SPORTING DRAFTS AND RESTRAINT OF TRADE*

by

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I Let's Start at the Very Beginning

The words of the song, "Doe, a Deer" in *"The Sound of Music"* include the following:

"Let's start at the very beginning; It's a very good place to start"

I wish to utilise this concept though I will fudge a little. I do not intend to analyse restraint of trade principles right from the very beginning. This would take us back into the 15th Century, or perhaps earlier. I will, however, start with an analysis of the restraint of trade doctrine from the beginning of the presently applicable common law principles. Only by putting sporting drafts in the context of the broad applicable restraint of trade principles can we really see the present day cases in proper perspective.

II The Common Law Principles Applicable to Business Restraints of Trade

(a) The Leading Cases

The present principles of common law business restraints of trade stem, I believe, from three landmark cases decided around the beginning of this century. These three cases are:

(i) *Mogul Steamship Company Limited v. McGregor & Ors* – an 1891 decision of the House of Lords (*"Mogul Steamships"*)[1]

(ii) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company* – an 1894 decision of the House of Lords ("*Nordenfelt*")[2]; and

(iii) *Attorney-General (Commonwealth of Australia) v. Adelaide Steamship Co.* – a 1913 decision of the Privy Council[3] confirming a decision of the Australian High Court.[4] [This case is commonly known as, and will be referred to here as "*The Coal Vend Case*"].

Mogul Steamships was a case brought by a ship owner excluded from an association of other shipowners. This association underbid the plaintiff, reduced freight selectively on services operated by the plaintiff so that the plaintiff had to carry freight at unremunerative rates and circulated shipping agents with notices saying that none of its members would give discounts to any agent which shipped cargo on the plaintiff's vessels. In present *Trade Practices Act* terms, this was a collective boycott and would be an illegal "exclusionary provision" under the Act.[5]

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1 [1982] AC 25.

2 [1894] AC 535.

3 (1913) 18 CLR 30; [1913] AC 781.

4 sub nom. *The Adelaide Steamship Company Limited v. The King and The Attorney-General of the Commonwealth* (1912) 15 CLR 65 [Griffith CJ; Barton and O'Connor JJ]. The above decision overruled the 280 page judgment of Isaacs J. to the opposite effect (see *The King and the Attorney-General of the Commonwealth v. The Associated Northern Collieries & Others* (1912) 14 CLR 387).

5 See *Trade Practices Act* 1974 (Cth) s.45(1)(a); s.45(2)(a)(i); s.45(2)(b)(i); for definition of "exclusionary provision" see s.4D.

Nordenfelt involved a covenant from a patentee who had sold his arms manufacturing business and covenanted for 25 years not to engage anywhere in the world in the manufacture of guns or ammunition. The question before the House of Lords was whether this restraint was valid. *Nordenfelt* clearly involved a quite different issue from that in *Mogul Steamships*. Its importance in the present context is that some of the principles in the case were applied (and in my view misapplied) in *The Coal Vend Case*.

The Coal Vend Case is Newcastle's contribution to the common law doctrine of restraint of trade and to the emasculation of the *Australian Industries Preservation Act* 1906 (Cth), Australia's first attempt at controlling restrictive trade practices. The majority of the coal mines in the Newcastle – Maitland area entered into an arrangement to restrict the output of coal and raise and fix the price of coal sold. Further, they entered into an agreement with a number of shipowners who carried the bulk of the coal produced whereby they agreed to sell all their coal required for inter-State purposes to the shipowners. The shipowners agreed to buy all coal required for that trade from members of the association, not to carry coal for other producers and not to sell such coal at a price greater than that fixed under the agreement. The object of the agreement was to protect individual coal producers from "excessive competition and unremunerative prices ... for coal". In present day *Trade Practices Act* terms, such arrangements would be illegal both as a collective boycott[6] and as a price fixing arrangement between competitors.[7]

(b) The Principles from the Leading Cases

The amalgam of principles which emerge from the above cases is as follows:

(i) There is no illegality in arrangements between competitors unless there is "a desire to inflict malicious injury on their rivals".[8] Collective arrangements to secure trade, to boycott a competitor or to price fix did not qualify as arrangements involving a "malicious intent".

(ii) The test of restraint of trade illegality is whether the arrangement relates to "unlawful obstruction, violence, molestation or the procuring of people to break their contracts".[9] In most trade agreements, of course, nothing physical is involved at all and neither, in most cases, do such agreements depend upon procuring a party to breach an existing contract.

(iii) Anything (unless it involved the violation of a legal right in the sense referred to in (ii) above) which "might have been done by an individual (can) ... be done by a combination of persons".[10] This was, according to the reasoning in the cases, because a combination is nothing more than the combined operation of the actions of single persons. The cases thus do not recognise at all that which is the linch pin of the *Trade Practices Act* 1974 (Cth). This is that certain business activity which can be conducted by unilateral decision making may well be condemned when made in combination with competitors. In the case

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6 *Ibid.*

7 See *Trade Practices Act* 1974 (Cth) s.45(1)(b); s.45(2)(a)(ii); s.45(2)(b)(ii). These provisions cover anticompetitive arrangements. Price fixing between competitors is deemed anticompetitive and thus illegal [*Trade Practices Act* 1974 (Cth) s.45A(1)].

8 Lord Halsbury in *Mogul Steamships* at 36. The purpose of the agreement was merely to attract competition (Lord Watson at 42). To similar effect see Lord Hannen at 59. Other Members of the House agreed generally. In *Coal Vend*, the necessary requirement for illegality was said to be one of "sinister intention" (which was not proven in the case). See *Coal Vend* in the Privy Council [(1913) 18 CLR at 53-54].

9 Lord Halsbury in *Mogul Steamships* at 37; To similar effect Lord Watson at 39; Lord Bramwell at 44 and Lord Field at 52. Other Members of the House agreed generally. To similar effect see *Coal Vend* in the Privy Council [(1913) 18 CLR at 35].

10 Lord Halsbury in *Mogul Steamships* at 38; To similar effect Lord Bramwell 44; Lord Morris at 50 and Lord Field at 57. Other Members of the House agreed generally. To similar effect see *Coal Vend* in the Privy Council [(1913) 18 CLR at 35].

of pricing decisions and decisions as to parties with whom to conduct business, unilateral decisions are generally untouched by the *Trade Practices Act* 1974 (Cth) whilst decisions made by competitors collectively are almost universally condemned by it. The difference in these two scenarios is simply unrecognised in the cases referred to.

(iv) To render a contract "unlawful" means that the contract must be one of a kind to which the law will not give effect. But these types of contracts are limited to those which offend public policy. Their Lordships said that contracts relating to immorality may, for example, be offensive to public policy but "it has never been the law that a contract in restraint of trade is contrary to law" in this sense.[11]

(v) In *Nordenfelt*, Lord McNaughten laid down what is still the guiding principle applicable to common law restraint of trade covenants to protect goodwill on the sale of a business. Lord McNaughten stated the relevant principle in this regard in the following terms:
"*The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities*".[12]

Whilst the above statement may not be contentious, even today, in the context of covenants to protect goodwill on the purchase of a business (an intangible asset), an important impact of his Lordship's statement in the restraint of trade context is in its subsequent application (and in my belief, its misapplication) in the quite different area of price fixing and collective boycott arrangements between competitors. Thus in the *Coal Vend Case,* Lord Parker of Waddington, in delivering the Advice of the Privy Council, used Lord McNaughten's principle to conclude in a price fixing and collective boycott context that:

> "*For a contract in restraint of trade to be enforceable ... the restraint ... must (to use the words of Lord McNaughten) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public .... Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties had been held unenforceable because it involved some injury to the public*".[13]

On this basis, and others, their Lordships found the Coal Vend Arrangements not to be unlawful under the *Australian Industries Preservation Act* 1906 (Cth). This Act illegalised, amongst other things, "any combination in relation to trade or commerce with intent to restrain trade or commerce to the detriment of the public".

The application of Lord McNaughten's principle (given in the context of a restraint of trade covenant to protect goodwill) to the case of collective boycott and pricing arrangements between competitors can be described only as an antitrust law miscegenation.

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11 Lord Halsbury in *Mogul Steamships* at 39; Lord Bramwell at 46 to similar effect. Other Members of the House agreed generally.

12 Lord McNaughten in *Nordenfelt* at 565.

13 *Coal Vend* (in the Privy Council) (1913) 18 CLR at 33.

(vi) There may be illegality if a combination raises prices to an unreasonable extent. However, the combination must involve "calculation" to do this and:
"*the onus of showing (this)... will lie on the party alleging it and... if the Court is satisfied that the restraint is reasonable between the parties, this onus will be no light one*".[14]

(vii) In considering the term "detriment to the public",[15] there is no presumption that "the public" means "the consuming public". Thus the interests of producers and distributors must also be considered. If the agreement is one "reasonably" to enhance prices and wages, then it is not one which is "detrimental to the public" as a whole.[16] Arrangements are not "detrimental to the public" if their purpose is to prevent "cut-throat competition".[17] In *Coal Vend*, it was said that there could be no illegality unless a combination had the intention of:
"*controlling the supply price of coal to the public by unduly raising prices or otherwise*".[18]

Given the above principles, it is clear enough that combinations between competitors to restrain trading were, at common law, virtually impregnable. Rarely would it be possible to leap all the hurdles placed by the courts in a plaintiff's path. To be successful, a plaintiff trying to upset a restrictive trading arrangement at common law had to show:

- a desire to inflict malicious injury;
- some sort of violence, obstruction or molestation;
- some result which was detrimental to the public. However, most of the matters which one might imagine to be detrimental to the public were not considered by the courts to be "detriments" at all. Thus, for example, it was not a detriment to raise prices unless this was "calculated" and prices were raised "unduly". In considering this question, one had to look at the question from the producer viewpoint as well as the consumer viewpoint. Obviously enough, a producer will contend that price increases are "reasonable" with the same vehemence as a consumer will allege that such increases are "undue". In the ultimate, the Privy Council in *Coal Vend* did a Pontius Pilate and did not consider whether an increase in the price of coal in excess of 46% in two years was or was not "undue". In any event, it is hard to see how the court system is appropriately geared to adjudicate upon vendor/purchaser price disputes.

The subsequent history of the evaluation of combinations between competitors fulfilled the prophecy of the above cases. In subsequent decisions, the courts adopted a "hands off" policy and failed to disturb arrangements entered into between parties, whether competitive with each other or not, to advance their own self interest.[19] The courts, working from a test which allegedly

14 *Ibid* at 35. See n.18 as to the actual increase in coal prices by virtue of the vend.
15 One of the terms used in the *Australian Industries Preservation Act* 1906 (Cth), which Act was interpreted in *Coal Vend*.
16 *Supra* n.13 at 41 et seq.
17 *Supra* n.13 at 48.
18 *Supra* n.13 at 49. Prices were, in fact, raised from 7/6d. in 1906 to 11/- in 1908 (see n.13 at 52). A price increase of over 46% in two years was not, apparently, considered to be an "undue" increase. The Privy Council Advice did not analyse the concept of the "reasonableness" of price but simply declined to condemn such price increase as occurred as being "detrimental to the public".
19 See *North Western Salt v. Electrolytic Alkali Co. Ltd* [1914] AC 461. Combination to fix salt prices held lawful restraint of trade even though "unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices" (469). The House of Lords thought the alternative to approval of such an arrangement might be "an ill-regulated supply and unremunerative prices which may, in point of fact, be disadvantageous to the public. Such a state of things, may if not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance" (469). In 1927, the Privy Council struck down the *Commercial Trusts Act* of New Zealand in a particularly unscholarly advice effectively of 14 lines [*R v. Crown Milling Co* [1927] AC 394]. This advice was quite contrary to New Zealand authority on its legislation [*Merchants Association of NZ v. The King* (1913) 32 NZLR 537; *Fairbairn Wright Co. v. Levin* (1915) 34 NZLR 1].

considered the public interest, in fact considered issues affecting the public to be an irrelevancy. What was in the private interests of parties was held to be the most appropriate indicator of what was in the interest of the public as a whole.

