

## DRAFT SYSTEMS IN PROFESSIONAL TEAM SPORTS AND THE RESTRAINT OF TRADE DOCTRINE: IS THE AFL DRAFT DISTINGUISHABLE FROM THE NSWRL DRAFT?

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*When the New South Wales Rugby League ("NSWRL") implemented a draft system in 1990 it was successfully challenged by the players in *Adamson v NSWRL*. This article examines this decision, though it should be noted that the rules of the NSWRL draft are no longer in operation. The Australian Football League ("AFL"), however, has continued to use its draft system and it is argued that the AFL draft rules are much fairer on the players than the rules previously used by the NSWRL. This is because while the AFL draft does initially restrict a player's choice of employer, this is only true for the first two years. At the end of that period the rules provide players with some genuine bargaining power to help them choose the employer of their choice. It is suggested therefore that the AFL draft is distinguishable from the draft system once used by the NSWRL that was declared invalid by the courts. There are still problems with the AFL draft in that clubs are able to initiate the trade of players without the player's consent, but it is suggested that this can be solved by the introduction of a consent clause. It is also suggested that the restrictive nature of the draft can be reduced by the introduction of a limited form of free agency for players who have been playing for a certain period of time and/or played a certain number of games.*

### Introduction

Labour market controls have been implemented by the organizing bodies of team sports since the formation of professional leagues in the nineteenth century. In Australia, the Victorian Football League (VFL), now the Australian Football League (AFL), as well as the former controlling body of rugby league's main competition, the New South Wales Rugby League (NSWRL), have, over the decades, implemented various controls to limit the movement of players from one club to another. These have included metropolitan and country zoning, which was declared a restraint of trade in *Foschini v Victorian Football League and South Melbourne Football Club*;<sup>1</sup> a limit of 13 imports for each club that was used in the 1970's by the NSWRL; and a retain and transfer system where a club could place a player on a retain list, thus preventing him from playing for another club without

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<sup>1</sup> Unreported, Supreme Court of Victoria, 15 April, 1983.

the consent of his existing club. The retain and transfer system, however, was also held to be a restraint of trade in *Buckley v Tutty*.<sup>2</sup>

More recently draft systems have been implemented by both the VFL, in 1986, and the NSWRL, in 1990. While the draft system introduced by the VFL continues to be used in the AFL, the draft rules used by the NSWRL were held by the Full Court of the Federal Court to represent an unreasonable restraint of trade in *Adamson v New South Wales Rugby League Ltd* ("*Adamson*"),<sup>3</sup> and are therefore no longer in operation. This article will examine this decision and also the United States case of *Smith v Pro Football Inc*, ("*Smith*")<sup>4</sup> in the context of whether these decided court cases indicate that all draft systems, including the AFL's, represent an unreasonable restraint of trade, or whether each set of draft rules needs to be treated as a distinct entity. Case examples will then be examined to see what the rules of the AFL draft system allow in regard to the movement of players between clubs. First, however, a brief explanation will be made of what is involved with a draft system

### Draft Systems

Draft systems come in two forms. One is used to control the entry of players into a competition and is commonly referred to as external draft, while the other is used to control the movement of players already playing in the competition, and is usually referred to as an internal draft. All draft systems are based on the general principle that the last placed team will have first choice of the available players, with the rest of the teams then having a choice in the reverse order from which they finished the previous season's competition, with the process then being repeated for a second round, third round etc.<sup>5</sup>

The system was devised by the National Football League (NFL) in 1935<sup>6</sup> and it has continued to employ an external draft ever since. It was the NFL draft system on which the then VFL modeled its own system when it introduced a national draft in 1986, with an internal pre-season draft also being introduced for players already playing in the competition in 1988. As Dabscheck and Opie point out, this internal

<sup>2</sup> (1970) 125 CLR 3. A similar system in English soccer was held to be an unreasonable restraint of trade in *Eastham v Newcastle United Football Club Ltd* [1964] 1 Ch 413.

<sup>3</sup> (*Appeals Case*) (1991) 31 FCR 242.

<sup>4</sup> 593 F 2d 1173 (1978).

<sup>5</sup> The AFL draft has also included systems of priority picks where a club that has won five matches or less in a season, or at other times, less than ten games over two seasons, was then eligible for a draft choice before the first round. This however led to speculation that it gave teams the incentive to lose matches at the end of a season in order to keep the number of wins under these requirements. For the 2006 season therefore the system is to be changed so that the extra draft choice comes after the first round has been completed, that is, at number 17.

<sup>6</sup> *Smith v Pro Football Inc* 593 F 2d 1173 (1978), 1175.

style draft is an uniquely Australian form of labour market control.<sup>7</sup> Under the draft rules, all players from outside of the competition have to nominate themselves for the national (external) draft, with these players then being selected by the clubs in the reverse order that they finished the previous season, though clubs can also choose to trade draft choices for players already playing for another club. Once a player was drafted a club initially had a hold on his services for three years,<sup>8</sup> though this was then changed to one year, before being changed again to the present two years in 1994. Players already playing in the AFL who have been delisted by their clubs can also nominate for the national draft, but players whose contracts have been completed and who wish to leave their club, but have not been delisted, can only nominate for the later pre-season (internal) draft. However, these now uncontracted players who wish to leave a club can be traded by that club for other players and/or draft choices in the national draft.

When the NSWRL implemented a draft system in 1990, it too included both an external and internal draft. The draft operated under a number of rules set down by the NSWRL. Under rule 55 a list known as the Internal Draft List was to be circulated to each club on the first Wednesday of November. Rule 56, meanwhile, entitled a player who participated in the Internal Draft meeting to either negotiate and enter into a contract with any club, or enter into a subsequent Internal Draft List.

Rule 57 entitled a player who did not wish to play for the club which had selected him in the draft to make an appeal to an Appeals Board. Rule 61 then directed the board to have regard to:

1. The best interests of the game, the player and the club.
2. Any unreasonable financial or other hardship caused.
3. The service the player in question had given to the game.

Under rule 64 a player who had successfully appealed was entitled to participate in the next Internal Draft Meeting.<sup>9</sup> It was these rules in regard to the internal draft that were the subject of litigation in *Adamson*.

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<sup>7</sup> Braham Dabscheck and Hayden Opie, 'Labour Regulation of Sporting Labour Markets' (2003) 16 *Australian Journal of Labour Law* 259-283, 265.

<sup>8</sup> Braham Dabscheck, 'Abolishing Transfer Fees: The Victorian Football League's New Employment Rules', (1989) 6 *Sporting Traditions* 63-87, 71.

<sup>9</sup> *Adamson and Others v New South Wales Rugby League Ltd and Others (Trial Case)* (1990) 27 FCR 535, 538-40.

