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# Restraint of Trade Law in Sport

## **Abstract**

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## **Keywords**

sports law; restraint of trade laws; transfer system; player draft; salary cap

## **Disciplines**

Entertainment, Arts, and Sports Law | Law

## RESTRAINT OF TRADE LAW IN SPORT

JAMES JOHNSON<sup>1</sup>

Landmark sports law cases such as *Bosman*, *Buckley v Tutty* and *Federal Baseball Club* have shaped the organisation of professional sport. This article analyses US, European and Australian cases applying restraint of trade laws. In particular, it examines cases which have dealt with the lawfulness of restraint mechanisms such as the transfer system, player draft and salary cap. The competing interests of the athlete and the club/league are not always easily reconciled. This article concludes that restraint of trade laws in the US favour the club/league, whereas in Europe, they tend towards the interests of the player. Australia's application of restraint of trade laws to sport is more even-handed than in the US and Europe: it better balances the interests of the players and club/league.

### INTRODUCTION

In Ancient Greece, sport provided a platform for competitors to demonstrate superior skills and athleticism. Sport today not only provides an opportunity for this demonstration, but it also substantially rewards elite competitors for their success. Historically, sport has been regarded as a social movement, but today elite sport is a commercial industry.<sup>2</sup> This worldwide business, with its lucrative contracts and sponsorships, generates an estimated US\$384 billion per year.<sup>3</sup> As a result, a growing number of athletes are generating their living from competition. With this increase in salary, elite athletes are considered professionals in their field. Today, as modern sport is a business and athletes are professionals, common law rules which previously only applied to business, now apply to sport as well.

As in business, contracts are necessary in sport to ensure the sport's continuing success. Sport contracts are commonly entered into to reduce the margin for dispute between the privy parties and are binding on each party. However, contracts are unenforceable if they contain provisions that are contrary to public policy. For example, if a contract unreasonably restrains a person in the exercise of their profession or trade, it is unenforceable. This is known as a restraint of trade.

Today, professional athletes expect treatment equal to professionals in other business fields by not having to accept practices that restrict their professional activities. Consequently, they seek court intervention when their trade is restrained. The courts conclude that professional athletes engage in 'trade', which has resulted in free-agency for athletes.<sup>4</sup> Clubs and sporting leagues ('leagues') oppose free-agency, because it intrudes on their ability to organise and

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<sup>2</sup> D Healey, *Sport and the Law* (3rd ed 2005) 15.

<sup>3</sup> D Andrews, *Sport and Corporate Nationalisms* (2004) 22.

<sup>4</sup> Free-agency allows an athlete, whose contract with a club has expired, to sign a contract with any club that the athlete chooses.

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regulate their particular sport. In response, clubs and leagues attempt to use additional sporting rules that restrain athletes, such as the use of the player draft ('draft') and salary cap ('cap').

Court intervention is highly controversial, because sport has several features that distinguish it from typical businesses, such as its origins as a social movement. Courts have the complicated job of considering these unique features of sport and separating them from the commercial areas over which the courts have jurisdiction. Landmark cases, such as *Bosman* highlight this responsibility and the European Court of Justice's decision there has revolutionised the rules that govern the sport. The global trend has been to treat athletes as one would treat professionals of any other business or discipline, while honouring as far as possible the unique nature and role of sporting clubs and their governing bodies.

This article compares and analyses the role that restraint of trade laws play in American ('US'), European and Australian sport. It initially examines the restraint of trade doctrine at common law. Then it analyses the sporting models and the application of restraint of trade laws to sport by US, European and Australian courts. Next, this paper compares the methods that these jurisdictions have employed to deal with free-agency, caps and drafts and discusses the interests of the athletes, the clubs and the league. Finally, the paper concludes with recommendations for improving Australia's application of restraint of trade laws to sport.

### COMMON LAW RESTRAINT OF TRADE<sup>5</sup>

The common law doctrine of restraint of trade<sup>6</sup> permits a person to carry out legal trade in 'such a matter as he chooses'.<sup>7</sup> Thus, any restraint on a person's right to work is prima facie void. However, if the restraint is regarded as 'reasonable', then this provision can be rebutted.<sup>8</sup>

To determine reasonableness in restraint of trade cases, the common law courts have used the *Nordenfelt Test* which establishes whether or not the restraint is reasonable in the interest of the privy parties and the public.<sup>9</sup> These two limbs of the *Nordenfelt Test* are generally treated as one; if the restraint is held to be reasonable in the interests of the privy parties, then the restraint is also reasonable in the interests of the public.

The privy parties must satisfy two requirements for their restraint to be considered reasonable. First, the party seeking to restrain another party must have a legitimate interest. Second, the restraint must not go any further than what is necessary to protect that interest. In a sporting context, the privy parties are the league/club and the athlete. Thus, if a league restrained an athlete by implementing a cap, the league may argue that the financial sustainability of the league is a legitimate interest and it is necessary to reduce its athletes' salaries to protect that financial sustainability.