III Restraint of Trade and "Employment"

When an "employment" factor entered into restraint of trade evaluations, however, the courts took a different approach to that detailed above.

This point is perhaps most dramatically illustrated in the 1887 United Kingdom Court of Appeal Decision in *Mineral Water Bottle Exchange and Trade Protection Society v. Booth.*[20] The arrangement before the court involved members of a trade association who agreed between themselves not to employ for two years any person who had left the employment of another member without the consent of such other member.

Cotton LJ held such a covenant to be unenforceable as it:

> "*... might be used most oppressively by preventing a man who had never been in any confidential position and never desired improperly to use the information he had then acquired from getting employment from another master in the trade he knew most about, and which he could best carry on*".[21]

Fry LJ invalidated the covenant on the ground that:

> "*The restraint of trade and of the liberty of Her Majesty's subjects in gaining employment is far in excess of any legitimate purpose of the contracting parties*".[22]

The Trial Judge, Chitty J, said:

> "*If (an employee) has the misfortune to discharge himself lawfully he falls within (the rule) not as being himself bound but ... the members of the association ... must all close their doors to him and refuse to employ him. I think this is an unreasonable restraint of trade ...*".[23]

Even in 1887, there were arrangements akin to drafts and non-employment of the employees of competitors! It can well be argued that the *Mineral Water Bottle Case* is a predecessor to subsequent arrangements such as sporting drafts. It has been cited freely in a number of decisions relating to such drafts.

What is interesting in the *Mineral Water Bottle Case* is that the countervailing interests of employees were considered. The court did not simply wash its hands of the evaluation issue as it had done in *Mogul Steamships* and *Coal Vend.* The court did not regard the public benefit issue as being totally foreclosed because of what the parties to the agreement had decided between themselves. To the argument that the arrangement could not be illegal because it was exempted under the *Trade Union Act* of 1871 the court said:

> "*(This) is not an agreement between the employer and the employed, but it is an agreement between employers of labour, who may amount ... to the large number of 500 ... I think it is an agreement which I ought not to enforce between the society and any member or as between any members of the society itself*'.[24]

The follow on "employee" cases decided about the same time as *Mogul Steamships, Nordenfelt* and *Coal Vend* show a consistent, yet quite divergent, approach to "restraint of trade" issues from that adopted in those cases. For example, whilst the courts required evidence of unreasonableness (which evidence seemed impossible to produce to the satisfaction of the courts)

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20 (1887) 36 Ch.D 465 (CA).

21 *Ibid* at 471 per Cotton J. The court was of the opinion that such a covenant might have been valid if limited to employees who had acquired confidential information.

22 *Ibid* at 472.

23 *Ibid* at 469.

24 *Ibid* at 468-469, per Chitty J.

to substantiate illegality in the case of a combination restricting competitive trading activity, when employment and labour considerations entered into the picture, the direct opposite evaluation was made. Thus in *Mason v. Provident Clothing and Supply Ltd*,[25] the House of Lords, when called upon to interpret a covenant to restrict the activities of a prior employee, concluded that:

> "*Such a restraint on the liberty of a man to earn his living or exercise his calling is a serious one, and the courts have always regarded such restrictions with jealousy ...* ***evidence cannot be given on the question of the validity or reasonableness (of the restraint)***.[26] [Present writer's emphasis]

The House also held that a person's own talents can never be restrained. Lord Haldane, for example, distinguished covenants necessary to protect confidential information and trade secrets (validly restrainable) from those restraining the skills acquired by a servant in the course of his employment (not validly restrainable). His Lordship held that skills, as such, can never be restrained for these are the inherent property and assets of the workman himself.

Three years later in *Herbert Morris v. Saxelby*,[27] the House of Lords was called upon to interpret a covenant restricting an employee. It held this covenant to be non-enforceable because:

(i) The covenant was "oppressive" notwithstanding the fact that it had not been procured by force, fraud, misrepresentation or deceit.[28]

(ii) The question of an oppressive restraint was not only an issue to be looked at from the viewpoint of the individual alone. Said Lord Atkinson:
"*The general public suffer with him, for it is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and of all those who desire to employ him ...*[29]

(iii) The law on restraint of trade was said to be:
"*laid down in the clearest and most happily selected language in the oft quoted passage of the judgment of Lord McNaughten, so that it is ... no longer necessary to refer to earlier authorities ...*"[30]
In interpreting this test, however, the House found that a mere protection against competition by a former employee was, under Lord McNaughten's test, not in the public interest and therefore void.

(iv) Goodwill covenants on the sale of a business were held to be in a different position to covenants entered into in order to restrain former employees. The former covenants are necessary to protect intangible property (goodwill) for which a vendor has been paid. The restraints will be enforceable only if the employer has a genuine interest to protect. Such interests might be trade secrets, knowledge of manufacturing processes and the like. But, in the case of restraints on former employees, there is a public policy which provides that, in the absence of some legitimate interest which an employer should be able to protect: "*... every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the State of his labour, skill or talent by any contract that he enters into.*"[31]

(v) The House of Lords also expressly affirmed its previously reached conclusions in *Mason v. Provident Clothing and Supply Co. Ltd* to the effect that an employee's skills and

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25 [1913] AC 724.
26 *Ibid* per Lord Haldane VC. All Members of the House concurred in the view expressed either expressly (Lord Dunedin) or in all relevant respects in separate speeches (Lord Shaw and Lord Moulton).
27 [1916] 1 AC 688.
28 *Ibid* at 698, per Lord Atkinson.
29 *Ibid* at 699, per Lord Atkinson.
30 *Ibid*.
31 *Ibid* at 701, per Lord Atkinson.

training, as distinct from his knowledge of trade secrets or confidential information, can never be restrained as such.

The interpretation of "public interest" when "employment considerations" are involved is in dramatic contrast to the interpretation of what was allegedly the same test when purely trading arrangements are involved. The courts have found in favour of freedom of employment whilst, at the same time, blessing restrictions on trading activities. The courts have found in favour of people being able freely to offer themselves for employment yet, at the same time, have found no fault with concerted trading arrangements inhibiting market entry. The courts have held that private interests and public interests are co-terminus when restrictive trading activities are involved. Yet the courts, at the same time, have rigorously scrutinised private arrangements when they have prevented or inhibited freedom of employment. The contrast between the courts' evaluations in the "employment" and the "trading" fields could not have been more dramatic. This contrast is ironic, however, because the courts reached totally different conclusions in each area but did so allegedly by applying the same test in each case.

IV The Conflicts Apparent from the Early Decisions: A Summation

It is, I think, instructive to return to the early common law decisions. It is these decisions which have compromised the relevant conflicting interests. It is these decisions which starkly show the conflicts of principle involved.

(a) The arguments based on the common law interpretation of "business" restraints which lead to the conclusion that sporting drafts should be validated

In looking at sporting drafts, the following arguments for draft validation flow from early common law decisions in relation to "business restraints":

(i) Sporting organisations should be left to do largely as they wish. This is because any restraints that a sporting association imposes are clearly:
- not maliciously intended;
- not restraints of the kind deemed illegal under common law;
- reasonable in the public interest. Especially is this so when the public interest, at common law, was thought to be best determined by the parties engaging in the restraints. In any event, a genuine public purpose obviously can be alleged in sporting draft restraints. The sporting bodies imposing such restraints obviously want to advance, not retard, the sport they administer. On the basis of common law decisions, the argument can be put that sporting organisations themselves are best equipped to determine what is in the overall best interests of the sports they administer; and
- there is no public detriment in the sense that unreasonably high prices are imposed on the public or shortages of services eventuate. Indeed, the sporting bodies imposing draft restraints argue with zeal that the restraints they impose aid the development of sporting talent and the survival of sporting clubs, not vice-versa.

(ii) The argument that sporting draft restraints are justifiable at common law and should be upheld is based on the holdings in *Mogul Steamships* and *Coal Vend* upon the discussion in PART II of this paper.

(b) The argument based on the common law interpretation of restraints where "employees" are involved which lead to the conclusion that sporting drafts should be invalidated

The arguments to the effect that sporting drafts should be invalidated are based on an evaluation of common law restraints of trade in which "employee considerations" are relevant.

(i) These arguments submit that the restraints imposed by sporting drafts are or might be:
- used oppressively to prevent a sportsperson obtaining employment;

- an unfair restraint on a person exercising his or her skills. These skills are aspects of the sportsperson's abilities. They are not confidential secrets. They are perhaps skills which have been learnt with one club and which may be used, on transfer, to the benefit of another. But this is no different to any person changing employers. At common law, an employee cannot be restrained from transferring jobs purely because he or she acquired certain skills in his or her prior position;
- disadvantageous to the public in that a sportsperson is not free to exercise his or her skills to the best benefit of himself or herself and those who wish to employ him/her; and
- unjustifiable because they do not protect any goodwill in a vendor/purchaser sense. Therefore, such restraints constitute a simple covenant against competition, and should be declared void for this reason.

(ii) Arguments to the above effect are mounted on the basis of the precedents in *Mineral Water Bottle Exchange and Trade Protection Society; Mason v. Provident Clothing and Supply;* and *Herbert Morris v. Saxelby* and from the points set out in the discussion in PART III of this paper. Such arguments assert that sporting organisations have no interest, or no sufficient interest, to support the draft restraints. Further, the argument runs, draft restraints are not justified by an employer/employee relationship. They are, the argument runs, nothing more than unjustifiable restraints imposed by an agreement of employers to the detriment of employees whose freedom of employment is inhibited by the arrangements made.

(c) Other considerations

The argument to invalidate sporting drafts is also a pragmatic one. It may be alleged that, whatever the alleged justification for sporting draft restraints, such justifications are illusory when the reality is looked at.

V How Sporting Drafts Fared In The Courts Prior To The New South Wales Rugby League Case

I wish to discuss the NSW Rugby League draft rules as a separate subject of this paper. I do this because the court evaluation of this case is relatively contemporary and because this paper is given in Rugby League territory. As a prelude to discussion of this case, however, it is useful to see how preceding sporting drafts have fared in the courts.

(a) The recognition of the unique nature of sport

There is no doubt that case law clearly recognises the unique nature of sport.

The relevant issues were eruditely put by the United States Federal Court in *US v. National Football League*[32] and have been also put in other cases in Australia and elsewhere to which I later refer.

It is asserted in these cases that professional teams must not compete too well. On the playing field they must do so. But in a business sense, the stronger teams must not drive out the weaker for, if they do so, the whole League, including both the stronger and the weaker, will be worse off and then no team will survive profitably. Thus the courts acknowledge the fact that it is wise that rules be passed to help the weaker clubs in their competition with the stronger ones in order to keep the League fairly in balance. Even the most enthusiastic of fans of strong teams will cease to attend home games if visiting teams are weak. To allow unrestricted competition would allow:

- the creation of greater and greater inequalities in the strength of teams;
- weaker teams to be driven out of business; and
- the ultimate destruction of the entire League.

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32 *US v. National Football League & Ors* 1953 Trade Cases 67,614 (ED Penn).