## Draft Systems and the Restraint of Trade Doctrine

### *The Nordenfelt Test*

The common law restraint of trade doctrine was established in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*,<sup>10</sup> a case involving a restrictive clause in a contract that prevented the seller of a business from operating a new business in that particular industry for a period of 25 years. The test that was developed in *Nordenfelt* was that contracts preventing a person from carrying out their trade, business, occupation or profession will be in restraint of trade, unless it is reasonably necessary 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.<sup>11</sup> Thus in regard to draft systems, the restraint must first be what is reasonably necessary to protect the legitimate objectives of the league, namely the creation of more even, and financially more viable competition. It must then not be unreasonable on the players, and thirdly not be injurious to the public who watch the games.

### *Adamson v NSWRL*

The first argument in *Adamson* was that the internal draft introduced by the NSWRL breached s45 (2) (a) and (b) of the *Trade Practices Act 1974* (Cth) (TPA) as either representing an exclusionary provision or one which had the purpose or effect of substantially lessening competition. Hill J, however, held that the restrictions imposed by the draft rules did not come within the ambit of either s45 (2) (a) or (b) of the TPA because the relevant playing contracts involved contracts of service.<sup>12</sup> The second argument involved s88F of the *Industrial Arbitration Act*

<sup>10</sup> [1894] AC 535.

<sup>11</sup> *Ibid* 565. For a discussion of *Nordenfelt* in regard to the other labour market controls utilised by the AFL, namely the salary cap, see Antoni Buti, 'Salary caps in Professional Teams Sports: an Unreasonable Restraint of Trade', (1999) 14 *Journal of Contract Law* 130-153, 133-4.

<sup>12</sup> *Ibid* 548-9. See Warren Pengilley, 'Sporting Drafts and Restraint of Trade' (1994) 10 *Queensland University of Technology Law Journal* 89, 110-112 and 116-7 where the author argues that the *Trade Practices Act 1974* (Cth) should apply to labour market controls, such as player drafts. Section 45 of the TPA, it should be noted, was successfully argued in the Super League case: *News Ltd v Australian Rugby Football League* (1996) 139 ALR 193, while South Sydney was successful, at least in the Full Court of the Federal Court, in *South Sydney District Rugby League Football Club Ltd v News Ltd* [2001] ATPR 41-824. For a discussion of these cases and how s45 applies to a sporting context see Warren Pengilley 'Rugby League at Trial', (1996) 11 *Australian and New Zealand Trade Practices* 113-124; C. Sweeney 'Professional Sporting Leagues and the Competition Laws', (1997) 4 *Competition and Consumer Law Journal* 173-202; Lyndon Griggs 'News Ltd v ARL: the Birthplace of Superleague But the Death of Joint Ventures?' (1997) 5 *Competition and Consumer Law Journal* 166-179; 'Chris Davies 'Souths v News Ltd, (2001) 8 *James Cook University Law Review* 121-129; Saul Fridman, 'Sport and the Law: The South Sydney Appeal', (2002) 24 *Sydney Law Review* 558-68; Chris Davies 'News Limited v South Sydney District Rugby League Club Limited', (2003) 10 *James Cook University Law Review* 116-128. This section has therefore been successfully argued by a sporting organisation and a club, as both are able to use s45 of the TPA. However, given the fact that any challenge to the AFL draft is almost certainly going to come from the players, the law as it presently stands means that s45 would not be able to be utilised. The salary cap on the other hand could be a

1940 (NSW) which allowed the Industrial Commission to make orders declaring void in whole, or in part, either ab initio or from some other time, any contract or arrangement which is either (i) unfair, (ii) harsh or unconscionable, or (iii) is against public interest. Justice Hill, however, noted that the fairness used by the section involved consideration of all the circumstances of each player, and since a substantial number of the applicants did not give evidence, his Honour concluded that it was impossible to properly evaluate the issues of fairness.<sup>13</sup> This only left the players with the argument that the rules were in breach of the common law restraint of trade doctrine.

In regard to the restraint of trade claim, Hill J pointed out that the rules relating to the internal draft could operate as a restraint by preventing a player from playing with the club of his choice. It differed, therefore, from the *Buckley v Tutty* case where the restraint operated to prevent the player from exercising his trade altogether. Despite this, it was still Hill J's opinion that:

*"short of restraining a player from playing altogether there could seldom be a greater restraint upon trade than restricting an employee's freedom from choosing his employer."*<sup>14</sup>

In applying the *Nordenfelt* test Justice Hill identified three relevant legitimate interests of the League and the clubs the internal draft was concerned with protecting. These were:

1. The desirability of a strong and competitive competition, with teams as evenly matched as possible.
2. All the clubs competing to be as financially viable as possible.

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different situation as a club, the Sydney Roosters, has threatened to challenge the NRL salary cap. One advantage of using s45 of the TPA is that authorisation can be sought for a provision that may be invalid under the act. In Australia, s88 of the TPA allows authorisation to be sought from the Australian Competition and Consumer Commission (ACCC), on the grounds that it is in the public interest and that the benefits outweigh the anti-competitive detriment, while in New Zealand s58 of the *Commerce Act 1986* (NZ) has similar provisions. This section was successfully used by the New Zealand Rugby Union in *Rugby Union Players Association Inc v Commerce Commission* [1996] 3 NZLR 301 in relation to a transfer system that created a quota on the number of players in a given category that could transfer to a new team. For a discussion of this case and the argument that s88 could have been used in Australia in both the Super League case and in regard to the situation involving South Sydney see Chris Davies 'News Ltd v ARL, South Sydney v News Ltd – and the Question of Authorisation Under s88 of the Trade Practices Act', (2002) 10 *Trade Practices Law Journal* 215-225. It should be further noted that the standard player contracts used in the AFL and NRL, and also rugby union in Australia and New Zealand, mean that the players are clearly employees, though the courts had declared the players to be employees well before the introduction of these standard contracts: see *Buckley v Tutty* (1971) 125 CLR 353, 372; *Federal Commissioner of Taxation v Maddelena* (1971) 2 ATR 541, 549.

<sup>13</sup> *Ibid* 552-3.

<sup>14</sup> *Ibid* 555.

3. That the clubs be in a position to retain the players engaged by them and that in particular rich clubs should not be able to plunder the weaker clubs of their good players.<sup>15</sup>

When looking at the question as to the protection of the legitimate interests of the League, Hill J accepted the fact that a desirable objective at the beginning of the season was for teams to be as evenly matched for talent as possible. His Honour further noted the inevitable fact that the assessment of equality of talent in teams was very much a subjective one, but nevertheless concluded that the internal draft did, to some degree, operate to assist in the furtherance of these aims.<sup>16</sup> His Honour also noted that one of the consequences of the draft was that clubs could not approach players with offers of high rewards as they knew they could not secure the services of that player. Thus, to some degree the internal draft did militate against the consequences of full blown cheque book warfare.<sup>17</sup> As to the fact that the draft helped to prevent clubs from poaching players mid season, it was also held to be reasonable for the League to seek to outlaw unrestricted mid-season offers that would lead to the loss of the top level playing talent of a club.<sup>18</sup>

In looking at how the internal draft affected the interests of the players, Hill J noted that the applicants emphasised four matters:

1. The importance that a particular player may place on obtaining a job which might provide training for a future career.
2. The problem that a player could be drafted by a club with whom the player did not wish to play.<sup>19</sup>
3. Since the methods of remuneration varied, and as win bonuses depended on team success, the actual remuneration receivable by the player could vary depending upon the team which drafted him.
4. The late November timing of the draft imposed a very significant detriment to a player since clubs often started training in early October.<sup>20</sup>

Hill J pointed out in regard to these points that the rules did not prevent a player from stipulating that a particular type of job be found for him, and that in practical terms, a club would not draft a player who clearly did not wish to play with them.

