THE USE OF MULTIPLE RESTRAINTS OF TRADE IN SPORT AND THE QUESTION OF REASONABLENESS

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Athletes, particularly those competing in team sports, are not uncommonly restricted by more than one substantive restraint of trade. The literature on restraints of trade in sport deals by and large with restraints as single impositions.[1] This article addresses the effect of multiple restraints of trade imposed on athletes and how these, in combination, bear upon the question of reasonableness under the restraint of trade doctrine. The use of multiple forms of trade restraints is somewhat unique to the industry of sport to include over the years, player draft systems,[2] salary caps,[3] zoning restrictions,[4] retain or transfer systems[5] and wage ceilings.[6] Restraints limiting athlete endorsement of sponsor products and services, a restraint of more recent origin yet to be tested before a court of law, will be considered against the background of the restraints listed above. Given the lucrative returns associated with athlete endorsement, such may prove to be a restraint too far.[7]

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1 See, eg, Antonio Buti, 'Salary Caps in Professional Team Sports: An Unreasonable Restraint of Trade' (1999) 14 *Journal of Contract Law* 130; Stephen F Ross, 'Player Restraints and Competition Law throughout the World' (2004) 15 *Marquette Sports Law Review* 49; Chris Davies, 'The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine' (2006) 22 *Journal of Contract Law* 246; 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 *Australian and New Zealand Sports Law Journal* 80; Stephen Owen-Conway and Linda Owen-Conway, 'Sport and Restraint of Trade' (1989) 5 *Australian Bar Review* 208; Chris Davies, 'The AFL's Holy Grail: The Quest for an Even Competition (2005) 12 *James Cook University Law Review* 65; Tony Buti, 'AOC Athletes' Agreement for Sydney 2000: The Implications for the Athletes', (1999) 22 *University of New South Wales Law Journal* 746; James Johnson, 'Restraint of Trade in Sport' (2009) *Bond University Sports Law eJournal* <http://epublications.bond.edu.au/slej/>.

2 Presently operating in the Australian Football League. See also *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242 ('*Adamson*').

3 Operating in the National Rugby League, the Australian Football League and the National Basketball League.

4 See *Hawick v Flegg* (1958) 75 WN (NSW) 255; *Foschini v Victorian Football League and South Melbourne Football Club* (unreported, Supreme Court of Victoria, Crockett J, 15 April 1983).

5 See *Buckley v Tutty* (1971) 125 CLR 353.

6 See *Johnstone v Cliftonville Football and Athletic Club* [1984] NI 9.

7 There is no intention in this paper, for reasons of specificity, to discuss benefits that may be thought to compensate athletes for the imposition of the various restraints of trade imposed in the context of major Australian sport. For example, s 23 of the AFL Collective Bargaining Agreement permits a player to wear as a 'tool of his trade' any footwear of his choice. Trademarks displayed on modern sporting tools are a means of product endorsement from which a player may expect some remuneration from a manufacturer and could be used to promote the argument that endorsement restraints are 'partial' in scope, a factor often going to reasonableness. Such clauses generally fall short, however, of permitting the overt endorsement advertising of manufacturers <http://mm.afl.com.au/portals/0/afl_docs/afl_hq/policies/collective_bargaining_agreement_2007_2011.pdf> .

Introduction

All major sports in Australia impose through their player contracts various forms of restraints of trade. In particular, the Australian Football League ('AFL') imposes a salary cap, a player draft and various limitations on player use of their 'personal property'.

The question of multiple restraints and reasonableness is all the more topical for recent calls to reintroduce a draft system in the National Rugby League ('NRL') in addition to the existing salary cap.[8] And again, the proposed use of a salary cap in rugby union in addition to existing trade restraints: 'The Australian Rugby Union is set to introduce an NRL-like salary cap to curb player expenditure of more than $30 million, cracking down on third-party payments, and reducing individual player payments by as much as 25 per cent'.[9] Is the imposition of each restraint to be viewed as a singular occurrence isolated from other restraints of trade in respect to the question of reasonableness? A draft or a salary cap introduced where other restraints of trade are extant, must, it is proposed, be considered against the backdrop of the cumulative effects of all restraints upon a player's interests in general. In fact, as the AFL moves towards a so-called 'free agency' system, trade limitations nonetheless remain: 'A player has served seven seasons or fewer of AFL football at one club, and is now out of contract. The player is not eligible for free agency if his club wishes to retain him. He may only move clubs via a trade or the draft.'[10]

The question is whether a restraint that is reasonable when singular, becomes unreasonable when combined with one or more additional restraints. As Wilcox J stated in *Adamson v New South Wales Rugby League*: 'The more onerous the restraint, the more difficult it is … to satisfy a court that it was … no more than was reasonably necessary'.[11]

As there is no per se ban on incorporating multiple restraints of trade into a contract, the question of reasonableness is perhaps best examined in the context of a group of restraints likely, in combination, to provide more than reasonable protection in securing the legitimate interests of the covenantee. In considering reasonableness as it relates to multiple restraints, one must differentiate between those restraints which combine to damage a single aspect of an athlete's trade, such as his or her earning capacity, and to multiple restraints which impact

[8] 'NRL chief executive David Gallop has warned that players could be driven into the arms of rugby union if the push within the code to adopt a draft system continues': Stuart Honeysett, 'Draft Will Drive Talent to Our Rivals Warns David Gallop' *The Australian* (online), 14 March 2012 <http://www.theaustralian.com.au/sport/nrl/draft-will-drive-any-talent-to-our-rivals-warns-david-gallop/story-fnca0von-1226298598054>.

[9] Josh Rakic, 'Big Paycuts on Cards as ARU seeks Salary Cap', *The Sydney Morning Herald* (online), 13 March 2011 < http://www.smh.com.au/rugby-union/union-news/big-paycuts-on-cards-as-aru-seeks-salary-cap-20110312-1bs2k.html>.

[10] 'Free Agency Rules' AFL statement 16 March 2012.

[11] *Adamson* (1991) 31 FCR 242, 266 (Wilcox J).

on several trading interests of the athlete, for example, one restraint dictating the club he or she must play for and another bearing upon earning capacity. Suggested below are several approaches to considering the effects of multiple restraints upon a covenantor's interests.

For purposes of clarity, where multiple restraints impact on an athlete's freedom to trade, a covenantee may be tempted to argue that the interests of each party should be 'balanced out', such that each will give up a little in return for having some of their own interests met. For example, where multiple restraints are in issue, the finding that one restraint is unreasonable would require, in balancing the competing interests of the parties, that the other restraint be declared reasonable. This approach is incorrect. Determining the reasonableness of a restraint of trade 'is not to undertake a "balancing" exercise with a comparative evaluation of the weight of the interests of organisers and players. It is to test the justification attempted by those in adverse interest, in the litigation, to the players. … [The trial judge] had proceeded on the footing that [it] was a question of "balancing" the competing interests. In my view, that was impermissibly to lighten the burden on the respondents [the League].'[12] Having said this, it is suggested below however, that 'balancing' the interests of the parties in a manner similar to the accepted practice of setting-off an extensive duration against a small geographic scope may offer a means of resolution.

Much of the subject matter of this paper concerns the imposition of a restraint of trade during the currency of employment. Whilst this is less than common, there is no principle denying relief to those properly aggrieved. As J D Heydon writes extra-judicially:

> Since *Warner Bros Pictures Inc v Nelson* [[1936] 3 All ER 160; [1937] 1 KB 209], there have been several instances of the restraint of trade doctrine being applied to contracts during their continuance, for example, contracts of employment,[13] contracts for the exclusive provision of services[14] and contracts controlling the activities of players of professional sport whether or not they are parties to the contracts.[15] These developments are sound. … it would unnecessarily hamstring the doctrine of restraint of trade to apply a test based on when a 'contract' came to an end.[16]

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[12] *Adamson* (1991) 31 FCR 242, 290 (Gummow J). Note also *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 707 (Lord Parker) ('*Saxelby*'): 'It was at one time thought that … the court ought to weigh the advantages accruing to the covenantor … against the disadvantages … but any such process has long been rejected as impracticable.'

