeson CJ described the latter as making a person the object of a purchase, using a person's labour in an unrestricted manner and being entitled to the benefit of a person's labour without providing compensation.⁵²⁷

Marx provides a slightly different view of the distinction between labour and a commodity, and autonomy plays a far less prominent role. Compared to Locke, Marx's idea of labour is more reliant on the relationship between labour and commodities. Marx believed that the value of a commodity was based on it being a product of labour, that the labour of a human transforms all commodities into something of value and that value can be measured in quantities (Marx 1867, 26-27). Central to Marx's theory is labour 'value' or 'power', something that is only present in humans and is realised when a worker and employer meet in the market and the worker agrees to sell their labour for a definite period of time. Wages allow labour power to be converted to labour and are

⁵²⁴ (2008) 249 ALR 200.

⁵²⁵ Ibid [25].

⁵²⁶ Ibid [27].

⁵²⁷ Ibid [26].

necessary for a worker's subsistence. For Marx, this last point distinguishes a worker from a slave and labour from a commodity (Marx 1867, 118-119).

(e) The transfer of workers and commodities

An important issue in whether labour is a commodity is the right of an employer to assign a person's contract to another employer. In *Nokes* Lord Atkin highlighted this issue when he stated that people attach importance to the identity of the company with whom they deal.⁵²⁸ This issue engages with autonomy and the right of a worker to control their labour. In this context Merkel J found in *McCluskey v Karagiozis*⁵²⁹ that by transferring employees within a corporate group without their consent, employees had been denied their right as a free citizen to choose their employer and thus were treated as serfs.⁵³⁰ Also in *Nokes* Viscount Simon LC stated that the right to a person's contract of service cannot be transferred from one employer to another unless there is a statutory exception or an employee consents.⁵³¹ Thus the common law views consent to having one's contract transferred to another employer as critical in not being a serf or a slave, however, even if consent is provided, affected players can still be commodified.

(f) The evolution of the legal principle that 'labour is not a commodity'

The history of the principle that labour is not a commodity lies in reaction to economic theory of the 18th century that viewed labour as just that – a commodity. One of the earliest scholars to hold this position was Adam Smith, who in his 1776 work, the

⁵²⁸ *Nokes* [1940] AC 1014, 1030.

⁵²⁹ [2002] FCA 1137.

⁵³⁰ *Ibid* [16].

⁵³¹ *Nokes* [1940] AC 1014, 1020. Contracts can also be assigned if contemplated within the contract: *Tolhurst v the Associated Portland Cement Manufacturers (1900) Limited and the Imperial Portland Cement Company Limited* [1903] AC 414.

Wealth of Nations, analogised labour wages to commodity prices and likened the demand for the labour of men to any other commodity (Smith 1776, 51-53). Featuring prominently in liberal economic theories of the 19th century and strongly influencing the labour theory of value was the notion that labour should be treated as a commodity (Paton 2010, 77). However, by the mid-1800s, economists were beginning to challenge that idea. Marx's work in the 1860s (see Marx 1867) signified the emergence of the principle that labour is not a commodity and was reinforced by the work of Lujo Brentano in 1877 (Brentano 1877) and Dr John Kells Ingram in 1880 (Ingram 1880). At the turn of the 19^h century the principle had gained the endorsement of the Catholic Church, when in 1891, Pope Leo XVII stated that labour is the exclusive property of the worker and that free consent regulates wages (Pope Leo XVII, 43-45).

Some debate exists over the origins of the concise phrase that 'labour is not a commodity'. O'Higgins' argument that Dr Kells Ingram coined this phrase in a speech in 1880 represents the traditional European view (O'Higgins 1997, 226). In contrast, Evju presents an American perspective, speculating that the co-founder of the American Federation of Labor, Samuel Gompers, created the phrase during the union's labour reform campaign between 1908 and 1914, despite acknowledging a lack of supporting evidence (Evju 2012, 7-8). What is certain is that the *Clayton Antitrust Act of 1914* included the phrase 'the labor of a human being is not a commodity or article of commerce'.⁵³² It is difficult to imagine that the anti-slavery movement in the United States during the second half of the 1800s had no part in shaping American ideology on labour. During the early 1900s the principle that labour is not a commodity was

⁵³² *Clayton Antitrust Act of 1914*, 15 October 1914, Pub. L. 63-212, 38 Stat. 730 (15 U.S.C. § 12-27, 29, 52-53).

certainly influencing the judiciary. In one of the early baseball cases, *American League Baseball Club of Chicago v Chase*, Bissell J of the New York Supreme Court in 1914 stated that baseball's labour system created 'a species of quasi peonage unlawfully controlling and interfering with the personal freedom of the men employed'.⁵³³

What creates less debate is the influential role of the principle in the global development of labour law. At the Peace Conference in 1919 that drafted the Treaty of Versailles, the Commission on International Labour Legislation adopted the principle by stating 'that labour should not be regarded merely as a commodity or article of commerce' (Treaty of Versailles 1919, Part XII, Article 427).⁵³⁴ The international community adopted the wording of the *Clayton Antitrust Act* in 1914, when the Philadelphia Declaration confirmed that 'labour is not a commodity'⁵³⁵ and annexed this principle to the ILO's Constitution.⁵³⁶ Fudge notes the important role that the principle played in shaping the development of labour law in Europe, North America and Australia from the early 20th century to the present day (Fudge 2011, 122).

(g) Summary

The principle that labour is not a commodity has played an influential role in labour law and assists understanding of how labour in modern markets can be commodified.

⁵³³ *American League Baseball Club of Chicago*, 149 N.Y.S. 6, 16 (1914).

⁵³⁴ The original wording of the proposed declaration was 'the principle that in right and in fact the labor of a human being cannot be treated as merchandise or an article of commerce': Evju 2012, 5-8.

⁵³⁵ International Labour Conference, *Declaration Concerning the Aims and Purposes of the International Labour Organisation* (adopted by the Conference at its Twenty-Sixth Session Philadelphia, 10 May 1944).

⁵³⁶ International Labour Organization, *Constitution of the International Labour Organization*, 1 April 1919, Annex I(a), available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO>.

Control and autonomy over one's labour are critical in labour not being treated as a commodity. Constructs of the principle that labour is not a commodity developed by theorists, legislators and jurists, combined with this section's concept of how labour can be commodified, allow this chapter to now explore the extent to which labour in professional baseball can be regarded as being commodified.

9.2 TO WHAT EXTENT IS THE LABOUR OF PROFESSIONAL BASEBALL TREATED AS A COMMODITY?

After being traded from the St Louis Cardinals to the Philadelphia Phillies in 1969, Curt Flood, an African American and All-Star and World Series champion centre fielder who played in the Major and Minor Leagues during segregation and was part of the civil rights movement, stated that he was not a slave or a piece of property (see Snyder 2007). Despite the improvements in players' control of their labour that followed *Flood* through collective bargaining, Flood's view still prevailed among some Major League players in the 1990s. Evidence of this can be found in former Major League player Dan Peltier's testimony before a Senate hearing that professional baseball's labour system was akin to the system of indentured servitude of the 1700s.⁵³⁷ This section will now assess Flood and Peltier's claims and determine whether the key labour controls in professional baseball that were reviewed in Chapter 8 commodify labour.

(a) The draft

As discussed in Chapter 8, the recruitment of most entry-level workers in MLB and NPB is through an external player draft, while the ABL has only held three drafts. The

⁵³⁷ *Hearing on Senate 53 Before the Senate Committee on the Judiciary*, 105th Cong 13–15 (June 17, 1997) (testimony of Dan Peltier, former baseball player) 7.

use of the drafts in MLB and NPB removes a free market for entry-level players to negotiate an employment contract with a professional club. Instead, a player must be selected by a club in the draft and can only negotiate a contract with that club. Selecting players in a draft is akin to a commodities market and this practice tends to commodify labour by denying a player the autonomy of choosing their employer and controlling who they work for. Drafted players must sign a contract with the selecting team or wait until the draft in the following year, thus denying them the autonomy envisioned by Locke and thereby commodifying labour.

In *Adamson v New South Wales Rugby League Ltd* the inability of players to choose their prospective employer in the internal draft in the NSWRL was viewed by the Federal Court of Australia as inconsistent with a fundamental right in a free society that distinguishes serfs from free persons.⁵³⁸ *Adamson* involved professional players no longer contracted by a NSWRL team finding a new team through selection in a draft. Also, the United States Court of Appeals for the District of Columbia in *Smith v Pro Football Inc*, an antitrust case that challenged the National Football League's draft on the basis that drafted players who did not contract with the selecting team could not play professional football, described college players in the draft as 'fungible commodities'.⁵³⁹ The logic of these decisions can be applied to professional baseball. The NPB and ABL drafts include professional players, and drafted players in MLB and NPB drafts who do not contract with the selecting team face similar sanctions to the college players in *Smith*. The views of the Federal Court of Australia and the United

⁵³⁸ *Adamson* [1991] 103 FCA 319, 342.

⁵³⁹ *Smith v Pro Football Inc*, 593 F.2d 1173, 1187 (D.C. Cir. 1978).

States Court of Appeals identify that player drafts do not treat players as free and autonomous workers but as commodities.

(b) The reserve and free agent systems

Working with the draft and the limit on players to negotiate with multiple clubs is the reserve system. As was examined in Chapters 2 and 8, the reserve system gives clubs the right to control a player's right to work as a baseball player for a designated period of time, though in MLB and NPB it may take an unspecified period of time to achieve as eligibility is based on service on the active roster. During the reserve period a player can only work as a baseball player for the one club while, as will be discussed below, the club can assign the player's contract to another club or terminate the player's contract at any time, practices that when viewed together plainly commodify labour. Justice Bissell in 1914 in *Chase* described this system as treating a baseball player as a chattel and the club as having title to the player.⁵⁴⁰ Also, Bissell J viewed the reserve system as a system of servitude that allows the 'purchase, sale, barter and exchange of the services of baseball players' and creates a quasi peonage system that violates the spirit of the United States' Constitution.⁵⁴¹ In his dissenting judgment in *Flood*, Marshall J stated that players were not bound to a club by slavery but by the reserve system, a system that players could not escape from after signing their first professional contract.⁵⁴² In *Silverman v Major League Baseball Player Relations Committee* Newman CJ of the United States Court of Appeal for the Second Circuit described the reserve system as one where a player's services become the property of a club and the player has limited freedom to seek employment with another club. Chief Justice

⁵⁴⁰ *American League Baseball Club of Chicago*, 149 N.Y.S. 6, 12 (1914).

⁵⁴¹ *Ibid* 19.

⁵⁴² *Flood*, 407 US 258, 289 (1972).

Newman stated that until the advent of free agency in 1976 a player's services were the property of a club until he was traded or released from his contract.⁵⁴³

These statements demonstrate that baseballers are commodified in that they are capable of being controlled through contractual provisions and industry practice. By giving clubs control over a player's labour for a set period of time and allowing most players to be traded at any time, the reserve system regards labour as a commodity, something that can be owned, not as the free worker envisioned by Locke. The commodification of players by the reserve system is reinforced by any player breaching the reserve system being 'blacklisted' from playing professional baseball by being placed on a restricted or ineligible list.

A labour control interrelated to the reserve system that tends to de-commodify labour is free agency. While the reserve system gives control of a player's labour to the club, free agency gives players who serve the designated reserve period control over their labour by allowing them to choose their employer and sell their labour on the free market. But free agency is not easy to attain, as should be apparent from what was said in Chapter 8. In the United States free agency in MiLB is granted after seven years (one year is calculated as one month on the active roster or disabled list) and after six years of service on the active roster in MLB. In Japan there is no free agency for *ni-gun* players while *ichi-gun* players require seven or eight years of active roster service for domestic free agency and nine years for international free agency. In addition, Chapter 8.3 demonstrated that few Japanese players elect to exercise their rights as free agents, though the numbers have increased in the past few years. The combination of

⁵⁴³ *Silverman*, 67 F.3d 1054, 1060 (2d Cir. 1995).

Minor League and Major League free agency and free agency eligibility being based on years of service provides clubs with potentially indefinite control over a player's labour, and at minimum provides for 13 years of control. Thus, the degree to which free agency de-commodifies labour depends on the actual number of years required to qualify and the ability of players to choose their employer and transfer clubs as free agents.

(c) Compensation for the loss of free agents

While free agency can de-commodify labour, the rules related to the loss of a free agent also view players as commodities. In some situations MLB and NPB free agent rules require compensation for a free agent's former club. Compensation is in the form of a draft pick in MLB and in NPB (limited to domestic free agent transfers) a player or cash, or both. As was discussed in Chapter 8.2, MLB clubs who have made a 'qualifying offer' to a free agent who moves to another club are entitled to a compensatory draft selection in the next draft (MLB Basic Agreement 2012, article XX.B).⁵⁴⁴ In NPB, clubs who lose a free agent can receive compensation in the form of a player and/or cash from the player's new club, with the level of compensation being based on the player's rank in club salary for their last season (NPB Agreement 2004, article 10).⁵⁴⁵ Thus the rules on free agency commodify players in that they are viewed as the property of clubs and therefore a club is entitled to compensation if it loses a free agent player.

⁵⁴⁴ For the rules on qualifying offers see above n 525.

⁵⁴⁵ NPB clubs are permitted to protect 28 players from compensation and for the ranking system, see above n 528.

