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THE DEVELOPMENT AND EVOLUTION OF LABOUR MOBILITY IN AUSTRALIAN SPORT

MATT NICHOL*

The regulation of labour in Australian professional sport developed interconnected labour controls that evolved to severely restrict the ability of players to choose their employer and change jobs. While practices such as the retention and transfer system, restrictions on interleague transfers, residency, zoning, free agency and salary caps seem abhorrent in the lens of standard industrial practice, they underpin the regulation of player labour in sport. Prior to collective bargaining that emerged in the 1990s, a number of labour controls were successfully challenged in court. The cases demonstrate that sport is not immune from the common law restraint of trade doctrine. However the regular cases that were contested from the 1950s to 1990s ended when sports shifted to collective bargaining. Modern labour controls such as free agency, trades and salary caps are now contested at the negotiation table. This article examines labour controls in Australian sport that were challenged in court. It argues that labour controls that inhibit mobility are now subjected to collective bargaining and are determined by players, clubs and leagues.

1 INTRODUCTION

Labour mobility is central to labour markets and a functioning economy. Choosing your employer and negotiating a market contract and salary is done regularly throughout a worker's career. Labour mobility is important from the perspective of worker rights and leads to higher wages and job satisfaction, as well as employers being able to maintain their workforce and gain access to skills.¹ Yet the simple acts of moving to a new employer and selecting one's employer are things that many athletes in Australian professional team sports do not experience. Labour controls such as drafts, salary caps, free agency and versions of the reserve system² interact to severely restrict labour mobility in sport. These and earlier labour controls like residency, zoning, league transfers, compensation fees and the retention and transfer system can be categorised as regulating the recruitment of players and the movement of players between

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1 Treasury, *Non-competes and other restraints: understanding the impacts on jobs, business and productivity* (Issues Paper, April 2024) 4.

2 The reserve system is used in American team sports and gives a club control over the labour of a player for a designated number of years' service until a player becomes a free agent.

clubs.³ While labour controls in sport are typically justified by leagues and clubs on the basis of competitive balance,⁴ they interact to reduce the cost and movement of labour.⁵

Many of the early labour controls used to restrict labour mobility in Australian sport were challenged by players in court on the basis they violated the common law restraint of trade doctrine. This article will analyse these cases in relation to their effect on labour mobility. It is important to note that almost all of the cases that will be reviewed were litigated between the 1950s and 1990s. The reason for a historical analysis of labour control cases is to gain insight into how the regulation of labour mobility in sport developed, its current regulation and likely future directions. A review of the case law is also important in light of the absence of litigation over the past 25 years, a reflection in the rise of unionism and collective bargaining in Australian sport and the more recent willingness of player associations to collaborate closely with leagues. This article will argue that the decisions of courts, and then collective bargaining, shape labour controls that govern labour mobility in Australian professional team sport. As sport operates an autonomous self-regulatory system of labour regulation that highly restricts labour mobility, it is necessary to understand how current labour controls evolved through the courts and the collective bargaining table. By reviewing the nature of previous labour controls and how they were treated by the courts or developed via collective bargaining, it is possible to gain insight into the current regulation of labour mobility in sport and to identify the future nature of labour controls. When the courts rule a labour control is an unlawful restraint of trade it is unlikely the sport will return to using the labour control in the future. The labour control cases that will be examined also demonstrate that after a court rules a labour control is illegal, other sports may continue to use the same labour

3 Braham Dabscheck, 'Playing the Team Game: Unions in Australian Professional Team Sports' (1996) 38(4) *Journal of Industrial Relations* 600, 603 ('Dabscheck Team').

4 McKeown broadly describes it as a level of competitiveness and uncertainty that optimises the appeal of a league to fan: James McKeown, 'The Economics of Competitive Balance: Sports Antitrust Claims after American Needle' (2011) 21(2) *Marquette Sports Law Review* 517, 525. A Major League Baseball commissioned report defined competitive balance as every well-run club having a 'regularly recurring reasonable hope of reaching post-season play' ('RRRRPP'): Richard Levin, George Mitchell, Paul Volcker and George Will, *The Report of the Independent Members of the Commissioner's Blue Ribbon Panel Baseball Economics* (Report, July 2000) 8. This definition has its origins in *Philadelphia World Hockey Club Inc v Philadelphia Hockey Club Inc*, 351 F. Supp 462, 486 (E.D. Pa., 1972). The policy of competitive balance sees the distribution of performance ability across a league so that one team does not have a monopoly on success. Leagues attempt to achieve competitive balance to attain uncertainty in outcome of a match so that fan interest can be monetised: Daniel Read, Aaron Smith and James Skinner, 'A Comparative Analysis of Competitive Balance Between a Closed and an Open Rugby League' (2021) 22(8) *Journal of Sports Economics* 871, 872 ('Read, Smith and Skinner').

5 Matt Nichol and Keiji Kawai, 'The Regulatory Space of Baseball: Is Global Regulation Needed to Govern the International Movement of Players?' (2022) 1(1) *Sports Law and Governance Journal* 47, 52.

control until it is challenged in court. Understanding the development and evolution of labour controls benefits sports governing organisations, sports administrators, clubs, player associations, players and academics.

This article is divided into four parts. Part 2 identifies the laws that govern labour mobility in Australian sport. Part 3 then explores labour controls in Australia's sporting landscape that have been contested in court on the basis of common law restraint of trade. Then Part 4 looks at labour controls that are subject to collective bargaining in Australian sport. Finally, Part 5 evaluates labour controls in Australian sport.

2 AUSTRALIAN LAW AND LABOUR MOBILITY IN SPORT

A *Employment contracts and the restraint of trade doctrine*

The enforceability of contracts in Australia that restrict a worker's ability to sell their services in the labour market is regulated by the common law restraint of trade doctrine. The origins of this law can be traced to the 15th century.⁶ The common law's modern test for determining whether a restraint of trade is enforceable was established in 1894 by the House of Lords in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*.⁷ The Court held that a restrictive covenant is legally enforceable if it is necessary in protecting the covenantee's interests and is reasonable.⁸ Further, Lord Herschell LC held that in determining if a covenant is valid, it is necessary to determine if it exceeds what is needed to protect the covenantee and the distinction between general and particular restraints (in terms of geographic application) is relevant.⁹ The Court also held that to be enforceable a restraint cannot interfere with or injure the public interest.¹⁰ Lord Watson observed that the community has a material interest in maintaining rules of fair dealing between people and that the community suffers greater injury from breach of these rules than from contracts that restrain trade.¹¹

Australian courts adopted the *Nordenfelt* test, which is now the orthodox judicial approach.¹² In 1979 Chief Justice Barwick in *Forbes v New South Wales Trotting Club Ltd*¹³ stated that the public interest was a key factor that influenced the development of the common law doctrine of restraint of trade in

6 David Thorpe, 'Expositions on the Restraint of Trade Threshold' (2012) 29 *Journal of Contract Law* 208, 210.

7 [1894] AC 535 (*Nordenfelt*).

8 Ibid 547.

9 Ibid 548.

10 Ibid 549, 553.

11 Ibid 552.

12 Joellen Riley, 'Sterilising Talent: a Critical Assessment of Injunctions Enforcing Negative Covenants' (2012) 34(4) *Sydney Law Review* 617, 619.

13 (1979) 25 ALR 1.

employment contracts.¹⁴ Riley observed that when a restraint passes the ‘flabby test’ of reasonableness, courts move to issue an injunction without considering other commercial contract matters such as whether damages are so inadequate a remedy to justify an injunction.¹⁵

The restraint of trade doctrine has been applied to sport in Australia and is influenced by British case law. In the landmark British case of *Eastham v Newcastle United Football Club Ltd*¹⁶ the Chancery Division of the High Court in 1964 held the ‘retention and transfer’ system in professional soccer to be an unreasonable restraint of trade.¹⁷ This system prevented a player from freely moving clubs by being placed on ‘retain’ or ‘transfer’ lists and imposed a transfer fee when a player moved clubs. Competitive balance was central to the decision in *Eastham*. Justice Wilberforce ruled the retention system exceeded what was needed to prevent wealthy clubs from recruiting the best players¹⁸ and that the transfer system was unlawful due to its interaction with the retention system.¹⁹

Rugby league in Australia had a similar retention transfer system to British soccer. Shortly after *Eastham* the High Court of Australia followed the ruling in 1971 in *Buckley v Tutty*²⁰ by holding rugby league’s retention and transfer system to be an unreasonable restraint of trade, and importantly, that professional rugby players were employees.²¹ The High Court’s decision was not only important in that it held the rugby league player transfer system to be unlawful but in recognising players as employees it would lead to the unionisation of Australian athletes and in time collective bargaining.