[13] *Heine Bros (Aust) Pty Ltd v Forrest* [1963] VR 383.

[14] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308.

[15] *Buckley v Tutty* (1971) 125 CLR 353; *Adamson* (1991) 31 FCR 242.

[16] JD Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 3rd ed, 2008), 69–70. Former Justice of the High Court of Australia.

In addition to those noted by Heydon, in several celebrated sports cases including *Eastham v Newcastle United Football Club*[17] and *Beetson v Humphries*[18] the restraints in question applied during the currency of employment. As an aside, so entrenched was the focus on the single restraint in question that in these cases additional restraints patently impacting on the interests of a covenantor were ignored as factors going to reasonableness. In *Eastham* in addition to the transfer and retention systems players were restricted to a maximum wage of £20 a week during the season and £17 during the off-season. It is worth noting given the subject matter of this paper that although Wilberforce J was prepared to recognise that the transfer restraint and the retention restraint operated as a system, no mention was made of the wage ceiling that had existed up until 'after the issue of the writ' as an additional restraint, even if merely as an historical overlay.[19]

Similar observations were made in *Beetson v Humphries*, a case that concerned professional rugby league player Arthur Beetson who was restrained under a by-law of the League from writing newspaper columns critical of referees, officials, the General Committee or which raised allegations of rule breaches by players. Beetson had written for the press since 1970 being paid by 'The Sun' in 1980 $571 for 35 weeks totalling $20 000. The second plaintiff, Western Suburbs coach Roy Masters, also wrote a column for The Sun and was deprived of his 'meagre' earnings' under the same by-law. Hunt J recognised that the 'practical effect of By-Law 34 on the plaintiff's occupation as a sporting journalist will be a financial one'.[20] No mention, though, was made of other financial restraints that had been applied in the sport in the years leading up to the case which included a 13 man import rule, a maximum signing on fee and a wage ceiling.

The fact of multiple restraints in sport

Sport is an industry characterised by the multifarious imposition of restraints of trade on contracting athletes. Many of these restraints, such as draft systems and salary caps, are incorporated for the stated purpose of enhancing competition between the various clubs participating under the organisation's banner. Other restraints, such as limits placed on offering endorsement services, are designed to enhance the organisation's earning capacity by removing potential competitors from the market.

[17] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 ('*Eastham*').
[18] *Beetson v Humphries* (unreported, Supreme Court of New South Wales, Hunt J, 30 April 1980).
[19] *Eastham* [1964] Ch 413, 417–18. Although the ceiling had been removed it was nonetheless described by Wilberforce J as existing at 'the material time'.
[20] *Beetson v Humphries* (unreported, Supreme Court of New South Wales, Hunt J, 30 April 1980) 15.

The example of the NRL

The NRL Playing Contract incorporates restraint of trade terms typical of those found in many Australian professional sports leagues. The relationship between the NRL and premier rugby league players is that of employer and employee.[21]

The major restraint of trade on NRL players is the salary cap, set at $4.4 million per club in 2012 'for the 25 highest paid players at each club' plus up to an additional '$350,000 on those players outside the top 25 who play in the NRL competition'.[22]

The Collective Bargaining Agreement ('CBA') states that:

> The NRL Clubs and Players recognise the importance of a Salary Cap and acknowledge that the Salary Cap limits, in a reasonable way, the remuneration that may be paid by, or on behalf of, any one NRL Club to its Players.[23]

Should the salary cap be averaged amongst the top 25 players, each would receive $176 000 per annum. Of course, better players are paid far more leaving less money available for other players. The impact of the salary cap on NRL players is revealed in the difference between what each would command in a free market and that paid under the salary cap.

There are a number of additional trade restraints. First, under section 3.1(s) the player must:

> not play the Game with any person, team of organisation save for the Club or in matches in any representative Competitions … except with the prior written consent of the Club.

Second, under section 3.1(t) the player must:

> not without the prior written consent of the Club, which the Player acknowledges will only be given with the consent of the NRL, participate in any football match of any code.

[21] NRL Playing Contract (2012), s 1.1. All NRL Playing Contract references refer to the 2012 contract (copy with author).
[22] National Rugby League, *Rugby League Reference Centre: Salary Cap*, NRL http://www.nrl.com/nrlhq/referencecentre/salarycap/tabid/10434/default.aspx.
[23] NRL Collective Bargaining Agreement (2006-2010), s 9.1.

Third, under section 3.1(u) the player must:

> not participate in any sporting or leisure activities other than matches approved by the Club and the NRL … except where:
>
> (i) the chances of injury are unlikely …
>
> (ii) there is no pre-arranged media coverage
>
> (iii) the Player is not (directly or indirectly) paid.

Fourth, under section 3.1 (v) the player must:

> not to enter into any Non-Playing Agreement or Third Party Agreement without the prior written consent of the Club.

Fifth, under section 3.2(a) the Player may:

> make public appearances and contribute to the press, television and radio provided that:
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> (i) the consent of the Club has been obtained, which consent must not be unreasonably withheld and
>
> (ii) such appearances and contributions do not conflict with the interests of, or bring into disrepute, the NRL, the Club or the Game.

Although preserving the employer's entitlement to a level of employee fidelity or preventing injury to players, the above restraints nonetheless impinge upon a player's capacity to fully engage with outside agencies to play any rugby code for reward or any sport where injury could possibly result. The effect of many of these restraints, at least singularly, is relatively minor to be merely a fringe influence on the question of reasonableness. There is, though, potential for substantial loss of income through terms restricting 'non-playing agreements' and 'public appearances', an illustration of which is found in the 'ultimatum' delivered to dual international Ellyse Perry in May 2012 by her 'W-League' soccer club Canberra United demanding she quit cricket 'or find another club' – a prima facie restraint of trade jeopardising potential salary and endorsement earnings.[24] Although in many instances clubs may give permission to players to engage in other sports or activities, the existence of a restraint of trade is determined by the contractual right to impose a restraint.[25]

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[24] Sebastian Hassett, 'Spectacular Own Goal as Star Forced to Choose Codes' *Sydney Morning Herald* (online), 30 May 2012 <http://www.smh.com.au/sport/football/spectacular-own-goal-as-star-forced-to-choose-codes-20120529-1zhh2.html>.

[25] *Adamson* (1991) 31 FCR 242, 285.

The big-ticket restraints

The salary cap in the NRL, as with other sports, is a major impost on player earnings. Where such a restraint is applied alongside other 'serious' restraints such as a player draft, a transfer system or residency requirement the burden on players takes on what might be called an exponential quality. Not only are earnings diminished but the entitlement to choose an employer and the place of work are beyond the athlete's control.

As commercially damaging as these restraints are to individual athletes, the most common restraints in Australian sport are those restricting athletes from engaging in private endorsement for sponsors. Endorsement restraints are found, for example, in the contracts of the Women's National Basketball League, the Australian Rugby Union ('ARU'), the Australian Olympic Committee and the AFL to name a few.

Again the NRL contract incorporates terms typical of most sporting contracts. The NRL player is granted the right to use his 'Player Property', in essence his image or reputation, but finds, in fact, that the right is so restricted as to be potentially worthless.