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<sup>15</sup> Ibid 560.

<sup>16</sup> Ibid 561-2.

<sup>17</sup> Ibid 565.

<sup>18</sup> Ibid 566.

<sup>19</sup> Ibid 557.

<sup>20</sup> Ibid 558-9.

Any detriment to the players, such as the fact that the remuneration may vary depending on the club to which the player was drafted to, needed to be weighed against the legitimate interests of the League.<sup>21</sup> Justice Hill then held that the restraint imposed by the internal draft was not unreasonable having regard to, on one hand, the legitimate interests of the League and the clubs, and on the other, the interests of the players.<sup>22</sup>

On appeal to the Full Court of the Federal Court both s45 (2) (a) and (b) of the TPA and s88F *Industrial Arbitration Act 1940* (NSW) were again argued unsuccessfully by the applicants. In regard to the common law restraint of trade Sheppard J noted that in certain circumstances the internal rules did operate to the substantial economic disadvantage of the players, and while he acknowledged the clubs and administrators were acting in good faith and had the best interests of the game in mind, it was his opinion that this did not warrant the conclusion that there was no unreasonable restraint of trade.<sup>23</sup> Wilcox J was of the opinion that the fact that the players were inhibited from looking elsewhere meant that their bargaining position with their existing club was weakened, and that it was common experience that such a weakened bargaining position leads to diminished rewards.<sup>24</sup>

It was also Wilcox J's opinion that the internal draft rules did very little to protect the interests of the League and the clubs, yet at the same time did much to infringe the interests of the players. This was because they firstly limited the players' choice of employer, and secondly that the rules operated after the expiration of their contracts,<sup>25</sup> a point, it is worth noting, that was a major reason soccer's transfer system was deemed to be invalid in *ASBL v Bosman* ("Bosman").<sup>26</sup> Likewise in *Eastham v Newcastle United Football Club Ltd*<sup>27</sup> Wilberforce J (as his Lordship then was) emphasised that the English soccer retain and transfer rules operated at a time when the player was not an employee of the club, with the retain rules being held to be an unreasonable restraint of trade.

Gummow J noted that the basic proposition that the reasonableness of a restraint of trade was to be tested against what the restraint entitles or requires the parties to do. The issue of reasonableness of the restraint was, therefore, not to be determined by what happened in practice, or might happen in practice, but by what was permitted by the League and the clubs under the terms of the rules agreed between

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<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid* 568.

<sup>23</sup> *Adamson and Others v New South Wales Rugby League Ltd and Others (Appeal Case)* (1991) 31 FCR 242, 248.

<sup>24</sup> *Ibid* 280.

<sup>25</sup> *Ibid* 280.

<sup>26</sup> *Union Royale des Societes de Football Association (ASBL) v Bosman* [1996] 1 C.M.L.R 645.

<sup>27</sup> [1964] 1 Ch 413, 431.

them.<sup>28</sup> His Honour identified the same three legitimate interests previously identified by Hill J and in regard to the provision of an even competition, he held that the NSWRL had not satisfied the onus of showing the restraint of the internal draft was no more than what was reasonable.<sup>29</sup>

In regard to the objective of financial stability, Gummow J agreed with Wilcox J that there was no evidence of any problems as to the financial stability in a system that imposed salary caps without an internal draft.<sup>30</sup> As to the aim of helping retain their present players, his Honour stated that perhaps the best way of achieving this was to place the players on long term contracts.<sup>31</sup> While Gummow J's overall conclusion was that the internal draft was in restraint of trade, his Honour did add that the NSWRL could reconsider the rules, implying that different, less restrictive draft rules could be considered a reasonable restraint of trade.<sup>32</sup> In his judgment Gummow J also referred to *Smith*, a case involving a challenge to the NFL's draft system. Since the external draft is yet to be judicially considered in Australia this case provides useful material in regard to an external draft.

#### *Smith v Pro Football Inc*

The first thing that should be noted about *Smith* is that, unlike *Adamson*, it did not involve a collective challenge to the system, but was an indirect way for a player to receive compensation for a career ending injury.<sup>33</sup> The player in question, Smith, had been drafted by the Washington Redskins in 1967 and suffered his injury the following year. He contended that the draft, as it existed at that time, was an unreasonable restraint of trade, was in violation of the Sherman Antitrust legislation, and that, but for the draft, he would have negotiated a far more lucrative contract than the one he signed.<sup>34</sup>

The majority noted that the NFL clubs were not competitive in any economic sense as the clubs basically operate as a joint venture in producing an entertainment product, namely football games and telecasts, with the draft being designed not to insulate the NFL from competition, but to improve the entertainment product by enhancing its teams' competitive quality.<sup>35</sup> It was also noted that the asserted justification for the draft was that it had the legitimate business purpose of

<sup>28</sup> *Adamson and Others v New South Wales Rugby League Ltd and Others (Appeal Case)* (1991) 31 FCR 242, 285.

<sup>29</sup> *Ibid* 296.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* 297.

<sup>32</sup> *Ibid* 297. For further discussion on the case see A. Humphries 'Sport, Restraint of Trade and the Australian Courts: *Adamson v New South Wales Rugby League Ltd* (1993) 15 *Sydney Law Review* 259-283.

<sup>33</sup> *Smith v Pro Football Inc* 593 F 2d 1173 (1978), 1192.

<sup>34</sup> *Ibid* 1174-75.

<sup>35</sup> *Ibid* 1179.

promoting competitive and playing equality amongst the teams, producing better entertainment for the public, higher salaries for the players, and increased security for the clubs. However, it was held by the majority that the draft was anticompetitive in its effect on the market for players' services because it virtually eliminated economic competition amongst buyers for the services of sellers by permitting college players to negotiate with only one team.<sup>36</sup> It was also held that the draft did not increase competition in the economic sense of encouraging others to enter the market and to offer the product at a lower cost.<sup>37</sup> Thus the Court concluded that the draft, as it existed in 1968, was an unreasonable restraint of trade as it was anticompetitive in its purpose and severely anticompetitive in its effect.<sup>38</sup> The majority also expressed the opinion that it was the sharing of revenue by the NRL that had created the equality amongst the teams in the league, not the draft system.<sup>39</sup>

