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# Restraint Of Trade In Australian Sport - Was the AFL's hand forced on Ben Cousins?

## **Abstract**

Sporting organisations are now sanctioning athletes for off-field conduct. This article considers the law on restraint of trade both at common law, and under the Trade Practices Act, and its relevance to sporting disputes. Specifically, it considers the legality of the suspension of prominent Australian Football League (AFL) player Ben Cousins and the legal issues surrounding the AFL Commission's subsequent deliberations on whether or not to permit Cousins to re-enter the AFL.

## **Keywords**

Restraint, trade, common law, reasonable, unreasonable, legitimate interests, sport, football, Ben Cousins, disrepute, TPA

## **Disciplines**

Law

## RESTRAINT OF TRADE IN AUSTRALIAN SPORT

*Was the AFL's hand forced on Ben Cousins?*

SAM CHADWICK\*

Sporting organisations are now sanctioning athletes for off-field conduct. This article considers the law on restraint of trade both at common law, and under the *Trade Practices Act*, and their relevance to sporting disputes. Specifically, it considers the legality of the suspension of prominent Australian Football League (AFL) player Ben Cousins and the legal issues surrounding the AFL Commission's subsequent deliberation on whether or not to permit Cousins to re-enter the AFL.

Seldom before has a disciplinary sanction applied by an Australian sporting organisation been as topical as in the suspension imposed by the AFL on Brownlow medallist Ben Cousins. In the history of sport, athletes and sporting bodies have been sanctioned for misconduct or non-compliance with contracts, rules or regulations. Regularly, athletes have been prevented from representing clubs or participating in competitions under such rules and regulations. In fewer instances, these athletes (and/or sporting organisations) have sought and obtained relief from the courts claiming that the actions of the club, league and/or governing body constitute an unlawful restraint of trade either at common law or, more recently, also under the *Trade Practices Act 1974* (Cth) (the TPA).

Modern professional sport is big business. Clubs and associations rely heavily on dollars from corporate sponsors. As a result, a greater emphasis is placed on the quality of services performed by athletes and their adherence to contemporary social standards of behaviour. Whilst previously rules and regulations were prescribed for the prohibition on performance enhancing substances, modern sport has seen the evolution towards prohibiting (and investigating) recreational drug use and other misconduct by its athletes in their private lives. Naturally, the frequency of sanctions and suspensions imposed on elite athletes has also increased.

It may be that in certain circumstances disciplinary action taken by sports regulators in relation to recreational drug use may amount to an unlawful restraint of trade.

The case of Ben Cousins is an intriguing one. His playing contract was terminated by his then club the West Coast Eagles. He was then suspended by the AFL. Whilst there may be legal issues around that suspension, it is the AFL's deliberation and determination to permit Cousins to play after the initial 12-month suspension that drew most public interest and which this article addresses.

In the circumstances, could the AFL have legally prohibited Cousins from playing in the AFL after the cessation of initial 12 month ban? Was the AFL concerned that a decision to further prohibit Cousins participating in the AFL result in a successful court challenge? Did the AFL acknowledge internally that it faced a real risk of establishing a potentially devastating precedent for Australian sporting governing bodies?

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## THE INITIAL AFL BAN

### Disciplinary issues in modern professional sport

With the growth of professional sport as a major business industry,<sup>1</sup> the scrutiny placed on players and officials has intensified. Greater emphasis is now placed on both on and off-field behaviour of athletes. Adherence to strict illicit drug policies and codes of conduct not only ensures that the players are equipped to perform to the best of their ability, but avoids the withdrawal of vital sponsorship dollars resulting from corporate sponsors reluctance to be seen to endorse improper (and sometimes illegal) behaviour.

Recently, former Australian Wallaby Lote Tuqiri lodged a claim against the Australian Rugby Union (ARU) for breach of contract, after he was sacked over alleged repeated disciplinary issues.<sup>2</sup> The ARU chose not to challenge the claim, but instead reached a settlement with Tuqiri avoiding a court determination.<sup>3</sup> In 2008, Australian swimmer Nick D'Arcy was dropped from the Australian Swimming Team for the 2008 Beijing Olympic Games for bringing the team into disrepute, after being charged with assault.<sup>4</sup> Whilst D'Arcy was partially successful in a court challenge against the decision, he did not achieve his primary objective of being reinstated to the team for the Olympics.<sup>5</sup> D'Arcy was also subsequently dropped from the team for the 2009 World Championships after receiving a conviction.<sup>6</sup> There have been suggestions that AFL Coleman Medallist Brendan Fevola seems destined to face similar punishment if he attracts further controversy for his behaviour. The AFL has already indicated he could face suspension for past wrongdoing.<sup>7</sup>

### Cousins' conduct

Before the start of the 2006 season, Cousins was caught fleeing the driver's seat of his vehicle to avoid a police breath test 50 metres away. He was subsequently forced to resign as captain of the West Coast Eagles.<sup>8</sup>

In early 2007, West Coast grew increasingly concerned about Cousins' erratic behaviour, allegedly as a result of increasing recreational drug use.<sup>9</sup> Notwithstanding this, Cousins form

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- 1 See, eg, the AFL's 2008 revenue was \$302 million: '2008 Annual Report' (2008) *Australian Football League*, page 88. <[http://www.afl.com.au/portals/0/afl\\_docs/afl\\_hq/annual\\_reports/2008/p85-95-Finance\\_and\\_Legal.pdf](http://www.afl.com.au/portals/0/afl_docs/afl_hq/annual_reports/2008/p85-95-Finance_and_Legal.pdf)>.
  - 2 Larissa Cummings, *Lote Tuqiri Sacking Detail Kept Secret* (2009) *The Daily Telegraph Online* <<http://www.dailytelegraph.com.au/sport/lotu-tuqiri-sacking-detail-kept-secret/story-e6frefni-1225759100913>> at 7 August 2009.
  - 3 Jon Geddes, *Lote Tuqiri Strikes Truce with ARU* (2009) *News.com.au* <[http://www.news.com.au/couriermail/story/0,20797,25976888-10389,00.html?from=public\\_rss](http://www.news.com.au/couriermail/story/0,20797,25976888-10389,00.html?from=public_rss)> at 24 August 2009.
  - 4 Karen Barlow, *Transcript from program 'The World Today', Nick D'Arcy Booted from Olympics Squad* (2008) *ABC Online* <<http://www.abc.net.au/worldtoday/content/2008/s2220832.htm>> on 18 April 2008.
  - 5 *Nick D'Arcy v Australian Olympic Committee* CAS 2008/A/1574.
  - 6 Meg Purtel, *Transcript from program 'PM', Nick D'Arcy Dropped Again* (2009) *ABC Online* <<http://www.abc.net.au/pm/content/2008/s2537611.htm>> on 7 April 2009.
  - 7 AAP, *AFL FollowUp on Fevola Allegation* (2009) *The Age Online* <<http://news.theage.com.au/breaking-news-sport/afl-follow-up-on-fevola-allegation-20091016-h0yh.html>> at 16 October 2009.
  - 8 David Weber, *Transcript from program The World Today, Brownlow Medallist Ben Cousins Resigns from West Coast Eagles Captaincy* (2006) *ABC Online* <<http://www.abc.net.au/worldtoday/content/2006/s1575110.htm>> on 21 February 2006.
  - 9 David Markr, *Transcript from program The World Today, West Coast Eagles Suspend Cousins* (2007) *ABC Online* <<http://www.abc.net.au/pm/content/2007/s1877152.htm>> on 20 March 2007; Finn