B Exclusive contracts of service and labour mobility

Common law of contract also governs employment practices in sport. When there is an employment contract that requires the exclusive provision of ‘special’ services for a designated period of time,²² Australian courts have followed the position of another British case, *Lumley v Wagner*.²³ Services are special in that they are not easily replaced on the market and if the worker does not perform the skills they can lose their value. Examples include athletes, entertainers and performers. In *Lumley* style cases where there is a breach of contract by the

14 Ibid 17.

15 Riley (n 12) 619.

16 [1964] Ch 413 (*Eastham*).

17 Ibid 438, 440-441, 448.

18 Ibid 434.

19 Ibid 438.

20 (1971) 125 CLR 353 (*Buckley*).

21 Ibid 371-372, 381-382.

22 *Bulldogs Rugby League Club Ltd & Anor v Williams & Ors* [2008] NSWSC 822, [53] (*Bulldogs v Williams*).

23 (1852) 42 ER 687 (*Lumley*).

employee, courts refuse to order specific performance or award damages.²⁴ Instead courts issue an injunction to prevent the worker from breaching the term of the contract. To obtain an injunction, an employer must prove there is a serious question to be tried, damages were inadequate, they would suffer irreparable harm and the balance of convenience favours granting the injunction.²⁵

The use of injunctions is not without criticism. VanderVelde argued they violate the principle of free labour and the right to quit a job.²⁶ Riley posited that the use of equity in employment matters promotes the legal bias that supports employers and is inappropriate as it focuses on the strong bargaining position of employers rather than protecting the vulnerable party to the employment relationship.²⁷ Several cases in professional sport in Australia evidence the principles of *Lumley*.

In *Hawthorn Football Club Ltd v Harding*²⁸ Tadgell J in the Victorian Supreme Court held a player provided special services in that damages for the loss of an Australian 'rules' footballer could not be calculated by reference to loss of patronage, membership fees and other factors.²⁹ The Court was unwilling to place a monetary value on the loss of a professional footballer. In the same year as *Harding* the Victorian Supreme Court heard another case on exclusive contracts of service involving a Victorian footballer. Evidence of the special skills of footballers was expressed by Crockett J in *Buckenara v Hawthorn Football Club Ltd*,³⁰ who ruled that Gary Buckenara could not be easily replaced due to his skill and talent.³¹ Courts in other jurisdictions followed this logic in the context of rugby league.

Justice Santow in *St George District Rugby League Football Club Ltd v Tallis and Ors*³² similarly described the services of rugby league player Gordon Tallis as special in that he could not be easily replaced.³³ The Supreme Court of New South Wales issued an injunction that prevented Tallis from playing for another

24 An order for specific performance is deemed to amount to forced labour or slavery. The basis for not awarding damages is that the special services are so unique that no other person can perform them and therefore damages cannot be calculated: Matt Nichol, *Globalization, Sports Law and Labour Mobility: The Case of Professional Baseball in the United States and Japan* (Edward Elgar Publishing, 2017) 107 ('Nichol').

25 *Bulldogs v Williams* (n 22) [36].

26 Lea VanderVelde, 'The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity' (1992) 101(4) *The Yale Law Journal* 775, 775-777, 782.

27 Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005) 177.

28 [1988] VR 49.

29 Ibid 60.

30 [1988] VR 39.

31 Ibid 47.

32 (Supreme Court of New South Wales, Santow J, 24-28 June 1996).

33 Ibid 15.

club during the exclusive term of his contract on the basis that damages were inadequate for the loss of his special skills.³⁴ The view of these courts contradicts the current regulation of player labour mobility, where the trade period at the end of a season attracts significant attention and essentially involves the replacement and transfer of players. In *Bulldogs Rugby League Club Ltd Anor v Williams and Ors* Austin J ruled that if the injunction was granted against Sonny Bill Williams he could resume playing for the club and that his actions in breaching the contract created any hardship he experienced.³⁵ Such a position ignores the potential imbalance in power between club and player when exclusive contracts are entered and that professional athletes typically have short careers where they can earn high incomes.

C *Australian competition law and sport*

Australia's competition law is contained in Part IV of the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (Cth)) and also applies to labour in sport. In the world of sport, players have typically been unsuccessful in using the Act to challenge labour controls. However, clubs have had some victories. Section 45 of the *Competition and Consumer Act* is relevant to labour mobility as it prohibits contracts, arrangements and understandings that have the purpose or effect of lessening competition. Competition law is relevant to labour controls that are the subject of collective bargaining as the Act excludes any contract or arrangement that relates to the remuneration and working conditions of employees.³⁶ Most athletes in team sports are likely to be classed as employees according to the High Court ruling in *Buckley v Tutty* that professional rugby players were employees.³⁷ Also excluded from Part IV are contracts of service that restrict work during or after the contractual relationship.³⁸

Actions by Australian athletes against clubs or leagues under s 45 of the *Trade Practices Act 1974* (Cth) generally failed. In *Adamson v West Perth Football Club*³⁹ Adamson played Australian rules football for West Perth in Western Australia and he was refused a transfer to Norwood in South Australia under the interstate transfer rules administered by the then National Football League of Australia. Rules that prevent transfers between leagues inhibit both labour mobility and a player's ability to work. The Federal Court of Australia held that Adamson was an employee for the purposes of the legislation and therefore the football club

³⁴ Ibid 19.

³⁵ *Bulldogs v Williams* (n 22) [62], [66].

³⁶ *Competition and Consumer Act 2010* (Cth), s 51(2).

³⁷ *Buckley* (n 20) 371-372.

³⁸ *Competition and Consumer Act 2010* (Cth), s 51(2)(b).

³⁹ (1979) 27 ALR 475 ('Adamson').

did not acquire services as required under the then *Trade Practices Act*.⁴⁰ However, as will be seen in Part B, Adamson did prove the transfer rules were an unlawful common law restraint of trade.⁴¹ Similarly in the case of transfers within a league, Steve Carfino in *Carfino v Australian Basketball Federation*⁴² was unable to demonstrate his failure to obtain a clearance in the National Basketball League constituted a breach of the *Trade Practices Act* as his employment contract did not involve goods or services. The Federal Court determined the restraint to be an unreasonable restraint of trade,⁴³ highlighting the willingness of courts to apply the restraint doctrine to sport. Bans on participating in sport were also subject to review under the *Trade Practices Act*. In *Hughes v Western Australian Cricket Association (Inc) and Others*⁴⁴ Kim Hughes was prohibited from all forms of cricket in Australia for participating in tours of apartheid South Africa in the 1980s. Like Adamson, Hughes failed to prove a breach of s 45 of the *Trade Practices Act* as the Federal Court found that his prohibition did not substantially lessen competition as he failed to prove the existence of other markets. However, the Court did rule the ban constituted an unlawful restraint of trade,⁴⁵ in turn applying the doctrine to labour controls that inhibit mobility through a prohibition on participation in the sport.

In rare cases athletes have shown labour controls breached competition law. McCarthy, a rodeo rider, in *McCarthy & Ors v Australian Rough Riders Association Inc & Ors*⁴⁶ proved to the Federal Court that a prohibition by the Rough Riders Association on riders participating in non-sanctioned rodeos was both a breach of s 45 of the *Trade Practices Act* and an unreasonable restraint of trade at common law as it was unlimited temporarily and geographically.⁴⁷ Justice Spender found that the arrangement between members of the Rough Riders Association had the effect of reducing and lessening competition.⁴⁸ This logic could equally apply to the cases involving restraints on transfers between and within leagues and player bans as clubs are not competing for the services of players.

In contrast to the competition cases involving players, leagues and clubs in Australian sport have had success in using s 45 of the *Trade Practices Act* to challenge agreements made by leagues that restrict labour mobility. Two cases that arose from the Super League saga in rugby league demonstrate that

40 Ibid 505-506.

41 Ibid 506-507.

42 [1988] 10 ATPR 40-895.

43 Ibid 49,659-49,660.

44 (1986) 69 ALR 660.

45 Ibid 697, 700-703.

46 [1988] 10 ATPR 40-836.

47 Ibid 49,028-49,030.

48 Ibid 49,027, 49,029.

agreements made between leagues and clubs can also negatively affect player labour mobility. In its efforts to create Super League in the 1990s, News Corporation was able to demonstrate to the Federal Court on appeal in *News Ltd v Australian Rugby Football League Ltd*⁴⁹ that the ‘commitment’ and ‘loyalty’ agreements that existing clubs were required to sign by the Australian Rugby League (‘ARL’) contained exclusionary provisions related to excluding News Ltd as a rival league⁵⁰ that lessened competition and therefore breached s 45. The exclusionary provisions in the commitment agreements had the effect of substantially lessening competition as the supply by the clubs of rugby league teams was limited to the ARL and there was a prohibition on the acquisition of the services of a competition organiser other than the ARL.⁵¹ The Federal Court found that competition existed among clubs to be part of the ARL as clubs had to annually apply to be a participant and there was discussion on reducing the number of Sydney teams.⁵² Clubs were also found to be in competition for the services of News Ltd as an alternative competition⁵³ and for players.⁵⁴ The commitment and loyalty agreements restricted labour mobility as clubs could not switch leagues and compete for the services of ARL players.