Section 3.3 grants to the Club the right to use the player's 'Player Property':

> The Player grants to the Club for the duration of the Employment Term a licence to use, and to license the use of, his Player Property (together known as the 'Rights') and to sub-license the Rights to the NRL on terms that authorise the NRL to further sub-licence the Rights to the NRL Partnership.[26]

The player is also permitted to use his Player Property. Section 3.4(a) states:

> the Player is entitled to use his Player Property for commercial purposes including, but not limited to endorsements, promotions, events and marketing provided that the NRL Playing Contract and remuneration Rules are not contravened.

The right to use Player Property is, however, far from absolute:

> The Player must not, without the prior written approval of the Club and the Salary cap Auditor, exercise his rights … where use of the Player Property would or might:

[26] Note: 'Player Property' 'means the name, photograph, likeness, reputation and identity of the Player': s 29 (Definitions and Interpretation), Collective Bargaining Agreement.

> (i) Conflict with the name, reputation, image, products or services of the Club, the NRL, any of the Club's sponsors or a Game Sponsor.
>
> (ii) Conflict with, or be prejudicial to, the interests of the Club or the NRL …

In effect, the player is entitled to engage in endorsement that does not conflict with (compete against) any sponsor of his club, the NRL or the sponsor of a particular game. Once a club, the NRL or any other relevant entity agrees to endorse a particular product or service, all other products falling within that category, for example, cars, airlines or alcoholic beverages, are excluded from the player's capacity to endorse. Whilst this arrangement may seem to leave a number of product categories available for exploitation by the player, in reality the club's and the NRL's sponsors are many and cover most product lines advantaged through a marketing association with sport.[27]

To illustrate the difficulty a player faces in finding 'sponsor-free products and services', consider that the NRL and all clubs endorse the products and services of sponsors. The NRL has some 18 sponsors.[28] The Sydney Roosters has 12 sponsors[29] and the Parramatta Eels has 52 sponsors.[30] A rugby player with the ARU and a provincial team such as the Western Force may have up to 45 products and services lines closed-off from endorsement.

The terms of many sporting contracts also require players to wear specific apparel to certain sport related events. The NRL player, for example, must:

> Wear only Team Apparel at training, NRL Competition matches, Representative Matches, matches in the Related Competitions and in all public appearances as a player.[31]

In addition, players must wear apparel mandated by the NRL or their Club across a range of public appearances.[32] There can be little doubt that the Club is entitled to insist on players wearing designated team apparel to work related events. Nevertheless, extending the restriction to 'all public appearances as a

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[27] Only certain products are advantaged through an association with sport. 'The task facing the sponsor is ostensibly to ensure his presence is clearly associated with the activity and where necessary to "drain" the activity values onto the brand. … Essentially sponsorship allows the sponsored brand to live in the reflection of the sponsored activity': Tony Meenaghan and David Shipley, 'Media Effect in Commercial Sponsorship' (1999) 33 *European Journal of Marketing* 328, 335.

For discussion see David Thorpe, 'Sports Marketing as a Factor in the Punishment of Athletes for Misconduct' (2012) 85 *ANZSLA The Commentator* 2.

[28] National Rugby League, *Sponsors*, NRL http://www.nrl.com/Sponsors/tabid/10630/Default.aspx.

[29] Sydney Roosters, *Sponsors Make a Difference*, <http://www.sydneyroosters.com.au/default.aspx?s=current-partners>.

[30] Parramatta Eels, *Eels Sponsors*, <http://www.parraeels.com.au/corporate-partners>.

[31] NRL Playing Contract (2012), s 3.1(i).

[32] NRL Playing Contract (2012), s 3.1(j).

player' would seem to include appearances as a 'private' player. Modern players appear regularly on television discussion panels, at fundraising and charitable events, visit hospitals and conduct interviews on the way into and out of the ground. Public appearances are also opportunities for endorsement – the player is seen, for example, on the evening news with his sponsor's name on a cap or a jacket before the public across the nation. Noting that Lord Denning MR defined a restraint of trade as any 'contract which interferes with the free exercise of his trade … by restricting him in the work he may do for others, or the arrangements which he may make with others',[33] this avenue for securing endorsement income through indirect means is, by operation of the contractual terms listed above, removed from the player.

Similar restraints are also found in the AFL Collective Bargaining Agreement.[34] Section 7 bans a player from participating in any competition but those approved by the AFL. Section 10 establishes a 'First Year Draft'. Section 11 places limits on 'Total Player Payments'. Section 21 bans a player from the use of his image for endorsement that conflicts with the AFL or a 'Protected Sponsor' of an AFL Club.[35]

There are, then, multifarious restraints of varying degrees of burden bearing upon the trading interests of athletes. How should these restraints be approached under the *Nordenfelt* principle? [36]

Reasonableness and adequate protection

According to the foundational case of *Nordenfelt v Maxim Nordenfelt Guns*[37] any restraint of trade is prima facie void. An exception to this general principle occurs where the restraint is 'reasonable in reference to the interests of the parties' and 'reasonable in reference to the interests of the public'.[38]

A sporting organisation would be justified in arguing that each restraint should be examined as a distinct legitimate interest so that provided each restraint is no more than is necessary to protect a specific interest, the restraint is reasonable. This is a strong argument but, as proposed in this paper, unreasonably weights

[33] *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, 169.
[34] AFL Collective Bargaining Agreement (2007).
[35] As stated previously, it is not the intention of this paper to consider benefits that may be thought to compensate for the imposition of the various trade restraints in sport.
[36] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 ('*Nordenfelt*').
[37] Ibid.
[38] The test of reasonableness is recorded in the oft quoted statement of Lord Macnaghten: 'All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and, therefore void. That is the general rule. But there are exceptions. … It is sufficient justification, and indeed, it is the only justification, if the restriction is reasonable – reasonable that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public': *Nordenfelt* [1894] AC 535, 565.

the enforceability of a restraint in favour of the covenantee where multiple restraints of trade bear upon the interests of covenantor athletes.

In exploring the organisation's entitlement to trade protection, two related concepts are examined below. One considers the question of whether a covenantee is to be awarded total protection as opposed to reasonable protection of its interests and the other, the extent to which the covenantor's interests are considered in the assessment of reasonableness.

'Sport restraints' do not fall within the neat categories of 'customer lists' and 'goodwill' that commonly form the subject matter of a protectable interest. Restraints of trade in sport are often designed to enhance competition between teams for purposes of marketing the game to the public – an exception being restraints curtailing athlete endorsement. Consequently, considering the scope of protectable interests in sport necessitates drawing upon the reasoning of the employment and sale of business cases.

'Nth' degree protection or reasonable protection

To be clear, an athlete will argue that the effect of two or more substantive restraints on his or her interests should be accumulated with respect to the question of reasonableness. In contrast, a sporting organisation will claim that each substantive restraint does no more than protect a legitimate interest and should, as such, be enforced. From the athlete's perspective a claim by the sporting organisation to 'total' protection of its interests makes redundant any reference to the adverse circumstances visited upon the covenantor as a matter going to reasonableness. The argument that the organisation is limited to 'reasonable' protection more readily permits an appraisal of the effects of the restraint on the athlete's interests.

The question by analogy is whether the restraint of trade doctrine should afford a covenantee total protection in circumstances where *almost* total protection, (in fact a high degree of partial protection) is reasonable. Would it be correct, for example, to permit a restraint to extend an additional 5 kilometres to ensure the continuing custom of a one client of the covenantee out of 100 clients, where a restraint 5 kilometres narrower would secure the ongoing custom of the remaining 99? This question is particularly relevant to endorsement restraints where a ban on, for example, internet advertising yields only a small return to the organisation but a great loss to the athlete.