The various possible methods of "balancing" teams are conveniently listed in the *National Football Case*.[33] It is appropriate to set out these as all sporting drafts seem to consist of one of these systems, or a combination of them. The methods are:

- limit bonus prices which can be paid to new players;
- give the weaker teams a prior right over stronger teams to draft new players;
- prohibit the sale of players after a certain time in the season;
- limit the number of players which can be drafted by various teams;
- limit the total amount of salaries which a team can pay;
- give the lowest team the right to draft a player from the highest team when and if the highest team has won a certain number of consecutive championships; and
- reasonably restrict the projection of games by radio or television into the home territories of other teams.

The *National Football League Case*[34] concluded that:

> *"The member clubs of the National Football League, like those of any professional League, can exist only as long as the League exists. The League is truly a unique business enterprise which is entitled to protect its very existence by agreeing to reasonable restrictions on its member clubs."*[35]

Statements to the above effect have been made in a number of United States cases.[36] Akin views have been expressed in Australia. The High Court in *Buckley v. Tutty*[37] clearly recognised the legitimate interest of the NSW Rugby League and of its clubs:

> *"... to ensure that the teams fielded in the competitions are as strong and well matched as possible, for in that way the support of the public will be attracted and maintained, and players will be afforded the best opportunity of developing and displaying their skill."*[38]

Thus, said the High Court, it was legitimate for the NSW Rugby League to aim to provide a system to promote "balance" in the capacity of the various clubs and develop team spirit in such clubs. The court in *Buckley v. Tutty* blessed the concept of a League player draft though, as is well known, it invalidated the particular arrangements before it. Similarly the Victorian Football League has been held to have a legitimate interest in protecting the VFL competition,[39] the VFL being judicially characterised as "an alliance of sworn enemies".[40]

There is no doubt that courts recognise the special nature of sporting competition and the necessity for sporting bodies to regulate such competition.

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33 *Ibid.*
34 *Ibid.*
35 *Ibid* at 68,937. The Court in this case was evaluating not a player draft but the reasonableness of restraints prohibiting one club's games being televised into the area of another club when such other club was playing a home game.
36 *Supra* n.32; *WTWV v. National Football League and Miami Dolphins* 1982 Trade Cases 64, 784; *Philadelphia World Hockey Club Inc v. Philadelphia Hockey Club* 351 F.Supp 462 at 486; *Mackey v. National Football League* 1976 Trade Cases 61, 119 at 70, 076; *NCAA v. Board of Regents of the University of Oklahoma* 1984-2 Trade Cases 66, 139 at 66387-8; *Gaines v. National Collegiate Athletic Association* 1990-2 Trade Cases 69, 238.
37 (1971) 125 CLR 353.
38 *Ibid* at 377.
39 *Foschini v. VFL* [Supreme Court of Victoria; Crockett J. 15 April 1983 (Unreported)].
40 *Ibid.*

(b) How, in practice, have player drafts fared when they have come before the courts for adjudication?

Notwithstanding the clear recognition by the courts of the interest of sporting control bodies in regulating sport and in "balancing" the ability of teams, sporting drafts have had a very low success rate before the courts. The courts in this, as in many other areas of the law, are faced in individual cases with a litigant before them whose freedom clearly is restrained by a sporting draft, often dramatically so. The courts also, of course, have the same natural tendency to find in favour of individual freedom of action in this area as they have traditionally had in other areas involving employee restraints.[41] Against this, the courts have to balance the demands of a general philosophical theory which can be easily asserted, and even accepted in principle, but which is extraordinarily difficult to quantify and prove in specifics. Perhaps it is not surprising, in these circumstances, that the courts have held in favour of individual freedom and pushed the more general philosophical theory into the background. Perhaps also the decisions may tend disproportionately to favour individual freedom of action because some of the restraints imposed on players have been quite gross.

Whatever the reason for the holdings of the courts, there appears to me to be only one case[42] in Australia upholding the validity of player drafts. This is an unreported judgement of Mr Justice Helsham in the Supreme Court of New South Wales relating to soccer player transfer fees.[43] Soccer contracts, usually for a period of one year, required the payment of a transfer fee to a player's prior club if a player transferred to another club at the end of a season. The transfer fee to be fixed was to be based on a number of criteria including the cost of the player to the club, the length of player service with the club in question, coaching provided and "any other relevant information that will assist in arriving at a reasonable transfer fee". If a transfer fee could not be agreed, there was an appeal procedure available pursuant to which the executive committee of the Federation could set a reasonable transfer fee. Justice Helsham held that the restraint involved was reasonable in the circumstances. A player's club could not retain a player against that player's wishes except by fixing an unrealistic transfer fee. The appeal mechanism was an appropriate check on any abuse of power by a club in setting a transfer fee which was unrealistic and which may have operated, in fact, as a refusal of a player transfer. Against the above decision validating the NSW Soccer Federation player draft, there is, however, a barrage of decisions invalidating sporting drafts.

It should be noted that American evaluations on the question of draft validation are under United Stated antitrust laws, which laws are not totally applicable in the Australian Sporting draft context. This is because American antitrust law permits restraints which are agreed between player associations and clubs after a process of collective bargaining. The American evaluations

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41 See discussion in PART III of this Paper.

42 ie, only one case prior to Mr Justice Hill upholding the NSW Rugby League Draft (n.71 below). In this PART (PART V) of the text we are speaking of cases prior to the evaluation of the NSW Rugby League Draft. In any event, of course, Mr Justice Hill's decision was reversed on appeal.

43 *Hoszowski v. NSW Federation of Soccer Clubs* [Helsham CJ in Equity: Supreme Court of NSW 6 October 1978 (Unreported)].

are thus largely addressed to the question of whether there has been a genuine process of bargaining not at whether the restraints are reasonable at common law.[44] American evaluations are relevant only when the collective bargaining immunity is not applicable.

The principles of the Australian, English and New Zealand decisions in point can be summarised as follows:

(i) In *Buckley v. Tutty*[45] the High Court of Australia invalidated provisions whereby a player was not able to transfer from one club to another unless released from the first club. The court found the restraint invalid as it could apply in circumstances where a club was not prepared to employ a player but would not consent to him being employed by another club. Further there was no time limit. A club could retain a player no matter how long ago his employment with that club may have ceased. A transfer fee could also be placed on a player by a club which did not wish to retain such player. This transfer fee went to the player's club, not the player. This also was said by the High Court to restrain a player from working elsewhere and thus constituted an invalid restraint of trade.
There was a Qualification and Permit Committee of the NSW Rugby League to which players might appeal in relation to transfers and transfer fees. The Court was not, however, impressed by the role of this Committee saying:
"*... a player is completely in the hands of the Committee; he has no right to require it to decide in a particular way or in accordance with any suggested principle, and it cannot be assumed that the decisions of the Committee will always and necessarily ensure that the restraint imposed by the rules is no more than a court would consider reasonable.*"[46]

(ii) An akin restraint to that in *Buckley v. Tutty* was held illegal in the case of the United Kingdom soccer transfer arrangements.[47]

(iii) In the case of the Victorian Football League, rules requiring club clearance in order to change clubs were invalidated by the Victorian Supreme Court on the same reasoning as that of the High Court in *Buckley v. Tutty* above.[48] In *Foschini*,[49] the judicial comment was made in relation to these VFL rules that:
"*It is difficult to understand why a club, which is unprepared to enter into a contract with a player upon whose services it has, by virtue of the zoning system, first option, should not be required to release that player for a transfer fee either to be agreed or fixed by arbitrators.*"

(iv) The Victorian VFL decisions have been applied in Western Australia to the same effect. An attempt was made by the West Perth Football Club in *Adamson v. West Perth Football Club*[50] to distinguish the Western Australian Appeal Committee from that in other cases

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44 See *Philadelphia World Hockey,* Supra n.36 (But note in that case that there had not been good faith collective bargaining in relation to the reserve clause before the Court and thus this clause was invalidated); *Mackey v. National Football League,* Supra n.36 (no genuine collective bargaining purely by player union acceptance of a prior unilaterally imposed restraint); *Zimmerman v. National Football League* 1986-2 Trade Cases 67237 - potential players bound by the restrictive terms of a player - League bona fide negotiated arrangements; *Wood v. National Basketball Association* 1987 - 1 Trade Cases 67424 (player bound by draft and "salary cap" arrangements bona fide negotiated between player association and basketball league). For a general discussion on the United States sporting drafts see JP Morris "*Fair and Square: Antitrust Laws and Professional Sports in America*" (1985) Law Institute of Victoria Journal 552. For the situation in the United States prior to the widespread adoption of collective bargaining procedures see "*The Superbowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*" Comment in (1967) 81 Harvard LR 418.

45 *Supra* n.37.

46 *Supra* n.37 at 379.

47 *Eastham v. Newcastle United Football Club* [1963] 1 Ch. 413.

48 *Supra* n.39; *Hall v. Victorian Football League* [1982] VR 64.

49 *Supra* n.39.

50 (1979) ATPR 40-134.

because of the matters it could take into account. The Court, however, was not satisfied that the relevant appeal provisions were reasonable or that they made reasonable what was otherwise an unlawful restraint of trade.

(v) In New Zealand, Rugby League rules giving the New Zealand Rugby League power to withhold a clearance to permit New Zealand players to play in another country were held to be unreasonable restraints.

In the words of North P:

"*It places in the hands of the respondent a complete and unfettered discretion to withhold its consent or to refuse a clearance in respect of any of its players. It is unrestricted in point of time and place. It is no answer for the respondent to say that it exercises its wide powers in a reasonable manner.*"[51]

As previously stated, most American decisions in point have involved evaluations of antitrust law principles or evaluations as to the genuineness of the collective bargaining process permitted under United States antitrust law. However, in those cases where American decisions are in point, such decisions have showed a marked affinity to the Australian, English and New Zealand decisions noted above. Thus requirements that a player continues to be the property of one club until "sold" and "reserve clauses" permitting clubs unilaterally to extend the season of a player have been invalidated.[52] The "Rozelle Rule" in the United States whereby a party becomes a free agent if he does not play for one year, but nonetheless, must compensate his old club if subsequently signing with a different club has also been invalidated.[53]

(c) What general principles has the court given in relation to player restraints?

In invalidating most of the player drafts before them, courts have laid down a number of general principles. It is appropriate to list these:

(i) The word "trade" in the context of "restraint of trade" is one of wide import. It extends to employment generally.[54] For "restraint of trade" purposes, an amateur footballer is engaged in "trade".[55]

(ii) No restrictions can impose a greater restraint than is necessary to protect the genuine interests of the controlling sporting organisation.[56]

(iii) If a plaintiff is unreasonably restrained, it is not to the point that the motive for his complaint may arise from something unrelated to remuneration – for example a desire, for personal reasons, not to play for a particular club.[57]

(iv) How restraints affect players can be judged only by how they work in practice.[58]

(v) The courts will look at alternative methods available to achieve the benefits alleged by sporting organisations as following from the restraints. Thus, for example, a court may conclude, on the evidence, that it is not established that any substantial change would occur if the restraints were abolished.[59] In *Buckley v. Tutty*, the High Court posed

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51 *Blacker v. New Zealand Rugby Football League Incorporated* [1968] NZLR 547 at 556 (per North P). His Honour relied heavily upon *Mineral Water Bottle Exchange and Trade Protection Society v. Booth* (Supra n.20) in reaching his decision.

52 *Robertson v. National Basketball Association* (1975) 389 F.Supp 867.

53 *Ibid, Mackey v. National Football League* Supra n.36.