(d) The assignment of contracts

Players are also commodified through the practice of ‘buying’ and ‘selling’ players through trades. The term trade itself invokes concepts of property. The right of professional baseball clubs to assign a player’s contract to another club is a practice that views players as property that can be traded for other players or sold for cash. This position was held by Curt Flood, who in a letter to the Commissioner of MLB protesting his trade argued that he was ‘not a piece of property to be bought and sold irrespective of my wishes’.⁵⁴⁶ As discussed above in Chapter 9.1, the courts require an employee to consent to the transfer of their contract so that the person is not viewed by the law as a slave, though such consent could still see the worker as a commodity in practical terms.

Few industries allow employers to exchange employees for one another and the central issue identified above in cases such as *Nokes* is whether an employee consents to an assignment of their contract.⁵⁴⁷ In professional baseball a player formally consents to assignment of his contract in his uniform player contract. Yet the level of this consent is questionable for young players, as any contract they sign can be seen as the product of an unequal bargaining position created by the draft, the reserve system and dealing with large multi-million dollar corporations. The English case of *Schroeder*,⁵⁴⁸ noted in Chapter 7.4, highlighted that sometimes courts refuse to enforce unreasonable restraints that are the product of an unequal bargaining position. Further, players are unlikely to appreciate or be thinking about the possibility of their contract being

⁵⁴⁶ Letter from Curt Flood to Bowie Kuhn, *United States of America National Archives*, 24 December 1969 <<http://research.archives.gov/description/278312>>.

⁵⁴⁷ *Nokes* [1940] AC 1014, 1020.

⁵⁴⁸ *A Schroeder Music Publishing Co Ltd* [1974] 3 All ER 616.

assigned to a minor league team or being traded to another major league club that is likely to negatively affect their career. Most players cannot prevent a trade and the ‘five and ten’ rule in MLB only allows veteran players to block a trade to some clubs.⁵⁴⁹ Again, even if a player consents to the assignment of his contract that does not prevent such a transaction from commodifying labour.

A club has the contractual power to assign a player’s contract to another club at any time (see MLB Uniform Player Contract, clause 6(a)). An extreme example was in 2014 when the Detroit Tigers traded Austin Jackson to the Seattle Mariners in the middle of a game. Jackson was removed from the field and sent to his new club (Maine 2014). When viewed in conjunction with a club’s right to terminate a player’s contract at any time, the right of assignment allows players to be quickly moved and, as something that can be exchanged and easily replaced, akin to a commodity.

(e) The waiver system

The movement of players by the waiver system in MLB was discussed in Chapter 8.2 and also exists in NPB. However, in NPB it is under used when compared to MLB, in part because a club has a single 70-man roster and the same company owns the *ichi-gun* and *ni-gun* teams. Waivers are typically used in NPB when a player is notified of his release by *senryokugai* and removed from the 70-man roster. While the waiver system prevents stockpiling of players in MLB, the limited roster space afforded by a 70-man roster has a similar practical effect in NPB. The waiver system and internal contracting procedures in MLB facilitate the movement of players and, as Ross

⁵⁴⁹ A club must receive a player’s written consent to assign a contract if the player has five or more years of Major League service, or if the player has ten or more years of Major League service, the last five being with the one club: MLB Basic Agreement 2012, article XIX.A(1)(2).

observes, the promotion of competitive balance (Ross 1997, 559). But this system can at times also treat players as a commodity, the subject of a mere transaction.

For example, during a four-month period in the 2013 offseason the MLB waiver system saw Australian pitcher Liam Hendriks move from the Minnesota Twins to the Chicago Cubs, then to the Baltimore Orioles and finally to the Toronto Blue Jays. He was then traded to the Kansas City Royals in the middle of the 2014 season (Brudnicki 2014). At the end of the season Hendriks was traded back to Toronto and after the 2015 season was again traded to the Oakland Athletics. With each waiver transfer Hendriks was assigned to a team in his new club's Minor League system, not only affecting his ability to obtain an active roster position on a Major League roster but also the living arrangements for him and his wife. Players like Hendriks are not able to exert any control over their labour, a key feature of Locke's autonomous worker, and instead are shuffled between clubs in what are effectively 'paper transactions'. The lack of control over a player's labour is evidence that such practices more closely resemble the movement of commodities rather than workers. It is difficult to imagine that the consent a player provides in his uniform player contract to the waiver system could genuinely extend to the transfers experienced by players such as Hendriks.

(f) The posting system

Exemplifying the commodification of labour are the posting system rules in the Posting Agreements of 2000 and 2013 between MLB and NPB. As explained in Chapter 8.3, a reserved player in NPB must obtain consent from his club to be 'posted' to a MLB club (Posting Agreement 2013, article 7). This requirement implies that the player is the property of his NPB club and is not Locke's autonomous worker who can control

his own labour. In addition, the posting system in the Posting Agreement 2000 permitted all 30 MLB clubs to make bids for the posted player (Posting Agreement 2000, article 8, see now Posting Agreement 2013, articles 7 and 9) in what was described a 'blind auction'. The highest bidder won the exclusive and non-transferable rights to enter a contract with the player (Posting Agreement 2000, articles 9 and 11, see new Posting Agreement 2013, article 9). This process tended to commodify labour as auctions that award the winning bidder property rights generally involve commodities or objects, not people – unless the auction is a slave auction, where the slave is the 'property' of its owner. The Posting Agreement 2013 does, however, have some effect in de-commodifying labour by removing the auction system and allowing any MLB club willing to pay the release fee to negotiate a contract with a posted player (Posting Agreement 2013, article 9), though a player must still obtain consent from his club to be posted.

(g) The treatment of Latin American players

The recruitment of Latin American players by many MLB clubs indicates that baseball players can be viewed as a commodity. Throughout Latin America players can be signed as young as 16 years old and recruited into MLB club academies at even younger ages. Recruitment practices of MLB clubs in cheap labour markets such as the Dominican Republic and Venezuela has seen MLB clubs use what is referred to as the 'boatload' approach to recruiting players: a boatload of Latin American players can be signed for the same cost as one or two players in the United States (Duru 2010, 669-670). This mentality led Wollett to identify MLB clubs as treating Latin American children and young men as 'pieces of cheap fruit' (Wollett 2008, 123). Recruitment

practices such as the boatload approach both exploit vulnerable labour and commodify labour.

(h) Multi-year contracts

Multi-year contracts in professional baseball appear not to treat players as commodities and in MLB veteran players under the collective bargaining agreement are entitled to some control over a potential trade. This can be contrasted with the reserve system prior to free agency. Until the Seitz arbitration in 1975, MLB owners argued the reserve system operated in perpetuity, thereby giving owners control over a player's labour as a baseball player forever. Similarly, free agency was not recognised in NPB until 1993. Combined with the ability of a club to trade a player at any time, this system is an example of how labour can be commodified. The labour rights of players to play baseball were controlled by an employer from the moment the player signed a contract until he stopped playing.

While players who attain free agency have greater control over their labour, there is still a degree of commodification in this system. In the MLB-MiLB system clubs control a player's right to work as a baseball player for seven years as a Minor League player, and then six years of service in the Major Leagues. Thus a player's labour is controlled for a minimum of 13 years. But it should be noted that to some degree Major League service is indefinite as it is based on years of service. For many players six years of service will never be achieved and for a number of free agents they will take longer than six years to be eligible for free agency. Similarly, in NPB free agency is based on service, excludes minor league service and takes between seven and nine years of service. As discussed in Chapter 8, adding to the level of commodification in NPB

is the absence of a strong free agent market with many free agents not activating their free agent status, and a number of free agents decide to stay with their club.

(i) The extent of commodification

There are several factors that contribute to the commodification of labour in baseball. In the domain of professional baseball it is possible for commodification to result from an unequal bargaining position between worker and employer. For example, a young player drafted by a professional baseball club must either sign a highly restrictive employment contract or sit out of professional baseball for 12 months and wait for another draft. Under the MLB Rule 4 draft college seniors have no such option and must sign with the selecting club in order to pursue a professional career. This has led to low signing bonuses being offered to many college seniors (Gordon 2015, 149). Such commodification is underscored by owners colluding on employment conditions, and in the United States, the exemption of Major League players from antitrust law until 1998. Thus the system of self-regulation and autopoiesis within a league can increase the ability of labour to be treated as a commodity where players are unable to legally challenge labour controls such as the reserve system that commodify labour.

This section has demonstrated that central aspects of the labour system of professional baseball typically do not involve autonomous workers. But a key question is where this system sits within the theory and literature on the principle that labour is not a commodity. Slavery is the extreme example of a commodity. In light of the fact baseball players receive a salary, possess varying levels of negotiation power throughout their career, are represented by agents and lawyers and enjoy freedom of association, professional baseball players are not to be regarded as slave labourers. This

reflects the improvements in the treatment of professional baseball players that have occurred in the decades since Flood's declaration. Thus, a professional baseball player is not a slave, but nor is he a free worker.

Most professional baseball players lack the control of their labour associated with the concept of a free worker and enjoyed by workers who are not professional athletes. In some situations a baseball player may be an extreme example of 'exploited' labour or of commodified labour. Clearly, it may be hard to conceive professional baseball players as exploited when they earn high incomes, sometimes in the tens of millions of dollars. Similar issues were raised when Curt Flood described himself as a slave in his court challenges against MLB. Flood was one of the highest paid players in 1969 with a salary of US\$90,000. Flood's response was a 'well-paid slave is nonetheless a slave' (Snyder 2007, 104). Echoing these sentiments was Justice Frank in *Gardella* in 1949 when he stated that it is inconsequential that baseball players are well paid as only the totalitarian minded would consider that high pay excuses virtual slavery.⁵⁵⁰ Such logic can be applied to consent in a uniform player contract.

High paid players may face far less exploitation than when they were in earlier stages of their careers. Nevertheless, exploited labour in the context of professional baseball could be viewed as being 'commodified'. The level of commodification not only varies from league to league, it is shaped by factors such as the stage of a player's career, the country where a worker plays or is recruited from and a player's position. The level of labour mobility enjoyed by players and their exploitation by owners provides a useful guide in assessing how commodified the labour of baseball is at a given time and in an

⁵⁵⁰ *Gardella*, 172 F.2d 402, 410 (2d Cir. 1949).

individual league. Therefore it is possible to conceive labour in professional baseball as being commodified, the level of which can depend on the stage of autopoiesis within a particular league (for example commodification was much higher in MLB and NPB prior to free agency).

(j) Summary

The construction of labour as a commodity by the autopoietic systems of labour regulation in the three professional baseball leagues results in many players having little control over their labour. Most baseball players are neither the autonomous free worker envisioned by Locke nor the slave described by Flood. The closest a player comes to Locke's autonomous worker is if they qualify as a free agent and can control their labour by choosing their employer. Instead players can be viewed as being 'commodified', the level of which varies among leagues, the point in a player's career, the status of a player and the stage in the evolution of an autopoietic labour system. Perhaps commodification is highest in Latin American countries such as the Dominican Republic and Venezuela.

9.3 JUSTIFICATIONS FOR PROFESSIONAL BASEBALL'S RESTRICTIVE LABOUR CONTROLS

This chapter will now review a number of the key justifications that can be advanced for professional baseball's current system for the regulation of labour. The following justifications are also frequently used in baseball and other sports to validate restrictive labour controls that might otherwise violate the common law restraint of trade doctrine. Despite this overlap, the justifications can be distinguished on the basis that they are being examined here in the context of commodifying labour and removing a worker's

autonomy. Human rights are a key aspect of this discussion. Also, the justifications in this section are different to the restraint of trade doctrine in that labour controls related to commodification are the product of collaboration between owners, and for much of the history of MLB, such controls were excluded from antitrust law by the Supreme Court's exemption for MLB.

(a) Sport is 'special'

Siekmann identifies that one of the key sports law issues in the EU is whether sport is 'special' and should be treated differently under EU law (Siekmann 2012, 698). This special regulation involves interaction with external regulation such as labour law, contract law and competition law and, in the case of Europe, European Community law. Garcia notes that sporting bodies that advocate the 'specificity of sport' are yet to produce a clear definition of that specificity, but he defines this concept as the social and economic attributes of sport that require special treatment by law (Garcia 2007, 7).

At the core of the 'specificity of sport' argument is the idea that the application of general legal rules to sport needs to be flexible and consider the unique characteristics of sport. Garcia links the specificity of sport to autonomy and the idea that, as sport has historically sat on the peripheries of state regulation, sport should remain self-governed (Garcia 2007, 7). Thus, it can be seen that the specificity of sport is essentially an argument for self-regulation. The specificity of sport has played a pivotal role in the application of European labour law and competition law to sports by the European Court of Justice and the European Commission (Colucci 2011, 35-36).⁵⁵¹

⁵⁵¹ The *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) addresses the specificity of sport by requiring the EU to promote sport while taking account of its specific nature.