In restraint of trade law there is a level of uncertainty as to how the relative interests of the parties are to be considered – one seemingly given little attention in commentary. Two semantically different formulations of reasonableness can

be identified in the foundational case of *Herbert Morris v Saxelby*.[39] Lord Parker stated that 'to be reasonable in the interests of the parties the restraint must afford *adequate* protection to the party in whose favour it is imposed'.[40] Lord Atkinson worded the requirement with a slight but nonetheless significant difference: 'nothing more than *reasonable* protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests.'[41] On one hand, the test is designated by 'adequate protection' and on the other, by 'reasonable protection'. For present purposes it is enough to note that 'adequate protection' refers to a restraint of sufficient scope to fully protect the interests of the covenantee. That is, a restraint of any scope is enforceable where necessary to protect the entire interest of the covenantee. On the other hand, 'reasonable protection' would permit a court to strike down a restraint where its scope, whilst necessary to protect the totality of the covenantee's interests, is unreasonable when weighed against other factors, say, where the 'damage' to the covenantee's interests is minor as against the cost to the covenantor of enforcing the restraint.

In *Connors Brothers Ltd v Connors*[42] the covenantor agreed not to engage in sardine processing throughout the entirety of Canada but later sought to have the restraint overturned on the basis that the covenantee's business had not been conducted in all parts of Canada. Viscount Maugham found that it was not necessary to prove that all areas included within the covenant were subject to an immediate trade interest, stating:

> In a country of vast spaces … it will always be possible, until the population of the country reaches a point now scarcely contemplated, to point to areas where there are only a few settlers or inhabitants, and where, accordingly, few if any, of the goods sold by the manufacturer have penetrated.[43]

The Court found it was acceptable to protect even a small market, perhaps consisting of a handful of customers,[44] a point reflected in the words of H M Blake in the *Harvard Law Review*: 'a restraint is usually held to be reasonable … only

[39] *Saxelby* [1916] 1 AC 688.
[40] Ibid 707 (emphasis added).
[41] Ibid 700 (emphasis added).
[42] *Connors Brothers Ltd v Connors* [1940] 4 All ER 179.
[43] Ibid [1940] 4 All ER 179, 194.
[44] The reasoning to an extent recognises that some leeway is given to new businesses with plans or potential for expansion: *Cook v Shaw* (1894) 25 OR 124. Nevertheless Heydon J has commented that 'on the facts … sufficient dealings by the business sold were proved to justify a Canada-wide restraint': Heydon, above n 16, 206.

if its scope is necessary in its full extent to protect a legitimate interest of the employer'.[45]

There is, then, an arguable right for a covenantee to protect its legitimate interests completely. Despite the apparent immutability of this prescription, there is authority indicating that reasonableness will not always be a matter of providing 'nth degree' protection.

According to Heydon, at least in respect to geographic scope, the division depends on 'whether the business *substantially* extends over the area in issue' suggesting that protection cannot extend beyond that which is reasonable in the circumstances.[46]

A more definitive statement is found in *Blakely & Anderson v De Lambert*:

> a covenant will not necessarily be allowed to go to the full extent of preventing all possible injury. It is always a question of what is reasonable by way of protection in all the circumstances of the case, and the area of possible injury may not be coterminous … with the right to protection.[47]

The better view, one supported by the thrust of policy since the first restraint of trade cases of the 15th century, is that a restraint cannot extend to give 'Nth degree' cover to covenantors where it is rational that protection should only extend to that which is reasonable. In the context of this paper, it cannot be expected that a restraint of trade will necessarily deliver complete protection to a sporting organisation against the accumulated effects of multiple restraints bearing upon the covenantor athlete's interests.

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[45] Blake H.M. Employee Agreement Not to Compete, (1959–60) 73 Harvard Law Review 625 at 675. Indeed, even defining the interests of the covenantee is elusive. How can it ever be in the interests of the restrained party to be restrained? One answer was given by Lord Parker of the House of Lords:

> 'in one sense no doubt it is contrary to the interests of the covenantor to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so he would lose other advantages, such as the possibility of obtaining the best terms on the sale of an existing business or the possibility of obtaining employment or training under competent employers. As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by doing so': *Saxelby* [1916] AC 688, 707. This explanation in respect to the sale of a business cannot be argued against. As regards employment, however, the 'advantage' accruing to the employee is satisfied merely by the covenantor becoming employed; a circular formulation which is difficult to sustain for it could justify the imposition of virtually any restraint of trade.

[46] Heydon, above n 16, 155 (emphasis added).

[47] *Blakely & Anderson v De Lambert* [1959] NZLR 356, 378.

The interests of the athlete covenantor

Akin to the debate on the degree of protection to be afforded a covenantee is the extent to which a covenantor's interests are considered as against those of the covenantee. Here the focus is on the interests of covenantor athletes as opposed to the interests of covenantee sporting organisations.

According to Lord Macnaghten in *Nordenfelt*, the interests of the covenantor must be considered when calculating the reasonableness of a restraint.[48] However, as discussed above, the covenantor's interests may well be subsumed where a restraint does no more than protect the legitimate interests of the covenantee.

Nevertheless, the interests of the covenantor cannot be entirely ignored. In *Attwood v Lamont* before the English Court of Appeal, Younger LJ commented that

> the restraint must not only be reasonable in the interests of the covenantee but in the interests of both the contracting parties. This disposes of the almost passionate protest of Neville J in *Leetham v Johnstone-White* [[1907] 1 Ch 322] that no agreement was invalid, provided the restriction was reasonably necessary for the protection of the employer, however oppressive to the employee and fatal to his chance of obtaining his own living in this country might be.[49]

In *Amoco Australia v Rocca Bros Motor Engineering*,[50] heard before the High Court of Australia, Gibbs J referred to Lord Parker's wording in *Herbert Morris v Saxelby*[51] (stating *adequate* protection rather than *reasonable* protection) to comment:

> The test thus stated suggests that it is not material to consider the effect of the contract on the covenantor. … In my opinion it is permissible, in asking whether a restraint is reasonable in the interests of the parties, to consider, as part of the circumstances of the case against which the question of reasonableness is to be decided … the effect of the agreement on the position of the covenantor.[52]

In the Australian sporting cases up until *Buckley v Tutty* in 1971,[53] there had been a tendency to enforce restraints with little regard to burden placed on the covenantor athlete. To Hardie J in *Elford v Buckley*, professional rugby league

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[48] *Nordenfelt* [1894] AC 535, 565.
[49] *Attwood v Lamont* [1920] 3 KB 571, 589.
[50] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288.
[51] *Saxelby* [1916] AC 688, 707. See further above n 45.
[52] Ibid, 407–8.
[53] *Buckley v Tutty* (1971) 125 CLR 353.

was not a full-time job but rather a 'supplement to income'.[54] By the time of *Adamson*[55] in 1991, however, the interests of the athletes concerned were given particular attention.[56]

In *Adamson* Sheppard J framed the debate in these terms: 'A point of possible unevenness between the other judgments … concerns the question whether it is relevant to take into account the interests of, or matters affecting, the players.'[57] The question itself reveals a negative mindset apparently prevailing in respect to player interests. His Honour commented that:

> I have not understood why the likely or potential effect on those most affected by it – in this case professional football players – is not a matter relevant to be taken into account. … If one does not make a judgment about how it is likely to affect the players whose ability to earn their living is or may be restricted by it, one will not have the complete picture. … Unless one examines the consequences or potential consequences upon the players, one will not be able to make an adequate or satisfactory judgment on the question whether the persons who have imposed the restraint have established that it goes no further than is reasonably necessary to protect their legitimate interests. An important part of the mosaic will be absent.[58]