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<sup>6</sup> The author notes that the doctrine of restraint of trade only applies to common law countries. In Europe similar principles are applied which can be found in several provisions of the Treaty of the European Community ("EC").

<sup>7</sup> *Petrofina (Great Britain) Ltd v Martin* [1996] 1 Ch 146, 180 per Diplock LJ.

<sup>8</sup> *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.

<sup>9</sup> In *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535, 565 Lord Macnaghten stated, 'reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public.'

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**A COMPARISON OF THE ORGANISATION OF SPORT**

The US, Europe<sup>10</sup> and Australia each organise their sport in a system unique from one another. It is important to draw attention to these differences, because the organisation of sport affects the application of their respective restraint of trade laws.

The US sport model is strictly divided into amateur and professional sports. The elite amateur league is the National Collegiate Athletic Association ('NCAA').<sup>11</sup> An extensive range of sports fall under the umbrella of the NCAA, ranging from baseball to cross-country skiing.<sup>12</sup> Collegiate athletes receive university scholarships as opposed to a wage or salary, thus maintaining their amateur status.

US professional sport consists of four major sporting leagues: Major League Baseball ('MLB'), National Basketball Association ('NBA'), National Football League ('NFL') and National Hockey League ('NHL').<sup>13</sup> US professional sports produce colossal salaries and broadcasting fees, therefore, they are regarded as completely commercial in nature.<sup>14</sup> In fact, US professional sport is commonly considered a part of the entertainment industry.<sup>15</sup> As a result, rules and decisions in US professional sport are more influenced by commercial interests than they are in European or Australian sport.

In Europe, sport is based on the 'grass-roots approach'.<sup>16</sup> The two fundamental elements of this approach are the promotion/relegation system and the pyramid structure.<sup>17</sup> The promotion system allows clubs to be promoted to better leagues or relegated to lower leagues based on their performance. Club level sport lies at the base of the pyramid. These teams at club level are also members of Regional Sporting Federations which stand above them in the pyramid, who are in turn members of a National Federation, who are members of the European Sport Federation. The pyramid structure allows the same governing body to regulate each sport. Consequently, unlike in the US, the distinction between amateur and professional sport in Europe is not clear-cut. For example, it is possible to have amateur and professional athletes competing in the same sporting event.

Australian sport is a mixture of both the European and the US sport model. At the amateur and second tier professional league level, sport is based on Europe's grass-roots approach. Similar to Europe, the pyramid structure exists, however only at club, state and national level. However, the top Australian professional leagues have adopted systems that are similar to the US professional leagues. Soccer's A-league, the National Rugby League ('NRL') and the Australian Football League ('AFL') all have strict professional rules in place such as the cap,

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<sup>10</sup> The author acknowledges that each European country has a different domestic organisation of sport. However, for the purpose of comparing restraint of trade in sport, the European model (as per the European Commission) will be compared to Australia and the US.

<sup>11</sup> The NCAA is an association comprising colleges and athletic conferences who administer intercollegiate athletics.

<sup>12</sup> For a full list of sports see [www.ncaa.org](http://www.ncaa.org).

<sup>13</sup> L Halgreen, *European Sport Law – A Comparative Analysis of the European and American Models of Sport* (2004) 178.

<sup>14</sup> D Andrews, *Sport and Corporate Nationalisms* (2004) 1.

<sup>15</sup> *Ibid.*

<sup>16</sup> European Commission, *The European Model of Sport* <[http://ec.europa.eu/sport/action\\_sports/historique/docs/doc\\_consult\\_en.pdf](http://ec.europa.eu/sport/action_sports/historique/docs/doc_consult_en.pdf)> at 01 October, 2007 4.

<sup>17</sup> *Ibid* 7.

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but these leagues do not utilise the promotion/relegation system that is synonymous with the grass-roots approach.

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Restraint of trade issues have undoubtedly shaped the legal structure of modern day sport.<sup>18</sup> The application of restraint of trade laws in sport was questioned in the US as early as 1922.<sup>19</sup> US restraint of trade laws affect both amateur and professional sports, but in different ways. US Amateur sport, as noted previously, is less commercial than US professional sport. The typical US amateur restraint of trade issue involves monopolistic practices of sporting organisations, such as the NCAA's attempt to control college football television contracts.<sup>20</sup>

US professional sport is more commercial in nature than US amateur sport, which means that restraint of trade laws are applied more often at the professional level. Various exemptions to restraint of trade laws protect US professional sports.<sup>21</sup> The application of restraint of trade laws to US sport in general is complicated, because it varies from sport to sport.<sup>22</sup> MLB receives greater protection from restraint of trade laws than any other US professional sport.<sup>23</sup> MLB's unique protection has resulted from a number of US cases which have questioned the lawfulness of the controversial 'reserve clause'.<sup>24</sup>

The reserve clause, introduced in 1876, permits clubs exclusive rights to re-contract their athletes at the expiry of their existing agreement.<sup>25</sup> Effectively, this clause allowed clubs to contract athletes for their entire playing career. In general business terms, this restriction is

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<sup>18</sup> L Halgreen, *European Sport Law – A Comparative Analysis of the European and American Models of Sport* (2004) 85.

