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DRAFT SYSTEMS AND SALARY CAPS IN AUSTRALIAN SPORT

Dr Chris Davies

1. Introduction

A feature of Australia's team sports is that the various leagues operate with labour market controls, namely draft systems and salary caps, with the objective of these controls being the creation of a more even, and therefore more financially stable leagues. Both the A-League and the National Rugby League (NRL) competitions operate with just a salary cap, but the Australian Football League's (AFL) also implements a national draft. What I will therefore examine in this presentation is how draft systems and salary cap systems operate, and the potential legal ramifications in using these labour market controls. In order to understand the legal aspects of these labour markets the restraint of trade doctrine needs to be examined.

2. The Restraint of Trade Doctrine

From a legal perspective the potential problem with labour market controls are that they may not allow players to select the employer of their choice, or may force them to accept a wage lower than they would earn if a salary cap was not in operation. Labour market controls may therefore be a restraint of trade under the test developed in the case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd* [1] which is now known as the *Nordenfelt* test.

This test states that contracts which prevent a person from carrying out their trade will be in restraint of trade, unless it is reasonably necessarily to protect the legitimate interests of the party imposing the restraint, not unreasonable in regard to the party on whom the restraint is imposed, and not injurious to the public.[2] Thus in regard to draft systems and salary cap, the restraint:

1. Must be reasonably necessary to protect the legitimate objectives of the league, namely the creation of a more even competition;
2. Must not be unreasonable on the players;
3. Must not be injurious to the public who watch the games.

It should be noted that the salary cap has never been the subject of litigation, and while the AFL draft has, likewise, never been legally challenged, a draft system that was implemented by the then New South Wales Rugby League (NSWRL) for the competition that was the forerunner of today's NRL was challenged in *Adamson v NSWRL*.[3]

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[1] [1893] AC 535.
[2] Ibid, 565. For a discussion of *Nordenfelt* in regard to the other labour market controls utilised by the AFL, namely the salary cap, see Antonio Buti, 'Salary caps in Professional Teams Sports: an Unreasonable Restraint of Trade', (1999) 14 *Journal of Contract Law* 130-153.
[3] (1990) 27 FCR 335.

3. Draft Systems and the Law

(a) What is a Draft System?

The AFL draft was introduced in 1986 and was modelled on the system devised by the National Football League (NFL) in 1935. Like all draft systems, it is based on the principle that the last placed team will have first choice of the available players, with the rest of the teams then having a selection in the reverse order from which they finished the previous season's competition. This process is then repeated for a second, third round etc. Thus, the team which finished last in the AFL season will receive the first selection in the national draft to choose whoever it considers to be the best young player in Australia. The team that won the premiership in that year on the other hand will have to wait until every other club has received its first round draft pick before being able to have its first selection.

In the AFL draft four or five rounds are held each year, and since it mainly involves players who have never played in the AFL, it is known as an external draft. There is also a pre-season daft which is usually for players who have already played for another club, but were not traded or re-selected in the national draft. It is therefore known as an internal draft There is now a third draft, known as the rookie draft, where players can be selected by the clubs to be placed on the clubs' rookie list which is essentially a secondary list for the clubs. Each club can nominate two rookies who can play senior football, but the rest cannot, unless needed to replace an injured senior player.

(b) The Rugby League Draft

One of the first things that was examined in *Adamson* was the question of the legitimate aims of the party that was implementing the draft, namely the NSWRL, and the court accepted that it was a desirable objective for a sporting league to have the teams as evenly matched for talent as possible at the beginning of each season.[4] However, it was then held that the NSWRL draft rules did very little to protect the interests of the League and the clubs, but at the same time limited the players' choice of employer by these rules. This was seen as interfering with the interests of the players, particularly as it operated after the expiration of their contracts.[5] It should also be noted that this draft was an internal draft, that is, it operated on players already playing for a club in the NSWRL. It is arguably a greater restraint, in my opinion, to restrict the movement of players already in the competition and I agree that the internal draft used by the NSWRL was an unreasonable restraint of trade.