However the acceptance of the specificity of sport by courts in the United States is more complex. In *Brown* the Supreme Court in 1996 categorically rejected the specificity of sport as a basis for not applying the antitrust exemption to collective bargaining in professional sport.⁵⁵² Yet at other times this idea has influenced the Supreme Court. The status of baseball as America's 'national pastime' is said to have influenced the Supreme Court in refusing to overturn baseball's antitrust exemption in *Flood*. Academics such as Abrams argue that the interpretation of the law by Blackmun J was influenced by his passion for baseball (Abrams 2007, 184-187), as demonstrated by him being an avid baseball fan and known by some as the 'Minnesota Twin' (his home MLB team) (Ross 1995, 172). Justice Blackmun began the Court's majority decision by listing 88 baseball players and identities.⁵⁵³ Ross argues this part of the judgment was needed to demonstrate that, due to baseball's unique position in American culture, the Court should not (and Congress probably did not intend to) destroy baseball by applying inflexible antitrust laws (Ross 1995, 176). As Ross notes, Blackmun J relied on the specificity of sport principle in finding that the exclusion of baseball from antitrust law in *Federal Baseball* and *Toolson* was justified on the basis of baseball's unique characteristics and needs.⁵⁵⁴

The specificity of sport argument is used to justify restrictive labour controls in professional baseball and other sports such as the player draft and the reserve clause. As discussed, these controls tend to commodify labour. But are these controls justified on the basis that sport is special and therefore necessitates restrictions on labour

⁵⁵² *Brown*, 518 U.S. 231, 248-249, 255-257 (1996).

⁵⁵³ *Flood*, 407 U.S. 258, 262 (1972).

⁵⁵⁴ *Ibid* 282.

mobility? Baseball's status as the 'national pastime' certainly contributed to MLB gaining a judicial exemption from antitrust law. But how special is sport and professional baseball? It is difficult to argue that baseball is so unique that it requires controls that commodify labour. Should baseball be exempt from this important principle because it involves unique regulatory features such as a high degree of collaboration and specialised regulatory activity? The answer is no. Like any other worker, athletes are entitled to exercise some control over their labour. The highly restrictive labour controls in professional baseball exceed what is needed to protect the interests of leagues and clubs. While this explanation can also be applied to the assessment of the reasonableness of a restraint of trade, in this context it can be viewed in terms of human rights rather than commercial arrangements.

(b) Competitive balance

Another common justification for restrictive labour controls in sport, many of which would otherwise be illegal in other industries, is the need to create competitive balance. Such a goal is important in ensuring there is a level of uncertainty in the outcome of a game, which helps to sustain the interest of fans and generate sufficient revenues to underpin a financially viable league and the salaries of players. Competitive balance requires some limitation on the operation of a free labour market in order to ensure clubs have equal access to player talent, an aim in professional baseball that is primarily achieved through the player draft and the reserve system. Yet the players selected in the draft take years to develop into potential major league players and while the reserve system allows clubs to assign a player's contract through a trade, a club must also trade one of their own players. In addition, baseball's key labour controls do not require

clubs with excess talent to move surplus players to weaker clubs (Ross 1989, 672-673).

Such factors undermine the idea of labour controls achieving competitive balance.

Stakeholders within baseball also justify controls such as the reserve system on the basis that without these controls, the rich clubs would be able to recruit the best players at the expense of competitive leagues. In this light they can be seen as controls on clubs and the effects on players are only secondary. As discussed in Chapter 7.4, this argument has been unsuccessfully advanced to justify the retention/transfer systems in English soccer, Australian rugby and Australian Rules football, and the interpretation of MLB's reserve system as a contractual clause that operated in perpetuity. Yet when courts and arbitrators ruled against the leagues in these cases, the labour system did not collapse and wealthy clubs did not dominate the recruitment of the best players (although there are exceptions, such as the current English Premier League). Ross supports this position in noting that not only did the introduction of free agency in MLB not result in wealthy clubs dominating the free agent market but that wealthy clubs in these markets lost more free agents than they gained (Ross 1989, 681). In terms of creating competitive balance, baseball's labour controls gives clubs relatively equal access to labour but the underlying competitiveness of a club is also based on factors such as scouting, recruitment, player development and coaching.⁵⁵⁵ Competitive balance justifies baseball's labour system to a degree but it does not justify the highly restrictive labour controls and the commodification of labour that results.

⁵⁵⁵ Ross makes the important observation that leagues have not capped spending on these areas, instead focusing on labour controls that monopolise the labour market: Ross 1989, 680.

(c) Economic justifications

Owners and leagues in professional baseball frequently adopt economic justifications to support the use of restrictive labour controls. The financial viability of a league and its member clubs is dependent upon ensuring that competition for labour does not result in growth in player salaries that is not underpinned by a club's revenues, which can ultimately lead to the bankruptcy of clubs.⁵⁵⁶ While wage control can be used to justify professional baseball's labour system, as Ross argues, monopoly leagues (such as MLB, NPB and the ABL) can use labour controls to 'artificially' suppress player salaries (Ross 1989, 667). In addition, Ross argues that some restrictions on labour mobility and a free labour market in MLB are needed to ensure clubs are neither too strong or too weak, resulting in decreased competition, which can negatively affect fan interest and the revenues used to pay players (Ross 1989, 687).

The relationship between controls on labour mobility and wages demonstrate why regulatory actors in MLB such as player unions have resisted unrestricted labour markets. As discussed in Chapter 5, Marvin Miller led the MLBPA from the late 1960s to the early 1980s and pursued greater equality between players and owners. In bargaining negotiations on free agency, Miller feared that an oversupply of free agent labour would damage the market value of players, thereby decreasing the income earning capacity of players. Influenced by his experience as a trade union economist, Miller negotiated a free agent qualification period of six years of service (Miller 2004, 255, 259). Therefore the MLB free agent system allows clubs to retain the contractual

⁵⁵⁶ For example, competition for soccer players in Europe saw player wages and team payrolls grow in the 1990s and 2000s, resulting in teams in many European leagues facing bankruptcy due to total player payrolls far exceeding team revenues. This led the Union of European Football Associations to introduce its financial fair play rules in 2012: Union of European Football Associations, *UEFA Club Licensing and Financial Fair Play Regulations 2012*.

rights to a player for a designated period of time and at the same time does not undermine the value of free agents by creating an oversupply of free agent players. The risk of oversupply of free agents in NPB is even lower as free agency eligibility requires between seven and nine years of service (Rule of Free Agent 2009, article 2(1)(2)).

(d) The representation of players

Davies points out that the legal enforceability of labour controls in sport is strengthened when they are subject to collective bargaining by a powerful player union (Davies 2006, 93). This argument applies to MLB and NPB given the roles of the MLBPA and the JPBPA in subjecting labour controls in those leagues to successive rounds of collective bargaining over a number of years. No longer are those controls unilaterally imposed by owners, rather they are the product of good faith bargaining. Thus, it is harder to argue that current labour controls commodify labour as players have the opportunity to regulate them through collective bargaining.

However, the justification that labour controls are the product of collective bargaining does not apply to all leagues. As was discussed in Chapters 5 and 6, MLBPA excludes from membership over 7,000 Minor League players and the working conditions of these players are not the product of collective bargaining. Despite not being members of the MLBPA, the union has negotiated labour controls that effect Minor League labour, such as the signing bonus pool and tax system for the amateur draft and international amateur free agents in the 2012 collective agreement. Like MiLB, there are no collective negotiations, nor a player union in the ABL. Therefore the working conditions in MiLB and the ABL cannot be justified on the basis of being a product of collective bargaining.

The justification of the labour system based on the grounds of representation can be extended to include agents. However, this argument has limitations as player agents help implement uniform player contracts, where the bulk of the agreement (including restrictions on labour mobility) cannot be negotiated, except for salary and special covenants. This justification is perhaps stronger for free agent players, particularly those players (and their agents) who are able to negotiate long-term contracts for millions, sometimes hundreds of millions of dollars. However, this justification is much weaker in NPB. As discussed in Chapter 6, player agents for Japanese players in NPB were prohibited until 2001 and agents must be registered attorneys who can only represent a maximum of one player (Japanese Professional Baseball Players Association website, undated).

(e) Summary

Of all the justifications for the labour controls in professional baseball, perhaps the strongest is that the labour systems in MLB and NPB are the product of collective bargaining and unionisation of the workforce. No longer are the labour controls in these two leagues the product only of the will of owners. Collective negotiations in MLB have seen the evolution of free agency and salary arbitration, while in NPB collective bargaining has led to a reduction in the number of years required to become a free agent. In contrast the collective representation of players cannot be used as a justification for the labour systems in MiLB and the ABL, as these leagues have no unions and collective bargaining does not take place.

9.4 THE DE-COMMODIFICATION OF LABOUR IN PROFESSIONAL BASEBALL

This chapter will now change approach by looking at how the labour of professional baseball might be 'de-commodified'. This section will suggest methods by which labour might not be treated as a commodity, or at the very least, be treated better than it currently is.

(a) Controlling a player's right to work

Clubs controlling a player's right to work as a baseball player can unfairly impede his labour mobility, ability to work and capacity to be the autonomous worker envisioned by Locke. An illustrative example is the right of a club to unconditionally release a player. As discussed above, clubs can exercise this right at any time. MLB clubs frequently exercise this right in relation to Minor and Major League players during spring training, on the eve of a new season and even during a season. Such timing makes it very difficult for players to obtain a roster position on another club, as all MLB clubs finalise their Minor and Major League rosters in the weeks leading up to a new season and may not have a roster position for a player released during a season or in the weeks prior to a season commencing. Similar issues exist for players wanting to play in a foreign league like NPB. To continue their professional career these players may need to look at playing in the independent leagues in North America.

A deadline for releasing players in the off-season would help players obtain another job by giving them more time before the start of a season to secure a contract. The deadline could be at least two months before the start of a season (preferably longer), allowing clubs time to release players at the end of the season and assess players at or before

spring training. An early deadline is preferable as it would give players more time to market themselves to potential employers. Also, contracted players would have some level of job security for the forthcoming season. An additional advantage of a deadline is that uncontracted players would have time to seek employment in foreign leagues. Such a system operates in NPB in the autumn after the end of a season, where rosters for the following year are finalised and there are two *senryokugai* periods for releasing players: early October and early November.

As discussed above, controlling NPB players through the need to provide consent for players to be posted tends to commodify labour. Amendments to posting protocols in 2013 de-commodified labour to an extent, for example, capping the release fee at US\$20 million and allowing any MLB club to negotiate a contract with a posted player. However, the need to obtain consent from the player's club to be posted is still a problem, and if consent is given, it is close to the player's eligibility for international free agency (nine years of service) when a player's value is likely to be high. The autonomy of NPB players could be improved by designating a set number of years of service required for a player to be posted, in contrast to the current normative practice of players being posted in connection with free agency eligibility. Players would still require the consent of their club to be posted. Setting a minimum number of years for posting eligibility would give players a greater level of control over their labour.

(b) Player collectivism in Minor League Baseball and the Australian Baseball League

The absence of collectivism in MiLB and the ABL contributes to the commodification of players in these leagues. Working conditions are not the product of collective

negotiations between players and clubs and, players lack a collective voice in relation to labour issues. The exclusion of Minor League players from the MLBPA leaves players without a mechanism to lobby for fairer working conditions, even though the MLBPA sometimes makes decisions that affect Minor League players. The lack of collective negotiations in the ABL is compounded by the high annual turnover of players and the lack of a player union in any form. Collectivism in both of these leagues would allow players to bargain over labour controls that commodify labour and allow such practices to be rectified, or at least addressed.

The prospects of collectivism occurring in MiLB and the ABL are not high. Attempts to unionise these workforces are likely to be met with resistance by MLB and the ABL, as are any attempts to enter some form of collective negotiations. Practical barriers also exist. MiLB and the ABL experience a high turnover of players. Each year, players in MiLB move through their club's network of teams, and some contracted players must give way for a new group of drafted players. Players may not see the value in unionisation as they intend to quickly progress to the Major Leagues, or alternatively, are not in the system of professional baseball for very long. ABL players face similar problems in any efforts to unionise or introduce collective relations. Few foreign affiliated players from MiLB or NPB return to the ABL for a second year, with the availability of Australian affiliated players dependent on their affiliate allowing the player to play during the offseason. Local Australian players have careers outside of baseball and may not see any benefit in moves to collectivise as the ABL is little more than an extension of their amateur baseball career.

(c) Control of assignments and trades

Another method to de-commodify labour in baseball is to give players greater control over the assignment of their contract and trades. Leagues like the Australian Football League require players to approve a trade (Australian Football League Collective Bargaining Agreement 2015-2016, article 22.4). In MLB the ‘five and ten’ rule, discussed above, grants a similar right to players with at least five years of MLB service but most players have little control over whether they are traded and their contract assigned. An extreme example, as noted earlier, involved the multiple assignments of Liam Hendriks’ contract in 2014. Granting players greater control over their contract, perhaps through the expansion of the five and ten rule or limits on waiver transactions would help to de-commodify labour, particularly in MLB.

(d) Summary

The de-commodification of labour in professional baseball can in part be achieved by reducing the gap between workers at the major and minor league level. Some form of player collectivism in the MiLB and the ABL would help achieve this goal. Players in MLB and *ichi-gun* in NPB enjoy a privileged and well-paid life. Much of the de-commodification of labour needs to occur at the minor league level in order to reduce the gap in the treatment of elite and developing players.

9.5 CONCLUSION

The labour practices in professional baseball tend to commodify labour through practices like the reserve system, elements of free agency and the assignment of contracts. These practices violate the principle that labour is not a commodity. Such practices view labour as something that is capable of being controlled and owned, in

other words, as a commodity. In turn players are moved between major league and minor league teams as a club controls the rights of a player to play baseball. Only a small percentage of free agent players are able to control their labour and choose their employer through free agency. Such players can be viewed as Locke's autonomous worker in the world of professional baseball. The strategies for de-commodification of labour outlined in this chapter could help to address the gap between elite and developing players.