Sheppard J went on to state that even in cases where a restraint is reasonably required to protect the interests of the covenantee it will still be necessary 'to consider the impact of the restraint upon those whom it is intended to affect',[59] before concluding definitively that '[i]n other cases … the effect will be drastic and will lead plainly to the conclusion that the restraint is unreasonable'.[60]

The division between the respective entitlements of covenantor and covenantee was also addressed by Wilcox J in *Adamson*: 'although the primary question will always be the extent of the covenantee's need for protection, it is impossible to leave out of account the effect of the restraint upon the covenantor.'[61] His Honour

[54] *Elford v Buckley* [1969] 2 NSWR 170, 175.
[55] *Adamson* (1991) 31 FCR 242. It is interesting to note that in *Adamson* although a salary cap operated alongside the draft system its legitimacy was not challenged so as to make redundant the Leagues' argument that the draft was necessary to prevent 'cheque book warfare' between the clubs (at 249). Nonetheless the salary cap continued to form part of the factual matrix under which the draft was considered, specifically the draft as a 'supplement' to the salary cap (at 271).
[56] In *Adamson* (1991) 31 FCR 242 the parties to the restraint were the NSW Rugby League and the Clubs playing in its premier competition. Whilst the players were not covenantors under the contract they nonetheless carried the burden of the restraint. The comments of the judges in respect to the effects of the restraint would, with little doubt, be no different had the players in fact been signatories.
[57] Ibid 246.
[58] Ibid 247.
[59] Ibid 248.
[60] Ibid 248.
[61] Ibid 266.

then considered the specific burden placed on the players to state: 'In order to determine whether the matters of justification which are found to be established are sufficient to support the rules, it is necessary also to consider the effect of those rules upon the players.'[62]

There is, therefore, strong support for the proposition that even where restraints are singularly reasonable the collective burden on the covenantor athlete must also be appraised when considering enforcement.

Policy considerations

Although the above authority is perhaps sufficient to require that the effects of multiple restraints be included in the assessment of reasonableness, there is no reason given the arguably unique circumstances of the sports industry that policy should not also dictate such an inclusion.

For purposes of explanation, there is nothing unusual about the restraint of trade doctrine adjusting policy in response to new circumstances or developments in economic thought or social philosophy. As Diplock LJ said in *Petrofina (Great Britain) Ltd v Martin*:

> The public interests, which the common law doctrine against restraint of trade is designed to promote, are social and economic – liberty and prosperity; the liberty of the individual to trade with whom he pleases in such manner as he thinks desirable, and the prosperity of the nation by expansion of the total volume of trade. The accepted economic theories as to how best to promote the expansion of the total volume of trade vary from time to time. They are reflected not only in legislation … . but also in the attitude of the courts towards contracts in restraint of trade; but their reflection in the attitude of the courts takes the form of a change of approach to the question of what is reasonable in the interests of the parties.'[63]

Nor has the restraint of trade doctrine been backward in altering micro policy within the broad economic or philosophic paradigm existing at the time of contracting where such is necessary to ensure the reasonableness of a restraint. Examples over the last century include a willingness of courts to review the level of consideration supporting a restraint,[64] differentiating between restraints on employees and those supporting goodwill,[65] looking to the equality of bargaining power between parties[66] or distinguishing between an employee's

[62] Ibid 276.
[63] *Petrofina (Great Britain) v Martin* [1966] 1 All ER 126,139.
[64] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288.
[65] *Saxelby* [1916] 1 AC 688.
[66] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308.

'subjective knowledge' and the employer's 'objective knowledge'[67] and recognising a 'newer' form of protectable interest in staff connections.[68]

As stated by French, Kiefel and Nicholson JJ in *Peters (WA) v Petersville Ltd*: 'the cases show that the Courts will look at aspects of the bargain in order to determine whether it is reasonable.'[69] The unique nature of the sports industry raises a number of 'aspects of the bargain' pertinent to the discussion of the reasonableness. These include: an arguable inequality of bargaining power between athlete and organisation; an absence of consideration supporting certain restraints; a limited career span in which to earn a substantial 'sporting' income; exposure to career ending injury; the subjection of players to interclub trades whilst still contracted; the argument that an athlete's reputation forms part of his or her 'subjective knowledge' rightly to be traded only by the athlete;[70] the fact that some restraints, are general rather than partial in scope – a factor going specifically to the question of reasonableness.[71]

A further policy factor, one yet to be judicially considered in respect to the restraint of trade doctrine, is the impact of digitalised communications on the definition of a 'protectable' interest. That is, how to calculate reasonableness in what might be called the 'cyber-markets', those markets typified by sports advertising on screens as diverse as mobile phones and shopping centre televisions, on websites from YouTube to Emirates Airlines to Swisse Vitamins. Each website is a forum of endorsement denied athletes by contractual restraints that are, in effect, world-wide. One need only think here of Australian cricketer Brett Lee who endorses for reward Kit Kat and Timex watches in India.[72] The internationally marketable reputations of Ian Thorpe, David Beckham and Tiger Woods also come to mind. Every product website is a means for athletes to exploit for purposes of endorsement advertising. Indeed, these websites offer such diversity of product line or geographic location that even athletes of moderate reputation could generate income through endorsement. For example, an athlete from a country town could well endorse a home-town business by website without affecting the interests of his or her sporting organisation. More importantly from the perspective of this paper, the income forgone from such endorsement must be aggregated with the income lost through salary caps, draft systems or apparel restraints to determine the reasonableness of the restraints in question.

Developments in the mass media, particularly through digitalised communications, have created new forums for the sport product. That these forums should

[67] *Mason v Provident Clothing & Supply Company Ltd* [1913] AC 724.
[68] *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995.
[69] *Peters (WA) v Petersville Ltd* (1999) ATPR 41-714, [26]
[70] *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724.
[71] *Fitch v Dewes* [1921] 2 AC 158.
[72] http://www.youtube.com/watch?v=imZGf4XT2cUhttp://www.youtube.com/watch?v=imZGf4XT2cU [video removed by user]

accrue naturally to the sporting organisation as a matter of entrenched right is to deny the role policy has played in adjusting the restraint of trade doctrine to the needs of the day. As Lord Morris said in *Nordenfelt*: 'the time for a departure has arisen … we have now reached a period when it may be said that science and invention have almost annihilated time and space.'[73] A treatise reflected in the words of Macmillan LJ in *Vancouver Malt and Sake Brewing Co v Vancouver Breweries Ltd*: 'Public policy is not a constant.'[74] Indeed, it borders on the absurd to continue to apply definitions of a covenantee's protectable interests applicable to the analogue age (or earlier) to the markets of the digital age.

In restraint of trade law there are two dominant philosophies informing the judiciary: that of promoting trade and that of securing the freedom of the individual to trade. In *Adamson* Wilcox J remarked that '[i]f that restraint is enforceable, it can only be because it does no more than reasonably protect the interests of the respondents, having regard to its effect upon the players'.[75]

Policy adjustment in respect to multiple restraints of trade, it is proposed, should be made, to paraphrase Wilcox J in *Adamson*, with 'regard to [the] effect upon the player covenantor'.[76] Reasonableness cannot be seen to involve merely the enhancement of the organisation's goals to the inordinate cost of athletes. As Ross comments, '[w]hatever the supposed advantage in enhancing competition between clubs, the effect of such restraints represents a significant transfer of wealth from players to clubs'.[77]

Revisiting 'A Balancing Exercise' as a matter of policy

In *Adamson*, Gummow J emphasised that determining the reasonableness of a restraint of trade did not involve the Court in balancing the interests of the parties one against the other but was rather to ensure that the covenantee met the burden of reasonableness.[78] Again, this rule developed from and is most applicable to singular restraints of trade. In respect to multiple substantive restraints of trade however, it is at least arguable that reasonableness could well be determined by balancing the benefits of all restraints against the cost of all restraints in a manner akin to the recognised practice of 'balancing' the scope of 'duration' against the scope of 'geographic reach'.

