

FREE AGENCY AND THE AUSTRALIAN FOOTBALL LEAGUE

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The Australian Football League (AFL) has operated a twin labour market control system of salary cap and draft since the mid-1980s. While the AFL can point to facts such as an increase in the number of clubs winning premierships since this time to justify their use, the players were still restricted in regard to playing for the club of their choice. This therefore led to a push from the players for free agency, which was introduced at the end of the 2012 season. Its main features are a two tiered system of restricted and unrestricted free agents, an eight year qualification period and compensation in the form of draft selections being granted by the AFL rather than coming from the club receiving the services of the free agent. It is suggested that the AFL had no choice but to introduce some form of free agency, though only time will tell whether the model adopted represents a balanced policy that serves the League, clubs and players fairly.

I INTRODUCTION

The Australian Football League (AFL) is one of the most regulated sporting leagues in the world, operating both a salary cap and draft system in its quest to create a more even competition. Arguably, the AFL has flourished since adopting these labour market controls, transforming itself from a Melbourne-based, suburban football competition into a commercially successful national competition generating a turnover in excess of \$700 million per annum.¹ The AFL's model for a stable and even competition is predominantly based upon the National Football League (NFL) in America. While leagues like the AFL and the NFL can claim that certain limitations on a competition are desirable to achieve their legitimate objectives of financial stability and competitive equality,² restrictive covenants in employment contracts are subject to the common law doctrine of restraint of trade.³ As yet, the AFL's draft and

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¹ John Durie, 'Caps Off to Storm', *The Weekend Australian* (Sydney), 24-25 April 2010, 23.

² Stephen Ross, 'Anti-Competitive Aspects of Sport' (1999) 7 *Competition and Consumer Journal* 1, 3.

³ In Australia, the determination on whether the restrictive measure is legally valid is assessed either through legislation, namely the anti-competitive exclusionary provisions in s 45 of the *Competition and Consumer Act 2010* (Cth) (formerly *Trade Practices Act 1974* (Cth)) or under the common law restraint of trade doctrine. However, an action

salary cap rules have not been challenged in the courts. However, the AFL Players' Association (AFLPA) threatened to initiate legal challenges to ensure freedom of player movement.⁴ This led, in February 2010, to the AFL announcing plans to implement free agency agreements to mitigate the risk of such action.⁵

The article will therefore examine the legal considerations underpinning the introduction and operation of free agency within the AFL. It will examine the potential effect this player transfer reform may have on the AFL's equalisation strategy, with comparisons being made to the advent, and use, of free agency in the NFL.⁶ First, however, it will discuss the peculiar economics of the sports business and the impact of the restraint of trade doctrine, both generally - in relation to labour market controls in sports - and specifically, on the AFL's salary cap and draft systems. Finally, the article addresses whether the AFL will be able to achieve a reasonable balance between its desire for competitive equality and the players' right to freedom of employment.

II THE ECONOMICS OF SPORT AND LABOUR MARKET CONTROLS

A *The Peculiar Economics of Sport*

The justification for labour and product market controls in professional team sports is founded in the 'peculiar economics of the sports industry.'⁷ The sports industry

maintained under s 45(2) requires that the claimant be engaged in 'contracts for service'. As professional athletes are usually contracted as employees, not under 'contracts of service', they are excluded from the statute's protection: see *Adamson v New South Wales Rugby League Ltd* (1991) 27 FCR 535, 548-9 (Hill J) ('*Adamson Trial*') and *Adamson v West Perth Football Club Inc* (1979) 39 FLR 199, 228-9 (Northrop J). It follows therefore that a professional team sportsperson is more likely to raise an allegation of restraint of trade through the common law than the legislation: see Sam Chadwick, 'Restraint of Trade in Australian Sport – Was the AFL's Hand Forced on Ben Cousins?' [2010] *Bond University Sports Law eJournal* 1, 6 <<http://epublications.bond.edu.au/slej/11>>.

⁴ Patrick Smith, 'Demetriou Ambushed on Free Agency', *The Australian* (online), 12 April 2008 <<http://www.theaustralian.com.au/news/demetriou-ambushed-on-free-agency/story-e6frg7hf-1111116040040>>.

⁵ Jennifer Witham, *Free Agency for 2012* (23 September 2010) AFL Official Website <<http://www.afl.com.au/tabid/208/default.aspx?newsid=89810>>.

⁶ Colin Carter, 'In Sport, Normal Business Rules Shouldn't Apply', *The Weekend Australian* (Sydney), 1-2 May 2010, 48.

⁷ Vassiliki Augerinou, 'The Economics of Professional Team Sports: Content, Trends and Future Developments' (2007) 3(1) *Sport Management International Journal* 5, 6. Buti explains that product control is maintained through the controlling sports authority placing limits on the number of clubs or teams in the League at any one time and the number of players

differs from other industries as it is not possible to produce any output (the sporting competition) without the assistance of other producers (clubs).⁸ Sports leagues rely on mutual interdependence to maintain a sustainable competition since each individual club has a vested interest in the economic viability of the other clubs.⁹ Hence, professional sports administrators govern, with a myriad of restrictions on the clubs and players, to provide stability for their organisation.¹⁰

Dabscheck and Buti suggest that the restrictions imposed by a sporting body's administration are designed to promote competitive equality as the attractiveness of a competition frequently depends upon a 'high degree of uncertainty about the result'.¹¹ The notion of 'outcome uncertainty' is a fundamental premise from which officials argue that sporting equality is necessary for a viable professional team sports league.¹² Here, sporting equality means that each club in a league performs equally well over a number of seasons.¹³ The hypothesis is that without the assistance of market regulating mechanisms the wealthier teams would acquire the best playing talent. The commercial viability of the sport and public interest then becomes compromised through the continued domination of the competition by the more affluent clubs.¹⁴

on team lists. Buti also states that typical labour market controls include restricting player mobility through transfer systems, zoning rules, draft schemes and the salary cap: Antonio Buti, 'Salary Caps in Professional Team Sports: An Unreasonable Restraint of Trade' (1999) 14 *Journal of Contract Law* 130, 130.

⁸ John Goddard and Peter Sloane, *Economics of Sport* (2003) Department of Economics, University of Wales Swansea <<http://www.swan.ac.uk/economics/cware/ec340/EconomicsofSport.pdf>>.

⁹ Ibid 6.

¹⁰ Buti, above n 7, 143.

¹¹ Ibid; Braham Dabscheck, 'Sport, Human Rights and Industrial Relations' (2000) 6(2) *Australian Journal of Human Rights* 129, 8.

¹² Buti, above n 7, 143.

¹³ Ibid.

¹⁴ Dabscheck, above n 11, 8. In economic terms, Szymanski and Kesenne suggest that the competitive balance of a sporting league is compromised when large market teams adopt self-interested behaviour which causes them 'to dominate the competition to the point where it becomes too predictable and demand will fall below the level that maximises joint profits and (and consumer interest)': Stefan Szymanski and Stefan Kesenne, 'Competitive Balance and Gate Revenue Sharing in Team Sports' (2004) 52(1) *Journal of Industrial Economics* 165, 166. See also Stefan Szymanski, *The Comparative Economics of Sport* (Palgrave, Macmillan, 2nd ed, 2010). Davies' commentary on the imbalance of the Victorian Football League (VFL) during the 1980s indicates that competitive balance in the competition had been reduced to an unsustainable level. Davies also suggests that

For these reasons, sports leagues allocate significant resources to the construction of regulatory mechanisms aimed at ensuring outcome uncertainty and competitive balance.¹⁵ The survival of their respective sports is the primary justification provided by administrators for the regulation of sporting labour markets.¹⁶ Secondary arguments supporting product and labour market controls refer to the purpose of maintaining team stability, reducing wages and costs and a conviction that clubs should be compensated for players lost to competing clubs.¹⁷

The unique economics of the sports industry also underpins the financial and operational structures of professional sports leagues.¹⁸ For instance, the need to cooperate and maintain competitive equality provides a lure for economic collusion.¹⁹ As such, the agreements between the constituent clubs of a league will often assume the characteristics of a cartel.²⁰ Accordingly, although anti-competitive activities in more conventional industries are closely monitored, cartel-like behaviour in sporting organisations remains an accepted practice.²¹ In essence, collusive measures are

without the labour market controls introduced by the game's administration there was a danger that only three teams may have had a realistic chance of regularly winning the premiership, namely, the two most affluent clubs, Essendon and Carlton, and the club with the most productive country zone for recruiting talented players, Hawthorn: Chris Davies, 'The AFL's Holy Grail: The Quest for an Even Competition' (2005) 12 *James Cook University Law Review* 65, 89.

¹⁵ Aaron Smith and Bob Stewart, 'The Special Features of Sport: A Critical Revisit' (2010) 13(1) *Sport Management Review* 1, 7.

¹⁶ Dabscheck, above n 11, 8.

¹⁷ Ibid 8-9.

¹⁸ Buti, above n 7, 142-4.

¹⁹ Smith and Stewart, above n 15, 7.

²⁰ A cartel is an anti-competitive arrangement between two or more competing businesses. Cartels are favoured by producers because they enable a group of firms to act as if in a monopoly, that is, the sole provider of a good or service to the market. Such entities, however, promote imperfect competition since they control the market and can set a profit maximising price. The contrast is firms which operate in a perfectly competitive market, where the price is set by the market forces of supply and demand: see Douglas McTaggart, Christopher Findlay and Michael Parkin, *Economics* (Pearson Education Australia, 4th ed, 2003) 178-82. The Australian Competition and Consumer Commission ('ACCC') claims that cartels harm the Australian economy and distort economic markets because consumers, businesses and governments can be forced to pay higher prices for goods and services: ACCC, *Cartels* <<http://www.accc.gov.au/business/anti-competitive-behaviour/cartels>>.

²¹ Goddard and Sloane, above n 8, 1. Generally, agreements between teams within a sporting competition, which restrict the quantity supplied in order to maximise profits or

closely associated with the appeal of the product that sports administrations are selling to the market as collaboration limits the potential for one or two teams to control the competition.²²

The AFL is one sporting league which has successfully managed to equalise the competition with regulatory measures. Collaboration between the member clubs was essential for producing an exciting game capable of drawing the general public's interest away from other sports and entertainment options.²³ The AFL's executive planned to increase consumer demand for their brand of commodity and in line with the competition becoming more professional and business-like the AFL implemented its core operational strategy, namely, the equalisation policy.²⁴ This strategy has two limbs. First, there is a highly regulated labour market that incorporates the national and pre-season player drafts, a total player payments regime and restrictions on the teams' list size.²⁵ Secondly, the AFL promotes fiscal equalisation through pooling and an equal distribution of major revenue streams.²⁶

A critical question is whether sporting organisations implementing labour market controls are subject to the law. In Australia, the common law principles governing restraint of trade are particularly relevant to restrictive employment practices.²⁷

B The Common Law Restraint of Trade Doctrine

The restraint of trade doctrine was established in *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd*,²⁸ with Lord Macnaghten stating that:

to redistribute revenue to the members with smaller incomes, are not deemed invalid by consumer law agencies. In more conventional industries, however, such practices often fall foul of anti-competitive laws. For extensive legal information on Australian competition law see Julie Clarke, *Australian Competition Law* (2013) <<http://www.australiancompetitionlaw.org/>>.

²² Buti, above n 7, 144.

²³ Carter, above n 6, 48.