<sup>19</sup> *Federal Baseball Club of Baltimore v NL of Professional Baseball Clubs* 259 US 200 (1922).

<sup>20</sup> See for example *NCAA v Board of Regents of University of Oklahoma* 468 US 85 (1984) where the NCAA breached the Sherman Act by restricting NCAA football broadcasts. The US Supreme Court held that the NCAA was imposing an unreasonable restraint by controlling television contracts. This case effectively ended the NCAA's control over college football television contracts.

<sup>21</sup> These exemptions include: the MLB Exemption; the NFL exemption; the Non Statutory Labor Exemption; the Statutory Labor Exemption, and the Single League Entity Defence.

<sup>22</sup> See, eg, *International Boxing club v US* 358 US 242 (1959) and *Radovich v National Football League* 352 US 445 (1957).

<sup>23</sup> The author acknowledges that smaller American professional leagues, such as MLS, Arena Football and the WNBA, also receive greater protection from restraint of trade laws. This is because their league is structured as a single-entity. A single-entity league means that the league itself owns and controls all of the franchises who participate in the league. The league also negotiates contracts for the players, as opposed to traditional leagues where the franchises themselves contract their players. Since the league is a single-entity, all members share the same interests and purposes. This means that technically there is a lack of competition between the members of the league, thus can be exempted from restraint of trade laws. This was exemplified in *Fraser v Major League Soccer LLC* 284 F 3d 47 (1<sup>st</sup> Circ 2002) where it was held that, due to the single-entity structure a violation of restraint of trade laws could not succeed. This has since been regarded as the *Single-Entity Defence*.

<sup>24</sup> See, eg, *Federal Baseball Club of Baltimore v NL of Professional Baseball Clubs* 259 US 200 (1922) *Toolson v New York Yankees Inc* 346 US 356 (1953) and *Flood v Kuhn* 407 US 258 (1972).

<sup>25</sup> C Kolonko, *Restraint of Trade in Sport: An International and South African Perspective* (2006) 69.

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almost certainly considered unlawful, because it unreasonably restrains an employee from seeking employment elsewhere.

*Federal Baseball Club v National League*

In 1915, two baseball leagues existed in the US: the American League and the National League. The plaintiffs, the players and American League clubs, attempted to enter contracts for participation in the American League. The National League, the defendants, denied the plaintiffs the opportunity, because they enforced the reserve clause on any athlete attempting to transfer to the American League. The plaintiffs brought an action against the defendants alleging that their trade had been restrained.

The US Supreme Court considered whether or not baseball was subject to restraint of trade laws, noting that baseball needed to be considered 'trade' or 'commerce' to fall within the scope of restraint of trade laws.<sup>26</sup> The court unanimously held that baseball was not engaged in trade or commerce; therefore, baseball was exempt from restraint of trade laws. This decision effectively led to MLB's unique exemption to restraint of trade laws.

MLB's exemption does not extend to other US sports.<sup>27</sup> In order for these sports to fall under restraint of trade laws, the league must be engaging in trade or commerce. *Wood v National Basketball Association* questioned whether or not professional sport was trade or commerce.<sup>28 29</sup> The court held unanimously that professional sport did fall under the umbrella of restraint of trade laws, because it was engaging in trade.

Unlike in the US, the application of restraint of trade laws to European sport is a relatively new development. Also dissimilar from the US approach which allows baseball to receive greater protection than the other major sports, the European courts apply restraint of trade laws equally to all sports. Traditionally, European sport has been considered a 'cultural', as opposed to an 'economic', activity.<sup>30</sup>

The controversial debate on whether European sport is an economic activity or cultural has caused a number of problems for the European Court of Justice ('ECJ') when deciding whether restraint of trade laws apply to sport. If European sport is considered cultural, then restraint of trade laws do not apply. However, the practice of sport is subject to restraint of trade laws in so far as it constitutes an economic activity. Unlike the US courts which hear restraint of trade cases from a number of sports, the European courts are generally faced with issues involving football (soccer).

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<sup>26</sup> *Federal Baseball Club of Baltimore v NL of Professional Baseball Clubs* 259 US 200 (1922) 3 per Holmes J.

<sup>27</sup> *Radovich v National Football League* 352 US 445 (1957) 35 per Wald J.