Super League and the ARL merged for the 2000 season and the resulting arrangements saw the number of teams reduced from 22 to 14. The South Sydney Rabbitohs, a foundation member of the ARL, were not offered a place in the new league. The Rabbitohs succeeded before a majority of the Full Federal Court in *South Sydney District Rugby League Football Club Ltd v News Ltd*⁵⁵ in evidencing that their omission from the new National Rugby League (‘NRL’) was exclusionary and therefore breached s 45 of the *Trade Practices Act*. Justice Moore ruled that the 14-team competition was exclusionary due to its effect on the provision of services to and acquisitions of services from the clubs participating in the rival competition.⁵⁶ The reduction in the size of the competition restricted the supply of services by the clubs.⁵⁷ Similarly, Merkel J concluded the purpose of the 14-team competition was to limit or restrict the supply of services to the 14 clubs.⁵⁸ South Sydney was found to have been excluded from the new NRL.⁵⁹ In turn labour mobility was affected as there were fewer teams that a player could be employed by. Whereas the creation of Super League increased labour mobility

49 (1996) 139 ALR 193.

50 Ibid 349.

51 Ibid 349.

52 Ibid 338-339.

53 Ibid 339.

54 Ibid 342.

55 (2001) 181 ALR 188.

56 Ibid 227.

57 Ibid 230.

58 Ibid 254.

59 Ibid 256.

through an expanded number of professional clubs and higher salaries, the reduction in the number of the clubs and the loss of the Rabbitohs had the opposite effect.

Despite the impact of the Full Federal Court's ruling on labour mobility, News Ltd appealed to the High Court, where a majority overturned the Full Federal Court. Both parties argued that at the time of the 1997 agreement to merge the two leagues they were in competition with each other to supply or acquire goods or services in which the 14-team competition related.⁶⁰ The High Court ruled the purpose of a 14-team competition was not to exclude any particular club or to limit or restrict the supply of services to any particular club or clubs.⁶¹ Further, the decision to create a new competition was lawful and News Ltd and the ARL had to specify the size of the new competition and determine who could compete. The parties were under no legal obligation to accept all 22 teams from the two 1997 leagues, who did not constitute particular persons of whom there was a proscribed purpose.⁶²

3 LABOUR CONTROLS IN SPORT THAT RESTRICT LABOUR MOBILITY THAT HAVE BEEN CHALLENGED IN COURT

In the early days of unionism in Australian sport in the 1970s and 1980s,⁶³ collective bargaining was not a feature of labour regulation as it did not commence until the 1990s.⁶⁴ Therefore players from the 1950s to the early 1990s questioned in court labour controls that limited labour mobility on the basis of the restraint of trade doctrine. These cases were sometimes funded by rival clubs

60 *News Ltd and Others v South Sydney District Rugby League Football Club and Others* (2003) 200 ALR 157, [9] (Gleeson CJ).

61 *Ibid* [24] (Gleeson CJ).

62 *Ibid* [27] (Gleeson CJ).

63 The Australian Football League Players' Association was formed in 1973, the Rugby League Players' Association in 1979 and the National Basketball Players' Association in 1989. In the 1990s the Australian Soccer Players' Association (now Professional Footballers Australia) formed in 1993, the Rugby Union Players' Association and the Australian Cricketers' Association in 1995 and the Australian Netballers' Association in 1997: Braham Dabscheck, 'A Primer on Australian Player Associations' (2012) 23(3) *The Economic and Labour Relations Review* 61, 63 ('Primer').

64 Hayden Opie and Graham Smith, 'Professional Team Sports and Employment Law in Australia: From Individualism to Collective Labour Relations?' (1992) 2(2) *Marquette Sports Law Journal* 211, 213 ('Opie and Smith - Professional'). This article was also published as Hayden Opie and Graham Smith, 'The Withering of Individualism: Professional Team Sports and Employment Law' (1992) 15(2) *UNSW Law Journal* 313. The first collective bargaining agreement in Australian sport was in the Australian Football League in 1993, soccer in 1996, rugby union in 1997 and cricket in 1998.

in order to secure the services of players.⁶⁵ Residential requirements, zoning, the retention and transfer system, transfers between leagues, compensation fees and internal player drafts all saw players use the courts to challenge highly restrictive labour controls that prevented players from choosing their employer. There was little international influence from court challenges in European and American sport, except for the British *Eastham* case on the retention and transfer system in soccer. A historical review of the cases demonstrates the vulnerability of players prior to the inception of strong unionism and collective bargaining. This review is also relevant in understanding how labour mobility was regulated in the past so that it can be understood which directions the use of labour controls may take in the future.

A *Residency and zoning*

Prior to the introduction of player drafts in Australian sport, the interrelated tools of residency and zoning operated to control the movement of players and shape a team's labour supply. These two labour controls affected labour mobility by allocating geographic zones to individual clubs and required players who resided in a club's zone to play for their 'zoned' club. Another use of zoning was that leagues required a player to live in a zone for a minimum length of time to be eligible to play for a club. Residency and zoning were justified by leagues and clubs on the basis of achieving the policy objective of competitive balance by preventing wealthier clubs acquiring the best players.⁶⁶ These restraints were also justified on the basis of clubs investing in and promoting the sport in the local area.⁶⁷ Residency and zoning were also intended to facilitate fan loyalty.

Residency and zoning formed the basis of many sport's internal transfer systems and influenced a player's ability to choose and change clubs. There were a number of cases across different sports and jurisdictions on residency and zoning, demonstrating the limitations of legal action in challenging a labour control as a court's declaration that a sport's regulation of labour mobility is unlawful did not make the same practice illegal in other sports. The practice of residency and zoning remained part of the labour regulation of a sport until a player successfully challenged it in court.

The New South Wales Rugby League ('NSWRL') (precursor to the NRL) had a zoning and residency system prior to implementing a retention and transfer system in 1961. Players who resided in a club's zone for 28 days were eligible to play for that club upon receiving a clearance from his previous club. Greg Hawick played for the Wagga Kangaroos in 1957. Despite not living in its zone

65 Braham Dabscheck, 'Industrial Relations in Australasian Professional Team Sports' (2004) 30(3) *Otemon Journal of Australian Studies* 3, 6.

66 *Hall v Victorian Football League and Clarke* [1982] VR 64, 69.

67 *Ibid.*

or receiving a clearance from Wagga, he signed a three-year contract with North Sydney in 1958. Hawick then received a better offer from Paramatta. Hawick decided to play for Wagga in 1958 on the belief that North Sydney would then release him from his contract. In response the NSWRL held meetings that Hawick did not attend nor have the opportunity to defend himself. Subsequently Hawick was suspended for the 1958 season and he was required to reside in North Sydney for 28 days prior to the 1959 and 1960 seasons.⁶⁸ Hawick sought injunctive relief in the Supreme Court of New South Wales.

According to the High Court's judgment in *Cameron v Hogan*,⁶⁹ McLelland J in *Hawick v Flegg*⁷⁰ ruled against the NSWRL's argument it was a voluntary association and therefore not subject to external review. Justice McLelland held Hawick was denied natural justice in proceedings against him⁷¹ and his suspension for one year was of sufficient substance and interference with his livelihood to justify intervention by the court.⁷² While McLelland J did not refer to the rules in *Nordenfelt*, Dabscheck observed that the decision reflected restraint of trade principles as residency and zoning removed a player's right to be employed.⁷³ As will be seen below, shortly after *Hawick* the NSWRL again attempted to regulate the distribution of player talent when it introduced the retention and transfer system that was litigated in *Buckley*. Then in the 1990s the NSWRL implemented a draft that was also contested in court. Despite the decision of the Supreme Court of New South Wales, zoning and residency continued in other sports for a number of decades.

In Australian rules football, Victoria's regions and Melbourne's suburbs were divided into zones until the Victorian Football League (the predecessor to the Australian Football League ('AFL')) adopted the national draft in 1986,⁷⁴ a response to the Victorian Supreme Court ruling in 1982 that zoning was an illegal restraint of trade. Under the zoning system a player was eligible for his zoned team if he resided in the relevant geographic zone for a period of 13 consecutive weeks. Players were not subject to zoning if they had not played football for 36 consecutive months.⁷⁵

68 Braham Dabscheck, 'The Intercept That Changed the Game Forever: Fifty Years of Buckley v Tutty' (2022) 1(1) *Sports Law and Governance Journal* 23, 29.

69 (1934) 51 CLR 371.

70 (1958) 75 WN (NSW) 255.