Another feature of the case was the strong dissenting judgment of MacKinnon J who noted that the system was a pure draft- simple, uncomplicated, and complete with the team with the poorest winning record drafting first and the others following in the reverse order to their win-lost record. His Honour also noted that since its inception in 1935 approximately 17,000 players had been drafted by professional football teams with a relatively insignificant number of lawsuits challenging the validity of the NFL draft. MacKinnon J was also of the opinion that a player draft is natural for league sports because competitive equality among the component teams is an inherent requirement for meaningful sports competition. His Honour gave the example of the Cleveland Browns in the All-American Football Conference, which, in the process of winning championships nearly every year, saw its crowds drop from 70,000 to less than 20,000 because the fans said "Oh they are going to win anyway, what is the use of going out there".<sup>40</sup> Arguably, therefore, sporting equality is just as important to the top teams as it is to the bottom teams. His Honour also expressed the opinion that while revenue was equally shared amongst the various teams in the NFL, this of itself would not overcome the innate advantages that some teams would have because of the city they were based in, or the perception that certain teams had a better prospect of winning a championship. Only a draft system, his Honour stated, could do that.<sup>41</sup>

Justice MacKinnon also expressed the opinion that it was the players who were a direct recipient of the benefits of the increased national interest in the game. It was noted that the increased benefits available as a professional player had all but

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<sup>36</sup> Ibid 1186-87.

<sup>37</sup> Ibid 1186.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid 1188, 1184.

<sup>40</sup> Ibid 1197-98.

<sup>41</sup> Ibid 1203.

eliminated the competition for graduating college players from lucrative coaching positions and other business opportunities which at one time had meant that many of the best college players did not go on into the professional ranks. Once the best college players regularly joined the professional ranks it was his Honour's opinion that the quality of the game was assured, with it being his opinion that the growth of football between 1935 and 1968 was due largely to the competitive balance achieved by the League during those years.<sup>42</sup>

His Honour also made it clear that he disagreed with the majority's view that the effect of the draft was to strip the players of any real bargaining power, lowered their salaries, and that it suppressed, if not destroyed, competition for their salaries.<sup>43</sup> In his Honour's opinion the majority had only looked at the draft from a players' perspective and had not taken into consideration that, in regard to bargaining power, the operation of the draft also restricts the clubs from dealing with other players. It was pointed out, for instance, that the Washington Redskins had drafted Smith because of their need for a free safety position, but in selecting Smith the Redskins had to overlook other players of similar ability as it could not waste a later round choice on another player from this position.<sup>44</sup>

MacKinnon J then stated that without a draft a less stable league with fewer franchises and lower salaries would result. With a draft system the incoming players received salaries and bonuses far in excess of what they could command in a free market of teams, in a league that did not have the competitive balance that a player draft produces.<sup>45</sup> His Honour stated that the aim of a league is to have all teams as nearly as possible at roughly equal competitive strength and drawing power, and not to create problem franchises, and that a draft system is one of the more important methods by which weaker teams can improve themselves.<sup>46</sup>

#### *Analysis of the Cases*

*Adamson* and *Smith* provide judicial opinion in regard to both the internal and external draft systems. The author agrees that the rules in regards to the NSWRL draft that were examined in *Adamson* were rightfully considered to be an unreasonable restraint of trade. This was because although there were two drafts, a player who had already played in the competition was only able to change clubs via the second, internal draft. The practical effect of this meant that there were two totally independent drafts which gave players already in the competition little or no

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<sup>42</sup> Ibid 1200-01.

<sup>43</sup> Ibid 1211.

<sup>44</sup> Ibid 1212.

<sup>45</sup> Ibid 1214.

<sup>46</sup> Ibid 1216.

bargaining power in relationship to what club would now select them, and certainly no more power than when they first entered into the competition. There is, however, an interaction between the two drafts in the AFL, with the ability of a player to nominate for the pre-season (internal) draft if his club has not negotiated a trade deal, giving that player significant bargaining power. This, therefore, is an important difference between the NSWRL draft and the AFL draft.

The internal draft system also involved many 'draft meetings', held over a period of months, at which players could be selected by the clubs. This, in the author's opinion, was unnecessarily complicated and unfair on the players as it made it harder for them to know which club they would be playing for, and did not provide them with sufficient time to train with the team before the start of the new season. The AFL draft involving just the one external draft and one internal draft is a much simpler and much fairer system on the players, and represents another significant difference between the NSWRL draft and the AFL draft.

In regard to the decision in *Smith*, while the majority decided that the draft system was invalid, they also stated that this only applied to the rules as they stood in 1968, and it was acknowledged that by the time the case was heard in 1978, significant changes had been made to the NFL draft. This is similar to what Justice Gummow stated in *Adamson*, namely that the NSWRL could look at redrafting their rules, implying that a different set of rules could be considered reasonable.

Thus there is authority in the decided cases that each set of draft rules has to be judged on its own merits. The author would therefore propose that while, prima facie, *Adamson* acts as a precedent in Australia that draft systems are an unreasonable restraint of trade, because each set of draft rules needs to be examined individually only those identical or very similar to the NSWRL draft rules would definitely fall under the precedent set by *Adamson*. It is also suggested that *Adamson* emphasises the need to examine what is permitted under the rules which involves looking at the practical operation of the specific rules of a particular draft system. Therefore, what is permitted under the AFL draft rules will now be examined in relation to, firstly, the protection of the interests of the league, then in regard to the third element of *Nordenfelt*, namely whether it is injurious to the public. Finally, its impact on the players will be examined.<sup>47</sup>

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<sup>47</sup> The author acknowledges that the strict interpretation of the *Nordenfelt* test requires that the interests of the parties be examined, and if that is reasonable, then the impact on the public needs to be examined. However, for the structure of this article it was better to look at the impact on the public before looking at the draft's impact on the players.

## The AFL Draft and the Restraint of Trade Doctrine

### *Protecting the Interests of the League*

The restraint of trade doctrine places the onus on the party imposing the restriction to show that it is no more than what is necessary to protect their interests.<sup>48</sup> As with all labour market controls, a league such as the AFL justifies the imposition of a draft system by stating that it helps to create a more even, and therefore a financially more viable, competition. As Buti points out,<sup>49</sup> the administrators of professional sporting leagues and clubs often seek to justify labour and product market controls on the basis of the peculiar economics of the sports industry. That is why professional team sports have a tendency to be highly regulated and co-operative organisations with rules and restrictive labour market controls that have to be obeyed by both the clubs and the players. The reason for this is that the attractiveness of the competition is arguably dependent on a high degree of uncertainty about the result, and so measures are needed to reduce the chances of a few teams dominating the competition by means of their superior economic power.<sup>50</sup> A question then arises as to whether a draft system actually helps to create a more even competition, with the author's opinion being that the AFL is now an even competition.<sup>51</sup> This conclusion is reached by comparing the evenness of each decade that the VFL/AFL has been in existence, with this comparison being based on three criteria. These are the number of teams winning premierships in each decade, the number of teams making the finals at least once every decade, and the number of teams fulfilling their "finals quota".<sup>52</sup> A brief overview of the author's results are as follows: the 1990's saw seven clubs win the premiership compared to a combined total of five clubs during the 1970's and 1980's; every club, except Fremantle who only joined the AFL in 1995, made the finals at least once in the 1990's, the first time this had happened since the 1920's; and most

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<sup>48</sup> Buti, above n11, 141. This therefore raises the concept of protectable interests which lies at the heart of the justification of the restraint of trade doctrine: see John Carter and David Harland, *Contract Law in Australia*, 4<sup>th</sup> Edition, Butterworths, Sydney, 2002, 588. For a discussion of protectable interests in sporting leagues and the salary cap see Chris Davies, 'The Use of Salary Cap in Professional Team Sports and the Restraint of Trade Doctrine', (2006) 22 *Journal of Contract Law*.