54 *Supra* n.37, n.47.

55 *Supra* n.51. Similarly, even in the case of a professional, it is not necessary that he earn all his income from the activity in question or that income may be earned elsewhere if the restraint is imposed. [*Hughes v. Western Australian Cricket Association* (1986) ATPR 40-736; Supra n.37].

56 *Supra* n.37, n.48.

57 *Supra* n.48.

58 *Supra* n.47.

59 *Supra* n.47 at 433.

alternative possible scenarios surmising that these might perhaps achieve the same results as those achieved by the restraints in question. The Court, however, concluded that:

"*It is not for a court to advise in advance what restrictions would be reasonable; our function is only to consider whether the rules in their present form impose a greater restraint than is necessary for the adequate protection of the interests of the League and its members.*"[60]

(vi) The Courts will not be impressed by claims that the sporting organisation involved has no real position of power over players subject to the organisation's draft. Thus the case law has established that the rules of the English Soccer Association, when considered as a whole and in conjunction with arrangements existing with soccer administrations in other countries, created a "united monolithic front all over the world".[61] Akin opinion has been expressed in relation to the New Zealand Rugby League.[62] It is no answer to say that a player may retire from the organisation because, if a player does this, he is prevented from playing the sport in question.[63]

(vii) It matters little whether a sporting organisation is carried on at a profit or not; whether players are paid or not; or whether officials act in an honorary capacity or not.[64] In a number of cases, trading may in fact be the principal activity of sporting organisations, sport being encouraged as a means of receiving financial rewards from trading.[65] In *Philadelphia Hockey* the United States Federal Court expressed the interaction of trade and sport in quite colourful, but no doubt accurate, terms which gave rise to doubt as to what it saw as being the reality of the position.[66]

(viii) Finally, the courts have, generally speaking, paid little attention to appellate tribunals established by sporting associations. The courts have not regarded these as making restraints more reasonable.[67] As has been previously noted, the High Court regards such Tribunals as being of no value unless their decisions will be always the same as those of a court[68] – an almost impossible guarantee. It seems as if appellate tribunals will be of limited assistance although the existence of such a tribunal was an important factor in the validation of the NSW Soccer Federation transfer rules previously referred to.[69]

The above principles, taken collectively, mean that sporting drafts have immense difficulties in being validated at common law.

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60 The Court held that the rules before it were unreasonable: *Supra* n.37 at 378.
61 *Supra* n.47 at 438.
62 *Supra* n.51.
63 *Supra* n.37.
64 See *Tutty v. Buckley* in the Full Court of the Supreme Court of NSW [1970] 3 NSWR 463 at 474 for perhaps the most definitive statement on this point.
65 See *ex.p Western Australian National Football League* (1979) ATPR 40-103 at p.18044 (High Court).
66 See, for example, *Philadelphia Hockey* Supra n.36 at 466:
"*Despite the thousands of words uttered on this record by all the parties about the glory of the sport of hockey and the grandeur of its superstars, the basic factors here are not the sheer exhilaration from observing the speeding puck but rather the desire to maximise the available buck.*"
In similar terms, at 501:
"*A review of the record convinces me that, above all else, the NHL owners are probably more shrewd as businessmen than they are as enthusiasts of sports.*"
67 *Supra* n.37; see also *Tutty v. Buckley* in the Supreme Court of NSW (Supra n.64); *Blacker v. New Zealand Rugby Football League* (Supra n.51).
68 *Supra* n.46 and related text.

VI The Proposed New South Wales Rugby League Draft

The Federal Court's evaluation of the proposed New South Wales Rugby League Draft is an important case in the field of sporting restraints. This is so for a number of reasons:

- it is contemporary and it is an Australian Full Court decision;
- the restraints in the draft were not as overtly restrictive as those in the cases previously referred to. It thus follows that the restraints involved were more "reasonable" than those in the cases previously discussed. Thus, one would have thought, the chances of court blessing for the draft were greater; and
- conversely, the draft seemed to be aimed more overtly at furtherance of the objectives of the League and the clubs in it. As has been noted, the courts have always recognised the validity of restraints to achieve the betterment of a sporting competition. The court in the NSW Rugby League Case was asked to look at this principle and to give weight to it. Very little weight had been given in prior decisions to the principle that restraints are justifiable in order to advance sporting competitions. Yet one reason for this may have been that the restraints on individuals in prior decisions were fairly gross in nature. The Rugby League Draft restrictions were not overtly of this kind.

(a) An outline of the proposed New South Wales Rugby League Draft

Details of the proposed Draft are reproduced in the Appendix to this Paper.[70] It is thus appropriate here only briefly to summarise these details.

The League's proposed Draft consisted, in essence, of the following component parts:

(i) **A Player Quota**. Clubs could contract with not more than 57 players eligible to play for the club in the Rugby League Competition.

(ii) **Some Players were free to contract**. Players could contract with a club without reference to either the internal or external draft if they had already been playing with that club or if they or their fathers had substantial connection with that club.
In addition, any players who had played in the rugby league competition for 10 years was a free agent and was permitted to contract with a club of his choice.
A player who had not played rugby league for the three previous seasons was also a totally free agent. This provision covered, for example, converts to rugby league from rugby union.

(iii) **The operation of the Internal and External Drafts**. All other players came within either the Internal or the External Draft.

(iv) **The External Draft**. The external draft applied to country players [other than those within the jurisdiction of a club in the competition – for example Canberra, Illawarra or Newcastle], overseas players, or juniors who did not have the relevant club connection to qualify for a free draft with the club seeking to employ them.
The external draft operated in respect of the above classes of players who had not been signed by a club. In practical terms only those players in the above categories who were not already contracted to a club were subject to the external draft. In broad terms, clubs were to have the choice of players in the external draft in reverse order to that in which the clubs finished in the preceding year's competition. The selection of players in the external draft was to be made on the third Tuesday of November preceding the next season. An external draft selected player was not to be compelled to sign a contract for more than one year. If such player wished at the end of a season to transfer to another club, such player would be subject to the Internal Draft.

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69 *Supra* n.43 and related text.

70 As noted in the Appendix, it was prepared by Mark Adams, then a solicitor with Deacons Graham & James (then Sly and Weigall) for use in connection with the case.

(v) **The Internal Draft**. The internal draft, in broad terms, applied to players who were not totally free or were not subject to the external draft.
In broad terms, a player subject to the internal draft had to complete a form setting out his requirements for a contract and agreeing to play for the club which selected him provided such club was not more than 100 kilometres from the ground of the club with which he last played in the competition. It is to be noted that, as distinct from other drafts considered by the courts, it was the player himself who initially nominated the terms and conditions upon which he was prepared to offer his services.
The internal draft selection was to occur on the first Tuesday in December of the year preceding the next season. The selection process was to be akin to the process of selection for the external draft set out above, ie, the team finishing at the bottom of the prior year's competition has first choice of a player and so on.

(vi) **Appeals Procedure**. An appeals procedure was set out. The Appeal Board was to be independent of the League and could take into account criteria set out in the rules. These included financial hardship, a player's domestic and family situation and a player's employment.

The major issues in the litigation between the players and the League related to the internal draft and the impact of the appeals procedures. Obviously enough, the external draft was much less restrictive because it permitted clubs to approach and sign players subject to it.

(b) The evaluation of the New South Wales Rugby League's proposed Draft at first instance

The proposed Draft came before Mr Justice Hill of the Federal Court of Australia. His Honour gave judgment on 4 February 1991.[71]

His Honour commented upon prior attempts to control Rugby League and noted that the Draft before him was to replace the "modified transfer fee" then in existence. This system obliged a club wishing to sign a player playing with another club to pay eighty percent of the average playing fee to the old club as a "transfer fee". The maximum transfer fee was $50,000. It should be noted that this system had not been challenged though, in light of the cases set out in this paper, it might perhaps have its problems if so challenged. Some clubs complained about it because it did not deter wealthy clubs from buying players. Players complained about it because a club wishing to employ a player had to pay a fee to the player's prior club and this made the player a less marketable commodity.

His Honour applied common law authority previously set out in this paper.[72] His Honour, consistently with prior authority, rejected the initial submission of the League that a dissatisfied player could play in another competition. This was on the not unreasonable ground that a player exercising such a choice would have to move either to England or New Zealand.

His Honour found, on the evidence of the players, that many considerations, in addition to money, were relevant to their choice of club. He enumerated some of these as being:

- the change of improving their game with a good team or a good coach;
- geographical considerations and quality of life factors;
- the need to fit service with a club in with family requirements;
- the potentiality of a job which would provide a career after the player's league career had come to an end;
- the possibility of advancing players' long term goals of being coaches;

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71 *Adamson v. NSW Rugby League Limited* (1991) ATPR 41-084.
72 See PARTs II and III.

- improving players' choices of playing first grade or representative football which might be poor if players were required to play with a team already well catered for in the position of their choice;
- the chance of playing with a winning team; and
- the prospect of getting better television and media exposure.

Clearly enough these legitimate interests of players could be put at nought if the player were selected other than by a club of their choice. His Honour, however, held, as a matter of interpretation of the Draft Rules, as follows:

> "*It may be noted that the draft rules require a player entering the draft to stipulate the terms and conditions upon which he is prepared to play in his application form. As the rules and the application form presently read, there seems no reason why a player could not stipulate, as a term of his offer to the clubs in the draft, that he requires them to find a job of a particular kind. Indeed there is much to be said for the view that a player may go further and stipulate that it is to be a condition that the club drafting him obtain for him a job with a particular location. Counsel for the first respondent [the NSW Rugby League Limited] indeed submitted that this was the correct interpretation of the rules although this view did not meet with enthusiasm from counsel for the remaining respondents [the various individual Leagues Clubs] and, if accepted, would provide a mechanism whereby a player could defeat the objectives of the draft as seen by the League and ensure that he played with a club of his choice.*
>
> *There is I think a difficulty in deciding in abstract the correct interpretation of the rule when no dispute has arisen between parties to it. However, while not wishing to pass upon an extreme interpretation of the rules, I am of the view that, at the very least, a player could stipulate, if not for a job with a defined employer or at a defined place, at least for a job of a particular kind. Once this interpretation of the rules is accepted it can be seen that the hardship to the player complained of is considerably mitigated*".[73]

His Honour also concluded on the evidence that "in practical terms ... no club would nominate a player under the draft who clearly did not want to play with that club".[74]

Having held as above, the impact of the draft in restraining the activities of players clearly was greatly diminished. This was because a player, under his Honour's interpretation of the Draft Rules, could almost guarantee that his nominated playing conditions could be satisfied only by the club of his choice.

His Honour then evaluated the interests of the League in implementing the draft. He embraced the words of *Buckley v. Tutty*[75] to the effect that the League had an interest in providing competition stability. He noted that the Rugby League had submitted that the Draft was aimed to achieve:

- as evenly matched a competition as possible;
- the financial stability of competing clubs;
- the retention, as far as possible, by clubs of players playing with them;
- the prevention of the strong or rich plundering weaker clubs of their good players, particularly mid-season; and
- the development of the game at junior levels.

His Honour found that the draft system should go some way towards achieving the above objects although his judgment could hardly be regarded as a resounding endorsement of the Rugby League's case.

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73 *Supra* n.71 at 52, 318.
74 *Ibid.*
75 *Supra* n.38 and related text.