It should be noted that the court did state that the NSWRL could reconsider the rules which suggests that a set of different draft rules could represent a reasonable restraint of trade.[6] These statements indicate that the decision in *Adamson* was that just the draft system brought before the court was a restraint of trade, not all draft systems. What also should be noted is that under our adversarial system it is the parties involved which bring the cases to the court, which means that despite the decision in *Adamson* the AFL draft is still allowed to operate. But what I will now examine is the question of the legality of the AFL draft system.

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[4] Ibid at 560.
[5] *Adamson v NSWRL (Appeal Case)* (1991) 31 FCR 242 at 281-2.
[6] Ibid 297.

(c) The AFL Draft

It is now over 20 years since the *Adamson* decision, yet there has not been even a threat of anyone challenging the AFL draft. One reason is that the players, through their players' association, the Australian Football League Players' Association (AFLPA) have agreed that both the draft and salary cap systems are for the overall benefit of the game. Thus it does not matter if a court would declare the AFL draft an unreasonable restraint of trade, if the players and clubs are happy with it, then it will never reach the courts.

However, if it was ever to be challenged in court, I feel the AFL would have good case that it is reasonable. Firstly, the AFL has, in my opinion, strong evidence that these systems have created a more even competition. This is shown by the fact that in the 1970s and 1980s combined, just five teams won the premiership, yet in both the 1990s and 2000s, seven different teams won the premiership in each decade. It should also be noted that while the AFL draft is restrictive on the players when they first join the AFL, they are only bound to the club that drafted them for two years. After that they can resign with that club, or ask to be traded to another club in exchange for other players or draft selections.

Thus, unlike in the NSWRL draft, players already in the AFL have some bargaining power in relationship to what club could now select them. It should be noted that if no suitable trade is agreed to by the club who originally selected the player, then that player can nominate for the pre-season draft. If a player change clubs be means of this pre-season draft then the original club receives no compensation in the form of other players and/or draft picks. There is, therefore, an incentive for clubs to negotiate trade deals for players who wish to leave that club.

It can therefore be argued that the AFL can justify the use of the draft system because, together with the AFL's use of a salary cap, it has helped the league achieve its stated objective of a more even competition.

The next question is whether it is reasonable on the players, and while it can be restrictive on the players' choice of employer, they arguably receive much better wages than they would if the draft was not in operation. The estimates are that the AFL generates twice the income as the NRL, mainly because of bigger crowds at the matches and more money from television rights. This is why the AFL's top players earn almost double that of the top NRL players which is why the AFL was able to lure both Karmichael Hunt and Israel Folau from the NRL. Thus the draft can be deemed to be reasonable on the players, despite not always being able to select their employer. However, the AFL has just brought in free agency rules, first of all for the introduction of the Gold Coast and Greater Western Sydney with both clubs being able to select one uncontracted player from the other clubs without having to go through the draft. From 2012 players who have played a certain number of games will be able to change clubs without having to go through a trade deal. The AFL will then determine what the original club should receive as compensation by means of draft selections.

The third component of the *Nordenfelt* test is whether the contract or regulations are injurious to the public. It is suggested that the public benefit of the draft is that it has ensured a revenue base which allows full time professionalism and with it, players

who are fitter and more skillful than previous generations because of the extra time they can devote to training. The more even competition has also ensured that supporters will not see their team go literally decades without even making the finals, as happened in the pre-draft era, as evidenced by Hawthorn's 32 years without making the finals from 1925-1956; South Melbourne (now Sydney) 24 years from 1946-1969; Melbourne's 22 years from 1965-1986 and St. Kilda's 21 from 1940-60.

While the question as to whether the AFL has created a more even competition or not involves an examination of both the draft and salary cap systems, with the NRL it is just the salary cap that is in operation.

4. Salary Caps in Australian Sport

The present day NRL has its origins in the Sydney based competition run by the NSWRL which evolved into a more national competition, firstly run by the Australian Rugby League (ARL), and then by the NRL. It was the NSWRL that first introduced a salary cap in 1990, along with a draft system, though the draft system was successfully challenged by the players.[7] The salary cap, meanwhile, was dropped during the Super League war when News Ltd and the ARL tried to attract the best players by offering high wages that were well beyond the revenue being generated.