²⁴ Robert Macdonald, *Play on? Business Strategy, Labour Market Regulation and Game Development in Australian Football* (2002) SMAANZ Newsletter, 5 <<http://rdmacdonald.com.au/rdmwp/wp-content/uploads/2011/10/RDM-Game-Development.pdf>>.

²⁵ Ibid 6. A total player payments scheme and a salary cap regime are similar terms. Furthermore, the AFL's initial equalisation strategy decided against the introduction of free agency agreements for the players.

²⁶ Ibid.

²⁷ Ibid.

²⁸ [1894] AC 535 ('*Nordenfelt*').

All interferences with individual liberty of action in trading and all restraints of trades of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable that is, in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.²⁹

The test established in *Nordenfelt* is therefore that contracts preventing a person from carrying out their trade, business, occupation or profession will be in restraint of trade, unless they are reasonably necessary to protect the legitimate interests of the party imposing the restraint, not unreasonable for the person restrained and not unreasonably injurious to the public.³⁰ Furthermore, the restraint must afford no more than adequate protection to the party in whose favour it is imposed.³¹ *Nordenfelt* is authority for the proposition that where a restraint is reasonable, as judged by reference to the parties and the public, such a restriction will not void a contract.³²

Significantly, sports leagues have introduced two broad classes of labour market controls to promote competitive equality. The first refers to restrictions on player wages while the second class concerns restraints that limit the movement of players.³³ Restraint of trade challenges in sport can involve: an individual's action;³⁴ a challenge

²⁹ Ibid 565.

³⁰ Ibid.

³¹ Chris Davies, 'The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine' (2006) 22 *Journal of Contract Law* 246, 247.

³² James Macken et al, *The Law of Employment* (Lawbook Co, 5th ed, 2002) 85.

³³ Warren Pengilley, 'Sporting Drafts and Restraint of Trade' (1994) 10 *Queensland University of Technology Law Journal* 89, 98.

³⁴ See, eg, *Hall v Victorian Football League* [1982] VR 64 ('Hall'); *Foschini v Victorian Football League and South Melbourne Football Club* [1983] VSC 126 (15 April 1983) ('Foschini'). In *Hall*, the plaintiff wanted to join South Melbourne, the club he had supported since the age of five and for which his father had played, even though under the VFL's regulations he was zoned to Collingwood. These regulations were held to be an unreasonable restraint of trade. Silvio Foschini, meanwhile, was an uncontracted player with South Melbourne who wanted to join St Kilda but was prevented from doing so. The court determined that the refusal to permit the relevant transfer was an unreasonable restraint of trade.

mounted by a player that is backed by the players' association;³⁵ or a collective action brought by a group of players.³⁶

The consequence of a successful action brought collectively by a number of players or by an individual is that the game's authorities will be forced to amend the offending regulation. However, a temporal difference exists between the two classifications of legal challenge. In the short term, the court's declaration from the joint players' action will generally have an immediate impact as the administrators are compelled to change the game's laws in response to the decision.³⁷ On the other hand, the verdict from an individual's suit governs that player's particular circumstances, which will not necessarily produce an instant adjustment to the association's rules.³⁸ Under these conditions, with the precedent established, further action from other players becomes a likely event and the league will be inclined to institute the appropriate alterations to the laws of the game.³⁹ Thus, the medium to long term effects from legal action by an individual or by players acting as a collective body are essentially the same. Accordingly, administrators of sports leagues are extremely wary of lawsuits and tend to adopt a defensive strategy to ward off legal challenges from any quarter rather than dealing with the consequences from the courts.⁴⁰

³⁵ See, eg, *Eastham v Newcastle United Football Club Ltd.* [1964] Ch. 413 ('*Eastham*') where the football players' association backed George Eastham's challenge to English soccer's transfer system which operated in the early 1960s. Eastham was contracted to play for the Newcastle United Football Club but asked to be transferred to Arsenal. The transfer rules permitted clubs to retain their players even though the contractual obligations between the player and club may have been completed. Newcastle United relied upon this rule to prevent Eastham from transferring and refused to release him. The player, financially supported by his players' association, took legal action. The court held that these retention regulations were an unreasonable restraint of trade.

³⁶ See, eg, *Adamson Trial* (1991) 27 FCR 535 where 170 players challenged the internal draft of the New South Wales Rugby League (NSWRL) which had been introduced during the 1991 season. It was held that the internal draft rules did little to protect the interests of the respondents but infringed substantially upon the freedom and interests of the players. Therefore, there was an unreasonable restraint of trade.

³⁷ See *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242 ('*Adamson Appeal*').

³⁸ See *Hall* [1982] VR 64; *Foschini* [1983] VSC 126 (15 April 1983).

³⁹ The VFL's response, of introducing the salary cap and the external draft, to the *Hall* and *Foschini* judgments are prime examples of an alteration to a governing body's rules to pre-empt further legal challenges.

⁴⁰ Braham Dabscheck, 'Playing the Team Game: Unions in Australian Professional Team Sports' (1996) 38(4) *Journal of Industrial Relations* 600, 602-3.

In restraint of trade cases involving sport, the judiciary has accepted that labour market controls are justified on the grounds that they protect the legitimate interests of the league, namely, competitive equality, financial viability and player retention.⁴¹ However, the courts have consistently maintained that a restriction cannot impose a greater restraint than is reasonably necessary to protect the genuine interests of the controlling sporting organisation.⁴² Most notably, the courts have been unforgiving in circumstances where a restraint creates a post-contractual obligation on the player. This should be kept in mind when analysing the AFL's key equalisation measures: the draft and the salary cap.⁴³

III LABOUR MARKET CONTROLS AND THE AFL

A *The AFL Draft*

Since the 1980s, the then Victorian Football League (VFL) and later the AFL have utilised the twin labour restraint system of the draft and salary cap. The main objective of the salary cap is to standardise the amount each club can allocate to player payments while the purpose of the draft is to ensure a competitive balance throughout the league.⁴⁴

The national draft adopted by the VFL was based on the NFL model. The American football code initially implemented a system for drafting players in 1935 and the employment of such a regime for controlling player movement is considered to be an integral component of the NFL's success.⁴⁵ Under the AFL draft rules, all players

⁴¹ *Adamson Appeal* (1991) 31 FCR 242, 297 (Gummow J).

⁴² *Buckley v Tutty* (1971) 125 CLR 353, 378 ('*Buckley*'); Pengilly, above n 33, 100.

⁴³ Pengilly, above n 33, 101.

⁴⁴ James Johnson, 'Restraint of Trade Law in Sport' [2009] *Bond University Sports Law eJournal* 1, 1 <<http://epublications.bond.edu.au/slej/10>>.

⁴⁵ Carter, above n 6, 48. While there are four major professional sports leagues in North America, namely baseball (MLB), basketball (NBA), ice-hockey (NHL) and football (NFL), it is the NFL which has become the paramount competition in the modern era: Jeffrey Schneider, 'Unsportsmanlike Conduct: The Lack of Free Agency in the NFL' (1991) 64(3) *Southern California University Law Review* 797, 797. The NFL is by far the most attended domestic sports league in the world by average attendance per game, with 67,509 fans per game in the 2006 season. In addition, the NFL earns nearly \$4 billion each year in national television rights fees, which provides each team with well in excess of \$100 million a year: Tarik El-Bashir and Thomas Heath, 'NHL's Strong Comeback Marred By Poor TV Ratings', *The Washington Post* (online), 5 June 2006 <<http://www.washingtonpost.com/wp-dyn/content/article/2006/06/04/AR2006060400897.html>>. A number of commentators have attributed this success to a mutual understanding

from outside the competition must nominate for the 'national' or 'external' draft.⁴⁶ The clubs then make draft selections of the available players in the reverse order that they finished in the previous season's competition.⁴⁷ Once every team has had a selection the process is repeated a number of times, providing second, third and subsequent round draft choices. The AFL also created a uniquely Australian draft, the internal draft,⁴⁸ involving current AFL players who have not negotiated a new contract with their club.⁴⁹ The internal and external drafts effectively deny players the opportunity to choose and negotiate with prospective clubs as the players may only obtain employment with the club that selects them in the drafting process.⁵⁰

Moreover, the AFL draft system stipulates that a footballer wishing to embark on an AFL career must nominate for the national draft.⁵¹ Once drafted, the club which

between the players and owners of the necessity to institute restrictive measures that promote competitive equality: Ari Nissim, 'The Trading Game: NFL Free Agency, the Salary Cap, and a Proposal for Greater Trading Flexibility' (2004) 11 *Sports Lawyers Journal* 257, 269. See also Scott Backman, 'Players Fight for Their Freedom: The History of Free Agency in the NFL' (2002) 9 *Sports Lawyers Journal* 1, 55.

⁴⁶ Davies, above n 14, 67.

⁴⁷ Ibid.

⁴⁸ Braham Dabscheck, 'The Imperfect Market for Players' (2004) 23(4) *Economic Papers* 345, 348.

⁴⁹ Dabscheck, above n 11, 11.

⁵⁰ Davies, above n 14, 68.

⁵¹ The 'external' draft for players from outside the AFL competition will be referred to as the national draft. The 'internal' draft for players already playing in the competition will be termed the pre-season draft. Moreover, the critical timeframe for player movement between clubs occurs at the end of the regular season. The competition's premiership is decided in the Grand Final, which is traditionally held on the last Saturday in September. Prior to the introduction of free trading, the trading period for the exchange of players and/or draft choices normally transpired over five to eight days in October with the national draft being held in November and the pre-season draft being conducted in December. With the introduction of free agency the AFL will dedicate nearly the whole of October to player movement. In 2012, the first year when eligible players were able to change clubs without being traded, the free agency window ran for three weeks from 1 October until 19 October. In addition, the trading period was extended to operate for three weeks. The clubs commenced trading on Monday, 8 October and the trade period closed on Friday, 26 October. As such, during the course of that month, there were two weeks when the free agency and trading periods overlapped: Sports Business Insider, *Gillette Sponsors AFL's Extended Trade Period* (14 August 2012) <<http://sportsbusinessinsider.com.au/news/category/sponsorship-and-marketing/gillette-sponsors-afls-extended-trade-period/>>.

selected the player has a mandatory hold on his services for two years.⁵² Delisted players, those footballers who have been selected by a club in previous national drafts but whose services are no longer required, can also nominate for the national draft. Conversely, a player who has completed his contract and wishes to transfer to another club, but whose club wants to retain him on their playing list, can only nominate for the later pre-season draft.⁵³ If a player does transfer via the pre-season draft, his former club is not compensated. However, the departure of a footballer through the pre-season draft can be mitigated by his club arranging a deal for the player in the October trading period. During this time, clubs can trade players to other clubs by way of exchange for other players, draft selections in the national draft, or a combination of both.⁵⁴

The critical component in the transfer process is the bargaining power and leverage in negotiations that an uncontracted player obtains through the interconnection between the two drafts.⁵⁵ In a draft transfer system the preferred currency becomes draft choices, as a club can lay the foundation for a successful future by choosing quality long-term players with good selections.⁵⁶ Clubs, however, are reluctant to give away draft picks. Nevertheless, this is precisely the result that eventuates from allowing a player to move via the pre-season draft.⁵⁷ In effect, a real incentive exists for the club to negotiate an appropriate deal in October, as otherwise the club is faced with the unwelcome prospect of being denied compensation. The most skilful out-of-contract players in the competition are obviously better positioned in terms of bargaining power, although the system does provide every player with some form of leverage in their negotiations to move.