71 Ibid 257-258.

72 Ibid 259.

73 Primer (n 63) 31.

74 'AFL Draft History', Australian Football League (Web Page)

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75 *Hall v Victorian Football League and Clarke* [1982] VR 64, 68.

In *Hall v Victorian Football League and Clarke* Hall was zoned to Collingwood but he wished to play for South Melbourne (now Sydney)⁷⁶ as his father was a former player and administrator and he grew up a fan of the club.⁷⁷ In 1982 the Supreme Court of Victoria held that determining if zoning was lawful was not on the basis of the restraint attaining a useful purpose (e.g. competitive balance). This decision was significant as leagues in litigation typically justify labour controls on the basis of competitive balance. Instead zoning was deemed to be an unlawful restraint as a player could only join one club, unless an appeals board approved a transfer. Thus labour mobility was central to the Court's decision. Also, Murray J ruled residential zoning operated by 'freak of chance and represent[s] no real connection of any description between him [the player] and the club'.⁷⁸ The Court determined residential zoning to be an unreasonable restraint of trade as Hall was prevented from choosing his employer,⁷⁹ in turn demonstrating the legal connection between residency and zoning and labour mobility. The decision in *Hall* opened the door to the Victorian Football League introducing the draft as an alternate means of allocating entry level talent to clubs.

Cricket and netball demonstrate the unwillingness of sports to change their labour regulation in response to court rulings in other leagues. In 1991 the Supreme Court of Victoria in *Nobes v Australian Cricket Board*⁸⁰ determined cricket's residential requirement of living in a state three months prior to the commencement of the state cricket season (and because Nobes previously played for South Australia) could not unreasonably prevent a professional cricketer from working for a new team once ties ended with the former team.⁸¹ The Supreme Court found the three month residency rule to be an unreasonable restraint of trade as the market for interstate cricketers was limited, the restriction was severe for older players, it deprived professional players earning capacity for a year and the working life of a player was relatively short.⁸² This rationale highlights many of the issues facing professional athletes who have their labour mobility restricted by unnecessarily harsh labour controls in what is typically a short career. Residency was again deemed to be an unlawful restraint of trade in the 2004 netball case of *Avellino v All Australia Netball Association Ltd.*⁸³

76 Hall was not eligible to be recruited by South Melbourne under the 'father-son' rule as his father played insufficient games: Ibid 68. In the AFL this rule permits the sons of former players (and now daughters in the Australian Football League Women's) who played a designated number of games to by-pass the zoning rules (and now the draft) and play for their father's club.

77 Ibid 65.

78 Ibid 70.

79 Ibid 71.

80 (Supreme Court of Victoria, Marks J, 16 December 1991).

81 Ibid 20.

82 Ibid 24-25.

83 [2004] SASC 56.

B *The retention and transfer system*

Courts have also examined the enforceability of other labour controls that prohibit player movement to another club. In 1971 the High Court reviewed the NSWRL's transfer system in *Buckley*.⁸⁴ Introduced in 1961 after the decision in *Hawick* ruled residency rules to be unlawful, rugby league's retention and transfer system was fundamentally the same as the British soccer transfer system that was disputed in *Eastham*. The retention and transfer system was similar in nature and effect to the reserve system used in American sports such as baseball.⁸⁵ Under the retention and transfer system, after a player signed a contract, the club controlled the contractual rights to the player in the league and the player could only transfer to another club if permitted by his club. Clubs maintained two lists: 'retain' and 'transfer'. In leagues such as the NSWRL and the Victorian Football League a transfer fee was required. There were limited rights of appeal and relevant appeals bodies generally lacked independent members. Retention and transfer systems were found to be an unreasonable restraint of trade in *Buckley* and then in the Australian rules football case of *Foschini*.

In *Buckley*, the High Court held the retention and transfer system to be an unreasonable restraint of trade as a club could prevent one of its players from playing for another club, even if the player was no longer employed or not selected to play. This system represented a major impediment to labour mobility. Further, the system was ruled to be unreasonable on the grounds a club received a transfer fee for a player it did not wish to employ. In this light the transfer fee system negatively affected a player's ability to change teams and the structure of transfer fees is an important consideration for sports such as soccer that still use transfer fees. The High Court also held the retention and transfer system prevented a player from financially benefitting from his own skills and obtaining employment.⁸⁶ Thus the ability of an athlete to sell their skills to potential employers is relevant in determining whether modern labour controls are valid restraints.

Despite the landmark ruling by the High Court in *Buckley*, other sports continued to use the retention and transfer system. The retention and transfer system that operated with residential zoning in the Victorian Football League was deemed by the Victorian Supreme Court to be unlawful in *Foschini v Victorian Football League*.⁸⁷ The League justified the transfer system on the basis it created competitive balance as wealthy clubs could not recruit the best players.⁸⁸ While the courts have recognised competitive balance as a legitimate objective for

⁸⁴ *Buckley* (n 20) 376.

⁸⁵ See, e.g., Nichol (n 24) 13, 144; Ed Edmonds, 'Arthur Soden's Legacy: The Origins and Early History of Baseball's Reserve System' (2012) 5 *Albany Government Law Review* 38.

⁸⁶ *Ibid* 376.

⁸⁷ (Supreme Court of Victoria, Crockett J, 15 April 1983).

⁸⁸ *Ibid* 7.

leagues to pursue, they have consistently concluded that the means chosen by sports to be more than is reasonably necessary to achieve those legitimate objectives. In this light Justice Crockett found the retention and transfer system to be a ‘monolithic system’ whereby a club received title to a footballer without any reciprocal obligations. Thus any imbalance in rights and obligations created by a labour control are central in determining its legality. As in *Buckley*, the Supreme Court of Victoria found the restraint to be unreasonable as the club could refuse a transfer even if it failed to play or contract the player.⁸⁹ The retention and transfer system thus represented an unacceptable impediment on labour mobility in rugby league and Australian rules football.

C *Transfer between leagues*

Labour controls that restrict labour mobility between different leagues have also been declared by courts to be unreasonable restraints of trade. As discussed in Part A, when Brian Adamson attempted to move from West Perth in the Western Australian Football League to Norwood in the South Australian National Football League, his repeated requests for a transfer were denied by West Perth. In *Adamson v West Perth Football Club* Northrop J of the Federal Court held the transfer system to be an unreasonable restraint of trade as it effectively allowed a player to work for only one club and the appeal process was unreasonable.⁹⁰ This decision evidences the impact of the inter-league transfer rules on labour mobility and the ability of a player to change jobs through geographic labour mobility.

D *Compensation fees*

Compensation fees were paid at all levels of Australian soccer in the 1990s. These fees were different from transfer fees in that they were paid by a player’s new club after their previous contract ended.⁹¹ Compensation fees had the potential to limit labour mobility as clubs may have been reluctant to recruit a player who incurred additional costs. In 1995 the Australian Soccer Players’ Association (now Professional Footballers Australia) utilised politics⁹² and an

⁸⁹ Ibid 25.

⁹⁰ *Adamson* (n 39) 507.

⁹¹ Braham Dabscheck, ‘The Socceroos Strike a Deal’ (2002) 37(1) *International Review for the Sociology of Sport* 79, 80 (‘Socceroos’).

⁹² A Senate inquiry into soccer led to two reports: Senate, *Environment, Recreation, Communications and Arts References Committee, Commonwealth Parliament of Australia, Soccer* (Report No 119/1995, June 1995); Senate, *Environment, Recreation, Communications and Arts References Committee, Commonwealth Parliament of Australia, Soccer* (Report No 14/1996, November 1995) (‘Second Report’). Prior to the Senate inquiry, Soccer Australia in 1994 commissioned former Supreme Court of New South Wales judge the Honourable Donald Gerald Stewart to conduct an inquiry into Australia soccer. The Stewart Report was not published by Soccer Australia but was

interim award application to the Australian Industrial Relations Commission (precursor to the Fair Work Commission)⁹³ to challenge compensation fees in professional soccer's player transfer system.⁹⁴ As the Association was newly formed, the use of the Senate was likely part of an agenda to change a highly restrictive transfer system. Engaging at a political level in the governance of labour mobility was a departure from testing these issues by way of the courts and collective bargaining, engaging with the court of public opinion, the executive and the legislature. The Senate Committee in its second report investigated the role of coaches, players, agents, clubs and officials in relation to the transfer of Australian sportspeople and matters related to corruption, conflicts of interest and tax evasion in soccer.⁹⁵ Among its findings the Committee highlighted the need to abolish the domestic transfer fee.⁹⁶ Political pressure from the Senate likely flowed to the player association's decision to contest the compensation fee system in the Australian Industrial Relations Commission. Like the courts the Commission held soccer's compensation fee system was likely an illegal restraint of trade. However, the Commission ruled it did not have the power to make an interim award for new working conditions under the *Industrial Relations Reform Act 1993* (Cth). The Australian Industrial Relations Commission recommended that the parties negotiate a new compensation fee system before the end of 1996. Subsequent collective bargaining between the National Soccer League (now the A-League), Soccer Australia (predecessor to Football Australia) and the Australian Soccer Players' Association led to modifications to compensation fees and minimum pay and conditions in the first collective agreement for professional Australian soccer.⁹⁷

E *Internal player drafts*

In many professional sports leagues around the world, player drafts are now a key labour control that restrict labour mobility in that a player is prevented from negotiating a contract on a free market and choosing their employer. Players are

included in the Senate's First Report: Braham Dabscheck, 'Australian Professional Team Sports in a State of Flux' (2003) 29 *Otemon Journal of Australian Studies* 3, 15.