The NRL was formed in 1998 after a compromise was reached between News Ltd, which was running and financially supporting Super League, and the ARL. Two years later a salary cap was introduced to help create a more even, financially more stable competition which is recognised by the courts as being a legitimate objective for a league.[8] Like the AFL, the NRL, from a legal perspective, has to show that the salary cap has created a more even competition, and personally I think that it has with this opinion being based on the fact that teams making the finals, grand finals and been premiers over the last ten years has been reasonably well spread amongst all the teams. Thus, it can be argued that the salary cap has achieved its objective, but as the recent scandal involving Melbourne Storm has shown, clubs may be willing to breach the salary cap rules in order to try and win a premiership.

The Melbourne Storm's systematic breaches of the salary cap over a five year period was achieved by having two sets of contracts: the official ones showing that the Melbourne Storm was keeping to its salary cap, and a second set, kept separately, which reflected what the players were actually being paid. It was estimated that when the Melbourne Storm won the 2009 premiership it was around $400,000 over the salary cap, and around $700,000 over for the 2010 season. Overall, the extra payments were estimated to be around $1.7m for the five year period.[9]

The NRL immediately announced that penalties were to be imposed on the Melbourne Storm, the most significant being the loss of the 2007 and 2009 premierships, the repayment of $1.1m in prizemoney and a $500, 000 fine, lose of all competition points already accumulated for the 2010 season, with the club also not being able to compete for competition points for the remainder of the 2010 season.

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[7] *Adamson v New South Wales Rugby League* (1990) 27 FCR 535.
[8] See *Adamson v New South Wales Rugby League* (1990) 27 FCR 535 at 561; *Buckley v Tutty* (1971) 125 CLR 353 at 377.
[9] Dean Ritchie, 'NRL caught in Storm of cheats,' *The Daily Telegraph*, 23 April, 2010 at 2.

It is my opinion that the NRL had no choice but to impose these penalties since it could not allow Melbourne to keep the titles as it would have been unfair on the other clubs which had stayed under the salary cap. The fine and loss of prizemoney had to be imposed to act as a deterrent to other clubs which may contemplate deliberately breaching the salary cap. Perhaps the most controversial was the decision not to allow the Melbourne Storm to keep the points it had already won in the 2010 season, nor compete for points in the rest of the season, even though the Melbourne Storm players indicated they would be willing to take pay cuts in order to allow the club to get under salary cap.[10] However, the Melbourne Storm would still have the team it had acquired while in breach of the NRL rules and again this would have been unfair on the other clubs.

What the Melbourne Storm scandal therefore illustrates is that it can be difficult to enforce a salary cap. However, it was eventually detected. While the hope was that the penalties handed out after the 2002 Canterbury Bulldogs salary cap scandal would be sufficient deterrent has proven to be incorrect, the even harsher penalties handed out to the Melbourne Storm will hopefully be sufficient to act as a future deterrent. What is also interesting about the Melbourne Storm salary cap scandal is the fact there was never any suggestion that the NRL salary cap would be challenged in court, which indicates that the NRL salary cap is here to stay, with this being supported by the chief executives of the clubs.[11]

The recently formed A-League competition also implemented a salary cap from its very first season, with it presently being $2.5m, though each club can pay marquee player outside of the cap. Robbie Flower, for instance, has been the marquee player at firstly the North Queensland Fury, and now the Perth Glory. Given the fact that the fact that many of the clubs are in financial trouble, it would appear that player salaries need to be reduced, if anything.

5. Conclusion

Since the introduction of the draft, the AFL has gone from strength to strength with a truly national competition which draws large crowds and receives substantial money from television rights. It can point to a number of indicators to support its claim that it has created a more even competition and has therefore achieved the legitimate objective of the draft. While the Melbourne Storm scandal has highlighted the fact that salary caps can be hard to enforce, the harsh penalties imposed by the NRL should act as a deterrent to other clubs. The A-League, AFL and NRL salary caps appear to have become integral parts of how these competitions operate and are likely to remain for the foreseeable future.

[10] Phil Rothfield, 'Let the Storm start again on zero,' *The Sunday Telegraph*, 25 April, 2010 at 46.
[11] Brad Walter, 'CEO meeting should look back to go forward', *The Sydney Morning Herald*, 3 May, 2010 at 24; Stuart Honeysett, 'NRL is second rate, says players,' *The Australian*, 5 May, 2010 at 48.