CHAPTER 10 GLOBALISATION AND LABOUR

MOBILITY IN PROFESSIONAL BASEBALL

Globalisation has seen the spread of baseball and therefore the expansion of the labour market for professional baseball players. The autopoietic systems of domestic leagues no longer operate in isolation. They can be affected by the interaction with the autopoiesis of other leagues, as demonstrated by the interaction between MLB, NPB and the ABL. Also, globalisation can affect the internal operation of a league's autopoiesis through it being part of a global labour market. Clubs in professional leagues can now source labour from around the globe, raising questions as to how the global movement of labour is regulated and how a league's internal labour system regulates foreign players. Leagues and clubs can embrace the increased availability of players flowing from the effects of globalisation, as is the case in MLB and the ABL, or alternatively, adopt a protectionist approach to domestic labour by securing work for local players, a position adopted by NPB.

This chapter will begin by setting out theoretical approaches to globalisation. It will then examine how baseball's global labour market is constructed, followed by an examination of how global labour mobility in professional baseball is regulated. Other global sports such as soccer, ice hockey and basketball have also dealt with the issues related to the global movement of its players and the regulation of global labour in these sports will be reviewed to see if there are any practices that can be adopted in baseball. Then, Chapter 11 will propose a framework for a global player transfer system for baseball.

10.1 REGULATION IN THE ERA OF GLOBALISATION

The effects of globalisation are an important influence on the operation and success of regulatory regimes. Autopoietic systems, including those of labour in industries such as baseball, are now affected by other autopoietic systems that exist beyond national boundaries. Since the end of World War II, the pace of globalisation has accelerated, in large part due to technology aiding communication and enhancing the movement of capital and people. Traditional national boundaries have been redefined by such developments, not to mention regional alliances like the 'Euro zone'. The changes brought by globalisation have created a regulatory paradigm that presents new challenges to regulatory actors and approaches to regulation. This section will present theoretical approaches to constructing globalisation and introduce global regulatory actors.

(a) Constructs of globalisation

Regulation is no longer confined by local or national boundaries and instead operates in a global context. But globalisation has many meanings and can be constructed in multiple ways. However, globalisation does encounter social and political opposition (Brown 2012, 1, 5) and has led to a counter movement and anti-globalisation perspectives (see eg Eschele 2004). This section presents a number of approaches to globalisation.

Globalisation can be constructed in terms of the role of regulatory actors. Brown describes globalisation as a phenomenon that moves domestic and foreign businesses, and developed and developing countries, closer to one another (Brown 2012, 1, 5). Braithwaite and Drahos examine these concepts in more detail and view globalisation

as a contest of principles between unequal state actors, a competition between harmonisation and national sovereignty. Evidence of such inequality can be seen in the ability of countries such as the United States to use coercive mechanisms like trade sanctions that are not available to weaker states. According to Braithwaite and Drahos there are three distinct kinds of globalisation: the globalisation of enterprises, the globalisation of markets and the globalisation of regulation. Each type of globalisation involves the spread of a phenomenon and the movement of convergent phenomena results in a stronger degree of globalisation (Braithwaite and Drahos 2000, 7-8).

The movement of ideas through globalisation prompted Klein to use economics to create a spectrum of globalisation. At one end is 'testicular globalisation', a form of globalisation that uses established practices and new conditions to further existing economic differences. It is based on the ability of technology to move capital around the world. The result is an expansion of the gap between developed and third world countries. At the opposing end of Klein's spectrum is 'tough love' globalisation. This type of globalisation involves the decentralisation of power by allowing underdeveloped but aggressive countries to exploit global opportunities (Klein 2008, 164-165).

Globalisation can also be constructed as an abstract concept, evidenced by Bauman and Appadurai conceptualising globalisation in terms of motion and movement. Bauman described globalisation as 'fluid' or 'liquid' modernity, in that fluids and liquids do not hold shape for long periods and quickly change shape. Liquid modernity involves fluids melting 'solids', shapes with fixed dimensions and features (Bauman 2000, 2-4). Appadurai constructs a similar concept of globalisation by seeing it as objects in motion

that creates a world of flows in motion. These flows can be of objects, people, images and discourses. Appadurai views these flows as relations of disjuncture that take paths of varying speeds and start/end points in relation to institutional structures in different regions, nations or societies (Appadurai 2001, 6-7).

Another approach to globalisation is Castells' network society, a social structure based on new technology and social organisation. Electronic networking technologies give new capabilities to the traditional form of social organisation, creating more flexible and adaptive social networks that can overcome traditional limitations. Castells points out that globalisation is another way of describing the social network, because the network society involves the entire world (Castells 2005, 3-5).

(b) Global regulatory actors

To deal with a global regulatory environment, where corporations and production processes are geographically fragmented (Brown 2012, 2, 6), a global system of regulation is emerging that incorporates national, regional, supranational and global regulatory actors and regulation. Agreements are entered into between nations and sometimes regions on matters like investment and trade. Non-state regulatory actors include the likes of the United Nations, the Association of Southeast Asian Nations, WADA, the International Labour Organization and the World Trade Organization. Such organisations have different requirements to be a constituent, perform diverse regulatory functions and produce regulations such as covenants, charters and declarations. As examined in Chapter 6, domestic and global regulatory systems can interact through global bodies like WADA, working with national anti-doping authorities to operate a global system of anti-doping rules and practices. The

consequence of global regulation is an increase in the number of regulatory actors, the volume of regulation and the complexity of national regulatory regimes.

(c) Summary

Globalisation is a concept with a rich variety of meanings and interpretations, but in the context of regulation it is important to note that globalisation has increased the complexity of regulation. The targets of regulation, be they people or enterprises, now have the ability to move all or part of their operations to a new part of the globe to avoid unfavourable regulatory regimes and take advantage of more preferable systems of regulation. In addition to the need for regulatory regimes to respond to this new paradigm, there has been growth in the number of global regulatory actors and the interaction between domestic, regional and global regulatory actors, leading to more complex regulatory systems and greater competition among regulatory actors within a regulatory space.

10.2 THE GLOBAL LABOUR MARKET IN PROFESSIONAL BASEBALL

(a) The global spread of baseball

The early global spread of baseball was linked to trade and migration with and to Pacific countries like Japan and Australia, via the movement of teachers, international students and the military in the 1800s. Missionaries introduced baseball to Korea in 1905, and the Japanese colonisation of Taiwan in 1897 brought with it baseball (Chiba 2004, 195). Baseball spread to Latin America through colonisation and trade in the 1890s and early 1900s (Guerra 2013). During this period, to take root prior to television, Szymanski and Zimbalist identified that sports such as baseball needed expatriates to demonstrate and teach the game to locals, the local population and especially elites. They also

needed spectators excited by their own countrymen playing the game and exceeding the abilities of the inventors (Szymanski and Zimbalist 2006, 64).

However the global movement of baseball is now interconnected with television and, more recently, global baseball tournaments. Senior international tournaments such as the World Baseball Classic ('WBC') promote the game of baseball to both established and burgeoning baseball countries, as will the Olympics once again from 2020. Junior international tournaments such as Little League (Under 12 tournament) and a number of other youth tournaments help promote baseball and develop fan bases for the consumption of professional baseball. Recent years have seen MLB promote baseball and its brand by playing official and exhibition games in Mexico, Puerto Rico, Cuba, Japan and Australia. All of these activities develop the popularity of baseball and help to expand the labour market for professional baseball players.

(b) The globalisation of labour in professional baseball

As discussed throughout this thesis, the premier labour market in baseball in terms of the standard of competition and salary is MLB. When the over 7,000 affiliated players contracted by MLB clubs in MiLB are added to the 1,200 players on 40-man rosters, the MLB-MiLB system represents the largest professional baseball labour market in the world. Reflecting a global labour market are the number of players now born outside the United States: 26.5 per cent of Major League players (Schiff and Jarvis 2016, 647) and 46 per cent of Minor League players (ESPN 2012, 'Percentage of foreign players rises'). Duru notes that many of these players come from the cheap labour markets of Latin America where MLB clubs use the 'boatload' approach to recruiting players: a boatload of Latin American players can be signed for the same cost

as one or two players in the United States (Duru 2010, 669-670). Chapter 8.2 identified that a major cause in the increase in Latin American players in MLB was an unintended consequence of the MLB amateur draft and the shifting of resources to develop amateur talent from the United States to several Latin American countries.

Other labour markets in professional baseball now exist outside North America and Latin America, where professional leagues are expanding the talent pool. Asia is a labour market that emerged in the 1990s with the success of Japanese players moving from NPB to MLB. Established professional leagues now exist in South Korea (KBO) and Taiwan (CPBL). Australia is one of the few countries outside the Americas and Asia with a professional league. In Europe, countries such as Germany and the Netherlands are also emerging markets for professional baseball players.

In the context of soccer, countries have been described as ‘exporters’ or ‘importers’ of players and some countries act as a ‘transfer hub’ (KEA European Affairs and Centre for the Law and Economics of Sport 2013, 5). Such descriptions also apply to baseball. The United States clearly acts as the largest importer of players and also performs the role of exporting players to leagues in Latin America and Asia, albeit in much smaller numbers. Latin American and Asian countries export and import players, but in leagues like NPB the movement of players in both directions is strictly controlled. Australia is essentially a transfer hub, facilitating the export of players to North America and importing players into the ABL.

(c) Foreign baseball players in each of the three leagues

How the autopoietic systems of self-regulation in professional baseball leagues respond to the global labour supply of baseball players has important consequences for the regulation of global labour mobility. As already seen in this section of Chapter 10, MLB and its clubs embrace the globalisation of workers in order to access cheap labour markets, maintain and enhance the standard of MLB and create revenue in new markets. Like MLB, the ABL has embraced the foreign labour market but for different reasons to MLB. Foreign professional players are needed in the ABL for it to provide a professional level of competition that can attract fans, sponsors and players. In contrast to MLB and the ABL, NPB has not embraced the global labour market and protects the employment of Japanese players. Evidence of the marginalised role of foreign players in NPB is their description as *suketto gaijin*, which means foreign helpers. Even though the ABL and NPB adopt divergent approaches to the global labour market both leagues control the number of foreign players. Thus an autopoietic system can respond to the globalisation of labour in a positive manner or through protectionism, or somewhere in between.

The ABL regulates the number of foreign players on a roster and on the field. It is unclear why this practice exists but it is likely due to the ABL's desire to develop Australian players. Teams in small cities such as Canberra and Adelaide are permitted to have 12 to 14 foreign players on their active rosters while the other teams can have ten foreigners. This difference is based on Canberra and Adelaide being smaller cities and therefore producing fewer players capable of playing in the ABL. During a series two starting pitchers must be Australian and approximately five players must be Australian in the line up during a game. As discussed in Chapter 2, NPB imposes strict

limitations on labour mobility for foreign players by allowing a maximum of four players on the active roster. Of the four players, a maximum of three players can be pitchers, or alternatively, a maximum of three position players. There is no limit, however, on the number of foreigners on the 70-man roster (NPB Agreement 2013, article 82(2)). During the 2016 season NPB clubs typically had between five and eight foreign players on the 70-man roster (see NPB website in English; Nippon Professional Baseball, Professional Baseball Perfecto Data 2016), creating varying levels of competition for one of the four active roster positions.

(d) Impact of migration law on labour mobility

Central to the mobility of baseball's global workforce is a player's ability to work in a foreign country. To play in a foreign league (and even in MLB in games in Toronto), players must be able to obtain a passport and the relevant visa. Visa requirements therefore determine the eligibility of players to enter a country, the length of their stay and their ability to remain in a country. The large supply of foreign labour in the MLB-MiLB network, the ABL and to a lesser degree NPB, necessitate a brief review of visa requirements in the United States, Japan and Australia.

Immigration law in the United States was tightened after the terrorist attacks in September 2001. The new laws adversely affected lower level professional sports and many Minor League players were subsequently unable to secure the required visa (Shilts et al 2006, 71). Stevenson and Wolsdorf note that the old regime for P-1 and O-1 visas required players to have 'extraordinary ability' as an athlete or be internationally recognised. Such requirements were difficult for many foreign Minor League players to meet (Stevenson and Wolsdorf 2006, 2-3). However, the introduction of the

*COMPETE Act of 2006*⁵⁵⁷ made it easier for Minor League players to obtain a visa (Gould 2013, 17). Athletes are no longer required to be internationally recognised and must simply meet criteria set by a relevant league (Stevenson and Wolsdorf 2006, 2-3).⁵⁵⁸

In Japan immigration law governs both the entry and residence of foreigners. Under the *Immigration Control and Refugee Recognition Act*,⁵⁵⁹ not only must long-term visitors have the relevant visa to enter the country but these foreigners are required to obtain a residence card from their municipal council. This card contains relevant personal information and details of a person's stay.⁵⁶⁰

There are several visa options in Australia for foreign players wanting to play in the ABL. To play in the ABL foreign players can, for example, obtain a sub-class 401-sport stream visa⁵⁶¹ or an equivalent visa.

(e) Summary

The global workforce in professional baseball continues to grow as the game expands into new markets. The resulting decentred system of regulation sees state and non-state regulation governing the movement of players among elite professional leagues. While leagues such as MLB and the ABL embrace global labour markets, leagues like NPB

⁵⁵⁷ Pub. L. No. 109-463, 120 Stat. 3477 (2006).

⁵⁵⁸ *COMPETE Act of 2006*, Pub. L. No. 109-463, 120 Stat. 3477 (2006), section 2.