In *Fitch v Dewes*, the respondent Dewes, an articled clerk and managing clerk of the solicitor Fitch, entered into an agreement not to 'directly or indirectly be engaged or manage or concerned in the office profession of a solicitor within a

[73] *Nordenfelt* [1894] AC 535, 575 (Lord Morris).
[74] *Vancouver Malt and Sake Brewing Company Ltd v Vancouver Breweries Ltd* [1934] AC 181, 189.
[75] *Adamson* (1991) 31 FCR 242, 281.
[76] Ibid 266.
[77] Ross, above n 1, 50.
[78] *Adamson* (1991) 31 FCR 242, 290-291.

radius of seven miles of the town hall of Tamworth'.[79] The question of contention was the unrestricted duration of the restraint – that is, it was a restraint excluding for 'all time'[80]. Lord Birkenhead LC, unperturbed, enforced the restraint on the basis that although the duration was unlimited, the covenantor was advantaged by the limited geographic scope of the restraint which permitted him to develop 'his business acquaintance with the clients of the firm so long as he does not practise within a range of seven miles'.[81] His Lordship commented that 'if the restriction in respect of space is extremely limited, it is evident that a very considerable restriction in respect of time may be more acceptable than would otherwise have been the case'.[82]

The role of policy is to 'balance' the entirety of the benefits against the entirety of the costs in circumstances where trade restraints are imposed in multiples.

Multiple restraints: calculating 'reasonableness'

How then is one to adjudge reasonableness where several distinct restraints, each of which provides no more than 'adequate' protection in respect to a single interest of the covenantee, but which, in combination, bear heavily upon the trading interests of the covenantor?

Few cases give any detailed consideration to the combined effects of multiple restraints of trade as a distinct matter going to reasonableness. Two sporting cases touch on but cannot be seen to offer any principled guidance as to how multiple restraints should be dealt with under the restraint of trade doctrine. *Eastham*[83] is one and *Adamson*[84] another. Nor do these cases differentiate between damage to specific interests as opposed to the overall interest of the covenantor. At best there is acknowledgement without affirmation of a principle. In a third case, *Cream v Bushcolt Pty Ltd*,[85] the substantive restraint and dimensions of time and space were expressed as separate restraints in themselves permitting recourse, should the court have found it necessary, to consider the combined impact of all restraints.

Although not addressing in principle the concept of multiple restraints as a distinct matter going to reasonableness, these cases reveal four means by which multiple restraints of trade may combine to cause an otherwise reasonable restraint to be unreasonable or to exacerbate the impact of an existing unreasonable restraint:

[79] *Fitch v Dewes* [1921] 2 AC 158, 162.
[80] Ibid 166.
[81] Ibid 166.
[82] Ibid 163.
[83] *Eastham* [1964] Ch 413.
[84] *Adamson* (1991) 31 FCR 242.
[85] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82; (2004) ATPR 42-004; Aust Contract Reports 90-199.

1. Where different substantive restraints combine to adversely affect a single trading freedom of the covenantor.
2. Where different substantive restraints combine to affect the totality of the covenantor's freedom to trade.
3. Where the dimensions of duration and geographic space are each expressed as singular restraints of trade but may combine to affect single or broad interests of the covenantor.
4. A fourth category arises in circumstances where 'economic' and 'non-economic' restraints impact upon a specific interest.

Restraints bearing upon a specific interest

Multiple restraints of trade may act in combination to damage a singular interest of the covenantor. Should a player draft be combined with a zoning restriction, the impost on the covenantor athlete in respect to freely deciding who will be his or her employer is greater than where a draft alone is imposed. Similarly, the effect on an athlete's income is greater where a salary cap and an endorsement restraint are employed.

The case of *Eastham*[86] ostensibly concerned a 'retain or transfer' system which, through its constituent parts, affected a specific interest of the covenantor: the player's capacity to freely offer his professional services to the football market. The player George Eastham claimed the 'retain or transfer' system operated by the Football Association was an unreasonable restraint of trade.

At the end of the season each club was required to send to the Football Association a list of players it wished to retain and a list of players it wished to transfer, along with the fee to be charged for agreeing to the transferee. A player on the retain list could not play for any other club. Only a player on the transfer list could be acquired by another club. Where there was no club interest a player became a free agent. Players could be placed on both lists, the purpose of which was to add power to the club's bargaining position:

> the retention provisions are used to reinforce the club's desire to secure a transfer fee for a player they do not wish to retain. … if a player is merely on the transfer list, he may escape, either by persuading the management committee to give him a free transfer, or by going outside the league; he cannot escape if he is on the retain list.[87]

[86] *Eastham* [1964] Ch 413.
[87] Ibid 430.

Justice Wilberforce found the 'retain and transfer term' operated as a system.[88] Nevertheless, his Honour believing the 'two sets of provisions are severable'[89] thought it necessary to consider the retention restraint and the transfer restraint separately. From this severance it is possible to propose a form of judicial approval for combining the effects of multiple restraints as these bear upon a specific interest of covenantors.

The transfer system was described by Wilberforce J, rather ambiguously, as possessing 'an element of restraint' but one 'not so serious as the restraint produced by the retention system.'[90] In greater detail:

> Now I must consider the transfer system. Taking this alone – that is on the assumption that the retention system is not used to reinforce it – it does not appear to me to be so very objectionable … placing a player on a transfer list and asking a fee for him, though it prevents a player from going to another league club unless the fee is paid, leaves the player with the right to have the fee reduced or eliminated and leaves him free to seek employment outside the league. There is a restraint here but it would not take much to justify it.[91]

Our interest is in the combined effect the transfer system and the retention system have on the question of reasonableness. According to Wilberforce J:

> What makes the transfer system objectionable, in my judgment, is its combination with the retain system. When it is combined – that is, when a man is retained and it is made known that his club is open to offer, or when a man is put on both the transfer and retain list – he cannot escape outside the League, all he can do is (in the latter case) to apply to have the transfer fee reduced. But even if it is reduced, no club may pay it, and yet he cannot go outside. It seems to me that the arguments put forward in favour of the retention system alone equally fail to support this combined system.
>
> I conclude that the *combined* retention transfer system as existing at the date of the writ is in unjustifiable restraint of trade. … whether the transfer system could be justified if supported by a modified retention system … or if it were divorced entirely from the retention system, is another matter which is not the subject of dispute in the present matter …[92]

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[88] Ibid 438.
[89] Ibid 428.
[90] Ibid 431.
[91] Ibid 437.
[92] Ibid 438 (emphasis added).

The transfer system as a single restraint was not seen by Wilberforce J as especially egregious. However, in combination with the retention system, the transfer system was found by his Honour to be unreasonable as the player 'cannot escape outside the League'.[93]

Given that the 'retain or transfer' functioned as a system, there is some difficulty in classifying the limitation as a pure example of disparate restraints accumulating in their effects. In fact each operated as a separate component of the one restraint. Indeed, most players would find themselves on either the transfer list or the retain list: one restraint generally being mutually exclusive of the other. Nonetheless, Wilberforce J was clear in declaring a separate function for each component and in so doing delivered a level of judicial authority to the broad concept that different substantive restraints may operate collectively in respect to the question of reasonableness. In such circumstances only by considering the combined effects of these multiple restraints on a specific interest can the impost borne by the athlete be accurately calculated.