Apart from the initial two year period when the player is bound to his drafting club,⁵⁸ the AFL's regulations generally facilitate player movement. The key to determining mobility under the current model is the interaction between the national and pre-season drafts, the trading period and a specific player's bargaining power. Prima

⁵² Davies, above n 14, 68.

⁵³ Ibid.

⁵⁴ AFL, *NAB AFL Draft Explained* (2010) <<http://www.afl.com.au/about/tabid/13514/default.aspx>>.

⁵⁵ Chris Davies, 'Draft Systems in Professional Team Sports and Restraint of Trade: Is the AFL Distinguishable from the NRL Draft?' (2006) *The Australian and New Zealand Sports Law Journal* 80, 95.

⁵⁶ AFL, above n 54.

⁵⁷ Davies, above n 55, 96.

⁵⁸ Ibid 97.

facie, the transfer mechanism may appear disjointed and yet, in its application, the system has been reasonably successful.⁵⁹

While some commentators suggest that the AFL draft is an unreasonable restraint of trade, others have pointed to evidence that the AFL has achieved its stated objective of creating a more even competition.⁶⁰ In regard to sport, the restraint of trade doctrine mainly impacts on the players. However, it can be argued that a more even competition created by labour restrictions has increased the amount of money flowing into the AFL,⁶¹ and that ultimately the players have benefited from better payments.⁶² Despite the arguable benefits of higher wages, there were still problems of players wishing to change clubs, usually to relocate to their home town, with a study of these cases clearly indicating why a lack of free agency was a potential legal problem for the AFL. Accordingly, attention will now focus on a series of specific relocation issues which highlight the inadequacies of the AFL's regulations governing player transfer.

B The Pre-Free Agency System within the AFL

While the AFL draft has never been the subject of legal action, it is imperative to note that an internal draft system implemented by the New South Wales Rugby League in 1990 was successfully challenged in *Adamson v NSWRL*.⁶³ Justice Wilcox stated that 'the right to choose between prospective employers is a fundamental element of a free society. It is the existence of that right which separates the free person from the serf.'⁶⁴ This statement should be kept in mind during the following examination of four player scenarios that highlights the difficulties that faced players when they wished to change clubs in the absence of free agency.

⁵⁹ 'Roos Voices Free Agency Concerns', *ABC News* (online), 23 February 2010 <<http://www.abc.net.au/news/stories/2010/02/23/2828291.htm>>.

⁶⁰ See Davies, above n 14, where the author points out that the 1990s saw seven clubs win the premiership compared to a total of five clubs during the 1970s and 1980s. Every club, except Fremantle, made the finals at least once in the 1990s. This is the first time this had happened since the 1920s. In the 2000s, seven clubs won the premiership and every club made the finals at least once.

⁶¹ Davies, above n 55, 101.

⁶² *Ibid.*

⁶³ *Adamson Appeal* (1991) 31 FCR 242.

⁶⁴ *Ibid* 267 (Wilcox J).

1 *Nick Stevens*

Nick Stevens was selected at number 25 in the 1997 draft by the Port Adelaide club where he played 127 games over six seasons.⁶⁵ However, at the end of the 2003 season he indicated his desire not only to return to his hometown of Melbourne but to play for a historically successful club. He therefore turned down an offer to be traded to the Melbourne club, which would have provided Port Adelaide with a valuable fifth pick in the national draft. Instead, Stevens asked to be traded to Collingwood, which offered their two draft picks, numbers 17 and 35,⁶⁶ but Port Adelaide considered this offer to be inappropriate for a player of his standing. When the two clubs were unable to secure a trade, Stevens entered the pre-season draft. He was selected by Carlton with the second overall pick in that draft and, as such, Port Adelaide was not compensated for losing Stevens.⁶⁷

While Stevens managed to accomplish his main priority of returning to Melbourne, his transfer could have been problematic for the AFL - that is, the outcome would have been substantially more complicated if two interstate clubs had the early pre-season draft selections, rather than the Melbourne-based Carlton club. Under different circumstances, Stevens' determination to return to Victoria could have resulted in legal action.

2 *Chris Judd*

Four years later Chris Judd, arguably the most talented player in the AFL at the time, also expressed an intention to return home to Melbourne. Drafted at selection number three in 2001, Judd enjoyed a stellar career with the Perth-based West Coast Eagles. During his 134 games at this club Judd compiled an impressive list of achievements that included winning two Club Champion awards and captaining the 2006 Premiership side. He also won the Brownlow medal, an award granted to the fairest and best player in the competition, in 2004. While the Eagles were willing to accommodate Judd's request to transfer to a Victorian team, the club was determined

⁶⁵ *Nick Stevens* (10 March 2012) Blueseum <<http://www.blueseum.org/tiki-index.php?page=Nick%20Stevens>>. In 1998 Stevens was the inaugural winner of the AFLPA Best First Year Player and twice finished in the top 3 in his club's best and fairest awards: Jon Anderson, *Nick Stevens Earning His Pay* (3 July 2004) Carlton Supporters Club <<http://www.carltonsc.com/modules.php?name=News&file=print&sid=415>>.

⁶⁶ Matt Brown and David Christie, 'Rawlings, Stevens into Draft', *ABC News* (online), 17 October 2003 <<http://www.abc.net.au/news/stories/2003/10/17/969369.htm>>.

⁶⁷ 'Stevens May Leave Port for Nothing as Deals Collapse', *Sydney Morning Herald* (online), 17 October 2003 <<http://www.smh.com.au/articles/2003/10/16/1065917550798.html?from=storyrhs>>.

to obtain adequate compensation for the loss of his services. Four clubs emerged in the race for Judd, namely, Essendon, Melbourne, Collingwood and Carlton. The contest for his services eventually narrowed down to a choice between Collingwood and Carlton. Collingwood had salary cap restrictions and lacked suitable draft picks,⁶⁸ unlike Carlton, which was able to offer a number of early draft selections.⁶⁹ After advising West Coast that their number one selection was not available,⁷⁰ Carlton ultimately secured Judd's services by trading selections three and 20, and a player, Josh Kennedy.⁷¹

While the main focus had been on securing a deal to allow Carlton to obtain Judd, the other aspect of the case was that Kennedy, a number four selection in the 2005 national draft, was effectively forced to leave Carlton. Kennedy had grown up in Northampton, a farming community 470 km north of Perth,⁷² and at 17 had moved to the city to play for East Fremantle in the Western Australian Football League (WAFL) in a bid to be selected in the AFL draft. While the Judd transfer presented Kennedy with an opportunity to continue his career in his home state under a contract providing increased remuneration,⁷³ he described it as 'having his world turned

⁶⁸ Francis Leach, 'Free Agency will Destroy Delicate AFL Trade System', *Crikey* (online), 9 October 2007 <<http://www.crikey.com.au/2007/10/09/free-agency-will-destroy-delicate-afl-trade-system/>>.

⁶⁹ Greg Denham, 'Blues to Lock out Eagles for Judd', *The Australian* (online), 5 October 2007 <<http://www.theaustralian.com.au/news/blues-to-lock-out-eagles-for-judd/story-e6frg7mo-1111114571803>>.

⁷⁰ Mark Robinson, 'Kennedy Agrees to Judd Deal', *Fox Sports* (online), 11 October 2007 <<http://www.foxsports.com.au/story/0,8659,22567196-23211,00.html>>. Carlton had instigated discussions with Richmond on a potential deal that was valid under the transfer regulations, but one that was deemed unethical. Richmond and Carlton had first and second selections respectively in the 2008 pre-season draft with the suggested plan involving having Judd nominate for the December draft, thereby denying West Coast compensation. The deal then was that Carlton would swap its number three pick in the national draft for Richmond's number 18, with a fringe Richmond player also being proposed as an additional benefit for Carlton in the exchange. The principal condition in the bargain was a commitment from Richmond to bypass Judd in the pre-season draft therefore allowing Carlton to secure the former Eagles star. While a legal move, this was arguably outside the spirit of the draft: *ibid*.

⁷¹ Leach, above n 68.

⁷² 'Chris Judd will Play for Carlton in 2008', *Herald Sun* (online), 11 October 2007 <<http://www.heraldsun.com.au/sport/chris-judd-will-play-for-carlton-in-2008/story-e6frf9if-1111114615923>>.

⁷³ *Ibid*.

upside down again,'⁷⁴ claiming that the move back to Western Australia was a decision forced upon him, and that 'it wasn't what I wanted to do, but it came up and I had to make a decision that was best for my life.'⁷⁵ Kennedy maintained that he experienced significant internal pressure because if he said 'no' to the trade he would 'be seen as the person who prevented the best footballer in the country from getting where he wanted to go.'⁷⁶

The AFL has stated that players involved in the trading period must consent to the swap before a deal can be finalised.⁷⁷ Under the principles of contract law, if a player is under contract they can hold an employer to that contract. However, it is clear that Kennedy's consent to be traded was compromised. Judd's move to Carlton highlights the potentially traumatic nature of the trading system as Kennedy was burdened with a relocation decision he would have preferred not to have made.

3 *Ryan O'Keefe*

Twelve months after Chris Judd's departure from West Coast, the focus of attention in the post-season trading period turned to the Sydney Swans All-Australian forward, Ryan O'Keefe, who had been a member of Sydney's 2005 premiership side.⁷⁸ Selected by Sydney at number 56 in the 1999 draft, he had played 164 games by the end of the 2008 season when he indicated his wish to return home to Melbourne.⁷⁹ He therefore declined a three year contract to remain at Sydney which, having rated O'Keefe as one of their best five players, declared that it wanted a first round national draft pick as compensation.⁸⁰

However, two critical factors transpired to negate O'Keefe's anticipated return to Melbourne. The first was the AFL's expansion program into the Gold Coast and Greater Western Sydney in 2011 and 2012 respectively. These two new franchises had been granted draft concessions to provide the means to be competitive which meant

⁷⁴ Emma Quayle, 'Kennedy has the Last Laugh', *Sydney Morning Herald* (online), 7 December 2008 <<http://www.smh.com.au/afl/afl-news/kennedy-has-the-last-laugh-20091124-j85f.html>>.

⁷⁵ Ibid.

⁷⁶ Ibid; Robinson, above n 70.

⁷⁷ AFL, above n 54.

⁷⁸ 'Swans, Ryan O'Keefe in Contract Talks', *The Age* (online), 29 September 2008 <<http://news.theage.com.au/sport/swans-ryan-okeefe-in-contract-talks-20080929-4qbd.html>>.

⁷⁹ Ibid.

⁸⁰ Greg Denham, 'Hawks Set to Swoop on Sydney Swans Star Ryan O'Keefe', *The Australian* (online), 7 October 2008 <<http://www.theaustralian.com.au/news/hawks-set-to-swoop-on-sydneys-okeefe/story-e6frg7mo-111117679624>>.