⁵⁵⁹ Shutsunyû Kokukanri Oyobi Nanmin Tei Hô [*Immigration Control and Refugee Recognition Act*], [Cabinet Order No. 319 of 1951 as amended 15 July 2009].

⁵⁶⁰ Immigration Bureau, Government of Japan, *Immigration Procedures Handbook* <<http://www.immi-moj.go.jp/english/tetuduki/index.html>>.

⁵⁶¹ Australian Government, Department of Immigration and Border Protection, Temporary Work (Long Stay Activity) visas (sub-class 401) <<https://www.border.gov.au/Trav/Visa-1/401->>>.

adopt a strict protectionist approach to globalisation and severely restrict the number of foreign players on a club's active roster.

10.3 THE REGULATION OF THE GLOBAL LABOUR MARKET IN BASEBALL

There is no global system of labour regulation in professional baseball. Instead an ad hoc system of formal and informal agreements and rules regulate player movement between autopoietic labour systems. This section of Chapter 10 will begin by examining the issues that arise in the transfer of players between countries and leagues. The movement of players from Asian clubs to MLB clubs will be analysed, followed by problems associated with the recruitment of Latin American players. This section will conclude by examining the role of regulatory actors in governing global labour mobility.

(a) Problems in the recruitment of Asian players by Major League clubs

As noted in Chapters 6 and 8, problems in the recruitment of professional Japanese players date back to as early as the cases of Murakami Masanori in the 1960s and more recently Nomo Hideo in the 1990s. While these transfers resulted in MLB and NPB entering into the United States-Japanese Player Contract Agreements in 1967 and 2000, neither those agreements nor the current (2013) Agreement between the Office of the Commissioner of MLB and the Office of the Commissioner of NPB have sought to regulate the recruitment of talented Japanese amateurs by MLB clubs. The recruitment of such players has created issues for external regulatory actors in amateur baseball, notably the Japan High School Baseball Federation ('JHSBF') and the Japan Amateur Baseball Association ('JABA'). These bodies are directly responsible for the

recruitment of amateurs by Japanese and foreign professional clubs.⁵⁶² Recent events have demonstrated the ineffectiveness of the informal ‘gentlemen’s agreement’ between MLB and NPB that is intended to prevent MLB clubs from recruiting amateur Japanese players considered to be NPB prospects.

If Japanese prospects are not selected in the NPB draft, they may sign with a MLB club (see Yamaguchi and Tabuchi 2012, 18). In 2008, the Boston Red Sox breached this informal agreement when they recruited industrial league pitcher Tazawa Junichi, who nominated for the NPB draft, only to ask clubs not to draft him (Kawai and Nichol 2014, 187-189). NPB clubs and the league informally agreed to prohibit players like Tazawa from playing in NPB after ending their MLB career by agreeing on a two-year ban for industrial and college players and a three-year prohibition for high school players (Horikawa 2004, 21). Further tensions were created when several MLB clubs unsuccessfully attempted to recruit two of Japanese baseball’s best high school pitching prospects: Kikuchi Yusei in 2009 (Biggs 2009) and Ôtani Shohei in 2012 (Yoshimura 2012, 14; Tomishige 2012, 2). These actions by MLB clubs sparked fear of a talent drain in NPB and created concerns similar to those caused by the loss of Nomo to the Dodgers. The steady stream of problematic amateur transfers continued in 2013 when the Los Angeles Dodgers signed industrial league pitcher Numata Takumi to a Minor League contract, violating the JABA’s rules and procedures (JABA Rule of Registration 2009, article 15).⁵⁶³ Numata received a life ban from playing in the

⁵⁶² See Japan High School Baseball Federation, *Kouto ugakkô yakyûbuin no puro yakyûdan tonô kankei ni tuiteno kitei* [Regulation on relationship between high school baseball players and professional baseball teams] (1968, amended 2005) and Japan Student Baseball Association, *Nihon gakusei yakyû kenshô (zenmen kaitei)* [Japan Student Baseball Charter] (24 February 2010).

⁵⁶³ Prior to signing a professional contract, industrial league players must be removed from the JABA registry of players so that players do not simultaneously possess amateur and professional status. This did not occur and neither the Dodgers nor Numata obtained

industrial leagues (Nikkan Sports 2013), a prohibition that, like the ‘Tazawa ban’, may be an illegal restraint of trade.

The recruiting of amateurs by some MLB clubs has also caused problems in South Korea. In 2012 the Baltimore Orioles were banned from attending high school and college games in South Korea after they signed high school pitching prospect Seong-min Kim prior to entering his final year of high school, a violation of the Korean Baseball Association’s rules. Kim was prohibited from playing or coaching in high school or college and was not signed by any KBO or MLB clubs (Yonhap News 2012).

(b) Problems in the recruitment of Latin American players

The race to find cheap international talent has seen the recruitment practices of many MLB clubs in several Latin American countries push the boundaries of ethical and legal conduct. Recruitment in Latin America is largely unregulated and has been described as a ‘free-for-all’ (Kalthoff 2014, 372). Supporting the recruitment of Latin American players are baseball academies operated by MLB clubs, and in countries such as the Dominican Republic, approximately 500 players annually sign a contract with a Major League club and enter a local academy (Rosenblatt 2014, 344-345). MLB has attracted criticism for allowing the recruitment of players from Latin America to operate in a largely unregulated manner.⁵⁶⁴ Conditions of MLB club academies have been criticised for perpetuating poverty and poor education in countries such as the

permission from his club, the Edion Aiko-dai Ob Blitz, to contact each other. As a registered player, Numata was required to contract exclusively with his industrial league club for a period of three years (two years for college players).

⁵⁶⁴ The Major League Rules only govern the age of international players signing a contract with a MLB club. Rule 3(a)(1)(B) of the Major League Rules requires foreign players (not a resident of the United States, Canada or Puerto Rico) to be 17 years old at the time of signing a contract, or 16 years old at the time of signing if the player will be 17 years old by the end of the season during which the player has signed during or by 1 September.

Dominican Republic (Rosenblatt 2014, 354). Only a small number of academy players are selected to play in the Minor Leagues (Gould 2013, 16-19) and less than one per cent will play in the Major Leagues (Kalthoff 2014, 363). Then, there are the problems of *buscone* in the Dominican Republic, player agents who identify local talent and sign their client with a MLB club. *Buscone* receive as much as 30 per cent of their client's signing bonus and have skimmed money from a player's signing bonus, sometimes splitting money with the scout from the MLB club. Also, *buscone* have given their players banned performance enhancing drugs and have provided fraudulent documentation to prove a player's age (Rosenblatt 2014, 352-353; Kalthoff 2014; 360-364), the latter being a practice not limited to the Dominican Republic.

Recruitment practices of MLB clubs in Latin America have also been criticised on the basis of using a business model that attempts to sign many young players to contracts below their market value (Kalthoff 2014, 360). Labour lawyers such as Wollett described MLB clubs as using the 'boatload' mentality to treat American Latino children and young men as 'pieces of cheap fruit' (Wollett 2008, 123). The boatload mentality sees many Major League clubs using US\$100,000 to sign 20 Dominican players for \$US5,000 each, as opposed to four American players for US\$25,000 per player, thus increasing the chances of finding a Major League prospect. Gould highlights that this practice can result in signing bonuses for Dominicans that are grossly disproportionate to players of similar talent in the United States. For example, Pedro Martinez received a signing bonus of US\$6,500 compared to Mike Mussina's US\$225,000, while Hanley Ramirez's bonus of US\$232,000 was dwarfed by Troy Tulowitzki's signing bonus of \$US2.3 million (Gould 2013, 17).

Then there are the legal, political and ethical issues related to the defection of Cuban professional players. Over 200 Cubans have defected to play in MLB. Labeled ‘traidoresal blisbol’ or ‘baseball traitors’ by Fidel Castro’s regime, less than 60 defectors have actually played in the Major Leagues (Solomon 2011, 154). MLB prohibits its clubs from contacting players in Cuba and Cubans who defect to the United States are subject to the MLB draft. Consequently Cuban defectors typically become residents in a country other than the United States and then sign a contract as an international free agent with a MLB club (Solomon 2011, 159-160). Defection as a member of the Cuban national baseball team at a foreign tournament is not possible for many players (government appointed security accompanies the team and players can be selected based on their ‘flight risk’). The extraordinary risks taken by Cuban players to play in MLB were demonstrated by Los Angeles Dodgers’ outfielder, Yasuiel Puig.⁵⁶⁵ Puig was smuggled out of Cuba by a Mexican drug cartel engaged by a Miami businessman, neither of whom were paid the agreed fee. Puig’s life has been threatened and MLB has provided him with security. As relations between Cuba and the United States continue to improve (see Solomon 2011, 173-178), as evidenced by an MLB exhibition game between the Tampa Bay Rays and the Cuban national team in Havana in March 2016 (and attended by President Barack Obama), it is likely that at some point a player agreement will be needed. The Cuban government and NPB entered a player agreement in 2014 that has since facilitated a number of Cuban players signing with NPB clubs (Badler 2014; Otero 2014; Graczyk 2014) and a similar agreement between MLB and the Cuban government would be needed to allow Cuban players to play in MLB without the need to defect.

⁵⁶⁵ See Katz 2014 for the full story of Puig’s journey to the Dodgers.

(c) Governing professional baseball's global labor market

With the gradual global growth of baseball has come a decentred system of regulation that has contributed to the problems experienced in Latin America, Japan and South Korea. Inside this system exists a fragmented global player transfer system that consists of a mix of formal and informal arrangements, agreements between professional leagues,⁵⁶⁶ agreements between professional clubs from different countries, and agreements between professional leagues and national baseball federations. This fragmented system is largely the result of the absence of an independent global regulator, a gap incompletely filled by a number of regulatory actors.

As discussed in Chapter 5, the World Baseball Softball Confederation ('WBSC') replaced the International Baseball Federation in 2013 as the peak international body in baseball (and softball). Originally a lobby group representing baseball and softball in their effort to be reinstated to the Olympic program, the WBSC is primarily responsible for organising international competitions and promoting grassroots baseball, not governing the movement of players to professional clubs (as is the case with FIFA in soccer). The establishment of the WBC as the premier international tournament in 2006 not only involves the world's best professional baseball players every four years, it also created a number of new global regulators. In addition to the regulatory activities of the World Baseball Classic Inc and its steering committee, as owners of the competition MLB and MLBPA perform the regulatory function of permitting Major and Minor League players to participate in the tournament. As discussed above Chapter 5.6(c) baseball is returning to the Tokyo Olympics in 2020

⁵⁶⁶ MLB has player transfer agreements with the NPB, the KBO and the Mexican Pacific Baseball League.

and the International Olympic Committee will now formally function as a global regulator in baseball.

In the absence of an independent global regulator, the global regulation of baseball labour is dominated by MLB, at least when its own interests are affected. MLB's regulatory activities encompass the regulation of professional players through private agreements with other professional leagues and the recruitment of international amateurs.⁵⁶⁷ The MLB Basic Agreement 2012 required the establishment of an International Talent Committee to explore the introduction of an international amateur draft and in the interim implemented a taxation system for recruiting international amateurs by MLB clubs. As discussed in Chapter 8.2, the taxation system involves allocating a signing bonus pool to all clubs, with those clubs who exceed their allocated bonus being taxed an amount based on their over usage (MLB Basic Agreement 2012, Attachment 46, section II). Regulating the recruitment of international amateurs by MLB clubs is likely to be a subject of collective bargaining negotiations between MLB and MLBPA in 2016.

(e) Summary

Baseball's global autopoietic system of labour regulation currently comprises an ad hoc system of rules and agreements that is enforced by an array of regulators. This system weakens global labour mobility and is in contrast to the highly structured systems present within MLB, NPB and the ABL. The fragmented nature of this regulatory system is in part due to the absence of a strong independent global regulator.

⁵⁶⁷ International players are residents of any country or territory, other than the United States, Canada and Puerto Rico: MLB Basic Agreement 2012, attachment 46, section II. E(1.).

10.4 GLOBAL PLAYER MOVEMENTS AND LESSONS FROM OTHER SPORTS

This chapter will now explore the player transfer systems in other global sports. The player transfer systems in soccer, ice hockey and basketball will all be reviewed in order to determine whether there are rules and procedures from these systems that can be adapted for a global system in baseball.

(a) The global governance of player transfers in soccer

Soccer is the world's only true global sport and now has a global system of regulation that governs the game and the movement of players between leagues and from club to club. FIFA is the global regulatory body which sets regulations to be followed by regional organisations that cover areas such as Europe, Asia and North America. Governing bodies then implement the rules at the national and league level. Baseball has a similar governance structure but without the strong global and regional regulators.

The regulation of player labour in soccer has seen the emergence of three ways for clubs to obtain players: through a club's own development system, from another club by way of transfer fee, and by signing uncontracted players (Long 2014, 80-81). Governing the movement of players through these transfer methods is FIFA's Regulations on the Status and Transfer of Players, first introduced in 2001 and amended in 2003. These regulations were implemented after the famous *Bosman Case*⁵⁶⁸ in 1996, a case that found that transfer fees in the 'retention and transfer' system breached the European

⁵⁶⁸ *Union Royale Beige des Societes de Football Association ASBL v Bosman* (C-415/93) [1996] CEC 38.

Treaty on the basis it prevented the free movement of workers among member states (Davies 2003, 192-196).