On balance, his Honour held the restraints reasonable. He noted the "100 km rule" and the "Appeal Provisions" were relevant to the question of reasonableness. He distinguished the appeal rules in *Buckley v. Tutty*[76] from those before him. The *Buckley v. Tutty* Appeal Rules, his Honour concluded, did not have any suggested principles by which appeals were to be adjudicated. However, there were specific factors listed in the Rugby League Draft Rules before the Court. Accordingly, said his Honour:

> "*the rules ... do not suffer the defects of those considered in* ***Tutty's Case*** *and assist in ameliorating the consequences to a player of a draft selection that may prove disadvantageous to him*".[77]

His Honour held that the proposed Draft was not an unreasonable restraint of trade stating his conclusion in the following words:

> "*I should say that I have not found the question easy to resolve, for the present is a borderline case. There are compelling arguments on each side to be balanced and it must steadily be born in mind that to prevent a player from exercising a free choice as to the club which is to employ him, involves a significant restraint on the freedom of the player, notwithstanding that that restraint may be somewhat mitigated by the factors to which I have already referred. Nevertheless, I am of the view that the respondents have shown on balance that the restraint imposed by the internal draft is not unreasonable having regard to the legitimate interests of the League and the clubs, on the one hand, and the players on the other*".[78]

There are four general points one can make on his Honour's decision whilst, nonetheless, recognising that difficult questions of balance are required:

(i) Significantly his Honour's decision was reached on his interpretation of the rules. This interpretation, if generally availed of, would have defeated the objects of the draft entirely by ensuring that a player could, if he wished, stipulate terms and conditions as to his willingness to play for a club which terms and conditions could ensure that a player played only for a club of his choice.[79]

(ii) His Honour's conclusions were based on his view that, in fact, no club would draft a player who did not wish to play for the club.

(iii) His Honour does not appear to have correctly applied the High Court's decision in *Buckley v. Tutty* to the Appeal procedures before him.[80]

(iv) His Honour reached his conclusion with considerable doubt.

No doubt Mr Justice Hill's decision appeared to the Leagues Clubs to be something of a pyrrhic victory. The League's Draft was validated but only on an interpretation of it which, if generally utilised, meant that its basic objective might never be achieved, ie, players could, by prescribing restrictive terms and conditions as to their willingness to play, ensure that they played only for the club of their choice.

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76 In connection with the comments of the High Court on Appeal Rules, see n.46 and related text.

77 *Supra* n.71 at 52,326.

78 *Ibid.*

79 *Supra* n.73 and related text for His Honour's interpretation of the Draft Rules.

80 *Supra* n.46 and related text for comments of the High Court on appellate tribunals and their decisions. In *Buckley v. Tutty*, one requirement in relation to the appellate bodies and their decisions was that their decisions must necessarily impose no greater restraint than the court itself would regard as reasonable. This test might well be regarded as impossible to satisfy in practice. However, the High Court quite clearly regarded this test as the appropriate one by which appeal procedures should be judged.

(c) The decision on the New South Wales Rugby League's proposed Draft in the Full Federal Court

Not surprisingly the decision of Mr Justice Hill was appealed. The Full Federal Court [Sheppard; Wilcox and Gummow JJ] gave its decision on 6 September 1991.[81]

In essence, the Full Federal Court found, on the facts, that the claims of the NSW Rugby League at best "operated at some degree" to assist the evenness of the competition. The Full Federal Court held, however, contrary to the view of Hill J at trial, that the draft was not necessary to ensure the financial stability of the clubs. It further held that the "100 km" limitation rule could work adversely to a player. Further, although the Appeal Rules may "assist in ameliorating the consequences to a player of a draft selection that may prove disadvantageous to him", there was "no way of knowing to what extent, in practice, they will do so".[82] In addition, the Full Federal Court did not believe necessarily that a club would decline to draft a player who had definitively stated that he did not wish to play with the selecting club. The best way, the Full Federal Court thought, to ensure this result was to allow a player the choice of clubs.

In short, the Full Federal Court allowed the appeal on the following grounds:

- the internal draft was contrary to the common law principle that parties should be free to trade as they wish. As Wilcox J. put it:

  "*How, in a free society, can anyone justify a regime which requires a player to submit ... intensely personal decisions to determination by others?*"[83]
- the internal draft rules operated at the conclusion of a player's contract, imposing a new contractual restraint on him even in cases where he entered his contract before the new rules were adopted. The player received nothing in return for this new impost.
- the rules were too broad. It seemed quite wrong, said the Court, to apply the same rules both to a struggling Third Grade Player earning a few dollars a week and to a Test Star commanding a six-figure annual emolument. Very few players had the ability substantially to affect the evenness of the competition yet the rules covered everyone.

Mr Justice Wilcox said that the Appeal should be upheld and the internal draft invalidated, his views being encapsulated in the following words:

> "*Hill J. concluded his discussion of the case by commenting that it was a "borderline" one which he had not found easy to resolve. I have not felt the same difficulty about the merits of the matter. As I have already indicated, my opinion is that some of the findings and assumptions made by Hill J. were unduly favourable to the respondents. On the view I take, the internal draft rules do very little to protect the interests of the respondents. They do much to infringe the freedom and the interests, economic and non-economic, of the players. The attempted justification fails*".[84]

It is obvious enough that the Full Federal Court has imposed a high onus on any sporting body seeking to justify its drafts. The liberty of the subject to conduct his business as he wishes is, in the view of the Full Federal Court, of paramount importance. Indeed, it is virtually inviolable. Claims of sporting benefits will obviously be difficult to prove. Even the establishment of an independent Appeal Tribunal is of no great assistance unless it can be demonstrated what, in practice, it will do[85] – an impossible task, one would think, when, in fact, the Tribunal has never sat.

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81 *Adamson v. New South Wales Rugby League* 1991 ATPR 41-141.

82 *Ibid* at 53, 033 Wilcox J.

83 *Ibid* at 53, 035.

84 *Ibid* at 53, 036; Sheppard and Gummow JJ agreed that the justification for the restraint had not been made out broadly for the same reasons as those expressed by Wilcox J.

85 *Supra* n.82. See also the High Court's comments on this issue in *Buckley v. Tutty* Supra n.46 and related text.

VII Was The Full Federal Court Right? What Has Happened to New South Wales Rugby League Without The Draft?

It is, of course, not possible to say what would have happened to the New South Wales Rugby League had the draft been implemented. It is, however, possible to assess the actuality of what has happened in the League without the draft.

The following is the position:[86]

(i) In 1992, the year after invalidation of the draft, four teams qualified for the final five who had not done so since 1988.

(ii) In the period 1988 to 1993, 13 of the League's 16 teams have been represented in the final five.

(iii) The 1992 Annual Report of the New South Wales Rugby League commented that there was a fractional fall in attendance at games but this was due to hard economic times and had to be taken in the context that crowd attendances had, as a trend, been steadily upwards. Table One below shows the overall position.[87] It is to be noted that in 1993 crowds increased in excess of 16% although it appears that much of this increase can possibly be attributed to the move of the Brisbane Broncos from Lang Park to ANZ Stadium which saw crowds increase from 239,000 to 475,000.[88]

Table One

Attendances at Home and Away Games of NSWRL

(1988 – 1993)

(Source: NSWRL Records)

1988	1,734,630
1989	1,882,383
1990	2,000,393
1991	2,184,888
1992	2,064,660
1993	2,347,729

(iv) The revenue of the Rugby League also showed healthy increases as Table Two below indicates.[89]

Table Two

Revenue of New South Wales Rugby League

(1988 – 1992)

(Source: 1992 NSWRL Annual Report)

	A $m
1988	10,625
1989	11,937
1990	19,093
1991	18,186
1992	21,609

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86 See Braham Dabscheck: "*Rugby League Post the Draft Case*" (1993) Vol.3 No.3. The Australian and New Zealand Sports Law Association Newsletter.

87 Reproduced from Dabscheck (Supra n.86).

88 *Supra* n.86.

89 *Ibid.*

(v) The comment of John Quayle, General Manager of the New South Wales Rugby League on the League's position was that:
"*we are now one of the most – if not* ***the*** *most – successful and financially secure sporting organisations in Australia*".[90]

(vi) There are plans to expand the competition. In 1992, it was announced that four more teams would join the competition in 1995 – the North Queensland Cowboys, the Queensland Crushers (Brisbane), the Perth Pumas and the Auckland Warriors.

Based on the above facts and statistics,[91] it must be concluded that the invalidation of the League's internal draft has hardly had calamitous consequences. Whilst it is very hard, perhaps impossible, to give concrete court evidence on the benefits of sporting drafts in stabilising clubs and "balancing the competition", it may well be that the Full Federal Court was right in adopting a doubting approach to alleged restraint benefits and heavily weighting its evaluation in favour of liberty of the subject.

VIII The Trade Practices Act And Sporting Drafts

(a) The relevance of the Trade Practices Act

At first sight, one would think that the *Trade Practices Act* would have a lot to say about sporting drafts. This is so because the Act is concerned with arrangements between competitors (which the various clubs certainly are) and also because there are a considerable number of American antitrust cases which concern sporting drafts – although, as Mr Justice Hill pointed out, the American draft system has no equivalent of the League's "internal draft" and it was the "internal draft" which was being evaluated by the Federal Court in the *NSW Rugby League Case*.

The following provisions of the *Trade Practices Act* could be regarded as relevant:

- those provisions dealing with collective boycotts of players who did not comply with the Draft's terms. In *Trade Practices Act* terms, the arrangement was one whereby competitive clubs agreed only to employ players complying with the draft and thus, without Authorisation from the Trade Practices Commission, would seem to constitute an illegal "exclusionary provision" under the Act.[92]
- those provisions dealing with arrangements having the purpose, effect or likely effect, of substantially lessening competition.[93]

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90 *Sydney Morning Herald* 20 July 1993 cited from Dabscheck (Supra n.86).

91 The commentary by Dabscheck (Supra n.86) sets out further matters of interest which have not been here reproduced.

92 See n.5 above for these sections of the Act covering collective boycotts or, as the term is called in the *Trade Practices Act*, "exclusionary provisions". The Trade Practices Commission may Authorise such an arrangement if it delivers public benefit exceeding any detriment created by it.

93 *Trade Practices Act* 1974 (Cth) s.45(1)(a); s.45(2)(a)(ii); s.45(2)(b)(ii). Such arrangements may also be Authorised on "public benefit" grounds (Supra n.92).

Each of the above provisions specifically covers arrangements relating to "goods" or "services". The term "services" is specifically defined in s.4(1) of the Act. This definition is expansive but excludes from its net:

"*rights or benefits being ... the performance of work under a contract of service.*"[94]

(b) Decision as to the application of the Trade Practices Act to sporting drafts

Mr Justice Hill at first instance followed, as a matter of comity, the decision previously reached by Northrop J in *Adamson v. West Perth Football Club Incorporated.*[95] In that case, which involved inter-club arrangements in the National Football League governing Australian Rules Football, the *Trade Practices Act* was held inapplicable to the restraints because:

- the term "competition" when used in the *Trade Practices Act* was used:
  "*in a commercial and economic sense rather than in a sporting sense*".
- the exclusion of "work" from the definition of "services" meant that:
  "*... a club does not come within s.45(3)*[96] *of the Act when* **it acquires rights or benefits granted or conferred under a contract** for the performance of work"[97] [Writer's emphasis];
- the right or privilege of a club to enter into a contract of service was not the acquisition of services by a club;
- there was, in any event no restraint on a club entering into contracts of service. In the words of Northrop J:
  "*In any event the provisions of the rules and regulations of the various leagues and clubs do not restrain the right or privilege of a club to enter into contracts of services, they operate on the performance of work under such contracts or other arrangements in the sense that if a club fields a player in a match without having obtained the necessary clearance and permit that club is liable to suffer a penalty*";[98] and
- the exemption of "work" from the definition of "services" in s.4(1) means that not only are restrictions which relate to the "actual performance of work under a contract of service" exempt from the *Trade Practices Act* but also exempt are:

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94 Relevantly, s.4(1) provides as follows:
"Services" include:
"... any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be provided, granted or conferred under –
(a) a contract for or in relation to -
(i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
(ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
(iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
(b) ...
(c) ...
(d) ...
but does not include rights or benefits being the supply of goods or the performance of work under a contract of service;"

95 (1979) ATPR 40-134. The provisions of the *Trade Practices Act* were held inapplicable to the National Football League clearance system but the system was invalidated as being an unreasonable restraint of trade at common law. The major issue in the case was whether the appeal provisions were sufficiently different from those in *Buckley v. Tutty* (*Supra* n.37) to make the restraints "reasonable". Northrop J. was not satisfied:
"*that the relevant appeal provisions were reasonable, or rather made reasonable what otherwise was an unlawful restraint of trade*".