2008 was the last uncompromised draft for five years.⁸¹ O'Keefe's age was the second factor as he was about to turn 28 and many clubs suggested they would be focusing on a youth policy.⁸²

During the October trade week, O'Keefe attracted interest from Hawthorn, Collingwood and Carlton, though neither of the latter two teams was prepared to trade their first round draft picks. Hawthorn emerged as the most serious contender to arrange a deal by announcing that it was willing to trade its first round selection, number 16, but this offer was removed from the negotiating table before the end of the trading period. Hawthorn stated that while O'Keefe was a valid selection at number 16, the unique nature of the 2008 draft meant that it was unwise for the club to be entering as late as the back end of the second round.⁸³

Thus, at the end of the trade week, a frustrated O'Keefe was unable to organise an exchange. There was the option of the pre-season draft but, unfortunately for O'Keefe, the first three clubs to have selections in the 2009 pre-season draft were non-Melbourne based clubs.⁸⁴ Furthermore, O'Keefe and Sydney had a strong player/club relationship. O'Keefe claimed that he was unwilling to deny Sydney compensation for the loss of his services and, in return, the Swans made it clear that he was always welcome back at the club.⁸⁵ After a trade did not materialise O'Keefe re-signed with Sydney on a four year, rather than a three year deal, with increased contractual payments.⁸⁶

O'Keefe's relationship with the Swans intimated that legal action was highly unlikely. His situation, however, exemplified the AFL players' frustrations with the existing relocation mechanisms: a respected player with significant bargaining power and a willing club were unable to conduct a trade deal. It was a scenario that

⁸¹ Greg Denham and Stephen Reilly, 'Ryan O'Keefe Trade Deal on Brink of Collapse', *The Australian* (online), 10 October 2008 <<http://www.theaustralian.com.au/news/okeefe-trade-on-brink-of-collapse/story-e6frg7mx-111117710537>>.

⁸² Ibid.

⁸³ In the 2008 national draft, Hawthorn's first two selections were numbers 16 and 34: *ibid*.

⁸⁴ Ryan O'Keefe, *Ryan O'Keefe on Free Agency* (17 December 2008) AFL Players Association <<http://111.223.231.106/articleimage/ryan-okeefe-free-agency>>.

⁸⁵ O'Keefe claimed he was grateful for the opportunity the Swans presented him to get a start in the AFL and also for their patience in the early years of his career: *ibid*.

⁸⁶ Denham, above n 80. The following year, 2009, O'Keefe was moved into the midfield and enjoyed an outstanding season winning the club's best and fairest award: Todd Balym, 'Ryan O'Keefe Finds Happy Place at Sydney Swans', *The Daily Telegraph* (online), 1 April 2010 <<http://www.dailytelegraph.com.au/sport/afl/ryan-okeefe-finds-happy-place-at-sydney-swans/story-e6frexwr-1225848202401>>.

highlighted the AFL players' calls for less restrictive labour measures and, in particular, increased their demand for free agency.⁸⁷

4 *Luke Ball*

Advocates for free agency did not have long to wait for another case to confirm the inherent difficulties accompanying player mobility under the then AFL transfer system when almost twelve months after Ryan O'Keefe's unsuccessful relocation, St Kilda's Luke Ball was forced to endure six weeks of uncertainty before his future employer was determined.⁸⁸

Ball had been drafted by St Kilda at number two in the 2001 draft.⁸⁹ In eight years at the club he played 142 games, winning both the club's Best and Fairest and All-Australian selection in 2005. However, in 2009, form and injuries restricted his game time,⁹⁰ and at the end of the season, Ball announced that he wished to move to another club, nominating Collingwood as his preferred destination.⁹¹ However, during the October trade period Collingwood used its first and third round draft picks, numbers 14 and 46, to secure the services of Sydney ruckman, Darren Jolly.⁹² This left Collingwood with only selection number 30 to offer in exchange for Ball – an offer that was rejected by St Kilda.⁹³ Subsequently, St Kilda offered Ball a three year contract worth \$1 million,⁹⁴ which was also rejected by Ball who then nominated for

⁸⁷ Stephen Reilly, 'Opening New Trade Routes Next Goal', *The Australian* (online), 11 October 2008 <<http://www.theaustralian.com.au/news/opening-new-trade-routes-next-goal/story-e6frg7mo-1111117720267>>.

⁸⁸ Jon Ralph, 'AFLPA Says Ball Saga Strengthens Free Agency Push', *Herald Sun* (online), 28 November 2009 <<http://www.heraldsun.com.au/sport/afl/aflpa-says-ball-saga-strengthens-free-agency-push/story-e6frf9jf-1225804752428>>.

⁸⁹ Russell Holmesby, Editorial, *Inside Football* (online) <<http://www.insidefootballonline.com/holmesby.html>>.

⁹⁰ Jon Ralph, 'Collingwood Magpies Bag Luke Ball', *Herald Sun* (online), 26 November 2009 <<http://www.heraldsun.com.au/sport/afl/collingwood-magpies-bag-luke-ball/story-e6frf9jf-1225804351275>>.

⁹¹ Stephen Reilly and Courtney Walsh, 'Luke Ball Books his Ticket to Fly with Magpies', *The Australian* (online), 27 November 2009 <<http://www.theaustralian.com.au/news/sport/luke-ball-books-his-ticket-to-fly-with-magpies/story-e6frg7mf-1225804363169>>.

⁹² Damian Barrett and Mark Stevens, 'No Deal for Luke Ball', *Herald Sun* (online), 9 October 2009 <<http://www.heraldsun.com.au/sport/afl/luke-ball-still-up-in-air/story-e6frf9io-1225784579357>>.

⁹³ Ibid.

⁹⁴ Mark Robinson, 'Saints Deal with Heartbreak', *Adelaide Now* (online), 22 January 2010 <<http://www.adelaidenow.com.au/sport/afl/saints-deal-with-heartbreak/story-e6freck3-1225822741933>>.

the national draft.⁹⁵ Collingwood finally selected Ball with its number 30 selection; the same draft pick originally offered to St Kilda as a trade.⁹⁶

While Ball eventually arrived at his nominated club, the period between the end of trade week and the national draft was an unpleasant time for him as he was subjected to 'unedifying comments, innuendo and speculation about his future.'⁹⁷ In particular, there was a real concern that he would be taken by another club against his wishes, despite his determination to become a Collingwood player.⁹⁸ While every club had selections ahead of Collingwood's number 30,⁹⁹ Ball had taken a calculated risk that his \$500 000 annual salary demands, and his refusal to talk with some clubs, may have warned other clubs off, leaving him still available at selection 30.¹⁰⁰ The AFL administrators promoted this outcome as an endorsement of its transfer regime and one which illustrated that under the system in place players were able to move to the club of their choice. The AFLPA, however, stated that the situation was a 'classic example of a footballer who deserved the right to determine his own future.'¹⁰¹

In summary, these player case scenarios illustrate that labour market controls such as the draft and salary cap can impact significantly on an AFL footballer's freedom of employment. Moreover, *Buckley v Tutty*¹⁰² and *Adamson*¹⁰³ are strong Australian authorities for the proposition that restraints on players must go no further than to provide adequate protection of a sporting league's interests. Therefore, changes to the AFL's labour market that make the restrictions more reasonable would not only benefit the players, but should make the current employment regime less susceptible to a restraint of trade challenge in the courts.¹⁰⁴ In this context, free agency agreements are one such method of improving the reasonableness of the AFL's regulatory structure.

⁹⁵ Ibid.

⁹⁶ Jon Ralph, 'Race for Luke Ball Reaches Fever Pitch', *Herald Sun* (online), 20 November 2009 <<http://www.heraldsun.com.au/sport/afl/race-for-luke-ball-reaches-fever-pitch/story-e6frf9jf-1225799919812>>.

⁹⁷ Monash University, *Luke Ball in New Colours for 2010* (27 November 2009) <<http://www.sport.monash.edu.au/news/ball-in-new-colours.html>>.

⁹⁸ Ibid.

⁹⁹ Ralph, above n 96.

¹⁰⁰ Ibid; Reilly and Walsh, above n 91.

¹⁰¹ Caroline Wilson, 'AFL Justifiably Wary of Free Agency', *The Age* (online), 6 December 2009 <<http://www.theage.com.au/afl/afl-news/afl-justifiably-wary-of-free-agency-20091205-kc3a.html>>.

¹⁰² (1971) 125 CLR 353.

¹⁰³ *Adamson Trial* (1991) 27 FCR 535.

¹⁰⁴ Davies, above n 55, 102.

At this juncture it is worth reiterating that AFL's labour system has been largely modelled on the NFL. Critically, establishing free agency in the NFL was a complex process and legal certainty was only achieved after a long period of conflict between the owners and players. Thus, to fully appreciate the free agency model developed by the AFL, it is worthwhile to examine the player movement difficulties encountered by the NFL.

IV THE DEVELOPMENT OF FREE AGENCY IN THE NFL

A *The Application of Antitrust Law in the NFL*

In 1920 the first major professional football league was formed in the United States, and a year later the association became the NFL. By 1936 the NFL had become reasonably well established and started to draft college players.¹⁰⁵ The teams retained their drafted players through the NFL's adaptation of the 'reserve rule'.¹⁰⁶ This clause was inserted into each player's new contract and therefore the club effectively retained the right to renew the playing contract for an additional year in perpetuity.¹⁰⁷ In essence, the player was prevented from moving to another team of his own volition and the options were limited to staying with the drafting team for his entire career, waiting to be traded, or retiring.¹⁰⁸

Free agency in the NFL began in 1947 when the perpetual reserve clause contained in the standard player contract was replaced with the 'one year option rule'.¹⁰⁹ The clubs basically retained the same right to renew a player's contract that existed under the reserve rule system, but the renewal clause was limited to a one-time use.¹¹⁰ Once a club had exercised its one year option, the player became a free agent and was eligible to negotiate with any team in the league.¹¹¹ The setting for unrestricted free agency was negated though in 1963 when the NFL amended its Constitution and

¹⁰⁵ Peter Katz, 'A History of Free Agency in the United States and Great Britain: Who's Leading the Charge?' (1994) 15 *Comparative Labor Law and Policy Journal* 371, 385.

¹⁰⁶ The highly restrictive 'reserve clause system' enabled officials to reserve players on their roster for the year following their current contract even in the absence of a newly signed contract: Jonathon Goldberg, 'Player Mobility in Professional Sports: From the Reserve System to Free Agency' (2008) 15 *Sports Lawyers Journal* 21, 22.

¹⁰⁷ Richard Bartok, 'NFL Free Agency Restrictions under Antitrust Attack' (1991) 2 *Duke Law Journal* 503, 509.

¹⁰⁸ Schneider, above n 45, 802.

¹⁰⁹ Bartok, above n 107, 509.

¹¹⁰ Schneider, above n 45, 802.

¹¹¹ Bartok, above n 107, 509. See also *ibid*.

adopted the 'Rozelle Rule',¹¹² a regulation which required the team signing a free agent to compensate the player's former club.¹¹³ If the two teams were unable to agree on the terms of compensation, the NFL Commissioner, Pete Rozelle, had discretion to award compensation in the form of players and/or draft picks. The Rozelle Rule limited opportunities to transfer because sides were effectively deterred from signing other players due to the risk associated with steep compensation to the former club.¹¹⁴

Significantly, in 1975 the NFL Players' Association (NFLPA) challenged the Rozelle Rule on antitrust grounds in *Mackey v NFL*.¹¹⁵ At first instance it was held to be an unreasonable restraint of trade.¹¹⁶ On appeal to the Eighth Circuit the restriction was considered to be of unlimited duration and was unaccompanied by procedural safeguards.¹¹⁷ The Eighth Circuit confirmed the District Court's finding and ordered the owners to engage in collective bargaining with the players' union over the offending provision of the NFL Constitution.¹¹⁸

The landmark victory in *Mackey* presented the players with substantial leverage in negotiations and the prospect of an improved system of player movement.¹¹⁹ Notwithstanding this golden opportunity, the NFLPA traded away their courtroom advantage by agreeing to a procedure, the right of first refusal/compensation scheme, which was similar to the Rozelle Rule.¹²⁰ Under the right of first refusal/compensation

¹¹² Bartok, above n 107, 509.