<sup>28</sup> *Wood v National Basketball Association* 602 F Supp 525 (1984) where the plaintiff alleged that the salary cap was a violation of the *Sherman Act*. It was held that the salary cap was legal, although, the court noted that the NBA did not receive the same protection from restraint of trade laws that Baseball did.

<sup>29</sup> Also see *Radovich v National Football League* 352 US 445 (1957).

<sup>30</sup> In *BNO Walrave and LJM Koch v Association Union Cycliste Internationale* [1974] ECR 1405, the plaintiffs were professional pacemakers for motorcycles. The defendants inducted a provision that required the pacemaker to be of the same nationality as the motorcyclist. The plaintiffs argued that this provision was contrary to European law as it discriminated on grounds of nationality between member states. The ECJ held that the practice of sport is subject to community law only in so far as it constitutes an economic activity.

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### *Dona v Manteco*

The plaintiff, an athlete agent, tried to recruit foreign athletes to participate in the Italian Football League ('IFL'). The recruitment was blocked, because the Italian Football Federation prevented the participation of foreign athletes in the IFL. The plaintiff argued that this was a restraint of trade, because it prevented member states from freely moving the services of athletes. The ECJ upheld the decision in *Walrave*<sup>31</sup>, holding that European Law applies to sport if the matter is considered 'economic'.<sup>32</sup>

The application of restraint of trade laws to Australian sport has more similarities to Europe than to the US. First, the application is more recent in Australia than in the US. Secondly, restraint of trade laws are applied equally to all Australian sports with no sport receiving greater protection than others from the application of the doctrine, unlike the US's MLB.

In deciding whether or not the doctrine of restraint of trade applies to Australian sport, the Australian courts have held that the sport must amount to 'trade'. If an athlete receives payment for competing in a sport, the sport is considered trade, regardless of whether it is 'part-time trade' or 'full-time trade'. This was first established in the famous Australian case *Buckley v Tutty* where the High Court used the reasoning and precedent set in the English case, *Eastham v Newcastle United Football Club*.<sup>33</sup>

### *Eastham v Newcastle United Football Club*

Eastham, the plaintiff, was a famous British footballer once contracted to Newcastle United, the defendant. During the course of the contract, several disputes arose between Eastham and Newcastle United. As the contract came to an end, Eastham requested that he be transferred to another club. At the time, the English Football League ('EFL') transfer rules allowed a club to retain players, even after the expiration of their contract with an athlete. Newcastle United used this rule to prevent Eastham from transferring.

Eastham brought an action alleging that the EFL transfer rules restrained his trade by preventing him from pursuing further employment opportunities as an athlete after the duration of his contract. One of the arguments raised by Newcastle United was that Eastham was not engaged in trade; therefore, his trade could not be restrained.<sup>34</sup> The Court held that if a person is paid to play sport and makes a living from that payment, then the person is engaged in employment and is therefore engaged in trade. With this establishment of sport as 'trade', the Court applied the doctrine of restraint of trade. The Court considered the transfer system to be 'an unreasonable restraint of trade' and held that if clubs did not re-hire a player on a further contract, the player should be able to leave for free.

### **FREE-AGENCY**

The most common type of restraint of trade in sport is where an uncontracted athlete is restricted from contracting with a new club without the consent of the athlete's previous

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<sup>31</sup> *BNO Walrave and LJN Koch v Association Union Cycliste Internationale* [1974] ECR 1405.

<sup>32</sup> In obiter, the ECJ stated that athletes are considered workers as defined by European law. This paved the way for Europe's landmark case, *Bosman*.

<sup>33</sup> *Eastham v Newcastle United Football Club* [1963] 3 All ER 139.

<sup>34</sup> Several other arguments were raised in this case, but this argument will be focused on for the purposes of this paper.

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club.<sup>35</sup> Traditionally, an athlete's previous club has only granted consent when the athlete's new club has provided adequate compensation.<sup>36</sup> In the US, the athlete's freedom of movement to other clubs has generally been questioned in the context of the reserve clause<sup>37</sup> or the *Rozelle Rule*.<sup>38</sup>

*Flood v Kuhn*<sup>39</sup>

In 1969, Curt Flood was traded from the St. Louis Cardinals to the Philadelphia Phillies without his consent. Flood refused to play for his new club and requested that he be made a free agent upon expiry of his contract. Kuhn, MLB's Commissioner, denied Flood's request noting that the reserve clause, which had been upheld since *Federal Baseball Club*, applied to Flood. In turn, Flood brought an action against Kuhn arguing that the reserve clause breached restraint of trade laws.

The US Supreme Court upheld MLB's exemption established in *Federal Baseball Club*. However, the court noted that the reserve clause was 'an inconsistency and illogic of long standing that [should] be remedied by Congress.'<sup>40</sup> The court also agreed for the first time that baseball is engaged in trade and commerce, and recommended that Congress consider baseball's MLB's exemption.