<sup>49</sup> *Ibid*, 142.

<sup>50</sup> *Ibid*, 143.

<sup>51</sup> The author does acknowledge that there is always an element of subjectivity to this. Note too that in *Adamson and Others v New South Wales Rugby League (Trial Case)* (1990) 27 FCR 535,562-3 it was held that statistics cannot be used to try and determine the evenness of a competition because of the fact that there has not been sufficient time to create a valid sample size for statistical analysis.

<sup>52</sup> The finals quota involves looking at the number of times a club makes the finals in a given decade in relation to the percentage of teams that make the finals each year. For example, in the AFL eight teams out of sixteen (fifty per cent) now make the finals each year. This means that the finals quota is now fifty per cent, that is, in a perfectly even competition each team would be expected to make the finals fifty per cent of the time which is five times per decade.

clubs in the 1990's went close to reaching their finals quota.<sup>53</sup> In the present 2000 decade there has already been five different premiers, while all the clubs have already made the finals at least once.

As noted by Le Grand,<sup>54</sup> there is also strong anecdotal evidence that in the AFL there has never been smaller gap between the best and the worse teams in the competition.<sup>55</sup> Three AFL coaches, Essendon's Kevin Sheedy, Sydney's Paul Roos and the Western Bulldogs' Rodney Eade, for instance, have all made statements in recent years about how even the AFL competition now is,<sup>56</sup> with Eade pointing out that the evenness of the 2005 season was almost inevitable considering that all but 23 players now in the competition have entered it by means of the national draft.<sup>57</sup> It is suggested that the labour controls imposed by the AFL, of which the draft is arguably the most significant, is the reason behind this. Therefore, it can be argued that the AFL can justify the use of the draft system because it, together with the AFL's use of a salary cap, has helped the league to achieve its stated objective of a more even and financially more viable competition. Its financial viability can be seen by the recent \$780m five year television deal that the AFL has just negotiated. In regard to the AFL's use of the twin system of a draft and salary cap, it is the author's view that it is the draft system that is instrumental in ensuring that the playing strength is initially evenly spread, with the salary cap then playing an important role in the helping to ensure that this evenness is maintained.<sup>58</sup>

### *The Interests of the Public*

Another component of the *Nordenfelt* test is whether the contract or regulations are injurious to the public. It is suggested that what the public have gained from the introduction of the draft are the following:

<sup>53</sup> This is a summary of the findings in another article by the author entitled 'The AFL's Holy Grail: the Quest for an Even Competition' (2005) 12 *James Cook University Law Review*. For discussions on how the evenness of sporting leagues may be measured see: Joshua Utt and Rodney Fort, 'Pitfalls to Measuring Competitive Balance with Gini Coefficients', (2002) 3 *Journal of Sports Economics* 367; Jeffrey Boreland and Robert MacDonald, 'The Demands for Sport', (2003) *Oxford Review of Economic Policy* 478; P.Dorian Owen and Clayton R. Weatherston, 'Uncertainty of Outcome and Super 12 Rugby Union Attendance' (2004) 5 *Journal of Sports Economics* 347.

<sup>54</sup> Chip Le Grand, 'Interstate clubs hold all the vital aces,' *The Australian*, Thursday, 5 June, 2003, 16.

<sup>55</sup> Chip Le Grand, "Sydney pours \$100m into AFL", *The Australian*, Thursday, 5 June, 2003, 16.

<sup>56</sup> See Jessica Halloran, 'Hayes enjoying club culture', *The Sydney Morning Herald*, 11 July, 2003, 38.

<sup>57</sup> For a list of the 23 players see Michael Lovett, *AFL Record Guide to Season 2005*, Australian Football League, 2005, 335. These players entered the competition through a number of zone exemptions that allowed clubs to select a player or players from their local zone, or in the case of Sydney and Brisbane, from their state zones, with these choices being made prior to the national draft. There are also a few players from Adelaide and Fremantle still playing who were also selected as pre-draft selections from the time when these new teams in the competition were entitled to such selections. Considering that the most recent player selected under these systems was Brisbane's Clark Keating who debuted in 1996, it will not be very long before no player will have entered the competition other than through the national draft. Note that Keating was delisted by Brisbane at the end of the 2006 season.

<sup>58</sup> For a discussion on the validity of salary caps see Davies, above n48, and Buti, above n11.

1. A faster game played by full time professional players who are fitter and more skillful than previous generations because of the extra time that they can devote to training.
2. A more even and more interesting competition where the difference between the best and worse teams is far narrower than in the decades prior to the introduction of the draft.
3. The opportunity to still support a club that may have been traditional for a family to follow for generations, even if in the case of South Melbourne and Fitzroy supporters it involves following a team now based interstate.
4. The near certainty that within a ten year period a team will enjoy some finals representation.
5. More televised matches than ever before.

It is therefore suggested that for the above reasons the AFL draft has not been injurious to the public. This can also be illustrated by looking at the fact that in the era prior to the draft system and salary some teams went decades without making the finals. Hawthorn, for instance, went 32 years without making the finals from 1925-1956 while South Melbourne (now Sydney) went 24 years without making the finals during the period of 1946-1969. Other long periods without making the finals include Melbourne's 22 years from 1965-86 and St. Kilda's 21 from 1940-60.<sup>59</sup>

Thus, after applying two elements of the *Nordenfelt* test, the author would argue that the AFL draft does operate in the interests of the league as it does help to achieve its stated objective of a more even competition, and that it is also not injurious to the public. This suggests that the question of reasonableness in regard to the AFL draft system is therefore dependent upon its impact on the players.

#### *The Interests of the Players*

The interests of the players wishing to play AFL is the opportunity to have a full time professional career with stable employment situations, which, ideally would also involve playing for the club of their choice. With the AFL draft system players

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<sup>59</sup> Lovett, n57, 618. It is acknowledged that, percentage wise, more teams make the finals now than they did in some of these decades, but adjusting the figures to the present day 50 per cent of the teams making the finals does little to change these figures. Hawthorn record, for instance, would only be altered by a 5<sup>th</sup> place in 1943, and hence would still have had a period of 18 years without making the finals, one year in the finals, followed by another period of 13 years without making the finals. South Melbourne meanwhile would still have gone 17 years without making the finals.

unquestionably have little or no choice in who will be their employer for the first two years of their AFL career, and this, prima facie, certainly goes against the fundamental right of an employee to select their employer. What the rules permits after this initial two period then needs to be examined to see whether they give players genuine bargaining power to then select the employer of their choice, for as was stated in *Curro v Beyond Productions*,<sup>60</sup> the relative bargaining position of the parties is an important consideration when determining reasonableness in regard to a restraint of trade.