¹¹³ Nissim, above n 45, 259.

¹¹⁴ Ibid.

¹¹⁵ (*Trial Case*), 407 F Supp 1000, 1029 (D Minn, 1975) (*'Mackey'*). Antitrust law in the United States is legislated under the *Sherman Antitrust Act*, 15 USC §§1-7 (1890) (*'Sherman Act'*), which establishes express prohibitions on restraints of trade and invokes the equity powers of that nations' federal courts to ensure compliance; The language of the *Sherman Act* is very broad, with section 1 stating that 'every contract, combination ..., or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal.' See Michael Scheinkman, 'Running Out of Bounds: Over-Extending the Labor Antitrust Exemption in *Clarett v National Football League*' [2005] 79 *St John's University Law Review* 733, 734.

¹¹⁶ This watershed case was the first antitrust suit concerning free agency restrictions; Bartok, above n 107, 510.

¹¹⁷ *Mackey (Appeal Case)* 543 F 2d 606, 616 (8th Cir, 1976).

¹¹⁸ Goldberg, above n 106, 35.

¹¹⁹ Backman, above n 45, 17.

¹²⁰ Backman, above n 45, 17. The NFLPA exchanged increased financial benefits in the 1977 and 1982 Collective Bargaining Agreements for the opportunity to improve the system of free agency: Matthew Collins, 'C: C as in Cash, Cough it Up, and Changes – NFL Players

scheme, a player became a free agent at the completion of his contract, subject to two significant restrictions.¹²¹ First, a free agent was permitted to receive offers from other teams for a three month period, but he could not sign with any of these teams. Instead, the player's club had the option to match any offer made to a player in order to retain his services.¹²² Second, if the player's original club refused to match the competing offer, then the club was still entitled to compensation from the acquiring team in the form of future draft choices.¹²³ The owners had effectively secured a player restraint system that would dramatically control the movement of players throughout the league for over a decade.¹²⁴ Moreover, the new regime had been agreed upon through arm's-length collective bargaining and under these circumstances, the non-statutory labour exemption was clearly applicable.¹²⁵

In 1987, the NFLPA went on strike after negotiations for a new Collective Bargaining Agreement (CBA) failed to produce an acceptable offer for unrestricted free agency.¹²⁶ After 24 days the majority of players returned to work. Crucially, with the NFL and the owners continuing to apply the stringent employment provisions of the 1982 agreement, the parties failed to reach a compromise on the free agency issue.¹²⁷

Score with Free Agency Following Freeman McNeil's Big Gain' (1993) 71 *Washington University Law Quarterly* 1269, 1274.

¹²¹ Mitch Truelock, 'Free Agency in the NFL: Evolution or Revolution?' (1994) 47 *Southern Methodist University Law Review* 1917, 1930.

¹²² Collins, above n 120, 1275.

¹²³ Truelock, above n 121, 1931.

¹²⁴ Collins, above n 120, 1275. During the period covering the 1977 and 1982 Collective Bargaining Agreements, only two players changed teams under the Right of First Refusal/Compensation scheme.

¹²⁵ Backman, above n 45, 17. Prima facie, the broad language of the *Sherman Act* proscribes numerous restrictive measures in contracts and relationships between labour and management in the professional sports arena. Consequently, to limit the invasiveness of antitrust law and to fulfil the congressional intent of protecting union activities such as collective bargaining, the Supreme Court created a non-statutory labour exemption. Thus, if an anti-competitive regulation is incorporated into a sports league constitution as a result of an accord between management and players, the non-statutory exclusion applies and the offending rule is immunised from antitrust scrutiny. The exemption acts as a shield for rules that reduce competition and is triggered when the parties reach agreement through bona-fide arm's-length negotiations: see *Brown v Pro Football Inc.*, 518 US 231, 235-7 (1996); see also Scheinkman, above n 115, 734; Pepper Brill, 'Major League Soccer or Major League Sham? Players Bring Suit to Bite the Hand That Feeds Them' (1999) *Columbia Business Law Review* 585, 595.

¹²⁶ Bartok, above n 107, 504.

¹²⁷ Backman, above n 45, 20.

The players subsequently initiated an action, *Powell v NFL*,¹²⁸ claiming that the retention system violated antitrust laws. In an attempt to pre-empt an adverse finding the NFL management unilaterally modified the right of first refusal scheme by introducing a new system, 'Plan B'.¹²⁹ Under this form of free agency each team was permitted to protect the top thirty-seven of their forty-five rostered players with the first refusal/compensation scheme that had been in effect since 1982.¹³⁰

However, the Plan B system was also problematic as the eight unprotected players became unrestricted free agents. In *McNeil v NFL*,¹³¹ eight individual footballers filed an action against the NFL and its member clubs, alleging violations of the *Sherman Act*¹³² through illegal restraints imposed under this regime.¹³³ It was held that while this form of free agency contributed significantly to competitive balance in the NFL, ultimately, the system had a harmful effect on competition for player services and was substantially more restrictive than was necessary to achieve the league's objectives.¹³⁴ *White v NFL*¹³⁵ soon followed. Here, the plaintiffs challenged the antitrust validity of Plan B and sought damages pursuant to the irreparable harm the program inflicted upon player salaries.¹³⁶ Momentum was with the players. *McNeil* estopped the owners from denying liability for the enforcement of Plan B,¹³⁷ and with the owners contemplating a potential costly payout in *White*,¹³⁸ the parties negotiated a settlement which was largely incorporated into the 1993 Collective Bargaining Agreement (CBA).¹³⁹

¹²⁸ 678 F Supp 777 (1988).

¹²⁹ The introduction of Plan B occurred while *Powell* was still being heard before the court: Collins, above n 120, 1276.

¹³⁰ Ibid 1277.

¹³¹ 764 F Supp 1351 (DC Minn, 1991) ('*McNeil*').

¹³² *Sherman Act*, 15 USC §§1-7 (1890).

¹³³ Katz, above n 105, 393.

¹³⁴ Backman, above n 45, 39. Some commentators suggest that *McNeil* was the most important decision to affect professional football in the United States: Truelock, above n 121, 1939; Backman, above n 45, 40.

¹³⁵ 822 F Supp 1389, 1394 (1993) ('*White*').

¹³⁶ *White*, 822 F Supp 1389, 1394-5; Nissim, above n 45, 261; Backman, above n 45, 40.

¹³⁷ In *McNeil II*, the players were seeking to prevent the owners from re-litigating issues they had previously lost to different plaintiffs through the means of collateral estoppel. The Court found that all the requirements for collateral estoppel had been met: *McNeil II* 790 F Supp 871, 892-5 (DC Minn, 1992).

¹³⁸ Truelock, above n 121, 1944.

¹³⁹ Backman, above n 45, 17.

B *The 1993 Collective Bargaining Agreement*

The 1993 CBA saw the expansion of the concept of free agency whereby a veteran with at least five years of League experience was considered an unrestricted free agent and was allowed to freely negotiate with any club.¹⁴⁰ The CBA did allow for two exceptions to the free agency rules to protect clubs from losing their most talented players: the 'franchise' and 'transition' restrictions. Each club was entitled to designate one player as its 'franchise' player for that season. This player could not enter the market as a free agent. In exchange, this player was guaranteed a contract equal to the greater of two options: the average of the five highest paid players in the league at his position or 120 per cent of his previous year's salary.¹⁴¹ The agreement also authorised the club to designate one player on its roster, who would otherwise have been a free agent, as a 'transition' player. The club then tendered a salary equal to the greater of the average of the ten highest paid players in the league at his position or 120 per cent of his prior season's contract.¹⁴² The transition player could negotiate with other teams but the current club retained the right of first refusal as if the player was a restricted free agent, thus allowing the incumbent club to match an offer or receive compensation for losing that player. Although the franchise and transition players were costly, they did provide clubs with a mechanism to resign valuable veterans.¹⁴³

Furthermore, a new transfer mechanism was adopted by the 1993 CBA that substantially improved player movement. The key to the 1993 transfer system was that veterans, who had played in five or more seasons, became absolute free agents. They could negotiate with any club without restriction, penalty or compensation.¹⁴⁴ Veterans with more than three, but less than five seasons, were deemed restricted free agents.¹⁴⁵ For these free agents, the right to first refusal option existed for the player's original club. If the player was lost to another side the provision of the complementary draft pick was determined by the qualifying offer that the original club placed on the player.¹⁴⁶ Essentially, the size of the offer made by the incumbent team established the quantity and quality of the draft choices that became available.¹⁴⁷ The key feature of this scheme, which improved the efficiency of player

¹⁴⁰ Collins, above n 120, 1283; see also Katz, above n 105, 394.

¹⁴¹ Goldberg, above n 106, 53.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Katz, above n 105, 394.

¹⁴⁵ Ibid.

¹⁴⁶ Backman, above n 45, 46; Katz, above n 105, 395; 1993 CBA article XIX, 2(c).

¹⁴⁷ Backman, above n 45, 46.

movement in the NFL, was that the team losing the free agent obtained a drafting opportunity without another team having to forsake a draft selection.¹⁴⁸ Consequently, the clubs were more willing to enter into transactions to promote player movement.¹⁴⁹

The critical turning point for free agency in the NFL was *McNeil*.¹⁵⁰ Following this decision, the NFLPA became more aware that 'unbridled, unrestricted free agency' was not a realistic option and that a transfer mechanism that allowed a team's structure to develop was necessary for the League to grow.¹⁵¹ Concomitantly, the owners were prepared to accept a more expansive form of free agency. The lesson to be learned, therefore, from the NFL's free agency experience is that compromise to find stable common ground is crucial to a positive outcome.¹⁵²

Two factors constrain the transfer of the NFL's experience with free agency to the AFL. First, the laws governing restraints on labour are from different jurisdictions and are therefore not identical, though there is sufficient commonality with their common law backgrounds to make the comparison worthwhile. Secondly, in the US the team owners are individuals who, in economic terms, are assumed to be profit-maximisers. This assumption is inappropriate in the context of the predominantly member-owned AFL clubs.¹⁵³ Despite these constraints, the narrative behind the various confrontations associated with free agency development in the NFL provided a salient warning for the parties who participated in the AFL's free agency negotiations on the need for cooperation. With this background in mind, we now focus on the factors which influenced the AFL's free agency model.

V THE AFL'S MOVEMENT TO FREE AGENCY

A *The Free Agency Consultations*

In 2007 only nine players were traded by their respective clubs during the AFL's designated trade week. This fact, and the specific player scenarios mentioned above,

¹⁴⁸ Katz, above n 105, 395; 1993 CBA article XIX, 2(c).

¹⁴⁹ Katz, above n 105, 395.

¹⁵⁰ 764 F Supp 1351 (DC Minn, 1991).

¹⁵¹ Goldberg, above n 106, 54.

¹⁵² Backman, above n 45, 55.