in pre-season trial matches was – as usual – exceptional. Subsequently, on the eve of the 2007 season, West Coast suspended Cousins indefinitely and insisted he attend drug rehabilitation. He did so at a prominent clinic in the United States.<sup>10</sup> Later that year, Cousins returned to play with West Coast.

In October 2007 Cousins was arrested in Perth for drug possession and refusing a driver assessment.<sup>11</sup> West Coast Eagles terminated his playing contract the next day.<sup>12</sup> The charges were subsequently dropped.<sup>13</sup>

### **The AFL imposed ban and the possible challenge of the ban**

Following Cousins' arrest, the AFL Commission held a hearing in relation to his conduct. Cousins was present at the hearing on 19 November 2007. The AFL imposed a 12 month suspension on Cousins from playing in the competition.<sup>14</sup>

The AFL Commission's suspension was for 'bringing the game into disrepute' deeming Cousins' conduct unbecoming of an AFL player.<sup>15</sup> Importantly, the AFL Commission did so under the AFL Code of Conduct<sup>16</sup> and not the Illicit Drugs Policy.<sup>17</sup> Cousins had not tested positive to any prohibited substance (including recreational drugs) during the previous 10 years he had been playing and subject to the AFL drug testing regime.

The AFL drew widespread criticism for the action against Cousins, particularly as he had reportedly never tested positive to an AFL drug test. The ban was seen by many as going outside its own policies to target a single player. However, Cousins did not challenge the charge of 'bringing the game into disrepute', nor the 12 month sentence imposed. It is not the purpose of this article to assess in detail his prospects of success had he chosen to do so. Rather, this article addresses the issues relevant to the AFL's subsequent deliberation and decision to permit Ben Cousins to re-enter the AFL competition for the 2009 season.

Before doing so, it is worth briefly considering the possibility that Cousins could have challenged the initial AFL ban. In a recent hearing in the Court of Arbitration for Sport (CAS), Mikhaylo Zubkov, a Ukrainian swimming coach participating in the World Swimming Championships in Melbourne, was partially successful in his appeal against world swimming governing body's, FINA's, decision to suspend him for bringing the 'sport into disrepute'.<sup>18</sup> Mr Zubkov was filmed involved in a physical altercation with his daughter, Kateryna, a swimmer at the Championships, whom he was coaching. The issues and findings arising from the various hearings in relation to Mr Zubkov's conduct are rather detailed. However, it

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Bradshaw and Mick Cullen, *'Enough's Enough' – Cousins Suspended* (2007) AFL.com.au <<http://www.afl.com.au/Season2007/News/NewsArticle/tabid/208/Default.aspx?newsId=39784>> on 20 March 2007.

10 Karen Collier, *Ben Cousins in Rehabilitation, Father Says* (2007) The Herald Sun Online <<http://www.heraldsun.com.au/news/victoria/cousins-in-rehab-dad/story-e6frf7kx-1111114771707?from=mostpop>> on 1 November 2007.

11 ABC news, *Cousins Slapped with 12-month Ban* (2007), ABC Online <<http://www.abc.net.au/news/stories/2007/11/19/2095135.htm>> at 19 November 2007.

12 Ibid; David Lowden, *He's Gone – Eagles Sack Cousins* (2007) Wide World of Sports <<http://www.ninemsn.com.au/article.aspx?id=306770>> on 17 October 2007.

13 Above n 11.

14 Ibid.

15 Ibid.

16 'Players' Code of Conduct' *Australian Football League*, Clause 4.1.

17 *AFL 'Illicit Drugs Policy'*, February 2007.

18 *Mikhaylo Zubkov v The Federation Internationale, the Natation (FINA)*, CAS 2007/A/1291 (Zubkov); Paul Horvath, 'Justice Delayed Is Justice Denied, Or Is It?' (2008) 82(7) *Law Institute Journal*, 48, 49.

is important to note that the CAS panel held that Zubkov did not bring the sport of swimming into disrepute and, importantly, that he had not hit his daughter. Mr Zubkov was, however, found guilty of 'misbehaviour' and 'conduct unbecoming' of a registered team official under the FINA Code of Conduct.<sup>19</sup> Consequently, CAS found that FINA's lifetime expulsion of Mr Zubkov (to be reconsidered after 6 years) excessive and disproportionate and determined a suspension of 8 months a more appropriate and proportionate punishment for such conduct.<sup>20</sup> The panel noted that 'public opinion of the sport must be diminished as a result of the conduct in question'.<sup>21</sup>

It is imperative to understand that a charge of 'bringing the game into disrepute' can only be substantiated in circumstances when the relevant conduct actually brings the sport into disrepute, not that it is likely or possible to do so.<sup>22</sup> Therefore, there must be actual evidence of such 'disrepute'. The Zubkov case, whilst not binding on Australian courts, provides a framework upon which Cousins may have challenged the initial suspension imposed by the AFL for - broadly - the same offence.

It is worth noting that Cousins could have sought to refer the matter to CAS rather than appeal to an Australian Court. The CAS's jurisdiction includes, inter alia, hearing disputes of a disciplinary nature following a decision by a sports organisation.<sup>23</sup>

#### **AFL's deliberation**

Ben Cousins' management made numerous requests, over a number of months following the suspension, for criteria to be established in order to permit possible re-introduction into the AFL.<sup>24</sup> Cousins was never provided such criterion.

Eventually, at an AFL Commission hearing on 18 November 2008, 12 months after the initial suspension, the AFL Commission granted Cousins' application to be eligible to be drafted onto a club's list in the draft for the 2009 season. Such eligibility was, however, subject to strict individualised drug testing conditions.<sup>25</sup>

#### **RESTRAINT OF TRADE IN SPORT**

Those involved in professional sport (players, officials, clubs, sponsors, leagues and governing bodies) enter into contracts to protect their interests. The sporting leagues and governing bodies need to protect the league and, often, the sport itself. To do so, governing bodies have created a mass of rules and regulations to protect their reputation, from player Codes of Conduct to Anti-doping Codes to Illicit Drug Policies. Such rules and regulations ordinarily create limitations far more onerous than those imposed on a standard employee.