The first point that needs to be made in regard to the bargaining power of the AFL players is the presence of a strong players' association as 99.5 per cent of the players are members of the Australian Football League Players Association (AFLPA),<sup>61</sup> with Smith<sup>62</sup> suggesting that it has become a powerful lobby group. While the AFLPA did not play a part in the drawing up of the original draft rules, it certainly has sufficient clout to influence the ongoing operation of the draft, and because of the decision in *Adamson*, is able to negotiate from a position of strength with its governing body, the AFL Commission.<sup>63</sup>

What is more relevant in regard to players with at least two years experience in the AFL is their individual bargaining power in relation to the clubs. The author suggests that the interactive use of both a national and pre-season draft does give players already in the AFL some genuine bargaining power whenever they wish to move clubs, as a number of case studies over the last decade clearly illustrate. It is also suggested that it is this trade aspect of the AFL draft that is a major, and significant, difference between the AFL draft system and the NSWRL draft system as it enables players already in the competition to change clubs without being limited to just the internal pre-season draft.

The Sydney Swans, for instance, after finishing last in 1994 with only four wins, had both second and third choice in the national draft at the end of that year. Fremantle, meanwhile, had the number one choice as part of its player package on entering the competition. Both these interstate clubs chose promising young Victorians with these picks, Fremantle selecting Jeff White, Sydney, Anthony Rocca and Shannon Grant, both of whom expressed a strong desire to remain in Melbourne, though they eventually agreed to go to Sydney for the mandatory first two years.

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<sup>60</sup> (1993) 30 NSWLR 337, 345.

<sup>61</sup> Braham Dabscheck, 'Playing the Team Game: Unions in Australian Professional Team Sports' (1996) 38 *Journal of Industrial Relations* 600-628, 612.

<sup>62</sup> Patrick Smith 'League fast running out of credibility', *The Australian*, Thursday, 8 May, 2003, 16.

<sup>63</sup> For further discussion on the use and impact of Collective Bargaining Agreements in Australian team sport see Dabscheck and Opie, above n7.

At the end of that period Rocca indicated his desire to join his brother, Saverio, at Collingwood. Negotiations began between the two clubs, with Rocca indicating he would nominate for the internal draft if no agreement was reached, even though there was no guarantee Collingwood would be able to select him. In such a scenario, however, Sydney would receive nothing for what had been a valuable early draft choice. An eleventh hour pre-national draft agreement was reached between Sydney and Collingwood, which saw Rocca move to Collingwood in exchange for two players and a draft pick.<sup>64</sup>

Both White and Grant were to sign for another year with Fremantle and Sydney respectively, before indicating their wish to return to Victoria. Melbourne showed its interest in both players, and after finishing last that season it had the first selection in both the national and pre-season drafts. Fremantle, however, was able to negotiate a deal with Melbourne which saw it receive player and draft choices in return for White going to Melbourne. The incentive for Melbourne to do such a deal was that it then allowed it to retain its first round draft choice in the pre-season draft.<sup>65</sup>

North Melbourne (now known as the Kangaroos) meanwhile was interested in obtaining the services of Grant who stated he was happy to go to either Melbourne or North Melbourne. Negotiations began with Sydney, with North Melbourne at first offering Brett Allison, but Sydney was adamant that it would only accept disgruntled North Melbourne captain, Wayne Schwass, as a direct swap. Schwass was keen to leave North Melbourne after a very public verbal altercation with coach Denis Pagan after that year's Preliminary Final, and indicated that he was more than happy to go to Sydney. North Melbourne, therefore, faced the real prospect of not only losing one of its best players, and gaining nothing in return, but also the likelihood of having Grant being selected by Melbourne, unless it could successfully negotiate a deal with Sydney. In the end North Melbourne relented and agreed to a direct swap with Sydney which saw both clubs obtain a replacement player for a player they were inevitably going to lose, while just as critically, the wishes of both players were also fulfilled.<sup>66</sup>

A similar situation involved the Brisbane Lions after it selected Western Australian youngster, Des Headland, with the first draft choice in 1998. Headland stayed for four years, including playing a starring role in Brisbane's 2002 Premiership win. At the end of that season, with his contract completed, he indicated his wish to return to Western Australia, and eventually a deal was struck between Brisbane and Fremantle which saw Headland go Fremantle and Brisbane receive its first

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<sup>64</sup> Lovett, above n57, 389.

<sup>65</sup> Ibid 375.

<sup>66</sup> Ibid 389.

round choice.<sup>67</sup> The 2002 draft also saw Nick Davis move from Collingwood to Sydney in exchange for Sydney's second round draft pick, a move seen as representing a much better deal for Sydney as Davis was considered to be worth a first round draft selection. Sydney, however, was unwilling to give up its first round selection as it wanted to select a mid-field player rather than a small forward like Davis.<sup>68</sup> However, once Davis made it clear that he no longer wished to remain at Collingwood and wanted to return to Sydney, Collingwood had little choice but to accept the second round draft selection. The only other alternative was to have a player on its list who no longer wished to be there, and as pointed out by Hill J in *Adamson*, this is something that clubs try to avoid as it is detrimental to team moral.<sup>69</sup> During the 2003 trade period on the other hand Collingwood was unable to negotiate a deal with Port Adelaide for star mid-fielder, Nick Stevens, who firstly turned down an offer to be traded to the Melbourne club, then simply nominated for the internal draft where he was subsequently selected by Carlton.<sup>70</sup> This was a perfectly acceptable outcome for Stevens as his main priority was to return to his home city of Melbourne, and he was just as happy to go to Carlton as he was to Collingwood. Collingwood on the other hand missed out on obtaining a valuable player while Port Adelaide received nothing in return for the departure of Stevens, and for instance would have received Melbourne's fifth pick in the draft had that deal been successful.<sup>71</sup>

These are examples, it is suggested, of what MacKinnon J discussed in *Smith*, namely that there is a real incentive for a club to obtain a deal that suits a player because under a draft system clubs need to make the most of their draft picks, and losing a player to another club and getting nothing in return means that the club has effectively lost a draft choice.

It should also be noted that under the old NSWRL draft system all the players mentioned above could only have gone to another club via the internal draft, with no bargaining power to give them a say in where they would go. As a consequence they were back in the same position they were when they had first wanted to join the league. It should also be noted that under the NSWRL draft system when a player nominated for the internal draft, the club involved also received nothing in return for what may well have been an early draft selection.

It is suggested, therefore, that what these case studies indicate is that while players will have little or no choice under the AFL draft rules as to whom his first

<sup>67</sup> Chip Le Grand, 'Headland listens to heart, answer call of the west', *The Weekend Australian*, 15-16 February, 2003, 50; Lovett, above n57, 362.