Restraints affecting the 'Total Position' of the covenantor

Different substantive restraints may also combine to affect the 'total position' of the athlete covenantor 'across the board', rather than a specific part of an athlete's trading activities. For example, a draft and a wage ceiling although operating in different areas of the athlete's commercial interests, impact on the overall trading freedoms of the employee athlete.

Adamson[94] gives some recognition to an approach to the restraint of trade doctrine that combines the effects of more than one restraint on the diverse interests of the covenantor. The case concerned the introduction by the League of an internal draft system, a non-economic restraint, to operate simultaneously with the then existing salary cap, an economic restraint. The draft provided for clubs to acquire the services of players coming-off contract in reverse order to how the club finished in the previous year's competition. The purpose of the draft was to enable the worst performing clubs to employ the best players and 'prevent the stronger clubs from obtaining the services of an unfair proportion of the better players at the expense of the weaker clubs'.[95] The rationale being that 'public support and the opportunities for players to develop and employ their skills both depend upon the League continuing to conduct the competition between evenly matched and financially viable clubs'.[96] The League also argued that both restraints were necessary because the salary cap alone was 'inadequate to restrain "cheque book warfare" '[97] – a colloquial term used to describe clubs

[93] Ibid.
[94] *Adamson* (1991) 31 FCR 242.
[95] *Adamson* (1991) 31 FCR 242, 250.
[96] Ibid.
[97] Ibid 271-2.

that compete for player services by offering more money than they can afford to pay.

The internal draft was found by Hill J at trial to be a restraint on trade because the player was 'prevented from playing with the club of his choice. … there could seldom be a greater restraint upon trade than restricting an employee's freedom from choosing his employer'.[98] Justice Wilcox on appeal agreed, though in stronger language, stating the right to choose 'separates the free person from the serf'.[99]

In summary, two forms of restraint were operating in rugby league at the time: the salary cap and the internal draft. His Honour indicated, but fell short of declaring, that reasonableness is a matter of accumulating the effects of the various restraints upon the covenantor's interests:

> There is nothing in any of the cases, so far as I am aware, to suggest that consideration of onerousness must be confined to economic effects. On the contrary, Isaacs J's reference to the covenantor's 'fullest liberty of action' suggests that his Honour held the view that *the covenantor's total position is relevant*. *Whether or not this is so*, it seems to me that, in principle, non-economic effects ought not to be disregarded. They may not be as easy to evaluate as economic effects; but they may be just as significant …[100]

The words of Isaacs J 'fullest liberty of action' were utilised by Wilcox J as a means by which to bring non-economic restraints under the restraint of trade doctrine. There had not apparently been any case to that point in time supporting a restraint on non-economic interests: 'Counsel for the League argued that the principles regarding restraint of trade were protective only of economic interests, as opposed to social interests … But they were not able to cite any authority to the effect.'[101] It will also be noticed that 'fullest liberty of action' as it relates to 'total position' is expressed with some diffidence.

Clearly, if Wilcox J was concerned with the 'total position' of the covenantor, the application is relevant to the effects of several restraints of trade impacting upon the covenantor. In short, the total position of the covenantor must be taken to include economic and non-economic restraints of trade as these apply concurrently to the freedom to trade.

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[98] *Adamson v New South Wales Rugby League Ltd* (1991) 27 FCR 535, 555 (Hill J).
[99] *Adamson* (1991) 31 FCR 242, 267.
[100] Ibid 266 (Wilcox J), quoting *Brightman v Lamson Paragon Ltd* (1914) 18 CLR 331, 337 (Isaacs J) (emphasis added).
[101] Ibid 265.

On a simpler level but nonetheless revealing, was the preparedness of the Court to address the League's arguments as to the cumulative necessity of the restraints: 'The most that can be said is … that the internal draft rules operate to some degree to assist the cause of evenness of competition'.[102]

Where a covenantee claims the necessity of combining restraints of trade to protect a legitimate interest, it is logical to suggest that the court in considering that claim is also contemporaneously considering the combined effects of multiple restraints as to their reasonableness. That is, if evenness of competition is achieved through the salary cap assisted by the draft, it can only be achieved by the draft adding to the burden of the covenantor athlete.

It is, however, the reference of Wilcox J to the 'covenantor's total position'[103] that is of most import in discerning an approach to multiple restraints and the question of reasonableness. Assuming the interests of the covenantor are legitimate, the reasonableness of the burden is measured against the total effect of the multiple restraints on the covenantor.

Adamson suggests a liberal approach to applying the restraint of trade doctrine to multiple restraints on trade. In essence there is no necessity for a disgruntled athlete to point to concentrated damage to a specific area of his or her freedom to trade.

Separate restraints as to time and space

It is not uncommon for the dimensions of time and space to be combined when considering reasonableness. Time (the duration of a restraint) and space (the geographic scope of a restraint) are the elemental dimensions in which a substantive restraint of trade operates – all restraints exist within some geographic dimension and across some period of time. In *Cream v Bushcolt Pty Ltd*,[104] however, restraints as to duration, geographical reach and the substance of the restraint were expressed within the 'Restraint Deed' as independent obligations:

> Each of the restraint obligations imposed on the Covenantor … is a separate and independent obligation for the other restraint obligations imposed (although they are cumulative in effect).[105]

The case concerned the sale of the livestock transport business, Cream Transport (of which Mr Cream was the managing director) to Bushcolt Pty Ltd.

[102] Ibid 276. A further supporting argument of the League was the need to promote club stability by preventing players from signing midway through a season.
[103] Ibid 266.
[104] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82; (2004) ATPR 42-004; Aust Contract Reports 90-199.
[105] Ibid [15]. The words ('although they are cumulative in effect') were recorded in the deed.

Cream Transport operated over much of Western Australia employing up to 10 drivers and returning revenue exceeding $3 million. Mr Cream held a pilot's licence enabling him to fly to customers in outlying areas of the state. Cream, soon to marry and desirous of diminishing his workload, sold the business to Bushcolt in 1998 for $1 573 000. Bushcolt required Cream to enter into a deed in restraint of trade which was to him 'of no concern' given his expressed desire to permanently leave the industry.

The substantive restraint stipulated that Cream not 'promote, participate in, operate or engage … or be concerned or interested in directly or indirectly … [the] restrained business'.[106] The restraint took in 'the State of Western Australia' for a period of 10 years.

Mr Cream and his wife left Geraldton to buy into a post-office in Perth. Soon after they found 'they were unhappy in the business and had not settled down to life in Perth'.[107] Cream sought to return to Geraldton where he and his wife had friends and family and to re-establish himself in the livestock transport business – a quest that necessitated challenging the reasonableness of the restraint.

The Court of Appeal found Bushcolt had a legitimate interest to protect in the good-will of the business given Cream's strong business identity.

The cumulative effect was ignored by the trial judge who found that each restraint, as a separate entity, not to exceed reasonable limits. On appeal, however, Malcolm CJ found the restraint, at 10 years duration, unreasonable.[108] Because Cream had not worked over the entire State, the geographic reach exceeded that necessary for the legitimate protection of Bushcolt. It was unnecessary for the Court to consider the cumulative effects of the multifarious restraints, however, his Honour nonetheless commented that:

> if I am wrong in that respect and each of those restraints considered individually could be regarded as reasonable *their combined effect* constituted an unreasonable restraint of trade with the result that the covenant was void.[109]

The passage deals with the dimensions of time and space as these accumulate to effect a single substantive restraint and offer an alternate form by which multiple restraints may be combined where the express terms of the contract so dictate.

[106] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82; (2004) ATPR 42-004; Aust Contract Reports 90-199, [15].
[107] Ibid [37].
[108] Miller and McKechnie JJ agreeing.
[109] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82; (2004) ATPR 42-004; Aust Contract Reports 90-199, [98] (emphasis added).