From Ben Johnson to Ben Cousins, drug use by sports people has always attracted public interest. Originally, rules and regulations were formulated to protect the integrity of the

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19 *Mikhailo Zubkov v The Federation Internationale, the Natation (FINA)*, CAS 2007/A/1291 at 56; Horvath, above n 18, 50.

20 Ibid 68; Horvath, above n 18, 50.

21 Ibid 60; Horvath, above n 18, 51.

22 Horvath, above n 18, 50-1.

23 Court of Arbitration for Sport, *20 Questions about the CAS* (2009), CAS website <<http://www.tas-cas.org/20question>> at 1 October 2009.

24 Mark Robinson, *Ben Cousins Chasing Football Comeback Criteria from AFL* (2008), Perth Now.com.au <<http://www.news.com.au/perthnow/story/0,21598,23734917-5014215,00.html>> at 21 May 2008.

25 AFL Commission Chairman Mike Fitzpatrick, *The AFL Statement on Cousins* (2008), AFL.com.au <<http://www.afl.com.au/news/newsarticle/tabid/208/default.aspx?newsId=69870>> at 18 November 2008.

relevant sport by prohibiting the use of performance enhancing substances by athletes. Contemporary professional sport has seen the rapid evolution towards testing for and prohibiting the use of recreational drugs and other misconduct by sportspersons in their private lives. Such disciplinary action taken by sports regulators in relation to recreational drug use may constitute an unlawful restraint of trade in certain cases, either at common law or under the TPA.

There have been a number of cases in Australia where sports people have been successful in a restraint of trade argument against a club or governing body, some of which are discussed below.

The key legal principles regarding restraint of trade in sport are relatively settled.

In professional sport, there are a number of agreements and undertakings that impose conditions that operate as a restraint of trade. Many of these restraints are necessary and reasonable, some more tenuous to the proper administration of the sport. The general issue in determining whether a restraint of trade in sport is reasonable or not, involves a balancing of the interests of the sport, the club, and society as against the adverse effects on the player (such as lost income).

The three key categories that apply in a sporting context are:

1. draft and transfer systems between players and leagues;
2. disciplinary proceedings against athletes (or officials); and
3. restriction on participation in competitions.<sup>26</sup>

A number of athletes have been successful in a wide range of unlawful restraint of trade arguments against sporting bodies (under both the TPA in Australia and the common law doctrine), including in relation to:

- the retention and transfer rules in relation to an English football association;<sup>27</sup>
- the Victorian Football League's (VFL) now obsolete player zoning system;<sup>28</sup>
- the New South Wales Rugby League's internal draft restricting an employee's freedom from choosing his employer;<sup>29</sup>
- the placing of bans on players who participate in non-sanctioned tours or competitions;<sup>30</sup>
- the limits placed on players and coaches regarding their comments made in the media;<sup>31</sup> and

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26 Annette Greenhow, 'Anti-Doping Suspensions and Restraint of Trade in Sport' (2008) *Sports Law eJournal*, Bond University, 1, 2. <<http://epublications.bond.edu.au/slej/7>>.

27 See, eg, *Eastham v Newcastle United* [1964] Ch. 413 (under common law doctrine).

28 See, eg, *Hall v Victorian Football League and Clarke* [1982] VR 64; (1977) 58 FLR 180; *Foschini v Victorian Football League* (Unreported, Sup Court of Victoria, Crockett J, 15 April 1983) (under common law doctrine).

29 See, eg, *Adamson v New South Wales Rugby League* (1991) 27 FCR 535; 100 ALR 479 (under common law doctrine).

30 See, eg, *Greig v Insole* [1978] 1 WLR 302 (under common law doctrine); *Hughes v Western Australian Cricket Association* (1986) 19 FCR 10; (1986) 69 ALR 660; ATPR 40-736 (under the TPA); *Barnard v Australia Soccer Federation* (1988) 81 ALR 52 (under common law doctrine).

31 See, eg, *Beetson v Humphreys* (Unreported, Sup Ct of NSW, Hunt J, 30 April, 1980), 28 (under common law doctrine).

- regulations prescribing the maximum wage a player could earn (not to be confused with 'salary caps', which control the amount each club in a competition can spend on total payments to all of its players, not to a particular individual).<sup>32</sup>

Certain other regulatory restraints of trade imposed by sporting organisations are now regularly accepted as being reasonable and legitimate and in the interests of the public. These include salary cap systems,<sup>33</sup> draft systems and objective criteria which are used to exclude (or remove) teams from the relevant league.<sup>34</sup>

Since the introduction of the competition provisions of the TPA in Australia, applicants have ordinarily alleged contravention of the anti-competitive exclusionary provisions in s 45 of the TPA in conjunction with a claim for unlawful restraint of trade under the common law. Whilst the criteria for claims made under the common law and under s 45 of the TPA are similar in a number of respects, they have some important distinctions. For claims made under the TPA causes of action plaintiff sporting organisations have ordinarily had greater success than individual athletes. The reasons for this, and the potential implications for athletes such as Ben Cousins, are outlined below.

### At common law

(a) *Nordenfelt*

The principles of the common law restraint of trade doctrine are well settled and apply equally in the sporting context.<sup>35</sup> There is a substantial body of case law dealing with restraint of trade arguments in relation to athletes and sporting organisations.

The starting point when considering a restraint of trade argument is often been said to be to consider the judgment of Lord McNaghten in *Nordenfelt v Maximum Nordenfelt Guns and Ammunition Co Limited* [1874] AC 535 (*Nordenfelt*).<sup>36</sup> His Lordship declared that all restraints were void as being contrary to public policy, unless the restraint was 'reasonable' and not contrary to the public interest.

Firstly, it must be established that there is a restraint of one's 'trade'. Thereafter, in determining an unlawful restraint of trade claim, a court is faced with three fundamental questions:

1. Is there a legitimate interest worth protecting?
2. If so, is the restraint imposed reasonable in the circumstances? And,
3. If so, is the restraint against the public interest?<sup>37</sup>

*Nordenfelt* has been held to be the position in Australia generally and in relation to sporting disputes.<sup>38</sup> In *Adamson v New South Wales Rugby League*<sup>39</sup> (*Adamson v NSWRL*), the plaintiff alleged that the league's draft, used to control transfer of

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32 See, eg, *Johnston v Cliftonville Football & Athletic Club Ltd* [1984] NI 9 (under common law doctrine).