As a result of the Court's recommendation, the Senate and House of Representatives passed and enacted the Curt Flood Act.<sup>41</sup> This act does not abolish MLB's restraint of trade exemption; however, it considerably restricts its scope. The act limits the application of restraint of trade laws to the MLB athletes' right to sue their clubs or employers for violations of restraint of trade laws. Neither the MLB draft nor any discretion over the Minor League falls under this ruling. Rather the MLB's restraint of trade exemption still protects these two areas.<sup>42</sup>

Other US sports have used measures that restrict athletes' freedom to move to other clubs, namely the NFL's *Rozelle Rule*. However, unlike MLB's reserve clause, the courts have allowed the application of the restraint of trade laws to the *Rozelle Rule*.

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<sup>35</sup> L Halgreen, *European Sport Law – A Comparative Analysis of the European and American Models of Sport* (2004) 170.

<sup>36</sup> See *Toolson v New York Yankees Inc* 346 US 356 (1953).

<sup>37</sup> The reserve clause was developed in the 1880s and used in baseball. The reserve clause prohibited a club from contracting an athlete who was 'reserved' to another club. The reserve clause gave a club the exclusive right to re-contract an athlete once the athlete's contract had expired. The only way that an athlete could transfer to another team was if the new club paid an adequate compensation to the athletes existing club. Essentially, a club could hold onto an athlete for the athlete's entire playing career.

<sup>38</sup> Similar to the baseball's reserve clause, the *Rozelle Rule* provided that fair and reasonable compensation for free agents needed to be paid to the athlete's former club before being transferred.

<sup>39</sup> *Flood v Kuhn* 407 US 258 (1972).

<sup>40</sup> *Ibid*, 284 per Blackmun J.

<sup>41</sup> *Curt Flood Act* 1998 (US).

<sup>42</sup> L Halgreen, *European Sport Law – A Comparative Analysis of the European and American Models of Sport* (2004) 180-1.

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### *Mackey v National Football League*<sup>43</sup>

Mackey, who at the time of this case was the president of the NFL Players Association ('NFLPA'), challenged the NFL's long standing *Rozelle Rule*. Mackey argued that the rule limited the athlete's bargaining power, because clubs were not prepared to pay the compensation demanded by the athlete's previous club. The NFL argued that because of *Federal Baseball Club* and *Toolson*<sup>44</sup>, the doctrine of restraint of trade did not apply to sport. The court noted that MLB's exemption was an anomaly only applying to MLB. It was held that the *Rozelle Rule* violated restraint of trade laws and subsequently forced the NFL to use less restrictive measures.

One year after the ruling in *Mackey* the *Rozelle Rule* was reinstated, because the NFLPA and the NFL entered into a Collective Bargaining Agreement ('CBA').<sup>45</sup> <sup>46</sup> This was because the court developed the Non-Statutory Labor Exemption.

### NON-STATUTORY LABOR EXEMPTION

The Non-Statutory Labor Exemption provides protection from restraint of trade laws when a CBA is entered into. This is provided that the CBA affects only the privy parties to the agreement and is negotiated between the union and management in good faith. The US Supreme Court developed this exemption to encourage unions and management to negotiate fair outcomes independently before seeking court intervention.<sup>47</sup> Thus, the US system gives preference to CBAs over the application of restraint of trade laws to balance the interests of athletes, clubs and leagues.<sup>48</sup> In sum, in the US, when parties enter into a CBA, it creates an exemption to the application of restraint of trade laws to sport.

In Europe, prior to 1995, the transfer system resembled the US reserve clause or *Rozelle Rule* system.<sup>49</sup> The transfer system entitled clubs to prevent athletes from transferring to other clubs unless the holding club was satisfied with the amount of compensation received for their athlete. *Bosman*, described as 'the most important European sports law decision', questioned the transfer system.<sup>50</sup>

### *The Bosman case*<sup>51</sup>

The plaintiff, Bosman, was a professional footballer under contract to Royal Club Liege (RCL) of Belgium. Just before Bosman's contract expired, RCL offered him a new contract which reduced his salary by nearly 75%. Consequently, Bosman requested to be made a free agent

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<sup>43</sup> *Mackey v National Football League* 543 Fed 2d 606 (8th Cir 1976).

<sup>44</sup> *Toolson v New York Yankees Inc* 346 US 356 (1953).

<sup>45</sup> The *National Labour Relations Act* 1935 (USA) allows for negotiation between unions and management to determine workplace conditions. In America, each sport has a player association. The player association is the bargaining agent for the players, who bargains with the league to ensure that athlete's interests are considered. This process is called the negotiation of CBAs.

<sup>46</sup> A CBA is a union-management agreement.

<sup>47</sup> See *Brown v Pro Football Inc* 518 US 231 (1996).

<sup>48</sup> See *Clarret v National Football League* 369 F 3d 124 (2<sup>nd</sup> Cir 2004).