Economic and non-economic restraints on a specific interest

As discussed above, multiple restraints will either bear upon a single interest of the athlete or upon generally across the board. In reality, however, even non-economic restraints have an impact on the economic interests of athletes. Indeed, economic restraints may also affect the non-economic interests of athletes. These variations are pertinent to the question of reasonableness where multiple restraints of trade are utilised in sporting contracts.

Non-economic restraints prevent the forces of supply and demand functioning to clear the market at the true market price. This is seen most clearly where draft systems are used to spread player talent across a sporting competition. At its most simple, when a player is removed from the market, interested clubs are prevented from engaging in a 'bidding war' to acquire his or her services at the correct wage/price.

Economic restraints may also render a non-economic burden. As Buti explains the collateral effects of a salary cap:

> one could reasonably argue that a salary cap system, indirectly at least, interferes with a player's right to freely determine their employer, coach and team-mates and affects remuneration that is able to be earned. For example, a club may need to 'cut-off' a player from their list because of salary cap restrictions, forcing that player to move to a club that they prefer not to play for.[110]

The argument can rightly be put that an economic restraint that is reasonable on its face may shift to the unreasonable where a non-economic restraint can be shown to have an adverse impact on an athlete's economic interests.

The outcomes of multiple restraints

In a scheme of multiple restraints, enforcement will turn on whether or not the restraints are collectively unreasonable and do so where either a 'total position' or a 'specific interest' approach is applied. Three outcomes are possible:

1. Collectively all restraints are reasonable,
2. Collectively all restraints are unreasonable, or
3. One or two restraints are reasonable but in combination with one or two others, are unreasonable.

The outcome therefore depends on how egregious is each restraint singularly and in combination with other restraints. For instance, the more a salary cap

[110] Buti, 'Unreasonable Restraint of Trade', above n 1.

tends towards the unreasonable, the more likely restraints collectively will be found to be unreasonable. To reiterate the statement of Wilcox J in *Adamson*: 'The more onerous the restraint, the more difficult it is for the person seeking to enforce the restraint to satisfy the court that it was, in all of the circumstances, no more than reasonably necessary for the protection of his or her interests'[111] – a comment made in respect to a single restraint which is equally applicable to multiple restraints. Similarly, given the variety of circumstances attending restraints of trade in sport, no definitive answer can be given as to whether the removal of one restraint will make reasonable the remaining restraints given that these may, singularly, also be unreasonable.

Much of the analysis so far has considered the broad categories of economic and non-economic restraints as these relate to reasonableness. It is also possible to look to specific factors of a single restraint as influencing the reasonableness of multiple restraints. In this sense we are not looking solely or necessarily to the combination of, for example, economic burdens, but to matters peculiar to a particular substantive restraint. For example, whether consideration has been adequate to support the restraint,[112] or is there an egregious imbalance of bargaining power.[113] Each burden is laid alongside those of other restraints to accumulate the effects on covenantor athletes. Given the differential impact of some of these factors, there is greater scope for individual complaint. As Gummow J commented in *Adamson*: 'The High Court [in *Buckley v Tutty* (1971) 125 CLR 353] did not state the ultimate question as being whether, in some broader sense, the restraint was unreasonable. The restraint in such cases strikes at the essential interest of each player.'[114]

There is little point in traversing the variety of facts and circumstances that go to determining the reasonableness of a single restraint (aspects of which have been well discussed in commentary and law reports) as it plays against other restraints. It is enough to realise that each burden of each restraint as it bears upon a covenantor athlete is to be aggregated in the calculation of reasonableness. At times this will concern the imposition of multiple 'economic restraints' as a salary cap effectively places a ceiling on wages whilst an endorsement restraint coupled with apparel and appearance restraints further diminish income. On other occasions a draft and a salary cap will affect the overall interests of the athlete to cause a loss of income and a diminution in the freedom to choose an employer or a place to work.

[111] *Adamson* (1991) 31 FCR 242, 266.
[112] *Amoco Australia v Rocca Bros Motor engineering Co Pty Ltd* (1973) 133 CLR 288, 316.
[113] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308, 1315.
[114] *Adamson* (1991) 31 FCR 242, 289.

Conclusion

All major sports impose on their athletes a multitude of substantive trade restraints. These vary from salary caps and wage ceilings to player drafts and residency requirements, and more recently restraints on athletes providing endorsement services to sponsors. This paper proposes that the effects of each restraint should be accumulated in determining reasonableness under the restraint of trade doctrine.

A sporting organisation would be justified in arguing that as each restraint protects a discrete interest, consideration should not move beyond the reasonableness of the singular restraint. It was suggested, however, that this approach places too little emphasis on the cost borne by the covenantor athlete. For notable athletes the combination of a salary cap and an endorsement restraint could well diminish income by several hundred thousands of dollars a year. When additional restraints such as a draft or appearance restraints are included, the athlete is all the more burdened and the collective effects all the more tending towards the unreasonable.

Of some import where multiple restraints of trade are imposed is the extent to which a covenantee can expect to be afforded total protection of its interests as opposed to reasonable protection. This outcome was suggested to be particularly germane to the enforcement of restraints imposed on endorsement advertising, especially if conducted through a digital medium such as sponsors' websites. It was argued that there is ample authority for limiting covenantees to reasonable protection of their interests only and in so doing limiting enforcement to restraints which are collectively reasonable. Although it has been said that the entitlement to trade protection is the 'primary question' of reasonableness, as Wilcox J stated, 'it is impossible to leave out of account the effect of the restraint upon the covenantor'.[115] It is proposed that it is both impractical and unrealistic to ignore the overall effect of trade restraints on athletes' interests when reviewing the reasonableness of sporting restraints.

This paper has proposed that reasonableness where multiple restraints of trade are employed necessitates considering the impact on the 'specific interests' such as income earning capacity and the impact on the overall, or 'total' interests of athletes such as the freedom to offer player services to the employer of choice alongside restraints limiting personal revenue. It is suggested that the more a singular restraint tends towards the unreasonable the more likely it is that additional restraints will make multiple restraints collectively unreasonable. In such circumstances the sporting organisation, to preserve the benefits of those restraints important to achieving its objectives, would need to consider removing or modifying one or several restraints within the collective.

[115] *Adamson* (1991) 31 FCR 242, 266.

Underpinning the debate as to the reasonableness of multiple restraints is the constant need of courts to adjust the restraint of trade doctrine to the policy imperatives of the time, a practice that has seen the restraint of trade doctrine adapt to the changing economic, technological and philosophical needs since the early cases of the 15th century. Just as time and invention caused a paradigm shift in the restraint of trade doctrine in *Nordenfelt*, the courts of today must be cognisant of the need to adapt reasonableness to the changing technological and social needs. 'I have only to observe', said Lord Watson of the facts in *Nordenfelt*, 'that they are, from a legal standpoint of view, exceptional' such that the judges of the past 'never imagined that any business could attain such wide dimensions that it could not be reasonably protected from the invasion of the seller, except by subjecting him to a restraint unlimited in space.'[116] In a radical departure from the norms of single restraint decision-making, it was suggested that the costs and benefits accruing to both athlete and organisation under a multiple restraints regimen may in fact be 'balanced out' in a manner similar to the accepted practice of weighing an excessive geographic scope of a restraint against the short duration of the restraint.

Today it would be asked whether it is reasonable to see every sources of an athlete's income limited by the mandates of the contractually dominant party, the sporting organisation and to be further burdened by trade restraints dictating both the employer and the place of employment.

[116] *Nordenfelt* [1894] AC 535, 553 (Lord Watson).