¹⁵³ 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?' (February 2005) *Monash University Business and Economics* <<http://www.buseco.monash.edu.au/eco/research/papers/2005/0205competitivebalancesports.pdf>>.

intensified the demand for a more efficient method of player transfer.¹⁵⁴ Further, the AFL acknowledged that it was the only professional sport in the world which utilised a draft system without a free agency component incorporated into its rules.¹⁵⁵ The inflexibility of the AFL's player movement scheme was roundly criticised and the prospect of legal action was clearly imminent.¹⁵⁶ A prominent players' agent at the time, Ricky Nixon, announced that he had 'law firms ready to challenge the AFL's rules' and that he 'would not hesitate if one of his clients was prevented from joining the club of his choice.'¹⁵⁷

It was in this context that consultations to facilitate the introduction of free agency commenced between the newly-formed Progress Working Party, a composite body representing the clubs, and the AFLPA.¹⁵⁸ The free agency negotiations, however, did not proceed smoothly. At the core of the conflict were the specific interests of the parties. On one hand the players wanted more flexibility to transfer after the completion of their contractual responsibilities. The clubs, on the other hand, were much less enthusiastic about the overall concept of free agency. Most noticeably they were concerned about compensation for the loss of former players.¹⁵⁹ Supporters of Australian Football also voiced reservations about mass turnovers in club playing lists as this could destroy the tradition of club loyalty.¹⁶⁰ Meanwhile, the major party to the negotiations, the AFL Commission, remained stridently committed to its quest

¹⁵⁴ Justin Chadwick, 'Warnock Won't Come Cheap: Dockers', *Sydney Morning Herald* (online), 11 September 2008 <<http://news.smh.com.au/sport/warnock-wont-come-cheaply-dockers-20080911-4ef8.html>>. The number of players traded in 2001 was 33. At the end of the 2008 trade week only 35 players had traded clubs in the last three years: Reilly, above n 87.

¹⁵⁵ Will Brodie, 'AFL Clubs can Fight to Keep Stars Under Free Agency', *The Age* (online), 23 January 2010 <<http://www.theage.com.au/afl/afl-news/afl-clubs-can-fight-to-keep-stars-under-free-agency-20100223-ozy7.html>>; Greg Denham, 'Free Agency Becomes a Reality', *The Australian* (online), 24 February 2010 <<http://www.theaustralian.com.au/news/sport/free-agency-becomes-a-reality/story-e6frg7mf-1225833630075>>.

¹⁵⁶ Sam Lienert, 'Coaches Warnings over Free Agency', *Fox Sports* (online), 11 July 2007 <<http://www.foxsports.com.au/breaking-news/coaches-warnings-over-free-agency/story-e6frf33c-1111113936330>>.

¹⁵⁷ Adam Cooper, 'AFL Free Agency Could Help Strugglers', *Sydney Morning Herald* (online), 1 May 2008 <<http://news.smh.com.au/sport/afl-free-agency-could-help-strugglers-20080501-2a16.html>>.

¹⁵⁸ Wilson, above n 101. We use the term 'working party' or 'working parties' to refer to the various members of the AFL executive, the AFLPA and the Progress Working Party that negotiated the free agency rules to be introduced at the end of the 2012 season.

¹⁵⁹ *Ibid.*

¹⁶⁰ Holmesby, above n 89, 1.

for competitive parity. The Commission feared that the competitiveness of the League could be compromised if talented players were only attracted to the successful clubs once they were granted free agency.¹⁶¹

Matters were also complicated by the incorporation of the two new clubs, Gold Coast and Greater Western Sydney, into an expanded 18 club competition. This expansion required major structural reforms regarding list concessions and the development of models for the new franchises. Both clubs, for instance, were permitted to sign uncontracted players from other clubs, though this was limited to one player from each of the other AFL clubs. However, negotiations stalled on a more general player movement,¹⁶² which led the AFLPA to threaten to reverse its collective bargaining agreement with the AFL.¹⁶³ Such threats hastened an announcement by the AFL Commission that free agency would be introduced at the end of the 2012 season.¹⁶⁴

¹⁶¹ Wilson, above n 101.

¹⁶² Mark Stevens, 'Clause Could Force AFL to Act on Free Agency', *Daily Telegraph* (online), 13 October 2009, <<http://www.dailytelegraph.com.au/sport/afl/clause-could-force-afl-to-act-on-free-agency/story-e6frexx0-1225786062951>>.

¹⁶³ *Ibid.*

¹⁶⁴ It was ultimately decided that free agency in the AFL would operate under a procedural system that is governed by five rules: 1. A player who has served seven seasons or less at one club and is now out of contract is not eligible for free agency if his club wishes to retain him. He may only move clubs via a trade or the draft. If he delists himself, he is subject to the draft, and may be selected by any club. 2. A player who has served seven seasons or less at one club and has been delisted by his club is a Free Agent and is eligible to field offers from rival AFL clubs. The player chooses the best offer from one rival club and can move *automatically* to the new club of his choice. His original club does not receive any compensation pick for the loss of the player. 3. A player who has served eight or more seasons at one club, is one of the 10 highest-paid players at his club, and is now out of contract for the first time since reaching eight seasons of service is eligible to field offers from rival AFL clubs. If he wishes to change clubs, the player must choose the best offer from one rival club. His club has the right to match the presented offer. If the club matches the offer, he may choose to remain with his original club, seek a trade or enter the draft. If the club does not or cannot match the offer, the player can move to the new club. His original club will receive a compensation pick for the loss of the player on an AFL-determined formula to apply where clubs lose more free agents than they gain in any single transfer period. 4. A player who has served eight or more seasons at one club, is *not* one of the 10 highest-paid players at his club, and is now out of contract for the first time since reaching eight seasons of service is eligible to field offers from rival AFL clubs. If he wishes to change clubs, the player must choose on the best offer from one rival club. His club does *not* have the right to match the presented offer and the player can move *automatically* to the new club. His original club will receive a compensation pick for the loss of the player on an AFL-determined formula. 5. A player has served ten or more

Free agency was only introduced into the NFL after almost 30 years of internal conflict and litigation. In fact a strong line of authorities starting with *Mackey* in 1975 eventually culminated in the 1993 CBA, which has established itself as the central plank in dealings involving free agency in the NFL.¹⁶⁵ In contrast to the NFL, free agency for veteran players was introduced into the AFL via consultation and negotiation.

The consultative process undertaken by the AFL's negotiating parties focused on producing a system uniquely structured to suit the culture and traditions of the Australian competition, while acknowledging the rights of the players to increased self-determination of their playing careers.¹⁶⁶ The agreed free agency model is intended to protect the competitive balance of the competition while addressing player concerns on mobility.¹⁶⁷ Critically, it will apply from 2012 to 2016,¹⁶⁸ the lifetime of the next CBA, and represents a tiered concept involving both restricted and unrestricted free agency.¹⁶⁹

Restricted free agency applies to those players who are out of contract after eight years of service with a single team and are amongst the ten highest-paid players at the club.¹⁷⁰ Before a restricted free agent can move, the player's incumbent club has the chance to retain him on its list by matching any offer made by another club.¹⁷¹ If the original club does not match the terms of another contractual offer the player can

seasons of AFL football at one club, has already come out of contract once in the period after serving his first eight or more seasons at his club, and is now out of contract. The player is eligible to field offers from all rival clubs. If he wishes to change clubs, the player must decide on the best offer of his choice from one rival club. His club does *not* have the right to match the presented offer, and the player can move *automatically* to the new club of his choice. His original club will receive a compensation pick for the loss of the player, on an AFL-determined formula: AFL, *Free Agency Rules* (2012) <<http://www.afl.com.au/news/newsarticle/tabid/208/newsid/130820/default.aspx>>.

¹⁶⁵ Bernard Pellegrino and Seth Josephson, 'The Practical Impact and Historical Significance of the National Football League Free Agency Compromise After *McNeil v National Football League*' (1994) 4 *Seton Hall Journal of Sports Law* 1, 2.

¹⁶⁶ Witham, above n 5.

¹⁶⁷ Brodie, above n 155.

¹⁶⁸ *Ibid*.

¹⁶⁹ Denham, above n 155.

¹⁷⁰ AFL, *How Free Agency will Work* (2010) <<http://www.afl.com.au/tabid/208/default.aspx?newsid=89809>>.

¹⁷¹ Justin Rodski, 'Restricted Free Agency in the AFL is a Cop Out', *The Roar* (online), 24 February 2010 <<http://www.theroar.com.au/2010/02/24/restricted-free-agency-in-the-afl-is-a-cop-out/>>.

transfer to another club.¹⁷² However, if the offer is matched and the player still wants to leave he must do so through the regular mechanisms of the trade period and the draft.¹⁷³

Unrestricted free agency, meanwhile, can be obtained through one of three methods. First, a top ten highest-paid player who signs a contract after eight years of service qualifies as an unrestricted free agent when that contract is completed, provided he has had ten years at the club.¹⁷⁴ Secondly, a player with eight years on a club's list, but who is not one of the top ten highest-paid footballers, will qualify for unrestricted free agency when he is out of contract.¹⁷⁵ The third group of unrestricted free agents are those players who have been delisted by their club.¹⁷⁶

The free agency consultations centred on three critical elements: tenure, compensation, and the value of an individual player to a club. We now turn our attention to these elements.

B Tenure

Tenure, the required length of service at a particular club necessary for a player to qualify for free agency, was a major area of disagreement during the negotiations.¹⁷⁷ The AFLPA initially pushed for five years while the clubs were looking at nine or ten years with the one team.¹⁷⁸ The clubs considered the central problem with free agency was that it negated competitive equality because if players were free to choose they would naturally gravitate to the more successful clubs.¹⁷⁹ The clubs had this

¹⁷² Michael Gleeson, 'Free Agency for Quarter of Lists', *The Age* (online), 24 February 2010 <<http://www.theage.com.au/afl/afl-news/free-agency-for-quarter-of-lists-20100223-p0q3.html>>.

¹⁷³ Ibid.

¹⁷⁴ Ibid; AFL, above n 170.

¹⁷⁵ AFL, above n 170.

¹⁷⁶ Ibid.

¹⁷⁷ Jon Ralph, 'AFL Players Want Free Agency Introduced by 2012', *Herald Sun* (online), 28 May 2009 <<http://www.heraldsun.com.au/afl/more-news/afl-players-want-free-agency-introduced-by-2012/story-e6frf9jf-1225717108539>>; Cooper, above n 157.

¹⁷⁸ Mike Sheahan, 'Free to go After Eight Years', *Adelaide Now* (online), 22 February 2010 <<http://www.adelaidenow.com.au/sport/afl/free-to-go-after-eight-years/story-e6freck3-1225833211887>>; Caroline Wilson, 'AFL Agrees to Free Agency for Players from 2012', *The Age* (online), 22 February 2010 <<http://www.theage.com.au/afl/afl-news/afl-agrees-to-free-agency-for-players-from-2012-20100222-ort7.html>>.

