

PROFESSIONAL SPORT, MARKET RESTRICTIONS AND THE NBL'S PLAYER POINTS SYSTEM: A RESPONSE

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I INTRODUCTION

The doctrine of restraint of trade and its applicability to sport has been a vexed issue for some time. Because competition between sports is as important as competition within the sport, sporting organisations have had to try a range of measures in an attempt to attract the interest of the sports fan. As Jacob Holmes notes in the primary article, the reason why sporting organisations include restraint of trade covenants (be they salary caps, or adjunctive systems such as the Player Points System ('PPS'), drafts, restricted free agency, or some other measure) is to create a competitive balance within the league. This has been described elsewhere as the hypothesis of 'uncertainty of outcome':

For every fan who is a purist who simply enjoys watching athletes with outstanding ability perform regardless of the outcome, there are many more who go to watch their team win, and particularly to watch their team win a close game over a challenging opponent. In order to maintain fan interest a sports league has to ensure that teams do not get too strong, or too weak relative to one another, so that uncertainty of outcome is preserved.¹

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¹ J Quirk and R D Fort, *Pay Dirt: the Business of Professional Team Sports* (Princeton University Press, 1st ed, 1992) 243.

Despite the controversy that surrounds this hypothesis,² and little economic evidence to support it, the primary article's conclusion that sporting organisations need to regulate the labour market as a means to achieve outcome uncertainty is, intuitively, correct. The author is critical of the PPS used within the National Basketball League ('NBL'), and through the use of three individual examples, he has illustrated how some athletes are being excluded from earning a living in the NBL. On its face this would appear to constitute an egregious restraint of trade, particularly if athletes of lesser quality are able to participate. What would have been of interest in terms of adding weight to the submission would have been an examination of the counterfactual — this asks us to consider what would happen to the NBL and to the work opportunities of the players if the PPS did not exist. Would this see the NBL thrive or would we, because of the vast economic inequality between the clubs, then run foul of the 'uncertainty of outcome' hypothesis³ and ultimately see a declining interest in the league? The author is keen to draw a correlation, if not a causative link, between the PPS and the waning economic fortunes of the NBL. One suspects that the reasons for the deterioration in the NBL are many and varied, not the least being the very competitive environment in which sporting organisations compete for media space, the global reach of sports from outside Australia into this country, fans' interests, and available airtime on radio, TV and digital environments. While the PPS may have had a role, it is difficult to imagine, without further proof, that its enactment would have been singularly or even mostly responsible for the decline of the NBL. Indeed it might be suggested that the PPS was introduced as part of a range of measures to try to redress an already failing business model.

II DIFFICULTIES WITH *NORDENFELT* AND *ADAMSON*

A further difficulty in the application of the traditional tests from *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* ('*Nordenfelt*')⁴ and *Adamson v New South Wales Rugby League Ltd* ('*Adamson*')⁵ to sporting organisations, is that these cases suggest that each restraint be considered

² For a discussion of this within the context of New Zealand Rugby see A Simpson, 'Promoting Match Quality in New Zealand Rugby: Authorisation of Salary Caps and Player Transfer Restrictions under the *Commerce Act 1986* (NZ)' (2012) 7(1) *Australian and New Zealand Sports Law Journal* 1, 26.

³ See for example *Rugby Union Players' Association Inc v Commerce Commission (No 2)* [1997] 3 NSWLR 301.

⁴ [1894] AC 535.

⁵ (1991) 31 FCR 242.

individually. These cases direct the legal practitioner to consider whether *the* restraint is reasonably necessary, whether *the* restraint is reasonable, and finally, whether *the* restraint is injurious to the public interest. The author is clear that the PPS is in breach of these rules. Since the introduction of the PPS, more teams have left the NBL than in any other period of the competition's history; the PPS penalises players for good performances; and it restricts the opportunity to move (indeed, the author notes that 40 players have been lost to the competition through the operation of the PPS).

Perhaps the most significant element deserving of fuller examination (though this is not critical of the author who would be constrained by other factors) is to consider how the doctrine of restraint of trade, can, or should respond to the professional sporting organisation and the *multitude* of restraints that are imposed on the professional athlete. These can include drafts, restricted free agency, free agency, PPS, wage ceiling, restrictions around endorsement, media, sponsorship, conduct restrictions, as well as the control that is exercised by the sporting organisation over the image and property⁶ of the participant.

Perhaps *Nordenfelt*, as applied in *Adamson*, is unhelpful in its analysis. It could be argued that the thinking evident in that 19th century case, and applied by the Federal Courts in the early 90s,⁷ is no longer suitable to the modern full time professional sportsperson and that a new prototype is warranted. What that model may look like is beyond the remit of this response. However, rather than consideration of the reasonableness of each restraint, an examination of how the restraints *collectively* lead to a diminution in the earning capacity of the individual, or their employment prospects, or their endorsement earnings, may rebalance the test so that it is more in line with the interests of the player. This approach may be more amenable to the highly professional nature, and short career spans, of modern sportspeople.⁸

In addition to this, critical to a full examination of this issue, would have been consideration of what would occur if players were readily able to move between basketball leagues. If player movement was unrestrained within one league, but restrained within the NBL by the PPS, would we have players

⁶ For example, the National Rugby League Playing Contract, Section 3.4 provides that a player cannot use 'player property' in a way that would or might conflict with the name, reputation, image, product or services of a sponsor of the club or the NRL.

⁷ See also *Buckley v Tutty* (1971) 125 CLR 353.

⁸ See D Thorpe, 'The Use of Multiple Restraints of Trade in Sport and the Question of Reasonableness', (2012) 7(1) *Australian and New Zealand Sports Law Journal* 63.

who are valued more highly in the NBL playing in different leagues, which value them less? If this is occurring, then allocative efficiency is infringed — the best players are not being allocated to the premier league.

III CONCLUSION

What do these considerations mean for the NBL and the author's view that the PPS is in breach of the restraint of trade doctrine and that a restricted free agency model should be adopted? First, it suggests that in determining the range of restraints that are imposed on the player by the NBL, the regulations or the club need to be considered holistically. This, as a matter of reasonableness, must be judged against the needs of the league and the counterfactual of what the league would look like without the restraints in place.

If we are to accept the 'uncertainty of outcome' hypothesis, the critical question is whether restricted free agency, as posited by the author, would lead to competitive balance, and an increase in media attention, sponsors willing to invest, and fans actively engaging with the sport. To foresee what would happen is fraught with danger, and perhaps time with restricted free agency within the AFL will yield a response that is less than comforting to league competitive balance. Ultimately, the discussion of restraint of trade and its applicability to sporting organisations highlights the limits of legal experience, and suggests that only empirical data learnt through the hard lesson of experience will yield the knowledge we need.