The Regulations on the Status and Transfer of Players mandate that contracts be between one and five years and a maximum of three years if the player is under 18 years of age (FIFA Regulations 2003, article 18(2)). There are two international transfer periods under this system: a 'short transfer window' in the middle of a season and a 'long transfer window' prior to the start of a season (FIFA Regulations 2003, article 6). A registration system also operates under the regulations and a certificate is required for international transfers (FIFA Regulations 2003, article 5). Minors received enhanced protection by the prevention of international transfers for players aged under 18 (FIFA Regulations 2003, article 19), although professional clubs can still contract minors. Also, a dispute resolution body was created and will be discussed in Chapter 11 (FIFA Regulations 2003, article 24; Lembo 2011, 553-555; Davies 2003, 198-199).

Transfer fees are an important element of a global player transfer system. Soccer's transfer system also allows for two types of compensation: solidarity contribution and training compensation. This system incorporates both the financial costs of developing a player and the impact on the team of losing a contracted player. Clubs who acquire a contracted player must pay a 'solidarity contribution' to the player's previous club, financial compensation that is calculated as a percentage of the player's new contract.⁵⁶⁹ Soccer's transfer system also requires a player's new club to pay 'training compensation' to a player's previous clubs when the player signs his first professional

⁵⁶⁹ The amount of the transfer fee is five per cent of the player's new contract and is distributed on a pro rata basis to the player's teams when aged between 12 and 23 years: FIFA Regulations 2003, Annexe 5, article 1.

contract and on all professional transfers until the player is 23 years old (FIFA Regulations 2003, article 20).⁵⁷⁰

(b) The cost of player transfers in soccer and third party ownership of players

The increase in player movement that came after *Bosman* and the explosion in the cost of player labour contributed to the practice of ‘third party ownership’ (‘TPO’) arising in the early 2000s in many professional soccer leagues in Europe (except the United Kingdom, France and Poland) and South America (KPMG 2013). Driving the market for TPO was the financial strain imposed on clubs by the astronomical growth in player salaries and transfer fees (KPMG 2013, 2-14).⁵⁷¹ The prohibition of TPO by FIFA in 2014 only bans future TPO practices and TPO arrangements entered into prior to FIFA’s decision are still effective (Homewood 2014). TPO will be briefly reviewed due to its important but controversial role in labour mobility.

At the core of TPO is a contract where an investment fund, a company or a player agent provide cash to a club to fund the recruitment of a player in exchange for a stake in the player’s future economic rights (Duff 2011). Investors can receive a return as high as 65 per cent of the funds created by a player’s future transfer. Clubs sometimes use TPO agreements to address a club’s liquidity issues, or assist in financing the acquisition of players. TPO agreements can be seen as a joint investment in a player by a club and investor and as a method of recruiting players in exchange for divesting the future economic rights to the player (Conn 2014). Such practices clearly commodify labour.

⁵⁷⁰ Training costs are based on the costs the new club would have incurred had they trained the player: FIFA Regulations 2003, Annexe 4, articles 4 and 5.

⁵⁷¹ Player value in soccer incorporates both a player’s salary and transfer fee, as is the case for posted NPB players. In 2014, the International Centre for Sports Studies ranked Lionel Messi at an estimated value of €200 to €232 million, making him the highest valued soccer player in the world: International Centre for Sports Studies 2014, 8.

(c) Global player movement in ice hockey

The National Hockey League is the world's premier ice hockey league and has 30 clubs in Canada and the United States. These clubs attract many of the best European players and in 2001 the National Hockey League entered into an agreement with the International Ice Hockey Federation to regulate the international movement of players to the National Hockey League. This agreement did not include other professional hockey leagues. The agreement mandated that National Hockey League clubs pay a development fee to their player's former club. Between 2001 and 2004, 185 players transferred under this system and saw the payment of US\$28.8 million in transfer fees. The Russian federation supplies numerous players to the National Hockey League and opted not to be part of the 2005 and 2007 agreements. Only uncontracted Russian players could transfer to the National Hockey League. The 2007 agreement changed the transfer compensation system. National Hockey League clubs agreed to pay US\$10 to \$12 million into a transfer pool that would be used to pay a US\$200,000 'development fee' to a player's former club (Gleason 2008, 604-605). The current International Ice Hockey Federation transfer regulations operate on the basis of a registration system and players who make an international transfer require an 'International Transfer Card' (International Ice Hockey Federation International Transfer Regulations 2013, article I).

(d) The global movement of basketball players

The global labour market in basketball is now comprised of the Americas, Europe, Asia, Africa and Oceania (International Centre for Sports Studies 2012, 6). By 2011, 12.7 per cent of players in the National Basketball Association in the United States were

born and educated in foreign countries. Not only do the 30 clubs in the National Basketball Association, the world's premier basketball league, import players, they lost between 10 and 16 per cent of their players in 2008 to foreign clubs (Edelman 2010, 550), with a large percentage of these players pursuing careers in Europe.

Regulating the movement of these players is basketball's global regulator, Fédération Internationale de Basketball. Under the Fédération Internationale de Basketball's internal regulations⁵⁷² players may only be licensed at one club (Fédération Internationale de Basketball Internal Regulations 2010, article 66) and require a letter of clearance to transfer clubs (Fédération Internationale de Basketball Internal Regulations 2010, article 42).

(e) Summary

Football and basketball facilitate the global movement of players through rules and processes in a global system administered by a global regulatory body. The rules that facilitate international player transfers in ice hockey are similar in nature but are found in an agreement between the National Hockey League and the International Ice Hockey Federation. These three systems use a mix of player registration, transfer certificates, signing windows and transfer fees to govern the global movement of players.

10.5 CONCLUSION

The globalisation of the labour of baseball has created regulatory challenges with which the current framework of individual agreements between leagues can struggle to deal. One of the inherent problems in creating a global labour system is the absence of a

⁵⁷² Fédération Internationale de Basketball, *Internal Regulations 2010*.

strong independent global regulator. Football, basketball and ice hockey all provide models of global player regulation that could be adopted in professional baseball; but unlike baseball these three sports have central administration via an independent global regulator. Chapter 11 will now propose a system of global labour regulation for baseball.

CHAPTER 11 THE FRAMEWORK FOR A NEW GLOBAL PLAYER TRANSFER SYSTEM IN BASEBALL

Despite the significant globalisation of the labour market in professional baseball over the past 30 years, the previous chapter demonstrated that the regulation of the international movement of labour in professional baseball takes place in an ad hoc fashion. There is no global system. Instead, individual leagues deal with the challenges of globalisation in a piecemeal way, typically in response to their own perceived needs. This chapter proposes a global system of labour regulation to facilitate the movement and mobility of players, a system which will also enhance the access of clubs to player labour.

11.1 THE ISSUE OF A GLOBAL PLAYER TRANSFER SYSTEM

(a) Is there a need for a global player transfer system in baseball?

As was demonstrated in Chapter 10, the transition of baseball to a global sport has created a burgeoning international market for baseball labour. Currently, the dual regulatory systems for amateur and professional players represent an embryonic model of regulation, devoid of a clear and transparent set of rules for all players and an independent global regulator, two essential requirements for the operation of an effective global transfer system. The growth in the number of people seeking work as professional players will continue in response to the global promotion and development of baseball. A global framework of transfer rules and procedures is needed to support the international movement of labour.

Elite professional leagues like MLB and NPB start and finish within one month of each other, while the Latin American winter leagues and the ABL have different schedules.

Effectively managing the movement of players across four continents requires a degree of cohesion between the leagues that is currently absent. MLB clubs aggressively pursue talent wherever it may be and, as was seen in Chapter 10, this can be to the detriment of players. A negative outcome for labour mobility created by the ad hoc system of global labour regulation in baseball is that some players miss the opportunity to work as a professional baseball player, because there is no system to notify leagues of their availability or, alternatively, the contractual release of the player is too late to allow a player the time to secure another job prior to a season.

(b) Framework for a global player transfer system

A framework of rules and protocols to regulate the global movement of players could facilitate labour mobility and at the same time improve the access of clubs to foreign workers. Two options exist for the implementation of such a system: a global agreement or agreements between leagues. Baseball could follow soccer and adopt a global player transfer system that is used by the various regional or national confederations under the governance of the WBSC. Alternatively, as is the case in ice hockey, all of the professional leagues could enter an agreement to regulate the movement of players between leagues. Under this option, the various formal agreements MLB has entered into with professional leagues could be consolidated into a single agreement. A weakness in this latter model is that not all nations where baseball players are recruited from might be a party to the agreement, as was seen in the case of ice hockey, where the Russian federation is not a party to the agreement between the National Hockey League and the International Ice Hockey Federation. Another weakness is that there would be no independent regulator to enforce the

agreement. For these reasons a global agreement on player transfers is the preferred option.

It is worth noting that other forms of state regulation discussed in Chapter 3 provide potential options for a global player transfer system in baseball. As MLB and NPB are the two major labour markets in professional baseball, the American and Japanese governments could enter a bilateral regulatory scheme for the movement of baseball players. Such an agreement would encompass a large percentage of baseball's workers. Similarly the United States Government could unilaterally impose rules on player transfers that would then have the effect of regulating the recruitment of players from outside the United States. By comparison, the European Union exercises some regulatory oversight over FIFA's player transfer system as this system must comply with European Union law on the free movement of member citizens and their ability to sell their services. Such a regulatory system in baseball is less likely, however, considering the marginalised role of Europe in professional baseball. In any event, as discussed above, it is more likely that influential baseball nations would enter a global agreement to regulate the transfer of baseball players.

(c) Impact of a global player transfer system on a league's labour system

An important preliminary question in any discussion on the introduction of a global player transfer system is how such a system would impact upon a domestic professional league's transfer rules. The reserve system, free agency, the assignment of contracts and the posting system are all labour controls that would be affected by a global player transfer system. Another relevant labour control is the restriction placed on the number of foreigners on active rosters in leagues such as NPB and the ABL. In determining

whether to introduce a global player transfer system, it is necessary to decide how these existing labour controls should interact with a global system.

This regulatory dilemma can be resolved by one of two ways. One option is that a global system would replace the existing labour controls in domestic professional leagues, in effect starting a new system of labour controls. Such an option is unlikely to gain the support of power brokers like MLB and NPB. Nor are the MLBPA and Major League players likely to support such a move. Therefore the second option, a global transfer system that integrates current labour practices, is more likely to garner the required political support for implementation. FIFA's global player transfer system adopted this latter option, with domestic leagues permitted to use labour controls that are consistent with the global rules.

(d) Global transfer rules and domestic laws

Colucci highlights that in soccer one of the successes of FIFA's rules on the transfer of players is their compliance with European Union law (Colucci 2011, 41) and in general the rules comply with the law of numerous non-European Union nations who are members of FIFA. It is worth noting that due to the low profile of baseball in the European Union, it is unlikely that European Union law will influence the development of a global player transfer system in baseball. A global player transfer system in baseball will nevertheless face similar challenges to those experienced by soccer. These challenges include the capacity of minors signing professional contracts that impose restrictive labour controls, the legality of the assignment of contracts, the enforceability of contracts in multiple jurisdictions, and the compliance of transfer rules with contract law and labour law in numerous countries. The rules and processes in the

transfer system would need to have the flexibility required to comply with various legal regimes in North America, South America, Asia, Europe, Australia and, in the future, possibly Africa. The FIFA player transfer rules demonstrate that this is possible by developing a flexible framework of rules and protocols that can be adapted by confederations and local leagues, as long as the transfer system does not conflict with the international body's principles and rules. It should be noted, however, that baseball is a different labour market to soccer in that one country dominates the labour market and that talent for MLB is generally developed within a vertical labour system involving Minor League teams. This poses a challenge for a global player transfer system in a sport that does not have strong alternatives for labour.

11.2 PROPOSAL FOR GLOBAL PLAYER TRANSFER SYSTEM IN BASEBALL

(a) Signing periods for players

The starting point for creating a basic global player transfer system is setting clear time periods for the recruitment and release of players in professional leagues. Such a system would enhance labour mobility by allowing players time to seek work in the same league or in a foreign league and could incorporate a notice system to make foreign leagues aware of released players. The details of players released during a season could also be included in a notice system. This system would enhance labour mobility for MiLB players wanting to play in NPB and other Asian leagues. MiLB contracted players face the prospect of being released at any time in November or December, or even as late as spring training. This presents difficulties in transferring to a NPB (or other Asian) club, as those clubs typically hold tryouts for foreign players in October and sign most new foreign players by the end of December. Therefore a

NPB club may have signed the number of foreign players they allocate on a roster prior to MiLB players becoming available. The late release of Major and Minor League players is likely to negatively affect labour mobility to leagues such as NPB for fringe players on a 40-man roster and peripheral Major League players. Early release of such players would not only increase their ability to pursue opportunities (including higher salaries) in Asia, but also with other MLB clubs.

(b) Player registration system

A player registration system would support a signing period system. Leagues would be notified of registered professional players who are released or are available to play in a winter league. Such players would not require a transfer fee and a clearance would be automatic. A clearance certificate system could be part of a registration system and would potentially avoid some of the disputes discussed in Chapter 10 in relation to the ability of a player to transfer to a foreign league. A registration system would allow the quick dissemination of information related to players who are available to transfer leagues.