¹⁷⁹ Wilson, above n 101; Ben Broad, *Malthouse Sounds Alarm on Free Agency* (2009) AFL Official Website <<http://www.afl.com.au/tabid/208/default.aspx?newsid=86642>>; 'Kennett

perspective despite the presence of a salary cap. They argued that fiscal measures would not be sufficient to counter the non-pecuniary attractions of the stronger clubs, namely, large supporter bases, rich histories and fixtures regularly punctuated with sell-out matches.¹⁸⁰ Chris Judd's transfer from the West Coast Eagles was cited in support of this proposition as he was not inclined to play for Melbourne, Richmond or North Melbourne, the less fashionable Melbourne based sides in the competition, but for one of the AFL's traditional powerhouses: Carlton, Collingwood or Essendon. Eventually, the parties agreed to a compromise of eight years with two concessions:¹⁸¹ the clubs were granted a right of first refusal on the top ten salaried players in each club while, in return, the AFLPA gained a guarantee that the compensatory draft pick for the loss of a free agent would not be imposed upon the acquiring club.¹⁸² The eight years tenure to secure free agency was then incorporated into the AFL's 2012 CBA with the players.¹⁸³

The eight year tenure period contrasts with the NFL's five years.¹⁸⁴ However, players are drafted into the NFL after the completion of four years of college football and generally begin playing at the senior level immediately.¹⁸⁵ The physical nature of the NFL means that the average career is only three and a half years. Thus, the relatively short length of an NFL career substantially restricts a player's access to the free market.¹⁸⁶ Collins suggests that 'most players will never see free agency, others will enjoy it only briefly and a few reach it only after their value has begun to decline.'¹⁸⁷

Slams AFL Free Agency', *ABC News* (online), 24 February 2010 <<http://www.abc.net.au/news/2010-02-24/kennett-slams-afl-free-agency/342130>>.

¹⁸⁰ Wilson, above n 101; 'Kennett Slams AFL Free Agency', above n 179. Revenue sharing is the main, alternative fiscal measure employed by the AFL to maintain an even competition: Jason Murnane, *Restricted Free Agency: Evolution not Revolution* (22 October 2008) AFL Players' Association <<http://111.223.231.106/articleimage/restricted-free-agency-evolution-not-revolution>>.

¹⁸¹ Gleeson, above n 172. The concessions, the right to first refusal and the imposition of compensation to be placed on the acquiring club, will be discussed in more detail later in this article.

¹⁸² Wilson, above n 178; The alternative was for tenure to be based on the number of games played but this arrangement favoured star players, who would become eligible for free agency more readily than mid-tier players, or those who had suffered serious injury.

¹⁸³ Brodie, above n 155.

¹⁸⁴ National Football League, *Key Questions and Answers About the CBA* (20 January 2010) NFL Official Website <<http://www.nfl.com/news/story?confirm=true&id=09000d5d815da1d2&template=with-video-with-comments>>.

¹⁸⁵ Katz, above n 105, 413.

¹⁸⁶ Collins, above n 120, 1283.

¹⁸⁷ *Ibid.*

AFL players, on the other hand, are usually drafted at the age of 18 or 19 years with the clubs investing time and resources on player development.¹⁸⁸ The attrition rate in Australian football is also lower, with the average career being approximately seven years.¹⁸⁹ The most significant difference between the AFL and NFL is the age at which the players are drafted. If the years of college football are factored in, AFL and NFL players become eligible for free agency at a similar age and therefore at a similar stage of development in their careers.¹⁹⁰

Thus, tenure was a key element in the trade-off between public and private interests in the proposed transfer reforms. Although the extended length of service required was not in an individual footballer's interests in relation to his capacity to relocate, it did serve the public's interest in retaining competitive parity. Smith suggested that the appropriate balance, between the public interest in a financial and even AFL competition and the competing interest of the players for increased mobility, was achieved with the final determination of eight years of service.¹⁹¹ While tenure was of

¹⁸⁸ Lienert, above n 156.

¹⁸⁹ Clarke claims that the average career of an AFL player is now 7.7 years: Tim Clarke, 'Free Agency is 'Not Free Enough'', *WA Today* (online), 24 February 2010 <<http://www.watoday.com.au/afl/afl-news/free-agency-is-not-free-enough-20100224-p11z.html>>.

¹⁹⁰ One of the AFL's stakeholders who was not privy to the working parties' consultations, but whose views were still incorporated into the final determination of tenure, were the game's supporters. Wilson suggests that AFL fans claim 'a strong degree of ownership in the game.' Wilson uses Matthew Richardson as an example of a one-club player who has capitalised on his image as a loyal footballer and has obtained some lucrative opportunities, not only because he was a champion player with Richmond, but also because he stayed with this club throughout his career of 300 plus games. Wilson states that 'supporters love players who remain with one club for life', with club loyalty being a significant ingredient in the community aspect and fabric of the competition. It was therefore considered important that the structural changes to the transfer system imposed by free agency did not hurt the fans' faith in the game: Wilson, above n 101. See also Michelangelo Rucci, 'AFL Rule Change Clears Way for Pavlich Homecoming', *Courier Mail* (online), 24 February 2010, <<http://www.couriermail.com.au/news/two-way-deal/story-e6freon6-1225833744820>>; Braden Stokes, *Free Agency Secured for the 2012 AFL Season* (5 August 2010) AFL Players' Association <<http://111.223.231.106/articleimage/free-agency-secured-2012-afl-season>>. Accordingly, the free agency negotiations were intent on introducing a level of tenure that protected the culture of the competition and this demanded a qualifying period that prohibited a rapid turnover of players.

¹⁹¹ Patrick Smith, 'More Than Meets the Eye in Days of Intrigue', *The Australian* (online), 27 February 2010 <<http://www.theaustralian.com.au/news/sport/more-than-meets-the-eye-in-days-of-intrigue/story-e6frg7uo-1225834957988>>. Some commentators claimed that the AFLPA did not represent the players' interests strongly enough and that it should have

prime importance, appropriate compensation provision for an AFL club following the loss of a player's services was also significant.

C *Compensation and Restricted Free Agency*

As previously mentioned, AFL footballers, unlike those in the NFL, are usually not ready to perform at the highest level immediately upon joining the club.¹⁹² Many AFL players require a number of years of development before they become reliable contributors.¹⁹³ The Sydney Swans Jarrad McVeigh, for example, had been an outstanding junior footballer before being chosen at selection number five in the 2002 national draft.¹⁹⁴ McVeigh did not play an AFL game in his first year at the club and it was a further few years before he reached his full potential.¹⁹⁵ Sydney's need to persevere and develop an early draft pick illustrates the importance of providing adequate compensation to maintain the integrity of the draft. Effectively, compensation is necessary to counter the clubs' investment in the long term development of their players.¹⁹⁶

Under the proposed AFL free agency rules a compensatory draft selection will become available to a club that loses a player, who has been in their system for eight seasons or more, to another team.¹⁹⁷ Therefore, the success of the compensation component in the free agency model turns on the quality of the draft picks provided to the clubs. It is anticipated that the clubs will demand reasonably high draft selections because the departing free agents will generally be highly rated, both as players and clubmen. On this note, the rules provide that clubs which suffer a net loss of free agents will be compensated in the form of 'AFL allocated draft picks'¹⁹⁸ with the exact compensatory pick to be 'determined by the AFL.'¹⁹⁹ This arrangement

negotiated a threshold that promoted more mobility: see Rodski, above n 171; Brendan Schwab, 'Free Agency is a Basic Right for All Players', *The Age* (online), 21 August 2010 <<http://www.theage.com.au/afl/afl-news/free-agency-is-a-basic-right-for-all-players-20100820-138zk.html>>.

¹⁹² Katz, above n 105, 414.

¹⁹³ Lienert, above n 156.

¹⁹⁴ Richard Hinds, 'McVeighs See Second Son Rising', *Sydney Morning Herald* (online), 28 March 2009 <<http://www.smh.com.au/afl/afl-news/mcveighs-see-second-son-rising-2009-1124-j7nj.html>>. In 2001 McVeigh was the joint winner of the McLean Medal for the best player at the National AFL under 16 Championships.

¹⁹⁵ Ibid.

¹⁹⁶ Lienert, above n 156.

¹⁹⁷ AFL, above n 170.

¹⁹⁸ Witham, above n 5.

¹⁹⁹ Ibid.

is the most significant difference between player transfers outside of free agency where the clubs have to determine suitable compensation. It should be recalled that the AFLPA specifically negotiated for the compensatory draft pick to be allocated to the club losing the veteran player and not taken from the free agent's new club because this approach facilitates player movement and assists in maintaining the integrity of the draft.²⁰⁰

Although free agency will produce a more flexible labour market for most players, the main beneficiaries are likely to be the competition's mid-tier players: those footballers who have been with a club for at least eight years, but who are not amongst a club's highest-paid players. These players often become marginalised by a club's youth policy and will benefit considerably from the proposed model as they are generally not the type of players who could attract a trade deal.²⁰¹

However, players amongst the top ten salary earners at their club, who have served the requisite eight years of tenure, will only become restricted free agents and will be restrained through the AFL's safeguard mechanisms to protect competitive balance.²⁰² This is because the incumbent club will have the right to first refusal for these players' services which will allow it to match a rival club's offer. If so, the player must stay, enter the draft or seek to be traded.²⁰³ Further, the incumbent club only has to match the tabled offer in terms of the length of the contract, the salary, and additional service agreements, which cover club marketing duties.²⁰⁴ This matching rule will help deter affluent club members and sponsors from adversely influencing the outcome of a star player's relocation by means of additional third

²⁰⁰ Lienert, above n 156.

²⁰¹ Gleeson, above n 172; Hinds, above n 1944. The terms 'journeymen', 'second-tier' and 'mid-tier' players are gaining more prominent use in the media and refer to those players who are not considered stars but are serviceable footballers that have been involved with the competition for a number of years.

²⁰² Tim Lane, 'AFLPA Must do More Than Serve Economic Interests of its Membership', *The Age* (online), 28 February 2010 <<http://www.theage.com.au/afl/afl-news/aflpa-must-do-more-than-serve-economic-interests-of-its-membership-20100227-paat.html>>.

²⁰³ Patrick Smith, 'To Pretend Free Agency was not Needed was to Bury Your Head in a Cappuccino', *The Australian* (online), 24 February 2010 <<http://www.theaustralian.com.au/news/sport/to-pretend-free-agency-was-not-needed-was-to-bury-your-head-in-a-cappuccino/story-e6frg7mf-1225833631081>>; Denham, above n 155.

²⁰⁴ Smith, above n 203. The concept of matching a rival's offer protects the poorer clubs that are not as well positioned to organise independent arrangements between players and associates of the club: Gleeson, above n 172.

party agreements and, accordingly, different levels of wealth between the clubs and their members should not detract from competitive parity.²⁰⁵

While the matching requirements may be effective to maintain competitive balance, they leave the arrangements concerning mobility for the top players relatively unchanged. That is, if a restricted free agent's club wants to retain his services, then for a relocation to proceed the player will be subjected to the same transfer process that has been the source of concern for the players' association for many years.²⁰⁶ Thus, with no guarantees under the new rules that a restricted free agent will be able to change clubs, it is conceivable that an aggrieved individual could emerge to legally challenge the AFL's system.²⁰⁷

D *Free Agency and the Nordenfelt Test*

The *Nordenfelt* test, when applied to free agency, requires an examination of whether the restraint protects the interests of the AFL, whether it is not unreasonable on the players and, finally, whether the restraint is injurious to the public's interest.²⁰⁸ The key restraint imposed upon the restricted free agent is the right to first refusal scheme, which enables the player's incumbent club to match a rival's offer. The AFL could assert that the safeguards built into this system were specifically designed to maintain competitive balance so that the wealthier clubs could not attract the better players through attractive arrangements with sponsors.²⁰⁹ In addition, this restriction on the free agent is structured to allow the clubs to defend their star players as it is through an even distribution of champions that the game will continue to attract paying customers, lucrative broadcasting deals and revenue from sponsorship. Thus, in an increasingly competitive sports market, restraint of the restricted free agents

²⁰⁵ Denham, above n 155.