33 C Davies, 'Contemporary Issues in Sports Law: Salary Caps' (2003) 3 *The Verdict* 20-1.

34 See *South Sydney District Rugby League Football Club Limited v News Limited* (2000) 177 ALR 611.

35 Maeve McDonagh, 'Restrictive Provisions in Player Agreements' (1991) 126 *Australian Journal of Labour Law* 132; *Eastham v Newcastle United Football Club* [1963] 3 All ER 139 per Wilberforce J.

36 Greenhow, above n 26, 1.

37 *Nordenfelt v Maximum Nordenfelt Guns and Ammunition Co Limited* [1874] AC 535; Horvath, n 18, 53.

38 See above n 29; Greenhow, above n 2.

39 Above n 29.

players between clubs, constituted an unlawful restraint of trade under the common law doctrine, as well as under the TPA. The rules of the competition included the 'internal draft', whereby players who wished to play for another club for the next season (at the expiry of their contracts for the previous season) outlined the terms and conditions for which they would play rugby league. The players then submitted themselves to the draft on such terms and conditions. Any club could then select them to play for that club for the following season in the draft. Clubs were ranked in an order of selection preference and the players had no freedom to choose which club they would play for. The Full Federal Court, in allowing the appeal and declaring the relevant part of the league's rules void as a restraint of trade, applied *Nordenfelt*.<sup>40</sup> Justices Sheppard, Wilcox and Gummow determined that the rules of the league's 'internal draft' imposed a greater restraint than was necessary for the adequate protection of the interests of the league and its members.<sup>41</sup>

(b) Organisation's 'legitimate interests'

Upon receipt of a restraint of trade claim in sport, courts need to identify the legitimate interests of the relevant club, league and/ or sports organisation imposing the restraint.<sup>42</sup>

According to *Buckley v Tutty* [1972] 125 CLR 353 (*Buckley v Tutty*), an essential starting point in identifying whether the restraint is 'reasonable' and 'necessary', is to identify the 'legitimate interests' of the league or association. In *Buckley v Tutty*, the Australian High Court followed *Eastham v Newcastle United Football Club*<sup>43</sup> (*Eastham*) in the United Kingdom. In *Eastham*, the court acknowledged that the governing association had a 'special and legitimate' interest in ensuring that the football remained of a high quality by having competitive evenness between rival teams, and therefore imposing restraints to facilitate that objective.<sup>44</sup>

An interesting and successful restraint of trade claim occurred in the UK, when Tony Greig (former test cricketer and current commentator) alleged an unlawful restraint of trade was imposed on him by the International Cricket Conference (ICC). The claim was made under the common law doctrine and was in relation to the ICC's rules prohibiting Greig (and other players) from participating in the World Series Cricket Competition organised by Kerry Packer.<sup>45</sup> This rule also disqualified the players from eligibility to play in test matches organised by the ICC. The three plaintiffs, Tony Greig, John Snow and Michael Proctor, had entered into contracts with the World Series Cricket organisation to play in the series of matches organised in Australia for 1-5 years. The plaintiffs sought a declaration that the relevant rules were an unlawful restraint of trade. Slade J stated that the ICC and the Test and County Cricket Board had a legitimate interest in protecting, most importantly, the financial wellbeing of Test Cricket. However, Slade J found that the rules went beyond what was 'reasonable and necessary' to protect the legitimate interest of the sport and, importantly, that the rules would deprive the community from seeing elite

40 *Adamson v New South Wales Rugby League* (1991) 103 ALR 319, 340.

41 *Ibid* 373.

42 See, eg, above n 27; *Greig v Insole* [1978] 1 WLR 302; above n 40; *Buckenara v Hawthorn Football Club Ltd* [1988] VR 39; *Beetson v Humphreys*, unreported, Sup Ct of NSW, Hunt J, 30 April 1980, 28.

43 Above n 27.

44 Paul Horvath, 'Organisational Structure, Economics and Best Governance Practice in Non-Professional Sporting Leagues' (2008) 3(1) *Australian and New Zealand Sports Law Journal* 69, 82.

45 *Greig v Insole* [1978] 1 WLR 302 (under common law doctrine).

sportsmen from displaying their skills which was contrary to the public interest. Accordingly, the detriment to these players and the public significantly outweighed the probable benefits to the ICC, that players be deterred from contracting with private non-sanctioned competitions.<sup>46</sup>

Unlawful restraints of trade can also apply in relation to sportspersons' ancillary business interests. In *Beetson v Humpreys*,<sup>47</sup> a New South Wales Rugby League player and a coach challenged the league's prohibition imposed on players, coaches and officials from commenting in the media on the decisions of referees and administrators. Relevantly, the two plaintiffs both contributed newspaper columns in relation to rugby league. Hunt J acknowledged that the league is permitted to protect not only its own interests, but those of its related or member bodies (such as its clubs).<sup>48</sup>

His Honour then identified the three legitimate interests of the league, namely:

'attaining and retaining players in the game (particularly the young ones)';

'protecting referees, touch judges and other officials from unfavourable criticism'; and

'ensuring that the life of those persons engaged in the administration of the league ... is not made more difficult by exposing their decisions to well-publicised criticism.'<sup>49</sup>

In short, the defendant claimed that unless prevented, the public criticism of clubs, coaches, referees and/or decisions of the league itself would undermine the future of the sport by deterring people from playing (particularly young players), refereeing or administering the game. It was noted that the league was seeking to preserve the game's future.<sup>50</sup>

Hunt J determined that the limit on players and coaches from making such public comment was 'completely unnecessary for the protection of the league's interests'.<sup>51</sup>

In *Buckenara v Hawthorn Football Club Limited (Buckenara)*<sup>52</sup> the Court noted that the 'legitimate interests' of football clubs are to ensure (if possible) highly skilled players represent them and not competitors of the club.<sup>53</sup>

(c) What is a 'reasonable' restraint?

In determining whether a restraint is reasonable in the circumstances, there are a range of relevant considerations a court will take into account. However, what is reasonable 'in the circumstances', means what is reasonable 'as between the parties.' Firstly, it is worth noting that the defendant accepts the onus of establishing that the relevant restraint is not unreasonable by reference to the interests of the parties

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46 K E Lindgren, 'Sport and the Law: The Player's Contract' (1991) 135 *Journal of Contract Law* 140-1; above n 45, 354.

47 McDonagh, above n 35, 135; above n 31, 28.

48 Above n 31, [19].

49 Above n 31, [20].

50 Ibid.

51 Paul Horvath 'Restraint of Trade in Australian Sport', *Sportslawyer* <[www.sportslawyer.com.au/](http://www.sportslawyer.com.au/)> at 7; above n 31, 28.

52 Above n 52.

53 Above n 52, [44]-[48].

concerned.<sup>54</sup> This is best explained by referring to the courts' reasoning in previous cases.