(c) Transfer fee for reserved players

One of the biggest issues confronting the formation of a global player transfer system in baseball is the transfer fee for a reserved player. Players who move leagues as free agents or participate in winter leagues (where the club retains the right to reserve the player) would not require a transfer fee. All other contracted players would require a transfer fee to change leagues. Such an approach was adopted in the Posting Agreement 2013 (and before that the Posting Agreement 2000) between MLB and NPB, an agreement where there is no transfer fee for international free agents. While most

players change leagues as free agents, the value in a transfer fee system for reserved players is in terms of a clear and transparent system being in place that facilitates transfers for such players. For example, currently a player reserved by a MLB club must negotiate his release to join an Asian club, whereas a transfer fee system would encourage the movement of reserved players through a clear set of procedures and fees.

Several compensation models were discussed in Chapter 10 in the context of other global sports. Baseball could implement compensation in the form of a training fee and a consolidation fee, as is the case in soccer, or replicate's ice hockey compensation fee where transfer fees come from a central fund. The movement of reserved players is likely to be contentious for leagues like NPB and KBO, but something akin to the current Posting Agreement where the player's current club sets the transfer fee could operate on a global scale.

The transfer fee for reserved players needs to accurately value the on-field loss of the player. It can also be conceived as the amount paid to release a player early from his contract and in this way is a substitute for damages in breach of contract. Over the years a number of methods to calculate the posting system's transfer fee have been proposed. Rosner and Conroy identified a number of transfer fee proposals for reserved players moving from NPB to MLB. They include a flat fee paid by MLB to NPB for Japanese players participating in the MLB draft; a per player fee that is negotiated by the two leagues and based on the selection of Japanese players in an international draft; a uniform per player fee; and a uniform player fee with set fee classes based on a player's skill and experience (Rosner and Conroy 2009, 119-125). Kawai and Nichol's proposal for calculating the transfer fee involves combining the principle of the

solidarity contribution in soccer with Rosner and Conroy's percentage transfer system (Rosner and Conroy 2009, 125). The basis of the transfer fee would be the player's new contract and the former club's compensation would be scaled according to the number of years required by a player to qualify as a free agent. For example, the scale could be set at 400 per cent of the salary one year before qualification, 600 per cent for two years, 800 per cent for three years and so on. Using the player's new contract and the number of years remaining until free agency to calculate the transfer fee is advantageous in that it takes account of the interests of both the former and new clubs and would promote consistency in setting transfer fees. An alternative method of calculation is setting the transfer fee at fixed percentages of a contract. One option is to rank the player's final salary at their former club (as is done in the NPB free agent system). Another option is to calculate the transfer fee as a fixed percentage of the player's new contract or set a scale of percentages based on salary ranges (Kawai and Nichol 2015, 522-523). These transfer fees allow an amount to be calculated for the early release of a player and could be used in a global player transfer system.

There is a political element to the composition of a transfer fee for reserved players, as any fee would need to appease clubs in MLB and NPB and the leagues themselves. Removing a NPB club's power to set the transfer fee is likely to encounter some resistance in Japan, as is any fee not capped at US\$20 million, both of which are features of the new Posting Agreement 2013. Set transfer fees are unlikely to gain the necessary support. Kawai and Nichol's proposal of a transfer fee based on a percentage of a new contract has merit in that it is calculated on the basis of the player's value to his incumbent club and the number of years remaining until free agent ability. This also represents the economic fee for allowing a player to be released early from his

contract in lieu of damages. Clubs wishing to take advantage of cash compensation could permit a transfer several years before free agency eligibility. As the cost of acquiring players would be cheaper than the posting system, this proposal is likely to gain support from MLB clubs. But leagues such as NPB and KBO who lose reserved players are unlikely to support such a system, as the value of the transfer fee would decrease from current levels.

(d) Player involvement in developing a new player transfer system

In discussing a global player transfer system it is also necessary to consider the involvement of players. Player associations are the logical vehicle for such involvement, although this will be limited to countries with professional leagues and unions. It is likely that the MLBPA and the JPBPA would want to be involved in negotiations for a global player transfer system. Under the MLB Basic Agreement 2012, the MLBPA was a participant in the international talent committee, a body set up to explore the recruitment of international amateurs (MLB Collective Agreement 2012, Attachment 46). Similarly, the JPBPA was consulted by NPB in the 2013 negotiations over the new posting system (Kawai and Nichol 2015, 509-509). With the movement of Korean players to NPB and MLB, another player stakeholder is the Korean Professional Baseball Players Association, which was formed in 1999, recognised by the KBO in 2000 and gained status as a union under South Korean labour law in 2009 (Fort et al 2015, 185; Kim 2014, 166).

Several options exist for the input of player unions in the development of a global player system. Collective bargaining is one option, whereby the league and its player union negotiate features of the transfer system that the league would then lobby for inclusion

in the global system. A practical difficulty facing this option is that a global player transfer system is likely to be trumped by more important domestic issues. A second option is that player unions informally discuss with their league key features of a transfer system outside of collective bargaining negotiations, an option that would not formally operate within a country's labour law system. A third option is that player unions be given a seat at the negotiation table when a global player transfer system is developed. Such an option is likely to be supported by the player unions. A final option is that domestic player unions be represented by an informal global body, composed of representatives from the individual player unions and nations without player unions.

11.3 GLOBAL PLAYER MOVEMENT AND DISPUTE RESOLUTION

(a) Disputes in the global movement of players

As discussed in Chapters 6, 8 and 10, one of the earliest disputes in the global movement of baseball players occurred in 1964. Murakami Masanori, a *ni-gun* pitcher for the Nankai Hawks, was sent to the United States to play for a Minor League affiliate of the San Francisco Giants. His performance saw the Giants attempt to purchase his contract for US\$10,000 from Nankai by exercising an option in Murakami's contract. Both clubs claimed the reserve rights to Murakami. MLB and NPB resolved the dispute by permitting Murakami to play for the Giants in 1965 and 1966, and then return to NPB in 1967. The transfer of NPB players to MLB was effectively ended by the 1967 Agreement between MLB and NPB, which required clubs in MLB and NPB to honour the other league's rules, including the reserve system (Kawai and Nichol 2015, 501; Kawai and Nichol 2014, 182).

Since the 1990s there have been disputes over the global movement of amateur and professional players. Many of these disputes have arisen in the transfer of players from Japan to the United States. It was noted in Chapters 6, 8 and 10 that the landmark transfer of Nomo Hideo to the Los Angeles Dodgers in 1995 was facilitated by a loophole in the NPB Agreement and resulted in controversy in Japan. Shortly after Nomo, Irabu Hideki created further controversy when he demanded to be traded to his team of choice, the New York Yankees, after the Chiba Lotte Marines traded him to the San Diego Padres. Another transfer in the 1990s involving Dominican Republican player Alfonso Soriano sparked controversy when he tried to use the ‘voluntary retirement’ clause in the NPB Agreement used by Nomo. Soriano’s club, the Hiroshima Toyo Carp argued the loophole had been removed by a change to the NPB Agreement, an argument rejected by MLB on the basis that they had not been notified of the change (Kawai and Nichol 2014, 183-184). These disputes were resolved by negotiation between MLB and NPB and led to the revision of the 1967 Agreement and the introduction of the Posting Agreement 2000. Also, as was seen in Chapter 10, over recent years there have also been disputes involving amateur transfers from Japan and South Korea to MLB.

(b) Current method of dispute resolution

Disputes involving players in MLB and NPB are currently resolved through arbitration. The preference in Japan to resolve disputes internally through consensus has seen little use of salary arbitration. In contrast, arbitration has featured prominently in MLB. In the 1970s, as noted in Chapters 5 and 8, arbitrator Peter Seitz found that the reserve system did not operate in perpetuity and resolved to recognise free agency. Salary arbitration has evolved to be an important mechanism in directly and indirectly

increasing player salaries. The ABL has no formal dispute resolution mechanism and teams or the league settle disputes. As demonstrated in Chapters 5 and 7, the courts and statutory labour authorities in each country also exist for players to settle disputes.

No dispute resolution system currently exists for international player transfers and the two relevant leagues usually negotiate a resolution. A formal dispute resolution mechanism would help resolve problems that arise in the transfer of players and is particularly important for players at risk of unscrupulous practices by agents and clubs, for example, players in Latin American countries. Independent resolution of disputes would facilitate transfers and ensure that relevant rules and procedures are followed.

Soccer provides insight into how a global player transfer system can incorporate a dispute resolution system. The FIFA Regulations on the Status and Transfer of Players establish a Dispute Resolution Chamber. The Chamber can hear disputes between clubs and players that involve contracts, employment and transfer fees (FIFA Regulations 2003, article 24(1)). The Chamber is composed of a minimum of three members, consisting of an equal number of club and player representatives. The Chamber is empowered to nominate a Dispute Resolution Chamber judge from its members. The judge can hear disputes of amounts up to a maximum of 100,000 Swiss Francs, together with disputes related to training compensation and solidarity contributions without complex factual or legal issues or where the Chamber has established relevant principles. Decisions of the Chamber or the judge can be appealed to the Court of Arbitration for Sport (FIFA Regulations 2003, article 24(2)).

(c) Disputes, baseball and the Court of Arbitration for Sport

As noted in Chapter 5 sports-related disputes can be resolved through specialised arbitration and mediation through the Court of Arbitration for Sport ('CAS') (also known in French as the Tribunal du Sport or 'TAS'), which was established by the International Olympic Committee in 1983 (Blackshaw 2003, 62). The International Council of Arbitration for Sport is the administrative body of the CAS and is responsible for the independence of the CAS, the rights of parties and the financing of the CAS (Mavromati and Reeb 2015, 5). The CAS's Code of Sports-related Arbitration establishes these two bodies, both of which are located in Lausanne, Switzerland but the CAS may hold a hearing elsewhere (CAS Code 2016, article S28). The CAS may use arbitration or mediation to resolve sporting disputes (CAS Code 2016, article S12). The jurisdiction of the CAS is invoked when the statutes or regulations of a federation, association or sports-related body provides for dispute resolution by the CAS (CAS Code 2016, articles S1 and R47). But as Blackshaw notes the CAS can hear any disputes directly or indirectly related to sport, including commercial matters, as long as the parties agree to this in writing (Blackshaw 2003, 62-63). Arbitral awards made by the CAS are final and binding (Blackshaw 2003, 81) and can be appealed in a Swiss Court only on limited grounds.⁵⁷³

While MLB, NPB and the ABL do not presently give the CAS jurisdiction to resolve disputes in their by-laws, it is possible, in the domain of anti-doping, for some players to have a dispute heard by the CAS. The WADA Code gives athletes accused of anti-

⁵⁷³ For a recent CAS case involving 34 current and former Essendon Football Club players in the Australian Football League, see *World Anti-Doping Agency v Thomas Bellchambers et al, Australian Football League, Australian Sports-Anti-Doping Authority* (CAS2015A/4059). The players were suspended by the CAS for breaching the WADA Code and the players unsuccessfully appealed this decision in the Federal Court of Switzerland.

doping violations the right of appeal to the CAS (WADA Code 2015, article 8.5). Thus players accused of anti-doping violations in the ABL and NPB, where the WADA Code is enforced, could appeal to the CAS, as could players in MiLB, MLB and NPB who represent a national team.

11.4 THE NEED FOR AN INDEPENDENT GLOBAL REGULATOR IN BASEBALL

(a) Global regulatory actors in sport

There are a number of global regulatory actors in sport and these actors shape the different possible models of global regulation. The most prominent global regulatory actor is the International Olympic Committee, the representative body of the summer and winter Olympics. The International Olympic Committee is interconnected to national Olympic Committees. The International Olympic Committee is influential in the broader global regulation of sport, having been central to the establishment of WADA in the realm of anti-doping and the CAS to resolve sporting-related disputes. Baseball has not been an Olympic sport since the 2008 Beijing games but as discussed in Chapter 5.6(c) the International Olympic Committee has endorsed baseball as a sport at the Tokyo 2020 Olympics, the WBSC will need to ensure the sport (including the professional leagues) adhere to the policies of the International Olympic Committee.

Sporting federations are another important global regulator. Federations are typically established at an international level, with regional confederations below them who are responsible for governance in the sport in their region. As discussed in Chapters 5 and 10, the WBSC is baseball's global federation. Foster identified that international sporting federations produce four types of regulations and norms: the rules of the game,

the ethical principles of sport, international sports law and global sports law. According to Foster, the difference between international sports law and global sports law is that international sports law are general principles of law that apply to sport, while global sports law are the principles derived from the rules and regulations of international sporting federations (Foster 2003, 4). In this context global sports law can also be used to describe the regulations and principles produced by WADA and CAS.

Another global regulatory actor is the global player union. Such bodies have increased in number as individual sports have globalised and seen the increased movement of players across national boundaries. For example, FIFPro is the global player union in soccer and its members come from 58 national player associations, covering 65,000 male and female players (FIFPro, 'About FIFPro'). Another global player union is rugby union's International Rugby Players Association. There is at present no global player union for professional baseball players.

(b) Proposal for a global regulator for baseball

A global player transfer system requires an independent regulator to monitor and enforce the transfer system, as is the case in soccer with FIFA. Such a body would be equipped to deal with the types of disputes that were discussed above. The focus of the WBSC is grassroots baseball, operating junior and senior international tournaments and the pending return of baseball (and softball) to the Olympics. Currently, the WBSC is not equipped to manage a global player transfer. One option is that a new global regulator could be created that focuses on the regulation of professional player movement. However, this would add another global regulator to the already cluttered global regulatory sphere of baseball. Alternatively, the regulatory domain of the WBSC

could be expanded to include professional players and leagues. Such an option may require a change in the membership of the WBSC to include the professional leagues of the Americas, Asia and Australia. To avoid duplication in resources and an even more fragmented global governance system, the optimal method of governing a global player transfer system is to add such a regulatory function to the WBSC, thereby expanding its scope to include labour in professional baseball.