93 The Australian Industrial Relations Commission underwent name changes in the 2000s in response to the Labor Party's *Fair Work Act 2009* (Cth). In 2009 the Commission was renamed Fair Work Australia and in 2013 another name change saw it become the Fair Work Commission.

94 *Media Entertainment and Arts Alliance v Marconi Fairfield Soccer Club and Others and Australian Soccer Federation* (Australian Industrial Relations Commission, Dec 1285/95 M2565, 1995).

95 Second Report (n 92) iii.

96 Ibid v.

97 The Ericsson Cup Collective Bargaining Agreement 1996–1999; Socceroos (n 91) 82; Matt Nichol and Keiji Kawai, 'The Regulatory Space of Collective Labour Relations in Australian Team Sports' (2021) 14(1) *Australian and New Zealand Sports Law Journal* 83, 96 ('Collective Labour').

then prohibited from changing clubs unless a free agent, traded or released from their contract. Drafts involve clubs receiving selections in a number of rounds (usually reverse ladder order from the previous season). If selected a player must sign a contract with the club or sit out of that sport until the next draft.

Drafts can be internal or external. Internal drafts consist of professional players already in the competition while external drafts are for entry level amateur players joining the league.⁹⁸ Drafts were introduced in Australian sports after the courts held the retention and transfer system and residency and zoning to be unlawful restraints of trade.

Several decades after *Hanwick* and *Buckley* the NSWRL introduced an internal draft in 1990 for out of contract players. Drafts were conducted in 1990 and 1991. In response Phillip Adamson, supported by the Rugby League Players Association,⁹⁹ challenged the internal draft in the Federal Court with 127 other players¹⁰⁰ in what appeared to be a class action. In *Adamson v New South Wales Rugby League Ltd*¹⁰¹ Wilcox J held that the internal player draft violated a worker's common law right to choose his employer, a right that differentiates a serf from a free worker.¹⁰² Thus labour mobility was central to the decision. Justice Wilcox stated the draft imposed a new post-contractual restraint as it operated at the end of a player's contract. His Honour also ruled the draft to be unreasonable as it affected all players equally, regardless of a player's skill or salary.¹⁰³ This reasoning was new in the cases on labour controls in sport. Justice Shepard determined the draft had the actual or potential effect of negatively impacting the economics of players.¹⁰⁴ Thus the financial impact of a labour control is also relevant in determining its validity. *Adamson* is important in the context of the Australian sporting landscape and the regulation of labour mobility given the NRL has not since operated a draft and the AFL's external draft¹⁰⁵ for entry-level players has never faced judicial scrutiny.¹⁰⁶ This situation gives AFL players some leverage in collective bargaining as they can threaten to litigate over the

98 Chris Davies, 'Draft Systems in Professional Team Sports and the Restraint of Trade Doctrine: Is the AFL Draft Distinguishable from the NSWRL Draft?' (2006) 1(1) *Australian and New Zealand Sports Law Journal* 80, 81 ('Davies').

99 Dabscheck Team (n 3) 616.

100 Brad Walter, 'How the draft legal challenge galvanised players', *National Rugby League* (Web Page, 21 December 2019) <<https://www.nrl.com/news/2019/12/19/how-the-draft-legal-challenge-galvanised-players/>>.

101 *Adamson* (n 39).

102 Ibid 342, 355.

103 Ibid 355-356.

104 Ibid 323.

105 The AFL draft began in 1986. Since the introduction of free agency in 2012 the AFL draft has been an external draft. While restricted free agents may be required to transfer teams via the draft (see Part C), this has never happened in the history of free agency.

106 See Davies (n 98) 91-98.

draft, one of the foundations of the AFL's system of regulating player labour and a key pillar in its policy of equalisation.

4 COLLECTIVE BARGAINING AND LABOUR CONTROLS THAT RESTRICT LABOUR MOBILITY

Since collective bargaining began in Australian sport in the mid 1990s,¹⁰⁷ labour controls that were once challenged by players in court are now subject to negotiation. Opie and Smith recognised that the rise in collectivism marked the end of individualism that were represented by the sports cases discussed in Part 3 above.¹⁰⁸ This is an important development as labour controls that are collectively bargained are insulated from review under competition law and may not violate the restraint of trade doctrine. Labour mobility and related controls are also subject to regular bargaining rather than the uncertainty of litigation. This bargaining involves enhanced employment protections for vulnerable athletes. A recent threat to negotiated labour mobility has been the increase over the past ten years of protracted bargaining and impasse as players fight for a greater share of increased broadcasting revenues. In some cases this has led to players taking industrial action and players effectively being locked out when a bargaining agreement ends.

A *The status of collective bargaining agreements in Australian sport*

Prior to the rise of unionism and collective bargaining in Australian professional sport in the 1990s, restrictions on labour mobility were contained in by-laws and agreed to by clubs through the multi-employer association of the league.¹⁰⁹ Opie and Smith opined in the 1990s that the commencement of collective bargaining may lead to sport entering mainstream industrial relations.¹¹⁰ However, it is necessary to start by noting that Australian sports conduct collective bargaining outside the *Fair Work Act*¹¹¹ and engage with the Fair Work Commission in a sporadic and strategic manner.¹¹² No major Australian sports have their current collective bargaining agreement approved by the Fair Work Commission.¹¹³ Approval requires compliance with a number of

¹⁰⁷ Opie and Smith - Professional (n 64) 213.

¹⁰⁸ Ibid 240.

¹⁰⁹ Collective Labour (n 97) 94.

¹¹⁰ Opie and Smith - Professional (n 64) 241.

¹¹¹ Collective Labour (n 97) 94, 99; Brendan Schwab, 'Collective Bargaining in Australian Professional Team Sports' (1998) 29 *Australian Society for Sports History Bulletin*, 26 ('Schwab').

¹¹² See Matt Nichol, 'Does the Model of Collective Bargaining in Australian Sport Require Reconsideration?' (2026, forthcoming) *Adelaide Law Review*.

¹¹³ The register of enterprise bargaining agreements was searched using various terms related to major Australian sports. No sport currently has a registered enterprise bargaining agreement: Fair Work Commission, 'Enterprise Agreements and Awards', Find an

provisions of the *Fair Work Act*. Collective agreements in sport are therefore common law contracts that are enforceable in the courts, a practice that has occurred since bargaining began in the 1990s. This arrangement has been met with little resistance from player associations.¹¹⁴ The only current collective bargaining agreement in sport that is publicly available is the joint AFL and Australian Football League Women's ('AFLW') agreement.¹¹⁵ Information about other collective bargaining agreements was obtained from the websites of leagues and media reporting.

Basketball, the NRL and AFL have all previously had enterprise bargaining agreements approved by the Fair Work Commission. The National Basketball League and the Australian Basketball Players' Association registered enterprise agreements in 2003, 2005, 2010 and 2016.¹¹⁶ This was likely the product of the Players' Association being a member of the Media, Entertainment and Arts Alliance ('MEAA'). In June 2016, the newly formed Australian Basketball Players' Association and the National Basketball League had the Fair Work Commission approve an enterprise agreement for the men's league,¹¹⁷ which has since expired.¹¹⁸ It is unknown why the league and players association did not apply to the Fair Commission to approve the current collective agreement.

Previously the NRL had the precursors to the Fair Work Commission approve its first enterprise bargaining agreement in 2004 and subsequent agreement in 2006.¹¹⁹ Like the Australian Basketball Players' Association, the Rugby League Players' Association was at the time a member of the MEAA. A dispute over statutory entitlements to long-service leave in 2002 saw the Australian Industrial Relations Commission approve enterprise agreements that offset the practical inability of players to take long-service leave as mandated by

Agreement, Search at <<https://www.fwc.gov.au/document-search?search-ui=agreements>> at 26 May 2026.

114 Schwab (n 111) 20.

115 The agreement is available on the Australian Football League Players' Association website: See 'AFL and AFLW Collective Bargaining Agreement (2023-2027)', *Australian Football League Players' Association* (Web Page) <<https://www.aflplayers.com.au/resources/afl-aflw-collective-bargaining-agreement-2023-2027>>; AFL Policies & Terms, *Australian Football League* (Web Page) <<https://www.afl.com.au/policies>>.