In 1982, a promising young footballer who resided in the Collingwood Football Club zone sought to play for rival club South Melbourne. He sought a clearance from Collingwood on the basis that he was a South Melbourne supporter and wanted to represent them. Collingwood refused his application for a clearance to South Melbourne, consistent with the rules and regulations of the VFL at the time. The player, Peter Hall, claimed in the Supreme Court of Victoria that the rules and regulations were void as an unreasonable restraint of trade in contravention of Part IV of the TPA and the common law doctrine (*Hall v VFL*).<sup>55</sup> Murray J held in favour of the player finding, amongst other things, that professional Australian Rules Football constituted 'trade', the player intended to accept payment for playing football (in the future) and that the restraint exceeded what was 'necessary' to protect the VFL's legitimate interests.<sup>56</sup> The Court stated that the VFL bore the onus to show that the rules and regulations were a necessary restraint of trade. They were unable to do so. In effect, the Court invalidated the relevant rules preventing clearances for players to play for a club of their choice and prevented the VFL from applying the rules.<sup>57</sup>

In 1978 a West Perth footballer, Brian Adamson, sought a clearance from the West Perth Football Club participating in the Western Australian Football League (WAFL) to play for the Norwood Football Club in the South Australian National Football League (SANFL) for the following season. Importantly, whilst Adamson had played two matches for West Perth in the 1978 season, no agreement or contract had been entered into for Adamson to play with West Perth for that season.<sup>58</sup> He had however submitted to the rules of the league as a registered player. Adamson then relocated to South Australia for non-football related employment. The WAFL and SANFL were affiliated with the Australian National Football League, and each league and its affiliated clubs had certain rules restricting player transfers between associated clubs and leagues. West Perth and the WAFL refused to grant a clearance to Adamson to play for Norwood under these rules. Adamson applied to the Federal Court, claiming that the relevant rules of the West Perth Football Club, the WAFL, the SANFL and the Australian National Football League regarding player transfers constituted an unlawful restraint of trade under both the common law doctrine, and the TPA (*Adamson v West Perth*).<sup>59</sup> Ultimately, the Court determined that Adamson had failed make out all elements of the TPA claim,<sup>60</sup> but nonetheless held that the relevant rules were a breach of the common law restraint of trade doctrine.<sup>61</sup> In short, Toohey J held that the clearance and permit provisions of the rules and regulations excluding Adamson from plying his trade as a professional footballer for 3 years and depriving him the potential to be paid for playing football, was unreasonable and unjustified.<sup>62</sup>

On the other hand, in *Buckenara*,<sup>63</sup> the Supreme Court of Victoria determined that Hawthorn's refusal to permit Gary Buckenara to return home and play for the West

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54 See, eg, above n 31, 18; *Hall v Victorian Football League & Clarke* [1982] VR 64; (1977) 58 FLR 180.

55 *Hall v Victorian Football League & Clarke* [1982] VR 64; (1977) 58 FLR 180.

56 *Ibid* 65.

57 Horvath, above n 51, 5.

58 *Adamson v West Perth Football Club Inc* (1979) 27 ALR 475, 478.

59 *Adamson v West Perth Football Club Inc* (1979) 27 ALR 475.

60 *Ibid* 479-80.

61 *Ibid* 480-1.

62 *Ibid*.

63 Above n 52.

Coast Eagles was a reasonable restraint of trade.<sup>64</sup> Buckenara, a very talented footballer originally from Western Australia, contracted in December 1984 to play for VFL club Hawthorn for the 1985 and 1986 seasons. The contract included an option for the club to renew the contract for an additional 2 years. Buckenara played in Hawthorn's premiership in 1986. During that season, it was revealed that the West Coast Eagles were due to enter the VFL competition for the following season, and in doing so becoming the inaugural Western Australian club to play in the VFL. Consequently, Buckenara wished to free himself of his Hawthorn contract and play for West Coast for the 1987 season. Buckenara claimed that whilst the contract specified that Hawthorn could renew his services for 1987, he was assured during contract negotiations in 1984 that the club would not stand in his way should he wish to return to Perth after the 1986 season. The Court deemed that Hawthorn's reliance on this clause was *not* an unreasonable restraint of trade and dismissed the plaintiff's claim.<sup>65</sup> Crockett J determined that courts are likely to be very reluctant to find a restraint of trade existing in relation to the performance of services within the term of a contract. His Honour went on further to state that the restraint of trade provisions in the agreement were necessary to protect the 'legitimate business interests' of the club, and it would require an exceptional state of affairs for such clauses in a negotiated contract to be deemed unnecessary.<sup>66</sup>

(d) Not injurious to the public interest

The court must consider whether the restraint is adverse to the public interest.<sup>67</sup> Whilst a restraint may be reasonable as between the parties, it will be unenforceable at law if it is unreasonable in the public interest.<sup>68</sup> Accordingly, the public interest question becomes crucial to those challenging the restraint of trade if the restraint has been deemed to be reasonable as between the parties.

In *Beetson v Humphreys*, the restraint was held to be unlawful as being unreasonable on the plaintiffs in the circumstances. However, the Court stated that the plaintiffs had failed to show that the restraint was unreasonable in the public interest, as a separate and independent ground for declaring the restraint unenforceable at law.<sup>69</sup> In doing so, Hunt J confirmed that the plaintiffs bore the onus for showing that the restraint is injurious to the public interest.

As noted earlier from *Nordenfelt*, all unreasonable restraints themselves are contrary to public policy and therefore are presumed to be adverse to the public interest.

However, this is not an easy threshold to meet if the restraint is, *prime facie*, 'reasonable' as between the parties. Hunt J noted that the independent ground of damage to public interest is ordinarily only invoked in monopoly cases, or in circumstances where the parties are of unequal bargaining power.<sup>70</sup> His Honour went on:

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64 Horvath, above n 51, 7.

65 Above n 52, 45.

66 Above n 52, 45; Crockett J cited Lord Reid J reasoning (at 294) from the well known House of Lords decision in *Esso Petroleum Co Limited v Harper's Garage (Southport) Limited* [1968] AC 269; 1 All ER 699.

67 A Buti, 'Salary Caps in Professional Team Sports: An Unreasonable Restraint of Trade' (1999) 14 *Journal of Contract Law* 130, 151 - 152.

68 *Ibid.*

69 Above n 31, 41 per Hunt J.

70 Above n 31, 37 per Hunt J.

All of these cases suggest that it would be a rare situation where a restraint which is not unreasonable in the interests of the parties would otherwise be injurious to the public interest. But that does not mean that such situations cannot exist.<sup>71</sup>

### The TPA and case examples

Broadly, s 45 of the TPA prohibits conduct in trade or commerce that creates or enforces part of any agreement that is exclusionary or which substantially lessens competition.