11.5 ASSESSING THE FEASIBILITY OF THE PROPOSALS

It is necessary to briefly assess the feasibility of the proposals in this chapter and their likelihood for successful implementation. The greatest obstacle to introducing a global player transfer system and independent global regulator are the key professional leagues. For these reforms to occur, MLB and to a lesser degree NPB and KBO will need to relinquish some control over their labour. This will be particularly difficult for MLB, which sees itself as a quasi-global regulator and custodian of the game of baseball. However there is hope that some of the proposed reforms could gain support from MLB, which is slowly moving towards greater regulation of international players, as demonstrated by the establishment of the international talent committee in 2012 and the regulation of the recruitment of international amateurs.

The proposed fees for the transfer of reserved players may encounter resistance from NPB and KBO, as clubs in these leagues would probably receive significantly lower transfer fees than under the current posting systems in each league. Overcoming such concerns is important in gaining the political support needed from NPB, and to some degree, KBO. NPB has the political and economic power to shape a global player

transfer system and, with the backing of KBO, would constitute an important voice for Asia.

Another potential area for support of the proposals in this chapter may be found in the Latin American members of the WBSC. As discussed in earlier chapters, the amateur and professional ranks of Latin America provide a large percentage of the MiLB and MLB workforces, as well as foreign players in NPB and KBO. Players in countries such as the Dominican Republic have been subjected to unethical practices of MLB clubs and agents and would benefit from a more highly regulated global transfer system.

The WBSC is made up of a large number of member federations, many of whom can be classified as ‘minnows’ or emerging baseball nations. As baseball continues to develop in these countries a growing number of their players will be recruited by professional teams. Such an outcome would benefit from a global player transfer system and independent regulator. As there are a number of minnows who are members of the WBSC, support from a bloc of these nations would improve the chances of the proposed reforms gaining acceptance among the established baseball nations.

11.6 CONCLUSION

Baseball’s emergence as a global game with multiple professional leagues creates a regulatory paradigm with which the current system of regulation is not designed to deal. More than ever amateur and professional players travel the globe looking for work as a baseball player. The current global labour system sees players released from their teams at various times of the year, sometimes on the eve of a new season, making it difficult for many players to obtain a new job. An independent global regulator that is

responsible for a new global player transfer system could facilitate the movement of players and where appropriate require the provision of financial compensation for the loss of a player. One option is that such a regulatory function be added to the WBSC, while another option would see the creation of a new global regulatory body. The main hurdle to the implementation of these proposals is gaining the political support of the two largest professional leagues: MLB and NPB.

CHAPTER 12 CONCLUSION

The global evolution of the American national pastime is evidenced by baseball's preparations in 2016 for the fourth instalment of the World Baseball Classic in 2017. During February and March 2016, qualifying tournaments were held in Australia, Mexico and Panama and, in September 2016 the final qualifying tournament was held in Brooklyn in the United States. These four tournaments included teams from the host nations of Australia, Mexico and Panama, as well as New Zealand, South Africa, Spain, France, Great Britain, Israel, Brazil, Pakistan, Germany and Colombia. In addition to the winners of each of the four qualifying pools, Australia, Colombia, Mexico and Israel, are teams who qualified based on their performance in the 2013 WBC: the United States, Canada, China, Japan, South Korea, Chinese Taipei, Netherlands, Italy, Dominican Republic, Venezuela, Cuba and Puerto Rico. The geographic diversity of nations competing in the 2017 WBC qualifiers and finals are evidence of the game of baseball no longer being the sole preserve of the United States. Baseball is the most popular sport in Japan and maintains a strong presence in South Korea and Taiwan. Similarly, in Latin America, baseball holds a unique status in Cuba and the Dominican Republic, while it is an emerging sport in Europe. So what does the globalising world of baseball tell us about the regulation of labour in professional baseball?

The increasing global popularity of baseball has several implications for labour regulation. The spread of amateur baseball beyond the shores of the United States has created a growing labour market for professional baseball players. Consequently, professional leagues and teams now compete beyond national boundaries to secure talent. Emerging from amateur baseball are professional leagues. Where MLB and MiLB were once the only professional baseball leagues in the world, these leagues not

only compete with professional leagues in Latin America and Asia for players, but MLB clubs now recruit players from these leagues. In increasing the global coverage of baseball, MLB even established the ABL as a winter league in 2010. As Chapter 10 highlighted, the globalised workforce in baseball presents challenges to the ad hoc system of global labour regulation present in professional baseball, a product of the traditional league-based approach to labour and the creation of agreements between leagues to govern the movement of labour.

Central to the regulation of labour in professional baseball are the world's two premier leagues, MLB, followed by NPB. These two leagues were chosen for this thesis as they are the two largest and highest paying professional baseball leagues and they operate highly restrictive labour markets. In addition, they also exert the greatest influence in regulating labour and labour mobility. To provide a contrast in the regulation of labour in these two leagues, the ABL was chosen as a winter league. The regulation of labour mobility was examined in each league, with particular emphasis on labour controls such as the reserve system, free agency and assignment of contracts.

This thesis has investigated a number of interrelated research questions. The central research question is: How is labour, and specifically labour mobility, regulated in professional baseball? This research question also intersects with a broader question: How is labour mobility regulated within each of the three jurisdictions where the leagues are located? These two research questions engage with general regulatory theory. Thus a third research question is: How have the internal autopoietic labour systems of each league evolve over time in response to the actions of both internal and external regulatory actors? The final key research question is: How has globalisation

shaped labour mobility in professional baseball? These research questions give rise to the possibility of future research, including comparative research on labour mobility and constraints on mobility during the employment relationship, the commodification of labour in professional baseball in the United States and Japan, the fight for a living wage in MiLB and the need for a global player transfer system in professional baseball.

In response to the above research questions this thesis has made a number of key findings. In summary, MLB, NPB and the ABL all have systems of labour regulation that highly restrict labour mobility. Restrictive labour controls such as the draft, the reserve system and free agency are practices that would otherwise be illegal if they were not legitimised through labour law and collective bargaining (as is the case in in MLB and NPB). Autopoiesis is a key theme of this thesis. The autopoietic systems of labour regulation in each of the three leagues have similar labour controls and rules that shape labour mobility. But the level of actual mobility experienced by players varies from league to league. Labour rules and controls within a league related to mobility are now subject to legal rules on collective bargaining and can be exposed to external regulation by actors such as courts and statutory authorities. Therefore within each autopoietic system of labour regulation labour mobility is influenced by the activities of both internal and external regulatory actors. Another important finding is that self-regulation and not state imposed regulation is the dominant form of regulation within the autopoietic labour systems of MLB, NPB and the ABL. This thesis has also concluded that labour is commodified to varying degrees in each of the three leagues and that the level of commodification depends on the time within each autopoietic system. Also, globalisation has had a dramatic impact on labour mobility in professional baseball as it has expanded the number of employment opportunities for

players and enhanced the ability of players to move around the globe in search of work. It should be noted that the global movement of baseball players operates in an ad hoc system of regulation.

As these findings suggest, regulatory theory provides useful insight into how professional baseball is regulated, as was highlighted in Chapters 3, 4 and 8. Autopoietic legal systems produce and reproduce their own elements by the interaction of each element. As explained in Chapter 8, MLB, NPB and ABL systems of labour regulation can each be viewed as autopoietic. These internal regulatory systems attempt to protect their own autopoiesis and at the same time evolve through methods of self-reproduction such as collective bargaining. It has also been shown that the internal autopoietic systems of labour regulation in each league engage to varying degrees with external regulation. Even though the Supreme Court exempted the labour of MLB from antitrust law in the 1920s, which was subsequently partially overturned by the *Curt Flood Act* in 1998, American labour law has shaped MLB's autopoietic system of labour regulation since MLBPA became a key regulatory actor in the 1960s and 1970s. The regulatory activities of both internal and external regulatory actors are central to the evolution of MLB's autopoietic system of labour. In contrast, Japanese clubs and the JPBPA have never challenged NPB's autopoietic system of labour regulation, while external regulation has only been engaged in relation to the confirmation of the legal status of the JPBPA as a labour union by the Labor Commission in 1985 and the Tokyo High Court determining that the attempt to contract NPB teams in 2004 was a mandatory subject of collective bargaining. These cases are nevertheless important in that they were based on the players being employees under the *Labor Union Act*. The lack of litigation in NPB reflects the general trend of low

litigation rates in Japan and the role of culture in using internal forms of dispute resolution. Meanwhile, as the ABL is only six years old and the league owns all six teams, players are not unionised and have not challenged the system of labour regulation. However, Chapter 7 demonstrated that other Australian professional sports have used contract law and the common law doctrine of restraint of trade to challenge the registration and transfer system and zoning/residency rules and there is potential for the equivalent labour controls in the ABL to be challenged.

Chapter 9 of this thesis found that the labour of professional baseball in all three leagues is commodified and the regulation of labour therefore conflicts with the important labour law principle that labour is not a commodity. One of the key labour controls in professional baseball that commodifies labour is the reserve system, which gives a club control over a player's labour for a designated period of time. In contrast, free agency generally de-commodifies labour by giving players the right to negotiate a contract with prospective teams and choose their employer; although it can at the same time commodify labour by requiring compensation to the player's previous club in some circumstances. The key issue is determining the *extent* to which labour is commodified. Relevant factors that shape the level of commodification include the attitude of the league and its clubs (and owners) to the ability of players to choose their employer and move clubs, whether there is a player union, the role of the union in negotiating labour controls and the stage of a player's career. So, for example, experienced major league players tend to have more bargaining power and control over their labour than entry-level players and minor league players.

Not only are the effects of globalisation evidenced by the expansion of the WBC beyond traditional baseball nations, the movement of players between professional leagues and the recruitment of players by professional clubs from many WBC participants highlight the fact that the autopoietic labour systems in MLB, NPB and the ABL no longer operate in isolation. MLB has embraced globalisation, as evidenced by 26.5 per cent of MLB players and 46 per cent of MiLB players now being born outside the United States. By contrast, NPB adopts a protectionist approach to labour and controls the number of foreign players on the active roster. Sitting somewhere between the practices of these two leagues is the ABL, which has minimum lineup requirements for Australian players and active roster limits on foreign players, but relies on MiLB and NPB players to maintain the standard of a professional league. The movement of professional players around the globe is likely to continue to increase as the standard of leagues in Asia and Australia improves and as potentially new leagues are formed. Over the short-term, dominating the movement of players will be leagues with economic and political power, notably MLB and NPB. At present, formal and informal agreements between leagues govern the movement of players between professional leagues. For there to be a global system of labour regulation, these leagues would need to cede some control over labour to a global regulator, a scenario that may be met with resistance inside MLB and NPB.

Due to the increasing globalisation of baseball and the subsequent growth in the movement of players to professional baseball leagues, Chapter 11 of this thesis suggested a series of proposals for a global player transfer system in baseball. These proposals included introducing a player registration system; a notice system for professional leagues (and their clubs) for when a player a player is contractually

available; setting deadlines prior to the start of a season for the contractual release of players; and introducing a transfer fee for reserved players that would be calculated on a scale according to the number of years required to qualify as a free agent. To govern such a system and any related disputes, it was suggested that the powers of the WBSC be extended to include these responsibilities. Such a system would enhance labour mobility by allowing professional players, notably fringe major league players and minor league players, greater opportunity to find a job in professional baseball by making clubs aware of the availability of uncontracted players and requiring clubs to finalise rosters for a season in advance of the commencement of a season (formally done in NPB). It would also improve access to the labour market for clubs. While elite players will always have the status and bargaining power to move countries and leagues, the proposed reforms are designed to give emerging players the opportunity to secure employment in what is typically a short athletic career and potentially become the next Albert Pujols, Yasuiel Puig or Tanaka Masahiro.

The importance of the above findings of this thesis can be found in the insights provided into the operation of regulatory theory, labour law and regulation and sports law. This thesis has also connected these three areas of law and research to conclude that the internal and external systems of regulation present in MLB and the United States, NPB and Japan and the ABL and Australia are very similar yet produce different regulatory outcomes in relation to labour mobility. While labour controls in each autopoietic system are similar in nature, and face similar external regulation in terms of contract law, labour law and competition law, the cultural, historical and normative factors within each autopoietic labour system, combined with different degrees of engagement with these external regulations, result in very different levels of labour mobility.

Labour mobility is the highest in MLB, where free agency has enhanced the ability of (some) players to act as Locke's autonomous worker and to negotiate high incomes. Waiver processes and the right of clubs to assign a player's contract also facilitate labour mobility. While these labour controls and practices exist in NPB, the level of labour mobility is much lower. Economics plays a role as the difference in income between the highest paid player and the average income is much lower, while cultural practices such as *ongaeshi*, the obligation to repay one's seniors (*senpai*), also shapes labour mobility. In the ABL the league's status as a winter development league results in a high turnover of players. While labour mobility for players between teams is low compared to MLB and NPB, player movements do occur and the league exercises discretion in allowing Australian players to change teams. A key development in the autopoietic regulation of labour in each of the three leagues is the exposure of leagues to other autopoietic labour systems through globalisation. Labour regulation in MLB, NPB and the ABL no longer evolves in a regulatory vacuum. Instead, the autopoiesis of each league is shaped by the mobility of a global labour supply and the regulatory acts of other leagues.

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