116 Fair Work Commission, 'Enterprise Agreements and Awards', Find an Agreement, 'Basketball' search at <https://www.fwc.gov.au/document-search?keyword=basketball&search-ui=agreements&sort=search_api_relevance%3ADESC> at 26 May 2026.

117 Media, Entertainment and Arts Alliance, National Basketball League Players Agreement 2016-2019, AG2016/3173, 24 June 2016.

118 *Kevin Lisch (AG2019/4281) National Basketball League Agreement 2016-2019* [2019] FWCA 8084, [1].

119 'NRL receives support for new bargaining agreement', *ABC News*, 8 October 2004 <<https://www.abc.net.au/news/2004-10-08/nrl-receives-support-for-new-bargaining-agreement/566070>> and Stephen Long, 'Rugby League players win enterprise agreement', ABC AM, 26 May 2005 <<https://www.abc.net.au/listen/programs/am/rugby-league-players-win-enterprise-agreement/1575610>>..

statute.¹²⁰ After the three-year term of the agreements ‘expired’,¹²¹ the contents of these agreements were later absorbed into the collective bargaining agreement.¹²² It is possible that these enterprise agreements are still valid if they were not terminated by agreement¹²³ between the AFL and the Australian Football League Players’ Association.

B Salary caps

A salary cap is one method of restricting a team’s total wages and therefore players may receive less than they would on a free market. Salary caps were first introduced in professional sport in 1983 in the National Basketball Association (‘NBA’) in the United States.¹²⁴ In Australian sport salary caps were implemented in the Victorian Football League in 1985 and the NSWRL in 1990.¹²⁵ Other sports followed. Salary caps now exist in most professional sporting leagues in Australia, including the AFL, AFLW, NRL, National Rugby League Women’s (‘NRLW’), A-League, A-League Women and Super Netball.

Even though litigation targeted labour controls in the 1980s and early 1990s, the legality of salary caps is yet to be tested in an Australian court. It is possible that courts would find a salary cap a valid restraint of trade as it is the product of collective bargaining and players provide input into its form. However the uncertainty of the legality of salary caps gives player associations some leverage when collectively bargaining as they can threaten to litigate over the legality of the league’s labour system. The salary cap is a major labour relations issue for player associations and leagues in collective negotiations as it is connected to the

120 Braham Dabscheck and Hayden Opie, ‘Legal Regulation of Sporting Labour Markets’ (2003) 16 *Australian Journal of Labour Law* 1, 16. See e.g., Fair Work Commission, ‘Agreements and Awards’, Find an Agreement, Adelaide Football Club Ltd Agreement <https://www.fwc.gov.au/document-search?keyword=adelaide+football+club&search-ui=agreements&sort=search_api_relevance%3ADESC> at 28 May 2026.

search/view/3/aHR0cHM6Ly9zYXN5Y2RhdGFwcmRhdWVhYS5ibG9iLmNvcuUud2luZG93cy5uZXQvZW50ZXJwcmVlbWVudHMvSGlzdG9yaWNhbC8xOTAwLTIwMDMvMjAwMi8xMi9hZzgyMDIzMC5wZGY1?sid=&q=football> at 21 November 2023.

121 See for example the AFL Players Long Service Leave Agreement [Adelaide Football Club Ltd] [2002], certified 6 December 2002 and available at Fair Work Commission <<https://www.fwc.gov.au/document-view/agreements/afl-players-long-service-leave-agreement-adelaide-football-club-ltd-2002?from=search>>.. The role of the nominal expiry date of an enterprise agreement under the Fair Work Act is to permit negotiations of a new agreement and allow ‘protected’ industrial action under the Act.

122 See Australian Football League and Australian Football League Players Association Incorporated, *AFL and AFLW Collective Bargaining Agreement 2023-2027* (Collective Bargaining Agreement) clause 6 (‘CBA 2023-2027’).

123 Under s 225 of the *Fair Work Act* an agreement that reaches its nominal expiry date continues if a new agreement is not in place. Such agreements can be terminated if an employer, employee or employee organisation applies to the Fair Work Commission.

124 Dabscheck Game (n 3) 607.

125 Ibid 607-608.

percentage of revenues received by players,¹²⁶ an important factor in light of the growing broadcast revenues received by Australia's major sports in recent years. A product of collective bargaining in Australian sport (and perhaps a number of salary cap breaches in the AFL and NRL in the 1990s and 2000s) is a soft cap, which facilitates players receiving additional income and creates exemptions.

As discussed above the only current collective bargaining agreement that is publicly available is the AFL and AFLW agreement. In 2025 the AFL salary cap was \$17.76 million per club and then incrementally rising to \$18.44 million in 2027.¹²⁷ Yearly additional service agreements¹²⁸ with third parties of \$1.26 million are permitted.¹²⁹ The AFLW salary cap was \$2.29 million in 2025 and increases gradually to \$2.46 million in 2027.¹³⁰ In addition clubs can have additional service agreements of \$127,693 (increases to \$135,470 by 2027).¹³¹

Transparency is an issue as only one collective bargaining is publicly available. League websites and media releases shed light on the salary caps of other leagues. The NRL salary cap is \$9.11 million and there is a \$188,000 allowance for veterans and developed players who were either trained by the club before becoming a NRL player, have been a top 30 player for at least eight years at the club or were a top 30 player for at least 10 years across the NRL.¹³² The NRLW salary cap was \$900,000 in 2023 and increases to \$1.5 million by 2027.¹³³ NRL press releases do not reveal whether this is a hard or soft cap. In 2024 the salary cap in soccer's A-League was \$2.6 million. This is also a soft cap as an additional \$300,000 to \$600,000 can be paid to designated players, as well as payments to marquee players.¹³⁴ In the A-League Women in 2023 the collectively bargained

126 Players receive between approximately 18 and 29 per cent of revenue. This is considerably lower than the approximately 58 per cent in American sports and between 63 and 68 per cent in European soccer (except Germany): Braham Dabscheck, 'Player Shares of Revenue in Australia and Overseas Professional Team Sports' (2011) 22 (1-2) *Labour and Industry: A Journal of the Social and Economic Relations of Work* 57, 79-80.

127 CBA 2023-2027' (n 122) Schedule 2A, clause 1(a).

128 An example of an additional service agreement is a marketing contract between a player and a club sponsor.

129 CBA 2023-2027' (n 122) Schedule 2A, clause 2.

130 Ibid Schedule 2B, clause 1(a).

131 Ibid Schedule 2B, clause 2.

132 'Integrity - The Salary Cap', *National Rugby League* (Web Page) <<https://www.nrl.com/operations/integrity/salary-cap/>>.

133 Alicia Newton, 'Everything you need to know: NRLW CBA', *National Rugby League* (Web Page, 14 February 2023) <<https://www.nrl.com/news/2023/02/14/everything-you-need-to-know-nrlw-cba/>>.

134 Marco Monteverde, 'A-League: New agreement will allow clubs to spend extra money outside of salary cap', *News.com.au* (online, 9 September 2021) <<https://www.news.com.au/sport/football/aleague-new-agreement-will-allow-clubs-to-spend-extra-money-outside-of-salary-cap/news-story/94a6f4c172de338d4e66d89d9745a1ec>>.

minimum salary cap was \$500,000 and the maximum cap \$600,000.¹³⁵ After protracted and bitter negotiations the new Super Netball collective bargaining agreement reportedly has a soft salary cap of \$690,995 in 2024 that rises to \$742,212 by 2026. Additional payments from sponsors are permitted of \$40,000 per player and \$160,000 per team.¹³⁶

C *Free agency*

The AFL and AFLW are the only Australian sports with a formal free agent system. Like the salary cap the legality of free agency has not been tested in court. Collective bargaining underpins the legal basis for free agency in the AFL and thus supports it being an enforceable restraint of trade due to the players' role in creating and then developing free agency. The AFL's 2007-2011 collective bargaining agreement required consultation on free agency through a 'progress working party' composed of the AFL, clubs and the Australian Football League Players' Association.¹³⁷ Free agency necessitated approval by the AFL Commission, who opposed it on the grounds it was antithetical to competitive balance.¹³⁸ Competitive balance was again central to a league's position on a labour control but this time it was due to the negative effects on competitive balance rather than achieving competitive balance. The AFL Commission's position ignores that free agency involves giving players the liberty of choosing their employer and negotiating a contract on a free market.