Successful TPA restraint of trade claims are generally made by applicants which are sporting organisations, being clubs, leagues or governing bodies. This is because in accordance with s 45(2), persons who perform work under a 'contract of service', are excluded from TPA protection.<sup>72</sup> This is discussed further below.

#### (e) Trading Corporation

Firstly, to be properly enlivened, the TPA requires that the organisation whom the conduct is alleged against be a 'trading corporation.' In *Adamson v NSWRL*, the court stated that an overview of a body's current activities was the only clear guide to ascertain its character. The court determined that trading was a major source of income for and/or, was a principal activity of the organisations (the league and its clubs), and they were therefore properly treated as 'trading corporations'. Murphy J also noted that a body could be a trading corporation even if trading was incidental but not insubstantial. Accordingly, the league and all the clubs constituted 'trading corporations' and were subject to the TPA.<sup>73</sup>

Subsequently, in *Hughes v Western Australian Cricket Association*,<sup>74</sup> (Hughes) Toohey J found that the West Australian Cricket Association (WACA) was a sufficiently complex and sophisticated organisation dealing with large sums of money to constitute a 'trading corporation'.<sup>75</sup> However, Toohey J held that the WACA's cricket clubs, whilst having activities that were of a trading nature such as bar facilities, were not significant enough for the clubs to constitute a 'trading corporation'.<sup>76</sup> Importantly, ex-Australian test cricket captain Kim Hughes was consequently successful in his restraint of trade argument against the WACA after it imposed a ban on him and other cricketers who had participated in a 'rebel' tour of South Africa from being able to play cricket in Australia (under its rules and regulations).

It is now generally accepted that major sporting organisations are 'trading corporations' at law.

#### (f) The two limbs of s 45

Sections 45(2)(a) and (b) and s 46 of the TPA operate to place legislative regulation on restraints of trade, and have been used by sportspersons to challenge restrictive contractual provisions.<sup>77</sup>

Section 45(2) has two limbs:

*A corporation shall not –*

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71 Above n 31, 38 per Hunt J.

72 See above n 59.

73 McDonagh, above n 35, 139

74 *Hughes v Western Australian Cricket Association* (1986) 19 FCR 10; [\(1986\) 69 ALR 660](#); ATPR 40-736.

75 Ibid 675-6 per Toohey J.

76 Ibid 677-80 per Toohey J.

77 McDonagh, above n 35, 140-7; Greenhow, above n 26, 4.

- (a) *make a contract, arrangement or arrive at an understanding if –*
  - (i) *the proposed contract, arrangement or understanding contains an exclusionary provision; or*
  - (ii) *a provision of the proposed contract, agreement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or*
- (b) *give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding arrived at, before or after the commencement of this section, if that provision:*
  - (i) *is an exclusionary provision, or*
  - (ii) *has the purpose, or has or is likely to have the effect, of substantially lessening competition.*

The cases involving disputes between athletes, their clubs and their governing bodies have differentiated between the two limbs of s 45(2). The majority of successful cases have been run under the first limb of s 45(2),<sup>78</sup> which prohibits an organisation creating or giving effect to provision in a ‘contract, arrangement or understanding’ that contains an ‘exclusionary provision’. The second category of s 45(2) prohibits a corporation making or giving effect to a clause in a ‘contract, arrangement or understanding’ which has the ‘purpose or likely effect of substantially lessening competition’.

The affect of the definition of ‘exclusionary provision’ in the TPA covers any provision between legal persons with the purpose of restricting the limitless supply or acquisition of goods or services from particular persons or classes of persons in particular situations.<sup>79</sup> As outlined in *Hughes*, it is the subjective purpose of those engaging in the relevant conduct which determines whether the relevant provision is exclusionary or not.<sup>80</sup>

The second limb of s 45 only applies when the agreement has the effect of ‘substantially lessening competition’. The definition of competition in s 45(3) is competition in any market in which a corporation supplies or acquires goods or services.

(g) Contract, arrangement or understanding

The term ‘contract, arrangement or understanding’ ensures that s 45(2) is wide in scope.<sup>81</sup> Importantly, it does not require the existence of a contract.

In *Adamson v West Perth*, notwithstanding that the claim failed in respect of the TPA allegation, the Federal Court determined that the rules of the Australian National Football League, the WAFL, the SANFL and the West Perth Football Club were, by definition, a ‘contract, arrangement or understanding’ in accordance with s 45 of the TPA.<sup>82</sup> In *Hughes*, a rule prohibiting a player from participating in a game not recognised or authorised by the Australian Cricket Board or the WACA, was deemed to constitute an ‘understanding’ for the purposes of the TPA.<sup>83</sup> Toohey J stated that for the rules of an organisation to constitute a ‘contract’ as between its members (as

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78 Greenhow, above n 26, 5.

79 Ibid 6.

80 Above n 74, 662.

81 McDonagh, above n 35, 140.

82 Above n 59, 75; McDonagh, above, n 140.

83 Above n 74, 36, per Toohey J.

opposed to an ‘understanding’), there must have existed an intention that the rules should give rise to enforceable legal relations.<sup>84</sup>

The rules in question in *Hughes* and *Adamson v West Perth* are typical of a sporting league or federation. Ordinarily, athletes do not negotiate or sign such rules and regulations, but rather undertake to adhere to them by agreeing to participate in the relevant competition.

(h) ‘Services’ obstacle

Whilst it is fair to assume that the default position is that most players of modern professional team sports are employees, each case must be considered in light of the circumstances.

The two limbs of s 45(2) require the supply and acquisition of ‘services’ for conduct to fall under the ambit of either limb.<sup>85</sup> Section 4(1) of the TPA then expressly excludes from the definition of services ‘the performance of work under a contract of service’ (i.e. employees). This hurdle was unable to be overcome in *Adamson v West Perth*, where Northroth J found that Adamson was performing his work under a ‘contract of service’ as an employee of the club and therefore, did not meet the requirements of s 45(3).<sup>86</sup>

Section 45 of the TPA only applies to ‘contracts for services’. Only athletes ‘whose contracts are such as to provide for what might be described as the ordinary measure of control by the club over their activities as players’ are employees.<sup>87</sup> At common law, a ‘contract of service’ normally represents the relationship where a person is employed by another person and works on account of, or in the business of, that other person. On the other hand, a ‘contract for service’ is when the individual is self-employed and works on his or her own account (i.e. a contractor). The courts tend to examine the entirety of the relevant contract or understanding and to determine whether, on balance and in the circumstances, the person is working in the service of another or is working on his or her own behalf.