96 s.45(3) defines the term "competition" for purposes of s.45 of the *Trade Practices Act.*

97 *Supra* n.71 at 52, 310; n.95 at 18466.

98 *Supra* n.95 at 18, 466 followed by Hill J. Supra n.71 at 52, 310.

> "*the antecedent formation of contracts where those contracts provide for the performance of work*".

The above, being so, the arrangements between the clubs did not, in his Honour's view, come within the *Trade Practices Act* at all.

On appeal, the inapplicability of the *Trade Practices Act* was confirmed. Sheppard J. believed that the rules were not intended to have any illegal "purpose".[99] Wilcox J. was of the view that the draft would be both anticompetitive and an illegal collective boycott but for the definition of "services" in the Act. His Honour concluded that:

> "*From a policy viewpoint, some people might think it unfortunate that s.45 does not apply to a case such as this. As I have pointed out, the internal draft rules undoubtedly have the purpose of restricting the supply of footballers' services (in the ordinary sense of that word) and the effect of substantially limiting competition in the market place for those services ... It is difficult to see what policy purpose is achieved by leaving inviolate arrangements under which potential employers agree not to compete amongst themselves ... It is certainly not in the interests of employees. They find themselves, uniquely so far as the Act is concerned, having to suffer any collusion amongst those with whom they would negotiate ... It seems to me that the present position is anomalous ...*"[100]

(c) Comments on the Courts' holdings as to the inapplicability of the *Trade Practices Act* to sporting drafts

It seems very difficult to argue against the view of Wilcox J. that, in policy terms, the *Trade Practices Act* should apply to sporting drafts. It is also hard to argue against his view that the draft has the purpose of restricting:

> "*footballers' services (in the ordinary sense of the word) ...*"

The reasons for non-applicability of the Act thus basically involve the question of what the word "services" means in the context of the *Trade Practices Act*, as distinct from its meaning "in the ordinary sense of (the) word".

It seems that the Courts have adopted a number of very strange judicial stratagems to exclude sporting drafts from the *Trade Practices Act*. The arguments for such exclusion are variously expressed but each of them has flaws. To accept them in totality involves:

- the acceptance of the proposition that because sport is involved, the word "competition" is necessarily restricted only to what happens in the sporting arena. No doubt, the word "competition" is used differently in a sporting sense to the way in which it is used in the *Trade Practices Act*, ie, in an economic sense. The courts may well restrict the operation of the Act to economic activities and let referees and umpires adjudicate what happens in the sporting arena. But there is a lot of economics involved in determining who gets on to the sporting arena in the first place and what coloured uniform that person wears. The words of the United States judiciary in relation to ice hockey restraints cannot be ignored in this context when the cynical, but no doubt realistic judicial comment was

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99 *Supra* n.81 at 53007. His Honour did not specifically discuss the "work" exclusion from the definition of "services" but he stated that he agreed with the conclusions of Wilcox J. and Gummow J. that the appeal should be allowed. Wilcox J. specifically covered the question of the applicability of the *Trade Practices Act* (see text following) before moving on to the question of the reasonableness of the restraints at common law. Gummow J. dealt with the issue primarily from the viewpoint of a common law restraint. He thus did not become involved as to whether the restraints did or did not infringe the *Trade Practices Act* though he utilised a number of American antitrust cases to compare "reasonableness" in the United States to "reasonableness" at common law. One would think that his Honour's analysis is misplaced. The United States antitrust cases are analogous with Australian *Trade Practices Act* law and not with Australian common law restraints of trade. There is an American common law doctrine of restraint of trade, and a comparison between it and the akin Australian doctrine would have been the more appropriate one to have made.

100 *Supra* n.81 at 53021 - 53022.

made in relation to player restraints that:

"*... the basic factors here are not the sheer exhilaration from observing the speeding puck but rather the desire to maximise the available buck*";[101]

and that National Hockey League owners are probably:

"*more shrewd as businessmen than they are as enthusiasts of sports.*"[102]

For the courts in Australia to ignore this point in totality seems to show what can be described only as a certain amount of commercial naivety.

- the equation of "work" with all steps taken to negotiate those with whom one is permitted to contract work again seems to involve difficult logic. Arrangements between competitors to restrict bidding for services would seem a far cry from restrictions in a contract between an employer and an employee involving a job of work. In policy terms, it seems that the courts could easily distinguish the two cases. The reason given by Wilcox J. show that there are clear policy reasons for the adoption of such a distinction.
- it is simply unrealistic Doublespeak[103] to believe that sporting drafts do:
  "*not restrain the right or privilege of a club to enter into contracts of services*"
  but merely operate on the performance of work under such contract:
  "*in the sense that if a club fields a player in a match without having obtained the necessary clearance ... that club is liable to suffer a penalty.*"[104]

As a factual proposition, this statement will, no doubt, often enough, be wrong. There may well, in many sporting drafts, be a prohibition on fielding non-cleared players. But what club in reality will not be constrained from entering into certain player contracts when the penalty of playing certain contracted players may range from forfeiture of competition points in all games in which such player participates to the imposition of continuous and, no doubt, substantial penalty fines for playing a contracted player, or both?

A far more appropriate judicial solution to the problem would appear to be to apply the *Trade Practices Act* to player drafts but assess the anti-competitive and exclusionary effects of such drafts in accordance with the method of negotiation between, for example, the League and players. If bona fide negotiations between player representatives and, for example, the Rugby League, result in a mutually acceptable arrangement, this arrangement may well not be anti-competitive. In the United States, such arrangements do not infringe the *Sherman Act* though the courts are vigilant to ensure that negotiations did, in fact, take place and that they were bona fide.[105] Even if there is an anti-competitive infringement in Australia, genuinely negotiated arrangements may well have public benefit sufficient to receive Authorisation from the Trade Practices Commission, and thus exemption from *Trade Practices Act* illegality, on "public benefit" grounds. Indeed, the Trade Practices Commission's Authorisation procedure might well prove a very flexible tool for evaluating genuinely negotiated draft arrangements. The NSW Rugby League, in its case before the Federal Court, would not, however, have been able to take advantage of any "genuine negotiation" aspects of the draft arrangement then proposed. The draft was an arrangement entered into between clubs. There was no player negotiation input into the

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101 *Supra* n.66 where this comment is set out in fuller form.

102 *Ibid.*

103 "Doublespeak" is evasive language designed to disguise the truth. Its constant use in society is demonstrated by the examples given in the "*Quarterly Review of Doublespeak*" published by the United States National Council of Teachers of English. "Doublespeak" is akin to "Doublethink" which is defined in the Macquarie Dictionary as "the ability to accept two contradictory facts simultaneously and to discipline the mind to ignore the difference between them [coined by George Orwell in *Nineteen Eighty Four* (1949)]".

104 *Supra* n.98.

105 See, for example, cases cited at n.44.

rules of the draft though the League did offer to negotiate with players after the draft rules had been agreed upon and publicly released. "Genuine negotiation", of course, involves more than this. It involves the players' representatives being involved in negotiations from the beginning of contemplated arrangements through to their conclusion. If arrangements cannot be negotiated between player representatives and the League, there is much to be said for the view that player restraints should not be permitted at law. If they can be negotiated, there are avenues open to have them blessed in *Trade Practices Act* terms.

In my view, it is very difficult indeed to regard the court's total exemption of player drafts from the *Trade Practices Act* as being based on reasoning which can be described as other than doubtful at best, and specious at worst.

IX Sporting Drafts And Unfair, Harsh Or Unconscionable Contracts

The players argued in the NSW Rugby League Case that the draft was contrary to s.88F of the *Industrial Arbitration Act* 1940 (NSW) [now s.275 of the *Industrial Relations Act* 1991 (NSW)]. This provision prohibits contracts in relation to a job or work which are harsh, unconscionable or against the public interest.

Mr Justice Hill declined to consider the player argument in relation to the draft as a whole. He concluded, quite rightly in my view, that:

- the section applies only to contracts of services actually entered into between players and their clubs as these contracts, and not the League draft, are the contracts pursuant to which the players actually perform work;[106] and
- an evaluation of claims under s.88F of the *Industrial Arbitration Act* must be considered on a "case by case" basis. Considerations of "fairness" in relation to the League Draft must thus be evaluated in relation to the circumstances of each player. There is no such thing as "per se" unfairness.

His Honour's approach was upheld on Appeal.

It is thus unlikely that a broadly applying sporting draft will be able to be invalidated under s.275 of the *Industrial Relations Act* 1991 (NSW), the successor to the now repealed s.88F of the *Industrial Arbitration Act* 1940 (NSW).

X An Alternative Economic Theory To Validate Sporting Drafts

An alternative economic theory, as yet unargued in Australia, can be advanced as a basis upon which player drafts might be validated. This is that all clubs in, say, the Rugby League should be regarded as one economic entity both for purposes of the restraint of trade doctrine and, should the *Trade Practices Act* apply,[107] for purposes of evaluations under that Act. This economic theory argues that decisions relating to player drafts are, in economic reality, internal management decisions of one economic entity. They are designed to enhance the enterprise efficiency of a single entity and should be legally evaluated in this light. The logic of the theory is that the only income generating activity of clubs is from playing football in the League, that other income (such as distributions for television) is League generated and that games are not between isolated clubs but a part of an overall competition which is possible only because it is organised and run

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106 In the writer's view, this conclusion is clearly correct. However, the interpretation of this provision is in marked contrast to the interpretation of the concept of "work" in the *Trade Practices Act* context. In the *Trade Practices Act* context, it was held that the interpretation of the word "work" not only covered employer-employee contracts but also covered all arrangements between competitive clubs which might restrict competitive bidding in relation to work contracts. [See text PART VIII.(a) and VIII.(b)]. The two interpretations are, in the writer's view, somewhat inconsistent. The interpretation in the context of the *Industrial Arbitration Act* is far to be preferred and, in the writer's view, should also be applied in the *Trade Practices Act* context [See text PART VIII.(c)].

107 Which current interpretation says it does not – see PART VIII of text.

by the League. Thus it is the League as a whole which is the productive enterprise and no club produces anything outside of the League.

