

Dennis Tutty: An Australian Hero

© Braham Dabscheck*
Senior Fellow
Faculty of Law
University of Melbourne
(November 2008)

The Czech writer Milan Kundera has said that ‘The struggle of [people] against power is the struggle of memory against forgetting’. The Rugby League Players’ Association, by naming its Club Delegate of the Year award, the ‘Dennis Tutty Award’ is not only remembering, but honouring, someone who took on power and won.

In 1969, Tutty initiated legal action against the employment rules of the New South Wales Rugby League (NSWRL). Under the retain and transfer system, Tutty, whose contract with his club Balmain had expired, was unable to take up employment with another club unless Balmain granted him permission to do so. Clause 30 (f) of the NSWRL’s rules specifically stated, that unless a club agreed to release a player it was ‘entitled to retain the player’s name on its register indefinitely’.

Dennis Tutty was, and is, a quiet, shy and unassuming man. His demeanour was interpreted by rugby leagues’ leading lights to be of someone who was a pussy cat; someone who would do as he was told. His demeanour, in fact, hid from view a man who was as competitive off the field as he was on the field. He believed the treatment he received from Balmain and the NSWRL was wrong and he decided to do something about it.

Two extraordinary things are associated with his legal action, which was initially heard by the Supreme Court of New South Wales and, on appeal, the High Court of Australia. First, other than for three other players from Balmain - Peter Jones, Laurie Moraschi and Arthur Beetson – who stood out with him for a period in 1969, he did not receive any financial or moral support from any other players from other clubs. Second, he financed the case himself, from income he earned as an unskilled worker. There cannot be too many unskilled workers who have run cases which have found their way to the High Court. He stood out of football for more than two years, in his mid twenties, the best years of his playing life, before his case worked its way through the legal system.

Both the Supreme and High Courts found the NSWRL's transfer system to be an unreasonable restraint of trade. This decision has cast a long shadow in not only the general application of the restraint of trade doctrine, more generally, but on Australian sport, in particular. The general practice of lower courts is to follow the lead of a superior court, under the principle of *stare decisis* (following precedent), in other cases that come before them. Since *Buckley v Tutty*, the only sport employment law case to be resolved by the High Court, there have been a series of cases where courts have struck down various employment rules, developed by different leagues, which have restricted the economic rights and freedoms of players.

These decisions have not only protected the rights of individual players, but have also strengthened their collective position in aiding the establishment of player associations

and the negotiation of comprehensive collective bargaining agreements across the gamut of Australian professional team sports. One of the ways in which leagues can potentially insulate their employment rules from legal attack is to have them recognised as being an important ingredient in the successful operation and economic performance of their sport.

Various collective bargaining agreements provide 'generous' or 'high incomes', compared to what players received in the period in which Dennis Tutty played. The team salary cap for players in the Australian Football League, for 2008, was \$7.431 million per club, to be shared by 38 players, with 'extra' payments for veterans and promotional activities. The top 25 players in rugby league clubs have a salary cap of \$4.1 million, for 2008, also with provisions for top ups. For 2008, the 132 players of Australian rugby were guaranteed total minimum payments of \$26.5 million. For the 2008/2009 season, the average salary of an A-League player is approximately \$115,000, excluding marquee players, whose incomes range from \$200,000 to \$1 million. For the 2008/2009 season, 25 players on Cricket Australia contracts will share payments of \$9,349 million, with 25 players, in each state team, sharing \$1.145 million

These agreements have not only enhanced the income players can earn, but also provide mechanisms for the resolution of disputes and grievances with their respective clubs and leagues and have channelled resources for the more general welfare of players including, if not especially, further education and training for second careers, when their playing days come to an end. Current players, and the benefits they enjoy, are in no small way in debt to Dennis Tutty and the stance he took in single handily challenging the employment

rules of the NSWRL almost forty years ago. The Rugby League Players' Association is to be congratulated for naming an award after him. He has been afforded recognition for his struggle in defending the basic human right of employment, as both a sporting and an Australian hero.

* Braham Dabscheck recently published a paper entitled 'The Tutty Case', in Andrew Moore and Andy Carr (eds.), *Centenary Reflections: 100 Years of Rugby League in Australia*, ASSH Studies 25, Australian Society for Sports History, Melbourne, 2008. The paper was delivered at a conference held at the Powerhouse Museum on 7 and 8 November, 2008, which forms the basis of this article.