<sup>49</sup> L Halgreen, *European Sport Law – A Comparative Analysis of the European and American Models of Sport* (2004) 173.

<sup>50</sup> *Ibid*, 167.

<sup>51</sup> *Belgian FA v Bosman* [1996] All ER [EC] 97.

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so he could continue his career with another club. An interested French club, US Dunkerque (USD), offered him a contract which he accepted.

In accordance with the European transfer system, RCL was entitled to request a transfer fee. USD agreed to the transfer fee that RCL had requested, but before USD could pay the fee, the transfer was cancelled by RCL because of speculation that USD did not have sufficient funds. As a result, Bosman was only able to contract with a semi-professional club, thus inevitably receiving a reduced salary.

Bosman sought damages, alleging that the transfer system in place unreasonably prevented him from transferring to USD. Bosman argued that the system was inconsistent with restraint of trade laws, because it restricted athletes from seeking employment with other clubs.<sup>52</sup> The defendants, RCL and Union European Football Association (UEFA), argued that the transfer system maintained reasonable competition between European clubs by providing smaller clubs with compensation for athletes who were contracted by bigger clubs.

In the judgment, the ECJ applied *Dona* noting that the court had jurisdiction since football was an 'economic activity' and that Bosman, a footballer, was a 'worker' under European law. The court held that the transfer system restricted footballers' employment opportunities by forcing clubs to pay transfer fees for uncontracted athletes, which was contrary to restraint of trade laws.

This precedent set by the ECJ established the foundations upon which the European transfer system (and most transfer systems around the world) is based today. As a result of *Bosman*, the European transfer system applies free-agency to all athletes who are out of contract. Therefore, a club cannot receive a transfer fee unless their athlete wishes to sign a contract with another club before the expiration of his existing contract.

Like the American and European courts, Australian courts have intervened where an athlete's ability to transfer to other clubs has been restricted. Australia's transfer system is commonly referred to as the 'transfer and retention system.'<sup>53</sup> Similar to the US reserve clause, the *Rozelle Rule*, and the pre-*Bosman* transfer system, the transfer and retention system prohibited uncontracted athletes from transferring to other clubs unless transfer fees were paid. Similar to the application of restraint of trade laws to sport, the early English case *Eastham v Newcastle United FC* heavily influenced Australia's transfer system laws.<sup>54</sup> This case was applied in the renowned High Court case *Buckley v Tutty*.<sup>55</sup>

### ***Buckley v Tutty***

Tutty, the plaintiff, was a contracted member of Balmain Rugby League Club (Balmain) who participated in the NSW Rugby Football League (NSW RFL). Tutty wished to leave Balmain to be employed by another club. The NSW RFL rules allowed its members to place transfer fees on their athletes. In conjunction with the rules, Balmain placed a high transfer fee on Tutty. As a result, no club was prepared to pay the transfer fee that Balmain demanded. Tutty remained at Balmain until his contract expired two years later. Even though Tutty was a non-

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<sup>52</sup> Bosman also argued that the current nationality regulations were inconsistent with the EC.

<sup>53</sup> D Healey, *Sport and the Law* (3rd ed 2005) 45.

<sup>54</sup> *Eastham v Newcastle United FC* [1964] 3 All ER 139 at 147 per Wilberforce J, where it was held that once a player's contract had expired with a club, the club could not expect to retain the player's services until the player had agreed to a new contract.

<sup>55</sup> *Buckley v Tutty* (1971) 125 CLR 353.

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contracted athlete, Balmain maintained that any interested club would have to pay the transfer fee which had been set while he was on contract.

Tutty alleged that the transfer and retention system, part of the NSW RFL's bylaws, restrained his trade. The defendants, Balmain and NSW RFL, argued that the restraint was reasonable, because the system prevented the richer clubs from 'poaching' the league's best athletes. The High Court held that the league rules fettered the athlete's right to seek employment.<sup>56</sup> Therefore, the transfer and retention system was held to be a restraint of trade.

Like Europe's *Bosman* case, *Buckley v Tutty* altered the transfer system in Australia. As a result, clubs cannot demand transfer fees for their athletes once their contract with that athlete has expired. However, similar to Europe, under the Australian transfer system clubs can request transfer fees if an athlete who is currently contracted to them wishes to play for another club.<sup>57</sup>

### CAPS AND DRAFTS

The cap and draft are two of the most controversial issues in professional sport.<sup>58</sup> The primary objective of the cap is to minimise the salaries of professional athletes, whereas the draft is to ensure a competitive balance throughout the league.<sup>59</sup>

The cap developed in the early 1980s, when the NBA had a financial crisis because of the rise of athletes' salaries.<sup>60</sup> The cap allocates each team a certain amount of money to spend on athletes' salaries. Generally, the cap is calculated by projecting the league's gross revenue for that season. The athlete benefits are subtracted from this projected amount, and the remaining money is distributed equally between the teams competing in the league.<sup>61</sup>

The draft was first introduced in 1936 in US football.<sup>62</sup> The draft generally allows the lower ranking teams from the previous season to select from the best athletes entering the league in the upcoming season. Generally, once an athlete is drafted to a club, the drafting club has exclusive rights to contract the athlete.<sup>63</sup> In theory, the draft restricts the richer clubs from signing all the best available athletes, thus maintaining competitive leagues.