This economic rationale has been discussed by a number of American commentators – prominent amongst them being Grauer,[108] Goldman,[109] Lazaroff[110] and Roberts.[111]

The theory is novel to Australia. Admittedly, the High Court in *Buckley v. Tutty*[112] did recognise that the League had some elements of a joint venture and akin observations can be gleaned from a number of cases.[113] However, there are, in my view, too many things operating against such a theory for it ever to be accepted in Australia. Some of these are:

- established precedent does not recognise the concept at all;
- to uphold the theory would mean that the rights of individuals, so jealously enshrined in the court precedents to date, would be completely negated. To overturn prior precedent protecting player freedom would require the courts to regard a player draft as a method of allocating players amongst divisions of a company (the "divisions" being the clubs and "the company" being the League) in the same way as an employer company allocates employees to various branches of its establishment. It would, I think, be a very difficult task to convince a court to characterise the League, and football players in it, in this manner. If the courts did this, all the protection given to players to date would, of course, be negated completely;
- in any event, the theory depends upon a number of factual findings. In the United States, the theory has been judicially upheld on the basis that it makes no economic sense to prohibit arrangements between parent and wholly owned subsidiary companies because, though they are legally different entities, they are economically the same entity. The Supreme Court expressed its reasoning on this issue in *Copperweld* in the following terms:

  "*... a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of s.1 of the* ***Sherman Act****. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two corporate consciousness, but one ... With or without an informal "agreement", the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests and there is no justification for s.1 (of the* ***Sherman Act****) scrutiny*".[114]

True it is that the League determines general policies. However, in my view, it does not determine general policies within the strict constraints of *Copperweld* even though some of the policies centrally set are exceedingly important (eg, allocation of television revenue). The League does not have day to day control over, or even ultimate responsibility for, many decisions made

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108 MC Grauer "*Recognition of the NFL as a Single Entity under Section 1 of the Sherman Act; Implications of the Consumer Welfare Model*" (1983) 82 Michigan Law Review 1.

109 L Goldman, "*Sports, Antitrust and the Single Entity Theory*" (1989) 63 Tulane Law Review 751.

110 DE Lazaroff, "*The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*" (1984) 53 Fordham Law Review 157, "*Antitrust Analysis and Sports Leagues: Re-examining the Threshold Questions*" (1988) 20 Arizona State Law Journal 953.

111 GK Roberts "*Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraint on Intraleague Rivalry*" (1984) UCLA Law Review 219, "*The Single Entity Status of the Sports Leagues under Section 1 of the Sherman Act: An Alternative View*" (1986) 60 Tulane Law Review 562, "*The Antitrust Status of Sports Leagues Revisited*" (1989) 64 Tulane Law Review 117.

112 *Supra* n.37 and related text.

113 See generally discussion in PART V.(a) of text.

114 *Copperweld Corporation v. Independence Tube Corporation* 1984-1 Trade Cases 66,065 (US Sup Ct). For other cases on this point see J. Briggs and S. Calkins "*Antitrust 1986 – 1987: Power and Access (Part II)*" (Fall 1987) Vol.32 No.3. The Antitrust Bulletin.

by individual clubs. Clubs appoint their own coaches and pursue their own policies. It can be argued that branches of large companies do the same thing. However, the essence of *Copperweld* is common shareholding, and thus common economic interest in, the agreeing entities. The "common interest" test is even harder for the League to satisfy when it is to be noted that the Supreme Court in *Copperweld* gave as the reasons for its decision that:

- the very notion of an "agreement" between parent and subsidiary wholly lacks meaning as a subsidiary company always has unity of purpose with its parent;
- if there were a breach of competition law when parent and subsidiary agreed, then such a holding would ignore reality. Competition law should not depend upon the formality of whether an entity is an unincorporated division or a wholly owned subsidiary. The parent company can mandate either structure;
- management decisions as to one structure or another are not relevant to whether an entity's conduct threatens competition;
- in view of the modern complexity of the law, an entity should be entitled to structure itself as it wishes without exposure to antitrust liability; and
- the holding would not cripple antitrust enforcement. Indeed the Court saw no adverse effects of its decision whatsoever in this regard.

None of these factors apply sufficiently strongly for any sporting drafts of which I am aware to be validated on the "single enterprise" concept. No doubt, however, the theory provides scope for innovative future argument in Australia.

XI Unresolved Issues In Sporting Drafts

The following issues currently are unresolved in the sporting draft area:

(a) The Salary Cap question

The League "Salary Cap" was part of the background to the NSW League litigation but was not directly challenged by the players. Thus any references to the salary cap were made by way of background only, the internal draft being argued by the League as an important adjunct to the effectiveness of the non-challenged salary cap. At the time of the case, each club, with some exceptions, was limited to a cap of $1.5 million. Actual expenditure limits ranged between $0.8 million and $1.5 million depending upon the financial position of clubs.[115] The justification for the salary cap was said to be to prevent:

> "... *such disadvantages as might flow from cheque book warfare (which) would be avoided because no club could spend more than its allotted cap.*"[116]

The salary cap was agreed to in August 1988 and was determined by reference to player contracts for the 1987 – 1989 seasons and the financial status of the clubs. It was implemented for the first time in the 1990 season. The specific problem which gave rise to the recommendation of a salary cap was that some clubs had overspent on salaries to players in order to remain competitive. As a result, clubs required additional resources, either from outside sources or from the League itself. Further, the poorer clubs could not remain competitive as they could not meet the demands of players and, accordingly, risked losing the services of their players to other and richer clubs. The cap was determined for each club, having regard to its financial position. Some clubs, because of their financial difficulties, were awarded a salary cap somewhat lower than that of the wealthier clubs. The ultimate intention, however, was that the ceiling be the same for each club.[117]

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115 *Supra* n.81 at 53, 010 per Sheppard J. See also Gummow J. at 53, 047.
116 *Ibid.*
117 *Supra* n.81 per Wilcox J. at 53, 016.

Mr Justice Hill found that the internal draft contributed to the stability of the competition, given that the salary caps were not, at the relevant date, the same for each club. However, with an equal salary cap for all clubs, the position may have been different. The League argument was that a salary cap alone was not adequate to "even up" the competition without it being supplemented by the internal draft.

Mr Justice Wilcox thought that salary cap issues went not to "cheque book welfare" but to "competitiveness". If one club purchased a number of players from another, this may be upsetting to the club losing the players, but:

> "*... traders cannot be immunised from upset; and upset has nothing to do with financial viability.*"[118]

The evidence showed that there were only two instances where "undue" purchasing of recruits may have occurred prior to the introduction of the internal draft rules.

Mr Schwab, who had had extensive experience as an administrator of Australian Rules Football ventured the view that the internal draft scheme was a method of disciplining clubs for breaching the salary cap. Wilcox J., not unreasonably one might think, concluded that any sanctions for breach of the salary cap arrangements should operate against the guilty, the breaching clubs, rather than against the innocent, the players. Also, as Mr Justice Wilcox pointed out, the VFL had operated a salary cap arrangement for 5 years without an internal draft system and Mr Schwab made no complaint as to the difficulty of doing this.[119]

The internal draft, therefore, was thought not to be justified in order to implement the salary cap. The question is whether a salary cap, without an internal draft, would be held to be an unreasonable restraint of trade.

The question is, of course, one of fine line conjecture and may well become one, in the ultimate, of the subjective views of those judges who actually hear the case. However, my view is that a salary cap arrangement, if properly administered, could well be validated. This is because:

- it does not directly inhibit player freedom;
- it can be argued as benefiting players. In ensuring that clubs are financially viable, the League is also ensuring that clubs can play their players;
- as a matter of common law restraint of trade evaluations, and their history, there has been considerable latitude allowed to parties to restrain trade. It has only been when individual rights are infringed that this latitude has been trimmed back by the courts;[120]
- especially if the salary caps become uniform, it can be argued that they have the clear purpose of "evening out" the League competition. The courts have always acknowledged that this is a proper purpose for the League to seek to achieve.

In order for the "salary cap" arrangements to be reasonable, it would clearly be advisable for financial guidelines to be set for all clubs, for financial evaluations to be made by appropriately qualified and impartial auditors and for there to be a review tribunal with specific objective criteria

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118 *Ibid* at 53, 029 per Gummow J. who agreed with these comments. So did Sheppard J., though he made it clear that he was not to be taken as deciding the legality of the salary cap arrangements.

119 *Ibid.*

120 See contrast in the common law findings discussed in PART II and those in PART III. For summation of differences see PART IV. No comment is made here as to whether or not it is desirable for the League to introduce a "salary cap" policy. Neither is it intended to discuss the views of those who say such a policy cannot work in any event – because, for example of various "evasion" techniques practised by clubs (for example, a club might arrange a lucrative outside employment contract which does not involve the expenditure of club funds). The analysis in the text reaches the conclusion that, notwithstanding the difficulty of devising and administering a "salary cap" policy, a policy can be devised which would not be held unreasonably to restrain trade. Much, however, will depend upon the arrangements as actually implemented.

by which to review salary cap determinations. Such a process would ensure that, if salary caps are uneven, they are uneven for demonstrably justifiable financial reasons. This would mitigate against any possibility of an accusation being made that the salary cap was being administered in a way which unfairly favoured one team over another in the competition.

(b) What is the ultimate position as to whether the *Trade Practices Act* applies to player drafts and salary caps? This issue is still not beyond debate.

In view of what has been said earlier in this paper,[121] there must be a possibility that the High Court could hold that the *Trade Practices Act* applies to player drafts, even those akin to the Rugby League internal draft. However, in view of the present Full Federal Court holding on this point, a final determination of the issue must await another day.

It is also possible that the Federal Court may hold that the *Trade Practices Act* applies to salary caps even though it has held that the Act does not apply to the internal draft. This depends upon just how far the Federal Court will see the exclusion of "work" from the definition of "services" in s.4(1) as extending. This exclusion extends as far as arrangements inhibiting competitive bidding for players. Does it extend to arrangements imposing an overall limit on how much clubs may pay for their players?

If the *Trade Practices Act* applies to salary cap arrangements, there may well be an anti-competitive (and thus illegal) purpose, effect or likely effect in the arrangements. However, even so, the arrangements are not doomed. In a public body such as the NSW Rugby League, or indeed any other sporting body with "salary cap" provisions, the issue of the "reasonableness" of the restraint at common law and the issue of the "public benefit" of the arrangements in an application to the Trade Practices Commission for Authorisation of them must involve much the same question. It would thus appear that such arrangements would succeed both at common law and as a Trade Practices Authorisation application or would fail in both respects. Given the caveat that the arrangements are properly and impartially administered, it is my belief that a salary cap arrangement could survive both at common law and as delivering public benefit outweighing anti-competitive detriment – the relevant test under the *Trade Practices Act* for grant of authorisation by the Trade Practices Commission.

XII In Conclusion

Predicting how courts will regard sporting drafts is an uncertain and tricky business. There are no set guidelines or evaluation. Court evaluations may well be, in some cases, determined by the personal values, or perhaps the prejudices, of the judges who actually hear individual cases.

All that can be said, when all is considered, is that substantial freedom at common law has been given to parties to restrain trade as they wish. When, however, an individual's right to employment is prejudiced, the courts are highly protective of such rights.

The sporting draft cases to date highly favour the rights of individual players. Whilst finding "in principle" agreement with the concept that sporting bodies have an interest in regulating sporting competitions and "evening them out", there has, with the singular exception of NSW Soccer,[122] been no decision which has blessed player drafts on this basis.

The decision on the NSW Rugby League's proposed draft was a landmark decision. The restraints in that case were aimed at evening out the League competition and were not as gross as the restraints which had previously been invalidated by the courts. The draft was upheld at first instance but invalidated on appeal. Clearly enough, the liberty of players was the paramount consideration in the court's decision. The Court may well have been correct in its scepticism of

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121 PART VIII esp. PART VIII.(c).