<sup>68</sup> 'Who's in, who's out' *The Age*, Tuesday, 29 October 2002, Sport 3.

<sup>69</sup> *Adamson and Others v New South Wales Rugby League Ltd and Others (Trial Case)* (1990) 27 FCR 535, 557.

<sup>70</sup> Lovett, above n57, 350.

<sup>71</sup> Chip Le Grand, 'Bulldogs play under fire', *The Weekend Australian*, 18 October, 2003, 51

employer will be, this will only be the case for the first two years. At the end of that period they can choose to stay with the club that drafted them, ask the club to trade them, or decide to re-nominate for the draft by means of the pre-season internal draft, and in this process players have significant bargaining power which can help them to move to the club of their choice. Thus, the author would argue that the AFL rules do not impose the same post-contractual restriction on the players' selection of their employer which had been one of the reasons Wilcox J had declared the NSWRL draft to be a restraint of trade.

However, while these are examples of how the AFL draft rules can give a player who makes it clear that he wishes to leave a club sufficient bargaining power to achieve this objective, there are also examples where players have been linked to trade deals without their knowledge, or have been mentioned as possible trades while they are in the process of negotiating new contracts with their present clubs. For example, prior to the 1999 national draft Collingwood wished to secure the services of Richmond's Steve McKee to fill its perceived tall player needs. Richmond, meanwhile, were interested in securing a small midfielder in the mould of Collingwood's Clinton King. A pre-national draft deal was therefore struck between the two clubs which resulted in a direct swap of the two players.<sup>72</sup> The lateness of the deal, however, meant that Clinton King did not know he would be going to a new club until the following morning, and even then it was from sources other than the two clubs involved.

During the 2001 pre-draft trading period it was noted that Hawthorn's Trent Croad went into a post season operation a Hawk and came out a Docker, Hawthorn and Fremantle having negotiated a trade deal during the time of the operation.<sup>73</sup> St Kilda, meanwhile, having accepted it was going to lose Barry Hall, to Sydney, began to see what players it could target in a potential trade deal. Five players were mentioned in the media as possibilities, though Sydney insisted that none of these players would be traded. In the end another player not mentioned in the media reports, plus draft choices, were exchanged in a three way deal involving Sydney, St. Kilda and Richmond.<sup>74</sup> While it is accepted that St Kilda had the right to try and obtain the best possible trade deal for a star player, it was nevertheless an unsatisfactory situation to have so many Sydney players feeling uncertain about their futures

When the 2005 trade period saw only 13 players change clubs, there were calls from those within the industry that the trade period was too regulated and that it

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<sup>72</sup> Lovett, above n57, 353.

<sup>73</sup> Chip Le Grand, 'Croad awakes a Docker', *The Australian*, Wednesday, 10 October, 2001, 21.

<sup>74</sup> 'For the record', *The Australian*, Wednesday, 10 October, 2001, 20.

had become too restrictive to serve the needs of clubs and players.<sup>75</sup> Suggested changes from people like Chief Executive of the AFLPA, Brendan Gale, were for limited free agency for players who have played a certain number of games, and for clubs to be able to trade draft picks from more than one year.<sup>76</sup>

### Suggested Changes to the AFL Draft

As Le Grand points out the AFL trade period serves an essential purpose, allowing clubs to make immediate improvements to their playing list, while at the same time providing players with the opportunity to find employment at another club.<sup>77</sup> While the author is also of the opinion that the trade period is an important component of the AFL's draft system, the author is also of the opinion that there are a number of issues that need to be addressed.

The first question is how the AFL should address the issue that, at present, AFL clubs are able to trade players, initially at least, without their consent.<sup>78</sup> In regard to this question it is worth noting the eventual outcome of the *Bosman* decision in relation to European soccer. After the *Bosman* ruling saw the end of the transfer system for out of contract soccer players, a new set of Regulations for the transfer of players still under contract were made. One significant rule was that no player could be transferred without his consent, with penalties being imposed on any club who approached another club without the consent of the player concerned.<sup>79</sup> It is suggested that a similar rule could easily be incorporated into the AFL draft system so that no player could be considered as part of trade deal without first obtaining his consent. This would mean that a player who indicated that he wished to leave club A to go to club B could only be exchanged for draft selections and players who had clearly indicated their wish to leave club B by, for instance, asking to be placed on some type of trade or transfer list. This would mean, for example, that the Shannon Grant/ Wayne Schwass swap would have been allowed to have taken place as both these out of contract players had indicated their willingness to leave

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<sup>75</sup> Chip Le Grand, 'Tough to kick a goal' *The Weekend Australian*, 8 October, 2005, 27. Note that in the 2006 draft period this number of players who were traded to a new club had dropped even further to just nine.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Under the rules a player, his club and the prospective club must all agree to the terms of the trade, but that does not stop clubs from agreeing firstly with another club to trade particular player to that club, and then consulting with that player to see if they will be willing to go to that new club. It should also be kept in mind that a player under a contract can, by means of the principles of contract law, hold his club to that contract and so refuse a particular trade.

<sup>79</sup> Article 13 of the Regulations Governing the Application of the Regulations for the Status and Transfer of Players, <http://www.fifa2.com>. For a discussion of these new Regulations see Chris Davies, 'Post Bosman and the Future of Soccer is Contract Law', (2003) 19 *Journal of Contract Law* 190-202.

their original club and go to North Melbourne and Sydney respectively. The deal, therefore, would have taken place with the full consent of both players.

Under this proposal the Clinton King/Steve McKee deal, however, could not have taken place, at least not without the prior consent of the players concerned. In the case of Barry Hall, St. Kilda would have been restricted to negotiating draft choices with Sydney, or to players who had indicated their consent to be traded, not the Sydney players St. Kilda had indicated, via the media, that it was interested in as none had indicated any desire to leave Sydney. Obviously with relatively few draft choices each year, some considerable restriction is involved here, which is why it may be necessary to allow clubs to trade, not only present year draft picks, but possibly following years as well.

It could also be possible to allow clubs to seek a trade involving players from other clubs who have indicated no desire to leave, but only if it obtains the permission of the player first. For instance when St Kilda was interested in a number of Sydney players as a trade for Barry Hall, it would have needed to have contacted the players concerned first, either through their managers, or perhaps through an AFL, or AFLPA, appointed 'draft officer' who could act as a neutral negotiator. The important thing would be that the players' consent is obtained before they are even discussed as being part of a trade deal. It is suggested that some players, although not initially interested in changing clubs, may be interested in an offer that, for instance, gives them a much better opportunity of playing in their favoured position.

It should be noted that the AFLPA attempted in the recent enterprise bargaining agreement to have the trading of players limited to out of contract players, but ultimately it settled for the compromise that players on contracts longer than three years would not be traded in the first year of that contract. The AFLPA was successful however in ensuring that contracted players could no longer be delisted.<sup>80</sup> As mentioned, the author suggests that the implementation of a consent clause would still allow clubs to trade contracted players, but it would be a much fairer system on the players.