All successful TPA cases regarding the existence of an exclusionary provision involve athletes performing under a ‘contract for services’.<sup>88</sup> In *Hughes*, one of the grounds for attacking the WA Cricket Council rule preventing players from participating in cricket matches other than those recognised by the Australian Cricket Board or the WACA, was that it involved a ‘contract, arrangement or understanding’ containing an exclusionary provision. In determining the claim by the player, Toohey J noted that:

The question is whether they [the Respondents] were competitive for the services of a cricketer affected by the alteration of the rule and whether they entered into a contract or arrived at an understanding... for the purpose of preventing, restricting or limiting the supply of services from the applicant.

Toohey J held that the WA Cricket Council rule met this test and therefore constituted an exclusionary provision within the meaning of the TPA.

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84 *Buckley v Tutty* (1972) 125 CLR 353.

85 See definition of ‘exclusionary provision’ in s 4D of the TPA.

86 Above n 59, 505-7; McDonagh, above n 35, 141.

87 *Barnard v Australia Soccer Federation* (1988) 81 ALR 52 per Pincus J.

88 McDonagh, above n 35, 142; See above n 74, where Toohey J held that Hughes was not an ‘employee’ and therefore not excluded from recourse under the TPA.

It was acknowledged in *Adamson v West Perth*, that a professional footballer is an employee of the club which acquires their 'services'. Additionally, in *Adamson v NSWRL*, the full court of the Federal Court held that New South Wales Rugby League players were not providing 'services' within the definition of the term in s 4 of the TPA, as performance of work under a 'contract of service' is excluded from that definition.<sup>89</sup> It was noted by Sheppard J that before players become entitled to play for a club in the league, they were required to enter into a standard form contract. All of these standard form contracts provided for employment of the players by their club. Sheppard J then stated that, in the circumstances, there was no evidence suggesting the players provided services as independent contractors rather than employees.<sup>90</sup>

It is worth noting that in *Barnard* Pincus J considered whether a semi-professional footballer was or was not protected by the TPA. In the end, Pincus J decided that it was unnecessary to determine this, as 'the case at general law is fairly clear'<sup>91</sup> and granted the player relief under the common law doctrine.

(i) 'Unreasonable' or 'unnecessary' restraint?

In determining a restraint of trade claim under the TPA, courts still need to determine whether the restraint is 'reasonable' (or 'necessary'). They do so by reference to the common law principles outlined above.

(j) Remedies

There are a range of remedies open to successful applicants under the TPA. In addition to an action for damages, an injunction may be obtained and there are various other orders available under s 87 (including varying the terms of the contract). Accordingly, there are a number of benefits for a sporting body and/or athlete choosing to initiate proceedings under the TPA rather than at common law.

## THE PROVISION OF AFL PLAYER 'SERVICES' UNDER THE TPA

It is now evident that playing football in the AFL constitutes 'trade' both at common law and under the TPA.<sup>92</sup> For the 2008 financial year, the AFL recorded a revenue of \$302 million, a record operating profit of \$207 million, a net surplus of \$19 million, a cash deposit of \$50 million and had net assets of \$104 million.<sup>93</sup> The AFL, as a major commercial entity, is unquestionably a 'trading corporation'.

Generally, under the terms of the Standard Playing Contract with their club, AFL players agree to be bound by the AFL's Rules and Regulations (such as the Code of Conduct).

As outlined above, the TPA (and the common law) does not require the relevant restraint to be embodied in a contract. In light of decisions such as *Adamson v West Perth*, *Hughes* and *Greig v Insole*, it is likely that the AFL Code of Conduct constitutes at the very least an 'understanding' between the league and its players. Consequently, the Code is almost certain to constitute a 'contract, agreement or understanding' for the purposes of s 45 the TPA (and at common law).

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89 Above n 29, 320.

90 Ibid 322.

91 *Barnard v Australia Soccer Federation* (1988) 81 ALR 52, 57.

92 See, eg, above n 55.

93 2008 Annual Report, Australian Football League, 88.

<[http://www.afl.com.au/portals/0/afl\\_docs/afl\\_hq/annual\\_reports/2008/p85-95-Finance\\_and\\_Legal.pdf](http://www.afl.com.au/portals/0/afl_docs/afl_hq/annual_reports/2008/p85-95-Finance_and_Legal.pdf)>.

However, professional athletes such as Cousins face a difficult task to circumvent one hurdle in any endeavour to successfully assert that the terms of Regulations or a Code are actionable under the TPA. AFL footballers are placed under significant demands by their clubs. They are required to commit to the club on a full time basis. They must attend all training, conditioning and rehabilitation sessions, interviews, meetings and often commercial or promotional obligations. Additionally, they are given annual leave from their clubs and are subject to stricter codes of conduct than the ordinary employee. These factors, amongst others, indicate that the relationship between an AFL player and his club is a 'contract of service', or an employer-employee. This is how the courts viewed the provision of services by professional sportspeople in *Adamson v West Perth*, *Adamson v NSWRL* and *Buckenara*.

Consequently, the disciplinary action against Ben Cousins under the Code is likely to have been excluded from the eyes of the TPA. Accordingly, Cousins would have been left to rely on the common law restraint of trade doctrine in any action.

### WOULD THE RESTRAINT HAVE BEEN REASONABLE?

It is clear that a further ban on Cousin's eligibility to participate in the AFL would constitute a restraint on his trade as a professional footballer.

The question, then, is whether this hypothetical restraint would have been reasonable and necessary as between the parties considering, *inter alia*, the legitimate interests of the AFL. Depending on this answer, it may then be necessary to consider whether the restraint was injurious to the public interest.

#### The AFL's legitimate interests

It would seem that the AFL's key focus areas and interests include, like many other sporting organisations, maximising:

1. the overall on-field evenness of the AFL competition;<sup>94</sup>
2. the popularity of the AFL (and the sport itself) as a spectator sport, thus maximising crowd attendances, club supporter memberships, and television and radio ratings (and thus television rights);
3. the promotion of and publicity afforded to the AFL;
4. the attractiveness of the AFL (and the sport itself) to potential elite players;
5. dollars from sponsors, merchandise sales and other revenue for the AFL and its clubs.<sup>95</sup>

In addition to the above, the AFL has a particular current focus of growing and expanding the league in unexplored markets domestically and internationally.<sup>96</sup> In particular, the AFL is focused on growing the popularity and publicity of the AFL in markets where it intends to enter new clubs, namely, Western Sydney and the Gold Coast.

The AFL is a heavily regulated competition. A number of the AFL's more onerous restraints have been introduced in order to facilitate the objective of having on-field evenness within the league. For example, revenue is shared between all 16 clubs, clubs' playing lists and total player salaries are capped to prevent wealthier clubs simply buying the best players, and

94 Horvath, above n 44, 82.

95 2008 Annual Report, Australian Football League, pages 18-25. <  
[http://www.afl.com.au/portals/0/afl\\_docs/afl\\_hq/annual\\_reports/2008/p10-25-Commissioners\\_Report.pdf](http://www.afl.com.au/portals/0/afl_docs/afl_hq/annual_reports/2008/p10-25-Commissioners_Report.pdf)>.