While collective bargaining was the mechanism used to introduce free agency, it can also be viewed as a tool of the AFL in delaying free agency. Despite resistance from the AFL and clubs, free agency was formally implemented through collective bargaining in 2012.¹³⁹ Court action may have occurred had the AFL not agreed to free agency. Smith and Moore argue that if the AFL failed to introduce free agency it was almost certain that the Australian Football League Players' Association would have challenged the AFL's system of labour regulation in court, including the key labour controls of the draft and salary

135 Matt Comito, 'APL & PFA's six big Liberty A-League updates as salary cap goes up 20%: full details', *A Leagues* (online) <<https://aleagues.com.au/news/a-league-news-latest-salary-cap-collective-bargaining-agreement-women-details/>>.

136 'Netball Australia, players reportedly agree to new CPA as bitter standoff finally ends', *Fox Sports* (online, 3 December 2023) <<https://www.foxsports.com.au/netball/netball-2023-pay-war-finally-over-as-new-agreement-ends-bitter-standoff-cba-pay-deal-latest-news/news-story/84f4ed4b40c218a04a758192324b32d4>>.

137 Meg Smith and David Moore, 'Fairness, Free Agency and Franklin: The Forever Complex Nature of Industrial Relations in Sport' (2014) 22(1) *International Journal of Employment Studies* 5, 14 ('Smith and Moore').

138 Chris Davies and Justin Cook, 'Free Agency and the Australian Football League' (2012) 24 *Bond Law Review* 64, 87 ('Davies and Cook').

139 Australian Football League and Australian Football League Players' Association, *Collective Bargaining Agreement "2012 – 2016"* (Collective Bargaining Agreement) ('CBA 2012-2016').

cap.¹⁴⁰ Prominent former AFL player agent Ricky Nixon made similar claims on behalf of his clients.¹⁴¹

The mechanics of the AFL free agent system were not initially set out in the collective agreement¹⁴² but instead in the AFL Rules.¹⁴³ Subsequent collective bargaining has governed the rules of free agency for the men's and women's competitions.¹⁴⁴ Free agency in the AFL is evolving through collective bargaining and gives rise to two types of free agents: restricted and unrestricted free agents. The evolution of free agency through collective bargaining may support its lawfulness under the restraint of doctrine if challenged in court.

At first restricted free agents in the AFL were players in the top 25 per cent of salaries at their club (10 highest paid players) and had played eight years with the same club. Service with the same club restricts labour mobility for eligible players and diverges from league service in American free agency. If a restricted free agent received an offer from another club, the player's incumbent club had the 'right of first refusal' by matching the offer.¹⁴⁵ In the event the incumbent club did match a restricted free agent's offer, the free agent could only transfer to the new club via a trade or the draft.¹⁴⁶ These two mechanisms represent decreased labour mobility. The only examples of trades under the restricted free agent system are Patrick Dangerfield who in 2015 transferred from Adelaide to Geelong¹⁴⁷ and Jeremy Cameron who moved from Greater Western Sydney to Geelong in 2020.¹⁴⁸

Unrestricted free agents can choose their club and the incumbent club has no rights to prevent the move.¹⁴⁹ There are two types of unrestricted free agents.

140 Smith and Moore (n 137) 14.

141 Davies and Cook (n 138) 87.

142 See CBA 2012-2016 (n 139) Schedule G, clause 4, which required a working party to discuss changes to free agency but did not mention the rules of free agency.

143 Australian Football League, Australian Football League Rules, October 2013, rule 17. For more recent rules, see Australian Football League Rules, 11 February 2026 <<https://resources.afl.com.au/afl/document/2026/02/13/52922632-b4be-4c8d-82b8-3766b96c8a88/AFL-Rules-Final-11-February-2026-.pdf>>.

144 CBA 2023-2027 (n 122) Schedule 5A, clause 4 and Annexure C, clause 1 (AFL) and clause 2 (AFLW).

145 Australian Football League and Australian Football League Players' Association Inc, *Collective Bargaining Agreement "2017 – 2022"* (Collective Bargaining Agreement) Annexure D, clauses 1.5(c)–(e) ('CBA 2017-2022').

146 Ibid Annexure D, clause 1.5(i).

147 Matt Nichol, 'The Commodification of Labour in the Australian Football League: What is the Impact of Free Agency?' (2018) 31 *Australian Journal of Labour Law* 73, 93 ('Nichol Commodification').

148 'Cats cave, Giants score historic draft bounty for Jezza', *Australian Football League* (Web Page, 12 November 2020) <<https://www.afl.com.au/news/523645/jeremy-cameron>>.

149 CBA 2017-2022 (n 145) Annexure D, clause 1.1.

The first is a player who has served eight or more consecutive years at his club.¹⁵⁰ Delisted players are the second type of unrestricted free agent¹⁵¹ and possess considerably less bargaining power than players who accrue the required service. Previously such players needed to enter the draft to find a new club and free agency represents improved labour mobility.¹⁵²

Free agency in the AFL involves compensation in the form of draft selections for the loss of players. Compensation diverges from American sports in two significant ways. Compensatory draft selections are at the discretion of the AFL and the draft pick is provided by the AFL and not the player's new club.¹⁵³ Clubs not losing draft selections for free agents facilitates labour mobility as clubs are more willing to recruit a free agent if they do not provide compensation. However the AFL exercises significant power in exercising its discretion to issue a compensatory draft selection.

The AFLW also has free agency. Like the AFL there are unrestricted and restricted free agents. Areas of divergence are the eligibility of restricted free agents and the absence of compensation for the loss of a free agent. An unrestricted free agent is a delisted player who was not offered a contract for the next season.¹⁵⁴ Restricted free agency is based on the AFLW's collectively bargained tiered salary system.¹⁵⁵ A restricted free agent is a player who is on a one year contract and is offered another one year contract at a lower payment tier than they received in the previous season. A restricted free agent can change clubs if prior to the free agent period another club offers payment at or above their previous season payment tier.¹⁵⁶ Thus restricted free agency is connected to player wages, contract length and list management by a club and provides greater labour mobility than the service requirements for AFL restricted free agents.

150 Ibid Annexure D, clauses 1.1(a)-(b).

151 Ibid Annexure D, clauses 1.1(c)-(d).

152 Nichol Commodification (n 147) 93.

153 CBA 2017-2022 (n 145) Annexure D, clause 1.6.

154 Ibid Annexure C, clause 2.1(a).

155 The collective bargaining agreement permits two Tier 1 players, six Tier 2 and 3 players and 16 Tier 4 players. During the term of the bargaining agreement the salaries incrementally increase from \$87,192 to \$117,968 for Tier 1, \$71,806 to \$96,257 for Tier 2, \$61,548 to \$81,782 for Tier 3 and \$51,290 to \$72,373 for Tier 4: See Ibid Schedule 2B, clause 1(a).

156 Ibid Annexure C, clause 2.1(b).

5 EVALUATION OF LABOUR CONTROLS IN AUSTRALIAN SPORT

A *Assessing labour controls in sport*

Evaluation of the labour controls in sport is timely given the Australian government's inquiry into restraints on labour mobility and recent ban on non-compete clauses for some workers.¹⁵⁷ Labour controls in sport can be contrasted to restraints of trade in employment contracts in that they apply during the employment relationship.¹⁵⁸ As has been demonstrated, a range of labour controls used in sport to limit labour mobility have been ruled to be unlawful restraints of trade. The cases on labour controls are important in that they were determined prior to collectivism and strong player unionism and reflected the individualism identified by Opie and Smith. The lack of collectivism heightened the vulnerable position of young athletes and the declarations of the courts helped to correct the imbalance in bargaining positions.

Labour controls are typically justified by leagues and clubs on the policy grounds of competitive balance. It is submitted that competitive balance does not justify imposing labour controls on young athletes that severely handicap labour mobility and artificially set player wages at below market levels. However, such restrictions are now generally accepted as part of the sporting landscape. Instead of being subjected to litigation, restraints on labour mobility are now the subject of collective bargaining and face regular rounds of negotiations.

B *Do labour controls achieve their purpose?*

Prior to examining whether labour controls in sport can be justified on the basis of competitive balance it is necessary to assess whether they achieve their purpose. In the cases discussed leagues typically state the purpose of labour controls such as the retention and transfer system and residency and zoning are to achieve competitive balance. In the context of sport this means that wealthy teams cannot pay the best players the most money to secure their services. But in practice labour controls affect the ability of all players, regardless of skill, to sell their services on a free market and secure the greatest deal. The Federal Court recognised this point in *Adamson* when it ruled the NRL's internal draft affected all players equally and did not consider talent. Similarly, the salary cap negatively influences the ability of lower skilled players to secure their market

157 See Treasury, 'Competition Review, Non-compete clauses and other restraints' (Web Page, 7 October 2025) <<https://treasury.gov.au/review/competition-review-2023/non-compete-clauses>>. Note that the 2025-2026 budget bans non-compete clauses for low and middle income workers, wage fixing agreements and no-poach agreements.