The author also agrees with those within the industry that the present rules are too restrictive and that the system can be made less rigid and still retain its integrity and its ultimate objective, namely achieving an even competition.

The first way is the introduction of a limited free agency which, for instance, could allow players who have played 100-150 games, or who have played for at least six

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<sup>80</sup> Greg Denham, Michael Davis, 'Aging stars benefit in new award', *The Australian*, Tuesday, 17 June, 2003, 17.

years, the opportunity of moving from their club without needing to comply with the draft rules. The clubs involved would then have to negotiate an appropriate compensation package for the player's former club, and if the two clubs cannot agree on the value of a free agent, the suggestion is that an independent mediator could be appointed to settle such a dispute.<sup>81</sup> It should also be noted that free agency can also work well for the clubs, as has been illustrated in the NFL. This is because it can assist a club obtain a player that can immediately fill a weakness in the side and therefore potentially make the team immediately stronger, unlike the selection of young draft choices who may take a number of years to fulfill their potential. This is something that the AFLPA is presently researching, with the intention of making limited agency part of the next collective bargaining agreement that is scheduled to be completed prior to the 2008 season.<sup>82</sup>

The other way by which the trade aspect of the AFL draft could be made less restrictive is to allow clubs to trade draft choices from more than one year, something that again is already allowed in the NFL. As Le Grand points out this would in effect increase currency that the clubs have in regard to trading, which in turn would provide greater opportunities for players seeking to change clubs. Le Grand uses the example of Peter Everitt who wanted to leave Hawthorn at the end of the 2005 season due to personal problems with the club's coach and take up the offer of a three year contract with Sydney. Sydney, as reigning premiers, did not have good draft selections and were therefore not in the position to provide Hawthorn with an acceptable compensation package, so the deal did not eventuate. If Sydney had been able to trade future year draft choices as well, then the deal may have taken place.<sup>83</sup> Although this may also be seen as an example of the restrictions that are placed on players, it should also be acknowledged that Everitt had earlier in the year agreed to a one year extension to his contract. However, it should be further acknowledged that unlike most employees, Everitt was not able to leave his employer by giving one month's notice, though at the end of this

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<sup>81</sup> Le Grand, above n75, 27.

<sup>82</sup> *Ibid.*

<sup>83</sup> In this article's discussion of the trade deals that have taken place in the last decade or so in the AFL the Sydney Swans have figured prominently. This is not surprising considering that it has been the club that has been the most active in giving up early draft picks and players in order to secure players it had identified as being suitable players. First, second or third round draft choices, for instance, were traded over the years in order to secure Jason Ball, Paul Williams, Barry Hall, Nick Davis and Darren Jolly to the club, all of whom played an important role in the Sydney's 2005 premiership win. In the 2005 trade Sydney again traded away their first and second round draft choices in order to secure the services of Essendon's Ted Richards and Geelong's Paul Chambers, while in 2006 it traded a second round draft selection in return for Hawthorn's Peter Everitt. Other clubs, most notably St. Kilda and Geelong, have concentrated more on selecting young players, which indicates that different strategies can work for different clubs as St. Kilda has made the final four in both 2004 and 2005, while Geelong figured prominently in the 2005 finals. It also worth noting that the two Grand Finalists in 2005 and 2006, Sydney and the West Coast Eagles, had both made the finals nine times in the last eleven years, indicating that obtaining the very early draft picks is not absolutely essential for success as both clubs have had only two top ten draft choices during the last eleven years.

extension to the contract he was traded to Sydney in exchange for a second round draft selection in the 2006 draft.

### Conclusion

The author firstly suggests that the decision in *Adamson* does not mean that all draft systems are going to be considered to be unreasonable restraints of trade by the courts, with the crucial factor being how restrictive a particular draft system is in regard to enabling players to find the employer of their choice. It is also suggested that in regard to the AFL draft, the *Nordenfelt* test would suggest that it does operate in the interests of the league by helping to achieve its stated objective of a more even competition, and at the same time is not injurious to the public. The issue of whether or not it is a reasonable restraint of trade therefore lies with its impact on the players. The author agrees with the statements made by MacKinnon J in *Smith* that the players are the direct recipients of the benefits of the draft because the more even competition it has helped to create means there is more money in the game and therefore ultimately better payments to the players. In this regard it can be deemed to be reasonable on the players, though there is still the question as to whether it is unreasonable in that it prevents the players from selecting their employer, a factor that was emphasised in *Adamson*.

However, it should also be noted that the draft system at the centre of the *Adamson* case was far more restrictive on the players' movements than the AFL's, and yet it was held by the original trial judge in *Adamson* to be a reasonable restraint of trade. Statements made by the Full Court of the Federal Court in the subsequent appeal indicate that a different set of rules to those of the NSWRL could represent a reasonable restraint of trade. This then raises the question as to whether the AFL draft can be distinguished from the NSWRL draft. The author would suggest that the rules of the AFL draft can be so distinguished on the grounds that, firstly, it contains just the one external and one internal draft, rather than a number of internal draft meetings that were present in the NSWRL draft system. This, it is suggested, is much fairer on the players than the NSWRL system had been as it allows them to know which club they will be playing for at a much earlier date. The second reason is that under the NSWRL draft, players already in the competition could only change clubs by means of the internal draft. This meant that under the NSWRL draft the players had no more bargaining power than when they first entered the competition. However, under the AFL draft, unlike the NSWRL draft, players who have been in the competition for at least two years and have come to the end of their contracts, arguably have some genuine bargaining power. As the case studies show, the operation of the AFL draft rules has enabled players to move to the club of their choice. The AFL draft rules certainly prevent

players coming into the competition for the first time to be able select their employer, but the author suggests that it is not unreasonable for an untried youngster to have to go to the club that selects him for the first two years, given that the AFL has created a system that provides these players with a genuine professional career in a competition where the average annual wage is now over \$200,000.<sup>84</sup>

What could be considered unreasonable, however, is that the present AFL draft rules allow players already in the competition to be traded, initially at least, without their consent, though this can be remedied by the inclusion of a consent clause. While the author accepts comments made from those within the industry that the trade period is restrictive on the players, it should also be noted that it is nowhere near as restrictive as not having any trade period, as occurred in the NSWRL draft. The restrictive nature of the draft on the players, however, could be further reduced by the introduction of a limited free agency, and allowing clubs to trade draft choices from more than one year.

If the NRL, as has been suggested at various times, decides to bring in a new draft system it would, for obvious legal reasons, have to be significantly different to that which was implemented in 1990. It is suggested that the AFL draft system would be a good model to follow, namely that there should be a national (external) and pre-season (internal) draft so that players already in the competition, who wish to leave a club, could be traded for either draft choices or other players. It is also suggested that a consent clause in relation to players who are the targets of potential trades, limited free agency and the flexibility to trade choices from more than one year would provide a draft system that is even more reasonable on the players than the present AFL model. This would not only make it less likely that players would take legal action, but also that if they did choose to do so, more likely that the system would survive such a restraint of trade challenge in court.

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<sup>84</sup> Le Grand, above n75, 27.