The cap and draft impose restrictions on athletes' salaries and ability to choose their employer. The cap and draft provisions are generally found in a player's contract or a collective agreement. If considered in regard to law in general, these restrictions are clear-cut violations of restraint of trade laws. However, in certain situations, various courts have

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<sup>56</sup> D Healey, *Sport and the Law* (3rd ed 2005) 45.

<sup>57</sup> See for example *Elford v Buckley* [1969] 2 NSWLR where Elford demanded a free transfer while contracted to Western Suburbs. The court ruled in favor of the club because Elford was a contracted player.

<sup>58</sup> C Kolonko, *Restraint of Trade in Sport: An International and South African Perspective* (2006) 78.

<sup>59</sup> L Halgreen, *European Sport Law – A Comparative Analysis of the European and American Models of Sport* (2004) 174-5.

<sup>60</sup> The author acknowledges that the first salary cap was introduced by the NBA in 1946, however, it was a trial and lasted only one season.

<sup>61</sup> National Basketball Association, Salary Cap <[www.nba.com/cap](http://www.nba.com/cap)> 15 September 2007.

<sup>62</sup> E Gruver, *The American Football League: A Year-by-Year History* (1997) 17.

<sup>63</sup> L Halgreen, *European Sport Law – A Comparative Analysis of the European and American Models of Sport* (2004) 175.

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allowed leagues to utilise the draft and cap if the court considered them to be reasonable in the interests of the league.

With the exception of MLB, all US professional sports use the cap and the draft. Generally, US courts have justified their ruling in favour of the cap and draft by referring to the objectives that the restrictions provide the league. The objective of the draft and cap is to maintain constant competition in the league.

***Smith v Pro Football***<sup>64</sup>

Smith, the plaintiff, was a college football athlete destined for the NFL. After his final college season, Smith entered the NFL draft. Smith was not drafted until the 17th round. At this time, it was common for draftees to be released during pre-season if they were not drafted in the first 10 rounds. Smith's low draft position limited his bargaining power when negotiating his contract. Smith demanded that he be a free agent, so that he could negotiate with other teams and receive a better contract. The league and club denied Smith's demand.

Smith brought an action, alleging that the NFL draft had unreasonably restrained his trade and violated the doctrine of restraint of trade. The court held that the NFL draft was reasonably necessary to accomplish the business purposes of the league, but that the number of draft rounds was unreasonable, because it was anti-competitive in both its purpose and its effect. As a consequence of *Smith v Pro Football*, the number of rounds of the draft are restricted in US professional sport leagues. Although each sport varies, generally no more than 10 rounds are permitted in US sport.

Unlike in the US, the cap and draft are relatively uncommon in European sports.<sup>65</sup> Several European football leagues have unsuccessfully considered the cap on a number of occasions.<sup>66</sup> One complication is the structure of the European sporting model. For example, the member states may have different taxes and currencies, resulting in complexities in competition between clubs at the European league level.<sup>67</sup> The other predicament is the precedent set by *Dona* and *Bosman*, whereby athletes are considered workers. A salary cap or draft placed upon non-athlete European workers would almost certainly be struck down by the ECJ. Therefore, European leagues have been hesitant to implement these restrictions.

Since the 1970s, Australian leagues, in particular AFL and Rugby League, have attempted to use salary caps and drafts similar to the US.<sup>68</sup> The Australian approach, similar to the US, is that caps and drafts are accepted in so far as it is necessary to protect the interests of the league.<sup>69</sup> This precedent was first established in a well known Rugby League case, *Adamson v Rugby League*.

***Adamson v NSW Rugby League***<sup>70</sup>

Adamson, the plaintiff, bought a claim on behalf of 222 athletes who participated in the NSW Rugby League ('NSWRL'). The NSWRL attempted to implement the draft system after it

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<sup>64</sup> *Smith v Pro Football Inc* 593 F 2d 1173 (DC Circ 1978).

<sup>65</sup> England's *Guinness Premiership* and *Super League* do use the salary cap.

<sup>66</sup> J Arnaut, *Independent European Sport Review* (2006) 91-115.

<sup>67</sup> *Ibid.*

<sup>68</sup> Australian Football League, *History*  
<<http://www.afl.com.au/Season2007/Statistics/History>> 15 October 2007.

<sup>69</sup> *Adamson v NSW Rugby League Ltd* (1991) 31 FCR 242 at 364-5 per Gummow J.