96 Ibid.

young talent is made available via a draft system in which the worst performed teams are awarded priority selections.<sup>97</sup> Since the introduction of these restraints, the overall on-field competition between the AFL clubs has become increasingly more even.<sup>98</sup> Consequently, this then sustains the optimism of supporters of more clubs for longer into the season. This, in turn, increases match attendances, interest in the competition and television and radio audiences, the other objectives of the AFL.<sup>99</sup> Interestingly, the AFL has very recently announced the introduction of a highly-regulated free-agency system to commence for the 2012 season.<sup>100</sup>

All of these core objectives of the league appear valid.<sup>101</sup> There is nothing to indicate otherwise. It is plain that these areas of focus would be regarded as the AFL's 'legitimate interests'.

### **Was the restraint reasonable as between the parties?**

Leading up to his initial ban in 2007, a number of sponsors indicated they may withdraw their financial support in light of the negative publicity drawn from Ben Cousins' conduct.<sup>102</sup> This is relevant to the league having to protect its legitimate interest of maximising corporate sponsorship revenue for itself and its clubs. Furthermore, it is likely that the AFL had to be seen to make a tough stand on conduct which was improper (and illegal) in order to protect its image with sponsors, supporters and players (actual and potential).

However, whilst Cousins' conduct attracted significant attention to the AFL's reputation in the wider community, it arguably had not negatively affected its overall publicity, promotion and/or popularity. The media became somewhat obsessed with the Cousins saga. The scrutiny and interest in the Cousins scenario meant that Cousins, and by extension the AFL, was constantly in the media. If anything, arguably the Cousins 'brand' grew throughout his 12 month ban leading up to the AFL's deliberation on the decision.

Cousins had, at the very least, an arguable case against the AFL. Cousins had reportedly never tested positive for illicit drug use prior to his ban,<sup>103</sup> or during the 12 month period of suspension from eligibility to play. Cousins had endured the most severe penalty ever imposed on an AFL player. There was little to indicate that allowing Cousins to enter the competition again would tarnish the league's reputation, considering the league had issued, a year before, what many saw as harsh punishment for Cousins' conduct. The AFL's position in relation to such wrongdoing was loud and clear. It would seem that the AFL had sufficiently protected its image.

Additionally, there was no evidence that Cousins' return to the AFL would negatively affect the league's popularity, and/or revenue sources (such as media, sponsorship, memorabilia sales, membership and crowd attendance figures). There was little indication sponsors or potential sponsors would withdraw their financial support to the AFL, or a particular club, if Cousins was permitted to re-enter the competition and represented that club. Cousins

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97 Horvath, above n 44, 82.

98 Ibid.

99 Ibid.

100 Jennifer Witham, Free Agency for 2010 (2010), AFL.com.au, <<http://www.afl.com.au/tabid/208/default.aspx?newsid=89810>> at 16 April 2010.

101 See above n 27; above n 84.

102 David Lowden, *He's Gone – Eagles Sack Cousins* (2007) Wide World of Sports <<http://wwos.ninemsn.com.au/article.aspx?id=306770>> at 17 October 2007.

103 Geelong Advertiser, *West Coast Star Ben Cousins Charged Over Illegal Drug* (2009) Geelong Advertiser Online <[http://www.geelongadvertiser.com.au/article/2007/10/17/7907\\_news.html](http://www.geelongadvertiser.com.au/article/2007/10/17/7907_news.html)> at 17 October 2007.

remained an overwhelmingly popular player amongst football fans. With the benefit of hindsight, this proved to be correct when Richmond's membership substantially grew after selecting Cousins to play for them,<sup>104</sup> and a massive 86,972 supporters attended Cousins' 'return' game against Carlton in Round 1 of the 2009 season.<sup>105</sup>

Had the AFL Commission decided, under the AFL Code of Conduct, to restrict Cousins' eligibility to participate in the league for another period of time, it would bare the onus to show that such a decision was necessary as between the parties (see *Hall v VFL*). On balance, it seems unlikely that the AFL could have done so. It appears that a court would deem that an additional prohibition from playing in the league would have been a greater restraint than is necessary for the adequate protection of the AFL and its clubs, in the circumstances. This was the rationale given in *Adamson v NSWRL*.

Such action would be beyond what is 'reasonable and necessary' to protect the legitimate interests of the AFL<sup>106</sup> and, in addition to the obvious detriment on Cousins, would deny supporters from seeing one of the sport's elite players.<sup>107</sup> As articulated in *Adamson v West Perth*, excluding Cousins from plying his trade for another 12 months would seem unnecessary as between the parties.

### **Injurious to the public interest**

If the restraint was reasonable as between the AFL and Ben Cousins, the case law notes that the restraint would be unlikely to have been held to be unlawful under the independent ground of being contrary to the public interest.<sup>108</sup> As noted above, all unreasonable restraints themselves are presumed to be against the public interest. Accordingly, this article will not explore this separate ground in detail.

However, it is worth briefly considering whether the circumstances may constitute one of the two identified scenarios under which a restraint can be unreasonable (and thus unlawful) as being injurious to the public interest.<sup>109</sup>

### **CONCLUSIONS**

The emphasis on an athlete's adherence to stringent drug and conduct codes has intensified in the lucrative world of modern professional sport. From Lote Tuqiri to Nick D'Arcy to Ben Cousins, sportspersons are being held to the strict obligations contained in their contracts, and the regulations, policies and codes they submit to.

However, the restraint of trade doctrine's application to professional sport is now well entrenched. Accordingly, professional sporting bodies must carefully consider these issues when drafting contracts, rules and regulations and, when disciplining their athletes for breaches of disciplinary standards.

Had the AFL extended the suspension of Cousins for a further period, it would have faced a significant risk that a court would have deemed it to be unreasonable as between the parties and, therefore, unlawful. Was the AFL's hand forced on Cousins? Is this why the AFL

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104 *Membership*, Richmond Football Club Website (2009)  
<<http://www.richmondfc.com.au/Membership/tabid/7629/default.aspx>> at 14 October 2009.

105 Ben Casanella, *Blues Thrash Tigers by 83 Points* (2009) AFL.com.au  
<<http://www.afl.com.au/2009%20premiership/tabid/15001/default.aspx>> at 26 March 2009.

106 As above n 59; above n 55; above n 40.

107 As the Court noted in *Greig v Insole* [1978] 1 WLR 302, 354.

108 See above n 31, 37-8.

109 As noted earlier, being monopoly cases, or in circumstances where the parties are of unequal bargaining power.

Commission permitted Cousins' re-entry into the league? It is unlikely that we will ever truly know. It may just be that the AFL was properly advised.