122 *Supra* n.43.

submissions as to the need for the draft. The subsequent reality of the Rugby League is that, without the draft, the history of the competition has been one both of commercial success and "evenness", 13 of the 16 clubs in the League making the top 5 places in the period 1988 to 1993.[123]

In my view, a salary cap arrangement, if properly and impartially administered, is likely to be blessed by the courts.[124] This is not because of any "single enterprise" economic theory[125] but because of simple pragmatics – a properly administered salary cap arrangement does not unduly inhibit players and fulfils the objectives of evening up the sporting competition.

The *Trade Practices Act*, which most would feel to be a leading issue in relation to player drafts, has, to date, been of no importance. This is because the courts, wrongly in my view, have held player drafts outside the reach of the Act.[126] It is a matter of conjecture whether the Act is also inapplicable to salary cap arrangements. Even if it is applicable, however, a public benefit evaluation of salary cap arrangements should, broadly speaking, involve the same issues as a "reasonableness" restraint of trade evaluation at common law. As I believe a properly administered salary cap arrangement would survive a common law restraint of trade evaluation, I believe that it should be able to satisfy the *Trade Practices Act's* public benefit criteria in order to obtain Trade Practices Commission authorisation under that Act.

The future of the legality of future sporting drafts no doubt depends upon how aggressive players' associations become and how reasonable, or otherwise, sporting control organisations are. It seems to me that both players and organisers of sport recognise their common interest in the good of the sport involved. They thus, for the most part, negotiate with goodwill towards each other. The clarification of the law will depend upon whether, in the future, one or other side seeks to impose some restraint which will be the classic straw which breaks the camel's back. The increasing commercialism and big money in all sports will, no doubt, give rise to future litigation on restraint of trade and sporting draft issues. I do not seek to be seen as encouraging such litigation but must make the comment that only by such litigation will lawyers be able to know just how far everyone can go in the restraint of trade game.

We have but partial answers to many questions at the present time.

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123 See generally PART VII.
124 See PART XI.
125 See PART X.
126 See PART VIII.

APPENDIX

SUMMARY OF THE PROPOSED OPERATION OF THE NEW SOUTH WALES RUGBY LEAGUE DRAFT RULES *

1. Player Quota

A Club may contract with a total of 57 players who will then be eligible to participate for the Club in the New South Wales Rugby League Premiership Competition ("Competition").[1]

2. Players Free to Contract

The categories of players with which Clubs may directly contract without any reference to either the external or internal draft systems are as follows:[2]

(a) A player who played in the preceding Competition and whose last match in the Competition was with the Club.

(b) A player who did not play for the Club in the preceding Competition but who played for the Club on the last occasion that he played in the Competition and such occasion was not more than two years prior to the date of the commencement of the current Competition.

(c) A local junior who has never played in the Competition but who has played rugby league with a team located in the area under the jurisdiction of the Club for the two seasons preceding the date of the commencement of the Competition.[3]

(d) A player who has not played rugby league at any time during the three seasons prior to the date of the commencement of the Competition.[4]

(e) A player whose father played for the Club for at least five seasons of the Competition.[5]

(f) A player who has played in the Competition for any one Club for a period of at least ten years.[6]

3. Players Subject to the Internal/External Draft System

Any person who does not fall within the categories outlined in paragraph 2 will be prohibited from directly contracting with a Club without subjecting himself firstly to the external or internal draft system.[7] This will include the following categories of players provided all such players have not participated in the Competition during the three seasons prior to the date of the commencement of the current Competition:

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* Deacons Graham & James (then Sly and Weigall), of which firm the writer was then a partner, acted for the various NSW Rugby League clubs in the proceedings before the Federal Court. This summary of the operation of the Draft Rules was prepared by Mark Adams, then a solicitor with Sly and Weigall, in connection with those proceedings. This summary has been slightly modified for purposes of the present Paper. It sets out the position in 1991 when the proposed Draft came before the Federal Court of Australia. Reference is made to various Rugby League Rules in footnotes but these rules are not here reproduced.

1 Refer to Rules 11, 13, 17(ii), 22 and 32(a).

2 Refer to Rule 12(c).

3 Therefore, a person who has played for a team, say, within the jurisdiction of the South Sydney Club in 1988 and 1990, but in 1989 played with a team located within the jurisdiction of, say, the Manly Warringah Club, and wishes to sign with the South Sydney Club for the 1991 Competition would not come within this category.

4 This will especially apply to rugby union players.

5 Thus someone like Matt Parish who is currently contracted to the Balmain club may join the Western Suburbs Club where his father Don Parish played rugby league for that Club for at least five seasons.

6 This will include the likes of Andrew Farrar, Mario Fenech, Peter Sterling and Brett Kenny.

7 Refer Rules 16 and 21.

(a) A country player (ie, a person who has played rugby league in Australia outside of the Competition) whose team does not come within the jurisdiction of any of the Clubs (eg, Illawarra, Canberra, Newcastle).
(b) An overseas rugby league player, whether he plays in a major premiership Competition overseas or not.
(c) A player who has played with a team within the jurisdiction of one of the Clubs for the two seasons preceding the date of the Competition when he wishes to join another Club.
(d) A junior player who has not played for a team within the jurisdiction of the Club which he wishes to join for the preceding two seasons preceding the date of the Competition in which he wishes to participate.

4. The External Draft System

The external draft system will apply to the following categories of players:[8]

(a) A country player whose team does not come within the jurisdiction of any of the clubs provided that he has not played representative football for Australia, New South Wales or Queensland.
(b) An overseas player who has not played in a major premiership competition conducted in another country.[9]
(c) A local junior who falls within either paragraph 3(c) or (d) above.

The external draft will operate somewhat differently to the internal draft. Set out below is the manner in which the external draft is intended to operate.[10]

(i) On the third Tuesday of each November of each year the League will conduct an "External Draft Meeting" at which a representative from each Club will be entitled to attend and make selections of players who fall into the categories referred to in paragraphs 4(a), (b) and (c) and who are not contracted to play for a Club in the Competition. It is also required that the Club has invited such player to play for the Club so that in practical terms, the Club is likely to have already had talks with such player. For this reason particularly, it is more likely that the external draft system will not operate in as restrictive a manner as the internal draft.
(ii) The Club representative attending the External Draft Meeting shall have the opportunity of selecting players one at a time, in the reverse order to the order in which the Clubs finished at the completion of the last match of the preceding Competition until:
  (a) the number of players selected by the Club pursuant to the external draft reaches five; or
  (b) the total number of players within the Club that it has otherwise contracted or selected pursuant to the external draft reaches 57.
(iii) Unlike the internal draft, players who are nominated and selected at the External Draft Meeting are not placed on any sort of list. Clubs wishing to sign such players merely raise the relevant player's name at the External Draft Meeting and state that it selects the player pursuant to the external draft. The player who is selected by a club at an External Draft Meeting shall not be obliged to sign a contract with that club for a period of more than one season. Should a player wish to transfer to another club after one season, such player will be subject to the internal draft.

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8 Refer to Rule 16.
9 This, presumably, refers to countries which are members of the International Rugby League Board, ie, Australia, England, France, New Zealand and Papua New Guinea.
10 Refer to Rules 16 – 19.

5. The Internal Draft System

The internal draft system applied to players who were not totally free to contract or were not subject to the external draft system. In broad terms, these constituted players who were:[11]

(a) Country players who have played representative football for Australia, New South Wales or Queensland;
(b) Overseas players who have played in a major premiership Competition conducted in another country;
(c) Players who have previously played in the Competition within the last three seasons (except players totally free to contract – See 2 above).

On the first Tuesday of December of each year, the League shall circulate to each club a list to be known as the "Internal Draft List". A player falling into any of the categories referred to above in paragraph 5(a), (b) and (c) may apply to be placed upon the Internal Draft List on the form prescribed by the League. Such player must obviously not be contracted to play for any other club or body affiliated with the League unless he has obtained a clearance from the League.[12]

The prescribed form to be completed by players requires the disclosure of personal details and the following provisions to which the player must agree:

1. *I hereby agree to play Rugby League:*
   (a) For the term and remuneration set out hereunder:
   (b) For any one of the Clubs participating in the draft;
   OR
   (b) For any one of the Clubs whose grounds are situated not more than one hundred (100) kilometres from the ground of the Club with which I last played in the Competition.
   (c) Which selects me at the next Internal Draft Meeting held pursuant to the provisions of the Premiership Competition Rules.
   I hereby request that you communicate the terms of this offer to each of the Clubs.
2. *A contract upon such terms and conditions shall be constituted immediately upon the selection of my name by a Club at the Internal Draft Meeting.*
3. *I hereby agree to execute the standard form of contract approved by the League with the Club which selects me in the draft upon such terms and conditions as soon as possible*".

With respect to the prescribed form, it is to be noted that the player initially nominated the terms and conditions upon which he is prepared to offer his services. It is also to be noted that a player has a choice as to whether he agrees to be transferred to a Club whose ground is situated more than one hundred (100) kilometres from the ground of the Club with which the player last played in the Competition. The player must make this choice before the Internal Draft Meeting at which he will be selected.

Upon receipt of the application forms by the players, the League prepares the Internal Draft List which is distributed to the Clubs.

On the second Tuesday of December the League shall conduct a meeting to be known as the "Internal Draft Meeting". At that meeting a representative of each Club shall be entitled to attend and make selection of players from the Internal Draft List until the total number of players with whom the Club has contracted reaches 57. The Clubs will choose players whose names appear on the Internal Draft List one at a time in the reverse order to the order in which the Clubs finished at the completion of the preceding Competition.

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11 Refer to Rule 22.
12 This seems to apply to players participating in major competitions overseas such as the English Rugby League Competition.

There is also provision for further Internal Draft Meetings to be held if all the players on the Internal Draft List are not chosen by the Clubs. Such subsequent Internal Draft Meetings may be held from February to June of each year and each Club may select players on such List one at a time in the reverse order to the order in which the Clubs finished at the completion of the preceding Competition.

6. Appeals Procedure

An Appeals Board will be established to hear appeals from players who do not wish to play for the Club which selected them at either the External or Internal Draft Meeting. The Appeals Board will be constituted as follows:[13]

(i) A Chairman who is qualified for admission as a Barrister or Solicitor of the Supreme Court of New South Wales and whose appointment is agreed to by the League and the Association of Rugby League Professionals.
(ii) A person nominated by the Board of the League.
(iii) A person nominated by the Association of Rugby League Professionals.

The rules have also set out criteria which the Board is to have regard to when determining such appeals.[14] These are:

(a) The best interests of the game, the player and the Club.
(b) Any unreasonable financial or other hardship caused to the player by reason of him joining that Club having regard to:
    (i) his age;
    (ii) his marital status;
    (iii) his health and welfare of his family;
    (iv) his employment and any possible loss of income;
    (v) any mortgages or other financial obligations of the player.
(c) The service he has given to the game.
(d) Any other relevant matter.

An appeal to the Appeals Board shall be lodged with the General Manager in the form prescribed and signed by the player lodging the appeal (refer to Rules 26). The General Manager shall fix the date, time and place for the hearing before the Appeals Board as soon as practicable after lodgement of the notice of appeal by the player and the General Manager shall advise all parties interested of the appeal of those particulars.[15]

The rules provide that the Appeals Board may regulate any proceedings brought before it in such manner that it thinks fit provided that:

(i) any person whose interest will be affected by the decision of the Appeals Board shall be given the opportunity to be heard and the right to be legally represented; and
(ii) the Appeals Board shall give reason for its decisions.

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13 Refer Rule 23.
14 Refer Rule 25.
15 No prescribed form of Appeal was included in the Rules.