158 Such controls may also exist during the currency of employment in 'standard' employment arrangements but it is the application of post-termination controls that tends to result in the most dispute.

value and all players earn less money. The ability of labour controls that restrict labour mobility to achieve competitive balance must be weighed against the labour rights of young players to maximise their income through negotiations in a free market in what is typically a short career in professional sport. Consideration must also be given to the right to choose one's employer, a right that is severely limited by the draft and versions of free agency (including the retention and transfer system and zoning and residency) that limit the movement of players during their contract or a specified period. Individual liberties such as the right to choose your employer and negotiate a market wage are rights that workers in non-sports industries enjoy and the ability of sport to severely curtail these rights based on notions of competitive balance need to be scrutinised.

C *Are labour controls in sport justified on the basis of competitive balance?*

Due to the prevalent role of competitive balance in the use of labour controls it is necessary to assess whether this objective is obtained and constitutes a relevant justification. In measuring competitive balance in the AFL, NRL and National Basketball League, Booth identified two types of competitive balance commonly used in the economics literature: competitive balance within a season and competitive balance between seasons. The first type of competitive balance involves concentration and the second dominance.¹⁵⁹ Within season competitive balance is measured by winning percentage and between season competitive balance by the distribution of premierships.¹⁶⁰

Between 1967 and 1984 when the AFL used the retention and transfer system and residency and zoning, competitive balance was poor with three clubs winning five of 18 premierships.¹⁶¹ Booth concluded that in season competitive balance was higher between 1985 and 2004 than 1970 to 1984,¹⁶² in part due to the introduction of a salary cap, draft and revenue sharing.¹⁶³ However, Booth identified expansion as a factor in improving the AFL's competitive balance as expansion teams won eight of 13 premierships from 1992 to 2004.¹⁶⁴ Between 1985 and 2004 Booth concluded there was little difference in between season competitive balance in the AFL, NRL and National Basketball League, with the salary cap in all three leagues playing a role, as well as the limit on imports in

159 Daniel Plumley, Girish Ramchandani, Sarthak Mondal and Rob Wilson, 'Looking forward, glancing back; competitive balance and the EPL' (2022) 23(4-5) *Soccer & Society* 466, 467-468 (Plumley et al').

160 Ross Booth, *Comparing Competitive Balance in Australian Sports Leagues, the AFL, NBL and NRL: Does the AFL's Team Salary Cap and Player Draft Measure Up?* (Discussion Paper No 02/05) 3.

161 Ibid 6.

162 Ibid 11.

163 Ibid 13.

164 Ibid 14.

basketball and expansion (and contraction in NRL and the National Basketball League).¹⁶⁵ Between season competition improved in the AFL between 2005 and 2023 with eight teams winning premierships,¹⁶⁶ though the competition expanded to 18 teams in 2012 which affected competitive balance through a number of compromised drafts that gave the new clubs a large number of high draft picks. During this period between season competition in the NRL was slightly better with ten teams winning premierships.¹⁶⁷ Between season competitive balance was lowest in the NBL with six teams winning premierships. While Australian sports operate closed leagues (no relegation) and have demonstrated greater competitive balance, Read et. al. point out they are far from balanced.¹⁶⁸

It is worthwhile comparing competitive balance in Australia to foreign leagues. In European sport the regulation of football (soccer) is notable for its general lack of labour controls, save for the financial fair play rules. Since *Eastham* British soccer was devoid of restraints on labour mobility. Despite the absence of labour controls, the English Premier League was relatively balanced between 1978 and the early 2000s. Since the 2000s the Premier League has become unbalanced and there is a focus on the 'big six' teams of Arsenal, Chelsea, Manchester City, Manchester United and Tottenham.¹⁶⁹ Plumley et. al. observe that the lack of competitive balance in the Premier League over the past 20 years is a product of the financial imbalance resulting from the distribution of television revenues,¹⁷⁰ supporting the implementation of constraints on player contracts such as the salary cap.

The major American sports provide a useful comparison on competitive balance to Australian sport as they use similar labour controls. Like Australian sport, drafts, free agency and salary caps (except Major League Baseball where a luxury tax exists) are all utilised in American sport. However, Paul and Weinbach argued these restraints may not regulate competitive balance as the Coase theorem holds that resources flow to their highest value use.¹⁷¹ Paul and Weinbach reviewed competitive balance in the National Basketball Association

165 Ibid 23.

166 See 'Premiership Winners', *Australian Football League* (Web Page) <<https://www.afl.com.au/stats/premiership-winners>>.

167 Ibid.

168 Read, Smith and Skinner (n 4) 874.

169 Francesca Basini, Vasiliki Tsouli, Ioannis Ntzourfras and Nial Friel, 'Assessing competitive balance in the English Premier League for over forty seasons using a stochastic block model' (2023) 186(3) *Journal of the Royal Statistical Society Series A: Statistics in Society* 530, 533.

170 Plumley et al (n 159) 467-468.

171 Rodney Paul and Andrew Weinbach, 'Similarities and differences between competitive balance and uncertainty of outcome: a simple comparison of recent history in the NBA and NFL' in Michael Barry, James Skinner and Terry Engelberg (eds), *Research Handbook of Employment Relations in Sport* (Edward Elgar Publishing, 2016) 355, 357.

(‘NBA’) and the National Football League (‘NFL’). Between 1995 and 2011 competitive balance in the NBA was found to have improved,¹⁷² while in the NFL between 1993 and 2012 competitive balance substantially declined.¹⁷³ Major League Baseball (‘MLB’) offers a different perspective due to the absence of a salary cap. Competitive balance was poor during the late 1990s due to teams with high payrolls dominating the playoffs.¹⁷⁴ Research on the relationship between competitive balance and payroll in MLB in the 2000s is inconclusive and supports the positions that competitive balance both increased and decreased.¹⁷⁵

D *The future development of labour controls in sport*

It is worthwhile to now consider the impact of the development of labour controls in sport on how the regulation of labour mobility will evolve in the future. The labour controls that have been deemed to be illegal restraints of trade are unlikely to be introduced again. *Adamson* plays an ongoing role in the regulation of labour in the NRL as the league has failed to again introduce a draft. Hovering over leagues is the fact that the legality of the salary cap and free agency is yet to be tested in court. This legal uncertainty, combined with the resolve of players to previously test the legality of labour controls, gives player associations some leverage over leagues in collective negotiations. Players retain the strategic option of challenging a league’s labour system in court. While a historic review of cases suggests the players are in a strong position, it must be noted that sport’s restraint of trade cases were litigated prior to collective bargaining. No Australian court has reviewed a labour control in sport that was the subject of collective bargaining. Courts may take a different approach to the validity of labour controls where players have had input into its configuration. Yet this is a risk leagues may not be prepared to take and therefore player associations have some leverage over leagues in collective negotiations.

6 CONCLUSION

Labour mobility in sport and its regulation can be contrasted to other industries. However, the question arises as to whether player labour should involve a market that sees the regular movement of players, and if so, what form would such a market take? The regulation of labour in professional sport in Australia developed a series of labour controls that evolved to severely restrict the ability of players to choose their employer, change jobs and negotiate a market salary. While practices such as the retention and transfer system, restrictions on transfers, residency, zoning, compensation fees, free agency and

¹⁷² Ibid 361.

¹⁷³ Ibid 366-367.

¹⁷⁴ Tyler Veach, ‘Competitive Balance and Team Payroll: The Case of Major League Baseball’ (2010) 12 *Major Themes in Economics* 71, 76.

¹⁷⁵ Ibid 87.

salary caps seem abhorrent in the lens of standard industrial practice, they have for decades underpinned the regulation of player labour in Australian sport. Leagues argue such controls are needed to produce competitive leagues, though the competitive balance in a number of leagues raises questions over whether such objectives are met. Reviewing these labour controls gives some insight into the future of labour mobility and where labour controls may or may not venture. Prior to strong unionism and collective bargaining, labour controls were successfully challenged in court by players over a number of decades. The cases demonstrate that sport is not immune from the common law's restraint of trade doctrine. Players have generally been unsuccessful in arguing competition law applies to labour mobility. However, the cases brought by individuals in the 1970s, 1980s and 1990s ended as sports shifted to collective bargaining to negotiate labour controls and other conditions of employment. The modern labour controls of salary caps and free agency are no longer contested in the court room but at the negotiation table and they are now subject to regular review. Understanding the development of labour controls in sport is important in identifying how the labour regimes govern labour mobility and shape the ability of young athletes to choose their employer and control their career, as well as influencing the labour supply of clubs. The restrictions imposed on the labour mobility of players can be viewed negatively in that young athletes are prevented from freely selling their labour in an unfettered market. Clubs and leagues, on the other hand, may argue restraints are needed to protect their investment in a player and achieve competitive balance. And such restrictions are arguably part of a broader trend in Australian employment (unless and until it is further regulated) that sees restraints placed on labour mobility more generally.