²⁰⁶ Cooper, above n 157.

²⁰⁷ The NFL instituted various structures of restricted free agency prior to the negotiation of the 'all-important' 1993 CBA. The most relevant for analysing the AFL's proposed model is the Plan B mechanism for player transfer. Not a single protected player changed clubs during the three years that Plan B was in operation. Following the *McNeil* verdict, and after the 1993 CBA was successfully negotiated, many of the concerns relating to free agency in the NFL were resolved. The transfer system became more certain and flexible as players with five years of service became absolute unrestricted free agents who could freely relocate. The only limitation placed on these players is the provision for each club to 'tag' two free agents as a 'franchise' or a 'transition' player: Katz, above n 105, 418; see also *McNeil III*, 1992 WL 315292, at 1; Truelock, above n 121, 1944; Collins, above n 120, 1281-2.

²⁰⁸ Davies, above n 14, 83.

²⁰⁹ Smith, above n 191.

can be claimed by the AFL to be necessary to provide an attractive product and maintain the financial stability of the competition.

The second matter for determination in the *Nordenfelt* test is whether the restraint is reasonable on the restricted free agent. The onus rests with the AFL, the party imposing the restraint, to justify the reasonableness of its labour limitations on the highest income earners in the competition.²¹⁰ In this regard, the AFL could offer the defence provided by the NSWRL in *Buckley v Tutty* where it was submitted that the rules do not 'operate in restraint of trade, but rather foster and encourage it.'²¹¹ Furthermore, the NSWLR claimed that:

[It] promoted the sport and provided an organisation within which opportunities are provided for players who wish to do so to turn their skill to profit and it is not a restraint of trade of a player who wishes to remain a member of the League to require him to abide by its rules while he takes advantage of the benefits membership affords.²¹²

AFL players have experienced the advantages of a full time professional career that is highly remunerated as a result of the restrictive measures imposed through the administration's quest for competitive balance.²¹³ By 2009, for example, the average salary had reached \$240,000 a season.²¹⁴ Restricted free agents, as the highest paid footballers at their respective clubs, will earn in excess of this figure.²¹⁵ Accordingly, these players would be extremely well compensated under the controlled regime of the proposed free agency model.²¹⁶ Therefore, the significant financial rewards improve the reasonableness of the system.²¹⁷ Moreover, the rules imposing limitations on the movement of restricted free agents are part of a formal collective bargaining agreement between the AFLPA and the AFL; the accord between the two parties implying that the players consider the restrictions to be reasonable. Hence, the AFL can use the players' agreement to the rules as evidence of their reasonableness.

²¹⁰ *Buckley v Tutty* (1971) 125 CLR 353, 377.

²¹¹ *Ibid* 372.

²¹² *Ibid*.

²¹³ Davies, above n 55, 93.

²¹⁴ Stephen Reilly, '2006 Premiership Winning West Coast Player Tyson Stenglein Retires', *Perth Now* (online), 3 December 2009 <<http://www.perthnow.com.au/sport/afl/premiership-midfielder-tyson-stenglein-officially-retires/story-e6frg1zu-1225806624053>>.

²¹⁵ 'Roos Voices Free Agency Concerns', above n 59.

²¹⁶ Wilson, above n 178.

²¹⁷ *Ibid*.

This, in turn, places the AFL in a strong position to defend the restrictions on free agents as not being in restraint of trade.²¹⁸

The final matter to be addressed under the *Nordenfelt* assessment is whether the limitations on mobility for the restricted free agents are injurious to the public. The AFL could offer that without some confinement on the movement of the best players in the competition the concept of a 'team' would disappear.²¹⁹ A significant amount of the enjoyment in team sports exists because fans can identify and support the star players at their club.²²⁰ If 'mass migration' of the more talented footballers were permitted,²²¹ the game of AFL could potentially lose its core constituency.²²² The free agency rules were constructed to respect the culture of the competition,²²³ and the sense of ownership claimed by the AFL's fans is an important element in the tradition of the game.²²⁴ This is another example of the private interests of individual players in the AFL conflicting with the public interest. While the free agency restrictions limit the capacity of the upper echelon of players to relocate, the supporters benefit through each club's retention of their champion footballers. Essentially, the public retains their affiliation with the stars of the game. It is safe to conclude that the general public would benefit, rather than be injured, by the model's limitations on the restricted free agents.

Therefore, should a restricted free agent in the AFL's 2012 free agency model propose to challenge the rules as being in restraint of trade, the AFL would appear well placed to defend such an action as the three elements to the *Nordenfelt* test on the reasonableness of the restraint can be justified. However, the AFL could improve the system by introducing an option to trade future draft picks by making it easier for clubs to be satisfactorily compensated.²²⁵

Now we will examine the four player scenarios previously mentioned to see how they would be affected by the new free agency rules.

E *Player Case Scenarios in the Proposed Model*

Nick Stevens and Chris Judd were only at Port Adelaide and West Coast respectively for six seasons, and therefore would not have served the mandatory tenure of eight

²¹⁸ Stevens, above n 162.

²¹⁹ Katz, above n 105, 414.

²²⁰ Ibid.

²²¹ Ibid.

²²² Lane, above n 202.

²²³ Witham, above n 5.

²²⁴ Wilson, above n 178.

²²⁵ Davies, above n 55, 102.

years to qualify for free agency. Nevertheless, if the AFL modified the projected transfer model and permitted clubs to exchange draft selections from the years ahead, then Josh Kennedy would not have been placed in the unedifying situation that transpired. Carlton could have accomplished the Judd transfer without trading Kennedy.

Ryan O'Keefe on the other hand had been with Sydney for nine seasons and, accordingly, would now be considered a free agent. His remuneration at Sydney, however, would have placed him in its top ten highest paid players, thereby classifying him as a restricted free agent. In all likelihood Sydney would have matched any rival club's bid. Consequently, his relocation to Melbourne would have reverted to the existing mechanisms of the trade or draft. O'Keefe's trade was unable to be negotiated and it appears that the only way his relocation could have been achieved was by trading future draft picks. Luke Ball, likewise, had spent the required eight years at St Kilda but as a highly paid player he would also have been restrained as a restricted free agent. In this case, though, it appears that St Kilda would not have been willing to match Collingwood's offer and under the new rules he would have been allowed to accept Collingwood's offer with St Kilda receiving an AFL-determined compensation draft pick.²²⁶

F The 2012 Free Agency Movements

In the first two weeks of October 2012 some AFL players were, for the first time since the draft system was implemented, able to select the club of their choice without the need for their previous club receiving an acceptable trade as compensation. The most

²²⁶ The postscript to the aforementioned player scenarios presents a number of interesting outcomes. After transferring from West Coast, Chris Judd was appointed the captain of the Carlton Football Club. He was runner-up in the Brownlow Medal in 2009 and then confirmed his reputation as one of the competition's marquee players by winning his second Brownlow Medal in 2010. Josh Kennedy, however, developed into a key forward for West Coast and played a significant role in enabling the Eagles to make the final series for both the 2011 and 2012 seasons. Meanwhile, Luke Ball's transfer from St Kilda to Collingwood provided an unusual twist of fate. In 2010, Ball played in two Grand Finals against his former club with the drawn Grand Final between Collingwood and St Kilda on 25 September 2010 being only the third in AFL/VFL history. The premiership was decided in a rematch one week later which Collingwood won. Finally, in another set of unusual circumstances, Ryan O'Keefe's Sydney Swans defeated Hawthorn in the 2012 Grand Final. Hawthorn, it should be recalled, could have recruited O'Keefe in the 2008 national draft. O'Keefe was instrumental in Sydney winning the 2012 premiership decider, winning the Norm Smith Medal for the best player in the Grand Final.

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publicised move was that of former number one draft selection, Brendon Goddard, as a restricted free agent from St Kilda to Essendon after his former club decided not to match the financial offer made by Essendon. Thus, Essendon obtained the best available player on the market and, under the free agency rules, did not have to sacrifice any draft choices or players. It is important to note, though, that St Kilda was compensated by the AFL in the form of the number 13 selection in the 2012 National Draft.

A number of other clubs also received free agency compensations from the AFL for player movements. For example, Port Adelaide received selections 30 and 31 for the loss of Danyle Pearce (Fremantle) and Troy Chaplin (Richmond). Melbourne also lost two players through free agency, Brent Moloney to Brisbane, and Jared Rivers to Geelong, and obtained selection number 49 in return. Meanwhile, West Coast and Hawthorn received selections 62 and 66 for the loss of Quentin Lynch and Clinton Young, respectively. Both Lynch and Young moved to Collingwood. This club, one of the traditional powerhouses, obtained the most players under the new free agency rules.

Therefore, the first year of free agency movements has already highlighted a potential issue with free agency, namely, that it could make the more powerful clubs stronger as they may prove to be the most attractive to a free agent. Collingwood, with the most members in the AFL and the biggest attendances, definitely fits into that category. Essendon, likewise, is one of the historically stronger clubs. While it is not possible to foresee how much the clubs will benefit from obtaining the services of these free agents, if such a trend continues it may well impact on the AFL's objective of creating an even competition.

VI CONCLUSION

The transformation of the AFL from a suburban football competition to, arguably, the most successful sporting business in Australia has been underpinned by the use of highly restrictive labour market controls. These restraints were aimed at ensuring outcome uncertainty and competitive balance. The AFL's spectacular growth in revenue, television broadcasting rights and crowd attendances over the last three decades can be attributed to this equalisation strategy. The draft system, in particular, has been instrumental in achieving an even spread of playing strength amongst the clubs with the salary cap helping to ensure this evenness is maintained.

However, while these labour market controls have been effective in promoting competitive parity, the limitations imposed on the players' freedom of employment exposed the AFL to potential restraint of trade action. The introduction of free agency was therefore essential if the AFL was to avoid the NFL experience where the road to

greater freedom of player movement involved numerous lawsuits before the combined effort of players and management reached a suitable collective bargaining agreement. The AFL has created the best possible model for free agency, one which involves a tiered concept of unrestricted and restricted free agents, and one that attempts to find a balance between the AFL's legitimate interest in protecting the competitive balance of the competition, and the players' desire for greater employment mobility.

For instance, the period of tenure agreed to, namely eight years, was an acceptable compromise between the AFL's wish for ten years, and the AFLPA's wish for seven. If the qualifying period for free agency had been substantially lower, clubs may have been faced with the prospect of spending years developing a player only for another club to obtain his services for what may be the best years of his career. However, while the AFLPA may have had to concede ground in regard to tenure, it was able to obtain perhaps a more important guarantee, namely that the compensatory draft selection will not be imposed upon the club acquiring the free agent. The NFL analysis indicates that player movement is negated under these conditions. Thus, the provision of an AFL-allocated draft pick to a club suffering a net loss of a free agent is a significant component of the AFL's free agency rules.

However, while the restrictions on transfer were forced upon the games' highest-paid players to maximise the clubs' retention of their most talented footballers, the 2012 free agency movements have already highlighted the fact that it could well prove to be the stronger clubs which obtain the services of many free agents which, in turn, could undermine the AFL's objective of an even competition. Despite this possible concern, as the only professional sporting organisation in the world implementing a draft system without offering a free agency option, such changes to the system of player transfer were inevitable and necessary if the AFL was to avoid a legal challenge.

Therefore, while the free agency model adopted by the AFL was the best possible for its particular needs, only time will tell whether it represents a balanced policy that serves the League, clubs and players fairly.