<sup>70</sup> *Ibid.*

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already utilised the cap. Adamson argued that the NSWRL draft rules coupled with the cap were unreasonable restrictions placed upon athletes and were contrary to Australia's restraint of trade laws. The court held that the cap, which had already existed for a number of years, was reasonably necessary to ensure the continuance of the league. The addition of the draft, however, was unreasonable, because the salary cap was already protecting the interests of the league. The draft which limited the athletes' ability to choose their employer was held to be unreasonable and therefore void.

### CONCLUSION

Today, sport is progressively more commercial in nature and athletes are demanding to be treated equally to professionals of other disciplines. As a consequence, restraint of trade is increasingly a focus of the courts. Sporting restraint of trade cases first appeared in US courts nearly a century ago; however, for the courts of Europe and Australia, these cases are a more recent development.

In each of these three jurisdictions, the court's position in restraint of trade issues has swayed between the interests of the clubs/leagues and those of the athlete. The court ruled in favour of the athletes' interests through its decision to grant athletes free-agency upon the expiration of their contracts. With the exception of MLB, courts in all three jurisdictions allow free-agency in all of their sports.

On the other hand, the courts ruled in favour of the clubs/leagues by allowing them to implement caps and drafts in some jurisdictions. This is best demonstrated in the US where all sports, with the exemption of MLB, currently use a cap and draft. In Europe, the precedent set by *Bosman* does not permit caps or drafts, due to the likelihood that the ECJ will strike them down for being an unreasonable restraint on an athlete's trade. Australia tends to compromise between the US and European positions by generally allowing caps but by usually deeming the addition of drafts an unreasonable restraint of trade. Yet, Australia's AFL uses the draft; however, it has not, to the author's knowledge, been challenged in court.

Competing in European leagues is most advantageous from an athlete's perspective, because the courts' decisions generally restrict European clubs and leagues from imposing any mechanisms that would restrict an athlete's trade. For example, Andy Dorman a former Major League Soccer ('MLS') All-Star last season in the US, transferred to a European league, because his four year contract earned him a mere US\$35,000 each season. This move was a result of the restrictions placed upon US athletes resulting in less athlete bargaining power. Dorman explains, 'I had to move to the UK where there is no limit to the amount a club can spend on athletes'.<sup>71</sup> European leagues give athletes, like Dorman, the freedom to negotiate contracts by not placing restrictions such as caps upon them.

From a club/league perspective, the US system which permits caps and drafts represents, first and foremost, club/league interests.<sup>72</sup> While the cap and draft may result in weakening athletes' bargaining power, it benefits the club by lowering the expenses paid in salaries, and benefits the league by maintaining tight competition between clubs. These restrictions do not allow for clubs in the US to dominate the leagues year after year as they do in the English

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<sup>71</sup> Interview with A Dorman, New England Revolution and Major League All-Star (Telephone Interview, 1 November 2007).

<sup>72</sup> The practical result from *MLS v Fraser* is that American leagues are able establish a single-entity league structure in order to avoid expensive salaries and the anti-laws generally. This type of league may be the organisational structure of choice for future leagues.

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Premier League, where Manchester United, Chelsea and Arsenal are at least in the top four at the end of each season.

Australia tends to waver between the American and European positions of implementing caps and drafts. However, Australia tends to balance its position between the leagues/clubs and the athlete, rather than adhering to either the US or Europe position of favouring one side over another. Whereas the US leans more towards the interests of the clubs and leagues, Europe leans further towards the interests of the athletes. Australia appears willing to use the reasoning behind the US and European courts in making decisions in an attempt to balance the interests of the athletes with those of the clubs/leagues. However, Australia's present well-balanced position will face difficulties as its leagues become more commercial in nature and more in-line with US leagues.

As Australia's leagues develop, the courts must continue to balance the interests of the athlete with those of the club and league. This could be done by setting a precedent promoting the use of CBAs. This occurs in the US, where sports are generally exempt from restraint of trade laws when the players' union, representatives of the clubs and league officials, enter into CBAs. In setting this type of precedent in Australia, the courts would encourage players' unions to develop as they have in the US, namely in MLB.

If Australian courts could set a precedent promoting the use of CBAs, as done by the US Supreme Court in *Mackey v National Football League*, which developed the Non Statutory Labor Exemption, then court intervention would not be as necessary. Disputes would be resolved before going to court. The stronger the player unions, the more the interests of the athletes are satisfied. The clubs/leagues would also benefit from this precedent, because they would be less burdened with intervention which can result in revolutionary effects, as in *Bosman*. Ultimately, if the court set a precedent that prohibited court intervention where CBAs had been entered into, then the interests of the athletes would continue to be balanced with those of the clubs and leagues. This balance is crucial to sustaining the satisfaction of both athletes and clubs/leagues, which are equally necessary to the continuance and development of professional sport.<sup>73</sup>

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